



**McNees**  
Wallace & Nurick LLC

100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166  
Tel: 717.232.8000 • Fax: 717.237.5300

Pamela C. Polacek  
Direct Dial: 717.237.5368  
Direct Fax: 717.260.1736  
ppolacek@mwn.com

March 15, 2010

**VIA ELECTRONIC FILING**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**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:

Please find enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") the original and three (3) copies of the Joint Brief of Choice One Communications of Pennsylvania, Inc. and CTC Communications Corp. (collectively, "One") and XO Communications Services, Inc. ("XO") in the above-referenced proceeding

As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with a copy of this document. Please date stamp the extra copy of this transmittal letter and Joint Brief, and kindly return them to our messenger for our filing purposes.

Very truly yours,

McNEES WALLACE & NURICK LLC

By   
Pamela C. Polacek

Counsel to Choice One Communications of Pennsylvania, Inc. and CTC Communications Corp. and XO Communications Services, Inc.

c: Administrative Law Judge Angela T. Jones (via E-mail and First Class Mail)  
Certificate of Service

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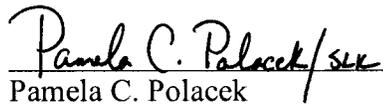
I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

**VIA E-MAIL AND FIRST CLASS MAIL**

Michelle Painter, Esq.  
Painter Law Firm  
13017 Dunhill Drive  
Fairfax, VA 22030  
[painterlawfirm@verizon.net](mailto:painterlawfirm@verizon.net)

Deanne M. O'Dell, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
213 Market St. – 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
[dodell@eckertseamans.com](mailto:dodell@eckertseamans.com)

Theodore A. Livingston, Esq.  
Kara K. Gibney, Esq.  
Mayer Brown LLP  
71 S. Wacker Drive  
Chicago, IL 60606  
[tlivingston@mayerbrown.com](mailto:tlivingston@mayerbrown.com)  
[kgibney@mayerbrown.com](mailto:kgibney@mayerbrown.com)

  
Pamela C. Polacek

Counsel to Choice One Communications of  
Pennsylvania, Inc. and CTC Communications Corp.  
and XO Communications Services, Inc.

Dated this 15<sup>th</sup> day of March, 2010, at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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***AMICUS CURIAE* BRIEF OF CHOICE ONE COMMUNICATIONS OF PENNSYLVANIA,  
INC., CTC COMMUNICATIONS CORP. AND XO COMMUNICATIONS SERVICES, INC.  
ON THE ISSUES RAISED ON INTERLOCUTORY REVIEW**

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Respectfully submitted:

McNEES WALLACE & NURICK LLC  
Pamela C. Polacek, Esq. (Pa. I.D. No. 78276)  
Barry A. Naum, Esq. (Pa. I.D. No. 204869)  
McNEES WALLACE & NURICK LLC  
100 Pine Street, P.O. Box 1166  
Harrisburg, PA 17108-1166

*Counsel to Choice One Communications  
Of Pennsylvania, Inc. and CTC Communications  
Corporation*

Of Counsel

John J. Heitmann, Esq. (*pro hac vice* app. pending)  
Joseph D. Wilson, Esq. (*pro hac vice* app. pending)  
KELLEY DRYE & WARREN LLP  
3050 K Street, N.W., Suite 400  
Washington, DC 20007

McNEES WALLACE & NURICK LLC  
Pamela C. Polacek, Esq. (Pa. I.D. No. 78276)  
Shelby A. Linton-Keddie, Esq. (Pa. I.D. No. 206425)  
McNEES WALLACE & NURICK LLC  
100 Pine Street, P.O. Box 1166  
Harrisburg, PA 17108-1166

Harry N. Malone, Esq.  
DEVINE, MILLIMET & BRANCH  
111 Amherst Street  
Manchester, NH 03101

*Counsel for XO Communications Services, Inc.*

Dated: March 15, 2010

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*Amicus curiae* Choice One Communications of Pennsylvania, Inc. and CTC Communications Corp. (collectively, "One") and XO Communications Services, Inc. ("XO"), by undersigned counsel and pursuant to 52 Pa. Code § 5.502(e), or alternatively with leave for good cause shown, respectfully submit this Brief to the Pennsylvania Public Utility Commission ("PUC" or "Commission") on the issues raised for interlocutory review by Petitioner Core Communications, Inc. ("Core") and Respondents AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. (collectively, "AT&T") in the above-captioned actions (collectively, the "AT&T Action"). One and XO submits this *Amicus Curiae* Brief to support:

