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March 15, 2010

*Via Overnight Delivery*

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

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

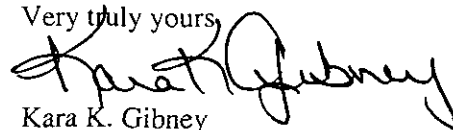
Dear Mr. McNulty:

Please find enclosed an original and nine (9) copies of AT&T's Brief on Petitions for Interlocutory Review and Answer to Material Questions in the above-captioned matter.

Please also find enclosed two proof of filing copies. I ask that you date stamp each copy, and return one to me and one to Michelle Painter in the enclosed self-addressed postage pre-paid envelopes.

Thank you and please contact me if you have any questions.

Very truly yours,



Kara K. Gibney

Enclosure

cc: Hon. James H. Cawley, Chairman  
Hon. Tyrone J. Christy, Vice-Chairman  
Hon. Wayne E. Gardner, Commissioner  
Hon. Robert H. Powelson, Commissioner  
Cheryl Walker Davis, Director, Office of Special Assistants  
Certificate of Service  
Office of Administrative Law Judge

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MAR 15 2010

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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SECRETARY'S BUREAU

AT&T'S BRIEF ON PETITIONS FOR INTERLOCUTORY REVIEW AND  
ANSWER TO MATERIAL QUESTIONS

AT&T Communications of PA, LLC and  
TCG Pittsburgh

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SECRETARY'S BUREAU

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AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh (“AT&T” and “TCG,” collectively “AT&T”) hereby submit to the Pennsylvania Public Utility Commission (“Commission”) their Brief on Petitions for Interlocutory Review and Answer to Material Questions in the above-captioned matter. This Brief addresses both AT&T’s petition and Core Communications Inc.’s (“Core”) petition.

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

The issue presented to this Commission is whether it has subject matter jurisdiction to hear and decide this case. This case involves a complaint filed by Core alleging that AT&T failed to compensate Core for the termination of traffic on Core’s network. After testimony was filed and discovery answered, it became clear that all the traffic at issue was non-toll, Internet Service Provider (“ISP”)-bound traffic. AT&T moved to dismiss the Complaint for lack of subject matter jurisdiction, and Administrative Law Judge (“ALJ”) Angela Jones granted AT&T’s motion as to all ISP-bound traffic (which even Core agrees is all the traffic terminated before September 2009 and all, or nearly all, of the traffic terminated after September 2009), but denied AT&T’s motion as to a small amount of traffic allegedly terminated after September 2009 that Core claims *may* have been terminated to Voice over Internet Protocol (“VoIP”) providers.

As to the ISP-bound traffic, ALJ Jones properly found that the Commission does not have jurisdiction. It is without dispute that ISP-bound traffic is jurisdictionally interstate (regardless of where the call originates and terminates). As ALJ Jones observed, the FCC, and not this Commission, has jurisdiction over the ISP-bound compensation issues in this case.

As to the VoIP-bound traffic, ALJ Jones found that because Core claims there *may* be some AT&T-originated VoIP-bound traffic terminated after September 2009, the case should go forward. Here, however, ALJ Jones’ recommendation is slightly askew. Core has already submitted its testimony in this case and answered discovery, and Core did not provide a shred of

evidence that AT&T sent *any* VoIP-bound traffic to Core. Rather than waste the Commission's and the parties' time and resources litigating an issue that may not even exist, the Commission should modify ALJ Jones' recommendation and dismiss Core's complaint related to the VoIP-bound traffic without prejudice. At such time as Core can identify any VoIP-bound traffic sent by AT&T, if indeed such traffic exists, it would be free to renew its Complaint at that time. Until then, this entire case must be dismissed.

Core interjects a substantial amount of irrelevant and incorrect factual issues in its Petition and arguments. Specifically, Core claims that this Commission should assert subject matter jurisdiction in order to prevent carriers like AT&T from using Core's network for free. There are numerous problems with this argument. First, this "equity" argument cannot give the Commission jurisdiction over interstate traffic. Second, Core has always been able to raise its dispute in the proper forum, *i.e.* the FCC. It is not necessary for this Commission to assert jurisdiction in order to give Core a forum to have its case heard. Third, AT&T is not a "bad actor" that has spent years refusing to pay Core for the use of its network. Core did not even bother billing AT&T for *any* traffic for over four years, even though Core had all the information it needed to identify and bill AT&T's traffic. The fact that Core did not bill AT&T for four years was not at all surprising – AT&T operates pursuant to a bill-and-keep arrangement with every single Competitive Local Exchange Carrier ("CLEC") in Pennsylvania, and does not pay any CLEC for the termination of AT&T's non-toll traffic. Bill and keep is an industry standard and accepted practice, particularly with the exchange of non-toll traffic among CLECs.

What is surprising here, though, is Core's novel theories for charging AT&T for the termination of ISP-bound traffic. Core billed AT&T intrastate access charges for the termination of non-toll, ISP-bound traffic, even though it is clearly inappropriate to apply access charges to

local traffic. Core rendered bills to AT&T for the exchange of local traffic, even though Core had no interconnection agreement with AT&T that permitted Core to bill AT&T anything at all, and Core has no tariff in place to permit it to bill AT&T for local traffic. Core had every reason to know it was not permitted to bill AT&T for the ISP-bound traffic, given that the FCC has specifically singled out ISP-bound traffic for different treatment in order to root out and cease the practices of arbitrage carriers like Core.

Weighed against the facts and the law, Core's Petition seeking interlocutory review of the ALJ's dismissal of the case as it relates to ISP-bound traffic is clearly off target. As the ALJ correctly observed, it has been settled for over ten years that all ISP-bound traffic is jurisdictionally interstate (even if such traffic appears to be local in nature, *i.e.* notwithstanding that such dial-up ISP-bound traffic may be locally dialed). *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9<sup>th</sup> Cir. 2003) ("the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes"). And it is equally well settled that states and state commissions have no authority to regulate such traffic, except when acting as deputized federal regulators in arbitrating, approving, or enforcing interconnection agreements under 47 U.S.C. § 252. *Id.* at 1126, 27. Core is not asking the Commission to arbitrate, approve, or enforce an interconnection agreement. Accordingly, under settled law, the Commission lacks jurisdiction to entertain Core's Complaint and it should be dismissed as beyond this Commission's jurisdiction. Even Core has argued to the Commission that all ISP-bound traffic is interstate and therefore under the jurisdiction of the FCC.<sup>1</sup>

There is a second, independent basis for upholding the ALJ's dismissal of Core's Complaint – although the ALJ did not reach the issue, and the Commission does not need to

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<sup>1</sup> 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, Reply Brief of Core Communications, Inc. p. 37, September 20, 2007.

reach it either, because the lack of subject matter jurisdiction is determinative. That second basis for dismissal is preemption. All of the ISP-bound traffic AT&T sent to Core was *non-toll* traffic. Even if state commissions had jurisdiction to regulate compensation for ISP-bound traffic in the absence of any FCC regulation (which they do not), the FCC *has* chosen to regulate in the area of non-toll, ISP-bound traffic, and has *explicitly preempted* any state authority over such matters. Specifically, in the *ISP Remand Order*, the FCC held: "Because we now exercise our 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.*"<sup>2</sup> The Pennsylvania Commission has expressly endorsed the FCC's preemption analysis – twice.<sup>3</sup>

While the ALJ correctly dismissed Core's Complaint as it relates to ISP-bound traffic, it did not grant AT&T's Motion to Dismiss in its entirety because Core alleged that a very small amount of traffic terminated *after* September 2009 could be calls terminated to VoIP providers. AT&T's Petition seeks interlocutory review of that decision. As the Complainant, Core bears the burden of proving that the Commission has jurisdiction over the traffic in dispute, and it may not withhold its offer of proof until the hearing. Core was required to provide sufficient information to establish that the Commission has jurisdiction over the traffic at issue in its case-in-chief. Core failed to show (after all testimony had been filed and discovery answered) that any VoIP-bound traffic was originated from AT&T and, therefore, failed to meet its burden of proving that the Commission has jurisdiction over any of the traffic at issue. The ALJ

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at ¶82 (emphasis added).

<sup>3</sup> Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A-310814F7000, at p. 57, n46 (PUC April 18, 2003) ("April 18, 2003 Opinion and Order"); Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A-310814F7000, at p. 10 (PUC Jan. 18, 2006 Order) ("Jan. 18, 2006 Opinion and Order").

recognized that Core failed to present evidence establishing that it terminated any VoIP-bound traffic originated by AT&T, but nonetheless has allowed the matter to go to hearing. But the time has come and gone for Core to present its evidence and Core did not present anything in testimony or its answers to discovery that indicate how much, if any, VoIP-bound traffic it terminated for AT&T – in fact, Core stated in discovery that it *could not* provide such information. In light of Core’s utter failure to meet its burden of proof, the Commission should reverse the ALJ’s determination and dismiss Core’s Complaint in its entirety.

## **II. THE COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER ISP-BOUND TRAFFIC**

### **A. There Is No Evidence Of A Factual Dispute Regarding The Nature Of The Traffic At Issue**

#### **1. All The Traffic Terminated By Core Was ISP-Bound Traffic And There Is No Evidence That Core Terminated VoIP-Bound Traffic Originated By AT&T**

AT&T’s and Core’s networks are not directly connected to each other. Instead, they exchange traffic indirectly. Both AT&T and Core are directly connected to Verizon, which provides transiting service for both. This means that with respect to AT&T-originated traffic directed to a Core customer, AT&T sends the call to Verizon, and Verizon forwards the call on to Core. Core’s Complaint alleges non-payment by AT&T for the termination of this indirect traffic.

Core’s testimony and discovery responses concede that all traffic terminated before September 2009 was ISP-bound traffic. Core also concedes that most, if not all, of the traffic terminated after September 2009 is ISP-bound traffic, but alleges that a small amount of traffic terminated after September 2009 *might* have been terminated to VoIP providers. AT&T attempted to determine whether Core has billed AT&T for any VoIP-bound traffic. However,

after all the testimony has been filed and discovery answered, Core has failed to show that any VoIP-bound traffic originated from AT&T.

To the contrary, in its Reply to New Matter, filed June 24, 2009, Core admitted that the “AT&T Indirect Traffic” at issue here “is *virtually all* terminated to ISPs.”<sup>4</sup> Core’s response to Interrogatory AT&T-II-4 states: “Inasmuch as Core’s customers for local exchange service in Pennsylvania are and were primarily ISPs during the billing periods at issue in this case, the traffic AT&T sends to Core is *primarily bound for delivery by Core to its ISP customers.*” (Emphasis added).<sup>5</sup> Core’s testimony and interrogatory responses indicate that it has 55 ISP customers.<sup>6</sup> Core states that it has only five non-ISP customers, all of which are VoIP providers.<sup>7</sup> But Core did not bill these customers for any usage prior to September 2009.<sup>8</sup> Accordingly, *all* of the traffic terminated before September 2009 was ISP-bound traffic. And the vast majority, if not all, of the traffic terminated after September 2009 was ISP-bound traffic. Core does not dispute these facts. While Core claims that a very small amount of traffic it terminated *after* September 2009 *might* have been terminated to VoIP providers, Core has not shown (and claims it cannot show) whether any of that VoIP-bound traffic originated from AT&T. Indeed, Core’s testimony has already been filed in this case, but it does not provide evidence that Core terminated any VoIP-bound traffic for AT&T. Moreover, AT&T asked Core in discovery how much of the non-ISP bound traffic was sent by AT&T to Core, or how much Core has billed AT&T for non-ISP bound traffic, and Core stated that it could not provide this

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<sup>4</sup> Reply To New Matter, at 7 (emphasis added).

<sup>5</sup> Relevant excerpts from Core’s responses to AT&T’s second set of interrogatories, AT&T-II, were included as Attachment A to AT&T’s Motion to Dismiss. The Motion to Dismiss with attachments is included as Ex. 1 hereto.

<sup>6</sup> Testimony of Bret Mingo at 2 (Attachment B to AT&T’s Motion to Dismiss); Response to Interrogatory AT&T-II-14.

<sup>7</sup> Response to Interrogatory AT&T-II-13; Testimony of Bret Mingo at 2.

<sup>8</sup> Response to Interrogatory AT&T-III-3. (Relevant excerpts from Core’s responses to AT&T’s third set of interrogatories, AT&T III, were included as Attachment C to AT&T’s Motion to Dismiss).

information.<sup>9</sup> If Core is incapable of identifying whether, and how much, VoIP-bound traffic was sent by AT&T, then Core has failed to meet its burden of proof that the Commission has jurisdiction over any traffic in this case.

## 2. All Of The Traffic Terminated By Core Was Non-Toll Traffic

While only material to AT&T's alternative preemption argument (which the ALJ did not address and the Commission need not address unless it finds that it has subject matter jurisdiction over ISP-bound traffic outside the context of an interconnection agreement dispute), all of the ISP-bound traffic terminated by Core is non-toll traffic. For example, Mr. Mingo's testimony admits (at 4) that "[t]he 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."<sup>10</sup> And in its response to Interrogatory AT&T-II-5, Core stated that "with respect to those calls for which the CPN of the calling and called parties would be rated as 'local' . . . [t]he total amount in dispute between AT&T and Core for the termination of "local" traffic was \$7,705,189.63." That amount, of course, is approximately the same amount Core seeks to recover in this lawsuit for the termination of all of the indirect traffic at issue.<sup>11</sup> This is further evidence that all of the ISP traffic is non-toll. Moreover, the theme animating Core's testimony and Reply to New Matter is *not* that the traffic at issue is "toll" and therefore subject to intrastate access charges, but rather that its tariffed intrastate access charges *can apply to non-toll* as well as toll traffic – which further demonstrates Core's belief that all, or nearly all, of the traffic at issue here is non-toll.<sup>12</sup>

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<sup>9</sup> Response to Interrogatory ATT-III-4.

<sup>10</sup> See also *Id.* at p. 18, lines 6-7 ("Can access tariffs apply to *locally-dialed traffic like the AT&T indirect traffic?*") (emphasis added).

<sup>11</sup> Reply to New Matter, 23.

<sup>12</sup> Reply to New Matter (Summary of Position), p. 6, ¶ 25 ("Core denies that intrastate access charges only apply to interexchange traffic"); *Id.* p. 7, 32 ("Core denies that its intrastate access charges only apply to non-local, toll traffic"); Mingo Testimony at 18 ("there are instances in which an access tariff can and does apply to 'local'

In fact, Core proposes to settle this matter with an offer that addresses non-toll – and only non-toll – traffic. *Id.* at 23 (“By way of this testimony, Core hereby offers to enter into the attached [agreement] that will cover all locally-dialed traffic exchanged between AT&T and Core, and will apply the Commission-approved TELRIC rate to such traffic”).

Finally, when Core filed to expand its Certificate of Public Convenience and Necessity (“CPCN”) to the rural ILECs’ territory, Core stated therein that all of the traffic it handles is local traffic. Core specifically stated that “all calls handled by Core originate and terminate on a local basis in the same LATA.”<sup>13</sup>

**B. The ALJ Properly Dismissed Core’s Complaint For Lack Of Subject Matter Jurisdiction**

**1. Core’s Factual Allegations Are Irrelevant To The Commission’s Jurisdiction Over ISP-Bound Traffic And, In Any Event, Untrue**

Core’s Petition makes several factual allegations that are entirely irrelevant to the question of the Commission’s jurisdiction over ISP-bound traffic and that, in any event, are wrong. AT&T takes this opportunity to set the record straight.

*First*, Core argues (Petition, ¶ 2) that AT&T conceded jurisdiction in its Answer to Core’s Complaint, and criticizes AT&T for not moving to dismiss until two months before the date set for evidentiary hearings, claiming that AT&T was fully aware when it filed its Answer that the traffic at issue was ISP-bound traffic. That is irrelevant because subject matter jurisdiction cannot be waived, and a case must be dismissed at any time if it is determined that the Commission lacks jurisdiction. *Pennhurst Medical Group, P.C. v. Department of Public*

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traffic”); *Id.* at 26 (“Core believes that its intrastate switched access tariff should apply to all the intrastate traffic it terminates . . . including both toll and locally dialed traffic”).

<sup>13</sup> 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-310922F0002, AmA, Opinion and Order, December 4, 2006, pp. 34-35, citing Core Exceptions at p. 27.

*Welfare*, 796 A.2d 423, 425 n. 2 (Pa.Cmwlth.2002) (“Questions of jurisdiction can never be waived, and may be raised at any time by the parties or sua sponte by an appellate court.”), citing *Commonwealth v. Little*, 455 Pa. 163, 314 A.2d 270 (1974).

