MAYER • BROWN

Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637

Main Tel +1 312 782 0600
Main Fax +1 312 701 7711
www.mayerbrown.com

Kara K. Gibney
Direct Tel +1 312 701 8350
Direct Fax +1 312 706 8782
kgibney@mayerbrown.com

October 25, 2010

Via Overnight Delivery

Rosemary Chiavetta, 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 PA, LLC, and TCG Pittsburgh, Inc. Docket Nos. C-2009-2108186, C-2009-2108239

Dear Ms. Chiavetta:

Please find enclosed an original and three (3) copies of AT&T's Answer to Core Communications, Inc.'s Motion for Interim Relief for each docket referenced above.

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, with Painter Law Firm, PLLC, in the enclosed self-addressed postage pre-paid envelopes.

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

Very truly yours,

Kara Gibney

Enclosure

cc: Certificate of Service
Office of Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

AT&T'S ANSWER TO CORE COMMUNICATIONS, INC.'S MOTION FOR INTERIM RELIEF

AT&T Communications of PA, LLC and
TCG Pittsburgh

Michelle Painter
PA Bar ID No. 91760
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
painterlawfirm@verizon.net

Theodore A. Livingston
J. Tyson Covey
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
tlivingston@mayerbrown.com
jcovey@mayerbrown.com
kgibney@mayerbrown.com

TABLE OF CONTENTS

Page

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 Answer to Core Communications Inc.'s ("Core") Motion for Interim Relief ("Motion").

INTRODUCTION AND SUMMARY OF ARGUMENT

Core's Motion asks the Commission to do something it has never done before:

- Require a respondent carrier, as a matter of interim relief, before there has been any trial, hearing or briefing on the merits, to pay money to the plaintiff carrier in a case seeking money damages.
- Determine a rate that will apply to past traffic exchanged between carriers, where there is no tariff or contract establishing a rate for such traffic, and impose that new rate retroactively.

Not only would these actions be completely unprecedented, they would also be completely unauthorized and unlawful.

Core's Motion is a brazen effort to bypass a trial on the merits and to collect a substantial amount of money – about $1.5 million – without needing to prove anything. Core's Motion purports to rely on the Commission's September 8, 2010 Opinion and Order. Core takes the position that in that Opinion and Order the Commission determined that AT&T must pay Core for terminating locally dialed, ISP-bound traffic for the entire period January 2004 to the present, and that the sole question remaining in the case is how much AT&T is required to pay. In other words, Core contends that the Commission in its Opinion and Order awarded summary judgment to Core on all liability issues – leaving the only issue to be decided at the scheduled November 18-19 merits hearings the amount of damages due Core.

Of course, the Commission did no such thing; nor was it asked to. All the Commission decided in its Opinion and Order was that it possesses subject matter jurisdiction to hear and adjudicate Core's complaint and that the FCC's *ISP Remand Order*[1] does not preempt the Commission's jurisdiction in this case because the Commission reads that *Order* to apply only to ISP-bound traffic sent by ILECs to CLECs. And that is all that the Commission was asked to decide.[2]

* * *

Core's Motion is flawed for other reasons as well:

1. Core cannot satisfy the requirements for *any* form of interim relief, because all it alleges (and all it can allege) is "pure economic injury, compensable in money."
2. The relief Core seeks is barred by principles of due process. AT&T has a right to have a full hearing on the merits of this case before the Commission can order any payment directly to Core (or even into an escrow account). Core's Motion is a transparent attempt to bypass the already scheduled hearings in this matter and have the Commission pre-judge the merits of the case before being presented with and considering all of the pertinent evidence, legal argument and legal authorities.

[1] *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"*).

[2] Moreover, even if the Opinion and Order were, as Core contends, a liability determination, it still would be improper and unlawful to require AT&T to pay Core money *now*. Bifurcated trials are not uncommon in the judicial system – *i.e.*, liability is determined in a Phase I liability trial and if the plaintiff prevails there damages are determined in a Phase II damages trial. Fed. R. Civ. Proc. 42(b); 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2387-2390 (3d ed.); Pa. R. Civ. Proc. 213. A plaintiff who prevails in a Phase I liability trial cannot begin to collect money from the defendant, however, unless and until it prevails in the Phase II damages trial. We have found no case to the contrary and are confident that Core cannot come forward with any either. To require a defendant to part with money before it has been determined *in a trial* what if anything it owes would violate the most fundamental precepts of due process.

3. The relief Core seeks is barred by its own failure to comply with Pennsylvania law. According to Core, it has been terminating locally dialed, ISP-bound calls originated by AT&T and other Pennsylvania CLECs for over six and a half years. Yet, Core has never filed a tariff establishing a rate for terminating these calls, notwithstanding the explicit requirement found in 66 Pa. C.S.A. § 1302 that the filing of a rate is a prerequisite for charging it. In fact, Core's only intrastate tariff that deals with charges to other carriers – Core's switched access tariff – recognizes that bill-and-keep is *the* appropriate compensation arrangement for local traffic exchanged between CLECs. Because there is no tariffed rate, Core is barred from charging anything for past traffic exchanges.

4. The relief Core seeks is also barred because it would require the Commission to engage in retroactive ratemaking, something the Commission may not do.

