



August 28, 2009

**VIA ELECTRONIC FILING**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
400 North Street, Second Floor  
Harrisburg, PA 17120

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

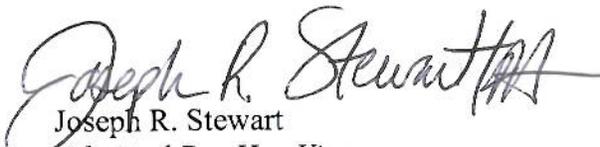
Dear Secretary McNulty:

Enclosed for filing on behalf The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania are Embarq Pennsylvania's Exceptions to the Recommended Decision.

A copy of this pleading has been served in accordance with the attached Certificate of Service.

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

Sincerely,

  
Joseph R. Stewart  
*Admitted Pro Hac Vice*

ZEB/jh

cc: The Honorable Susan D. Colwell (*via electronic and first-class mail*)  
Cheryl Walker Davis (*via electronic and first-class mail*)  
All Parties on the attached Certificate of Service (*via electronic and first-class mail*)

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Regarding Intrastate Access	:	
Charges and IntraLATA Toll Rates of Rural	:	
Carriers, and the Pennsylvania Universal	:	Docket No. I-00040105
Service Fund	:	
	:	
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**EXCEPTIONS TO THE RECOMMENDED DECISION OF THE UNITED  
TELEPHONE COMPANY OF PENNSYLVANIA, LLC D/B/A EMBARQ  
PENNSYLVANIA**

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Dated: August 28, 2009

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## I. Introduction

After hundreds of pages of pre-filed testimony and several days of hearings, Administrative Law Judge Susan D. Colwell issued a Recommended Decision (“RD”) on July 22, 2009. The RD includes 45 findings of fact, 14 conclusions of law, and recommends that the Commission institute a rulemaking to define the specific form of the Pennsylvania Universal Service Fund and its uses.<sup>1</sup>

The United Telephone Company of Pennsylvania, LLC d/b/a Embarq Pennsylvania (“Embarq PA”) respectfully files these Exceptions to certain portions of the RD. Embarq PA’s principal exception to the RD is that, in recommending a rulemaking to define the specific form of the PAUSF and its uses, the RD goes beyond the scope of the Commission’s order instituting this investigation. For that reason alone, the Commission should reject the RD. Embarq PA also takes exception to certain other portions of the RD, as discussed below.

## II. Argument

### Exception No. 1:

**The Commission should not open a rulemaking to alter the PAUSF at this time.** (RD at 92, ordering paragraph 2)

The RD recommends that the Commission open a rulemaking to define the specific form of the PAUSF and its uses.<sup>2</sup> This recommendation should be rejected by the Commission because it is outside the scope of the issues that the order initiating this investigation required to be addressed.<sup>3</sup>

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<sup>1</sup> RD at 92.

<sup>2</sup> *Id.*

<sup>3</sup> Order entered April 24, 2008 at 30-35 (“April Order”).

Ordering paragraph 1(a) limited the issues to be addressed to: 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 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.<sup>4</sup> Ordering paragraph 2 provided some additional detail regarding the scope of the investigation, but nowhere did the April Order ask that the Office of Administrative Law Judge (“OALJ”) address the question of whether a rulemaking should be opened to define the specific form of the PAUSF or its uses. Therefore, the RD’s recommendation of a rulemaking must be rejected.

And even if the recommended rulemaking were within the scope of the issues referred to the OALJ, the Commission should not now open a rulemaking to define the specific form of the PAUSF or its uses. First, there is no evidence that the PAUSF is “broken.” Second, the pendency of other proceedings that are likely to have a significant effect upon both the PAUSF and on benchmark rates means that the Commission should reject the significant, sea-changing recommendation of the RD.

As Embarq PA showed (and no party disproved), there are no current widespread requests by RLECs to pierce the \$18.00 rate cap.<sup>5</sup> Embarq PA itself is not currently seeking to increase that cap.<sup>6</sup>

Embarq PA witness Mr. Gutshall also demonstrated that there are issues pending

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<sup>4</sup> *Id.* at 30.

<sup>5</sup> RD at 13.

