**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Core Communications, Inc. v.AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.  | : : : : : :  | C-2009-2108186C-2009-2108239 |
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**INITIAL DECISION**

Before

Angela T. Jones

Administrative Law Judge

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I. HISTORY OF THE PROCEEDING

A. Background

On or about May 19, 2009, counsel for Core Communications, Inc. (“Core” or “Complainant”) filed two formal complaints (“Complaints”) with the Pennsylvania Public Utility Commission (“PUC” or “Commission”) against AT&T Communications of PA, LLC, (“AT&T-PA”) and TCG Pittsburgh, Inc.(“TCG”) (collectively, “AT&T” or “Respondents”) alleging non-payment by AT&T for terminating AT&T transmissions from Verizon tandem switches to Core end-user customers. These Complaints are Docket Nos. C-2009-2108186 (AT&T PA) and C-2009-2108239 (TCG). Core has coined this telecommunications traffic as AT&T Indirect Traffic, which involves intrastate switched access service by Core. Core averred that it does not have an interconnection agreement or traffic exchange agreement (“TEA”) with AT&T; and thus, alleged that Core’s tariff controls the compensation it should receive for providing AT&T with intrastate switched access service. Core averred that Respondents have not paid regarding this type of access service and have outstanding balances due for periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009. Complainant requests the Commission to direct Respondents to pay all intrastate switched access charges due and those same charges that may accrue in the future.

On June 9, 2009, AT&T filed its Answer to the Complaints alleging the parties were paying each other in-kind for access service through a bill-and-keep arrangement from January 1, 2004 through December 31, 2007. AT&T averred that the bill-and-keep arrangement is the industry standard method for intercarrier compensation.[[1]](#footnote-1) Regarding compensation after 2007, AT&T alleged that the parties were in negotiations over compensation without any agreement. AT&T averred that the compensation at issue should be resolved on a going-forward basis and that virtually all of the traffic at issue is ISP-bound (“Internet Service Provider”) local traffic which is

governed by the FCC’s *In the Matter of 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”)*, *remanded but not vacated, Worldcom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). AT&T averred that the bill-and-keep method was by default the in-kind payment for the access service from January 1, 2004 through March 2008 and that this bill-and-keep arrangement is appropriate for any of these same intrastate access services charges in the future. AT&T does not agree to pay Core for local ISP-bound access charges at its tariff rate or at the Verizon tandem reciprocal compensation rate for termination of traffic that is predominantly ISP-bound.

Core disputed the fact that the terminated traffic is ISP-bound should dictate the determination of its compensation to be outside the jurisdiction of this Commission. Furthermore, Core failed to accept the alleged industry standard of a bill-and-keep arrangement. Although there is no intercarrier compensation agreement between the two CLECs, the volume of traffic was at times heavily skewed to services performed by Core for AT&T to terminate the telecommunications traffic to Core’s customers. Core submits that it should be compensated for its services at its tariff rate for access and termination of traffic.

From initial telecommunications service performed by Core to and through September 2009, Core’s only customers in Pennsylvania were ISPs. In or about October 2009, Core alleged that it began providing service to Voice-Over-Internet-Protocol (“VOIP”) providers. Core claims that in or around April 2010, Core’s VOIP customers originated communications. Tr. 20. Prior to April 2010, Core handled only inbound traffic which was terminated to its customers. Core originated no outbound traffic. Tr. 18.

B. Relevant Procedural History

On December 8, 2009, AT&T filed a Motion to Dismiss this proceeding suggesting that the Commission lacked subject-matter jurisdiction or, in the alternative, the relief sought had been preempted by the FCC. AT&T cited cases from the FCC, predominantly the *ISP Remand Order,* and cases from Pennsylvania, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania*, *Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Docket No. A-310814F7000 (April 18, 2003); and *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania*, *Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Docket No. A-310814F7000 (Jan. 18, 2006), and alleged that the instant proceeding should not rely on, *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc. et al.*, 2007 Cal. PUC LEXIS 310 (Cal. PUC 2007), *aff’d, AT&T Communications v. Pac-West Telecomm, Inc*., 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008)(“*Pac West”)* because *Pac West* ignored the ramifications of ISP-bound traffic and wrongly limited the *ISP Remand Order* to traffic solely between an ILEC and a CLEC.

AT&T requested that the undersigned Administrative Law Judge (“ALJ”) suspend the instant proceeding while the Motion to Dismiss was pending.

By letter dated December 9, 2009, Core responded stating that it objected to any suspension of further testimony while the motion was pending as well as the motion itself.

On December 28, 2009, Core filed its Answer to the Motion to Dismiss. Core stated that the FCC has never preempted the Commission's authority to address issues relating to intercarrier compensation between two CLECs. Rather, the *ISP Remand Order* applied only to intercarrier compensation between an ILEC and CLECs. In this case, the exchange of traffic is between two CLECs; thus, the *ISP Remand Order* is not operable over the Complaints. In *arguendo*, Core contended even if the *ISP Remand Order* applied here, the Commission would still have jurisdiction as the Telecommunications Act of 1996 contemplated shared state and federal authority over all aspects of competition.

Moreover, Core contended that the *Pac-West* case, which is directly on point with the issues presented in this proceeding, makes clear that state commissions have not been preempted from applying intrastate tariff rates to ISP-bound traffic exchanged between two CLECs.

Core stated the Commission has jurisdiction necessary to address intercarrier compensation issues between CLECs regarding the termination of the intrastate ISP-bound traffic because there is no FCC preemption of this authority. Core contended this Motion to Dismiss was a delay tactic as an obstacle to resolve the dispute and prolonged non-payment for services rendered by Core. Core suggested any reward to such behavior would be unfair.

 On January 6, 2010, AT&T filed a Motion to Reply to the Answer of Core (“Motion to Reply”) and requested oral argument on jurisdictional issues. The latter request included a plea to suspend the procedural schedule pending the Commission’s determination of the jurisdictional issue pursuant to 52 Pa.Code § 5.103(d)(2). AT&T alleged further testimony and hearings were unnecessary and would cause inefficient use of the Commission’s and the parties’ resources if it was determined that the PUC did not have jurisdiction.

 By electronic mail (“email”) dated January 11, 2010, counsel for AT&T requested that the evidentiary hearing schedule be changed due to personnel conflicts with the schedule. The parties agreed to modify the procedural schedule with the evidentiary hearing scheduled for February 3, 2010, and if necessary, February 5, 2010.

 By Answer dated January 26, 2010, Core found no basis for AT&T to file its Motion to Reply to Core’s Answer. Core alleged AT&T’s reply was not justified by procedure and therefore requested that AT&T’s reply be stricken. In *arguendo*, Core contended the reply by AT&T was defective as it did not comply in format with any Commission regulation. Core further stated that the Motion to Reply was inappropriate and contended that there were no justifiable reasons to suspend the procedural schedule as requested by AT&T.

 By Order dated February 1, 2010, the undersigned ALJ granted the Motion to Suspend the Procedural Schedule pending a ruling on the Motion to Dismiss. The Motion for Oral Argument was granted and the parties conducted oral argument on February 3, 2010. The hearing scheduled for February 5, 2010 was cancelled.

 By Order No. 6 dated February 26, 2010, (“*Order No. 6*”) the undersigned ALJ granted the Motion to Dismiss regarding the traffic prior to September 2009 and denied the Motion to Dismiss regarding traffic after September 2009. The undersigned understood that compensation for a call was to be determined by the point of origin and the point of destination, also known as the “end-to-end” analysis. The undersigned ALJ ruled that the purpose or destination of the calls at issue was to reach the services of the ISP and concluded that the application of the “end-to-end” analysis resulted in the calls being under the jurisdiction of the FCC. However, the traffic after September 2009 still required material facts to be resolved including whether the mix of traffic after September 2009 included VOIP traffic and therefore the purpose of the call was not to reach the services of the ISP. Thus, the Motion to Dismiss was denied regarding the traffic and termination services supplied by Core to end-users after September 2009 because the end-to-end analysis did not result in the call being under the jurisdiction of the FCC.

