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March 1, 2010

Via Electronic Filing
James McNulty, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Core Communications, Inc. v. AT&T Communications of Pa., LLC and TCG Pittsburgh, Inc., Docket Nos. C-2009-2108186 and C-2009-2108239

Dear Secretary McNulty:

On behalf of Core Communications, Inc., ("Core") enclosed please find the original of its Answer to AT&T's Motion to Compel Responses to AT&T's Fifth Set of Interrogatories and Requests for Production of Documents and the electronic filing confirmation page with regard to the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service.

Sincerely yours,

Deanne M. O'Dell

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Angela Jones, w/enc.
Cert. of Service, w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Core's Answer to AT&T's Motion to Compel, Set V, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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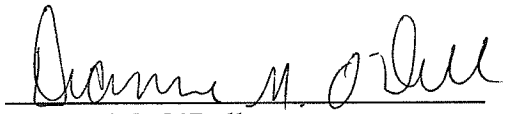
Dated: March 1, 2010



Deanne M. O'Dell

BEFORE THE
PENNSYLVANIA UTILITY COMMISSION

Core Communications, Inc.	:	
Complainant	:	
	:	
v.	:	
	:	
AT&T Communications of PA, LLC	:	Docket No. C-2009-2108186
	:	
and	:	
	:	Docket No. C-2009-2108239
TCG Pittsburgh, Inc.	:	
	:	
Respondents	:	

ANSWER OF CORE COMMUNICATIONS, INC. TO AT&T'S MOTION TO COMPEL RESPONSES TO AT&T'S FIFTH SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO CORE COMMUNICATIONS, INC.

Pursuant to 52 Pa. Code § 5.342(g)(1), Core Communications, Inc. ("Core") files this Answer in opposition to the Motion to Compel ("Motion") filed by AT&T Pennsylvania, LLC ("AT&T") and TCG Pittsburgh, Inc. ("TCG") (AT&T and TCG are collectively referred to as "AT&T") seeking answers and documents from Core through AT&T's Fifth Set of Interrogatories and Requests for Production of Documents (collectively, "Interrogatories") to Core.

I. INTRODUCTION

Core's Complaint was filed in May 2009 and the parties have been engaging in discovery since then. The subject Motion is the second Motion to Compel filed by AT&T. The first Motion to Compel is concerned with requests 4-1 through 4-9 contained in AT&T's fourth set of discovery, which was served on January 6, 2010.

AT&T served Core with its fifth set of discovery on January 12, 2010. Core filed and served responses and objections to AT&T's fifth set on February 1, 2010. AT&T requested supplemental responses from Core. Following discussions between counsel, Core served supplemental responses on February 19, 2010.

On February 24, 2010, AT&T filed the subject Motion which alleges Core has not provided sufficient answers to certain Interrogatories. Generally speaking, AT&T contends that Core did not answer all of the questions asked in the various subsections and subparts of the Interrogatories.

By Order #6 dated February 26, 2010, the Presiding Officer granted in part a Motion to Dismiss filed by AT&T on December 8, 2009. Specifically, Order #6 dismissed Core's complaint for lack of subject matter jurisdiction for all traffic sent by AT&T to Core prior to September 2009 but denied AT&T's Motion for all traffic sent by AT&T to Core after September 2009. At this time Core plans to seek interlocutory review of the dismissal of the complaint but has not yet determined whether or not to seek a suspension of the procedural schedule regarding traffic after September 2009. To the extent such a suspension is sought and granted, resolution of this Motion to Compel (as well as the previously filed and pending Motion to Compel) may be suspended. Regardless of the procedural uncertainty and as explained below, Core submits that AT&T's Motion to Compel should be denied.

II. AT&T IMPROPERLY SEEKS TO COMPEL INFORMATION THAT HAS ALREADY BEEN PROVIDED BY CORE (AT&T Interrogatory No. 5-1)

AT&T contends that Core's responses to Interrogatory No. 5-1 are not sufficient because Core did not clearly indicate (a) the dates of discussions between Mr. Mingo and

AT&T's employees (Mr. Cammarota and Mr. Cederqvist) and (b) whether (or not) those discussions were reduced to writing. *See* AT&T Motion, pp. 2-3.

