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January 14, 2011

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

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

Dear Secretary Chiavetta:

On behalf of Core Communications, Inc., ("Core") enclosed for filing please find the original of its Reply Brief PUBLIC VERSION along with the electronic filing confirmation page with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely yours,

Deanne M. O'Dell

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

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

CERTIFICATE OF SERVICE

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

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Dated: January 14, 2011

Deanne M. O'Dell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF
OF
CORE COMMUNICATIONS, INC.

PUBLIC VERSION

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Date: January 14, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative

Statutes and Regulations

I. INTRODUCTION

Despite the best efforts of AT&T Pennsylvania, LLC ("AT&T") and TCG Pittsburgh, Inc. ("TCG")(collectively, "AT&T" or "Respondents") to create a murky and confusing picture of this case, it really is quite simple and involves one issue – resolving a payment dispute between two competitive local exchange carriers ("CLECs"). While the Commission has resolved many payment disputes between incumbent local exchange carriers ("ILECs") pursuant to state law and its delegated authority under the federal Telecommunications Act of 1996, 47 U.S.C. §§ 251-252, this appears to be the first case wherein the Commission is asked to resolve a payment dispute between two CLECs. *See Palmerton Telephone Company v. Global NAPs South, Inc. et al.,* PA P.UC. Docket No. C-2009-2093336 (Opinion and Order entered March 16, 2010 ("*Palmerton*").

Core has presented several legally sound and reasonable theories under which the Commission can and should order AT&T to pay something more than $0.00 for services rendered either by application of Core's tariff or by imposition of the Commission-approved Total Element Long Run Incremental Cost ("TELRIC") rate. Core Main Brief ("M.B.") at 17-29. Additionally, to address payment for future services, the Commission must direct AT&T to enter into a Traffic Exchange Agreement ("TEA") with Core which establishes a mutually acceptable reciprocal compensation payment arrangement. Core M.B. at 29-37.

AT&T, on the other hand, adamantly disavows any payment responsibility. As support, AT&T concocts a myriad of tenuous and outlandish theories to try to justify its unjustifiable position that it owes Core nothing. While Core anticipated and fully addressed most of these theories in its Main Brief, which it incorporates by reference herein, the fallacies implicit in several of AT&T's more outlandish arguments will be further addressed below.

First, despite AT&T's strong advocacy to the contrary, there is no federal or state mandate that bill-and-keep must be applied when two CLECs cannot reach a mutually acceptable payment agreement nor would accepting any of Core's theories through which AT&T would be required to pay something above $0.00 for services rendered somehow improperly alter existing CLEC practices. Second, AT&T has presented nothing to support its claim that the Commission is somehow barred from applying the clear language of Core's tariff to this situation or that Core has somehow "waived" its right or conceded its ability to collect payment pursuant to its tariff. Likewise, AT&T has presented nothing in opposition to Core's alternative request that the TELRIC reciprocal compensation tandem rate be applied to calculate the amount owed by AT&T to Core for services rendered. Finally, there is no record support or policy reason to merit adoption of AT&T's wishful thinking that the Commission is somehow required or justified in "punishing" Core by denying Core payment for services rendered.

In sum, AT&T's entire Main Brief is nothing more than an effort to clutter this case with advocacy that has no solid legal or practical foundation and includes many red herring arguments. After sorting out fact from fiction, the reality is this – Core has performed a service for AT&T and AT&T refuses to pay for it. There can be no doubt that the only legally sound and reasonable result here is one which directs AT&T to pay Core for past, present and future traffic. Core has presented several reasonable and legally sound paths to such an outcome including application of Core's tariff or the Commission-approved TELRIC rate to past due amounts and requiring AT&T to enter into a TEA to cover future traffic. In addition to being a fair and reasonable result, adopting Core's position is consistent with the Commission's unequivocal recent pronouncement that "[t]he non-payment of appropriate intercarrier compensation from one CLEC to another CLEC cannot be condoned as a matter of law and as a

matter of sound regulatory policy. *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239, at 11 (Opinion and Order entered September 8, 2010) ("*Material Question Order*").

II. ARGUMENT

The key facts of this case are undisputed. AT&T has sent Core over 400,000,000 minutes of traffic. Core Exh. BLM-1; Core Hearing Exh. No. 2. Core has and continues to terminate this traffic and transport it to Core's end-users so that AT&T's end-users receive uninterrupted service. AT&T refuses to pay anything for this service. In trying to justify what is effectively a theft of service, AT&T states only that it "should be required to abide by the controlling document, a tariff or a contract" and then tries to make the case that there is no controlling document. Tr. 188.

