

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Core Communications

Public Meeting held September 1, 2016
2133609-OSA

v.

Docket No. C-2009-2133609

XO Communications Services, Inc.

MOTION OF CHAIRMAN GLADYS M. BROWN

Today's motion addresses an Initial Decision and exceptions to a formal complaint filed by Core Communications, Inc. (Core) against XO Communications Services, Inc. (XO) about the compensation due for dial-up internet service provider (ISP) bound traffic and intrastate calls where the Carrier Identification Code (CIC) is present but the Calling Party Number (CPN) is not.¹

The carriers are competitive local exchange carriers (CLECs) who operate in Pennsylvania. Core's primary business is dial-up ISP-bound traffic although it has since expanded into voice service starting in September 2009.² XO's primary business is local and long-distance voice service.³ These CLECs have no interconnection agreement. XO subsequently refused to negotiate an alternative Traffic Exchange Agreement (TEA) when Core offered to do so after Core changed their billing practices and substituted intrastate access rates with interstate access for traffic without a CPN.⁴

The dispute for dial-up ISP-bound traffic and traffic lacking CPN for billing purposes centers primarily on dial-up internet traffic for two Carrier Identification Codes (CICs). CICs contain information that carriers use to determine what compensation one carrier owes another carrier for telecommunications service, typically at the wholesale level. The two CICs at issue are 5607 and 5119.

¹ The CIC is a telephone industry standard that identifies, among other things, the particular long distance carriers and other customers in order to bill and route traffic to them. CIC is the four digit number an end-user dials, including 1, to reach their long-distance carrier of choice to make a long-distance call. The CPN is part of the Instant Address Messaging (IAM) which contains the number of the calling party. The absence of CPN can result in a call being rejected. *Newton's Telecommunications Dictionary*, (CMP Books, San Francisco: 2004), pp. 148 and 153 (*Newton's*); Initial Decision, pp. 8 and 13, Findings of Fact Nos. 13-15. The absence of CIC information was not an issue in our earlier disposition of a dial-up internet compensation dispute involving Core and another CLEC, AT&T Communications of Pennsylvania. *AT&T v. Core Communications, Inc. and the Pa. PUC*, 806 F.3d 715 (3rd 2015) (*ATT*).

² Initial Decision, Finding of Facts 16 and 17.

³ Initial Decision, Finding of Facts 1 and 5.

⁴ Initial Decision, p. 8; Core Exceptions p. 26. The total MOUs were established by the ALJ. Initial Decision, p. 11. The period at issue does not date from 2005, raising statute of limitations concerns, but is limited to the February 2010 to April 2011 period because the breakdown of the earlier months did not match the billed MOUs. Initial Decision, p. 31.

The carriers disagree on: (1) whether the dial-up internet traffic is local or non-local; (2) whether a higher intrastate access rate set under state law or the FCC's *ISP Remand Order* rate cap of \$0.0007 per minute of use (MOU) should apply to non-local dial-up traffic; (3) the appropriate compensation for 180,858 minutes of non-local dial-up traffic in the 5119 CIC; (4) the appropriate compensation for 337,021 minutes of traffic in the 5607 CIC that lacks the CPN for billing purposes; (5) whether an interest rate is appropriate for past traffic volumes; and, (6) penalties.⁵

I believe that a legally sound approach for the 180,858 minutes of non-local dial-up traffic in the 5119 CIC is a rate of \$0.0007. That rate does not exceed the \$0.0007 rate cap the FCC imposed on dial-up traffic in its *ISP Remand Order*. That result is consistent with precedent in the Third Circuit upholding our application of a federal \$0.0007/MOU rate for CLEC-to-CLEC dial-up traffic⁶ and precedent in the 9th Circuit holding that state rates beyond the \$0.0007 MOU rate cap are preempted by federal law.⁷ A \$0.0007/MOU rate is consistent with the *ISP Remand Order*'s professed goal of stopping dial-up internet rate arbitrage.⁸

