

October 26, 2009

**VIA OVERNIGHT DELIVERY**

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

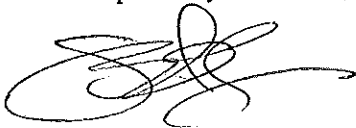
Re: **Core Communications, Inc., v. XO Communications Services, Inc.**  
**Docket No. C-2009-2133609**

Dear Secretary McNulty:

Please find enclosed for filing with the Pennsylvania Public Utility Commission ("PUC") the original and three (3) copies of the Preliminary Objections on behalf of XO Communications Services, Inc. in the above-referenced proceeding.

Please date-stamp and return the enclosed extra copy of this cover letter in the self-addressed, postage paid envelope provided. Should you have any questions regarding this correspondence, please contact the undersigned at (703) 547-2615 or via email to [sharon.e.adams@xo.com](mailto:sharon.e.adams@xo.com).

Respectfully submitted,



Sharon Adams  
Senior Regulatory Analyst

Enclosures

c: Core Communications Services, Inc.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CORE COMMUNICATIONS, INC.,	:	
	:	
Complainant,	:	
v.	:	Docket No. C-2009-2133609
	:	
XO COMMUNICATIONS	:	
SERVICES, INC.	:	
	:	
Respondent.	:	
	:	
	:	
	:	

---

**NOTICE TO PLEAD**

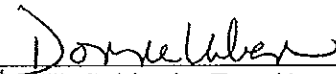
---

To: Core Communications, Inc.

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

Respectfully Submitted,

FLASTER/GREENBERG P.C.

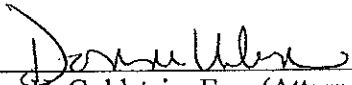
By:   
Darren H. Goldstein, Esq. (Attorney ID No. 83552)  
Donna T. Urban, Esq. (Attorney ID No. 72932)  
1810 Chapel Avenue West  
Cherry Hill, NJ 08002  
v. (856) 661-1900  
f. (856) 661-1919  
[darren.goldstein@flastergreenberg.com](mailto:darren.goldstein@flastergreenberg.com)  
[donna.urban@flastergreenberg.com](mailto:donna.urban@flastergreenberg.com)  
*Attorneys for XO Communications Services, Inc.*

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Commission should dismiss the Complaint for lack of sufficient specificity. Alternatively, the Commission should order Core to amend the Complaint to specify the technical nature of the traffic at issue and, in particular, to allege whether such traffic is ISP-bound traffic or not. The Commission should then dismiss this matter for lack of subject matter jurisdiction and/or for legal insufficiency if the amended Complaint alleges (as Core has previously represented to XO) that the traffic at issue is ISP-bound traffic. If the Commission deems that discovery is necessary to resolve that jurisdictional issue, it should order discovery limited solely to the jurisdiction issue.

Respectfully Submitted,

FLASTER/GREENBERG P.C.

By:   
Darren H. Goldstein, Esq. (Attorney ID No. 83552)  
Donna T. Urban, Esq. (Attorney ID No. 72932)  
1810 Chapel Avenue West  
Cherry Hill, NJ 08002  
v. (856) 661-1900  
f. (856) 661-1919  
[darren.goldstein@flastergreenberg.com](mailto:darren.goldstein@flastergreenberg.com)  
[donna.urban@flastergreenberg.com](mailto:donna.urban@flastergreenberg.com)  
*Attorneys for XO Communications Services, Inc.*

Dated: October 26, 2009



Federal Communications Commission (“FCC”), as the FCC and this Commission have explicitly stated and as Core has previously acknowledged). XO has refused to pay intrastate access charges for calls that XO understands, upon information and belief, were bound for ISPs. Core, not XO, should have records indicating whether the telephone numbers that were dialed with respect to the terminating traffic at issue were the numbers of Core’s customers providing internet service. Simply put, Core’s Complaint is defective because it does not specify whether the terminating traffic is local, bound for ISPs, or interexchange (or toll) traffic, for which differing jurisdictional and compensation arrangements apply.

3. As described in more detail below, the Complaint should be dismissed for three reasons: (1) it lacks specificity concerning the critical issue of what type of traffic is involved to determine whether this Commission has jurisdiction and whether intrastate charges may apply (see paragraphs 9-11, below), (2) based on the fact that *if* the calls at issue do involve calls to ISPs, this Commission lacks jurisdiction based on unequivocal preemption by the FCC (previously acknowledged by Core itself) (see paragraphs 12-18, below), and (3) based on the fact that *if* the calls at issue do involve calls to ISPs, Core’s claims are legally insufficient since Core seeks to recover based on its switched access tariff and Core itself has previously acknowledged that switched access charges are not applicable to ISP-bound traffic (see paragraphs 19-24 below). As is also discussed below, ALJ Salapa’s denial of preliminary objections filed by Choice One Communications of Pennsylvania, Inc. d/b/a One Communications and CTC Communications Corp. d/b/a One Communications (“One”) in a different proceeding is not controlling and should not be followed (see paragraphs 25-31, below).