Making this claim requires AT&T to gloss over the fact that it refuses to negotiate any contract that would result in it paying anything to Core. As explained further in Section II.A, there is no legal mandate or policy directive requiring the Commission to order bill-and-keep as the "default payment" arrangement for CLECs that do not reach another understanding. Likewise, as explained in Sections II.B and II.C, AT&T has presented no viable legal theory or argument showing that the Commission is somehow barred from requiring AT&T to either pay Core's tariffed rate or the TELRIC tandem rate until such time as the parties reach a mutually satisfactory payment agreement. After stripping away these two theories, AT&T is left only with its self-serving and incredulous claim that "Core. . . is breaking the law by attempting to bill and collect" for services rendered and, therefore, the Commission should "punish" Core by not requiring AT&T to pay for services rendered. As explained in Section III, there is no record support justifying the denial of payment to Core by AT&T to somehow "punish" Core for its actions in this proceeding.

A. No Legal or Policy Mandate Requires Commission to Order a Bill and Keep Arrangement Between CLECs

In the absence of a contractual agreement or applicability of tariff, AT&T insists that bill-and-keep must apply between two CLECs and, by logical extension, that neither CLEC has a right to challenge applicability of bill-and-keep. AT&T M.B. at 36-39. As support, AT&T insinuates that bill-and-keep is the only Federal Communications Commission ("FCC") and Commission endorsed resolution where two CLECs cannot agree on a reciprocal compensation scheme. AT&T M.B. at 37. In addition, AT&T tries to support its claim by essentially arguing that any other result would "disrupt" the entire CLEC world. AT&T M.B. at 37-39. Both of these arguments lack legal and practical support and must be rejected.

1. No federal law or precedent mandates the Commission to direct a bill-and-keep arrangement to resolve this case

As explained in Core's Main Brief, AT&T argued in the first phase of this proceeding (prior to the *Material Question Order*) that the FCC, through the *ISP Remand Order,* required a bill-and-keep arrangement for carriers who exchanged traffic and did not have an interconnection agreement governing that exchange. Core M.B. at 33-35. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, at ¶ 78 (Order on Remand & Report and Order, Apr. 27, 2001) ("*ISP Remand Order*"). Aside from being legally incorrect at inception because the argument ignored the subsequent reversal of the *ISP Remand Order*, the Commission determined

in its *Material Question Order* that the *ISP Remand Order* does not apply to the traffic exchanged here, i.e. between two CLECs.[1] *Material Question Order*.

None of this, however, has deterred AT&T from still trying to insinuate that the FCC somehow mandates imposition of bill-and-keep arrangements between CLECs and, by necessary implication, that such an arrangement is all that the Commission can direct here. In its Main Brief, AT&T claims that the FCC has "endorsed" bill-and-keep and cites to the FCC's *First Report and Order*. AT&T M.B. at 37. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (First Report & Order adopted August 1, 1996)("*First Report and Order.*"). AT&T also incredibly cites to the FCC's comment in the *ISP Remand Order* that bill-and-keep "appears" to be the "most efficient recovery mechanism for ISP-bound traffic." Neither of these cites support the result AT&T is trying to achieve in this case, i.e., that the FCC mandates bill-and-keep as the only resolution for this case.

First, the Commission has made clear in the *Material Question Order* that the question of what compensation is required here was not addressed in the *ISP Remand Order*. *Material Question Order* at 10. Moreover, the Commission has specifically maintained its authority to address compensation rates for CLEC-to-CLEC arrangements even though it has not yet had the opportunity to address <u>how</u> to implement the reciprocal compensation regime as between two

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[1] Although AT&T has not appealed the *Material Question Order* nor otherwise sought review of it, it reiterates these lost arguments in its Main Brief and states that it is doing so "out of an abundance of caution solely to ensure [that its] position is preserved for appeal." AT&T M.B. at 44. AT&T then incorporates by reference various documents related to this issue. To the extent such incorporation is necessary or even appropriate, Core incorporates by reference the following documents: Core's Answer to AT&T Motion to Dismiss filed December 28, 2009; Core's Answer to AT&T's Motion for Leave to File Reply and Request for Oral Argument on Jurisdictional Issues and for Suspension of the Procedural Schedule filed January 26, 2010; Core's Brief in Support of Core's Petition for Interlocutory Commission Review and Answer to a Material Question filed March 15, 2010; and, Core's Brief in Support of Petition for Interlocutory Commission review and an Affirmative Answer to The material question Submitted by AT&T filed March 15, 2010.

