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December 14, 2010

Via Overnight Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

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

Dear Ms. Chiavetta:

Please find enclosed an original and nine (9) copies of the Main Brief of AT&T for each docket referenced above.

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

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

Very truly yours,

Kara Gibney

Enclosure

cc: Certificate of Service
Office of Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

MAIN BRIEF OF AT&T

AT&T Communications of PA, LLC and
TCG Pittsburgh

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AT&T Communications of Pennsylvania, LLC, and TCG Pittsburgh ("AT&T" and "TCG," collectively "AT&T") hereby submit to the Pennsylvania Public Utility Commission ("Commission") their Main Brief in the Complaint dockets initiated by Core Communications Inc. ("Core").[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Core's Formal Complaint asks the Commission to do something that neither this nor any other state commission has ever done:

(i) Create a rate for a "service" where none currently exists – either in a contract or in a tariff – and apply that rate both prospectively and retroactively; or

(ii) In the alternative, hold that an intrastate switched access service tariff applies not only to non-local, toll, interexchange traffic (which on its face is clearly *all* Core's tariff applies to), but also to the termination of locally dialed, non-toll calls.

Not only would either of these actions be completely unprecedented, they would also be completely unauthorized and unlawful. For these reasons alone, Core's Complaint should be denied.

* * *

Core seeks payment for terminating what it claims amounts to more than 400 million minutes of locally dialed, ISP-bound traffic originated by AT&T end user customers during the past 6½ years. Core asks the Commission to award it more than $7.5 million, an amount it derives by multiplying the more than 400 million minutes of local traffic allegedly terminated by Core from AT&T customers by the rate specified in Core's intrastate switched access service tariff for terminating non-local, toll, interexchange traffic ($.014 per minute), plus an unspecified

[1] AT&T is including Proposed Findings of Fact and Conclusions of Law as Appendix A and B to this brief.

amount of interest. In the alternative, Core asks that it be awarded an amount equal to the same 400 million plus minutes multiplied by the so-called Verizon tandem-based reciprocal compensation rate ($.002439) – which not even Verizon pays – plus, again, an unspecified amount of interest.

Core does not have a contract with AT&T that covers the local traffic in question. Nor does its tariff specify a rate for terminating locally dialed calls. Accordingly, there is no lawful rate for the "service" that Core claims to have provided – which means it would be unlawful for Core to bill and collect *anything* for AT&T's locally dialed ISP-bound traffic.

Core admits that it has no contract with AT&T; it also admits that it has not filed a tariff that contains the so-called Verizon tandem rate, or any rate at all that applies to the termination of locally dialed traffic. Core further admits that "[c]arriers generally bill one another either by tariff or by agreement." Mingo Direct at 17. To overcome the problem these facts create, and to suggest *some* basis for charging AT&T *some* rate, Core offers the novel and unprecedented assertion that its switched access service tariff, which by its own terms is limited to non-local, toll, interexchange traffic, can and should be read to nonetheless apply to locally dialed traffic. That assertion is frivolous, so much so that it is difficult to fathom how Core could make it with a straight face. Core's own actions make that crystal clear.

Core is certificated to operate in a number of other states, including Delaware, New Jersey, West Virginia and Alabama. Tr.[2] 17-18, 122-132 (Mingo cross-examination). In each of these states, Core has on file with the state commission an intrastate switched access service tariff that is, in pertinent part, substantially identical to Core's Pennsylvania tariff. The Delaware, New Jersey, West Virginia and Alabama tariffs define the terms "access service,"

[2] The transcript of the evidentiary hearing held in this matter on November 18, 2010 is referred to herein as "Tr."

"switched access service," and "local traffic" the same way as the Pennsylvania tariff, and all five tariffs describe "Switched Access Service" (the service for which Core is authorized to charge the switched access rate) precisely the same way. Core's CEO Bret Mingo admitted this on cross-examination. See Tr. 124-125, 127, 129; AT&T Cross Exs. 12, 13, 14, 15, and 16. He also acknowledged on cross-examination that the AT&T traffic in question satisfies the definition of "local traffic" in all five tariffs. Tr. 98-99, 118-129.

There is, however, one very critical way in which the tariffs differ. The Delaware, New Jersey, West Virginia and Alabama tariffs all have a section that the Pennsylvania tariff does not: one that describes a "service" called "Local Traffic Exchange and Termination" and that specifies a rate that applies to this "service" (in each case, a small fraction of the switched access service rate). This stands as a conclusive admission by Core (1) that the switched access service and the rate specified for it in the Pennsylvania tariff do not apply to local traffic and therefore do not apply to AT&T's locally dialed traffic; and (2) that if Core wished to charge a rate for this locally dialed traffic Core recognizes that it must include an additional section in its tariff covering the service of "Local Traffic Exchange and Termination" and a rate for that service. Accordingly, Core's tariffs in these other states leave no room for doubt that Core's Pennsylvania tariff does not cover or specify a rate for the locally dialed traffic at issue here.

Core has also admitted before this Commission that the specific kind of locally dialed traffic at issue here – ISP-bound calls – can never be subject to switched access charges because "whatever else it may be, ISP-bound traffic cannot be 'access traffic.'" See AT&T Cross Exs. 9 and 10.

Finally, AT&T is not aware of a single instance – and Core has not identified any – where this Commission, or any other state commission, has applied intrastate switched access

rates to local traffic generally, or to locally dialed ISP-bound traffic, specifically. To the contrary, the Commission has expressly recognized that switched access charges apply only to non-local, toll, interexchange traffic.

* * *

What this all means is that in order to grant Core the relief it seeks:

- The Commission would have to ignore 66 Pa. C.S.A. §§ 1302 and 1303 and permit Core to bill and collect a rate it has never tariffed.
- The Commission would have to ignore 66 Pa. C.S.A. § 1304's ban on discriminatory rates and permit Core to bill and collect from AT&T a rate ($.014 per minute) that is 20 times the rate paid by ILEC Verizon for precisely the same kind of traffic ($.0007 per minute) and that is infinitely greater than the rate ($0) paid by virtually every other CLEC in the state.
- The Commission would be required to create out of whole cloth a new rate – one not reflected in either an agreement or a tariff – and apply it both prospectively *and retroactively*, something the Commission may not legally do.
- The Commission would be required "to substantially alter existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania by replacing the use of bill-and-keep compensation" with a regime in which CLECs pay each other explicit rates for terminating local traffic. *PUC v. MCImetro Access Transmission Services, LLC*, 2006 WL 2051138, * 1 (Pa. P.U.C. June 22, 2006) ("*MCImetro Access*") (AT&T Cross Ex. 4).

* * *

Core devotes a lot of space and rhetoric in its papers and testimony to denouncing the well-established bill-and-keep form of compensation. In doing so:

- Core ignores that bill-and-keep is the basis on which *all* other CLECs in Pennsylvania exchange local traffic with one another – including CLECs who, like Core, terminate locally dialed ISP-bound calls.
- Core ignores that bill-and-keep has been the consistent and uniform practice for CLEC-to-CLEC exchanges of local traffic both in Pennsylvania and elsewhere since the passage of the 1996 federal Telecommunications Act.
- Core ignores that although AT&T has exchanged local traffic with other CLECs on a bill-and-keep basis without exception during the entire relevant period, no other CLEC, including those which have terminated significant volumes of locally dialed ISP-bound calls, has complained about bill-and-keep. Tr. 208 (AT&T Panel redirect).
- Core ignores that this Commission has expressly recognized that "the use of bill-and-keep compensation" is the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania." *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4).
- Core ignores that, as this Commission has recognized, in the *ISP Remand Order* the FCC "established . . . an overall policy of moving Internet access compensation from an MOU [minute of use] basis to a Bill-and-Keep system." *Id.* *9 (AT&T Cross Ex. 4). As recently as October 2010, the FCC reaffirmed that its goal was to "encourage 'decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance on end users, consistent with the

tentative conclusion...that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic.'" AT&T Cross Ex. 20; *Core Communications, Inc. v FCC, et. al.,* Brief for the Federal Respondents in Opposition, p. 22.

Far from being a disfavored compensation arrangement, as Core attempts to portray it, bill-and-keep is the universally *preferred* arrangement in the CLEC-to-CLEC world. If all CLECs were required to enter into intercarrier compensation agreements with one another providing for explicit payments for local traffic, the administrative costs associated with establishing and implementing the contracts and billing each other would dwarf many times over any conceivable benefit that any individual CLEC might realize.

Core also devotes a lot of space and rhetoric to an effort to paint AT&T as an unrepentant scofflaw that unjustifiably refuses to pay its bills. A quick look at the history surrounding Core's own actions refute this erroneous portrayal of AT&T. Core became certificated in Pennsylvania in 2000. From 2000 until early 2008, Core never sent a single bill to AT&T. During these eight years, Core also never once approached AT&T to request negotiation of a contract rate for the exchange of local traffic. This was not at all unusual because AT&T did not get bills from any other CLECs for the exchange of local traffic. Nor did it send any bills for local traffic to any CLEC. Out of the blue, in 2008, Core began sending bills to AT&T. Once AT&T reviewed these bills, it became clear that the vast majority were for local traffic, for which Core had no tariff and no lawful rate. AT&T paid Core's bills for toll traffic, even though untimely, but declined to pay the unlawful ones for local traffic.

Contrary to Core's claim that AT&T is somehow a bad actor for refusing to pay Core's bills, it is in fact Core that has failed to obey the law. For example, 66 Pa. C.S.A. § 1302

requires, as a prerequisite to charging a rate, that a carrier file a tariff that contains the rate. Core has blithely ignored that statutory requirement for years. And 66 Pa. C.S.A. § 1303 prohibits a carrier from charging a rate that is not contained in a tariff. Core's entire case in this proceeding runs roughshod over that statutory prohibition. Moreover, in order to obtain its certification, Core represented to this Commission that it possesses the "technical, financial and managerial resources" required to operate as a responsible telecommunications company. 66 Pa. C.S.A. 3019(a). Yet, Core's CEO Bret Mingo, who claims to have been responsible for Core's "billing and network management" from the outset (Mingo Direct at 1; Tr. 24), freely admits that he had no idea how to read the industry standard records that Verizon has provided to Core *on a daily basis* since 2004 – records that showed both that AT&T was originating locally dialed traffic that was being sent to Core and precisely, on a daily basis, the volume of that traffic. Tr. 64-71; Mingo Direct at 8. He also freely admits that he did not bother to hire someone who could read these records until the very end of 2007 – by which time the records (specifically, the cartridges that contained them) were exhausting available storage space at Core, unread and unused. Tr. 64-65; Mingo Direct at 8. It is difficult to imagine a more graphic display of the absence of technical and managerial fitness to run a telecommunications company.

Core acknowledges that it did not send any bills to AT&T until early 2008. Mingo Direct at 10. But it tries to deflect the Commission's attention away from its own technical and operational incompetence by blaming AT&T for not telling Core that it was originating calls directed to Core's ISP customers. Mingo Direct at 9.

That is nonsense – because AT&T *did tell* Core that it was sending traffic to Core. It did so in real time in the same manner that all reputable carriers inform downstream carriers of the source of arriving traffic and whether the traffic is local or toll in nature: AT&T passed on to

Verizon on each and every one of its calls its carrier identification code ("CIC") and the calling party's number ("CPN"). Panel Reply Testimony of AT&T at 14. And Verizon passed this information on to Core in the records that were sent to Core each and every day – in the cartridges that piled up, unused and unread, in Core's offices in 2004, 2005, 2006 and 2007. Tr. 64-71. Had Core bothered to look at these records, the CIC would have told Core that the call was originated by AT&T and the CPN would have told Core whether the call was locally dialed or toll.

Moreover, because Core waited years before sending any bills, and because the existing practice for CLEC-to-CLEC exchanges of local traffic was and is "bill-and-keep compensation," it was reasonable for AT&T and other CLECs to assume that Core, like all other Pennsylvania CLECs, was terminating local traffic on a bill-and-keep basis.

