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July 7, 2011

Via Electronic Filing

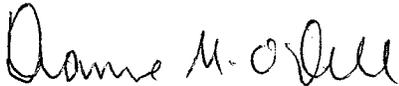
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

On behalf of Core Communications, Inc., ("Core") enclosed for filing please find the original of its Motion for Leave to File Update to its Reply to the Exceptions of AT&T along with the electronic filing confirmation page with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely yours,



Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

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

CERTIFICATE OF SERVICE

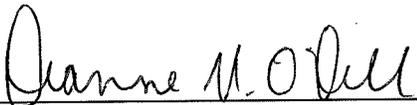
I hereby certify that this day I served a copy of Core Communications, Inc.'s Motion for Leave to File Update to its Reply to the Exceptions of AT&T upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and First Class Mail

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Dated: July 7, 2011



Deanne M. O'Dell

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

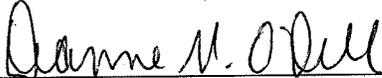
NOTICE TO PLEAD

To:		
Michelle Painter, Esq.		Theodore A. Livingston, Esq.
Painter Law Firm		Kara K. Gibney, Esq.
13017 Dunhill Dr.		Mayer Brown LLP
Fairfax, VA 22030		71 S. Wacker Dr.
		Chicago, IL 60606

Attorneys for AT&T Communications of PA, LLC & TCG Pittsburgh, Inc.

Pursuant to 52 Pa. Code § 5.103(b) you are hereby notified to file a written response to the enclosed Motion within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,



Deanne M. O'Dell, Esq.
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717.255.3744

Dated: July 7, 2011

**BEFORE THE
PENNSYLVANIA 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	:	

**MOTION OF CORE COMMUNICATIONS, INC.
FOR LEAVE TO FILE UPDATE TO CORE’S REPLY TO THE
EXCEPTIONS OF AT&T**

Pursuant to 52 Pa. Code § 5.103, Core Communications, Inc. (“Core”) requests permission to file an update to its Reply to the Exceptions of AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. (collectively “AT&T”). A copy of the proposed update is attached hereto as **Exhibit A**. In support of this Motion, Core avers as follows:

1. Following submission of exceptions in this matter, the Ninth Circuit Court of Appeals filed its opinion in *AT&T Communications Of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 08-17030, 2011 WL 2450986 (9th Cir. June 21, 2011)(“*AT&T v. Pac-West*”), a case which is referenced in the Initial Decision (“I.D.”) issued by Administrative Law Judge Angela T. Jones on May 24, 2011. Since it was not available prior to the due date for exceptions, Core was not able to address the court’s opinion in its exceptions.
2. Core’s reply exceptions were limited to responding to the arguments or issues raised in the exceptions of AT&T consistent with 52 Pa. Code § 5.534. As the opinion was filed

after exceptions were due, it was not referenced in AT&T's exceptions and, therefore, Core could not have addressed AT&T's advocacy regarding the opinion in its reply exceptions.

3. The Ninth Circuit opinion was filed two days prior to the due date for reply exceptions. Core is not a party to *AT&T v. Pac-West* and did not receive a copy of the opinion until its review of AT&T's reply exceptions. In fact, the second paragraph of Core's Reply to Exceptions states "There has been no contrary decision or order from the Commission, any court, or the Federal Communications Commission ("FCC") reversing or altering this determination." Core Reply Exceptions at 1 (emphasis added). AT&T's reply exceptions provided a copy of the opinion and repeatedly relied upon it to support its advocacy. AT&T Reply Exceptions at 2-3, 9-11.