5. The relief Core seeks is barred because it would violate 66 Pa. C.S.A. § 1304's prohibition against unreasonably discriminatory rates. Throughout the relevant time period, no other Pennsylvania CLEC has paid Core anything for terminating these sorts of calls, and ILEC Verizon has paid a minute-of-use ("MOU") rate of $.0007.[3] Yet, by its Motion, Core is seeking to impose on AT&T a different – and much higher – rate of either $.002439 per MOU or $.014 per MOU – the latter rate being *twenty times* what Verizon pays and has paid throughout the relevant time period.

* * *

[3] This rate is provided for in an interconnection agreement between Verizon and Core.

The situation in which Core finds itself is entirely of its own making. Core complains that AT&T has engaged in "procedural maneuverings to quash or delay" these proceedings. (Motion at 2).[4] But it is Core that waited more than four years (from January 2004 until March 2008), before even sending a bill to AT&T. And, it is Core that to this day has failed to file a tariff establishing a rate for *any* locally-dialed traffic, even though Core itself claims it has been free to charge for such traffic since the day it started to do business in Pennsylvania. Indeed, Core is and at all relevant times has been statutorily required to file tariffed, nondiscriminatory rates applicable to *all* parties *before* charging explicit rates for any type of traffic, including the traffic at issue here.

STATEMENT OF FACTS

The following facts are undisputed – and indisputable:

1. Beginning in January 2004 and continuing to the present, Core has terminated locally dialed, ISP-bound traffic originated by AT&T.

2. Core has never filed with the Commission a tariff establishing a rate for terminating such locally dialed, ISP-bound traffic.

3. At all relevant times, Core has had on file with the Commission an intrastate switched access tariff which established access rates for the origination and termination of non-local, toll, interexchange traffic. The MOU terminating access rate established therein is $.014.

4. The only mention in that tariff (or, for that matter, in any Core tariff) of "local" traffic is in the definition of "Mutual Traffic Exchange," which the tariff characterizes as "[a] compensation arrangement between certified local exchange service providers where local

[4] Tellingly, Core can point to nothing that AT&T has done that has operated to "quash" or "delay" these proceedings. Its words are empty rhetoric.

exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff, Section 1 at Original Sheet No. 9. This "in kind" compensation is bill-and-keep.[5]

5. At no time during the four plus year period January 2004 through February 2008 did Core submit any bill or bills to AT&T for terminating AT&T originated locally dialed, ISP-bound traffic.

6. Beginning in March 2008, Core sent bills to AT&T seeking payment for the termination of this traffic going back to January 2004. The rate reflected in these bills is $.014 per MOU, the tariffed switched terminating access rate applicable to non-local, toll, interexchange traffic.

7. AT&T has not paid these bills because, among other reasons, they reflect a rate that does not apply to this traffic and because they purport to enforce a tariffed rate that likewise does not apply to this traffic.

8. Throughout the relevant time period (January 2004 to the present), Core has terminated locally dialed, ISP-bound traffic originated by other carriers, including ILEC Verizon and other Pennsylvania CLECs. *None of these other Pennsylvania CLECs has paid Core anything for the termination of this traffic.* And at all such times, ILEC Verizon has paid Core an MOU rate of $.0007 – the rate ceiling prescribed by the FCC for locally dialed, ISP-bound traffic.

9. At all relevant times (January 2004 to the present), AT&T, which is a CLEC, has exchanged local traffic with every other Pennsylvania CLEC exclusively on a bill-and-keep

[5] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 11 FCC Rcd 15499 (CC Docket No. 96-98) (rel. Aug. 8, 1996) at ¶ 1027 ("*First Report and Order*") (referring to the "in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements).")

basis. Accordingly, AT&T does not pay, and throughout the relevant period has not paid, any other CLEC for the termination of AT&T's local traffic in Pennsylvania.

10. On May 19, 2009, Core filed its formal complaint against AT&T, seeking payment for the termination of locally dialed, ISP-bound traffic beginning in January 2004 at the tariffed switched access terminating rate of $.014 per MOU.

11. Core made clear in its prefiled testimony that all of the traffic at issue is locally dialed, ISP-bound traffic. Acting on this admission, AT&T on December 8, 2009 filed a motion to dismiss based on AT&T's contention that the Commission does not have subject matter jurisdiction over ISP-bound traffic because it is jurisdictionally interstate, and that the Commission lacked authority to adjudicate Core's complaint because the FCC had explicitly preempted state commission authority to set rates for locally dialed, ISP-bound calls in the *ISP Remand Order*.

12. On February 26, 2010, the presiding ALJ issued Order #6, granting, in part, AT&T's Motion to Dismiss. ALJ Jones found that the Commission lacks subject matter jurisdiction to adjudicate Core's complaint to the extent it relates to locally dialed, ISP-bound traffic.

13. On March 5, 2010, Core filed a Petition for Interlocutory Review and Answer to Material Question. Core's Material Question and Suggested Answer were: "**Question:** Does the Commission have subject matter jurisdiction to adjudicate a formal complaint by one Pennsylvania Competitive Local Exchange Carrier (CLEC) against another Pennsylvania CLEC for traffic that originates and terminates in Pennsylvania and is terminated to the CLEC's internet Service Provider (ISP) end users? **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 exchange between two CLECs."