CLECs, which Core is seeking here. *See*, AT&T Cross Ex. No. 4 (Pennsylvania *Public Utility Commission v. MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Service,* Pa. P.U.C. Docket No. R-00050799 at 7 (Order adopted June 22, 2006)("*Verizon ATS*"). AT&T's efforts to ignore the Commission's clear pronouncements that it has the authority to address these issues and that the *ISP Remand Order* does not dictate the outcome of this case are without merit and must be rejected.

Second, AT&T cites to the *First Report and Order* as "endorsing" bill-and-keep. An "endorsement," however, is not the same as a legally required mandate. In fact, the federal rule addressing bill-and-keep arrangements specifically states as follows:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 52.722(b).
>
> *See* Exh. BLM-12 which is a copy of 47 C.F.R. § 51.713 (emphasis added).

Here the traffic is not roughly balanced because AT&T customers originate traffic that is sent to Core for termination and transport but Core's customers do not originate traffic to AT&T's customers. Tr. at 174-175. AT&T attempts to marginalize this by referencing the definition of "Mutual Traffic Exchange" in Core's tariff. AT&T M.B. at 38. According to AT&T, the tariff definition does not state that the traffic must be balanced for bill-and-keep to apply. In AT&T's logic, Core has somehow waived the applicability of the federal rule requirements for the traffic it terminates for AT&T based on a definition in Core's tariff. This is a nonsensical argument. Core's tariff sets forth a commonly used definition of Mutual Traffic Exchange and, in fact, states that providers would pay each other "in kind." AT&T Cross Ex. No. 12 at Original sheet No. 9 (Core's PA PUC Tariff No. 4). Payment "in kind" is fully

consistent with the FCC's "roughly balanced" traffic rule. In this case, AT&T is not paying Core "in kind" because, in fact, AT&T is paying nothing for Core's service nor is AT&T rendering an "in kind" service for Core. This tariff definition, which does not even apply to the traffic at issue here, is not the smoking gun AT&T claims. Rather, the federal rule clearly requires something that does not apply to the facts of this case, i.e., roughly balanced traffic. The FCC's statements about bill-and-keep as well as the non-applicable definitions of Mutual Traffic Exchange in Core's tariff are irrelevant.

Finally, it is notable that the FCC has never actually adopted bill-and-keep in any context other than its "roughly balanced" traffic rule. In its 2005 rulemaking notice on a unified intercarrier compensation system, the FCC appended a staff proposal on bill-and-keep but was careful to disavow that proposal. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Further Notice of Proposed Rulemaking released March 3, 2005) ("*Further Notice*")(discussing a myriad of intercarrier compensation proposals, but not bill-and-keep); *and see*, *id.* at Separate Statement of Comm. Michael J. Copps ("[T]he staff appendix is not the product of a Commission vote, nor does it reflect my opinion at this time.") Indeed, the *Further Notice* affirmed the fact that "[c]urrent Commission rules require the calling party's LEC to compensate the called party's LEC for the additional costs associated with transporting a call..." *Id.*, at ¶ 13. The FCC revisited intercarrier compensation in its 2008 rulemaking notice, issuing three separate, mammoth proposals for rate convergence, but bill-and-keep was nowhere to be found in the FCC's plans. *In the Matter of High-Cost Universal Service Support*, WC Dockets 05-337 *et al.*, (Order on Remand and Further Notice of Proposed Rulemaking released Nov. 5, 2008)(the FCC's intercarrier compensation proposals appear as

Appendix A, Appendix B and Appendix C.). However much AT&T may wish that a bill-and-keep regime is in the offing, the FCC has shown no intent or ability to adopt such a regime.

2. No state law or precedent mandates the Commission to direct a bill-and-keep arrangement to resolve this case

AT&T states that the "Commission also has recognized that bill-and-keep is the existing and appropriate intercarrier compensation practice for the exchange of local traffic between CLECs." AT&T M.B. at 37. The only Commission precedent cited in support of this position is the *Verizon ATS* order. *See generally,* AT&T Cross Ex. No. 4 at 1 (*Pennsylvania Public Utility Commission v. MCImetro Access Transmission Services, LLC. dba Verizon Access Transmission Service*, Pa. P.U.C. Docket No. R-00050799, 2006 WL 2051138 (Pa.P.U.C.)(Order adopted June 22, 2006)("*Verizon ATS*"). As explained in Core's Main Brief, the *Verizon ATS* case did not address the issue raised in this case and, in fact, the case actually bolsters Core's position here. Core M.B. at 31-32. AT&T offers nothing else to support its claim that the Commission is somehow required or mandated pursuant to Commission precedent or state law to find that AT&T is not required to pay Core anything for services rendered under the guise of calling it a "bill-and-keep" arrangement. As no such authority exists, AT&T's advocacy in this regard must be ignored.

