TAB 1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Direct Testimony

of

Bret L. Mingo

on behalf of

Core Communications, Inc.

Dated: November 16, 2009

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS?

A. My name is Bret L. Mingo. I am president and CEO of Core Communications, Inc. ("Core"), a competitive local exchange carrier ("CLEC") with substantial operations in Pennsylvania. My business address is 209 West Street, Suite 302, Annapolis, Maryland 21401.

Q. PLEASE DESCRIBE YOUR QUALIFICATIONS AND EXPERIENCE AS THEY RELATE TO THIS PROCEEDING?

A. I manage all facets of network management and billing for Core. I am the principal contact at Core for interconnection and billing with Verizon as well as CLECs such as AT&T. I have served in this capacity since the company's founding in 1997. I have also served as the primary point of contact for Core in its discussions with AT&T regarding the disputes at issue in this case.

Q. WHAT IS THE PURPOSE, GENERALLY, OF YOUR TESTIMONY?

A. The purpose of my testimony is to describe the indirect traffic AT&T sends Core via the Verizon tandems (the "AT&T Indirect Traffic), Core's billing of AT&T for this traffic, Core's attempts to get AT&T to pay fair compensation for its use of Core's network, and AT&T's refusal to pay **anything** for the termination of this traffic.

Q. PLEASE DESCRIBE CORE AND ITS OPERATIONS GENERALLY?

A. Core is a provider of telecommunications services certificated by the Pennsylvania Public Utility Commission ("Commission") to provide competitive local exchange services and intrastate interexchange (IXC) service throughout Pennsylvania. Core's administrative headquarters are located in Annapolis, Maryland, and our chief network operation center ("NOC") is in Wilkes Barre, Pennsylvania. Core is in good standing with the Commission, and maintains a CLEC tariff (Pa. PUC Tariff No. 1), an IXC tariff (Pa. PUC

Tariff No. 2), and an intrastate switched access service tariff (Pa. PUC Tariff No. 4) with the Commission. Core maintains an interstate switched access service tariff with the Federal Communications Commission ("FCC"). Core is also certified to provide competitive local exchange service and intrastate IXC service in Maryland.

In its operations, Core has traditionally focused on the provision of telecommunications and related services to dial-up Internet service providers ("ISPs"). ISPs provide unregulated "enhanced" services that enable their customers to surf the web, send and receive email, and generally access the Internet. Because ISPs handle large volumes of inbound modem calls, ISPs are intensive users of telecommunications services. Many of Core's ISP customers are small to medium-sized businesses that are based here in Pennsylvania. Core also offers services to voice-over-Internet protocol (VOIP) providers, which similarly handle large call volumes and are intensive users of telecommunications services. VOIP providers are a highly varied bunch, including nationwide consumer-oriented companies (like Vonage) as well as small, independent businesses called "integrators" that focus on providing specialized VOIP systems to other businesses.

Q. WHAT TYPES OF CONSUMERS USE DIAL-UP ISP SERVICES?

A. Consumers who do not utilize broadband connections. Dial-up ISPs give these consumers access to the Internet. This is necessary because people in rural areas may not have access to broadband connections. Dial-up ISPs may also serve as a low-cost alternative for consumers who are not "heavy" internet users but still want access. The price to the consumer of dial-up ISP service ranges from $5 to $15 per month, whereas the price for a broadband connection (such as DSL or cable modem) starts around $40. For many consumers, dial-up ISP may be their preferred option to have Internet access and Core facilitates the ability of these consumers to have this access by enabling traditional landline telephone calls to reach the ISPs.

Q. PLEASE DESCRIBE THE RESPONDENTS AND THEIR OPERATIONS GENERALLY?

A. The individual respondents are AT&T Communications of Pennsylvania, LLC, and TCG Pittsburgh, Inc., both of which are based in New Jersey. Both Respondents are certificated by the Commission as CLECs and IXCs in Pennsylvania. It is my understanding that AT&T Communications of Pennsylvania, LLC operates mainly as an IXC whereas TCG Pittsburgh, Inc. operates primarily as a CLEC. At one time, TCG Pittsburgh, Inc. was one of the biggest CLECs operating in Pennsylvania, with a large base of so-called "UNE-P" residential customers as well as small business customers and some dial-up ISP customers. Respondents are wholly-owned subsidiaries of AT&T Corporation, also based in New Jersey. AT&T Corporation is the nation's largest provider of telecommunications services and a Fortune 5 company. In its "home region" of the South and the Midwest, AT&T affiliates are the dominant incumbent LEC in each state, similar to the stature of Verizon in Pennsylvania. But in Pennsylvania and other Northeast states, AT&T affiliates are for the most part CLECs and IXCs. From this point forward, I will refer to respondents collectively as "AT&T."

Q. WHY ARE CORE'S SERVICES NECESSARY FOR AT&T CUSTOMERS AND BENEFICIAL TO AT&T?

A. Because Core enables the AT&T customer to complete his or her call to the ISP, which in turn increases the utility of the AT&T customer's local phone service. Without Core's provisioning of telecommunications services (i.e. termination of the call, and delivery to the ISP), these customers would not have dial-up Internet access to their ISP, and their ability to select among a variety of independent ISPs would be limited or nonexistent.

AT&T benefits because Core's services enable the AT&T customer to utilize AT&T's telecommunications service in the manner he or she prefers (i.e. to call an ISP). Some AT&T customers may order a second line in whole or in part for dial access. The problem in this case is that AT&T's customers are compensating AT&T for the use of its local exchange services, but AT&T is refusing to compensate Core for completing the calls originated by those AT&T customers.

Q. PLEASE DESCRIBE THE TRAFFIC AT ISSUE IN THIS CASE?

A. First, the AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that originate and terminate in the same state, in this case Pennsylvania. 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. If both numbers are associated with rate centers located in the same state, then the call is intrastate. But if one number is associated with a rate center in state A, and the other number is tied to a rate center in state B, the call is interstate. AT&T has sent Core some interstate traffic, Core has invoiced AT&T for this traffic pursuant to its FCC interstate access tariff, and AT&T has paid these invoices substantially without dispute. So the only traffic at issue in this case is intrastate.

The AT&T Indirect Traffic further consists of locally dialed calls placed by AT&T's local service customers in order to reach Core's customers. 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 competitive LECs (like AT&T and Core). Locally dialed calls are placed by entering a ten digit telephone number (NPA-NXX-XXXX) into the telephone or modem or other device placing the call. Locally dialed calls are usually distinguished from "long distance" or "toll" calls for which the NPA-NXX of the calling and called parties are not associated with a common local calling area, and which are placed by dialing an eleven digit number (1+NPA-NXX-XXXX). From the consumer's point of view, 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." This distinction is eroding somewhat as LECs increasingly provide "all you can eat" packages on a flat-rate basis, similar to most wireless plans.

Q. HOW MUCH TRAFFIC HAS AT&T SENT CORE FOR TERMINATION?

A. The total volume Core has terminated on behalf of AT&T is significant, and constitutes a substantial use of Core's network. From June, 2004 through September, 2009, AT&T end users using the TCG Pittsburgh network (CIC 0292) originated 406,102,334 minutes of use for termination on Core's network, for which AT&T has compensated Core exactly $0.00. *See*, Exhibit BLM-1, at Tab 1 (Chart of Minutes of Use & Amounts in Dispute). This total does not include additional traffic originated under AT&T of Pennsylvania CIC 0288, for which AT&T has compensated Core. Also of note, the monthly volume of AT&T Indirect Traffic terminating on Core's network has diminished greatly over time. In June, 2004, the volume was 2,631,231 minutes of use, rising to 18,933,107 minutes in May, 2006. But between June, 2006 and December, 2008 it fell to just 17,163 minutes, the level at which it has remained ever since.

Q. HOW DOES AT&T INTERCONNECT WITH CORE IN ORDER TO DELIVER THE AT&T INDIRECT TRAFFIC FOR TERMINATION?

A. AT&T does not directly interconnect with Core and other CLECs, rather it uses the tandem switch network of Verizon Pennsylvania, Inc. ("Verizon") to interconnect indirectly with Core and others. *See*, Exhibit BLM-2, at **Tab 2** (Diagram of Indirect Interconnection). Given the large number of CLECs, wireless carriers, and rural incumbent LECs that exist, using the Verizon tandems for indirect interconnection can be a reasonable and economically efficient option. Unfortunately, in this case, it appears AT&T is using the tandems in part as a means to help escape its payment obligations to Core. That is, were AT&T to approach Core to request direct interconnection to Core's network, Core would be in a good position to demand that AT&T compensate Core for the use of its network. Instead, AT&T continues to pump its traffic into the Verizon tandems, heedless of who terminates the calls, and forswears any obligation to pay Core, the carrier that ultimately terminates the calls.

Q. WHAT TYPE OF ARRANGEMENT DOES AT&T HAVE WITH VERIZON FOR VERIZON TO TRANSIT THE AT&T INDIRECT TRAFFIC TO CORE?

A. AT&T has an interconnection agreement ("ICA") with Verizon Pennsylvania, Inc. ("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. *See*, Exhibit BLM-2, at **Tab 2** (Diagram of Indirect Interconnection). So, AT&T pays some intercarrier compensation on all of the AT&T Indirect Traffic—but it only pays Verizon for the transit function. Meanwhile, AT&T refuses to pay Core for the termination function.

Notably, AT&T's ICA with Verizon reveals a presumption that AT&T will ultimately compensate carriers like Core for the termination of AT&T indirect traffic that transits Verizon's tandems. The ICA between TCG Pittsburgh, Inc. and Verizon Pennsylvania, Inc. states, at Section 7.3:

> 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.

While it is true that Core can not enforce an ICA between AT&T and Verizon, this ICA language does show that AT&T has acknowledged its responsibility to pay CLECs, like Core, for indirect traffic regardless of the positions it is taking here.

Q. IF AT&T IS SENDING TRAFFIC FOR CORE TO TERMINATE AND AT&T REFUSES TO PAY, CAN CORE REFUSE TO TERMINATE THE TRAFFIC?

A. No. Both federal and state law make absolutely clear that Core must terminate all the calls it receives, and if it is not compensated for that termination service, Core's only choice is to seek payment through the regulatory complaint process. As a practical matter, this significantly diminishes Core's bargaining power because AT&T knows it can send the traffic and Core has to terminate it regardless of whether or not AT&T pays anything for that service. While I understand that regulators are concerned with ensuring that telecommunications calls are not stopped because of intercarrier compensation disputes, the result of this policy is to take away the only effective bargaining tool that Core has in this situation, that is, refusal to provide the service. This puts Core in the untenable position of either giving away its services for free (which it cannot sustain economically over the long-term) or engaging in expensive litigation. Either way, AT&T has all the bargaining power in this scenario.

Q. PLEASE EXPLAIN HOW YOU FIRST BECAME AWARE OF THE AT&T INDIRECT TRAFFIC?

A. Core receives so-called Carrier Access Billing System ("CABS") or "Category 11" records from Verizon on a regular basis. For many years, these records were delivered by mail in magnetic tape format. More recently Verizon has made them available via a website-based format. The CABS records are generated by Verizon's tandem switches and their purpose is to provide Core with information about calls that pass through the tandems on their way to Core's network, so that Core can bill the carriers whose end users originated the calls. 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 "minutes of use."

It is important to note that the Verizon tandems do not create CABS records for the vast majority of the traffic that passes from the Verizon tandems to Core. That is because the vast majority of that traffic is locally dialed traffic from Verizon's own end users to Core's end users. Since Core does not need CABS records to identify Verizon-originated traffic, or the call duration, Core simply bills all of these non-CABS MOUs to Verizon, and Verizon pays these bills routinely.

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.

At that time, Core did not know about, and had no reason to be aware of, the substantial volumes of telecommunications originated by AT&T and delivered to Core via Verizon's tandem switches. Since Core's customers were traditionally limited to dial-up ISPs, and this traffic 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. Also, calls to dial-up ISPs are almost always locally-dialed calls, not toll calls, and CABS records generally pertain only to toll calls.

When Core began its examination of the Verizon CABS records, it expected to find only trace amounts of toll calls recorded there. Instead, Core found that AT&T, since at least 2004, has been sending Core substantial volumes of traffic. While this AT&T Indirect Traffic may be small in comparison to the volume of traffic Core receives from Verizon directly, it is substantial nonetheless. Once Core found evidence of AT&T and other CLEC indirect traffic, we 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 we progressed farther back in time with reading the tapes, we began to invoice AT&T for the AT&T Indirect Traffic.

Q. DID AT&T EVER CONTACT CORE REGARDING THE AT&T INDIRECT TRAFFIC?

A. No. Prior to Core's analysis of the Verizon CABS records, AT&T never notified Core that it was sending the AT&T Indirect Traffic to Core for termination to Core's end users. As a result, other than reading the magnetic tapes which Core reasonably believed contained only trace usage, Core had no way of knowing that the Respondents were sending the AT&T Indirect Traffic to Core for many years. Yet the CABS records clearly demonstrate the opposite—that AT&T had been sending the AT&T Indirect Traffic to Core for years.

Q. WHEN DID CORE FIRST BILL AT&T FOR THE AT&T INDIRECT TRAFFIC?

A. In January, 2008, Core sent its initial invoice to AT&T, for the AT&T Indirect Traffic terminated by Core in December, 2007. In March, 2008, Core invoiced AT&T for the remainder of CY 2007. Core then billed AT&T for CY 2004-2006 in January, 2009, and for CY 2008 in May, 2009. As of the date of this testimony, Core has submitted intrastate switched access service bills to the Respondents for the termination of the AT&T Indirect Traffic for the periods from June, 2004 through September, 2009, including interstate minutes pursuant to Core's interstate switched access FCC Tariff No. 1 and intrastate minutes in accordance with Core's intrastate switched access Pa. PUC Tariff No. 4. Core's invoices cover both CIC 0292 traffic (TCG Pittsburgh, Inc.) and CIC 0288 traffic (AT&T Communications of Pennsylvania, LLC). Currently, Core bills AT&T each month for the prior month's usage. For example, Core billed AT&T on November 10, 2009 for AT&T usage in October, 2009.

Q. HOW DID AT&T RESPOND TO CORE'S INVOICES?

A. AT&T has paid Core in full for the interstate minutes as well as a very small portion of the intrastate minutes Core billed. In so doing, AT&T has paid all outstanding charges associated with CIC 0288, with the exception of $11,466.88 in interest charges. However, AT&T continues in its refusal to pay anything at all for the aforementioned 406,102,334 minutes originated under CIC 0292, almost all of which is intrastate traffic. The total amount of compensation due for this intrastate traffic is currently $5,997,637.40. *See*, Exhibit BLM-1, at **Tab 1** (Chart of Minutes of Use & Amounts in Dispute).

Upon receiving the initial round of invoices in early 2008, AT&T disputed various amounts by means of a form letter which lists various dispute reasons, some of which are checked, and some of which are left unchecked. For example, with respect to the CIC 0288 traffic and some other traffic in Pennsylvania and other states, AT&T initially checked a box that states "AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to discuss. Please contact us at your earliest convenience." *See*, Exhibit BLM-3, at **Tab 3** (AT&T Form Letter). This was odd because intrastate switched access is usually billed pursuant to tariff, not agreement. Specifically with respect to CIC 0292 traffic, the only response AT&T made initially was in the form of 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." *See*, Exhibit BLM-4, at **Tab 4** (Email from Lynda Eyerman to Stephanie Anderson).

Q. WHAT STEPS DID CORE TAKE TO RESOLVE THE OPEN BALANCE FOR CIC 0292?

A. We took AT&T up on its "invitation to discuss" and got in contact with Mark Cammarota, whose title is "Lead Carrier Relations—National Access Management." Mr. Cammarota forwarded Core a draft "Confidentiality and Pre-Negotiation Agreement" ("NDA") which was intended to support confidential negotiations towards an agreement on switched access payments. Both Core and AT&T executed this agreement in June, 2008. Once that was finalized, we began in earnest to pursue an agreement with AT&T whereby it would pay the open balance due for the traffic Core had terminated. At that time, AT&T was disputing not only the CIC 0292 traffic, but a lot of the CIC 0288 traffic as well. We attempted to reach Mr. Cammarota to schedule one or more negotiation sessions.

We feared that AT&T was using the pretext of "negotiations" on a "switched access agreement" to delay or avoid making switched access payments. We were also concerned that AT&T's intended to starve us into agreeing to charge rates lower than those listed in our tariffs. Nevertheless, we persisted to attempt good faith negotiations, since the only alternatives were (1) to receive little or no compensation; or (2) to engage in costly, time-consuming litigation. This is a common problem in the telecommunications industry. *See*, Exhibit BLM-5, at **Tab 5** (Hypercube Comments to FCC). We also understood that AT&T disputed, or intended to dispute, the CIC 0292 traffic on the basis that it is "local," i.e., dialed on a local, NPA-NXX-XXXX basis. We intended to discuss a traffic exchange agreement ("TEA") with AT&T to cover this locally-dialed traffic.

Q. DID AT&T NEGOTIATE WITH CORE?

A. No, certainly not in good faith. Shortly after the parties signed the NDA, Mr. Cammarota sent Core an email stating that the CIC 0292 traffic was "primarily all local traffic and is bill and keep" and offering to "forward a draft" of a "standard switched access agreement... we use with CLEC's." *See*, Exhibit BLM-6, at **Tab 6** (Email from Mark Cammarota to Stephanie Anderson). I personally had two or three very brief calls with Mr. Cammarota, but was never able to engage in a discussion about AT&T's continuing refusal to pay for any of the CIC 0292 traffic. Then, inexplicably, Mr. Cammarota simply disappeared. Between roughly, August, 2008 and March, 2009, I attempted to reach Mr. Cammarota at least twenty (20) times. He never responded. Finally, I wrote a formal demand letter to Mr. Cammarota, with a copy to AT&T's local counsel, explaining that

Core would need to initiate litigation if AT&T continued in its refusal to talk, much less compensate Core for the use of its network. *See*, Exhibit BLM-7, at **Tab 7** (Letter from Bret Mingo to Mark Cammarota).

Within days of this formal letter, Mr. Cammarota resurfaced, and the parties conducted two telephonic settlement conferences, one on May 7 and one on May 11, 2009. Core proposed to rebill substantially all of the CIC 0292 traffic—past, present, and future—at the Commission-approved TELRIC rate for traffic termination. The TELRIC rate is a cost-based rate that is calculated using the forward-looking, incremental costs associated with terminating traffic. The Commission promulgated these rates pursuant to the authority delegated to all state commissions by sections 251(b)(5) and 252(d)(2) of the federal Communications Act. The Commission's TELRIC termination rate ($0.00267) contains no subsidies, and is approximately one-fifth the switched access rate contained in the tariffs of Verizon Pennsylvania, Inc. and mirroring LECs like Core ($0.014). I felt we had made a bold and hopefully decisive concession, by agreeing to replace our tariffed switched access rates with cost-based rates, not only for future usage, but for past usage as well. However, AT&T denied our proposal, and declined to put forth any proposal of its own. That left Core with no option but to seek to enforce its right to payment for services through litigation.

Q. WHAT IS THE CURRENT STATE OF AFFAIRS AND HOW DOES THAT EFFECT CORE'S OPERATIONS?

A. 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. As of the filing of this testimony, AT&T continues to send significant amounts of indirect traffic to Core for termination to Core's end users, while adamantly refusing to pay Core any compensation for this use of Core's network. AT&T also continues in its refusal to enter into a reciprocal compensation arrangement with Core. Thus, it appears that Core will continue to incur significant expense to terminate AT&T Indirect Traffic on a going-forward basis. As long as AT&T refuses to pay for this service, Core remains unable to recover a substantial portion of its network costs. This limits our ability to maintain the current network, let alone upgrade and expand the network. Indeed, coupled with similar refusals by other CLECs and IXCs to pay lawfully billed amounts, AT&T's refusal to compensate Core anything at all, after using Core's network to the tune of 406,102,334 minutes of use, threatens Core's economic viability. This, in turn, will impact the ability of Core to provide telecommunications services to ISPs or expand into new lines of business. As I stated previously, Core's provisioning of these services enable many consumers to have access to the Internet. While I recognize that there is a federal policy push to bring broadband to all households, the reality is that dial-up ISPs today give a significant portion of consumers an important function that carriers like AT&T should be able to jeopardize because simply because they refuse to pay for the services they use.

Q. WHAT IS THE GENERAL SCHEME FOR COMPENSATION IN THE TELECOMMUNICATIONS INDUSTRY?

A. According to the FCC, "under the existing regimes, the calling party's carrier, whether LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the call. Thus, as a general matter, our existing regimes are based on a "calling-party-network-pays" (CPNP) approach to compensation." Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33 (Released: March 3, 2005), 20 F.C.C.R. 4685, 20 FCC Rcd. 4685, 2005 WL 495087 (F.C.C.)("*FNPRM*"), at ¶ 17. A CPNP regime can be distinguished from a "bill-and-keep" regime, in which "neither of the interconnecting networks charges the other network for terminating traffic that originates on the other carrier's network. Rather, "each network recovers from its own end users the cost of both originating traffic delivered to the other network, and terminating traffic received from the other network." *FNPRM*, at 37.

Q. WHAT IS THE POLICY BEHIND INTERCARRIER COMPENSATION?

A. The policy is to ensure that carriers are compensated for the use of their networks by the carriers whose end users place calls to the terminating carriers' networks and thus cause the costs of terminating those calls. The FCC has found that "carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs." First Report & Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325 (Released: August 8, 1996)("*Local Competition Order*"), at ¶ 1112. For this reason, the FCC adopted a cost-based reciprocal compensation regime in lieu of a bill-and-keep regime.

Q. WHAT ARE THE VARIOUS TYPES OF INTERCARRIER COMPENSATION?

A. The two primary categories of intercarrier compensation are switched access and reciprocal compensation. "Federal and state access charge rules govern the payments that interexchange carriers (IXCs) and commercial mobile radio service (CMRS) providers make to local exchange carriers (LECs) that originate and terminate long-distance calls, while the reciprocal compensation rules established under section 251(b)(5) of the Act generally govern the compensation between telecommunications carriers for the transport and termination of calls not subject to access charges." *FNPRM*, at ¶ 5. In the access regime, "[s]witching costs were recovered through per-minute charges assessed on

IXCs," and are "calculated based on the average embedded cost of providing such services." *FNPRM*, at ¶ 6.

Under the reciprocal compensation regime, "Commission rules require the calling party's LEC to compensate the called party's LEC for the additional costs associated with transporting a call subject to section 251(b)(5) from the carriers' interconnection point to the called party's end office, and for the additional costs of terminating the call to the called party. The rules further require that the charges for both transport and termination must be set at forward-looking economic cost. The Commission concluded that the "additional cost" standard of section 252(d)(2) permits the use of the same Total Element Long Run Incremental Cost (TELRIC) standard that it established for interconnection and unbundled elements. The TELRIC cost standard establishes prices based on the average cost of providing a particular function." *FNPRM*, at ¶ 13.

The line between access and reciprocal compensation can be blurry in practice. The simplest formulation is that reciprocal compensation applies to all traffic except traffic that is covered by the switched access regime. This formulation is supported by the Act, which provides that all "telecommunications" (i.e., traffic) falls within the reciprocal compensation regime, unless it constitutes "exchange access" which is specifically excluded from reciprocal compensation. 47 U.S.C. § 251(b)(5) and (g). Section 251(b)(5) establishes the application of reciprocal compensation to all telecommunications, and section 251(g) provides an exclusion for the access regime, which predated the Act. In the FCC's words, "traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing "receipt of compensation." Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, 2008 WL 4821547 (F.C.C.)(Released: November 5, 2008)("*Order on Mandamus*"), at ¶ 16.

Notably, the FCC **used to define reciprocal compensation as confined to "local" traffic**, as AT&T continues to argue here. But the FCC has since reconsidered and rejected the "local" definition of reciprocal compensation. The FCC stated in an order released last year that "in the Local Competition First Report and Order, the Commission found that section 251(b)(5) applies only to local traffic," and some commenters continue to press for such an interpretation… [H]owever, the Commission, in the ISP Remand Order, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that "local" is not a term used in section 251(b)(5)… [W]e find that the better view is that section 251(b)(5) is not limited to local traffic.." *Order on Mandamus*, at ¶ 7.

Q. HOW DO CARRIERS KNOW THE RATE OR RATES AT WHICH TO BILL ONE ANOTHER?

A. Carriers generally bill one another either by tariff or by agreement. Where there is a tariff but no agreement, the tariff governs. Where there is both a tariff and an agreement, the agreement should govern because it reflects a particular relationship between two specific carriers, whereas a tariff has general application. Access—whether interstate or intrastate—is generally billed pursuant to a tariff filed with and approved by the FCC or a state commission, such as Core's FCC Tariff No. 1 and Pa. P.U.C. Tariff No. 4. Reciprocal compensation can also be billed pursuant to a tariff, but more typically pursuant to an agreement made pursuant to section 251(b)(5) of the Act. Under this section, all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." While reciprocal compensation should ultimately govern intercarrier compensation between LECs, unless and until an "arrangement[]" is formed, the access regime may continue to apply to the relationship between specific LECs.

Q. CAN ACCESS TARIFFS APPLY TO LOCALLY-DIALED TRAFFIC LIKE THE AT&T INDIRECT TRAFFIC?

A. Yes. I am aware that AT&T has argued that Core's Pa. PUC Tariff No. 4 can only apply to "non-local, or toll, calls." AT&T's Amended Answer, at p. 5. At the outset, I should point out that AT&T can not decisively state whether or not the CIC 0292 traffic was toll or locally dialed. In discovery, we asked AT&T to describe whether or not its end users were billed a long-distance or toll charge in connection with their placing calls terminating to Core. We also asked whether their end users used a local, ten-digit, calling pattern, or a long-distance, eleven-digit pattern, when placing calls terminating to Core. A straight answer to either question would have established AT&T's assertion that the CIC 0292 traffic is not toll traffic. But instead, AT&T objected to and declined the first question whatsoever, and it provided a generic, essentially non-responsive answer to the second. *See*, Exhibit BLM- 8, **Tab 8** (AT&T Responses to Core Interrogatory Nos. III-3 and III-4.

In any event, while locally-dialed calls should ultimately be covered by a reciprocal compensation arrangement, such as a traffic exchange agreement ("TEA") between two CLECs, there are instances in which an access tariff can and does apply to "local" traffic, including situations where there is no TEA in place. According to the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines published by the

Alliance for Telecom Industry Solutions ("ATIS")(and produced by AT&T in discovery), "[a]ccess and interconnection services may be billed as usage-sensitive and flat-rated charges, which may include intraLATA non-subscribed toll, wireless and local services." *See*, Exhibit BLM-1, at Exhibit BLM-9, at **Tab 9** (Excerpts from MECAB Guidelines), at 1-1. Similarly, the guidelines state that "[t]he term access may encompass Interstate, Intrastate, and Local." *See id.*, at unnumbered page.

In the case of locally-dialed wireless calls, LECs' intrastate access tariffs applied for many years, both in Pennsylvania and elsewhere. For example, in the background portion of its decision in the landmark ICA arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., the Commission noted that "[p]rior to April 2002, ALLTEL was paid the rate of approximately $0.03 (3 cents) per minute with respect to indirect traffic that Verizon Communications terminated on its network. This rate is the intrastate access rate of ALLTEL and included all wireless traffic originated by Verizon Wireless." Indeed, Verizon Wireless' entire goal in that proceeding was to replace the existing access regime, which applied to its locally-dialed wireless traffic, with a reciprocal compensation regime that would produce a much lower termination rate. Core would welcome such a result in this case, although it is AT&T that should logically be seeking to replace access with reciprocal compensation.

In a case involving rural LECs that were charging wireless carriers at intrastate access rates for indirect, locally-dialed traffic, the Alabama Public Service Commission permitted the access rates to apply until the wireless carriers stepped forth and negotiated a reciprocal compensation arrangement.

The Alabama Commission described the problem as follows:

One of the fundamental principles of utility law is the notion that utilities have the constitutional right to a fair and reasonable return on their investment. In fact, this Commission has a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question. It is that fundamental concept that drives our decision in this cause.

It is undisputed in the foregoing pleadings that the Wireless Carriers are indirectly terminating CMRS traffic on the networks of the Rural Carriers over common facilities operated by BellSouth. It is also undisputed that the Rural LECs incur costs in terminating such traffic. Perhaps of even more interest is the fact that the Wireless Carriers have not challenged the general claim of the Rural LECs that a substantial portion of the indirect CMRS traffic at issue is being terminated by the Rural LECs without compensation at present. *Alabama Order*, at *13.

The Alabama Commission ultimately ruled:

Based on the foregoing, we find that this Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act's provisions. We find that strict enforcement of the tariffs in question with respect to indirect CMRS traffic would ensure that the Rural LECs receive compensation for the use of their respective networks until such time as the provisions of the Telecom Act regarding compensation for the traffic in question are implemented by the Wireless Carriers.

We note that federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Telecom Act. In this case, it is not the Commission's intention to supplant or circumvent the provisions of the Telecom Act which would likely address the issues raised in this proceeding. We are merely seeking to provide a justified measure of relief for what we see as a void in the Telecom Act's coverage by virtue of the status of the parties to this dispute. *Id.*, at *15.

The problems the Alabama Commission identified are the same problems that lead to the dispute in this case. AT&T is using a "void in the Telecom Act's coverage" to claim exemption from the fundamental, bedrock principle of reciprocal compensation. This is because, just as the Act did not permit incumbent LECs in the Alabama case to seek compulsory arbitration of an ICA with wireless carriers, so too in this case, the Act does not permit a CLEC like Core to seek arbitration with another CLEC like AT&T.

Q. DOES CORE'S SWITCHED ACCESS TARIFF, PAPUC TARIFF NO. 4, APPLY TO THE AT&T INDIRECT TRAFFIC?

A. Yes. Core's Pa. P.U.C. Tariff No. 4 requires compensation for the AT&T Indirect traffic at the filed intrastate switched access rate, which is $0.014/MOU. This is a case of straightforward application of tariffed rates to tariffed services. Core's Pa. P.U.C. Tariff No. 4 sets forth the rates, terms, and conditions for the provision of intrastate switched access service in Pennsylvania. Core's rates for switched access services, as set forth in the Tariff, are just and reasonable, and have been approved by the Commission. Core's Tariff defines "Switched Access Service" as: "[a]ccess to the switched network of an **Exchange Carrier** for the purpose of originating or **terminating communications.** Switched Access is available to **carriers** as defined in this rate sheet." Tariff, at Section 1 (Definitions)(emphasis added). The Tariff defines the term "Exchange Carrier" as: "[a]ny individual, partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service." *Id.* And the Tariff defines the term "Carrier" as an "Interexchange Carrier or Exchange Carrier." *Id.* Core's Tariff further states that "Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises." Tariff, § 4.1. The Tariff defines the term "Customer" as: "[t]he person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations. The Customer could be an interexchange carrier, a wireless provider, **or any other service provider.**" Tariff, at Section 1 (Definitions)(emphasis added).

Finally, Core's Tariff defines the term "Constructive Order" as the "**[d]elivery of calls** to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein." *Id.* (emphasis added).

Core's Tariff clearly applies to the traffic AT&T sends Core. AT&T clearly obtained Switched Access Service from Core, as defined by the Tariff i.e., AT&T clearly obtained "access to the Switched Network of Core for the purpose of originating or terminating Communications." Core is clearly an "Exchange Carrier" as defined by the Tariff; and AT&T is clearly a "carrier." AT&T is also clearly a "Customer" of Core for Switched Access Service, as defined by the Tariff. By delivering calls to Core's end users, over Core's switched local exchange services, AT&T "Constructively Ordered" switched access services from Core, under the plain terms of the Tariff. Accordingly, under Core's Tariff, AT&T is responsible for the payment of all applicable charges for Core's Switched Access Service. Core billed AT&T in accordance with its rate sheet for terminating switched access, as set forth in the Tariff. AT&T has clearly refused to pay Core's lawfully invoiced terminating switched access charges, in violation of the Tariff.

Q. SHOULD THERE BE A RECIPROCAL COMPENSATION ARRANGEMENT TO COVER THE AT&T INDIRECT TRAFFIC?

A. There can be no question that AT&T and Core should form a reciprocal compensation arrangement for the AT&T Indirect Traffic. As I stated earlier in this testimony, Core proposed that the parties settle all outstanding, current and future amounts due at the Commission-approved TELRIC rate, which is, again approximately one-fifth the switched access rate in Core's tariff. AT&T rejected that proposal, and negotiations stalled when AT&T declined to make a counterproposal. In fact, during discovery, AT&T made it quite clear that it does not, as a matter of company policy, enter into reciprocal compensation arrangements with other CLECs. *See*, Exhibit BLM-10, at **Tab 10** (AT&T Response to Core Interrogatory I-3). But the Act does require that all LECs—including AT&T and Core—have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). While we have made no progress so far in our attempts to negotiate an arrangement with AT&T, we will take one more stab at it. By way of this testimony, Core hereby offers to enter into the attached Traffic Exchange and Billing Agreement ("TEBA") that will cover all locally-dialed traffic exchanged between AT&T and Core, and will apply the Commission-approved TELRIC rate to such traffic. *See*, Exhibit BLM-11, at **Tab 11** (Traffic Exchange & Billing Agreement).

Q. IS "BILL-AND-KEEP" APPLICABLE TO THE AT&T INDIRECT TRAFFIC?

A. No. I am aware that AT&T has asked the Commission to apply bill-and-keep to the AT&T Indirect Traffic in this case. But bill-and-keep, meaning an arrangement in which carriers exchange traffic but do not bill for termination, only applies in situations where the traffic flows between two carriers is "roughly balanced." *See*, Exhibit BLM-12, at **Tab 12** (FCC Rule on bill-and-keep). The FCC rule states that "[a] state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is **roughly balanced** with the amount of telecommunications traffic flowing in the opposite direction, and **is expected to remain so**..." 47 C.F.R. § 51.713. In the case of the AT&T Indirect Traffic, the flow of traffic between AT&T and Core is not "roughly balanced." That is, the traffic flows from AT&T to Core, but not from Core to AT&T. Again, this is because AT&T end users are placing calls to Core's ISP customers.

AT&T has also claimed that the Commission should apply bill-and-keep in this case because it is "an industry standard practice." AT&T Prehearing Memorandum, at 3. And, AT&T has produced numerous written agreements it has with CLECs other than Core, which specifically provide for bill-and-keep on "local traffic." *See*, Exhibit BLM-13, at **Tab 13** (Excerpts from AT&T Response to Core Request for Production No. 3). To be clear, there is no such written agreement between Core and AT&T. Rather, AT&T is claiming bill-and-keep applies to Core precisely because there is no written agreement. *See*, AT&T's Amended Answer, at 2 and 5. If anything, these very explicit, written agreements AT&T has with other CLECs undermine AT&T's argument that the parties operated under a bill-and-keep arrangement **without** first having a written agreement. *Id.* Indeed, the existence of these written agreement simply supports the fact that bill-and-keep can not be imposed without a "meeting of the minds" between two carriers.

In addition, the fact that AT&T negotiated—or forced—other CLECs to enter into a bill-and-keep arrangement for "local traffic" has no bearing on Core's rights to compensation. We can not know the trade-offs that were made across the entirety of these agreements, and which resulted in the inclusion of the bill-and-keep language. Indeed, AT&T produced only the portions of these agreements that discuss bill-and-keep. We can not even tell what type of agreements these are, since the title has been redacted as well. The bottom line is that Core's rights to compensation can not, and were not, waived by the voluntary agreements formed between AT&T and other CLECs. Moreover, in the absence of a written agreement, AT&T does not have the right to dictate what "payment" terms apply – particularly when it chooses terms where Core is uncompensated for a service nobody denies it performs.

Q. HAS AT&T ITSELF RECOGNIZED THAT BILL-AND-KEEP CAN BE IMPOSED ONLY WHERE TRAFFIC FLOWS ARE ROUGHLY BALANCED?

A. Yes. For example, in a filing made by AT&T affiliate AT&T Wisconsin at the U.S. District Court for the Western District of Wisconsin, AT&T stated:

> When a local call originates on the network of one carrier and terminates on the network of another, the originating carrier is typically obliged to compensate the terminating carrier for the cost of transporting and terminating the call on its network. Such compensation obligations are referred to as "reciprocal compensation," because each carrier is obliged to pay the other for traffic terminated by the other. The 1996 Act requires that carriers enter into reciprocal compensation arrangements (47 U.S.C. § 251(b)(5)), but permits the arrangement to be "bill-and-keep," where no payments are exchanged (*id.* § 252(d)(2)(B)(1)). Carriers typically agree to bill-and-keep when the amounts of traffic each expects to terminate for the other are roughly balanced, so that reciprocal payments, if made, would be approximately equal. *See*, Exhibit BLM-14, at **Tab 14** (excerpt from the Complaint for Declaratory, Injunctive and Other Relief of AT&T Wisconsin).

Q. IS THE ISP REMAND ORDER APPLICABLE TO THE AT&T INDIRECT TRAFFIC?

A. No. AT&T states in its Answer that Core's Complaint is "not consistent with the FCC's *ISP Remand Order*." AT&T's Amended Answer, at 4. But the *ISP Remand Order* does not apply to this case because both AT&T and Core are CLECs. The *ISP Remand Order* only applies to ISP-bound traffic exchanged between incumbent LECs, like Verizon, and CLECs. AT&T has already made this argument in another forum, and lost. In a complaint case filed by CLEC Pac-West Telecom against AT&T Communications of California, the California Public Utilities Commission ruled that, as a CLEC, AT&T could not invoke the *ISP Remand Order's* interim pricing regime in order to avoid making payments due under Pac-West's intrastate termination tariff. With respect to AT&T's attempt to invoke the interim pricing regime, the California Commission found:

> [W]e believe that if the FCC had intended the interim compensation plan to cover exchanges of ISP-bound traffic between CLECs, the FCC would have explicitly addressed the obligations of a CLEC that wished to invoke the New Markets Rule. The fact that the FCC remained silent on this question, coupled with the repeated references in £ 89 to ILECs, supports Pac-West's argument that the interim compensation plan (including the New Markets Rule of £ 81) is intended to apply only to exchanges of ISP-bound traffic between ILECs and CLECs. Decision, *Pac-West Telecomm, Inc. v. AT& T Communications of California, Inc.*, Cal. P.U.C. Case 04-10-024, Decision 06-06-055, 2006 WL 1910202 (Cal.P.U.C.), at *11 (June 29 2006).

Accordingly, the California Commission found that AT&T was liable to pay Pac-West at the rate set forth in its intrastate traffic termination tariff,[1] which is exactly the result Core seeks in this case.