<sup>6</sup> Embarq PA statement 1.0, Direct Testimony of Russell R. Gutshall (“Gutshall Direct”) at 5.

at the FCC that involve reform of intercarrier compensation and changes to the federal universal service fund.<sup>7</sup> Because those matters have the potential to significantly affect intercarrier compensation, universal service funds at the state level, and benchmark rates, the Commission should not act at this time.<sup>8</sup>

The RD improperly goes beyond the scope of proceeding by completely reforming the PAUSF beyond the limited issue of benchmarks and uses of the PA USF if the need to raise rates above the benchmark exists. The RD is a monumental reversal of Commission policy relative to universal service in the Commonwealth. Moreover, the consequences of adopting the RD are difficult, if not impossible, to fathom. Given the restrictive use of the PAUSF envisioned by the RD, for example, there effectively is no ability of the Commission to undertake its obligations under Section 3017(a) of the Pennsylvania Public Utility Code. 66 Pa.C.S. § 3017(a). *See also*, Exception No. 3, below. The Commission should reject the RD.

**Exception No. 2:**

**The RD errs if it has concluded that the Commission is authorized to disallow an RLEC's rate change that is consistent with that RLEC's Chapter 30 plan. (RD at 91, Conclusion of Law 8)**

The RD states:

Sections 1301 and 3015 (g) of the Public Utility Code preserve the Commission's authority to conduct a just and reasonable analysis on ILEC rates.<sup>9</sup>

The meaning of Conclusion of Law No. 8 is uncertain. It could mean at least two things. First, it might mean that the Commission's "just and reasonable analysis" is confined to determining whether an RLEC's rate change is consistent with that RLEC's Chapter 30

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<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> RD at 91.

plan. If the rate change is consistent with the plan, then the change is automatically deemed just and reasonable, and the Commission's analysis is at an end. This interpretation is supported by the RD's language at page 90, which states:

Rather they should be permitted to raise rates consistent with their Chapter 30 plans, with the Commission performing a just and reasonable analysis where the raise is *not* consistent.<sup>10</sup>

But Conclusion of Law No. 8 might also mean that the Commission has the ability to disallow an RLEC's rate change even if it is consistent with that RLEC's Chapter 30 plan. If that is what the conclusion of law means, Embarq PA submits the RD is incorrect.

If an RLEC makes a rate change that is consistent with its Commission-approved alternative form of regulation plan, the rate change is, by definition, just and reasonable.

66 Pa.C.S. § 3015(g) states:

Nothing in this chapter shall be construed to limit the requirement of section 1301 (relating to rates to be just and reasonable) that rates shall be just and reasonable. The annual rate change limitations set forth in a local exchange telecommunications company's effective commission-approved alternative form of regulation plan or any other commission-approved annual rate change limitation shall remain applicable and *shall be deemed just and reasonable* under Section 1301.<sup>11</sup>

This provision of the statute does not prevent the Commission from determining whether a rate change is just and reasonable. But the Commission is required to conduct its analysis of whether a rate change is just and reasonable solely with reference to the RLEC's approved alternative regulation plan. The use of the word "shall" means that, if the rate change is consistent with the approved alternative regulation plan, the rate change

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<sup>10</sup> *Id.* at 90 (*emphasis added*).

<sup>11</sup> 66 Pa. C. S. § 3015(g) (*emphasis added*).

must be deemed just and reasonable.<sup>12</sup> To the extent the RD suggests otherwise, it errs.

**Exception No. 3:**

**The RD errs in recommending that the PAUSF be reformed to provide monetary assistance to RLECs only for service in high-cost service areas and for assistance to low-income customers. (RD at pp. 66, 89)**

The RD recommends that the PAUSF be completely reformed as described above.

This recommendation is in error.

In recommending complete reform of the PAUSF, the RD is advocating a needs-based test for determining any receipts from the fund. Indeed, according to the RD, an RLEC should receive PAUSF funding only for serving high-cost areas and to provide assistance to low-income customers. But Embarq PA, PTA, and the OCA all demonstrated in this record that the Commission should not adopt an additional and unneeded needs-based test.<sup>13</sup> Embarq PA witness Mr. Gutshall testified that Embarq PA's need for USF support existed when the fund was created as a result of the Global Order and subsequent Commission orders. The need continues to exist today because of Embarq PA's continuing obligation to maintain the reliability of its legacy network and to provide broadband service to all end-user customers.<sup>14</sup>

Moreover, changing the PAUSF in the way recommended by the RD would be inconsistent with the rationale under which the PAUSF was created. The *need* for the PAUSF was based upon the reductions in intrastate access charges and intrastate toll rates that the Embarq PA and other RLECs made. Thus, the basis for the fund was the need

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<sup>12</sup> Pennsylvania courts have held that "shall" is generally construed as creating a mandatory duty, and only rarely in matters of time or form is the term construed as creating only a discretionary duty. *See, e.g., Heard v. Heard*, 418 Pa. Super. 250 at 257 (1992).