3. AT&T's unfounded fears of supposedly altering existing CLEC payment arrangements do not require imposition of a bill-and-keep arrangement to resolve this case

After making half-hearted attempts to claim that the Commission is somehow legally required either by federal or state law to adopt AT&T's zero pay policy disguised as a "bill-and-keep" arrangement, AT&T spends a great deal of time creating the impression that requiring it to pay anything in this case will lead to utter chaos in the CLEC world with negative consequences for the Commission. AT&T M.B. at 38-39. According to AT&T, "every Pennsylvania CLEC

except for Core operates under a bill-and-keep arrangement for the exchange of local traffic." AT&T M.B. at 38, n. 20. If, in AT&T's reasoning, the Commission were to require AT&T to pay something here, then it would soon find its resources "exhausted" as the Commission processes would be suddenly opened to a floodgate of contentious CLEC-to-CLEC mediation and/or arbitrations. AT&T M.B. at 38-39. AT&T is engaging in nothing more than exaggerated hyperbole in an effort to scare the Commission about the potential ramifications of this case.

The record does not support AT&T's claims about what "every" CLEC in Pennsylvania does. In fact, all the record shows is that AT&T refuses to accept anything but a "bill-and-keep" arrangement with other CLECs. Even that, however, is not persuasive of any fact relevant here. The AT&T bill-and-keep arrangements entered into the record are incomplete and do not provide any other terms negotiated between the parties. *See* Exh. BLM-13. As such, all they show is that AT&T has required – or forced – other CLECs to enter into "bill-and-keep" arrangements but there is no way of knowing what trade-offs were made to reach this result. In sum, AT&T's view and practices regarding payment arrangements with CLECs is not conclusive evidence of what "every CLEC does."

On the contrary, the record shows that at least three other CLECs are paying Core for the transport and termination of traffic that is similar to the traffic at issue here – Comcast, PAETEC/Cavalier, and Verizon Business Solutions (the Verizon CLEC).[2] AT&T's efforts to discredit those payments by claiming that Core somehow "coerced" these carriers or, in the instance of PAETEC/Cavalier, that Core accepted far below the true value in payment for past due amounts to somehow gain leverage for this proceeding are ridiculous. Core is not AT&T.

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2 AT&T's brief stating that Verizon ILEC is paying Core $0.0007 ignores the point of Core Witness Mingo's testimony on cross-examination which states clearly that Verizon's CLEC – Verizon Business Solutions – is paying Core for the termination of traffic and has always paid. Core M.B. at 35, Tr. at 51-52.

While AT&T, as the largest telecommunications company in the world, can certainly marshal all of its resources to coerce other companies (as it has arguably done here through its incessant and needless legal maneuvering to avoid payment), it does not logically flow that all other carriers behave in the same manner.

Further, as Core Witness Mingo testified, Comcast began paying Core at its tariffed rates for traffic similar to that at issue in this case after the Commission's *Material Question Order* was entered. Tr. at 53. To the best of Mr. Mingo's knowledge, Comcast made this decision based on its sound analysis of the Commission's actions in the *Material Question Order* as well as the Commission's well-expressed viewpoint regarding the confiscatory nature of $0.0007 as a compensation rate. Tr. at 54; Core Cross Exam Exh. No. 1 at 19-23. Far from proving any coercion on the part of Core, the record made clear that Comcast, which is the third largest telecommunications provider in the country, reached a decision consistent with Core's position in this case after an analysis of the current law of Pennsylvania. *See* http://money.cnn.com/magazines/fortune/fortune500/2010/industries/157/index.html. AT&T's self-serving attempt to discredit Comcast's reasonable and legally sound decision should be ignored.

Likewise, the settlement reached with PAETEC/Cavalier for past due amounts resulted in a payment valued at **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL**. Since Core billed PAETEC/Cavalier a total of **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** MOUs, the final negotiated settlement agreement resulted in Core receiving an average compensation value of **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** per MOU on its past due bills. AT&T Cross Exam Ex. No. 21. As the negotiated settlement amount for past due bills is **BEGIN CONFIDENTIAL** [redacted]

[redacted] **END CONFIDENTIAL** any claim that AT&T may try to make regarding the difference between the amount billed by Core to PAETEC/Cavalier and the amount received in settlement relative to Core's claims against AT&T in this case is frivolous. *See* Core St. No. 1 at 23.

