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December 14, 2010

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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 Secretary Chiavetta:

On behalf of Core Communications, Inc., ("Core") enclosed please find the original of its Main Brief along with the electronic filing confirmation page 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

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Angela Jones, w/enc.
Cert. of Service, w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Core Communications, Inc.'s Main Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: December 14, 2010

Deanne M. O'Dell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF
OF
CORE COMMUNICATIONS, INC.

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Date: December 14, 2010

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I. 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 justify the very simple fact that it refuses to pay anything though it is legally required to do so. The Commission-approved business model of Core Communications, Inc. ("Core") permits consumers, who either do not have access to or do not want to pay for higher priced broadband services, to have an alternative way to access the Internet. Pursuant to the law the originating carrier, in this case AT&T Pennsylvania, LLC ("AT&T") and TCG Pittsburgh, Inc. ("TCG") (collectively, "AT&T" or "Respondents"), is required to compensate Core for its termination of traffic originated by AT&T's end-user consumers. AT&T has refused to do this and that is why Core was forced to file this complaint.

The practical effect of AT&T's actions 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 Enhanced Service Provider customers 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. Instead, Core is forced to continue to terminate the traffic, at its own cost, and seek compensation through litigation as it has done here. While this process moves through the litigation process, AT&T has remained adamant in its refusal to negotiate a reasonable compensation arrangement for either previously terminated traffic or future traffic.

As explained further below, the Commission should direct AT&T to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4 since there is no other agreement between the parties. If, however, the Commission decides not to apply Core's tariff to the previously terminated traffic (which it should), Core requests in the alternative that AT&T be directed to pay 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. To govern future traffic, Core requests that the Commission direct AT&T to negotiate in good faith with Core to reach a mutually acceptable reciprocal compensation arrangement governing payment. Finally, Core requests that – due to the circumstances in this case – the Commission issue an appropriate civil penalty on AT&T to address its prior actions to refuse to compensate Core for its substantial use of Core's network and to ensure future good faith performance. As AT&T's behavior clearly shows, it will simply continue to engage in its brand of lawless gamesmanship at the expense of Core and the public until ordered to do otherwise.

II. STATEMENT OF THE CASE

Core filed its Complaint in this case against AT&T on May 19, 2009. By letters dated May 19, May 21 and June 1, 2009, the Commission docketed the Complaint at docket numbers C-2009-2108186 and C-2009-2108239 and directed AT&T to respond to the Complaint. AT&T filed its Answer to the Complaint on June 9, 2009. In its Answer, AT&T stated that "the Pennsylvania Commission has jurisdiction over the subject matter of this Complaint..." Answer, ¶ 27. AT&T filed an Amended Answer on June 18, 2009, in which it reiterated its position that "the Pennsylvania Commission has jurisdiction over the subject matter of this Complaint..." Am. Answer, ¶ 27. Core filed its Reply to New Matter on July 2, 2009.

ALJ Angela T. Jones issued a Notice scheduling a prehearing conference for September 15, 2009. At that time, this case had been docketed together with *Laurel Highland Telephone Co. v. Choice One Communications of Pennsylvania, Inc.*, Docket No. C-2009-2108366. ALJ Jones issued a Prehearing Conference Order on June 29, 2009. Core filed a Protective Order governing production of confidential material on July 21, 2009. ALJ Jones issued Prehearing Order #2 on September 11, 2009, bifurcating Docket No. C-2009-2108366 from Docket Nos. C-2009-2108186 and C-2009-2108239. The parties each filed their prehearing conference memorandum on September 14, 2009, and a prehearing conference was held on September 15, 2009. ALJ Jones issued a Prehearing Order scheduling hearings for February 2 and 3, 2010. Core filed its Entry of Appearance and Substitution of Counsel on October 13, 2009. Core served St. No. 1, the Direct Testimony of Bret L. Mingo on November 16, 2009.

AT&T filed a Motion to Dismiss on December 8, 2009 just days prior to the due date of AT&T's Reply Testimony. AT&T argued that the Commission has no subject matter jurisdiction over ISP-bound traffic exchanged between competitive local exchange carriers ("CLECs") such as AT&T and Core, or in the alternative, that the Federal Communications Commission ("FCC") had preempted the Commission's authority to resolve the issue of compensation for such traffic. AT&T also sought a suspension of the procedural schedule and requested oral argument on its Motion to Dismiss. AT&T served Statement No. 1, the Reply Panel Testimony of E. Christopher Nurse and Sal D'Amico (who was later substituted with Mark Cammarota) on December 14, 2009.

Core filed its Answer to AT&T's Motion to Dismiss on December 28, 2009. AT&T filed a Motion for Leave to File Reply to Core's Answer and a Request for Oral Argument on jurisdictional issues on January 6, 2010. AT&T filed a letter requesting immediate suspension of

the procedural schedule on January 14, 2010. Core filed a response to that letter the following day. Core served St. No. 1SR, the Surrebuttal Testimony of Bret L. Mingo on January 11, 2010. Core filed its Answer to AT&T's Motion for Leave to File Reply and Request for Oral Argument on January 26, 2010. ALJ Jones issued Order #5 on February 1, 2010, converting the previously scheduled evidentiary hearing to an oral argument on AT&T's Motion to Dismiss and suspending the procedural schedule pending a ruling on AT&T's Motion to Dismiss. Oral argument was conducted on February 3, 2010.

Regarding discovery, AT&T filed a Motion to Compel Responses to AT&T Set IV Interrogatories on January 20, 2010 and Core filed its Answer to the Motion on January 25, 2010. AT&T also filed a Motion to Compel Responses to AT&T Set V Interrogatories on February 24, 2010 and Core filed its Answer to the Motion on March 1, 2010. Both Motions were addressed by Order #8 entered on October 15, 2010.

ALJ Jones issued Order #6 on February 26, 2010, granting AT&T's Motion to Dismiss in part, ruling that the Commission has no subject matter jurisdiction over CLEC-CLEC ISP-bound traffic, and denying in part, finding that there remained material factual issues with respect to voice-over-Internet protocol ("VOIP") traffic exchanged by the parties. Core filed is Petition for Interlocutory Commission Review and Answer to Material Question on March 5, 2010, requesting an answer to the question whether the Commission has jurisdiction to resolve a complaint regarding compensation for CLEC-CLEC ISP-bound traffic. AT&T filed its Petition for Interlocutory Review and Answer to Material Question on March 5, 2010, requesting an answer to the question whether ALJ Jones correctly denied AT&T's Motion to Dismiss with respect to VOIP traffic. By Order $7 entered April 7, 2010, ALJ Jones granting the parties' joint request to stay the proceeding pending resolution of the Material Questions.

Core filed its Brief in Support of Petition for Interlocutory Review and an Affirmative Answer to the Material Question presented by AT&T, and its Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question presented by Core on March 15, 2010. AT&T filed its Brief on Petitions for Interlocutory Review and Answer to Material Questions on March 15, 2010. Choice One Communications of Pennsylvania, Inc., CTC Communications Corp. and XO Communications Services, Inc. filed their *Amicus Curiae* Brief on the Issues Raised on Interlocutory Review on March 15, 2010. The Commission issued its Opinion and Order resolving both petitions for interlocutory review on September 8, 2010. The Commission answered the Material Question raised by Core in the affirmative, ruling that it does have subject matter jurisdiction to adjudicate a formal complaint regarding compensation for CLEC-CLEC ISP-bound traffic. *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239, at 11 (Opinion and Order entered September 8, 2010) ("*Material Question Order*"). The Commission also answered the Material Question raised by AT&T in the affirmative, ruling that it has jurisdiction to address intercarrier compensation issues related to VOIP traffic. *Id.*, at 14.

Following the *Material Question* Order, evidentiary hearings were scheduled for November 18, 2010 and November 19, 2010. Core filed a Motion for Interim Relief on October 5, 2010 seeking an order directing AT&T to pay Core within 10 days for traffic previously terminated or, alternatively, to establish an escrow account equal to the amount in dispute. AT&T filed its Answer to Core's Motion on October 25, 2010. ALJ Jones issued Order #9 on November 9, 2010, denying Core's interim motion. Evidentiary hearings were conducted on November 18, 2010. By agreement of the parties and with the approval of ALJ Jones, main briefs are to be filed on or before December 14, 2010 and reply briefs are due January 14, 2011.

III. STATEMENT OF FACTS

Core is a CLEC authorized by the Commission to provide local exchange telecommunications service throughout Pennsylvania. Core St. No. 1 at 1. Core is in good standing with the Commission, and maintains a CLEC tariff (Pa. PUC Tariff No. 1), an IXC tariff (Pa. PUC Tariff No. 2), and an intrastate switched access service tariff (Pa. PUC Tariff No. 4) with the Commission. *Id.* at 2. Core has traditionally focused on the provision of telecommunications services to dial-up internet service providers ("ISPs"), which provide unregulated "enhanced" services like web-surfing and email. *Id.* Dial-up ISPs serve as a low-cost alternative for consumers in rural areas and consumers who are not heavy Internet users but still want access. *Id.* Because ISPs handle large volumes of inbound modem calls, ISPs are intensive users of telecommunications services. *Id.*

Since September, 2009, Core has also provided telecommunications services to VOIP providers, which similarly handle large call volumes and are intensive users of telecommunications services. *Id.*, *and see*, *Material Question Order*, at 12 ("[T]here has been a dichotomy of traffic terminated by Core. Traffic terminated prior to September, 2009 was ISP-bound... Traffic terminated after September, 2009 may be mixed containing VoIP traffic termination and ISP-bound traffic.").