Q. HOW WOULD YOU SUMMARIZE THE RESPECTIVE POSITIONS OF AT&T AND CORE IN THIS CASE?

A. In the simplest terms, Core believes that its intrastate switched access tariff should apply to all the intrastate traffic it terminates for other CLECs in Pennsylvania, including both toll and locally-dialed traffic, unless and until individual CLECs step forward and enter into TEAs to implement section 251(b)(5). Reciprocal compensation begins where the intrastate access regime ends, and in this case, Core's tariff plainly covers all intrastate traffic. That is not to say reciprocal compensation can not apply. Indeed, should any carrier like AT&T choose to invoke its right to reciprocal compensation under the Act, Core is willing and ready to enter into a reciprocal compensation arrangement, such as our TEBA proposal. However, unless and until a carrier steps forth to invoke reciprocal compensation, the preexisting intrastate access regime applies, as embodied in the tariffs

[1] *Id.*, at *15.

of Core and other carriers. The only logical alternative to Core's position is that section 251(b)(5) reciprocal compensation preempted the intrastate access regime from its very enactment with the Telecommunications Act of 1996. In that case, reciprocal compensation applied automatically from the signing of the Act forward, and LECs' obligation to pay reciprocal compensation has been in place all this time.

AT&T's position is that neither the intrastate access regime, nor the reciprocal compensation regime, has ever applied, or can ever apply, to this traffic. AT&T claims that Core entered into an implicit bill-and-keep arrangement with AT&T, and it argues that without an explicit agreement, only bill-and-keep could apply. But bill-and-keep is simply a limited type of reciprocal compensation that applies where traffic is roughly balanced. Bill-and-keep is not a concept that is independent from reciprocal compensation; nor is bill-and-keep a third type intercarrier compensation regime like access or reciprocal compensation. In sum, bill-and-keep is not a magic wand that can erase AT&T's responsibility to pay for 406,102,334 MOUs that its customer originated, and which Core terminated in accordance with its tariffs and other applicable law.

Remedies

Q. PLEASE DESCRIBE GENERALLY HOW THE COMMISSION, IN CORE'S VIEW, SHOULD RESOLVE THIS CASE?

A. Core's request is that the Commission find that the plain language of Core's intrastate switched access tariff, Pa. P.U.C. Tariff No. 4, applies to the AT&T Indirect Traffic, and direct AT&T to pay all outstanding charges, plus interest as set forth in the Tariff. The Commission should further direct AT&T to enter into a TEA with Core to cover locally-dialed traffic going forward at the Commission-approved TELRIC rate.

In the event the Commission is not inclined to declare that Core's tariff applies here, Core's alternative request is to permit Core to rate all of the AT&T Indirect Traffic—past, present, and future—at the Commission-approved TELRIC termination rate, direct AT&T to pay that amount, and direct AT&T to enter a TEA. In essence, the TEA would, in this scenario, cover past, present, and future traffic—not just traffic going forward.

Core's second alternative request is that the Commission rely on fundamental principles of regulated utility cost recovery to arrive at a fair rate of compensation for Core's termination of the AT&T Indirect Traffic. At bottom, AT&T itself has done nothing but obfuscate application of a rate—any rate other than zero—to this traffic, and AT&T should not be permitted to benefit from its own obstanance. AT&T has benefited from the use of Core's facilities and AT&T is required to pay for this use. Any other result would constitute a takings of Core's property, that is, use of its network without any compensation, due to the rules which prevent Core from simply shutting down the AT&T Indirect Traffic.

Finally, Core requests that the Commission consider special measures to reprimand AT&T's conduct. It may be legitimate to haggle over the particular rate which should apply to a given set of traffic, such as the CIC 0292 AT&T Indirect Traffic. But to consistently deny that any rate applies to 406,102,334 MOUs is simply not good faith conduct. Without some sanction, an originating carrier like AT&T will always be tempted to simply deny payment. Should the terminating carrier sue, AT&T can then choose to settle, or drag out the litigation as long as possible, hoping the other party will simply give up. Therefore, Core respectfully requests that the Commission grant special relief in the form of civil penalties and the cost of Core's collection efforts, including attorney's fees in this case.

Q. WHAT POLICY REASONS WOULD SUPPORT COMMISSION APPLICATION OF CORE'S TARIFF TO THE AT&T INDIRECT TRAFFIC?

A. The problem in this case is that AT&T can send indirect traffic to other CLECs without any fear of cutoff. Moreover, CLECs cannot seek section 252 ICA arbitration with another CLEC, so AT&T is insulated from compulsory arbitration, as well. A terminating CLEC's only option in this scenario is to bring a formal complaint before the Commission after the fact, that is, after it has already terminated substantial amounts of indirect traffic. In these conditions, the easiest course for an originating carrier like AT&T is to do nothing, commit to nothing, and compel the terminating carrier to initiate litigation at its own expense. Of course, bringing a formal complaint is expensive, distracting, and the outcome can be uncertain.

Application of Core's Tariff would fill the perceived "regulatory void" which AT&T and other have seized upon to deny payment to terminating CLECs. Application of the relatively high intrastate switched access rate as a default rate would encourage originating carriers to come forth voluntarily to enter into TEAs with terminating LECs, and thereby gain the advantage of paying the lower, Commission-approved TELRIC rate. It would also eliminate regulatory uncertainty, the resulting disputes between carriers, and protracted and repetitive litigation that takes up valuable Commission resources. Finally, it would ensure that terminating LECs receive compensation for the use of their networks, even where the originating LEC may be unwilling to enter into a TEA.

CIC 0288

Q. WHAT ISSUES REMAIN WITH RESPECT TO THE CIC 0288 TRAFFIC?

A. Only the issue of interest. Shortly after the prehearing conference in this case, AT&T paid all of Core's outstanding charges for the intrastate AT&T Indirect Traffic originating under CIC 0288. Some of those charges had been outstanding since the early part of 2008. Core then sent AT&T an accounting of interest, or late payment, charges due Core pursuant to the terms of the Tariff. The total amount of interest due at that time was $11,466.88. Core has inquired several times about the status of this amount, which is now itself past due, but AT&T has never provided an official response. However, unless AT&T has some coherent objection, it should pay this outstanding interest immediately.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

List of Exhibits to Core St. No. 1

BLM-1	Chart of Minutes of Use & Amounts in Dispute
BLM-2	Diagram of Indirect Interconnection
BLM-3	AT&T Firm Letter
BLM-4	Email from Lynda Eyerman to Stephanie Anderson
BLM-5	Hypercube Comments to FCC
BLM-6	Email from Mark Cammarota to Stephanie Anderson
BLM-7	Letter from Bret Mingo to Mark Cammarota
BLM-8	AT&T Responses to Core Interrogatory Nos. III-3 and III-4
BLM-9	Excerpts from MECAB Guidelines
BLM-10	AT&T Response to Core Interrogatory I-3
BLM-11	Traffic Exchange and Billing Agreement
BLM-12	FCC Rule on Bill-and-Keep
BLM-13	Excerpts from AT&T Response to Core Request for Production #3
BLM-14	Excerpt from Complaint for Declaratory Injunctive and Other Relief of AT&T Wisconsin

BLM-1

BLM-1

CHART OF MINUTES OF USE AND AMOUNTS IN DISPUTE

[redacted]	Invoice #	Invoice Date	Usage Period	Intrastate MOUs	Intrastate Amt. Bille	Intrastate Amt. Paid
PA	7241	1/1/2009	Jun-04	2,631,231	$76,305.70	$0.00
	7242	1/1/2009	Jul-04	3,312,384	$96,059.14	$0.00
	7243	1/1/2009	Aug-04	3,802,696	$110,278.18	$0.00
	7244	1/1/2009	Sep-04	3,696,666	$107,203.31	$0.00
	7245	1/1/2009	Oct-04	3,908,670	$113,351.43	$0.00
	7246	1/1/2009	Nov-04	3,450,878	$100,075.46	$0.00
	7247	1/1/2009	Dec-04	4,006,931	**$56,097.03**	$0.00
	7260	1/1/2009	Jan-05	3,917,024	**$54,838.34**	$0.00
	7261	1/1/2009	Feb-05	3,811,010	$53,354.14	$0.00
	7262	1/1/2009	Mar-05	4,339,663	$60,755.28	$0.00
	7263	1/1/2009	Apr-05	3,908,712	$54,721.97	$0.00
	7264	1/1/2009	May-05	4,590,087	$64,261.22	$0.00
	7265	1/1/2009	Jun-05	4,482,759	$62,758.63	$0.00
	7266	1/1/2009	Jul-05	4,547,885	$63,670.39	$0.00
	7267	1/1/2009	Aug-05	4,895,208	$68,532.91	$0.00
	7268	1/1/2009	Sep-05	4,736,455	$66,310.37	$0.00
	7269	1/1/2009	Oct-05	12,978,366	$181,697.12	$0.00
	7270	1/1/2009	Nov-05	12,751,510	$178,521.14	$0.00
	7271	1/1/2009	Dec-05	13,409,641	$187,734.97	$0.00
	7786	1/1/2009	Jan-06	12,825,242	$179,553.38	$0.00
	7787	1/1/2009	Feb-06	12,669,390	$177,371.46	$0.00
	7788	1/1/2009	Mar-06	14,037,568	$196,525.96	$0.00
	7789	1/1/2009	Apr-06	17,679,058	$247,506.82	$0.00
	7790	1/1/2009	May-06	18,933,107	$265,063.50	$0.00
	666	1/1/2009	Jun-06	18,091,022	$253,274.30	$0.00
	7791	1/1/2009	Jul-06	17,597,388	$246,363.44	$0.00
	7792	1/1/2009	Aug-06	17,076,000	$239,064.00	$0.00
	7793	1/1/2009	Sep-06	15,344,275	$214,819.85	$0.00
	7794	1/1/2009	Oct-06	13,445,727	$188,240.18	$0.00
	7795	1/1/2009	Nov-06	13,294,186	$186,118.60	$0.00
	7796	1/1/2009	Dec-06	13,083,805	$183,173.27	$0.00
	202	3/19/2008	Jan-07	13,086,019	**$183,204.27**	$0.00
	204	3/19/2008	Feb-07	11,125,024	**$155,750.34**	$0.00
	207	3/19/2008	Mar-07	10,775,792	**$150,861.09**	$0.00
	210	3/19/2008	Apr-07	10,023,355	**$140,326.97**	$0.00
	213	3/19/2008	May-07	9,403,294	**$131,646.12**	$0.00
	216	3/19/2008	Jun-07	9,087,427	**$127,223.98**	$0.00
	649	4/11/2008	Jul-07	8,387,563	**$117,425.88**	$0.00
	222	3/19/2008	Aug-07	8,511,570	**$119,161.98**	$0.00
	225	3/19/2008	Sep-07	7,424,438	**$103,942.13**	$0.00

CHART OF MINUTES OF USE AND AMOUNTS IN DISPUTE

228	3/19/2008	Oct-07	7,125,484	**$99,756.78**	$0.00
154	3/12/2008	Nov-07	5,943,429	**$83,208.01**	$0.00
133	1/1/2008	Dec-07	5,075,296	**$71,054.14**	$0.00
978	5/28/2009	Jan-08	5,424,143	$75,938.00	$0.00
979	5/28/2009	Feb-08	3,722,308	$52,112.31	$0.00
980	5/28/2009	Mar-08	2,320,017	$32,480.24	$0.00
981	5/28/2009	Apr-08	1,021,566	$14,301.92	$0.00
982	5/28/2009	May-08	165,731	$2,320.23	$0.00
983	5/28/2009	Jun-08	32,175	$450.45	$0.00
984	5/28/2009	Nov-08	8,559	$119.83	$0.00
690	1/20/2009	Dec-08	17,163	$240.28	$0.00
722	2/10/2009	Jan-09	17,786	$249.00	$0.00
764	3/10/2009	Feb-09	17,786	$249.00	$0.00
809	4/10/2009	Mar-09	18,827	$263.58	$0.00
860	5/10/2009	Apr-09	14,061	$196.85	$0.00
1226	6/10/2009	May-09	16,559	$231.83	$0.00
1281	7/10/2009	Jun-09	19,037	$266.52	$0.00
1334	8/10/2009	Jul-09	15,480	$216.72	$0.00
1388	9/10/2009	Aug-09	16,065	$282.23	$0.00
1442	10/10/2009	Sep-09	14,710	$257.60	$0.00
1498	11/10/2009	Oct-09	17,126	$297.63	$0.00
			406,102,334	$5,997,637.40	$0.00

LEGEND—CHART OF MINUTES OF USE AND AMOUNTS IN DISPUTE

CIC 0292—The carrier identification code ("CIC") listed in the CABS records, which designates TCG Pittsburgh, Inc. as the originating carrier.

Invoice #--The number assigned by Core to each of its invoices to AT&T. Each monthly usage period is assigned a unique invoice number.

Invoice Date—The date on which each invoice was generated by Core using the CABS records, and transmitted to AT&T. Note that, at the beginning, Core would send several invoices together on the same date. Currently, Core sends one invoice each month, covering the prior month's usage.

Intrastate MOUs—The total Pennsylvania intrastate minutes-of-use ("MOUs") originated by AT&T in each monthly usage period.

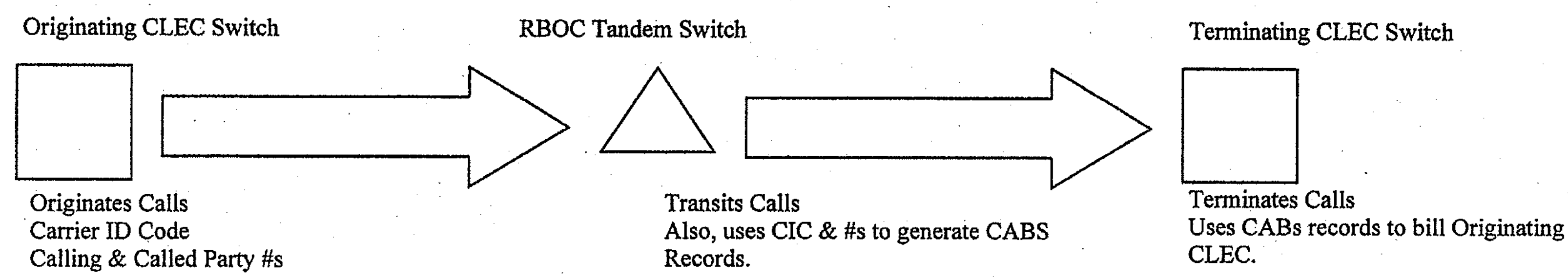
Intrastate Amount Billed—The total amount Core invoiced AT&T for termination of the MOUs in each monthly usage period. On the lines in which the Intrastate Amount Billed appears in bold type on a white background, Core initially invoiced AT&T at the wrong rate ($0.029/MOU). Core has now rerated these amounts at the correct rate ($0.014), and it is these rerated amounts that appear in the chart.

Intrastate Amount Paid—The total amount AT&T paid Core for termination of the MOUs in each monthly usage period, i.e., nothing.

BLM-2

BLM-2

DIAGRAM OF INDIRECT INTERCONNECTION



BLM-3

BLM-3 C

111664

Lynda Eyerman

AT&T
CONNECTIVITY BILLING
MANAGEMENT
300 NORTHPOINT PARKWAY
ALPHARETTA, GA 30005
ATTN: Lynda Eyerman

CORE COMMUNICATIONS INC

209 WEST STREET SUITE 302

ANNAPOLIS, MD 21401

111664

April 24, 2008

209 WEST STREET SUITE 302

ANNAPOLIS, MD 21401

AT&T Corp. is in receipt of the bill(s) noted in Attachment 1 and is disputing charges on the billing for the following reasons (checked, where applicable):

Contracted Company:
The billing does not comply with the requirements of your switched access agreement with AT&T Corp. for the following reasons:

_____ Your bill is not in the correct format for the following reason:

_____ We need the following additional information to confirm the accuracy of your bill:

_____ You have included the following rate elements, which should not have been included. Payment is being made based on the exclusion of these rate elements:

_____ Your billed rates are incorrect for the following reasons. Payment is being made based on the corrected rates:

- Billing End Office Charges above Contracted Rates
- Billing 800 DBQ Charges above Contracted Rates

_____ Other:

RECEIVED
APR 28 2008
BY:

Non-Contracted Company:

_____ We are unable to process your billing due to the following format concerns:

_____ We need the following additional information to confirm the accuracy of your bill:

__✓__ Your billed rates are incorrect for the following reasons:

_____ Interstate rates exceed the Interstate rates mandated by the FCC. (See attached.) Bills have been re-rated to reflect the appropriate rates. Payment is being made, under protest and with full reservation of AT&T Corp.'s rights, for the re-rated amount.

_____ Intrastate rates do not comply with the Public Utilities Commission mandates for the state(s) being billed. Bills have been re-rated to reflect the appropriate rates. Payment is being made, under protest and with full reservation of AT&T Corp.'s rights, for the re-rated amount.

__✓__ AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to discuss. Please contact us at your earliest convenience.

As a result of the above, AT&T Corp. will withhold payment for the disputed amounts and issue payment for the difference, as noted. Please contact us, if you have any questions and to resolve this billing issue.

Very truly yours,

Lynda Eyerman
AT&T Corp. Access Billing Management
770-750-3910
leyerman@att.com

AT&T Corp. Disputed Invoices Report 111654

		INVOICE NUM	BILL DATE	AUDIT NUM	STATE	JURIS*	BILLED $	PAID $
CORE COMMUNICATIONS INC	3806 3806	3806D0288 201	02/01/2007	ATTS3806PAINAW	PA	2	13,861.68	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 203	03/01/2007	ATTS3806PAINAW	PA	2	14,609.10	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 206	04/01/2007	ATTS3806PAINAW	PA	2	15,407.35	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 209	05/01/2007	ATTS3806PAINAW	PA	2	17,025.84	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 212	06/01/2007	ATTS3806PAINAW	PA	2	3,911.23	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 215	07/01/2007	ATTS3806PAINAW	PA	2	3,916.57	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 218	08/01/2007	ATTS3806PAINAW	PA	2	2,802.68	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 221	09/01/2007	ATTS3806PAINAW	PA	2	3,474.52	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 226	10/01/2007	ATTS3806PAINAW	PA	2	4,229.36	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 229	11/01/2007	ATTS3806PAINAW	PA	2	5,240.21	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 153	12/01/2007	ATTS3806PAINAW	PA	2	3,399.09	0.00
CORE COMMUNICATIONS INC	3806 3806	3806D0288 134	01/01/2008	ATTS3806PAINAW	PA	2	3,091.52	0.00

Jurisdictions Legend: 1 = Interstate/InterLATA, 2 = Intrastate/InterLATA, 3 = Intrastate/IntraLATA, 4 = Interstate/IntraLATA, 5 = Local

AT&T Corp. Disputed Invoices Report 111664

INVOICE NUM	BILL DATE	AUDIT NUM	STATE	JURIS*	BILLED $	PAID $

Jurisdictions Legend: 1 = Interstate/InterLATA, 2 = Intrastate/InterLATA, 3 = Intrastate/IntraLATA, 4 = Interstate/IntraLATA, 5 = Local

BLM-4

BLM-4

D

Stephanie Anderson

From: "EYERMAN, LYNDA M, ATTOPS" <leyerman@att.com>
To: "Stephanie Anderson" <billing@coretel.net>
Sent: Wednesday, April 23, 2008 11:09 AM
Subject: RE: Payment

BAN 25935438 is processed and you should receive shortly.

For CIC 288, Interstate was paid at the FCC mandate which is ILEC equivalent. We generally have to have someone from our Business Development group speak to the company to confirm intrastate rates. For 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.

I will be glad to have someone contact you if you are the correct person.

Lynda

From: Stephanie Anderson [mailto:billing@coretel.net]
Sent: Wednesday, April 23, 2008 11:00 AM
To: EYERMAN, LYNDA M, ATTOPS
Subject: Payment

Hey Lynda-

Thank you so much for all of your help. We received our first round of payments today. I do have a couple of questions about the payments:

The invoices for Cortel Virginia and Delaware were short paid, do you know why?

A few of the invoices for BAN 2593D5438 were not paid?

Everything was perfect for Coretel New York.

If you are not the person that I should direct these questions to please let me know who I should talk to.

Thanks,
Stephanie

Stephanie Anderson
Controller

Core Communications
209 West Street, Suite 302
Annapolis, MD 21401
billing@coretel.net
Phone: 410-562-4504
Fax: 443-217-0390

BLM-5

BLM-5

Hypercube Telecom, LLC

Government Affairs
Bldg 300, Suite 330
5300 Oakbrook Pkwy
Norcross, Georgia 30093
Tel 678-387-2801

FILE STAMP & RETURN

March 31, 2009

FILED/ACCEPTED

APR - 1 2009

Federal Communications Commission
Office of the Secretary

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

Re: **Informal Request of Hypercube Telecom, LLC With Respect to Carrier "Self-Help" Measures Pursuant to 47 C.F.R. § 1.41**

Dear Ms. Dortch:

Hypercube Telecom, LLC ("Hypercube"), pursuant to Section 1.41 of the rules of the Federal Communications Commission, hereby submits an original and four (4) copies of this Informal Request with respect to "self help" practices engaged in from time to time by interexchange carriers ("IXCs") in refusing to pay tariffed switched access charges.

As the enclosed white paper explains, the telecommunications industry remains plagued by a long-standing practice that is already prohibited by existing Commission rules and orders. Specifically, IXCs continue to engage from time to time in "self help" and refuse to pay tariffed access charges, attempting to force the local exchange carriers ("LECs") that provide such switched access services to accept settlements at amounts well below the LEC's lawfully tariffed rates. Such conduct is particularly harmful and insidious in the current economic climate where a smaller LEC, such as Hypercube, may be less able (or altogether unable) to withstand the IXC's withholding of such payments or to bear the costs of collection.

Although the Commission has previously found that "self help" in the form of withholding payments is not a reasonable practice, it continues nonetheless. Thus, as explained further in the enclosed paper, Hypercube respectfully requests that the Commission:

- reiterate in clear and unmistakable terms that an IXC's refusal to pay LECs for lawfully tariffed switched access charges or any other practices on the part of an IXC designed to force reductions in access rates not compelled by Commission or state regulations shall constitute an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended (the "Act"); and

- revise its base forfeiture schedule pursuant to Section 503 of the Act to make clear that a penalty of $40,000 will be applied against any IXC for each month (or portion thereof) in which it engages in such "self help" practices.

Thank you for your attention to this Informal Request, and please contact the undersigned should you have any questions. Please date-stamp the enclosed extra copy of this Informal Request and return it in the self-addressed envelope provided.

Sincerely yours,

James Mertz

James Mertz
Vice President Government Affairs
Hypercube Telecom, LLC

cc: Julie Veatch, Acting Division Chief, Wireline Competition Policy
Alex Starr, Enforcement Bureau

PROPOSALS FOR RESOLVING CARRIER "SELF HELP" MEASURES WITH RESPECT TO PAYMENT OF LAWFUL ACCESS CHARGES

Hypercube Telecom, LLC

March 31, 2009

PROPOSALS FOR RESOLVING CARRIER "SELF HELP" MEASURES WITH RESPECT TO PAYMENT OF LAWFUL ACCESS CHARGES

Issue:

The telecommunications industry is plagued by a practice that is already prohibited by the Federal Communications Commission's ("FCC") rules yet persists. Interexchange Carriers ("IXCs") consistently use "self-help" to force competitors to settle disputes on unfavorable terms. The FCC should make clear that "self-help" is an unacceptable practice and carriers that engage in "self-help" should be subject to meaningful enforcement in the form of forfeitures.

Background:

Carriers are required to pay for the use of others' networks to originate and terminate telephone calls. These payments are referred to as to "intercarrier compensation" and can vary based on a myriad of factors including whether the service is classified as local or long distance, interstate or intrastate, or basic or enhanced, and the type of carrier involved in routing the call to its destination, *e.g.*, wireless, local exchange, IXC or an enhanced service provider. While "self-help" may be used in a variety of situations, it frequently occurs in the context of carrier disputes over access charges.

The legal obligation to pay intercarrier compensation typically is established by a local exchange carrier's tariff that is filled with and approved by state public utility commissions or the FCC. IXCs that do not like the rates in these tariffs have legal remedies in the form of tariff protests or complaints to seek lower rates. Rather than pursue these remedies, however, some IXCs simply refuse to pay these lawfully, tariffed charges.

This puts the carrier that is unable to collect its lawfully tariffed charges in a quandary. The IXCs and the local carrier are serving exactly the same customers – the IXC is providing them long-distance service, and the local carrier is providing them local calling. The local carrier cannot simply disconnect a non-paying IXC because this would harm the carrier's relationships with its own customers. Thus, the carrier is effectively forced to provide access service for free until the dispute is resolved.

IXC self-help measures adversely impact the competitive telecommunications landscape and interfere with carriers' ability to focus on providing high quality service to their customers. Moreover, when large, better capitalized IXCs engage in anticompetitive self-help measures and refuse to pay the lawfully tariffed charges, smaller carriers must cut costs, in the form of layoffs, which artificially impedes the growth of these small businesses. To prevent these unreasonable and anticompetitive practices, the FCC should reiterate that carriers may not engage in "self-help" and may not refuse to pay tariffed access charges at any time.[1]

Existing Rules:

The FCC has long prohibited carriers from engaging in "self-help," finding that "a customer, a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."[2] This pay first and dispute later principle[3] was affirmed in *MGC Communications v. AT&T Corp.*[4] There, over the period from August 1998 to July 1999, AT&T advised MGC that it would not pay for MGC's interstate access services, but kept accepting and using those services. AT&T's failure to pay for those services was found to be impermissible self-help and a violation of section 201(b) of the Communications Act.[5]

Since MCG, the FCC has reiterated its policy to prohibit "self-help" in numerous proceedings. It has said that IXCs cannot block traffic unilaterally, either to put pressure on other carriers to lower their charges, or to avoid incurring greater liabilities to those carriers. Instead, the FCC has required these common carriers to complete traffic while pursuing their complaints against the interconnecting carriers in appropriate fora.[6]

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[1] This also is important if the Commission adopts a new intercarrier compensation regime where rates glide downward over a period of years. See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68 & 04-36, FCC 08-262 (rel. Nov. 5, 2008) ("*Order and FNPRM*").

[2] *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 at n.53 (Common Car. Bur. 1997) (citing *MCI Telecommunications Corp.*, 62 F.C.C.2d 703, 705-706 (1976)).

[3] The pay first and dispute later policy is based on the filed rate doctrine, also known as the filed tariff doctrine. This doctrine is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, was later applied to telecommunications common carriers and eventually was codified in Section 203 of the Act. Once filed, tariffs establish the rates IXCs must pay for tariffed services, and "have the force of law." *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980).

[4] *MCG Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11,647 (Comm. Car. Bur. 1999), affd., 15 FCC Rcd 308 (1999) ("*MCG*").

[5] *See id.*, 14 FCC Rcd at 11659, ¶ 27.

[6] *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 1 (Wireline Comp. Bur. 2007) ("*FCC Call Blocking Order*") (citing Sections 151 and 254 of the Communications Act).

Notwithstanding these FCC findings, certain IXCs continue to withhold access payments as leverage to force competitive local exchange carriers ("CLECs") into accepting lower rates or exact other concessions. For example, many IXCs withheld all access payments to numerous CLECs shortly after the FCC adopted a transition period to bring CLEC interstate access rates down to ILEC levels.[7] And even after the transition period ended and CLECs' interstate access rates matched those of competing incumbent local exchange carriers in their service territories, these IXCs continued to withhold payment on all access charges, even the undisputed interstate access charges, simply because they were not happy with the CLECs' lawfully tariffed and approved intrastate access rates, which typically are higher for all carriers, not just CLECs, than interstate rates.

In many cases, by withholding payment on CLEC access charges, IXCs forced CLECs into access agreements and settlements at rates well below the CLECs' lawfully tariffed rates. CLECs that refused to accede to IXC demands or attempted to terminate services to IXCs for failure to pay often found themselves in protracted and costly litigation with the IXCs. Generally speaking, most of these disputes occur between IXCs that are well capitalized, publicly-traded companies, and CLECs that are typically much smaller by many magnitudes.[8] These IXC self-help measures have real world consequences on small CLECs, forcing these companies to lay off employees and delay growth plans. In the current economic environment, self-help is particularly harmful as it exacerbates unemployment and artificially stunts the growth of innovative small companies. Additionally, these actions not only violate the FCC's rules, but also provide a competitive advantage to IXCs resulting from the considerable financial strain imposed on CLECs forced to accept either below tariff rates or spend valuable resources on litigation and forego plans for expansion and other growth opportunities.[9] Self-help tactics thwart the goals of FCC rulemakings, such as the rules that were created in the CLEC Access Reform Order, and the statutes and FCC rules that permit carriers to file tariffs that have the force of law.

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[7] *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*"CLEC Access Reform Order").*

[8] For example, even in the current environment of market turmoil, IXCs like AT&T and Verizon have market capitalizations of approximately $148 and $88 billion respectively, while one of the largest CLECs has a capitalization of $204 million (roughly 725 and 430 times smaller than AT&T and Verizon as measured by market capitalization).

[9] Many IXCs operate carrier affiliates that compete with other local exchange carriers, such as CLECs. By refusing to pay tariffed access charges and/or litigating disputes, IXCs withhold valuable revenues owed to CLECs creating a competitive advantage for their affiliates.

Resolution:

Given the IXCs' repeated failures to heed FCC findings that self-help is an unreasonable practice and violation of Section 201(b), the FCC must not only reiterate that carriers may not refuse to pay competitors for lawfully tariffed charges, engage in traffic discrimination, or undertake any other practices designed to force competitors to transition to lower rates sooner than required by the FCC or state public utility commissions;[10] it must add teeth to those policies by adopting a base forfeiture for self-help violations by customer-competitors.[11]

The FCC should revise the base forfeiture schedule to make clear it will levy penalties against carriers that engage in this discriminatory and anti-competitive practice. "Self-help," like those activities outlined above, is more than a simple customer dispute – it threatens smaller carriers with the loss of their business, results in customer disruptions such as the loss or reduction of service, threatens the ubiquitous connectivity of the telecommunications network generally, thwarts important FCC policies, and wastes agency and carrier resources.

Section 503 of the Act provides that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the FCC, shall be liable to the United States for a forfeiture penalty.[12] The FCC has wide discretion in determining forfeitures for violations of the Act, and it should issue forfeiture notices for self help actions in an amount consistent with other recent penalties levied for a variety of violations of the Act. For example, for each month in which a carrier has failed to pay required universal service contributions, the FCC has established a base forfeiture amount of $10,000 (for underpayment) or $20,000 (for no payment), plus an upward adjustment based on one-half of the company's approximate unpaid contributions to address both the detrimental impact on the Universal Service Fund and the illegitimate competitive advantage the non-payer gains.[13] Similarly, the forfeiture guidelines "establish a standard forfeiture amount of $40,000 for violations of our rules and orders regarding unauthorized changes of preferred interexchange carriers,"[14] another anti-competitive practice.

[10] Although some carriers may have legitimate disputes concerning jurisdictional classification of traffic, those disputes should not give a customer a free pass to refuse to pay all intercarrier compensation charges. The carriers have legal remedies other than self-help by which to seek resolution of their claims.

[11] *See* 47 C.F.R. § 1.80.

[12] 47 U.S.C. § 503.

[13] *See, e.g., Telrite Corporation, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-05-IH-2348, NAL/Acct. No. 200832080084, ¶¶ 14, 24-25 (rel. Apr. 17, 2008) (imposing $924,212 forfeiture for failure to pay USF, TRS, NANPA, and other regulatory fees over the course of approximately two years, which contained an upward adjustment of $417,438, which represented 50 percent of the largest balance due during that period).

[14] *Horizon Telecom, Inc., Apparent Liability for Forfeiture*, File No. EB-07-TC-4006, NAL/Acct. No. 200832170013 (rel. Feb. 29, 2008) (fining Horizon $5,084,000 for slamming and other violations).

The public interest requires common carriers to complete their customers' calls and pay lawful tariffed compensation rates to their common carrier competitors. The FCC should enforce this requirement with investigations and forfeitures just as it does in other instances of non-payment (USF) and other anti-competitive practices (USF and slamming). And the gravity of these illegal self-help action further dictates expediting any investigations to prevent these activities as soon as practical. Such action is consistent with existing FCC rules and orders and will allow carriers to focus on providing service to their customers, rather than wasting resources on disputes with IXCs. A standard base forfeiture guideline of $40,000 for each month that an IXC engages in self-help and refuses to pay a CLEC's lawfully tariffed access charges is a reasonable deterrent for such illegal conduct and an amount that is consistent with other FCC forfeitures.

BLM-6

BLM-6

---- ----- Forwarded message ----------
Date: Tue, 17 Jun 2008 16:10:11 -0400
From: Stephanie Anderson <billing@coretel.net>
To: bret@coretel.net
Subject: Fw: CDR Analysis Results & Rerate calculation on TCG (Local) & ATT (CIC 288 - LD)

Stephanie Anderson
Controller

Core Communications
209 West Street, Suite 302
Annapolis, MD 21401
billing@coretel.net
Phone: 410-562-4504
Fax: 443-217-0390

----- Original Message -----
From: CAMMAROTA, MARK, ATTCORP
To: billing@coretel.net
Sent: Tuesday, June 17, 2008 3:28 PM
Subject: CDR Analysis Results & Rerate calculation on TCG (Local) & ATT (CIC 288 - LD)

Stephanie,

Attached are 2 files for your review:
- Corecomm Analysis.xls: which are the results of the Call Detail Records you previously sent on traffic on CIC 292. The PLU stands for (percent of local usage) and PIU stands for (percent of Interstate usage). As you will see this traffic is primarily all local traffic and is bill & keep. AT&T will pay for any toll traffic carried across this CIC (paid at competing ILEC tariff rate). Total due by ATT = $2,578.52

-core comm rerated tcg and att billing 061208.xls: This file is the calculated payment that AT&T would pay on the TCG local CIC 292 (toll traffic, rated at competing ILEC tariff) and ATT (which is the LD traffic on CIC 288 that is rerated at competing ILEC tariff). the ATT tab includes rerating the withheld intrastate for DE, VA, and PA. (The other 2 states - MD and NY - were paid in full.) Total due for ATT = $46,131.54.

I an walk you through the reports if you'd like to better understand, just let me know.
We would need to finalize all payments and going forward switched access rates via a standard switched access agreement (LOA), which we use with CLEC's. I can forward a draft of that if you'd like to review.

Again, please contact me at any time and we'll discuss further.
Regards,
Mark

Mark Cammarota
Lead Carrier Relations - National Access Management
203.938.9193
mcammarota@att.com

Corecomm Analysis.xls	**Content-Type:** APPLICATION/VND.MS-EXCEL **Content-Encoding:** BASE64

core comm rerated tcg and att billing 061208.xls	**Content-Type:** APPLICATION/VND.MS-EXCEL **Content-Encoding:** BASE64

BLM-7

BLM-7

F

CORE COMMUNICATIONS, INC.
209 West Street
Suite 302
Annapolis, Maryland 21401

Tel. 410 216 9865
Fax 410 216 9867

April 6, 2009

By Email
Mark Cammarota
Lead Carrier Relations - National Access Management
203.938.9193
mcammarota@att.com

Re: AT&T's Past Due Balances on Access Charge Invoices

Dear Mark:

This letter is in reference to outstanding past due amounts owed by AT&T Corp. companies ("AT&T") to Core Communications, Inc. ("Core") and its affiliates for the provision of switched access services. We would like to reach an amicable settlement of all amounts due as soon as possible. If we cannot reach such a settlement in a reasonable time frame, we will pursue any and all lawful avenues for recovery, including litigation.

The total amounts due are as follows:

CIC 0292

CY 2007 Invoices: $2,830,777.24*

CY 2004-06 Invoices: $4,744,419.26*

CIC 0288

CY 2007 Invoices: $90,969.15*

CY 2004-06 Invoices: $8,523.92*

CIC 5438

CY 2004-06 Invoices: $776.58*

Additional amounts are past due from AT&T to Core's affiliates in Delaware, New York, Virginia and West Virginia.

* These figures do not include interest owed on past due amounts.

The CY 2007 invoices have gone largely unpaid, well over one year after transmittal. AT&T acknowledged receipt of the CY 2007 invoices by emails dated April 23, 2008. Soon thereafter, AT&T disputed all "intrastate" charges on the basis that "AT&T Corp. has not reached agreement with your company regarding Intrastate rates…" AT&T has also stated that it "extends an invitation to discuss" an agreement with Core "regarding intrastate rates." Later, on July 17, 2008, AT&T further stated that "this traffic is primarily all local traffic and is bill & keep." Core is not aware of any factual or legal basis for these conclusions. Further, AT&T has never even attempted to identify the source of its cryptic "disputes."

As you are no doubt aware, with the exception of negotiated agreements, "bill and keep" has never been approved as an appropriate intercarrier compensation mechanism either by the FCC or any of the states in which AT&T sends traffic to Core for termination on Core's network. In essence, AT&T is taking a "free ride" on Core's network, knowing full well that Core has no practical or legal avenue to stop the flow of incoming traffic. Ironically, it now appears that AT&T is engaging in precisely the sort of "traffic pumping" and "regulatory arbitrage" that it complains about before the FCC and other forums. As we move forward with our collection efforts, we will make every effort to document and demonstrate AT&T's bad faith conduct.

In attempt to resolve these matters, I have attempted to contact you no less than twenty (20) times over the past year. You have made no attempt to respond to my inquiries. Two weeks ago, I personally reached out to AT&T's Pennsylvania counsel in order to get in touch with you. He has not gotten back to me, either. AT&T's "invitation to discuss" an agreement rings hollow, and was proffered apparently as a diversion and without any intent to actually discuss.

We fully expect AT&T to pay all invoiced amounts, plus interest. As always, you can reach me on my cell phone, (202) 437-5219. However, if I do not hear from before the end of this week, I will instruct counsel to move forward immediately to collect all past due amounts.

