

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CORE COMMUNICATIONS, INC.
BRIEF IN SUPPORT OF PETITION FOR INTERLOCUTORY COMMISSION REVIEW
AND ANSWER TO A MATERIAL QUESTION**

Deanne M. O'Dell, Esquire
Attorney ID No. 81064
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
P.O. Box 1248
Harrisburg, PA 17108-1248
Phone: (717) 237-7160
Fax: (717) 237-6019
dodell@eckertseamans.com

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I. MATERIAL QUESTION AND SUGGESTED ANSWER

Pursuant to 52 Pa. Code § 5.302(b), Core Communications, Inc. (“Core”) files this brief supporting its March 5, 2009 Petition for Interlocutory Commission Review and Answer to a Material Question (“Petition”) and addressing the merits of the question Core raised therein.

In its Petition, Core requests the Commission answer this question:

Does the Commission have subject matter jurisdiction to adjudicate a formal complaint by one Pennsylvania CLEC against another Pennsylvania CLEC for traffic that originates and terminates in Pennsylvania and is terminated to a CLEC’s ISP end users?

Core suggests the following answer:

Yes. The Commission has subject matter jurisdiction over all carriers, services and facilities provided or located in Pennsylvania. There has been no federal preemption of the Commission’s authority to address compensation issues regarding locally-dialed ISP-bound traffic exchanged between two CLECs.

II. INTRODUCTION

The crux of this case is an attempt by an originating carrier to take a “free ride” on the network of a terminating carrier—who is forced to incur uncompensated costs to terminate traffic—by proffering strained interpretations of the law to argue that this Commission has no authority to order it to pay anything. Filing its Motion to Dismiss a mere two months before evidentiary hearings were scheduled to occur, AT&T Pennsylvania, LLC (“AT&T”) and TCG Pittsburgh, Inc. (“TCG”) (collectively, “AT&T”) successfully turned the previously scheduled evidentiary hearings into an oral argument and effectuated a stay of the proceedings which remains in place pending resolution of these two material question petitions. The practical effect of this is that Core continues to remain uncompensated for some 400,000,000-plus minutes of use (“MOUs”) of telecommunications traffic generated by residential end users of AT&T and terminated by Core to its Internet service provider (“ISP”) customers (the “AT&T Indirect Traffic”) in Pennsylvania. As if that were not enough, however, AT&T continues to send Core

traffic which Core must terminate and for which AT&T continues to refuse to pay anything.

Unlike a traditional commercial setting where a provider of a service can simply stop providing the service if it does not get paid, Core is without recourse because it cannot simply stop accepting AT&T's traffic.¹ Instead, Core is forced to continue to terminate the traffic, at its own cost, and seek compensation through litigation as it has done here. And due to AT&T's utter intransigence, Core's attempts to negotiate a reasonable payment arrangement have been abysmally unsuccessful.

Core initially invoiced AT&T for the termination of the AT&T Indirect Traffic at the rates set forth in Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4.² Later, after AT&T disputed application of the tariff rates on the basis that the AT&T Indirect Traffic is "local" in nature, Core offered to enter into a traffic exchange agreement ("TEA") with AT&T which would set the rate for all locally-dialed traffic between AT&T and Core at the Commission-approved tandem termination rate as determined by using the total long-run incremental cost model ("TELRIC"), which provides for recovery of joint and common costs.³ The Commission's TELRIC tandem termination rate is considerably lower than the intrastate access rates set forth in Core's tariff.⁴ Core repeated this offer in September, 2009 when it filed its Direct Testimony in this case.⁵ AT&T, however, refuses to acknowledge any responsibility to

¹ See, e.g. Declaratory Ruling & Order, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers – Call Blocking by Carriers*, WC Docket No. 07-135, 22 FCC Rcd. 11629, 2007 WL 18880323 (F.C.C.)(June 28, 2007) at ¶¶ 5-6; and, *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114, Opinion and Order entered Aug. 8, 2020 at 9 ("all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.")(emphasis added).

² See, **Tab 1** (Core Statement No. 1) at 10.

³ *Id.*, at 13, 22-23.

⁴ See, **Tab 2** (Comparison of Proposed Rates and Resulting Amounts Due).