- affirmation of Order #6 issued by Administrative Law Judge ("ALJ") Angela Jones in the AT&T Action (the "Order") insofar as it granted AT&T's motion to dismiss and dismissed Core's claims based on pre-September 2009 traffic because that traffic was: (i) entirely ISP-bound, (ii) therefore jurisdictionally interstate and (iii) incapable of vesting this Commission with subject matter jurisdiction over Core's claims based on such traffic; and
- reversal of the Order insofar as it denied AT&T's motion to dismiss with respect to Core's claims based on post-September 2009 traffic on the surmise that such traffic potentially included some VOIP traffic.

## I. STATEMENT OF THE CASE

### A. The Nature of the AT&T Action

The AT&T Action focuses on a dispute between Core, a competitive local exchange carrier ("CLEC"), and AT&T, a CLEC, over intercarrier compensation for the exchange of ISP-bound traffic. The D.C. Circuit Court of Appeals recently summarized the mechanics regarding the exchange of such traffic as follows:

When a customer accesses the internet via "dial-up," his or her call goes to a local exchange carrier ("LEC"), which commonly hands the call off to another LEC, which in turn connects the customer to an internet service provider ("ISP"). The ISP links the customer to the web. At least as early as 1999 the Federal Communications Commission was concerned that the regulatory procedures under which the sending LEC compensated the recipient LEC were leading to the imposition of excessive rates, and that these rates in turn were distorting the markets for internet and telephone services. The

Commission in due course responded with an alternative regulatory regime . . ."

*Core Communications, Inc. v. FCC*, 592 F.3d 139, 140-41 (D.C. Cir. 2010).

Core's Complaint in the AT&T Action asks the Commission to order AT&T to pay Core several million dollars in terminating intrastate switched access charges for 2004 to the present pursuant to Core's state Switched Access Tariff (Pa. PUC Tariff No. 4, the "Tariff"). *See* Compl. Against AT&T ¶¶ 17 & 24. Core asks the PUC to order AT&T to pay Core for providing such service, on both a retrospective and prospective basis, at one of three rates: (a) the rate in the Tariff; (b) the TELRIC tandem reciprocal compensation rate of Verizon Pennsylvania; or (c) "a reasonable rate" to be established by the Commission. *See, e.g., id.* ¶¶ 53 & 63.

It is undisputed that the bulk of the traffic underlying Core's claims against AT&T is "Internet Service Provider ("ISP")-bound traffic." *See, e.g.,* Order at 6, 12; AT&T Mot. to Dism. at 1 & n.1. That is to say, such traffic was: (a) originated by AT&T's customers who dial their ISPs who are customers of Core; (b) then the traffic is routed through the tandem switches of Verizon Pennsylvania to Core's network; (c) then it is routed to Core's ISP-customers; and (d) then routed by those ISPs to the internet cloud. *See* AT&T Mot. to Dism. at 3. It is also undisputed that Core and AT&T do not have an interconnection agreement ("ICA") between Core and AT&T governing access for ISP-bound traffic. *E.g., id.* at 4; Order at 1.

While Core asserts that it is entitled to receive terminating switched access charges for allegedly terminating ISP-bound traffic originating with AT&T pursuant to its Pennsylvania state Tariff, AT&T has contended that the Tariff does not apply and that compensation for the exchange of ISP-bound traffic in Pennsylvania has been, and should be made if at all, pursuant to a "bill-and-keep" relationship in absence of an ICA providing for the terms by which other compensation should be made. *See* AT&T Amend. Answ. To Compl., pp. 1-5. AT&T has also asserted other reasons why

Core's claims fail, notably that the Commission lacks subject matter jurisdiction over those claims. *See* this Brief, *infra*, Section I.B.

Core suggests that there may also be some small amount of voice-over-internet-protocol ("VOIP") traffic occurring after September 2009 that partly underlies its claims against AT&T, in addition to the ISP-bound traffic. *See, e.g.*, Order at 7. AT&T counters that, *inter alia*, Core has neither satisfactorily alleged or adduced proof to show that any such VOIP traffic originated with AT&T. *See* this Brief, *infra*, Section I.B.