14. On September 8, 2010, the Commission issued its Opinion and Order answering Core's material question in the affirmative, thereby asserting jurisdiction over this dispute.

15. Core filed its Motion for Interim Relief, which is the subject of this answer, on October 5, 2010. In its Motion, Core requests that AT&T be directed to pay Core (within ten days of an order granting the relief requested) $1,425,512.38. All but about $16,000.00 of this requested amount is based on the termination of locally dialed, ISP-bound calls. The amount attributable to this traffic is derived by multiplying all terminating minutes during the period January 2004 through August 31, 2010 by an MOU rate of $.002439 (which Core represents to be the Commission-approved tandem-based rate tariffed by Verizon). See Motion, Attachment A. In addition, Core requests that AT&T be directed to pay $.002439 per MOU for all AT&T originated locally dialed, ISP-bound calls terminated by Core after August 31, 2010. (In the alternative, Core requests that AT&T be required to place the $1,425,512.38 in an escrow account and to pay Core $.014 per MOU (the tariffed switched access terminating rate) for such calls terminated after August 31, 2010.)

ARGUMENT

A. The September 8 Opinion And Order Determined Only That The Commission Has The Power to Hear and Adjudicate Core's Complaint; It Did Not Determine The Merits of That Complaint.

Core claims that the Commission "has conclusively determined the key issue in dispute," which Core characterizes as "whether AT&T has a legally justifiable reason to pay Core $0 for Core's termination" of locally dialed, ISP-bound traffic originated by AT&T during the period January 2004 to date. Core contends that the Commission ruled that there is no legally justifiable reason not to pay Core "something" for that entire period, and that the "only issue that

remains" for the ALJ to decide is "the specific amount owed by AT&T to Core." Motion at 4. In other words, according to Core, the Commission has awarded to Core partial summary judgment as to liability and has stripped AT&T of its right to present a liability defense on the merits.

Core is wrong. The Commission in its September 8 Opinion and Order did not "conclusively determine" AT&T's liability; nor was it asked to. The Commission was asked to answer a specific material question that dealt solely with the issue of whether the Commission had the *jurisdictional power* to hear and decide Core's complaint.

The Commission did not have before it either the facts or the legal arguments and authorities relating to the merits that AT&T plans to present at the hearings scheduled for November 18 and 19. Accordingly, the Commission could not have addressed and resolved AT&T's ultimate liability. Among other things, the Commission did not address and therefore could not have resolved any of the following issues:

1. Whether Core, having waited more than four years (from January 2004, when, according to Core, it began terminating locally dialed, ISP-bound calls placed by AT&T customers, until March 2008), may back bill for the entire four plus year period, consistent with Pennsylvania law?
2. Whether Core may bill anything for past traffic exchanges, where it has not filed a tariff establishing a rate for such exchanges, notwithstanding that it is and at all relevant times has been statutorily required to file a tariff before billing another carrier in the absence of a mutual agreement?
3. Whether Core is barred from back billing for past traffic exchanges as a result of its own failure to comply with Pennsylvania law, namely, 66 Pa. C.S.A. § 1302,

which requires that "every public utility . . . file with the commission . . . tariffs showing all rates established by it and collected and enforced, or to be collected and enforced, within the jurisdiction of the commission"?

4. Whether the Commission, at Core's request, can establish a new rate today and apply it retroactively over the past six and a half years, consistent with the prohibition on retroactive ratemaking?

5. Whether Core may, consistent with the prohibition on discriminatory rates prescribed by 66 Pa. C.S.A. § 1304, charge AT&T any rate for terminating locally dialed, ISP-bound traffic, when no other Pennsylvania CLEC had paid Core anything for terminating such traffic, and where Core has not even attempted to bill the vast majority of such CLECs for terminating such traffic?

6. Whether Core may, consistent with the prohibition on discriminatory rates prescribed by 66 Pa. C.S.A. § 1304, charge AT&T a rate greater than $.0007 per MOU for terminating locally dialed, ISP-bound traffic, when at all relevant times it has been paid by ILEC Verizon $.0007 per MOU for terminating such traffic?

Core attempts to sidestep all this by pretending that the Commission determined that AT&T's only defense was its reliance on the *ISP Remand Order*. Core does this by mischaracterizing, badly, what the Commission actually said. Core (Motion at 3) contends that the Commission "determined that AT&T's sole reliance" on the *ISP Remand Order* "to justify its non-payment 'is misplaced.'" But this is what the Opinion and Order really says: "Compensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the

ISP Remand Order, and reliance on that order to resolve the *jurisdictional* issue in this case is misplaced."[6] Opinion and Order at 10 (emphasis added).

Clearly, then, the Commission did *not* determine that AT&T only had a single defense and that its reliance on that defense was "misplaced." Rather, the Commission simply determined that the FCC's *ISP Remand Order* did not preempt the Commission from hearing and deciding Core's complaint because, in the Commission's view, that *Order* did not cover locally dialed, ISP-bound calls exchanged between CLECs.[7]

* * *

Based on the foregoing alone it is clear that Core's Motion should be denied, because its sole predicate – the assertion that the Commission has already decided that AT&T is liable to Core and may not present any liability defense at the merits hearings scheduled for November 18 and 19 – is patently false.