Respondents are authorized by the Commission to provide CLEC and interexchange service in Pennsylvania. Core St. No. 1, at 3. TCG was one of the first CLECs operating in Pennsylvania, and at one time served "UNE-P" residential customers as well as small business customers and some dial-up ISP customers. *Id.* Respondents are wholly-owned subsidiaries of AT&T Corporation. *Id.* AT&T Corporation is the nation's largest provider of telecommunications services and a Fortune 5 company. *Id.* In its "home region" of the South and

the Midwest, AT&T affiliates are the dominant incumbent local exchange carriers ("LEC") in each state, as Verizon is in Pennsylvania. *Id.*

AT&T sends and has sent large volumes of AT&T Indirect Traffic to Core indirectly, via the tandem switch network of Verizon Pennsylvania, Inc. ("Verizon"). *Id.* at 1, and Exh. BLM-2 (Diagram of Indirect Interconnection). Core's Pennsylvania network and services enable AT&T customers to complete calls to their ISP, which in turn increases the utility of the AT&T customer's local phone service. *Id.* at 3. Some AT&T customers may order a second line in whole or in part for dial access. *Id.* at 4. AT&T's customers compensate AT&T for the use of its local exchange services, but AT&T is refusing to share this compensation with Core for completing the calls originated by AT&T's customers. *Id.*

The AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that originate and terminate in Pennsylvania. *Id.* An intrastate call can be distinguished from an interstate call by comparing the calling party's phone number with the called party's phone number. *Id.* AT&T has sent Core some interstate traffic, Core has invoiced AT&T for this traffic pursuant to its FCC interstate access tariff, and AT&T has paid these invoices substantially without dispute. *Id.* So the only traffic at issue in this case is intrastate. *Id.*

The AT&T Indirect Traffic further consists of locally dialed calls placed by AT&T's local exchange service customers in order to reach Core's customers. *Id.* 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). *Id.* The difference between locally dialed and "toll" calls is that locally dialed calls are generally included with the consumer's flat-rate local service charge, whereas toll calls

incur a per-minute charge or "toll." *Id.* at 5. Local and toll dialing are retail concepts and subject to change as carriers merge together and develop new retail packages, such as the "all you can eat" retail plans whereby carrier charge a flat-rate for all calls. *Id.*

From June, 2004 through September, 2009, AT&T end users using the TCG network (CIC 0292) originated 406,102,334 MOUs for termination on Core's network, for which AT&T has compensated Core exactly $0.00. *Id., and see*, Exh. BLM-1 (Chart of Minutes of Use & Amounts in Dispute). Following September, 2009, AT&T end users using the TCG network originated an additional 91,964 MOUs. Core Hearing Exh. No. 2 (attached chart shows AT&T MOUs terminated on Core's network).

AT&T has an interconnection agreement ("ICA") with Verizon by which AT&T is entitled to send traffic to the Verizon tandems for delivery to third-party carriers, such as Core. *Id.* at 6. In turn, Verizon is entitled to charge AT&T a per-MOU rate for the service of transiting the AT&T's traffic from AT&T to Core. *Id., and see*, Tab 2 (Diagram of Indirect Interconnection). Pursuant to this ICA and the intrastate access tariff referenced therein, AT&T pays Verizon at a tandem switched transport rate of $0.000983/MOU, a tandem transport rate of $0.000195/MOU and another tandem transport rate of $0.000045/MOU/mile. Core Cross Exh. Nos. 3 and 4 (excerpts from the ICA and Verizon's intrastate access tariff). So, AT&T pays some intercarrier compensation on all of the AT&T Indirect Traffic—but it only pays Verizon for the use of its network, not Core.

AT&T's ICA with Verizon states, at Section 7.3:

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

> In all cases, each Party shall follow the Exchange Message Record ("EMR") standard and exchange records between the Parties and with the terminating carrier to facilitate the billing process to the originating network. Core St. No. 1 at 7.

But AT&T has never sought, and indeed has studiously avoided, entering into a traffic exchange agreement with Core. *Id.* at 13 and 23; *and see*, Core St. No. 1SR at 2. In an ordinary commercial context, Core's "real world" recourse for non-payment would be to discontinue terminating AT&T's calls. However, federal and state law require Core to terminate all the calls it receives, and if it is not compensated for that termination service, Core must seek payment through the regulatory complaint process. Core St. No. 1 at 7.

Core receives and has received Carrier Access Billing System ("CABS") or "Category 11" records from Verizon on a regular basis. *Id.* at 8. CABS records are generated by Verizon's tandem switches and their purpose is to provide 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. *Id.* at 8. For each call, CABS records the carrier identification code ("CIC") of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in MOUs. *Id.*

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

At that time, Core did not know about, and had no reason to be aware of, the substantial volumes of telecommunications originated by AT&T and delivered to Core via Verizon's tandem switches. *Id.* at 9. Since Core's customers were traditionally limited to dial-up ISPs, and this traffic was, to Core's knowledge, generated by Verizon end users, Core did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records. *Id.* Instead, Core found that AT&T, since at least 2004, has been sending Core substantial volumes of traffic. *Id.* Once Core found evidence of AT&T and other CLEC indirect traffic, it embarked on a larger project of systematically processing several years' worth of magnetic tapes, in order to get a complete picture of this traffic. *Id.* As these efforts progressed Core began to invoice AT&T for the AT&T Indirect Traffic. *Id.* Prior to Core's analysis of the Verizon CABS records, AT&T never notified Core that it was sending the AT&T Indirect Traffic to Core for termination to Core's end users. *Id.* As a result, other than reading the magnetic tapes which Core reasonably believed contained only trace usage, Core had no way of knowing that the Respondents were sending the AT&T Indirect Traffic to Core for many years. *Id.*

In January, 2008, Core sent its initial invoice to AT&T, for the AT&T Indirect Traffic terminated by Core in December, 2007. *Id.* at 10. In March, 2008, Core invoiced AT&T for the remainder of CY 2007. *Id.* Core then billed AT&T for CY 2004-2006 in January, 2009, and for CY 2008 in May, 2009. *Id.* Currently, Core bills AT&T each month for the prior month's usage. *Id.* As of November, 2009, the total amount of invoiced charges in dispute for the AT&T Indirect Traffic was $5,997,637.40. *Id.*

Upon receiving the initial round of invoices in early 2008, AT&T disputed various amounts by means of a form letter stating "AT&T Corp. has not reached agreement with your

company regarding Intrastate rates and extends an invitation to discuss. Please contact us at your earliest convenience." *Id.* at 11, *and see*, Exh. BLM-3 (AT&T Form Letter). AT&T also sent an email stating "[f]or CIC 292, someone from our Business Development Group will need to speak with you and review Call Detail Records since records can contain local service." *Id., and see*, Exh. BLM-4 (Email from Lynda Eyerman to Stephanie Anderson). Core contacted Mark Cammarota, AT&T's Lead Carrier Relations—National Access Management. *Id.*

AT&T, through Mr. Cammarota, subsequently sent Core an email stating that the AT&T Indirect Traffic was "primarily all local traffic and is bill and keep" and offering to "forward a draft" of a "standard switched access agreement... we use with CLEC's." *Id.* Core, through its President Bret Mingo, conducted two or three brief calls with Mr. Cammarota, but was never able to engage in a discussion about AT&T's continuing refusal to pay for the AT&T Indirect Traffic. *Id.* Then, inexplicably, Mr. Cammarota simply disappeared. *Id.* Between roughly, August, 2008 and March, 2009, Mr. Mingo attempted to reach Mr. Cammarota at least twenty (20) times, but he never responded. *Id.* Only after Core wrote a formal demand letter to Mr. Cammarota, with a copy to AT&T's local counsel, did Mr. Cammarota resurface. *Id.*, at 12-13, *and see*, Exh. BLM-7 (Letter from Bret Mingo to Mark Cammarota). Core and AT&T parties then conducted two telephonic settlement conferences, one on May 7 and one on May 11, 2009. *Id.* at 13. Core proposed to rebill all of the AT&T Indirect Traffic—past, present, and future—at the Commission-approved TELRIC rate for traffic termination. *Id.* AT&T denied Core's proposal, and declined to put forth any proposal of its own, leaving Core no option but to seek to enforce its right to payment for services through litigation. *Id.*

In sum, AT&T has never denied that its end users originate the AT&T Indirect Traffic to Core for ultimate delivery to Core's end user customers. So long as it does so, AT&T will be

responsible for causing a substantial portion of Core's network costs. *Id.* As a result, AT&T's non-payment challenges Core's ability to maintain a robust and reliable network, let alone upgrade and expand its network to offer additional services, such as VOIP and outbound calling. *Id.*

IV. LEGAL FRAMEWORK

Pennsylvania has long been in the vanguard of the states in terms of opening its telecommunications market to facilities-based and other forms of competition. In 1995, the Commission approved four applications for competitive local exchange service, including that of respondent TCG Pittsburgh, Inc., thereby establishing local telecommunications competition in Pennsylvania. *See generally, Application of MFS Intelenet of Pennsylvania, Incorporated et al. for a Certificate of Public Convenience and Necessity in Order to Operate As a Local Exchange Telecommunications Carrier*, Pa. P.U.C. Docket Nos. A-310203F0002 *et al.*, 1995 WL 945205 (Pa.P.U.C.)(Order entered October 4, 1995). Among the first issues the Commission faced was to structure a reciprocal compensation regime to account for traffic exchanged between CLECs and incumbent local exchange carriers ("ILECs"). Although it considered CLEC requests for a universal "bill-and-keep" regime, the Commission instead required the parties "to negotiate a resolution of the reciprocal compensation issue...," *Id.* at *29, and "to explore the interconnection costs and an appropriate mechanism for recovering such costs." *Id.*

In 1996, Congress enacted substantial amendments to the federal Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, known as the "Telecommunications Act of 1996," Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 *et seq.*)(the "1996 Act"). The 1996 Act built upon the market-opening efforts of Pennsylvania and other states, and included reciprocal compensation provisions which (1) required all LECs to "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. §251(b)(5);

and (2) granted state commissions authority to establish rates that "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. §252(c)(2) and (d)(2). The FCC subsequently promulgated rules implementing the 1996 Act, including a cost-based, forward-looking pricing methodology known as total element long-run incremental cost ("TELRIC") for state commissions to use in setting rates for reciprocal compensation and other services. *See generally, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (First Report & Order, 1996)(the FCC's rules governing reciprocal compensation were codified at 47 C.F.R. Subpart H, §51.701 *et seq.*).

Following passage of the 1996 Act, the Commission duly established reciprocal compensation rates using the FCC's TELRIC methodology. *See, In Re MFS Intelenet of Pennsylvania, Inc.*, Pa.P.U.C. Docket No. A-310203F0002, 1998 WL 842283 (Pa.P.U.C.), at *13 (Opinion and Order entered July 27, 1998)(approving "reciprocal compensation rates [of] $0.002902 per minute of use for termination at the Tandem... and $0.001864 per minute of use for termination at the End Office"); *and see, Petition of Focal Communications Corporation of Pennsylvania For Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Pa. P.U.C. Docket No. A-310630F0002, 2000 WL 35798624 (Pa.P.U.C.), at WL page 4 (Opinion and Order entered August 17, 2000)("*Focal*") ("Upon careful review of BA-PA's MFS III TELRIC... cost study, competitors comments thereon, and the subsequent adjustments to that study reviewed in connection with the Global Order in 1999, the Commission set reciprocal compensation rates at $.001723 per minute for end office termination and $.002814 per minute for termination at a tandem, effective December 31, 1999.") *and see, Generic Investigation Re*

Verizon Pennsylvania Inc.'s Unbundled Network Element Rates, Pa. P.U.C. Docket No. R-00016683, Appendix A, Exhibit Part C-4 at 6 (Compliance Order entered July 16, 2004)("*Generic Rate Investigation*")(establishing reciprocal compensation rates of $0.002439/MOU for "Termination at Tandem" and $0.000987/MOU for "Termination at End Office")(AT&T Cross Exh. 5 is an excerpt from this order showing the Commission's rates).