## **B. AT&T's Motion To Dismiss and The Order**

On December 8, 2009, AT&T moved to dismiss Core's Complaint, arguing that:

1. ISP-bound traffic is jurisdictionally interstate based on time-honored Federal Communications Commission ("FCC") and federal court decisions and, therefore, state PUCs, including the Commission, lack subject matter jurisdiction to address rate disputes concerning such traffic in the absence of an ICA between the parties. *See* AT&T Mot. to Dism. at 1, 12-15;
2. Even if the Commission had subject matter jurisdiction, switched access charges, which Core claims to be entitled to pursuant to its state access Tariff, apply only to access (a/k/a "toll") traffic, and, per FCC orders, ISP-bound traffic is non-access/non-toll traffic. Thus, Core's Tariff does not apply. *See id.* at 4 & n.7;
3. Even if the Commission had subject matter jurisdiction, the FCC has issued regulations establishing an intercarrier compensation regime governing non-toll, ISP-bound traffic, and, thus, the FCC has preempted state PUCs from addressing intercarrier compensation issues for ISP-bound traffic. *See id.* at 10-11, 16-19.
4. The Commission does not have subject matter jurisdiction (and has been preempted from addressing the compensation issue before it) notwithstanding that the ISP-bound traffic at issue was exchanged between two CLECs, *see id.* at 22-24, or may have originated in Pennsylvania, *see id.* at 10 n.14; and
5. Core has failed to sufficiently allege or adduce evidence to show that any VOIP traffic on which Core may be basing its claims originated with AT&T – which Core must do because it bears the burden of proof on that issue. *See id.* at 9-10.

This Brief will focus on the first, fourth and fifth arguments of AT&T described above, consistent with the Order.<sup>1</sup>

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<sup>1</sup> One and XO generally agree with the substance of the other AT&T arguments; however, One and XO reserve their rights to raise those and any other arguments, regardless of whether or not AT&T raised them in its Motion to Dismiss, in this action and the ones Core has brought against One and XO before this Commission.

In opposing AT&T's Motion to Dismiss, Core argued that the ISP-bound traffic at issue in this case is jurisdictionally intrastate because it originates with AT&T's customers in Pennsylvania and terminates at Core's facilities in Pennsylvania before Core's ISP customers carry such traffic to the internet cloud. *See, e.g.*, *Ans. Of Core To AT&T's Mot. To Dism.* ("Core Opp.") at 4. Core suggested that the FCC's pronouncement that ISP-bound traffic is jurisdictionally interstate is effectively limited to such traffic exchanged between two incumbent local exchange carriers ("ILECs") or ILEC and a CLEC, but that such pronouncements do not apply to ISP-bound traffic exchanged between two CLECs. *See id.* at 9-11 & n.29.

**C. The Order On AT&T's Motion To Dismiss**

After briefing by both Core and AT&T and hearing oral argument, ALJ Jones issued the Order; which granted AT&T's Motion to Dismiss in part as to the pre-September 2009 traffic and denied the Motion to Dismiss in part as to the post-September 2009 traffic. As to Core's claims based on the former body of traffic, it was undisputed that such traffic was ISP-bound traffic. *See* Order at 12. The Order concluded that the Commission did not have subject matter jurisdiction over Core's claims based on that ISP-bound traffic, notably reasoning that:

In the days of solely POTs (plain old telephones), calls were made through the PSTN (Public Switched Telephone Network). The switches in the PSTN determined the path between the origin and destination of a call. The physical path of the call was that of the switches activated to get from the origin to the destination point enabling the callers to communicate. The compensation for the call was determined by the point of origin and the point of destination, also known as the "end-to-end" analysis. In simplest terms as understood by the undersigned, the Internet is similar to the switch providing a path for transmission of telecommunications service or information service. However, the Internet can also be a destination in regard to using the system for information service.