Perhaps more to the point of AT&T's exaggerated claims about potential ramifications of adopting Core's position here is that Core is not seeking a declaratory order or asking the Commission to set forth a default reciprocal compensation arrangement applicable to all CLECs as a result of this proceeding. Rather, Core has filed a complaint, pursuant to its tariff, against one carrier and is asking the Commission to require that carrier to pay as required by the tariff. Core is not asking the Commission to disrupt CLEC-to-CLEC arrangements governing the traffic of non-parties to this case as those arrangements would remain unchanged by the outcome of this case. In other words, the reciprocal compensation scheme covering traffic exchanged by other CLECs, whether it is bill-and-keep or something else, would remain in place notwithstanding the decision in this proceeding. AT&T's scare tactics regarding the potential overuse of Commission resources are simply not credible.

B. Nothing Bars the Commission From Requiring AT&T Pay Core's Tariffed Rate

The plain terms of Core's tariff apply to the AT&T Indirect Traffic at issue here. Core M.B. at 19-21. Because AT&T does not want to pay the rates contained in that tariff or, more precisely any rates, AT&T is forced to argue that no tariffed rate exists or, alternatively, that the tariff rate cannot be applied in this situation. As explained below, AT&T has presented nothing to support either of these assertions and, therefore, both must be rejected.

1. The plain terms of Core's tariff apply to the traffic at issue here

AT&T correctly states that whether Core's tariff applies to the AT&T Indirect Traffic "begins and ends with the language of the tariff itself." AT&T M.B. at 22. Core also agrees with AT&T that the filed-rate doctrine requires the Commission to strictly enforce the terms of a public utility's tariff. Core M.B. at 17-19. While Core and AT&T disagree on whether the plain terms of the tariff apply to the AT&T Indirect Traffic, AT&T has presented no convincing argument that the tariff language does not apply.

AT&T's first argument is that the tariff only applies to interexchange carriers based on the definition in the tariff of the generic term "Access Service." AT&T M.B. at 23. Because the definition of Access Service references "Interexchange Carriers," AT&T argues that Core's tariff cannot apply when AT&T is exchanging locally dialed traffic. AT&T's analysis, however, conveniently avoids any discussion of the definition of "Switched Access Service" which is the specific service that Core actually provided and still provides AT&T and for which Core seeks compensation. AT&T Cross Ex. No. 12 at Original Sheet 10 (Core's PA PUC Tariff No. 4). As explained in Core's Main Brief, that definition clearly applies to the AT&T Indirect Traffic. Core M.B. at 19-20. AT&T never explains why it ignores the definition of the service at issue in this case nor does it offer any explanation about why – after analyzing <u>all</u> of the terms in the tariff – the tariff should not apply to the AT&T Indirect Traffic.

While AT&T conveniently ignores the definition of Switched Access Service, it does acknowledge that the following Switched Access Service Arrangements are available: (1) originating feature group ("FG") access; (2) originating 800 FG access; and, (3) terminating FG access. AT&T M.B. at 23. According to AT&T, *Newton's Telecom Dictionary* defines "Feature Group" as permitting "toll" and, therefore, Core's reference to Feature Group call type for Switched Access Service must mean that Core's tariff is not applicable to locally-dialed calls.

AT&T M.B. at 24. Again, however, AT&T chooses to ignore the tariff definitions of each of the referenced feature groups which are contained in the following sections: (1) originating FG access is defined in Section 4.2.4; (2) originating 800 FG access is defined in Section 4.2.5; and, (3) terminating FG access is defined in Section 4.2.6. AT&T Cross Ex. No. 12 at Original Sheet Nos. 45-45 (Core's PA PUC Tariff No. 4). To be clear, the specific Switched Access Service Arrangement AT&T uses on Core's network is terminating FG access. In any event, however, none of these Feature Group definitions limit Switched Access to non-locally-dialed calls despite AT&T's wishful thinking. As these terms are defined in Core's tariff, those definitions are applicable regardless of how the terms may be defined in an informal dictionary.

Finally, AT&T cites to the definition of "Mutual Traffic Exchange" in Core's tariff which, according to AT&T, is a "bill-and-keep" definition. AT&T M.B. at 24-25. AT&T claims that the inclusion of this definition in Core's tariff shows that Core recognizes bill-and-keep as "the compensation arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges" and, therefore, AT&T reasonably believed that Core never intended the switched access service to apply to the AT&T Indirect Traffic. AT&T M.B. at 24. AT&T's reasoning is, once again, seriously flawed. The actual definition of Mutual Traffic Exchange (again, a payment-in-kind arrangement) does not set forth AT&T's wishful thinking and, in fact, the term is never used in the tariff again after the definitions section. *See* AT&T Cross Exam Ex. No. 12 at Original Sheet No. 9 (Core's PA PUC Tariff No. 4). Further, Core began billing AT&T pursuant to its tariff for the AT&T Indirect Traffic in January 2008 as soon as Core determined that AT&T was sending it substantial amounts of traffic thereby providing AT&T notice of its interpretation of its tariff. Core St. No. 1 at 9-10. Once AT&T received its first bill from Core making clear that Core was seeking payment pursuant to its tariff, any previous

"assumptions" of AT&T were no longer reasonable. Regardless of AT&T's convoluted tariff interpretations, there can be no serious question about Core's intent or interpretation of the applicability of its tariff to the AT&T Indirect Traffic.