B. Under Controlling Pennsylvania Law, Core Is Not Entitled To Any Form of Interim Relief

Core purports to have filed its Motion pursuant to 52 Pa. Code § 5.103, which applies generally to "motions." However, Section 5.103 does not authorize the extraordinary interim relief Core is requesting through its Motion. The statutory provision that authorizes such relief

[6] *Given that the only issue before the Commission was whether it had subject matter jurisdiction to even hear this* case, there was absolutely no reason for AT&T to raise the multitude of other reasons why Core is not entitled to the relief it is requesting in this case.

[7] To be clear, AT&T is not conceding here that the Commission's determination regarding this jurisdictional issue is correct. For example, to come to the conclusion described above, the Commission obviously was required to construe the *ISP Remand Order* and determine its meaning and scope. The Commission, however, in an earlier case determined that it lacks the authority to construe and interpret the *ISP Remand Order.* See 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 (PUC Jan. 18, 2006 Order). There, the Commission was confronted with a debate between US LEC and Verizon over the scope of the *ISP Remand Order.* US LEC contended that that *Order* covers both local and VNXX ISP-bound calls while Verizon claimed that it covered only locally dialed, ISP-bound calls. The Commission concluded that because the "*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 parties' dispute. *Id.* at p. 10.

and sets out what the petitioner must show in order to qualify for it is 52 Pa. Code § 3.6. Specifically, Section 3.6(b) requires that a petitioner show (1) that its right to relief is clear, (2) that there is an immediate need for relief, (3) that the failure to grant the relief would result in irreparable harm, and (4) that the requested relief would not injure the public interest. Core's Motion fails even to mention Section 3.6 much less attempt to deal with its prerequisites for interim relief. But Section 3.6 and its requirements cannot be so easily avoided. It is the only statutory provision that authorizes interim relief. And, tellingly, the very authorities on which Core purports to rely, Opinion and Order, *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates,* Docket No. C-2009-2093336 (May 5, 2009) (*"Palmerton"*), and Opinion and Order, *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company, Docket No. C-20028114 (Aug. 8, 2002)* (*"Level 3"*), were filed pursuant to this provision.[8]

It is no mystery why Core has seemingly tried to run away from Section 3.6(b): Core cannot begin to satisfy its requirements.[9] There is no "immediate need for relief" (particularly where Core itself for more than four years did not bill for the termination of locally dialed calls and for more than seven years has failed to file a tariff giving notice to other CLECs that it intends to seek compensation on a basis other than bill-and-keep); nor can Core claim any "irreparable harm" – because the only thing Core has alleged, or could allege, is a "pure

[8] It should also be noted that 52 Pa. Code § 3.6a states that a presiding officer may not issue a decision until a hearing is held on the merits of the petition. Core has not requested that such a hearing be scheduled, but pursuant to the Commission's regulations, such a hearing must be held. In both *Palmerton* and *Level 3*, the presiding officer conducted a hearing before issuing a decision on the request for interim relief.

[9] Even if the Commission were to determine for some reason that 52 Pa. Code §3.6 does not apply here, it is beyond serious debate that granting the extraordinary relief Core is demanding here –asking the Commission to require a party to pay a substantial amount of money before any hearings have been held – would violate AT&T's fundamental right to due process.

economic injury, compensable in money."[10] That, the Commission has held, is insufficient to satisfy Section 3.6(b)'s third requirement. See *Palmerton* at p. 8.

Moreover, Core does not have a "clear" "right to relief." As we discuss herein, Core's requested relief is barred by, among other things, its own failure to comply with Pennsylvania law; by the prohibition on retroactive ratemaking; and by the statutory ban on discriminatory rates.[11]

Core cites and relies extensively on *Palmerton* and *Level 3* to support its request for relief. But those cases do not help Core. In fact, those cases serve only to undermine Core's entire Motion. First, and importantly, in neither of those cases did the Commission require the respondent to pay anything to the petitioner *before* a hearing and final decision on the merits, as Core is demanding here.

Second, the facts in this case bear no resemblance whatsoever to the facts in either *Palmerton* or *Level 3*. In *Palmerton*, Palmerton had a valid tariffed rate for which it regularly billed Global NAPs. As the Commission noted in its Order on interim relief, Palmerton's Complaint asserted that Global NAPs refused to pay "***tariffed*** access charges for ***interexchange*** services." *Palmerton* at 3. Here, Core does not have a valid tariffed rate and did not bill AT&T *anything* for over four years.

In *Palmerton,* the Commission ordered Global NAPs to escrow the disputed amounts (*i.e.*, amounts that Palmerton had billed Global NAPs under its switched access tariff but which

[10]Core failed to provide any actual facts supporting its statement that "Core cannot continue to absorb the costs of providing service for free..." *Core Motion* at p. 5. Core of course is free to charge its ISP customers for the service it provides to them, and presumably it has. Moreover, there is no reason to believe that Core is failing to recover the costs incurred in providing that service in the compensation it receives from its customers. Finally, over the past year, very little AT&T originated traffic has actually been handled by Core; current amounts are *de minimis.*

[11] The reasons Core is not entitled to the relief it requests in this case are not necessarily all included in this Answer. AT&T will present its full case at the merits hearing and through the normal litigation process.

