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January 14, 2011

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 proprietary version and one (1) copy of the public version of AT&T's Reply Brief for each docket referenced above.

Please also find enclosed one proof of filing copy. I ask that you date stamp and return it to me in the enclosed self-addressed postage pre-paid envelope.

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	)	

REPLY 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 Reply Brief in the Complaint dockets initiated by Core Communications Inc. ("Core").

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal theme of Core's Main Brief is that access charges (which are intended only for toll, interexchange traffic) should be applied to the locally dialed, ISP bound traffic at issue in this case. But Core is betrayed by its own advocacy elsewhere where it has asserted, emphatically: "whatever else it might be, ISP-bound traffic cannot be 'access traffic.'"[1] And: "Is there ever a situation in which access charges would apply to ISP-bound traffic?" "No."[2] These admissions alone thoroughly discredit the positions Core espouses here.

* * *

Even ignoring this conflicting advocacy, Core has a fundamental, inescapable and in the end fatal problem: There is no lawful rate for its termination of local traffic. In a transparent effort to disguise this problem, Core has filed a Main Brief that is filled with blatant misstatements of fact, overblown and overheated rhetoric and hyperbole, and legal arguments that lack both relevance and merit. But try as it might, Core cannot evade the fundamental facts that doom its case: Core has never tariffed a rate for the termination of local traffic. Core attempts to paint AT&T as a bad actor and scofflaw that refuses to pay its bills. But all that

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1 *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 ("*Embarq Arbitration*") (AT&T Cross Ex. 10).

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

AT&T has done is refuse to pay unlawful bills. If there is any bad actor here, it is Core – who has violated Pennsylvania law with impunity by attempting to charge and suing to collect an unlawful, untariffed and unreasonably discriminatory rate. The situation in which it finds itself is Core's own doing. Core has never even attempted to file a tariff establishing a rate for local traffic termination, even though Core did file such tariffs in a number of other states. Further, Core did not bill AT&T for eight years even though it had all information necessary to produce and send bills; Core did not approach AT&T to request negotiations for eight years; and when Core finally did request negotiations, it took unreasonable and illegal positions that made it impossible for the parties to reach agreement.

None of these facts merited any mention, much less explanation, in Core's Main Brief. Indeed, to accept the premise of Core's Main Brief, the Commission would have to:

- pretend that the November 18 hearing never took place;
- pretend that access charges apply to local traffic;
- pretend that Core never filed tariffs in other states which, in stark contrast to its Pennsylvania tariff, contain sections that deal with and create a rate for local traffic termination;
- pretend that AT&T concealed that its traffic was going to Core and "stole" Core's services, when in fact AT&T told Core, in the manner all carriers in the industry understood, every day since Core entered the market that its traffic was going to Core – and Core by its own admission lacked the competence to look at or understand what it was being told, and did not bother to hire someone that could for many years;
- pretend that "bill-and-keep compensation" is not (as the Commission itself has recognized) the "existing CLEC-to-CLEC practice" for local traffic termination in Pennsylvania;
- pretend that there is no ban on retroactive ratemaking and that the Commission may decide today that the Verizon reciprocal compensation rate (which not even Verizon pays) should apply to AT&T's traffic – not only going forward but for the past 6½ years as well; and

- pretend that Sections 1302 and 1303 of the Public Utility Code[3] permit Core to bill and collect a rate that has never been tariffed (or agreed to), and that Sections 1303 and 1304 permit Core to bill and collect from AT&T a rate that is 20 times greater than the rate paid by Verizon and infinitely greater than the rate "paid" by virtually every other CLEC in the state.

But this is not a game of "let's pretend." As AT&T detailed in its Main Brief, and as the evidentiary record plainly establishes, these are the facts:

1. Core received authority to operate as a telecommunications carrier in Pennsylvania in 2000.

2. Beginning at that time – or at least since June 2004 – AT&T originated locally dialed, ISP-bound traffic that was directed to Core.

3. At all times Core knew (or should have known) that it was receiving significant volumes of traffic originated by other carriers.[4] Among other reasons, Verizon "marked" all traffic as either its own or that of another carrier. Moreover, with each call AT&T sent to Core, AT&T provided its carrier identification code ("CIC"), which told Core that the call was coming from AT&T, as well as the numbers of both the calling and called parties, which told Core whether the call was toll or local. Verizon delivered this information to Core each and every day.

4. Core lacked the basic managerial and technical competence necessary to read and understand the industry-standing billing records that Verizon was sending to it on a daily basis, so it just allowed the records to pile up, unread and unused.

5. Core did not hire anyone that could read the records it received on a daily basis until the end of 2007.

6. Core did not tariff a local reciprocal compensation rate in 2000 when it began operations, and as of the date of this Reply Brief, has still not tariffed a local reciprocal compensation rate in Pennsylvania. This is despite the fact that Core has tariffed such a rate in virtually every other state where Core operates.

7. Core did not approach AT&T in 2000 when it began operations to request negotiation of a contract for a rate to apply to the termination of locally dialed ISP-bound traffic, or any local traffic at all. Core did not approach AT&T until 2008 – eight years after Core received authority to operate in Pennsylvania.

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3 66 Pa. C.S.A. §§ 1302 & 1303.

4 *Infra*, IV.B.

8. All of Core's bills to AT&T for locally dialed, ISP-bound calls improperly apply Core's intrastate switched access tariff rate – the rate that applies to intrastate toll traffic ($.014 per minute).

9. Since October 2004, ILEC Verizon has paid Core $0.0007 per minute for precisely the same kind of traffic that is at issue here – locally dialed ISP-bound traffic. Before that, Verizon paid Core *nothing* at all for this traffic.

10. Up until October 2010, no Pennsylvania CLEC has paid Core an explicit rate for the termination of locally dialed traffic. Since October 2010, no CLEC has paid anything with the possible exception of PAETEC/Cavalier and Comcast.[5]

* * *

Before a rate may be billed, it must be specified in a filed tariff or a contract. 66 Pa. C.S.A. §§ 1302, 1303; Mingo Direct at 17. Core admits that all of the traffic at issue is locally dialed, ISP-bound traffic. Core does not have and never had a tariffed rate for the termination of local traffic. And Core of course acknowledges that it does not have and never had an agreement with AT&T covering locally dialed traffic. This is dispositive of Core's claims for compensation for this traffic.