4. Core seeks recovery of intrastate switched access service charges, but omits from its Complaint the basic information necessary to consider whether Core provided switched

access services for “intrastate” calls within the meaning of its tariff. Contrary to Core’s suggestion in the Complaint, not all calls that can in one sense be characterized as originating and terminating in the same state are, as a matter of law, “intrastate” calls subject to Core’s tariff and this Commission’s jurisdiction. *See* Compl. ¶ 12. Certain traffic, including calls to an ISP, is exclusively subject to the FCC’s jurisdiction and not subject to intrastate charges. Therefore, the Complaint is insufficient in that it merely claims that the traffic at issue originates and terminates within Pennsylvania without also asserting that the traffic is not of a type, such as ISP-bound traffic, that would fall outside of this Commission’s jurisdiction. In other words, even if Core was able to prove each of the allegations in its Complaint, it would still not succeed in meeting its burden of proving that this Commission has jurisdiction over this dispute or that it is entitled to intrastate access charges.

5. It would not be difficult for Core to provide the necessary specificity regarding the type of traffic at issue. Rather, it would be simple – but critical – for Core to provide the information lacking from the Complaint. In particular, Core must provide information sufficient and specific enough to establish the nature of the traffic at issue. Excerpts from its tariff and summarized invoices do not provide that specificity. Since determining whether the traffic is ISP-bound or otherwise depends on the identity of Core’s customers and the type of service those customers provide to end-user customers, this is the information Core should provide. XO does not have that information in its possession and cannot discern it from the Complaint. Accordingly, the Complaint must be dismissed because it deprives XO of information critical to permit XO to consider and defend against Core’s claims.

6. For these reasons and others, all of which are explained more fully below, the Commission should dismiss the Complaint pursuant to 52 Pa. Code § 5.101(a)(3) because it

lacks sufficient specificity.<sup>1</sup> In the alternative, the Commission should order Core to amend the Complaint to specify the technical nature of the traffic at issue and, in particular, to allege whether such traffic is local, ISP-bound, or interexchange. If the amended Complaint alleges that the traffic at issue is ISP-bound traffic, as XO has reason to believe that it is, the Commission should then dismiss this matter for lack of subject matter jurisdiction pursuant to 52 Pa. Code § 5.101(a)(1) and for failure to state a claim.

### **BACKGROUND**

7. The Complaint alleges that Core terminated XO's "telecommunications traffic" to Core's customers and, therefore, that XO must pay Core for terminating such traffic in the past as well as pay Core if it terminates any such traffic in the future. *See, e.g.*, Compl. ¶ 2. Core asks the Commission to order XO to pay Core at one of three intrastate rates: (1) the rate in Core's intrastate Switched Access Tariff (Pa. PUC Tariff No. 4) for intrastate access traffic, Compl. ¶¶ 3, 36-56; (2) the TELRIC tandem reciprocal compensation rate of Verizon Pennsylvania, *id.* ¶¶ 57-66; or (3) "a reasonable rate" to be established by the Commission pursuant to its authority under the Pennsylvania Public Utility Law, *id.* ¶¶ 67-79. In addition, Core asks the Commission to declare that its intrastate Switched Access Tariff, Pa. PUC Tariff No. 4, applies to the traffic at issue. *E.g., id.* ¶ 3.

8. The Complaint does not contain allegations specifying the nature of the terminating traffic at issue, information critical to determining whether intrastate charges apply and whether this Commission has jurisdiction. *See generally* Compl. Rather, the Complaint refers to the traffic through non-descript terms such as "telecommunications traffic" or "XO's

---

<sup>1</sup> In accordance with 52 Pa. Code § 5.101(e)(1), XO does not include an answer to the Complaint with these preliminary objections because XO has objected to the Complaint on grounds that it lacks sufficient specificity.

Traffic.” *E.g., id.* ¶ 1, ¶ 15. XO has reason to believe, however, that most, if not all, of the traffic underlying the dispute is ISP-bound traffic based on representations made by Core employees and information on Core’s website, [www.coretel.net](http://www.coretel.net), regarding the services it provides to its customers. Therefore, following the framework of the Complaint, the traffic at issue is originated by an XO customer by calling a telephone number assigned to a Core customer. *See* Compl. ¶ 2. For most, if not all, of the calls at issue, XO believes that Core’s customers are ISPs that provide internet services to XO’s customers. Therefore, the nature of the traffic may be determined by identifying the Core customers receiving each call. On origination of the call, XO carries the call to Core via Verizon’s tandem switch, and Core then carries the call to its ISP customer.<sup>2</sup> *See* Compl. ¶ 2. The ISP then connects the call to its point of termination in the internet cloud based on the end-user customer’s request.