In *Core v. FCC*, 592 F.3d. 139, No. 08-1365, (D.C. Cir. Jan. 12, 2010) at 9 the U.S. Appeals Court states, "Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls." In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of

1996, Intercarrier Compensation for ISP-bound traffic, 14 FCC Rcd 3689 (1999), the FCC applied its "end-to-end" analysis for classification of the communication as local or interstate declaring the analysis turns on whether the communication's origin and destination are in the same state. *The FCC concluded based on the end-to-end principle that dial-up Internet traffic was interstate. Id., at 18. "The FCC has consistently applied [the end-to-end analysis] to determine whether communications are interstate for purposes of Section 201 [of TA 1996]" Core v. FCC, Slip Op. at 10. Moreover, the U.S. Appeals Court found that ISP-bound traffic is interstate based on the end-to-end analysis and indeed the FCC has authority under Section 201 of the TA 1996 to regulate compensation between the sending local exchange carrier and the recipient local exchange carrier regarding ISP-bound traffic.*

*It is the undersigned ALJ's point of view that the end-to-end analysis looks at the origin and destination of the call. As counsel for Core states, the destination would be the Internet cloud. Consequently, by applying Core v. FCC, the telecommunication service at issue is under the jurisdiction and authority of the FCC to determine the compensation for the transport and termination service rendered. Core argued that the ISP Remand Order is limited to ISP-bound traffic originated by an ILEC and terminated by CLEC. The undersigned submits that Core v. FCC fails to endorse a limitation of just ILEC/CLEC origination and termination.*

Order at 11-14 (emphasis added).

ALJ Jones rejected Core's argument that CLEC-to-CLEC ISP-bound traffic is not considered jurisdictionally interstate and that only such traffic exchanged between ILECs or an ILEC and a CLEC is interstate. *See id.* at 13 ("The undersigned submits that *Core v. FCC* fails to endorse a limitation of just ILEC/CLEC origination and termination."). ALJ Jones summarily dispatched with the principal authority, *Pac-West Telecomms. v. AT&T of Cal.*, 2007 Cal. PUC LEXIS 310 (Cal. PUC 2007), and *AT&T v. Pac-West Telecomms.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2009), relied upon by Core to support its CLEC-to-CLEC argument, *see Core Opp.* at 2, 9, 12-115 & ns.3, 29, 42, 48-50. Notably, ALJ Jones reasoned that those decisions were "made prior to *Core v. FCC* [592 F.3d 139 (D.C. Cir. 2010)] where the end-to-end analysis determined jurisdiction and authority of the FCC. As stated above the end-to-end analysis does not respect the type of carrier involved in the exchange of traffic for compensation. Consequently, the distinction Core makes of

an ILEC/CLEC relationship versus a CLEC/CLEC relationship to determine intercarrier compensation is moot." *See* Order at 13-14.

ALJ Jones denied AT&T's Motion to Dismiss as to the post-September 2009 traffic because she concluded that there were material disputes of fact regarding whether (a) that body of traffic included, along with ISP-bound traffic, at least some VOIP traffic and (b) the destination of such VOIP traffic. *Id.* at 10-11. There is nothing in the Order, however, addressing the ramifications of Core's failure to meet its burden of proof by establishing that the VOIP calls were originated by AT&T in Pennsylvania and terminated by Core in Pennsylvania.

## II. AUTHORITY FOR THIS AMICUS CURIAE BRIEF

One and XO are authorized as of right to submit this *Amicus Curiae* Brief pursuant to 52 Pa. Code § 5.502(e). That provision provides, in pertinent part, "[a] person interested in the issues involved in a Commission proceeding, although not a party, may, without applying for leave to do so, file amicus curiae briefs in regard to those issues."

One and XO are interested in the issues involved in the interlocutory review in the AT&T Action. First, Core has instituted actions against One and XO before this Commission in which it has asserted claims that are substantially similar to the claims that Core has asserted against AT&T in the AT&T Action. *See* Docket No. C-2009-2130379 and Docket No. C-2009-2131838 (collectively, the "One Action"); Docket No. C-2009-2133609 (the "XO Action").<sup>2</sup> In those Actions, for example, Core asserts substantially identical claims against One as those asserted against AT&T, and Core admits that the vast majority of the traffic at issue in the One Action, as in the AT&T Action, is ISP-bound. *See, e.g., generally* Core's Compl. Against One; Core's Resp. to One's Interrog. No. 2. Likewise, Core suggests in the One Action that there might be a small amount of post-August 2009 VOIP traffic that it terminated which is at issue. *See, e.g., id.*, Resp to Interrog. Nos. 2-3. One and

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<sup>2</sup> That said, not all the issues in three Actions are the same. In addition, neither XO or One necessarily take the same position on all the issues that are similar between their Actions, though they do take the same position with respect to the arguments made in this Brief.