4. While Core's exceptions and reply exceptions provide the Commission with sufficient analysis to properly dispose of its complaint here, the newly filed opinion does make a number of novel assertions which cloud the Ninth Circuit court's analysis of the central issue of Federal Communications Commission ("FCC") preemption of state authority that Core addresses in its update. In fact, the court's preemption analysis is deeply flawed because it never acknowledges the appropriate standard for finding preemption. Contrarily (and correctly), the court finds that the FCC did not foresee the situation presented here, i.e., CLEC-CLEC disputes over compensation for ISP-bound traffic. Finally, the court failed to come to grips with the plain fact that the FCC intended the *ISP Remand Order* to be implemented only through ILEC-CLEC interconnection agreements and the change-of-law process.

5. If the newly filed opinion and its novel assertions had been available prior to exceptions presumably AT&T would have addressed them in its exceptions and then Core would have had an opportunity to provide a reply. Likewise, if Core had known about the opinion prior

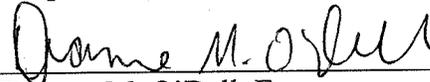
to the filing of its reply exceptions, it could have addressed the opinion in its reply exceptions but Core did not know about the opinion. Rather, only AT&T – a party in the Ninth Circuit case – has presented any argument on the Ninth Circuit opinion and then only in reply exceptions.

6. As Core had no reasonable control over the timing of this opinion included in AT&T's reply exceptions and the case has been discussed in the context of this proceeding, Core respectfully requests that the Commission grant this request to update its reply exceptions.

7. Granting this motion and accepting the update will provide Core a fair and reasonable opportunity to address this new opinion – an opportunity which AT&T has already taken for itself – giving the Commission a more full record upon which to base its decision.

WHEREFORE, Core Communications, Inc. respectfully requests that this motion be granted and that the attached Exhibit A be considered by the Commission in resolving the pending exceptions.

Respectfully submitted,



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Date: July 7, 2011

Attorneys for Core Communications, Inc.

EXHIBIT A

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 :

**CORE COMMUNICATIONS, INC.
UPDATE TO CORE'S REPLY TO THE EXCEPTIONS OF AT&T**

Following submission of exceptions and two days prior to the due date for reply exceptions, the Ninth Circuit Court of Appeals filed its opinion in *AT&T Communications Of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 08-17030, 2011 WL 2450986 (9th Cir. June 21, 2011)(“*AT&T v. Pac-West*”), a case which is referenced in the Initial Decision (“I.D.”) issued by Administrative Law Judge Angela T. Jones on May 24, 2011. Core is not a party to *AT&T v. Pac-West*, and was not aware the opinion had been filed until its review of AT&T’s reply exceptions which provided a copy of the opinion and repeatedly relied upon it to support its advocacy. AT&T Reply Exceptions at 2-3, 9-11, ATT. 1.

For the most part, the court’s opinion simply tracks the Federal Communications Commission (“FCC”) staff’s *amicus* brief, as is evident from the court’s lengthy quotations from that document. Core has already addressed, in its exceptions and reply exceptions, the deficiencies that undermine FCC staff’s analysis. Core Exceptions at 11-20, Core Reply

Exceptions at 8-11. However, the court makes a number of novel assertions which cloud its analysis of the central issue of FCC preemption of state commission authority.

For example, the court correctly identifies the central issue in the case as one of preemption, not subject matter jurisdiction. The court notes that “a matter may be subject to FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation,” and “[d]etermining whether the FCC has chosen to displace state law turns on the scope of its intent in exercising its jurisdiction.” *AT&T v. Pac-West*, at *9 (citations omitted). The court concludes, “the FCC has not exercised its jurisdiction over all manifestations of ISP-bound traffic.” *Id.* Thus the court’s analysis rejects AT&T’s position that a state commission has no subject matter jurisdiction over any ISP-bound traffic (CLEC-CLEC or otherwise) by virtue of its interstate nature. *See, AT&T Exceptions*, at 19 (“[B]ecause the ISP-bound traffic at issue is unquestionably ‘interstate,’ it follows, necessarily, that the Commission lacks the power, authority and jurisdiction to hear this case.”).