Core nevertheless contends (Br. at 19-21) that its intrastate tariff and the switched access rate it specifies apply (and always have applied) to locally dialed traffic. To support this assertion, Core ignores common sense and the long-standing industry practice that access charges apply only to toll traffic. Instead, Core plucks and strings together several out-of-context

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[5] In order to get Core to drop its protest in the PAETEC/Cavalier pending merger, PAETEC/Cavalier agreed to pay the Verizon reciprocal compensation rate of $0.002439 per MOU, but *only for one year.* **BEGIN CONFIDENTIAL**

END CONFIDENTIAL *Infra,* V. As for Comcast (which has a merger with NBC pending and may as a result be expected to take available steps to avoid even the possibility of regulatory disfavor), Mr. Mingo testified that it has started to pay Core's bills, even though there is no written agreement. Tr. 54-55. It is difficult to see how this arrangement can be squared with relevant statutory law.

snippets from its tariff, arguing that these sections can somehow be read together as meaning that the switched access service rate applies to *all* intrastate traffic, including local calls. Core is wrong. *First*, the language of the tariff read as a whole plainly shows that the switched access rates apply only to toll, interexchange traffic. *Second*, if the tariff really did purport to apply switched access rates to local traffic, it is difficult to believe that the Commission would have ever permitted the tariff to go into effect given that the rate is dramatically higher (twenty times) than the rate the largest ILEC (Verizon) charges for the termination of local traffic. *Third*, Core's actions in other states leave no doubt that the tariff applies switched access rates only to toll traffic. In Delaware, New Jersey, West Virginia, and Alabama, Core has filed intrastate access tariffs that are identical to its Pennsylvania tariff, with one exception. These other tariffs all contain a section describing and establishing a rate for local traffic termination; Core's Pennsylvania tariff does not. If, as Core now contends, switched access service covers both toll and local calls, why would Core include in these other state tariffs a section covering local traffic termination? Obviously, it wouldn't.

These other tariffs stand as a clear concession that Core's Pennsylvania tariff does not apply to local traffic. These other tariffs also stand as a clear acknowledgement that access charges, which are notoriously high, do not and cannot apply to local traffic. Each establishes a local traffic termination rate that is only a small fraction of the applicable switched access rate.

In the alternative, Core appears to suggest that even if the tariff itself does not really cover local traffic termination (and it clearly does not), the Commission nevertheless should permit the switched access rate to be used as a "default" where neither a tariff nor an agreement

applies.[6] This "default" suggestion is unlawful and should be rejected for several reasons: (1) it is squarely barred by Sections 1302 and 1303 of the Public Utility Code (which taken together flatly prohibit charging a rate that is not specified in the tariff for the traffic in question); (2) the "default" rate is discriminatory (in violation of Section 1304 of the Public Utility Code) because Verizon pays a much lower rate for the termination of the same type of traffic and virtually every other CLEC pays Core nothing; and (3) applying the "default" rate to past traffic exchanges violates the rule against retroactive ratemaking. Furthermore, applying exorbitantly high access rates to local traffic is hardly reasonable or equitable. Intrastate access rates are set "above cost as a means of generating additional revenues that can be used to subsidize local rates and, thus, keep basic local service affordable."[7] Core provides no justification for attempting to apply such subsidy-laden access rates to the termination of local traffic.

Perhaps recognizing how outrageous it is to request that access charges be applied to local traffic, Core proposes a second alternative – that the Commission apply Verizon's tandem rate to both past-billed traffic and future traffic. That proposal is unlawful for the same reasons as Core's "default" proposal: it violates 66 Pa. C.S.A. §§ 1302, 1303, 1304, and the rule

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[6] Core asserts that this is what the Commission authorized in the *Alltel/Verizon Wireless* arbitration, *Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an interconnection agreement with ALLTEL Pennsylvania, Inc.*, Pa.P.U.C. Docket No. A-310489F7004, 2005 WL 6502686 (Jan. 18, 2005) ("*Alltel/Verizon Wireless*"), and what the Alabama Public Service Commission authorized in *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*") (AT&T Cross Ex. 11). Neither says anything that even remotely resembles what Core claims. Indeed, Core persists in claiming that the Alabama commission approved the application of switched access rates to local wireless traffic even though its CEO (Bret Mingo) admitted on cross-examination that the commission did no such thing. Tr. 115. *Infra,* I.B.

[7] *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund, Docket No. I-00040105,* December 20, 2004, p. 3.

prohibiting retroactive ratemaking. Indeed, Core has never tariffed the Verizon tandem rate; accordingly, applying it to past-billed traffic would run afoul of §§ 1302 and 1303's explicit requirement that the filing of a rate is a prerequisite for charging it and the prohibition on retroactive ratemaking. The Verizon tandem rate is also unreasonably discriminatory in violation of Section 1304: Verizon doesn't even pay that rate (it pays a rate that is less than one-third the tandem rate ($.0007 per MOU versus $.002439 per MOU)), and virtually every CLEC in Pennsylvania pays nothing.

In arguing that the Commission should permit Core to charge either the tariffed switched access rate or the Verizon tandem rate, Core purports to place heavy reliance on the Commission's decision in *Palmerton.*[8] Core claims that because the Commission allowed Palmerton to charge Global NAPs its tariffed switched access rates on the VoIP-originated traffic delivered by Global NAPs, Core should be permitted to charge AT&T Core's tariffed switched access rates for the locally dialed traffic at issue here.

The problem is that the facts in this case bear no resemblance whatsoever to the facts in *Palmerton. First,* in *Palmerton*, the traffic at issue was *interexchange* traffic and Palmerton had a valid tariffed rate applicable to that traffic for which it regularly billed Global NAPs. *Palmerton* at 1, 13, 15-18, 21-22. Here, the traffic is local, Core does not have a valid tariffed rate for that traffic, and Core did not bill AT&T anything for over four years. *Second,* in *Palmerton,* Global NAPs' sole defense was that the Commission did not have jurisdiction over the traffic at issue; therefore, once that claim was eliminated, Global NAPs' entire defense fell apart. Here, although AT&T continues to maintain that the Commission does not have jurisdiction over the traffic at issue, the jurisdictional issue is unrelated to AT&T's Pennsylvania

[8] Opinion and Order, *Palmerton Telephonc Co. v. Global NAPs South, Inc., et al.*, Pa. P.U.C. Docket No. C-2009-2093336 (March 16, 2010).

state law reasons for not paying Core's bills – *i.e.*, there was (and still is) no legal basis under Pennsylvania law for Core to charge AT&T. *Third*, in *Palmerton*, carriers other than Global NAPs were paying Palmerton's tariffed charges, and the Commission was concerned that Global NAPs' refusal to pay was discriminatory and anticompetitive. Here, the vast majority of CLECs are not paying Core anything for the termination of local traffic (and Core has even billed only a handful of CLECs), and Verizon is only paying a rate of $0.0007. Thus, if the Commission were to grant Core's request, it would create the exact discrimination the Commission was concerned about in *Palmerton*.