XO contend, *inter alia*, that the Commission lacks subject matter jurisdiction over Core's claims. *E.g.*, One's Answ. To Core's Compl., pp 1-2.

Second, and as a result of the above-noted similarity, the Commission's determination of the issues before it on interlocutory review in the AT&T Action are likely to bear on the resolution of the issues in the One and XO Actions. Core admits those Actions and the AT&T Action present similar issues and that resolution of the issues in the AT&T Action is likely to have an effect on the resolution of the issues in the other Actions. *See* Core's Petition For Interlocutory Review And Answer To A Material Question Of Core Communications, Inc., at 1 & n.1 ("[a]ddressing this issue now will ensure an efficient resolution of the formal complaint in this proceeding [and] similar formal complaints in other pending proceedings," [referring to the One and XO Actions]).

In the event that the Commission does not believe that One and XO may, as of right, submit this *Amicus Curiae* Brief pursuant to 52 Pa. Code § 5.502(e), they, in the alternative, submit that the above-noted reasons provide good cause for granting them leave to file this *Amicus Curiae* Brief.

### **III. STATEMENT OF THE QUESTIONS PRESENTED**

(1) Is the Order's holding that the Commission lacks subject matter jurisdiction over ISP-bound traffic under Core's claims against AT&T correct such that Core's claims based on pre-September 2009 traffic were properly dismissed and that, therefore, this part of the Order should be affirmed? **Suggested answer:** *Yes*; and

(2) Is the Order's holding regarding Core's claims based on post-September 2009 traffic incorrect such that that part of the Order should be reversed and AT&T's Motion to Dismiss granted as to that traffic as well because Core has not identified such traffic as originating with AT&T and terminated by Core, an issue on which Core bears the burden of proof. **Suggested answer:** *Yes*.

### **IV. SUMMARY OF ARGUMENT**

The answer to both of the Questions Presented should be in the affirmative for reasons discussed more fully in this Brief. In sum, those reasons are:

(1) Under long and well-established FCC precedent, which has been challenged before the D.C. Circuit Court of Appeals several times but never overturned, ISP-bound traffic is

jurisdictionally interstate, not intrastate, because such traffic terminates in the internet cloud and thus crosses state lines. That is the case regardless of whether the point from which the call originates and the ISP that routes the call to the internet are in the same state. All the traffic that Core has identified as originating with AT&T is ISP-bound traffic and, therefore, all such traffic is jurisdictionally interstate. The Commission does not have subject matter jurisdiction over such traffic because it is jurisdictionally interstate.

(2) Core bears the burden of proving that any VOIP traffic terminated by Core after September 2009 traffic originated with AT&T to prevail on its claims as to that traffic, regardless of whether that traffic is VOIP or ISP-bound traffic. In denying AT&T's Motion to Dismiss as to post-September 2009 traffic, the Order pointed out that some of this traffic might be VOIP and thus might fall within the Commission's jurisdiction. The Order, however, fails to consider the import of Core's failure to demonstrate that any such traffic actually was originated by AT&T and terminated by Core within Pennsylvania. Core has not alleged that such traffic originated with AT&T in its Complaint or adduced sufficient evidence from which a trier of fact could conclude that any post-September 2009 traffic terminated by Core was VOIP traffic or that it originated with AT&T. For that reason, AT&T's Motion to Dismiss should also have been granted as to the post-September 2009 traffic.

## V. ARGUMENT

### A. The Order Should Be Affirmed To The Extent It Granted The Motion To Dismiss

The Order's conclusion that the Commission does not have subject matter jurisdiction over claims based on ISP-bound traffic is well-grounded in the law and should be affirmed.

#### 1. **The Order's Grant Of AT&T Motion To Dismiss Flows From and is Supported By Well-Established Legal Precedent.**

The Order's conclusion that the ISP-bound traffic underlying Core's claims against AT&T flows from the well-established legal tenet that ISP-bound traffic is jurisdictionally interstate under the "end-to-end analysis" accepted by the FCC and various courts.