**I. Preliminary Objection On The Grounds That The Complaint Lacks Sufficient Specificity**

9. The Commission should dismiss the Complaint pursuant to 52 Pa. Code § 5.101(a)(3) because it lacks sufficient specific information regarding material facts. For a complaint to be sufficiently specific, its allegations must “(1) contain averments of all facts the plaintiff will eventually have to provide in order to recover, and (2) [be] sufficiently specific so as to enable the party served to prepare a defense thereto.”<sup>3</sup> By not identifying the technical nature of the traffic in dispute, the Complaint fails to meet the first part of that standard because, to prevail on its claims, Core must establish that this dispute falls within the Commission’s

---

<sup>2</sup> In this scenario, if Core’s customers are in fact ISPs, then XO is not acting as an interexchange carrier. Rather, XO is originating calls dialed to local numbers destined for ISPs. Consequently, the switched access charges set forth in Core’s switched access tariff are not applicable.

<sup>3</sup> *See Com., Dept. of Transp. v. Shipley Humble Oil Co.*, 370 A.2d 438, 439 (Pa. Commw. 1977) (finding that complaint was insufficiently specific under PA. R. Civ. P. 1019(a)).

jurisdiction and that Core's intrastate Switched Access Tariff applies to the traffic at issue. Core bears the burden of proof on both of those issues and has failed to establish its prima facie case in the Complaint.<sup>4</sup> The Complaint also fails to satisfy the second part of that standard because XO's ability to prepare a defense will be severely compromised absent allegations in the Complaint specifying the technical nature of the traffic at issue.

10. In order for this Commission to assert subject matter jurisdiction, this dispute must involve intrastate services. Core's assertion that the traffic at issue in this case is "intrastate" or "telecommunications traffic" is insufficient to determine whether the Commission has jurisdiction or whether Core's intrastate Switched Access Tariff applies. While Core has averred that the traffic at issue is "intrastate traffic because it originates and terminates within Pennsylvania," Compl. ¶ 12, it pleads this with no specificity to determine whether the terminating traffic is local, bound for ISPs, or interexchange (or toll) traffic, for which differing jurisdictional and compensation arrangements apply. For example, the terminating traffic at issue may fall into these categories: (1) local traffic from another local exchange company ("LEC"), for which reciprocal compensation rates under section 251(b)(5) may apply, (2) interexchange traffic from an interexchange carrier ("IXC"), for which access charges under section 251(g) or an applicable state provision may apply, or (3) ISP-bound traffic (as XO believes is the case here) where the FCC's specified rate cap of \$.0007 applies. Core notes that XO believes the traffic at issue is ISP-bound traffic not subject to access charges, Compl. ¶ 26,

---

<sup>4</sup> See *Palmerton Tel. Co. v. Global NAPs South, Inc.*, No. C-2009-2093336, Recommended Decision at 40 (Pa. PUC Aug. 7, 2009) (Weismandel, ALJ) (recommending dismissal of complainant-telephone company's claim for compensation pursuant to its intrastate access tariff because it "ha[d] the burden of proof as to its claim that it is owed intrastate access charges. . . [and] failed to bear its burden" by not establishing that its tariff applied to the traffic at issue) (pending). See also 66 Pa. C.S. § 332(a) (proponent of order bears burden of proof). *Accord Commonwealth v. KT&G Corp.*, 863 A.2d 1254, 1257 (Pa. Commw. 2004) (stating that the plaintiff bears burden to establish personal jurisdiction over defendant).

but Core has been careful not to confirm this fact in its Complaint because it knows that the FCC has asserted exclusive jurisdiction over regulation of such traffic.

11. To the best of its knowledge, XO believes that most, if not all, of the traffic at issue is ISP-bound traffic that is not subject to access charges; however, XO cannot effectively prepare a response to the allegations in the Complaint without more information specifying the type of traffic terminated since that would determine the appropriate form of compensation. In this case, determining whether the traffic is ISP-bound or otherwise depends on the identity of Core's customers and the type of service those customers provide to end-user customers. If a Core customer provides internet services when it receives a call to the telephone numbers assigned to it by Core, then that customer is an ISP and those calls terminated are ISP-bound calls. Core should have included these specific allegations in the Complaint because, upon information and belief, Core, not XO, has information in its possession, custody or control to readily identify its own customers and determine whether or not the traffic at issue is ISP-bound traffic.<sup>5</sup> XO cannot obtain this information from the invoices rendered by Core. XO is entitled to know more specifics regarding the allegations in the Complaint to prevent Core from later asserting the Complaint rests on some other kind of traffic and from submitting proof of any other kind of traffic in support of its allegations.<sup>6</sup> Because Core has not pled a material fact (i.e., the nature of the traffic at issue), XO is unfairly disadvantaged and unable to effectively prepare its response, thus the Complaint should be dismissed.