* * *

Given the facts, the Commission should not be persuaded by Core's rhetoric about AT&T – claiming that AT&T engages in "lawless gamesmanship" (Br. at 2), and accusing AT&T of "theft of service" (Br. at 38). AT&T's only "offense" has been to decline to pay a rate that is not specified in either a contract or a tariff and to take the position that it would not pay bills that sought to collect unlawful rates. Insisting that the billing party comply with the law clearly is not "lawless." The only party here who has refused to comply with the law is Core. Its entire case and its conduct preceding it has been in defiance of the letter and intent of Sections 1302, 1303 and 1304 of the Public Utility Code. So if anyone should be subject to a civil penalty under 66 Pa. C.S.A. § 3301 (Core purports to seek such a penalty against AT&T (see Core Br. at 37, 43-46)), it should be Core – not AT&T.

ARGUMENT

I. CORE'S SWITCHED ACCESS SERVICE TARIFF RATES DO NOT APPLY TO AT&T'S LOCALLY DIALED TRAFFIC.

Core argues that its switched access tariff is "entitled to a presumption that its rates are 'reasonable,'" that "AT&T, as the party challenging Core's tariff" has the burden of

demonstrating that the rates are not reasonable, and that AT&T must do so in a separate "formal complaint challenging Core's tariff." Core Br. at 19. That argument is wrong for it misconstrues the whole purpose of this proceeding.

AT&T is not challenging the validity or reasonableness of Core's switched access tariff rates – that would be plain to anyone reading AT&T's testimony and briefs or attending the hearing. AT&T agrees that Core's switched access tariff rates are presumptively valid *as to the traffic to which the rates apply – i.e.,* non-local, toll, interexchange traffic. In fact, AT&T *has* paid Core's switched access tariff rates for the termination of AT&T's non-local, toll, interexchange traffic. Tr. 35-37; AT&T Panel Testimony at 11, fn. 12. So that is not the issue here. The issue here is whether Core's switched access tariff is applicable to *locally-dialed traffic*. The filed rate doctrine does not entitle Core to any presumption that it does – as Core seems to suggest – and AT&T demonstrates below that the tariff does not apply to locally dialed traffic.

Indeed, the plain language of Core's switched access tariff 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. AT&T Br. at 22-27. Having no applicable tariff establishing a rate for terminating locally dialed traffic, the filed rate doctrine (codified at 66 Pa. C.S.A. § 1303), in conjunction with 66 Pa. C.S.A. § 1302 (which requires the filing of a rate as a prerequisite for charging it), dictate that Core cannot charge anything for the termination of locally dialed, ISP-bound traffic. *Popowsky v. Pa. PUC,* 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994) (*"Popowsky"*).

Core ignores these bed rock principles and argues that even if its switched access tariff does not apply to locally dialed traffic (and it clearly does not), the Commission should nevertheless permit switched access rates to be used as a "default" (both prospectively and retroactively) where there is no tariff or agreement establishing a legally binding rate for the termination of locally dialed traffic. Core Br. at 21-25. Core cites no authority that supports this argument – in fact, all authority is to the contrary. Core's "default" proposal violates 66 Pa. C.S.A. §§ 1302 and 1303 (which prohibit charging a rate that is not specified in a tariff for the traffic in question), § 1304 (which bans discriminatory rates), and the rule prohibiting retroactive ratemaking.

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

Core's argument that its switched access tariff applies to locally dialed traffic strings together several definitions in that tariff out of context, while simultaneously ignoring substantive provisions and other relevant definitions that Core, for obvious reasons, found unhelpful to its argument. When Core's tariff is read as a whole it is obvious that the tariff applies only to *non-local,* toll, interexchange traffic and not to local traffic. This interpretation is the only one that is consistent with Pennsylvania law, with statements made by this Commission and by Core itself that switched access charges apply only to non-local, toll, interexchange calls, and with Core's conduct that shows that Core never believed its switched access tariff rates applied to local traffic.

With respect to the plain language of the tariff:

1. The tariff defines the term "Access Service" as a service provided to an "Interexchange Carrier." Tariff, Section 1 (emphasis added) ("Switched Access to the network of an ***Interexchange Carrier*** for the purpose of originating or terminating communications.").

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). In originating the locally dialed traffic at issue here, and passing it on (through Verizon) to Core, AT&T has been operating as a local exchange carrier. And when providing *local* exchange service, AT&T plainly is not acting as an *interexchange carrier* providing service *between two or more exchanges*.[9]

2. The tariff specifies that Switched Access Service is only provided for three types of calls – none of which are local calls. Specifically, the tariff applies to 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). By limiting the applicability of Core's switched access service to interexchange (*i.e.*, toll) calls, section 4.2.3 is consistent with the tariff's definition of "Access Service" as a service provided to an "Interexchange Carrier" engaged in "communication for hire" "between two or more exchanges."

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[9] Core ignores the definition of Access Service and relies on the definition of "Switched Access Service" (Core Br. at 19) – which uses the terms "exchange carrier" and "carrier" instead of "interexchange carrier." Core argues that AT&T is an "exchange carrier" and a "carrier," and therefore Core's switched access rates apply to AT&T's local traffic. As explained in the text, the definition of "Access Service" is plainly limited to service provided to an interexchange carrier providing service between two or more exchanges, and all other provisions of the tariff confirm that Core's switched access service was not intended to apply to the locally dialed traffic at issue. That interpretation is consistent with Pennsylvania law, this Commission's and Core's prior statements, Core's actions, and the way switched access service is viewed by state commissions everywhere.

3. The manner in which Core's tariff treats "local traffic" is the final nail in the coffin: It makes crystal and indisputably clear that switched access rates do not and cannot apply to "local traffic," including the locally dialed traffic at issue here. As Core's witness Mr. Mingo admitted at the hearings, AT&T's locally dialed traffic at issue in this case satisfies the Pennsylvania tariff's definition of "local traffic" and is thus "local traffic" for purposes of the Pennsylvania tariff. Tr. 98-99, 118, 129. The tariff discusses the termination of "local [] traffic" 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 "in kind" exchange is bill-and keep. Panel Reply Testimony at 26, fn 25; Tr. 99 (Mingo). If, as Core argues, the tariff's explicit switched access rates applied to the termination of local traffic, this "Mutual Traffic Exchange" provision would make no sense at all. If Core's argument were correct, there couldn't be bill-and-keep for local traffic; there could only be the explicit switched access rates. 66 Pa. C.S.A. §§ 1302 & 1303.