* * *

Finally, Core's claim that its "economic viability" is being threatened rings hollow. By its own admission, Core did not even know AT&T was sending it traffic until 2008. Mingo Direct at 8-9. But Core did know it was receiving traffic originated by carriers other than Verizon throughout the period 2004-2007; and it knew, also throughout this period, that it was not billing for this non-Verizon traffic. Tr. 72-73, 77-78; Mingo Surrebuttal at 5-6; AT&T Cross Ex. 1 (Core's Response to Interrogatory 6-6). Evidently, Core did not think that leaving that traffic unbilled in any way "threaten[ed] [its] economic viability." Mingo Surrebuttal at 2. Of the more than 400 million minutes for which Core seeks compensation in this case, fully 97% were delivered to Core during this period, 2004-2007. Mingo Direct, Ex. BLM-1. That period ended before Core claims to have first realized that it was terminating AT&T-originated locally dialed traffic. By the time Core filed suit, the traffic flow from AT&T had slowed to barely a

trickle (which coincides with the fact that virtually all Internet traffic has moved away from dial-up service to DSL, cable modem service, or some other high-speed arrangement). Indeed, for the period June 2008 through October 2009, the total "bill" that Core claims is due, even at switched access rates ($.014 per minute), amounts to only $3,321.52 – only five one-hundredths of one percent of the total amount claimed (0.05%). *Id.* Subsequent to October 2009, the monthly "bills," even at switched access rates, are less than $100.00. Core Hearing Ex. No. 2 (Core Response to Interrogatory 6-2). If allowing the traffic received in the four years 2004-2007 to go unbilled did not "threaten[ ] [Core's] economic viability," it is plain that the piddling amounts received since then could not possibly impact its "economic viability" in the least.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Core has been certificated to operate as a CLEC in the Commonwealth of Pennsylvania since 2000. Cmplt, ¶ 3; Tr. 64.

To and through September 2009, Core's only customers in Pennsylvania were ISPs. Beginning in or about October 2009, Core claims to have begun providing service to Voice Over Internet Protocol ("VoIP") providers – *i.e.*, companies that serve end user customers that receive VoIP communications. Core claims that beginning in or about April 2010, Core's VoIP customers have originated communications. Tr. 20. Prior to that time, Core handled only inbound traffic that was terminated to its customers; Core originated no outbound traffic at all. Tr. 18. The outbound traffic that purportedly commenced in April 2010 goes only to Verizon end user customers; calls directed to other carriers' customers are blocked. Tr. 21.

Currently Core has 60 ISP customers and 6 VoIP customers. Core Hearing Ex. 3. Core claims that it cannot distinguish between traffic directed to ISPs and that directed to VoIP providers. Tr. 43.

Throughout the relevant time period, June 2004 to the present, AT&T has been certificated to operate as a CLEC in Pennsylvania. Amended Answer, ¶ 5. During that time, AT&T has, among other things, provided local exchange service to both business and residential customers. *Id.*

The networks of AT&T and Core have *never* been directly interconnected. Instead, these two CLECs have been indirectly interconnected through ILEC Verizon. Amended Answer, ¶ 11; Panel Reply Testimony of AT&T at 7. That is, both are interconnected to Verizon's network, which passes traffic from one CLEC to the other. *Id.* Because of the significant facilities costs associated with direct interconnection, most CLECs opt for this indirect method of interconnecting with one another. Mingo Direct at 6.

Throughout the relevant period, ILEC Verizon has provided a transiting service to AT&T. Accordingly, AT&T-originated traffic destined for one of Core's customers is handed off by AT&T to Verizon, which in turn hands it off to Core. Amended Answer, ¶ 11; Panel Reply Testimony of AT&T at 7.

Since at least as early as June 2004, AT&T has originated traffic that was forwarded to Verizon, and by Verizon to Core for termination. The overwhelming majority of this traffic has been locally dialed. A very small fraction has been non-local, toll, interexchange traffic. All of it is ISP-bound traffic. (Because Core maintains it cannot *identify* any specific call as being directed to a VoIP provider as opposed to an ISP, the Commission is compelled to assume that all AT&T-originated traffic delivered since September 2009 has been ISP-bound traffic.)

On each of its calls throughout the period June 2004 to the present, AT&T has passed on to ILEC Verizon (a) AT&T's CIC, (b) the calling party's number, and (3) the called party's number. Panel Reply Testimony of AT&T at 14. Verizon in turn passed all of this information

along to Core in industry standard records provided to Core on a daily basis. *Id.*; Tr. 65-71; Mingo Direct at 8.

During the period June 2004 through December 2007, Core terminated about 395 million minutes of locally dialed ISP-bound traffic originated by AT&T. Mingo Direct, Ex. BLM-1. Core also terminated during this period a small amount of toll traffic originated by AT&T. Mingo Surrebuttal at 4-5. Core did not bill AT&T for any of this traffic prior to January 2008. Mingo Direct at 10; Panel Reply Testimony of AT&T at 17.

In January 2008 Core sent AT&T an invoice for traffic terminated during December 2007. In March 2008 Core sent AT&T an invoice covering traffic terminated during the first eleven months of 2007; in January 2009 Core submitted an invoice covering the period June 2004 through December 2006;[3] and in May 2009 Core sent AT&T an invoice covering all of 2008. Mingo Direct at 10.

For toll calls, *i.e.*, those calls where the NPA-NXXs of the calling and called parties are associated with different exchanges or local calling areas, AT&T paid these late-submitted bills. AT&T did so because there was a lawful rate for terminating this toll traffic, contained in either Core's federal switched access service tariff on file with the FCC (for interstate toll traffic) or Core's Pennsylvania intrastate switched access service tariff on file with the Commission (for intrastate toll traffic). Some of Core's invoices for toll traffic required adjustment because Core used a rate or rates that exceeded the maximum rate or rates permitted by Pennsylvania and/or federal law. AT&T made these adjustments, and Core agreed that the adjustments were correct. Mingo Surrebuttal at 5.

[3] Although for all the reasons stated in this brief AT&T believes that Core has no legal basis to backbill AT&T for the termination of locally dialed traffic, even if it could, under 52 Pa.C.S. § 64.19 Core can only backbill AT&T four years. Core did not bill AT&T for the period June 2004 through December 2006 until January 2009. Under the four year limitations period, Core is not entitled to recover terminations charges prior to January 2005.

Core billed for all of the locally dialed ISP-bound traffic at its tariffed intrastate switched access service rate. Tr. 38. AT&T, which had properly assumed that such traffic was subject to the bill-and-keep compensation convention (the universally recognized practice for CLEC-to-CLEC exchanges of local traffic), refused to pay the non-local switched access service rate for any of the locally dialed traffic. There was no lawful tariff establishing a rate for locally dialed traffic, either specifically for traffic received from AT&T alone (which would have been illegal on its face) or in general for all locally dialed traffic. AT&T and Core have never had any contract that specified a rate for terminating locally dialed traffic. That is undisputed. And Core has never had on file with the Commission a tariff that specifies a rate for such traffic. As we show below, that is indisputable.

The volume of AT&T-originated locally dialed traffic terminated by Core has varied over time. Through September 2009, Core claims that it terminated more than 406 million minutes of AT&T locally dialed ISP-bound traffic. Mingo Direct at 5. Of this total, all but about 12 million minutes – or 3% of the total – was terminated prior to the time Core submitted its first invoice (January 2008). And by June 2008, all but about 225,000 minutes of the total – or only five one-hundredths of one percent of the total – had been terminated. Mingo Direct at 5; Tr. 30, 33-34, 38. In 2009 the monthly average was about 15,000-16,000 minutes of locally dialed, ISP-bound traffic. Today, it is in the 4,500 minutes per month range. *Id.*

AT&T exchanges local traffic with all other CLECs in Pennsylvania on a bill-and-keep basis and has done so without exception since the passage of the 1996 federal Telecommunications Act. Panel Reply Testimony of AT&T at 13. To AT&T's knowledge, no other Pennsylvania CLEC has attempted to bill another CLEC for terminating local traffic. In 2006 the Commission recognized that the "existing CLEC-to-CLEC intercarrier compensation

practice[ ] in Pennsylvania" is "bill-and-keep compensation." *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4).

Bret Mingo is Core's CEO and has been since the Company's inception. Core is certificated to operate as a CLEC in a number of other states, including Delaware, New Jersey, West Virginia, Alabama, Maryland, and New York. Tr. 17-18, 122-132. Mr. Mingo is, and since their inception has been, the CEO of the Core operating companies in each of these states. Tr. 17.

In his capacity as CEO, Mr. Mingo has been throughout the relevant period in charge of Core's "billing and network management." Tr. 24.

In 2004 the Commission approved reciprocal compensation rates for terminating local traffic for ILEC Verizon. AT&T Cross Ex. 5. These rates are $.000987 per minute (for termination at the end office) and $.002439 per minute (for termination at the tandem). *Id.* Tr. 88-89. Earlier, in 1997, the Commission ruled that an "average" rate would apply to Verizon traffic terminated at a CLEC switch "where the CLEC [as Core does] employs a single-tier interconnection structure." AT&T Cross Ex. 6. Because Verizon terminates a significant volume of calls at its end offices rather than at its tandems, this means that the "average" rate paid by Verizon would never equate to the tandem termination rate of $.002439, but instead would be somewhere between the end office and tandem rates.

At all relevant times since at least June 2004, Verizon has provided Core with Carrier Access Billing System ("CABS") records on a daily basis. Tr. 64-65. CABS records are industry standard records that contain information on toll and local calls. Panel Reply Testimony of AT&T at 12, 14. The CABS records received by Core included all traffic, local and toll, originated by third party carriers and terminated by Core. Tr. 64. The daily CABS records

provided Core with: (1) the CIC of the originating carrier for each call (CIC 288 and 292 for AT&T), which would allow Core to identify calls originated by AT&T (Tr. 66); (2) the calling and called party numbers for each call (Tr. 66), which would allow Core to jurisdictionalize each call as local or toll (Tr. 68-69, 71); and (3) the duration of each call, which would allow Core to bill for usage on a minute-of-use basis (Tr. 67). Mr. Mingo testified (Tr. 67):

> Q. So for category 11 or CABS records for AT&T from 2004 forward, you've got the CIC code, you've got the calling party number; correct?
>
> * * *
>
> A. Yes, yes.
>
> Q. And you've got the called party number?
>
> A. That's correct.
>
> Q. And you would also get the duration, that is, how long the call lasted. So if you were billing usage on a minute-of-use basis, you'd know how much to bill?
>
> A. That's correct.
>
> Q. So you got all four of those?
>
> A. That's correct.

See also Mingo Direct at 8 ("For each call, CABS records the [CIC] of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in 'minutes of use.'")

Core did not attempt to analyze the CABS records until the end of 2007. Mingo Direct at 8. Mr. Mingo testified that although he was responsible for Core's "billing and network management" (Tr. 24), he and Core were incapable of reading the industry standard CABS records (Tr. 64-65). The records, according to Mr. Mingo, "cluttered" Core's office, unread and

unused for years. Tr. 64. Core hired a consultant to read the CABS records at the end of 2007. Mingo Direct at 8.

Mr. Mingo acknowledged that the CABS records provided Core with everything it needed to determine that it was receiving locally dialed traffic from AT&T and to bill AT&T for the termination of that traffic (Tr. 64-71; Mingo Direct at 8-9), and that if Core had analyzed the CABS records it was receiving from Verizon it could have determined in June 2004 (and throughout the rest of 2004, 2005, 2006 and 2007) that it was terminating traffic originated by AT&T (Tr. 71-72). Mr. Mingo testified (Tr. 71-72):

> Q. Now, if you'd analyze the CABS records that were being sent to you on a daily basis beginning back in June of 2004 and moving forward, you could have determined that you were getting traffic that was AT&T originated?
>
> A. That's right. If we fully understood the magnitude of what was on those tapes earlier, we could have done it earlier, yes.
>
> Q. And if you'd look at - - - if you'd analyzed the information on the cartridge beginning in June 2004 and moving forward, you could have determined in June 2004, for instance, that you were getting traffic from AT&T?
>
> A. That's right.
>
> Q. And the same is true in 2005, 2006 and 2007?
>
> A. Yes.

Mr. Mingo also testified that as far back as 2004 Core knew (1) that AT&T and other carriers were operating as CLECs in Pennsylvania (Tr. 72); (2) that Core did not have a direct connection with AT&T and other CLECs (Mingo Direct at 5); (3) that these CLECs were directly interconnected with Verizon (Tr. 72); (4) that these CLECs were serving residential customers in Pennsylvania (Tr. 73); and (5) that these CLECs' residential customers may be originating traffic that Core was terminating (Tr. 73). Mr. Mingo also testified that when Core began operations in 1999 or 2000 "each and every other LEC and IXC operating in Pennsylvania

was notified" that "Core applied to the North American Numbering Plan Administrator (NANPA) for telephone numbers," "so that [those carriers] could load Core's new numbers into their switches and thereby enable calling between their end users and Core's end users." Mingo Surrebuttal at 5-6. Mr. Mingo further testified that, at all relevant times, traffic originated by Verizon was "marked as Verizon [-originated] on [Core's] switches," and therefore that Core has always been "accurately billing" Verizon for the termination of its traffic and that it was "not very likely" that Core would have billed Verizon for the termination of any other carrier's traffic. Tr. 77-78. See also AT&T Cross Ex. 1 (Core Response to Interrogatory 6-6) ("Core bills Verizon for the traffic Verizon marks as self-originated; and Core bills other carriers for the traffic Verizon marks as originated by such other carriers").

This means that Core knew at all times during the period June 2004 through December 2007 that it was receiving significant volumes of traffic from carriers other than ILEC Verizon. Nevertheless, during this period, Core did not send a single bill to any other carrier.