 On March 5, 2010, both Core and AT&T filed separate Petitions for Interlocutory Review and Answer to Material Questions with respect to *Order No. 6*. On March 15, 2010, Core and AT&T filed briefs in support of their respective positions for the Interlocutory Review and Answer. Also on March 15, 2010, Choice One Communications of Pennsylvania, Inc., CTC Communications Corp. and XO Communications, Inc. filed a Joint *Amicus* Brief to be considered in this matter pursuant to 52 Pa.Code § 5.502(e).[[2]](#footnote-2)

 By Order dated April 7, 2010, the undersigned ALJ granted a Joint Motion by Core and AT&T to stay the proceeding, which was filed on March 23, 2010. The stay was to remain in effect until the Commission issued an Order regarding the Interlocutory Review or an expressed request to lift it, whichever occurred first.

 By Opinion and Order entered September 8, 2010, the Commission ruled on the material questions (“*Material Question Order*”). On the issue of whether the Commission had jurisdiction and authority of the traffic prior to September 2009, the Commission opined that the precedent in *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006) was applicable to this proceeding and did not accept the end-to-end analysis. The Commission stated,

The First Circuit Court established that the Massachusetts DTE (effectively the public utility commission of the state of Massachusetts) was not preempted by the FCC’s *ISP Remand Order* on deciding an interconnection agreement dispute even when it related to information or ISP bound traffic between GNAPs [Global NAPs] and Verizon New England.

*Material Question Order* at 9-10. The Commission further stated, “[W]e decline to supplement our focus by application of the ‘end-to-end’ analysis where doing so would effectively cede jurisdiction without legal basis and require applying that analysis to two Commission-certificated CLECs.” *Id* at 9. Lastly, the Commission stated, “[N]on-payment of appropriate intercarrier compensation from one CLEC to another CLEC cannot be condoned as a matter of law and as a matter of sound regulatory policy.” *Id* at 11.

 Regarding the traffic after September 2009, the Commission stated, “This Commission unequivocally stated in *Global NAPs[[3]](#footnote-3)* that it has jurisdiction to address intercarrier compensation issues related to VOIP traffic.” *Id* at 14. The Commission found that the undersigned ALJ properly denied the Motion to Dismiss regarding the VOIP traffic. The Commission agreed that there remained outstanding genuine issues of fact. *Id* at 13.

 On January 20, 2010, counsel for AT&T filed a motion to compel discovery responses from Core (“Compel I”). The discovery responses concerned revenues from Pennsylvania customers and operations from 2004 through 2009. On January 25, 2010, Core objected to the discovery stating that it was irrelevant, burdensome, procedurally belated, and submitted solely to characterize Core as a bad carrier. However, Core consented to respond to four of the outstanding nine requests.

 On February 24, 2010, AT&T filed a second motion to compel discovery responses from Core (“Compel II”). Compel II concerned inquiries to further expound upon the surrebuttal testimony of Core’s witness and to address AT&T’s assertion that the responses provided by Core to discovery were incomplete. On March 1, 2010, Core responded to Compel II and stated with clarifying remarks that it adequately answered the discovery.

 By Order dated October 5, 2010, the undersigned ALJ granted in part and denied in part the discovery requests in Compel I and Compel II. [[4]](#footnote-4) Regarding Compel I the ALJ found the discovery requests that were denied to be burdensome and unwarranted in specificity. Regarding Compel II the ALJ found that the responses Core provided were adequate and reasonable. Thus, Compel II was denied.

 On October 5, 2010, Core filed a Motion for Interim Relief (“Interim Relief”) requesting that AT&T be directed to pay Core a sum in excess of $1.4 million for all calls Core terminated for AT&T end-users for the period of June 2004 through August 2010, and $0.002439 per minute of use (“MOU”) for all terminated calls after August 31, 2010, or in the alternative, for AT&T to be directed to put in excess of $1.4 million in an escrow account and to pay Core at a rate of $0.014 per MOU[[5]](#footnote-5) for all calls Core terminated for AT&T after August 31, 2010. Core stated in support that requiring AT&T to pay a reasonable amount recognized the intent of the *Material Question Order* in that, “neither AT&T nor any other carriers should be permitted to withhold payment for service rendered. … [Furthermore] the result of not requiring AT&T to pay anything only benefits AT&T to the detriment of Core despite the Commission’s … determination that AT&T cannot simply ‘pay nothing.’” Interim Relief at 1-2.

 By Order dated November 9, 2010, the undersigned ALJ denied Core’s Motion for Interim Relief. The ALJ found that Core’s Interim Relief did not comply with Commission regulations at 52 Pa.Code § 3.6(b) in that it was unclear whether Core had a right to relief. A clearly established right for relief is one of the four factors that must be presented to obtain interim relief. The ALJ concluded that because this factor was not established, the regulation was not fulfilled and the interim relief was denied.

 An evidentiary hearing was held in this matter on November 18, 2010. Deanne O’Dell, Esquire was present on behalf of Core and presented one witness, Mr. Bret Mingo. Michelle Painter, Esquire and Theodore A. Livingston, Esquire were present on behalf of AT&T and presented a panel of two witnesses, which were Mr. Christopher Nurse and Mr. Mark Cammarota. The following exhibits were presented at the evidentiary hearing:

 Core

Core Stmt. No. 1, the Direct testimony of Mr. Bret Mingo, and Exhs. BLM-1 through BLM-14;

Core Stmt. No. 1-SR, the Surrebuttal testimony of Mr. Bret Mingo, and Exhs. BLM-15 and BLM-16;

Core Hearing Exh. No. 1, responses to AT&T interrogatory 6;

Core Hearing Exh. No. 2, response to AT&T interrogatory 6-2;

Core Hearing Exh. No. 3, response to AT&T interrogatory set VI;

Core Hearing Exh. No. 4, response to AT&T interrogatory 6-4;

Core Hearing Exh. No. 5, response to AT&T interrogatory 6-5;

Core Cross Exh. No. 1, Petition for Writ of Certiorari, *Pa. Pub. Util. Comm’n v. FCC, et al.*, No. 10-189 (August 6, 2010) denied Nov. 15, 2010;

Core Cross Exh. No. 2, AT&T response to Core interrogatory

IV-22;

Core Cross Exh. No. 3, AT&T interrogatory response to Interconnection Agreement request;

Core Cross Exh. No. 4, Verizon tariff sheet; and

Core Cross Exh. No. 5, AT&T response to Core interrogatory

IV-18.

AT&T

AT&T Stmt. No. 1.0, Panel Reply Testimony of Messrs. E. Christopher Nurse and Mark Cammarota;

AT&T Cross Exh. No. 1, Core response to AT&T interrogatory

6-6.5;

AT&T Cross Exh. No. 2, Notice of Withdrawal;

AT&T Cross Exh. No. 3, Nov. 16, 2010, PAETEC and Cavalier Motion to Transfer;

AT&T Cross Exh. No. 4, Commission Order dated Jul. 8, 2006;

AT&T Cross Exh. No. 5, Jul. 8, 2004 Commission Compliance Order excerpts;

AT&T Cross Exh. No. 6, Commission April 10, 1997 MFS III Order excerpts;

AT&T Cross Exh. No. 7, Commission letter of April 2009;

AT&T Cross Exh. No. 8, Section 3 of the Federal Communications Act;

AT&T Cross Exh. No. 9, excerpt of rebuttal testimony;

AT&T Cross Exh. No. 10, excerpt of supplemental testimony;

AT&T Cross Exh. No. 11, Jan. 26, 2004 Alabama Commission Order;

AT&T Cross Exh. No. 12, excerpt of Core switched access tariff (“Tariff”);

AT&T Cross Exh. No. 13, Delaware access services tariff;

AT&T Cross Exh. No. 14, New Jersey access services tariff;

AT&T Cross Exh. No. 15, West Virginia access services tariff;

AT&T Cross Exh. No. 16, Alabama access services tariff;

AT&T Cross Exh. No. 17, two letters;

AT&T Cross Exh. No. 18, excerpts from Maryland access services tariff;

AT&T Cross Exh. No. 19, New York corrected switched access tariff; and

AT&T Cross Exh. No. 20, Federal Respondents including AT&T Main Brief on Petition for Writs of Certiorari, *Core Communications, Inc. v. FCC, et al.*, and *Pa. Pub. Util. Comm’n v. FCC, et al.* Nos. 10-185 and 10-189, respectively, filed October 2010.