Core is also wrong that AT&T could have filed its Motion to Dismiss at an earlier date. Core intentionally hid from AT&T the type of traffic at issue: It could have stated in its Complaint that the traffic at issue was ISP-bound traffic, but it chose not to. Thus, AT&T had no way of knowing that the traffic at issue was ISP-bound traffic until after December 1, 2009, when Core finally admitted through discovery that all the traffic terminated prior to September 2009 and all, or nearly all, the traffic terminated after September 2009 was ISP-bound. AT&T promptly filed its Motion to Dismiss one week later, on December 8, 2009.<sup>14</sup> Even if AT&T had suspected that the traffic at issue was ISP-bound traffic, it would have been pointless to file a Motion to Dismiss before the nature of the traffic was conclusively resolved. Indeed, in two other similar complaints filed by Core, it did not disclose the type of traffic involved, the defendants suspected the traffic was ISP-bound traffic and moved to dismiss, Core objected to the dismissal, and the ALJs refused to dismiss the cases at that early stage because all factual issues were not resolved regarding the type of traffic at issue.<sup>15</sup>

*Second*, Core claims (at ¶ 7) that the Commission should assert jurisdiction over its Complaint because otherwise “carriers will be empowered to continue to hide behind the guise of a lack of subject matter jurisdiction to justify their outright refusal to pay for services rendered.” While that says nothing about the scope of the Commission’s jurisdiction, the impression Core

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<sup>14</sup> Although AT&T is able to properly route a call to Core via Verizon, AT&T like all LECs is not able to definitively determine if a called telephone number is an ISP in contrast to a genuine local exchange customer; both calls will initially appear the same. AT&T Testimony at n.4. Of course, Core is able to readily make that determination, because the ISP is Core’s customer. *Id.*

<sup>15</sup> *Core Communications, Inc. v. XO Communications Services, Inc.*, Docket No. C-2009-2133609; *Core Communications, Inc. v. Choice One Communications of Pennsylvania, Inc. d/b/a One Communications*, Docket No. C-2009-2130379 and *Core Communications, Inc. v. CTC Communications Corp. d/b/a One Communications*, Docket No. C-2009-2131838.

hopes to leave, which is entirely false, is that it will have no remedy if the Commission does not assert jurisdiction over this case. That is not true. Core has always had the option to take this issue to the entity that properly has jurisdiction over it – *i.e.*, the FCC. So Core’s claim that it has no ability to get this issue resolved is plainly false.

*Third*, Core accuses AT&T of being a bad actor, claiming that it is taking a “free ride” on Core’s network, and suggesting that AT&T has been withholding payments for the termination of traffic for years. While irrelevant to the Commission’s subject matter jurisdiction, Core’s accusations are not true.<sup>16</sup> Since at least January 2004, AT&T has sent traffic to Core, through Verizon, which Core has terminated to its own customers. Verizon provides, or stands ready to provide, Core with all details related to calls originating from AT&T, or with whatever details Core has negotiated to receive from Verizon. In fact, Core’s witness, Mr. Mingo, admitted that Core had the means and opportunity to determine that AT&T was sending calls to Core, but it did absolutely nothing for years to utilize that information.<sup>17</sup> As a result, Core did not bill AT&T for any traffic until the beginning of 2008 and 2009, at which time it sent AT&T a bill for all past years beginning in January 2004. The fact that Core did not bill AT&T for nearly four years was hardly surprising to AT&T. AT&T was not expecting to receive any bill at all. AT&T operates under a bill and keep arrangement with every single CLEC in Pennsylvania; accordingly, AT&T does not pay *any* other CLECs for the termination of AT&T’s non-toll

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<sup>16</sup> AT&T paid Core’s intrastate switched access rates for bills directed to AT&T Communications of Pennsylvania (CIC 288), but only because the traffic sent looked like long distance traffic when AT&T analyzed the calling/called party information. However, now that AT&T has received Core’s testimony and discovery responses, AT&T realizes it improperly paid Core for ISP-bound traffic that is jurisdictionally *interstate* and not subject to intrastate access charges.

<sup>17</sup> Mr. Mingo testified (at 8) that Core receives Carrier Access Billing System (“CABS”) or “Category 11” records from Verizon on a regular basis, which “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.” But it was not until 2007 that Core “purchased special equipment and hired a consultant to ‘read’ an historical sampling of the records Verizon had been sending Core.”

traffic. What came as a surprise was that, after four years of sitting on its hands, Core sent AT&T a switched access bill for over \$7 million for ISP-bound, non-toll calls. Although AT&T was willing to discuss an arrangement for the exchange of traffic on a going-forward basis, Core demanded that AT&T first pay all the illegal backbilled amounts, and therefore the negotiations stalled.

Of course Core claims that the backbilled amounts are not illegal, but plainly that is not true. Core does not have an interconnection agreement with AT&T that provides a basis for billing AT&T for ISP-bound traffic. Core does not have a tariff on file with the Pennsylvania Commission that establishes rates for terminating non-toll ISP-bound traffic (nor could it, given that ISP-bound traffic falls under the FCC's jurisdiction). The only tariff that Core has on file with the Commission involving compensation between companies is its intrastate switched access tariff – and that is the tariff Core used to calculate the amount supposedly owed by AT&T for the termination of the non-toll, ISP-bound traffic at issue here. But, even if we ignore that ISP-bound traffic is *interstate*, switched access charges apply only to *toll* traffic, not the ISP-bound traffic at issue here, which is *non-toll*.

**2. The Commission Lacks Jurisdiction To Regulate Compensation For ISP-Bound Traffic Outside The Context Of An Interconnection Agreement Dispute**

The ALJ correctly found (at 14) that the Commission does not have jurisdiction over the ISP-bound traffic at issue because it is jurisdictionally interstate and therefore under the exclusive jurisdiction of the FCC: “[B]ecause the *Core v. FCC* end-to-end analysis affirmatively states that the FCC has jurisdiction and authority over ISP-bound traffic and intercarrier exchange compensation regardless of the entities involved with the exchange of traffic, the traffic at issue prior to September 2009 is under the jurisdiction and authority of the FCC.” That determination should be upheld.

It is well-settled – as a matter of FCC precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic. *Pacific Bell*, 325 F.3d at 1126 (“the FCC and the D.C. Circuit have made it clear that ISP traffic is ‘interstate’ for jurisdictional purposes”). And because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement (“ICA”) under § 252. *Id.* at 1126-27. Core itself has argued to this Commission that all ISP-bound traffic is interstate and therefore under the jurisdiction of the FCC. Specifically, in its arbitration with Embarq, Core stated: “All of the FCC’s rules are now premised on the theory that *any call to an ISP is interstate* and therefore under the FCC’s jurisdiction and rules for intercarrier compensation.”<sup>18</sup>

The FCC first addressed ISP-bound traffic over ten years ago in the *ISP Declaratory Ruling*,<sup>19</sup> where it found that a call placed by a user of “dial-up” internet service does not terminate at the ISP’s local server but continues to the ultimate destination or destinations, specifically at an internet website that is often located in another state. *ISP Declaratory Ruling*, ¶ 12. Applying the “end-to-end” analysis, which determines the jurisdictional nature of communications by comparing the end points of the communication, the FCC concluded that ISP-bound telecommunications traffic is jurisdictionally interstate. *Id.* at 3695-3702 ¶¶ 10-20. The United States Court of Appeals for the District of Columbia Circuit accepted the FCC’s determination that ISP-bound traffic was jurisdictionally interstate, stating: “[t]here is no dispute” that the FCC was “justified in relying on” its end-to-end analysis in concluding that

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<sup>18</sup> 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, Reply Brief of Core Communications, Inc. p. 37, September 20, 2007 (emphasis supplied).

<sup>19</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Ruling*”)

ISP-bound traffic is “jurisdictionally interstate.” *Bell Atlantic Tel Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). In 2001, the FCC returned to this issue and reaffirmed its finding that ISP-bound traffic is jurisdictionally interstate traffic that would be regulated directly by the FCC under its statutory authority under Section 201 to ensure that the rates for interstate services are “just and reasonable.” *ISP Remand Order*, ¶ 1. *Id.* at ¶ 52 (“ISP traffic is properly classified as interstate, and it falls under the [FCC’s] section 201 jurisdiction”).<sup>20</sup> Most recently, as the ALJ pointed out, the United States Court of Appeals for the D. C. Circuit stated: “Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls.” *Core v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010). In the ALJ’s words, the D.C. Circuit “found that ISP-bound traffic is interstate based on the end-to-end analysis and indeed the FCC has authority under Section 201 of the TA 1996 to regulate compensation between the sending local exchange carrier and the recipient local exchange carrier regarding ISP-bound traffic.” *Order #6* at 12; *Core v. FCC*, 592 F.3d at 144.<sup>21</sup>

Because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement under § 252. Indeed, the Ninth Circuit held in *Pacific Bell*, 325 F.3d at 1126-27, that under the statutory scheme adopted in the 1996 Act, state commissions have no authority over interstate traffic, except for the authority to adjudicate interconnection disputes

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<sup>20</sup> The FCC’s conclusion was undisturbed by the remand in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). *ISP Mandate Order*, ¶ 4 (in *WorldCom*, “the court did not question the [FCC’s] finding that ISP-bound traffic is jurisdictionally interstate.”).

<sup>21</sup> *Core* claims (at ¶ 6) that the ALJ erred in relying on the D.C. Circuit’s 2010 decision because the decision is “not applicable to the complaint involved here.” That plainly is not true. The 2010 decision reiterates the over a decade-old determination that, under the FCC’s end-to-end analysis, ISP-bound traffic is jurisdictionally interstate. And, as the ALJ correctly pointed out (at 14), the end-to-end analysis does not draw a distinction between ILEC/CLEC traffic and CLEC/CLEC traffic. The interstate nature of ISP-bound traffic therefore is not only “applicable to the complaint,” it is determinative as it dictates that *Core*’s Complaint be dismissed for lack of subject matter jurisdiction.

pursuant to § 252.<sup>22</sup> The Court explained that “[b]efore the 1996 Act, the FCC had general rule-making authority to regulate ‘interstate’ traffic and the states had general authority to regulate ‘intrastate’ traffic.” *Id.* at 1126 (citing 47 U.S.C. § 152; *Local Competition Order*, at 15499 ¶ 83).<sup>23</sup> The 1996 Act does not change these basic principles; rather, Congress “changed this division of labor somewhat” in certain limited, specific respects. *Id.* The principal change was that Congress enacted new substantive, federal provisions governing competition for local services, and thereby broadly extended the FCC’s authority into the field of intrastate telecommunications; the Act and the FCC’s rules now preempt state regulation of local telecommunications competition generally. *Id.* at n.10; *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 377-83 & n.6 (1999); *MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 510 (3<sup>rd</sup> Cir. 2001). In addition, Congress gave state commissions *federal* authority to apply the 1996 Act and the FCC’s rules in individual cases by arbitrating interconnection agreements under § 252. *Iowa Utils. Bd.* 525 U.S. at 378 n.6. But while the Act “granted the state commissions defined authority over interstate traffic under §§ 251 and 252 . . . it is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is *confined* to the role described in § 252 – that of arbitrating, approving, and enforcing interconnection agreements.” *Pacific Bell*, 325 F.3d at 1126 (emphasis added). “The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic.” *Id.* at 1127.

For these reasons, the Ninth Circuit struck down an attempt by the California Public Utility Commission (“CPUC”) to regulate reciprocal compensation for ISP-bound traffic outside

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<sup>22</sup> Section 252 federally delegated state authority is not at play in this dispute, because there is no interconnection agreement or arbitration between Core and AT&T.

<sup>23</sup> Indeed, Congress has always intended federal regulation to preempt state law with respect to the establishment of rates for interstate telecommunications traffic. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-49 (1930) (“Neither these interstate rates nor the division of revenue arising from interstate rates was a matter for the determination” of a state regulatory commission); *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30-31 (1919) (interstate rates are governed by federal and not state law).

the context of a § 252 proceeding. *Id.* at 1126-28. Specifically, the CPUC had issued generic orders applicable to all ICAs, purporting to establish that ISP-bound traffic was covered by the ICA's reciprocal compensation provisions. However, because the CPUC's "only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms," the Court concluded that "[b]y promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement." *Id.* at 1125-26.

The Sixth Circuit made a similar determination in *Verizon North, Inc. v. Strand*, 367 F.3d 577 (6<sup>th</sup> Cir. 2004). There, a CLEC billed an ILEC with which it did not have an ICA for terminating ISP-bound traffic at rates set forth in an intrastate tariff. When the ILEC refused to pay the charges, the CLEC filed a complaint with the state commission. The state commission asserted jurisdiction over the dispute, even though the CLEC was relying on its tariff rather than on an interconnection agreement and ordered the ILEC to pay the tariffed rates. The Sixth Circuit noted that the state's ability to regulate interconnection between LECs was "clearly bounded by the plain language of § 252." While "the Act does not completely eliminate the role of the state commissions in regulating interconnection between LECs . . . to the extent [a state commission] order is inconsistent with the Act or prevents its implementation, it is preempted." *Id.* at 582-83. Because the state commission's order bypassed the federal statutory process for establishing interconnection and effectively permitted the institution of the terms of an ICA "by fiat," the order was inconsistent with the statutory framework of § 252 and thus preempted. *Id.* at 584-85.<sup>24</sup>

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<sup>24</sup> As the ALJ correctly found (Order #6 at 13-14), and as explained further in part II.B.4.c, contrary to the claim made by Core in oral argument (Feb. 3, 2010 Tr. at 53, 56) and in its witness, Mr. Mingo's, testimony (at 25-26), the

Core has admitted that all the traffic terminated prior to September 2009 and the vast majority, if not all, of the traffic terminated after September 2009 was ISP-bound traffic. And because ISP-bound traffic is jurisdictionally interstate, the ALJ correctly concluded that the Commission does not have jurisdiction over it here (where there is no dispute over an ICA), and Core's Complaint was properly dismissed as to that traffic.

### **3. The *Palmerton* Decision Does Not Effect The FCC's Exclusive Jurisdiction Over ISP-Bound Traffic**

Core will likely argue that the Commission's recent decision in the *Palmerton*<sup>25</sup> case undercuts AT&T's argument that the FCC has exclusive jurisdiction over ISP-bound traffic. That argument would be incorrect. The FCC and the courts have drawn a distinction between "mixed-use" services and purely interstate services. When a service is "mixed use" (like VoIP traffic), state commissions are precluded from regulating in the area only where (1) it is impossible or impractical to separate the service's intrastate and interstate components, and (2) the FCC has chosen to regulate in the area. *Vonage*, ¶ 17.<sup>26</sup> If, on the other hand, traffic is purely interstate (like ISP-bound traffic), state commissions are precluded (under the case law cited above) from exercising jurisdiction even where the FCC has not yet acted. *Supra*, part II.B.2.

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critical fact here is not whether the intercarrier relationship is an ILEC-CLEC or CLEC-CLEC relationship, but the fact that the traffic at issue is jurisdictionally interstate. As *Pacific Bell*, 325 F.3d at 1126-27, makes clear, state commissions have no jurisdiction over interstate traffic, except to the extent that the 1996 Act or the FCC has granted state commissions such authority. Core's dispute with AT&T does not arise under § 252, and the FCC has not otherwise delegated authority to the state commissions to regulate the intercarrier compensation for CLEC-to-CLEC interstate ISP-bound traffic. Quite the contrary, the FCC has directly asserted its historic authority under § 201 to regulate the interstate rates that CLECs serving ISPs may charge originating carriers, which necessarily displaces any state attempt to regulate such rates. *ISP Remand Order*, ¶ 66; *ISP Mandate Order*, ¶ 21.

<sup>25</sup> February 11, 2010 Motion of the Chairman of the Pennsylvania Public Utility Commission in *Palmerton Tel. Co. v. Global NAPs South, Inc., et al.*, C-2009-209336 ("*Palmerton*"). The Pennsylvania Commission's February 11, 2010 Carry-in Agenda provides that the Commission, by a 5-0 vote, adopted the Chairman's Motion.

<sup>26</sup> Memorandum Opinion and Order, *In the Matter of Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WL Docket No. 03-211 (Nov. 12, 2004) ("*Vonage*").

A “mixed-use” service is one where some of the traffic is between intrastate end points and some of the traffic is between interstate end points. *Vonage*, ¶ 17. In other words, when applying the FCC’s end-to-end analysis (which determines the jurisdictional nature of communications by comparing the end points of the communications), some of the calls are purely intrastate (with end points within a single state), and some of the calls are purely interstate (with end points in different states). *Id.* Mixed-use services are “generally subject to dual federal/state jurisdiction” – with states having jurisdiction over the *intrastate* calls, and the FCC having jurisdiction over the *interstate* calls. *Id.* This is true “except where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies” (*id.*), in which case the FCC preempts state authority. In *Vonage*, the FCC found that VoIP traffic is “mixed-use” traffic subject to dual federal/state jurisdiction. *Id.*, ¶ 18. Accordingly, state commissions are precluded from exercising jurisdiction over VoIP traffic only where the intrastate calls cannot be distinguished from the interstate calls and only to the extent the FCC has chosen to preempt state authority. *Id.*, ¶ 17.