---

<sup>5</sup> See *Masters v. Karivalis*, 73 Pa. D. & C.2d 40, 1975 WL 16842, at \*42 (Pa. Ct. Com. Pl. Apr. 28, 1975) (requiring plaintiff to specify certain facts in a complaint because he had full and intimate knowledge of those facts).

<sup>6</sup> See *Mordy v. Reichley*, 7 Pa. D. & C.2d 80, 1957 WL 8160 (Pa. Ct. Com. Pl. June 16, 1956) (finding complaint to lack sufficient specificity because it "state[ed] no facts whatever as to how the accident occurred . . . Unless it is corrected defendants would be exposed to the danger of having plaintiffs offer proof of any conceivable set of facts that would fall within the general language of the averments").

**II. Preliminary Objection On The Grounds That The Commission Lacks Subject Matter Jurisdiction Over This Dispute If The Traffic at Issue is ISP-bound Traffic**

12. XO's jurisdictional objection described below relies on evidence outside the Complaint;<sup>7</sup> however, Section 5.101(c) of the Commission's regulations requires all preliminary objections to be raised at one time.<sup>8</sup> Core's unwillingness to state in its Complaint specific material facts regarding the type of traffic involved (i.e whether those Core customers are ISP providers) should not be held against XO or impair XO's ability to obtain dismissal of the Complaint quickly and efficiently. Furthermore, XO raises this preliminary objection to the Commission's jurisdiction to underscore the significance of the Complaint's lack of sufficient specificity regarding the nature of the traffic in dispute, and to lay the grounds for the Commission's dismissal of an amended Complaint, if the Commission orders Core to file an amended complaint specifying the technical nature of the traffic at issue in lieu of dismissing this matter due to the Complaint's lack of sufficient specificity and such amended Complaint demonstrates that the traffic at issue is ISP-bound traffic.

13. Upon information and belief, XO believes that most, if not all, of the traffic at issue in this case is ISP-bound traffic. If XO's belief is correct, then the Commission has no jurisdiction over this case because the FCC has held that ISP-bound traffic is jurisdictionally interstate traffic as end users access websites across state lines.<sup>9</sup> Regarding the subject matter of the Commission, it has been said that:

---

<sup>7</sup> E.g., *Jones v. Knox Energy Assoc.*, No. C-2009-2086059, 2009 WL 2218224 (Pa. P.U.C. July 14, 2009) (slip op.).

<sup>8</sup> 52 Pa. Code § 5.101(c).

<sup>9</sup> E.g., *In The Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6484-85, ¶ 21 & n. 69 (Nov. 5, 2008) ("*Mandamus Remand Order*") ("We have consistently found that ISP-bound traffic is jurisdictionally interstate. ...This conclusion has not been questioned by the D.C. Circuit."). See *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory

The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the legislature. The Commission must act with, and cannot exceed, its jurisdiction. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.<sup>10</sup>

14. The FCC has a long history of interpreting provisions of the Communications Act of 1934, as amended, (the “Act”) and their application specifically to ISP-bound traffic. In particular, the FCC has analyzed whether the reciprocal compensation regime in section 251(b)(5) or the access charge regime in 251(g) should apply to this traffic. Section 251(b)(5) of the Act requires all LECs to “establish reciprocal compensation arrangements for the transport and termination of telecommunications,”<sup>11</sup> whereas section 251(g) applies only to “exchange access, information access, and exchange services for such access to interexchange carriers and information service providers.”<sup>12</sup> In the FCC’s 2008 *Mandamus Remand Order*, the FCC found that traffic terminating to an ISP falls within the scope of section 251(b)(5), not section 251(g),<sup>13</sup> but that ISP-bound traffic would be “afforded different treatment from other section 251(b)(5) traffic pursuant to [its] authority under section 201 and 251(i) of the Act.”<sup>14</sup> Thus, the FCC has exercised its authority to address intercarrier compensation issues regarding ISP-bound traffic

---

Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*), vacated and remanded, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

<sup>10</sup> *Palmerton Tel. Co. v. Global NAPs South, Inc.*, No. C-2009-2093336, R.D. at 22 (Pa. PUC Aug. 7, 2009) (Weisman, ALJ) (internal citations omitted).

<sup>11</sup> 47 USC § 251(b)(5).

<sup>12</sup> 47 USC § 251(g).