⁵ **Tab 1** (Core Statement No. 1) at 13.

ever compensate Core for termination of the AT&T Indirect Traffic on Core's extensive facilities-based network in Pennsylvania.⁶

The AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that originate and terminate in Pennsylvania, as determined by comparing the calling party's phone number with the called party's phone number.⁷ This information is derived from Carrier Access Billing System ("CABS") call detail records generated by Verizon's tandem switches.⁸ If the calling party's number is associated with a rate center in one state, and the called party's number is associated with a rate center in a different state, the call is rated as interstate.⁹ Notably, AT&T has sent Core some interstate traffic, as identified by this same method, and AT&T has paid Core's invoices for this interstate traffic at the rates set forth in Core's interstate access tariff filed at the FCC.¹⁰ Further, AT&T has sent Core some intrastate interexchange traffic, again as determined by the call detail records, and AT&T has paid Core's invoices at the rates set forth in Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4.

The AT&T Indirect Traffic further consists of locally dialed calls placed by AT&T's local service customers in order to reach Core's customers. A "locally dialed" call is one for which the NPA-NXX of the calling party and the called party are associated with a common local calling area, as defined in the local exchange service tariffs of incumbent LECs (primarily, Verizon), and mirrored in the local exchange service tariff of competitive LECs (like AT&T and Core).¹¹ Locally dialed calls are placed by entering a ten digit telephone number (NPA-NXX-XXXX) into the telephone or modem or other device placing the call.

⁶ See, **Tab 3** Core response to AT&T Interrogatory 5-12 (served February 1, 2010).

⁷ **Tab 1** (Core Statement No. 1) at 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, at 4-5.

The total volume Core has terminated on behalf of AT&T is significant, and constitutes a substantial use of Core's network. From June, 2004 through September, 2009, AT&T end users using the TCG Pittsburgh network (CIC 0292) originated 406,102,334 minutes of use for termination on Core's network, for which AT&T has compensated Core exactly \$0.00.¹² Despite this high volume of traffic, AT&T does not directly interconnect with Core, rather it uses the tandem switch network of Verizon Pennsylvania, Inc. ("Verizon") to interconnect indirectly with Core.¹³ Pursuant to its interconnection agreement with Verizon, AT&T compensates Verizon for providing a transiting function for the AT&T Indirect Traffic; but it compensates Core nothing.¹⁴ Notably, AT&T's agreement with Verizon requires AT&T to enter into reciprocal compensation arrangements with third parties to whom AT&T sends indirect traffic; but AT&T has not done so.¹⁵ As AT&T's behavior clearly shows, it will simply continue to engage in its brand of lawless gamesmanship until ordered to do otherwise.

III. ARGUMENT

A. **The Commission Has Subject Matter Jurisdiction To Address Intercarrier Compensation Issues For The Termination Of Intrastate Traffic Such As The AT&T Indirect Traffic**

In its Motion to Dismiss, AT&T argued that the Commission has no subject matter jurisdiction to address the issues arising out of Core's formal complaint in this case.¹⁶ This is plainly wrong. There can be no legitimate dispute that the Commission has subject matter jurisdiction to address intercarrier compensation issues for intrastate telecommunications traffic—including the AT&T Indirect Traffic—pursuant to the Commission's enabling statute.¹⁷

¹² See, **Tab 1**, (Core Statement No. 1), Exh. BLM-1 (Chart of Minutes of Use & Amounts in Dispute).

¹³ See, *Id.*, Exh. BLM-2 (Diagram of Indirect Interconnection).

¹⁴ *Id.* at 6.

¹⁵ *Id.*, at 6-7.

¹⁶ AT&T Motion to Dismiss Formal Complaint of Core Communications, Inc., dated December 8, 2009 at 8-10 ("AT&T Motion to Dismiss").

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

The Commission has jurisdiction over the local exchange facilities and services of AT&T and Core, both of which are facilities-based CLECs certificated by the Commission to provide local exchange telecommunications services in Pennsylvania. There is no dispute that AT&T provides Commission-regulated local exchange services to its residential and business end users, which enable those end users to place “local” calls to Core’s ISP end users. And there is no dispute that Core provides local exchange services to its ISP end users.¹⁸ Finally, there is no dispute that AT&T, Core and Verizon, operate the switches and other facilities used to support the AT&T Indirect Traffic—including the termination function supplied by Core—within the state of Pennsylvania.