I am unpersuaded by claims that the rate for non-local dial-up ISP traffic can be higher because that traffic does not fall within the scope of the *ISP Remand Order* and its rate cap of \$0.0007/MOU. A carve-out for non-local dial-up traffic that results in a rate exceeding the \$0.0007/MOU rate cap is not consistent with precedent or the *ISP Remand Order*'s professed goal of stopping traffic arbitrage.⁹ Rate differences between local dial-up ISP-bound traffic and non-local dial-up ISP-bound traffic will create the very arbitrage that the *ISP Remand Order* sought to eliminate.

I also disagree that Core failed to meet its burden of proof showing that 337,021 minutes in the 5607 CIC should be compensated by XO because the traffic lacked the CPN needed to determine whether to bill the traffic as interstate, intrastate, or local.¹⁰ The Carrier Access Billing System (CABS) data Core consulted and their prior billing practices for traffic without CPN information show the traffic belonged to XO.¹¹ The 5607 CIC traffic belongs to XO as much as the other traffic that is treated as XO's dial-up ISP-bound traffic subject to the \$0.0007/MOU rate cap.¹² The denial of compensation to Core for 337,012 minutes despite the evidence it is XO's traffic undermines our precedent holding that carriers cannot refuse to compensate another carrier as a matter of law and policy when their network is used.¹³

⁵ Initial Decision, Findings of Fact 26-28, p. 16 and pp. 31-32.

⁶ *ATT*, 806 F.3d at 726-729; *ATT California v. Pac-West & CA. PUC*, 651 F.3d 980 (9th 2011) *In re: Local Competition*, Docket No. 96-96, FCC 01-131 (April 27, 2011), para. 1-8 and 82; (*ISP Remand Order*); accord *In re: Intercarrier Compensation*, Docket No. 01-92 (April 27, 2001), para. 1 and 11.

⁷ *ATT Communications of California v. Pac-West Telecomm and California Public Utility Commission*, 651 F.3d 980 (9th Cir. 2011); *ATT*, 806 F.3d at 727-728 citing *ISP Remand Order* at para. 82.

⁸ *ISP Remand Order*, Docket No. 96-98 (April 27, 2001) at para. 1-11 and 82; XO Exceptions at 1.

⁹ *ATT*, 806 F.3d at 727-728 citing *ISP Remand Order*, para. 1-11 and 82.

¹⁰ Initial Decision, pp. 31-32.

¹¹ Initial Decision, Finding of Facts 9-11, 14-15, 25-26, and p. 8; Core Exceptions at 31-32.

¹² Opportunities to respond were not taken on the total billed MOUs imputed to XO or the allocation between intra toll and local that impacted XO. Initial Decision at 10 and 11.

¹³ *Palmerton v. Global NAPS*, Docket No. C-2009-209336 (March 16, 2010), pp. 37 and 40.

The fact that the traffic belongs to XO, however, does not establish what the compensation rate should be when the CPN needed to bill properly for the traffic is absent through no fault of a receiving carrier. In those instances, the compensation rate should reflect a carrier's practice and the record but should also encourage XO and other carriers to take affirmative action ensuring that CIC and CPN information is accurately provided to a directly or indirectly interconnected carrier. Opportunities to resolve the dispute through an interconnection agreement or TEA were declined despite the federal Communications Act's obligation to negotiate in good faith.¹⁴

I conclude that an effective approach consistent with the record is setting a rate for the 337,021 minutes using Core's interstate access rate when the CPN or other necessary billing information is absent. This was Core's prior practice for managing such traffic and is consistent with precedent.¹⁵ In contrast, Core's intrastate access rate is higher than the reciprocal compensation rate Core proposed in a TEA designed to resolve the dispute,¹⁶ is different from the intrastate access rate of \$.014 XO proposed,¹⁷ and is higher than the \$.0007/MOU rate cap for dial-up traffic with billing information.¹⁸