Regards,

Bret Mingo
President

Copy: Linda Eyerman, AT&T (by email to: leyerman@att.com)
Mark Keffer, AT&T (by Federal Express and by email to: mkeffer@att.com)

From: Origin ID: ADWA (410) 562-4504
Stephanie Anderson
Core Communications, Inc.
209 West Street
Suite 302
Annapolis, MD 21401

FedEx Express

E

Ship Date: 06APR09
ActWgt: 0.1 LB
CAD: 8001160/INET9011
Account#: S *********

Delivery Address Bar Code

SHIP TO: (703) 691-6046 BILL SENDER

Mark Keffer
AT&T Comm. of Pennsylvania
3033 CHAIN BRIDGE RD FL 3

OAKTON, VA 22185

Ref #
Invoice #
PO #
Dept #

TUE - 07APR A1
STANDARD OVERNIGHT

TRK# 0201 7974 8252 4335

22185
VA-US
IAD

19 PIZA

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

BLM-8

BLM-8

RESPONSE OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC. And TCG PITTSBURGH, INC. TO INTERROGATORIES OF CORE DATED AUGUST 24, 2009, Docket Nos.: C-2009-2108186, C-2009-2108239

Answered by: Mark Cammorata

INTERROGATORY NO. III-3: Enumerate, describe, and quantify all of the recurring and nonrecurring fees and charges, including taxes and surcharges, AT&T bills its end user customers in connection with each of the services AT&T provides which enable its end users to place the calls that result in the AT&T-originated indirect traffic that terminates to Core.

Objection: AT&T objects to this request on the grounds that it seeks documents or information which are neither relevant nor material to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. AT&T further objects to this request on the grounds that it is overbroad, unduly burdensome, and seeks an analysis, calculation, or compilation which has not previously been performed and which would be unduly burdensome to perform. AT&T further objects to this requests on the grounds that it seeks documents or information that are publicly available.

Response:

RESPONSE OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC. And TCG PITTSBURGH, INC. TO INTERROGATORIES OF CORE DATED AUGUST 24, 2009, Docket Nos.: C-2009-2108186, C-2009-2108239

Answered by: Mark Cammorata

INTERROGATORY NO. III-4: Describe the dialing patterns AT&T's end users use in order to connect to Core's network in connection with the AT&T-originated indirect traffic, including, but not limited to the following:

a) Do AT&T's end users dial a ten digit phone number in the NPA-NXX-XXXX format?

b) Do AT&T's end users dial on a 1+ NPA-NXX-XXXX basis?

Objection: AT&T objects to this request on the grounds that it calls for speculation and seeks information that is not in AT&T's possession, custody or control. Subject to and without waiving its general and specific objections, AT&T will respond to this request to the extent AT&T can provide general industry understandings regarding how end users dial certain types of telephone calls in the time period permitted by 52 Pa. § 5.342(d).

Response: If an AT&T end user is making a local call, then it will be either a seven digit or ten digit telephone call depending on whether the end user is located in an area that requires ten digit dialing or still permits seven digit dialing. If the call is a long distance call, then the end user must dial 1 plus the ten digit called party's telephone number. Some business customers may set up calling patterns differently depending on the type of equipment used.

BLM-9

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Multiple Exchange Carrier Access Billing Guidelines
Issue 9, December 2006

1 PREFACE

Effective January 1, 2001 the process outlined in MECAB Issue 7, which allows companies to utilize their own recordings for access and interconnection billing, may be implemented.

The use of EMI Category 11-50-01 through 04 and 11-50-21 through 24 meetpoint summary usage records, for billing of access and interconnection services, will be discontinued effective August 31, 2002.

This document contains the recommended guidelines for the billing of access and interconnection services provided to a customer by two or more providers or by one provider in two or more states within a single LATA. Access and interconnection services may be billed as usage-sensitive and flat rated charges, which may include intraLATA non-subscribed toll, wireless and local services. Examples of Usage-Sensitive Services are Feature Group B (FGB), Feature Group C (FGC), Feature Group D (FGD), Wireless Services [Type 1 (Line Side Service), Type 2A (Trunk Side Tandem Service) and Type 2B (Trunk Side End Office Service)], trunk side connections (e.g., Basic Service Arrangement (BSA)), and Directory Assistance (DA) Transport. Examples of Flat-Rated Services are WATS Access Lines (WALs), Dedicated Access Lines (DALs), High Capacity, two-point services, multi-point services, direct/local transport and DA transport. This document also addresses the billing of jointly provided Feature Group A (FGA) line side BSA services in Section 9 of this document.

Types of customers and providers are as follows but are not limited to those below.

- End User: A customer who occupies premises that utilize retail telephone services provided by telecommunications carriers. They may order other services such as access.
- IXC: Interexchange Carrier (Also referred to as IC). A long distance company that carries traffic between local exchange carriers.
- LEC: Local Exchange Carrier. A company providing local telephone service. This term could include the following entities:
  1. CLEC: Competitive Local Exchange Carrier. A company, which competes by providing it's own switching and/or network, or by purchasing unbundled network elements from an established local telephone provider. This term is meant to distinguish a new or potential competitor from the established local exchange provider.
  2. ILEC: Incumbent Local Exchange Carrier. A company providing the connection to the end user's premise and access to the long distance network prior to the introduction of local competition. It is the established Regional Bell Operating Company (RBOC) or Independent Company.
  3. ULEC: Unbundled Local Exchange Carrier. A company that provides local, intraLATA toll and access service by purchasing one or more unbundled network elements from another company. This includes only buying dial tone (port) or the entire platform of elements (UNE-P).
  4. USP: Unbundled Service Provider. A company (CLEC or ILEC) that has sold one or more network elements to another company in order for them to provide local, intraLATA toll and access services.
  5. WSP: Wireless Service Provider (which includes CMRS (Commercial Mobile Radio Service), PCS (Personal Communication Services), etc.). A company whose network provides service to an end user through the use of airwave signals.

Multiple Exchange Carrier Access Billing Guidelines
Issue 9, December 2006

These guidelines were developed by the Billing Committee of the Ordering and Billing Forum (OBF). The Multiple Exchange Carrier Access Billing (MECAB) document (dated November 9, 1987) was changed to reflect the FGA/FGB meet-point Billing Task Force Report dated December 8, 1988. The Federal Communications Commission (Commission) requested the report in its October 4, 1988 Order in CC Docket No. 87-579. The Commission addressed the report in its Memorandum Opinion and Order (MO&O) of October 5, 1989. This revised MECAB document also incorporates the resolution statements of recent OBF issues.

The OBF is a voluntary group of provider and customer participants who convene to identify, discuss and resolve issues, which involve the ordering and billing of access services at a national level. The term access may encompass Interstate, Intrastate, and Local. The OBF functions under the Alliance for Telecommunications Industry Solutions (ATIS) authorized by the Federal Communications Commission (FCC) in a January 17, 1985 Memorandum Opinion and Order.

This document provides industry guidelines for meet-point billing (MPB) options. This document addresses the following:

- Common service identifiers
- Calculation of transport mileage
- Identification of the involved providers
- Provider-to-provider transfer of adjustment information and usage data
- MPB conversion and notification procedures.

This document identifies common data elements critical for the provision of verifiable and auditable bills in multiple provider situations and provides procedures for making common data elements and other data available to all providers, depending on the billing option selected.

The bill displays that appear are for illustrative purposes only. The Carrier Access Billing System Billing Output Specifications (CABS BOS©) documentation contains the industry standards for CABS access paper bills, bill data tapes and customer service records. The Small Exchange Carrier Access Billing (SECAB) Guidelines contain similar standards for paper and mechanized bills and inventory and rating information for the providers whose access bills do not conform to the CABS BOS.

Refer to CABS BOS and the SECAB for the current standards for billing outputs.

BLM-10

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RESPONSE OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC. And TCG PITTSBURGH, INC. TO INTERROGATORIES OF CORE DATED JULY 2, 2009, Docket Nos.: C-2009-2108186, C-2009-2108239

Answered by: Mark Cammorata

INTERROGATORY NO. 3: Please identify each and every competitive local exchange carrier in Pennsylvania which operates under a "bill and keep" arrangement with AT&T, as referenced in AT&T's Amended Answer filed June 18, 2009 in this matter.

Objection: AT&T objects to this request on the grounds that it seeks documents or information which are neither relevant nor material to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. AT&T further objects to this request on the grounds that it is overbroad, unduly burdensome, and seeks an analysis, calculation, or compilation which has not previously been performed and which would be unduly burdensome to perform. AT&T further objects to this request on the grounds that it seeks the disclosure of information or documents that are confidential to AT&T and subject to an obligation of confidentiality owed by AT&T to third parties. Subject to and without waiving its general and specific objections, AT&T will respond to this request in the time period permitted by 52 Pa. § 5.342(d).

Response: See Objection to Request for Production No. 3. Because the standard practice between AT&T and other CLECs is to terminate local traffic under a bill & keep arrangement, AT&T does not enter into local traffic termination agreements with other CLECs. However, in order to provide as complete an answer as possible, AT&T will provide Core two distinct sources of information in response to this question. First, to the extent that AT&T has an agreement with a CLEC that, while not a local traffic termination agreement, somehow confirms that the parties operate under a bill & keep arrangement for local traffic, AT&T will endeavor to provide the relevant portions of such agreements in connection with Request for Production No. 3. Second, recognizing that a majority of bill and keep arrangements are operated in practice without contract terms (in fact, without mutually negotiated contract terms, it is AT&T's position that only bill & keep could apply), AT&T lists in ATTACHMENT - INTERROGATORY No. 3 all of the CLECs in Pennsylvania that are listed in the Local Exchange Routing Guide (LERG) with whom AT&T has so far been able to confirm, to the best of its knowledge, it operates under a bill & keep arrangement (to the extent the carriers exchange local traffic). AT&T will update this list, as necessary. To clarify, AT&T has not received bills for the termination of local traffic in the form of local reciprocal compensation charges from any carrier listed in ATTACHMENT - INTERROGATORY No. 3, nor has it billed any of those same CLECs for the termination of local traffic in the form of reciprocal compensation. AT&T has no practical way of confirming whether any CLEC intended to charge for the termination of local traffic and somehow used an incorrect billing code. Further, AT&T included its own affiliates in ATTACHMENT - INTERROGATORY No. 3 because, to the extent that it terminates local traffic on behalf of another AT&T affiliate, AT&T follows the standard practice of bill & keep.

BLM-11

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TRAFFIC EXCHANGE AND BILLING AGREEMENT

This Agreement between Core Communications, Inc., with offices at 209 West Street, Suite 302, Annapolis, MD 21401, and its affiliate CLEC companies[1] on one side, and ________________, with offices at __________________________, and its affiliated CLEC companies[2] (collectively "______"), on the other side (each a "Party" or collectively "the Parties"), is effective upon its execution between the undersigned Parties. This Agreement covers services in the state [s] of [STATE or STATES] (the "Jurisdiction").

WHEREAS, the mutual exchange and termination of traffic originating on each Party's network is necessary and desirable; and

WHEREAS, the Parties desire to exchange such traffic in a technically and economically efficient manner; and

WHEREAS, the Parties wish to enter into an agreement to establish reciprocal compensation for the exchange of traffic between their respective telecommunications networks on terms that are fair and equitable to both Parties; and

WHEREAS, Sections 251(a) and 251(b) of the Telecommunications Act of 1934, as amended, (the "Act") impose specific obligations on certain telecommunications carriers with respect to the interconnection of their networks and the establishment of reciprocal compensation arrangements;

WHEREAS, Sections 251(b)(5) and 251(g) of the Act define the universe of all telecommunications traffic for intercarrier compensation purposes;

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

"Section 251(b)(5) Traffic" shall be defined as all traffic that is rated as "local" based on a comparison of the NPA-NXX of the calling and called party numbers, using the local calling areas as defined in the terminating party's local exchange tariff in each state.

"Section 251(g) Traffic" shall include all traffic that is rated as "toll" based on a comparison of the NPA-NXX of the calling and called party numbers, using the local calling areas as defined in the terminating party's local exchange tariff in each state; <u>and</u> any other traffic that

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[1] CoreTel Alabama, Inc., CoreTel Arkansas, Inc., CoreTel California, Inc., CoreTel Connecticut, Inc., CoreTel DC, Inc., CoreTel Delaware, Inc., CoreTel Florida, Inc., CoreTel Georgia, Inc., CoreTel Illinois, Inc., CoreTel Indiana, Inc., CoreTel Kansas, Inc., CoreTel Kentucky, Inc., CoreTel Louisiana, Inc., CoreTel Maryland, Inc., CoreTel Massachusetts, Inc., CoreTel Michigan, Inc., CoreTel Mississippi, Inc., CoreTel Missouri, Inc., CoreTel Nevada, Inc., CoreTel New Jersey, Inc., CoreTel New York, Inc., CoreTel North Carolina, Inc., CoreTel Ohio, Inc., CoreTel Oklahoma, Inc., CoreTel Pennsylvania, Inc., CoreTel South Carolina, Inc., CoreTel Tennessee, Inc., CoreTel Texas, Inc., CoreTel Virginia, LLC, CoreTel West Virginia, Inc., and CoreTel Wisconsin, Inc.

[2]

does not constitute Section 251(b)(5) Traffic, including all traffic for which there is insufficient data to determine the NPA-NXX of the calling and called parties.

The Parties agree to pay each other reciprocal compensation for the termination of Section 251(b)(5) Traffic, and to pay each other terminating access charges for the termination of Section 251(g) Traffic. Specifically, the Party whose end user originates a call shall pay reciprocal compensation, or terminating access charges, to the Party that terminates the call to its end user, as appropriate.

The rate applicable to the termination of Section 251(b)(5) Traffic shall be the TELRIC rate for the incumbent LEC entity in whose territory such traffic is terminated by the terminating Party, as determined by the NPA-NXX of the called party. The TELRIC rates for various incumbent LECs, as determined by the most recent state TELRIC proceeding for each incumbent LEC, or in the absence of such a proceeding, internal TELRIC studies conducted by each incumbent LEC and set forth in one or more publicly filed ICAs, are set forth in the attached Schedule A.

The rate applicable to the termination of Section 251(g) Traffic shall be the rate set forth in the terminating Party's interstate or intrastate access tariff, as applicable.

All compensation payable pursuant to this Agreement shall be payable within thirty (30) days of the bill date.

This Agreement shall be effective as of the Effective Date and shall continue in effect for three calendar years following the Effective Date (the "Initial Term"). The Effective Date shall be the last day on which either party executes this Agreement, as indicated on the signature page. After the Initial Term, this Agreement shall continue in force and effect, unless and until terminated as provided in this Agreement.

Either Party may terminate this Agreement effective upon the expiration of the Initial Term or effective upon any date after expiration of the Initial Term by providing written notice of termination at least ninety (90) days in advance of the date of termination.
If either Party provides notice of termination and on or before the proposed date of termination either Party has requested negotiation of a successor agreement, this Agreement shall remain in effect until the effective date of the successor agreement.

In the event the Parties can not successfully negotiate a successor agreement within one year following the noticed date of termination, the Parties agree to mutually submit any outstanding issues in dispute regarding the successor agreement to the Federal Communications Commission.

Any assignment by either Party of any right, obligation, or duty, in whole or in part, or of any interest, without the written consent of the other Party shall be void, except that either Party may assign all of its rights, and delegate its obligations, liabilities and duties under this Agreement, either in whole or in part, to any entity that is, or that was immediately preceding such assignment, an Affiliate of that Party without consent, but with written notification.

The effectiveness of an assignment shall be conditioned upon the assignee's written assumption of the rights, obligations, and duties of the assigning Party.

Each person whose signature appears on this Agreement represents and warrants that he or she has authority to bind the Party or Parties on whose behalf he or she has executed this Agreement.

This Agreement shall be binding on and inure to the benefit of the respective successors and permitted assignees of the Parties.

Each Party shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.

This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and all contemporaneous oral agreements, negotiations, proposals, and representations concerning such subject matter for applicable traffic exchanged between the Parties. No representations, understandings, agreements, or warranties, expressed or implied, have been made or relied upon in the making of this Agreement other than those specifically set forth herein.

The originating Party agrees to pay any transit charges that may be assessed by a non-party LEC for the utilization of its transit facilities for the routing of traffic between the Parties networks.

IN WITNESS WHEREOF, each Party has executed this Agreement to be effective as of the date signed by both Parties below.

Core Communications, Inc. and the Core affiliates listed in note 1	______________________________ and the ______ affiliates listed in note 2
By__________________________	By__________________________
Name:_______________________	Name: _______________________
Title: _______________________	Title: _______________________
Date_________________________	Date_________________________

Schedule A
LEC Reciprocal Compensation Rates

LEC	State	Rate	Unit	Rate Element
RBOC Rates				
AT&T	IL	$0.00374600		EO Local Termination
AT&T	IL	$0.00107200		Tandem Switching
AT&T	IL	$0.00020100		Tandem Transport Term
AT&T	IL	$0.00001300	per mile	Tandem Transport Facility Mileage
AT&T	WI	$0.00424100		EO Local Termination
AT&T	WI	$0.00070400		Tandem Switching
AT&T	WI	$0.00018800		Tandem Transport Term
AT&T	WI	$0.00001400	per mile	Tandem Transport Facility Mileage
AT&T	MI	$0.00062200	per call	EO Local Termination (Setup)
AT&T	MI	$0.00052100		EO Local Termination
AT&T	MI	$0.00032200	per call	Tandem Switching (Setup)
AT&T	MI	$0.00033700		Tandem Switching
AT&T	MI	$0.00007700	per call	Tandem Transport Term (Setup)
AT&T	MI	$0.00008100		Tandem Transport Term
AT&T	MI	$0.00000100		Tandem Transport Facility Mileage
AT&T	OH	$0.00360000		EO Local Termination
AT&T	OH	$0.00062300		Tandem Switching
AT&T	OH	$0.00014600		Tandem Transport Term
AT&T	OH	$0.00000600	per mile	Tandem Transport Facility Mileage
AT&T	IN	$0.00409700		EO Local Termination
AT&T	IN	$0.00030700		Tandem Switching
AT&T	IN	$0.00010200		Tandem Transport Term
AT&T	IN	$0.00000500	per mile	Tandem Transport Facility Mileage
AT&T	KY	$0.00140830		End Office Switching Function
AT&T	KY	$0.00067720		Tandem Switching Function
AT&T	KY	$0.00000300	per mile	Common Transport
AT&T	KY	$0.00074660		Common Transport
AT&T	TN	$0.00080410		End Office Switching Function
AT&T	TN	$0.00097780		Tandem Switching Function
AT&T	TN	$0.00000640	per mile	Common Transport
AT&T	TN	$0.00038710		Common Transport
AT&T	TX	$0.00079400		Tandem Switching
AT&T	TX	$0.00013500		Tandem (Common) Transport Termination
AT&T	TX	$0.00000200	per mile	Tandem (Common) Transport Facility
AT&T	TX	$0.00108870	per call	EO Switching Set Up
AT&T	TX	$0.00104230		EO Switching
AT&T	OK	$0.00774600	per call	EO Switching Set Up - Rural Zone
AT&T	OK	$0.00205100		EO Switching - Rural Zone
AT&T	OK	$0.00512900	per call	EO Switching Set Up - Suburban Zone
AT&T	OK	$0.00135800		EO Switching - Suburban Zone
AT&T	OK	$0.00462300	per call	EO Switching Set Up - Urban Zone
AT&T	OK	$0.00122400		EO Switching - Urban Zone
AT&T	OK	$0.00194900	per call	Tandem Switching - Set Up
AT&T	OK	$0.00051600		Tandem Switching
AT&T	OK	$0.00049900		Tandem Termination -- Rural Zone
AT&T	OK	$0.00028240		Tandem Termination -- Suburban Zone
AT&T	OK	$0.00026650		Tandem Termination -- Urban Zone
AT&T	OK	$0.00014660		Tandem Termination -- Interzone
AT&T	OK	$0.00002665	per mile	Tandem Facilities -- Rural Zone
AT&T	OK	$0.00004860		Tandem Termination -- Suburban Zone
AT&T	OK	$0.00000770		Tandem Termination -- Urban Zone
AT&T	OK	$0.00000235		Tandem Termination -- Interzone
AT&T	KS	$0.00131000		EO Switching - Urban Zone
AT&T	KS	$0.00169000		EO Switching - Suburban Zone
AT&T	KS	$0.00253000		EO Switching - Rural Zone
AT&T	KS	$0.00078900		Tandem Switching
AT&T	KS	$0.00015700		Tandem Termination -- Urban Zone
AT&T	KS	$0.00017100		Tandem Termination -- Suburban Zone
AT&T	KS	$0.00019600		Tandem Termination -- Rural Zone
AT&T	KS	$0.00018600		Tandem Termination -- Inter Zone
AT&T	KS	$0.00000100	per mile	Tandem Facility Mileage -- Urban Zone
AT&T	KS	$0.00000300	per mile	Tandem Facility Mileage -- Suburban Zone
AT&T	KS	$0.00000600	per mile	Tandem Facility Mileage -- Rural Zone
AT&T	KS	$0.00000100	per mile	Tandem Facility Mileage -- Inter Zone

Schedule A
LEC Reciprocal Compensation Rates

AT&T	AR	$0.00015700		Tandem Termination -- Urban Zone
AT&T	AR	$0.00017100		Tandem Termination -- Suburban Zone
AT&T	AR	$0.00019600		Tandem Termination -- Rural Zone
AT&T	AR	$0.00018600		Tandem Termination -- Inter Zone
AT&T	AR	$0.00000100	per mile	Tandem Facility Mileage -- Urban Zone
AT&T	AR	$0.00000300	per mile	Tandem Facility Mileage -- Suburban Zone
AT&T	AR	$0.00000600	per mile	Tandem Facility Mileage -- Rural Zone
AT&T	AR	$0.00000100	per mile	Tandem Facility Mileage -- Inter Zone
AT&T	AR	$0.00100700	per call	EO Switching Set Up - Urban Zone
AT&T	AR	$0.00096400		EO Switching - Urban Zone
AT&T	AR	$0.00129900	per call	EO Switching Set Up - Suburban Zone
AT&T	AR	$0.00124400		EO Switching - Suburban Zone
AT&T	AR	$0.00194400	per call	EO Switching Set Up - Rural Zone
AT&T	AR	$0.00186200		EO Switching - Rural Zone
AT&T	AR	$0.00078900		Tandem Switching
AT&T	MO	$0.00216400	per call	EO Switching Set Up - Urban Zone
AT&T	MO	$0.00130900		EO Switching - Urban Zone
AT&T	MO	$0.00260200	per call	EO Switching Set Up - Suburban Zone
AT&T	MO	$0.00157500		EO Switching - Suburban Zone
AT&T	MO	$0.00374800		EO Switching Set Up - Rural Zone
AT&T	MO	$0.00226900		EO Switching - Rural Zone
AT&T	MO	$0.00319300		EO Switching Set Up - Urban Zone Springfield
AT&T	MO	$0.00193300		EO Switching - Urban Zone Springfield
AT&T	MO	$0.00276800		Tandem Switching Set Up
AT&T	MO	$0.00642000		Tandem Switching
AT&T	MO	$0.00019000		Tandem Termination -- Urban Zone
AT&T	MO	$0.00028500		Tandem Termination -- Suburban Zone
AT&T	MO	$0.00030200		Tandem Termination -- Rural Zone
AT&T	MO	$0.00016200		Tandem Termination -- Urban Zone Springfield
AT&T	MO	$0.00033200		Tandem Termination -- Inter Zone
AT&T	MO	$0.00000200	per mile	Tandem Facility -- Urban Zone
AT&T	MO	$0.00000700	per mile	Tandem Facility -- Suburban Zone
AT&T	MO	$0.00001500	per mile	Tandem Facility -- Rural Zone
AT&T	MO	$0.00000001	per mile	Tandem Facility -- Urban Zone Springfield
AT&T	MO	$0.00000300	per mile	Tandem Facility -- Inter Zone
AT&T	CA	$0.00144800	per call	EO Local Termination -- Set up charge, per call
AT&T	CA	$0.00136000		EO Local Termination -- Duration charge, per MOU
AT&T	CA	$0.00045300	per call	Tandem Switching - Shared Transport -- per Call
AT&T	CA	$0.00062900		Tandem Switching - Shared Transport --Setup per Completed Message
AT&T	CA	$0.00045300		Tandem Switching - Shared Transport --Holding Time per MOU
AT&T	CA	$0.00125100		Switch Transport Common --Fixed Mileage
AT&T	CA	$0.00002100	per mile	Switch Transport Common -- Variable
AT&T	CT	$0.00298500	per call	EO Local Termination -- Set up charge, per call
AT&T	CT	$0.00309000		EO Local Termination -- Duration charge, per MOU
AT&T	CT	$0.00351000	per call	Tandem Served -- Set up charge, per call
AT&T	CT	$0.00553800		Tandem Served -- Duration charge, per MOU
AT&T	NV	$0.00311000	per call	EO Local Termination -- Set up charge, per call
AT&T	NV	$0.00250600		EO Local Termination -- Duration charge, per MOU
AT&T	NV	$0.00265800	per call	Tandem Switching - Shared Transport -- Set up charge, per call
AT&T	NV	$0.00126100		Tandem Switching - Shared Transport --Duration charge, per MOU
AT&T	NV	$0.00030500		Switched Transport - Common --Fixed Mileage per MOU (Fixed Mileage)
AT&T	NV	$0.00001900	per mile	Switched Transport - Common --Variable Mileage per MOU per Mile (Variable Mileage)
AT&T	AL	$0.00086630		End Office Switching Function, per MOU
AT&T	AL	$0.00049800		Tandem Switching Function Per MOU
AT&T	AL	$0.00000230	per mile	Common Transport - Per Mile, Per MOU
AT&T	AL	$0.00032240		Common Transport - Facilities Termination Per MOU
AT&T	FL	$0.00093020		End Office Switching Function, per MOU
AT&T	FL	$0.00060190		Tandem Switching Function Per MOU
AT&T	FL	$0.00000350	per mile	Common Transport - Per Mile, Per MOU
AT&T	FL	$0.00043720		Common Transport - Facilities Termination Per MOU
AT&T	GA	$0.00075600		End Office Switching Function, per MOU
AT&T	GA	$0.00041860		Tandem Switching Function Per MOU
AT&T	GA	$0.00000280	per mile	Common Transport - Per Mile, Per MOU
AT&T	GA	$0.00019550		Common Transport - Facilities Termination Per MOU
AT&T	LA	$0.00204800		End Office Switching Function, per MOU

Schedule A
LEC Reciprocal Compensation Rates

AT&T	LA	$0.00055070		Tandem Switching Function Per MOU
AT&T	LA	$0.00000320	per mile	Common Transport - Per Mile, Per MOU
AT&T	LA	$0.00037480		Common Transport - Facilities Termination Per MOU
AT&T	MS	$0.00119000		End Office Switching Function, per MOU
AT&T	MS	$0.00053790		Tandem Switching Function Per MOU
AT&T	MS	$0.00000260	per mile	Common Transport - Per Mile, Per MOU
AT&T	MS	$0.00045410		Common Transport - Facilities Termination Per MOU
AT&T	NC	$0.00073310		End Office Switching Function, per MOU
AT&T	NC	$0.00047880		Tandem Switching Function Per MOU
AT&T	NC	$0.00000230	per mile	Common Transport - Per Mile, Per MOU
AT&T	NC	$0.00016760		Common Transport - Facilities Termination Per MOU
AT&T	SC	$0.00126550		End Office Switching Function, per MOU
AT&T	SC	$0.00073600		Tandem Switching Function Per MOU
AT&T	SC	$0.00000450	per mile	Common Transport - Per Mile, Per MOU
AT&T	SC	$0.00040950		Common Transport - Facilities Termination Per MOU
VZ	NY	$0.00289300		Recip Traffic Exch Trunk 1 Way and 2 Way Meet Point B (nonconvergent)
VZ	PA	$0.00243900		Local Call Termination; Traffic Delivered at VZ Tandem or Local Serving Wire Center
VZ	MI	$0.00831140		Reciprocal Compensation Traffic Tandem Rate
VZ	OH	$0.00567230		Reciprocal Compensation Traffic Tandem Rate
VZ	NV	$0.01012380		Reciprocal Compensation Traffic Tandem Rate
VZ	TX	$0.00530410		Reciprocal Compensation Traffic Tandem Rate
VZ	VA	$0.00159000		Reciprocal Compensation Traffic Tandem Rate
VZ	RI	$0.00343300		Meet Point B Tandem Office
VZ	WA	$0.00283200		Meet Point B Tandem Office
VZ	MD	$0.00267000		Reciprocal Compensation Traffic Tandem Rate
VZ	FL	$0.00401080		Reciprocal Compensation Traffic Tandem Rate
VZ	NJ	$0.00286300		Transport and Termination -- Termination at Tandem
VZ	CA	$0.00151100		Switch Usage Interoffice Orig./Term.
VZ	CA	$0.00036400		Switch Usage Tandem Switching
VZ	CA	NA		Common Transport per mile
VZ	CA	$0.00005300		Common Transport fixed per termination
VZ	DE	$0.00195700		Transport and Termination -- Termination at Tandem
VZ	OR	$0.00369170		Transport and Termination -- Termination at Tandem
VZ	MA	$0.00207500		Recip Traffic Exchange Trunk -- Meet Point B Access Tandem
VZ	IL	$0.00527660		Reciprocal Compensation Traffic Tandem Rate
VZ	DC	$0.00500000		Reciprocal Compensation Traffic Tandem Rate
Qwest	AZ	$0.00097000		End Office Call Termination, per Minute of Use
Qwest	AZ	$0.00055000		Tandem Switched Transport, per Minute of Use
Qwest	AZ	$0.00079000		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	AZ	NA		Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	CO	$0.00161000		End Office Call Termination, per Minute of Use
Qwest	CO	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	CO	$0.00035900		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	CO	$0.00000700	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	IA	$0.00155800		End Office Call Termination, per Minute of Use
Qwest	IA	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	IA	$0.00134000		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	IA	NA		Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	ID	$0.00134300		End Office Call Termination, per Minute of Use
Qwest	ID	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	ID	$0.00045640		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	ID	$0.00003670	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	MN	NA		End Office Call Termination, per Minute of Use
Qwest	MN	$0.00112000		Tandem Switched Transport, per Minute of Use
Qwest	MN	$0.00052000		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	MN	NA		Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	MT	$0.00157400		End Office Call Termination, per Minute of Use
Qwest	MT	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	MT	$0.00060800		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	MT	$0.00003900	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	ND	$0.00148200		End Office Call Termination, per Minute of Use
Qwest	ND	$0.00210000		Tandem Switched Transport, per Minute of Use
Qwest	ND	$0.00036200		Tandem Transmission -- Fixed Over 8 to 25 Miles

Schedule A
LEC Reciprocal Compensation Rates

Qwest	ND	$0.00001770	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	NE	$0.00126000		End Office Call Termination, per Minute of Use
Qwest	NE	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	NE	$0.00049600		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	NE	$0.00001790	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	NM	$0.00204600		End Office Call Termination, per Minute of Use
Qwest	NM	$0.00085300		Tandem Switched Transport, per Minute of Use
Qwest	NM	$0.00067100		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	NM	$0.00002500	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	OR	$0.00133010		End Office Call Termination, per Minute of Use
Qwest	OR	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	OR	$0.00037200		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	OR	$0.00000700	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	SD	$0.00070200		End Office Call Termination, per Minute of Use
Qwest	SD	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	SD	$0.00040600		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	SD	$0.00001400	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	UT	$0.00162633		End Office Call Termination, per Minute of Use
Qwest	UT	$0.00179800		Tandem Switched Transport, per Minute of Use
Qwest	UT	$0.00048600		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	UT	$0.00002430	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	WA	$0.00117800		End Office Call Termination, per Minute of Use
Qwest	WA	$0.00069000		Tandem Switched Transport, per Minute of Use
Qwest	WA	$0.00026000		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	WA	$0.00001000	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
Qwest	WY	$0.00262200		End Office Call Termination, per Minute of Use
Qwest	WY	$0.00285600		Tandem Switched Transport, per Minute of Use
Qwest	WY	$0.00054710		Tandem Transmission -- Fixed Over 8 to 25 Miles
Qwest	WY	$0.00001910	per mile	Tandem Transmission -- Per Mile Over 8 to 25 Miles
ILEC Rates (Non-RBOCs)				
CinBTel	OH	$0.00211400		End Office Local Termination
		$0.00126600		Tandem Switching
		$0.00004900		Tandem Transport Facility Mileage
		$0.00131800		Dedicated Transport: Shared Transport per mou
CinBTel	KY	$0.00378200		End Office Local Termination
		$0.00257500		Tandem Switching
		$0.00007300	per mile	Tandem Transport Facility Mileage
		$0.00204200		Dedicated Transport: Shared Transport per mou
Citizens	NY	$0.00313200		Reciprocal Compensation MOU Rate (Citizens Telecommunications Co. of New York, Inc.)
Embarq	FL	$0.00222100		Reciprocal Compensation -- End Office
Embarq	FL	$0.00205300		Reciprocal Compensation -- Tandem Switching
Embarq	FL	$0.00081400		Reciprocal Compensation -- Shared Transport
Embarq	OH	$0.00399700		Reciprocal Compensation -- End Office
Embarq	OH	$0.00243500		Reciprocal Compensation -- Tandem Switching
Embarq	OH	$0.00164100		Reciprocal Compensation -- Shared Transport
Embarq	NV	$0.00220000		Reciprocal Compensation -- End Office
Embarq	NV	$0.00130000		Reciprocal Compensation -- Tandem Switching
Embarq	NV	$0.00049300		Reciprocal Compensation -- Shared Transport
Embarq	PA	$0.00595100		Reciprocal Compensation -- End Office
Embarq	PA	$0.00305000		Reciprocal Compensation -- Tandem Switching
Embarq	PA	$0.00183300		Reciprocal Compensation -- Shared Transport
Embarq	TX	$0.00288700		Reciprocal Compensation -- End Office
Embarq	TX	$0.00276200		Reciprocal Compensation -- Tandem Switching
Embarq	TX	$0.00363400		Reciprocal Compensation -- Shared Transport
Embarq	VA	$0.00416400		Reciprocal Compensation -- End Office
Embarq	VA	$0.00177500		Reciprocal Compensation -- Tandem Switching
Embarq	VA	$0.00127900		Reciprocal Compensation -- Shared Transport
Fairpnt.	FL	$0.01500000		Reciprocal Compensation Rate (Fairpoint FL f/k/a GTC, Inc.)
Kentucky Ind. RLECs	Combined Recip. Comp. Rate			Full Co. Name

Schedule A
LEC Reciprocal Compensation Rates

Ballard	$0.00554700		Ballard Rural Tel. Coop. Corp., Inc.
Brandenburg	$0.00504000		Bandenburg Telephone Company
Coalfields	$0.00928800		Coalfields Tel. Company
Duo County	$0.00598000		Duo County Telephone Cooperative Corp.
Foothills	$0.00817500		Foothills Rural Telephone Cooperative Corp.
Logan	$0.00612500		Logan Telephone Cooperative, Inc.
Mtn. Rural	$0.00839300		Mountain Rural Telephone Cooperative Corp.
No. Central	$0.00900200		North Central Telephone Cooperative Corp.
Peoples	$0.00756700		Peoples Rural Telephone Cooperative Corp., Inc.
So. Central	$0.00431800		South Central Rural Telephone Cooperative Corp., Inc.
Thacker	$0.00958100		Thacker-Grigsby Telephone Company, Inc.
W. Kentucky	$0.00702900		West Kentucky Rural Telephone Cooperative Corp., Inc.
Pennsylvania Inc. RLECs			
Denver & Ephrata Te	$0.01200000		Transport and Termination--Rate per Terminated MOU
Buffalo Valley Tel. Co	$0.01200000		Transport and Termination--Rate per Terminated MOU
Conestoga Tel. & Tel	$0.01200000		Transport and Termination--Rate per Terminated MOU
North Pittsburgh Tel.	$0.01900000		Transport and Termination--Rate per Terminated MOU
Frontier--Commonwe	$0.02000000		Reciprocal Compensation Traffic--Per Minute Rate
Frontier Comm. Of Br	$0.01100000		Reciprocal Transport and Termination
Frontier Comm. Of Ca	$0.01100000		Reciprocal Transport and Termination
Frontier Comm. Of O	$0.01100000		Reciprocal Transport and Termination
Frontier Comm. Of La	$0.01100000		Reciprocal Transport and Termination
TDS-Deposit Tel. Co.	$0.01750000		Reciprocal Compensation--Transport and Termination
TDS-Mahanoy & Mah	$0.01750000		Reciprocal Compensation--Transport and Termination
TDS-Sugar Valley Te	$0.01750000		Reciprocal Compensation--Transport and Termination
Armstrong Tel. Co.--N	$0.01700000		Transport and Termination
Armstrong Tel. Co.--P	$0.01700000		Transport and Termination
Hickory Tel. Co.	$0.01700000		Transport and Termination
Ironton Tel. Co.	$0.01700000		Transport and Termination
Lackawaxen Tel. Co.	$0.01700000		Transport and Termination
Laurel Highland Tel. (	$0.01700000		Transport and Termination
North-Eastern Penns	$0.01700000		Transport and Termination
North Penn Tel. Co.	$0.01700000		Transport and Termination
Palmerton Tel. Co.	$0.01700000		Transport and Termination
Pymatuning Tel. Co.	$0.01700000		Transport and Termination
South Canaan Tel. C	$0.01700000		Transport and Termination
Venus Tel. Co.	$0.01700000		Transport and Termination
Yukon-Waltz Tel. Co.	$0.01700000		Transport and Termination
Bentleyville Tel. Co.	$0.02000000		Reciprocal Compensation Rates--Per Terminating Minute
Marianna & Scenery	$0.02000000		Reciprocal Compensation Rates--Per Terminating Minute
Tennessee Ind. RLEC	The following BellSouth rates apply on an interim basis to all listed Tennessee RLECs.		
	$0.00080410	End Office Switching	
	$0.00097780	Tandem Switching	
	$0.00000640	Common Transport - Per Mile, Per MOU	
	$0.00038710	Common Transport - Facilities Term. Per mou	
Ardmore			Ardmore Telephone Co., Inc.
Ben Lomand			Ben Lomand Rural Telephone Cooperative, Inc.
Bledsoe			Bledsoe Telephone Cooperative
CenturyTel			CenturyTel of Adamsville, Inc.
CenturyTel			CenturyTel of Claiborne, Inc.
CenturyTel			CenturyTel of Ooltewah-Collegedale, Inc.
Concord			Concord Telephone Exchange, Inc.
Crockett			Crockett Telephone Co., Inc.
DeKalb			DeKalb Telephone Cooperative, Inc.
Highland			Highland Telephone Cooperative, Inc.