"[The FCC] ha[s] consistently found that ISP-bound traffic is jurisdictionally interstate . . . This conclusion has not been questioned by the D.C. Circuit." *E.g., In The Matter of High-Cost Universal Service Support*, 24 F.C.C.R. 6475, 6484-85, ¶ 21 & n.69, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (Nov. 5, 2008) ("*The Mandamus Response Order*") *See also Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) ("the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes").

On several occasions the FCC has pronounced that ISP-bound traffic is jurisdictionally interstate. Starting on February 26, 1999 with its "*Declaratory Ruling*," cited below, the FCC has "held that ISP-bound traffic is jurisdictionally interstate because end users access websites across state lines." *See The Mandamus Response Order*, 24 F.C.C.R. at 6483 ¶ 16. In the *Declaratory Ruling* determined that, pursuant to an analysis of the originating point and the terminating point of an ISP-bound call, reasoned that:

Consistent with these [FCC] precedents, we conclude, as explained further below, that the [ISP-bound] communications at issue here ***do not terminate at the ISP's local server ... but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction.*** As the Commission stated in *BellSouth MemoryCall*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."

Thus, we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.

*See Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 3689, 3697-98 ¶¶ 12-14 (1999) ("*The Declaratory Ruling*"), *vacated on another point and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

In 2001, the FCC in a related proceeding stated that it "has long held" that the jurisdictional nature ISP-bound traffic is interstate. See *Intercarrier Compensation For ISP-Bound Traffic, Order on Remand and Report and Order*, 16 F.C.C.R. 9151, 9164 ¶ 24 (2001) ("*ISP Remand Order*"), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

Again in November 2008, the FCC reaffirmed its long-standing ruling that ISP-bound traffic is jurisdictionally interstate, stating, among other things, that, "[because] we reaffirm our findings concerning the interstate nature of ISP-bound traffic . . . it [therefore] follows that such traffic falls under the [FCC's] section 201 authority preserved by the Act and that [the FCC] therefore ha[s] the authority to issue pricing rules pursuant to that section." *The Mandamus Response Order*, 24 F.C.C.R. at 6484-85, ¶ 21 (emphasis added).<sup>3</sup>

The D.C. Circuit Court of Appeals has addressed the *Declaratory Ruling* and *ISP Remand Order* and, while it either vacated or remanded portions of those orders, it left the FCC's decision that ISP-bound traffic was jurisdictionally interstate intact. See "*The Mandamus Response Order*") 24 F.C.C.R. at 6484-85, ¶ 21 & n.69.

As recently as January 2010, the D.C. Circuit in *Core v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), had before it the FCC's determination that ISP-bound traffic was jurisdictionally interstate in addressing the legality of the FCC's compensation regime for ISP-bound traffic. Not only did the D.C. Circuit not undermine the FCC's determination that ISP-bound traffic was jurisdictionally interstate in that decision, it implicitly endorsed that determination, which is at the heart of the FCC's basis for its *Mandamus Remand Order*, by denying the petitions, including one by Core, contesting the legality of the FCC's ISP-bound traffic compensation regime addressed. Indeed, the D.C. Circuit in *Core v. FCC* favorably acknowledged the FCC's determination on the jurisdictional nature of ISP-

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<sup>3</sup> *The Mandamus Response Order* also explains that such traffic is not access or toll traffic but is instead section 251(b)(5) traffic. See 24 F.C.C.R. at 6479-83 ¶¶ 7-16. Thus, by establishing that the interstate traffic at issue here is not access or toll traffic, the FCC has made clear that Core's claims for access charges under its intrastate access Tariff are unlawful.

bound traffic in stating that "the Commission concluded that under the end-to-end principle dial-up internet traffic was interstate" "[b]ecause a customer's venture into the web characteristically reaches servers out of state (and often out of the country)." 592 F.3d at 142.

In light of the above-noted authority, the Order should be affirmed insofar as it granted AT&T's Motion to Dismiss for lack of subject matter jurisdiction.