Global NAPs had refused to pay), but in doing so cautioned that its grant of interim relief "should not be interpreted as precedent that a purely economic injury, compensable in money" (which is all Core alleges here) "normally satisfies the irreparable injury requirement."[12] Rather, the Commission found that interim relief (in the form of an escrow) was appropriate in light of the "facts and circumstances" of that case – facts and circumstances that even Core admits do not exist here. For example, Palmerton alleged that "when faced with an adverse ruling" from other state commissions, Global NAPs "has ceased doing business" in those states, and "has not remitted undisputed amounts to carriers operating in those jurisdictions."[13] Palmerton also pointed out that Global NAPs had reported "Pennsylvania jurisdictional revenues at zero."[14] Palmerton also specifically cited to Global NAPs "deteriorating financial condition" as one of the primary bases for its right to interim relief. *Palmerton* at 3. Here, in stark contrast, Core touts AT&T's financial strength, and does not claim (nor could it) that AT&T may not have the ability to pay if it is required to do so once this case is concluded.

Third, the Commission based its finding in *Palmerton* on the fact that other entities competing in Pennsylvania were paying traffic termination charges to Palmerton, while Global NAPs was an outlier by refusing to pay. Thus, the Commission was concerned that it was discriminatory *vis a vis* those carriers that were paying Palmerton's tariffed charges for Global NAPs to be permitted not to pay the tariffed charges. The Commission specifically found that when some carriers are forced to pay charges that other carriers are not paying, it can cause "an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communication services." *Palmerton* at 9. In

[12] *Palmerton*, p. 8.

[13] *Id.*, p. 7.

[14] *Id.*, p. 7.

this case, the relief sought by Core actually creates the exact discrimination the Commission was concerned about in *Palmerton*. The evidence is undisputed that no other CLEC is paying Core either the Verizon tandem rate (which is not a Core tariffed rate), or Core's tariffed switched access rate (which does not apply to the local traffic at issue here), or any rate at all. Thus, if the Commission were to grant Core's request for interim relief (or final relief, for that matter), it would be creating a highly discriminatory situation in which only one CLEC is being forced to pay Core any rate, and an unlawful one at that.

Fourth, in *Palmerton,* there was a clear basis for the amount to be put in escrow – namely, Palmerton's tariffed intrastate access rate that applied to non-local traffic. In this case, Core is asking that the amount to be put in escrow be based on a rate that ILEC Verizon has tariffed,[15] not a rate that Core has ever tariffed. Unlike in *Palmerton,* Core does not have a tariff that authorizes charges for non-toll, locally dialed traffic, meaning there is no existing, lawful rate to be used to calculate an amount to be placed in escrow.

Finally, in *Palmerton*, unlike here, the defendant Global NAPs had but a single defense to Palmerton's access charge claim, namely, Global NAPs' contention that because VoIP originated traffic is jurisdictionally interstate, the Commission lacked the authority to apply intrastate switched access tariffs to such traffic. The Commission rejected that argument, thereby leaving Global NAPs with no liability defense. Yet, even in those circumstances, the Commission did not require that Global NAPs pay anything directly to Palmerton before a hearing on the merits, as Core is requesting here. Moreover, as discussed above, had Global NAPs been financially strong and able and willing to pay judgments against it (all of which AT&T unquestionably is), it

[15] Specifically, the tandem-based rate for ILEC Verizon, which not even ILEC Verizon pays to Core. Core provided absolutely no cost basis or factual showing as to why this rate makes any sense for the traffic at issue in this case, and even if it had done so, the Commission would be required to afford AT&T its due process right to contest such a showing before granting relief.

is clear that the Commission would not have required either a security bond or an escrow. Accordingly, far from providing any support for Core's Motion, *Palmerton* demonstrates that Core fails to qualify for *any* form of interim relief.

Core's effort to draw support from *Level 3* is even more farfetched. There, Level 3 sued to prevent Marianna & Scenery Hill Telephone Co. ("M&SH") from suspending calls to Level 3's ISP customers. Level 3 had assigned numbers from its NXX blocks to ISPs located outside the local exchange areas associated with these NXXs so that M&SH end user customers could reach these ISPs with what appeared to them and the M&SH switch as local calls, even though they were in reality long distance calls. M&SH complained that this practice forced its network to engage in "long haul" transport for free and deprived it of originating access revenue, and it threatened to stop carrying the calls in a way that would allow them to continue to be completed. When M&SH began to make good on its threat, Level 3 moved for an interim order requiring M&SH to stop in effect blocking the ISP calls.