Pennsylvania state law is equally clear that switched access rates like those in Core's tariffs do not apply to local traffic, but rather apply only to the origination and termination of non-local, toll, interexchange calls.

1. The Commission has observed 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,* Docket Nos. P-00991648, *et al,* September 30, 1999, at p. 12 (emphasis added).

2. 66 Pa. C.S.A. § 3017(b) provides that "[n]o person or entity may refuse to pay tariffed access charges for ***interexchange services*** provided by a local exchange telecommunications company." (Emphasis added.)[10]

3. AT&T is not aware of a single instance – and Core has not identified any – in which 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. In fact, far from applying switched access rates to local traffic, the Commission has stated that "the use of bill-and-keep compensation" is the "existing CLEC-to-CLEC intercarrier compensation practice [ ] in Pennsylvania." *PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, * 1, 9 (Pa .P.U.C. June 22, 2006) (AT&T Cross Ex. 4). This bill-and-keep compensation is also consistent with Core's tariff.

Furthermore, Core's own conduct shows that Core itself does not believe that its switched access tariff covers AT&T's locally dialed traffic.

1. Core did not send bills to AT&T (or any other CLEC) for the termination of local traffic from the time it began operating in 1999 or 2000 until 2008 (Mingo Direct at 10), which is consistent with AT&T's practice with every other CLEC in the state of exchanging traffic on a bill-and-keep basis (AT&T Panel Reply Testimony at 13; Tr. 207-208).

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[10] Core claims (at 21) that the Commission's statement and the statutory provision quoted in the text stand for the proposition that switched access tariffs apply to "toll" and "interexchange" traffic, and do not address the issue here of whether switched access tariffs can apply to locally dialed traffic in the absence of a traffic exchange agreement. Core is grasping at straws. The Commission's statement and the Pennsylvania statute are clear that switched access charges apply only to toll charges – and that is consistent with how every state commission in the country views switched access. Moreover, Core's claim that switched access rates should be applied to locally dialed traffic whenever there is no legally binding rate in a tariff or agreement would violate Pennsylvania law in many respects, as explained in the text. Finally, Core is yet again trying to divert attention away from the fact that Core itself is responsible for the absence of an applicable tariff or agreement.

2. In the ongoing *Embarq* arbitration, Core 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.'" *Embarq Arbitration,* Docket No. A-310922F7002, Supplemental Comments of Core Communications, Inc., January 26, 2009, p. 11 (AT&T Cross Ex. 10). See also *Id.*, Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007 at pp. 6-7 (AT&T Cross Ex. 9) ("Q. Is there ever a situation in which access charges would apply to ISP bound traffic?" Core's Answer: "No."). Core's attempt to explain away these statements are unpersuasive.

3. In the states of Delaware, New Jersey, West Virginia, and Alabama (Tr. 17-18, 122-132), Core has filed switched access service tariffs that are, in pertinent part, substantively identical to Core's Pennsylvania tariff.[11] Core's tariffs in these states each define "access service" exactly the same way as the Pennsylvania tariff; they define "switched access service" (the term relied upon by Core to support its interpretation of the tariff as applying to locally-dialed traffic) exactly the same way as the Pennsylvania tariff;[12] they define "local traffic" the same way;[13] and they describe switched access services, the services for which Core is authorized to charge switched access rates, in precisely the same way.[14]

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[11] *See* AT&T Cross Exhibits 13 (Delaware), 14 (New Jersey), 15 (West Virginia), 16 (Alabama).

[12] Tr. 124-125, 127, 129. *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] The Delaware and West Virginia tariffs' definition of "local traffic" matches verbatim the Pennsylvania definition. Tr. 124, 127-128. *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." And while the New Jersey and Alabama tariffs' definition

If the switched access service rates in Core's Pennsylvania tariff applied to locally-dialed traffic as Core now claims, then the switched access service rates in Core's Delaware, New Jersey, West Virginia, and Alabama tariffs likewise would apply to locally dialed traffic. But Core plainly did not see things that way, because in Delaware, New Jersey, West Virginia, and Alabama, Core has specifically tariffed a rate for the termination of *local traffic*. Indeed, in each of those four states, Core's tariffs all have a section entitled "Local Traffic Exchange and Termination," that covers the termination of "local traffic" and provides a rate for that "service." Tr. 123; Cross Ex. 13-16, Section 6.[15] If Core truly thought that its switched access service rates applied to locally-dialed traffic, it would not have included provisions in these other state tariffs describing and establishing a rate for the termination of locally-dialed traffic. Plainly, Core understood that its "switched access service" (which is identical in all five states) did 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" – just as it did in the four other states.

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of "local traffic" is slightly different, Mr. Mingo has acknowledged that the different formulations do not make any substantive difference: both mean that 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.

[14] *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.

[15] Likewise, in New York and Maryland – two other states where Core is certificated – Core's 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 and Cross Ex. 19, Section 7.

B. Core Cites No Authority To Support Its Claim That Access Rates May Be Applied To Locally Dialed Traffic

In the alternative, Core argues (at 21-25) that even if its switched access service tariff does not apply to locally dialed traffic, the Commission should use switched access service rates as a "default" where there is neither an applicable tariff or agreement. *First*, Core conveniently ignores the fact that Core itself is the reason there is no applicable tariff or agreement. *Second*, Core never explains why extremely high access rates should ever apply to local traffic; nor is such an explanation even feasible. As this Commission has found, intrastate access rates are set "above cost as a means of generating additional revenues that can be used to subsidize local rates and, thus, keep basic local service affordable."[16] For example, intrastate access rates include a pure subsidy element called a Carrier Common Line ("CCL") charge.[17] Given that Core mirrors the ILEC rates, Core never justifies how it can charge a CCL for the termination of ***local*** traffic, and still meet the legal requirement that its rates be just and reasonable. If the Commission were to accept Core's position, AT&T would essentially be paying to subsidize Core's local service, even though Core does not even offer basic local residential service. This clearly makes no sense.