<sup>13</sup> *Mandamus Remand Order* ¶ 16.

<sup>14</sup> *Id.* ¶ 6.

based on Section 201, notwithstanding whatever authority it may also have under Section 251(b)(5) to regulate such interstate, non-access traffic.<sup>15</sup>

15. Core erroneously states in the Complaint that “[t]here has been no federal preemption of the Commission’s ability to address the subject matter of this complaint,” while knowing full well that the FCC has done just that, (i.e., preempted the Commission). Compl. ¶

13. Starting with its *ISP Remand Order*, the FCC has clearly asserted its exclusive jurisdiction and expressly preempted state commission regulation of ISP-bound traffic:

This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.<sup>16</sup>

16. The above-noted precedent makes it evident that the Commission does not have jurisdiction over the instant dispute if the traffic at issue is ISP-bound traffic. The FCC has determined that ISP-bound traffic is interstate traffic, and the Commission does not have jurisdiction over interstate traffic.<sup>17</sup> Indeed, in light of the FCC’s clear preemption language in

---

<sup>15</sup> E.g., *Id.*, 24 FCC Rcd at 6483-86, ¶¶ 17-22.

<sup>16</sup> *Id.*, 24 FCC Rcd 6485-86, ¶ 22 (emphasis added). See also *Inter-carrier Compensation For ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9189 ¶ 82 (2001) (“*ISP Remand Order*”), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

<sup>17</sup> See, e.g., 66 Pa. Cons. Stat. Ann. § 104 (West 2009) (“The provisions of this part, except when specifically so provided, shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.”); *Pa. Public Utility Comm’n v. ALLTEL*, 59 Pa. PUC 447 (1985) (“the interstate operations [of a carrier] are subject to the jurisdiction of the Federal Communications Commission (FCC)”).

the *ISP Remand Order*, the Commission has unequivocally held on several occasions that it does not have authority to address issues regarding intercarrier compensation for ISP-bound traffic.<sup>18</sup>

17. XO and this Commission can be certain that Core is well aware that the FCC has asserted exclusive jurisdictional authority over regulating ISP-bound traffic, considering Core is the lead party that has appealed the FCC's *Mandamus Remand Order* on the basis that Core believes "[t]he FCC exceeded its statutory authority by setting rates for 'telecommunications' traffic that terminates to ISP customers."<sup>19</sup> Specifically, Core states in its Initial Brief in that appeal:

The FCC also concluded that all telecommunications to ISPs are 'clearly interstate', even when such telecommunications originate and terminate in the same state. Pursuant to this 'interstate' finding, the FCC found that it "retains full authority to regulate charges for traffic and services subject to federal jurisdiction."<sup>20</sup>

18. Moreover, Core does not argue in that appeal that ISP-bound traffic is exchange access subject to the access charge regime, rather than the reciprocal compensation regime. Instead, Core agreed with the FCC's statutory classification of ISP-bound traffic:

The FCC concluded that 'telecommunications' traffic to ISPs 'falls within the scope of section 251(b)(5).' The FCC also concluded that 'the transport and

---

<sup>18</sup> See *In re Petition of US LEC of Pennsylvania, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, A-310814F7000, Opinion and Order, 2006 WL 238971 at 10 (Pa. PUC Jan. 18, 2006) ("we have previously concluded in our April 18, 2003 Order that the FCC's ISP Remand Order has preempted rate authority by state commissions over intercarrier compensation for ISP-bound traffic"); *In re Petition of Global NAPS South, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, A-310771F7000, Opinion and Order, 2003 WL 21135673 at n. 46 (Pa. PUC April 21, 2003) ("The ISP Remand Order has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic. Thus, our determination is limited to voice traffic only.")

<sup>19</sup> *Core Communications v. Federal Communications Commission*, No. 08-1365, 2009 WL 2525340 (D.C.Cir.), Brief for Petitioner Core Communications, Inc, at 29 (filed June 19, 2009) ("Core Initial Brief"). Until such time as there is a ruling on that appeal, the FCC's ruling stands and Core's Complaint is preempted.

<sup>20</sup> Core Initial Brief at 7 (citations omitted).

termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).’ *Core agrees. The problem here is that the FCC usurped the state commissions’ rate-making authority under section 252(d)(2).*<sup>21</sup>

Thus, while Core clearly disagrees with the FCC’s assertion of jurisdiction over ISP-bound traffic, it cannot genuinely argue that this Commission has subject matter jurisdiction over this dispute if the traffic at issue is ISP-bound traffic, knowing that the FCC has consistently and repeatedly labeled such traffic as jurisdictionally interstate.