<sup>13</sup> Embarq PA Statement 1.0, Direct Testimony of Russell R. Gutshall ("Gutshall Direct") at 6

<sup>14</sup> *Id.* at 10.

for offsetting revenue to compensate RLECs for the reduced intrastate access charges and toll rates. Because those two reductions remain in effect today, the need for the offsetting revenue from the PAUSF still exists, and no other needs-based test is required.<sup>15</sup>

The RD would eliminate the ability of a Pennsylvania RLEC to continue to receive funding from the PAUSF to offset the access charge and toll rate reductions that the RLEC previously made and that remain in effect. That not only runs counter to the basis upon which the PAUSF was originally created, it also is a potential violation of the revenue neutrality requirement of Act 183. Previous access reductions were accomplished in a revenue neutral manner because the PAUSF was used to offset the access reductions. If the fund were drastically reconfigured as the RD recommends, an important tool historically relied upon by the Commission would not be available to implement the revenue neutrality now required by the law. Absent a substitute revenue source, Section 3017(a) of Act 183 would be violated.<sup>16</sup>

Revising the fund as recommended would also put upward pressure on local rates. This would be unfair to consumers in rural high-cost areas of the Commonwealth. And it would also be unfair and contrary to any RLEC that adopted an alternative regulation plan to date.

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<sup>15</sup> Embarq PA Statement 1.1, Rebuttal Testimony of Russell R. Gutshall (“Gutshall Rebuttal”) at 1, 2.

<sup>16</sup> “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).

**Exception No. 4:**

**The RD errs when it states that, pending the outcome of the rulemaking, RLECs should not be permitted to take funding from the PAUSF in order to obtain the revenues constituting the difference between the \$18 rate cap and their Chapter 30 plan entitlements. (RD at p. 88)**

Embarq PA thoroughly addressed this issue in its Reply Brief at pages 10-14.

That portion of the Reply Brief is incorporated here as if fully rewritten. But Embarq PA will, nonetheless, highlight several of the points it previously made.

First, the Commission in its *Global Order* stated explicitly that a rural ILEC whose one party residential rate exceeded the \$16 rate cap would be allowed to recover the difference between the rate cap and the approved rate from the PAUSF.<sup>17</sup> The *Global Order* thus specifically rebuts any claim that the ability to draw from the PAUSF is limited only to offsets for reductions of intrastate access charges. And the RD itself acknowledges that, when the \$16 rate cap was implemented, there were three companies whose rates exceeded the cap. Those three companies received payments from the PAUSF, not to offset access rate or toll rate reductions, but to maintain the residential rate cap. Therefore, ample precedent shows that the PAUSF, from its inception, has not been limited to funding just access and toll reductions.<sup>18</sup>

The RD attempts to diminish, if not eliminate, the significance of those facts by stating:

... the Global Order anticipated that the rate cap would be carried out in part by the rural ILECs' drawing on the PAUSF where their required revenues exceeded the rate cap when the revenue requirement was short-changed by reduced access rates.<sup>19</sup>

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<sup>17</sup> *Global Order* at 145.

<sup>18</sup> RD at 86, 87.

<sup>19</sup> RD at 87.

The RD does not support that assertion with any citation, nor does it provide any explanation of what was meant. It may be saying the *Global Order* means that RLECs have received funding from the PAUSF only when they received less revenue because of reduced access rates. But that contention is untenable because three small companies received a draw from the PAUSF purely because their residential rates exceeded the applicable rate cap.

The RD's conclusion regarding the ability to draw from the PAUSF to recover the difference between an authorized rate increase and an applicable rate cap is also contradicted by the settlement of certain appeals taken from the *Global Order*.<sup>20</sup>

The RD also claims that allowing companies to obtain support from the PAUSF for the difference between the applicable rate cap and a company's authorized rate would be at the expense of competition in general.<sup>21</sup> But that prediction seems unlikely, at best. The PAUSF has been operating for a number of years already, and competition in Pennsylvania is robust. Therefore, the RD's speculation that competition will suffer by permitting an RLEC to draw from the PAUSF to recover the difference between its allowable rate and the rate cap is incorrect.