Core plainly understands that its switched access rates are too high to be applied to local traffic. That is why Core's Delaware, New Jersey, West Virginia and Alabama tariffs each establishes a rate for the termination of local traffic that is a small fraction of the applicable

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[16] *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers, and the Pennsylvania Universal Service Fund,* Docket No. I-00040105, December 20, 2004, *p. 3.*

[17] *Re Nextlink Pennsylvania, Inc.,* Docket No. P-00991648; P-00991649, 93 PaPUC 172 (September 30, 1999) ("*Global Order*") at p. 13. The Commission stated that the CCL is "the largest contributor to local service rates not directly related to costs." The Commission went on to further explain that "local exchange rates throughout the United States have been subsidized by access charges which are well in excess of their costs." *Id.*

switched access rate. Tr. 123; Cross Ex. 13-16, *compare* Section 6 (titled "Local Traffic Exchange and Termination") *to* Section 5.4. For example, in Delaware Core's switched access rate is $0.025 and its rate for the termination of local traffic is $0.001957. In New Jersey, the access rate is $0.0178100 compared to a local termination rate of $0.003738; in West Virginia the access rate is $0.0203800 compared to a local termination rate of $0.002618; and in Alabama the access rate is $0.00705 compared to a local termination rate of $0.001710.

Moreover, Core's "default" proposal is unlawful and should be rejected for the following reasons:

(1) Core's proposal would allow Core to collect an explicit rate for past terminations of local traffic, even though Core did not have a tariff establishing a rate for such terminations, which violates the requirement of 66 Pa. C.S.A. §§ 1302 and 1303 that a rate must be specified in a lawful tariff before it may be charged.

(2) Core's proposal would require the Commission to set a rate now for the termination of locally dialed traffic (because no lawful rate currently exists in a tariff or agreement) and apply that rate retroactively to past traffic exchanges – an obvious violation of the rule against retroactive ratemaking.

(3) Core's proposal would allow it to charge AT&T much more for the termination of local traffic than it charges other carriers (*e.g.*, $0.014 per minute versus $0 paid by *all* CLECs prior to October 2010 and virtually every CLEC since that time, and $0.0007 per minute paid by ILEC Verizon) without any cost-based justification, which violates the nondiscrimination provisions of 66 Pa. C.S.A. § 1304.

Each of these arguments is addressed more fully in Part II's discussion of Core's second alternative proposal to apply the Verizon tandem-based reciprocal compensation rate to the local traffic at issue, which violates these statutory provisions in exactly the same way.

Core argues (at 32) that *Verizon ATS* "bolsters" Core's position that its switched access rates should be applied to CLEC-CLEC local traffic exchanges, because it shows that the Commission "can no longer wait for the FCC to address these types of intercarrier compensation issues." But Core's "wait" for FCC action will be over soon. The 9th Circuit has before it the issue of whether the FCC's *ISP Remand Order* applies to CLEC-to-CLEC traffic exchanges. *AT&T Communications v. Pac-West Telecomm, Inc.*, No. 08-17030. 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, 2010. Moreover, whether the FCC has adequately addressed intercarrier compensation issues between CLECs is irrelevant to whether Core's request here violates *state* law – which is the only issue AT&T is now raising since the Commission has rejected AT&T's arguments with respect to the *ISP Remand Order*. As explained above, Core's primary and alternative proposals are plainly unlawful under state law.[18]

Core has been unable to find a single instance in which this Commission – or any other state commission – has ever ruled that intrastate switched access rates apply to local traffic. Core claims (at 22-24) that this Commission authorized access charges to be applied to local traffic in the arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., and that the Alabama Public Service Commission did so in *Alabama Independent Telephone Companies*, 232

[18] And – putting the *ISP Remand Order* aside – state law provides that the Commission does not have jurisdiction over this dispute, which involves jurisdictionally *interstate* traffic. Indeed, the Commission's enabling statute gives the Commission jurisdiction only over intrastate traffic, not interstate traffic. 66 Pa. C.S.A. § 104. *See* AT&T Main Br. at 45.

P.U.R.4th 148, Docket No. 28988 (AT&T Cross Ex. 11).[19] But Core is wrong, as even its own witness admits. *See* AT&T Main Br. at 28-30.

The *Alltel/Verizon Wireless* arbitration dealt with wireless traffic,[20] and all the Commission said there was that at some time in the past Verizon Wireless had paid switched access charges for all intrastate calls originated by its customers. Core's witness Mr. Mingo admitted on cross examination (Tr. 110-111) that the Commission did not endorse, approve, or impose the practice in that arbitration,[21] but rather required the use of cost-based reciprocal compensation instead of access for all intraMTA wireless to wireline calls.

The Alabama decision also dealt with wireless traffic. 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 contrary to Core's claim, these were not switched access service tariffs and the rates were not switched access rates – the tariff rates were actually one-half of the applicable switched access rates, as Core's witness Mr. Mingo admits. Tr. 115.[22]

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[19] Of course, Core must not have been too confident in its claim that the Alabama Commission permitted access charges to be applied to local traffic, because Core filed a tariff in that state establishing a separate (and much lower) rate for the termination of locally dialed traffic. AT&T Cross Ex. 16.

[20] With respect to wireless traffic, local rates are charged for all intra-MTA traffic. The MTA is significantly larger than a local calling area, and so would include traffic that is toll in the wire line world. Tr. 112.

[21] 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.

[22] Core (at 21) cites two general statements from the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines as purported support for its position that access charges can apply to local traffic. The guidelines, however, say no such thing.

Moreover, there is no mistaking Core's advocacy elsewhere that locally dialed, ISP-bound traffic (the type of traffic at issue here) is not access traffic. In the *Embarq* arbitration, Core 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.'" *Embarq Arbitration,* Docket No. A-310922F7002, Supplemental Comments of Core Communications, Inc., January 26, 2009, p. 11 (AT&T Cross Ex. 10).[23] Further, Core previously testified under oath before this Commission 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).

Core ignores these admissions, and instead tries to explain away other damaging statements it made in the *Embarq* case. For example, Core claims (at 25) that when it said the *ISP Remand Order* applied to "all" ISP-bound traffic, it intended "all" to mean just VNXX and local traffic when such traffic is exchanged between an ILEC and CLEC, and that "all" was not meant to include CLEC-to-CLEC traffic exchanges. This makes no sense. First, Core plainly stated that there was ***never*** a situation in which access charges would apply to local ISP-bound traffic – it made no exception, such as for CLEC-to-CLEC traffic. Second, Core's claim that access charges do not apply to ILEC-to-CLEC ISP-bound traffic, but do apply to CLEC-to-CLEC ISP-bound traffic, is without merit for the reasons set forth in AT&T's Motion to Dismiss.

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[23] 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. *Embarq Arbitration*, Docket No. A-310922F7002, Rebuttal Testimony of Timothy J. Gates, Core Statement 1.1, June 4, 2007, pp. 6-7 (AT&T Cross Ex. 9).

