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March 5, 2010

Via Overnight Delivery

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

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

Dear Mr. McNulty:

Please find enclosed an original and three (3) copies of AT&T's Petition for Interlocutory Review and Answer to Material Questions in the above-referenced matter.

Please also find enclosed a proof of filing copy that I ask you to date stamp and return to me in the enclosed self-addressed postage pre-paid envelope.

Please contact me if you have any questions or concerns with this matter.

Very truly yours,


Michelle Painter

cc: Certificate of Service
Administrative Law Judge Angela Jones

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.)
)
 Complainant)
)
 v.)
)
 AT&T Communications of PA, LLC)
)
 and)
)
 TCG Pittsburgh)
)
 Respondents)

**Docket No. C-2009-2108186
Docket No. C-2009-2108239**

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**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

**AT&T'S PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO
MATERIAL QUESTION**

Pursuant to 52 Pa. Code § 5.302, AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh ("AT&T" and "TCG," collectively "AT&T") hereby Petition the Pennsylvania Public Utility Commission ("Commission") for Interlocutory Review and Answer to a Material Question in the above-captioned matter. Interlocutory review should be granted because it will clarify whether this case should proceed, and thereby expedite the conduct of this proceeding, as set forth more fully below:

MATERIAL QUESTION FOR REVIEW

Does the ALJ's February 26, 2010 *Order #6* ("*ALJ Order*") correctly deny AT&T's Motion to Dismiss with respect to VoIP traffic alleged to have been terminated after September 2009?

Suggested Answer: No. The ALJ Order improperly denies AT&T's Motion to Dismiss with respect to VoIP traffic alleged to have been terminated by Core after September 2009. All testimony has been filed in this case, yet Core presented no evidence that AT&T sent any traffic to Core that was terminated to a VoIP customer despite being asked to provide such information

in discovery. Since Core has failed to meet its burden of proving that there is any VoIP traffic at issue here (and hence that the Commission has jurisdiction over the dispute), and in order to promote judicial economy and avoid wasteful and unnecessary litigation of issues, AT&T requests that the Commission issue an Order granting AT&T's Motion to Dismiss in its entirety.

DISCUSSION AND ARGUMENT

Core's complaint alleges non-payment by AT&T for the termination of indirect traffic. Core's testimony and discovery responses concede that all of the traffic terminated before September 2009 (and most, if not all, of the traffic terminated after September 2009) was ISP-bound traffic, but alleges that a small amount of traffic terminated after September 2009 *might* be VoIP traffic.¹ Based on Core's testimony and discovery responses, AT&T filed a Motion to Dismiss arguing that the Commission lacked subject matter jurisdiction over the ISP-bound traffic at issue because, under well-settled law, ISP-bound traffic is jurisdictionally interstate and state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement ("ICA") (which is not the case here because the parties do not have an interconnection agreement).² With respect to the very small amount of traffic Core terminated *after* September 2009 that Core claims could be VoIP traffic, AT&T argued that Core's complaint should be dismissed because (even if the Commission has jurisdiction over VoIP traffic)³ Core failed to show (after all testimony had been filed and discovery answered) that any VoIP traffic originated from AT&T. The ALJ granted AT&T's

¹ Testimony of Bret Mingo at 2; Response to Interrogatory AT&T-II-13 and 14, and AT&T-III-3 and 4 (Attachments A, B and C to AT&T's Motion to Dismiss).

² *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir. 2003).

³ AT&T does not agree that the Commission has jurisdiction over VoIP traffic in the context of this proceeding. VoIP traffic is jurisdictionally interstate (*In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22,404, 2004 WL 2601194 (FCC 2004), and state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an ICA (*Pacific Bell*, 325 F.3d at 1126-27) – which, again, is not the case here because the parties do not have an ICA. That jurisdictional question, however, is not determinative here because, even if the Commission has jurisdiction over VoIP traffic, Core has failed to show that any is involved here.