Once it had established TELRIC reciprocal compensation rates, the Commission rejected subsequent ILEC requests to apply a different, lower, rate to traffic bound for Internet service providers ("ISPs"). *Global Order* at *89 ("we direct that calls to local ISPs shall be considered local and that reciprocal compensation shall be applied on all ISP traffic for all future interconnection agreements filed with this Commission."); *and*, *Focal*, at WL page 11 ("BA-PA, as the proponent of a rate other than those set forth in the Global Order is the party having the burden of proof. Notwithstanding that BA-PA submitted a cost study attempting to show that the rates prescribed in the Global Order should not be adopted... BA-PA has failed to convince us that the rates for the termination of ISP traffic are not consistent with TA-96, the FCC rules interpreting TA-96, or the Public Utility Code.").

In 2001, the FCC issued an order mandating a rate cap of $0.0007/MOU on ISP-bound traffic exchanged pursuant to ILEC-CLEC interconnection agreements. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, at ¶ 78 (Order on Remand & Report and Order, Apr. 27, 2001) ("*ISP Remand Order*"). However, the Commission found in the present proceeding that the *ISP Remand Order* does not govern CLEC-CLEC ISP-bound traffic. *Material Question Order*, at 10 ("Compensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the *ISP Remand Order*").

In addition to reciprocal compensation matters, the Commission has also exercised its authority to resolve intercarrier compensation disputes involving switched access charges and tariffs. Most notably, the Commission recently found that an incumbent LEC was entitled to charge a competitive LEC pursuant to its intrastate switched access tariff for the termination of VOIP traffic exchanged indirectly through the tandem network of Verizon. *Palmerton Telephone Company v. Global NAPs South, Inc., et al.*, Pa. P.U.C. Docket No. C-2009-2093336, at 25 (Opinion and Order entered March 16, 2010) ("*Palmerton*") ("In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.")

Finally, both the Commission and the FCC have mandated that telecommunications carriers cannot cease providing service to other telecommunications carriers based on a payment dispute. *See, In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers—Call Blocking by Carriers,* WC Docket No. 07-135, 22 FCC Rcd. 11629, 2007 WL 1880323 (F.C.C.)(Declaratory Ruling and Order, June 28, 2007), at ¶¶ 5-6; *and see, Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Pa. P.U.C. Docket No. C-20028114 (Opinion and Order, Aug. 8, 2002), at 9 ("all carriers are obligated to complete calls where it is technically feasible to do so ***regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.***") (Emphasis added). The reason for this prohibition is to prevent stopping the flow of telecommunications traffic over a payment dispute because such disruption might result in preventing consumers from making and receiving the telephone calls of their choosing. This is very different from a

traditional commercial setting wherein businesses are not forced to provide service to other businesses for free. In fact, if a business fails to pay another for services rendered, the business providing the service has the right – usually through a contract – to cease providing the service. This is also different from the perspective of providing public utility service to an end-user as all public utilities have the right—pursuant to the law and Commission regulations—to terminate service to a retail customer who fails to pay his or her bills. 52 Pa. Code §§ 64.61-64.111.

While prohibiting carriers from blocking the flow of traffic does serve a public policy goal of ensuring uninterrupted telecommunications services, in a case like this one, it also results in requiring a carrier like Core to terminate indirect traffic first and to seek payment for that service later, through Commission intervention.

V. ARGUMENT

As the ALJ has succinctly stated, and as the Commission has fully acknowledged:

> This dispute involves transport and termination services to end-user customers by Core for AT&T. Core provided the services and has not received compensation. Both AT&T and Core are CLECs. Therefore, in simplest terms, this is an intercarrier compensation dispute between two CLECs. One CLEC (AT&T) has failed to pay the other (Core) for service rendered and services that continue to be rendered. *Material Question Order*, at 7.

AT&T has never denied that its end users originate the AT&T Indirect Traffic to Core for ultimate delivery to Core's end user customers. Likewise, there is no dispute that AT&T has refused to pay anything for Core's termination of this traffic. During cross-examination, AT&T Witness Nurse explained AT&T's position "that [it] should be required to abide by the controlling document, a tariff or a contract." Tr. at 188. As explained below, Core's Tariff applies to the AT&T Indirect Traffic and the Commission should order AT&T to pay accordingly. In the alternative, if the Commission concludes that the tariff does not apply (which it should not), then the Commission must order AT&T to pay at the Commission-approved

TELRIC-rate unless and until the parties reach a mutually satisfactory reciprocal compensation agreement otherwise.

A. Core's Tariff Applies to the AT&T Indirect Traffic

1. The Filed Rate Doctrine Requires That the Commission Strictly Enforce the Terms of Properly Filed Tariffs

The Commission's enabling statute 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." 66 Pa. C.S.A. § 1302. Indeed, "[n]o public utility shall... demand or receive... a greater or less rate for any service rendered... than that specified in the tariffs of such public utility applicable thereto." 66 Pa. C.S.A. § 1303. Further, "[t]he rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part." *Id.* Should the Commission "find[ ] that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law..." then it "shall determine the just and reasonable rates... to be thereafter observed and in force..." 66 Pa. C.S.A. § 1309.

The Commission and its reviewing courts have consistently found that "[t]he filed-rate doctrine also known as the commission-made rate doctrine, provides that rates and tariffs established by the Commission are prima facie reasonable and have the force of law until modified or changed by the Commission or after judicial review." *See, e.g., Application for Authority to Transfer Control of Tri-gen-Philadelphia Energy Corporation by the Sale of All of its Stock, Currently Owned by Trigen Energy Corporation, to Thermal North America, Inc.*, Pa. P.U.C. Docket No. A-130375F5000, 2005 WL 6502674 (Pa. P.U.C.), at 8 and note 36 (Opinion & Order, April 7, 2005), *citing, Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979);

Shenango Township Board of Supervisors v. Pa. PUC, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); and *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997).

Specifically for tariffs filed by CLECs, the Commission has found that "[u]pon filing of an initial access tariff by a CLEC, the rates contained therein will be allowed by the Commission to go into effect by operation of law. The Commission will presume that CLEC access charge rates that are at or below the corresponding access rates (for origination and termination) of the local ILEC in whose certificated territory the CLEC is providing service are reasonable without requiring cost documentation... Any party that files a complaint against the existing access charge rates of the CLECs will have the burden of proof of demonstrating that the rates are not just and reasonable." *Global Order*, at 93 Pa.P.U.C. 172, *19.

In this case, Core filed its Switched Access Tariff with the Commission, and the tariff has been permitted to go into effect. By its own terms, Core's tariff governs compensation for the termination of intrastate communications, which is clearly "within the jurisdiction of the commission." Indeed the Commission has already found that it "has jurisdiction in this matter because both Core and AT&T are facilities-based CLECs certified by the Commission to provide local exchange telecommunications services in Pennsylvania, and that AT&T, Core and Verizon operate the switches and other facilities used to support AT&T's Indirect Traffic, including the termination function provided by Core, within the state of Pennsylvania." *Material Question Order*, at 10. As demonstrated below, Core's tariff provides the rates and terms applicable to its provision of switched access service. Accordingly, the rates set forth in Core's tariff applies to its provision of switched access service to AT&T in Pennsylvania unless and until those rates are modified or found to be inapplicable to the AT&T Indirect Traffic.

Since it is undisputed that Core's filed rates are set "at or below the corresponding access rates" of Verizon, Core's tariff is entitled to a presumption that its rates are "reasonable." Further, AT&T, as the party challenging Core's tariff, bears the "burden of proof of demonstrating that the rates are not just and reasonable," a burden AT&T does not even pretend to carry. The filed-rate doctrine applies, and AT&T's sole remedy (which it has elected to pursue against other carriers but not Core) would be to file a formal complaint challenging Core's tariff, and demonstrate that Core's rates, and the application of those rates to the AT&T Indirect Traffic "are not just and reasonable." Yet, AT&T has never pursued this remedy, even though it has been on notice that Core would apply the Tariff rates to the AT&T Indirect Traffic since early 2008—almost three years ago.

2. The Plain Terms of Core's Tariff Apply to the AT&T Indirect Traffic

Core's Pa. P.U.C. Tariff No. 4 (the "Tariff") requires compensation for the AT&T Indirect traffic at the filed intrastate switched access rate of approximately $0.014 per MOU, which mirrors Verizon's intrastate switched access rates and rate structure.[1] This is a case of straightforward application of tariffed rates to tariffed services. Core's Tariff defines "Switched Access Service" (the service Core provided AT&T) as: "[a]ccess to the switched network of an ***Exchange Carrier*** for the purpose of originating or ***terminating communications***. Switched Access is available to ***carriers*** as defined in this rate sheet." Tariff, at Original Sheet No. 10 (emphasis added). The Tariff defines the term "Exchange Carrier" as: "[a]ny individual, partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service." Tariff, at Original Sheet No. 7. The Tariff

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1 Core's Tariff provides for an aggregate switched access service rate of $0.01393876/MOU plus Tandem Switched Facility mileage charges of $0.000045/MOU per mile. The mileages charges vary depending on the tandem network geography in each LATA. Tariff, 1st Rev. Sheet No. 51.

defines the term "Carrier" as an "Interexchange Carrier or Exchange Carrier." Tariff, at Original Sheet No. 6. Core's Tariff further states that "Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises." Tariff, at Original Sheet No. 44. The Tariff defines "Customer" as: "[t]he person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations. The Customer could be an interexchange carrier, a wireless provider, ***or any other service provider***." Tariff, at Original Sheet No. 7 (emphasis added). And the Tariff defines the term "Constructive Order" as the "[d]elivery of calls to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein." *Id.*

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

access charges, in violation of the Tariff. The Commission should apply the plain terms of Core's Tariff to the AT&T Indirect Traffic, and order AT&T to pay the total amount invoiced using the Tariff rate, which amount was calculated to be $5,997,637.40 as of October 31, 2009. Core St. No. 1, Exh. BLM-1. The Commission should order AT&T to pay additional amounts invoiced using the Tariff rate from November 1, 2009 through the date of the Commission order. (The volume of the AT&T Indirect Traffic to Core since October, 2009 through August 2010 was 91,964 MOUs. Core Hearing Exh. 2.) In addition, the Commission should order AT&T to pay late payment charges at the tariffed rate of 1.5% per month, Tariff, Original Sheet No. 33, from the due date of each invoice.