All of the above exhibits were admitted into the record.

 Pursuant to the procedural schedule Main Briefs were filed by both parties on December 14, 2010, and Reply Briefs were filed by both parties on January 14, 2011.[[6]](#footnote-6) On January 7, 2011, AT&T moved to reopen the record for admission of a late-filed exhibit identified as AT&T Cross Exh. No. 21 with proprietary content. The substance of this exhibit was supplemental information of the TEA between Core and PAETEC/Cavalier. Core did not

object to the admission of AT&T Cross Exh. No. 21 and it was admitted into the record by Order dated January 12, 2011.

 By letter dated February 3, 2011, Ms. O’Dell, counsel for Core, filed a letter with the Commission noting *Pac-West Telecomm, Inc. v. AT&T Communications of California, et. al*, Docket No. 08-17030, (“*9th Circuit Appeal*”), which concerned the issue of the exchange of CLEC-to-CLEC ISP-bound traffic - an issue paramount in this proceeding. It was noted that the FCC filed an *Amicus* Brief in the *9th Circuit Appeal* providing its reasoning as to why the *ISP Remand Order* applies to CLEC-to-CLEC ISP-bound traffic (“FCC *Amicus* Brief”). By letter dated February 4, 2011, Ms. Painter, counsel for AT&T, concurred with the significance of the FCC *Amicus* Brief and responded to the Core, February 3, 2011 letter. The letters were filed with the Commission. The FCC *Amicus* Brief was submitted only to the undersigned ALJ and the parties to the instant proceeding.

 By Order dated March 18, 2011, the undersigned ALJ admitted both of the February letters of the parties and the FCC *Amicus* Brief into the evidentiary record.

On April 13, 2011, counsel for Core filed a Petition to Reopen the Record to admit additional evidence (“Petition”) Core believed pertinent to the pending dispute. Core alleged that the two documents at issue requested for admission, a transcript of oral argument before the U.S. Supreme Court on March 30, 2011, in the matter of *Talk America Inc., et. al v. Michigan Bell Telephone Co., et. al,* Case Nos.: (07-2469, 07-2473)(“*Talk America”)*; and the brief submitted by AT&T Michigan[[7]](#footnote-7) in the *Talk America* proceeding, are relevant to what effect a brief authored by the FCC staff is entitled. Core contended the pending additional evidence directly addresses the issue identified in Order #11, which is the effect of the FCC *Amicus* Brief.

On May 3, 2011, in compliance with revised Order #12[[8]](#footnote-8) and an agreement between the parties, AT&T responded to the Petition contending that the pending additional evidence does not represent a material change of fact or law relevant to this proceeding and therefore does not conform with the rationale articulated by Pennsylvania Public Utility Commission regulation to justify the record to be reopened at 52 Pa.Code § 5.571(b).

By Order dated May 9, 2011, the undersigned ALJ denied the Petition of Core to Reopen the Record finding that Core failed to comply with the requisite justification to reopen the record pursuant to 52 Pa.Code §§ 5.431(b) and 5.571(b).

 This matter is ready for decision.

II. FINDINGS OF FACT

1. Core is a CLEC, authorized by the Commission to provide local exchange service throughout Pennsylvania and received its certificate of public convenience in August 2000. Core Stmt. No. 1 at 1.
2. Core has traditionally focused on the provision of telecommunications service to dial-up ISPs which provide unregulated “enhanced” services such as, web-surfing and email. Core Stmt. No. 1 at 2.
3. AT&T-PA and TCG are authorized by the Commission to provide CLEC and interexchange service in Pennsylvania. Core Stmt. No. 1 at 3.
4. TCG was one of the first CLECs operating in Pennsylvania, and at one time served “UNE-P”[[9]](#footnote-9) residential customers as well as small business customers and some dial-up ISP customers. Core Stmt. No. 1 at 3.
5. Respondents are wholly-owned subsidiaries of AT&T Corporation. Core Stmt. No. 1 at 3.
6. AT&T sends and has sent large volumes of telecommunications traffic to Core indirectly, via the tandem switch network of Verizon (the “AT&T Indirect Traffic”). Core Stmt. No.1 at 1, and Exh. BLM-2 (Diagram of Indirect Interconnection).
7. Dial-up ISPs serve as a low-cost alternative for consumers in rural areas and consumers who are not heavy Internet users but still want access. ISPs handle large volumes of inbound modem calls. Core Stmt. No. 1 at 2.
8. Post-September, 2009, Core has offered telecommunications services to VOIP providers. Core Stmt. No. 1 at 2, and see, *Material Question Order* at 12.
9. Core’s Pennsylvania network and services enable AT&T customers to complete calls to their ISP, which in turn increases the utility of the AT&T customer’s local phone service. Core Stmt. No. 1 at 3.
10. AT&T’s customers compensate AT&T for the use of its local exchange services, but AT&T is refusing to pay Core for completing the calls originated by AT&T’s customers. Core Stmt. No. 1 at 3.
11. The AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that originate and terminate in Pennsylvania. Core Stmt. No. 1 at 3.
12. An intrastate call can be distinguished from an interstate call by comparing the calling party’s phone number with the called party’s phone number. Core Stmt. No. 1 at 3.
13. AT&T has sent Core some interstate traffic, which Core has invoiced pursuant to its FCC interstate access tariff. AT&T has paid these invoices substantially without dispute. Thus, the only traffic at issue in this case is intrastate. Core Stmt. No. 1 at 3.
14. The AT&T Indirect Traffic consists of locally dialed calls placed by AT&T’s local exchange service customers in order to reach Core’s customers. Core Stmt. No. 1 at 3.
15. A “locally dialed” call is one for which the NPA-NXX of the calling party and the called party are associated with a common local calling area, as defined in the local exchange service tariffs of incumbent LECs (primarily, Verizon), and mirrored in the local exchange service tariff of CLECs (like AT&T and Core). Core Stmt. No. 1 at 3.
16. The difference between locally dialed and “toll” calls is that locally dialed calls are generally included with the consumer’s flat-rate local service charge, whereas toll calls incur a per-minute charge or “toll.” Core Stmt. No. 1 at 5.
17. Local and toll dialing are retail concepts. Core Stmt. No. 1 at 5.
18. From June, 2004 through September, 2009, AT&T end users using the TCG network (CIC 0292) originated 406,102,334 MOUs for termination on Core’s network, which AT&T has not paid. Core Stmt. No. 1 at 5, and see, Exh. BLM-1 (Chart of Minutes of Use & Amounts in Dispute).
19. AT&T did pay Core for its end users using the AT&T-PA network (CIC 0288) for termination on Core’s network. Core Stmt. No. 1 at 5.
20. Following September, 2009, AT&T end users using the TCG network originated an additional 91,964 MOUs. Core Hearing Exh. No. 2 (attached chart shows AT&T MOUs terminated on Core’s network).
21. AT&T has an interconnection agreement (“ICA”) with Verizon by which AT&T is entitled to send traffic to the Verizon tandems for delivery to third-party carriers, such as Core. In turn, Verizon is entitled to charge AT&T a per-MOU rate for the service of transiting the AT&T’s traffic from AT&T to Core. Core Stmt. No. 1 at 6. and see, Exh. BLM-2 (Diagram of Indirect Interconnection).
22. Pursuant to this ICA and the intrastate access tariff referenced therein,

AT&T pays Verizon at a tandem switched transport rate of $0.000983/MOU, a tandem transport rate of $0.000195/MOU and another tandem transport rate of $0.000045/MOU/mile. Consequently, AT&T pays intercarrier compensation for the AT&T Indirect Traffic to Verizon for the use of its network, but has yet to pay Core. Core Cross Exh. Nos. 3 and 4 (excerpts from the ICA and Verizon’s intrastate access tariff).