Motion to Dismiss with respect to all the ISP-bound traffic, but denied the motion with respect to VoIP traffic that may have been terminated after September 2009.

The ALJ correctly pointed out (at pp. 10-11) that Core has failed to present evidence establishing that any traffic terminated after September 2009 was VoIP traffic originated by AT&T, stating (emphasis added):

The pleadings including the oral argument do not establish with certainty whether there is a mix of traffic after September 2009. The established fact is that the **potential** for a mix of traffic exists. However, whether the traffic is mixed is not an established fact. Furthermore, the destination of the VOIP traffic is also unclear from the pleadings and oral argument.

The ALJ, however, failed to recognize the ramifications of Core's failure. As the Complainant, Core bears the burden of proving that the Commission has jurisdiction over the traffic in dispute, and it may not withhold its offer of proof until the hearing. In fact, the time has come and gone for Core to present its evidence. Testimony has already been filed, and Core's testimony does not indicate how much, if any, VoIP traffic it terminated for AT&T. Further, AT&T asked Core in discovery how much of the non-ISP bound traffic was sent by AT&T to Core, or how much Core has billed AT&T for non-ISP bound traffic, and Core stated that it could not provide this information.⁴ Inasmuch as Core has admitted that it cannot provide any evidence establishing that it terminated any VoIP traffic originated by AT&T, Core has failed to meet its burden of proving that the Commission has jurisdiction over any of the traffic at issue and its complaint should be dismissed in its entirety.

WHEREFORE, for the foregoing reasons, AT&T respectfully requests Interlocutory Review and Answer to the Material Question as set forth above. In accordance with 52 Pa. Code § 5.302(b), AT&T reserves its right to file a separate Brief addressing the merits of the Material Question and setting forth its position on its Motion.

⁴ Response to Interrogatory ATT-III-4, which is attached hereto.

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

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Its Attorneys

DATED: March 5, 2010

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**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

**Response of Core Communications, Inc.
to the Interrogatories of AT&T Communications of PA, LLC, Set III
in Docket Nos. C-2009-2108186 and C-2009-2108239**

Interrogatory - AT&T-Core-3-4: With respect to Core's response to AT&T-2-21 wherein Core states, "it is reasonable to assume that at least some of the AT&T Indirect Traffic was directed to those customers," please answer the following questions:

(a) Provide any and all documents demonstrating that AT&T's traffic was directed to any of the 5 non-ISP customers.

(b) Provide the exact amount of AT&T traffic that was directed to any of the 5 non-ISP customers, and the date such traffic was sent.

(c) Provide the exact amount billed by Core to AT&T and the date(s) Core billed AT&T for traffic that was directed to any one of the 5 non-ISP customers.

Response:

Core does not track the amount of AT&T Indirect Traffic, or any other class of traffic, that is delivered to particular customers or classes of customers. Core terminates all telecommunications on its network on a nondiscriminatory basis.

Response provided by:

Bret Mingo

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Petition for Interlocutory Review and Answer to Material Question upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Fairfax, Virginia, this 5th day of March 2010.

VIA E-MAIL AND FIRST CLASS MAIL

Deanne O'Dell
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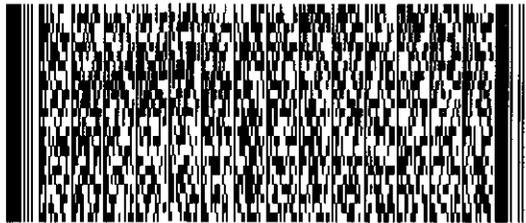
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James McNulty
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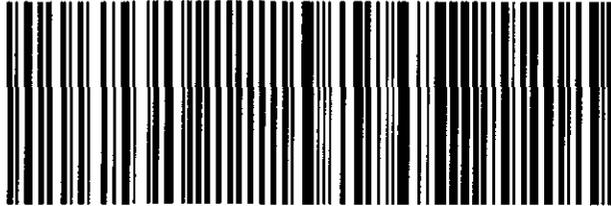


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