3. Switched Access Rates May Be Applied to "Local" Traffic

Nothing in Core's Tariff or the Commission's precedent precludes application of a switched access tariff and rates to "local" traffic, where, as here, the plain terms of a tariff apply to all intrastate "communications." While AT&T cites to passages from a Commission order and a Pennsylvania statute, AT&T St. No. 1, at 26, these authorities simply stand for the uncontroversial proposition that switched access tariffs apply to "toll" and "interexchange" traffic. Neither authority addresses the issue presented here, which is whether Core's Tariff can also apply to "local" or "locally-dialed" traffic in the absence of a traffic exchange agreement ("TEA").

Although locally-dialed CLEC-CLEC calls should ultimately be covered by a TEA, (which AT&T steadfastly has refused to negotiate) there are cases in which an intrastate access tariff can and does apply, including in cases where, as here, there is no TEA in place. According to the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines published by the Alliance for Telecom Industry Solutions ("ATIS")(and produced by AT&T in discovery), "[a]ccess and interconnection services may be billed as usage-sensitive and flat-rated charges,

which may include intraLATA non-subscribed toll, wireless and local services." *See*, Core St. No. 1, at 19, *and see*, Exh. BLM-9 (Excerpts from MECAB Guidelines), at 1-1. Similarly, the guidelines state that "[t]he term access may encompass Interstate, Intrastate, and Local." *See id.*, at unnumbered page. Further, the distinction between "toll" and "locally-dialed" calls is a retail concept and not always determinative of intercarrier compensation obligations. Tr. at 28 (Core Witness Mingo testified that "the difference between a toll call and a local call is something that is a relationship you have with your retail customer. I can't know what you're actually billing your customer. I'm assuming you're behaving like Verizon, but I don't know that. So I mean, as far as a toll versus local, that is a retail – retail concept. And it's not a co-carrier concept.") The fact that AT&T itself could not or would not state whether or not the AT&T Indirect Traffic consisted of "locally dialed" or "toll" calls, *see,* Core St. No. 1 at 18, further demonstrates the blurry line between these concepts.

In the case of locally-dialed wireless calls, LECs' intrastate access tariffs applied for many years, both in Pennsylvania and elsewhere. For example, in the landmark ICA arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., the Commission noted that "[p]rior to April 2002, ALLTEL was paid the rate of approximately $0.03 (3 cents) per minute with respect to indirect traffic that Verizon Communications terminated on its network. ***This rate is the intrastate access rate of ALLTEL and included all wireless traffic originated by Verizon Wireless***." *Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.*, Pa. P.U.C. Docket No. A-310489F7004, 2005 WL 6502686, at WL page 11 (Pa.P.U.C.)(Opinion Order entered Jan. 18, 2005).

Indeed, Verizon Wireless' entire goal in that proceeding was to replace the existing access regime, which applied to its locally-dialed wireless traffic, with a reciprocal compensation regime that would produce a much lower termination rate. *Id.* (comparing switched access rate to lower reciprocal compensation rate). Core would welcome such a result in this case, although it is AT&T that should logically be seeking to replace access with reciprocal compensation.

Similarly, in a case involving LECs charging wireless carriers at intrastate access rates for indirect, locally-dialed traffic, the Alabama Public Service Commission permitted the access rates to apply until the wireless carriers stepped forth and negotiated a reciprocal compensation arrangement. The Alabama Commission described the problem as follows:

> [T]his Commission has a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question. It is that fundamental concept that drives our decision in this cause...
>
> [T]he Wireless Carriers are indirectly terminating CMRS traffic on the networks of the Rural Carriers over common facilities operated by BellSouth... [T]he Rural LECs incur costs in terminating such traffic... [but] a substantial portion of the indirect CMRS traffic at issue is being terminated by the Rural LECs without compensation at present. *Re Compensation for Indirect CMRS Traffic Petitioners*, Ala. P.S.C. Docket No. 28988, 232 P.U.R.4th 148, 2004 WL 417312 (Ala.P.S.C.), at *13 (Order, Jan. 26, 2004).

The Alabama Commission ruled:

> [T]his Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act's provisions. We find that strict enforcement of the tariffs in question with respect to indirect CMRS traffic would ensure that the Rural LECs receive compensation for the use of their respective networks until such time as the provisions of the Telecom Act regarding compensation

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

The problems the Alabama Commission identified are the same problems that led to the dispute in this case, and show why it is appropriate to apply intrastate switched access charges to locally-dialed traffic in the absence of a TEA. AT&T is using a "void in the Telecom Act's coverage" to claim exemption from the fundamental, bedrock principle of reciprocal compensation. This is because, just as the Act did not permit incumbent LECs in the Alabama case to seek compulsory arbitration of an ICA with wireless carriers, so too in this case, the Act does not permit a CLEC like Core to seek arbitration with another CLEC like AT&T. Notably, the Alabama Commission vacated its order, but only after the parties to the case entered into a settlement including traffic exchange agreements governing compensation for the traffic at issue ("Under the terms of the proposed settlement, each Participating Wireless carrier agreed to enter into a comprehensive Traffic Termination Agreement with each Participating ILEC except in those instances in which the Settlement Parties are presently parties to an interconnection agreement."). *Re Compensation for Indirect CMRS Traffic Petitioners*, Ala. P.S.C. Docket No. 28988, 2004 WL 2309076 (Ala.P.S.C.), at *3 (Order, July 30, 2004).

Finally, AT&T's claim that Core itself has already advocated that the AT&T Indirect Traffic cannot be "access traffic" because it is ISP-bound, *see* Tr. at 109-110, is based on a contorted view of Core's advocacy in its interconnection arbitration with Embarq. Tr. at 109-

110. The context in which Core's statements arose was the issue of so-called "VNXX traffic," calls which are locally dialed and which originate and terminate in the same LATA, although in different exchange areas. *See, id., and see,* Excerpt from the Main Brief of Core Communications, Inc. in Pa. P.U.C. Docket No. A-310922F7002 (July 31, 2007), at 46-61, attached to Core's December 28, 2009 Answer to AT&T's Motion to Dismiss. In the Embarq case, Core argued (correctly) that the *ISP Remand Order* applied equally to VNXX traffic and to "local" traffic that physically originates and terminates in the same exchange area. *See, id.* When Core stated, in that case, that the *ISP Remand Order* applies to "all" ISP-bound traffic, it clearly intended "all" to mean both "VNXX" and "local." In addition, the Embarq case is an ILEC-CLEC interconnection arbitration, in which the *ISP Remand Order* clearly applies, *see* Tr. at 109, and not a CLEC-CLEC dispute, in which the *ISP Remand Order* has no application. *See Material Question Order.*

B. In the Alternative, the Commission-approved TELRIC Rate Applies to the AT&T Indirect Traffic

In the event the Commission determines that Core's Tariff (despite its plain terms) does not apply to the AT&T Indirect Traffic, then the Commission should exercise its "subject matter jurisdiction to resolve intercarrier compensation disputes," *Palmerton*, at 25, and apply the current, Commission-derived total elemental long-run incremental cost ("TELRIC") to the AT&T Indirect Traffic. The TELRIC reciprocal compensation rate is generally applicable to CLEC termination of traffic in Pennsylvania in a variety of contexts, and therefore TELRIC is the only credible alternative to Core's Tariff. Core is entitled to the tandem reciprocal compensation rate (instead of the end office rate) because each of Core's switches serves the entire incumbent tandem serving area in which it is situation. Tr. 92 (Core Witness Mingo testified that "[a]ll of our switches have a functional service area of a tandem . . ."); *and see*, 47

C.F.R. § 51.711 ("Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.") As of today the Commission-set TELRIC tandem reciprocal compensation rate is $0.002439. AT&T Cross Ex. 5 (excerpt from *Generic Rate Investigation,* Appendix A, Exhibit Part C-4 at 21.)

Commission precedent generally contemplates two primary groupings of methods for determining rates, the forward-looking TELRIC method and various methods based on historical or embedded costs which are used to determine access rates, such as the fully distributed cost ("FDC") method. *See*, *Verizon Pennsylvania Inc., et al. v. CTSI, LLC*, Pa. P.U.C. Docket No. C-20077332, at 6-12 (Order entered August 29, 2008) ("The Commission has traditionally availed itself of a number of generally accepted methodologies and standards for deriving the costs of various telecommunications services and establishing their lawfully just and reasonable rates. "Just and reasonable rates" have been deemed to be "cost justified" if they have been based on a reasonable measure of cost.")

Core is aware of ***no*** Commission precedent to support AT&T's wishful thinking that Core's costs can simply be assumed into non-existence. In *Palmerton*, the Commission concluded that "[c]osts indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes 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, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities." *Palmerton*, at 25. Rather than foregoing any attempt to reach a reasonable estimate of cost, the Commission instead relies on

generally acceptable costing principles whenever it applies a rate to a particular class of traffic. In the Commission's own words, "[t]he utilization of generally accepted methodologies and standards for the derivation of telecommunications services costs cannot be reasonably confined to a select group of telecommunications carriers that operate under our jurisdiction or to select groups of wholesale and retail services that are offered within Pennsylvania." *Id.*

TELRIC is clearly one such "generally accepted methodolog[y]," and would constitute a reasonable rate for the Commission to apply to the AT&T Indirect Traffic. According to the Commission, "[c]ertain standards and methodologies for the derivation of costs for the services and operations of telecommunications carriers including forward-looking economic cost standards and methods have been approved by the [FCC] and subsequently adopted by this Commission. In accordance with the federal [1996 Act], this Commission has implemented and utilized the total element long-run incremental cost standard and methods for deriving certain costs and rates for interconnection between ILECs and CLECs, including the costs and rates for unbundled network elements (UNEs)." *Id.*

The Commission has reiterated that TELRIC applies in the context of "reciprocal compensation rates for the exchange of local exchange traffic between interconnected ILECs such as Verizon PA and CLECs…" as well as "in the intercarrier compensation arrangements between local wireline telecommunications carriers, e.g., ILECs, and wireless carriers for the exchange of intra-MTA (within the major trading area) traffic." *Palmerton*, at 34 and note 21. There is no logical or policy reason to prevent the Commission from finding that TELRIC applies to CLEC-CLEC traffic as well.

TELRIC is well-established and broadly applicable in Pennsylvania. The Commission approves TELRIC reciprocal compensation and other rates only after extensive multi-party

proceedings involving massive evidentiary records. Core St. No. 2, at 7; *and see*, *supra.* at 13 (listing Commission TELRIC reciprocal compensation proceedings). Although these proceedings focus on the costs attributable to incumbent LEC networks (Verizon Pennsylvania in particular), FCC rules and Commission practice apply the resulting reciprocal compensation rate equally to ILEC and CLEC networks. 47 C.F.R. § 51.711(a)(1) ("Rates for transport and termination of telecommunications traffic shall be symmetrical... symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.") Under the TELRIC methodology smaller carriers' costs are presumed to be greater than larger carriers' costs, Core St. No. 1, at 7, which why FCC rules permit CLECs to challenge the symmetrical rates rule and prove that their costs are greater than the incumbent's. 47 C.F.R. § 51.711(b).