In its Motion to Dismiss, AT&T admits that the AT&T Indirect Traffic all originates and terminates within the same Local Access and Transport Area (“LATA”) and is, therefore, intraLATA traffic.¹⁹ Under federal law, a call is intrastate if it originates and terminates in the same state.²⁰ IntraLATA traffic is by definition intrastate telecommunications.²¹ And the Fifth, Sixth and Tenth Circuits have confirmed that calls to ISPs terminate at the ISP, and that such calls are therefore intrastate.²² The Commission clearly has jurisdiction over intrastate telecommunications.²³ The Commission also has specific jurisdiction to set “just and

¹⁸ Opinion and Order, *Application Of Core Communications Inc. For Authority To Amend Its Existing Certificate Of Public Convenience And Necessity And To Expand Core’s Pennsylvania Operations To Include The Provision Of Competitive Residential And Business Local Exchange Telecommunications Services Throughout The Commonwealth Of Pennsylvania*, Docket No. A-310922F0002, AmA, at 26 (Dec. 4, 2006).

¹⁹ AT&T Motion to Dismiss, at 10-11.

²⁰ Declaratory Ruling, *In the Matter of Thrifty Call, Inc.*, CCB/CPD File No. 01-17, 19 FCC Red. 22240, 22246, 2004 WL 2578216 (F.C.C.)(Nov. 12, 2004), at ¶15. (“[A] call is intrastate if it originates and terminates in the same state.”).

²¹ Neither party contends that the disputed traffic includes any intraLATA, interstate traffic.

²² See *SW. Bell Tel. Co. v. Brooks Fiber Commc’ns of Okla. Inc.*, 235 F.3d 493, 501 (10th Cir. 2000); *Sw. Bell Tel. Co. v. Pub. Util. Comm. of Tex.*, 208 F.3d 475, 487 (5th Cir. 2000) (“[t]he conclusion that modem calls terminate locally for purposes of compensation is both well-reasoned and supported by substantial evidence”); *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 437 (6th Cir. 2003).

²³ 66 Pa. C.S. § 102, 3011, *et. seq.*

reasonable” rates for all services offered by the CLECs it certifies.²⁴ The Commission also has jurisdiction to enforce the plain terms of Core’s Pa. P.U.C. Tariff No. 4. Complementing this historic state ratemaking authority, the Commission has additional jurisdiction to establish cost-based TELRIC rates for termination of telecommunications pursuant to the federal Telecommunications Act of 1996 (“TA-96”).²⁵ Accordingly, the Commission clearly has several overlapping sources of subject matter jurisdiction to address the issues arising from Core’s formal complaint. Indeed, AT&T itself previously admitted that “the Pennsylvania Commission has jurisdiction over the subject matter of this Complaint...”²⁶ even while acknowledging, at the same time, that “[t]he traffic in dispute is all local traffic (and virtually all local ISP-bound traffic).”²⁷

In its recent decision addressing a complaint filed by Palmerton Telephone Company, the Commission asserted its subject matter jurisdiction over intercarrier compensation owed by one Pennsylvania local exchange carrier to another, in the face of the same type of argument that AT&T raises here.²⁸ In Palmerton, Global NAPs argued that the FCC had declared all voice-over-Internet Protocol (“VoIP”) traffic to be interstate in nature, thus eliminating any possibility of state commission subject matter jurisdiction, just as AT&T here argues the FCC has declared all ISP-bound traffic to exclusively interstate. The Commission rejected that argument, finding that its jurisdiction remained despite the partial preemption of certain aspects of VOIP regulation by the FCC. The Commission reasoned that:

Costs indeed attach to the termination of any type of traffic that Palmerton receives, and such costs do not “magically disappear” when the traffic includes

²⁴ 66 Pa. C.S. § 1301.

²⁵ 47 U.S.C. §§ 251(b)(5) and 252(d)(2).

²⁶ AT&T’s Am. Answer dated June 18, 2009 at 19.

²⁷ *Id.* at 4.

²⁸ *Palmerton Telephone Co v. Global NAPs South, Inc., et. al.*, Docket No. C-2009-2093336, Motion of Chairman James H. Cawley adopted February 11, 2010 (final order pending) (“*Palmerton*”).

VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, Palmerton deserves compensation for the traffic that it terminates at its facilities. Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law.²⁹

Similarly, AT&T's indirect transmission of traffic by way of Verizon's tandems to Core in Pennsylvania constitutes a service that "falls squarely within this Commission's jurisdiction," as is Core's service of terminating this traffic for AT&T's benefit. Indeed, it is no surprise that AT&T is hostile to the Commission's decision in *Palmerton*, as it must realize that the Commission's reasoning there is fatal to its jurisdictional arguments in this case.³⁰

Moreover, multiple FCC and related court rulings with respect to ISP-bound traffic indicate that state commissions retain subject matter jurisdiction over compensation issues, unless and until and only to the extent that the FCC steps in and preempts. In the 2001 *ISP Remand Order*, the FCC recounted the history of the ISP-bound traffic issue, starting with its own 1999 *ISP Declaratory Ruling*:

Despite finding that ISP-bound traffic is largely interstate, the Commission concluded [in the *ISP Declaratory Ruling*] that it had not yet established a federal rule to govern intercarrier compensation for this traffic. The Commission found that... nothing in the statute or our rules prohibits state commissions from determining in their arbitrations that reciprocal compensation for this traffic is appropriate, so long as there is no conflict with governing federal law.³¹

The FCC then clarified that:

This Order [*i.e.*, the *ISP Remand Order*] does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier

²⁹ *Palmerton*, Chairman Cawley Motion at 15.

³⁰ See, *AT&T's Petition for Interlocutory Review and Answer to a Material Question*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239, at 2 n.3 (Mar. 5, 2009). Core is responding to AT&T's Material Question, including its claim that the Commission does not have jurisdiction over VoIP services in a separate brief.

³¹ Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 16 FCC Rcd. 9151, 2001 WL 455869 at ¶ 15 (F.C.C.)(Apr. 27, 2001)(“*ISP Remand Order*”).

compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.³²

Of course the Commission's response to the Material Question posed by Core depends on what the FCC meant by "this issue," and the extent to which the FCC preempted state commission's historic subject matter jurisdiction over all traffic that originates and terminates within a state. But these passages reveal the FCC's presumption that, absent its own intervention, state commissions have jurisdiction over compensation for ISP-bound traffic.

Even more telling is the FCC's statement regarding "CLEC-to-CLEC" traffic in its *Unified Intercarrier Compensation NPRM*, issued on the same day as the *ISP Remand Order*.

There, the FCC noted that:

In issuing this *NPRM*, we do not expect that we will extend intercarrier compensation rules to Internet backbones, on which we do not currently impose rate-making regulation. Neither do we expect to extend compensation rules to other interconnection arrangements that are not currently subject to rate regulation and that do not exhibit symptoms of market failure.

* * *

Thus, we do not contemplate a need to adopt new rules governing CLEC-to-CLEC, IXC-to-IXC, CMRS-to-CMRS or CMRS-to-IXC arrangements.³³

In this statement, the FCC again revealed its assumption that absent federal intervention, state commission authority can apply to a wide range of traffic types, including "CLEC-to-CLEC" traffic, which of course, is precisely the type of traffic that is at issue in this case.

B. The Commission Has Never Been Preempted From Addressing Compensation for the Termination of CLEC-to-CLEC ISP-Bound Traffic

In its Motion to Dismiss, AT&T argued that the *ISP Remand Order* preempted state commission authority to address intercarrier compensation for ISP-bound traffic that is

³² *Id.* at ¶ 82

³³ Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610, 9612, at ¶ 2 and n. 2 (FCC 2001) ("*Unified Intercarrier Compensation NPRM*")

originated by one CLEC and terminated to another CLEC in Pennsylvania.³⁴ As the party claiming preemption, AT&T has the burden of proof and must show that there is “a clear indication that an agency intends to preempt state regulation.”³⁵ While “[p]re-emption may result . . . from action taken by . . . a federal agency acting within the scope of its congressionally delegated authority,”³⁶ the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption.³⁷ As the Commission acknowledged in Palmerton, the First Circuit has found that the *ISP Remand Order* does not preempt state commission jurisdiction over every conceivable category of ISP-bound traffic, but rather only that traffic that is explicitly addressed there.³⁸ AT&T has not met this burden of proof as there is no “clear indication” or express intention stated by the FCC to preempt the power of the Commission to address intercarrier compensation issues between CLECs regarding ISP-bound traffic originating and terminating on an intrastate basis.