In the *Palmerton* case, the Commission exercised jurisdiction over Global NAPs’ delivery of alleged VoIP traffic, but only after determining that the traffic included intrastate interexchange calls.<sup>27</sup> Motion of Chairman James H. Cawley at 18-19. The Commission’s exercise of authority therefore was based on the “dual federal/state jurisdiction” over a “mixed-use” service, and the factual determination that the VoIP traffic at issue included *intrastate*

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<sup>27</sup> In stark contrast to this case, the Chairman’s Motion at page 1 in *Palmerton* found that it was “beyond doubt that a number of these calls are Voice over Internet Protocol (“VoIP”) calls.” That is certainly not the case here as there remains doubt on whether any of the calls at issue are VoIP calls.

traffic – it was not based on the notion that the Commission had dual authority over purely *interstate* traffic.<sup>28</sup>

Unlike VoIP-bound traffic, the FCC has found that all ISP-bound traffic is purely interstate. The FCC has applied its end-to-end analysis to ISP calls and concluded that all ISP-bound telecommunications traffic is jurisdictionally interstate. In *Core v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010), Core tried to convince the D.C. Circuit that ISP-bound traffic was mixed-use, and argued that because the first segment of the call “terminates” locally, the FCC’s authority over interstate communications is inapplicable. The D.C. Circuit rejected Core’s argument because “it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged.” *Id.* In oral argument, Core made the very same argument to the ALJ (February 3, 2010 transcript at 53, 55),<sup>29</sup> and the ALJ properly rejected it (Order #6 at 12-13).<sup>30</sup>

There are two additional, fundamental distinctions between our case and *Palmerton*. First, the Commission in *Palmerton* relied on cases that deal with the adjudication of rights under interconnection agreements. As discussed above, even in the case of purely interstate traffic such as ISP-bound calls, state commissions have jurisdiction to address intercarrier

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<sup>28</sup> It was also relevant to the Commission’s *Palmerton* decision that the FCC had not yet spoken on the issue “in its long pending but still unresolved proceedings” relating to intercarrier compensation for VoIP traffic (Motion of Chairman James H. Cawley at 7-8, 15-16). Of course, as explained in the next section, the FCC *has* chosen to regulate in the area of non-toll ISP bound traffic, the type of traffic at issue here, and has determined that bill and keep applies. Moreover, in the *Palmerton* case, there was a state tariff governing the type of compensation owed by Global NAPs. *Id.* at 18. Here, Core does not have any tariff or contract governing compensation for the type of traffic at issue. *Supra*, part II.B.1.

<sup>29</sup> Judge Jones: “So you are saying there’s a two-step process here . . . that ISP bound traffic is mixed?” Ms. O’Dell: “Yes.” Feb. 3, 2010 Tr. at 53. Judge Jones: “So you are saying that I should ignore the part [of the call] where Core goes to the cloud, that the determination is at Core’s switch?” Ms. O’Dell: “Yes.” *Id.* at 55.

<sup>30</sup> As the ALJ stated (at 13): Core’s “argument misses the mark of the end-to-end analysis or attempts to distort the analysis to means beneficial to Core. It is the undersigned ALJ’s point of view that the end-to-end analysis looks at the origin and destination of the call. As counsel for Core states, the destination would be the Internet cloud. Consequently, by applying *Core v. FCC*, the telecommunication service at issue is under the jurisdiction and authority of the FCC to determine the compensation for the transport and termination service rendered.”

compensation, but only when acting as a deputy federal regulator in arbitrating, approving or enforcing an interconnection agreement – which of course is not the case here. The Commission also relied on cases from New Hampshire and Georgia (Motion of the Chairman at 9-14), in which state commissions adjudicated rights under state tariffs that apply on their face to the traffic at issue. Here, there is no tariff (or agreement) that applies to the traffic at issue. In Pennsylvania, to the best of our knowledge, all CLECs exchange local, non-toll traffic, including ISP-bound calls, on the basis of bill and keep. In contrast, in *Palmerton* the Commission noted that other Pennsylvania carriers recognized the applicability of Palmerton's tariff to VoIP-originated calls. Motion of the Chairman at 18-19.

Second, as in the New Hampshire and Georgia cases, in *Palmerton* Global NAPs could not prove that any particular call originated in IP format – meaning that it could not prove that *any* of the calls at issue originated in IP format. Accordingly, there was a complete failure of proof. That is, Global NAPs was unable to prove that it was immune to intrastate access charges even if its theory were accepted. *See* Motion of the Chairman at 9-13. Here, by contrast, it is undisputed that all of the traffic at issue (at least through September 2009) is ISP-bound traffic.

For these reasons, the ALJ's decision dismissing Core's Complaint as to ISP-bound traffic for lack of subject matter jurisdiction and the *Palmerton* decision are not inconsistent. They address two very different circumstances, and both can stand.<sup>31</sup> And even if the Commission were to disagree on that point, *Palmerton* is distinguishable because (as explained in the next section), while the FCC has not exercised its jurisdiction to regulate compensation for

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<sup>31</sup> The ALJ was fully aware of the Commission's *Palmerton* decision when she issued her decision and did not find it inconsistent with her determination. She stated: "[T]he Commission is to focus on the actual service provided; i.e. is there a common carrier engaged in telecommunications services by transporting traffic calls that are not IP-based. . . . The undersigned ALJ submits that the Commission's focus must be supplemented with the end-to-end analysis of the telecommunications service at issue." Order #6 at 13.

VoIP-bound traffic, it has exercised its jurisdiction to regulate compensation for non-toll ISP-bound traffic, which is at issue here.

**4. Even If The Commission Had Jurisdiction Over ISP-Bound Traffic, The FCC's Compensation Regime For The Exchange Of Non-Toll, ISP-Bound Traffic Explicitly Preempts The Commission's Authority To Order Compensation For Such Traffic**

Although the ALJ did not reach the issue and the Commission need not reach the issue, because the lack of subject matter jurisdiction is dispositive, there is another independent reason for dismissing Core's Complaint: preemption. Specifically, even assuming arguendo that the Commission would have jurisdiction to regulate compensation for ISP-bound traffic in the absence of any FCC regulation, which it does not, the FCC *has* chosen to regulate in this area. And the compensation regime established by the FCC for the exchange of non-toll, ISP-bound traffic requires it to be exchanged on a "bill and keep" basis, and explicitly preempts any state authority over such matters.

**a. The ISP Remand Order Preempted State Commission Authority To Set Rates For ISP-Bound Traffic**

The 1996 Act and the FCC's rules and orders preempt contrary state regulation. *AT&T Corp v. Iowa Utils. Bd.* 525 U.S. at 378 n. 6 ("the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters discussed by the 1996 Act, it unquestionably has"); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (federal filed tariffs preempt reseller's claims under state contract and tort law); *Smith*, 282 U.S. at 148-49 (state commission's regulation of interstate rates preempted); *Postal Telegraph-Cable Co.*, 251 U.S. at 30-31 (state regulation of interstate rates preempted). Federal law preempts conflicting state regulation "where compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law

“stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case, FCC’s rules and orders preempt any purported Commission authority to establish compensation for non-toll, ISP-bound traffic, because those rules and orders establish that intercarrier compensation for such traffic must be on a “bill and keep” basis in cases like this one.

By way of background, in the *ISP Remand Order*, the FCC recognized that Section 251(b)(5)’s reciprocal compensation requirement created incentives for a LEC to engage in regulatory arbitrage, and to profit, not by charging its customers, but by positioning itself to receive a disproportionate amount of reciprocal compensation from other LECs. *ISP Remand Order* at 9153 ¶ 2. The problem is that a user of “dial-up” internet service will likely make many extended calls to the ISP, but the ISP will rarely, if ever, call the “dial-up” user or anyone else. *Pacific Bell*, 325 F.3d at 1119. Because, under a reciprocal compensation regime, the originating LEC pays the terminating LEC, LECs that serve only ISPs receive but rarely if ever pay reciprocal compensation.<sup>32</sup> This creates an incentive for LECs to serve ISPs at rates well below market cost while deriving their revenues not from their ISP customers, but from the LECs whose customers are calling the ISPs. Thus, when a LEC’s customers primarily are ISPs, the whole notion of “reciprocal” compensation becomes skewed. *Id.*

Given the magnitude of the ISP-bound traffic problem, the FCC decided that it was time to establish an appropriate federal cost recovery mechanism for the exchange of this traffic. *ISP Remand Order* at 9154 ¶¶ 3-4. And the FCC concluded that “the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users.” *Id.*, 9154 ¶ 4. Of particular relevance here, while the FCC developed mechanisms for some carriers to transition toward bill and keep, the FCC explained that those

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<sup>32</sup> That is in fact what has happened in this case as Core has conceded that its customers make no outbound calls.

carriers that were not exchanging traffic pursuant to an ICA (such as Core and AT&T) were to immediately exchange ISP-bound traffic on a bill and keep basis. *Id.* at 9188-89 ¶ 81. In setting forth a federal intercarrier compensation regime for ISP-bound traffic, the FCC expressly preempted state authority to regulate such traffic: “Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, *state commissions will no longer have authority to address this issue.*” *Id.* at 9189 ¶ 82.

The terms of the *ISP Remand Order* are clear: it applies to “LECs” that serve ISPs (such as Core) and any “carrier” delivering traffic to such a *LEC* (such as AT&T), and it requires those carriers to exchange ISP traffic on a bill and keep basis. *Id.* ¶¶ 13, 66-67, 80-81. And the FCC was equally clear (*id.* at 82) that its determination concerning ISP-bound traffic would preempt any action by this Commission to establish rates for such traffic, as Core has asked it to do. The Commission therefore should dismiss Core’s Complaint.

**b. The Pennsylvania Commission Has Held On Two Occasions That It Is Preempted From Establishing A Compensation Scheme For The ISP-Bound Traffic At Issue Here**

This Commission has recognized that the *ISP Remand Order* preempts any authority it may have over the ISP-bound traffic at issue here. In 2003 the Commission explained that “[t]he *ISP Remand Order* has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic.” April 18, 2003 Opinion and Order, p. 57, n46. The Commission reiterated its conclusion in 2006, stating that because “the FCC’s *ISP Remand Order* has preempted rate authority by state commissions over intercarrier compensation for ISP-bound traffic, it is clear that this Commission lacks the authority to resolve the rate issue [*i.e.*, the rate for VNXX ISP-bound calls and calls to ISPs located in the same local calling area as the calling party] at hand.” Jan. 18, 2006 Opinion and Order, p. 10.

Core acknowledges that this Commission previously held that the FCC has preempted state commission rate authority over ISP-bound traffic.<sup>33</sup> Most recently, Core filed a pleading in its Embarq arbitration case addressing the FCC's November 5, 2008 Order on Remand, and Core reiterated therein that "the Commission has already found – twice – that the FCC has asserted complete jurisdiction over ISP-bound traffic."<sup>34</sup>

**c. The ISP Remand Order Applies To CLEC-To-CLEC ISP-Bound Traffic**

Core will likely argue – as it did before the ALJ – that the *ISP Remand Order* does not apply in this case because the FCC's Order purportedly only applies to ISP-bound traffic exchanged between incumbent LECs and CLECs. The ALJ correctly rejected that argument (at 13): "Core argued that the *ISP Remand Order* is limited to ISP-bound traffic originated by an ILEC and terminated by CLEC. The undersigned submits that *Core v. FCC* fails to endorse a limitation of just ILEC/CLEC origination and termination." Core's unduly and incorrectly narrow reading of the *ISP Remand Order* would promote the very regulatory arbitrage that the FCC adopted the *ISP Remand Order* to prevent. Under any reasonable interpretation of the *ISP Remand Order*, the FCC intended to protect *all* carriers – ILECs and CLECs alike – from the arbitrage practices of carriers like Core.

To begin with, both the reciprocal compensation provision of the 1996 Act (*i.e.*, § 251(b)(5)) and the FCC's reciprocal compensation rules apply by their plain terms to CLEC-to-CLEC traffic. The statutory reciprocal compensation provision, § 251(b)(5), applies to any "carrier" that requests reciprocal compensation from any "LEC," both of which are statutorily defined terms that includes CLECs. *See also ISP Mandate Order* at 9157 ¶ 10 ("We disagree

<sup>33</sup> 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, Reply Brief of Core Communications, Inc. p. 41, September 20, 2007.

<sup>34</sup> Supplemental Comments of Core Communications, Inc., Docket No. A-310922F7002, January 26, 2009, p. 7.

with commenters who argue that section 251(b)(5) only can be applied to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier. The [FCC] rejected that argument in the *Local Competition Order*, finding that section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier, and adopted rules implementing that finding.”). Since 1996, the FCC's rules implementing the reciprocal compensation provisions have likewise applied to "LECs" and to any "carrier" that requests reciprocal compensation, and thus apply to CLEC-to-CLEC traffic exchanges. 47 C.F. R. § 51.701(a) (“The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.”); *Id.* § 51.703 (“Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.”). In the *ISP Remand Order*, the FCC did *not* amend the language establishing that the rules govern traffic between all "LECs" and requesting "carriers." *See ISP Remand Order*, Appendix B (modifying 47 C.F. R. § 51.701(b)). Rather, it amended only the language establishing the *types of traffic* that would be carved out from the reciprocal compensation rules for direct federal regulation under § 201. *See id.*; *see also ISP Remand Order* at 9169 ¶ 39. Accordingly, the text of the FCC's rules cannot be reconciled with Core's claim that the FCC did not regulate CLEC-to-CLEC ISP-bound traffic.

Similarly, in the *ISP Remand Order* itself, the FCC consistently describes the new rules in terms that include CLEC-CLEC relationships, and there is nothing in the *ISP Remand Order* to suggest that it is limited to ILEC-CLEC relationships. The FCC made clear that it was addressing "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.*" *Id.*

at 9159 ¶ 13 (emphasis added); *see also id.* at 9181 ¶ 66 ("we must now determine, pursuant to our section 201 authority, what compensation mechanism is appropriate when *carriers* collaborate to deliver calls to ISPs" (emphasis added)). It concluded that "a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient than recovering these costs from originating *carriers*." *Id.* ¶ 67 (emphasis added). It explained that it was adopting an "interim compensation mechanism" that "limit[ed] carriers' opportunity to recover costs from other *carriers*." *Id.* (emphasis added). It clarified that the rate caps it imposed had "no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic)." *Id.* at 9188 ¶ 80. And, it explained that "where *carriers* are not exchanging traffic pursuant to interconnection agreements prior to the adoption of this order" (as was the case between AT&T and Core), "*carriers* shall exchange traffic on a bill-and-keep basis during this interim period." *Id.* at 9188 ¶ 81 (emphasis added). The FCC clearly knows how to refer specifically to "ILEC" and "CLEC" when it wants to; but, instead, throughout the *ISP Remand Order*, the FCC uses the term "LEC" and "carrier" without modifiers and without qualifications – a clear indication that the FCC intended the order to apply to ILEC-CLEC relationships and CLEC-CLEC relationships.

The FCC's decision to apply the new interim rules to CLEC-to-CLEC traffic should not be surprising, because the FCC's entire focus in the Order was on CLECs (like Core here) that serve ISPs, not on the nature or status of the originating carrier that delivers traffic to such CLECs. As the FCC explained, a compensation regime in which the originating carrier pays the carrier serving the ISP creates an "incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic," and "[t]o the extent that carriers offer these

customers below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals." *Id.* at 9182 ¶ 68. As the FCC found, "the record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers," with one-way payments reaching more than two billion dollars by 2001. *Id.* at 9183 ¶ 70. The FCC therefore specifically concluded that, in the context of ISP-bound traffic; the originating-carrier-pays rule "undermines the operation of competitive markets," and that efficient market prices can prevail only when CLECs price their retail services based on costs rather than "their ability to shift costs to other carriers." *Id.* ¶ 71 (emphasis added). This regulatory arbitrage victimizes originating ILECs and CLECs alike, and thus the FCC had no policy-based reason to distinguish the two (and in fact did not distinguish the two).<sup>35</sup>

Core will undoubtedly point the Commission to the district court decision in *AT&T Communications v. Pac-West Telecomm, Inc.*, 2008 WL 3539669 (N.D. Cal. 2008) ("Pac-West"). The ALJ was perfectly aware of that decision when she made her ruling (Feb. 3 Tr. 32-34, 39-40), and found it unpersuasive.<sup>36</sup> That case is on appeal to the Ninth Circuit, was wrongly decided, and is not binding on this Commission.

First, the district court did not address subject matter jurisdiction at all (AT&T's principal argument discussed above), but rather addressed only the question of whether the *ISP Remand Order* applied to CLEC-to-CLEC ISP traffic.<sup>37</sup> Second, although the district court recognized

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<sup>35</sup> In fact, CLECs probably are more vulnerable than well-established ILECs, because such ILECs are probably better able to absorb the added costs than CLECs that have more precarious footholds in the market.

<sup>36</sup> The ALJ stated (Order #6 at 14): The Pac-West decision "was made prior to *Core v. FCC* where the end-to-end analysis determined jurisdiction and authority of the FCC. As stated above, the end-to-end analysis does not respect the type of carrier involved in the exchange of traffic for compensation. Consequently, the distinction Core makes of an ILEC/CLEC relationship versus a CLEC/CLEC relationship to determine intercarrier compensation is moot."

<sup>37</sup> The court wrote: "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 of ISP bound traffic" That is the question and the only question that the court addressed and answered. Pac-West, 2008 WL 3539669, \*3.