1. AT&T paid some intercarrier compensation on the AT&T Indirect Traffic, but that compensation went only to Verizon for the use of its network; not to Core for its services to transport and terminate the traffic.
2. AT&T’s ICA with Verizon at Section 7.3 states,

Each Party shall exercise all reasonable efforts to enter into a reciprocal local traffic exchange arrangement (either via written agreement or mutual tariffs) with any wireless carrier, ITC, CLEC, or other LEC to which it sends, or from which it receives, local traffic that transits the other Party's facilities over Traffic Exchange Trunks…

In all cases, each Party shall follow the Exchange Message Record (“EMR”) standard and exchange records between the Parties and with the terminating carrier to facilitate the billing process to the originating network.

Core St. No. 1 at 7.

1. AT&T has not sought to enter into a TEA with Core. Core Stmt. No. 1 at 13 and 23; and see,Core Stmt. No. 1-SR at 2.
2. Core does not have as a recourse for failure to receive payment to discontinue terminating AT&T’s calls because federal and state law require Core to terminate all the calls it receives, and if it is not compensated for its termination service, Core must seek payment through the regulatory complaint process. Core Stmt. No. 1 at 7.
3. Core receives and has received Carrier Access Billing System (“CABS”) or “Category 11” records from Verizon on a regular basis. CABS records are generated by Verizon’s tandem switches and their purpose is to provide information about calls that pass through the tandems on their way to Core’s network, so that Core can bill the responsible carriers whose end users originated the calls at the appropriate amount based on the minutes used. Core Stmt. No. 1 at 8.
4. For each call, CABS records the carrier identification code (“CIC”) of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in MOUs. Core Stmt. No. 1 at 8.
5. In 2007, Core was preparing its network to provide wholesale telecommunications services on a large scale to VOIP customers. As part of its preparations, Core purchased special equipment and hired a consultant to “read” an historical sampling of the records Verizon had been sending Core. Because Core knew that traffic to and from VOIP carriers would include a substantial proportion of toll calls, Core wanted to understand the CABS format, the information provided in the CABS records, and generally how to both audit and invoice CABS bills. Core Stmt. No. 1 at 8.
6. Prior to the revelations in understanding the CABs records in late 2007, Core did not know about the substantial volumes of telecommunications originated by AT&T and delivered to Core via Verizon’s tandem switches. Core Stmt. No. 1 at 9.
7. Since Core’s customers were traditionally limited to dial-up ISPs, and this traffic as far as Core knew, was generated by Verizon end users, Core did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records. Core Stmt. No. 1 at 9.
8. It was through this examination process of the CABS record that Core found AT&T, since at least 2004, had been sending Core substantial volumes of traffic. Core Stmt. No. 1 at 9.
9. Once Core found evidence of AT&T’s and other CLEC’s indirect traffic, it embarked on a larger project of systematically processing several years’ worth of magnetic tapes, in order to get a complete picture of this traffic. As these efforts progressed Core began to invoice AT&T for the AT&T Indirect Traffic. Core Stmt. No. 1 at 9.
10. Prior to Core’s analysis of the Verizon CABS records, AT&T did not notify Core that it was sending the AT&T Indirect Traffic to Core for termination to Core’s end users.Since Core did not read the CABS records, Core did not know that the Respondents were sending the AT&T Indirect Traffic to Core before this CABs examination. Core Stmt. No. 1 at 9.
11. Core failed to send AT&T a bill from 2000 through the end of 2007 for any exchanged services. AT&T Stmt. 1.0 at 17.
12. The first bill sent by Core to AT&T for ISP-bound local traffic was sent in January 2008 for services rendered in December 2007. Core Stmt. No. 1 at 10.
13. Core sent subsequent bills for the same type of services in the above paragraph as follows:
	1. Sent in March 2008 for services from January 2007-November 2007;
	2. Sent in January 2009 for services from January 2004-December 2006;
	3. Sent in May 2009 for services for the year of 2008.

Core Stmt. No. 1 at 10.

1. Subsequent to May 2009, Core bills AT&T each month for the prior month’s usage. As of November, 2009, the total amount of invoiced charges in dispute for the AT&T Indirect Traffic was $5,997,637.40. Core Stmt. No. 1 at 10.
2. Upon receipt of the initial round of invoices in early 2008, AT&T in writing disputed various amounts, stated that AT&T Corp. had not reached an agreement with Core regarding intrastate rates and extended an invitation to discuss the traffic and rates. Core Stmt. No. 1 at 11,and see, Exh. BLM-3(AT&T Form Letter).
3. AT&T also sent an email stating “[f]or CIC 292, someone from our Business Development Group will need to speak with you and review Call Detail Records since records can contain local service.” Core contacted Mark Cammarota, AT&T’s Lead Carrier Relations - National Access Management. Core Stmt. No. 1 at 11,and see, Exh. BLM-4 (Email from Lynda Eyerman to Stephanie Anderson).
4. AT&T, through Mr. Cammarota, subsequently sent Core an email which stated that the AT&T Indirect Traffic was “primarily all local traffic and is bill-and-keep” and offered to “forward a draft” of a “standard switched access agreement… use[d] with CLEC’s.” Core Stmt. No. 1 at 11.
5. Core, through its President Bret Mingo, conducted two or three brief calls with Mr. Cammarota, but was never able to engage in a discussion about AT&T’s continuing refusal to pay for the AT&T Indirect Traffic. After these two or three attempts to consult Mr. Cammarota, Mr. Cammarota has not been accessible. Core Stmt. No. 1 at 11.
6. Between roughly, August, 2008 and March, 2009, Mr. Mingo attempted to reach Mr. Cammarota at least twenty (20) times, but he never responded. Once Core wrote a formal demand letter to Mr. Cammarota, with a copy to AT&T’s local counsel, Mr. Cammarota

became responsive. Core Stmt. No. 1 at 12-13, and see, Exh. BLM-7 (Letter from Bret Mingo to Mark Cammarota).