And while the parties disagree on that issue, it will be resolved by the 9th Circuit[24] and has nothing to do with Core's statements quoted above – in which Core states unequivocally that ISP-bound traffic can never be access traffic, and that access charges could never be applied to ISP-bound traffic.

Unable to cite any authority that supports its proposed application of access charges to local traffic, Core tries to blur the distinction between toll and local traffic by arguing that a locally dialed call is transformed into a toll call if the caller's carrier charges its customer a "toll," and, conversely, that a toll call can be transformed into a local call if the caller's carrier does not charge a "toll." Core Br. at 22. In other words, Core argues that the determination of intercarrier compensation charges (access or reciprocal compensation) depends on the way in which the retail customer is charged by the originating carrier – if the retail customer is charged a toll, then access charges are due; if the retail customer is charged for local, then reciprocal compensation applies. By this logic, (1) a terminating carrier would not know whether access rates applied to traffic unless and until the originating carrier told the terminating carrier whether it charged the caller a toll, and (2) an interexchange carrier could escape access charges on calls that are clearly interexchange, toll calls simply by saying "I didn't charge a toll." That of course is not the way the world works. It is well-settled industry practice that carriers distinguish between toll (or interexchange) calls and local ones by looking at the NPA-NXXs of the telephone numbers of the calling and called parties. AT&T Panel Reply at 12-13. If the originating and terminating numbers of a call are associated with the same exchange or local

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[24] Whether the FCC agrees with Core's new-found position that the *ISP Remand Order* applies only to traffic exchanges between an ILEC and CLEC, and not to traffic exchanged between two CLECs, should be resolved in February when the FCC files its amicus curiae brief with the 9th Circuit in *AT&T Communications v. Pac-West Telecomm, Inc.*, No. 08-17030.

calling area, the call is local; and if they are associated with different exchanges or local calling areas, the call is toll (or interexchange). *Id.*

Core's own witness, Mr. Mingo, ultimately admits that the normal way to distinguish local and toll traffic is by looking at the NPA-NXXs of the calling and called party. Mingo Direct at 4-5; Tr. 26-27, 29 (Mingo Cross-Examination). During cross-examination Mr. Mingo testified as follow (Tr. 26-27):

> Q: Is a locally dialed call one where the NPA [-NXX] . . . of the party placing the call and the NPA-NXX of the party to whom the call is directed are both associated with the same local calling area?
>
> A. Yes, that's what I mean here.
>
> Q: So if we look at the two NPA-NXXs, you could say the call originates or begins and terminates or ends in the same local calling area; correct?
>
> A. Based on the NPA-NXX comparison, yes.
>
> Q. And am I correct that the industry uses NPA-NXX on both ends to categorize calls as interstate, intrastate, interexchange and local?
>
> A. I would say that's a common way that most carriers would do it.

Mr. Mingo further testified (Tr. at 29):

> Q. Different local calling areas. Call starts in one and ends in the other. In practice, that's treated as an interexchange or toll call?
>
> A. That's treated as a toll call in practice.

Moreover, the Commission has previously rejected Core's position that intercarrier compensation is determined by whether the retail customer is charged a toll:[25]

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[25] In that case, GNAPs argued that it should be able to broadly define its local calling area without being confined to the ILEC's calling area and without imposition of access charges – in other words, GNAPs wanted the originating carrier's local calling area to determine whether access charges or reciprocal compensation applied. *Id.* at 24. Verizon responded that GNAPs was free to adopt its own local calling area for retail purposes, but that intercarrier compensation should be determined by the local calling area of the ILEC. *Id.* at 24-25. The ALJ recommended that the Commission adopt GNAPs proposal, but the Commission rejected that recommendation.

> We believe it more appropriate to retain the status quo and determine the type of intercarrier compensation applicable based on the ILEC's local calling area. Thus, while the CLEC may use different calling areas for purposes of its retail marketing products, the CLEC's selection of the local calling area should not be used, at this time, to determine the type of intercarrier compensation that should apply (*i.e.*, whether the call is subject to reciprocal compensation or access charges). As noted, this does not affect the ability of the CLEC to define local calling areas for purposes of its retail marketing strategy.

In *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with Verizon Pa. Inc.*, Docket NO. A-310771F7000 (April 17, 2003) at 35. *See also id.* at 36 ("Therefore, we shall require that intercarrier compensation between Verizon and GNAPs be determined in accordance with Verizon's Commission-approved standard tariffed local calling area boundaries. It is important to note, however, that this disposition will not prevent GNAPs from offering larger local calling areas than those offered by the ILECs.") Thus, whether a call is rated local for intercarrier compensation purposes depends not on how the CLEC charges the retail customer, but rather is based on the NPA-NXX of the calling and called parties, and whether they are within the same local calling area as defined by the ILEC. As the Commission points out, several other state commissions agree that intercarrier compensation is to be determined on a wholesale basis – not a retail basis – by the ILEC local calling areas. *Id.*

C. Adopting Core's Proposal Would Bring An End To The "Existing CLEC-to-CLEC Practice . . . Of Bill-And-Keep Compensation," Which The Commission Should Not Do

If the Commission were to accept Core's argument that switched access service tariffs cover all intrastate traffic, including local traffic, it would mean that all CLECs that have switched access service tariffs (and that would likely be every one of at least the facilities-based CLECs – 136 at last count) could begin an avalanche of backbilling each other at switched access rates for local traffic termination going back quite a few years. It would mark an abrupt

end to the "existing CLEC-to-CLEC . . . practice[ ] . . . of bill-and-keep compensation"[26] for local traffic and would most likely usher in a litigation free-for-all. It would also create the spectacle of carriers throughout the Commonwealth being asked to pay exorbitantly high minute of use rates for what everyone thought for years were bill-and-keep local traffic exchanges.

The Commission should not take lightly Core's attempt to scrap bill-and-keep. "[T]he use of bill-and-keep compensation" – in the Commission's words – is the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania." *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4). Indeed, 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), none of whom has ever complained about it (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. 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.

While Core claims that bill-and-keep cannot apply to the locally dialed traffic at issue here, it provides nothing to support that claim. And Core's baseless rejection of bill-and-keep ignores two very significant facts: (1) Core's own switched access tariff provides that bill-and-

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26 *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4).

keep applies to locally dialed traffic, and (2) every other CLEC in the state exchanges local traffic with other CLECs on a bill-and-keep basis. Core has no response at all to the plain language of its tariff. And its only response to the fact that CLECs operate under bill-and-keep arrangements is to point to the PAETEC/Cavalier agreement. Core Br. at 35. But even Core admits that the PAETEC/Cavalier agreement is a short-term arrangement that PAETEC/Cavalier essentially was forced to enter into in order to get Core to drop its protest to PAETEC/Cavalier's pending merger. Tr. 50-51, 55, 152-153; AT&T Cross Ex. 2; Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶¶ 3(b) & 4(a); AT&T Cross Ex. 21. That agreement does not call into question the appropriateness of bill-and-keep – which continues to be used by all other CLECs in the state.