(*id.* at \*7) that the ISP-bound traffic at issue was jurisdictionally interstate, it ignored completely what that means: that because it was neither arbitrating, approving nor enforcing an interconnection agreement, the state commission lacked jurisdiction to regulate the traffic. *Supra*, part II.B.2. Third, the district court erroneously treated the *ISP Remand Order* as being limited solely to traffic exchanged between an ILEC and a CLEC. As demonstrated above, the *ISP Remand Order* quite clearly addresses *all* ISP-bound traffic, including traffic exchanged between two CLECs. To rule otherwise makes absolutely no sense, and would send the message that ILECs are protected from the adverse consequences of Core's (and other carriers') regulatory arbitrage, but CLECs are not. That is exactly the wrong message to send – and is against both common sense and the law. It is also against this Commission's long-standing policy of parity in the regulatory treatment of ILECs and CLECs. For these reasons, the *ISP Remand Order*, by its terms, applies to all "carriers," and, consistent with the FCC's explicit preemption of state commission authority to address the issue, the Commission should dismiss Core's Complaint.

**5. State Law Also Leads To The Conclusion That The Commission Does Not Have Jurisdiction Over The ISP-Bound Traffic At Issue Here**

Dismissal of Core's Complaint as to the ISP-bound traffic is also required under state law. "As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers." *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission*, 875 A.2d 1243, 1249 (Pa.Cmwlth.2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 664 A.2d 664 (Pa. Cmwlth. 1995)). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm'n*, 43 A.2d 348 (1945).

Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.

*Hughes v. Pa. State Police.*, 619 A.2d 390 (1992).

Here, the enabling statute gives the Commission authority to regulate and address intercarrier compensation issues for *intrastate*, and only *intrastate*, telecommunications traffic. 66 Pa.C.S.A. § 104. Accordingly, as a matter of state law, the Commission lacks the authority to address intercarrier compensation issues for traffic that is *interstate*. As previously explained, it is well-settled that all ISP-bound traffic is jurisdictionally interstate, it therefore falls outside of the Commission's jurisdiction. *Supra*, part II.B.2.

### **III. THE ALJ ERRED IN DENYING AT&T'S MOTION TO DISMISS WITH RESPECT TO THE VOIP-BOUND TRAFFIC ALLEGED TO HAVE BEEN TERMINATED AFTER SEPTEMBER 2009**

As previously explained, Core's testimony and discovery responses concede that all of the traffic terminated before September 2009 (and most, if not all, of the traffic terminated after September 2009) was ISP-bound traffic, but alleges that a small amount of traffic terminated after September 2009 *might* have been terminated to VoIP providers.<sup>38</sup> AT&T's Motion to Dismiss argued that Core's Complaint should be dismissed even as to the small amount of VoIP-bound traffic alleged to have been terminated after September 2009 because Core failed to show (after all testimony had been filed and discovery answered), and admitted that it could not show, that any VoIP-bound traffic originated from AT&T. The ALJ denied AT&T's Motion to Dismiss as to the alleged VoIP-bound traffic. That determination should be reversed.

Core has the burden of proving that the Commission has jurisdiction over the traffic in dispute.<sup>39</sup> The necessary predicate is to prove that there is some traffic attributable to AT&T

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<sup>38</sup> Testimony of Bret Mingo at 2; Response to Interrogatory AT&T-II-13 and 14, and AT&T-III-3 and 4 (Attachments A, B and C to AT&T's Motion to Dismiss).

<sup>39</sup> Initial Decision, *Palmerton Tele. Co v. Global NAPS South, Inc.*, C-2009-209336, at 20-24, 34, 40 (Aug. 7, 2009).

over which this Commission has jurisdiction. As discussed in the prior section, the Commission does not have jurisdiction over ISP-bound traffic. Core has not proven that AT&T has sent any non-ISP bound traffic to Core, and, in fact, has admitted that it *cannot* prove it. Testimony has already been filed in this case, and Core's testimony does not indicate how much, if any, VoIP-bound traffic it terminated for AT&T. Moreover, AT&T asked Core in discovery to provide: "any and all documents demonstrating that AT&T's traffic was directed to any of the [VoIP] customers"; "the exact amount of AT&T traffic that was directed to any [VoIP] customers and the date such traffic was sent"; "the exact amount billed by Core to AT&T and the date(s) Core billed AT&T for traffic that was directed to any one of the [VoIP] customers."<sup>40</sup> Core stated that it could not provide this information: "Core does not track the amount of AT&T Indirect Traffic, or any other class of traffic, that is delivered to particular customers or classes of customers."<sup>41</sup> Having admitted that it cannot provide evidence establishing that it terminated any VoIP-bound traffic originated by AT&T, Core has failed to meet its burden of proving that the Commission has jurisdiction over any of the traffic at issue and its Complaint should be dismissed in its entirety.

The ALJ correctly pointed out (Order #6 at 10-11) that Core failed to present evidence establishing that any traffic terminated after September 2009 was VoIP-bound traffic originated by AT&T, stating (emphasis added):

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

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<sup>40</sup> Response to Interrogatory ATT-III-4 (Attachment C to Motion to Dismiss).

<sup>41</sup> *Id.*

The ALJ, however, allowed the case to proceed to hearing as to the alleged VoIP-bound traffic, finding that “genuine issues of fact remain” and that the “issue of whether there exists mixed traffic, both VOIP and ISP-bound is material to this proceeding” and that “these facts are needed to determine resolution of this dispute.” *Id.* at 11.

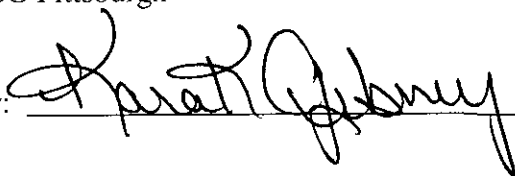
The problem with that reasoning is that Core may not withhold its offer of proof until the hearing (52 Pa. Code § 5.243(e)(2)) – and that is all that is left to do here. Testimony has already been filed and discovery answered, and Core presented nothing in its case-in-chief to establish that it terminated any VoIP-bound traffic for AT&T. Moreover, even if Core could wait until hearing to show that it terminated VoIP-bound traffic originated by AT&T, Core admitted in discovery that it cannot provide such evidence. Core has plainly failed to meet its burden of proving that the Commission has jurisdiction over any traffic at issue here, and therefore its Complaint should have been dismissed in its entirety.

#### IV. CONCLUSION

For the reasons set forth herein, the Commission should (1) deny Core’s request for interlocutory review of the ALJ’s decision dismissing Core’s Complaint for lack of subject matter jurisdiction, and (2) grant AT&T’s request for interlocutory review and answer the material question in a manner that fully dismisses Core’s Complaint due to Core’s failure to meet its burden of proving the Commission has subject matter jurisdiction over any of the traffic at issue.

Respectfully submitted,

AT&T Communications of PA, LLC and  
TCG Pittsburgh

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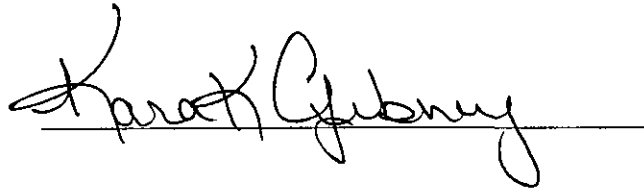
Its Attorneys

DATED: March 15, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of AT&T's Brief on Petitions for Interlocutory Review and Answer to Material Questions was served on March 15, 2010 by e-mail and overnight mail, postage prepaid, on the following party:

Counsel for Core Communications, Inc.  
Deanne O'Dell  
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Harrisburg, PA 17101  
DODell@eckertseamans.com

A handwritten signature in black ink, appearing to read "Karath Gubney", is written over a horizontal line.

**RECEIVED**  
MAR 15 2010  
PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

# **EXHIBIT 1**

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December 8, 2009

VIA OVERNIGHT DELIVERY

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

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

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SECRETARY'S BUREAU

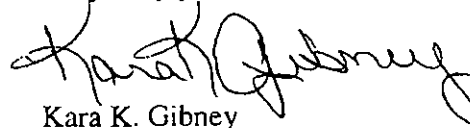
Dear Mr. McNulty:

Please find enclosed an original and three (3) copies of AT&T's Motion to Dismiss Formal Complaint of Core Communications, Inc. in the above-referenced matter.

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

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

Very truly yours,



Kara K. Gibney

cc: Certificate of Service  
Administrative Law Judge Angela Jones

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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DEC - 8 2009

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Docket No. C-2009-2108186

Docket No. C-2009-2108239

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

Pursuant to 52 Pa. Code §5.103, AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh ( collectively "AT&T") hereby submit this Motion to Dismiss the Complaint of Core Communications, Inc. ("Core") for lack of subject matter jurisdiction and, in the alternative, because the relief it seeks is preempted. Pursuant to 52 Pa. Code §5.103(d)(2), AT&T requests that the presiding officer immediately suspend the filing of any further testimony until she rules on this Motion, including AT&T's Reply Testimony that is currently due on December 14, 2009. In support of its Motion, AT&T states as follows:

**INTRODUCTION**

There are two independent reasons for dismissing Core's Complaint. *First*, Core is attempting to litigate an issue which the Pennsylvania Public Utility Commission ("Commission) does not have subject matter jurisdiction to decide. Subject matter jurisdiction cannot be waived, and a case must be dismissed at any time if it is determined that the Commission lacks

jurisdiction. *Second*, even if the Commission had subject matter jurisdiction over Core's Complaint, Core is asking the Commission to litigate in an area where the FCC has *explicitly* preempted state authority.

1. All of the traffic AT&T sent to Core before September 2009 was dial up ISP-bound traffic – a fact Core does not dispute.<sup>1</sup> The FCC has very clearly determined that all ISP-bound traffic is jurisdictionally interstate (even if such traffic appears to be local in nature, *i.e.* notwithstanding that such dial-up ISP-bound traffic may be locally dialed). *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9<sup>th</sup> Cir. 2003) (“the FCC and the D.C. Circuit have made it clear that ISP traffic is ‘interstate’ for jurisdictional purposes”). And because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement (“ICA”) (which is not the case here because the parties do not have an interconnection agreement). *Id.* at 1126-27. Core itself has argued to this Commission that all ISP-bound traffic is interstate and is therefore under the jurisdiction of the FCC.<sup>2</sup>

2. All of the ISP-bound traffic AT&T sent to Core before September 2009 was *non-toll* traffic. Even if state commissions had jurisdiction to regulate compensation for ISP-bound traffic in the absence of any FCC regulation (which they do not), the FCC *has* chosen to regulate in the area of non-toll, ISP-bound traffic, and has explicitly preempted any state authority over such matters. Specifically, in the *ISP Remand Order*, the FCC held: “Because we now exercise

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<sup>1</sup> As discussed in part A below, Core has five non-ISP customers, but it did not begin billing those customers until September 2009, well after it filed its Complaint. All traffic prior to September 2009 – the traffic at issue in Core's Complaint – is ISP-bound traffic over which the Commission has no jurisdiction. Even if the five new non-ISP customers were relevant, Core has admitted they are VoIP customers and, as discussed herein, this Commission has not yet determined whether it may assert jurisdiction over VoIP services.

<sup>2</sup> 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, Reply Brief of Core Communications, Inc., p. 37, September 20, 2007.

our 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.*"<sup>3</sup> The Pennsylvania Commission has expressly endorsed the FCC's preemption analysis – twice: first in Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A-310814F7000, at p. 57, n46 (PUC April 18, 2003) ("April 18, 2003 Opinion and Order"), and then in Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A-310814F7000, at p. 10 (PUC Jan. 18, 2006 Order) ("Jan. 18, 2006 Opinion and Order").

## BACKGROUND

AT&T's and Core's networks are not directly connected to each other. Instead, they exchange traffic indirectly. Both AT&T and Core are directly connected to Verizon, which provides transiting service for both. This means that AT&T sends a call to Verizon, and Verizon forwards the call on to Core. Verizon provides, or stands ready to provide, Core with all details related to that call, or with whatever details Core has negotiated to receive from Verizon. From at least January 2004 to September 2009, AT&T has sent traffic to Core, through Verizon, which Core has terminated to its own customers, which Core admits are exclusively ISPs. Thus, all of the traffic that remains at issue is ISP-bound traffic. Core's Formal Complaint seeks to recover more than \$7.5 million for the termination of this ISP-bound traffic, based on Core's novel theory that its intrastate access tariff, which specifies rates for the termination of *intrastate toll* calls, somehow applies to ISP-bound traffic that the FCC has deemed jurisdictionally *interstate*

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<sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at ¶82 (emphasis added).

(and beyond state commission control, except in the context of an interconnection agreement dispute) and that is *non-toll* traffic in any event.

Core did not bill AT&T for any traffic until the beginning of 2008, at which time it sent AT&T a bill for all past years beginning in January 2004. The fact that Core did not bill AT&T for nearly four years was hardly surprising to AT&T. AT&T was not expecting to receive any bill at all. AT&T operates under a bill and keep arrangement with every single Competitive Local Exchange Carrier (“CLEC”) in Pennsylvania; accordingly, AT&T does not receive bills from *any* other CLECs for the termination of AT&T’s non-toll traffic. What came as a surprise was that, after four years of sitting on its hands, Core sent AT&T a switched access bill for over \$7 million for ISP-bound calls.

Core does not have an interconnection agreement with AT&T that provides a basis for billing AT&T for ISP-bound traffic. Core does not have a tariff on file with the Pennsylvania Commission that establishes rates for terminating ISP-bound traffic (nor could it, given that ISP-bound traffic falls under FCC jurisdiction). The only tariff that Core has on file with the Commission involving compensation between companies is its intrastate switched access tariff. But, even if we ignore that ISP-bound traffic is *interstate*, switched access charges apply only to *toll* traffic, not the ISP-bound traffic at issue here, which is *non-toll*.<sup>4</sup>

Moreover, Core itself has previously argued that access charges do not apply to ISP-bound traffic.<sup>5</sup> Core specifically stated, “whatever else it may be, ISP-bound traffic cannot be

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<sup>4</sup> AT&T paid Core’s intrastate switched access rates for bills directed to AT&T Communications of Pennsylvania (CIC 288), but only because the traffic sent looked like long distance traffic when AT&T analyzed the calling/called party information. However, now that AT&T has received Core’s testimony and discovery responses, AT&T realizes it was misled into paying Core for ISP-bound traffic that is jurisdictionally *interstate* and not subject to intrastate access charges. Because of this, AT&T will seek a refund of the access charges it paid to Core.

<sup>5</sup> 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, Supplemental Comments of Core Communications, Inc. January 26, 2009, pp. 9-11.

'access traffic.'"<sup>6</sup> In direct conflict with its previous arguments before this Commission, Core nevertheless asks the Pennsylvania Commission to use Core's intrastate switched access tariff as the basis for setting a rate for ISP-bound traffic.<sup>7</sup> That is, Core wants the Commission to use switched access rates (which, as the Commission well knows, have for many years been the basis of heated disputes because of their high levels) as the basis for determining what AT&T "owes" it. Core demands that AT&T pay it over \$7.5 million for traffic that went unbilled for years. In the alternative, Core asks the Commission to impose, retroactively, a compensation scheme based on *Verizon's* tariffs for the entire period of January 1, 2004 to date. Specifically, Core asks that AT&T be required to pay it for terminating the calls at issue at Verizon's tandem-based reciprocal compensation rate, a rate that has not and could not be tariffed by Core and that is not contained in any agreement between Core and AT&T. This would be clear legal error, first, because the Commission lacks the authority to establish any compensation scheme for ISP-bound traffic, and, second, because the Commission cannot require carriers to pay rates that are not tariffed or part of a contract.

As explained below, there is no factual dispute regarding the nature of the traffic at issue, and so AT&T now moves to dismiss Core's Complaint on two independent basis: (1) for lack of subject matter jurisdiction and (2) in the alternative, on the bases that the relief Core seeks is preempted.<sup>8</sup>

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> As AT&T's Answer to Core's Complaint and Core's own testimony and discovery responses demonstrate, all or virtually all of the traffic sent to Core originates and terminates within the same local exchange area. Therefore, even if the Commission determined that it had jurisdiction over such ISP-bound traffic, which it does not, Core's access tariff certainly would not apply to local traffic. Switched access rates apply to toll traffic only. See e.g. the September 30, 1999 *Global Order* at Docket Nos. P-00991648 *et. al.* – "Switched access charges are those that LECs bill to IXC's or other LECs, for using their facilities *in the placement or receipt of toll calls.*" p. 12; and 66 Pa.C.S.A. §3017(b) – "No person or entity may refuse to pay tariffed access charges for *interexchange services* provided by a local exchange telecommunications company.