Since October 2004 ILEC Verizon has paid Core $.0007 per minute for the termination of Verizon's locally dialed ISP-bound traffic. Tr. 44-45, 86-87. Prior to that time, Verizon paid Core nothing at all for this traffic. *Id.* The $.0007 per minute rate that ILEC Verizon pays is the rate cap or ceiling established by the FCC in the *ISP Remand Order.*[4] Core petitioned for review of the *ISP Remand Order* and the *ISP Mandate Order*[5] in the D.C. Circuit. The D.C. Circuit ultimately affirmed the FCC's Orders on January 12, 2010 and denied petitions for rehearing filed by Core and the Pennsylvania Commission on March 26, 2010. *Core Communications Inc.*

[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Remand Order") at ¶¶ 8, 78, 85, 98 (emphasis added).

[5] Order On Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, 2008 WL 4821547 (Nov. 5, 2008).

v. FCC, 592 F.3d 139 (D.C. Cir. 2010); Order, *Core Communications Inc. v. FCC,* No. 08-1365 (D.C. Cir. March 26, 2010). Core petitioned for review by the Supreme Court of the United States (Core Cross Ex. No. 1). The Supreme Court denied that petition and the like petition of the Commission [*Core Communications, Inc., v. FCC* (case no. 10-185) and *Pennsylvania Public Utility Commission v. FCC* (case no. 10-189)] on November 15, 2010. Tr. 48.

Subsequent to 2007, Core has sent bills to some of the CLECs with respect to whom Core terminated locally dialed ISP-bound calls. Panel Reply Testimony, Att. C (Core's Response to AT&T-II-5). With the exception of PAETEC and Cavalier (and of course ILEC Verizon), and the apparent exception of Comcast, no other carrier has paid or agreed to pay Core anything for terminating locally dialed ISP-bound traffic. Tr. 50-55, 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19. When Core terminates locally dialed traffic originated by ILEC Verizon and other carriers, its network performs exactly the same functions and Core incurs exactly the same costs as they do when Core terminates AT&T-originated locally dialed calls. Tr. 49.

On November 16, 2010 (two days before the hearing in this case), Core entered into a traffic exchange agreement with PAETEC/Cavalier, whereby PAETEC/Cavalier agree to pay Core $0.002439 per MOU for the termination of local traffic beginning in January 2011 and continuing for a period of one year. Tr. 50-51; Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶¶ 3(b) & 4(a)).[6]

[6] The agreement provides that it may be terminated in the event the Pennsylvania Commission, the FCC, or a court declares or holds "that the PUC does not have jurisdiction over intercarrier compensation between two CLECs for local traffic, or that a rate other than $0.002439 applies to such traffic." Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶ 4(b)). Core and PAETEC/Cavalier also entered into a settlement agreement relating to past terminations of local traffic. AT&T received an updated discovery response with a copy of that settlement the afternoon before this Brief was due. AT&T intends to introduce the settlement as a late-filed exhibit and will provide further discussion regarding that settlement in the Reply Brief.

Core's witness, Mr. Mingo, was candid that Core used its protest filed in the pending PAETEC/Cavalier merger proceeding – which Core withdrew immediately after the agreement was executed (Tr. 55; AT&T Cross Ex. 2) – as leverage to reach that agreement. Tr. 50-51, 152-153. With respect to Comcast, Mr. Mingo testified that sometime in October 2010, Comcast (who currently is attempting to merge with NBC, Tr. 54) agreed to pay for the termination of locally dialed traffic. Tr. 53-55. Mr. Mingo claims that Comcast has agreed to pay and is now paying the intrastate switched access rate for both toll and locally dialed calls, and that Comcast's monthly bills total about $10,000 a month. *Id.*

In April 2009 Core sent a letter to AT&T demanding that AT&T pay for all locally dialed traffic delivered from June 2004 forward at the tariffed intrastate switched access service rate ($.014 per minute). Mingo Direct, Ex. BLM-7. AT&T responded by pointing out that, based on Core's own records, the calls in question were all locally dialed and that the tariff in question applies only to non-local, toll, interexchange traffic. AT&T Cross Ex. 7. In an effort to resolve the matter short of litigation, AT&T engaged Core in discussions. *Id.*; Panel Reply Testimony of AT&T at 18-20; Mingo Direct at 11. The discussions failed because Core insisted that it receive payment for 100% of the locally dialed minutes originated by AT&T; that the least it would accept under any circumstances would be the Verizon tandem rate ($.002439 per minute) for 100% of the minutes going back to June 2004, plus interest; and that it would not consider under any circumstances a rate of $.0007 per minute (the rate paid by Verizon) for any of the minutes in question. Panel Reply Testimony of AT&T at 18-20. Mr. Mingo confirmed all of this on cross-examination. Tr. 94-95.

Core's intrastate access tariff, PA P.U.C. Tariff No. 4 (AT&T Cross. Ex. 12), is titled "Switched Access Tariff" and sets out the rules and regulations related to intrastate switched

access service, including a rate of $.014. The tariff defines "Access Service" as "Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications." Tariff, Section 1 (emphasis added). An "Interexchange Carrier" is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, ***between two or more exchanges***." *Id.* (emphasis added). An "exchange carrier" is defined as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service." *Id.* The tariff specifies that Switched Access Service is only provided for three types of calls: Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access. Tariff, Section 4.2.3. See also Tr. 119. The term "Feature Group" refers to a "switching arrangement" provided to "interexchange (long distance) carriers" by a LEC that "allow[s] the LEC's end-users to make *toll* calls via their favorite long distance carrier." *Newton's Telecom Dictionary* at 291 (emphasis added).

Core's intrastate access tariff also includes the following definition for "Local Traffic":

> (i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.

Tariff, Section 1 at Original Sheet No. 8. Core's intrastate access tariff also includes a definition of "Mutual Traffic Exchange," which the tariff characterizes as "[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff,

Section 1 at Original Sheet No. 9. Core's witness, Mr. Mingo, testified that the locally dialed traffic at issue in this case satisfies the tariff's definition of "Local Traffic." Tr. 98-99, 118, 129.

As previously noted, Core has intrastate access tariffs in the states of Delaware, New Jersey, West Virginia, Alabama, Maryland, and New York. Tr. 17-18, 122-132; AT&T Cross Exs. 13-16, 18, 19. The Delaware, New Jersey, West Virginia, and Alabama tariffs define and describe switched access service precisely the same as they are defined and described in Core's Pennsylvania tariff. Tr. 123-125, 127, 129.[7] Core's tariffs in these states (Delaware, New Jersey, West Virginia and Alabama) also define "Local Traffic" and "Mutual Traffic Exchange" precisely the same as they are defined in the Pennsylvania tariff. Tr. 124, 127-28.[8] The state tariffs in Delaware, New Jersey, West Virginia and Alabama, as well as those in Maryland and New York, each include a separate section that establishes a rate for the termination of local traffic (Tr. 123, 125-126, 129, 131-132). Cross Exs. 13-16, Section 6 (titled "Local Traffic Exchange and Termination"); Cross Ex. 18, Section 5 (titled "Local Exchange Traffic Termination Service"); Cross Ex. 19, Section 7 (titled "Reciprocal Compensation Arrangements"). Core's Pennsylvania intrastate access tariff does not have an equivalent to these sections of the other state tariffs. Tr. 123.

* * *

On May 19, 2009, Core filed its Formal Complaint against AT&T, seeking to recover more than $7.5 million for the termination of locally dialed, ISP-bound traffic – amounts reflecting the tariffed switched access terminating rate of $.014 per MOU. After Core made

[7] *Compare* AT&T Cross Exs. 13-16 (Delaware, New Jersey, West Virginia, and Alabama tariffs), Definitions of "Switched Access Service" & Section 4 *to* AT&T Cross Ex. 12 (Pennsylvania tariff), Definition of "Switched Access Service" & Section 4.

[8] *Compare* AT&T Cross Exs. 13-16, Definition of "Local Traffic" and "Mutual Traffic Exchange" to AT&T Cross Ex. 12, Definition of "Local Traffic" and "Mutual Traffic Exchange."

clear in its prefiled testimony that all of the traffic at issue is locally dialed, ISP-bound traffic, AT&T on December 8, 2009 filed a motion to dismiss based on AT&T's contention that the Commission does not have subject matter jurisdiction over ISP-bound traffic because it is jurisdictionally interstate, and that the Commission lacked authority to adjudicate Core's complaint because the FCC had explicitly preempted state commission authority to set rates for locally dialed, ISP-bound calls in the *ISP Remand Order*. On February 26, 2010, the presiding ALJ issued Order #6, granting, in part, AT&T's Motion to Dismiss. ALJ Jones found that the Commission lacks subject matter jurisdiction to adjudicate Core's complaint to the extent it relates to locally dialed, ISP-bound traffic.

On March 5, 2010, Core filed a Petition for Interlocutory Review and Answer to Material Question: "Does the Commission have subject matter jurisdiction to adjudicate a formal complaint by one Pennsylvania Competitive Local Exchange Carrier (CLEC) against another Pennsylvania CLEC for traffic that originates and terminates in Pennsylvania and is terminated to the CLEC's internet Service Provider (ISP) end users?" On September 8, 2010, the Commission issued its Opinion and Order answering Core's material question in the affirmative, thereby asserting jurisdiction over this dispute.

Core filed a Motion for Interim Relief on October 5, 2010, requesting that AT&T be directed to pay Core (within ten days of an order granting the relief requested) $1,425,512.38 for AT&T originated locally dialed, ISP-bound calls terminated by Core prior to August 31, 2002, and $.002439 per MOU for all such terminations by Core after August 31, 2010. (In the alternative, Core requested that AT&T be required to place the $1,425,512.38 in an escrow account and to pay Core $.014 per MOU (the tariffed switched access terminating rate) for such

calls terminated after August 31, 2010.) On November 9, 2010, the presiding ALJ denied Core's Motion for Interim Relief.

A hearing was held in this matter on November 18, 2010. Mr. Bret Mingo testified on behalf of Core. Messrs. Christopher Nurse and Mark Cammarota testified on behalf of AT&T.

ARGUMENT

I. SWITCHED ACCESS CHARGES DO NOT APPLY TO AT&T'S LOCALLY DIALED TRAFFIC.

Core takes the position that its switched access rate ($.014 per minute) applies to AT&T's locally dialed ISP-bound traffic, which is the entirety of the traffic in dispute in this case.[9] Core is wrong – for several reasons. First, its switched access service tariff applies only to non-local, toll, interexchange traffic; it does not apply to locally dialed calls of any sort. Second, Core has previously vigorously asserted before this Commission that switched access charges can never, under any circumstances, apply to the locally dialed traffic at issue here – locally dialed ISP-bound traffic. Third, the Commission has made clear that, as a matter of state law, switched access charges apply only to non-local, toll, interexchange traffic, and not to local traffic. Indeed, AT&T is not aware of a single instance in which this Commission or any other state Commission has imposed or approved the use of switched access charges with respect to locally dialed traffic.

A. Core's Intrastate Switched Access Tariff Does Not Cover The Locally Dialed ISP-Bound Traffic At Issue Here.

The question whether Core's Pennsylvania tariff specifies a rate that applies to the termination of AT&T's locally dialed ISP-bound traffic begins and ends with the language of the tariff itself. That is the essence of the filed tariff doctrine (which is codified in Pennsylvania in

[9] Even though AT&T does not necessarily agree that ISP-bound traffic that appears to be toll based on the calling/called party numbers is subject to access rates, AT&T has paid all properly rated "toll" charges to Core. Therefore, the only traffic at issue in this case is local traffic.

66 Pa. C.S.A. § 1303): Tariffs are strictly enforced in accordance with their express terms and no deviation therefrom is permitted. *PECO Energy Co. v. Township of Upper Dublin,* 922 A.2d 996, 1004 (Pa. Cmwlth. 2007). In this case, the language of the tariff itself makes clear (1) that the switched access rates apply only to non-local, toll, interexchange traffic and (2) that the tariff does not establish any rate at all for the termination of locally dialed traffic of any sort, including locally dialed ISP-bound traffic.

The tariff, PA P.U.C. Tariff No. 4,[10] is titled "Switched Access Service" and sets out the rules and regulations related to Core's intrastate switched access service. The tariff defines "Access Service" as "Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications." Tariff, Section 1 (emphasis added). Accordingly, "Access Service" is a service provided to an "Interexchange Carrier," which is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, ***between two or more exchanges***." *Id.* (emphasis added). In delivering local traffic, AT&T is not an interexchange carrier but a CLEC providing *local* exchange service. And as such, AT&T squarely falls within the tariff's definition of an "exchange carrier" ("any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service."). *Id.*

Further, the tariff specifies that Switched Access Service is only provided for three types of calls, specifically, Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access. Tariff, Section 4.2.3. The term "Feature Group" refers to a "switching arrangement" provided to "interexchange (long distance) carriers" by a LEC that

[10] Pertinent portions of the tariff are part of the record herein as AT&T Cross Ex. 12.