However, Core has already provided the requested information to AT&T. *See* AT&T Motion, p. 2. In its responses to Interrogatory 5-1, Core expressly indicated that the discussions between Mr. Mingo and Mrrs. Cederqvist and Cammarota were described in the Direct Testimony of Bret L. Mingo, Core St. No. 1. *Id.* That testimony provides dates and references to documents (which were attached as exhibits to the testimony). Core St. No. 1, at p.12-13, Exhibits BLM-6 and BLM-7.

Simply put, there is nothing to compel under Interrogatory 5-1. To the extent known to Core, Core has already indentified the exact dates and substance of each discussion with AT&T. Core has also identified (and provided a copy of) each document related to those discussions. Core's response to Interrogatory 5-1 indicates where the requested information can be found. It is not reasonable to compel Core to repeat this information within a supplemental response to Interrogatory 5-1.

Additionally, it must be noted that such information should also be available to AT&T through AT&T's own efforts. Both Mr. Cammarota and Mr. Cederqvist are employees or representatives of AT&T. Both of these gentlemen as employees/representatives of AT&T should be able to provide information related to discussions with Core to AT&T.

Based on the foregoing, AT&T's Motion to Compel responses to Interrogatory 5-1 should be denied.

III. AT&T IMPROPERLY SEEKS TO COMPEL INFORMATION FROM CORE RELATED TO OTHER CLECs (AT&T Interrogatories Nos. 5-2 and 5-9)

For the first time in the context of this Motion to Compel, AT&T has made allegations that Core is "unfairly targeting" AT&T while not pursuing other CLECS. AT&T Motion at 7. Because there is no basis in the record for this allegation, AT&T is attempting to get support in Interrogatories Nos. 5-2 and 5-9 by claiming that Core raised the issue. See AT&T Motion, at pp. 5-8. This is not the case. Core's complaint and underlying claims do not rely on Core's negotiations with other CLECs. Here, Core made a reference to other CLECs in response to AT&T's testimony that it was "ridiculous" for Core to claim that it was unaware of the AT&T Indirect Traffic prior to 2007. In this context, Core merely noted that AT&T was only one of "dozens" of CLECs which "at one time or another, may have sent Core substantial traffic." No mention was made of numbers of MOUs exchanged, amounts billed, or amounts collected with respect to various other CLECs, and no other CLECs was named. . Core St. No. 1-SR at 5. Further, Core provided information in response to AT&T's requests for follow-up information about the reference even though it AT&T should not be permitted to use information related to other CLECs to evade liability or dispute the amount of Core's claim against AT&T. Core identified eight (8) other CLECs. Core indicated that it has filed complaints against three (3) CLECS, and was negotiating with the remaining five (5) identified CLECs. Core believes that there are many other CLECs who send traffic to Core, and Core has indicated to AT&T that Core's search for other CLECs continues.

Core submits that there is no valid justification for AT&T's continued efforts to obtain information related to the other CLECs. This complaint is about AT&T's failure to pay Core for Core's provisioning of a public utility service to AT&T. Core cannot use

negotiations with other CLECs to establish AT&T's liability to Core or the amount owed by AT&T to Core. Nor can evidence of Core's negotiations with other CLECs be used by AT&T to evade liability to dispute the amount of Core's claim against AT&T. *See* Pa. R.E. 408. In fact, AT&T has itself claimed that "the history of dispute negotiations [between AT&T and Core] is irrelevant to the proper outcome of this case." AT&T St. No. 1 at 17. Negotiations with parties not involved in this case would be even less relevant to the outcome here. Core's negotiations and its contractual relationships with other CLECs are not relevant to the question of whether AT&T is legally required to pay Core. Accordingly, discovery should not be compelled on Core's negotiations and billing/collection efforts with other CLECs. *See* 52 Pa. Code §§ 5.321(c), 5.361.