**III. Preliminary Objection On The Grounds That Core’s Claims Are Legally Insufficient To The Extent They Seek Recovery Under Core’s Intrastate Switched Access Tariff, Or Under Any Other Intrastate Rate**

19. In order for Core to be entitled to intrastate switched access charges, Core must show that the traffic at issue is subject to switched access charges. The mere inclusion in the Complaint of Core’s tariff language purporting to apply its rate sheet “to originating and terminating communications” and the attachment of a summary of invoices ostensibly submitted in compliance with those tariff provisions do not provide sufficient detail to determine whether such tariff provisions actually apply to the type of traffic at issue. In fact, Core concedes in its Complaint that XO “has never ordered Switched Access Services directly from Core pursuant to its tariff;” Compl. ¶ 45, but presumably wants this Commission to assume that the tariff applies without providing any description of the type of traffic involved.

20. It is well-established in the communications industry that switched access charges apply to origination and termination of certain interexchange traffic, rather than local or ISP-bound traffic; however, Core has not described the nature of the traffic at issue, other than to claim it is “intrastate” and “telecommunications.” The language in Core’s tariff regarding

---

<sup>21</sup> Core Initial Brief at 33, n.3 (citations omitted) (emphasis added).

“Constructive Order[ing]” of its tariffed services is likewise insufficient to satisfy Core’s burden of showing that the tariff itself is applicable to this traffic. Including language in its tariff of services and rates does not grant Core the right to unilaterally impose its tariff charges for any services, especially where Core admits that XO never sought to purchase services through Core’s intrastate switched access tariff. Core cannot assume that XO “constructive[ly] ordered” services from a tariff without first establishing that the tariff rates properly apply in these circumstances. Therefore, the Complaint fails to establish Core’s prima facie case that switched access charges apply to the traffic at issue, and the claims set forth in the Complaint are accordingly legally insufficient.

21. Moreover, as Core is aware, XO believes the traffic at issue is ISP-bound traffic, which is explicitly exempted from switched access charges. Core itself has expressly advocated its position in other proceedings that access charges do *not* apply to ISP-bound traffic. In comments filed earlier this year in an FCC proceeding considering whether interstate access charges should be applied to ISP-bound calls that are terminated via VNXX-type foreign exchange arrangements, Core emphatically confirmed its understanding that the FCC’s “*Mandamus Remand Order* has clarified once and for all that all ISP-bound traffic is subject to section 251(b)(5)” because “[t]he *Mandamus Remand Order* states in no uncertain terms that ‘all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).’”<sup>22</sup> While Core may argue here that the FCC did not intend to capture certain ISP-bound traffic in its rules, this statement is evidence that such a claim is

---

<sup>22</sup> See, Comments of Core Communications, Inc. dated March 12, 2009, regarding Blue Casa *Petition for a Declaratory Ruling that Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251(g), Interstate Originating Switched Access Charges, not Reciprocal Compensation Charges, Apply to ISP-Bound Calls that are Terminated via VNXX-Type Foreign Exchange Arrangements* (“Blue Casa Comments”), at 3.

spurious and that Core is talking out of both sides of its mouth to suit its immediate advocacy needs in each proceeding. Core went on to state the obvious rationale why access charges do not apply to ISP-bound traffic:

[ISP-bound] VNXX service does not fall within section 251(g) because it does not meet the definition of "exchange access," defined as 'offering of access to telephone exchange services . . . for the purpose of origination or termination of telephone toll services.' ... 'Telephone toll service' 'in turn is defined as 'telephone service between stations in different exchange areas for which there is made a separate charge.' ... Here, of course, there is no 'telephone toll service' "for which there is a separate charge."<sup>23</sup>

22. Core states in the Complaint that it has offered to enter into a reciprocal compensation arrangement with XO under section 251(b)(5) and indicates that its switched access "tariff would only continue to govern until Core and XO Communications enter into a section 251(b)(5) reciprocal compensation arrangement." Compl. ¶ 4 & n.2. This statement is completely contradictory to Core's request for the Commission to enforce its switched access tariff for this traffic. Either the tariff applies or it does not. Clearly, Core does not genuinely believe that this traffic is subject to switched access charges under its tariff. Otherwise, there would be no reason for Core to consider negotiating a separate reciprocal compensation arrangement for this traffic if the Commission determined that Core's tariff applied.

23. The crux of Core's argument in its Complaint appears to be that its intrastate access tariff should automatically apply in the absence of another agreement between Core and XO, but that argument has no basis in the law. Core is grasping at straws, trying to force a square peg into a round hole. Core has appealed the FCC's mandated \$.0007 rate cap for ISP-bound traffic and, by virtue of that appeal, has clear knowledge of the current state of the law and the legitimate intercarrier compensation rate for ISP-bound traffic. However, to borrow from

---

<sup>23</sup> Blue Casa Comments at 4.