<sup>8</sup> AT&T's Motion to Dismiss is distinguishable from Choice One's preliminary objection for lack of specificity addressed by ALJ Salapa in an Order Denying Preliminary Objections, *Core Communications, Inc. v. Choice One*

First, all of the traffic at issue here is ISP-bound traffic. It has been settled for over ten years that all ISP-bound traffic is jurisdictionally interstate. *Pacific Bell*, 325 F.3d at 1126 (“the FCC and the D.C. Circuit have made it clear that ISP traffic is ‘interstate’ for jurisdictional purposes”). And it is equally well settled that states and state commissions have no authority to regulate such traffic, except while arbitrating, approving or enforcing interconnection agreements under 47 U.S.C. § 252. *Id.* at 1126, 27. Core is not asking the Commission to arbitrate, approve, or enforce an interconnection agreement – because the parties do not have one. Accordingly, under settled law, the Commission lacks jurisdiction to entertain Core's Complaint and it should be dismissed.

Second, all of the ISP-bound traffic at issue here is *non-toll*. Consequently, even if state commissions had jurisdiction to regulate compensation for ISP-bound traffic outside the context of an interconnection agreement (which they do not), the Complaint should be dismissed because the Commission is precluded by federal law from imposing the compensation scheme requested by Core. In the *ISP Remand Order*, the FCC established rules that govern intercarrier compensation for the very ISP-bound traffic at issue in this case. Specifically, in the *ISP Remand Order*, the FCC addressed and announced what it believed was at least an interim remedy for the enormous harm resulting from the kind of regulatory arbitrage around which Core and others like it had built their businesses. In a nutshell, because under the reciprocal compensation regime the originating LEC pays the terminating LEC, LECs (including Core) sought to serve ISPs (who receive many calls but make few, if any, calls) so that they would

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*Communications of Pennsylvania, Inc.*, C-2009-2130379; C-2009-2131838 (Oct. 21, 2009). There, Choice One argued that Core's complaint was not specific enough because it did not specify the type of traffic at issue. Choice One argued that if the traffic is ISP-bound traffic, the Commission does not have subject matter jurisdiction over such traffic. ALJ Salapa never reached the issue of subject matter jurisdiction, because he claimed there was a factual issue concerning the type of traffic at issue: “Clearly there is a factual dispute between Core and [Choice] One over the nature of the telecommunications traffic at issue.” *Id.* at 7. That is not the case here because (as demonstrated in Part A) Core's testimony and discovery responses conclusively show that all of the traffic at issue prior to September 2009 is non-toll, ISP-bound traffic.

receive large amounts of reciprocal compensation, but pay very little, if any.<sup>9</sup> In addressing this problem in the *ISP Remand Order*, the FCC stated in broad, plain terms: "Because we now exercise our authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, *state commissions will no longer have authority to address this issue.*" *ISP Remand Order* ¶ 82 (emphasis added). The FCC went on to prescribe a variety of rules directed at greatly diminishing, if not eliminating altogether, the harmful arbitrage opportunities. Among other things, the FCC mandated "bill and keep" for the exchange of ISP-bound calls by "LECs" and "carriers" which, like AT&T and Core here, do not have interconnection agreements. *ISP Remand Order*, ¶¶ 13, 66-67, 80-81.<sup>10</sup> This forecloses – *i.e.*, preempts – both the enforcement of Core's state tariff and the imposition of the Verizon tandem-based reciprocal compensation rate.

Relying on the *ISP Remand Order*, this Commission has twice held that it is preempted from making decisions regarding the ISP-bound traffic at issue in this case, explaining that "[t]he *ISP Remand Order* has virtually preempted state commission rate authority over intercarrier

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<sup>9</sup> Core is exactly the type of arbitrage carrier the FCC was targeting and addressing in its *ISP Remand Order*. Core admits that it has only inbound traffic in Pennsylvania, and therefore has created an entire business on generating inbound calls while avoiding any customers that would make outbound calls. In addressing Core's 2005 application to amend its certificate of public convenience, ALJ Wayne Weisman del very astutely pointed out Core's arbitrage business model when he explained that Core's customer base does not include any residential customers, but consisted entirely of ISPs. The ALJ further explained that because those ISPs make few outbound calls, if any, the reciprocal compensation primarily flows to Core. Based on Core's method of operation, the ALJ recommended that the Commission deny Core's application because it was "a sham" in that Core "is not, and does not intend to be, either 'facilities based' nor a 'local exchange carrier.'" Initial Decision, *Application of Core Communications, Inc.*, A-310922F0002, AmA (June 1, 2006) at Finding of Fact Nos. 12, 13, 22, Conclusion of Law No. 12. While the Commission ultimately granted Core's petition to amend its certificate, the ALJ's description of Core's business plan was (and remains) accurate, and this complaint demonstrates that the very concerns recognized by ALJ Weisman del regarding Core's arbitrage business model have come to be true.

<sup>10</sup> In its April 2001 *ISP Remand Order*, the FCC specifically ordered: "[W]here carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order... as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period." The interim period was to last until the FCC issued a final Order, which has yet to be issued, and therefore the interim period remains in effect. *ISP Remand Order* at ¶81.

compensation for ISP-bound traffic,”<sup>11</sup> and that “the FCC’s ISP Remand Order has preempted rate authority by state commissions over intercarrier compensation for ISP-bound traffic.”<sup>12</sup>

### SUBJECT MATTER JURISDICTION

“As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers.” *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission*, 875 A.2d 1243, 1249 (Pa.Cmwlth.2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 664 A.2d 664 (Pa. Cmwlth. 1995)). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm’n*, 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police.*, 619 A.2d 390 (1992). “Questions of jurisdiction can never be waived, and may be raised at any time by the parties or sua sponte by an appellate court.” *Pennhurst Medical Group, P.C. v. Department of Public Welfare*, 796 A.2d 423, 425 n. 2 (Pa.Cmwlth.2002), citing *Commonwealth v. Little*, 455 Pa. 163, 314 A.2d 270 (1974).

### ARGUMENT

#### A. There Is No Factual Dispute Regarding The Nature Of The Traffic At Issue

##### 1. It Is Undisputed That The Traffic At Issue Here Is ISP-Bound Traffic, Which Is Jurisdictionally Interstate And Outside The Commission’s Jurisdiction.

Core admits that all of the telecommunications traffic at issue in this case consists of ISP-bound calls. In its Reply to New Matter, filed June 24, 2009, Core admitted that the “AT&T Indirect Traffic” at issue here “is *virtually all* terminated to ISPs.” *Reply To New Matter*, at 7 (emphasis added). Core’s response to Interrogatory AT&T-II-4 states: “Inasmuch as Core’s

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<sup>11</sup> April 18, 2003 Opinion and Order, p. 57, n.46.

<sup>12</sup> Jan. 18, 2006 Opinion and Order, p. 10.

customers for local exchange service in Pennsylvania are and were primarily ISPs during the billing periods at issue in this case, the traffic AT&T sends to Core is *primarily bound for delivery by Core to its ISP customers.*" (Emphasis added). (Relevant excerpts from Core's responses to AT&T's second set of interrogatories, AT&T-II, are included as Attachment A hereto).

Core's testimony and interrogatory responses indicate that it has 55 ISP customers. Testimony of Bret Mingo at 2 (Attachment B hereto); Response to Interrogatory AT&T-II-14 (Attachment A hereto). Core states that it has only five non-ISP customers, all of which are VoIP providers. Response to Interrogatory AT&T-II-13 (Attachment A hereto); Testimony of Bret Mingo at 2 (Attachment B hereto). These VoIP customers, however, were not billed until September 2009. Response to Interrogatory AT&T-III-3. (Relevant excerpts from Core's responses to AT&T's third set of interrogatories, AT&T III, are included as Attachment C hereto). Accordingly, *all* of the traffic terminated before September 2009 was ISP-bound traffic. And the vast majority, if not all, of the traffic terminated after September 2009 was ISP-bound traffic. While Core claims that a very small amount of traffic it terminated *after* September 2009 was non-ISP traffic, Core has not explained whether the Commission has jurisdiction over that traffic, nor has Core said whether any of that non-ISP traffic originated from AT&T. In fact, AT&T asked Core in discovery how much of the non-ISP bound traffic was sent by AT&T to Core, or how much Core has billed AT&T for non-ISP bound traffic, and Core stated that it could not provide this information.<sup>13</sup> Response to Interrogatory ATT-III-4 (Attachment C hereto).

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<sup>13</sup> Core has the burden of demonstrating that the Commission has jurisdiction over the subject matter of this case. Other than ISP traffic, the only other kind of traffic Core claims to terminate are calls directed to VoIP providers and their end-user customers. Whether the Commission has the authority to address compensation for those calls depends on how it disposes of the Administrative Law Judge's Initial Decision in *Palmerton Telephone Co. v.*

As explained in Part B below, Core's Complaint must be dismissed as to *all* the traffic terminated prior to September 2009 because, as Core admits, all of that traffic is ISP-bound traffic, and such traffic is beyond this Commission's jurisdiction. Likewise, the Complaint should be dismissed as to the traffic terminated after September 2009 because, again, Core admits it is largely, if not exclusively, ISP-bound traffic, and Core fails to provide information demonstrating that any of the traffic is subject to this Commission's jurisdiction.<sup>14</sup> Core's Complaint can be partially saved (if at all) only to the extent Core meets its burden of showing that the small amount of non-ISP traffic terminated after September 2009 was originated by AT&T and falls within the Commission's jurisdiction – and to date, Core has made no allegations, much less a showing, to this effect.

**2. It Is Undisputed That The Traffic At Issue Here Is *Non-Toll*, ISP-Bound Traffic, For Which The FCC Established A Compensation Scheme In The *ISP Remand Order*.**

All of the ISP-bound traffic at issue here is non-toll traffic. For example, Mr. Mingo's testimony (Attachment B hereto) admits (at 4) that "[t]he 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." Emphasis added. *See also Id.* at p. 18, lines 6-7 ("Can access tariffs apply to *locally-dialed traffic like the AT&T indirect traffic?*") (emphasis added). And in its response to Interrogatory AT&T-II-5 (Attachment A hereto), Core stated that "with respect to those calls for which the CPN of the calling and called parties would be rated as 'local' . . . [t]he total amount in dispute between AT&T and Core for the termination of "local" traffic was \$7,705,189.63." That

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*Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates, C-2009-209336, at \*29-30, 34 (PA Pub. Util. Comm'n, Aug. 7, 2009) ("Aug. 7 Initial Decision").*

<sup>14</sup> It is not sufficient to simply state that the Commission has jurisdiction because a call originated and terminated in Pennsylvania, as Core has done here. If it is ISP-bound traffic, as is the case here, then it is irrelevant whether the traffic is *physically* intrastate. That is because the FCC has made clear that all ISP-bound traffic is jurisdictionally interstate regardless of where it originates and nominally terminates.

amount, of course, is approximately the same amount Core seeks to recover in this lawsuit for the termination of all of the indirect traffic at issue (Reply to New Matter, 23). This is further evidence that all of the ISP traffic is non-toll. Moreover, the theme animating Core's testimony and Reply to New Matter is *not* that the traffic at issue is "toll" and therefore subject to intrastate access charges, but rather that its tariffed intrastate access charges *can apply to non-toll* as well as toll traffic – which further demonstrates Core's belief that all, or nearly all, of the traffic at issue here is non-toll. Reply to New Matter (Summary of Position), p. 6, ¶ 25 ("Core denies that intrastate access charges only apply to interexchange traffic"); *Id.* p. 7, 32 ("Core denies that its intrastate access charges only apply to non-local, toll traffic"); Mingo Testimony at 18 ("there are instances in which an access tariff can and does apply to 'local' traffic"); *Id.* at 26 ("Core believes that its intrastate switched access tariff should apply to all the intrastate traffic it terminates . . . including both toll and locally dialed traffic"). In fact, Core proposes to settle this matter with an offer that addresses non-toll – and only non-toll – traffic. *Id.* at 23 ("By way of this testimony, Core hereby offers to enter into the attached [agreement] that will cover all locally-dialed traffic exchanged between AT&T and Core, and will apply the Commission-approved TELRIC rate to such traffic").

Finally, when Core filed to expand its Certificate of Public Convenience and Necessity ("CPCN") to the rural ILECs' territory, Core stated therein that all of the traffic it handles is local traffic. Core specifically stated that "all calls handled by Core originate and terminate on a local basis in the same LATA."<sup>15</sup>

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<sup>15</sup> 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-310922F0002, AmA, Opinion and Order, December 4, 2006, pp. 34-35, citing Core Exceptions at p. 27.

As explained in Part C below, even if the Commission were empowered in the abstract to regulate and prescribe compensation for ISP-bound traffic (which it is not), because the traffic at issue here is *non-toll*, ISP-bound traffic, the *ISP Remand Order* expressly preempts any such authority. Moreover, the intercarrier compensation rules announced in that Order preempt and therefore preclude the relief requested by Core.

**B. The Commission Lacks Jurisdiction To Regulate Compensation For ISP-Bound Traffic Outside The Context Of An Interconnection Agreement Dispute**

It is well-settled – as a matter of FCC precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic. *Pacific Bell*, 325 F.3d at 1126 (“the FCC and the D.C. Circuit have made it clear that ISP traffic is ‘interstate’ for jurisdictional purposes”). And because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement (“ICA”) under § 252. *Id.* at 1126-27. As noted above, Core itself has argued to this Commission that all ISP-bound traffic is interstate and therefore under the jurisdiction of the FCC. Specifically, in its arbitration with Embarq, Core stated, “All of the FCC’s rules are now premised on the theory that *any call to an ISP is interstate* and therefore under the FCC’s jurisdiction and rules for intercarrier compensation.”<sup>16</sup>

The FCC first addressed ISP-bound traffic in the *ISP Declaratory Ruling*,<sup>17</sup> where it found that a call placed by a user of “dial-up” internet service *does not terminate* at the ISP’s local server but continues to the ultimate destination or destinations, specifically at an internet

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<sup>16</sup> 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, Reply Brief of Core Communications, Inc., p. 37, September 20, 2007 (emphasis supplied).

<sup>17</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Red 3689 (1999) (“*ISP Declaratory Ruling*”)

website that is often located in another state. *ISP Declaratory Ruling*, ¶ 12. Applying the “end-to-end” analysis, which determines the jurisdictional nature of communications by comparing the end points of the communication, the FCC concluded that ISP-bound telecommunications traffic is jurisdictionally interstate. *Id.* at 3695-3702 ¶¶ 10-20. The United States Court of Appeals for the District of Columbia Circuit accepted the FCC’s determination that ISP-bound traffic was jurisdictionally interstate, stating: “[t]here is no dispute” that the FCC was “justified in relying on” its end-to-end analysis in concluding that ISP-bound traffic is “jurisdictionally interstate.” *Bell Atlantic Tel Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). In 2001, the FCC returned to this issue and reaffirmed its finding that ISP-bound traffic is jurisdictionally interstate traffic that would be regulated directly by the FCC under its statutory authority under Section 201 to ensure that the rates for interstate services are “just and reasonable.” *ISP Remand Order*, ¶ 1. *Id.* at ¶ 52 (“ISP traffic is properly classified as interstate, and it falls under the [FCC’s] section 201 jurisdiction”).<sup>18</sup>

Because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement under § 252. Indeed, the Ninth Circuit held in *Pacific Bell*, 325 F.3d at 1126-27, that, under the statutory scheme adopted in the 1996 Act, state commissions have no authority over interstate traffic, except for the authority to adjudicate interconnection disputes pursuant to § 252.<sup>19</sup> The Court explained that “[b]efore the 1996 Act, the FCC had general rule-making authority to regulate ‘interstate’ traffic and the states had general authority to regulate ‘intrastate’ traffic.” *Id.* at 1126 (citing 47 U.S.C. § 152; *Local Competition Order*, at 15499 ¶

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<sup>18</sup> The FCC’s conclusion was undisturbed by the remand in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). *ISP Mandate Order*,<sup>18</sup> ¶ 4 (in *WorldCom*, “the court did not question the [FCC’s] finding that ISP-bound traffic is jurisdictionally interstate.”).

<sup>19</sup> Section 252 federally delegated state authority is not at play in this dispute, because there is no interconnection agreement or arbitration between Core and AT&T.

83).<sup>20</sup> The 1996 Act does not change these basic principles; rather, Congress “changed this division of labor somewhat” in certain limited, specific respects. *Id.* The principle change was that Congress enacted new substantive, federal provisions governing competition for local services, and thereby broadly extended the FCC’s authority into the field of intrastate telecommunications; the Act and the FCC’s rules now preempt state regulation of local telecommunications competition generally. *Id.* at n.10; *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 377-83 & n.6 (1999); *MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 510 (3<sup>rd</sup> Cir. 2001). In addition, Congress gave state commissions *federal* authority to apply the 1996 Act and the FCC’s rules in individual cases by arbitrating interconnection agreements under § 252. *Iowa Utils. Bd.* 525 U.S. at 378 n.6. But while the Act “granted the state commissions defined authority over interstate traffic under §§ 251 and 252 . . . it is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is *confined* to the role described in § 252 – that of arbitrating, approving, and enforcing interconnection agreements.” *Pacific Bell*, 325 F.3d at 1126 (emphasis added). “The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic.” *Id.* at 1127.