Schedule A
LEC Reciprocal Compensation Rates

Humphreys				Humphreys County Telephone Co.
Loretto				Loretto Telephone Co.
Millington				Millington Telephone Co.
North Central				North Central Telephone Cooperative, Inc.
Peoples				Peoples Telphone Co.
Tellico				Tellico Telephone Co.
Tenn. Telco				Tennessee Telephone Co.
Twin Lakes				Twin Lakes Telephone Cooperative Corporation
United				United Telephone Company
W. Tenn.				W. Tennessee Telephone Company
Yorkville				Yorkville Telephone Cooperative
Windstr.	AL	$0.01251000		Reciprocal Compensation Rate
Windstr.	FL	$0.01039000		Reciprocal Compensation Rate
Windstr.	KY 1	$0.01334000		Reciprocal Compensation MOU Rate (Windstream East)
Windstr.	KY 2	$0.01000000		Reciprocal Compensation MOU Rate (Windstream West)
Windstr.	MS	$0.00894000		Reciprocal Compensation Rate
Windstr.	NE	$0.01238000		Reciprocal Compensation Rate
Windstr.	NC	$0.00822000		Reciprocal Compensation Rate
Windstr.	OH	$0.01431000		Reciprocal Compensation Rate
Windstr.	PA	$0.01066000		Reciprocal Compensation Rate
Windstr.	SC	$0.01511000		Reciprocal Compensation Rate
Windstr.	WR	$0.01100000		Reciprocal Compensation Rate (Windstream Western Reserve in Ohio)

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Title 47: Telecommunication

PART 51—INTERCONNECTION
Subpart H—Reciprocal Compensation for Transport and Termination of Telecommunications Traffic

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§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to §51.711(b).

(c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

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BLM-13

BLM-13

RESPONSE OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC. And TCG PITTSBURGH, INC. TO REQUESTS FOR PRODUCTION OF DOCUMENTS OF CORE DATED JULY 2, 2009, Docket Nos.: C-2009-2108186, C-2009-2108239

Answered by: Jerry L. Hicks

REQUEST FOR PRODUCTION NO. 3: Please provide any documents that evidence an agreement between AT&T and any CLEC in Pennsylvania other than Core to exchange telecommunications traffic on a "bill and keep" basis.

Objection: AT&T objects to this request on the grounds that it seeks documents or information which are neither relevant nor material to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. AT&T further objects to this request on the grounds that it seeks the disclosure of information or documents that are confidential to AT&T and subject to an obligation of confidentiality owed by AT&T to third parties. Subject to and without waiving its general and specific objections, AT&T states that it will respond to this request only after it receives permission from CLECs to produce their agreements. Moreover, given the amount of time it will take to obtain permission from CLECs to produce their agreements and redact those agreements, AT&T will need more time to answer this request than is permitted by 52 Pa. § 5.349(d).

Response: AT&T has not yet completed its investigation into this matter and therefore cannot presently state what information it is capable of providing. AT&T will work diligently to complete its investigation and report its results to Core.

Amended Response: AT&T requested permission from CLECs to produce the attached redacted agreements that are responsive to Request for Production No. 3. AT&T has one confidential written agreement with an unnamed CLEC that refused to give AT&T permission to release it.

40096

AT&T

Robert P. Handal, Jr.
AT&T Director-Access Management

One AT&T Way
Room 2A109
Bedminster, NJ 07921-0752
908-234-4138

January 3, 2005

Maria Abbagnaro
General Counsel
Cordia Communications Corp.
445 Hamilton Avenue, Suite 408
White Plains, NY 10601

Re: [redacted] Agreement ("Agreement")

Dear Maria,

3. CLEC shall not originate any traffic to AT&T's 10-10-345 service unless and until CLEC enters into a billing and collection agreement for such traffic. CLEC shall also not charge AT&T for switched access service charges associated with traffic originated by any other carrier, including wireless carriers. In addition, neither party shall charge the other party for originating or terminating the other party's local traffic (*i.e.*, calls between the party's local service customers).

By: Robert P Handal Jr

Name: Robert P. Handal, Jr.

Title: AT&T Director-Access Management

Agreed to and accepted this 4th

day of JAN, 2005.

Cordia Communications Corp.

By:

Name: PATRICK FREEMAN

Title: PRESIDENT & CEO

[redacted] AGREEMENT

between

AT&T Corp.
Room 2A109, One AT&T Way
Bedminster, NJ 07921-0752

AT&T Contact: Robert P. Handal
Telephone No.: 908-234-4138
Facsimile No.: 908-234-8835

and

CLEC: ACN Communication Services, Inc.	**CLEC Contact: Dave Stevanovski**
Address: 32991 Hamilton Ct. Farmington Hills, MI 48334	**Telephone No.: 248-699-3404**
	Facsimile No.: 248-489-8901
Effective Date: September 1, 2004	

4. Exclusion of Local Traffic and PLU Factor

Neither party will charge the other party for originating or terminating any local traffic between local service customers of the parties (i.e., local to local traffic termination). Local traffic will be defined as calls between local service customers in the same ILEC-defined local calling area. Local traffic may be sent over the same trunks used for switched access traffic. ACN COMMUNICATION SERVICES, INC. will attempt to jurisdictionalize traffic sent by AT&T, and issue a bill to AT&T only for Switched Access Service (*i.e.*, excluding local traffic). In the event that ACN COMMUNICATION SERVICES, INC. is unable to jurisdictionalize the traffic, ACN COMMUNICATION SERVICES, INC. will reduce the access minutes of use charged to AT&T by a Percent Local Usage factor ("PLU") provided by AT&T. The PLU will be based on a sampling of actual calling data from the previous quarter. No true-up will occur following the revision of the PLU. The revised PLU will become the basis for billing until revised during the next quarter. ACN COMMUNICATION SERVICES, INC. may audit the PLU factor once in any twelve-month period upon receipt of sixty (60) days' prior written notice. Each Party will pay its own costs for the audit.

[redacted]

ACN COMMUNICATION SERVICES, INC.	**AT&T CORP.**
By: Dave St...	By: Cynthia Batchelder
Dave Stevanovski	Cynthia M. Batchelder
President	Local Services & Access Management - Vice President
10/4/04	Oct 13, 2004
Date	Date

BLM-14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN BELL, INC. d/b/a AT&T WISCONSIN,

Plaintiff,

v.

ERIC CALLISTO, MARK MEYER and LAUREN AZAR (in their official capacity, and not as individuals), SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P., NEXTEL WEST CORP., and NPCR, INC.

Defendants.

Case No. 09-C-515

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Wisconsin Bell, Inc. d/b/a AT&T Wisconsin ("AT&T Wisconsin") brings this action for declaratory, injunctive and other relief and alleges as follows:

INTRODUCTION

1. AT&T Wisconsin brings this action to challenge certain determinations made by the Public Service Commission of Wisconsin ("PSCW"), acting through its Commissioners, in establishing, purportedly pursuant to a certain requirement of the Federal Communications Commission ("FCC"), the terms of AT&T Wisconsin's interconnection agreement ("ICA") with Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp. and NPCR, Inc.

2. The challenged PSCW determinations, and the resulting provisions in the ICA, are contrary to the FCC requirement the PSCW purported to enforce. AT&T Wisconsin seeks declaratory, injunctive and other relief, to set aside the challenged PSCW determinations and to reform the ICA.

Sprint, the call can originate on AT&T Wisconsin's network and terminate on Sprint's networks, and vice versa.

33. When a local call originates on the network of one carrier and terminates on the network of another, the originating carrier is typically obliged to compensate the terminating carrier for the cost of transporting and terminating the call on its network. Such compensation obligations are referred to as "reciprocal compensation," because each carrier is obliged to pay the other for traffic terminated by the other. The 1996 Act requires that carriers enter into reciprocal compensation arrangements (47 U.S.C. § 251(b)(5)), but permits the arrangement to be "bill-and-keep," where no payments are exchanged (*id.* § 252(d)(2)(B)(1)). Carriers typically agree to bill-and-keep when the amounts of traffic each expects to terminate for the other are roughly balanced, so that reciprocal payments, if made, would be approximately equal.

34. Generally, reciprocal compensation under section 251(b)(5) of the 1996 Act applies only to local telecommunications traffic. Non-local traffic, such as long distance traffic, is generally subject to "access charges," at rates typically higher than reciprocal compensation rates.

35. The Kentucky ICA that Sprint sought to port to Wisconsin includes a provision that requires the parties to exchange local traffic pursuant to a bill-and-keep arrangement, without regard to whether the amounts of traffic each carrier delivers to the other are roughly balanced.

36. In Docket 6720-TI-211, AT&T Wisconsin contended that the bill-and-keep provision in the Kentucky ICA could not lawfully be ported to Wisconsin because it was subject to a state-specific pricing requirement that permitted the imposition of bill-and-keep only when the amounts of traffic the parties are exchanging are roughly balanced. AT&T Wisconsin further

TAB 2

COMPARISON OF RATES PROPOSED & RESULTING AMOUNTS DUE

Rate	***Source***	***Total Amount Due for 400,000,000 MOUs****
$0.014*	Core's Pa. P.U.C. Tariff No. 4	$5,600,000.00
$0.002439	Commission's TELRIC Proceedings, incorporated into Core's Traffic Exchange & Billing Agreement proposal	$975,600.00
$0.0007	FCC's *ISP Remand Order*	$280,000.00
$0.00/MOU ("bill-and-keep")	AT&T Pleadings	$0.00

*This rate has changed over time, to mirror the rates tariffed by Verizon Pennsylvania, Inc. The $0.014 figure represents the currently tariffed rate.
** The actual number of MOUs terminated by Core was 406,102,334 as of September, 2009, when Core filed Direct Testimony in this case. Since then, the number has grown. The figure of 400,000,000 is used simply for ease of calculation and comparison.

TAB 3

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

AT&T-Core-5-12: When Core terminates a call for AT&T or other carriers:

(a) Identify each function Core performs with Core owned and operated equipment;

(b) With respect to each function, identify the precise cost to Core for terminating the call.

(c) Identify each of Core's owned and operated equipment (including brand and model) or network component (including brand and model) that is used to terminate a call to Core's ISP customers in Pennsylvania. What brand and model of tandem and/or end office switch owned and operated by Core does Core utilize to terminate calls to its ISP customers in Pennsylvania?

(d) Is the brand and model of tandem and/or end office switch identified in (c) used for each and every call terminated to Core's ISP customers in Pennsylvania?

(e) What is the physical location (street address and CLLI) of Core owned and operated switching equipment utilized to terminate calls originated by AT&T customers? List the physical location (street address) where Core terminates calls to each of its ISP customers. For the purpose of this question, provide the precise point at which Core hands off traffic to each ISP, not the physical location of the ISP (e.g., do not provide the business address of the ISP).

Response: (a) Core's network provides, at a minimum, the following functions:

TDM Switching
Packet Switching
SIP Support
Vertical Feature Support
Modem Support
Number Assignment Database
Reciprocal Compensation Billing
Exchange Access Billing
Customer Billing
SS7 Signaling
MF Signaling
LNP Support
Local Trunking
Exchange Access Trunking
Long Distance Trunking
Cross-Connects
Collocation

Power
Backup Generators & Batteries
Network Monitoring
Network Security
Trouble Ticket System
24X7 Technical Support

(b) Core does not analyze or record the "precise cost to Core for terminating the call." To Core's knowledge, no carrier does. As a CLEC, Core's costs are not regulated on a rate of return or any other basis. Further, the access regime is not based on costs; except to the extent Core would seek approval to raise its interstate or intrastate access rates above those of the incumbents in the states where Core operates, which is not the case. Finally, the reciprocal compensation regime is founded on the TELRIC cost model, which does not take carriers' "precise cost" as the basis for ratemaking.

(c) Core does not purchase ready-made switching systems directly from one manufacturer. Core assembles switching systems which utilize components from a variety of equipment makers (including Alcatel/Lucent and Cisco), software vendors, and Core's own proprietary software.

(d) The same switching systems are used by Core in each of its six (6) switch sites, and all calls to Core's network are handled by these systems.

(e) Core maintains six (6) switch sites in Pennsylvania:

LATA 228: 401 N. Broad Street, Philadelphia, Pa
CLLIs PHLAPAFGGT8, PHLAPAFG39W, PHLAPAFGDSV

LATA 230: 1515 13th Ave, Altoona, Pa
CLLIs ALNAPANSGT0, ALNAPAATDS0

LATA 232: 15 Public Square, Wilkes-Barre, Pa
CLLIs WLBRPA04GT0, WLBRPA04DS0

LATA 234: 322 Fourth Ave, Pittsburgh, Pa
CLLIs PITBPAKBGT0, PITDPAUU00W, PITFPA01DS0

LATA 226: 301 Chestnut Street, Harrisburg
CLLIs HRBGPACTDS1, HRBGPACTBB1

LATA 924: 2503 W 15th St Erie, Pa
CLLIs ERIEPAMFGT0, ERIEPAMFDS0

(e) Calls are handed off to Core's customers at each of the switch sites listed above, and the customers collocate equipment inside Core's switch sites for that purpose.

Response provided by: Bret Mingo

TAB 4

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF CORE COMMUNICATIONS, INC. TO AT&T'S MOTION TO DISMISS FORMAL COMPLAINT OF CORE COMMUNICATIONS, INC.

Deanne M. O'Dell, Esq.
Attorney ID No.: 81064
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
717.255.3744
Fax 717.237.6019

Attorneys for Core Communications, Inc.

Dated: December 28, 2009

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I. INTRODUCTION

On December 8, 2009, AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh (collectively "AT&T") filed a Motion to Dismiss the Formal Complaint of Core Communications, Inc. ("Core") which was filed almost seven months before, on May 19, 2009.[1] The Motion to Dismiss presents no viable legal basis upon which to conclude that the Commission lacks jurisdiction to require AT&T to pay Core for terminating some 406,102,334 (and counting) minutes of traffic AT&T sends Core indirectly through the Verizon tandems (the "AT&T Indirect Traffic"). Consequently, AT&T's motion must be dismissed. Indeed, AT&T's Motion is a merely subterfuge intended to delay resolution of this proceeding so that AT&T can continue to utilize Core's termination services for free.

The flawed premise of AT&T's Motion is that that the Federal Communications Commission ("FCC") has preempted this Commission from addressing how carriers like Core should be compensated for terminating telecommunications that originate and terminate within Pennsylvania.[2] Going even further, AT&T erroneously claims that the FCC has mandated bill-

---

1 AT&T's decision to file its motion days before its own reply testimony was due is suspect. AT&T clearly could have filed this motion at the outset of the case, or at least discussed its plans to file the motion at the prehearing conference, when the schedule for written testimony was determined. In addition, AT&T in previous filings has indicated that preliminary disposition of Core's Complaint was inappropriate because "[t]he question of whether bill and keep should apply as a compensation scheme between Core and AT&T is a fact-intensive issue that is properly left for testimony and evidentiary hearings." AT&T Prehearing Memorandum (Sept. 14, 2009), at 3.

2 AT&T argues in passing that the Commission is powerless to determine what compensation should apply to the AT&T Indirect Traffic because "the Commission cannot require carriers to pay rates that are not tariffed or part of a contract." Although AT&T cites to no authority for this proposition, Core is compelled to respond. The Commission has authority to resolve Core's complaint in this matter, and in so doing may indeed request compensation at a rate to be determined by the Commission. As AT&T admits, Core as a CLEC cannot request ICA arbitration with AT&T, also a CLEC. Therefore, Core's only procedural means of relief against AT&T is to file a formal complaint, as it has done. Filing of such a complaint presumes that traffic has already been exchanged, and Core has already been deprived of compensation. Otherwise, Core would have no standing to bring a complaint in the first place. *See, eg.,* Memorandum Opinion & Order, *New Valley Corporation v. Pacific Bell*, DA 93-1353, 8 FCC Rcd. 8126, 1993 WL 468177 (F.C.C.), at ¶ 8 ("New Valley relies on the court's decision in Maislin to support its principal claim that it is entitled to a refund of all charges paid for the circuits at issue because PacBell's tariff did not authorize PacBell to charge and collect for the circuits. We find no basis in Maislin or any other court or

and-keep for ISP-bound traffic (meaning, according to AT&T, that it does not have to pay Core for services rendered). AT&T's arguments on this point are unmistakably—and outrageously—wrong as they are based on a paragraph within the *ISP Remand Order* which the FCC eliminated (through a subsequent forbearance order back in 2004.

Regarding AT&T's preemption argument, the FCC has never preempted the Commission's authority to address issues relating to intercarrier compensation between two competitive local exchange carriers ("CLECs"), either as a general matter, or, for the termination of telecommunications bound for Internet service providers ("ISPs"). Rather, the *ISP Remand Order* by its plain terms applies only to intercarrier compensation between an incumbent LEC ("ILEC") and the CLECs with which it exchanges traffic in each state in which the ILEC opts-in to the FCC's rate regime. Indeed, the only existing case directly on point makes clear that state commissions have not been preempted from applying intrastate tariff rates to ISP-bound traffic exchanged between two CLECs.[3] AT&T's attempt to marginalize this precedent by claiming that it was "wrongly decided" and is on appeal is superfluous rhetoric that does not negate the validity of the decision nor the fact that its mere existence completely undermines AT&T's claim of "explicit" preemption.

AT&T's further claim that the FCC has already determined that no compensation is due for the termination of ISP-bound traffic is based on outdated and reversed law. Even if the *ISP Remand Order* did apply to the situation here (which it does not), the FCC has made clear that AT&T would still be required to pay Core some compensation for the termination of its ISP-

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Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff.")

3 *See Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc. et. al.*, 2007 Cal. PUC LEXIS 310 (Cal. PUC 2007) attached hereto as **Exhibit A**; and, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008) attached hereto as **Exhibit B**.

bound traffic. In other words, AT&T's claim that the FCC mandates bill and keep (whereby AT&T pays nothing) for this situation is not correct as a matter of law.[4]

AT&T simply has no valid or lawful justification for refusing to pay Core *any* amount of money for Core's public utility services. The Commission has the jurisdiction necessary to address intercarrier compensation issues between CLECs regarding the termination of intrastate traffic that is bound for ISPs, as there has been no FCC preemption of this authority. AT&T's Motion to Dismiss is nothing more than a self-serving delay tactic intended to create doubt and confusion where there is none. AT&T's sole purpose is to delay resolution of this matter so that it can continue to send traffic to Core for termination and make no payments for services rendered, knowing that Core must, by law, continue to terminate this traffic without compensation until the Commission directs otherwise.[5] To reward such behavior would not only be contrary to the controlling law but also unfair. For these reasons, AT&T's Motion to Dismiss must be denied.

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[4] Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 16 FCC Rcd. 9151, 2001 WL 455869 (F.C.C.)(Apr. 27, 2001)("*ISP Remand Order*"). As discussed in depth below, the FCC in 2004 forbeared from further application of the rule AT&T relies for its bill-and-keep premise, the "New Markets Rule" of paragraph 81 of the *ISP Remand Order*. Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order*, WC Docket No. 03-171, 19 FCC Rcd. 20179, 2004 WL 2341235 (F.C.C.)(Oct. 18, 2004), at ¶¶ 9, 21, 24 and 26 ("*Core Forbearance Order*").

[5] *See*, Declaratory Ruling & Order, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers—Call Blocking by Carriers,* WC Docket No. 07-135, 22 FCC Rcd. 11629, 2007 WL 1880323 (F.C.C.)(June 28, 2007), at ¶¶ 5-6; *and*, Opinion and Order, *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Pa. P.U.C. Docket No. C-20028114 (Aug. 8, 2002), at 9 ("all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.") (Emphasis added).

II. ARGUMENT

A. The Commission Has Subject Matter Jurisdiction To Address Intercarrier Compensation Issues For The Termination Of Intrastate Traffic Such As The Traffic Involved In This Case

There is no dispute that the Commission has subject matter jurisdiction to address intercarrier compensation issues for intrastate telecommunications traffic, pursuant to the Commission's enabling statute.[6] In its Motion, AT&T emphasizes the undisputed fact that the traffic in dispute all originates and terminates within the same Local Access and Transport Area ("LATA") and is, therefore, intraLATA traffic.[7] Under federal law, a call is intrastate if it originates and terminates in the same state.[8] IntraLATA traffic is by definition intrastate traffic.[9] The Commission has jurisdiction over intrastate traffic.[10] Therefore, the Commission has jurisdiction to address Core's complaint, which deals with intrastate traffic and seeks application of a state tariff rate to compensation for termination of this traffic. Indeed, AT&T itself previously admitted that "the Pennsylvania Commission has jurisdiction over the subject matter of this Complaint…"[11] even while acknowledging, at the same time, that "[t]he traffic in dispute is all local traffic (and virtually all local ISP-bound traffic)."[12]

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6 66 Pa. C.S. §§ 102, 104, 1301, 1303, 1304, and 3012.

7 AT&T Motion to Dismiss, at 10-11.

8 Declaratory Ruling, *In the Matter of Thrifty Call, Inc.*, CCB/CPD File No. 01-17, 19 FCC Rcd. 22240, 22246, 2004 WL 2578216 (F.C.C.)(Nov. 12, 2004), at ¶15. ("[A] call is intrastate if it originates and terminates in the same state."); *and*, Report to Congress, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501,1998 WL 166178 (F.C.C.)(Apr. 10, 1998), at ¶112. ("[T]elecommunications are 'interstate' when the communication or transmission originates in any state … and [is] terminated in another state….").

9 Neither party contends that the disputed traffic includes any intraLATA, interstate traffic.

10 66 Pa. C.S. § 102, 3011, *et.seq.*

11 AT&T's Am. Answer (June 18, 2009), at 19.

12 *Id.* at 4.

Because the disputed traffic falls within the Commission's jurisdiction, the focus of this proceeding is to determine the applicable rate at which Core should be compensated. Core's primary argument is that the plain language of its intrastate switched access tariff should apply, since there is no traffic exchange agreement ("TEA") between the parties establishing another rate. In response, AT&T argues that switched access charges can only apply to toll traffic and that Core has already advocated that access charges cannot apply to ISP-bound traffic.[13] AT&T is wrong on both points. First, AT&T's quote of Core's advocacy is pulled from an arbitration between Core and Embarq (an ILEC) regarding the terms of an interconnection agreement between the parties.[14] The context in which Core's statements arose was the issue of so-called "VNXX traffic," calls which are locally dialed and which originate and terminate in the same LATA, although in different exchange areas.[15] In the Embarq case, Core argued (correctly) that the *ISP Remand Order* applied equally to VNXX traffic and to "local" traffic that physically originates and terminates in the same exchange area.[16] When Core stated, in that case (as quoted by AT&T in its Motion), that the *ISP Remand Order* applies to "all" ISP-bound traffic, it clearly intended "all" to mean both "VNXX" and "local." Also, as discussed below, the *ISP Remand Order* and related federal law regarding ISP-bound traffic is limited to ISP-bound traffic originated by an ILEC and terminated by a CLEC, not traffic exchanged between two CLECs.

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13 AT&T Motion to Dismiss, at 4-5.

14 AT&T Motion to Dismiss, at 19 referencing *In re: Petition of Core Communications, Inc.; Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq*, Pa. P.U.C. Docket No. A-310922F7002.

15 *See*, Excerpt from the Main Brief of Core Communications, Inc. in Pa. P.U.C. Docket No. A-310922F7002 (July 31, 2007), at 46-61, attached hereto as **Exhibit C**.

16 *See*, *id.*

Therefore, AT&T's attempt to bolster its erroneous position here by citing to Core's advocacy in the context of a factually different case is taken out of context and irrelevant.

As to AT&T's argument that the Commission is prohibited from ordering AT&T to pay the rate set forth in Core's intrastate access tariff for the traffic at issue here, AT&T has provided no legal support for this assertion. First, there is a factual issue as to whether the AT&T Indirect Traffic is, in fact, "toll" traffic within the meaning set forth in the Telecommunications Act of 1996 (TA-96).[17] Second, the Commission has the authority to determine whether or not Core's intrastate access tariff—which the Commission itself reviewed and approved—applies to the disputed traffic. Core submits that the tariff, by its express language, is plainly broad enough to cover the AT&T Indirect Traffic (which is undisputably intrastate),[18] unless and until the tariff is superseded by an agreement such as a TEA. Third, and contrary to AT&T's statement that the "switched access charges apply only to *toll* traffic, not . . . *non-toll*,"[19] the Commission has never issued any rule or order stating or mandating this nor is there any law to support this assertion. The language relied upon by AT&T simply reiterates the uncontested fact that the intrastate access regime encompasses intrastate toll traffic.[20] This, however, does not answer the question Core is presenting here, i.e., whether the broad language in Core's filed tariff applies to non-toll

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17 47 U.S.C. § 153(48)('Definitions')(The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service"); *and see*, Core Statement No. 1, at 18 ("I am aware that AT&T has argued that Core's Pa. PUC Tariff No. 4 can only apply to "non-local, or toll, calls." AT&T's Amended Answer, at p. 5. At the outset, I should point out that AT&T can not decisively state whether or not the CIC 0292 traffic was toll or locally dialed.") The existence of this factual uncertainty alone precludes the relief AT&T seeks in its Motion to Dismiss.

18 Core Communications, Inc. Pa. P.U.C. Tariff No. 4, at § 1 (defining "Switched Access Service" as "[a]ccess to the switched network of an Exchange Carrier for the purpose of originating or terminating communications. Switched Access is available to carriers, as defined in this rate sheet."); *and see*, Core Statement No. 1, at 21-22 (comparing terms in Core's tariff to facts in this case).

19 AT&T Motion to Dismiss, at 4.

20 *See*, AT&T Statement 1.0, at 25-26 citing to the *Global Order* and 66 Pa. C.S. § 3017(b). Neither of these, however, ***prohibit*** the application of access charges to non-toll, intrastate, intraLATA traffic.

as well as toll traffic in the absence of a TEA. As the Commission has jurisdiction to resolve this issue through an analysis of whether or not to apply Core's Commission-approved access tariff to the AT&T Indirect Traffic, AT&T's Motion must be denied.

AT&T's Motion also fails to mention the well-established "filed rate doctrine" through which a public utility like Core is required to charge, and entitled to collect, for services based on the rates, terms and conditions set forth in its applicable, Commission-approved tariff.[21] The filed rate doctrine is enshrined in the Commission's enabling statute.[22] The purpose of the doctrine is to ensure that public utilities receive payment for the public utility services they provide, [23] something which is not happening in this case. This doctrine provides another basis upon which to conclude that the Commission has jurisdiction in this matter because it empowers the Commission to address claims that customers (like AT&T) of a public utility (Core) are not paying pursuant to the utility's lawfully filed and applicable tariff, as Core is alleging here.

As an alternative to application of the rates established in its tariff, Core has made great efforts to negotiate a TEA with AT&T, pursuant to section 251(b)(5) of TA-96.[24] The TEA

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21 *See, Louisville & N. R. Co. v. Maxwell*, ("Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice, of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.")

22 66 Pa. C.S. § 1303 ("Adherence to tariffs")("No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part.")

23 *Philadelphia Suburban Water Company v. Pennsylvania PUC*, 808 A.2d 1044, 1050 (Pa. Commw. 2002)("Free public utility service has been examined by our appellate courts and found to be anathema to a system of regulation and publication of a utility's tariffs.")

24 47 U.S.C. § 251(b)(5).

proposed by Core would establish the Commission-approved, cost-based TELRIC rate, which is several times lower than the rate in Core's tariff, as the rate applicable to Core's termination of the AT&T Indirect Traffic.[25] As outlined in Core's direct testimony, Core's efforts in this regard have been met with obstinacy and utter refusals by AT&T.[26] The only explanation for such a non-constructive response (with no counteroffer) can be that AT&T does not want to pay Core anything for the services Core must provide. Such transparently self-serving behavior must not be permitted. The AT&T Indirect Traffic is indisputably intrastate traffic and this Commission has the authority and jurisdiction to determine the appropriate rate at which Core should be compensated by AT&T for providing the public utility service of termination. As AT&T has presented nothing to support its claim of a lack of jurisdiction, the Motion to Dismiss must be denied.

B. The Commission Has Not Been Expressly Preempted From Addressing Compensation Issues for the Termination of CLEC-to-CLEC ISP-Bound Traffic

Because most of the calls from AT&T customers are ultimately bound for Core's ISP customers,[27] AT&T relies on the argument that all ISP-bound traffic has been declared subject to

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25 Core Statement No. 1, at 22-23 and Exhibit BLM-11 (Core's proposed "Traffic Exchange and Billing Agreement").

26 Core Statement No. 1, at 13. In fact, AT&T has been very critical of this proposed resolution notably offering no other payment rate for Core's consideration and steadfastly arguing that AT&T does not have to pay anything. *See*, AT&T Statement 1.0, at 18-20. AT&T's obstinacy is especially remarkable in light of its admission that "both the reciprocal compensation provisions of the 1996 Act (i.e., § 251(b)(5)) and the FCC's reciprocal compensation rule apply by their plain terms to CLEC-CLEC traffic.") AT&T Motion to Dismiss, at 20. To be clear, Core's position is that section 251(b)(5) does apply to CLEC-CLEC traffic, once it has been implemented in the form of a TEA. Core Statement No. 1, at 22 and 26-27.

27 A now tiny but steadily growing portion of the AT&T Indirect Traffic is bound for Core customers that are not ISPs, but rather some flavor of voice-over-IP (VOIP) service or application provider. As AT&T correctly notes, AT&T Motion to Dismiss, at 9 and note 13, the issue of whether a LEC may collect intrastate access charges on certain calls placed by VOIP end users to the public switched telephone network (PSTN) is currently before the Commission in *Palmerton Telephone Co. v. Global NAPs South, Inc. et al.*, Pa. P.U.C. Docket No. C-2009-2093336. While that case is not identical to the current proceeding, Core acknowledges that the Commission's

the FCC's "interstate" jurisdiction, and, that the Commission has been preempted from the exercise of its subject matter jurisdiction to determine the appropriate rate for call termination in the absence of any agreement between the parties (ironically AT&T refuses to negotiate any type of traffic exchange agreement with Core).[28] In support of this claim, AT&T provides a lengthy discourse on the history of the FCC's *ISP Remand Order*, which governs ILEC-originated, CLEC-terminated, ISP-bound traffic. Sorting through AT&T's smoke and mirror arguments shows that there is no basis upon which to conclude that the Commission has been explicitly preempted from adjudicating this matter. On the contrary, the Commission has jurisdiction to address Core's complaint and this conclusion is supported by the only precedent squarely addressing the matter at issue here.[29]

Once believing it has established preemption, AT&T then focuses on the one FCC order that it favors (the *ISP Remand Order*), to argue that the FCC has exonerated it from paying Core anything for Core's termination of the traffic. Not only is AT&T wrong in its preemption theory, it is also wrong as a matter of law in relying on the subsequently modified *ISP Remand Order* (even if it did apply here) for support of its self-serving position that it owes Core nothing as a matter of federal law.

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resolution of that case could provide valuable guidance in the resolution of Core's complaint because it is dealing with the applicability of a utility's intrastate access tariff to traffic that the originating party claims is subject to (1) exclusive federal jurisdiction and (2) bill-and-keep.

[28] AT&T Motion to Dismiss, at 12-16.

[29] *See* **Exhibit B**, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008). Even if, as AT&T argues, the *ISP Remand Order* somehow silently governs CLEC-CLEC traffic (which it does not), AT&T fails to explain why the Commission would then lack authority to apply and enforce the FCC's rate set forth in that order to the AT&T Indirect Traffic. (As discussed in Section B.2, AT&T is wrong that the FCC mandates a bill-and-keep, i.e., no payment arrangement, if its order applied here.) The *ISP Remand Order* rules arise under section 251(b)(5) of the Act. Order on Remand, *In the Matter of High-Cost Universal Service Support*, WC Docket No. 04-36, 24 FCC Rcd. 6475, 2008 WL 4821547 (Nov. 5, 2008), at ¶ 7. Under TA-96 and FCC precedent, state commissions have an important role in the implementation and enforcement of section 251, even for "interstate" traffic. Indeed, AT&T itself points to two cases where the Commission interpreted and applied the *ISP Remand Order* rules to LECs under its jurisdiction. AT&T Motion to Dismiss, at 19.

1. The Commission Has Not Been Preempted From Adjudicating Core's Complaint On The Basis That The Traffic At Issue Here Is ISP-Bound

As the party claiming preemption, AT&T has the burden of proof and must show that there is "a clear indication that an agency intends to preempt state regulation."[30] While "[p]re-emption may result . . . from action taken by . . . a federal agency acting within the scope of its congressionally delegated authority,"[31] the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption.[32] AT&T has not met this burden of proof as there is no "clear indication" or express intention stated by the FCC to preempt the power of the Commission to address intercarrier compensation issues between CLECs regarding ISP-bound traffic originating and terminating on an intrastate basis.

AT&T spends much time explaining the FCC's actions in the *ISP Remand Order* regarding ISP-bound traffic that is originated by ILECs and terminated by CLECs on behalf of their ISP customers. While the FCC did affirmatively act: (1) to declare that the ISP-bound traffic at issue in the *ISP Remand Order* is jurisdictionally interstate; (2) to set rules for the compensation for that traffic; and, (3) to specifically preempt state commissions from making different compensation rules for that traffic, the *ISP Remand Order* involved ILEC to CLEC traffic only.[33] The issue in this case—the compensation applicable to CLEC to CLEC ISP-bound

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30 *Hillsborough County Automated Med. Labs., Inc.* 471 U.S. 707 (1985).

31 *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

32 *See Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100 n.7 (2d Cir. 2006) ("a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.") (Emphasis added).

33 In a footnote, AT&T makes the bizarre claim that its IXC affiliate, AT&T Communications of PA, LLC, was "misled" by Core into paying intrastate access charges for certain intrastate toll calls placed to ISPs on Core's network. AT&T Motion to Dismiss, at 4 and note 4. This claim is faulty on two levels. First, AT&T only paid Core for this explicitly and undisputedly intrastate, toll traffic shortly after the prehearing conference in this case, in

traffic—has never been squarely before the FCC in the *ISP Remand Order* or otherwise, and the FCC has promulgated no rules for such traffic.[34] AT&T tries to evade this reality by cobbling together references in the *ISP Remand Order* to "competing LECs" and "carriers" together with references to CLECs terminating traffic on behalf of their ISP customers.[35] What AT&T never acknowledges is that the entire premise of the *ISP Remand Order* and resulting rules is the relationship between incumbent LECs and competitive LECs. This ILEC-CLEC relationship is emphasized throughout the *ISP Remand Order* as well as subsequent related orders and cases.[36] For this reason, AT&T's attempted slight of hand is not persuasive nor does it constitute a

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September, 2009. Yet AT&T knew when it filed its Amended Answer in June, 2009, that the AT&T Indirect Traffic was "virtually all" ISP-bound. AT&T Am. Answer, at 3. Second, AT&T states elsewhere in its motion that "[s]witched access rates apply to toll traffic..." AT&T Motion to Dismiss, at 5 and note 7. Indeed, neither party to Core's knowledge has ever taken the position that the *ISP Remand Order* applies to toll traffic delivered by an IXC to a LEC, whether intrastate or interstate. Core reserves its right to more fully address AT&T's claim if and when AT&T follows through with its stated intention to "seek a refund of the access charges it paid to Core." AT&T Motion to Dismiss, at 4 and note 4.

34 *Cf.*, Declaratory Ruling & Report and Order, *In the Matter of Developing a Unified Intercarrier Compensation Regime—Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, 20 FCC Rcd. 4855, 2005 WL 433200 (Feb. 24, 2005), at ¶ 9 ("Because the existing [FCC] rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs.")

35 AT&T Motion to Dismiss, at 19-21.

36 *Egs., ISP Remand Order*, at ¶ 89 ("It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed."); *Core Forbearance Order*, at ¶ 8 ("The Commission also determined that the rate caps for ISP-bound traffic (or such lower rates as had been imposed by state commissions for the exchange of ISP-bound traffic) should apply only if an incumbent LEC offered to exchange all traffic subject to section 251(b)(5) at the same rates... The Commission adopted this "mirroring" rule to ensure that incumbent LECs paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic."); *Id.*, at ¶ 9 ("In this situation, if an incumbent LEC has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period (the "new markets" rule)." *In re Core Communications, Inc.*, 455 F.3d 267, 270 (2007)("If ISP-bound traffic were governed by § 251(b)(5), then reciprocal compensation arrangements would be required for the ILEC-to-CLEC hand-off described above, and ILECs would be required to compensate CLECs for completing their customers' calls to ISPs.. "); *and id.*, at 273 ("As an adjunct to the rate caps, the Commission established a "mirroring rule," which provided that the rate caps on ISP-bound traffic would apply only if the ILEC also offered to charge the CLEC the same capped rate to terminate local traffic that originated on the CLEC's network.")(Emphases added).

clearly expressed intention to preempt the Commission's authority to regulate intrastate ISP-bound traffic between CLECs which is what AT&T has the burden of showing in order to prevail on its preemption argument.

The actual compensation rules set forth in the *ISP Remand Order* clearly pertain—exclusively—to an ILEC-CLEC relationship. The order's provisions for rate caps, growth caps, the 3:1 presumption used to identify ISP-bound traffic, and the mirroring rule, are implemented through the interconnection agreement ("ICA") process[37] which, under TA-96, a CLEC may invoke <u>only against an ILEC</u>.[38] Under the mirroring rule, the FCC also made clear that <u>only an ILEC</u> may "opt-in" to the interim pricing regime, on a state-by-state basis.[39] Importantly, if the ILEC does not opt in, previous state commission rulings regarding ISP-bound traffic will continue to apply to the ISP-bound traffic that the ILEC originates.[40] The *ISP Remand Order* says nothing about how a CLEC such as AT&T would opt-in or otherwise avail itself of the interim compensation regime.[41] Based on all of this, the only federal court to address the issue

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37 *ISP Remand Order*, at ¶¶ 82, 89.

38 47 U.S.C. § 252.

39 *ISP Remand Order*, at ¶ 89 ("Because we are concerned about the superior bargaining power of <u>incumbent LECs</u>, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an <u>incumbent LEC</u> offers to exchange all traffic subject to section 251(b)(5) at the same rate. . .")(Emphases added).

40 *Id.* ("For those <u>incumbent LECs</u> that choose not to offer to exchange all section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.")(Emphasis added).

41 Nor does the *ISP Remand Order* explain what happens if one CLEC opts in and another CLEC does not. This is yet one more indication that the order is only meant to address intercarrier compensation between an ILEC and the CLECs that interconnect with that ILEC in states where the ILEC elects to opt in.

of CLEC to CLEC, ISP-bound traffic delineated the applicability of the *ISP Remand Order* to make clear that it does not apply when two CLECs are exchanging ISP-bound traffic.[42]

In this case, both Core and AT&T are CLECs. Thus, the *ISP Remand Order* is not operable and it does not preempt the Commission's jurisdiction over the Complaint. Moreover, AT&T's bogus argument that it needs to be "protected" from Core and that this Commission has already declared its desire to "protect" other CLECs from Core is ridiculous, based on rejected findings in a reversed initial decision, and intended only to divert attention away from both the facts and the law of this case which do not favor AT&T.[43] AT&T's further claim that "regulatory arbitrage victimizes ILECs and CLECs alike"[44] is likewise laughable, considering AT&T itself collects a rate of $0.002814/MOU (four times the rate set forth in the *ISP Remand Order*) for its own termination of ISP-bound traffic.[45] Likewise, the Commission orders cited by AT&T as support that the Commission itself determined it was preempted by the *ISP Remand Order* are not on point because they both address interconnection arbitrations between an ILEC

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42 *See* **Exhibit B**, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008).