"allow[s] the LEC's end-users to make *toll* calls via their favorite long distance carrier." *Newton's Telecom Dictionary* at 291 (emphasis added). Accordingly, Core's tariff applies on its face exclusively to non-local, toll, interexchange calls, and not to locally dialed, ISP-bound calls.

The tariff defines "Local Traffic" as follows:

> Local Traffic: Traffic is "Local Traffic" under this rate sheet if: (i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.

Mr. Mingo, Core's CEO, admits that AT&T's locally dialed traffic at issue in this case satisfies that definition and is thus "local traffic" for purposes of the Pennsylvania tariff. (Tr. 98-99, 118, 129).

Apart from this definition, the only mention that the tariff makes of local traffic is in the definition of "Mutual Traffic Exchange," which the tariff characterizes as "[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff, Section 1 at Original Sheet No. 9 (AT&T Cross Exhibit 12). This, of course, is a bill-and-keep arrangement; its inclusion in the tariff indicates that Core recognized that that is the compensation arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges. The fact that the tariff, at all relevant times (even today), has included this provision, and has not contained any provision establishing an explicit rate for terminating local traffic, is a reasonable basis for all other CLECs, including AT&T, to believe and understand that bill-and-keep is the *only* arrangement that applies to local traffic exchanged between Core and other CLECs. Furthermore, the fact that Core did not send bills to AT&T (or any other CLEC) for the

local traffic at issue for a number of years serves to confirm that Core recognized and intended that bill-and-keep was *the* arrangement that applies to this traffic.[11]

If there were any conceivable doubt with respect to whether or not Core's Pennsylvania tariff's switched access rates apply to AT&T's locally dialed traffic, what Core has done in other states lays such doubt conclusively to rest. Unlike in Pennsylvania, Core has specifically tariffed a rate for the exchange of local traffic in other states where it is certificated to do business. Core is a certificated carrier in a number of other states, including Delaware, New Jersey, West Virginia, Alabama, Maryland, and New York. (Tr. 17-18, 122-132). In each of these states, Core has filed a switched access service tariff. (See AT&T Cross Exhibits 13 (Delaware), 14 (New Jersey), 15 (West Virginia), 16 (Alabama), 18 (Maryland), and 19 (New York.))

Core's Pennsylvania tariff and the Delaware, New Jersey, West Virginia and Alabama tariffs are, in pertinent part, substantively identical. Core's tariffs in these states each defines "access service" and "switched access service" exactly the same way as the Pennsylvania tariff. Tr. 124-125, 127, 129.[12] The Delaware and West Virginia tariffs' definition of "local traffic" is verbatim the same as the Pennsylvania definition. Tr. 124, 127-128.[13] The New Jersey and Alabama tariffs' definition of "local traffic" is slightly different: Whereas the Pennsylvania (and Delaware and West Virginia) definition contains the words "the call originates and terminates in the same exchange area," the New Jersey and Alabama definition contains the words "the call

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[11] Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. See, *e.g.*, the FCC's *First Report and Order*, ¶ 1027. And in the *ISP Remand Order*, the FCC observed that "it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users." *Id.* at ¶ 4.

[12] *Compare* AT&T Cross Exs. 13-16 (Delaware, New Jersey, West Virginia, and Alabama tariffs), Definitions of "Access Service" and "Switched Access Service" *to* AT&T Cross Ex. 12 (Pennsylvania tariff), Definition of "Access Service" and "Switched Access Service."

[13] *Compare* AT&T Cross Exs. 13 and 15 (Delaware and West Virginia tariffs), Definition of "local traffic" to AT&T Cross Ex. 12 (Pennsylvania tariff), Definition of "local traffic".

originates and terminates in the same exchange area *as determined by the NPA-NXX of the calling and called parties.*" (Emphasis has been added to identify the additional words found in the New Jersey and Alabama tariffs.) Mr. Mingo, however, has acknowledged that the different formulations do not make any substantive difference. Both forms of the definition say and mean the same thing: The call originates and terminates in the same local exchange or calling area and one knows that because the NPA-NXX of the calling and called parties are associated with the same local exchange or calling area. Tr. 128-129. Mr. Mingo has also acknowledged that the AT&T locally dialed traffic at issue here satisfies the definition of "local traffic" in each of these tariffs and is therefore "local traffic" for purposes of all five tariffs. Tr. 98-99, 118-129.

In addition, each of the five tariffs describe switched access services, the services for which Core is authorized to charge switched access rates, in precisely the same way. *Compare* AT&T Cross Exs. 13-16 (Delaware, New Jersey, West Virginia, and Alabama tariffs), Section 4 *to* AT&T Cross Ex. 12 (Pennsylvania tariff), Section 4. Mr. Mingo acknowledged this as well. Tr. 124-125, 127-129.

There is, however, one very critical way in which the Pennsylvania tariff differs from the other four. The Delaware, New Jersey, West Virginia, and Alabama tariffs all have a section entitled "Local Traffic Exchange and Termination," which covers the termination of "local traffic" and provides a rate for that "service." Tr. 123; Cross Ex. 13-16, Section 6 (titled "Local Traffic Exchange and Termination"). Likewise, the New York and Maryland tariffs include a section establishing rates for local traffic, titled "Local Exchange Traffic Termination Service" and "Reciprocal Compensation Arrangements," respectively. Cross Ex. 18, Section 5 & Cross Ex. 19, Section 7. The Pennsylvania tariff does not include such a section. Tr. 123. This proves, beyond a shadow of a doubt, that Core itself understands that its Pennsylvania tariff does

not cover the locally dialed traffic at issue here and that if it wished to charge a rate for the traffic at issue here it had to include in its Pennsylvania tariff a section dealing with and specifying a rate for terminating "local traffic."

B. Contradicting its Position In This Case, Core Previously – And Vigorously – Has Asserted To This Commission That The Specific Kind Of Locally Dialed Traffic At Issue Here – Locally Dialed ISP-Bound Traffic – Can Never, Under Any Circumstances, Be Subject To Switched Access Charges.

Core's own advocacy in another proceeding before this Commission refutes the claim it makes in this case. In the ongoing *Embarq* arbitration, Core has emphatically and categorically maintained that locally dialed, ISP-bound traffic is not and cannot be access traffic – which means that it is not and cannot be subject to switched access charges. Specifically, Core stated, "whatever else it may be, ISP-bound traffic cannot be 'access traffic.'" *In re: Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq*, Docket No. A-310922F7002, Supplemental Comments of Core Communications, Inc., January 26, 2009, p. 11.[14] (AT&T Cross Ex. 10). Further, Core previously testified as follows:

"Q. Is there ever a situation in which access charges would apply to ISP bound traffic?"

Core's Answer: "No."

Id., Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007 at pp. 6-7. (AT&T Cross Ex. 9).

As this Commission is well aware, switched access charges are notoriously high – even when applied to the termination of toll traffic. In fact, the access charges of all ILECs in

[14] If it is access traffic, then Core would be required to pay originating access – something Core has vehemently fought against in its arbitration with Century Link. *In re: Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq*, Docket No. A-310922F7002, Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007, p. 11. AT&T Cross Ex. 9.

Pennsylvania are currently being reviewed by this Commission in order to reduce them to more reasonable levels. Core itself, in arguing that access charges should never apply to ISP-bound traffic, has previously cited to the FCC's finding that "the access charge system contains non-cost-based rates and inefficient rate structures...." AT&T Cross Ex. 9, p. 6. It would be unprecedented and extremely harmful to competition and to AT&T to find that switched access rates should apply to local traffic.

C. As A Matter Of State Law, Switched Access Charges Apply Only To Non-Local, Toll, Interexchange Traffic.

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

Core, in Mr. Mingo's direct testimony (at 19), suggests that in the Verizon Wireless/Alltel Arbitration Order the Commission somehow endorsed the application of switched access charges to all intrastate wireless to wireline traffic (including some "local" traffic, which in the wireless world is called intraMTA traffic). That is a gross distortion. Although in the background section of its Order the Commission noted that at some time in the

past Verizon Wireless had paid switched access charges for all intrastate calls originated by its customers, it did not endorse or approve – much less impose – the practice.[15] More telling, the upshot of the Commission's Order was to require the use of cost-based reciprocal compensation, rather than access, for all intraMTA wireless to wireline calls – something Mr. Mingo conceded in cross-examination. (Tr. 110-111).

Core (and Mr. Mingo) also refer to an Alabama commission order that, according to Core, approved the application of switched access charges to intraMTA wireless (*i.e.*, local) traffic. Mingo Direct at 19-21; *In re Compensation for Indirect CMRS Traffic,* 232 P.U.R.4th 148, Docket No. 28988 (Ala.P.S.C. Jan. 26, 2004) ("*Alabama Independent Telephone Companies*"). A copy of that order is part of the record as AT&T Cross Exhibit 11.

Again, Core is distorting and misrepresenting what the state commission actually said. In the *Alabama Independent Telephone Companies* case, the Alabama commission approved the use of state tariffs to establish a rate that wireless carriers were required to pay rural ILECs for terminating wireless-originated local traffic. But these were not switched access service tariffs and the rates were not switched access rates. For example, in the case of LEC CenturyTel of Alabama the tariff at issue was CenturyTel's "Wireless Local Termination Tariff" that was on file with the Alabama PSC. *Id.* at n.1. And as for the other ILECs, the Commission noted that the rates established by the tariffs at issue "constituted approximately one-half of the effective per minute access charge rate assessed by the Rural LECs." *Id.* at **2. Accordingly, the Alabama commission most certainly did *not* approve the application of switched access charges to local traffic.

[15] Moreover, we do not know what the Alltel tariff said. Unlike the Core tariff at issue here, it may have covered and applied to all intrastate traffic, at least to all intrastate wireless traffic.

In a case not cited by Core, the Missouri PSC rejected local termination tariffs precisely because the tariffs applied switched access service rates to the termination of intraMTA – local – traffic. The Missouri PSC's rejection was affirmed by the Missouri Supreme Court in *State ex rel. Alma Telephone Co. v. PSC of Missouri*, 183 S.W.3d 575 (Mo. S. Ct., *en banc*, 2006). The court held that it was impermissible under the 1996 Telecommunications Act to apply switched access rates to local traffic and based on that, found that the tariffs in question "are unlawful, and the PSC was correct in disallowing them." 183 S.W.3d at 578.

II. The Relief Sought By Core Is Barred Because It Would Violate Pennsylvania State Law.

The relief Core seeks – for the Commission to create a rate that will apply to the exchange of locally dialed, ISP-bound traffic, and to impose that new rate prospectively and retroactively – is barred by Pennsylvania state law. *First,* Core has never filed a tariff establishing a rate for terminating these local calls, notwithstanding the explicit requirement found in 66 Pa. C.S.A. § 1302 that the filing of a rate is a prerequisite for charging it. Because there is no tariffed rate, Core is barred from charging anything for past traffic exchanges. *Second*, the relief Core seeks is barred because it would violate 66 Pa. C.S.A. § 1304's prohibition against unreasonably discriminatory rates in that it would impose on AT&T a different – and much higher – rate than that paid by other CLECs and ILEC Verizon. *Third,* the relief Core seeks is barred because it would require the Commission to engage in retroactive ratemaking, something the Commission may not do.

A. Sections 1302 And 1303 Require That A Rate Must Be Specified In A Lawful Tariff Before It May Be Charged; Accordingly, It Would Be Unlawful For The Commission To Permit Core To Charge Its Untariffed "Rate."

The relief Core seeks is barred by Core's own failure to comply with Pennsylvania law. According to Core, it has been terminating locally dialed, ISP-bound calls originated by AT&T

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

Core, however, has never filed a tariff in Pennsylvania establishing a rate for terminating the traffic at issue in this case – locally dialed, ISP-bound traffic (despite the fact that it *did* file such tariffs in six other states). As a result, as a matter of statutory law and judicial precedent, Core is barred from "collect[ing] or enforc[ing]" any rate for terminating this traffic. The companion statutory provision to § 1302 forbids a public utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such public utility." 66 Pa. C.S.A. § 1303 ("adherence to tariffs"). Because Core's tariff fails to establish any rate for terminating the traffic in question, the Commission may not require AT&T (or any other CLEC) to pay Core anything for the completion of locally dialed, ISP-bound traffic.

Pennsylvania courts have confirmed that Sections 1302 and 1303, read together, mandate precisely this result. In *Popowsky v. Pa. PUC,* 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994), the Court held that because the public utilities in question did not have lawful tariffs on file with the PUC, the utilities could not lawfully charge customers *anything* for the provision of utility service, and that therefore the PUC was wrong to issue an order requiring customers to pay bills submitted by the utilities. *See also Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 829 (Pa.

Commw. Ct. 1980) ("a public utility may not charge any rate for services other than that lawfully tariffed . . . .").