For these reasons, the Ninth Circuit struck down an attempt by the California Public Utility Commission (“CPUC”) to regulate reciprocal compensation for ISP-bound traffic outside the context of § 252. *Id.* at 1126-28. Specifically, the CPUC had issued generic orders applicable to all ICAs, purporting to establish that ISP-bound traffic was covered by the ICA’s reciprocal compensation provisions. However, because the CPUC’s “only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection

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<sup>20</sup> Indeed, Congress has always intended federal regulation to preempt state law with respect to the establishment of rates for interstate telecommunications traffic. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-49 (1930) (“Neither these interstate rates nor the division of revenue arising from interstate rates was a matter for the determination” of a state regulatory commission); *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30-31 (1919) (interstate rates are governed by federal and not state law).

agreements and to interpret existing ones according to their own terms,” the Court concluded that “[b]y promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act’s requirement.” *Id.* at 1125-26.

The Sixth Circuit made a similar determination in *Verizon North, Inc. v. Strand*, 367 F.3d 577 (6<sup>th</sup> Cir. 2004). There, a CLEC billed an ILEC with which it did not have an ICA for terminating ISP-bound traffic at rates set forth in an intrastate tariff. When the ILEC refused to pay the charges, the CLEC filed a complaint with the state commission. The state commission asserted jurisdiction over the dispute, even though the CLEC was relying on its tariff rather than on an interconnection agreement and ordered the ILEC to pay the tariffed rates. The Sixth Circuit noted that the state’s ability to regulate interconnection between LECs was “clearly bounded by the plain language of § 252.” While “the Act does not completely eliminate the role of the state commissions in regulating interconnection between LECs . . . to the extent [a state commission] order is inconsistent with the Act or prevents its implementation, it is preempted.” *Id.* at 582-83. Because the state commission’s order bypassed the federal statutory process for establishing interconnection and effectively permitted the institution of the terms of an ICA “by fiat,” the order was inconsistent with the statutory framework of § 252 and thus preempted. *Id.* at 584-85.<sup>21</sup>

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<sup>21</sup> As explained further below, contrary to Mr. Mingo’s claim (Mingo Testimony at 25-26), the critical fact here is not whether the intercarrier relationship is an ILEC-CLEC or CLEC-CLEC relationship, but the fact that the traffic at issue is jurisdictionally interstate. As *Pacific Bell* makes clear, state commissions have no jurisdiction over interstate traffic, except to the extent that the 1996 Act or the FCC has granted state commissions such authority. Core’s dispute with AT&T does not arise under § 252, and the FCC has not otherwise delegated authority to the state commissions to regulate the intercarrier compensation for CLEC-to-CLEC interstate ISP-bound traffic. Quite the contrary, the FCC has directly asserted its historic authority under § 201 to regulate the interstate rates that CLECs serving ISPs may charge originating carriers, which necessarily displaces any state attempt to regulate such rates. *ISP Remand Order*, ¶ 66; *ISP Mandate Order*, ¶ 21.

Core's Formal Complaint involves traffic that is entirely ISP-bound traffic. And because ISP-bound traffic is jurisdictionally interstate, the Commission does not have jurisdiction over it here (where there is no dispute over an ICA), and Core's Complaint must be dismissed.

**C. Even If The Commission Had Jurisdiction Over ISP Traffic, The FCC's Compensation Regime For The Exchange Of Non-Toll, ISP-Bound Traffic Explicitly Preempts The Commission's Authority To Order Compensation For Such Traffic**

Even assuming *arguendo* that the Commission would have jurisdiction to regulate compensation for ISP-bound traffic in the absence of any FCC regulation, which it does not, the FCC *has* chosen to regulate in this area. And the compensation regime established by the FCC for the exchange of non-toll, ISP-bound traffic requires it to be exchanged on a "bill and keep" basis, and explicitly preempts any state authority over such matters.

**1. The ISP Remand Order Preempted State Commission Authority To Set Rates For ISP-Bound Traffic**

The 1996 Act and the FCC's rules and orders preempt contrary state regulation. *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. at 378 n. 6 ("the question in these cases is not whether the Federal Government has take the regulation of local telecommunications competition away from the States. With regard to the matters discussed by the 1996 Act, it unquestionably has"); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (federal filed tariffs preempt reseller's claims under state contract and tort law); *Smith*, 282 U.S. at 148-49 (state commission's regulation of interstate rates preempted); *Postal Telegraph-Cable Co.*, 251 U.S. at 30-31 (state regulation of interstate rates preempted). Federal law preempts conflicting state regulation "where compliance with both federal and state regulations is a physically impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case, FCC's rules and orders

preempt any purported Commission authority to establish compensation for non-toll, ISP-bound traffic, because those rules and orders establish that intercarrier compensation for such traffic must be on a “bill and keep” basis in cases like this one.

By way of background, in the *ISP Remand Order*, the FCC recognized that Section 251(b)(5)’s reciprocal compensation requirement created incentives for a LEC to engage in regulatory arbitrage, and to profit, not by charging its customers, but by positioning itself to receive a disproportionate amount of reciprocal compensation from other LECs. *ISP Remand Order* at 9153 ¶ 2. The problem is that a user of “dial-up” internet service will likely make many extended calls to the ISP, but the ISP will rarely, if ever, call the “dial-up” user or anyone else. *Pacific Bell*, 325 F.3d at 1119. Because, under a reciprocal compensation regime, the originating LEC pays the terminating LEC, LECs that serve only ISPs receive but rarely if ever pay reciprocal compensation. This creates an incentive for LECs to serve ISPs at rates well below market cost while deriving their revenues not from their ISP customers, but from the LECs whose customers are calling the ISPs. Thus, when a LEC’s customers primarily are ISPs, the whole notion of “reciprocal” compensation becomes skewed. *Id.*

Core is exactly the type of carrier the FCC was targeting and referring to when it discussed these arbitrage schemes that must be stopped. Core admits in this case that it does not have any outbound calling at all, but instead derives all of its revenues from inbound calls. Core further admits that virtually all of its customers are ISP customers, and even for those five customers that Core recently obtained, those customers only have inbound calling as well. After a full hearing regarding Core’s business model, ALJ Weismandel made the following findings, which remain equally true today<sup>22</sup>:

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<sup>22</sup> Initial Decision, *Application of Core Communications, Inc.*, A-310922F0002, AmA (June 1, 2006).

- It is profitable to receive reciprocal compensation, even at the lowest rate, when traffic imbalance causes almost all calls on your network to be terminating rather than originating.
- Core's Amended Application seeking authority to be a "facilities-based competitive local exchange carrier" is a sham.
- The trend at the FCC has been to put an end to "regulatory arbitrage" such as that engaged in by Core.
- Core's intent is not to compete on a level playing field with the RLECs as a true facilities-based local exchange carrier, but rather to tilt the playing field in its favor and "game the system" until such time as the laws regarding intercarrier compensation make that impossible to continue.

Given the magnitude of the ISP-bound traffic problem, the FCC decided that it was time to establish an appropriate federal cost recovery mechanism for the exchange of this traffic. *ISP Remand Order* at 9154 ¶¶ 3-4. And the FCC concluded that "the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users." *Id.*, 9154 ¶ 4. Of particular relevance here, while the FCC developed mechanisms for some carriers to transition toward bill and keep, the FCC explained that those carriers that were not exchanging traffic pursuant to an ICA (such as Core and AT&T) were to immediately exchange ISP-bound traffic on a bill and keep basis. *Id.* at 9188-89 ¶ 81. In setting forth a federal intercarrier compensation regime for ISP-bound traffic, the FCC expressly preempted state authority to regulate such traffic: "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, *state commissions will no longer have authority to address this issue.*" *Id.* at 9189 ¶ 82.

The terms of the *ISP Remand Order* are clear: it applies to "LECs" that serve ISPs (such as Core) and any "carrier" delivering traffic to such a LEC (such as AT&T), and it requires those carriers to exchange ISP traffic on a bill and keep basis. *Id.* ¶¶ 13, 66-67, 80-81. And the FCC was equally clear (*id.* at 82) that its determination concerning ISP-bound traffic would preempt

any action by this Commission to establish rates for such traffic, as Core has asked it to do. The Commission therefore should dismiss Core's Complaint.

**2. The Pennsylvania Commission Has Held On Two Occasions That It Is Preempted From Establishing A Compensation Scheme For The ISP-Bound Traffic At Issue Here**

This Commission has recognized that the *ISP Remand Order* preempts any authority it may have over the ISP-bound traffic at issue here. In 2003 the Commission explained that "[t]he ISP Remand Order has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic." April 18, 2003 Opinion and Order, p. 57, n46. The Commission reiterated its conclusion in 2006, stating that because "the FCC's ISP Remand Order has preempted rate authority by state commissions over intercarrier compensation for ISP-bound traffic, it is clear that this Commission lacks the authority to resolve the rate issue [*i.e.*, the rate for VNXX ISP-bound calls and calls to ISPs located in the same local calling area as the calling party] at hand." Jan. 18, 2006 Opinion and Order, p. 10.

Core acknowledges that this Commission previously held that the FCC has preempted state commission rate authority over ISP-bound traffic.<sup>23</sup> Most recently, Core filed a pleading earlier this year in the Embarq arbitration case regarding its legal analysis of the FCC's November 5, 2008 Order on remand, and Core reiterated therein that "the Commission has already found – twice – that the FCC has asserted complete jurisdiction over ISP-bound traffic."<sup>24</sup>

**3. The ISP Remand Order Applies To CLEC to CLEC ISP Traffic**

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<sup>23</sup> 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, Reply Brief of Core Communications, Inc., p. 41, September 20, 2007.

<sup>24</sup> Supplemental Comments of Core Communications, Inc., Docket No. A-310922F7002, January 26, 2009, p. 7.

Mr. Mingo's testimony on behalf of Core (at 25) suggests that the *ISP Remand Order* does not apply in this case because the FCC's Order purportedly only applies to ISP-bound traffic exchanged between incumbent LECs and CLECs. That unduly and incorrectly narrow reading would promote the very regulatory arbitrage that the FCC adopted the *ISP Remand Order* to prevent. Under any reasonable interpretation of the *ISP Remand Order*, the FCC intended to apply bill and keep to all ISP-bound traffic – including when one CLEC sends ISP-bound traffic to another CLEC.

To begin with, both the reciprocal compensation provision of the 1996 Act (*i.e.*, § 251(b)(5)) and the FCC's reciprocal compensation rules apply by their plain terms to CLEC-to-CLEC traffic. The statutory reciprocal compensation provision, § 251(b)(5), applies to any "carrier" that requests reciprocal compensation from any "LEC," both of which are statutorily defined terms that includes CLECs. *See also ISP Mandate Order* at 9157 ¶ 10 ("We disagree with commenters who argue that section 251(b)(5) only can be applied to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier. The Commission rejected that argument in the *Local Competition Order*, finding that section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier, and adopted rules implementing that finding."). Since 1996, the FCC's rules implementing the reciprocal compensation provisions have likewise applied to "LECs" and to any "carrier" that requests reciprocal compensation, and thus apply to CLEC-to-CLEC traffic exchanges. 47 C.F. R. §§ 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers."); *Id.* § 51.703 ("Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications

carrier.”). In the *ISP Remand Order*, the FCC did *not* amend the language establishing that the rules govern traffic between all “LECs” and requesting “carriers.” *See ISP Remand Order*, Appendix B (modifying 47 C.F. R. §§ 51.701(b)). Rather, it amended only the language establishing the *types of traffic* that would be carved out from the reciprocal compensation rules for direct federal regulation under § 201. *See id.*; *see also ISP Remand Order* at 9169 ¶ 39. Accordingly, the text of the FCC’s rules cannot be reconciled with Mr. Mingo’s claim that the FCC did not regulate CLEC-to-CLEC ISP-bound traffic.

Similarly, in the *ISP Remand Order* itself, the FCC consistently describes the new rules in terms that included CLEC-CLEC relationships. The FCC made clear that it was addressing “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.*” *Id.* at 9159 ¶ 13 (emphasis added); *see also id.* at 9181 ¶ 66 (“we must now determine, pursuant to our section 201 authority, what compensation mechanism is appropriate when *carriers* collaborate to deliver calls to ISPs” (emphasis added)). It concluded that “a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient than recovering these costs from originating *carriers.*” *Id.* ¶ 67 (emphasis added). It explained that it was adopting an “interim compensation mechanism” that “limit[ed] carriers’ opportunity to recover costs from other *carriers.*” *Id.* (emphasis added). It clarified that the rate caps it imposed had “no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic).” *Id.* at 9188 ¶ 80. And, it explained that “where *carriers* are not exchanging traffic pursuant to interconnection agreements prior to the adoption

of this order" (as was the case between AT&T and Core), "*carriers shall exchange traffic on a bill-and-keep basis during this interim period.*" *Id.* at 9188 ¶ 81 (emphasis added).

The FCC's decision to apply the new interim rules to CLEC-to-CLEC traffic should not be surprising, because the FCC's entire focus in the Order was on CLECs (like Core here) that serve ISPs, not on the nature or status of the originating carrier that delivers traffic to such CLECs. As the FCC explained, a compensation regime in which the originating carrier pays the CLEC serving the ISP creates an "incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic," and "[t]o the extent that carriers offer these customers below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals." *Id.* at 9182 ¶ 68. As the FCC found, "the record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers," with one-way payments reaching more than two billion dollars by 2001. *Id.* at 9183 ¶ 70. The FCC therefore specifically concluded that, in the context of ISP-bound traffic, the originating-carrier-pays rule "undermines the operation of competitive markets," and that efficient market prices can prevail only when CLECs price their retail services based on costs rather than "their ability to shift costs to other *carriers.*" *Id.* ¶ 71 (emphasis added). This regulatory arbitrage victimizes originating ILECs and CLECs alike, and thus the FCC had no policy-based reason to distinguish the two (and in fact did not distinguish the two).

Core will undoubtedly point the Commission to the district court decision in *AT&T Communications v. Pac-West Telecomm, Inc.*, 2008 WL 3539669 (N.D. Cal. 2008). That case is on appeal to the Ninth Circuit, was wrongly decided, and is not binding on this Commission. First, although the district court recognized (*id.* at \*7) that the ISP-bound traffic at issue was jurisdictionally interstate, it ignored completely what that means: that because it was neither

arbitrating, approving nor enforcing an interconnection agreement, the state commission lacked jurisdiction to regulate the traffic. Second, the district court erroneously treated the *ISP Remand Order* as being limited solely to traffic exchanged between an ILEC and a CLEC. As demonstrated above, the *ISP Remand Order* quite clearly addresses *all* ISP-bound traffic, including traffic exchanged between two CLECs. To rule otherwise makes absolutely no sense, and would send the message that ILECs are protected from Core's arbitrage schemes, but CLECs are not. That is exactly the wrong message to send – and is against both common sense and the law. For these reasons, the *ISP Remand Order*, by its terms, applies to all “carriers,” and, consistent with the FCC's explicit preemption of state commission authority to address the issue, the Commission should dismiss Core's Formal Complaint.

### CONCLUSION

Based on the foregoing, AT&T respectfully requests that the Commission dismiss Core's Complaint for lack of subject matter jurisdiction or, in the alternative, because the relief requested by Core is preempted. While the presiding officer decides this Motion, AT&T requests that the filing of any further testimony be immediately suspended pursuant to 52 Pa. Code §5.103(d)(2).

Respectfully submitted,

AT&T Communications of PA, LLC and  
TCG Pittsburgh.

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Its Attorneys

Dated: December 8, 2009

**CERTIFICATE OF SERVICE**

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

Dated at Chicago, Illinois, this 8th day of December 2009.

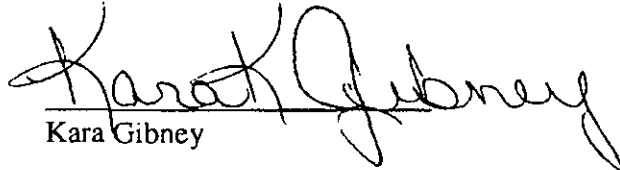
VIA E-MAIL AND FIRST CLASS MAIL

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**RECEIVED**

DEC -8 2009

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

  
Kara Gibney

**RECEIVED**

DEC - 8 2009

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**ATTACHMENT A**



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November 4, 2009

**Via Email and First Class Mail**

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

Dear Michelle:

On behalf of Core Communications, Inc., ("Core") enclosed please find its Responses to AT&T Communications of Pa., LLC's Request for Admissions, Set II and Interrogatories, Set II. Copies have been served in accordance with the attached Certificate of Service.

Sincerely yours,

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Cert. of Service, w/enc.  
James McNulty, Cert. of Service only

**CERTIFICATE OF SERVICE**

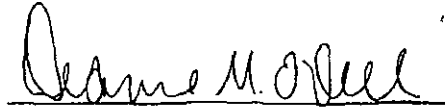
I hereby certify that this day I served a copy of Core's Responses to Interrogatories and Request for Admissions, Set II upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54

**Via Email and First Class Mail**

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Dated: November 4, 2009



Deanne M. O'Dell

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

**Interrogatory AT&T-II-4** For the period of January 2004-present, provide the name and number of all other carriers in Pennsylvania who have sent Core "an explicit order for services," as Core stated was the appropriate method to order service.