Commission-approved TELRIC rates are routinely incorporated into Commission-approved interconnection agreements. *E.gs.*, *Re NEXTLINK Pennsylvania, L.L.P.*, Pa. P.U.C. Docket No. A-310260 F0002, at *1 (Opinion & Order entered July 23, 1998) (setting "[r]eciprocal compensation for terminating local traffic at the rate of $0.001864 per minute of use (MOU) for traffic delivered at Bell's end office and at the rate of $0.002902 per MOU for traffic delivered at Bell's tandem or local serving wire center.") Prior to the *ISP Remand Order*, the Commission ruled that "calls to local ISPs shall be considered local and that reciprocal compensation shall be applied on all ISP traffic for all future interconnection agreements filed with this Commission." *Global Order*, 1999 WL 1041892 (Pa.P.U.C.), at *89. Perhaps of greater interest is that a TELRIC rate ($0.002814/MOU) applies to ISP-bound and other traffic exchanged (and terminated by AT&T) pursuant to its Commission-approved traffic termination

agreement with North Pittsburgh Telephone Company. BLM-15, at Amendment Exhibit B ("Rate Information"). Notably, this agreement was entered into well ***after*** the *ISP Remand Order* issued. *Id.* (cover letter dated February 23, 2009).

Finally, the Commission has steadfastly defended the TELRIC methodology, and rejected application of below–TELRIC rates (such the FCC's $0.0007/MOU rate for ILEC-CLEC ISP-bound traffic) as a "confiscatory" in its recent Petition for Certiorari to the Supreme Court. Core Cross Exh. 1, at 20 ("The [*ISP Remand Order*], with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that... bears no relationship to cost... the [FCC's] rate is set so far below actual costs as to be unjust and confiscatory.") While Core acknowledges that a filing does not constitute binding precedent, there is no reasonable way to interpret the Commission's advocacy on behalf of TELRIC as consistent with AT&T's refusal to pay *any* compensation whatsoever.

Accordingly, should the Commission decline to enforce the plain terms of Core's Tariff to the AT&T Indirect Traffic, the Commission should in the alternative permit Core to rerate its invoices to AT&T at the current Commission-approved TELRIC rate of $0.002439/MOU, and order AT&T to pay the resulting amount. That amount wass $1,425,512.38 as of August 31, 2010. Core Motion for Interim Relief at 1, n. 1. AT&T should also be directed to pay additional amounts due for traffic up to the present. The Commission should also order AT&T to pay associated interest charges at a reasonable lawful rate, to accrue from the date of each invoice.

C. The Commission Should Require AT&T to Enter Into a Traffic Exchange Agreement With Core Going Forward

As explained above, the Commission should find that Core's tariff is applicable to the traffic at issue in this case and require AT&T to pay accordingly. If, however, the Commission finds that the tariff does not apply, then Core alternatively asks the Commission to direct AT&T

to pay Core at the Commission-approved TELRIC rate for the traffic at issue in this case. As AT&T has made clear it will pay nothing but the "lawful rate whether by tariff or by contract" and that it will neither pay the tariffed rate nor enter into a contract to establish a payment rate, the Commission should also take affirmative action to direct AT&T to enter into a Traffic Exchange Agreement with Core to establish a reciprocal compensation payment arrangement that addresses payment for Core's termination of AT&T's traffic in the future.

1. All carriers are required to establish reciprocal compensation arrangements pursuant to federal law

Federal law is clear that all local exchange carriers are required to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Pursuant to federal rules such reciprocal compensation agreements must be established "with any requesting telecommunications carrier." 47 C.F.R. § 51.703. A reciprocal compensation agreement is one where the carrier originating the traffic pays the carrier terminating the traffic. 47 C.F.R § 51.703(e). Core has offered to negotiate a reciprocal compensation agreement to govern the traffic at issue in this case and AT&T has refused. Core St. No. 1 at 22-23. Neither the FCC nor the Commission has yet defined the process through which two CLECs should enter into such an agreement. But the FCC is not likely to act, and AT&T's intransigence demonstrates that the Commission should act now to fill this regulatory "void."

AT&T has offered no valid justification for refusing to pay Core and then for refusing to negotiate a payment agreement governing payment for future traffic. In fact, the Commission has put originating carriers on notice that if payment is sought by a terminating carrier for termination of their traffic, then originating carriers are required to initiate good faith negotiations for purposes of entering into a traffic exchange agreement. In *Palmerton*, the

Commission noted with disapproval that "following the receipt of Palmerton's billing invoices, GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP enabled traffic. This has not happened." *Palmerton*, at 35.

In this case, Core has sought to engage AT&T in negotiations intended to address the payment for both past traffic and future traffic. Core St. No. 1 at 10-12. While the parties may dispute why those negotiations did not satisfactorily resolve all issues, the fact is that they have not been resolved. Also undisputed is that during this impasse, one party – AT&T – is advantaged because it continues to refuse to pay Core anything for its termination services. AT&T will continue to receive service from Core without being required to pay for it unless and until the Commission takes decisive action to direct otherwise. Ordering AT&T to enter into a reciprocal compensation arrangement with Core is consistent with the law, Commission precedent and will ensure that Core is compensated going forward for the traffic that AT&T sends to it for termination. The Commission could order the parties to negotiate a TEA within a defined period of time, or the Commission could simply order the parties to enter into a TEA using Core's recently-negotiated TEA with PAETEC as a model. *See* Core hearing Exh. No. 5 (attaching the "TRAFFIC EXCHANGE & BILLING AGREEMENT" between Core and PAETEC.)

2. The Commission's Previous Ruling in the LTTS Tariff Case Does Not Negate Core's Right to Relief

Although the Commission has not yet issued guidelines for CLECs to enter into reciprocal compensation arrangements with other CLECs, it has rejected the concept of a tariff specifically implementing the reciprocal compensation regime. In 2005, MCImetro Access Transmission Services, LLC d/b/a Verizon ATS filed a tariff supplement to introduce Local

Traffic Termination Service ("LTTS") and thereby to establish a "default" compensation rate for Verizon ATS's termination of locally-dialed MOUs sent by any CLEC with whom Verizon ATS did not have an interconnection agreement. *See generally,* AT&T Cross Ex. No. 4 at 1 (*Pennsylvania Public Utility Commission v. MCImetro Access Transmission Services, LLC. dba Verizon Access Transmission Service*, Pa. P.U.C. Docket No. R-00050799, 2006 WL 2051138 (Pa.P.U.C.)(Order adopted June 22, 2006)("*Verizon ATS*").

The Commission concluded that there was "ambiguity" and "uncertainty" regarding its authority to approve default compensation rates by tariff and, because of that, rejected the proposed tariff. *Id.* at 6. In reaching this decision, however, the Commission made clear that it "could have the authority to approve a default compensation rate for CLEC-to-CLEC arrangements" and that the FCC precedent did not "contain express language addressing state commission authority to approve default compensation rates for CLEC-to-CLEC in the absence of a CLEC-to-CLEC interconnection agreement." *Id.* at 7. Based on this, the Commission chose a "cautious approach" until "after state commissions have the benefit of clarity from the FCC." *Id.* at 7. To be clear, *Verizon ATS* did not address the issue raised in this case, which is whether Pennsylvania's ***switched access regime***, as embodied by a CLEC's existing ***switched access tariff*** applies to CLEC-CLEC traffic in the absence of a TEA, where the plain language of that tariff covers all intrastate "communications." Rather, *Verizon ATS* addressed an issue that remains unresolved today – how to implement the ***reciprocal compensation*** regime as between two CLECs.

Indeed, *Verizon ATS* actually bolsters Core's position here in two ways. First, in recent years, the Commission has been clear that it can no longer wait for the FCC to address these types of intercarrier compensation issues and, thus, the decision in *Verizon ATS* case to await

FCC guidance is no longer appropriate. *See Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund,* Docket No. I-00040105, Order entered August 5, 2009 at 18-19. Moreover, the Commission has already determined that such guidance is not even necessary through its *Material Question Order* because it made clear that it does have jurisdiction to address the CLEC-to-CLEC compensation issues in this case and to set forth an appropriate rate. Therefore, to the extent AT&T tries to claim that the Commission's actions in *Verizon ATS* prohibit the Commission from granting Core relief in this case, such argument has no merit.

Second, *Verizon ATS* undermines AT&T's claim that no other CLEC in Pennsylvania beyond Core has challenged bill-and-keep or complained about that arrangement. Tr. at 208. In fact, the entire purpose of Verizon ATS' proposed tariff – proffered in 2005 – was to establish a default compensation arrangement for locally-dialed MOUs sent by CLECs where no other agreement existed between the CLECs. Given the Commission's decision at that time to reject the proposal and to "wait and see," the lack of subsequent attempts by CLECs to seek Commission redress for this issue until Core's 2009 complaint are not surprising.

3. Bill and Keep Can Not Apply to the AT&T Indirect Traffic

AT&T initially tried to defend its refusal to pay Core anything by relying on two theories related to the FCC's *ISP Remand Order*. First, AT&T tried to claim that the traffic at issue was determined by the FCC to be jurisdictionally interstate and, therefore, this Commission had no jurisdiction to adjudicate Core's complaint. AT&T St. No. 1 at 9, AT&T Motion to Dismiss. Second, AT&T tried to claim that the *ISP Remand Order* required carriers who exchanged traffic and did not have an interconnection agreement governing that exchange were governed by bill-and-keep. AT&T St. No. 1 at 3. Both of these theories have already and unequivocally been rejected. First, the Commission in its *Material Question Order* made clear that the *ISP Remand*

Order does not apply to the traffic exchanged here, i.e. between two CLECs. Second, there was never any legal validity to AT&T's claim that the *ISP Remand Order* required bill-and-keep because the language relied upon by AT&T had been reversed – a fact which AT&T witness Nurse only conceded on cross-examination though it was never referenced in his initial testimony nor ever corrected:

> ATTORNEY O'DELL: To the best of your knowledge, is this paragraph of the ISP Remand Order still in effect today?
> MR. NURSE: No.
> . . .
> ATTORNEY O'DELL: Okay. But you do not reference that forbearance anywhere in this testimony; is that correct?
> MR. NURSE: The paragraph 81 is part of the [*ISP Remand*] order and the FCC order forbear on it. I didn't state that.
> Tr. at 171-172.

Since AT&T can no longer claim reliance on the *ISP Remand Order* to justify its position that "bill-and-keep" governs the compensation for the traffic at issue in this case, AT&T appears to be left with only its broad claim that "every other CLEC in Pennsylvania operate[s] under the standard bill-and-keep arrangement for non-toll traffic." AT&T St. No. 1 at 13. AT&T, however, has no legal or record support for this claim.