43 AT&T Motion to Dismiss, at 17-18. AT&T quotes the ultimately reversed findings of ALJ Weismandel's June 2006 Initial Decision which rejected Core's application for CLEC certification in rural telephone company territories. On exceptions, the Commission reversed the initial decision and granted Core's application. Opinion and Order, *Application of Core Communications, Inc. for Authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the Provision of competitive residential and business Local exchange telecommunications services throughout the Commonwealth of Pennsylvania*, Docket No. A-310922F002, AmA, (Dec. 4, 2006), at 10-12 (specifically reversing the findings of ALJ Weismandel claiming that Core's application was a "sham"). The Commission's decision was upheld on appeal to the Commonwealth Court. *Rural Telephone Company Coalition v. Public Utility Commission*, 941 A.2d 751 (Pa. Commw. 2008).

44 AT&T Motion to Dismiss, at 22.

45 *See*, **Exhibit D**, Amendment No. 1 to the Traffic Termination Agreement between Consolidated Communications of Pennsylvania Company, LLC and TCG Pittsburgh, Inc., Pa. P.U.C. Docket No. A-310213F7005 (Feb. 2, 2005), at 3. In its upcoming Surrebuttal Testimony, Core will fully discuss and expose the hypocrisy of AT&T's repeated claims of "regulatory arbitrage" set forth in its Motion to Dismiss and Statement 1.0.

and a CLEC.[46] In these interconnection arbitration cases, unlike here, the FCC's ISP cases were relevant and directly on point. Similarly, as explained earlier, AT&T's attempt to cite to Core's advocacy during its interconnection arbitration with Embarq, again an ILEC, is irrelevant, in addition to being taken out of context.[47] To be clear, the dispute here is about the intrastate ISP-bound traffic exchanged between two CLECs. AT&T has presented nothing (because it cannot) to prove that the FCC has expressly preempted the Commission from adjudicating this matter. Without a showing of express preemption, the Commission maintains jurisdiction to address how AT&T must compensate Core for the termination of the intrastate traffic at issue here.

There is precedent, summarily dismissed by AT&T, which is directly on point and is directly contrary to AT&T's position. The United District Court for the Northern District of California has ruled that a state commission is not preempted from addressing CLEC to CLEC ISP-bound traffic and rejected all of AT&T's theories which have been copied here.[48] Pac-West Telecomm, Inc. ("Pac-West"), a CLEC, invoiced AT&T, also a CLEC, for termination charges on traffic that AT&T originated which was bound for ISPs based on Pac-West's intrastate traffic tariff. Similar to its behavior in this case, AT&T refused to pay based and relied on the same arguments it copied here. Initially, the California Public Utilities Commission ("CPUC") rejected AT&T's arguments concluding that "it is appropriate to apply the CLEC's intrastate

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46 AT&T Motion to Dismiss, at 8 and 19. Although the docket numbers and proper case cites are missing from AT&T's Motion, Core believes that AT&T is referring to the following two ICA arbitration cases each involving an ILEC-CLEC relationship: Opinion and Order, *In re Petition of US LEC of Pennsylvania, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, Docket No. A-310814F7000 (Apr. 18, 2003); *and*, Opinion and Order, *In re Petition of Global NAPS South, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, Docket No. A-310771F7000, (Apr. 21, 2003).

47 AT&T Motion to Dismiss, at 19 referencing *In re: Petition of Core Communications, Inc.; Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq*, Docket No. A-310922F7002.

48 *See*, **Exhibit B**, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008).

tariff for termination services afforded to another CLEC where no interconnection is in effect between the two CLECs."[49] AT&T then appealed the CPUC determination. On appeal, the District Court found that the issue of CLEC to CLEC ISP-bound traffic was not before the FCC when it crafted the *ISP Remand Order* and, therefore, states are not preempted from addressing the issue as it has been presented here.[50] In its Motion to Dismiss, AT&T offers nothing to distinguish this case from the one it lost before the District Court flippantly stating instead that the case was "wrongly decided" and is currently on appeal.[51] AT&T's view about why the decision was "wrongly decided" is merely a restatement of the same already rejected arguments it asks this Commission to consider in the context of this Motion to Dismiss. None of this negates the validity of the reasoning underlying both the District Court's Order as well as the underlying CPUC order. Moreover, the existence of this decision makes abundantly clear that there is no "express" preemption, otherwise AT&T's actions in California would have been approved. Without a convincing showing of express preemption, this Commission continues to have jurisdiction over Core's Complaint and AT&T's Motion must be dismissed.

2. Even If The ISP Remand Order Applied, AT&T Would Be Required To Compensate Core For The Termination Of Its ISP-Bound Traffic

Even if the compensation scheme established by the *ISP Remand Order* applied here, the Commission would still have jurisdiction under section 251(b)(5) to enforce application of the FCC's rate regime, as TA-96 contemplates shared state and federal authority over all aspects of

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49 *See*, **Exhibit A**, *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc. et. al.*, 2007 Cal. PUC LEXIS 310, *34 (Cal. PUC 2007).

50 *See*, **Exhibit B**, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740, *34-*35 (N.D. Cal. Aug. 12, 2008).

51 AT&T Motion to Dismiss, at 22.

competition.[52] AT&T wrongly claims that the FCC's rate regime for the exchange of ISP-bound traffic between ILECs and CLECs dictates bill-and-keep, meaning neither carrier bills the other for traffic termination.[53]

AT&T is plain wrong as a matter of law in this proffered interpretation of the *ISP Remand Order.* Essentially, AT&T argues that (if it were an ILEC and governed by the *ISP Remand Order* which it is not) it is not legally required to pay anything for the termination of its ISP-bound traffic.[54] It is true that the FCC did direct in the *ISP Remand Order* that bill-and-keep apply in certain situations, between ILECs and CLECs, pursuant to the "New Markets Rule" set forth in paragraph 81 of the order.[55] Under the New Markets Rule, when a new carrier (a CLEC) entered a new market after promulgation of the *ISP Remand Order*, it was required to exchange traffic on a bill-and-keep basis with the ILEC, assuming the ILEC had opted into the federal rate caps for ISP-bound traffic.[56] Core subsequently petitioned the FCC to forbear from this rule, *inter alia,* and the FCC ultimately agreed in 2004.[57] Because the New Markets Rule created

[52] In fact, the Commission has already taken action to interpret the applicability of the compensation scheme of the *ISP Remand Order* as between ILECs and CLECs. *Eg.,* Opinion and Order, *Petition of Verizon Pennsylvania Inc for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process*, Docket No. A-310752F7000 (May 29, 2002). Assuming the *ISP Remand Order* does apply to the AT&T Indirect Traffic (which it does not), AT&T offers no reason why the Commission could not similarly interpret and enforce those terms as between two CLECs.

[53] AT&T Motion to Dismiss, at 16-19. In its Amended Answer, AT&T argued that bill-and-keep applied because "the parties throughout this four-year period were 'paying' each other 'in kind' for terminating each other's local traffic, an arrangement known in the industry as 'bill and keep.'" AT&T Am. Answer, at 2-3. However, in the Motion to Dismiss, AT&T does not even acknowledge its previous theory of bill-and-keep, and appears to have abandoned this theory.

[54] AT&T Motion to Dismiss, at 19-23.

[55] AT&T relies exclusively on the New Markets Rule in paragraph 81 of the *ISP Remand Order* as the sole authority to support its claim that bill and keep applies to the AT&T Indirect Traffic. *See,* AT&T Motion to Dismiss, at 18 (citing twice to ¶ 81 of the *ISP Remand Order*).

[56] *ISP Remand Order*, at ¶ 81.

[57] *Core Forbearance Order*, at ¶¶ 9, 21. 24 and 26.

different rates for similar or identical functions and no longer appeared necessary for the protection of consumers based on the FCC's finding that opportunities for regulatory arbitrage were on the wane, the FCC made clear that there was one compensation scheme in effect for the termination of ISP-bound traffic between ILECs and CLECs.[58] This one compensation scheme requires ILECs to compensate CLECs at the rate of $0.0007/MOU. Thus, even if AT&T were correct (which it is not) that the compensation scheme set forth by the FCC for ILEC to CLEC ISP-bound traffic did somehow apply to this situation regarding the exchange of ISP-bound traffic between two CLECs, AT&T would still be required to compensate Core something for the termination of this traffic which it steadfastly refuses to do. Moreover, the Commission would still be empowered, pursuant to TA-96, to address the proper applicability of the *ISP Remand Order* compensation scheme (if it applied) and, therefore, AT&T's Motion to Dismiss claiming a lack of jurisdiction must be denied.

III. CONCLUSION

The Commission has jurisdiction to adjudicate Core's complaint against AT&T for AT&T's utter refusal to pay Core anything for Core's termination of AT&T's intrastate ISP-bound traffic. There is no dispute that the traffic in issue is intrastate because it originates and terminates within the Commonwealth of Pennsylvania. The only dispute is what AT&T should be required to pay Core for the termination of this traffic. AT&T has presented nothing to show that the Commission's authority to resolve this dispute has been preempted. There has been no express preemption by the FCC's *ISP Remand Order* (which deals with ILEC to CLEC ISP-bound traffic and not CLEC to CLEC ISP-bound traffic as the situation here). On the contrary, the currently effective cases directly on point make clear that no preemption has occurred.

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58 *Id.* at ¶¶ 21, 26.

Further, AT&T's argument that the federal scheme (assuming arguendo that it applies here which it does not) absolves AT&T from making any payment to Core for the termination of this traffic is wrong as a matter law because it ignores the fact that the FCC issued a subsequent order forbearing from the basis of AT&T's argument (the New Markets Rule). This argument further ignores the fact that the Commission is empowered under TA-96 to determine what the federal scheme requires in terms of compensation (if the federal rules did apply) between two Commission-certificated CLECs. For all of these reasons, the Commission maintains jurisdiction in this matter and AT&T's Motion to Dismiss must be denied.

Respectfully Submitted,

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EXHIBIT A

LexisNexis

LEXSEE 2006 CAL. PUC LEXIS 248

Pac-West Telecomm, Inc., Complainant,
vs.
AT&T Communications of California, Inc., Teleport Communications Group of San Francisco, Teleport Communications Group of Los Angeles, Teleport Communications Group of San Diego, Defendants

Decision 06-06-055; Case 04-10-024

California Public Utilities Commission

2006 Cal. PUC LEXIS 248

June 29, 2006, Dated; October 20, 2004, Filed

[*1] APPEARANCES: James M. Tobin and Mary Wand, for Pac-West, Telecomm, Inc., complainant.; Randolph W. Deutsch for AT&T Communications, of California, et al., defendants.

PANEL: MICHAEL R. PEEVEY, President; GEOFFREY F. BROWN; DIAN M. GRUENEICH; JOHN A. BOHN; RACHELLE B. CHONG, Commissioners

OPINION: DECISION GRANTING COMPLAINT

This decision grants the complaint of Pac-West Telecomm, Inc. (Pac-West) and awards it $ 7.115 million in unpaid tariff charges owed by defendant AT&T Communications of California, Inc. (AT&T). n1 However, we hold that AT&T is not liable for interest or late payment charges on these unpaid tariff amounts.

n1 As used in this decision, "AT&T" also refers to three additional defendants that are subsidiaries of AT&T Communications of California, Inc. The three subsidiaries are Teleport Communications Group of San Francisco (T-SF), Teleport Communications Group of Los Angeles (T-LA), and Teleport Communications Group of San Diego (T-SD). AT&T Corp., a New York corporation that is the parent of AT&T Communications of California, Inc., obtained control of these three companies in 1998 when it acquired their corporate parent, Teleport Communications Group, Inc. However, T-SF, T-LA and T-SD have retained their separate corporate identities, and have been operated as subsidiaries of AT&T Communications of California, Inc.

[*2]

I. Procedural Background

The complaint in this case alleged that AT&T and its three subsidiaries had refused to pay Pac-West the charges due for calls AT&T originates for its local exchange customers and routes to Pac-West through the tandem switches of the two principal California incumbent local exchange carriers (ILECs), Pacific Bell Telephone Company (Pacific) n2 and Verizon California Inc. (Verizon).

n2 Pacific Bell Telephone Company now does business as SBC California, the name by which it is referred to in the complaint.

The complaint noted that while Pac-West and AT&T each have interconnection agreements with Pacific and Verizon, they do not have an interconnection agreement with each other. In the absence of such an agreement, Pac-West contended that it was entitled to the termination charges set forth in its intrastate tariffs for traffic that originates with AT&T customers and is transmitted to Pac-West by the two ILECs. Pac-West alleged that AT&T has refused to pay any of the statements Pac-West has [*3] rendered for these charges, which now total over $ 7 million. n3 As relief, Pac-West asked not only that AT&T be ordered to pay all the charges for which it had been invoiced, but also to pay all future charges based on Pac-West's intrastate tariffs "unless and until the AT&T Companies enter into a direct interconnection agreement with Pac-West."

n3 The complaint originally alleged that "the AT&T Companies have refused to pay over $ 3.5 million of applicable tariffed Pac-West charges that they have incurred." However, in an e-mail message sent to the assigned Administrative Law Judge (ALJ) on December 21, 2004, Pac-West's counsel stated that she had discovered this amount was incorrect, that errors had been made in preparing Pac-West's bills to AT&T, and that the amount that should have been billed to AT&T under Pac-West's theory of the case exceeded $ 6 million.

In the testimony submitted on March 7, 2005, one of Pac-West's witnesses contended that the correct amount due from AT&T, as of January 31, 2005, was $ 7,115,014.16. As explained *infra*, AT&T does not dispute that this is the proper amount if the Commission accepts Pac-West's theory of the case.

[*4]

In its answer, AT&T contended that no charges were due. Since the overwhelming majority of the traffic that the two ILECs transmit for AT&T to Pac-West was ultimately bound for Internet service providers (ISPs), AT&T argued, this case should be governed by the so-called "ISP Remand Order" issued by the Federal Communications Commission (FCC) in April 2001. n4 In the ISP Remand Order, the FCC concluded that because of the regulatory arbitrage that had resulted from certain competitive local exchange carriers (CLECs) targeting ISPs as their customers (thus entitling these CLECs to substantial amounts of reciprocal compensation), n5 the FCC should use its authority to preempt this area and require the affected carriers to make a three-year transition to a "bill and keep" compensation system, n6 rather than allow the CLECs to continue reaping windfalls from the payment of reciprocal compensation. n7

n4 The technical citation for the ISP Remand Order is *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131), released *April 27, 2001, 16 FCC Rcd 9151.* In its pleadings, AT&T acknowledged that the United States Court of Appeals for the District of Columbia Circuit subsequently found that the statutory provision relied on by the FCC did not support the ISP Remand Order. However, AT&T noted, the D.C. Circuit remanded the order to the FCC for further consideration without vacating it. *Worldcom, Inc. v. FCC, 288 F.3d 429, 434 (D.C. Cir 2002), cert. denied sub nom. Core Communications, Inc. v. FCC, 538 U.S. 1012 (2003).* As a result of this unusual procedural posture, other courts (including the Ninth Circuit) have noted that the provisions of the ISP Remand Order remain in effect despite the D.C. Circuit's conclusions about the deficiencies in its statutory analysis. *See, e.g., Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1122-23 (9th Cir. 2003).* In this decision, the ISP Remand Order is sometimes referred to simply as the "Remand Order."

[*5]

n5 Under § 251(b)(5) of the Telecommunications Act of 1996, each local exchange carrier has a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." In *Wisconsin Bell, Inc. v. Bie, 216 F. Supp.2d 873 (W.D.Wisc. 2002),* the district court explained reciprocal compensation arrangements as follows:

> "As new entrants and incumbents have interconnected their local exchange networks, some calls originating on one carrier's network are completed, or 'terminated,' on another carrier's network. For example, if a customer of carrier A calls a customer of carrier B, the call originates on carrier

A's equipment but terminates on carrier B's equipment. Absent a reciprocal compensation arrangement, carrier A would charge its customer for the call, but carrier B would receive no compensation for the use of its equipment in terminating the call. In a reciprocal compensation regime, carrier A pays carrier B on a per minute basis for terminating the local call. This insures that both carriers are compensated for local intercarrier calls. In contrast, under a 'bill-and-keep' arrangement, each carrier recovers from its own customers the costs of terminating calls that originate with other carriers." *(216 F. Supp.2d at 875-76.)*

[*6]

n6 As noted in the quotation from *Wisconsin Bell, Inc. v. Bie, supra,* in a "bill and keep" arrangement each carrier recovers from its own customers the costs of terminating calls that originate with other carriers. The definition of "bill and keep" that appears in footnote 6 of the ISP Remand Order is quite similar to the one in *Wisconsin Bell, Inc. v. Bie*:

"'Bill and keep' refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network . . . Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks." *(16 FCC Rcd at 9153;* citations omitted.)

n7 In the ISP Remand Order, after noting in P 20 that reciprocal compensation had grown up because of the assumption that "traffic back and forth on . . . interconnected networks would be relatively balanced," the FCC described the problem of regulatory arbitrage connected with ISPs as follows:

"Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. These effects prompted the Commission to consider the nature of ISP-bound traffic and to examine whether there was any flexibility under the statute to modify and address the pricing mechanisms for this traffic . . ." (ISP Remand Order P 21; *16 FCC Rcd at 9162.)*

To illustrate the magnitude of the arbitrage problem, P 5 of the ISP Remand Order points to evidence that, on average, CLECs terminate 18 times more traffic than they originate, and that this imbalance results in "annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic." *(16 FCC Rcd at 9154-55.)*

The issue of arbitrage figures very prominently in the dispute here between Pac-West and AT&T. In one of the post-hearing briefs it submitted, Pac-West conceded that its business plan relies on targeting ISPs as customers. *See*, Pac-West Reply Brief on Compensation Issues, filed June 1, 2005, p. 9. Pac-West also did not dispute AT&T's assertion that Pac-West carries an estimated 20% of the dial-up Internet traffic in California. *See*, AT&T Opening Brief on Compensation Issues, filed May 11, 2005, p. 8.

[*7]

In its answer, AT&T placed particular reliance on P 81 of the ISP Remand Order, which states that for carriers not having an interconnection agreement in effect on the issuance date of the ISP Remand Order (as AT&T and Pac-West did not), ISP-bound traffic must be exchanged on a bill-and-keep basis. n8 AT&T concluded that since the ISP Remand Order preempted state law in this area (including any charges in intrastate tariffs), and since AT&T had met its obligation to exchange traffic on a bill-and-keep basis, it owed Pac-West nothing. AT&T also contended that as a CLEC rather than an ILEC, it had no obligation under the Telecommunications Act of 1996 to enter into an interconnection agreement with Pac-West. Thus, AT&T contended, the Commission should dismiss the complaint.

n8 P 81 of the ISP Remand Order states in full:

> "Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served). In such a case, as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period. We adopt this rule for several reasons. First, our goal here is to address and curtail a pressing problem that has created opportunities for regulatory arbitrage and distorted the operation of competitive markets. In so doing, we seek to confine these market problems to the maximum extent while seeking an appropriate long-term resolution in the proceeding initiated by the companion [notice of proposed rulemaking]. Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer. Second, unlike most carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments in their business plans." *(16 FCC Rcd at 9188-89;* footnote omitted.)

[*8]

A. The Prehearing Conference (PHC) and Scoping Memo

Shortly before the PHC scheduled for January 7, 2005, both parties submitted statements on the issues to be addressed at the PHC. In its statement, after summarizing the pleadings, Pac-West stated that the parties "do not fundamentally disagree over the legal issues that give rise to the dispute," and proposed that the Commission should have a two-phase proceeding, with the first phase devoted to the question of "whether the law requires AT&T to compensate Pac-West and the structure of that compensation mechanism," and the second phase devoted to an investigation of "the facts underlying the amounts allegedly due."

Pac-West also proposed that the parties should exchange opening briefs on February 18 and reply briefs on March 11, 2005. This schedule, Pac-West asserted, would "allow[] the Commission ample time to issue a decision and conduct any subsequent proceedings, should they be necessary," within the 12-month period for resolving adjudication matters set forth in Pub. Util. Code § 1701.2(d).

In its statement, AT&T agreed that the case presented threshold legal issues as to the scope and effect of the ISP Remand Order, and [*9] asserted that the parties' contentions could be set forth in "briefs that can be characterized as briefs on cross-motions for summary judgment." (AT&T PHC Statement, p. 2.) Although differing somewhat with Pac-West in its formulation of the issues to be briefed, AT&T endorsed the briefing deadlines proposed by Pac-West. AT&T also agreed with Pac-West that if a decision in Pac-West's favor was issued on the threshold legal questions, then a second phase of the proceeding -- with adequate time for discovery -- should be held to determine the amount of compensation due to Pac-West.

At the PHC, the Administrative Law Judge (ALJ) agreed that the parties' proposal for briefs on the threshold legal issues was a good one, although he altered the proposed due dates somewhat. The ALJ noted, however, that because of the 12-month period set forth in Pub. Util. Code § 1701.2(d), it would not be feasible to have a two-phase proceeding. Instead, the ALJ stated that at the same time the parties were drafting briefs on the legal issues raised by the ISP Remand Order, they would be required to submit testimony on the amount of compensation that should be paid to Pac-West in the event it prevailed on [*10] its liability theory.

Pac-West's and AT&T's counsel replied that while it would be feasible to submit testimony in this fashion, it was likely that even if their clients could agree on the number of traffic minutes at issue, Pac-West and AT&T would probably be submitting a menu of possible compensation awards in their testimony. Such a menu would be necessary, the parties emphasized, because of their significant differences over which rates should apply to the minutes at issue, as well as to their differences concerning the limitations period that applied to Pac-West's claims. n9

n9 For example, AT&T's counsel stated:

> "I want to make sure that you understand this, that it wouldn't be just one number. That based on the possibilities of how the legal arguments go, there could be different numbers presented to you for you to decide . . .
>
> * * *
>
> For example -- I don't know this yet because we haven't seen [support for Pac-West's] change from 3-1/2 to 6 million, but we might want to argue that some of that is barred by estoppel or statute of limitations or whatever . . ." (PHC Transcript, pp. 12-13.)

At another point, AT&T's counsel noted that as a result of Commission decisions, special rules apply as to how long one can back-bill for various types of telecommunications charges; *e.g.*, 90 days for residential customers and 18 months for access charges. (*Id.* at 14.)

Although AT&T raised a limitations issue in its February 11 opening brief on legal questions, counsel for AT&T sent a letter to the assigned ALJ on March 18, 2005 acknowledging that his principal limitations argument was based on a case that had been subsequently overruled. In subsequent briefs, AT&T's counsel has not disputed that this case is governed by the three-year limitations period applicable to uncollected tariff charges. *See*, Pub. Util. Code § 737.

[*11]

Following the discussion at the PHC, the Assigned Commissioner and assigned ALJ issued a scoping memo on February 14, 2005. The scoping memo directed that opening briefs on legal issues should be filed on February 11, 2005, with reply briefs due a month later, on March 11. February 25, 2005 was established as the due date for testimony on the compensation that would be owed in the event Pac-West prevailed on liability, n10 and hearings on the compensation issues were scheduled for April 12-15, 2005. In addition to these dates, the scoping memo set forth the issues to be decided as follows:

1. "Does P 81 of the ISP Remand Order control here, so that AT&T is not obliged to compensate Pac-West for ISP-bound traffic originating with AT&T local exchange customers and terminated by Pac-West, but rather is required only to exchange such traffic with Pac-West on a bill-and-keep basis?

2. "Under federal law, does P 81 of the ISP Remand Order not apply to the situation here, in which two CLECs that indirectly exchange ISP-bound traffic have not entered into an interconnection agreement, but rather exchange the traffic pursuant to transit arrangements with an ILEC that has entered into [*12] separate interconnection agreements with each of them?

3. "In the event the answer to Question 2 is that P 81 of the ISP Remand Order does not control here, does the ISP Remand Order nonetheless preempt state regulation of the kind of traffic exchanges described in Question 2? If so, what compensation, if any, is required to be paid to the CLEC that terminates the ISP-bound traffic?

4. "If the ISP Remand Order does not preempt state regulation of the situation described in Question 2, what compensation, if any, does Commission precedent require to be paid to the CLEC that terminates the ISP-bound traffic?"

n10 On February 17, 2005, AT&T filed a motion asking that the due date for this testimony be extended to March 7, 2005, and stating that Pac-West did not oppose this request. The ALJ granted the motion in an e-mail message the same day, and later confirmed the ruling in writing. *See*, Administrative Law Judge's Ruling Extending Time for Filing Testimony, issued March 7, 2005.

B. The Motion to Strike [*13] Portions of Pac-West's Compensation Testimony

In accordance with the schedule set forth in the Scoping Memo, the parties filed their opening and reply briefs on legal issues on February 11 and March 11, 2005, and Pac-West served testimony on the compensation issues on March 7.

AT&T did not serve any compensation testimony on the due date. Instead, on March 11, 2005, it filed a motion seeking to strike portions of the compensation testimony submitted by Pac-West witnesses John Sumpter and Barry Lear. In Sumpter's case, AT&T contended that the testimony was really legal argument and, in Lear's case, AT&T argued that he was trying to introduce evidence about AT&T's billing for access charges, an issue not included in the Scoping Memo. As an alternative to striking the testimony, AT&T sought leave to serve rebuttal testimony making two points: (1) that the material AT&T had provided in discovery was sufficient to establish the 3-to-1 traffic ratio referenced in the ISP Remand Order, and (2) that the bills cited by Pac-West represented claims for intercarrier access charges rather than reciprocal compensation.

Pursuant to an e-mail ruling by the ALJ, Pac-West filed a reply to AT&T's motion [*14] on March 18, 2005. In its reply, Pac-West argued that (1) the material in Sumpter's testimony challenged by AT&T was well within the limits of permissible policy testimony accepted at the Commission, and (2) the challenged material in Lear's testimony did not introduce a new issue, but simply sought to establish that AT&T's own billing practices were inconsistent with its position in this case.

On March 25, 2005, the ALJ denied the motion to strike without prejudice, and permitted AT&T to file limited rebuttal testimony by April 1, 2005. If Pac-West concluded that it needed discovery with respect to the rebuttal testimony, it was instructed to advise the ALJ of this fact by April 5, so that the hearings could be postponed until May 2, 2005 and Pac-West could be permitted to conduct necessary discovery.

Pursuant to the ALJ ruling, AT&T's limited rebuttal testimony was served on April 1, 2005. Pac-West did not request a delay in the compensation hearings to pursue discovery, so the hearings went ahead as scheduled on April 12-13, 2005. Following the hearings, both Pac-West and AT&T submitted opening briefs on the compensation issues on May 11, 2005, and reply briefs on June 1, 2005. [*15]

C. The Presiding Officer's Decision and Appeals Thereof

A Presiding Officer's Decision (POD) ruling in favor of Pac-West was mailed to the parties on September 19, 2005. On October 6, 2005, the Commission issued D.05-10-012, which extended -- pursuant to Pub. Util. Code § 1701.2(d) -- the 12-month deadline applicable to this proceeding.

On October 19, 2005, both AT&T and Pac-West filed timely appeals of the POD. On November 3, 2005, both AT&T and Pac-West filed a response to the appeal of the other. To the extent we consider it necessary, we address the arguments raised in the appeals of the POD at appropriate points in the text of this decision.

II. The Parties' Positions on the Legal Issues Raised by the ISP Remand Order

A. Elements of the Interim Compensation Plan in the ISP Remand Order

The essential dispute in this case is whether, as AT&T contends, the rule set forth in P 81 of the ISP Remand Order -- which both parties refer to as the New Markets Rule -- can be applied standing alone, or whether, as Pac-West contends, this rule can only be applied as part of an integrated FCC plan for transitioning CLECs that serve ISPs from reciprocal compensation to bill-and-keep [*16] (or some other form of intercarrier compensation).

The New Markets Rule is quoted in full in footnote 8 of this decision. However, in order to make the debate between the parties comprehensible, some understanding of the *other* elements of what the FCC describes in the Remand Order as the "interim compensation plan" is necessary. These other elements are known as the "rate cap," the "growth cap," the "mirroring rule," and the "3-to-1 ratio," and a good description of them appears in P 8 of the Remand Order. In P 8, the FCC described these other elements as follows:

> "Beginning on the effective date of this Order, and continuing for six months, **intercarrier compensation for ISP-bound traffic will be capped** at a rate of $ .0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at $ .0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at $ .0007/mou. Any additional costs incurred must be recovered from end-users. These rates reflect the downward trend in intercarrier compensation rates contained [*17] in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery.
>
> - We also impose a **cap on total ISP-bound minutes** for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling. These caps are consistent with projections of the growth of dial-up Internet access for the first two years of the transition and are necessary to ensure that such growth does not undermine our goal of limiting intercarrier compensation and [*18] beginning a transition toward bill and keep. Growth above these caps should be based on a carrier's ability to provide efficient service, not on any incentive to collect intercarrier payments.
>
> - Because the transitional rates are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.
>
> - In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt a **rebuttable presumption** that **traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic** subject to the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates. Carriers that seek to rebut this presumption, by showing [*19] that traffic above the ratio is not ISP-bound traffic or, conversely, that traffic below the ratio is ISP-bound traffic, may seek appropriate relief from their state commissions pursuant to Section 252 of the Act.
>
> - Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an incumbent LEC offers to exchange all traffic subject to Section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange Section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-

negotiated reciprocal compensation rates reflected in their contracts. The record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the **"mirroring" rule** we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for Section 251(b)(5) traffic." (ISP Remand Order P 8; *16 FCC Rcd at 9156-57;* boldface emphasis supplied.)

B. Pac-West's Position on the ISP Remand Order

The essence of Pac-West's [*20] argument in this case is that the interim compensation plan in the ISP Remand Order must be viewed as an integrated whole, and that AT&T is wrong because it seeks to apply only one element of that plan, the New Markets Rule in P 81, thereby taking that element out of context. In its March 11 reply brief on legal issues, Pac-West summarizes its position as follows:

"AT&T's claim that the New Markets Rule supports its refusal to pay Pac-West's tariff-based invoices for termination of AT&T's transit traffic is unfounded and wrong as a matter of law, and must be rejected based upon several independent grounds. For the New Markets Rule to apply, AT&T had to first opt-in to the FCC's Plan in its entirety by making a mirroring offer. It cannot do this as a matter of law because it is not an ILEC, and even if it could do so as a CLEC, it never did." (Pac-West Reply Brief, p. 41.)

Pac-West goes on to argue that because there is no interconnection agreement between itself and AT&T, the ISP Remand Order is simply irrelevant to the issues here. Citing *Verizon North Inc. v. Strand, 367 F.3d 577, 586-87 (6th Cir. 2004),* Pac-West states:

"[A]ppellate courts [*21] have found that the *ISP Remand Order* is simply irrelevant in the absence of a Section 252 interconnection agreement . . . [T]he *ISP Remand Order* is crafted specifically to not interfere with the Section 252 agreements between Incumbent and Competitive Carriers and it cannot be implemented in the absence of an interconnection agreement. The Interim FCC Plan requires that the carriers have or be able to negotiate a Section 252 Interconnection agreement. It is clear, however, that AT&T and Pac-West, as Competitive Carriers, cannot satisfy this essential condition. Therefore, the *ISP Remand Order* is not relevant to traffic which is the subject of this Complaint." (Pac-West Opening Brief, p. 18; footnotes omitted.)

Less radically, Pac-West also argues that FCC itself has declared that where the interrelated provisions of the ISP Remand Order do not apply, state-approved reciprocal compensation rates are the source one should consult in deciding how much compensation to pay CLECs for terminating ISP-bound calls. Relying upon the FCC's own description in the *Core Order* n11 of the mirroring rule set forth in P 89 of the Remand Order, Pac-West states:

"The *ISP Remand* [*22] *Order's* ratemaking scope is limited . . . to presumed ISP-bound traffic that is subject to the Interim FCC Plan. The Interim FCC Plan only applies to traffic exchanged between Incumbent and Competitive Carriers when the Incumbent has 'opted-in' to the FCC Plan. When the Interim FCC Plan does not apply, carriers are 'required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates.' With respect to applicable compensation rates, the FCC preemption, therefore, only extends to that traffic which is deemed to be ISP-bound under the presumptive methodology established by the *ISP Remand Order*. All other traffic, including both traffic exchanged between an Incumbent and Competitive Carrier that is below the 3 to 1 ratio and traffic not subject to the Interim FCC Plan, including any ISP-bound traffic exchanged between AT&T and Pac-West, remains subject to state ratemaking jurisdiction." (Pac-West Opening Brief, p. 22; footnotes omitted.)

n11 *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, Order, WC Docket No. 03-171, FCC 04-241, 19 FCC Rcd 20179* (released October 18, 2004). Hereinafter, this decision will be referred to as the *Core Order.*

[*23]

Pac-West also notes that since no interconnection agreement is in effect between itself and AT&T, and since Pac-West cannot compel AT&T to enter into an interconnection agreement (because AT&T is a CLEC rather than an ILEC), the applicable "state-approved reciprocal compensation rates" in this case are the call termination rates set forth in Pac-West's intrastate tariff:

> "In the absence of an applicable agreement between AT&T and Pac-West the state tariff rates are the most directly applicable lawful rates that Pac-West should charge Competitive Carriers that choose to deliver traffic to Pac-West's customers. It would be both unfair and anticompetitive for the Commission to acknowledge . . . that Pac-West has a legal right to be compensated for the traffic originated by AT&T and then to prevent Pac-West from recovering such compensation. Pac-West's state tariff is the only directly applicable state-approved mechanism available to a Competitive Carrier such as Pac-West that cannot force AT&T to negotiate or arbitrate a Section 252 interconnection agreement and when AT&T refuses to negotiate a voluntary agreement. To conclude that Pac-West cannot include a rate for intercarrier [*24] compensation in its state tariff is to deny Pac-West the right to recover revenues to which it is lawfully entitled. Because nothing in the ISP *Remand Order* indicates an intent to deny compensation to those Competitive Carriers that were exchanging traffic on the effective date of the order, equity and fairness dictate that the state tariff rates control." (Pac-West Opening Brief, pp. 24-25.)

Pac-West also points out that because the *Core Order* concluded the FCC should forebear from enforcing the New Markets Rule after October 8, 2004, the intercarrier rates in Pac-West's state tariff are the only rates that could be applied after that date, even if the Commission were to agree with AT&T that the New Markets Rule can be invoked without a mirroring offer:

> "Even if the Commission concludes that AT&T is correct and the New Markets Rule dictates the intercarrier compensation mechanism for the traffic it delivers to Pac-West [*i.e.*, bill-and-keep], the Commission must find that the rates in Pac-West's California state tariff control after the effective date of the *Core Order*. As noted earlier, effective October 8, 2004, the FCC forbore from enforcing the New Markets [*25] Rule. In its absence, and because the Interim FCC Plan cannot govern in the absence of a Section 252 agreement between AT&T and Pac-West, Pac-West's California tariff establishes the lawful rates for the traffic delivered to Pac-West by AT&T." (*Id.* at 25-26.)

Pac-West also argues that the FCC's recent pronouncements in the *T-Mobile Ruling* n12 support Pac-West's position that the call termination rates set forth in its intrastate tariff govern the compensation to be paid here. Quoting from *T-Mobile*, Pac-West describes that ruling's applicability to the situation here as follows:

> "When carriers interconnect indirectly, as is [the] case in this Complaint, 'there is no interconnection agreement or other compensation arrangement between the parties.' The absence of an agreement or arrangement does not, however, preclude intercarrier compensation. Rather, the FCC found [in *T-Mobile*] that its reciprocal compensation rules do not preclude carriers from accepting alternative compensation arrangements. Tariffs are an appropriate alternative in those circumstances where they have not been expressly prohibited or they don't supersede or negate the federal provisions under [*26] Sections 251 and 252 [of the 1996 Telecommunications Act]. Because the termination tariffs at issue in the *T-Mobile Ruling* applied only in the absence of an agreement, they were valid according to the rules in place prior to the date of [that ruling.]" (Pac-West Reply Brief on Legal Issues, pp. 33-34; footnotes omitted.)

n12 *Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order, CC Docket*

No. 01-92, FCC 05-42, 20 FCC Rcd 4855 (released February 24, 2005). Hereinafter, this decision will be referred to as either the *T-Mobile Ruling* or *T-Mobile.*

Pac-West concludes that all of the conditions specified in *T-Mobile* for the applicability of state tariffs are met here:

"Pac-West's intrastate tariff falls squarely within the conditions required for a valid intercarrier compensation tariff established by the *T-Mobile Ruling.* First, [*27] the FCC has not prohibited tariffs for intercarrier compensation between CLECs. Second, Pac-West's intrastate tariff does not conflict with or supersede the provisions of Sections 251 and 252. The purpose of the tariff is clear on its face [since it states that it applies only where no agreement is in place for the completion of local calls.] In addition . . . CLECs are not subject to and cannot invoke the negotiation and arbitration provisions of Section 252 as against another CLEC. Therefore, in the absence of an express prohibition and an alternative procedure for establishing a compensation mechanism, Pac-West's intrastate tariff is lawful." (*Id.* at 34-35; footnotes omitted.)

C. AT&T's Position on the ISP Remand Order

AT&T's principal argument is that in trying to argue that the Remand Order does not apply to exchanges of ISP-bound traffic between CLECs, Pac-West is effectively standing the FCC's jurisdictional ruling on its head. In its reply brief on legal issues, AT&T states:

"The more fundamental error in Pac-West's arguments is that the arguments require the Commission to accept the premise that the FCC has bifurcated its jurisdictional holding by predicating [*28] its jurisdiction on the type of the carrier carrying the traffic rather than the nature of the traffic itself. Pac-West would have this Commission believe that the FCC's jurisdictional determination that ISP-bound traffic is primarily interstate applied only to ISP-bound traffic that originates on an ILEC network and terminates to a [CLEC] . . . But it is without question that the FCC: (1) found that all ISP-bound traffic is within its jurisdiction as interstate traffic; (2) found it is in the public interest to establish a bill-and-keep reciprocal compensation mechanism for ISP terminating traffic; and (3) precluded state commissions from independently applying a compensation rate that conflicts with the FCC's pricing scheme. *There is no exception for ISP-bound traffic that is exchanged between CLECs . . . Pac-West can point to no language that exempts certain types of ISP-bound traffic from the FCC's jurisdiction.*" (AT&T Reply Brief on Legal Issues, pp. 2-3; emphasis added.)

