PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120

Core Communications, Inc.
v.
XO Communications Services, Inc.

Public Meeting September 1, 2016
2133609-OSA
Docket No. C-2009-2133609

STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Pennsylvania Public Utility Commission for disposition are exceptions and replies to exceptions to the Initial Decision (ID) issued in the above-captioned proceeding. The ID addresses a Formal Complaint filed by Core Communications, Inc. (Core) against XO Communications Services, Inc. (XO) about the compensation due for dial-up Internet traffic.

Core is certificated in Pennsylvania as a competitive local exchange carrier (CLEC) and an interexchange carrier (IXC). Core traditionally has focused on the provision of service to Internet Service Providers (ISPs) that generally receive only inbound calls and make no outbound calls. XO is certificated in Pennsylvania as a CLEC and an IXC. Core and XO do not have an interconnection agreement, and XO does not send any traffic directly to Core. Rather, Core and XO interconnect indirectly through Verizon Pennsylvania, Inc.'s (Verizon) network. Typically, XO sends ISP-bound traffic from its customers to Verizon who then sends the traffic to Core for termination to its ISP customers.

This matter is a compensation dispute between two CLECs involving ISP-bound traffic. The Commission is not preempted in this case from setting intercarrier compensation rates for both local and non-local ISP-bound traffic exchanged between XO and Core. This conclusion is consistent with the Third Circuit's decision in *AT&T v. Core*[1] and the First Circuit's decision in *Global NAPS*.[2] This federal precedent makes clear the Commission has jurisdiction to resolve an intercarrier compensation dispute between two CLECs involving ISP-bound traffic.

All of the ISP-bound traffic at issue in this case is accompanied by either Carrier Identification Code (CIC) 5119 or 5607. Except for 180,858 minutes of traffic for CIC 5119 and 337,021 minutes of traffic for 5607, the record establishes that all of the traffic at issue in this proceeding was locally dialed. For all locally dialed traffic, I agree with applying a capped

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[1] *AT&T Corp v. Core Communications, Inc.,* 806 F.3d 715 (3rd Cir. 2015) (the Federal Communications Commission (FCC) does not have exclusive jurisdiction over ISP-bound traffic, and a state public utility commission is permitted to resolve a CLEC-to-CLEC intercarrier compensation dispute over ISP-bound traffic that is not governed by an interconnection agreement as long as the state commission acts consistent with federal law).

[2] *Global NAPs Inc., v. Verizon New England,* 603 F.3d 71, 83 (1st Cir. 2010) (the FCC has not preempted state regulation of non-local ISP-bound traffic).

intercarrier compensation rate of $0.0007/MOU, in accordance with the FCC's *ISP Remand Order*[3] and the Commission's decision in *AT&T v. Core*.[4]

I also agree with applying a capped $0.0007/MOU intercarrier compensation rate to the 180,858 minutes of ISP-bound traffic at issue that are non-local in nature, based upon CPN data.[5] Legally, the Commission is not precluded from applying this rate to non-local ISP-bound traffic. As previously noted, the FCC has not preempted state regulation of non-local ISP-bound traffic, and applying a capped $0.0007/MOU rate to this traffic is consistent with the compensation rate for local ISP-bound traffic established in the *ISP Remand Order*.[6]

From a policy perspective, this rate approach makes particular sense, given the FCC's stated concern with avoiding arbitrage in the dial-up Internet markets. Arbitrage is a practice where different rates encourage carriers to rely on regulatory distinctions to maximize compensation or to avoid it. In my view, having a higher compensation rate for non-local ISP-bound traffic than local ISP-bound traffic would incentivize the very compensation arbitrage that the FCC sought to eliminate.

However, I do not agree with applying interstate access rates to the 337,021 minutes of traffic at issue for CIC 5607 billed under the intrastate "intra toll" category, as proposed in the motion.[7] At the same time, I also do not support the recommendation in the ID to disregard this traffic and not provide any compensation to Core for terminating it. Rather, as a compromise, I would apply a capped $0.0007/MOU compensation rate to this traffic.

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 – Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

[4] The Commission in *AT&T v. Core* determined that it had the authority to apply the FCC's capped $0.0007/MOU rate established in the *ISP Remand Order* to local ISP-bound CLEC-CLEC traffic.

[5] In *Core v. CenturyLink* (*Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with The United Telephone Company of Pennsylvania d/b/a CenturyLink*, Docket No. A-310922F7002, (Order entered December 19, 2013)), the Commission applied a bill-and-keep rate in a CLEC-ILEC interconnection dispute about dial-up Internet traffic that also included VNNX arrangements as demonstrated in the record. The Commission applied a bill-and-keep partly because of legal precedent that the intercarrier compensation regime established in the *ISP Remand Order* did not apply to VNXX non-local ISP traffic. There is no evidence in the record that the traffic at issue involves the use of VNXX numbering by Core. To the extent VNXX numbering practices are involved with the non-local ISP-bound traffic sent from XO to Core, a "bill-and- keep" compensation regime would apply, consistent with *Core v. CenturyLink*.