Core's own words, Core's Complaint "is completely detached from FCC and judicial rulings relating to sections 251(b)(5) and 251(g), as if filed by a carrier that, like Rumpelstiltskin, has slept through the last ten years of reciprocal compensation litigation."<sup>24</sup> Core wants to avoid application of the FCC's established rate to the traffic it terminates to its ISP customers, and it now seeks to make this Commission complicit in its contravention of the law. Core's claims are accordingly legally insufficient.

24. If Core amends its Complaint to confirm that the traffic at issue is ISP-bound traffic, the Commission should disregard Core's arguments that any other compensation rate should be applied and dismiss the Complaint. Core asks the Commission to apply either (1) its switched access tariff rate, (2) Verizon's reciprocal compensation rate, or (3) any rate the Commission determines. Tellingly, nowhere does Core ask the Commission to apply the FCC's established rate cap for ISP-bound traffic of \$.0007. Because this is the only legally defensible rate that could be mandated for ISP-bound traffic, even viewing all facts in the light most favorable to Core, Core would not be entitled to relief sought in the Complaint under any circumstances as a matter of law.

#### **IV. ALJ Salapa's Denial Of One Communications' Preliminary Objections Does Not Control And Should Not Be Followed**

25. XO is aware that ALJ Salapa recently denied preliminary objections by One Communications in a different proceeding brought by Core against One.<sup>25</sup>

---

<sup>24</sup> Blue Casa Comments at 1.

<sup>25</sup> *Core Communications, Inc. v. Choice One Communications of Pennsylvania, Inc. d/b/a One Communications & Core Communications, Inc. v. CTC Communications Corp. d/b/a One Communications*, Order Denying Preliminary Objections, Nos. C-2009-2130379 & C-2009-2131838 (Pa. PUC Oct. 21, 2009) ("Order Denying Preliminary Objections") (Salapa, ALJ).

26. First, as a matter of law, ALJ Salapa's decision is not binding here and does not have the force and effect of law or legal determinations.<sup>26</sup>

27. In any event ALJ Salapa's decision should not be followed here for the following reasons: (1) there is no factual dispute between the parties over the type of traffic until or unless Core asserts the type of traffic at issue is other than ISP-bound traffic; (2) XO is unable to determine the type of traffic at issue based on the allegations in the Complaint or the attached invoices; and (3) once Core does assert or admit that the type of traffic involved is ISP-bound, this Commission has already recognized that it has no jurisdiction over disputes related to such traffic.

28. ALJ Salapa incorrectly concluded that there was a "factual dispute between Core and One over the nature of the telecommunications traffic at issue,"<sup>27</sup> however, Core admitted in its answer to One's preliminary objections that the traffic at issue was ISP-bound.<sup>28</sup> Therefore, there was no factual dispute in that proceeding over the nature of traffic because Core conceded its agreement with One regarding this material factual issue. Rather, there was a legal disagreement between Core and One over the implications of Core's admission that the traffic was ISP-bound. Similarly, there is no factual dispute over the nature of traffic presented in the instant proceeding until or unless Core asserts in its Complaint that this traffic is other than ISP-bound. Since Core has not made any assertion in the Complaint regarding the type of traffic at issue here, other than to claim it is "intrastate" or "telecommunications," there is no means for the Commission or XO to determine if there is such a factual dispute. Furthermore, as explained

---

<sup>26</sup> 52 Pa. Code § 1.96.

<sup>27</sup> Order Denying Preliminary Objections at 6-7.

<sup>28</sup> Answer of Core Communications, Inc. to the Preliminary Objections of One Communications of Pennsylvania and CTC Communications Corp. at 4 ¶ 3, wherein Core states: "Admitted that the telecommunications traffic in dispute is originated by One as a CLEC, terminated by Core as a CLEC **and then sent by Core to its ISP customers.**" (Emphasis added).

above, such assertions are insufficient and do not establish this Commission's jurisdiction or Core's entitlement to the relief it requests. Moreover, Core's allegation or admission in this proceeding that the traffic at issue is ISP-bound traffic, once made, will confirm that there is no factual dispute between XO and Core regarding this material fact. On the contrary, the dispute will be a legal one that the Commission can easily resolve based on its own precedent. Specifically, the legal classification of certain traffic that is bound for an ISP that provides internet services to its customers is interstate traffic not subject to this Commission's jurisdiction.

29. Rather than require Core to amend its Complaint to specify the type of traffic at issue, ALJ Salapa assumed One could make that determination through the allegations in the Complaint and its attached invoices.<sup>29</sup> In the present case Core has filed a summary of invoices with its Complaint against XO; however, there is no information in that summary to allow XO to determine the nature of the traffic (i.e., whether the calls at issue terminate with an ISP or a PSTN customer). Because the summary does not include information about Core's customers, which XO believes to be ISPs, or even the telephone numbers called, XO has no way to independently determine what type of traffic is at issue. In contrast, as explained above, this information should be readily available to Core; therefore, Core should be required to provide it.