In support of this jurisdictional argument, AT&T places particular reliance on the Ninth Circuit's decision in *Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114 (9th Cir. 2003).* [*29] In that case, the Ninth Circuit invalidated two rulemaking decisions of this Commission which had held, on a generic basis, that the reciprocal compensation provisions in all interconnection agreements arbitrated by the Commission applied to ISP-bound traffic. At the same time, however, the Ninth Circuit upheld the Commission's decision that the reciprocal compensation provisions in a *specific* interconnection agreement, the 1999 agreement between Pacific Bell and Pac-West, applied to ISP-bound traffic. The different outcomes, the Court stated, were based on the fact that under the Telecommunications Act of 1996, "the authority granted to state regulatory commissions is confined to the role described in [47 U.S.C.] § 252 -- that of arbitrating, approving and enforcing interconnection agreements . . . The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic" such as *ISP-bound calls. (325 F.3d at 1126-27.)*

AT&T asserts that Pac-West's attempt to argue that compensation for ISP-bound calls should be determined by Pac-West's intrastate tariff rather than P 81 of the Remand Order cannot be reconciled [*30] with the jurisdictional precepts of *Pacific Bell v. Pac-West.* On this issue, AT&T states:

"[W]hat Pac-West is attempting to do . . . is impose a unilateral tariff obligation on AT&T, one that is clearly not 'reciprocal,' as a substitute for a contract that [Pac-West] cannot obtain under the law. As stated earlier, the Commission's authority under the Telecom Act is limited to 'that of arbitrating, approving and enforcing interconnection agreements.' The U.S. Court of Appeals for the 9th Circuit specifically found that the Commission had no general rule-making authority over interstate traffic. This Commission cannot authorize Pac-West to institute a generic reciprocal compensation 'tariff' in lieu of an interconnection agreement for ISP-bound traffic, or indeed any other form of traffic exchanged between CLECs." (AT&T Opening Brief on Legal Issues, p. 9.)

In addition to arguing that the Remand Order's language forecloses the possibility that Pac-West's intrastate tariff could apply here, AT&T argues that the *Core Order* is less significant than Pac-West claims. After noting that the essence of Core's petition for forbearance at the FCC was that the Remand Order's compensation [*31] interim plan could cause discrimination among CLECs (because the effect of the plan was to require only some CLECs to recover their termination costs for ISP-bound traffic from end-users), AT&T argues:

> "Core's issue [was] with the scheme for transitioning the reciprocal compensation provisions in the ILEC interconnection agreements to bill-and-keep. Core raised a concern that some CLECs during the transition would still receive reciprocal compensation while others would already be subject to bill-and-keep for traffic originating from ILECs. But generally CLECs have been exchanging traffic on a bill-and-keep basis, and continue to do so today. This is not an issue for Core Communications. Nothing in the *Core Order* implies that the FCC is requiring CLECs to begin paying each other reciprocal compensation fees for ISP-bound traffic when they have never done so before. The Pac-West interpretation of the *Core Order* would require the Commission to accept the premise that the FCC in this narrow Order overturned the fundamental policy determination of the FCC in the *ISP Remand Order*." (AT&T Reply Brief on Legal Issues at 16; underlined emphasis added.)

AT&T's answer [*32] to Pac-West's assertion that the Remand Order simply does not address CLEC-CLEC traffic exchanges is that "the FCC did not have to set up a scheme to phase out reciprocal compensation fees for ISP-bound traffic originated by CLECs because there is no evidence that any such compensation is currently being paid." (*Id.* at 8.) After emphasizing that P 81 of the Remand Order refers to "carriers," AT&T continues that "this language clearly encompasses *all* local carriers, not merely arrangements between ILECs and CLECs that have failed to enter into interconnection agreements with an ILEC." (*Id.* at 9; emphasis in original.)

AT&T also dismisses Pac-West's reliance on the mirroring rule set forth in P 89 of the ISP Remand Order. In response to Pac-West's claim that P 89 indicates state tariffs should be applicable where two CLECs have not entered into an interconnection agreement, AT&T says:

> "This paragraph is not, as Pac-West argues, a statement of general applicability. It is very specifically aimed at insuring that ILECs with interconnection agreements arbitrated by state commissions do not obtain an unintended competitive advantage from the FCC's pricing scheme for ISP-bound [*33] traffic. P 89 states that 'we order them [ILECs] to exchange ISP-bound traffic at the state approved or state-arbitrated reciprocal compensation rates reflected in their contracts (citation omitted).' (emphasis added.) This is very different from Pac-West's claim in its Opening Brief that [s]tates may assert jurisdiction over ISP-bound traffic and may set rates in instances where the traffic is not subject to an interconnection agreement . . . P 89 does not order the Commission to apply the Pac-West state tariff in terminating ISP traffic." (*Id.* at 13; citation omitted, emphasis in original.)

III. Discussion

A. Is Pac-West Entitled to Tariff Charges for Terminating ISP-Bound Traffic Originated by AT&T Customers?

Although there are ambiguities in the key paragraphs of the ISP Remand Order, we conclude that on balance, Pac-West's reading of these paragraphs more accurately reflects the FCC's intent than does AT&T's reading. Accordingly, we conclude that AT&T cannot rely on P 81 of the ISP Remand Order as a justification for insisting that the ISP-bound traffic it exchanges with Pac-West must be handled on a bill-and-keep basis, because we agree with Pac-West that [*34] only ILECs that have made the mirroring offer described in P 89 of the Remand Order are free to invoke the bill-and-keep arrangements set forth in P 81. As a CLEC, AT&T cannot make a mirroring offer, and so cannot invoke P 81. Moreover, contrary to its claims, AT&T has not established that the common practice within the telecommunications industry is for CLECs to exchange traffic among themselves on a bill-and-keep basis.

We also conclude that Pac-West's intrastate tariff is the appropriate source to look to for the compensation that AT&T must pay Pac-West for terminating ISP-bound calls. As the *T-Mobile Ruling* indicates, properly-filed state tariffs are an appropriate source to consult where reliance on them would not undermine the policy in the 1996 Telecommunications Act favoring voluntary interconnection agreements. Since both parties here acknowledge that AT&T cannot be forced to enter into an interconnection agreement with Pac-West (because AT&T is a CLEC), no interference with the Act's statutory scheme would result from applying Pac-West's intrastate tariff here. To rule to the contrary and in AT&T's favor on this issue would be to hold that despite the FCC's decision [*35] in the *Core Order* to forbear from enforcing the New Markets Rule after October 8, 2004, Pac-West would still not be entitled to receive any compensation for terminating AT&T's ISP-bound calls, simply because Pac-West had previously been compelled by law to accept a bill-and-keep arrangement. In our opinion, such a ruling would stand the *Core Order* on its head.

As noted in the description of the parties' positions, AT&T relies heavily on the fact that P 81 refers to "carriers" -- a term that encompasses both ILECs and CLECs -- to justify its argument that bill-and-keep should apply to its traffic exchanges with Pac-West. We acknowledge that, as the complete quotation of P 81 in footnote 8 of this decision shows, nothing within the language of P 81 itself expressly limits the New Markets Rule to exchanges of ISP-bound traffic between ILECs and CLECs. Since AT&T did not have an interconnection agreement with Pac-West on the effective date of the ISP Remand Order, the language of P 81, standing alone, therefore seems to support AT&T's argument that it is entitled to exchange ISP-bound traffic with Pac-West on a bill-and-keep basis.

However, applying P 81 in this fashion would ignore [*36] the concerns about possible ILEC arbitrage expressed in P 89 of the ISP Remand Order, which sets forth the mirroring rule. Paragraph 89 makes it clear that if an ILEC wants to invoke the interim compensation plan in the Remand Order, including the New Markets Rule of P 81, the ILEC must first make a mirroring offer that will foreclose the possibility of profiting from arbitrage when the ILEC is terminating ISP-bound traffic. Paragraph 89 provides in full:

> "It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, only if an incumbent LEC offers to exchange all traffic [*37] subject to Section 251(b)(5) at the same rate . . . For those incumbent LECs that choose not to offer to exchange Section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This 'mirroring' rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for Section 251(b)(5) traffic." (ISP Remand Order P 89; *16 FCC Rcd at 9194-94;* footnotes omitted, italics in original, underlining supplied.)

In view of the concern about arbitrage that pervades the ISP Remand Order, we believe that if the FCC had intended the interim compensation plan to cover exchanges of ISP-bound traffic between CLECs, the FCC would have explicitly addressed the obligations of a CLEC that wished to invoke the New Markets Rule. The fact that the FCC remained silent on this question, coupled with the repeated references in P 89 to ILECs, supports Pac-West's argument that the interim compensation plan (including the New Markets Rule of P 81) is intended to apply only to exchanges of [*38] ISP-bound traffic between ILECs and CLECs. n13

n13 In its appeal of the POD filed on October 19, 2005, AT&T attempts to deal with the issue of how a CLEC exchanging ISP-bound traffic with another CLEC with which it does not have an interconnection agreement could satisfy P 89's requirement of a mirroring offer. AT&T's answer to this dilemma is to argue that in its case, the underlying policy concerns of P 89 have been satisfied:

> ". . . AT&T and Pac-West have been exchanging both local voice and ISP-bound traffic at a uniform rate -- bill-and-keep -- which comports with the underlying policy goals of P 89. Thus, there

> is no opportunity for AT&T to engage in the type of arbitrage activities that compelled the FCC to establish an interim compensation scheme for ILECs and CLECs that have an interconnection agreement." (AT&T Appeal of POD, p. 16, n. 32.)

While it seems conceivable (despite the silence of P 89) that the FCC might be willing to excuse the requirement of a mirroring offer in the case of a CLEC that indirectly exchanges traffic with other CLECs -- provided the FCC's concerns about arbitrage opportunities could be met -- those concerns have not been allayed here. The only evidence AT&T cited to support its assertion that it "has always exchanged traffic with other CLECs on a bill-and-keep basis," and thus could not benefit from arbitrage, is the rebuttal testimony of Andrew Korsgaard (Exhibit 8). According to AT&T, Korsgaard "testified that he has never authorized nor seen an AT&T billing instruction to bill local traffic to any CLEC in any state." Based on this, AT&T finds "inexplicable" the POD's conclusion that "AT&T offered no evidence to support its claim that the common practice within the telecommunications industry is for CLECs to exchange traffic on a bill-and-keep basis." (POD, p. 22.)

Despite Korsgaard's testimony, the POD's conclusion on this issue was reasonable. Korsgaard deals only with AT&T's billing procedures; he does not appear to have any direct knowledge of the billing practices of other CLECs. (Ex. 8, p. 10.) Further, Pac-West vigorously disputed (in both its testimony and briefs) that Korsgaard's description of AT&T billing practices was an accurate depiction of AT&T's actual conduct. (See, Exhibit 5, Direct Testimony of Barry Lear, pp. 2-3; Pac-West Opening Brief, p. 21; Pac-West Reply Brief, pp. 25-30.)

As a practical matter, AT&T's position on the ISP Remand Order placed the burden on it to show the existence of a consensus among CLECs to exchange traffic on a bill-and-keep basis. Since Korsggard's rebuttal testimony speaks only to his understanding of AT&T's billing practices, and since Pac-West vigorously disputed the existence of any consensus among CLECs to exchange traffic on a bill-and-keep basis (or that AT&T had, in fact, followed this practice), the POD was correct to conclude that AT&T had not established that during the relevant period, the common practice within the telecommunications industry was for CLECs to exchange traffic on a bill-and-keep basis.

[*39]

AT&T has offered two arguments in support of its position that the bill-and-keep language in P 81 is not limited by the requirement of a mirroring offer in P 89. First, AT&T argues that to apply P 81 as Pac-West suggests "would require the Commission to accept the premise that the FCC has bifurcated its jurisdictional holding by predicating its jurisdiction on the type of the carrier carrying the traffic rather than the nature of the traffic itself." Asserting that the FCC has "(1) found that all ISP-bound traffic is within [FCC] jurisdiction as interstate traffic; (2) found it is in the public interest to establish a bill-and-keep reciprocal compensation mechanism for ISP terminating traffic; and (3) [has] precluded state commissions from independently applying a compensation rate that conflicts with the FCC's pricing scheme," AT&T continues that there is "no exception" from these rulings for ISP-bound traffic exchanged between CLECs. (AT&T Reply Brief on Legal Issues, pp. 2-3.) Second, AT&T points out that since P 89 directs ILECs that have not made a mirroring offer to "exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected [*40] in their contracts," this language lends no support to Pac-West's argument that, as a CLEC, its compensation for terminating AT&T's calls should be determined according to its intrastate tariff. We consider each of these arguments in turn.

As noted in the description of AT&T's position on the Remand Order, AT&T's jurisdictional argument relies heavily on the Ninth Circuit's decision in *Pacific Bell v. Pac-West Telecomm.* In that case, as noted above, the Ninth Circuit invalidated two decisions issued in a Commission rulemaking proceeding which had held that the reciprocal compensation provisions in all interconnection agreements arbitrated in California applied to ISP-bound traffic. The basis for the Ninth Circuit's ruling was that, apart from the powers conferred by § 252 of the Telecommunications Act, the Commission does not have jurisdiction under the 1996 Act to promulgate rules regarding traffic that the FCC has declared to be interstate. However, in the same decision, the Ninth Circuit upheld the Commission's decision that ISP-bound traffic exchanged between Pacific Bell and Pac-West was subject to the reciprocal compensation provisions in the companies' 1999 interconnection [*41] agreement. This latter decision by the Commission, the Ninth Circuit ruled, was consistent with the powers conferred on state public service commissions by § 252 to interpret and enforce specific interconnection agreements.

In essence, AT&T argues that the relief Pac-West is seeking here cannot be reconciled with the jurisdictional boundaries laid out by the Ninth Circuit in *Pacific Bell v. Pac-West Telecomm.* According to AT&T, "exercising general regulatory authority over interstate traffic is exactly what Pac-West would have this Commission do in this complaint case. It not only asks the Commission to ignore the clear language of the ISP Remand Order, it asks the Commission to authorize fees for terminating traffic outside the bounds of an interconnection agreement arbitration and pursuant to generic state authority (i.e., state tariffs)." (AT&T Opening Brief on Legal Issues, pp. 5-6.)

We disagree with this contention for several reasons. First, we believe that AT&T reads the holding in *Pac-West Telecomm* too broadly. As described above, that decision was entirely concerned with whether the reciprocal compensation provisions in California interconnection agreements between [*42] ILECs and CLECs applied to ISP-bound traffic. The Ninth Circuit held that the Commission did not have the power to promulgate a general rule on this question, but did have authority under the Telecommunications Act to determine whether the reciprocal compensation provisions in a specific interconnection agreement applied to such traffic. Contrary to AT&T's suggestion, the Ninth Circuit's decision is silent about the extent of the Commission's powers where the exchange of ISP-bound traffic takes place between two CLECs, a type of carrier that -- as both parties here acknowledge -- clearly does not have the right under the 1996 Act to compel another CLEC to negotiate an interconnection agreement. n14

n14 In its October 19, 2005 appeal of the POD, AT&T renews its argument that Pac-West's position on the interim compensation plan ignores the FCC's determination that all ISP-bound traffic is interstate. AT&T states:

> "The POD errs by ignoring that the FCC's ISP Remand Order preempts this Commission's jurisdiction to establish a reciprocal compensation scheme for the termination of all ISP-bound traffic. This Commission cannot impose a compensation scheme contrary to the FCC's imposed scheme, regardless of the nature of the traffic, regardless of whether the firms have entered into an interconnection agreement, and regardless of whether the two exchanging firms are charging each other terminating fees found in these agreements." (AT&T Appeal of POD, pp. 7-8.)

Despite AT&T's arguments, there is no conflict between the FCC's determination that all ISP-bound traffic is interstate and the POD's determination that traffic terminated by Pac-West for AT&T should be subject to the former's intrastate tariff. As noted in the text, it is clear from P89 of the Remand Order (as well as the *Core Order*) that the interim compensation plan applies only to exchanges of traffic between ILECs and CLECs. Where exchanges of ISP-bound traffic between CLECs are concerned, we think Pac-West is correct when it states:

> "The fundamental point that AT&T . . . confuses again in its appeal, is that it is entirely within the power of the FCC to adopt a rate plan for ISP-bound traffic that includes the application of state-approved rates in certain circumstances, as the FCC did in the ISP Remand Order. Thus, for the POD to enforce the ISP Remand Order by applying such state-approved rates in no way invades the FCC's jurisdiction. Instead, the POD properly implements the determinations of the FCC." (Pac-West Response to AT&T Appeal, p. 3.)

As explained in the text, while P 89 of the Remand Order does not definitively resolve the point, the most reasonable way of satisfying the concerns expressed in P 89 -- especially in view of (1) the absence of a mirroring offer by AT&T, (2) the Ninth Circuit's decision to uphold the application of intrastate termination charges to ISP-bound traffic in the interconnection agreement at issue in *Pac-West Telecom (325 F.3d at 1129-1131),* and (3) the guidance furnished by the *T-Mobile Ruling* -- is to apply Pac-West's intrastate tariff charges to the ISP-bound traffic that Pac-West terminates for AT&T.

[*43]

In addition, we believe that AT&T gives too broad a reading to the language in P 82 of the ISP Remand Order, on which AT&T also relies to support its jurisdictional argument. AT&T points to the language in P 82 stating that "because [the FCC] now exercise[s its] authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue." The thrust of P 82, however, is not broad jurisdictional pronouncements, but the timing of the implementation of the Remand Order's interim compensation plan. Thus, the FCC noted in P 82 that the interim plan "applies as carriers re-negotiate expired or expiring interconnection agreements," n15 and ruled that as of the publication date of the Remand Order, "carriers may no longer invoke Section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." In view of these statements directed at timing, we conclude that P 82 simply does not address the applicability of the interim compensation plan to situations in which both parties are CLECs and do not have an interconnection agreement [*44] in effect between them.

n15 This is consistent with the Ninth Circuit's observation in *Pacific Bell v. Pac-West Telecomm* that "the interim alternative payment scheme for ISP-bound traffic established in the Remand Order applies only prospectively, when existing interconnection agreements expire." *(325 F.3d at 1131.)*

Of course, having decided that AT&T cannot invoke P 81 of the Remand Order, we are left with the question of what compensation Pac-West should receive for the ISP-bound calls that it terminates for AT&T. As noted above, AT&T argues that P 89 of the Remand Order sheds no light on this question, because in cases where a mirroring offer has not been made, P 89 directs ILECs to "exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts." Since AT&T and Pac-West are both CLECs and there is no interconnection agreement in effect between them, AT&T argues that Pac-West can take no comfort from this language in [*45] P 89.

Even though we agree with AT&T that P 89 does not resolve the question of what compensation should be paid here, we also agree with Pac-West that the question of what compensation it should receive is best determined by resorting to the general principles that support the division of state and federal authority in the Telecommunications Act. We also agree that the FCC's recent ruling in the *T-Mobile* case furnishes useful guidance because it dealt with a compensation issue analogous to the one here, even though we are not bound to apply *T-Mobile* to the facts before us.

In *T-Mobile*, the FCC dealt with a situation in which CLECs and commercial mobile radio service (CMRS) providers were exchanging traffic indirectly without the benefit of interconnection agreements by using the transit services of ILECs. Disputes arose when the ILECs refused to compensate the CLECs for terminating the CMRS traffic, arguing that this was transit traffic and that the CMRS providers were required to pay reciprocal compensation. The *T-Mobile Ruling* described the disputes as follows:

> "For instance, many CMRS providers argue that intra[Major Trading Area, or MTA] traffic routed from [*46] a CMRS provider through a [Bell Operating Company, or BOC] tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA. Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, i.e., the BOC, and is routed to the LEC via access facilities. When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due." (*T-Mobile Ruling, P 6, 20 FCC Rcd. at 4858;* footnotes omitted.)

T-Mobile noted that because of such disputes (which had necessitated rulings by several state public service commissions), the CLECs had begun to file wireless termination tariffs with the state commissions "that apply only in the situation where there is no interconnection agreement or reciprocal compensation arrangement between the parties." (*Id.* at P 7.) The CMRS [*47] providers challenged the validity of these tariffs, arguing that the CLECs "engage[] in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith with CMRS providers." (*Id. at 20 FCC Rcd 4855, n.1.)*

In its ruling, the FCC noted that "because the existing rules are silent as to the type of arrangement necessary to trigger payment obligations," there was no basis for finding bad faith, and that "it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff," because the FCC had been aware of this practice when it last amended the CMRS rules, prior to the passage of the 1996 Telecommunications Act. (*Id.* at P 10; *20 FCC Rcd at 4860-61.)*

The FCC decided, however, that the best solution was to amend its CMRS rules on a prospective basis, and held as follows:

> "In light of existing carrier disputes, we find it necessary to clarify the type of arrangement necessary to trigger payment obligations. Because the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited [*48] from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act." (Id. at P 9, 20 FCC Rcd at 4860; footnote omitted.)

In view of the fact that the ISP Remand Order is silent on the issue of what compensation should be paid when one CLEC exchanges ISP-bound traffic with another CLEC and no interconnection agreement is in effect between them, and the fact that this Commission has previously held that a CLEC's intrastate tariff is applicable to exchanges with an ILEC where the ILEC has not yet made a mirroring offer (*see, 325 F.3d at 1129-31),* we conclude that -- subject to the limitations below -- it is appropriate to apply the CLEC's intrastate tariff for termination services afforded to another [*49] CLEC where no interconnection agreement is in effect between the two CLECs.

Having reached this conclusion, the computation of the amount payable to Pac-West by AT&T is straight-forward. In the testimony she submitted on behalf of Pac-West on March 7, 2005, Mart McCann calculated the total amount of termination charges that AT&T owed to Pac-West (pursuant to the latter's tariff) for the period July 1, 2001 to January 31, 2005 at $ 7,115,014.16. (Attachment to Exhibit 1, p. 6.) In the opening brief it filed on compensation issues on May 11, 2005, AT&T expressly stated that "AT&T does not challenge the calculation of the claimed invoices of Pac-West in Exhibit 1 . . . of $ 7,115,014.16." (AT&T Opening Brief on Evidentiary Issues, p. 3.) n16 Thus, the basic amount of termination charges that AT&T owes to Pac-West under the latter's tariff for the period in question n17 is not in dispute.

n16 In the reply brief on compensation issues that it filed on June 1, 2005, AT&T also stated that it "is not challenging Pac-West's claim as to the amount of AT&T traffic that terminated to Pac-West's network." (AT&T Reply Brief on Compensation Issues, p. 21, n. 34.)

[*50]

n17 *See*, Pub. Util. Code § 737.

B. Is Pac-West Entitled to Late Payment Charges and Interest on the Tariff Amounts Due?

There remains one further question in this case: whether Pac-West should be able to recover accrued late charges and interest on the $ 7.115 million due, as Pac-West's brief requests. n18 For the reasons set forth below, we conclude that as a matter of both equity and law, AT&T should not be required to pay either late charges or interest to Pac-West.

n18 Pac-West Brief on Compensation Issues, filed May 11, 2005, p. 23.

This was the same conclusion reached in the POD mailed in this proceeding on September 19, 2005. The POD gave four reasons why AT&T should not be required to pay interest or late charges: (1) under Commission caselaw, the decision whether to award interest or late fees on unpaid tariff charges is a matter within the Commission's discretion; (2) neither *T-Mobile* nor any other federal [*51] decision requires application of the intrastate tariffs of the carrier seeking reciprocal compensation; rather, the application of such tariffs is a matter within the Commission's equitable discretion; n19 (3) an award of interest and late charges would not be appropriate in view of the long period of time that elapsed between AT&T's initial refusal to pay Pac-West's invoices and the filing of the complaint here; and (4) not awarding interest or late charges would bring the amount awarded to Pac-West more in line with the $ .0007 per minute-of-use cap contained in the interim compensation plan set forth in P 8 of the ISP Remand Order. (POD, pp. 30-32.)

n19 As the Presiding Officer pointed out in the POD, "nothing in *T-Mobile* or in any other federal decision we are aware of requires that in cases where the FCC has not prescribed the appropriate form of reciprocal compensation, the intrastate tariffs of the carrier seeking such compensation must be applied. In choosing to follow *T-Mobile* and apply Pac-West's tariff in this situation, we are therefore exercising our equitable remedial powers." (POD, p. 31.) The Presiding Officer also noted that in its opening brief on legal issues, Pac-West had argued that its intrastate tariffs were the most directly applicable charges, and that "equity and fairness dictate that the state tariff rates control." The POD continued that by the time Pac-West filed its reply brief on legal issues, *T-Mobile* had been decided, "and Pac-West began to rely on that decision rather than on 'equity and fairness' alone to support the argument that its tariff . . . should govern the compensation to be paid here." (POD, p. 31, fn. 17, *comparing* Pac-West Opening Brief, pp. 24-25 *with* Pac-West Reply Brief, pp. 33-36.)

[*52]

In the appeal it filed on October 19, 2005, Pac-West sharply challenges the POD's determination not to award late charges on the amounts due. n20 Pac-West places particular reliance on D.93-05-062, *Toward Utility Rate Normalization (TURN) v. Pacific Bell, 49 CPUC2d 299.* This decision, Pac-West says, "fully supports enforcement by the Commission of Pac-West's tariffed late payment charge, which is 'part and parcel' of the tariffed rate structure for the services provided to AT&T." (Pac-West Appeal, p. 7.)

n20 To a lesser degree, Pac-West's appeal also disputes the POD's decision not to award interest on the unpaid termination charges. On this question, Pac-West's principal argument is that neither of the decisions cited by the POD, *Re Western Union Telegraph Company*, D.87-05-063 *(24 CPUC2d 350)* and *Air-Way Gins, Inc. v. Pacific Gas and Electric Company*, D.03-04-059, "involved a demand by a carrier for payment of *tariffed* late charges, much less a demand for such charges which was rejected by the Commission. Furthermore, neither decision even involved denial of interest payments sought by one of the parties." (Pac-West Appeal, p. 4; emphasis in original.)

Pac-West's attempt to explain away these two decisions is unpersuasive. D.87-05-063 states that interest was being awarded to Pacific Bell in that case "since the escrow funds have been placed in an interest-bearing account." But D.87-05-063 also clearly states that "the payment of interest is not a requirement under Section 737," the Public Utilities Code provision governing the recovery of unpaid tariff charges by a utility. *(24 CPUC2d at 364.)*

Pac-West is also incorrect when it states that in *Air-Way Gins*, "the Commission did not deny any request for interest or late charges since none was apparently sought." (Pac-West Appeal, p. 6.) Although it is true that D.03-04-059 does not discuss the issue, the complainants in *Air-Way Gins* did request interest on the refunds they sought, but the decision did not award interest to them. (*Compare*, July 27, 2000 Opening Brief of Complainants, p. 13, *with* D.03-04-059, *mimeo.* at 33, Ordering Paragraph 1.)

[*53]

An examination of *TURN v. Pacific Bell* does not support the reading Pac-West seeks to give it. In D.93-05-062, the key issue was the nature of the sanctions that should be imposed on Pacific Bell (Pacific) for its practice of imposing late charges on numerous customers who had, in fact, paid their bills on time. The evidence showed that Pacific's practice of imposing wrongful late charges had persisted for over five years, and was due largely to the inability of Pacific's computer system to keep track of the dates on which customer payments had actually been received.

The language on which Pac-West relies appears in a discussion of whether Pacific's conduct violated Pub. Util. Code § 532, which provides that "no public utility shall charge, or receive a different compensation . . . for any product or commodity furnished . . . or for any service rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time . . ." Pacific argued that the wrongfully-imposed late charges were not within the ambit of § 532 because they were not a rate for a product, commodity or service. In response to this claim, the Commission [*54] said:

> "We disagree. In this particular case, late payment charges and reconnection charges are *part and parcel* of the rates charged for telephone services which are undeniably subject to PU Code Section 532. Late payment charges and reconnection charges are, therefore, subject to PU Code Section 532.
>
> "Moreover, Pacific interprets PU Code Section 532 too narrowly. PU Code Section 489 requires that all utility charges and rates must be tariffed or otherwise publicly posted . . . Thus, late payment charges and charges for reconnecting service must be tariffed . . . We, therefore, interpret PU Code Section 532 to complement PU Code Section 489 by providing that the utilities shall not deviate from tariffs required by PU Code Section 489. PU Code Section 532 applies to any tariff rate or other provision. Pacific violated PU Code Section 532 each time it assessed improper late payment charges and reconnection fees, and disconnected customers in error." *(49 CPUC2d at 307;* emphasis added.)

While this passage makes clear that the wrongful imposition of late charges is a violation of the code provision requiring utility billings not to deviate from applicable [*55] tariffs, it certainly does not stand for the proposition that the Commission lacks authority in appropriate circumstances to relieve a customer from having to pay interest or late charges when the Commission concludes that requiring such payments would not be equitable.

In this case, we have no doubt that it would be inequitable to impose late charges and interest on the already-substantial sum that AT&T owes to Pac-West. As AT&T pointed out in its reply to the Pac-West appeal:

> "[P]erhaps the strongest evidence of Pac-West's indifference to its own tariff, is the admitted lack of accounting safeguards in its alleged tariff billing. Pac-West filed its original complaint in this case with a demand for terminating fees in the amount of $ 3.5 million. Pac-West's counsel announced in an e-mail to the [ALJ] dated January 5, 2005 and [at the January 7, 2005 PHC] that it was modifying its claim of $ 3.5 million up to approximately $ 6 million (although at that time it still could not be precise)." (AT&T Reply, pp. 9-10, footnote 21.)

Ultimately, of course, Pac-West took the position that AT&T owed $ 7.115 million in termination charges for the period from July 2001 through January 2005. [*56]

In other cases where telecommunications carriers have been cavalier about their tariff billings, other state public service commissions have also refused to impose late charges. In *America Phone Inc. v. AT&T Communications, Inc., 72 PUR4th 613 (1986),* for example, a South Dakota reseller of long-distance toll service, Phone America, filed a complaint against Northwestern Bell Telephone Company (NWB) contending that the wholesale bills sent by NWB were inflated and did not apply NWB's tariffs properly. One of Phone America's claims was that NWB had failed to send bills for five months after service began, which led Phone America to believe it was benefiting from a credit that it was not, in fact, receiving. *(72 PUR4th at 615.)* NWB's witness conceded that after the first bill was sent and not paid, a "refusal to pay or disconnect" notice should have been sent to Phone America but was not, and that subsequent bills simply accumulated for several months thereafter. *(Id. at 617.)*

In its decision, the South Dakota commission found that Phone America "did not learn until several months after service [*57] began that a mileage charge would be assessed when the WATS prorate was applied," that the mileage charge significantly increased Phone America's bill, and that "relying on the misunderstanding[,] Phone America continued to expand its system." (*Id. at 618-619.)* The commission also found that the six-month delay in sending a refusal to pay or disconnect notice caused Phone America to believe that the balance due on its bill was offset by the WATS prorate. Based on this, the South Dakota commission concluded:

> "NWB's delay in sending a refusal to pay or disconnect notice resulted in Phone America's delay in paying this bill. Accordingly a late payment fee will not be assessed against Phone America for the bills subject to this proceeding." (*Id. at 619;* emphasis added.)

Although for somewhat different reasons, a refusal to award late charges is also appropriate in this case. Here, Pac-West concedes that several years elapsed before it discovered the software error of its billing contractor that caused the prayer for relief in this case nearly to double between the time the complaint was filed and the time hearings were [*58] held. Although Pac-West has sought to explain this delay away in the testimony of its witness Mart McCann (Exhibit 1, pp. 3-4), the fact that the error took so long to discover raises significant doubt in our minds whether Pac-West was serious about seeking late charges prior to the filing of a complaint. In view of this delay, the fact that there was a bona fide dispute between Pac-West and AT&T about whether any reciprocal compensation was due under P 81 of the ISP Remand Order, n21 and the other factors set forth on pages 30-32 of the POD, n22 we agree with the Presiding Officer that it would not be equitable to require AT&T to pay late charges or interest on the amount we have found AT&T owes to Pac-West. n23

n21 As noted in the Administrative Law Judge's Ruling Permitting Filing of Rebuttal Testimony and Denying Motions to Strike Without Prejudice, issued on March 25, 2005, it was not until the filing of opening briefs on February 11, 2005 that Pac-West gave a clear statement of its theory in this case. It was largely because of this vagueness that the March 25, 2005 ruling permitted AT&T to file limited rebuttal testimony. (*See*, March 25, 2005 Ruling, pp. 3, 9-12.)

[*59]

n22 In its October 19, 2005 appeal, Pac-West argues that the POD ignores equitable factors that favor an award of the late payment charges specified in Pac-West's intrastate tariff. These factors are said to include (1) AT&T's awareness of the Pac-West tariff, (2) AT&T's refusal to negotiate an interconnection agreement with Pac-West, and (3) the supposed unfairness before the filing of the complaint herein of requiring Pac-West to terminate substantial amounts of AT&T traffic without receiving any compensation therefor. (Pac-West Appeal of POD, pp. 11-12.)

In our view, these alleged equitable factors are merely ways of restating that Pac-West and AT&T had a business dispute over the meaning of P 81 of the ISP Remand Order. In view of our conclusion that AT&T's position in this case finds some support in a literal reading of P 81, the factors cited by Pac-West do not justify an award of late payment charges.

n23 In view of our resolution of the compensation issues in this decision, it is unnecessary to decide the questions that consumed most of the time at the hearings held on April 12-13, 2005. Those questions included (1) whether the sample of billing data that AT&T provided to Pac-West was statistically sufficient to establish that the ratio of traffic terminated by Pac-West for AT&T exceeded the 3-to-1 ratio set forth in the ISP Remand Order, (2) whether Pac-West had erroneously relied on access charges to support its claim that AT&T's own billing behavior was inconsistent with AT&T's claim that bill-and-keep should apply here, and (3) whether Pac-West's termination rates should apply to the small volume of traffic that AT&T terminated for Pac-West. Although our decision makes it unnecessary to examine the evidence presented on these questions in detail, we observe that there can be little doubt that, whatever the statistical objections to the data provided by AT&T in discovery, the ratio of traffic terminated by Pac-West for AT&T to the traffic terminated by AT&T for Pac-West appears to be many times greater than 3-to-1, and is thus more than sufficient to satisfy the threshold for "ISP-bound traffic" under the ISP Remand Order.

For the same reasons we need not decide the questions litigated at the hearing, it is unnecessary to rule on Pac-West's June 8, 2005 motion to set aside the submission of this case and reopen the record to allow an affidavit to be received which asserts that MCI, another CLEC with which Pac-West has no interconnection agreement, has agreed to pay the termination charges in Pac-West's intrastate tariff for traffic exchanged between the two CLECs. On June 17, 2005, AT&T filed an opposition to this motion, and on June 24, 2005 (with leave from an Assistant Chief ALJ), Pac-West filed a reply in support of the motion. Because we need not rule on the issues raised by these pleadings, Pac-West's June 8, 2005 motion is deemed denied.

[*60]

IV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner for this proceeding, and A. Kirk McKenzie is the assigned ALJ and presiding officer.

V. Submission of Proceeding

This case was deemed submitted on June 1, 2005, when Pac-West and AT&T both submitted reply briefs on the issues litigated at the April 12-13 hearings. As noted in footnote 23, Pac-West filed a motion to set aside submission of the case on June 8, 2005, to which AT&T responded on June 17, 2005 and Pac-West replied on June 24, 2005. Because it is unnecessary to decide the issues raised by Pac-West's June 8 motion, this decision deems that motion denied.

Findings of Fact

1. AT&T and Pac-West are both CLECs.

2. As a CLEC, AT&T cannot be compelled under § 252 of the 1996 Telecommunications Act *(47 U.S.C. § 252)* to enter into an interconnection agreement with another CLEC.

3. No interconnection agreement is in effect between AT&T and Pac-West, but they exchange traffic indirectly by using the transit services of ILECs such as Pacific Bell Telephone Company and Verizon.

4. Many of the customers served by Pac-West are ISPs.

5. The overwhelming majority [*61] of the traffic terminated by Pac-West for AT&T is traffic that originates with local exchange customers on AT&T's network who use dial-up telephone service to connect with their ISPs.

6. Pac-West's website indicates that Pac-West carries approximately 20% of the total dial-up Internet service in California.

7. The volume of local exchange traffic terminated by Pac-West for AT&T is many times greater than the volume of local exchange traffic terminated by AT&T for Pac-West.

8. Under a bill-and-keep regime, neither of two interconnecting networks charges the other for terminating traffic that originates on the other network, but instead recovers from its own end-users (a) the costs of originating traffic that it delivers to the other network, and (b) the costs of terminating traffic that it receives from the other network.

9. AT&T did not prove that it is a common practice within the telecommunications industry for CLECs to exchange traffic among themselves on a bill-and-keep basis.

10. Since 1998, Pac-West has had on file with this Commission a tariff, Schedule Cal. CLC 1-T, that sets forth Pac-West's charges for terminating local and IntraLATA toll traffic originated by CLECs with [*62] which Pac-West has not entered into an interconnection agreement. This tariff has been amended several times since 1998.

11. In its decision concerning the *ISP Remand Order, Worldcom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir 2002),* cert. denied sub nom. *Core Communications, Inc. v. FCC, 538 U.S. 1012 (2003),* the United States Court of Appeals for the District of Columbia Circuit remanded the order to the FCC but did not vacate it, so the ISP Remand Order remains in effect.

12. AT&T did not make and, as a CLEC could not make, the mirroring offer described in P 89 of the ISP Remand Order.

13. In the T-Mobile Ruling, the FCC held that LECs could lawfully impose transport and termination charges on CMRS providers by means of a state tariff, because at the time these tariffs were in effect, the LECs were not entitled

under federal law to compel the CMRS providers to enter into interconnection agreements or negotiate reciprocal compensation arrangements with the LECs.

14. When calculated at the rates set forth in the Pac-West tariff described in Finding of Fact (FOF) 10, the charges due for the traffic originating on AT&T's network and terminating [*63] on Pac-West's network, for the period from July 1, 2001 to January 31, 2005, total $ 7,115,014.16.

15. The Commission is not required to award interest in situations where utilities seek to recover unpaid tariff charges pursuant to Pub. Util. Code § 737.

16. In situations where utility customers have sought to recover overcharges paid as a result of the utility's application of the wrong tariff to the customer, this Commission has sometimes refused to award interest to the customer on the amounts that were overpaid to the utility.

17. The decision whether to award late payment charges on unpaid amounts due under a utility's tariff is a matter within this Commission's equitable discretion.