**Exception No. 5:**

**The RD errs in its factual finding that the local loop is not a direct cost of basic local exchange service.** (RD Findings of Fact 9, 10, and 16, at pp. 11, 12)

The RD made three factual findings that are incorrect. It found that:

1. The incremental cost of basic local exchange service as estimated by the Synthesis Model would be the total cost of the network minus the cost of the loop;

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<sup>20</sup> PTA Main Brief at 15; PTA Exhibit JLL-4 at 2.

<sup>21</sup> RD at 87.

2. The loop is an input used by multiple services and should not be assigned as a direct cost of basic voice grade services; and
3. Model non-loop cost estimates are a reasonable proxy for the incremental cost of basic local exchange service, and that in almost all instances, the estimated incremental cost of the rural ILECs is less than the \$18 residential rate bench mark.<sup>22</sup>

Embarq PA witness Ms. Christy Londerholm demonstrated that the local loop is a direct cost of basic local exchange service. It's a direct, not incremental, cost because, when a customer contacts Embarq PA for service, it is to establish basic local exchange service. To provide that service, Embarq PA must build a loop to that customer. Therefore, the cost causation to Embarq PA for the loop is basic local exchange service. A local loop is necessary to provide dial tone. If a customer chooses to add other services, such as long distance or a custom calling feature, the dial tone must be there first. Accordingly, loop investment is a direct cost of basic local exchange service.<sup>23</sup>

The RD's failure to correctly account for the cost of a local loop leads the RD to the mistaken conclusion that the estimated incremental cost of providing basic local exchange service for a rural ILEC is less than the \$18 residential rate benchmark.<sup>24</sup> Ms. Londerholm's testimony proved that OCA witness Dr. Loube's own cost study showed that Embarq PA has an overall estimated average monthly cost per line that far exceeds the \$18 residential rate cap benchmark.<sup>25</sup> Therefore, the \$18 residential rate cap benchmark is not sufficient to cover all the costs of providing basic local exchange service.<sup>26</sup>

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<sup>22</sup> RD Findings of Fact 9, 10, and 16, at pp. 11, 12.

<sup>23</sup> Londerholm Rebuttal at 7.

<sup>24</sup> RD Finding of Fact 16 at p. 12.

<sup>25</sup> Rebuttal Testimony of Christy V. Londerholm (proprietary version) at 17.

<sup>26</sup> *Id.*

The erroneous nature of these Findings of Fact is also demonstrated by the rebuttal testimony of AT&T. According to the AT&T witnesses:

It is indisputable that the loop is a major part of local exchange service, and that loop costs are a major component of the costs of basic local service. Local loops were an indispensable part of local service before telephone companies even offered long distance service.

... loop costs are not “shared” cost services. Rather, loop costs are fixed, non-traffic sensitive costs that are incurred when the customer first places an order for local service.<sup>27</sup>

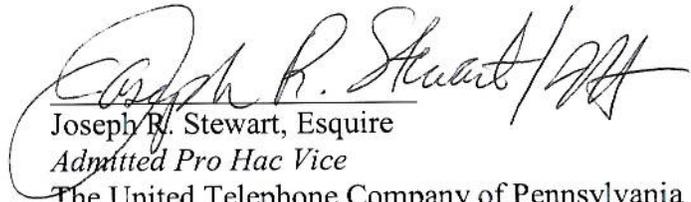
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<sup>27</sup> Rebuttal Testimony of AT&T Communications of Pennsylvania, LLC et al. at 16, 17.

### III. Conclusion

The Commission should grant Embarq PA's exceptions and reject the RD's conclusion that the PAUSF should be the subject of a rulemaking and restructured as the RD provides.

Respectfully submitted,



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*Admitted Pro Hac Vice*

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Dated: August 28, 2009

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Investigation Regarding Intrastate Access Charges and  
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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this 28<sup>th</sup> day of August, 2009, served a true copy of the foregoing Exceptions were served upon the persons below, via electronic and first-class mail, in accordance with the requirements of 52 Pa. Code §1.54:

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Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joseph R. Stewart". The signature is fluid and cursive, with a large initial "J" and "S".

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*Admitted Pro Hac Vice*

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