[6] I do not agree with the conclusion reached in the motion that non-local ISP-bound traffic comes within the parameters of the *ISP Remand Order*. Rather, consistent with the Commission's position in *Core v. CenturyLink*, the relevant legal precedent supports the FCC did not intend to expand the intercarrier carrier compensation regime established in the *ISP Remand Order* to non-local ISP-bound traffic. Thus, the Commission has the discretion but is not required under the *ISP Remand Order* to apply the $0.0007/MOU capped rate to the 180,858 minutes of non-local ISP-bound traffic.

[7] The motion references a New York federal court case involving *Global NAPS, Inc.*, to help support the decision to apply interstate access rates to this traffic. My understanding is that VoIP traffic was the subject of that case, not ISP-bound traffic.

The ID notes the toll classification of this traffic was based upon Core's belief that the traffic "should" be classified and not actual data. With no actual data to substantiate Core's position, the ID finds that Core, the party with the burden of proof in this matter, did not prove that the 337,021 minutes for CIC 5607 were non-local traffic subject to the Commission's regulatory authority. As a result, the ID finds that no compensation should apply to those minutes.[8]

On the other hand, I am sympathetic to the fact that the 337,021 minutes came into Core's network without a calling party number (CPN). According to Core's testimony, this occurrence made it impossible for Core to determine whether the calls are interstate, intrastate, or local.[9] I acknowledge that there is no indication on the record regarding who is responsible for the missing CPN information. But, in any event, Core was unable to identify the originating calling party and hence, was unable to determine the jurisdiction of this traffic.

I believe Core should be compensated at the capped $0.0007/MOU rate for the 337,021 minutes of traffic that lacked a CPN. This rate approach reflects the long-standing Commission policy that carriers are entitled to be compensated for the use of their networks and is a compromise between the competing arguments that Core should receive no compensation for this traffic on one hand versus that it should receive access rates on the other. This rate approach also resolves the jurisdictional ambiguities surrounding this traffic. Under this approach, all of the traffic at issue in this case would be compensated at a uniform rate – $0.0007/MOU. With a uniform rate, the lack of a CPN and the distinction between local and non-local traffic becomes irrelevant for compensation purposes.

I take issue with the reasoning in the motion behind applying interstate access rates to the 337,021 minutes of traffic for CIC 5607 that lacked a CPN. The motion reasons that the compensation rate should be one that encourages XO and other carriers to take action to ensure that CIC and CPN information is accurately provided to a carrier. This approach seemingly penalizes XO by having it pay Core higher interstate access rates for this traffic even though there is no record evidence XO is responsible for the missing CPN information. Such an approach seems contrary to the FCC's *Transformation Order*, which rejects a penalty rate approach for unidentifiable traffic.[10]

Moreover, applying interstate access to the 337,021 minutes of traffic for CIC 5607 lacking a CPN seems inconsistent with the motion's rate treatment of the 180,858 minutes of non-local ISP-bound traffic for CIC 5119. I have difficulty reconciling how one can use the avoidance of arbitrage to justify applying the capped $0.0007/MOU rate to the non-local ISP-bound traffic for CIC 5119 while, at the same time, apply rates in excess of $0.0007/MOU to the 337,021 minutes of traffic at issue for CIC 5607 that lack a CPN. Such disparate rate treatment would seem to incentivize the very compensation arbitrage that the motion seeks to avoid elsewhere when setting the compensation rate for non-local ISP-bound traffic for CIC 5119.

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[8] As previously noted, all calls exchanged between Core and XO are routed through the Verizon tandem.

[9] Core St. No. 1, p. 5; Core St. No. 1-SR, pp. 11-12.

[10] *In re: FCC Transformation Order*, Docket No. 10-90 (11/18/11) paras.731-733, *aff'd, In re: FCC,* 753 F.3d 1014 (10th Cir. 2012), *cert den.,* No. 14-610 (5/4/15).

Lastly, I do not agree with directing XO to pay Core interest at a rate of 6% per annum, beginning with the date that Core first submitted an invoice to XO for all of the traffic at issue here. Upon review of the motion, the rationale for this outcome seems punitive in nature. Also, awarding interest retrospectively is inconsistent with our decision in *AT&T v. Core*, where the Commission refused to award interest retrospectively in an intercarrier compensation dispute between two CLECs involving ISP-bound traffic. Although the motion attempts to distinguish the present case from *AT&T v. Core*, I do not believe the motion has provided any valid reasons to depart from the *AT&T v. Core* precedent.

For these reasons, I do not support the motion.

DATE: September 1, 2016

JOHN F. COLEMAN, JR.
COMMISSIONER