Conclusions of Law

1. In order to invoke the New Markets Rule set forth in P 81 of the ISP Remand Order, a carrier must also make a mirroring offer as described in P 89 of the Remand Order.

2. Only ILECs are in a position to make a mirroring offer of the kind described in P 89 of the ISP Remand Order.

3. Because AT&T did not make a mirroring offer, it may not invoke the New Markets Rule set forth in P 81 of the ISP Remand Order.

4. Because AT&T cannot invoke the New Markets Rule, it is not [*64] entitled to exchange ISP-bound traffic that originates on its network with Pac-West on a bill-and-keep basis.

5. Because Pac-West does not have a right under federal law to compel AT&T, a fellow CLEC, to negotiate an interconnection agreement, the situation here is analogous to the one described by the FCC in the *T-Mobile Ruling*.

6. Neither the ISP Remand Order nor any other federal decision dictates what compensation, if any, should be paid by one CLEC originating ISP-bound traffic on its network to another CLEC that terminates such traffic on its network.

7. In the absence of any controlling federal authority on the issue described in the preceding Conclusion of Law (COL), this Commission has discretion to determine the compensation, if any, that should be paid by one CLEC that originates ISP-bound traffic on its network to another CLEC that terminates such traffic on its network.

8. In the absence of either an interconnection agreement or any other reciprocal compensation arrangement between the parties, it is reasonable to require AT&T to compensate Pac-West for terminating ISP-bound traffic originating on AT&T's network at the minute-of-use and set-up rates set forth in the [*65] tariff described in FOF 10.

9. Under the circumstances of this case, it is not reasonable to require AT&T to pay Pac-West interest or late charges on the amounts computed pursuant to the preceding COL.

10. Pac-West's June 8, 2005 motion to set aside the submission of this case for the purpose of supplementing the record is moot and should be deemed denied.

ORDER

IT IS ORDERED that:

1. Within 30 days after the effective date of this decision, AT&T Communications of California, Inc. shall pay to Pac-West Telecomm, Inc. (Pac-West), the sum of $ 7,115,014.16.

2. Pac-West may not collect interest or late-charges that would otherwise be due under its tariff, Schedule Cal. CLC 1-T, on the amount set forth in Ordering Paragraph 1.

3. Pac-West's June 8, 2005 motion to set aside the submission of this proceeding for the purpose of supplementing the record is denied.

4. This proceeding is closed. This order is effective today.

Dated June 29, 2006, at San Francisco, California.

MICHAEL R. PEEVEY

President

GEOFFREY F. BROWN

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

Commissioners

EXHIBIT B

LEXSEE 2008 U.S. DIST. LEXIS 61740

AT&T COMMUNICATIONS, et al., Plaintiffs, v. PAC-WEST TELECOMM INC, et al., Defendants.

No. C 06-07271 JSW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 61740

August 12, 2008, Decided
August 12, 2008, Filed

SUBSEQUENT HISTORY: Stay granted by *AT&T Communs. of Cal. v. Pac-West Telecomm, Inc., 2008 U.S. Dist. LEXIS 79342 (N.D. Cal., Sept. 19, 2008)*

PRIOR HISTORY: *At&T Communs. of Cal. v. Pac-West Telecomm, Inc., 2007 U.S. Dist. LEXIS 31637 (N.D. Cal., Apr. 13, 2007)*

COUNSEL: [*1] For AT&T Communications of California, Inc., Teleport Communications Group of San Francisco, Teleport Communications Group of Los Angeles, Teleport Communications Group of San Diego, Plaintiffs: Seth Michael Goldstein, LEAD ATTORNEY, Mark E. Haddad, Max Fischer, Sidley Austin LLP, Los Angeles, CA; Randloph W. Deutsch, Esq., Sidley Austin LLP, San Francisco, CA.

For Pac-West Telecomm, Inc., Defendant: Gretchen Dumas, California Public Utilities Commission, San Francisco, CA; Tamar E. Finn, Washington, DC; Tanya King Dumas, Bingham McCutchen LLP, San Francisco, CA.

For Michael R. Peevey, Commissioner of the California Public Utilities Commission in his official capacity, Geoffrey F. Brown, Dian M. Grueneich, John Bohn, Rachelle Chong, Commissioners of the California Public Utilities Commission in their official capacity, Defendants: Laura Eve Gasser, LEAD ATTORNEY, California Public Utilities Commission, San Francisco, CA.

JUDGES: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

OPINION BY: JEFFREY S. WHITE

OPINION

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Now before the Court are the motion for summary judgment filed by Plaintiffs, AT&T Communications of California, Teleport Communications Group of San [*2] Francisco, Teleport Communications Group of Los Angeles, and Teleport Communications Group of San Diego (collectively "AT&T"), the cross-motion for summary judgment filed by Defendant, Pac-West Telecomm, Inc. ("Pac-West"), and the cross-motion for summary judgment filed by Defendants, Michael R. Peevey, Geoffrey Brown, Dian M. Grueneich, John Bohn, of the California Public Utilities Commission (collectively "the CPUC"). Having considered the parties' papers, relevant legal authority, and having had the benefit of oral argument, the Court HEREBY DENIES AT&T's motion and GRANTS the cross-motions filed by Pac-West and the CPUC.

II. BACKGROUND

The following facts are undisputed, unless otherwise noted. AT&T, a competitive local exchange carrier ("CLEC"), originates traffic that is routed, indirectly, to Pac-West through Pacific Bell Telephone Company ("Pacific Bell") [1] and Verizon California Inc. ("Verizon"), both of which are incumbent local exchange carriers ("ILECs"). Pac-West, which also is a CLEC, terminates the traffic that is originated by AT&T. (*See* Compl., P 31; Pac-West Answer P 31; CPUC Answer P 3.) AT&T and Pac-West have not entered into an interconnection agreement. [2] (*Id.*) [*3] Pac-West did, however, enter into interconnection agreements with Pacific Bell and Verizon, the terms of which required Pac-West to invoice the party that originated traffic for any termination charges. (A.R., Vol. I at p. 0006 (Pac-West PUC Compl., PP 17-18).) Thus, if AT&T originated a call that Pacific Bell routed to Pac-West, and Pac-West terminated the call, Pac-West should have charged AT&T, not Pacific Bell, for the cost of terminating the call.

1 Pacific Bell Telephone Company now conducts business as SBC California. (See Administrative Record, Volume III at p. 626 (Decision Granting Complaint (hereinafter "CPUC Decision) at 2).) The Court hereafter shall cite to the Administrative Record as follows "A.R., Vol. at p. ."

2 The terms "CLEC," "ILEC," and "interconnection agreement" are terms derived from amendments to the Communications Act of 1934, which were enacted as part of the Telecommunications Act of 1996. Those amendments are discussed in more detail in Section III.B, *infra.*

Notwithstanding the terms of its interconnection agreements with Pacific Bell and Verizon, Pac-West invoiced those entities until July 2001, at which time Pacific Bell and Verizon refused to continue [*4] to compensate PacWest for termination charges associated with traffic that Pacific Bell and Verizon did not originate. (*Id.* at p. 0006-7 (Pac-West PUC Compl. P 19 & n.6).)

Accordingly, Pac-West began to invoice AT&T for termination charges on traffic that AT&T originated. The parties agree that some of the traffic that AT&T originated was bound for internet service providers ("ISP-bound traffic"). Pac-West contends that some of the traffic was VNXX traffic [3], however that dispute is not material to the resolution of this motion. Furthermore, in the CPUC proceedings, Pac-West assumed that all traffic was ISP-bound for the purposes of determining the threshold legal issues. (*See, e.g.,* A.R., Vol I at p. 0094 (Pac-West Opening Brief to CPUC at 6).)

3 *See note 7, infra.*

Pac-West's termination charges were based on a state tariff that has been on file with the CPUC since 1998, which purports to set Pac-West's charges for intrastate traffic that is originated by CLECs with whom Pac-West does not have an interconnection agreement. (Compl., P 33; Pac-West Answer P 33; CPUC Answer, P 5.) AT&T refused to compensate Pac-West based on the tariff rates. Accordingly, in October 2004, Pac-West filed [*5] a complaint with the CPUC. (Compl., P 35; Pac-West Answer P 35; CPUC Answer P 7; A.R., Vol. I at P. 0001-62 (Pac-West CPUC Compl.).)

AT&T argued to the CPUC, as it does here, that, in a ruling entitled *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 F.C.C.R. 9151 (2001)* ("*ISP Remand Order*"), the Federal Communications Commission ("FCC") determined that ISP-bound traffic was interstate in nature and subject to its jurisdiction and set up a specific compensation regime to govern compensation for ISP-bound traffic. Thus, according to AT&T, under the *ISP Remand Order,* Pac-West must be compensated for the traffic at issue on a "bill and keep" basis.

On June 29, 2006, the CPUC issued a decision in favor of Pac-West and rejected AT&T's interpretation of the *ISP Remand Order.* The CPUC determined that the *ISP Remand Order* did not purport to address the manner in which two CLECs should be compensated for terminating ISP-bound traffic. It also concluded that "it is appropriate to apply the CLEC's intrastate tariff for termination services afforded to another CLEC where no interconnection [*6] agreement is in effect between the two CLECs." (A.R., Vol. III at p. 0658 (CPUC Decision at 34).)

AT&T applied for a rehearing with the CPUC, but when it did not receive a decision within sixty days, AT&T filed its Complaint before this Court. (Declaration of Seth M. Goldstein and Errata thereto ("Goldstein Decl."), Ex. B, Errata Ex. C; A.R., Vol. III at P. 0674-93 (AT&T's Application for Rehearing).) Subsequently, on March 1, 2007, the CPUC denied AT&T's application for rehearing. (Goldstein Decl., Ex. D; A.R., Vol. III at P. 0707-716 (Order Denying Rehearing of Decision).)

On July 31, 2006, AT&T paid Pac-West the sum of $ 7,115,014.16. On August 21, 2006, AT&T paid an additional $ 2,992,673.12, which reflected termination charges due for the period February 1, 2005 to June 1, 2006. AT&T continues to incur charges under Pac-West's tariff and pays those sums into the Court registry. (Compl., P 42; Declaration of Geri Lancaster ("Lancaster Decl.") PP 1-5, Ex. A; Docket No. 38.)

In its Complaint, AT&T alleges that the CPUC did not have jurisdiction to order AT&T to compensate Pac-West pursuant to the rates set forth in the tariff, because the FCC has determined that ISP-bound traffic is [*7] interstate in nature and must be compensated pursuant to the interim compensation regime set forth in the *ISP Remand Order.* AT&T further alleges that the CPUC Decision "unlawfully usurps the FCC's exclusive jurisdiction to regulate interstate telecommunications traffic" and "conflicts with and is preempted by" the Telecommunications Act of 1996 ("TCA") and the FCC's implementing decisions." (Compl. PP 5-6, 49-54.)

The Defendants deny those allegations and argue that the CPUC Decision is not preempted by the TCA because, in their view, the FCC has not exercised its jurisdiction over all ISP-bound traffic. They also assert that the *ISP Remand Order* does not clearly preclude state regulation of compensation between two CLECs for ISP-bound traffic, and that the CPUC's decision to apply the tariff to the traffic in question does not conflict with the purposes of the TCA.

III. ANALYSIS

The question presented to this Court for resolution is whether, in the *ISP Remand Order,* the FCC manifested a clear intent to preempt a state agency's ability to regulate the manner in which two CLECs may be compensated for the exchange ISP-bound traffic. This appears to be a matter of first impression. For the [*8] reasons set forth in the remainder of this Order, the Court concludes that this issue was not before the FCC when it crafted the *ISP Remand Order.* Therefore, the Court concludes that the CPUC Decision is not preempted by the *ISP Remand Order.*

A. Applicable Legal Standards.

1. Standard of Review.

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* A fact is "material" if the fact may affect the outcome of the case. *Id. at 248.* "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).*

The Court reviews the CPUC Decision *de novo* to determine whether it is "consistent [*9] with the [TCA] and the implementing regulations," and reviews "all other issues under an arbitrary and capricious standard." *Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1123 (9th Cir. 2003)* ("*Pacific Bell*"); *see also Qwest Corp. v. Washington State Utilities and Transportation Comm'n, 484 F. Supp. 2d 1160, 1169 (W.D. Wash. 2007)* ("*Qwest*").

2. Preemption.

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, ... when there is outright or actual conflict between federal and state law, ... where compliance with both federal and state law is in effect physically impossible, ... where there is implicit in federal law a barrier to state regulation, ... where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, ... or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).

"Pre-emption may result not only from action taken [*10] by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id. at 369.* In such a situation, "the law requires a clear indication that an agency intends to preempt state regulation" and ambiguity will not be sufficient to establish preemption. *See Global NAPs, Inc. v. Verizon New England, Inc., 444 F.3d 59, 71-72 (1st Cir. 2006)* (hereinafter "*Global NAPs I*"); *see also Global NAPs, Inc. v. Verizon New England, Inc., 454 F.3d 91, 100 n.7 (2d Cir. 2006)* (*GlobalNAPs II*) ("[A] federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.") (emphasis added).

B. The Telecommunications Act of 1996.

In order to place the parties' dispute in context, a brief summary of the TCA and subsequent FCC decisions implementing provisions of the TCA is warranted. Congress passed the TCA in order to "foster competition in local telephone markets." *Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland, 535 U.S. 635, 638, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*; *see also Pacific Bell, 325 F.3d at 1118* (noting that Congress passed the TCA to "foster competition [*11] ... by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services"). In order to achieve that goal, the TCA imposes certain general duties on each telecommunication carrier, including *inter alia,* the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." *47 U.S.C. § 251(a)(1).* In addition, "all local exchange carriers" ("LECs") have a duty to, *inter alia,* "establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id. § 251(b)(5).*

The terms of the TCA impose additional duties solely on ILECs. Those duties include "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." *47 U.S.C. § 251(c)(2).* ILEC's also have a "duty to negotiate in good faith in accordance with *section 252* of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection." *Id. § 251(c)(1).* The TCA imposes [*12] a concomitant duty on a telecommunications carrier that requests interconnection with the ILEC to negotiate the terms of an interconnection agreement in good faith. *Id.*

Section 251 also provides that:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that --
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implement the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

Section 252 sets forth the procedures for negotiation, arbitration and approval of interconnection agreements. For example, it provides for voluntary negotiations, whereby "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title." *Id. § 252(a)(1).* It also provides that any party may ask a state commission to mediate differences arising during [*13] the voluntary negotiations. *Id. § 252(a)(2). Section 252* also provides for a compulsory arbitration procedure. *Id. § 252(b), (c).* State commissions must approve any interconnection agreement reached through negotiation or arbitration, and a party aggrieved by a state commission's determination may seek judicial review of the decision. *Id. § 252(e).*

C. The TCA's Reciprocal Compensation and ISP-bound Traffic.

The FCC has stated that "reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499, at 16013* P 1034 (1996) ("*Local Competition Order*"); *see also Verizon California Inc. v. Peevey, 462 F.3d 1142, 1146 (9th Cir. 2006)* ("*Peevey*")

("Under a reciprocal compensation arrangement, the originating LEC must compensate the terminating [*14] LEC for delivering its customer's call to the end point."). The FCC also determined that "reciprocal compensation obligations should apply only to traffic that originates and terminates in a local area." *Local Competition Order, 11 F.C.C.R at 16013* P 1034.

In a perfect world, carriers that originate and terminate traffic for one another would be exchanging traffic on a relatively balanced basis, and the costs of originating and terminating those calls also would be relatively balanced. However, "[w]hen one carrier terminates many more calls than another, ... , unless reciprocal compensation applies, the terminating carrier would be subsidizing its competitor by terminating the competitor's calls for free." *Southern New England Tel. Co. v. MCI Worldcom Comm., Inc., 353 F. Supp. 2d 287, 291 (D. Conn. 2005)* ("*SNET I*"). The FCC has referred to such conduct as regulatory arbitrage and has "warned time and time again that it will not" be permitted. *Global NAPs II, 454 F.3d at 95.*

The world, however, is not perfect. Although an ISP often will be the termination point for a call, an ISP rarely initiates a call. Thus, traffic to ISPs typically flows only in one direction, and the increase in ISP-bound [*15] traffic upset the relative balance associated with reciprocal compensation. The increase in ISP-bound traffic also created opportunities for regulatory arbitrage, because if an LEC targeted ISPs as their customers, that LEC could receive a disproportionate share of compensation under the reciprocal compensation scheme required by the TCA. Accordingly, the FCC examined the issue in an order entitled *In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic, 14 F.C.C.R. 3689 (1999)* (the "*Declaratory Ruling*").

Because, in the *Local Competition Order,* the FCC concluded that the reciprocal compensation provisions of *Section 251(b)(5)* applied only to the transport and termination of local telecommunications traffic, the FCC had to determine whether ISP-bound traffic was interstate or intrastate in nature "[i]n order to determine what compensation is due when two telecommunications carriers collaborate to deliver a call to an ISP." *Declaratory Ruling, 14 F.C.C.R. at 3693-94* P 7. Applying an "end-to-end" analysis, the FCC determined that ISP-bound traffic should be considered "interstate" traffic [*16] and subject to FCC jurisdiction under *47 U.S.C. § 201*, and it concluded that the reciprocal compensation provisions of the TCA "do not govern intercarrier compensation" for ISP-bound traffic. *See, e.g., id., 14 F.C.C.R. at 3701-02* P 18, *3706* P 26 n.87. Because there was no federal rule to govern intercarrier compensation for ISP-bound traffic, the FCC concluded that "parties should be bound by their existing interconnection agreements." *Id., 14 F.C.C.R. at 3690* P 1; *see also id., 14 F.C.C.R. at 3703-06* PP 24-26. The FCC also allowed state commissions to "determine in their arbitration proceedings at this point whether reciprocal compensation should be paid for ISP-bound traffic." *Id., 14 F.C.C.R. at 3704-05* P 25. The United States Court of Appeals for the District of Columbia Circuit, however, rejected the FCC's reasoning, vacated the *Declaratory Ruling,* and remanded the matter back to the FCC for further proceedings. *Bell Atlantic Tel. Co. v. FCC, 340 U.S. App. D.C. 328, 206 F.3d 1, 3 (D.C. Cir. 2000).*

On remand, the FCC modified its previous analysis of the issue, but it reached the same conclusion. Specifically, the FCC concluded that all telecommunications traffic was subject to reciprocal compensation, [*17] unless it fell within one of the exceptions set forth in *47 U.S.C. § 251(g). See ISP Remand Order, 16 F.C.C.R. at 9154* P 3, *9163-64* PP 23-26, *9166-67* PP 34-36. The FCC also concluded that ISP-bound traffic fell within "at least one of the three enumerated categories in subsection (g)" and was not subject to the reciprocal compensation provisions of *Section 251(b)(5)*, and it amended the relevant regulations to reflect these conclusions. *Id., 16 F.C.C.R. at 9166-67* PP 34-36; *see 47 C.F.R. § 51.701.* The FCC declined "to modify the restraints imposed by *section 251(g)* and instead continue[d] to regulate ISP-bound traffic under *section 201.*" *Id., 16 F.C.C.R. at 9169* P 40.

The FCC also acknowledged that ISP-bound traffic had created opportunities for regulatory arbitrage and, because the record suggested a need for immediate action, instituted an interim compensation regime that would govern compensation for ISP-bound traffic while it engaged in a rulemaking process. *See generally id., 16 F.C.C.R. at 9153-55* P 2-6, 9181-93 PP 67-88. That interim compensation regime provides for two different modes of compensation.

The first mode provides for rate caps and growth caps. Further, with respect [*18] to the rate caps, the FCC adopted a mirroring rule, which requires that an ILEC seeking to benefit from the rate caps for ISP-bound traffic charge the same rates for *Section 251(b)(5)* traffic. *Id., 16 F.C.C.R. at 9186-93* PP 77-88. When an ILEC chooses not to make a mirroring offer, it must "exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts." *Id., 16 F.C.C.R. at 9194* P 89. The FCC also implemented "a rebuttable presumption that traffic delivered to a carrier, *pursuant to a particular contract,* that exceeds a 3:1 ratio of terminating to originating traffic is subject to the compensation mechanism set forth in this Order," in recognition of the fact that some carriers were not able to identify ISP-bound traffic. *Id., 16 F.C.C.R. at 9187* P 79 (emphasis added).

The FCC provided for a different mode of compensation "where carriers are not exchanging traffic pursuant to interconnection agreements prior to the adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served)." *Id., 16 F.C.C.R. at 9188* P 81. In that situation, "as [*19] of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period." [4] *Id.* This rule is referred to as the "New Markets Rule."

4 Bill-and-keep is "an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating the traffic that it receives from the other network." *ISP Remand Order, 16 F.C.C.R. at 9153* P 2 n.6.

The FCC also stated that:

> [t]he interim compensation scheme we establish here applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. 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 [*20] ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke *section 252(i)* [5] to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. *Section 252(i)* applies only to agreements arbitrated or approved by state commissions pursuant to *section 252*; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to *section 201.*

Id., 16 F.C.C.R. at 9189 P 82.

5 "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." *47 U.S.C. § 252(i).*

The D.C. Circuit again rejected the FCC's reasons for concluding that ISP-bound traffic is not subject to the reciprocal compensation provisions of the TCA and remanded the matter to the FCC for further proceedings. *WorldCom, Inc. v. FCC, 351 U.S. App. D.C. 176, 288 F.3d 429, 432-33 (D.C. Cir. 2002).* [*21] The court did not, however, vacate the *ISP Remand Order,* and it left the FCC's interim compensation regime in place. *Id. at 434*; *see also Peevey, 462 F.3d at 1146 n.1, Pacific Bell, 325 F.3d at 1122-23.* Thereafter, on October 8, 2004, the FCC issued a ruling in which it determined that it would forbear from applying the growth caps and the New Markets Rule. *In re Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order, 19 F.C.C.R. 20179 (2004)* (the "*Core Order*"). [6]

6 To date, the FCC has not issued an order in response to the D.C. Circuit's remand in *WorldCom,* and that court recently ordered the FCC to respond by November 5, 2008. *See In re Core Communications, Inc., 382 U.S. App. D.C. 120, 531 F.3d 849, 2008 U.S. App. LEXIS 14501, 2008 WL 2649636 at * 11 (D.C. Cir. July 8, 2008).* If the FCC fails to respond, the D.C. Circuit stated that the interim compensation regime would be "vacated on November 6, 2008." *Id.*

D. The CPUC Decision Is Not Preempted by Federal Law.

"A matter may be *subject to* FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation." *Global NAPS I, 444 F.3d at 71* (emphasis in original). It is clear that, for jurisdictional purposes, [*22] the FCC has determined that ISP-bound traffic is predominantly interstate in nature. *See, e.g., Pacfic Bell, 325 F.3d at 1126* ("Although it is an unsettled question under federal law ... whether ISP traffic is 'local' for purposes of reciprocal compensation provisions in interconnection agreements, the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes."). AT&T's arguments are premised, in part, on the assertion that the FCC has exercised its jurisdiction over *all* ISP-bound traffic. The Court concludes that the *ISP Remand Order* cannot be read as broadly as AT&T urges.

For example, in the *Peevey* case, Pac-West asserted that the CPUC could not impose origination charges for interexchange VNXX ISP-bound traffic on the basis that the *ISP Remand Order* preempted "state commissions from imposing any intercarrier compensation not provided for in the order." [7] *Peevey, 462 F.3d at 1158.* The court, however, concluded that "the FCC's imposition of rate caps for ISP-bound traffic, and simultaneous preemption of state authority to address compensation for ISP-bound traffic [were] not relevant" to the parties' dispute. *Id.*

> 7 The *Peevey* court provides [*23] an excellent description of VNXX calls. *See Peevey, 462 F.3d at 1148.* In brief, VNXX calls are calls which appear to the calling party to be local, but which are in fact routed to a different calling area. The CPUC has determined that VNXX calls "should be rated to consumers as a local call, meaning that the originating LEC cannot charge the calling party a toll despite the long-distance nature of the call's physical routing." *Id.*

Although this reference to FCC preemption of state authority could, on its face, lend credence to AT&T's position, the *Peevey* court went on to explain that the rate caps were "intended to substitute for the reciprocal compensation that would otherwise be due to CLECs for terminating local ISP-bound traffic. They do not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic. As this issue was not before the FCC when it crafted the ISP Remand Order, the order does not preclude the FCC's ruling." *Id. at 1158-59.* In light of this statement, this Court does not read *Peevey* to hold that the FCC has exercised its jurisdiction over the appropriate compensation for all ISP-bound traffic. *See also Global NAPs I, 444 F.3d at 72* (holding [*24] that "the *ISP Remand Order* does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it is at best ambiguous on the question, and ambiguity is not enough to preempt state regulation"); *Pacific Bell, 325 F.3d at 1130 n.15* (finding "no conflict between the CPUC's arbitration decision to approve reciprocal compensation for ISP-bound calls and federal law," and concluding, therefore, that section "*251(b)(5)* does not preempt a state commission like the CPUC from approving of the inclusion of ISP-bound traffic in reciprocal compensation provisions").

The Court finds further support for its conclusion in the *Qwest* case. In that case, Pac-West argued that all ISP-bound traffic, including VNXX ISP-bound traffic, was subject to the interim compensation regime set forth in the *ISP Remand Order.* The district court was not called upon to address the preemptive scope of the *ISP Remand Order,* because the case involved the interpretation of interconnection agreements that incorporated the provisions of *ISP Remand Order* into their terms. However, that court rejected the very argument that AT&T advances in this case and determined that the *ISP Remand* [*25] *Order* could not be construed to eliminate all distinctions between local and interexchange traffic or the "compensation regimes that apply to each - namely, reciprocal compensation and access charges." *Qwest, 484 F. Supp. 2d at 1170.*

The *Qwest* court also noted that the *ISP Remand Order* did not mention VNXX traffic, which it found "unsurprising in light of the questions that prompted the" *Local Competition Order* and the *ISP Remand Order, i.e.* "'whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user to an ISP *in the same local calling area* that is served by a competing LEC.' ... The scope of the *ISP Remand Order's* conclusions must therefore be confined to the context of that question." *Id. at 1172* (quoting *ISP Remand Order, 16 F.C.C.R. at 9159* P 13) (emphasis in original). Accordingly, the court concluded that the interim compensation regime established in the *ISP Remand Order* did not apply to all ISP-bound traffic. *Id. at 1170; see also id. at 1172-75.*

Furthermore, as the *Qwest* court noted, most courts that have examined this issue have reached similar conclusions as to the limited scope of the *ISP Remand Order.* [8] *See id. at 1173* (citing cases); [*26] *see also Global NAPs II, 454 F.3d at 97 n.6, 99-101*; *Global NAPs I, 444 F.3d at 63* ("We ... hold that the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls as are involved here, leaving the DTE free to impose access charges for such calls under state law."). [9]

> 8 Even the FCC has acknowledged that the *ISP Remand Order* is ambiguous as to whether the interim compensation scheme was intended to cover interexchange VNXX ISP-bound calls and has stated that it "'has not addressed the application of the *ISP Remand Order* to ISP-bound calls outside a local calling area' or 'decided the implications of using VNXX numbers for intercarrier compensation more generally.'" *Global Naps I, 444 F.3d at 74* (quoting FCC's *Brief for Amicus Curiae,* available at 2006 WL 2415737).

9 The only authority to the contrary appears to be *SNET I, supra,* and *Southern New England Telephone Co. v. MCI Worldcom Communications, 359 F. Supp. 2d 229 (D. Conn. 2005)* ("*SNET II*"), the latter of which denied SNET's motion to alter or amend the judgment in *SNET I.* This Court, however, chooses not to follow the *SNET* court, which did not have the benefit of the FCC's view of the [*27] scope of the *ISP Remand Order* at the time it reached its decision.

Although these cases support a conclusion that the FCC has not exercised its jurisdiction over all ISP-bound traffic, they do not purport to address the specific issue in this case, namely whether the FCC preempted state authority to regulate compensation for ISP-bound traffic exchanged between two CLECs. Accordingly, as a starting point, the Court must examine the text of the *ISP Remand Order* to determine the FCC's intent. That order is not a model of clarity.

For example, the FCC uses the terms "LEC" and "carrier" without modifiers throughout the *ISP Remand Order.* Yet, the FCC also demonstrated that it when it wished to refer specifically to an ILEC or a CLEC, it knew how to do so. *Compare ISP Remand Order, 16 F.C.C.R. at 9153* P 2, *9154-55* PP 4-5, *9173* P 47, *9181* P 66, *9187-90* PP 78-83 *with id. 16 F.C.C.R. at 9157* P 8, *9159* P 13, *9182-83* PP 69-70, *9190* P 84, *9191* P 86. [10] Indeed, the CPUC acknowledged that there is nothing in the *ISP Remand Order* that expressly limits its applicability to an ILEC-CLEC relationship.

10 Defendants argue that a plausible reading of the *ISP Remand Order* is that when the FCC used the term [*28] LEC or carrier generically, it intended to use the term to encompass both an ILEC and a CLEC, rather than to refer to any type of carrier.

Notwithstanding the general references to "carriers" and "LECs," the provisions of the interim compensation regime that provide for the rate caps, the growth caps, and the 3:1 presumption used to identify ISP-bound traffic, apply only as carriers renegotiate expired or expiring interconnection agreements. *ISP Remand Order, 16 F.C.C.R. at 9189* P 82; *see also id.* at *9156* P 8 (growth caps are to be calculated based upon "ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation" under an existing interconnection agreement). Under the TCA, only ILECs have a duty to negotiate interconnection agreements, when a CLEC requests interconnection. That fact suggests that the FCC was focused on the relationship between ILECs and CLECs when it crafted the *ISP Remand Order.*

AT&T relies heavily on the New Markets Rule, set forth in paragraph 81, and on paragraph 82 of the *ISP Remand Order* to support its position. Again, nothing in hose paragraphs suggests that they are limited [*29] to an ILEC-CLEC relationship. However, in the *Core Order,* the FCC explained the New Markets Rule as follows:

> In this situation, if an *incumbent* LEC has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period. This rule applies, for example, when a new carrier enters a market or an existing carrier expands into a market it previously had not served.

Core Order, 19 F.C.C.R. at 20182 P 9 (emphasis added). The FCC's interpretation of the *ISP Remand Order* in the *Core Order* suggests that it did not intend the New Markets Rule to apply broadly to *any* carriers that were not exchanging traffic pursuant to an interconnection agreement. Rather, it intended the New Markets Rule to apply when a CLEC requested interconnection from an ILEC, after the effective date of the *ISP Remand Order.*

Furthermore, in the conclusion of the *ISP Remand Order,* the FCC states that it was striving "to balance the need for an intercarrier compensation regime that has hindered the development of efficient competition in the local exchange and access markets with the need to provide a fair and reasonable transition for CLECs that [*30] have come to depend on intercarrier compensation revenues." *Id.* at *9198* P 95. Again, this conclusion suggests that the FCC was focused on the issues attendant to traffic exchanged between ILECs and CLECs.

AT&T also argues that the FCC's concerns about regulatory arbitrage are equally applicable to the CLEC-to-CLEC relationship and to this case in particular, where Pac-West admits that it "employed a business model in which it sought to terminate in-bound traffic and obtain compensation for that service from other LECs" and also admits "that it targeted and enlisted ISPs as customers." (Pac-West Answer P 21.) AT&T again relies on the New Markets Rule to argue that the FCC was trying to avoid creating new opportunities for regulatory arbitrage and to move toward a compensation regime in which carriers would recover more of their costs from consumers, rather than other carriers.

However, the FCC's statements in the *ISP Remand Order* and the *Core Order,* set forth above, and the cases that have interpreted the *ISP Remand Order* imply that the FCC was concerned about CLECs taking advantage of ILECs, not other CLECs. *See, e.g., Global NAPs II, 454 F.3d at 95* (noting concerns "that would-be competitors [*31] may elect to enter the market not so much to expand competition but to take advantage of the relatively rigid regulatory control of the incumbents" and that the FCC has warned that it would not permit competitors "to build their business to benefit almost exclusively from the existing intercarrier compensation schemes at the expense of both the incumbents and consumers"); *Qwest, 484 F. Supp. 2d at 1175* (although concluding that state commission's interpretation of *ISP Remand Order* could present opportunities for regulatory arbitrage, noting that "[b]y invoking the term 'regulatory arbitrage,' the FCC's [*sic*] was referring to the concern that high, one directional traffic to ISPs allowed *CLECs* to terminate approximately eighteen to forty times more traffic than they originated, creating significant traffic imbalances and a $ 2 billion annual windfall *from ILECs* through reciprocal compensation on calls to locally situated ISPs") (emphasis added); *SNET I, 353 F. Supp. 2d at 292* (noting that although ILECs initially were beneficiaries of reciprocal compensation, "CLECs began to target ISPs as customers"); *Notice of Proposed Rule Making In the Matter of Developing a Unified Intercarrier Compensation Regime, 16 F.C.C.R. 9610, 9616 P 11 (Apr. 19, 2001)* [*32] (hereinafter "the *NPRM*") ("As a result of these inefficient termination charges, certain CLECs appear to have targeted customers that primarily or solely receive traffic, particularly ISPs, in order to become net recipients of local traffic.").

In that vein, the FCC imposed the mirroring rule only upon ILECs. If the FCC was concerned about the possibility of regulatory arbitrage between two CLECs, it is reasonable to assume that it would have required the mirroring rule to apply to all LECs. Furthermore, in the *NPRM,* the FCC stated that it did not "expect to extend compensation rules to other interconnection arrangements that are not currently subject to rate regulation and *that do not exhibit symptoms of market failure.*" *NPRM, 16 F.C.C.R. at 9612* P 2 (emphasis added). The FCC explained this statement by noting that, "we do not contemplate a need to adopt new rules governing CLEC-to-CLEC ... arrangements." *Id. at 9675 n.2.* From this statement, one can infer that FCC did not believe that CLEC-to-CLEC relationships exhibited the types of market failure underlying its concerns about regulatory arbitrage. This provides further support for the Court's conclusion that the FCC was not focused [*33] on compensation arrangements between two CLECs when it crafted the *ISP Remand Order.*

Finally, Pac-West's tariff applies only in the absence of an interconnection agreement. While it does not appear that Pac-West could invoke *Section 252* to compel AT&T to enter into an interconnection agreement, the CPUC Decision does not prevent AT&T and Pac-West from voluntarily negotiating the terms of an interconnection agreement to determine the method by which they will compensate one another for the traffic they exchange. Therefore, the CPUC Decision does not conflict with the FCC's goals of encouraging voluntary negotiations to address intercarrier compensation. *See, e.g., Missouri v. Sprint Spectrum L.P., 112 S.W.3d 20, 25-26 (2003)* (concluding that state commission decision to rely on tariff as basis for compensating rural exchange carriers for terminating traffic originated by wireless carriers was not preempted by TCA, where tariff was subordinate to any negotiated agreement under the TCA). [11]

11 Because the instant case involves two CLECs, rather than an ILEC and a CLEC, it is distinguishable from *Verizon North Inc. v. Strand, 367 F.3d 577 (6th Cir. 2004).* In that case, the Sixth Circuit [*34] concluded that an order requiring Verizon, an ILEC, to pay termination charges based on a CLEC's tariff was preempted by the TCA because it bypassed "the federal statutory process for reaching an interconnection agreement and to create a competitive relationship via the filing of a unilateral tariff. Instead of achieving a reciprocal compensation arrangement via the negotiation and arbitration mechanism provided in the Act, the MPSC permitted the institution of an interconnection agreement by fiat." *Id., 367 F.3d at 584.* As previously noted, the TCA imposes duties upon ILECs and CLECs to negotiate interconnection agreements in good faith. The TCA imposes no such duties upon two CLECs.

Accordingly, the Court finds that the question of how two CLECs should be compensated for the exchange of ISP-bound traffic was not before the FCC when it crafted the *ISP Remand Order* and, therefore, concludes that the *ISP Remand Order* does not govern the parties' relationship. For the reasons set forth above, the Court also concludes that the CPUC Decision to apply the Pac-West tariff does not conflict with the TCA and the FCC's implementing regulations. Accordingly, the CPUC Decision is not preempted [*35] by federal law.

CONCLUSION

For the foregoing reasons, the Court HEREBY DENIES AT&T's motion for summary judgment and GRANTS each of the Defendants' cross-motions for summary judgment. The Clerk is directed to release the funds from the Court registry to Pac-West within thirty (30) days of the date of this Order. A separate judgment shall issue, and the Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: August 12, 2008

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

EXHIBIT C

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Petition of	:	
CORE COMMUNICATIONS, INC.	:	**Docket No.: A-310922F7002**
	:	
Petition of Core Communications Inc. for	:	
Arbitration of Interconnection Rates, Terms	:	
and Conditions with the United Telephone	:	
Company of Pennsylvania d/b/a Embarq	:	

Administrative Law Judge David A. Salapa, Presiding

MAIN BRIEF OF CORE COMMUNICATIONS, INC.

DATED: July 31, 2007

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Issue 8: *VNXX traffic and other rating issues (VOIP)*

Core's Best Offer Language:

> Core proposes adding the following language to Embarq's proposal at § 55.3:
>
> "Reciprocal Compensation for Section 251(b)(5) Traffic.
> The Party originating Section 251(b)(5) Traffic shall compensate the terminating Party for the transport and termination of such traffic to its Customer in accordance with Section 251(b)(5) of the Act at the equal and symmetrical rates stated in the Pricing Attachment."
>
> Core proposes to modify Embarq's proposed § 55.5 to read as follows:
>
> "Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations and consistent with the provisions of Part F of this Agreement."
>
> Core proposes deleting Embarq's proposed § 55.6 and replacing it with the following language:
>
> "The determination of whether a call is toll traffic shall be based on a comparison of the originating and terminating NPA-NXXs associated with the call."
>
> Core proposes deleting Embarq's § 55.7 with no proposed replacement language.