AT&T’s reading of the *ISP Remand Order* is simply too broad. While the FCC did affirmatively act: (1) to declare that the ISP-bound traffic at issue in the *ISP Remand Order* is jurisdictionally interstate; (2) to set rules for the compensation for that traffic; and, (3) to specifically preempt state commissions from making different compensation rules for that traffic, the *ISP Remand Order* involved ILEC-to-CLEC traffic only. The issue in this case—the compensation applicable to CLEC-to-CLEC ISP-bound traffic—has never been squarely before the FCC in the *ISP Remand Order* or otherwise, and the FCC has promulgated no rules for such traffic. In fact, the FCC itself has recognized—on the same day that it released the *ISP Remand*

³⁴ AT&T Motion to Dismiss at 16-19.

³⁵ *Hillsborough County Automated Med. Labs., Inc.* 471 U.S. 707 (1985).

³⁶ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

³⁷ See *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100 n.7 (2d Cir. 2006) (“a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.”)

³⁸ *Palmerton*, at 9.

Order—that it has never issued rules specifically governing “CLEC-to-CLEC” traffic.³⁹ And as demonstrated in the previous section of this brief, absent specific FCC intervention, this Commission’s historic regulatory authority over intercarrier compensation issues remains firmly in place.

As explained in Core’s Answer to AT&T’s Motion to Dismiss, the entire premise of the *ISP Remand Order* and resulting rules is the relationship between *incumbent* LECs and *competitive* LECs.⁴⁰ This ILEC-CLEC relationship is emphasized throughout the *ISP Remand Order* as well as subsequent related orders and cases.⁴¹ The actual compensation rules set forth in the *ISP Remand Order* clearly pertain—exclusively—to an ILEC-CLEC relationship. The order’s provisions for rate caps, growth caps, the 3:1 presumption used to identify ISP-bound traffic, and the mirroring rule, are implemented through the interconnection agreement (“ICA”) process⁴² which, under TA-96, a CLEC may invoke *only against an ILEC*.⁴³ Under the mirroring rule, the FCC also made clear that *only an ILEC* may “opt-in” to the interim pricing

³⁹ *Unified Intercarrier Compensation NPRM*, at ¶ 2 and n. 3.

⁴⁰ See **Tab 4** (Answer of Core to AT&T Motion to Dismiss dated December 28, 2009) at 10-15.

⁴¹ Egs., *ISP Remand Order*, at ¶ 89 (“It would be unwise as a policy matter, and patently unfair, to allow *incumbent LECs* to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed.”); *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order*, WC Docket No. 03-171, 19 FCC Rcd. 20179, 2004 WL 2341235 at ¶ 8 (F.C.C.)(Oct. 18, 2004)(“The Commission also determined that the rate caps for ISP-bound traffic (or such lower rates as had been imposed by state commissions for the exchange of ISP-bound traffic) should apply only if an *incumbent LEC* offered to exchange all traffic subject to section 251(b)(5) at the same rates... The Commission adopted this “mirroring” rule to ensure that *incumbent LECs* paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic.”); *Id.*, at ¶ 9 (“In this situation, if an *incumbent LEC* has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period (the “new markets” rule).” *In re Core Communications, Inc.*, 455 F.3d 267, 270 (2007)(“If ISP-bound traffic were governed by § 251(b)(5), then reciprocal compensation arrangements would be required for the *ILEC-to-CLEC* hand-off described above, and *ILECs* would be required to compensate CLECs for completing their customers' calls to ISPs.. ”); and *id.*, at 273 (“As an adjunct to the rate caps, the Commission established a “mirroring rule,” which provided that the rate caps on ISP-bound traffic would apply only if the *ILEC* also offered to charge the CLEC the same capped rate to terminate local traffic that originated on the CLEC's network.”)(Emphases added).

⁴² *ISP Remand Order*, at ¶¶ 82, 89.