In addition to the foregoing general response, Core also offers the following specific responses to the subsections of Interrogatory 5-2 and 5-9:

A. NEGOTIATIONS BETWEEN CORE AND OTHER CLECs (AT&T Interrogatories Nos. 5-2(a), 5-2(e), 5-2(f) and 5-9)

In subsections (a), (e) and (f)[1] of Interrogatory 5-2 <u>and</u> Interrogatory 5-9, AT&T seeks information related to Core's negotiations with other CLECs concerning payment to Core for the termination of traffic. In response to these Interrogatories, Core objected to the above-mentioned subsections of Interrogatory 5-2 and Interrogatory 5-9 on February 1, 2010. Without waiver of its objections, Core provided information to AT&T in response to Interrogatories 5-1 and 5-9.

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[1] Subsection (f) seeks the provision of documents related to any part of Interrogatory 5-1.

Specifically, Core informed AT&T that negotiations failed with three (3) other CLECs and the Core filed complaints against those CLECs.[2] Core also informed AT&T that Core was still in negotiations with five (5) other CLECs. *See* Core's Supplemental Response to Interrogatory 5-9. Moreover, Core has provided a summary of these negotiations by explaining that that the CLECs are not "willing to pay anything for any service unless and until specifically directed by the Commission." *See* Core's Supplemental Response to Interrogatory 5-9. Core noted that the positions expressed by each CLEC varied widely. *See* Core's Supplemental Response to Interrogatory 5-9.

Even though eight (8) other CLECs have been identified by Core and Core has summarized the results of these negotiations, AT&T contends that AT&T lacks "the opportunity to investigate" Core's negotiations with the other CLECs. *See* AT&T Motion, at pp. 8, 10. This is not true. Core has provided sufficient information for AT&T to locate each of the identified CLECs. With the already provided information, AT&T could contact the identified CLECs to independently confirm the existence of negotiations.

Moreover, AT&T's Interrogatories ask for non-discoverable materials. Pennsylvania Rule of Civil Procedure No. 4003.3 states that "discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or **legal theories**." By seeking summaries of the negotiations, these interrogatories seek the disclosure of the mental impressions, conclusions, opinions and the work-product of the Plaintiff's attorneys, which are protected from disclosure under Pennsylvania's work product doctrine.

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[2] Core provided copies of these complaints to AT&T.

Nevertheless, AT&T is using the Motion to force Core to provide detailed information on the dates and participants in Core's negotiations with other CLECs. The need for details on dates and persons is unclear. AT&T does not elaborate on the need for such information by AT&T. Nor does AT&T explain how the dates and participants in Core's negotiations with other CLECs is related to any of AT&T's claims or defenses. The lack of an explanation suggests that AT&T is seeking this information to create an unreasonable annoyance, burden or expense for Core. This should not be permitted. 52 Pa. Code § 5.361.

Additionally, it should be remembered that Core voluntarily provided information to AT&T - without waiver of Core's objections. The informal or voluntarily provision of information is supported by the Commission. If the information voluntarily provided by Core to under Interrogatories 5-2(a), (e) and (f) and 5-9 are used as a basis to compel more information from Core, no future party would be willing to engage voluntarily or informally provide information to any other party.

Based on the foregoing, AT&T's Motion to Compel responses to Interrogatories 5-2(a), 5-2(e), 5-2(f) and 5-9 should be denied.

B. AT&T IMPROPERLY SEEKS TO COMPEL INFORMATION RELATED TO CORE's BILLING AND COLLECTION EFFORTS AGAINST OTHER CLECs (AT&T Interrogatories Nos. 5-2(b), 5-2(c), 5-2(d), 5-1(f))

With respect to subsections (b), (c), (d) and (f) of Interrogatory 5-2, AT&T seeks information related to Core's efforts to bill and collect charges from CLECs other than AT&T for the termination of traffic. Specifically, AT&T asks "how much traffic did each CLEC send Core" and the "exact date of each bill and the time period covered in the bill" broken out by "each CLEC."