1. Core and AT&T then conducted two telephonic settlement conferences, one on May 7, 2009, and one on May 11, 2009. Core proposed to rebill all of the AT&T Indirect Traffic - past, present, and future - at the Commission-approved TELRIC rate for traffic termination. AT&T failed to accept Core’s proposal, and declined to put forth any proposal of its own, leaving Core to seek payment for its services through litigation. Core Stmt. No. 1 at 13.
2. AT&T has never denied that its end users originate the AT&T Indirect Traffic to Core for ultimate delivery to Core’s end user customers. Core Stmt. No. 1 at 13.
3. Core and AT&T are not directly interconnected. These parties are indirectly connected through Verizon; consequently the calls sent by AT&T are transported and terminated by Core to Core customers but go through Verizon’s network and tandem switch first before Core provides its services. AT&T Stmt. 1.0 at 7.
4. Core relies on Verizon to receive calling records showing all calls sent to Core by all carriers with whom Core is indirectly interconnected, including AT&T. AT&T Stmt. 1.0 at 14.
5. It is the normal course of business since Core’s operations began in Pennsylvania for Verizon to daily send information necessary to bill other carrier for all traffic indirectly sent to Core. This information contains the identity of the carrier sending the traffic to Core and the minutes associated with each carrier’s traffic. Tr. 64-67.[[10]](#footnote-10)
6. Core did not look at the information Verizon sent in the call records until 2008. AT&T Stmt. 1.0 at 14; Tr. 64-65..
7. Core admits that Verizon’s call records provide Core with all the information needed for billing appropriately the indirect local traffic. Tr. 64-71; Core Stmt. No. 1 at 8.
8. When Core began operations in Pennsylvania, “Core applied to the North American Numbering Plan Administrator (“NANPA”) for telephone numbers… [so that] each and every other LEC and IXC[[11]](#footnote-11) operating in Pennsylvania was notified [and each carrier] could load Core’s new numbers into their switches and … enable calling between their end users and Core’s end users.” Core Stmt. No. 1-SR at 5-6.
9. Traffic originated by Verizon was designated appropriately and therefore Core has accurately billed Verizon for the termination of its traffic. It is “not very likely” that Core would have billed Verizon for the termination of any other carrier’s traffic. Tr. 77-78; see also AT&T Cross Exh. 1.
10. All traffic sent by Core prior to September 2009, was ISP-bound local traffic. AT&T Stmt. 1.0, Attachment C (Core response to AT&T-Core-3-3).
11. All disputed traffic in this proceeding is for non-toll, locally dialed traffic. AT&T Stmt. 1.0 at 8-9.
12. Core has refused to provide information on whether any traffic sent by AT&T after September 2009 is not ISP-bound traffic. AT&T Stmt. 1.0 at 8.
13. The vast majority of Core’s traffic even after September 2009 is ISP-bound local traffic. AT&T Stmt. 1.0 at 5.
14. Core cannot identify which traffic is ISP-bound local traffic or VOIP traffic; so it is indeterminate whether the traffic after September 2009, contains VOIP transmissions. AT&T Stmt. 1.0, Attachment C (Core response to AT&T-Core-3-4); Tr. 42-43.
15. Core has sent and continues to send bills to AT&T with charges derived from Core’s tariffed rate for switched access traffic. AT&T Stmt. 1.0 at 5.
16. Core has a filed intrastate switched access tariff, Pa. P.U.C. Tariff No. 4 entitled Switched Access Tariff with the Commission. This tariff established access rates for the origination and termination of non-local, toll, interexchange traffic with a terminating access rate of $0.014 MOU. AT&T Cross Exam. Exh. 12.
17. In delivering local traffic, AT&T is not an IXC but a CLEC providing local exchange service. AT&T Cross Exam. Exh. 12.
18. Bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs. AT&T Cross. Exam. Exh. 4.
19. AT&T operates on a bill-and-keep basis with every other CLEC in Pennsylvania. AT&T Stmt. 1.0 at 13.
20. AT&T assumed that it and Core were exchanging traffic on a bill-and-keep basis since Core failed to bill AT&T for seven years while operating in Pennsylvania (2000 inception of operations through 2007).
21. AT&T does not conduct traffic studies to ensure traffic is balanced with other CLECs. Tr. 208.
22. AT&T has not received complaints from any other CLEC that the bill-and-keep arrangement is unacceptable. Tr. 208.
23. The Commission has previously found the bill-and-keep arrangement as the “existing CLEC-to-CLEC intercarrier compensation practice.” AT&T Cross Exam. Exh. 4 (*PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, \*1 (Pa.P.U.C. June 22, 2006)).
24. Core has charged its own customers “very close to zero” for the services it has rendered for AT&T to transport and terminate calls to ISPs when Core customers originate such calls. Core Stmt. No. 1-SR at 11.
25. Not until April 2010, did Core send outbound traffic to any carrier in Pennsylvania. AT&T Cross Exam. Exh. 1 (Core response to AT&T-Core-6-4).
26. Beginning in April 2010, Core customers began sending outbound traffic to solely Verizon. Core does not send outbound traffic to any CLEC because it blocks customers that attempt to call a customer served by any carrier other than Verizon. Tr. at 21.
27. Verizon pays Core a rate of $0.0007/minute for the termination of all locally dialed calls, whether ISP-bound or VOIP. Verizon has paid this rate since October 2004 to the present. Tr. 44-45, 86-87.
28. Prior to October 2004, Verizon paid Core nothing for termination of locally dialed calls. *Id*.
29. Paetec/Cavalier has agreed to pay $0.002439 MOU, the TELRIC[[12]](#footnote-12) tandem rate, to Core for termination of local traffic for one year beginning January 1, 2011. Tr. at 50-51; AT&T Cross Exam. Exhs. 2-3.
30. Core has charged three other CLECs, Comcast, XO Communications and One Communications, for termination of local traffic. Tr. 51-52; AT&T Stmt. 1.0, Attachment C (Core response to AT&T-Core-II-5 and II-6).
31. Core failed to provide its costs for reciprocal compensation. Tr. 210.
32. Core failed to provide evidence of any economic harm as a result of a bill-and-keep arrangement with AT&T.
33. Prior to 2008, neither Core nor AT&T requested to negotiate a rate for exchanged local traffic.
34. When AT&T and Core broached the possibility of establishing a rate for exchanged local traffic on a going-forward basis, Core required payment of service rendered at an agreed set rate as a condition. AT&T Stmt. 1.0 at 18.
35. Core’s costs to terminate a call from Verizon are the same as its costs to terminate a call from AT&T. Tr. 49.
36. Of the more the 400 million minutes for which Core seeks compensation, 97% were delivered to Core from 2000 to end-of-year 2007. Core Exh. BLM-1.
37. The flow of traffic from AT&T for Core to transport and terminate has decreased since the end-of-year 2007. Core Exh. BLM-1; Core Hearing Exh. No. 2 (Core Response to Interrogatory 6-2).

III. DISCUSSION

A. Allegations

This dispute involves transport and termination services for AT&T to end-user customers of Core. Core provided the services and has not received compensation. Both AT&T and Core are CLECs. Therefore, in simplest terms, this is an intercarrier compensation dispute between two certificated CLECs operating in the Commonwealth of Pennsylvania. One CLEC (AT&T) has failed to pay the other (Core) for services rendered and services that continue to be rendered.

Core alleged that:

1. The services at issue are under the subject-matter jurisdiction of the Commission;[[13]](#footnote-13)
2. The services at issue are covered by its state tariff and therefore AT&T should pay Core according to the terms of the tariff;
3. In the alternative, the services at issue are applicable to the Commission-approved TELRIC rate and should be paid accordingly;
4. On a going-forward basis, the Commission should direct AT&T to enter a TEA with Core; and
5. As a matter of public policy, the Commission should levy a civil penalty against AT&T for its conduct regarding the termination service it has received in this matter for which it has failed to pay Core.

AT&T countered that:

1. The state tariff does not cover the service that is provided;
2. Verizon’s tandem reciprocal compensation rate does not apply to the traffic at issue;
3. The relief sought is barred as it would violate Commission statutory law;
4. A bill-and-keep arrangement is the industry standard germane to the services provided so AT&T owes no compensation;
5. Core is responsible for the situation it finds itself in;
6. The Commission should not require CLECs to enter TEAs for local traffic exchange;
7. AT&T’s conduct does not oblige a civil penalty; and
8. Respectfully noting the Commission’s decision, *Material Question Order,* entered September 8, 2010, the Commission fails to have subject-matter jurisdiction over this matter because the traffic is ISP-bound.

The undersigned ALJ has determined that the paramount issue of whether the Commission has jurisdiction needs to be addressed anew due to the development of the FCC *Amicus* Brief declaring its intent in the *ISP Remand Order*. Also, the Commission should

resolve whether there is any monetary compensation due to Core for its services of terminating ISP-bound local traffic for AT&T. Lastly, it must be determined if the conduct of AT&T regarding non-payment for service it received from Core warrants a civil penalty or fine.

B. Analysis

These Complaints are about compensation for services rendered and whether or not, based on interpretation of the law, monetary payment is due. It is critical that the Commission address whether it has subject-matter jurisdiction of this matter despite the *Material Question Order.* The FCC *Amicus* Brief filed in the *9th Circuit Appeal* that was admitted into this record *sua sponte* provides persuasive precedent on the issue of jurisdiction.

Critical to this case is whether the Commission has subject-matter jurisdiction over ISP-bound traffic exchanged between two CLECs. If the Commission retains subject-matter jurisdiction, then the other issues pending are: (1) whether the state tariff at issue is applicable, (2) whether the state tariff rate should be implemented, (3) whether there was a mix of traffic (traffic other than ISP-bound) after September 2009, and (4) the corresponding compensation for the mixed traffic (if indeed it was mixed). If it is determined that the ISP-bound traffic falls under federal jurisdiction, then Core has requested the Commission to decide whether the Commission should apply federal law in this dispute at a rate of $0.0007 MOU. The issues of whether compensation is due in the future for the type of traffic at issue and whether the Commission should levy a civil penalty or fine against AT&T based on its conduct in the dispute of payment for services rendered by Core have been raised by Core and should also be addressed.

Pursuant to 66 Pa.C.S. § 332(a), “Except as may be otherwise provided in section 315… or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.” The party filing the Complaint bears the burden of proving that he or she is entitled to relief from the Commission. 66 Pa.C.S. § 332(a).