⁴³ 47 U.S.C. § 252.

regime, on a state-by-state basis.⁴⁴ Importantly, if the ILEC does not opt in, previous state commission rulings regarding ISP-bound traffic will continue to apply to the ISP-bound traffic that the ILEC originates.⁴⁵ The *ISP Remand Order* says nothing about how a CLEC such as AT&T would opt-in or otherwise avail itself of the interim compensation regime.⁴⁶ Based on all of these indications, the only federal court to address the issue of CLEC-to-CLEC, ISP-bound traffic found that the *ISP Remand Order* does not apply when two CLECs are exchanging ISP-bound traffic.⁴⁷

In this case, both Core and AT&T are CLECs. Thus, the *ISP Remand Order* is not operable and it does not preempt the Commission's jurisdiction over Core's formal complaint. AT&T's claim that "regulatory arbitrage victimizes ILECs and CLECs alike"⁴⁸ is likewise laughable, considering AT&T itself collects a rate of \$0.002814/MOU (four times the rate set forth in the *ISP Remand Order*) for its own termination of ISP-bound traffic.⁴⁹ Likewise, the Commission orders cited by AT&T as support that the Commission itself determined it was preempted by the *ISP Remand Order* are not on point because they both address interconnection arbitrations between an ILEC and a CLEC.⁵⁰ In these interconnection arbitration cases, unlike here, the FCC's ISP cases were relevant and directly on point. Similarly, AT&T's attempt to cite

⁴⁴ *ISP Remand Order*, at ¶ 89 ("Because we are concerned about the superior bargaining power of *incumbent LECs*, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an *incumbent LEC* offers to exchange all traffic subject to section 251(b)(5) at the same rate. . .")(Emphases added).

⁴⁵ *Id.*

⁴⁶ Nor does the *ISP Remand Order* explain what happens if one CLEC opts in and another CLEC does not.

⁴⁷ See **Tab 4** (Core Answer to AT&T Motion to Dismiss), Exhibit B, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008).

⁴⁸ AT&T Motion to Dismiss, at 22.

⁴⁹ See, **Tab 5** (Core Hearing Exhibit No. 1)

⁵⁰ AT&T Motion to Dismiss, at 8 and 19. AT&T referred to Opinion and Order, *In re Petition of US LEC of Pennsylvania, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, Docket No. A-310814F7000 (Jan. 18, 2006); and, Opinion and Order, *In re Petition of Global NAPS South, Inc. For Arbitration With Verizon Pennsylvania, Inc.*, Docket No. A-310771F7000, (Apr. 21, 2003).

to Core's advocacy during its interconnection arbitration with Embarq, again an ILEC, is irrelevant, in addition to being taken out of context.⁵¹

In *Pac-West*, the United District Court for the Northern District of California ruled that a state commission is not preempted from addressing intercarrier compensation for CLEC-to-CLEC ISP-bound traffic and rejected all of AT&T's theories which have been repeated here.⁵² Pac-West Telecomm, Inc. ("Pac-West"), a CLEC, invoiced AT&T, also a CLEC, for termination charges on traffic that AT&T originated which was bound for ISPs based on Pac-West's intrastate traffic tariff. Similar to its behavior in this case, AT&T refused to pay based and relied on the same preemption arguments it puts forth here. The California Public Utilities Commission ("CPUC") rejected AT&T's arguments concluding that "Pac-West's intrastate tariff is the appropriate source to look to for the compensation that AT& T must pay Pac-West for terminating ISP-bound calls."⁵³

AT&T then appealed the CPUC determination. On appeal, the federal District Court for the Northern District of California found that the issue of CLEC-to-CLEC ISP-bound traffic was not before the FCC when it crafted the *ISP Remand Order* and, therefore, states are not preempted from addressing the issue as it has been presented here.⁵⁴ In its Motion to Dismiss, AT&T offers nothing to distinguish this case from the one it lost before the District Court flippantly stating instead that the case was "wrongly decided" and is currently on appeal.⁵⁵ But

⁵¹ AT&T Motion to Dismiss, at 19 referencing *In re: Petition of Core Communications, Inc.; Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq*, Docket No. A-310922F7002.

⁵² See **Tab 4** (Core Answer to AT&T Motion to Dismiss), Exhibit B, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008).

⁵³ *Id.*, Exhibit A, *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc. et. al.*, 2007 Cal. PUC LEXIS 310, *10 (Cal. PUC 2007).

⁵⁴ *Id.*, Exhibit B at *AT&T Communs.* at *34-*35.