As stated in the response already provided to AT&T, Core does not have a database that tracks total MOUs and amounts bills and collected for each carrier over time. See Core Response to Interrogatories Nos. 5-2(c), (d). Regarding the traffic that is sent to Core for termination, AT&T ignores that the relevant records are derived on a monthly basis using the call-specific CDR information received from Verizon in the Carrier Access Billing System ("CABS") or "Category 11" records. See Core St. 1, at. pp. 8-10. As explained in Core's testimony, only after a laborious and costly process can the data be cultivated and then turned into a paper invoice that is sent to the originating carrier. *Id.* Providing the information AT&T seeks in this request in the form requested by AT&T would require Core personnel through each account, manually add up monthly MOU totals for several years worth of usage, and create a new spreadsheet for each one of many CLECs. This would be extremely time consuming and would cripple the ability of Core's billing department to perform its required task of billing. Providing the exact amounts billing and collected would only compound the time and expense of identifying the MOUs sent to Core of which Core is aware. After identifying the carriers and MOUs in accordance with the steps described above, then Core would have to multiply the MOUs by the applicable rate(s). Presently, Core's accounting department keeps track of the total amount billed and collected for each carrier for all line items on the invoices (which combines intrastate and interstate). Because Core does business as a CLEC in Maryland and Pennsylvania, the only way to get the Pennsylvania-only amounts is to dedicate personnel in the accounting department to go through each invoice and manually add up the Pennsylvania-only amounts. Such an undertaking would be time consuming,

costly and would undermine the ability of accounting personnel to complete its daily tasks of billing and collections.

As support for its Motion to Compel, AT&T refuses to acknowledge the time, burden and expense involved in this process, and claims only that Core's responses are not credible. See AT&T Motion, pp. 6-8. In doing so, AT&T ignores the underlying fact that identifying the CLEC indirect traffic and the MOUs sent and invoiced for Pennsylvania is laborious and difficult and instead insinuates that its request for this information is a more routine issue. As noted above, this is not the situation. Moreover, it should be remembered that the weight and credibility of evidence is a trial issue. AT&T goes too far in seeking to compel discovery responses based on credibility. As noted above, AT&T ignores the effort required to cultivate data and information and the extreme burden and expense that would be required to produce the information in the form that AT&T seeks. .

Nevertheless, in response to Interrogatories Nos. 5-2(b) to 5-1(f), Core has provided AT&T with all the information that is currently and reasonably available. Specifically, Core has stated that it has complaints against three (3) other CLECs related to the termination of traffic. *See* Core's Supplemental Response to Interrogatory Nos. 5-2(b), (c). These complaints contain information related to the amounts billed and paid by these CLECs. *Id.* Core informed AT&T that Core billed each of the other CLECs at the same times and for the same usage periods as it billed AT&T. Core Response to Interrogatory 5-2(b). Core also informed AT&T that Core was still in negotiations with five (5) other CLECs related to the termination of traffic. *See* Core's Supplemental Response to Interrogatory 5-9.

Here, Core has sufficiently responded to AT&T's Interrogatories. The underlying issue was raised by AT&T. Core's complaint and underlying claims do not rely on Core's billing and collection efforts with other CLECs. In fact, AT&T has explained that it is seeking this information to explore whether (or not) (a) Core was pursuing other CLECs and/or (b) Core is engaged in "bill and keep" with other CLECs. AT&T Motion, p. 7. The information already provided by Core shows that Core is engaged in billing and collection efforts against eight (8) other CLECs does not have a "bill and keep" arrangement with them.

Even though Core has provided sufficient information to resolve AT&T's identified concerns, AT&T still contends that it must have a copy of each and every bill for every CLEC for the traffic sent to Core for the last six (6) years. AT&T Motion, pp. 5-8. Again, AT&T does not elaborate on the need for precise dates and billing information by AT&T. Nor does AT&T explain why the billing information for other CLECs is necessary to any of AT&T's claims or defenses. In fact, Core submits that the detailed billing records of other CLECs is simply not relevant or related to any claim or defense in this matter. Therefore, AT&T is not justified in seeking more precise and detailed billing information related to the other CLECs under Interrogatories Nos. 5-2(b) to 5-2(d) and 5-2(f).