**Response:** Verizon Pennsylvania, Inc. and Verizon North, Inc. of Pennsylvania routinely send Core ASRs to request creation of trunks to handle traffic terminating on Core's network.

As Core stated previously, in response to AT&T-Core 1-9, "no carrier that has sent telecommunications traffic to Core through the Verizon tandem [i.e., indirect traffic] has ever notified Core about its originating traffic; and none have ever sent Core an ASR."

Although Core does not excuse any carrier for failing to notify Core upon delivery of substantial amounts of traffic to Core's network, for which Core is required to provide termination services, Core notes that no other carrier has sent Core anything close to the large volume of traffic that AT&T has sent Core.

Response provided by: Bret Mingo

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

**Interrogatory AT&T-II-5** For the period January 2004 to the present, state whether Core has charged any telecommunications carrier for the termination of indirect local exchange traffic. If so, (1) identify each such telecommunications carrier, (2) state the amount Core charges or charged each carrier for the termination of that local indirect traffic, and (3) state the amount Core received from each carrier for the termination of that local indirect traffic. Provide all documents that support Core's response and that were relied upon in answering this request.

**Response:** Please see Core's response to Interrogatory AT&T-Core 1-12.

To Core's knowledge, the term "local exchange traffic" has no defined legal basis.

However, with respect to those calls for which the CPN of the calling and called parties would be rated as "local" for retail purposes, the following is true:

The following carriers have refused to pay Core invoices on the basis that the traffic in question is not subject to access charges because it is "local": AT&T, XO Communications.

The total amount in dispute between AT&T and Core for the termination of "local" traffic was \$7,705,189.63 as of September 8, 2009.

The total amount in dispute between XO and Core for the termination of "local" traffic was \$52,643.93 as of August 10, 2009.

One Communications also disputes Core's switched access service bills, including calls for which the CPN of the calling and called parties would be rated as "local" for retail purposes, but One does not claim that the traffic in dispute is "local." Rather, One claims that the traffic in dispute is "interstate."

The total amount in dispute between One and Core for the termination of "local" traffic was \$1,052,241.78 as of September 3, 2009.

Response provided by: Bret Mingo

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

**Interrogatory AT&T-II-13** Does Core have any Pennsylvania customers who are not Internet Service Providers? If so, how many and what type of customers (residential/small business/large business) are the non-Internet Service Provider customers?

**Response:** Yes. Core currently has 5 non-ISP business customers in who subscribe to Core's local exchange service in Pennsylvania.

Response provided by: Bret Mingo

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

**Interrogatory AT&T-II-14** How many customers does Core have in Pennsylvania broken out by residential and business?

**Response:** Core has approximately 55 ISP (business) customers in Pennsylvania.

Response provided by: Bret Mingo

# ATTACHMENT B

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DEC 8 2009

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**Direct Testimony**

**of**

**Bret L. Mingo**

**on behalf of**

**Core Communications, Inc.**

Dated: November 16, 2009

{L0392849.1}

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS?**

2 A. My name is Bret L. Mingo. I am president and CEO of Core Communications, Inc.  
3 (“Core”), a competitive local exchange carrier (“CLEC”) with substantial operations in  
4 Pennsylvania. My business address is 209 West Street, Suite 302, Annapolis, Maryland  
5 21401.

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

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

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

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

18 **Q. PLEASE DESCRIBE CORE AND ITS OPERATIONS GENERALLY?**

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

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

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

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

18 A. Consumers who do not utilize broadband connections. Dial-up ISPs give these  
19 consumers access to the Internet. This is necessary because people in rural areas may not  
20 have access to broadband connections. Dial-up ISPs may also serve as a low-cost  
21 alternative for consumers who are not "heavy" internet users but still want access. The  
22 price to the consumer of dial-up ISP service ranges from \$5 to \$15 per month, whereas  
23 the price for a broadband connection (such as DSL or cable modem) starts around \$40.  
24 For many consumers, dial-up ISP may be their preferred option to have Internet access

1 and Core facilitates the ability of these consumers to have this access by enabling  
2 traditional landline telephone calls to reach the ISPs.

3 **Q. PLEASE DESCRIBE THE RESPONDENTS AND THEIR OPERATIONS**  
4 **GENERALLY?**

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

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

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

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

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

8 A. First, the AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that  
9 originate and terminate in the same state, in this case Pennsylvania. An intrastate call can  
10 be distinguished from an interstate call by comparing the calling party's phone number  
11 with the called party's phone number. If both numbers are associated with rate centers  
12 located in the same state, then the call is intrastate. But if one number is associated with a  
13 rate center in state A, and the other number is tied to a rate center in state B, the call is  
14 interstate. AT&T has sent Core some interstate traffic, Core has invoiced AT&T for this  
15 traffic pursuant to its FCC interstate access tariff, and AT&T has paid these invoices  
16 substantially without dispute. So the only traffic at issue in this case is intrastate.

17 The AT&T Indirect Traffic further consists of locally dialed calls placed by  
18 AT&T's local service customers in order to reach Core's customers. A "locally dialed"  
19 call is one for which the NPA-NXX of the calling party and the called party are  
20 associated with a common local calling area, as defined in the local exchange service  
21 tariffs of incumbent LECs (primarily, Verizon), and mirrored in the local exchange  
22 service tariff of competitive LECs (like AT&T and Core). Locally dialed calls are placed  
23 by entering a ten digit telephone number (NPA-NXX-XXXX) into the telephone or  
24 modem or other device placing the call. Locally dialed calls are usually distinguished

1 from “long distance” or “toll” calls for which the NPA-NXX of the calling and called  
2 parties are not associated with a common local calling area, and which are placed by  
3 dialing an eleven digit number (1+NPA-NXX-XXXX). From the consumer’s point of  
4 view, the difference between locally dialed and toll calls is that locally dialed calls are  
5 generally included with the consumer’s flat-rate local service charge, whereas toll calls  
6 incur a per-minute charge or “toll.” This distinction is eroding somewhat as LECs  
7 increasingly provide “all you can eat” packages on a flat-rate basis, similar to most  
8 wireless plans.

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

10 A. The total volume Core has terminated on behalf of AT&T is significant, and constitutes a  
11 substantial use of Core’s network. From June, 2004 through September, 2009, AT&T end  
12 users using the TCG Pittsburgh network (CIC 0292) originated 406,102,334 minutes of  
13 use for termination on Core’s network, for which AT&T has compensated Core exactly  
14 \$0.00. See, Exhibit BLM-1, at Tab 1 (Chart of Minutes of Use & Amounts in Dispute).  
15 This total does not include additional traffic originated under AT&T of Pennsylvania CIC  
16 0288, for which AT&T has compensated Core. Also of note, the monthly volume of  
17 AT&T Indirect Traffic terminating on Core’s network has diminished greatly over time.  
18 In June, 2004, the volume was 2,631,231 minutes of use, rising to 18,933,107 minutes in  
19 May, 2006. But between June, 2006 and December, 2008 it fell to just 17,163 minutes,  
20 the level at which it has remained ever since.

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

23 A. AT&T does not directly interconnect with Core and other CLECs, rather it uses the  
24 tandem switch network of Verizon Pennsylvania, Inc. (“Verizon”) to interconnect

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

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

13 A. AT&T has an interconnection agreement (“ICA”) with Verizon Pennsylvania, Inc.  
14 (“Verizon”) by which AT&T is entitled to send traffic to the Verizon tandems for  
15 delivery to third-party carriers, such as Core. In turn, Verizon is entitled to charge AT&T  
16 a per-MOU rate for the service of transiting the AT&T’s traffic from AT&T to Core. *See*,  
17 Exhibit BLM-2, at Tab 2 (Diagram of Indirect Interconnection). So, AT&T pays some  
18 intercarrier compensation on all of the AT&T Indirect Traffic—but it only pays Verizon  
19 for the transit function. Meanwhile, AT&T refuses to pay Core for the termination  
20 function.

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

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

6  
7 In all cases, each Party shall follow the Exchange Message Record  
8 ("EMR") standard and exchange records between the Parties and with the  
9 terminating carrier to facilitate the billing process to the originating  
10 network.

11  
12 While it is true that Core can not enforce an ICA between AT&T and Verizon, this ICA  
13 language does show that AT&T has acknowledged its responsibility to pay CLECs, like  
14 Core, for indirect traffic regardless of the positions it is taking here.

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

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

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

1 A. Core receives so-called Carrier Access Billing System (“CABS”) or “Category 11”  
2 records from Verizon on a regular basis. For many years, these records were delivered by  
3 mail in magnetic tape format. More recently Verizon has made them available via a  
4 website-based format. The CABS records are generated by Verizon’s tandem switches  
5 and their purpose is to provide Core with information about calls that pass through the  
6 tandems on their way to Core’s network, so that Core can bill the carriers whose end  
7 users originated the calls. For each call, CABS records the carrier identification code  
8 (“CIC”) of the originating carrier, the telephone number of the calling party, the  
9 *telephone number of the called party, and the duration of the call in “minutes of use.”*

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

16 In 2007, Core was preparing its network to provide wholesale  
17 telecommunications services on a large scale to VOIP customers. As part of its  
18 preparations, Core purchased special equipment and hired a consultant to “read” an  
19 historical sampling of the records Verizon had been sending Core. Because Core knew  
20 that traffic to and from VOIP carriers would include a substantial proportion of “toll”  
21 calls, Core wanted to understand the CABS format, the information provided in the  
22 CABS records, and generally how to both audit and invoice CABS bills.

1           At that time, Core did not know about, and had no reason to be aware of, the  
2           substantial volumes of telecommunications originated by AT&T and delivered to Core  
3           via Verizon's tandem switches. Since Core's customers were traditionally limited to dial-  
4           up ISPs, and this traffic was generated by Verizon end users, Core did not expect that  
5           CLECs would originate any substantial volume of traffic that would be captured in  
6           CABS records. Also, calls to dial-up ISPs are almost always locally-dialed calls, not toll  
7           calls, and CABS records generally pertain only to toll calls.

8           When Core began its examination of the Verizon CABS records, it expected to  
9           find only trace amounts of toll calls recorded there. Instead, Core found that AT&T, since  
10          at least 2004, has been sending Core substantial volumes of traffic. While this AT&T  
11          Indirect Traffic may be small in comparison to the volume of traffic Core receives from  
12          Verizon directly, it is substantial nonetheless. Once Core found evidence of AT&T and  
13          other CLEC indirect traffic, we embarked on a larger project of systematically processing  
14          several years' worth of magnetic tapes, in order to get a complete picture of this traffic.  
15          As we progressed farther back in time with reading the tapes, we began to invoice AT&T  
16          for the AT&T Indirect Traffic.

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

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

1 demonstrate the opposite—that AT&T had been sending the AT&T Indirect Traffic to  
2 Core for years.

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

4 A. In January, 2008, Core sent its initial invoice to AT&T, for the AT&T Indirect Traffic  
5 terminated by Core in December, 2007. In March, 2008, Core invoiced AT&T for the  
6 remainder of CY 2007. Core then billed AT&T for CY 2004-2006 in January, 2009, and  
7 for CY 2008 in May, 2009. As of the date of this testimony, Core has submitted intrastate  
8 switched access service bills to the Respondents for the termination of the AT&T Indirect  
9 Traffic for the periods from June, 2004 through September, 2009, including interstate  
10 minutes pursuant to Core's interstate switched access FCC Tariff No. 1 and intrastate  
11 minutes in accordance with Core's intrastate switched access Pa. PUC Tariff No. 4.  
12 Core's invoices cover both CIC 0292 traffic (TCG Pittsburgh, Inc.) and CIC 0288 traffic  
13 (AT&T Communications of Pennsylvania, LLC). Currently, Core bills AT&T each  
14 month for the prior month's usage. For example, Core billed AT&T on November 10,  
15 2009 for AT&T usage in October, 2009.

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

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

1           Upon receiving the initial round of invoices in early 2008, AT&T disputed  
2           various amounts by means of a form letter which lists various dispute reasons, some of  
3           which are checked, and some of which are left unchecked. For example, with respect to  
4           the CIC 0288 traffic and some other traffic in Pennsylvania and other states, AT&T  
5           initially checked a box that states "AT&T Corp. has not reached agreement with your  
6           company regarding Intrastate rates and extends an invitation to discuss. Please contact us  
7           at your earliest convenience." *See*, Exhibit BLM-3, at **Tab 3** (AT&T Form Letter). This  
8           was odd because intrastate switched access is usually billed pursuant to tariff, not  
9           agreement. Specifically with respect to CIC 0292 traffic, the only response AT&T made  
10          initially was in the form of an email stating "[f]or CIC 292, someone from our Business  
11          Development Group will need to speak with you and review Call Detail Records since  
12          records can contain local service." *See*, Exhibit BLM-4, at **Tab 4** (Email from Lynda  
13          Eyerman to Stephanie Anderson).

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

16 **A.**We took AT&T up on its "invitation to discuss" and got in contact with Mark  
17          Cammarota, whose title is "Lead Carrier Relations—National Access Management." Mr.  
18          Cammarota forwarded Core a draft "Confidentiality and Pre-Negotiation Agreement"  
19          ("NDA") which was intended to support confidential negotiations towards an agreement  
20          on switched access payments. Both Core and AT&T executed this agreement in June,  
21          2008. Once that was finalized, we began in earnest to pursue an agreement with AT&T  
22          whereby it would pay the open balance due for the traffic Core had terminated. At that  
23          time, AT&T was disputing not only the CIC 0292 traffic, but a lot of the CIC 0288 traffic

1 as well. We attempted to reach Mr. Cammarota to schedule one or more negotiation  
2 sessions.

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

14 **Q. DID AT&T NEGOTIATE WITH CORE?**

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

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

4 Within days of this formal letter, Mr. Cammarota resurfaced, and the parties  
5 conducted two telephonic settlement conferences, one on May 7 and one on May 11,  
6 2009. Core proposed to rebill substantially all of the CIC 0292 traffic—past, present, and  
7 future—at the Commission-approved TELRIC rate for traffic termination. The TELRIC  
8 rate is a cost-based rate that is calculated using the forward-looking, incremental costs  
9 associated with terminating traffic. The Commission promulgated these rates pursuant to  
10 the authority delegated to all state commissions by sections 251(b)(5) and 252(d)(2) of  
11 the federal Communications Act. The Commission's TELRIC termination rate  
12 (\$0.00267) contains no subsidies, and is approximately one-fifth the switched access rate  
13 contained in the tariffs of Verizon Pennsylvania, Inc. and mirroring LECs like Core  
14 (\$0.014). I felt we had made a bold and hopefully decisive concession, by agreeing to  
15 replace our tariffed switched access rates with cost-based rates, not only for future usage,  
16 but for past usage as well. However, AT&T denied our proposal, and declined to put  
17 forth any proposal of its own. That left Core with no option but to seek to enforce its right  
18 to payment for services through litigation.

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

21 **A.** AT&T has never denied that its end users originate the AT&T Indirect Traffic to Core for  
22 ultimate delivery to Core's end user customers. As of the filing of this testimony, AT&T  
23 continues to send significant amounts of indirect traffic to Core for termination to Core's  
24 end users, while adamantly refusing to pay Core any compensation for this use of Core's

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

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

18 A. According to the FCC, "under the existing regimes, the calling party's carrier, whether  
19 LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the  
20 call. Thus, as a general matter, our existing regimes are based on a "calling-party-  
21 network-pays" (CPNP) approach to compensation." Further Notice of Proposed  
22 Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*,  
23 CC Docket No. 01-92, FCC 05-33 (Released: March 3, 2005), 20 F.C.C.R. 4685, 20 FCC  
24 Rcd. 4685, 2005 WL 495087 (F.C.C.) ("FNPRM"), at ¶ 17. A CPNP regime can be

1 distinguished from a "bill-and-keep" regime, in which "neither of the interconnecting  
2 networks charges the other network for terminating traffic that originates on the other  
3 carrier's network. Rather, "each network recovers from its own end users the cost of both  
4 originating traffic delivered to the other network, and terminating traffic received from  
5 the other network." *FNPRM*, at 37.

6 **Q. WHAT IS THE POLICY BEHIND INTERCARRIER COMPENSATION?**

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

16 **Q. WHAT ARE THE VARIOUS TYPES OF INTERCARRIER COMPENSATION?**

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

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

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

13 The line between access and reciprocal compensation can be blurry in practice.  
14 The simplest formulation is that reciprocal compensation applies to all traffic except  
15 traffic that is covered by the switched access regime. This formulation is supported by the  
16 Act, which provides that all “telecommunications” (i.e., traffic) falls within the reciprocal  
17 compensation regime, unless it constitutes “exchange access” which is specifically  
18 excluded from reciprocal compensation. 47 U.S.C. § 251(b)(5) and (g). Section 251(b)(5)  
19 establishes the application of reciprocal compensation to all telecommunications, and  
20 section 251(g) provides an exclusion for the access regime, which predated the Act. In  
21 the FCC's words, “traffic encompassed by section 251(g) is excluded from section  
22 251(b)(5) except to the extent that the Commission acts to bring that traffic within its  
23 scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access

1 traffic, including rules governing “receipt of compensation.” Order on Remand and  
2 Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of High-*  
3 *Cost Universal Service Support*, WC Docket No. 05-337, 2008 WL 4821547  
4 (F.C.C.)(Released: November 5, 2008)(“*Order on Mandamus*”), at ¶ 16.