Indeed, Core cannot in good faith contest that ISP-bound traffic is not jurisdictionally interstate. In *In re Petition of Core Commc'ns, Inc., Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq* (the "*Embarq Arbitration*"), Docket No. A-310922F7002, Core stated to this Commission that, "[a]ll of the FCC's rules are now premised on the theory that any call to an ISP is interstate and therefore under the FCC's jurisdiction and rules for intercarrier compensation." Reply Brief of Core Communications, Inc. p. 37, September 20, 2007.

**2. That The ISP-Bound Traffic At Issue Went From One CLEC To Another CLEC Does Not Undermine The Order's Finding As To Jurisdiction.**

ALJ Jones rightly rejected Core's argument that FCC pronouncements regarding ISP-bound traffic do not speak to CLEC-to-CLEC ISP-bound traffic and thus, the argument goes, that ISP-bound traffic is not necessarily jurisdictionally interstate.

Notably, Core's reliance on *Pac-West Telecomms. v. AT&T of Cal.*, 2007 Cal. PUC LEXIS 310 (Cal. PUC 2007) ("*Pac-West*") and *AT&T v. Pac-West Telecomms.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2009) provides untenable support for such argument. As ALJ Jones correctly pointed out, *Pac-West* and the decision from the U.S. District Court for the Northern District of California affirming it were made prior to *Core v. FCC*, 592 F.3d 139 (D.C. Cir. 2010). Likewise, those two decisions were also decided before the FCC issued the Mandamus Response Order, in which the FCC once again pronounced that ISP-bound traffic was interstate in nature and

provides no indication whatsoever, that its end-to-end analysis could produce a different conclusion based on the type of carriers handling the communication.

Indeed, none of the authority discussed in the preceding section of this Brief draws any distinction between the types of carriers handling the ISP-bound traffic in determining the application of the end-to-end analysis, or provides any indication that such distinction should be drawn. To reach a contradictory conclusion would undermine the purpose of the ISP-bound compensation regime, which was to curtail arbitrage schemes in general. To adopt the CLEC-to-CLEC distinction advocated by Core would create a carve-out that would allow such arbitrage schemes to perpetuate, in contravention of FCC's determination that they should not.

ALJ Jones correctly discredited *Pac-West* and its affirming decision for other reasons, too. The district court in the affirming decision, 2008 WL 3539669 at \*7, recognized that ISP-bound traffic is jurisdictionally interstate but failed to recognize that the PUC only could have jurisdiction over such traffic if it arbitrating, approving nor enforcing an ICA. The district court wrongly circumscribed the *ISP Remand Order* to traffic between an ILEC and a CLEC, but, *id.* at \*10, for reasons noted above neither that order nor any related orders provides for such a limitation or can reasonably be read to suggest such a limitation.

**3. The Order's Grant Of AT&T's Motion To Dismiss Is Not Incorrect In Light Of The Commission's Palmerton Decision.**

The Commission recently issued a decision in *Palmerton v. GNAPS*, Docket No. C-2009-209336, Mot. Of Chm. Cawley (Feb. 11, 2010) (the "*Palmerton Commission Decision*") overruling ALJ Weismandel's conclusion that the Commission did not have subject matter jurisdiction over various claims asserted by Palmerton because those claims addressed VOIP traffic, which ALJ Weismandel concluded was interstate in nature. That decision has no bearing on whether the Commission lacks subject matter jurisdiction over ISP-bound traffic, first, because the FCC has

never categorically stated that VOIP traffic is jurisdictionally interstate. By contrast, and as discussed above, the FCC has clearly stated that ISP-bound traffic is jurisdictionally interstate.

Moreover, the traffic at issue in the *Palmerton Commission Decision* terminated in Palmerton's in-state service area, but the traffic at issue in Core's cases terminates to the Internet cloud, a fact which has led the FCC to classify such traffic as interstate for jurisdictional purposes. That facilities within the Commonwealth are used to route AT&T traffic to the internet does not give the Commission jurisdiction over part of an interstate communication. See, e.g., *Verizon New England v. Maine PUC*, 509 F.3d 1, 8(1<sup>st</sup> Cir. 2007) ("[facilities] located in individual communities ... have been used for decades to provide interstate and intrastate service as part of a unified network [and such facilities are regulated by the FCC]"); *North Carolina Utils. Comm. v. FCC*, 552 F.2d 1036, 1045-46 (4<sup>th</sup> Cir. 1976) (similar).<sup>4</sup>