Because of its failure and refusal to comply with Pennsylvania statutory law, Core is barred from "collect[ing]," "enforc[ing]," "demand[ing] or receiv[ing]"[16] anything for past traffic exchanges, and therefore cannot prevail on its claims in this case.

B. Section 1304 Prohibits Discriminatory Rates, And Core's "Rate" Is Grossly Discriminatory; Accordingly, It Would Be Unlawful To Permit Core To Charge It.

There is another, independent reason why Core cannot prevail. The relief it seeks would permit Core to engage in unreasonable rate discrimination, something Pennsylvania law prohibits.

Specifically, 66 Pa. C.S.A. § 1304 ("discrimination in rates") provides: "No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage." In addition, 66 Pa. C.S.A. § 1303 provides that "[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron." Accordingly, Pennsylvania law prohibits charging different rates to similarly situated customers for the same service and at the same time confers on all utility customers "most favored nation" status in the event more than one rate is applicable to the service in question.

Core's Complaint asks that AT&T be required to pay $0.014 (Core's intrastate access rate) or, in the alternative, $.002439 (Verizon's tandem reciprocal compensation rate) per MOU for both past and future terminations of locally dialed, ISP-bound traffic. Up until October 2010,

[16] 66 Pa. C.S.A. §§ 1302, 1303.

Core did not receive any compensation from any CLEC for terminating precisely this kind of traffic. Tr. 50-55, 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19. Since October 2010 two – and only two -- CLECs have agreed to pay Core something for this traffic. Specifically, in November 2010, PAETEC/Cavalier agreed to a short-term arrangement, whereby, beginning in January 2011, it would pay Core $0.002439 per MOU for a period of one year.[17] Core does not try to hide the fact that PAETEC/Cavalier agreed to this arrangement only because Core essentially coerced an agreement by filing a protest in their pending merger proceeding. Tr. 50-51, 55, 152-153. Similarly, in October 2010, Core convinced Comcast (which also has a merger pending and therefore cannot afford to risk any regulatory displeasure) that, in light of the Commission's Material Question Order, it should agree to a compensation arrangement with Core. Tr. 53-55. Core's witness, Mr. Mingo, was unable to testify about the specific dollar amount involved, but he testified that the total usage volume was relatively small. *Id.* The only other carrier from which Core has received any payment for terminating this kind of traffic is ILEC Verizon. And at all relevant times ILEC Verizon has paid Core an MOU rate of $.0007. Tr. 44-47.

As discussed above, Core is barred from charging anything for past traffic sent by AT&T. Assuming *arguendo* that the PUC has jurisdiction to establish rates for CLEC-to-CLEC locally dialed, ISP-bound calls on a going forward basis, whatever rate Core charges one CLEC would have to be charged to every other CLECs as well. Otherwise, it would violate Section 1304.[18]

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[17] PAETEC/Cavalier also agreed to a settlement for amounts prior to January 2011, but AT&T only received the full terms of that settlement the afternoon before this Brief was due. AT&T intends to introduce the settlement and terms as a late-filed exhibit and will provide further discussion regarding that settlement in the Reply Brief.

[18] When AT&T asked Core in discovery to list all other telecommunications carriers it has charged, Core listed only two other carriers – XO Communications and Choice One. Given that there are many other CLECs in Pennsylvania, the only conclusion is that Core is not charging other CLECs at all, and therefore operating under a bill-and-keep with those other CLECs. See Core response to AT&T-II-5, included in Attachment C to AT&T Statement 1.0 (Panel Reply Testimony).

Although that statutory provision itself does not define "unreasonable," by any measure Core's attempt to charge not only more than other CLECs pay to terminate like traffic, but to charge between 3½ and twenty times more than ILEC Verizon pays for exactly the same service, is patently "unreasonable." Indeed, pertinent case law makes clear that in order for *any* rate differential to pass muster under Section 1304, the utility must show that the differential can be justified by the difference in costs required to serve different customers or different classes of customers. *See Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1060 (Pa. Commw. Ct. 2002) ("in order for a rate differential to survive a challenge brought under Section 1304 of the Public Utility Code, 66 Pa. C.S.A. § 1304, the utility must show that the differential can be justified by the difference in costs required to deliver service to each class."). Core, however, admits that it uses exactly the same network facilities in exactly the same manner and incurs exactly same costs whenever it terminates locally dialed, ISP-bound traffic – whether the call is originated by Verizon, AT&T, or another CLEC. Tr. 49. Therefore, it is impossible for Core to justify *any* rate differential from the compensation scheme which it has with the vast majority of Pennsylvania CLECs, *i.e.,* bill-and-keep.

Further, up until very recently Core has had two different compensation schemes for the exchange of locally dialed, ISP-bound traffic, if it were assumed *arguendo* that either the CLEC scheme (bill-and-keep) or the ILEC rate ($.0007 per MOU) could apply to AT&T-Core locally dialed, ISP-bound traffic. And in November and December of 2010, Core added two additional compensation schemes for PAETEC/Cavalier and Comcast. Under Pennsylvania law, the bill-and-keep scheme that applies to the overwhelming majority of CLECs would have to apply to AT&T, pursuant to Section 1303. In circumstances in which "more than one rate [is] applicable to service rendered to a patron [AT&T]," Core is statutorily required to "compute [its] bills under

the rate most advantageous to" AT&T, in this case, the CLEC bill-and-keep compensation scheme. 66 Pa. C.S.A. § 1303. *See Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Commw. Ct. 1995).

The bottom line is this: Even if the Commission were to ignore that Core may not lawfully charge anything for past traffic exchanged between the parties, the relief Core seeks would still violate Pennsylvania law because it would license unreasonable rate discrimination in violation of § 1304 and it would improperly void the "most favored nation" requirement of § 1303.

C. The Requested Relief Would Require The Commission To Engage In Retroactive Ratemaking, Which It May Not Do.

In order to award Core the relief it requests in this case for past traffic exchanges (*i.e.*, intrastate access rates of $0.014 or, in the alternative, Verizon's tandem reciprocal compensation rate of $0.002439), the Commission would have to create a new rate – because there is not and never has been an existing, lawful rate. And the Commission would have to make that rate effective retroactively. That the Commission may not do because it would violate the rule against retroactive ratemaking.

"Because of the prospective nature of rates, a rule against retroactive ratemaking has developed. The rule against retroactive ratemaking prohibits a public utility commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits." *Popowsky v. Pennsylvania Public Utility Commission,* 642 A.2d 648, 651 (Pa. Commw. Ct. 1994). *See also Popowsky v. Pennsylvania Public Utility Commission,* 868 A.2d 606, 609 (Pa. Commw. Ct. 2004) ("The PUC clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations.") (citing *Pike County Light & Power Company v. Pennsylvania Public Utility*

Commission, 487 A.2d 118 (Pa. Commw. Ct. 1985)); *Pennsylvania Gas and Water Co. v. Pennsylvania Public Utility Commission,* 470 A.2d 1066, 1072 (Pa. Commw. Ct.. 1984) ("Ratemaking principles require prospective ratemaking based upon a test year."); *Id.* ("A rate increase may act prospectively only.").

The only rate that may be demanded for the provision of service at any given time is the approved rate governing that service that is in effect at that time. Prospective rates may not be used to recoup past losses. The filed tariff doctrine, codified at 66 Pa. C.S.A. § 1303 (discussed above), prohibits a utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such . . . utility." Accordingly, the rule against retroactive ratemaking is a necessary corollary to the filed tariff doctrine and Section 1303. Applied here, it means that neither Core nor the Commission may create a new rate today and apply it retroactively to earlier periods. Otherwise, Core would be permitted to "demand and receive" a rate that is not "specified in [its] tariffs." As noted previously, Core's tariff does not specify any rate for terminating locally dialed, ISP-bound traffic.

III. Bill-And-Keep Is The "Existing CLEC-To-CLEC Intercarrier Compensation Practice[ ] In Pennsylvania" And Is The Most Appropriate And Sensible Compensation Arrangement For CLEC-To-CLEC Local Traffic Exchanges.

Core denounces bill-and-keep, arguing that it cannot possibly apply to the locally dialed traffic at issue in this case. Core's position ignores that bill-and-keep has been the universally recognized practice for CLEC-to-CLEC exchanges of local traffic in Pennsylvania and elsewhere since the passage of the 1996 federal Telecommunications Act. Indeed, without exception AT&T has exchanged local traffic on a bill-and-keep basis with every other CLEC in Pennsylvania. Panel Reply Testimony of AT&T at 13; Tr. 207-208. And none of those CLECs – including those that have terminated significant volumes of locally dialed, ISP-bound traffic – has ever complained about bill-and-keep. Tr. 208.

Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. *See, e.g.*, the FCC's *First Report and Order,* ¶ 1027. And in the *ISP Remand Order*, the FCC observed that "it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users." *Id.* at ¶ 4.

This Commission also has recognized that bill-and-keep is the existing and appropriate intercarrier compensation practice for the exchange of local traffic between CLECs. In *PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, * 1, 9 (Pa .P.U.C. June 22, 2006) (AT&T Cross Ex. 4), the Commission rejected a tariff filed by MCI that would have established rates for the termination of local traffic exchanged between two CLECs. In doing so, the Commission observed that the tariff would "substantially alter existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania by replacing the use of bill-and-keep compensation with a reciprocal compensation regime." *Id.* at *1. The Commission further acknowledged that, in the *ISP Remand Order*, the FCC "established interim federal reciprocal compensation rates for dial-up access to the Internet for" ISPs on a MOU basis "as part of an overall policy of moving Internet access compensation from a MOU basis to a Bill-and-Keep system." *Id.* at *9.[19]

[19] Core may argue that, based on the Commission's June 2006 decision disallowing MCI's local traffic termination, it would have been futile for Core even to have attempted to amend its intrastate tariff to include a section covering "local traffic exchange and termination." The Commission may well have disallowed such an amendment, opting instead to maintain the "existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania" – "bill-and-keep compensation." Then again, the Commission may have decided otherwise, choosing to view Core differently from how it viewed MCI, which was about to become an affiliate of ILEC Verizon, the dominant ILEC in the Commonwealth. We will never know, because Core never even tried. Had Core even attempted to file a tariff, it would have obviated the need for it to file a Complaint because the Commission could have considered all implications associated with disrupting and altering the existing CLEC-to-CLEC practice of bill-and-keep compensation, and it could have done so with wider industry input, just as it did in the MCI case.

Core's only response is to argue that bill-and-keep should apply only when the traffic flows are roughly balanced. But Core's own tariff endorses bill-and-keep without any qualification that the traffic must be roughly balanced. Tariff, Section 1 at Original Sheet No. 9 (defining "Mutual Traffic Exchange" as "[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network."). Moreover, all other CLECs in Pennsylvania operate under a bill-and-keep arrangement *without checking to see if the traffic is in balance* (Tr. 208) – including those CLECs who, like Core, terminate locally dialed, ISP-bound calls.[20]

Of course, "CLECs typically operate on a bill-and-keep basis with other CLECs for a lot of sensible reasons." Tr. 181. One of which is that the alternative would be to enter intercarrier compensation arrangements with every other CLEC in the state. For example, there are 136 facilities based CLECs in the Commonwealth as of August 19, 2009. http://www.puc.state.pa.us/telecom/pdf/Tel_FB_CLEC_TARC_081909.pdf If each one of those CLECs was to enter into an interconnection/traffic exchange agreement with every other facilities based CLEC, 9,180 separate agreements would be required. $\left[\frac{n!}{(n-2)! \times 2}\right]$ Many CLECs may not be currently exchanging traffic with many of the other CLECs, but because of the potential for that to change, agreements would likely be required if the bill-and-keep regime were scrapped. If only 5% of the negotiations turned contentious, that would still mean more

[20] Core argues (Mingo Direct at 25) that AT&T "recognized that bill-and-keep can be imposed *only* where traffic flows are roughly balanced." Emphasis added. That is not what AT&T said. AT&T said that "Carriers *typically* agree to bill-and-keep when the amounts of traffic each expects to terminate for the other are roughly balanced." That statement is a far cry from saying that traffic flows *must* be balanced before bill-and-keep applies. And more importantly, as explained in the text, every Pennsylvania CLEC except for Core operates under a bill-and-keep arrangement for the exchange of local traffic – including those terminating ISP traffic – without even making a determination on whether traffic flows are balanced.

than 450 instances where mediation/arbitration might be required. If that were to occur, existing Commission resources would soon be exhausted.

It would hardly be worth the time, money, and resources necessary to negotiate, enter into and administer such agreements, particularly given that the volume of traffic to which the agreements potentially would apply are at best relatively small or even non-existent. *See also* Tr. 174 ("Or if traffic balanced over time or if [for] all the CLECs, it balanced over them, or if it wasn't worth the bother of going through hundreds and hundreds of ICAs for small amounts of money, there are lots of cases where the traffic wouldn't necessarily be balanced, where it would also be reasonable to have a bill-and-keep arrangement.")