Core cites to 47 C.F.R. § 51.713 for the proposition that bill-and-keep can apply only when traffic flows are "roughly balanced." Core Br. at 34. But that provision relates only to the Commission's approval of interconnection agreements under the 1996 Act and, more importantly, applies only to an *incumbent LEC's* rates for the transport and termination of traffic – which is not the issue here. 47 C.F.R. § 51.705 ("An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of," among other things, "[a] bill-and-keep arrangement, as provided in §51.713."). When it comes to bill-and-keep arrangements between CLECs, the fact of the matter is that all 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.[27]

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[27] Core (at 34) claims that there is no support for the proposition that bill-and-keep might apply in scenarios where traffic is not roughly balanced. But Mr. Nurse testified that it exchanges traffic with all other CLECs in Pennsylvania on a bill-and-keep basis without

Core (at 33) cites *Verizon ATS* as purported proof that other CLECs have complained about bill-and-keep. Core is grasping at straws. Core neglects to mention that MCI (the CLEC in that case) was about to become an affiliate of ILEC Verizon, the dominant ILEC in the Commonwealth. So it cannot be said that the tariff was filed because of a CLEC's dissatisfaction with bill-and-keep. Moreover, there is no support whatsoever for Core's suggestion (at 33) that other CLECs have not attempted to challenge bill-and-keep because of the Commission's rejection of the proposed tariff in *Verizon ATS*. Indeed, if CLECs – including Core – had been dissatisfied with bill-and-keep they certainly would have let the Commission know in one way or another. And if they had, 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. But as things stand, CLECs have not expressed any dissatisfaction with bill-and-keep.[28]

II. VERIZON'S TANDEM RECIPROCAL COMPENSATION RATE CANNOT BE APPLIED TO THE LOCALLY-DIALED TRAFFIC AT ISSUE

In the event the Commission finds that Core's switched access tariff does not apply to locally dialed traffic and that Core's switched access rates cannot be applied as a "default" (as

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regard to whether the traffic is in balance. Tr. 208. In addition, in rejecting Verizon ATS' attempt to eliminate bill-and-keep as the practice among CLECs, there is no evidence that the Commission conducted any type of traffic studies to ensure that traffic was balanced among every single CLEC.

[28] Core (at 33-34) criticizes AT&T for relying on the FCC's *ISP Remand Order* to support its position that bill-and-keep applies to the locally dialed traffic at issue. AT&T, however, is not relying on the *ISP Remand Order* as the Commission already ruled that it has jurisdiction over this case and that it has not been preempted by the *ISP Remand Order;* rather, AT&T is relying on state law, which Core's proposal plainly violates. Even so, the FCC is going to opine about the effect of the *ISP Remand Order* on the Commission's jurisdiction when it files its amicus curiae brief with the 9th Circuit in *AT&T Communications v. Pac-West Telecomm, Inc.*, No. 08-17030.

the Commission should), Core's second alternative proposal is that the Commission apply the Verizon tandem-based reciprocal compensation rate ($.002439 per minute) – which not even Verizon pays – to AT&T's locally dialed traffic. That proposal – just like Core's proposal to apply a rate equivalent to its access rate as a "default" – violates (1) 66 Pa. C.S.A. §§ 1302 and 1303's explicit requirement that the filing of a rate is a prerequisite for charging it; (2) the rule prohibiting retroactive ratemaking; and (3) 66 Pa. C.S.A. § 1304's prohibition against unreasonably discriminatory rates.

A. Core's Request To Charge An Untariffed "Rate" Would Violate Sections 1302 and 1303.

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.) And 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").

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 (despite the fact that it *did* file such tariffs in six other states). Therefore, as a matter of statutory law and judicial precedent, Core is barred from "collect[ing] or enforc[ing]" any rate for terminating this traffic – whether it be the Verizon tandem-based reciprocal compensation rate, Core's proposed "default" rate that is equivalent to its access rate, or some other rate. *Popowsky*, 647 A.2d at 306-307 (holding 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); *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 . . . ."). AT&T Main Br. at 31-32.

That Core may have incurred costs for which it claims it was not compensated is irrelevant to the Commission's analysis under §§ 1302 and 1303 and, in any event, was Core's own fault. If a carrier chooses not to tariff a rate for a service, it cannot charge customers for that service, whether it incurs costs or not. To the contrary, a carrier's attempt to charge customers when it has failed to file a tariff is subject to sanctions and penalties by this Commission. The Commission's recent action regarding Covista, Inc. makes this abundantly clear. When Covista charged customers a non-tariffed $2/month paper billing fee, and a non-tariffed promotional bundled service offering, Covista was required to reimburse the customers and pay a $3,000 civil penalty for charging customers non-tariffed rates.[29]

The Commission also rejected an attempt by Bell Atlantic to backbill customers for non-tariffed rates.[30] Bell Atlantic claimed that if it was not allowed to backbill the customers, it would have to incur significant costs – nearly $7 million.[31] Bell Atlantic did file a tariff, but then sent customers a bill for charges that were incurred as many as twelve months *before the tariff*

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29 http://www.puc.state.pa.us/general/press_releases/press_releases.aspx?ShowPR=2618 (included as Attachment 1 to this Reply Brief).

30 *Phone Talk, Inc. v Bell Telephone Company of Pennsylvania, et. al.*, 75 Pa.P.U.C. 256 (September 12, 1991). That Order is included as Attachment 2 to this Reply Brief, and all page cites will be to the page numbers at the top right hand corner of the document.

31 *Id.* at fn 8.

became effective.[32] Not only did the Commission refuse to allow Bell Atlantic to backbill customers for non-tariffed rates, the Commission imposed a civil penalty of $212,000 on Bell Atlantic for violating the Public Utility Code by engaging in retroactive ratemaking.[33] In that case, the Commission recognized that a company simply cannot charge customers a non-tariffed rate and held:

> Nowhere does Bell recognize that it, not the Complainants, has acted unjustly, unreasonably and illegally in violation of the Public Utility Code. The pervasive sentiment appears that because of the class of Complainants, after all they're not residential customers, they can be treated with impunity.
>
> *We intend to disabuse Bell of this notion.* Respondent has clearly violated public utility law and accordingly has left itself open to sanctions.[34]

Here, too, Core should be sanctioned by this Commission for failing to tariff a service for which it billed AT&T.