**B. The Order Should Be Reversed To The Extent It Denied The Motion To Dismiss**

The Order should be reversed to the extent it denied AT&T's Motion to Dismiss. Section 332(a), 52 Pa. Code, provides that in hearings before the Commission "the proponent of a rule or order has the burden of proof ...." Core eventually contended that it is entitled to compensation from AT&T for the post-September 2009 VOIP traffic. Core, therefore, has the burden in this case of proving that such traffic exists (*i.e.*, that it originated with AT&T and was terminated by Core in Pennsylvania, such that AT&T is responsible for compensating Core for such traffic). See *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976) (generally stating that a

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<sup>4</sup>*Global NAPS v. Verizon New England*, 449 F.3d 59(1<sup>st</sup> Cir. 2006), cited at p.9, n.8 of the Cawley Motion is inapposite. That case involved an ICA dispute and the AT&T, One and XO Actions do not. Furthermore, that decision was issued before the FCC determined in *The Mandamus Remand Order* that ISP-bound traffic is not access traffic but is instead traffic falling with 47 U.S.C. § 251(b)(5). Thus, the Mandamus Remand Order establishes that ISP-bound calls are not toll calls subject to access charges and, once again, affirmed (based on an end-to-end analysis which rejects the two-call theory) that when LECs collaborate to deliver an ISP-bound call, the call is interstate. In the wake of that decision, it is impossible for Core to establish PUC jurisdiction over the ISP-bound traffic here because the traffic is interstate, non-access traffic and there is no ICA involved.

complainant, to satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the complaint).

The Order is silent on whether any VOIP traffic originated with AT&T, or even whether there was a factual showing made that could amount to a factual dispute on that point. Obviously, AT&T cannot be liable to Core for terminating access charges if Core does not establish that any of the post-September 2009 VOIP traffic originated with AT&T. Core's responses to discovery do not provide a basis from which a rational trier of fact could find that any alleged VOIP traffic terminated by Core was traffic that was originated by AT&T. *See* AT&T Mot. to Dism. at 9-10. Nor is the undersigned aware of any other cognizable offering of proof that would support such a conclusion.

## VI. CONCLUSION

For all the foregoing reasons, the Commission should affirm the Order to the extent it granted AT&T's Motion to Dismiss and reverse the Order to the extent it denied that Motion.

Respectfully submitted:

McNEES WALLACE & NURICK LLC

By Paula C Polacek/skc

Pamela C. Polacek, Esq. (Pa. I.D. No. 78276)  
Barry A. Naum, Esq. (Pa. I.D. No. 204869)  
McNEES WALLACE & NURICK LLC  
100 Pine Street, P.O. Box 1166  
Harrisburg, PA 17108-1166  
Phone: 717.237.5368  
Fax: 717.260.1736  
[ppolacek@mwn.com](mailto:ppolacek@mwn.com)  
[bnaum@mwn.com](mailto:bnaum@mwn.com)

*Counsel to Choice One Communications  
of Pennsylvania, Inc. and  
CTC Communications Corporation*

### Of Counsel

John J. Heitmann, Esq. (*pro hac vice* app. pending)  
Joseph D. Wilson, Esq. (*pro hac vice* app. pending)  
KELLEY DRYE & WARREN LLP  
3050 K Street, N.W., Suite 400  
Washington, DC 20007  
Phone: 202.342.8400  
Fax: 202.342.8451

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McNEES WALLACE & NURICK LLC

By Shelby A Linton-Keddie

Pamela C. Polacek, Esq. (Pa. I.D. No. 78276)  
Shelby A. Linton-Keddie, Esq. (Pa. I.D. No. 206425)  
McNEES WALLACE & NURICK LLC  
100 Pine Street, PO. Box 1166  
Harrisburg, PA 17108-1166  
Phone: 717.237.5368  
Fax: 717.260.1736  
[ppolacek@mwn.com](mailto:ppolacek@mwn.com)  
[skeddie@mwn.com](mailto:skeddie@mwn.com)

Harry N. Malone, Esq.  
DEVINE, MILLIMET & BRANCH  
111 Amherst Street  
Manchester, NH 03101  
[hmalone@devinemillimet.com](mailto:hmalone@devinemillimet.com)

*Counsel for XO Communications Services, Inc.*