Yet again, Level 3's Petition for interim relief was filed pursuant to 52 Pa. Code § 3.6, and the Commission carefully considered all four criteria when issuing its decision. The Commission specifically held that the "failure of a petitioner to prove any one of the elements compels the denial of such relief."[16] Although the Commission did require an escrow account, it was Level 3, *the petitioner*, who was required to deposit funds in an escrow – not the respondent, M&SH. As a condition to the interim relief order, Level 3 was ordered to do two things: (1) refrain from assigning any additional numbers to out-of-area locations, and (2) set up an escrow in the amount of the originating access charges that M&SH claimed were due it. The Commission's interim relief in *Level 3* is consistent with the usual practice surrounding the

[16] *Level 3* at p. 8.

issuance of preliminary injunctions – the party seeking *pendente lite* relief is required to post a bond equal to the damage that the opposing party would suffer if it turned out that the relief was improperly granted. See Pa. R. Civ. Proc. No. 1531(b)(1); Fed. R. Civ. Proc. 65(c) ("[t]he court may issue a preliminary injunction or temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.").

* * *

By running from 52 Pa. C.S.A. § 3.6(b) and pretending that it does not apply, Core has admitted what is readily apparent: It does not qualify for any form of interim relief because its only claimed injury is "pure economic injury, compensable in money." Far from providing any support, Core's own cited cases, *Palmerton* and *Level 3*, completely undermine Core's Motion. Those cases show that § 3.6(b) provides the governing test and that Core cannot satisfy it.

C. The Relief Core Seeks Is Barred By Core's Own Failure To Comply With Pennsylvania Law.

At all relevant times, Pennsylvania state law has required that Core file with the Commission tariffs establishing rates for each of the services it provides that are within the Commission's jurisdiction (*i.e.*, any and all intrastate telephone services). Specifically, 66 Pa. C.S.A. § 1302 (enacted in 1984) provides that "every public utility *shall file* with the commission . . . *tariffs showing all rates* established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission." (Emphasis added.)

Core, however, has never filed a tariff establishing a rate for terminating the traffic at issue in this case – locally dialed, ISP-bound traffic. As a result, as a matter of statutory law and judicial precedent, Core is barred from "collect[ing] or enforc[ing]" any rate for terminating this traffic. The companion statutory provision to § 1302 forbids a public utility from "demand[ing]

or receiv[ing]" any rate that is different from "that specified in the tariffs of such public utility." 66 Pa. C.S.A. § 1303 ("adherence to tariffs"). Because Core's tariffs fail to establish any rate for terminating the traffic in question, the Commission may not require AT&T (or any other CLEC) to pay Core anything for the completion of locally dialed, ISP-bound traffic. Pennsylvania courts have confirmed that Sections 1302 and 1303, read together, mandate precisely this result. In *Popowsky v. Pa. PUC,* 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994), the Court held that because the public utilities in question did not have lawful tariffs on file with the PUC, the utilities could not lawfully charge customers *anything* for the provision of utility service, and that therefore the PUC was wrong to issue an order requiring customers to pay bills submitted by the utilities. *See also Bell Telephone Co. v. Pa. PUC,* 417 A.2d 827, 829 (Pa. Commw. Ct. 1980) ("a public utility may not charge any rate for service other than that lawfully tariffed . . . .").

Core may try to argue that its intrastate switched access tariff covers the termination of locally dialed, ISP-bound traffic – indeed, that was the position it took initially when it attempted to back bill AT&T for all traffic exchanged back to January 2004. But that clearly is not the case.

First, the language of the tariff itself makes clear that it applies the switched access rate of $.014 per MOU only to non-local, toll, interexchange traffic, and that it establishes no rate for the termination of any local traffic, including locally dialed, ISP-bound traffic. The tariff, PA P.U.C. Tariff No. 4, is titled "Switched Access Service" and sets out the rules and regulations related to intrastate switched access service. The tariff defines "Access Service" as "Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications." Tariff, Section 1 (emphasis added). Accordingly, "Access Service" is a service provided to an "Interexchange Carrier," which is defined as "[a]ny individual,

partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, ***between two or more exchanges***." *Id.* (emphasis added). In delivering local traffic, AT&T is not an interexchange carrier but a CLEC providing *local* exchange service and as such squarely falls within the tariff's definition of an "exchange carrier" ("any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service."). *Id.*

Further, the tariff specifies that Switched Access Service is only provided for three types of calls, specifically, Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access. Tariff, Section 4.2.3. The term "Feature Group" refers to a "switching arrangement" provided to "interexchange (long distance) carriers" by a LEC that "allow[s] the LEC's end-users to make *toll* calls via their favorite long distance carrier." *Newton's Telecom Dictionary* at 291 (emphasis added). Accordingly, the tariff applies on its face exclusively to non-local, toll, interexchange calls, and not to locally dialed, ISP-bound calls.

In fact, the only mention of local traffic in the tariff relied upon by Core is in the definition of "Mutual Traffic Exchange," which the tariff characterizes as "[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff, Section 1 at Original Sheet No. 9. This, of course, is a bill-and-keep arrangement; its inclusion in the tariff indicates that Core recognized that that is the sort of arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges. The fact that the tariff, at all relevant times (even today), has included this provision, and has not contained any provision establishing a positive rate for terminating local traffic, can reasonably be expected to have led

all other CLECs, including AT&T, to believe and understand that bill-and-keep is the *only* arrangement that applies to local traffic exchanged between Core and other CLECs. Furthermore, the fact that Core did not send bills to AT&T (or any other CLEC) for the local traffic at issue for a number of years serves to confirm that Core recognized and intended that bill-and-keep was *the* arrangement that applies to this traffic.[17]