First, bill-and-keep is defined by federal rules as an intercarrier compensation arrangement where neither carrier charges the other for termination of traffic when a "state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction." Exh. BLM-12, 47 C.F.R. § 51.713. There is no factual or evidentiary support in the record for AT&T Witness Nurse's suppositions as to "other scenarios" where carriers might agree to use bill-and-keep even though the traffic may not be roughly balanced. Tr. at 174. Rather, the undisputed record is clear that the traffic between AT&T and Core is not "roughly

balanced" as all of the traffic originates from AT&T's customers to Core for termination to Core's customers. Tr. at 174-175. As there is no "roughly balanced" traffic between the two carriers in this case as required by the federal rule, bill-and-keep cannot apply.

Second, the record does not support AT&T's broad claims that "every other CLEC in Pennsylvania operate[s] under the standard bill-and-keep arrangement for non-toll traffic." AT&T St. No. 1 at 13. On cross-examination, Core Witness Mingo testified that Comcast is paying it intrastate access for locally dialed traffic and that Verizon Business Solutions has always paid for locally dialed traffic. Tr. at 51-52. Further, Core recently entered into a Traffic Exchange Agreement with Cavalier and PAETEC governing the going-forward payment for locally-dialed traffic at the Commission-approved TELRIC rate. Core Hearing Ex. No. 5. The facts simply do not support AT&T's claim that "everyone uses a bill-and-keep arrangement" and, therefore, the Commission should order such an arrangement in this case.

4. Non-Payment Based on Regulatory Uncertainty is Unacceptable

One of AT&T's premises is that it need not pay Core anything unless and until the parties enter into agreement whereby AT&T voluntarily agrees to pay Core for termination of traffic. AT&T witness Nurse testified at the hearing that "[o]ur position is we'd pay the lawful rate. When there's a lawful rate in a tariff or a contract, that's what we pay. Otherwise, it's bill-and-keep." Tr. 178. Of course, since AT&T also notes that a CLEC like Core cannot demand Commission arbitration of such an agreement, the crux of AT&T's argument is that Core can never receive compensation from AT&T, not in the past, not in the present, and not in the future. In essence, the Commission can and should infer that AT&T will never pay until it is specifically required to do so. Even when asked what AT&T's position would be if it – and not Core were terminating the traffic in this case – AT&T Witness Nurse's non-responsive answer was that Core's end-user customers should pay. Tr. at 204-205. This, however, is the opposite of

reciprocal compensation which requires the originating carrier to pay for call termination. 47 C.F.R. at § 51.701(e). The Commission has been unequivocal in its position that leveraging regulatory uncertainty into complete denial of ***any*** intercarrier compensation obligation is simply unacceptable.

In *Palmerton*, defendant Global NAPs took the position that it had no duty to pay plaintiff Palmerton *any* intercarrier compensation because of the specific (VOIP) nature of traffic. The Commission examined an extensive factual record and concluded "[i]n view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton ***cannot be condoned*** as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes." *Palmerton*, at 47 (emphasis added).

While the Commission has acknowledged that "the facts of [this] case are somewhat different than those in the recently decided case of *Palmerton*, which dealt with compensation from a CLEC to an ILEC," *Material Question Order*, at 7, the Commission echoed its findings *Palmerton*, concluding that "[t]he non-payment of appropriate intercarrier compensation from one CLEC to another CLEC ***cannot be condoned*** as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes." *Id.* at 7 (emphasis added). The Commission also found "***without merit*** AT&T's contention that because these Parties do not have an interconnection agreement, in as much as CLECs cannot compel other CLECs to negotiate interconnection agreements under the 1996 Telecommunications

Act... Core is somehow precluded from making its Complaint before this Commission." *Id.* at 10 and note 5 (emphasis added).

AT&T is not entitled to a free ride on Core's network simply because the Commission has yet to issue a ruling specifically addressing CLEC-CLEC traffic. The fact that this case raises certain issues of first impression does not imply (as AT&T suggests) that ***no compensation applies*** to the traffic at issue here. Despite its protests to the contrary, Tr. at 205 (AT&T witness Nurse disagreeing with "Core characterization of zero compensation"), AT&T itself has proposed application of specific rate ($0.00/MOU) to its own traffic. If the Commission is not inclined to enforce Core's Tariff in this case, then it should exercise its well-established "jurisdiction to resolve intercarrier compensation disputes" and apply a reasonable, cost-based, positive rate (the Commission-approved TELRIC rate of $0.002439/MOU) to the AT&T Indirect Traffic—past, present and future.

D. As a Policy Matter, the Commission Must Condemn AT&T's Blatant Attempt to Take a "Free Ride" on Other Carrier's Networks

AT&T raises many red herring arguments in an effort to justify its willful refusal to compensate Core for termination of AT&T's Indirect Traffic. As discussed below, none of these arguments have any merit and must be rejected. Because AT&T's claims stretch way beyond any reasonable factual, policy or legal justifications, the Commission should exercise its discretion and assess an appropriate civil penalty against AT&T consistent with 66 Pa. C.S. 3301.

1. AT&T's Allegations Relative to Backbilling are unfounded

AT&T falsely alleges that "Core... backbilled AT&T for four years and demanded payment in only thirty days." AT&T St. No. 1, at 4. Not only is this statement factually wrong but it purports to "accuse" Core of doing something that is neither illegal nor impermissible.

First, Core did not demand payment within only thirty days upon issuance of its invoices. In fact, when AT&T disputed Core's first round of invoices in early 2008 and sought to discuss the matter, Core contacted AT&T and attempted to negotiate an agreement regarding the invoices. Core St. No. 1 at 11-13. Core never demanded that AT&T forgo its analysis of the invoices nor did Core ever "force" AT&T to commit to payment before it was ready. Core St. No. 1-SR at 4. In fact, AT&T has paid nothing for the traffic in dispute so there has been no "harm" to AT&T as it has paid nothing.

Second, as Core Witness Mingo explained, "backbilling is a fact of life in the telecommunications industry." Core St. No. 1-SR at 4. In fact the Commission has concluded that "the interests of justice will best be promoted by allowing the "back-billing" of a commercial customer who has knowingly received and used the public utility service for which, due to mutual inadvertence and due to the negligence of the public utility, the said ratepayer paid nothing. A contrary result would unjustly enrich Complainant at the expense of the other ratepayers." *St. Francis of Assisi Catholic Church c/o Rev. William J. P. Langan v. PG Energy, a Division of Southern Union Company*, Docket No. C-20042391, 2005 Pa. PUC LEXIS 16, 15-16.

Moreover, there is Commission precedent for permitting a utility to backbill for theft of service without any time limit. *See Polan v. Duquesne Light Company*, Docket No. F-8156073 (September 17, 1982). Cases regarding backbilling in the absence of theft of service or the Complainant's culpability have set reasonable limits on the amount of time that a utility can reach back to rebill. *See, e.g., Pa. P.U.C. v. Duquesne Light Company*, 50 Pa. P.U.C. 555, 50 Pa. PUC 173 (1977) (six-year statute of limitations applied to company's rebillings due to inaccurate calculation of bills). Since Section 1312 of the Public Utility Code permits ratepayers to seek

rate refunds when certain findings are made, up to a four-year past period measured from the date that the improper billing was discovered, the Commission has concluded that "[p]arity and equity warrant that a utility should likewise be limited to a four-year past period for recoupment of underbillings." *Angie's Bar v. Duquesne Light Company,* Docket No. C-81881, 1990 Pa. PUC LEXIS 4.

As explained by Core Witness Mingo, Core invoiced AT&T as soon as it became aware of the substantial volumes of telecommunications traffic originated by AT&T's end-users and terminated by Core. Core St. No. 1 at 8-9. Core's first invoices to AT&T covered traffic terminated in the prior month. Subsequent invoices covered traffic for later periods. Core St. No. 1 at 10. All of Core's backbilling would easily pass the six-year test; and all or substantially all of it would pass the four-year test. *See,* Core St. No. 1, Exh. BLM-1 (showing invoice dates corresponding to usage periods billed on each date). Core's actions to backbill AT&T were consistent with industry practice and the Commission's guidelines regarding backbilling.

2. AT&T, not Core, is the Carrier Engaged in Harmful Arbitrage

Much of AT&T's case is built on a regulatory smear job which attempts to undermine Core's reputation as a legitimate service provider. *See, e.g.*, AT&T St. No. 1, at 6 ("arbitrage carriers like Core harm consumers and distort the market"), *and see id.* at 21 ("Core is an arbitrage carrier… traditional intercarrier compensation methods do not apply to traffic exchanged with Core.") The Presiding Officer has already accurately concluded that AT&T's attempt to smear Core is not an appropriate affirmative defense against the question of AT&T's liability for payment. *Order #8* entered October 5, 2010 at 7. But, even if Core's business model was found to somehow be relevant here, it has already been approved by the Commission in 2006 with that Commission decision being affirmed Commonwealth Court in 2008. *Application of Core Communications Inc.* Docket No. 310922F0002, (Opinion and Order entered

December 4, 2006); *Rural Tel. Co. Coalition v. PUC*, 941 A.2d 751 (Pa. Commw. Ct. 2008). In Core's application case, the Commission confronted all the same claims AT&T tries to make here and found that Core is a legitimate, facilities-based local exchange carrier that provides an important form of competition that benefits ISPs and dial-up end user customers particularly in underserved rural areas. Core St. No. 1-SR at 10. AT&T's desire to relitigate these findings in this complaint case initiated by Core against AT&T must be rejected.

Likewise, AT&T's claim that it needs to be "protected" from Core's business model is ridiculous and only intended to obfuscate the facts of AT&T's own bad behavior. AT&T St. No. 1 at 24. According to AT&T, ILECs are "protected" because the *ISP Remand Order* caps the rate they are required to pay at $.0007. However, AT&T is clear that it will only pay the "lawful rate" as contained in "a tariff or a contract." Tr. at 178. In practical terms, as discussed above, AT&T refuses to recognize applicability of Core's Tariff to the traffic at issue and it refuses to negotiate a "contract" with Core claiming that the "default" compensation governing them is "bill and keep" despite the fact that Core vehemently opposes a bill-and-keep arrangement. Thus, AT&T's position is simply an attempt to craft an argument justifying its willful non-payment for services rendered.

In addition, AT&T has refused to enter into a direct interconnection arrangement with Core whereby AT&T would not need to utilize Verizon's tandem because doing so permits AT&T to escape its payment obligations to Core. Core St. No. 1 at 6. Rather, AT&T is paying a transit rate to Verizon, which is not shared or allocated to Core, as a way to avoid negotiating direct payment to Core. Even AT&T Witness Nurse admits that AT&T receives a financial benefit from choosing this indirect interconnection arrangement. Tr. at 197-198.