Burden of proof means a duty to establish one’s case by a preponderance of the evidence, which requires that the evidence be more convincing by even the smallest degree, than the evidence presented by the other side. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). To satisfy the burden of proof against a utility, the Complainant must show that the utility is responsible or accountable for the problem described in the Complaint, *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976), or that the utility has violated either its duty under the Public Utility Code or the orders or regulations of the Commission. 66 Pa. C.S. § 701.

A Complainant can sustain the burden of proof by establishing a sufficient case through a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Public Utility Comm’n*, 134 Pa. Commw. 218, 221-222, 578 A.2d 600, 602 (1990); *alloc. den.*, 602 A.2d 863 (1992). Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence. *Mill v. Commw., Pa. Pub. Util. Comm’n*, 67 Pa. Commw. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. Pa. Public Utility Comm’n*, 154 Pa. Commw. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Public Utility Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 85 Pa. Commw. 23, 480 A.2d 382 (1984).

Furthermore, where the Complaint involves an existing, Commission-approved tariff, the burden then falls upon the customer (in this case AT&T) to prove that the charge for the service complained of is no longer reasonable. *Brockway Glass Co. v. Pa. Pub. Util. Comm’n,* 437 A.2d 1067, 63 Pa.Commw. 238 (Pa. Cmwlth. 1981). The Commission-approved tariff has the force of law and is binding on the utility and the customer. *Id.*  Thus, the burden is on Core to show that the existing tariff is applicable. If it is found that the existing tariff is applicable, then the burden is on AT&T to show that the charge for the services that apply under the tariff is not reasonable.

C. Whether the PUC Has Subject-Matter Jurisdiction Over ISP-bound Traffic

 Pursuant to Section 1301 of the Public Utility Code, “Every rate made, demanded, or received by any public utility, or any two or more public utilities jointly, shall be just and reasonable and in conformity with regulation or order of the Commission.” 66 Pa.C.S. § 1301. This matter relates to whether the rates and thus compensation for service demanded by Core for the exchange of ISP-bound traffic exchanged between CLECs is within the subject-matter jurisdiction of the Commission.

 It is not disputed that Core and AT&T are public utilities falling under the personal jurisdiction of the Commission by definition of public utility, at 66 Pa.C.S. § 102,

“Public Utility.”

1. Any person or corporations now or hereafter owning or operating in the Commonwealth equipment or facilities for:

 \* \* \*

 (vi) Conveying or transmitting messages or communications, … by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.

Both parties are certificated CLECs operating in the Commonwealth of Pennsylvania providing telecommunications services. 66 Pa.C.S. § 102. It is further undisputed that the traffic from June 2004 through September 2009 was ISP-bound traffic exchanged between two CLECs.

FOF 53.

Core noted that the Commission did not have before it the FCC’s interpretation of the *ISP Remand Order* as applied to CLEC-to-CLEC traffic exchanges or whether the FCC preempted state authority. Core February 3, 2011, letter, ¶ 1. Core failed to deny that the FCC’s interpretation is to be viewed as deferential although it was provided through an *Amicus* Brief. See AT&T February 4, 2011 letter, ¶ 2 citing, *Chase Bank, N.A. v. McCoy*, No. 09-329, 2011 WL 197641, at \*8 (U.S. Jan. 24, 2011); *Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan*, 129 S.Ct. 865, 872 n.7 (2009); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 953 n. 11 (9th Cir. 2006).

Subject-matter jurisdiction relates to the competency of a particular agency or administrative body to determine controversies of the general class to which the case presented for consideration belongs. *Riedel v. The Human Rel. Comm’n of the City of Reading*, 559 Pa. 33, 39-40, 739 A.2d 121, 124 (1999). The Commission is a creature of the legislative body which created it; and as such, it has only the powers, duties, responsibilities and jurisdiction given to it by the legislature. *Western Pennsylvania Water Co. v. Pennsylvania Pub. Util. Comm’n* , 10 Pa.Cmwlth 533, 311 A.2d 370 (1973).

The Commission must act within and cannot exceed its jurisdiction. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm’n*, 157 Pa.Super. 595, 43 A.2d 348 (1945). Subject-matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. Pennsylvania State Police*, 152 Pa.Cmwlth. 409, 619 A.2d 390 (1992), *app. denied*, 536 Pa. 633, 637 A.2d 293 (1993). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties can confer jurisdiction where it otherwise does not exist. *Commonwealth v. VanBuskirk*, 303 Pa.Super. 148, 449 A.2d 621 (1982). Furthermore, jurisdiction cannot be obtained by waiver or estoppel. *Scott v. Bristol Twp. Police Dep’t*, 669 A.2d 457 (Pa.Cmwlth. 1995). Since the subject-matter jurisdiction cannot be waived, it may be raised at any state of a proceeding by a party, or *sua sponte* by the court or agency in which the case exists. *Application of Keven Michael Walker, t/d/b/a Walker Trolley & Transit Co.*, Docket No. A-00112866, Opinion and Order, enter June 9, 1998, 1998 Pa. PUC LEXIS, 26.

 The FCC stated regarding jurisdiction,

Based on its ‘traditional’ end-to-end analysis to determine whether a particular call falls within the FCC’s jurisdiction over interstate communications, the FCC explained that ISP-bound traffic should be analyzed ‘for jurisdictional purposes as a continuous transmission’ from the ISP’s customer who initiated transmission to the Internet website (or websites) ‘often located in another state.’ … ‘ISP traffic is properly classified as interstate’ for jurisdictional purposes… the FCC held that it had authority under section 201(b) to establish pricing rules governing this traffic.[[14]](#footnote-14)

FCC *Amicus* Brief, at 7-8 (notes and citation omitted).

 Considering compensation the FCC stated,

The compensation rules adopted in the *ISP Remand Order* had four components - rate caps, a new markets rule, a growth cap and a mirroring rule. The rate caps consisted of gradually declining limits on the rates that ‘carriers may recover from other carriers for delivering ISP-bound traffic. The initial cap was set at $.0015/MOU and declined in increments to $.0007/MOU. The new markets rule denied any intercarrier compensation for ISP-bound traffic (and thus mandated a bill-and-keep regime) in markets where the ISP’s LEC was ‘not exchanging traffic pursuant to [an] interconnection agreement[] prior to adoption’ of the *ISP Remand Order*. The growth cap limited the total minutes for which a LEC could receive intercarrier compensation for the ISP-bound traffic. … [T]he mirroring rule, which applies only to ILECs, provides that an ILEC can avail itself of the rate caps and new markets rule only if it charges other carriers the same rate to terminate traffic subject to section 251(b)(5) originating on those carriers’ networks. [[15]](#footnote-15)

Exercising authority delegated to it by Congress in 47 U.S.C. § 160, the FCC subsequently issued an order granting a petition requesting forbearance from the growth cap rule and the new markets rule. That order rendered those two rules no longer enforceable as of October 18, 2004.

*Id* at 9-10 (note and citations omitted).

 Concerning the authority of the FCC to preempt the states,

[T]he FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic pre-empted inconsistent state regulation. The FCC explained, … it has ‘exercise[d] [its]

authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic,’…and thus ‘state commissions will no longer have authority to address this issue.’

*Id* at 10-11 (note and citation omitted).

Most significantly the FCC affirmatively stated,

The *ISP Remand Order* established an intercarrier compensation regime that applies to ISP-bound traffic exchanged between **CLECs**. …[T]he FCC’s description of the scope of its compensation regime, and the regulatory purpose … apply to **CLEC-to-CLEC ISP-bound traffic**.

*Id* at 15 (emphasis added). Moreover, “the FCC’s rules cover CLEC-to-CLEC ISP-bound calls and thus govern the resolution of …disputes between [CLECs].” *Id* at 25. The FCC’s rules preempt any state commission to rely on state law to set the corresponding rate in these disputes. *Id*.

It is evident that the FCC *Amicus* Brief provides sound reasoning in the application of the *ISP Remand Order* as federal law and precedent that the Commission does not have subject-matter jurisdiction to use state law to resolve this dispute regarding the appropriate rate for compensation for Core’s transport and termination services for ISP-bound traffic. In compliance with the *ISP Remand Order*, the subject-matter of this case, CLEC-to-CLEC exchange of ISP-bound traffic, is governed by federal law.