Discussion:

This issue involves the proper classification of virtual NXX or "VNXX" traffic for intercarrier compensation purposes.[79] VNXX traffic is traffic that is rated and routed as "local" or non-toll traffic based on the NPA-NXX combinations of the dialing number and the dialed number, even though the call path may cross over the geographic boundaries of the incumbent LEC's local calling area. The Commission has found that:

> With VNXX service, a customer can obtain a telephone number from a NXX code that is associated with a rate center or local calling area in which they are not physically located. This type of arrangement or service has been referred to as "virtual" NXX because the customer has only a virtual presence, as opposed to a physical presence, in the local calling

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79 Prehearing Memorandum of the United Telephone Company (May 22, 2006), at 8.

area based solely on the use of the assigned NXX code for that local calling area.[80]

Core's position is that all intraLATA traffic, whether geographically local or VNXX, should be rated as Section 251(b)(5) Traffic or intraLATA toll traffic based on a comparison of the NPA-NXX of the calling and called parties.[81] Similarly, Core's position with respect to ISP-bound traffic is that it should be rated as compensable traffic pursuant to the *ISP Remand Order* if the NPA-NXX of the calling and called parties fall within the same local calling area.[82] Embarq believes VNXX traffic should be subject to originating access charges, not terminating reciprocal compensation charges.[83] Embarq believes that the designation of traffic as intraLATA toll based on the actual geographic locations of the calling and called parties.[84] Embarq also proposes that calls using VOIP technology also be classified based on geographic locations for compensation purposes.[85]

a. Voice VNXX Calls Are Compensable Under Section 251(b)(5)

Core's proposal for voice VNXX calls is clearly consistent with federal law. As discussed above, under Issue 1, the FCC has defined the scope of traffic that is subject to reciprocal compensation as all "telecommunications traffic… except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access."[86] In order for Embarq to excise VNXX traffic from section 251(b)(5), it must demonstrate that VNXX traffic falls within one of the enumerated exceptions to the rule. And although Embarq argues at various points in

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80 Statement of Policy, <u>*Generic Investigation Regarding Virtual NXX Codes*</u>, Pa. P.U.C. Docket No. I-00020093 (Order entered Oct. 14, 2005), at 3.

81 Core Petition for Arbitration, Appendix 12, at § 55.6, p. 104. See Also Core Exhibit 1, Core Best Offer, at p. 10.

82 *Id.* at § 55.3, p. 104.

83 Embarq Exhibit 1, Embarq Best Offer, at p. 12

84 Id.

85 Id. at p. 14. See also, Embarq's Response to Core's Petition for Arbitration Appendix 2, at 19-21.

86 47 C.F.R. § 51.701(b).

this proceeding that VNXX traffic is "long distance" and therefore subject to "originating access",[87] that argument is ultimately undermined by key aspects of its own testimony.

In order for VNXX traffic to be subject to originating access charges, Embarq would need to prove that this traffic is "exchange access." The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[88] The Act defines "telephone toll services" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[89] VNXX traffic does not constitute "exchange access" because VNXX is offered as a non-toll service out of Core's local exchange services tariff, a fact which is not contested.

Indeed, Embarq's own testimony demonstrates that VNXX traffic is not exchange access traffic. On cross examination, Embarq witness Mr. Fox admitted that "VNXX traffic doesn't follow precisely the access call flow,"[90] and that "it's not really [a] clean model out there."[91] That may be something of an understatement. An access call generally involves three carriers: an originating LEC, an IXC, and a terminating LEC. The FCC has described the situation thus:

> Federal and state ***access charge rules govern the payments that interexchange carriers (IXCs) and commercial mobile radio service (CMRS) providers make to local exchange carriers (LECs) that originate and terminate long-distance calls,*** while the reciprocal compensation rules established under section 251(b)(5) of the Act

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87 *See, eg.*, Embarq Statement 1.0 (Fox Direct Testimony), at 34.

88 47 U.S.C. § 153(16).

89 47 U.S.C. § 153(48).

90 Tr., 265

91 Tr., 266 ("Q. So it sounds like you're saying, it sort of fits into the access regime but not really; is that a fair summary? A. You know, it's not really cleanly -- not a real clean model out there.")

generally govern the compensation between telecommunications carriers for the transport and termination of calls not subject to access charges.[92]

Of course, unlike an access call, **a VNXX call involves two LECs and no IXC**. Even if one could overlook this distinction (and Embarq offers no reason why one should), application of the access regime to VNXX calls yields absurd results. Without an IXC to pay the access charges, the originating and terminating LECs would either bill each other for the same minutes (in which case the LEC with the higher tariffed per minute access rate would receive net compensation). When pressed to explain whether and why Embarq would not owe Core terminating access charges, Mr. Fox essentially avoided answering the question.[93] No wonder he was forced to admit that VNXX calls do not really fit within the access regime "model."

More troublesome still for Embarq's position is the report generated by Embarq's own Agilent traffic tracking system, which classified essentially all of the calls Embarq has originated to Core to date as "local." In his written testimony, Embarq witness Ted Hart concluded that "only 3.3% of the minutes [ ] sent to Core may be considered local traffic."[94] To back up this claim, Mr. Hart also included an Exhibit 1 to his direct testimony, which purports to classify various NPA-NXX call combinations as "Local" or "Not Local." However, on cross examination, Mr. Hart admitted that, in order to classify the calls as local or non-local, he applied his interpretation of the Embarq retail end user tariff as well as Embarq's theory that calls should be rated based on the geographical end

92 Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 20 FCC Rcd. 4685 (rel. Mar. 3, 2005) ("*FNPRM*"), at ¶ 5.

93 Tr., 265 (Q. Okay. But you're saying that Embarq does not owe Core terminating access? A. Well, the interesting part is, the VNXX traffic doesn't follow precisely the access call flow. If you look in my testimony, I think it's in my direct under Issue 9 area, I have a definition on there of VNXX traffic.")

94 Embarq Statement 2.0 (Hart Direct Testimony), at 16.

points.[95] Based on his analysis, he manually input the words "Local" and "Not Local" into each of the rows in the final column of his exhibit.[96]

Mr. Hart's manual inputs, however, are completely undermined by the report generated by Embarq's own Agilent system, whose very purpose (according to Mr. Hart) is to classify calls for "jurisdictional" purposes, i.e, as local or non-local.[97] According to the Agilent web site:

> The ***Interconnect Analysis provides US operators with the ability to jurisdictionalize traffic***, making accurate measurements of all calls entering and leaving the network, even where the network elements are not capable of generating Call Detail Records (CDRs). ***It enables precise measurement of Minutes of Use to and from individual operators*** and accurate determination of the points of origination and termination, enabling accurate calculation of PIU, PLU and PDU rating factors. ***This means that operators can base Reciprocal Compensation arrangements and access charges on actual inter-carrier traffic.***[98]

Mr. Hart confirmed that "Agilent is a data warehouse storage system that stores call detail records related to SS-7 traffic"[99] for Embarq, and that the Agilent system is connected to Embarq's SS7 signaling system on 24 hours X 7 days per week basis.[100] He also confirmed that Embarq relies upon Agilent not only for litigation purposes, but also for ordinary business purposes.[101] Most important, Mr. Hart confirmed that the Agilent system is an effective tool for tracking calls and determining jurisdictionality.[102] The functionality and accuracy of the Agilent system are highly significant, since **the Agilent report based on Embarq's SS7 records clearly and unambiguously classifies substantially all of the traffic sent from Embarq to Core as local traffic.**

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95 Tr., 197-99.
96 Tr., 199.
97 Tr., 203.
98 http://assureme.comms.agilent.com/Product/Products.asp?pid=1006. (Emphasis added).
99 Tr., 199.
100 Tr., 201.
101 Tr., 203.
102 Tr., 201.

[BEGIN PROPRIETARY]

[103] [END PROPRIETARY]. This report from Embarq's own traffic tracking system demonstrates how absurd Embarq's position really is. As the Agilent reports show, the industry standard is to determine a call's jurisdictionality by comparing the NPA-NXX of the calling and the called party.

In any event, the FCC has stated on numerous occasions that VNXX arrangements are properly rated as local and are subject to section 251(b)(5) of the Act for intercarrier compensation purposes, and that such jurisdictional determinations should be based on a comparison of the NPA-NXXs associated with a call. As one example, in its *Virginia Arbitration Order*, the FCC expressly stated that the standard industry practice is for "carriers [to] rate calls by comparing the originating and terminating NPA-NXX codes."[104] Indeed, in that proceeding, the FCC agreed that "local traffic" is defined as "traffic that stays within the local calling area as determined by the NPA-NXX codes

103 Core Cross Exhibit 4.

104 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd. 27039, ¶ 301 (2002) ("*Virginia Arbitration Order*").

of the calling and called parties,"[105] not the physical location. The FCC similarly noted that "Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide."[106]

In the *Virginia Arbitration Order* the FCC determined that use of originating and terminating NPA-NXX codes is an appropriate means for segregating toll traffic, which is subject to state regulation, and local voice and ISP-bound traffic, which respectively are subject to the sections 251(b)(5) and 201 of the Federal Act and FCC rules.[107] To the extent the NPA-NXXs associated with a call are assigned to the same local calling area, a call is not "toll." Rather, the call is rated as either a local voice call under 251(b)(5) of the Federal Act or as an ISP-bound call under section 201 of the Federal Act using the "3:1" presumption established by the FCC in its *ISP Remand Order*.[108] Traffic associated with the same calling area (based on a comparison of NPA-NXX codes) that falls below the 3:1 ratio is presumptively local, and traffic above the 3:1 ratio is presumptively ISP-bound. Both forms of traffic, however, are subject to federal law.

Of course, the *Virginia Arbitration Order* is not the only instance in which the FCC determined that the jurisdictional nature of a VNXX call is based on a comparison of relevant NPA-NXX codes. In its landmark decision in *Starpower*, the FCC similarly confirmed that it is standard industry practice to rate calls as local or toll based on a comparison of NPA-NXX codes.[109] The FCC has stayed true to its precedence in *Starpower*, noting in its 2005 intercarrier compensation *FNPRM* that

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105 *Id.* at ¶ 264 (characterizing AT&T's position) and ¶ 266 (adopting AT&T's position and clarifying that the *ISP Remand Order's* 3:1 presumption is rebuttable).

106 *Id.* at ¶ 301.

107 *Id. at* ¶¶ 286-88.

108 *ISP Remand Order*, ¶ 79.

109 *Starpower Communications, LLC v. Verizon South Inc.*, EB-00-MD-19, Memorandum Opinion and Order, 18 FCC Rcd 23625, 23633, ¶ 17 (2003) ("*Starpower*").

"telecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call."[110] Indeed, relying on Starpower and clarifying its analysis in the Virginia Arbitration Order, the FCC further explained that "a call is rated as local if the called number is assigned to a rate center within the local calling area of the originating rate center. If the called number is assigned to a rate center outside the local calling area of the originating rate center, it is rated as a toll call."[111] At bottom, FCC precedent demands that parties rate calls based on a comparison of the relevant NPA-NXXs.

In addressing the same issue, the Maryland Commission followed the FCC's analysis in Starpower, and found that:

> ***FX calls are local calls, not interexchange calls, based on standard industry practice, including Verizon's own practice, and therefore reciprocal compensation is owed to the terminating carrier, and no access charges apply.*** The calls are local because the status of a call as local or toll is determined, pursuant to standard industry practice, by the telephone numbers of the calling and called parties, not by their physical location. The Commission notes in this regard the FCC's decision in *Starpower* rejecting Verizon's assertion that FX calls should be considered toll calls because the service enables a customer to avoid toll charges. The FCC noted that this argument missed the crucial point that Verizon South itself rated calls to and from its foreign exchange customers as local or toll based upon the telephone number assigned to the customer, not the physical location of the customer.[112]

The analysis provided by the FCC and the Maryland Commissions is supported by the record in this case, which demonstrates that the industry standard remains that calls are rated based on the NPA-NXX combinations, not geographical end points. As Mr. Hart's

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110 FNPRM at n.59.

111 *Id.* at ¶ 141.

112 *In the Matter of the Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) Concerning Interconnection Rates, Terms and Conditions*, Maryland PSCCase 8882, Order 79250 at 4-5; *and* Case 8922, Order 79813 at 3.

testimony shows, the only way for Embarq to rate calls its customers place to Core as non-local is to conduct a painstaking study of thousands of individual calls and to apply various assumptions and tariff interpretations. On the other hand, if Embarq simply relies upon its Agilent system (purchased for the very purpose of classifying traffic), then the calls are unquestionably local in nature.

b. ISP VNXX Calls Are Compensable Under the *ISP Remand Order*

All of the foregoing analysis applies equally to ISP-bound VNXX traffic as it does to voice VNXX traffic. Like voice VNXX traffic, and for the same reasons, ISP-bound VNXX traffic is not an "exchange access" or "telephone toll service." However, pursuant to the *ISP Remand Order*, there is a separate reason why ISP-bound VNXX traffic in particular is compensable under the terms of that order, and not subject to originating access charges. The reason is quite simply that **the *ISP Remand Order* on its face applies to all ISP-bound traffic**, not just ISP-bound traffic that Embarq may consider to be "local."[113] Mr. Gates testified that the FCC and the parties were very aware in the years leading up to the FCC's ISP remand order about VNXX traffic," and that VNXX "was a huge issue during that case, as you'll recall, back in the 2000's because the LECs were very concerned about all of that VNXX traffic and ISP bound traffic, which is why that order came out.."[114] Yet the FCC took no steps to exclude VNXX traffic from the ambit of the order. Indeed, the Commission has previously acknowledged that "[t]he *ISP Remand Order* has virtually preempted state commission rate authority over

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113 *See, eg., ISP Remand Order*, at ¶¶ 44 (stating that all "ISP-bound traffic" is "information access" under section 251(g) of the Act), 52 (claiming jurisdiction over all "ISP-bound traffic"), and 78, 79, 80, 81, 82, and 89 (creating interim compensation rules for all "ISP-bound traffic.").

114 Tr., 55-56.

intercarrier compensation for ISP-bound traffic."[115] Accordingly, the Commission did not apply the same analysis for voice VNXX traffic and ISP-bound VNXX traffic, and simply referred the parties in two previous arbitrations to the terms of the *ISP Remand Order*.[116]

c. The Commission has Resolved Treatment of ISP VNXX Traffic in the *Core RTC Certification Order*

In addition to all the reasons set forth above, Core notes that the Commission has already addressed the issue of compensation for ISP-bound VNXX traffic in the *Core RTC Certification Order*. The order clearly establishes VNXX traffic as local in nature, and therefore subject to reciprocal compensation and intercarrier compensation for ISP-bound traffic. The order rejects Embarq's theory that VNXX traffic is interexchange ("long distance") traffic subject to the access charge regime.

Although Core never took the position that an evaluation of VNXX traffic was necessary for the resolution of the certification case, the RTC Protestants insisted that Core was not a local exchange carrier because it relied primarily or exclusively on the use of VNXX arrangements to offer local calling to its ISP customers in RTC territories.[117] Indeed, the Protestants' arguments about VNXX-enabled ISP-bound traffic in the Core certification case mirror Embarq's arguments in this case.

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115 Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. For Arbitration with Verizon Pennsylvania, Inc.*, Docket No. A-310814F7000 (Order entered April 18, 2003) ("*USLEC/Verizon Arbitration Order*"), at 57 and note 46. The identical passage occurs in Opinion and Order, *Petition of Global NAPs South, Inc. For Arbitration... with Verizon Pennsylvania, Inc.*, Docket No. A-310771F7000 (Order entered April 21, 2003) ("*GNAPS/Verizon Arbitration Order*"), at 45 and note 46.

116 *Id.*

117 *Id.* at 29-30.

Ultimately, the Commission granted Core's exceptions on the issue of VNXX traffic, and explicitly agreed with Core's conclusion that such traffic should be classified as "local" as opposed to access or toll traffic:

> The record supports a conclusion that several ILECs, CLECs, and/or their affiliates, offer VNXX, or a VNXX-like service. The record indicates that VNXX is not exclusively used by Core. Based on our conclusion that Core has sufficiently invested in facilities and by a preponderance of the evidence has demonstrated a commitment for more investment so as not to fall in the category of reseller, we find the emphasis on its VNXX use misplaced in this regard.
>
> ***With regard to the local nature of Core's exchange service as a result of its use of VNXX, we would further agree with Core.***[118]

As further clarification of its endorsement of Core's position, the Commission cited with approval the following passage from Core's Exceptions:

> ***Core's services are telephone exchange services because each and every call is terminated on a local basis (whether geographically local, or VNXX)***, within the same LATA in which it originated, courtesy of Core's direct interconnections with Verizon tandems in each LATA. . . .It is also important to differentiate between Core's services, whereby each call is originated and terminated on a local basis, within the same LATA, and the service at issue in the Level 3 Application in Marianna & Scenery Hill territory. In the case of Level 3, it was determined that all Pennsylvania calls terminated by Level 3 were terminated at Level 3's modem banks in Baltimore, Maryland. By contrast, as set forth above, ***all calls handled by Core originate and terminate on a local basis in the same LATA.***[119]

The Commission broadly concluded "[t]he Exceptions of Core are granted."[120]

In light of the importance of the VNXX issue in the Core RTC Certification Proceeding, and the Commission's careful and conclusive analysis of the issue, there remains no further basis in the law to support Embarq's position that such traffic should be considered long distance or access traffic. Rather, the Commission's analysis wholly

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118 *Id.* at 31. (Emphasis added).

119 *Id.* (Emphasis added).

120 *Id.*

supports Core's position that VNXX traffic should be considered "local" compensable traffic both under Section 251(b)(5) and the *ISP Remand Order*.

d. Requiring Compensation for VNXX Calls is in the Public Interest

Compensating carriers for the termination of ISP-bound VNXX traffic at the extremely low ($0.0007/MOU) rate set forth in the *ISP Remand Order* is clearly in the public interest. Core witness Mr. Gates demonstrated that VNXX number assignments permit ISPs to operate in a cost-effective manner in the rural areas of Pennsylvania.[121] Mr. Gates testified that imposition of originating access charges by Embarq would force ISPs served by Core to either raise their rates dramatically, or else simply stop providing service in the more remote parts of Embarq territory.[122] Mr. Gates noted that rural residents in particular rely heavily on dial up ISP service, since broadband services are often not available or prohibitively expensive.[123] He also showed that imposition of originating access charges on ISP-bound VNXX traffic would require CLECs like Core to "duplicate the network of Embarq and other ILECs" by placing otherwise unnecessary facilities in each local exchange.[124] CLECs would thereby surrender one of their few competitive advantages over the incumbents, which is the ability to deploy networks in a "less capital intensive, less location sensitive" manner.[125]

In the past Embarq itself has advocated in support of CLECs' ability to use VNXX arrangements. In the Commission's Generic Investigation Regarding Virtual NXX Codes (Docket No. I-00020093), Embarq and Sprint jointly stated that:

121 Core Statement 1.0 (Gates Direct Testimony), at 38-39.
122 *Id.*
123 *Id.*, at 41-42.
124 *Id.*, at 39.
125 *Id.*

> The use of virtual NXXs provides benefits to the ILEC's end users as well as to the companies that utilize them. Virtual NXXs also benefits CLECs by alleviating the need for a CLEC to establish a physical presence in each exchange. Therefore, virtutal (sic) NXXs allows CLECs the ability to enter the market and provide competitive services without incurring prohibitive collocation costs. Furthermore, collocation leads to space exhaust in ILEC central offices. Given that the telecommunications industry and the technology that drives the industry are continually evolving, carriers should embrace innovative and cost effective ways (such as through the use of virtual NXXs) to provide service to end users. In summary, virtual NXXs maintain internet services at affordable prices, which promotes the public interest.[126]

Notably, Embarq's previous advocacy largely mirrors Mr. Gates' testimony.

e. VOIP Traffic is Telecommunications and is Compensable Under Section 251(b)(5) of the Act

VOIP traffic, as is relevant to this proceeding, is traffic that is originated by a VOIP end user in internet protocol (IP) format, is converted into time-division multiplexing (TDM) format, and is then delivered through the parties' switched telecommunications network (the same network that handles dial up calls and "ordinary" voice calls) to an end user with "plain old telephone service, or "POTS." Conversely, VOIP traffic may originate with a POTS end user, be routed through the switched telecommunications network, and terminate to a VOIP end user. Much like ISPs, VOIP providers seek to work with CLECs instead of incumbents, since VOIP services are marketed as replacements for incumbents' POTS lines.

Core's position is that VOIP traffic that passes between the parties' networks is "telecommunications" traffic that is subject to reciprocal compensation arrangements under section 251(b)(5). If Core delivers VOIP traffic originated by its VOIP provider

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126 See, Joint Comments of Sprint Communications Company, L.P. and the United Telephone Company of Pennsylvania (collectively "Sprint") in Docket No. I-00020093, dated November 18, 2002, at 5.

customer to Embarq for termination, then Core would pay Embarq at the reciprocal compensation rates the parties have agreed to. Conversely, if Embarq delivers VOIP traffic to Core, Embarq would pay Core at those same rates. Embarq proposes that VOIP calls "be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and intrastate access)."[127] Presumably, this means that VOIP traffic would be rated according to Embarq's theories regarding the geographic end points of the call.

Once converted into TDM format, VOIP traffic unquestionably qualifies as "telecommunications" under section 251(b)(5) of the Act and the FCC's implementing rules.[128] As such, VOIP traffic would be rated as "local" or "toll" based on a comparison of the calling party's and called party's NPA-NXX combination. Locally dialed calls are compensable under the reciprocal compensation regime, and toll calls are compensable under the access regime. Attempting to rate VOIP calls based on geographic end points would be practically impossible, since VOIP services are portable depending on where the VOIP end user chooses to log in to his VOIP service. As the FCC has found

> In marked contrast to traditional circuit-switched telephony, however, it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.[129]

Given these practical circumstances, Embarq's proposal to rate VOIP calls based on geographic end points should be rejected.

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[127] Embarq Exhibit 1,Embarq Final Offer, at p. 14.

[128] *See*, Memorandum Opinion and Order, *In re Universal Service Contribution Methodology*, WC Docket No. 04-3621 FCC Rcd 7518 (rel. June 27, 2006), at ¶ 41("we determine that interconnected VoIP providers provide 'telecommunications.'").

[129] Memorandum Opinion & Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling*, WC Docket No. 03-211, 19 FCC Rcd. 22404 (rel. November 12, 2004).

f. Embarq Has Offered No Support for its Belated Bill-and-Keep Proposals

In its final offer, Embarq proposes "bill and keep" as the intercarrier compensation mechanism for practically all forms of traffic other than exchange access traffic, including "Local and ISP-Bound Traffic"[130], "VNXX traffic"[131], and "non-local VOIP traffic."[132] With the exception of Mr. Fox's brief statement that Embarq "is amenable to consideration of a bill and keep compensation arrangement for all Core's VNXX traffic…"[133], there is no record whatsoever to support any of these last minute, "alternative" proposals. Moreover, for the reasons below, bill and keep is not appropriate except in very limited circumstances which are not present in this case.

The FCC carefully considered the merits of bill and keep in its 1996 *Local Competition Order*. The FCC defined bill and keep as "arrangements… in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network."[134] As a general matter, the FCC frowned on bill and keep, since it fails to permit cost recovery for the terminating carrier. ***"[A]s long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives,*** encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic."[135] The FCC did however recognize that when the traffic volumes terminated by each party to an interconnection are balanced, "bill-and-keep arrangements may

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130 Embarq Exhibit 1,Embarq Final Offer, at 8-9 and 11-12.
131 *Id.*, at 13-14.
132 *Id.*, at 15.
133 Embarq Exhibit 1.0 (Fox Direct Testimony), at 36.
134 Local Competition Order, at ¶ 1096. (Emphasis added).
135 *Id.*, at ¶ 1112.

minimize administrative burdens and transaction costs."[136] Accordingly, the FCC concluded that "state commissions may impose bill-and-keep arrangements if neither party has rebutted the presumption of symmetrical rates and ***if the volume of terminating traffic that originates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so...***"[137]

Core submits that neither party has offered any evidence to support the notion that the volumes of traffic to be terminated by the parties will be "approximately equal." Indeed Embarq has demonstrated that it originates far more traffic to Core than vice versa, and that it expects to continue to maintain that imbalance in the future. **Bill and keep is simply not appropriate where traffic volumes are out of balance.** Core further submits that nothing in the Act or the FCC's rules permit Embarq to subject particular classes of traffic to bill and keep (i.e., VOIP, VNXX), while applying other regimes (such as access) to other types of traffic. The only exceptions to section 251(b)(5) are exchange access and information access under section 251(g), and ISP-bound traffic by virtue of the *ISP Remand Order*. Otherwise all "telecommunications" are subject to reciprocal compensation under section 251(b)(5) of the Act and the FCC's implementing rules.

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136 *Id.*

137 *Id.*, at ¶ 1111.

EXHIBIT D

Consolidated
communications

3400 Avenue A, Katy, Texas 77493-1949
www.consolidated.com

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

February 23, 2009

Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room
Room 2 North
Harrisburg, Pa. 17120

Re: Petition for Approval for Amendment to Interconnection Agreement –
Docket A-310213F7005

Dear Sirs:

Attached please find filing for an Amendment to the existing Interconnection Agreement, Docket A-310213F7005 between Consolidated Communications of Pennsylvania (*fna* North Pittsburgh Telephone) and TCG (*fna* Teleport Communications Group).

If you have any questions, please feel free to call me at 281 396-5908

Sincerely,

Joanie Ferrance

Joanie Ferrance
Manager, Carrier Relations

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Amendment Number 1 to the Traffic Termination Agreement

Between

**Consolidated Communications of Pennsylvania Company, LLC ("CCPA")
with offices at 4800 Gibsonia Road, Gibsonia, PA 15044
(Formerly known as North Pittsburgh Telephone Company ("NPTC")**

And

**TCG Pittsburgh, a New York general partnership between TCG Partners and
TCG Joint Ventures Holding, Inc., a General Partnership with offices at
One AT&T Way, Bedminster, NJ 07921
(Formerly known as Teleport Communications Group – Pittsburgh ("TCG")**

This Amendment ("Amendment") is made and entered into by and between the above referenced parties which under their former names executed a traffic termination agreement effective February 1, 2005.

RECITALS

WHEREAS, the Parties entered into a Traffic Termination Agreement (the "Agreement") that was approved by the Pennsylvania Public Utilities Commission; and

WHEREAS, the Parties desire to amend the Agreement further by adding the terms, conditions and rates contained herein,

AGREEMENT

NOW, THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Amendment Terms

Pursuant to Section 23 of the Agreement, this Amendment is made in order to amend Exhibits A, B and C attached hereto and incorporated herein, to update exchange, date and rate information.

Effective Date

This Amendment shall be deemed effective upon approval by the Commission. However, pursuant to the Commission order, the rates are effective as set forth therein.

Further Amendments

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. The provisions of this Amendment, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions of this Amendment may not be given without the written consent thereto by both Parties' authorized representative. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, will be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or coveriant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

Entire Agreement

The Agreement as amended (including the documents referred to herein) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended and supersedes any prior understandings, agreements, or representations by or between the Parties, written or oral, to the extent they relate in any way to the subjects of the Agreement as amended.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Consolidated Communications of, Pennsylvania Company, LLC	TCG
Michael Shultz	Bill C. Peacock
Authorized Signature	Authorized Signature
Michael Shultz	Bill C. Peacock
Name Printed	Name Printed
V.P. Regulatory & Public Policy	Director - Interconnection Agreements
Title	Title
Feb. 12, 2009	2/5/09
Date	Date

CCPA AND TCG TRAFFIC TERMINATION AGREEMENT
AMENDMENT EXHIBITS

EXHIBIT A

LOCAL SERVICE EXCHANGES
AND
EAS ROUTES

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CCPA LOCAL SERVICE EXCHANGES

The CCPA local exchanges shall be based on the CCPA Local Exchange Areas as of January 31, 2009

EXCHANGE	NPA/NX
Cooperstown	724-898
Curtisville	724-265
Criders Corners	724-741
	724-720
	724-742
	724-772
	724-776
	724-778
	724-779
Freeport	724-294
	724-295
Gibsonia	724-443
	724-444
	724-449
Mars	724-625
Saxonburg	724-352
	724-353
	724-360
Wexford	724-933
	724-934
	724-935
	724-940

TCG LOCAL SERVICE EXCHANGES

The TCG local exchanges shall be based on the Incumbent Local Exchange Areas as operated by the CCPA effective January 31, 2009.

CCPA AND TCG TRAFFIC TERMINATION AGREEMENT
AMENDMENT EXHIBITS

EXHIBIT A

Sheet 2 of 2

EAS ROUTES
BETWEEN
CCPA AND TCG

TWO-WAY EAS ROUTES:

Route 1: TCG Perrysville to CCPA Wexford / CCPA Wexford to TCG Perrysville
Route 2: TCG Zelienople to CCPA Criders Corners / CCPA Criders Corners to TCG Zelienople

ONE-WAY EAS ROUTES:

Route 1: CCPA Freeport to TCG Tarentum
Route 2: CCPA Criders Corners to TCG Perrysville
Route 3: CCPA Mars to TCG Perrysville
Route 4: CCPA Curtisville to TCG Tarentum
Route 5: CCPA Gibsonia to TCG Glenshaw
Route 6: CCPA Saxonburg to TCG Tarentum

CCPA AND TCG TRAFFIC TERMINATION AGREEMENT
AMENDMENT EXHIBITS

EXHIBIT B

Sheet 1 of 2

RATE INFORMATION

Reciprocal Compensation Rate for EAS and ISP Traffic

EAS Compensation Rate Per Minute Delivered over the Direct Connection	$.002814
EAS Compensation Rate Per Minute Delivered over the Indirect Connection Provided by the Transit LEC	$.002814
ISP Compensation Rate Per Minute for all ISP Minutes over the 3 to 1 Cap as Calculated in Exhibit C	$.002814
- ISP Traffic Minute Cap on TCG Invoices to CCPA	26,181,515

Compensation Rates for IntraLATA Toll Traffic

- For TCG Originated Traffic Delivered to CCPA over the direct and indirect facilities

  The CCPA Intrastate IntraLATA Switched Access rates and terms are those set forth in the CCPA Intrastate Access Tariff PA P.U.C. No. 12, as that may be amended from time to time.

- For CCPA Originated Traffic Delivered to TCG over the direct and indirect facilities

  The initial TCG Intrastate Call Completion rate per minute is $.045 This rate will change effective with any CCPA Intrastate Switched Access rate change.

Transit Service

- Compensation rates and terms for transit service provided by CCPA to TCG are those set forth in the CCPA Intrastate Access Tariff PA P.U.C. No. 12, as that may be amended from time to time.
- Compensation rates and terms for transit service provided by TCG to CCPA are those set forth in the TCG Pittsburgh PA P.U.C. Tariff No. 4, as that may be amended from time to time.

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EXHIBIT B Sheet 2 of 2

Initial Percent Local Use Factor

TCG PLU Factor for Traffic Terminating to NTPC	15%
CCPA PLU Factor for Traffic Terminating to TCG	87%

The Initial PLUs will be updated as set forth in Section 6.2.

EXHIBIT C

BILLING CALCULATION

Actual call detail will be used by the Parties to determine the applicable jurisdiction of the terminating traffic. When either Party receives insufficient call detail to determine the jurisdiction of some or all minutes of use, the terminating Party will apply the factor(s) provided by the other Party only to those minutes of use for which there is not sufficient call detail. Such factor(s) will be used until the customer provides an update to its factor(s).

Compensation between the Parties will be calculated as set forth in this Exhibit C.

TRAFFIC ORIGINATING FROM TCG AND TERMINATING TO CCPA

The measured Total IntraLATA Terminating Minutes which exclude any transit minutes delivered to a third party, will be multiplied by the Percent Local Usage (PLU) factor to calculate the EAS minutes. These EAS minutes are subtracted from the Total IntraLATA Terminating Minutes to calculate the Total IntraLATA Toll Minutes.

The Total IntraLATA Toll Minutes will be billed at the rates and terms as specified by CCPA's applicable intrastate switched access tariff as set forth in Exhibit B. The EAS minutes will be multiplied by the Reciprocal Compensation Rate specified in Exhibit B.

An example of the calculation described above is as follows:

Example Calculation

A.	Total IntraLATA Terminating Minutes	100,000
B.	Percent Local Usage Factor (Example Factor Only - the actual factor is as set forth in Exhibit B)	15%
C.	Total IntraLATA EAS Minutes (Line A multiplied by Line B)	15,000
D.	Total IntraLATA Toll Minutes (Line C subtracted from Line A) These minutes are billed at the applicable CCPA intrastate switched access rates and terms as set forth in Exhibit B.	85,000

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EXHIBIT C

Sheet 2 of 4

E.	Reciprocal Compensation Rate (EXAMPLE RATE ONLY - the actual rate is as set forth in Exhibit B)	$.002814
	Total EAS Reciprocal Compensation Amount Due (Line C multiplied by Line E)	$42.21

TRAFFIC ORIGINATING FROM CCPA AND TERMINATING TO TCG

The measured Total IntraLATA Terminating Minutes, which exclude any transit minutes delivered to a third party, will be multiplied by the Percent Local Usage (PLU) factor to calculate the Total IntraLATA EAS and ISP-bound Minutes. Total IntraLATA EAS and ISP-bound Minutes are subtracted from the Total IntraLATA Terminating Minutes to calculate the Total IntraLATA Toll Minutes. Total IntraLATA EAS and ISP-bound Minutes will be split between ISP-bound Minutes and Reciprocal Compensation Billable EAS Minutes. ISP-bound Minutes will be determined by calculating the number of the IntraLATA EAS and ISP-bound Minutes that exceed a 3:1 ratio of terminating to originating Minutes. Reciprocal Compensation Billable EAS Minutes are developed by multiplying Total IntraLATA EAS Minutes originating from TCG (terminating to CCPA) by three (3). The resulting Reciprocal Compensation Billable EAS Minutes will be subtracted from Total IntraLATA EAS and ISP-bound Minutes to identify ISP-bound Minutes.

The Total IntraLATA Toll Minutes will be billed at the rate as set forth in Exhibit B or as currently effective as set forth in Section 5.3.1. The Reciprocal Compensation Billable EAS Minutes will be multiplied by the Reciprocal Compensation Rate set forth in Exhibit B. The ISP-bound Minutes will be multiplied by the capped rate set forth in Exhibit B.

EXHIBIT C

An example of the calculation described above is as follows:

Example Calculation

A.	Total IntraLATA Terminating Minutes	180,000
B.	Percent Local Usage Factor (EXAMPLE FACTOR ONLY - the actual factor is as set forth in Exhibit B)	87%
C.	Total IntraLATA EAS and ISP-Bound Minutes (Line A multiplied by Line B)	156,600
D.	Total IntraLATA Toll Minutes (Line C subtracted from Line A) These minutes are billed at the applicable TCG Intrastate switched access rate as set forth in Exhibit B.	23,400
E.	Reciprocal Compensation Billable EAS Minutes (TCG IntraLATA originating minutes to CCPA multiplied by 3) (Line C from example of Traffic Originating from TCG and Terminating to CCPA multiplied by 3)	45,000
F.	ISP-bound Minutes (Line E subtracted from Line C) (2003 CAP = 26,181,515)	111,600
G.	Reciprocal Compensation Rate (EXAMPLE RATE ONLY - the actual rate is as set forth in Exhibit B)	$.002814
H.	Total Reciprocal Compensation Amount Due (Line E multiplied by Line G)	$126.63
I.	ISP-bound Traffic Rate Cap EXAMPLE RATE ONLY - the actual (rate is as set forth in Exhibit B)	$.002814
J.	ISP-bound Traffic Compensation (Line F multiplied by line I)	$314.02

EXHIBIT C

TRANSIT TRAFFIC ROUTED BY EITHER PARTY TO A THIRD PARTY

The total transited traffic minutes which are routed to third parties shall be billed by the Transiting Party to the Originating Party at the rates and terms as specified in the Transiting Party's applicable intrastate switched access tariff identified in Exhibit B.

EXHIBIT D

Sheet 1 of 1

THIS EXHIBIT D AMENDS AND REPLACES SECTION 18.1 AND SECTION 18.2 OF THE AGREEMENT.

Notices All notices and communications concerning this Agreement shall be in writing and shall be addressed to:

If to Consolidated Communications of Pennsylvania Company, LLC:

Bill Terry
Sr. Manager - Regulatory
350 S. Loop 336 W.
Conroe, TX 77304-3308
Telephone: 936-788-7421
Fax: 936-788-1229
Email: bill.terry@consolidated.com

If to TCG:

Roberta Stevens
Lead Carrier Relations Manager
201 Streamside Court
Lilburn, GA 30047
Telephone: 770-564-2329
Fax: 281-664-4381
Email: robertastevens@att.com

With a Copy to:

L. Fredrik Cederqvist
Senior Attorney
32 Avenue of the Americas, Room E561
New York, NY 10013
Telephone: 212-387-4018
Fax: 212-539-9492
Email: fcederqvist@att.com

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TAB 5

Core Ex. No. 1
admitted 2/3/10

Reasons Why the FCC's ISP-Bound Traffic Orders Apply Only To ILEC-to-CLEC, ISP-Bound Traffic

The Purpose Of The ISP Orders Was To Correct A Specific Market Failure	The FCC designed its ISP Orders to address a very specific issue: To prevent CLECs from taking a perceived unfair advantage of ILECs' position in the marketplace as provider of last resort to residential end users
For CLEC-CLEC Traffic, The FCC Has Found No Market Failure To Correct	In an NPRM issued the same day as the *ISP Remand Order*, the FCC declined to adopt rules governing CLEC-to-CLEC arrangements because CLEC-to-CLEC traffic "do[es] not exhibit symptoms of market failure" Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 9612 at para. 2 and note 2.
The FCC's Compensation Scheme For ISP-Bound Traffic Ensures That ILECs Compensate CLECs for the termination of ISP-bound calls	The FCC's compensation scheme was intended to be implemented into Interconnection Agreements, which by definition are made between ILECs and CLECs, not CLECs and CLECs. The ILECs' duty to negotiate interconnection agreements is integral to the FCC's scheme because it gives CLECs leverage to ensure that ILECs compensate them for termination. CLECs have no similar legal obligation to negotiate interconnection agreements with another CLEC, and further, CLECs are required to terminate all incoming traffic regardless of payment.
The FCC's Mirroring Rule Was Designed Solely For ILECs	The cornerstone of the FCC's ISP Orders is the so-called "Mirroring Rule." Under the Mirroring Rule, the FCC's rate caps apply only if an ILEC "opts-in" to the FCC's scheme, by agreeing to exchange all 251(b)(5) traffic at rates set forth in ISP Orders. Otherwise, the ILEC was ordered to continue paying CLECs at state-approved reciprocal compensation rates. But, the FCC did not impose this rule or give CLECs the option to "opt-in" and therefore CLECs can not invoke the FCC's scheme against other CLECs. This omission demonstrates that the FCC never intended for its scheme to encompass CLEC-to-CLEC ISP-bound traffic.

Core Ex. No. 1
admitted 2/3/10

Regulatory Arbitrage — Collecting One Rate, But Paying Something Else

North Pittsburgh Tel. Co. $\longrightarrow$ AT&T

North Pittsburgh pays AT&T $0.002814/MOU for the termination of ISP-bound traffic on AT&T's TCG Pittsburgh network.

AT&T $\longrightarrow$ Core

AT&T pays Core NOTHING for the termination of ISP-bound traffic on Core's network in Pittsburgh and throughout Pennsylvania.