Finally, the record does not support AT&T's insinuation that Core's customers should bear the burden of paying for the costs to terminate the traffic originated by AT&T's customers. AT&T St. No. 1 at 5; Tr. at 204-205. The Commission has not adopted AT&T's viewpoint of what constitutes a "genuine local exchange customer." Tr. at 200-201; Core Cross Exh. No. 5. Moreover, as Core's business model continues to evolve it is serving more than ISP customers, is providing directory listings, and is originating traffic. Core Hearing Exh. Nos. 1, 3, and 4. As explained by Core Witness Mingo, "[w]e offer local telecommunications service to enhanced service providers ("ESPs"), including ISPs and increasingly, VOIP carriers. . . what they do with that service, and the manner in which 'interconnected VOIP' carriers are subject to 911 and other FCC requirements, is their business, not ours." Core St. No. 1-SR at 6.

Unlike Core, AT&T refuses to pay Core so that it can maintain a competitive advantage by not passing onto its customers the true cost of terminating their traffic. The Commission has made clear that if "certain competing telecommunications carriers pay intercarrier compensation for . . . traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." *Palmerton,* at 45. AT&T's ability to price its services lower because it is not passing onto customers the true cost of call termination, inhibits the ability of carriers who pay their intercarrier compensation obligations from entering into the market. Core St. No. 1-SR at 9. Thus, AT&T is creating for itself a competitive advantage by essentially stealing the use of Core's network. Core St. No. 1-SR at 11.

Moreover, AT&T's theory that Core's end-user customers should pay for the termination of AT&T's calls is not in the public interest. As explained by Core Witness Mingo, Core's

services enable customers who do not utilize broadband connections to access the Internet through dial-up service. Core St. No. 1 at 2. AT&T Witness Nurse agreed that "broadband" does not include "dial-up service." Tr. at 165-166. Thus, any reliance AT&T may make on the deployment of broadband by rural local exchange carriers is irrelevant. Tr. at 25-26. AT&T Witness Nurse also agreed that that some people may choose to access the Internet through dial-up service rather than through broadband connections. Tr. at 165-167. In fact, the record shows that the price for dial-up ISP service ranges from $5 to $15 per month whereas the price for broadband starts around $40/month. Core St. No. 1 at 2. Adding additional costs to ISPs to provide dial-up service will only have the effect of increasing the price consumers have to pay for dial-up service. The end result will be to deprive consumers of a reasonable alternative to broadband to access the Internet. In consideration of the fact that approximately 3.4 million Pennsylvanians live in rural areas, such a result is not reasonable nor beneficial. *See* http://www.rural.palegislature.us/about.html. In sum, the Commission should be concerned about AT&T's behavior in this case because of the harm it causes to the telecommunications industry and to consumers.

3. Core is Not Requesting Retroactive Ratemaking or Rate Discrimination

Because AT&T challenges the applicability of the tariffed rate to the traffic at issue here it may argue that the Commission cannot require it to pay anything whether because of potential retroactive ratemaking or rate discrimination. *See,* AT&T Response to Core Motion for Interim Relief at 21-24. Neither of these arguments have any merit and must be rejected. First, as explained above Core is asking the Commission to require AT&T to comply with its existing tariff and, therefore, it is not seeking a "new rate" to apply retroactively. Further, if Core's alternate request is granted and the TELRIC rate is applied to this traffic, AT&T is not "harmed"

by application of that rate which is many times less than the tariffed access rate. Further, AT&T's implicit request that the Commission apply an effective rate of $0.00/MOU is no more or less "retroactive" than Core's position in this case. AT&T should not be heard to complain about possible retroactive effects when it has done nothing to help the Commission resolve compensation for the AT&T Indirect Traffic.

Second, to the extent AT&T tries to claim application of its tariff rate somehow results in rate discrimination against AT&T, such argument is ridiculous. Core has done everything within its limited ability to resolve compensation issues with all the CLECs with whom it exchanges traffic. Core has filed two other complaints against CLECs seeking the same relief as it does in this case, and, for at least one other CLEC, Core is receiving compensation under its tariffed rate. Tr. at 51. Moreover, Core has always been willing to negotiate an agreement at the Commission-approved TELRIC rate with AT&T or any other CLEC, which rate would be less than the access rate. In fact, Core has entered into such an agreement with other CLECs in Pennsylvania. Core Hearing Exh. No. 5. Moreover, AT&T itself has entered into an agreement with another Pennsylvania carrier using the Commission-approved TELRIC rate. Core St. No. 1SR, Exh. BLM-15 (Traffic Termination Agreement). In sum, granting Core's primary request for relief in this matter will not unfairly "discriminate" against AT&T.

4. The Commission Should Direct AT&T to Pay a Reasonable Civil Penalty Pursuant to 66 Pa. C.S. §3301 for its Unreasonable and Obstructionist Behavior

In addition to directing AT&T to pay Core for past and continuing termination of the AT&T Indirect Traffic, all of the outstanding past due amounts, the facts of this record support imposing a civil penalty on AT&T for its unreasonable and bad faith actions to refuse to make any payment for services rendered and to ensure that AT&T pays Core as directed for the

termination of future traffic. To arrive at an appropriate civil penalty, the Commission considers the following factors set forth in 52 Pa. Code § 69.1201(c):

> (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
>
> (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
>
> (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
>
> (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
>
> (5) The number of customers affected and the duration of the violation.
>
> (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
>
> (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
>
> (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
>
> (9) Past Commission decisions in similar situations.

(10) Other relevant factors.

The Commission has already concluded that refusing to pay billed charges is conduct "of a serious nature" despite any efforts on the non-paying carrier's part to claim a legal right or entitlement to justify the non-payment. *Palmerton,* at 57. The Commission's very clear and recent pronouncements regarding its viewpoint that carriers are required to compensate each other for termination and AT&T's continued insistence that the rate is $0.00 counsel in support of a higher penalty.

AT&T's behavior knowingly and willfully put Core in the position of absorbing the costs to terminate AT&T's traffic. When approached by Core to negotiate an agreement, AT&T stonewalled and forced Core to engage in this litigation in an effort to recover its costs. Core St. No. 1 at 9-14. Obviously delaying this matter has advantaged AT&T given the fact that Core cannot block calls from AT&T customers and AT&T has not been required to pay Core a nickel for this traffic.

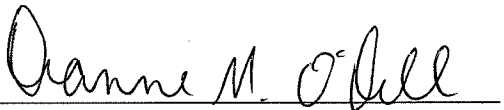
A serious civil penalty is also appropriate given the respective positions of the two parties. According to Fortune 500's ranking of America's largest corporations based on revenue for 2010, AT&T is ranked first among all telecommunications companies and seventh among all corporations with revenues of $123 billion in 2010. *See* http://money.cnn.com/magazines/fortune/fortune500/2010/snapshots/2756.html. In contrast, Core is a small, privately-owned company that serves a few key markets in the Mid-Atlantic region. Core cannot continue to absorb the costs of providing service for free while an entity with the significant financial resources of AT&T utilizes the justice system to delay resolution and to avoid making any payments to Core.

AT&T's stubborn intransigence should not be rewarded. Without strong and serious action by the Commission – such as an assessment of an appropriate civil penalty – Core believes that AT&T will have every incentive to continue to withhold any payment to Core for the continuing use of its termination services while, because of its significant resources, it erects every conceivable legal maneuver to delay the final resolution of this proceeding. Such an unfair result permits AT&T to continue to do what it has always done – utilize Core's termination services (at significant cost to Core) for free. Therefore, Core recommends that AT&T be required to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's Order in this matter. Further, Core recommends that AT&T be fined $1,000/day for each day that it fails to comply with the Commission's Order in this matter directing it to pay Core for use of its services and facilities.

VI. CONCLUSION

For all the reasons discussed above, Core requests that the Commission direct AT&T to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4 since there is no other agreement between the parties. If the Commission declines to apply Core's tariff to the previously terminated traffic (which it should not), Core requests in the alternative that AT&T be directed to pay 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. To govern future traffic, Core requests that the Commission direct AT&T to negotiate in good faith with Core to reach a mutually acceptable reciprocal compensation arrangement governing payment. Finally, Core requests that – due to the circumstances in this case – the Commission issue an appropriate civil penalty on AT&T to address its prior actions to refuse to compensate Core for its substantial use of Core's network and to ensure future good faith performance.

Respectfully submitted,



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APPENDIX A
PROPOSED FINDINGS OF FACT

1. Core Communications, Inc. ("Core") is a competitive local exchange carrier ("CLEC") authorized by the Pennsylvania Public Utility Commission ("Commission" or "PUC") to provide local exchange telecommunications service throughout Pennsylvania. Core St. No. 1 at 1. Core is in good standing with the Commission, and maintains a CLEC tariff (Pa. PUC Tariff No. 1), an IXC tariff (Pa. PUC Tariff No. 2), and an intrastate switched access service tariff (Pa. PUC Tariff No. 4) with the Commission. *Id.* at 2.

2. Core has traditionally focused on the provision of telecommunications services to dial-up internet service providers ("ISPs"), which provide unregulated "enhanced" services like web-surfing and email. *Id.*

3. Dial-up ISPs serve as a low-cost alternative for consumers in rural areas and consumers who are not heavy Internet users but still want access. *Id.* Because ISPs handle large volumes of inbound modem calls, ISPs are intensive users of telecommunications services. *Id.*

4. Since September, 2009, Core has also provided telecommunications services to voice-over-Internet protocol ("VOIP") providers, which similarly handle large call volumes and are intensive users of telecommunications services. *Id.*, *and see*, *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239, at 12 (order entered September 8, 2010) ("*Material Question Order*") ("[T]here has been a dichotomy of traffic terminated by Core. Traffic terminated prior to September, 2009 was ISP-bound... Traffic terminated

after September, 2009 may be mixed containing VoIP traffic termination and ISP-bound traffic.").

5. Respondents AT&T Communications of Pennsylvania, LLC ("AT&T"), and TCG Pittsburgh, Inc. ("TCG") (collectively, "AT&T" or "Respondents") are authorized by the Commission to provide CLEC and interexchange service in Pennsylvania. Core St. No. 1, at 3. TCG was one of the first CLECs operating in Pennsylvania, and at one time served "UNE-P" residential customers as well as small business customers and some dial-up ISP customers. *Id.* Respondents are wholly-owned subsidiaries of AT&T Corporation. *Id.* AT&T Corporation is the nation's largest provider of telecommunications services and a Fortune 5 company. *Id.* In its "home region" of the South and the Midwest, AT&T affiliates are the dominant incumbent local exchange carrier ("LEC") in each state, as Verizon Pennsylvania, Inc. ("Verizon") is in Pennsylvania. *Id.*

6. AT&T sends and has sent large volumes of telecommunications traffic to Core indirectly, via the tandem switch network of Verizon (the "AT&T Indirect Traffic"). *Id.* at 1, and Exh. BLM-2 (Diagram of Indirect Interconnection).