D. Whether the Commission Should Resolve Dispute Using Federal Law

It is compelling to the undersigned ALJ that Core stated, “… it is important to remember that even under the theory espoused by FCC staff, this Commission still maintains jurisdiction to conclude that AT&T is required to compensate Core at the rate of $0.0007…” (the federal rate cap in the *ISP Remand Order*). Core February 3, 2010 letter, ¶ 2. The implication of Core’s statement is that Core concedes the Commission does not have subject-matter jurisdiction

to settle a dispute regarding CLEC-to-CLEC ISP-bound traffic based upon state law. It seems that Core is however asserting that this Commission can resolve this dispute over CLEC-to-CLEC ISP-bound traffic by applying federal law.

It is also significant to the undersigned that, “[T]he FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic pre-empted **inconsistent** state regulation.” FCC *Amicus* Brief at 8 (emphasis added). A corollary is that the intercarrier compensation for ISP-bound traffic does not pre-empt state regulation that is consistent with federal law. Moreover the Telecommunications Act of 1996 gave both the FCC and state commissions roles in implementing reciprocal compensation obligations through arbitrated interconnection agreements. 47 U.S.C. § 251(b). Lastly, the Commission declared, “This Commission unequivocally stated in *Global NAPs* that it has jurisdiction to address intercarrier compensation issues related to VOIP traffic.” *Material Question Order* at 14.

It is reasonable and efficient to bring matters that have mixed traffic, ISP-bound and VOIP, to state commissions to determine the issues appropriately rather than to pursue the different forums based upon the type of traffic at issue. Furthermore, it appears that the structure set in place to adjudicate the issues of ISP-bound traffic and reciprocal compensation do not prohibit or deter state commissions to adjudicate the issues applying the federal law. See U.S.C. §§ 251(b)(1) and 252(d)(2)(A). Additionally, if the Commission uses federal law to resolve this dispute, then the Commission should be acting consistent with the FCC regarding intercarrier compensation. FCC *Amicus* Brief at 8. Therefore, the undersigned ALJ finds that the Commission can resolve the issue of ISP-bound traffic exchanged between two CLECs through application of federal law.

E. Application of Federal Law

The parties did not directly address this issue in briefs. Furthermore, it is evident from the February letters of the parties that the parties differ as to what federal law is applicable here. See Core February 3, 2011 letter at ¶ 2 (federal rate cap) contrast with AT&T February 4, 2011 letter at ¶ 3 (bill-and-keep may be appropriate). In extreme caution, the undersigned ALJ will stop short to resolve the issue of ISP-bound traffic exchanged between two CLECs by applying federal law. The undersigned will direct the parties to brief this matter as it is a matter of law and not fact.

F. Whether the Commission Should Levy Fine or Civil Penalty Against AT&T

Core stated, “AT&T’s unreasonable and bad faith refusal to make any payment for service rendered [by Core] justify imposition of a reasonable civil penalty on AT&T.” Core R.B. at 21. Moreover Core contended that refusing to pay billed charges is conduct ‘of a serious nature’ regardless of efforts to claim a legal right or entitlement to justify non-payment. Core M.B. at 45, *citing, Global NAPs* at 57. Core alleged AT&T knowingly and willfully put Core in the position to absorb all the costs for services Core rendered to AT&T; failed to negotiate an agreement for the costs forcing Core to resort to litigation and used delay tactics, which is advantageous to AT&T to prolong any resolution to this dispute. Core M.B. at 45. Core submitted that a Fortune 500 entity such as AT&T with its significant financial resources in contrast to a small, privately-owned Mid-Atlantic marketing entity such as Core and posited, “Core cannot continue to absorb the costs of providing service for free which … AT&T utilized the justice system to delay resolution and to avoid making any payments… *Id*.

Section 3301(a) of the Public Utility Code states,

1. General rule.—If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding… such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding $1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth…

66 Pa.C.S. § 3301(a). The Commission has provided a policy to evaluate factors and standards as a consequence for violations. Section 69.1201 of Title 52 of the Pennsylvania Codes states in part,

#### § 69.1201. Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations - statement of policy.

 (a)  The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

  \* \* \*

 (c)  The factors and standards that will be considered by the Commission include the following:

   (1)  Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

   (2)  Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

   (3)  Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

   (4)  Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

   (5)  The number of customers affected and the duration of the violation.

   (6)  The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

   (7)  Whether the regulated entity cooperated with the Commission’s investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

   (8)  The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

   (9)  Past Commission decisions in similar situations.

   (10)  Other relevant factors.

The undersigned does not find from the record evidence that AT&T violated any state law, regulations or any other matter prohibited by a public utility certified by this Commission. 66 Pa.C.S. § 3301. Frankly, AT&T acted in concert with its interpretation of the applicable laws regarding exchange of ISP-bound traffic between two CLECs, the record reveals nothing more. Moreover, Core did not succinctly state that AT&T violated a specific Commission regulation, order or law, rather Core insinuated that AT&T purposefully and willfully acted in bad faith.

The record evidence does not demonstrate that AT&T acted in bad faith; rather, the evidence demonstrates AT&T consistently acted within its interpretation of the existing federal law. The undersigned does not find that AT&T has acted in bad faith.

Furthermore, AT&T’s conduct here can be distinguished from the conduct found prohibited in *Global NAPs.* Global NAPs was found to have violated on three occasions Commission regulation at 52 Pa.Code § 63.36, which were not timely filing its annual financial reports for calendar years 2005, 2006 and 2007. *Global NAPs,* Initial Decision, dated August 7, 2009, at 39-40, 52; *Global NAPs*, Opinion and Order, entered March 16, 2010, at 61, ¶ 8. This regulation expressly states,

#### § 63.36. Filing of annual financial reports.

 Under 66 Pa.C.S. §§ 504 and 3301 (relating to reports by public utilities; and civil penalties for violations), the Commission may require a public utility to file certain reports, **and invoke penalties for failure to file those reports**…

(emphasis added). Global NAPs was found to have failed to comply with a Commission Order. *Global NAPs* at 54. As stated above, Core has failed to point out specific Commission violations, regulations or orders that AT&T committed. If there are violations of state or federal law or regulations that Core believes merit consideration, Core has not raised said violations on this record.

Lastly, Core has failed to provide an analysis or factual evidence that demonstrates the factors considered for the civil penalty are met. Core consistently stated that the conduct of AT&T was of a serious nature but failed to substantiate the underlying violation, Commission order or regulation that justified the serious nature. Furthermore, Core failed to supply any evidence such as the complained action involved fraud, willful misrepresentation, gross negligence, property damage, personal injury, or failed to timely file a required document with the Commission. It is apparent that from Core’s perspective, AT&T’s failure to pay for services rendered was the bad faith act. However, Core never demonstrated that the rationale provided by AT&T for its failure to pay was fraudulent, grossly negligent, willful misrepresentation, or the like.

The undersigned ALJ does not find that Core supported its claim by substantial evidence. It is determined that AT&T’s conduct in this dispute does not warrant a civil penalty to be levied by the Commission.

G. Mixture of ISP and VOIP Traffic after September 2009

 The Commission unequivocally stated, “[I]t has jurisdiction to address intercarrier compensation issues related to VOIP traffic.” *Material Question Order* at 14, citing *Global NAPs*. That portion of traffic that is ISP-bound after September 2009 is treated the same as the ISP-bound traffic before September 2009, which is to be resolved by federal law. However, the VOIP traffic is to be resolved by the Commission applying state law.

 Of note is a particular exchange between the witness for Core and counsel:

Q. Now, with respect to the traffic on this table for the period of November of 2009 through August 2010, is this all ISP-bound traffic?