This residual interstate rate not only reflects Core's prior practice but also encourages carriers with traffic lacking the billing information to take action to prevent the loss of critical traffic billing information from reoccurring. This approach also applies to the disposition of the MOUs arising from April 2011 to the date of this decision and going forward. The resulting rate, moreover, must also be consistent with rates in effect under the FCC's *Transformation Order* and its implementation by this Commission as these intercarrier compensation matters are now largely governed by federal directives.¹⁹

Finally, I believe that the statutory interest rate of 6%²⁰ that we applied in the ATT case should apply but, unlike the ATT case, the rate should apply retrospectively to the intercarrier compensation amounts that XO owes to Core. This rate should run from the date Core first submitted an invoice to XO for traffic during the February 2010 to April 2011 period resolved by the Initial Decision.²¹ This is warranted because this proceeding is unlike *ATT* in important respects. There is traffic other than dial-up. There is traffic where the CPN billing information critical to proper billing is absent. In such instances, if we limited interest payments for non-paid intercarrier compensation only prospectively, the non-compensated usage of network facilities by the non-paying carrier

¹⁴ *In re: FCC Transformation Order*, Docket No. 10-90 (11/18/11) paragraph 1011 *aff'd In re: FCC*, 753 F.3d 1014 (10th Cir. 2012) cert den. No. 14-610 (5/4/15); Core Exceptions, p. 26.

¹⁵ Initial Decision, Findings of Fact 8-10, 25-27, p. 8. *Accord Manhattan Telecommunications Corporation v. Global NAPS, Inc.*, Docket No. 08 Civ. 3829 (JSR) (USDC SDNY (March 31, 2010).

¹⁶ Core Exceptions, p. 26

¹⁷ XO Exceptions, p. 8.

¹⁸ Initial Decision, p. 8.

¹⁹ *In re: FCC Transformation Order*, Docket No. 10-90 (11/18/11) paragraph 1011 *aff'd In re: FCC*, 753 F.3d 1014 (10th Cir. 2012) cert den. No. 14-610 (5/4/15).

²⁰ 41 P.S. § 202.

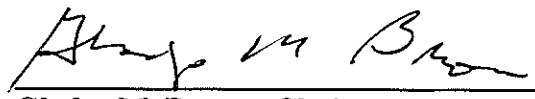
²¹ Initial Decision, pp. 31-32.

essentially amounts to an “interest-free” loan that accrues to the detriment of the unpaid carrier and ignores the time value of money. A combination of higher interstate rates and retrospective interest at a 6% statutory annual interest for traffic when CPN calling information is absent addresses these concerns. This also minimizes the likelihood of more litigation between these carriers as we transition to the bill and keep regime of zero switched access rate (\$0.0/MOU) envisioned for terminating traffic envisioned in the *Transformation Order*.

Therefore, I move that:

1. The Minute of Use rate for all dial-up traffic in Carrier Identification Code 5119 during the February 2010-April 2011 period be set at \$.0007/MOU, including the 180,858 non-local dial-up minutes;
2. The Minute of Use rate for all dial-up traffic in Carrier Identification Code 5607 during the February 2010-April 2011 period be set at \$.0007/MOU, excluding the 337,021 minutes that are not dial-up traffic;
3. The 337,021 minutes that are not dial-up traffic and which lack Calling Party Numbers needed to bill properly for that traffic will be set at Core’s interstate rate;
4. The traffic arising in April 2011 and going forward shall be set based on this decision at rates that are also consistent with FCC’s *Transformation Order*;
5. Core be authorized to collect interest at the rate of 6% simple interest beginning from the date that Core invoiced XO for the February 2010-April 2011 traffic up through the date Core issues a revised invoice to XO;
6. Core issue a revised invoice to XO no later than thirty (30) days after entry of this Opinion and Order;
7. XO pay the revised invoice within thirty (30) days of receipt; and
8. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

September 1, 2016
Date


Gladys M. Brown, Chairman