Thus, while AT&T correctly states that whether Core's tariff applies to the AT&T Indirect Traffic "begins and ends with the language of the tariff itself," its analysis of Core's tariff is woefully deficient in that it ignores key provisions such as the definitions of Switched Access Service and Feature Group. Moreover, it depends on the mere existence of a reference external to the tariff without regard for the fact that it is never substantively used in the tariff. AT&T's reading of Core's tariff is so strained and duplicitous that it must not be given any creditability.

2. Core has never implicitly agreed that its tariff cannot apply to the AT&T Indirect traffic

Since it cannot craft a plausible argument using the actual words in Core's tariff to prove that it does not apply to the AT&T Indirect Traffic, AT&T tries to show that Core has already implicitly agreed with AT&T's position. In this colorful fiction, Core's tariffs in other states as well as its advocacy in an interconnection arbitration with ILEC Embarq "lay [all] doubts to rest" about whether or not Core's Pennsylvania tariff's switched access rates apply to the AT&T Indirect Traffic. AT&T M.B. at 25-28. AT&T is wrong on both points.

As explained in its Main Brief, Core's advocacy in its interconnection arbitration with Embarq is not applicable here because it: (1) involves an interconnection dispute with an ILEC (unlike AT&T); (2) involves the issue of so-called "VNXX traffic" which is not an issue in this case; and, (3) involves an interpretation of the *ISP Remand Order* which the Commission has already determined is not applicable here. Core M.B. at 24-25. Thus, AT&T's out-of-context

statements taken from Core's advocacy in the interconnection arbitration proceeding have no applicability here.

Likewise, AT&T's attempt to find a "smoking gun" in tariffs filed by Core and its affiliates in other states is conclusive of nothing relevant here. According to AT&T, the fact that Core has specifically tariffed a rate for the exchange of local traffic in other states "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.'" AT&T M.B. at 25-27.

AT&T's position ignores the fact that the tariffs filed by Core and its affiliates in Delaware, New Jersey, West Virginia, Alabama, Maryland and New York are governed by the particular laws and rules of those states. The laws governing the tariffs in those states have no relevance regarding the laws of Pennsylvania. In fact, AT&T itself makes the argument that, according to the precedent in Pennsylvania, Core was prohibited from setting a separate rate for the termination of local traffic exchanged between two CLECs. AT&T M.B. at 37. AT&T Witness Nurse testified that attempting to file a tariff for such traffic would probably be futile:

> JUDGE: So is it your testimony that, if you are on the receiving end, where you are in a bill-and-keep situation –
>
> MR. NURSE: Right.
>
> JUDGE: – and you don't like it, is it your testimony that you could then file a tariff?
>
> MR. NURSE: MCI tried to do such, and the Commission rejected that.
>
> Tr. at 203

AT&T attempts to rehabilitate its witness' testimony by arguing that Core could have tried to file anyway and "the Commission may have decided otherwise." AT&T M.B. at 37, n. 19. AT&T's position in this regard, however, must be viewed through the lens of one which, as the largest telecommunications company in the world, obviously has the money and resources to file something that the Commission has already rejected and then engage in costly litigation to fight the outcome. Insinuating that significantly smaller carriers like Core are in the position to do the same is ludicrous. Moreover, as already explained, Core has a tariff in place that has been approved by the Commission and which governs the traffic at issue here. AT&T has never filed a complaint against Core's tariff nor proactively attempted to challenge it only offering claims against it as a defense to its non-payment. Core M.B. at 19. In sum, AT&T's attempt to rely on tariffs filed in other states as "laying to rest all doubts" about the applicability of Core's tariff to the AT&T Indirect Tariff has no validity and must be rejected.