 \* \* \*

A. I would not assume it’s all ISP-bound traffic, no. We’ve had other customers on our networks.

Q. Is this all inbound traffic?

A. Yes.

Q. So some of it might be traffic that’s going to a VOIP provider’s end-user, and some of it might be going to an ISP?

A. It would be going to one of our ISPs who’s buying VOIP super-port service from us, yes. Or an ISP service.

Q. Do you know how much of this traffic is going to ISPs and how much is going to a VOIP provider?

A. There’s absolutely no distinction for us. So no, we don’t keep track of that.

Tr. 42-43. Moreover, Core has not provided information on whether any traffic sent by AT&T after September 2009 is not ISP-bound traffic. FOF 55. Thus, the proponent, Core, failed to provide evidence to parse out the traffic that is VOIP versus ISP-bound traffic. Consequently, it is indeterminate whether there was definitely VOIP traffic and the quantity of it, if any, is unknown and not provided as record evidence.

 Even after the dichotomy established by Core and noted by the undersigned ALJ between the traffic through September 2009 and the traffic after September 2009 in *Order No. 6*, Core failed to argue, address, or provide substantial evidence of the quantity of VOIP traffic after September 2009. Therefore, Core has not fulfilled its burden of proof pursuant to 66 Pa.C.S.

§ 332. Thus, it is found that the traffic post September 2009 is to be treated the same as the traffic up to and including September 2009 in this dispute. The result of this dispute is that all traffic through August 31, 2010,[[16]](#footnote-16) exchanged between Core and AT&T is to be treated as ISP-bound traffic, and therefore, resolved by application of federal law.

H. Intercarrier Compensation Going-Forward

 The undersigned ALJ acknowledges that Core requested the Commission to provide direction for intercarrier compensation between the two CLECs on a going-forward basis. The undersigned ALJ will forebear to address that question now, but will address the issue after the parties have had the opportunity to provide argument regarding the application of federal law to this dispute.

IV. CONCLUSIONS OF LAW

1. The Commission has subject-matter jurisdiction over compensation for VOIP traffic, but not all of the claims contained in the Complaint of Core. *Palmerton Telephone Co. v. Global NAPs South, Inc., et al.,* Docket No. C-2009-2093336 (Order entered March 16, 2010); Petition for Reconsideration denied July 29, 2010. See also 66 Pa.C.S. § 1301.
2. The Commission has personal jurisdiction over both parties, Core and AT&T, as these entities are both certificated CLECs operating in the Commonwealth of Pennsylvania providing telecommunications services. 66 Pa.C.S. § 102.
3. As the proponent of the Complaint and Commission order, Core has the burden of proof in this proceeding. 66 Pa.C.S. § 332(a).
4. To establish a sufficient case and satisfy the burden of proof, Core must show that AT&T is responsible or accountable for the issue, claim, or problem described in the Complaint by a preponderance of the evidence. *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. P.U.C. 300 (1976); *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).
5. Core has failed to show by substantial evidence to support a finding of fact that VOIP traffic was transported and terminated by AT&T post-September 2009 mixed with ISP-bound traffic.
6. The Commission must act within its jurisdiction and must refrain from exceeding its jurisdiction. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm’n*, 157 Pa.Super. 595, 43 A.2d 348 (1945)
7. Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967).
8. Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, nor can jurisdiction be obtained by waiver or estoppel. *Commonwealth v. VanBuskirk*, 303 Pa.Super. 148, 449 A.2d 621 (1982).
9. Since subject-matter jurisdiction cannot be waived, it may be raised at any state of a proceeding by a party, or *sua sponte* by the court or agency in which the case exists. *Application of Keven Michael Walker, t/d/b/a Walker Trolley & Transit Co.*, Docket No. A‑00112866, Opinion and Order, enter June 9, 1998, 1998 Pa. PUC LEXIS, 26.
10. The nature of the traffic transported and delivered by Core as a service for AT&T is determinative of the Commission’s jurisdiction.
11. The FCC is entitled to deference even when the agency interprets its own Order through an *Amicus* Brief. *Chase Bank, N.A. v. McCoy*, No. 09-329, 2011 WL 197641, at \*8 (U.S. Jan. 24, 2011); *Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan*, 129 S.Ct. 865, 872 n. 7 (2009); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 953 n. 11 (9th Cir. 2006).
12. The FCC stated in its *Amicus* Brief that the *ISP Remand Order* applies to CLEC-to-CLEC exchanges of traffic.
13. The FCC stated that it has pre-empted state commissions from setting intercarrier compensation rates for ISP-bound traffic under state law.
14. The traffic at issue in this case is ISP-bound traffic over which the FCC has subject-matter jurisdiction.
15. It is reasonable for the Commission to apply federal law regarding intercarrier compensation in the instant dispute because 47 U.S.C. §§ 251(b)(2) and 252(d)(2)(A) require state commissions to apply federal law.
16. The instant case is distinguishable from *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates*, Docket No. C-2009-2093336, Opinion and Order entered March 16, 2010, regarding civil penalty because this case has no underlying violation, action or inaction pursuant to Commission order, statute, regulation or otherwise by AT&T substantiated by record evidence.
17. Core failed to provide substantial evidence that the factors and standards were met for evaluating violations of the Public Utility Code and Commission regulations at 52 Pa.Code § 1201 and 66 Pa.C.S. § 3301(a).

V. ORDER

THEREFORE;

IT IS ORDERED:

* + 1. That the formal Complaint filed by Core Communications, Inc. against AT&T Pennsylvania, LLC, at Docket No. C-2009-2108186 is dismissed in part consistent with this Order.
		2. That the formal Complaint filed by Core Communications, Inc. against TCG Pittsburgh, Inc., at Docket No. C-2009-2108239 is dismissed in part consistent with this Order.
		3. That the Office of Administrative Law Judge will send out a Notice so that the parties can convene to establish a procedural schedule for filing briefs or memoranda of law regarding the application of federal law to this dispute.
		4. That the record shall be opened to receive briefs or memoranda of law regarding the above ordering paragraph.

Date: May 11, 2011 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Angela T. Jones

 Administrative Law Judge

1. Core does not abide by the bill-and-keep arrangement for compensation of its termination service. Core contends that for intrastate traffic, which it alleged is at issue here, Core’s Pennsylvania tariff should dictate the compensation it should receive for termination service rendered. The traffic here for which Core seeks compensation is traffic prior to September 2009, which is discussed below. [↑](#footnote-ref-1)
2. By letter dated March 26, 2010, Core questioned whether the *Amicus* Brief was appropriate. [↑](#footnote-ref-2)
3. *Palmerton Telephone Co. v. Global NAPs South, Inc., et al.,* Docket No. C-2009-2093336 (Order entered March 16, 2010); Petition for Reconsideration denied July 29, 2010 (“*Global NAPs”)*. [↑](#footnote-ref-3)
4. The resolution to Compel I and Compel II were pending until the stay to this proceeding was removed. [↑](#footnote-ref-4)
5. The tariffed switched access terminating rate. [↑](#footnote-ref-5)
6. Both of the Reply Briefs of AT&T and Core contained proprietary information and are marked pursuant to the Protective Order issued at these dockets. [↑](#footnote-ref-6)
7. AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc. which is a wholly owned subsidiary of AT&T Inc. [↑](#footnote-ref-7)
8. Revised Order #12 dated May 5, 2011, granted the extension of time to AT&T to answer the Petition. [↑](#footnote-ref-8)
9. “UNE-P” is unbundled network element platform. [↑](#footnote-ref-9)
10. Although there are two other transcripts at these dockets for the oral argument regarding subject-matter jurisdiction and the prehearing conference dated February 3, 2010, and September 15, 2009, respectively; all references in this decision refer to the transcript dated November 18, 2010. [↑](#footnote-ref-10)
11. A “LEC” is a local exchange carrier and an “IXC” is an interexchange carrier. [↑](#footnote-ref-11)
12. Total Element Long-Run Incremental Cost (“TELRIC”) is used to figure the cost of phone service based on incremental cost of new equipment and new labor, or costs that would apply in a fully competitive environment. [↑](#footnote-ref-12)
13. This issue was determined by the Commission in its *Material Question Order*, entered September 8, 2010. [↑](#footnote-ref-13)
14. 47 U.S.C. § 201(b). [↑](#footnote-ref-14)
15. 47 U.S.C. § 251(b)(5). [↑](#footnote-ref-15)
16. Core stated in its Motion for Interim Relief, that it is requesting the Commission to resolve this dispute with AT&T for all traffic through August 31, 2010. [↑](#footnote-ref-16)