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

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

17 A. Carriers generally bill one another either by tariff or by agreement. Where there is a tariff  
18 but no agreement, the tariff governs. Where there is both a tariff and an agreement, the  
19 agreement should govern because it reflects a particular relationship between two specific  
20 carriers, whereas a tariff has general application. Access—whether interstate or  
21 intrastate—is generally billed pursuant to a tariff filed with and approved by the FCC or a  
22 state commission, such as Core’s FCC Tariff No. 1 and Pa. P.U.C. Tariff No. 4.  
23 Reciprocal compensation can also be billed pursuant to a tariff, but more typically  
24 pursuant to an agreement made pursuant to section 251(b)(5) of the Act. Under this

1 section, all LECs have a "duty to establish reciprocal compensation arrangements for the  
2 transport and termination of telecommunications." While reciprocal compensation should  
3 ultimately govern intercarrier compensation between LECs, unless and until an  
4 "arrangement[]" is formed, the access regime may continue to apply to the relationship  
5 between specific LECs.

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

8 **A.** Yes. I am aware that AT&T has argued that Core's Pa. PUC Tariff No. 4 can only apply  
9 to "non-local, or toll, calls." AT&T's Amended Answer, at p. 5. At the outset, I should  
10 point out that AT&T can not decisively state whether or not the CIC 0292 traffic was toll  
11 or locally dialed. In discovery, we asked AT&T to describe whether or not its end users  
12 were billed a long-distance or toll charge in connection with their placing calls  
13 terminating to Core. We also asked whether their end users used a local, ten-digit, calling  
14 pattern, or a long-distance, eleven-digit pattern, when placing calls terminating to Core. A  
15 straight answer to either question would have established AT&T's assertion that the CIC  
16 0292 traffic is not toll traffic. But instead, AT&T objected to and declined the first  
17 question whatsoever, and it provided a generic, essentially non-responsive answer to the  
18 second. *See*, Exhibit BLM- 8, **Tab 8** (AT&T Responses to Core Interrogatory Nos. III-3  
19 and III-4.

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

1 Alliance for Telecom Industry Solutions (“ATIS”)(and produced by AT&T in discovery),  
2 “[a]ccess and interconnection services may be billed as usage-sensitive and flat-rated  
3 charges, which may include intraLATA non-subscribed toll, wireless and local services.”  
4 *See*, Exhibit BLM-1, at Exhibit BLM-9, at **Tab 9** (Excerpts from MECAB Guidelines), at  
5 1-1. Similarly, the guidelines state that “[t]he term access may encompass Interstate,  
6 Intrastate, and Local.” *See id.*, at unnumbered page.

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

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

23 The Alabama Commission described the problem as follows:

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

7  
8 It is undisputed in the foregoing pleadings that the Wireless Carriers are  
9 indirectly terminating CMRS traffic on the networks of the Rural Carriers  
10 over common facilities operated by BellSouth. It is also undisputed that  
11 the Rural LECs incur costs in terminating such traffic. Perhaps of even  
12 more interest is the fact that the Wireless Carriers have not challenged the  
13 general claim of the Rural LECs that a substantial portion of the indirect  
14 CMRS traffic at issue is being terminated by the Rural LECs without  
15 compensation at present. *Alabama Order*, at \*13.

16  
17 The Alabama Commission ultimately ruled:

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

27  
28 We note that federal courts have recognized the right of states to enforce  
29 tariff provisions which are not inconsistent with the Telecom Act. In this  
30 case, it is not the Commission's intention to supplant or circumvent the  
31 provisions of the Telecom Act which would likely address the issues  
32 raised in this proceeding. We are merely seeking to provide a justified  
33 measure of relief for what we see as a void in the Telecom Act's coverage  
34 by virtue of the status of the parties to this dispute. *Id.*, at \*15.

35  
36 The problems the Alabama Commission identified are the same problems that lead to the  
37 dispute in this case. AT&T is using a "void in the Telecom Act's coverage" to claim  
38 exemption from the fundamental, bedrock principle of reciprocal compensation. This is  
39 because, just as the Act did not permit incumbent LECs in the Alabama case to seek

1 compulsory arbitration of an ICA with wireless carriers, so too in this case, the Act does  
2 not permit a CLEC like Core to seek arbitration with another CLEC like AT&T.

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

5 A. Yes. Core's Pa. P.U.C. Tariff No. 4 requires compensation for the AT&T Indirect traffic  
6 at the filed intrastate switched access rate, which is \$0.014/MOU. This is a case of  
7 straightforward application of tariffed rates to tariffed services. Core's Pa. P.U.C. Tariff  
8 No. 4 sets forth the rates, terms, and conditions for the provision of intrastate switched  
9 access service in Pennsylvania. Core's rates for switched access services, as set forth in  
10 the Tariff, are just and reasonable, and have been approved by the Commission. Core's  
11 Tariff defines "Switched Access Service" as: "[a]ccess to the switched network of an  
12 **Exchange Carrier** for the purpose of originating or **terminating communications**.

13 Switched Access is available to **carriers** as defined in this rate sheet." Tariff, at Section 1  
14 (Definitions)(emphasis added). The Tariff defines the term "Exchange Carrier" as: "[a]ny  
15 individual, partnership, joint-stock company, trust, governmental entity or corporation  
16 engaged in the provision of local exchange telephone service." *Id.* And the Tariff defines  
17 the term "Carrier" as an "Interexchange Carrier or Exchange Carrier." *Id.* Core's Tariff  
18 further states that "Switched Access Service, which is available to Customers for their  
19 use in furnishing their services to end users, provides a two-point communications path  
20 between a Customer's Premises and an End Users Premises." Tariff, § 4.1. The Tariff  
21 defines the term "Customer" as: "[t]he person, firm, other entity which orders Service  
22 and is responsible for the payment of charges and for compliance with the Company's  
23 rate sheet regulations. The Customer could be an interexchange carrier, a wireless

1 provider, or any other service provider.” Tariff, at Section 1 (Definitions)(emphasis  
2 added).

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

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

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

21 A. There can be no question that AT&T and Core should form a reciprocal compensation  
22 arrangement for the AT&T Indirect Traffic. As I stated earlier in this testimony, Core  
23 proposed that the parties settle all outstanding, current and future amounts due at the  
24 Commission-approved TELRIC rate, which is, again approximately one-fifth the

1 switched access rate in Core's tariff. AT&T rejected that proposal, and negotiations  
2 stalled when AT&T declined to make a counterproposal. In fact, during discovery,  
3 AT&T made it quite clear that it does not, as a matter of company policy, enter into  
4 reciprocal compensation arrangements with other CLECs. *See*, Exhibit BLM-10, at **Tab**  
5 **10** (AT&T Response to Core Interrogatory I-3). But the Act does require that all LECs—  
6 including AT&T and Core—have a “duty to establish reciprocal compensation  
7 arrangements for the transport and termination of telecommunications.” 47 U.S.C. §  
8 251(b)(5). While we have made no progress so far in our attempts to negotiate an  
9 arrangement with AT&T, we will take one more stab at it. By way of this testimony,  
10 Core hereby offers to enter into the attached Traffic Exchange and Billing Agreement  
11 (“TEBA”) that will cover all locally-dialed traffic exchanged between AT&T and Core,  
12 and will apply the Commission-approved TELRIC rate to such traffic. *See*, Exhibit BLM-  
13 11, at **Tab 11** (Traffic Exchange & Billing Agreement).

14 **Q. IS “BILL-AND-KEEP” APPLICABLE TO THE AT&T INDIRECT TRAFFIC?**

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

1 from AT&T to Core, but not from Core to AT&T. Again, this is because AT&T end  
2 users are placing calls to Core's ISP customers.

3 AT&T has also claimed that the Commission should apply bill-and-keep in this  
4 case because it is "an industry standard practice." AT&T Prehearing Memorandum, at 3.  
5 And, AT&T has produced numerous written agreements it has with CLECs other than  
6 Core, which specifically provide for bill-and-keep on "local traffic." See, Exhibit BLM-  
7 13, at **Tab 13** (Excerpts from AT&T Response to Core Request for Production No. 3).  
8 To be clear, there is no such written agreement between Core and AT&T. Rather, AT&T  
9 is claiming bill-and-keep applies to Core precisely because there is no written agreement.  
10 See, AT&T's Amended Answer, at 2 and 5. If anything, these very explicit, written  
11 agreements AT&T has with other CLECs undermine AT&T's argument that the parties  
12 operated under a bill-and-keep arrangement **without** first having a written agreement. *Id.*  
13 Indeed, the existence of these written agreement simply supports the fact that bill-and-  
14 keep can not be imposed without a "meeting of the minds" between two carriers.

15 In addition, the fact that AT&T negotiated—or forced—other CLECs to enter into  
16 a bill-and-keep arrangement for "local traffic" has no bearing on Core's rights to  
17 compensation. We can not know the trade-offs that were made across the entirety of these  
18 agreements, and which resulted in the inclusion of the bill-and-keep language. Indeed,  
19 AT&T produced only the portions of these agreements that discuss bill-and-keep. We can  
20 not even tell what type of agreements these are, since the title has been redacted as well.  
21 The bottom line is that Core's rights to compensation can not, and were not, waived by  
22 the voluntary agreements formed between AT&T and other CLECs. Moreover, in the  
23 absence of a written agreement, AT&T does not have the right to dictate what "payment"

1 terms apply – particularly when it chooses terms where Core is uncompensated for a  
2 service nobody denies it performs.

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

5 A. Yes. For example, in a filing made by AT&T affiliate AT&T Wisconsin at the U.S.

6 District Court for the Western District of Wisconsin, AT&T stated:

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

21  
22 **Q. IS THE ISP REMAND ORDER APPLICABLE TO THE AT&T INDIRECT**  
23 **TRAFFIC?**

24 A. No. AT&T states in its Answer that Core’s Complaint is “not consistent with the FCC’s  
25 *ISP Remand Order.*” AT&T’s Amended Answer, at 4. But the *ISP Remand Order* does  
26 not apply to this case because both AT&T and Core are CLECs. The *ISP Remand Order*  
27 only applies to ISP-bound traffic exchanged between incumbent LECs, like Verizon, and  
28 CLECs. AT&T has already made this argument in another forum, and lost. In a complaint  
29 case filed by CLEC Pac-West Telecom against AT&T Communications of California, the  
30 California Public Utilities Commission ruled that, as a CLEC, AT&T could not invoke  
31 the *ISP Remand Order*’s interim pricing regime in order to avoid making payments due

1 under Pac-West's intrastate termination tariff. With respect to AT&T's attempt to invoke  
2 the interim pricing regime, the California Commission found:

3 [W]e believe that if the FCC had intended the interim compensation plan  
4 to cover exchanges of ISP-bound traffic between CLECs, the FCC would  
5 have explicitly addressed the obligations of a CLEC that wished to invoke  
6 the New Markets Rule. The fact that the FCC remained silent on this  
7 question, coupled with the repeated references in ¶ 89 to ILECs, supports  
8 Pac-West's argument that the interim compensation plan (including the  
9 New Markets Rule of ¶ 81) is intended to apply only to exchanges of ISP-  
10 bound traffic between ILECs and CLECs. Decision, *Pac-West Telecomm,*  
11 *Inc. v. AT&T Communications of California, Inc.*, Cal. P.U.C. Case 04-  
12 10-024, Decision 06-06-055, 2006 WL 1910202 (Cal.P.U.C.), at \*11 (June  
13 29 2006).

14  
15 Accordingly, the California Commission found that AT&T was liable to pay Pac-West at  
16 the rate set forth in its intrastate traffic termination tariff,<sup>1</sup> which is exactly the result Core  
17 seeks in this case.

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

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

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<sup>1</sup> *Id.*, at \*15.

1 of Core and other carriers. The only logical alternative to Core's position is that section  
2 251(b)(5) reciprocal compensation preempted the intrastate access regime from its very  
3 enactment with the Telecommunications Act of 1996. In that case, reciprocal  
4 compensation applied automatically from the signing of the Act forward, and LECs'  
5 obligation to pay reciprocal compensation has been in place all this time.

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

#### 16 Remedies

17  
18 **Q. PLEASE DESCRIBE GENERALLY HOW THE COMMISSION, IN CORE'S**  
19 **VIEW, SHOULD RESOLVE THIS CASE?**

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

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

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

16           Finally, Core requests that the Commission consider special measures to  
17 reprimand AT&T's conduct. It may be legitimate to haggle over the particular rate which  
18 should apply to a given set of traffic, such as the CIC 0292 AT&T Indirect Traffic. But to  
19 consistently deny that any rate applies to 406,102,334 MOUs is simply not good faith  
20 conduct. Without some sanction, an originating carrier like AT&T will always be  
21 tempted to simply deny payment. Should the terminating carrier sue, AT&T can then  
22 choose to settle, or drag out the litigation as long as possible, hoping the other party will  
23 simply give up. Therefore, Core respectfully requests that the Commission grant special

1 relief in the form of civil penalties and the cost of Core's collection efforts, including  
2 attorney's fees in this case.

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

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

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

23 **CIC 0288**

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

1 A. Only the issue of interest. Shortly after the prehearing conference in this case, AT&T  
2 paid all of Core's outstanding charges for the intrastate AT&T Indirect Traffic originating  
3 under CIC 0288. Some of those charges had been outstanding since the early part of  
4 2008. Core then sent AT&T an accounting of interest, or late payment, charges due Core  
5 pursuant to the terms of the Tariff. The total amount of interest due at that time was  
6 \$11,466.88. Core has inquired several times about the status of this amount, which is now  
7 itself past due, but AT&T has never provided an official response. However, unless  
8 AT&T has some coherent objection, it should pay this outstanding interest immediately.

9 Q. **DOES THIS CONCLUDE YOUR TESTIMONY?**

10 A. Yes.

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DEC 8 2009

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**ATTACHMENT C**



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December 1, 2009

**Via Email and First Class Mail**

Michelle Painter, Esq.  
Painter Law Firm  
13017 Dunhill Dr.  
Fairfax, VA 22030

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

Dear Michelle:

On behalf of Core Communications, Inc., ("Core") enclosed please find its Responses to AT&T Interrogatories, Set III with regard to the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service.

Sincerely yours,

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Cert. of Service, w/enc.  
James McNulty, Cert. of Service only

**CERTIFICATE OF SERVICE**

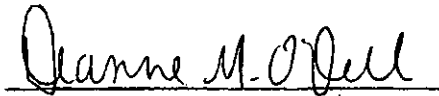
I hereby certify that this day I served a copy of Core's Responses to AT&T's Interrogatories, Set III upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54

**Via Email and First Class Mail**

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Dated: December 1, 2009



Deanne M. O'Dell

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

**Interrogatory AT&T-Core-3-3:** With respect to Core's response to AT&T-2-13, provide the following information:

- (a) On what date did Core begin providing service to each of the 5 non-ISP customers?
- (b) Describe the exact service provided to each of the 5 non-ISP customers.
- (c) Are any of the non-ISP customers VoIP providers, and if so, how many of the 5 are VoIP providers?
- (d) Is the service Core provides to the 5 non-ISP customers VoIP service? Provide a response for each of the customers.
- (e) Is the service provided to the 5 non-ISP customers inbound, outbound or both. Provide a response for each of the customers.

**Response:**

- (a) Core does not keep records that would allow a determination of the date on which Core began providing service to any one customer or set of customers. Core has service agreements with non-ISP customers that date back to 2004. However, those agreements do not require or specify that service commence on a particular date. As a practical matter, Core did not begin to bill any non-ISP customers pursuant to service agreements until September, 2009, because prior to that date, the actual usage was minimal.
- (b) The service Core designed for use by VOIP carriers and other session initiation protocol ("SIP")-based service providers is described in Core's Pa. P.U.C. Tariff No. 1, and is called "Superport" service.
- (c) Core does not have sufficient information to answer this question. Superport is designed for use by VOIP carriers and other enhanced service providers who use SIP and need access to the PSTN. However, Core does not monitor the precise purposes or business plans of our individual customers.
- (d) No.
- (e) Inbound.

Response provided by: Bret Mingo

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

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

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

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

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

**Response:**

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

Response provided by:

Bret Mingo

400 NORTH ST  
PUBLIC UTILITY COMMISSION

External Carrier: UPS



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Do not u:

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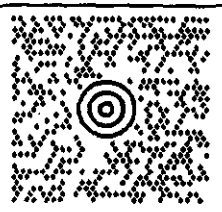
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SHIP TO: JAMES J. MCNULTY SECRETARY  
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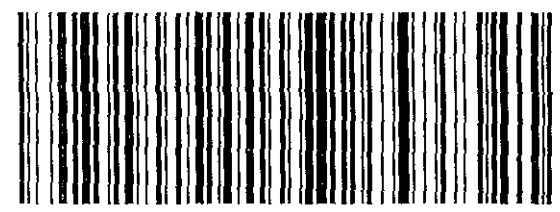


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