Second, it is clear as a matter of state law that switched access charges apply only to the origination and termination of non-local, toll, interexchange calls. As the PUC observed in its September 30, 1999 *Global* Order, at Docket Nos. P-00991648, *et al.*, "Switched access charges are those that LECs bill to IXCs or other LECs, for using their facilities ***in the placement or receipt of toll calls***." *Id.*, p. 12 (emphasis added). Similarly, 66 Pa. C.S.A. § 3017(b) provides that "No person or entity may refuse to pay tariffed access charges for ***interexchange services*** provided by a local exchange telecommunications company." (Emphasis added.) AT&T is not aware of a single instance in which this Commission has ever applied intrastate switched access rates to local traffic, and Core has not cited any. It would be extremely unreasonable and exceptionally unfair to require AT&T to pay switched access rates (which are notoriously high) for local calls, and particularly for very long duration Internet calls. To AT&T's knowledge, there is no carrier – either in the Commonwealth or in the entire nation – that is required to pay switched access rates for local calls, much less locally dialed, ISP-bound calls.

Third, Core itself has admitted, in another proceeding before this Commission, that locally dialed, ISP-bound traffic is not and cannot be access traffic – which means that it is not and cannot be subject to switched access charges. Specifically, Core has stated, "whatever else it

[17] Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. See, *e.g.*, the FCC's *First Report and Order*, ¶ 1027. And in the *ISP Remand Order*, the FCC observed that "it appears 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.* at ¶ 4.

may be, ISP-bound traffic cannot be 'access traffic.'" *In re: 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, p. 11.[18] Further, Core previously testified as follows: "Q. Is there ever a situation in which access charges would apply to ISP bound traffic?" Core's Answer: "No." *Id.*, Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007 at pp. 6-7.

Finally, Core has admitted in this case as well that its switched access tariff does not cover the locally dialed, ISP-bound traffic at issue. For example, in its Motion Core asks that AT&T be required to pay $.002439 per MOU for calls terminating after August 31, 2010. If these calls were really covered by Core's switched access tariff, that $.002439 rate would be unlawful and one that Core would be prohibited from "demand[ing] or receiv[ing]" because it is different from the switched access rate "specified in the tariff[ ]," namely, $.014 per MOU.

* * *

Because of its failure and refusal to comply with Pennsylvania statutory law, Core is barred from "collect[ing]," "enforc[ing]," "demand[ing] or receiv[ing]"[19] anything for past traffic exchanges, and therefore cannot prevail on its claims in this case. It follows then *a fortiori* that Core's requested interim relief is barred as well – because it seeks the payment of something for these past exchanges.

---

[18] If it is access traffic, then Core would be required to pay originating access – something Core has vehemently fought against in its arbitration with Century Link. *In re: 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, Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007, p. 11.

[19] 66 Pa. C.S.A. §§ 1302, 1303.

D. The Relief That Core Seeks Is Barred Because It Would Require The Commission To Engage In Prohibited Retroactive Ratemaking.

In order to award Core the relief it requests in this case for past traffic exchanges, whether on an interim basis or after a full evidentiary hearing on the merits, the Commission would have to create a new rate – because there is not and never has been an existing, lawful rate. And the Commission would have to make that rate effective retroactively. That the Commission may not do.

"Because of the prospective nature of rates, a rule against retroactive ratemaking has developed. The rule against retroactive ratemaking prohibits a public utility commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits." *Popowsky v. Pennsylvania Public Utility Commission,* 642 A.2d 648, 651 (Pa. Commw. Ct. 1994). *See also Popowsky v. Pennsylvania Public Utility Commission,* 868 A.2d 606, 609 (Pa. Commw. Ct. 2004) ("The PUC clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations.") (citing *Pike County Light & Power Company v. Pennsylvania Public Utility Commission*, 8487 A.2d 118 (Pa. Commw. Ct. 1985); *Pennsylvania Gas and Water Co. v. Pennsylvania Public Utility Commission,* 470 A.2d 1066, 1072 (Pa. Commw. Ct.. 1984) ("Ratemaking principles require prospective ratemaking based upon a test year."); *Id.* ("A rate increase may act prospectively only.").

The only rate that may be demanded for the provision of service at any given time is the approved rate governing that service that is in effect at that time. Prospective rates may not be used to recoup past losses. The filed tariff doctrine, codified at 66 Pa. C.S.A. § 1303 (discussed above), prohibits a utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such . . . utility." Accordingly, the rule against retroactive ratemaking

is a necessary corollary to the filed tariff doctrine and Section 1303. Applied here, it means that neither Core nor the Commission may create a new rate today and apply it retroactively to earlier periods. Otherwise, Core would be permitted to "demand and receive" a rate that is not "specified in [its] tariffs." As noted previously, Core's tariff does not specify any rate for terminating locally dialed, ISP-bound traffic.

* * *

The relief Core seeks (both in its Motion and in the case generally) is barred because it violates the rule against retroactive ratemaking.