However, the court’s preemption analysis is deeply flawed. The court never acknowledges that the standard for finding preemption is that a federal agency must make its intention to preempt state regulation *clear*. *See, Core Exceptions*, at 11-12. Indeed, the court candidly admits that “the *ISP Remand Order* could be clearer” with respect to whether the FCC intended it to apply to “ISP-bound traffic exchanged between two CLECs.” *AT&T v. Pac-West*, at *10. In the absence of a clearly expressed intent to preempt existing state commission authority over this traffic (an authority which neither the court nor FCC staff denies), the court simply erred in finding preemption.

Further, the court reasons that “in adopting an interim compensation regime for ISP-bound traffic, the FCC was primarily concerned with arbitrage opportunities created by traffic of

a particular nature,” *AT&T v. Pac-West*, at *14, implying that the thrust of this underlying “concern[]” overrides the lack of clear preemption for CLEC-CLEC traffic. But as Core noted with respect to FCC staff’s policy arguments, “[t]he FCC’s policy concerns are only relevant to the scope of traffic it actually regulated, i.e., ILEC-CLEC traffic.” Core Exceptions, at 19. For any other traffic, such as CLEC-CLEC traffic, the FCC underlying policy concerns are irrelevant, because the FCC never clearly stated its intent to regulate that traffic and thereby preempt state commission authority.

The failure of the court to identify a clear intention to preempt state commission authority over CLEC-CLEC traffic is especially glaring in light of the court’s own finding that “the FCC did not foresee the situation presented here,” i.e., CLEC-CLEC disputes over compensation for ISP-bound traffic. *Id.* at *15. Indeed, the court acknowledges the FCC’s own finding (contemporaneous with release of the 2001 *ISP Remand Order*) that “CLEC-to-CLEC relationships did not exhibit symptoms of market failure at the time; the market failure presented in this case is only possible because of the interim compensation rules themselves, which were issued the same day as the NPRM.” *Id.* But if the alleged “market failure” only arose *because* of the FCC’s rules, it simply cannot be said that those rules were designed to prevent them. Put another way, the FCC’s 2001 finding that in the absence of any “symptoms of market failure... we do not contemplate a need to adopt new rules governing CLEC-to-CLEC... arrangements,” Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001), cannot be squared with the notion that the FCC’s rules covered such “arrangements.” Thus, the Commission should reject the court’s attempt to retrofit the *ISP Remand Order* to cover CLEC-CLEC traffic.

Finally, the court fails to come to grips with the plain fact that the FCC intended the *ISP Remand Order* to be implemented only through ILEC-CLEC interconnection agreements (“ICAs”) and the change-of-law process. The court does correctly note:

[T]he TCA leaves something of an enforcement gap: CLECs have statutory duties to interconnect with other LECs and to provide reciprocal compensation, but there is no procedure specified for one CLEC to require another CLEC to enter into an interconnection agreement that would govern the terms of those duties. *AT&T v. PacWest*, at n. 3.

Yet, the court fails to acknowledge that “the *ISP Remand Order*’s insistence on implementation via the interconnection agreement process presumes an ILEC-CLEC relationship since, under the Telecommunications Act, a CLEC may invoke its rights to negotiation and arbitration of an [ICA] only with an incumbent local exchange carrier.” Core Exceptions, at 14 (internal quotations omitted). The court also ignores the *ISP Remand Order*’s numerous references to ILEC-CLEC ICAs and the complete lack of any discussion regarding how the *ISP Remand Order* is to be implemented between CLECs, which have no statutory avenue to form ICAs with one another. Core Exceptions, at 14-16.

For these reasons, in addition to those already set forth in Core's exceptions and reply exceptions, the Commission should not place any reliance on the opinion of the Ninth Circuit. Rather, the Commission should grant Core's exceptions, reject the recommendations set forth in the I.D. and sustain Core's complaint.

Respectfully submitted,



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Date: July 7, 2011

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