3. State law does not limit the applicability of switched access charges to non-local, toll, interexchange calls

AT&T argues that "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." AT&T M.B. at 28. However, AT&T's support for this proposition involves nothing beyond one sentence from the Commission's Global Order and a reference to 66 Pa. C.S.A. § 3017(b) – both of which simply stand for the uncontroversial proposition that switched access tariffs apply—at a minimum—to "toll" and "interexchange" traffic. AT&T never explains how these authorities preclude the application of switched access rates to locally-dialed traffic where, as here, the plain terms of a tariff apply to all intrastate "communications." AT&T brushes away any such analysis with the broad and unsupported claim that it "is not aware of a single instance in which this Commission" or, in fact, any Commission "in the entire nation" has made such a

determination. Although Core agrees that locally-dialed CLEC-CLEC calls should ultimately be covered by a TEA, the fact is that AT&T refuses to negotiate one in this case and, despite AT&T's contrary statement, there is no state law precluding the applicability of an access tariff until a mutually agreeable TEA is negotiated between the parties. Core M.B. at 21-25.

4. Applying Core's tariff will not result in a violation of state tariffing laws

According to AT&T, Core's tariff cannot be applied because doing so would violate Pennsylvania state law because: (1) Core never filed a tariff establishing a rate; (2) applying the tariff would result in a discriminatory rate; and, (3) applying the tariff would require the Commission to engage in retroactive ratemaking. AT&T M.B. at 32-36.

As discussed above, Core does have a tariff that can be applied to the traffic at issue and, to the extent the Commission concludes something else should have been filed, then it maintains the discretion to address that concern in way that does not deprive Core of payment for services rendered. *See Columbia Gas v. Pennsylvania Pub. Util. Comm'n,* 613 A.2d 74, 80 (Pa. Cmwlth. 1992). Likewise, the FCC has consistently maintained that a carrier's failure to properly file a tariff did not foreclose reasonable cost recovery in a complaint case. *See, e.g, In the Matter of New Valley Corp.,* 8 FCC Rcd. 8126 (Memorandum Option & Order adopted November 1, 1993), at ¶ 8; *In the Matter of New Valley Corp.,* 15 FCC Rcd. 5128 (Memorandum Opinion and Order adopted February 8, 2000), at ¶¶9-12; and, *In the Matter of America's Choice Communications,* 11 FCC Rcd. 22494, (Memorandum Opinion and Order adopted December 16, 1996), at ¶ 24.

However, even with application of a straightforward analysis of tariff law in Pennsylvania, AT&T does not prevail. AT&T's argument regarding "retroactive ratemaking"

has no factual support as already explained in Core's Main Brief and AT&T's concerns about rate discrimination are preposterous for a number of reasons. Core M.B. at 42-43.

First, there are already different rates that apply to the termination of traffic depending on what carriers are involved and the type of traffic exchanged. The FCC has noted, for example, that "our existing compensation regimes are based on jurisdictional and regulatory distinctions that are not tied to economic or technical differences between services." *Further Notice*, at ¶ 15. For CLECs that terminate ILEC-originated ISP-bound traffic, the rate is $0.0007/MOU. For CLECs and ILECs that terminate non-ISP bound traffic pursuant to an interconnection agreement, the rate is generally $0.002439/MOU. For CLEC-CLEC traffic, there is no certainty about what rate carriers have agreed to pay one another because there is no obligation for such agreements to be filed and approved by the Commission. While AT&T may believe in an ideal of a unified rate for all traffic, such compensation scheme does not exist today; and, the existence of such different rates cannot be considered illegal or even remotely within Core's control.

Second, AT&T itself collects different, and, therefore "discriminatory" rates, for the termination of ISP-bound traffic as North Pittsburgh pays $0.002814/MOU for traffic on AT&T's TCG Pittsburgh network. See Core Ex. No. 1 admitted 2/3/10. North Pittsburgh pays this rate even though the *ISP Remand Order* rate for ISP-bound traffic from ILECs is capped at $0.0007. Moreover, AT&T accepts this rate from North Pittsburgh while claiming in this proceeding that it would be illegal to require a CLEC to pay "between $3^{1/2}$ and twenty times more than the ILEC Verizon pays for exactly the same service." AT&T M.B. at 34. Apparently, AT&T's argument really is that it would be discriminatory and, therefore, illegal to require AT&T to pay anything but it is not illegal for AT&T to accept payment at a rate 300% greater

than the one required by the *ISP Remand Order* rate. Such a self-serving argument must be rejected.

Finally, and perhaps the most ludicrous argument of all, is AT&T's claim of potential discriminatory rates based on the theory that "no one pays" and, therefore, AT&T cannot be required to pay. AT&T M.B. at 33. Under this reasoning, the Commission should not require any ratepayer to pay his or her utility bill because some ratepayers do not pay their bills. This would be a ridiculous result. AT&T should not be permitted to rely on the bad behavior of some as support for its position that it should be legally permitted to engage in the same bad behavior. Setting aside all of AT&T's strained interpretations of Pennsylvania law, the bottom line is that Core performed a service for AT&T and Core deserves to be paid for that service.