IV. The Situation In Which Core Finds Itself Is Entirely Of Its Own Making, And The Attempt To Paint AT&T As A "Deadbeat" That Doesn't Pay Its Bills Is Transparently Wrong.

The central point of Core's testimony and arguments to date is the assertion that there is no legitimate reason for AT&T not to pay Core's bills for termination of locally dialed, ISP-bound traffic. As explained above, Core is dead wrong. AT&T pays lawful bills that contain lawful rates. Core's bills are not based on lawful rates. The rates it is attempting to collect are not reflected in a contract and are not specified in a lawful tariff. Accordingly, it is Core that is breaking the law by attempting to bill and collect them.

Furthermore, the situation in which Core finds itself – *i.e.*, having no legal basis to charge AT&T for the termination of this traffic – is entirely of its own making. Core waited nearly four years (from June 2004 until early 2008) before sending a bill to AT&T for the termination of locally dialed, ISP-bound traffic, even though Core had all the information necessary to bill AT&T for that traffic from June 2004 on. Moreover, Core to this day has failed to file a tariff establishing a rate for *any* locally dialed traffic. Indeed, Core is and at all relevant times has been statutorily required to file tariffed, nondiscriminatory rates applicable to *all* parties *before*

charging explicit rates for any type of traffic, including the traffic at issue here; but Core still has not filed a tariff (despite filing such tariffs in six other states).

A. At All Relevant Times, Core Had The Means And Ability To Identify The Traffic At Issue As Originated By AT&T And Bill AT&T For The Traffic.

Core admits that starting in June 2004 (and throughout the relevant period) it had all the information it needed to bill AT&T for the termination of locally dialed, ISP-bound traffic – it just failed to act on that information until years later. Indeed, from the moment Core became operational in late 1999 or early 2000, it started receiving tapes from Verizon on a *daily basis* that Core was told contained industry standard Carrier Access Billing System ("CABS") records. Tr. 64-65. Mr. Mingo admits that the daily CABS records provided Core with (1) the CIC of the originating carrier for each call; (2) the calling and called party numbers for each call; and (3) the duration of each call (Tr. 66-71)[21] – information that Mr. Mingo further admits is everything Core needed to identify AT&T-originated calls and bill AT&T for those calls on a minute-of-use basis (Tr. 64-71). Mr. Mingo, who claims responsibility for Core's "billing and network management" (Tr. 24), testified that Core had no idea how to read these industry standard records, so it just allowed them to "clutter[]" the office, unread and unused for years. Tr. 64-65. Core made no attempt to learn how to read the records or to hire someone who could until the end of 2007. Mingo Direct at 8. As Mr. Mingo himself explained, if Core had bothered to learn how to analyze the CABS records it could have determined in June 2004 (and throughout the rest of 2004, 2005, 2006 and 2007) that it was terminating locally dialed traffic originated by AT&T (Tr. 71-72).

[21] See also Mingo Direct at 8 ("For each call, CABS records the CIC of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in 'minutes of use.'")

Core's only defense for its failure to act is that it "had no way of knowing" that AT&T was sending indirect traffic to Core through Verizon. Mingo Direct at 9. That claim is not credible. As explained above, Core had the CABS records that provided it with everything it needed to identify the indirect traffic – it just chose not to look at them. Moreover, Core had every reason to know that it was receiving indirect traffic from other carriers even without looking at the CABs records.

First, Mr. Mingo testified that Core knew that AT&T and other carriers were operating as CLECs in Pennsylvania (Tr. 72); Core knew that it did not have a direct connection with AT&T and other CLECs (Mingo Direct at 5), but that Verizon did (Tr. 72); Core knew that these CLECs were serving residential customers in Pennsylvania (Tr. 73); and Core knew that these CLECs' residential customers may be originating traffic that Core was terminating (Tr. 73). How Core could have concluded from these facts that it was only terminating traffic originated by Verizon's customers is simply mind-boggling.

Second, Core's witness Mr. Mingo testified that when it began operations in 1999 or 2000 "each and every other LEC and IXC operating in Pennsylvania was notified" that "Core applied to the North American Numbering Plan Administrator (NANPA) for telephone numbers," "so that [those carriers] could load Core's new numbers into their switches and thereby enable calling between their end users and Core's end users." Mingo Surrebuttal at 5-6. Core claims that these facts makes "certain" that "AT&T was itself aware" of the possibility that "it was originating [traffic] to Core" and that its "end users would be able to place calls to Core's end users." *Id.* at 5-6. While that may be true, it is equally "certain" that Core itself was aware of that possibility.

Third, Core's witness Mr. Mingo testified that, at all relevant times, traffic originated by Verizon was "marked as Verizon on [Core's] switches," that Verizon's traffic was "not hard" to identify and therefore Core has done a "good job of accurately billing them." Tr. 77-78. See also AT&T Cross Ex. 1 (Core Response to Interrogatory 6-6) ("Core bills Verizon for the traffic Verizon marks as self-originated; and Core bills other carriers for the traffic Verizon marks as originated by such other carriers"). Of course, if Core has always known how much traffic it was terminating for Verizon, and accurately billing for it, Core had to have known that it was terminating substantially more traffic and that that traffic was attributable to other carriers. The fact that Verizon passed through traffic that was "marked" as having originated with other carriers leaves no doubt that Core knew *at all times* that it was terminating a significant volume of traffic originated by carriers other than ILEC Verizon. All Core had to do to determine the originating carrier of that traffic and bill for it was to look at the daily CABS records it was receiving from Verizon all along.

In the face of its numerous admissions that Core was too inept to handle the technical and managerial tasks necessary to identify and bill for traffic terminations, Core tries to paint AT&T as a bad actor, suggesting that Core never billed AT&T because AT&T tried to "hide" the traffic and never notified Core that it was sending it. Mingo Direct at 9-10; Mingo Surrebuttal at 5. But, as explained above, AT&T *did* tell Core that it was sending local traffic to Core, and it did so in the same way that every other carrier in the industry informs other carriers that it is sending traffic and the type of traffic it is sending, *i.e.*, it passed to Verizon on each and every call its CIC and CPN, and Verizon passed this information on to Core in the CABS records that were sent to Core each and every day. Neither AT&T nor Verizon "hid" anything.

B. Core Has Not Filed A Tariff Or Entered An Agreement Establishing Rates For Locally Dialed, ISP-Bound Traffic.

Core's witness Mr. Mingo testified that "[c]arriers generally bill one another either by tariff or by agreement." Mingo Direct at 17. Core, however, does not have a tariff or an agreement establishing rates for locally dialed, ISP-bound traffic, and that is no ones fault but its own.

At all relevant times, Pennsylvania state law has required that Core file with the Commission tariffs establishing rates for each of the services it provides that are within the Commission's jurisdiction (*i.e.*, any and all intrastate telephone services). 66 Pa. C.S.A. § 1302. From the moment it went into business in 1999 or 2000, Core knew that its ISP customers were not going to originate any traffic (that was Core's business plan),[22] and Core should have known that it would be terminating locally dialed, ISP-bound traffic for other carriers (*supra* at part IV.A). And even if one believes Core's claim (Tr. 73) that it was too "naive" to realize at first that it was terminating traffic that AT&T originated, it did realize that in late 2007. Yet Core did not and still has not filed a tariff with the Commission setting rates for the termination of locally dialed, ISP-bound traffic (assuming the Commission has jurisdiction over ISP-bound traffic) – even though it knew to do so in other states.[23] Of course, if Core had filed a tariff, AT&T would have been required to pay the presumptively valid tariff rate unless and until it was successfully challenged.

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[22] "Core's entire business model from the beginning was to generate incoming ISP traffic which, by its very nature, could come from any carrier whose end-user customers could dial-up an Internet connection with an ISP." AT&T Panel Reply at 13-14.

[23] In several other states Core has intrastate switched access tariffs virtually identical to the one it has in Pennsylvania; but in those other states Core's tariffs also include provisions which set rates for locally dialed traffic – something Core's Pennsylvania tariff does not do. *Infra* at part I.A.

V. Because The Traffic At Issue Is All Locally Dialed, ISP-Bound Traffic, The Commission Lacks Jurisdiction To Adjudicate Core's Complaint; In The Alternative, The FCC's *ISP Remand Order* Preempts The Commission From Doing So.

The parties have fully briefed and the Commission has determined the issue of whether it has jurisdiction to hear this dispute involving locally dialed, ISP-bound traffic. Although AT&T respectfully disagrees with the Commission's determination, it does not seek rehearing of that determination at this time, but rather reiterates its position here out of an abundance of caution solely to ensure it is preserved for appeal.[24]

There are two independent reasons the Commission does not have authority to hear this dispute: subject matter jurisdiction and preemption. The FCC has very clearly determined that all ISP-bound traffic is jurisdictionally interstate (even if such traffic appears to be local in nature, *i.e.* notwithstanding that such dial-up ISP-bound traffic may be locally dialed). *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) ("the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes"). And because ISP-bound traffic is jurisdictionally interstate, state commissions lack jurisdiction to regulate compensation for it except in the context of a dispute over an interconnection agreement ("ICA") (which is not the case here because the parties do not have an interconnection agreement). *Id.* at 1126-27. Core itself has argued to this Commission that all ISP-bound traffic is interstate and is therefore under the jurisdiction of the FCC.[25]

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[24] AT&T incorporates by reference: AT&T's Motion to Dismiss Formal Complaint of Core Communications, Inc., filed on December 8, 2009; AT&T's Reply to Answer of Core Communications, Inc. to AT&T's Motion to Dismiss Formal Complaint, filed on January 6, 2010; and AT&T's Brief on Petitions for Interlocutory Review and Answer to Material Questions, filed on March 15, 2010.

[25] In re: Petition of Core Communications, Inc.; Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq, Docket No. A-310922F7002, Reply Brief of Core Communications, Inc., p. 37, September 20, 2007.

State law also dictates that the Commission lacks subject matter jurisdiction over Core's Complaint. "As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers." *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission,* 875 A.2d 1243, 1249 (Pa. Cmwlth.2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission,* 664 A.2d 664 (Pa. Cmwlth. 1995)). The Commission must act within, and may not exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm'n,* 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police.,* 619 A.2d 390 (1992). Here, the enabling statute gives the Commission authority to regulate and address intercarrier compensation issues for *intrastate,* and only *intrastate*, telecommunications traffic. 66 Pa. C.S.A. § 104. Accordingly, as a matter of state law, the Commission lacks the authority to address intercarrier compensation issues for traffic that is *interstate.*

Even if the Commission had jurisdiction to regulate compensation for ISP-bound traffic in the absence of any FCC regulation (which they do not), the FCC *has* chosen to regulate in the area of non-toll, ISP-bound traffic (the type of traffic at issue here), and has explicitly preempted any state authority over such matters.[26] Specifically, in the *ISP Remand Order,*[27] the FCC held: "Because we now exercise our authority under Section 201 to determine the appropriate

[26] The Commission found that the FCC's analysis in the *ISP Remand Order* does not apply to CLEC-to-CLEC traffic exchanges. That issue is currently before the 9th Circuit in *AT&T Communications v. Pac-West Telecomm, Inc.*, No. 08-17030, and the 9th Circuit has invited the FCC to opine on the issue through an amicus curiae brief. The FCC has accepted that invitation and is currently scheduled to file its brief on February 2, 2011.

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

intercarrier compensation for ISP-bound traffic...*state commissions will no longer have authority to address this issue.*"[28]

CONCLUSION

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

Respectfully submitted,

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DATED: December 14, 2010

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Main Brief of AT&T upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Chicago, Illinois, this 14th day of December 2010.

VIA E-MAIL AND OVERNIGHT MAIL

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AT&T'S PROPOSED FINDINGS OF FACT

1. Core Communications, Inc. received authority to operate as a Competitive Local Exchange Carrier ("CLEC") in Pennsylvania in August 2000. Application of Core Communications, Inc. for Approval to Offer, Render, Furnish or Supply Telecommunication Services as an Interexchange Carrier, Competitive Local Exchange Carrier and as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania, Docket Nos. A-310922, A-310922F0002, and A-310922F0003, August 21, 2000.