Under these circumstances, AT&T appears to be engaged in an unwarranted "fishing expedition." AT&T should not be permitted to impose an unreasonable annoyance, burden or expense for Core in the mere hope of discovering some scintilla of evidence that will support AT&T's claims against Core. Accordingly, AT&T's Motion to Compel responses to these Interrogatories should be denied.

IV. AT&T IMPROPERLY SEEKS TO COMPEL INFORMATION THAT DOES NOT EXIST (AT&T Interrogatory No. 5-11)

Interrogatory 5-11 is a thinly-veiled effort to conduct cross-examination by way of an Interrogatory. AT&T has implied that Core is "cost-shifting" as an "arbitrage" carrier. In response, Mr. Mingo's Surrebuttal Testimony explains why Core does not offer outbound services, which would deter claims of "arbitrage." *See* Core St. 1-SR, at p. 11. In doing so, Mr. Mingo states that:

> ... in the current environment of regulatory uncertainty, which AT&T and other originating carriers exploit, competitive carriers like Core have to price originating services at very close to zero, i.e., give it away. The reality in the marketplace now is that many originating carriers do not pay terminating carriers for large amounts of traffic, using various excuses. We can not and will not compete with carriers who in essence steal the use of other carrier's networks.

Id.

Based on a misreading of this testimony, AT&T asked Interrogatory No. 5-11 to Core. Interrogatory 5-11 asks Core to "back-up" the claim by listing "each and every" service that Core has "priced at very close to zero." AT&T Motion, p. 11. Mr. Mingo's testimony does not, however, say that Core is actually pricing any services at close to zero. Instead, his testimony indicates that <u>if Core was providing originating service</u> that Core would have to price those "originating services at very close to zero" to compete with others. But, his testimony in no way creates an inference that such services are being offered or being priced near zero. Therefore, in its response to Interrogatory 5-11, Core explained that Core does not offer outbound services. Core further explained that the "information requested does not exist." *See* Core Supplement Response to Interrogatory 5-11.

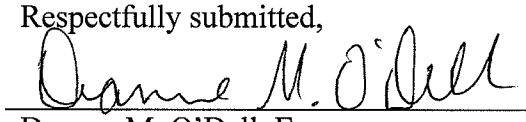
In its Motion, AT&T contends that Core's responses are not sufficient because Core did not clearly indicate what services (other than originating services), if any, are priced "at very close to zero." *See* AT&T Motion, at p. 11. This merely repeats the fundamental error in this Interrogatory. The Interrogatory, by its terms, is limited to Mr. Mingo's Surrebuttal Testimony. Mr. Mingo only indicated that originating services (which are not offered by Core) would need to be priced near zero to compete with other carriers. Nothing in his testimony indicates that Core's services were actually being priced near zero. Yet, AT&T is demanding that Core provide a discovery response stating that Core is not being forced to price services near zero. *See* AT&T Motion, p. 11. This goes well beyond a fair reading of Mr. Mingo's Surrebuttal Testimony, and should not be permitted.

Simply put, AT&T is clearly attempting to use Mr. Mingo's explanation as to why Core does not offer originating services as a springboard to obtain precise knowledge of Core's revenue and pricing of "each and every" service offered by Core. This is not reasonable or justified. The Commission's Rules do not permit discovery of irrelevant information for purposes of giving a party negotiating leverage. Moreover, Core's business model was thoroughly reviewed and approved by the Commission over the opposition of rural incumbent LECs in Docket No. A-310922AMA. AT&T's only intent here can be to avoid focusing on the actual claims in Core's Complaint. Such misdirection is not a relevant basis upon which to seek discovery and must not be permitted. AT&T's Motion should be denied.

V. CONCLUSION

Based on the foregoing, AT&T's Motion to Compel responses to Interrogatories 5-1, 5-2, 5-9 and 5-11 should be denied.

Respectfully submitted,



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Date: March 1, 2010