C. Nothing Bars the Commission From Requiring AT&T Pay Core the TELRIC tandem rate for the traffic

Noticeably absent from AT&T's Main Brief is any analysis of why, as an alternative to applying Core's tariff, the Commission cannot exercise its discretion to resolve intercarrier compensation disputes and apply the current, Commission-derived TELRIC rate to the AT&T Indirect Traffic. Core M.B. at 25-29. AT&T's brief is very clear that it should not be required to pay anything for Core's services. Likewise, AT&T spends a great deal of time setting forth the reasons why it believes Core's access rates should not apply. AT&T, however, never responds to Core's alternate position regarding the application of the TELRIC-tandem rate which is a Commission-approved rate and would be many times less than the tariffed access rate. The singular reference to this issue is one sentence in the "Procedural History and Statement of Facts" section of the brief. Specifically, AT&T makes the claim that Verizon itself would "never pay" a termination rate of $.002439. AT&T M.B. at 13. AT&T offers no record cite for this fact

and does not apply it to any subsequent analysis of this case. For these reasons it should be ignored.

III. THE RECORD DOES NOT SUPPORT DENYING CORE PAYMENT FOR SERVICES RENDERED BASED ON ANY OF CORE'S ACTIONS IN THIS PROCEEDING

In a obvious attempt to throw in some fanciful drama, AT&T makes the ludicrous claim that giving Core the relief it requests would somehow unfairly "reward" Core who, according to AT&T, is either "too inept" to deserve payment or is somehow "breaking the law by attempting to bill and collect" for its services rendered. AT&T M.B. at 6-8, 39-43. Even if everything AT&T alleges were true (which it is not), rewarding AT&T by not requiring it to pay for services rendered is not a reasonable outcome. Notably, AT&T did not initiate this action and has never challenged Core's tariff. AT&T only attempts to annihilate Core in defense of its own bad behavior. Such a nefarious and transparent effort should be summarily rejected.

To the extent it is given any consideration, however, there is absolutely no factual basis for AT&T's wild claims that Core behavior in this case merits a punishment. AT&T claims that "Core was too inept to handle the technical and managerial tasks necessary to identify and bill for traffic termination." AT&T M.B. at 42. However, the difficulties with Verizon's wholesale billing have been well-documented, in part, by AT&T who has stated that a CLEC's "attempt to verify Verizon's charges . . . requires a substantial dedication of time and administrative costs." *See, e.g., In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order adopted September 19, 2001 at ¶23, n. 76 citing AT&T Reply at 27. If AT&T, as the world's largest telecommunications carrier and all the resources

that includes admits difficulty with Verizon's wholesale bills, then the experiences of a much smaller company like Core should not be surprising.

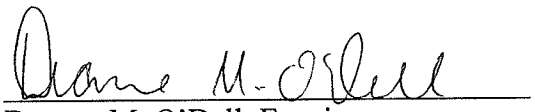
Additionally, AT&T's attempts to claim that it was "shocked" by Core's bills ring hollow. Core's bills were issued almost three years ago and instead of filing a complaint against Core's tariff, AT&T stalled resolution of this matter for several years and ultimately forced Core to come to the Commission and seek relief. As explained in Core's Main Brief, AT&T's choice to not pay Core is unacceptable for any reason. Core M.B. at 35-37. Moreover, AT&T's unreasonable and bad faith refusal to make any payment for services rendered justify imposition of a reasonable civil penalty on AT&T. Core M.B. at 43-46. There is simply no record support or rational basis upon which to conclude that Core should be "punished" in the form of rewarding AT&T by not requiring it to pay Core for services rendered. Such a result makes a mockery of the Commission's unequivocal recent pronouncements that it will not condone "as a matter of law and as a matter of sound regulatory policy" the non-payment of appropriate intercarrier compensation from one CLEC to another CLEC. *Material Question Order* at 11.

IV. CONCLUSION

For all the reasons discussed above, AT&T has presented no legal, rational or sound reason to deny Core's request that the Commission direct AT&T to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4 since there is no other agreement between the parties. Likewise, AT&T has presented no arguments against Core's alternative request that AT&T be directed to pay Core at the Commission-approved tandem termination rate as determined by using the TELRIC rate, which provides for recovery of joint and common costs. Moreover, AT&T has presented no reasonable defense against being directed by the Commission to negotiate in good faith with Core to reach a mutually acceptable reciprocal compensation arrangement governing payment. Finally, despite AT&T's efforts to

annihilate Core's character, the record evidence is clear that the Commission should issue an appropriate civil penalty on AT&T to address its prior actions to refuse to compensate Core for its substantial use of Core's network and to ensure future good faith performance.

Respectfully submitted,



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