30. ALJ Salapa noted that Core and One disagree whether the Commission has jurisdiction over the case and stated, "It is unclear that Core would not be entitled to relief under any circumstances as a matter of law because there is some doubt that the Commission lacks jurisdiction over the telecommunications traffic at issue in these complaints."<sup>30</sup> However, ALJ Salapa again incorrectly characterized this as a "factual issue," rather than a legal one. The

---

<sup>29</sup> Order Denying Preliminary Objections at 4.

<sup>30</sup> Order Denying Preliminary Objections at 7.

classification of ISP-bound traffic as “intrastate” or “interstate” and the Commission’s ensuing jurisdiction over such traffic is a legal question, not a factual one. In fact, as explained above, this Commission has already determined it does not have subject matter jurisdiction to address such disputes.<sup>31</sup>

31. Finally, ALJ Salapa applied an incorrect standard when he placed a burden on One to show that Core cannot recover any amount under any circumstance. To the contrary, XO’s preliminary objections should be granted to the extent that Core’s claims in particular involve ISP providers because XO has demonstrated that Core cannot recover on those particular claims under any circumstances. Core has carefully crafted its Complaint so as to not admit that this traffic is ISP-bound because it knows the FCC has asserted exclusive jurisdiction over such traffic. The only way that Core can hope to have this Commission address its Complaint is to cleverly describe it as intrastate traffic and hope no one at the Commission delves further. Core couches its grievance as one where XO is wantonly terminating traffic on Core’s network and refusing to pay for it. However, XO has simply refused to pay for access charges on terminating ISP-bound traffic, on the valid legal grounds that such charges are not applicable to ISP-bound traffic. Core knows if it properly filed this interstate dispute at the FCC, that the FCC would find that any agreement between the parties for termination of ISP-bound traffic would be subject to the federal rate cap of \$.0007, so it now shamelessly presses its case on this Commission, hoping for a better - yet legally untenable - result.

---

<sup>31</sup> See *In re Petition of US LEC of Pennsylvania, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, A-310814F7000, Opinion and Order, 2006 WL 238971 at 10 (Pa. PUC Jan. 18, 2006) (“we have previously concluded in our April 18, 2003 Order that the FCC’s ISP Remand Order has preempted rate authority by state commissions over intercarrier compensation for ISP-bound traffic”); *In re Petition of Global NAPS South, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, A-310771F7000, Opinion and Order, 2003 WL 21135673 at n. 46 (Pa. PUC April 21, 2003) (“The ISP Remand Order has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic. Thus, our determination is limited to voice traffic only.”)

## CONCLUSION

**WHEREFORE**, for all the foregoing reasons, the Commission should dismiss the Complaint for lack of sufficient specificity. Alternatively, the Commission should order Core to amend the Complaint to specify the technical nature of the traffic at issue and, in particular, to allege whether such traffic is ISP-bound traffic or not. The Commission should then dismiss this matter for lack of subject matter jurisdiction and/or for legal insufficiency if the amended Complaint alleges (as Core has previously represented to XO) that the traffic at issue is ISP-bound traffic. If the Commission deems that discovery is necessary to resolve that jurisdictional issue, it should order discovery limited solely to the jurisdiction issue.

Respectfully Submitted,

XO COMMUNICATIONS SERVICES, INC.

By: \_\_\_\_\_  
Darren H. Goldstein, Esq. (Attorney ID No. 83552)  
Donna T. Urban, Esq. (Attorney ID No. 72932)  
1810 Chapel Avenue West  
Cherry Hill, NJ 08002  
v. (856) 661-1900  
f. (856) 661-1919  
[darren.goldstein@flastergreenberg.com](mailto:darren.goldstein@flastergreenberg.com)  
[donna.urban@flastergreenberg.com](mailto:donna.urban@flastergreenberg.com)

Dated: October 26, 2009

VERIFICATION

I, Rich Jackson, Director at XO, verify that, in this capacity, I am authorized and do make this Verification, that the facts set forth in the foregoing Preliminary Objections to the Complaint are true to the best of my knowledge, information and belief. I understand that the statements are made subject to the penalties of 18 Pa. C.S. § 4904, relating to falsifications to authorities.

10/26/09

Date

Rich Jackson

County/City: Fairfax  
County/City/State of: Virginia  
The foregoing instrument was acknowledged before me this 26 day of October, 2009, by Rich Jackson  
(name of person seeking acknowledgment)  
Gene R. Simpson # 4067424  
Notary Public  
My commission expires: July 31, 2011