2. In order to obtain certification, an applicant seeking authority as a facilities-based CLEC must prove, by a preponderance of the evidence, that it possesses managerial, financial, and technical fitness, and has a commitment to compliance with Pennsylvania law. 66 Pa. C.S.A. §3019(a). Application of AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh to Amend their Certificates of Public Convenience to Begin to Offer, Render, Furnish or Supply Facilities-Based Competitive Local Exchange Telecommunications Services in the Service Territories of ALLTEL Pennsylvania, Inc., Armstrong Telephone Company-Pennsylvania, The Bentleyville Telephone Company, Citizens telephone Company of Kecksburg, Hickory Telephone Company, Mariana and Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and Yukon-Waltz Telephone Company, Docket Numbers A-310125F0002 and A-310213F0002, Opinion and Order (Nonproprietary), adopted December 20, 2000, entered April 10, 2001, Amended Application of Vanguard Telecom Corp., d/b/a CellularOne, for approval to offer, render, furnish, or supply Facilities-based Competitive Local Exchange Telecommunications Services, Docket Number A-310621F0002 and Amended Application of Vanguard Telecom Corp., d.b.a CellularOne, for approval to offer, render, furnish, or supply Facilities-based

Competitive Access Provider Service, Docket Number A-310621F0003, Tentative Opinion and Order adopted March 31, 1999, entered April 2, 1999 [amended and issued in Final Form by Final Opinion and Order adopted and entered April 8, 1999].

3. By obtaining certification to provide service in Pennsylvania, Core represented to this Commission that it had the managerial, technical and financial fitness to operate as a telecommunications carrier.

4. "The burden is on the facilities-based CLEC to make a go of its business." Application of Core Communications, Inc. for authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the provision of competitive residential and business local exchange telecommunications services throughout the Commonwealth of Pennsylvania, Docket No. A-310922F0002, AmA, Opinion and Order, December 4, 2006, p. 36.

5. As a certificated carrier in Pennsylvania, Core is required at all times to maintain the managerial and technical ability to operate as a telecommunications carrier, which includes the ability to timely bill its customers.

6. Core has the burden to ensure that it can conduct its business, including the ability to bill its customers.

7. Even if Core had established a tariff rate for the traffic at issue – and it did not (see Finding of Fact 31, below) – Core did not comply with the provision of its tariff that requires Core to bill its customers every thirty days. AT&T Statement 1.0 at p. 18, fn 20.

8. Core did not send AT&T a single bill from 2000 through the end of 2007. AT&T Statement 1.0 at p. 17.

9. Core first sent AT&T a bill in January 2008, for ISP-bound local traffic sent by AT&T in December 2007. Core Statement 1.0 at p. 10.

10. Core sent another bill to AT&T in March 2008 for ISP-bound local traffic sent by AT&T from January 2007-November 2007. Core Statement 1.0 at p. 10.

11. In January 2009, Core sent AT&T a bill for ISP-bound local traffic sent by AT&T from January 2004-December 2006. Core Statement 1.0 at p. 10.

12. In May 2009, Core sent AT&T a bill for ISP-bound local traffic sent by AT&T for the entire year of 2008. Core Statement 1.0 at p. 10.

13. AT&T and Core are not directly interconnected. Instead, AT&T and Core are indirectly interconnected through Verizon. This means that all calls sent by AT&T to Core must first go through Verizon's network. AT&T Statement 1.0 at p. 7.

14. Core relies on Verizon to receive calling records showing all calls sent to Core by all carriers with whom Core is indirectly interconnected, including AT&T. AT&T Statement 1.0 at p. 14.

15. At all times since Core has been operational in Pennsylvania, Verizon has sent records on a daily basis to Core that contain all information necessary to bill other carriers for all traffic indirectly sent to Core, including the identity of the carrier sending the traffic to Core, as well as the minutes associated with each carrier's traffic. Tr. 64-67.

16. Core did not even look at the Verizon call records until 2007. AT&T Statement 1.0 at p. 14.

17. Core's witness Mr. Mingo admits that the Verizon call records provided Core with everything it needed to determine that it was receiving locally dialed traffic from AT&T and to bill AT&T for the termination of that traffic (Tr. 64-71; Mingo Direct at 8), and that if Core had analyzed the CABS records it was receiving from Verizon it could have

determined in June 2004 (and throughout the rest of 2004, 2005, 2006 and 2007) that it was terminating traffic originated by AT&T (Tr. 71-72).

18. AT&T operates as a CLEC in Pennsylvania and provides services to Pennsylvania consumers – this is a well known fact. Core had to know it would receive traffic from AT&T customers. AT&T Statement 1.0 at p. 14.

19. Core's witness Mr. Mingo testified that as far back as 2004, Core knew (1) that AT&T and other carriers were operating as CLECs in Pennsylvania (Tr. 72); (2) that Core did not have a direct connection with AT&T and other CLECs (Mingo Direct at 5); (3) that these CLECs were directly interconnected with Verizon (Tr. 72); (4) that these CLECs were serving residential customers in Pennsylvania (Tr. 73); and (5) that these CLECs' residential customers may be originating traffic that Core was terminating (Tr. 73).

20. Mr. Mingo also testified that when Core began operations in 2000 "each and every other LEC and IXC operating in Pennsylvania was notified" that "Core applied to the North American Numbering Plan Administrator (NANPA) for telephone numbers," "so that [those carriers] could load Core's new numbers into their switches and thereby enable calling between their end users and Core's end users." Mingo Surrebuttal at 5-6.

21. Mr. Mingo further testified that, at all relevant times, traffic originated by Verizon was "marked as Verizon [-originated] on [Core's] switches," and therefore that Core has always been "accurately billing" Verizon for the termination of its traffic and that it was "not very likely" that Core would have billed Verizon for the termination of any other carrier's traffic. Tr. 77-78. See also AT&T Cross Ex. 1 (Core Response to Interrogatory 6-6) ("Core bills Verizon for the traffic Verizon marks as self-originated; and Core bills other carriers for the traffic Verizon marks as originated by such other carriers").

22. The burden is on Core to have the ability to read and interpret industry standard billing records received from Verizon.

23. Core failed to exercise proper managerial and technical fitness by failing to even look at the daily records sent by Verizon that contained all information necessary to send a bill to AT&T.

24. All traffic sent by AT&T to Core prior to September 2009 was ISP-bound local traffic. AT&T Statement 1.0, Attachment C, Core response to AT&T-Core-3-3.

25. Core has refused to provide information on whether any traffic sent by AT&T after September 2009 is *not* ISP-bound traffic. AT&T Statement 1.0 at p. 8.

26. The vast majority of Core's traffic even after September 2009 is ISP-bound. AT&T Statement 1.0 at p. 5.

27. Core cannot identify which traffic is ISP-bound local traffic or VoIP traffic. AT&T Statement 1.0, Attachment C, Core response to AT&T-Core-3-4.

28. The bills Core sent, and continues to send, to AT&T, charge Core's tariffed rate for switched access traffic, even for traffic that Core admits is local traffic. AT&T Statement 1.0 at p. 5.

29. All traffic that is in dispute in this case is for non-toll, locally dialed traffic. AT&T Statement 1.0 at pp. 8-9.

30. Core has never filed a tariff in Pennsylvania establishing a rate for terminating the traffic at issue in this case – locally dialed, ISP-bound traffic. AT&T Statement 1.0 at p. 16.

31. Core has filed a tariff in six other states – Delaware, New Jersey, West Virginia, Alabama, Maryland and New York – establishing a rate for the termination of local traffic. AT&T Cross Exam Exs. 13-16, 18-19.

32. At all relevant times, Core has had on file with the Commission an intrastate switched access tariff, PA P.U.C. Tariff No. 4 titled "Switched Access Tariff," which established access rates for the origination and termination of non-local, toll, interexchange traffic. The Minute Of Use ("MOU") terminating access rate established therein is $.014. AT&T Cross Exam. Ex. 12.

33. Core's switched access tariff defines "Access Service" as "Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications." Tariff, Section 1 (emphasis added). Accordingly, "Access Service" is a service provided to an "Interexchange Carrier," which is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, ***between two or more exchanges***." *Id.* (emphasis added). AT&T Cross Exam. Ex. 12.

34. In delivering local traffic, AT&T is not an interexchange carrier but a CLEC providing *local* exchange service and as such squarely falls within the tariff's definition of an "exchange carrier" ("any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service."). AT&T Cross Exam. Ex. 12.

35. Core's switched access service tariff further specifies that Switched Access Service is only provided for three types of calls, specifically, Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access. Tariff, Section 4.2.3. The term "Feature Group" refers to a "switching arrangement" provided to "interexchange (long distance) carriers" by a LEC that "allow[s] the LEC's end-users to make *toll* calls via their favorite long distance carrier." *Newton's Telecom Dictionary* at

291 (emphasis added). Accordingly, the tariff applies on its face exclusively to non-local, toll, interexchange calls, and not to locally dialed, ISP-bound calls. AT&T Cross Exam. Ex. 12.

36. The only mention of local traffic in the tariff relied upon by Core is in the definitions section. Core's intrastate access tariff defines "Local Traffic" as follows: " (i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes." Tariff, Section 1 at Original Sheet No. 8.

37. Core's tariff defines "Mutual Traffic Exchange" as "[a] compensation providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff, Section 1 at Original Sheet No. 9. This is a bill-and-keep arrangement and its inclusion in the tariff indicates that Core recognized that that is the sort of arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges. AT&T Cross Exam. Ex. 12.

38. The fact that Core's tariff, at all relevant times (even today), has included this Mutual Traffic Exchange provision, and has not contained any provision establishing a positive rate for terminating local traffic; combined with the fact that Core did not bill AT&T for seven years, led AT&T to reasonably believe and understand that bill-and-keep is the *only* arrangement that applies to local traffic exchanged between Core and AT&T.

39. The fact that Core did not send bills to AT&T (or any other CLEC) for the local traffic at issue for the first seven full years Core did business in Pennsylvania (despite at all times having all information Core needed to bill AT&T) demonstrates that Core recognized and

intended that bill-and-keep was *the* arrangement that applies to CLEC-to-CLEC locally dialed traffic.

40. Because Core did not have any tariff on file to charge AT&T for locally dialed traffic, Core charged AT&T switched access rates for local traffic.

41. Core has previously stated that there is never a situation in which switched access charges would apply to ISP-bound traffic. AT&T Cross Exam. Ex. 9 (Rebuttal Testimony of Timothy J. Gates on behalf of Core Communications, Inc.), p. 6.

42. Core also recognized that "the access charge system contains non-cost-based rates and inefficient rate structures..." *Id.* (citing to the FCC's Access Charge Reform Order.)

43. This Commission has previously recognized that "[s]witched access charges are those that LECs bill to IXCs or other LECs, for using their facilities in the placement or receipt of ***toll calls***." Global Order at p. 12.

44. Core cited to no Order, regulation or law from this Commission, or any other Commission in the country, that has ever found that switched access charges apply to local traffic.

45. Core claimed that switched access charges should apply to the traffic at issue in this case because Core has no other tariffed rate that would apply to the locally dialed ISP-bound traffic, or local reciprocal compensation.

46. The fact that Core has no other tariffed rate that applies to locally dialed ISP-bound traffic is a result of Core's own actions, or inactions, in Pennsylvania.

47. Despite being in business for over ten years in Pennsylvania, Core has never even attempted to tariff a rate for locally dialed ISP-bound traffic in Pennsylvania, even though Core has tariffed such a rate in six other states.

48. Bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs. AT&T Cross Exam. Ex. 4.

49. Given Core's failure to bill AT&T for seven years, and the industry-standard governing the exchange of local traffic between CLECs, AT&T had every right to expect that Core and AT&T were exchanging traffic on a bill-and-keep basis.

50. AT&T operates on a bill-and-keep basis with every other CLEC in Pennsylvania. AT&T Statement 1.0 at p. 13.

51. AT&T does not conduct traffic studies to ensure traffic is balanced with other CLECs. Tr. 208.

52. No CLEC other than Core has ever complained to AT&T that it finds a bill-and-keep arrangement to be unacceptable. Tr. 208.

53. This Commission has previously found that bill-and-keep is the "existing CLEC-to-CLEC intercarrier compensation practice." AT&T Cross Exam. Ex. 4 (*PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, * 1 (Pa.P.U.C. June 22, 2006)).

54. This Commission has also previously expressed concern with disturbing this existing CLEC-to-CLEC intercarrier compensation practice. *Id.*

55. In response to other carriers expressing concern about Core relying extensively on revenues from other carriers rather than its own customers, this Commission has previously found that it will not "condone an express shifting of costs by a new entrant where the record supports such a conclusion." PUC Core CPCN RLEC Order at p. 39.

56. Core has admitted that it charges its own customers "very close to zero," and therefore it is attempting to shift its costs onto other CLECs rather than recover them from their own customers. Core Statement No. 1SR at p. 11.

57. Core's business model depends on trying to charge other carriers, rather than end-user customers. The FCC has shut the door on Core's arbitrage business model, and it appears this complaint against AT&T is Core's attempt to find a new revenue source. AT&T Statement 1.0 at p. 6.

58. Bill-and-keep is the most appropriate compensation scheme for CLEC-to-CLEC compensation, even ISP-bound traffic that may be predominantly one-way.

59. Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. See, *e.g.*, the FCC's *First Report and Order*, ¶ 1027. And in the *ISP Remand Order*, the FCC observed that "it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users." *ISP Remand Order* at ¶ 4.