E. The Relief Core Seeks Is Barred Because It Would Violate The Pennsylvania Statutory Ban On Rate Discrimination.

There is yet another, independent reason why Core's Motion must be denied. The relief it seeks would permit Core to engage in unreasonable rate discrimination, something Pennsylvania law prohibits. Specifically, 66 Pa. C.S.A. § 1304 ("discrimination in rates") provides:

> "No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage."

In addition, 66 Pa. C.S.A. § 1303 provides that "[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron." Accordingly, Pennsylvania law prohibits charging different rates to similarly situated customers for the same service and at the same time confers on all utility customers "most favored nation" status in the event more than one rate is applicable to the service in question.

Core asks for interim relief that would require that AT&T pay either $.002439 per MOU or $.014 per MOU for both past and future terminations of locally dialed, ISP-bound traffic. As

noted previously, however, at all relevant times Core has not received any compensation from any other CLECs for terminating precisely this kind of traffic. The only carrier from which Core has received any payment for terminating this kind of traffic is ILEC Verizon. And, at all relevant times, ILEC Verizon has paid Core an MOU rate of $.0007. As discussed above, Core is barred from charging anything for past traffic sent by AT&T. Assuming *arguendo* that the PUC has jurisdiction to establish rates for CLEC-to-CLEC locally dialed, ISP-bound calls, whatever rate Core charges AT&T would have to be charged to other CLECs as well. Otherwise, it would violate Section 1304.

Although that statutory provision itself does not define "unreasonable," by any measure Core's attempt to charge not only more than other CLECs pay to terminate like traffic, but to charge between 3½ and twenty times more than ILEC Verizon pays for exactly the same service, is patently "unreasonable." Indeed, pertinent case law makes clear that in order for *any* rate differential to pass muster under Section 1304, the utility must show that the differential can be justified by the difference in costs required to serve different customers or different classes of customers. *See Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1060 (Pa. Commw. Ct. 2002) ("in order for a rate differential to survive a challenge brought under Section 1304 of the Public Utility Code, 66 Pa. C.S. § 1304, the utility must show that the differential can be justified by the difference in costs required to deliver service to each class."). Because Core uses exactly the same network facilities in exactly the same manner when it terminates locally dialed, ISP-bound traffic originated by all other CLECs as it does when it terminates such traffic originated by AT&T, it would be impossible for Core to show *any* difference in costs. Therefore, it is impossible for Core to justify *any* rate differential from the compensation scheme which it has with other Pennsylvania CLECs.

Further, because Core has two different compensation schemes for the exchange of locally dialed, ISP-bound traffic, if it were assumed *arguendo* that either the CLEC scheme (bill-and-keep) or the ILEC rate ($.0007 per MOU) could apply to AT&T-Core locally dialed, ISP-bound traffic, the CLEC scheme would have to apply, pursuant to Section 1303. In circumstances in which "more than one rate [is] applicable to service rendered to a patron [AT&T]," Core is statutorily required to "compute [its] bills under the rate most advantageous to" AT&T, in this case, the CLEC compensation scheme. 66 Pa. C.S.A. § 1303. See *Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Commw. Ct. 1995).

* * *

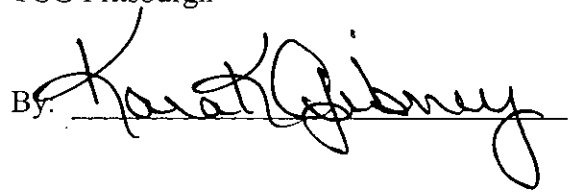
The bottom line is this: Even if the Commission were to ignore that Core may not lawfully charge anything for past traffic exchanged between the parties, the interim relief Core seeks would still violate Pennsylvania law – because it would license unreasonable rate discrimination in violation of § 1304 and it would improperly void the "most favored nation" requirement of § 1302. Further, the amount of future compensation is an issue to be decided as part of this case after all evidence has been submitted and evaluated – it is not appropriate to be pre-judged without due process, as Core is requesting in its Motion.

CONCLUSION

Based on the foregoing, AT&T respectfully submits that the Commission should deny Core's primary and alternative requests for interim relief.

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

By: 

Michelle Painter
PA Bar ID No. 91760
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
painterlawfirm@verizon.net

Theodore A. Livingston
J. Tyson Covey
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
tlivingston@mayerbrown.com
jcovey@mayerbrown.com
kgibney@mayerbrown.com

Its Attorneys

DATED: October 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Answer to Core Communications, Inc.'s Motion for Interim Relief 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 25th day of October 2010.

VIA E-MAIL AND OVERNIGHT MAIL

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

Kara K. Gibney

(312) 701-7717
MAYER BROWN LLP
SUITE 3300
71 SOUTH WACKER DRIVE
CHICAGO IL 60603

2 LBS

04B-RDL
1Z6E431E0113704 2144
S:BBLUE

SHIP TO: ROSEMARY CHIAVETTA SECRETARY
(312) 701-7717
PENNSYLVANIA PUBLIC UTILITY COMMN
400 NORTH STREET
COMMONWEALTH KEYSTONE BLDG. 2ND FL.
HARRISBURG PA 17120

PA 171 9-20

UPS NEXT DAY AIR

1

TRACKING #: 1Z 6E4 31E 01 3704 2144

BILLING: P/P

PKID:1366245

ASC 0810 DMXJ693 09.3V 10/2010