⁵⁵ AT&T Motion to Dismiss, at 22.

the very existence of this decision makes abundantly clear that there is no “express” preemption, otherwise AT&T’s arguments in California would have been accepted.

C. In Order #6, ALJ Jones Erroneously Relied on the D.C. Circuit’s Opinion in *Core v. FCC* As Setting Forth a Novel Application of the “End-to-End Analysis”

In ruling on AT&T’s Motion to Dismiss, ALJ Jones concluded that “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.”⁵⁶ In reaching her decision, ALJ Jones appears to have concluded that the Commission does have subject matter jurisdiction but that it is preempted upon application of the end-to-end analysis of the telecommunications service at issue that she felt compelled to apply based on a recent D.C. Circuit decision addressing the legal foundations of the *ISP Remand Order*.⁵⁷ There are several flaws with this analysis.

First, nothing in the DC Circuit’s opinion indicates that states are without subject matter jurisdiction to adjudicate compensation issues related to CLEC-to-CLEC ISP-bound traffic—because that traffic was never subject to the *ISP Remand Order*. As discussed herein, and as the *Pac-West* court found, the *ISP Remand Order* never applied nor was intended to apply to CLEC-to-CLEC ISP-bound traffic. Therefore, reliance on the D.C. Circuit opinion to address the questions in this case is fundamentally misplaced.

Second, as set forth herein, ALJ Jones failed to acknowledge that a presumption of state authority remains unless there is some clear and express showing of an attempt by the FCC to preempt that authority. The DC Circuit’s opinion, as recognized by ALJ Jones, acknowledges

⁵⁶ Order #6 at 13.

⁵⁷ *Id. Core Communs., Inc. v. FCC*, 592 F.3d 139, 144, (D.C. Cir. 2010)(“*Core v. FCC*”).

that there are intrastate components as well as interstate components to ISP-bound traffic.⁵⁸ Yet, in Order #6, ALJ Jones gives no weight to the substantial intrastate component of this traffic which provides a firm basis for Commission jurisdiction in the absence of federal preemption. The Commission's analysis in *Palmerton* supports Core's position on subject matter jurisdiction in this case. Here, there is indeed "a common carrier engaged in telecommunications services by transporting traffic calls that are not IP-based." Namely, AT&T provides local exchange services to its end users, Core provides local exchange service to its end users, and Core provides intrastate termination of telecommunications to AT&T.

Finally, ALJ Jones acknowledged that the facts of this case "compare with the facts of *Pac-West*."⁵⁹ However, she discounted the on-point *Pac-West* decision by concluding that the DC Circuit's opinion was more recent precedent that, in her opinion, mandated a focus on the interstate nature of the traffic in this case. While ALJ Jones is correct that *Pac-West* predates *Core v. FCC*, that fact is of no import and does not undermine the CPUC's and the District Court's analysis. The "end-to-end analysis" discussed in *Core v. FCC* was first articulated in the FCC's 1999 *Declaratory Ruling*, and later revived in the 2001 *ISP Remand Order*. Indeed, in reaching its finding of no preemption, the *Pac-West* court expressly acknowledged and accounted for the FCC's "end-to-end analysis."⁶⁰ Thus, ALJ Jones was not compelled by *Core v. FCC* to override *Pac-West*, in fact, erred in doing so.

IV. CONCLUSION

For all the reasons set forth herein, Core respectfully requests the Commission answer Core's Material Question in the affirmative, and in so doing, clarify that the Commission has

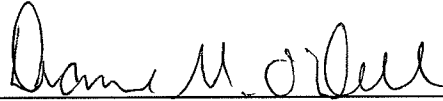
⁵⁸ Order #6 at 12 ("the U.S. Appeals Court states, 'Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls.'")

⁵⁹ *Id.* at 13.

⁶⁰ **Tab 4** (Core Answer to AT&T Motion to Dismiss), Exhibit B, *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 at *5-6 (N.D. Cal. Aug. 12, 2008).

subject matter jurisdiction over all carriers, services and facilities provided or located in Pennsylvania, and that there has been no federal preemption of the Commission's authority to address compensation issues regarding locally-dialed ISP-bound traffic exchanged between two CLECs.

Respectfully submitted,



Deanne M. O'Dell, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
717.255.3744
dodell@eckertseamans.com

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