60. Core's traffic is predominantly one-way because it has set up its business model to ensure that it receives only inbound traffic from other CLECs.

61. Up until April 2010, Core sent no outbound traffic at all to any carriers in Pennsylvania. AT&T Cross Exam. Ex. 1, Core response to AT&T-Core-6-4.

62. Beginning in April 2010, Core's customers began sending some outbound traffic to Verizon only. Core still sends no outbound traffic to any CLECs, as Core blocks any customers that attempt to call a customer served by any carrier other than Verizon. Tr. at p. 21.

63. Verizon pays Core a rate of $.0007/minute for the termination of all locally dialed calls, whether ISP-bound or VoIP. Verizon has paid this rate since October 2004 through the present. Tr. 44-45, 86-87. Prior to that time, Verizon paid Core nothing at all for this traffic. *Id.*

64. Verizon does not pay Core the tandem rate Core is attempting to charge AT&T as part of its alternative proposal. *Id.; See also* AT&T Cross Exam. Ex. 1 (Core response to AT&T-Core-6-1).

65. The only CLEC that has agreed to pay the tandem rate to Core for the termination of local traffic are Paetec/Cavalier. Tr. at p. 50-55.

66. Paetec/Cavalier agreed to pay this tandem rate for one year beginning January 1, 2011 in order to have Core withdraw its protest to the Paetec/Cavalier merger so that the merger could be approved without delay. AT&T Cross Exam. Exs. 2-3; Tr. 50-51.

67. Other than Comcast, who is also in the middle of a merger, all other CLECs do not pay Core anything for the termination of locally dialed traffic. Tr. 50-52.

68. Core is not charging the vast majority of CLECs anything for the termination of local traffic, but has only charged two other CLECs – XO Communications and One Communications. Attachment C to AT&T Statement 1.0 (Core response to AT&T-Core-II-5 and II-6).

69. The Commission has previously found that CLECs should not be permitted to charge a tandem rate for reciprocal compensation, but instead should charge a blended rate of the lower end office rate plus the tandem rate. AT&T Cross Exam. Ex. 6.

70. Core has not filed a tariff establishing the Verizon tandem rate for the termination of locally dialed traffic.

71. Core provided no evidence regarding its costs of reciprocal compensation. Tr. 210.

72. Core provided no evidence that it has suffered economically as a result of maintaining a bill-and-keep arrangement with AT&T.

73. From the time period of 2000 through 2008, Core did not request that AT&T negotiate a rate for the exchange of local traffic.

74. When AT&T and Core did discuss the possibility of establishing a rate on a going forward basis, Core refused to agree to any rate unless AT&T first agreed to pay all back-billed amounts in full. AT&T Statement 1.0 at p. 18.

75. With respect to agreeing upon a rate for the exchange of local traffic on a going forward basis, Core made clear that it would not even consider the rate that Verizon pays, or $0.0007/minute. Tr. 93.

76. Core's cost to terminate a call from Verizon is the same as its cost to terminate a call from AT&T. Tr. 49.

77. Core also informed AT&T that it would not consider any rate below the Verizon tandem rate of $.002934/minute. Tr. 93.

78. Of the more than 400 million minutes for which Core seeks compensation in this case, fully 97% were delivered to Core during the time Core claimed it had no idea AT&T was sending it any traffic. Mingo Direct, Ex. BLM-1.

79. By the time Core filed suit, the traffic flow from AT&T had slowed to barely a trickle. Indeed, for the period June 2008 through October 2009, the total "bill" that Core claims is due, even at switched access rates ($.014 per minute), amounts to only $3,321.52 – only five one-hundredths of one percent of the total amount claimed (.05%). *Id.*

80. Subsequent to October 2009, the monthly "bills," even at switched access rates, are less

than $100. Core Hearing Ex. No. 2 (Core Response to Interrogatory 6-2).

81. Core has provided absolutely no evidence that its economic viability has been threatened as a result of the bill-and-keep reciprocal compensation arrangement with AT&T. Given that Core did not even know AT&T was sending 97% of the traffic at issue in this case, Core's claim that its economic viability is threatened is not credible.

82. Given the very small amounts of traffic AT&T is sending to Core, and has been sending since June 2008, Core's claim that its economic viability is being threatened by the AT&T traffic is baseless.

APPENDIX B

AT&T'S PROPOSED CONCLUSIONS OF LAW

1. 66 Pa. C.S.A. §1302 provides that "every public utility *shall file* with the commission . . . *tariffs showing all rates* established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission." (Emphasis added).

2. The companion statutory provision to §1302 forbids a public utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such public utility." 66 Pa. C.S.A. § 1303 ("adherence to tariffs").

3. Pennsylvania courts have confirmed that Sections 1302 and 1303, read together, do not permit a carrier to charge any rate if it has not tariffed such rate. In *Popowsky v. Pa. PUC,* 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994), the Court held that because the public utilities in question did not have lawful tariffs on file with the PUC, the utilities could not lawfully charge customers *anything* for the provision of utility service, and that therefore the PUC was wrong to issue an order requiring customers to pay bills submitted by the utilities. *See also Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 829 (Pa. Commw. Ct. 1980) ("a public utility may not charge any rate for service other than that lawfully tariffed . . . .").

4. Core failed to tariff any rate for the termination of local traffic, whether ISP-bound or VoIP, and therefore Core is prohibited by law from charging AT&T any rate for terminating such traffic.

5. Because of its failure and refusal to comply with Pennsylvania statutory law, Core is barred from "collect[ing]," "enforc[ing]," "demand[ing] or receiv[ing]" anything for past traffic exchanges, and therefore cannot prevail on its claims in this case. 66 Pa. C.S.A. §§1302, 1303.

6. Core's Complaint is also barred because switched access charges apply only to the origination and termination of non-local, toll, interexchange calls – not the local traffic at issue here.

7. As the PUC observed in its September 30, 1999 *Global* Order, at Docket Nos. P-00991648, *et al.*, "Switched access charges are those that LECs bill to IXCs or other LECs, for using their facilities ***in the placement or receipt of toll calls***." *Id.*, p. 12 (emphasis added). Core has also recognized that switched access charges do not apply to ISP-bound traffic, such as the traffic at issue here. AT&T Cross Exam. Exs. 9 & 10.

8. 66 Pa. C.S.A. § 3017(b) provides that "No person or entity may refuse to pay tariffed access charges for ***interexchange services*** provided by a local exchange telecommunications company" (Emphasis added). "Interexchange services" are not at issue here; rather, this case involves local traffic.

9. On its face, Core's switched access tariff does not apply to the local traffic at issue here. The tariff, PA P.U.C. Tariff No. 4, is titled "Switched Access Tariff" and sets out the rules and regulations related to Core's intrastate switched access service. The tariff defines "Access Service" as "Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications." Tariff, Section 1 (emphasis added). Accordingly, "Access Service" is a service provided to an "Interexchange Carrier," which is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, ***between two or more exchanges***." *Id.* (emphasis added). In delivering local traffic, AT&T is not an interexchange carrier but a CLEC providing *local* exchange service. And as such, AT&T squarely falls within the tariff's definition of an "exchange carrier" ("any individual, partnership,

association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service."). *Id.*

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

11. In addition, Core's tariff defines "Local Traffic" as follows:

> Local Traffic: Traffic is "Local Traffic" under this rate sheet if: (i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.

Mr. Mingo, Core's CEO, admits that AT&T's locally dialed traffic at issue in this case satisfies that definition and is thus "local traffic" for purposes of the Pennsylvania tariff. (Tr. 98-99, 118, 129).

12. Core's tariff also characterizes the term "Mutual Traffic Exchange" as "[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other 'in kind' for terminating local exchange traffic on the other's network." Tariff, Section 1 at Original Sheet No. 9 (AT&T Cross Exhibit 12). This is a bill-and-keep arrangement. Its inclusion in the tariff indicates that Core recognized that bill-and-

keep is the compensation arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges.

13. Under the plain terms of Core's tariff, Core cannot charge AT&T its tariffed switched access rate for the termination of traffic Core itself has admitted is all locally dialed.

14. Core's conduct in other states where Core has specifically tariffed a rate for the termination of local traffic confirms that Core's Pennsylvania switched access tariff, which does not contain a similar rate for the termination of local traffic, cannot apply to the local traffic at issue in this case.

15. Core's Complaint also must be denied because it would require the Commission to establish a rate for termination of local traffic and apply that rate retroactively. The law does not permit the Commission to engage in retroactive ratemaking, as Core is requesting in this case.

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

("Ratemaking principles require prospective ratemaking based upon a test year."); *Id.* ("A rate increase may act prospectively only.").

17. The only rate that may be demanded for the provision of service at any given time is the approved rate governing that service that is in effect at that time. Prospective rates may not be used to recoup past losses. The filed tariff doctrine, codified at 66 Pa. C.S.A. § 1303, prohibits a utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such . . . utility." Accordingly, the rule against retroactive ratemaking is a necessary corollary to the filed tariff doctrine and Section 1303. Applied here, it means that neither Core nor the Commission may create a new rate today and apply it retroactively to earlier periods. Otherwise, Core would be permitted to "demand and receive" a rate that is not "specified in [its] tariffs." As noted previously, Core's tariff does not specify any rate for terminating locally dialed, ISP-bound traffic.

18. The relief Core seeks also is barred because it would violate the Pennsylvania statutory ban on rate discrimination.

19. 66 Pa. C.S.A. § 1304 ("discrimination in rates") provides:

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

20. 66 Pa. C.S.A. § 1303 provides that "[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron." Accordingly, Pennsylvania law prohibits charging different rates to similarly situated customers for the same service and at the same time confers on all utility customers "most favored nation" status in the event more than one rate is applicable to the service in question.

21. Core's Complaint asks that AT&T be required to pay $0.014/minute (Core's intrastate access rate) or, in the alternative, $.002439/minute (Verizon's tandem reciprocal compensation rate) for both past and future terminations of locally dialed, ISP-bound traffic. Requiring AT&T to pay this amount would be discriminatory as to Verizon and virtually all CLECs. Up until October 2010, Core did not receive any compensation from any CLEC for terminating precisely this kind of traffic. Tr. 50-55, 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19. Since October 2010, two – and only two -- CLECs have agreed to pay Core something for this traffic. The only other carrier from which Core has received any payment for terminating this kind of traffic is ILEC Verizon. And at all relevant times ILEC Verizon has paid Core an MOU rate of $.0007. Tr. 44-47.

22. Pertinent case law makes clear that in order for *any* rate differential to pass muster under Section 1304, the utility must show that the differential can be justified by the difference in costs required to serve different customers or different classes of customers. *See Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1060 (Pa. Commw. Ct. 2002) ("in order for a rate differential to survive a challenge brought under Section 1304 of the Public Utility Code, 66 Pa. C.S.A. § 1304, the utility must show that the differential can be justified by the difference in costs required to deliver service to each class.").

23. When Core terminates locally dialed traffic originated by ILEC Verizon and other carriers, its network performs exactly the same functions and Core incurs exactly the same costs as it does when Core terminates AT&T-originated locally dialed calls. Tr. 49.

24. It therefore would be impossible for Core to show *any* difference in costs or to justify *any* rate differential from the compensation scheme which it has with the vast majority of other Pennsylvania CLECs, *i.e.*, bill-and-keep.

25. Core has several different compensation schemes for the exchange of locally dialed, ISP-bound traffic. In circumstances in which "more than one rate [is] applicable to service rendered to a patron [AT&T]," Core is statutorily required to "compute [its] bills under the rate most advantageous to" AT&T. And in this case that would be the compensation scheme used by the vast majority of CLECs, *i.e.*, bill-and-keep. 66 Pa. C.S.A. § 1303. See *Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Commw. Ct. 1995).

26. In 2006, the Commission recognized that the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania" is "bill-and-keep compensation." *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Exam. Ex. 4).

27. The Commission refused to allow a tariffed rate to go into effect given that the tariffed rate would disrupt the CLEC-to-CLEC compensation practice of bill-and-keep. *Id.*

28. This Commission has recognized, in the *ISP Remand Order* the FCC "established . . . an overall policy of moving Internet access compensation from an MOU [minute of use] basis to a Bill-and-Keep system." *Id.* *9 (AT&T Cross Exam. Ex. 4).

29. Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. See, *e.g.*, the FCC's *First Report and Order,* ¶ 1027. And in the *ISP Remand Order*, the FCC observed that "it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users." *ISP Remand Order at* ¶ 4.

30. As recently as October 2010, the FCC reaffirmed that its goal was to "encourage 'decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance on end users, consistent with the tentative conclusion...that bill and keep is the appropriate intercarrier

compensation mechanism for ISP-bound traffic.'" AT&T Cross Exam. Ex. 20; *Core Communications, Inc. v FCC, et. al.,* Brief for the Federal Respondents in Opposition, p. 22.

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