7. Core's Pennsylvania network and services enable AT&T customers to complete calls to their ISP, which in turn increases the utility of the AT&T customer's local phone service. *Id.* at 3. Some AT&T customers may order a second line in whole or in part for dial access. *Id.* at 4. AT&T's customers compensate AT&T for the use of its local exchange services, but AT&T is refusing to share this compensation with Core for completing the calls originated by AT&T's customers. *Id.*

8. The AT&T Indirect Traffic consists entirely of intrastate calls, that is, calls that originate and terminate in Pennsylvania. *Id.* An intrastate call can be distinguished from an

interstate call by comparing the calling party's phone number with the called party's phone number. *Id.*

9. AT&T has sent Core some interstate traffic, Core has invoiced AT&T for this traffic pursuant to its Federal Communications Commission ("FCC") interstate access tariff, and AT&T has paid these invoices substantially without dispute. *Id.* So the only traffic at issue in this case is intrastate. *Id.*

10. The AT&T Indirect Traffic further consists of locally dialed calls placed by AT&T's local exchange service customers in order to reach Core's customers. *Id.* 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). *Id.*

11. The difference between locally dialed and "toll" calls is that locally dialed calls are generally included with the consumer's flat-rate local service charge, whereas toll calls incur a per-minute charge or "toll." *Id.* at 5. Local and toll dialing are retail concepts and subject to change as carriers merge together and develop new retail packages, such as the "all you can eat" retail plans whereby carrier charge a flat-rate for all calls. *Id.*

12. From June, 2004 through September, 2009, AT&T end users using the TCG network (CIC 0292) originated 406,102,334 minutes of use ("MOUs") for termination on Core's network, for which AT&T has compensated Core exactly $0.00. *Id.*, *and see*, Exh. BLM-1 (Chart of Minutes of Use & Amounts in Dispute).

13. From June, 2004 through September, 2009, AT&T end users using the TCG network (CIC 0292) originated 406,102,334 MOUs for termination on Core's network, for which

AT&T has compensated Core exactly $0.00. *Id.*, *and see*, Exh. BLM-1 (Chart of Minutes of Use & Amounts in Dispute).

14. Following September, 2009, AT&T end users using the TCG network originated an additional 91,964 MOUs. Core Hearing Exh. No. 2 (attached chart shows AT&T MOUs terminated on Core's network).

15. AT&T has an interconnection agreement ("ICA") with Verizon by which AT&T is entitled to send traffic to the Verizon tandems for delivery to third-party carriers, such as Core. *Id.* at 6. In turn, Verizon is entitled to charge AT&T a per-MOU rate for the service of transiting the AT&T's traffic from AT&T to Core. *Id.*, *and see*, Exh. BLM-2 (Diagram of Indirect Interconnection). Pursuant to this ICA and the intrastate access tariff referenced therein, AT&T pays Verizon at a tandem switched transport rate of $0.000983/MOU, a tandem transport rate of $0.000195/MOU and another tandem transport rate of $0.000045/MOU/mile. Core Cross Exh. Nos. 3 and 4 (excerpts from the ICA and Verizon's intrastate access tariff). So, AT&T pays some intercarrier compensation on all of the AT&T Indirect Traffic—but it only pays Verizon for the use of its network, not Core.

16. AT&T's ICA with Verizon states, at Section 7.3:

> Each Party shall exercise all reasonable efforts to enter into a reciprocal local traffic exchange arrangement (either via written agreement or mutual tariffs) with any wireless carrier, ITC, CLEC, or other LEC to which it sends, or from which it receives, local traffic that transits the other Party's facilities over Traffic Exchange Trunks…
>
> In all cases, each Party shall follow the Exchange Message Record ("EMR") standard and exchange records between the Parties and with the terminating carrier to facilitate the billing process to the originating network. Core St. No. 1 at 7.

17. But AT&T has never sought, and indeed has studiously avoided, entering into a traffic exchange agreement with Core. *Id.* at 13 and 23; *and see*, Core St. No. 2 at 2.

18. In an ordinary commercial context, Core's "real world" recourse for non-payment would be to discontinue terminating AT&T's calls. However, federal and state law require Core to terminate all the calls it receives, and if it is not compensated for that termination service, Core must seek payment through the regulatory complaint process. Core St. No. 1 at 7.

19. Core receives and has received Carrier Access Billing System ("CABS") or "Category 11" records from Verizon on a regular basis. *Id.* at 8. CABS records are generated by Verizon's tandem switches and their purpose is to provide 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. *Id.* at 8.

20. For each call, CABS records the carrier identification code ("CIC") of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in MOUs. *Id.*

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

22. At that time, Core did not know about, and had no reason to be aware of, the substantial volumes of telecommunications originated by AT&T and delivered to Core via Verizon's tandem switches. *Id.* at 9. Since Core's customers were traditionally limited to dial-up ISPs, and this traffic was, to Core's knowledge, generated by Verizon end users, Core did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records. *Id.* Instead, Core found that AT&T, since at least 2004, has been sending Core substantial volumes of traffic. *Id.*

23. Once Core found evidence of AT&T and other CLEC indirect traffic, it embarked on a larger project of systematically processing several years' worth of magnetic tapes, in order to get a complete picture of this traffic. *Id.* As these efforts progressed Core began to invoice AT&T for the AT&T Indirect Traffic. *Id.*

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

25. In January, 2008, Core sent its initial invoice to AT&T, for the AT&T Indirect Traffic terminated by Core in December, 2007. *Id.* at 10. In March, 2008, Core invoiced AT&T for the remainder of CY 2007. *Id.* Core then billed AT&T for CY 2004-2006 in January, 2009, and for CY 2008 in May, 2009. *Id.*

26. Currently, Core bills AT&T each month for the prior month's usage. *Id.* As of November, 2009, the total amount of invoiced charges in dispute for the AT&T Indirect Traffic was $5,997,637.40. *Id.*

27. Upon receiving the initial round of invoices in early 2008, AT&T disputed various amounts by means of a form letter stating "AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to discuss. Please contact us at your earliest convenience." *Id.* at 11, *and see*, Exh. BLM-3 (AT&T Form Letter). AT&T also sent an email stating "[f]or CIC 292, someone from our Business Development Group will need to speak with you and review Call Detail Records since records can contain local service." *Id., and see*, Exh. BLM-4 (Email from Lynda Eyerman to Stephanie Anderson). Core contacted Mark Cammarota, AT&T's Lead Carrier Relations—National Access Management. *Id.*

28. AT&T, through Mr. Cammarota, subsequently sent Core an email stating that the AT&T Indirect Traffic was "primarily all local traffic and is bill and keep" and offering to "forward a draft" of a "standard switched access agreement... we use with CLEC's." *Id.* Core, through its President Bret Mingo, conducted two or three brief calls with Mr. Cammarota, but was never able to engage in a discussion about AT&T's continuing refusal to pay for the AT&T Indirect Traffic. *Id.* Then, inexplicably, Mr. Cammarota simply disappeared. *Id.*

29. Between roughly, August, 2008 and March, 2009, Mr. Mingo attempted to reach Mr. Cammarota at least twenty (20) times, but he never responded. *Id.* Only after Core wrote a formal demand letter to Mr. Cammarota, with a copy to AT&T's local counsel, did Mr. Cammarota resurface. *Id.*, at 12-13, *and see*, Exh. BLM-7 (Letter from Bret Mingo to Mark Cammarota).

30. Core and AT&T then conducted two telephonic settlement conferences, one on May 7 and one on May 11, 2009. *Id.* at 13. Core proposed to rebill all of the AT&T Indirect

Traffic—past, present, and future—at the Commission-approved TELRIC rate for traffic termination. *Id.* AT&T denied Core's proposal, and declined to put forth any proposal of its own, leaving Core no option but to seek to enforce its right to payment for services through litigation. *Id.*

31. AT&T has never denied that its end users originate the AT&T Indirect Traffic to Core for ultimate delivery to Core's end user customers. So long as it does so, AT&T will be responsible a for causing a substantial portion of Core's network costs. *Id.* As a result, AT&T's non-payment challenges Core's ability to maintain a robust and reliable network, let alone upgrade and expand its network to offer additional services, such as VOIP and outbound calling. *Id.*

APPENDIX B
PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding.

2. As the proponent of a Commission order, Core has the burden of proof in this case.

3. To establish a sufficient case and satisfy the burden of proof, Core must show that the Respondents are responsible or accountable for the problem described in the Complaint.

4. The degree of proof required to establish a case before the Commission is a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602, 1990 Pa. Commw LEXIS 402, alloc. den., 602 A.2d 863 (Pa. Cmwlth. 1992); *Se-Ling Hosiery v. Marqulies*, 70 A.2d 854 (Pa. 1950).

5. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. 2 Pa. C.S. § 704; *Mill v. Pa P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

6. Core produced sufficient credible evidence to bear its burden of proof that AT&T has sent substantial amounts of traffic to Core, Core has terminated the traffic and AT&T has refused to compensate Core any amount for this service.

7. Core has produced sufficient credible evidence to bear its burden of proof that the traffic sent by AT&T to Core falls within the terms of Core's Tariff and should be compensated accordingly.

8. Core has produced sufficient credible evidence to bear its burden of proof that AT&T must be directed to enter into good faith negotiations with Core to establish a mutually agreeable traffic exchange agreement setting forth a reciprocal compensation agreement governing Core's termination of traffic originated by AT&T in the future.

9. Core has produced sufficient credible evidence to bear its burden of proof that AT&T should be assessed a civil penalty pursuant to 52 Pa. Code § 69.1201.

APPENDIX C
PROPOSED ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

1. Respondent is directed to pay Complainant $5,997,637.40 for traffic delivered as of October 31, 2009. For all additional MOUs sent by Respondent to Complainant from November 1, 2009 through the date of the Commission order, Respondent is directed to pay Complainant pursuant to the rate set forth in Core's Pa. P.U.C. Tariff No. 4 which is approximately $0.014 per minute-of-use. For all these MOUs, Respondent shall also pay the late payment charges at the tariffed rate of 1.5% per month pursuant to Core Tariff, Original Sheet No. 33, from the due date of each invoice.

2. Respondent is directed to enter into good faith negotiations with Complainant governing the payment of locally dialed, intrastate traffic at the Commission-approved TELRIC tandem rate.

3. Respondent is directed to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's Order in this matter.

4. Respondent is directed to pay a civil fine of $1,000/day for each day it fails to pay Core in compliance with the Commission's Order in this matter.