Core does not explain why it did not file a tariff establishing a rate for the termination of locally dialed traffic in Pennsylvania when it did so in many other states; nor does Core explain how charging an explicit rate for the termination of local traffic when it never had an applicable tariff setting lawful rates could be viewed as anything other than a violation of Sections 1302 and 1303. That brings us to an obvious question: If Core wanted to be able to charge an explicit rate for locally dialed traffic, why didn't it simply file a tariff covering local traffic termination, as it did in its other states? The answer is obvious.[35] Core knew it was terminating significant

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32 *Id.* at p. 16.

33 *Id.* at pp. 25-26.

34 *Id.* at p. 25 (emphasis supplied).

35 And it is not, as Core suggests, because the Commission did not permit MCI to tariff local traffic termination in 2006. As Core itself recognized, the Commission was being cautious in light of the possibility that the FCC would soon provide guidance and expressly left open the option of revisiting the matter if the FCC failed to do so. Core Br. at 31.

volumes of traffic originated by carriers other than Verizon in 2004, 2005, 2006, and 2007. *Infra,* VI.B. But Core decided not to try to bill these other carriers until 2008. By then dial-up internet access was nearly dead. Consumers had already moved almost all ISP-bound traffic onto DSL, cable modem service, and other high speed arrangements. In the case of AT&T, by 2008, some 97% of the traffic it would ever deliver had already been delivered. Mingo Direct, Ex. BLM-1. If Core in early 2008 had done what it had done in other states and filed an amended tariff with a new section covering local traffic termination, that would have stood as an admission that its tariff previously did not cover this traffic. Given the prohibition on retroactive ratemaking, Core obviously couldn't use the amended tariff to back bill for traffic delivered before the amended tariff went into effect. Accordingly, had Core done what it had done in other states, it would have forfeited the "right" to bill for any of the pre-2008 traffic.

It is apparent, then, that Core simply decided to divert attention away from its own failures, and to run with the transparent fiction that its switched access service tariff applied to the locally dialed traffic at issue and to throw barbs and aspersions at AT&T.

B. Core's Request Would Require The Commission To Engage In Retroactive Ratemaking, Which It May Not Do.

Core admits (1) that carriers "bill one another either by tariff or by agreement" (Mingo Direct at 17); (2) that it does not have an agreement with AT&T establishing rates for the termination of locally dialed traffic (Core Br. at 9; Mingo Direct at 11-12; Tr. 84-85); and (3) that it has not filed a tariff that contains the so-called Verizon tandem-based reciprocal compensation rate, or (assuming its switched access service tariff does not apply, which is the premise of Core's alternate proposal) any rate at all that applies to the termination of locally dialed traffic. This means that there is no lawful rate for the "service" that Core claims to have provided. If the Commission were to now establish the Verizon tandem-based reciprocal

compensation rate (or Core's proposed "default" rate) as the applicable rate for locally dialed traffic, and apply that rate to past exchanges, it would violate the prohibition against retroactive ratemaking. *Popowsky v. Pennsylvania Public Utility Commission,* 642 A.2d 648, 651 (Pa. Commw. Ct. 1994) ("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,* 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."). AT&T Main Br. at 35-36.

Core does not have an answer to this. Instead, Core claims (at 42) that it is not requesting retroactive ratemaking, but rather is asking the Commission to "require AT&T to comply with [Core's] existing tariff" – *i.e.*, its switched access tariff. That is a bad smokescreen. Core's alternative proposal is that the Commission apply the Verizon tandem reciprocal compensation rate *in the event the Commission finds that Core's switched access service tariff does not apply.* That request *is* a request for retroactive ratemaking: it assumes there currently is no applicable

tariff rate and it requires the Commission to create a new rate and apply it to past exchanges of traffic.[36]

Core also argues (at 43) that AT&T's request to apply "a rate of $0.00/MOU is no more or less 'retroactive' than Core's position in this case," and so AT&T "should not be heard to complain about possible retroactive effects." That is nonsensical. AT&T's position is that Core, at all relevant times, did not have – and still does not have – a tariff or agreement establishing a rate for the termination of locally dialed traffic, and therefore under Pennsylvania law and Commission precedent Core may not lawfully charge AT&T *anything* for the locally dialed traffic at issue. That does not ask the Commission to engage in retroactive ratemaking; instead, all AT&T is requesting is that the Commission compel Core to comply with Pennsylvania statutory law.

C. Core's Request Would Result In Unreasonable Rate Discrimination In Violation Of Section 1304

Under 66 Pa. C.S.A. § 1304, Core is prohibited from charging different rates to similarly situated customers for the same service, and under 66 Pa. C.S.A. § 1303's "most favored nation" provision, Core is required to give customers the most favorable rate in the event more than one rate is applicable to the service in question.[37] AT&T Main Br. at 32-35. Core's two alternative

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[36] Core (at 42) seems to think that since its access rate of $0.014 already "exists" in its switched access tariff, it is not a "new" rate for purposes of local service, and therefore applying that rate to past exchanges of local traffic does not violate the rule prohibiting retroactive ratemaking. That is nonsense. Core switched access tariff rate was established for toll traffic, not local traffic. Core does not have a tariff establishing a rate for local traffic, and setting one now – whether equivalent to Core's switched access rate or not – and applying it to past traffic exchanges violates the rule prohibiting retroactive ratemaking.

[37] 66 Pa. C.S.A. § 1304 ("discrimination in rates") ("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."); 66 Pa. C.S.A. § 1303 ("[a]ny public utility, having

proposals that the Commission (1) apply Core's switched access rate as a "default" rate in the event Core's switched access tariff does not apply to locally-dialed traffic, or (2) apply the Verizon tandem-based reciprocal compensation rate to locally-dialed traffic violate these provisions.

The undisputed facts are as follows:

(1) Prior to October 2010, Core did not receive any compensation from any CLEC for terminating local traffic (Tr. 50-55, 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19);

(2) Since October 2010 all but two CLECs have continued to pay nothing for Core's termination of local traffic – at least one of these CLECs "agreed" to pay under circumstances that even Core admits were coercive (Tr. 50-51, 55, 152-153); and

(3) Since October 2004, ILEC Verizon has paid Core an MOU rate of $0.0007 for terminating local traffic (Tr. 44-47). Prior to that, Verizon paid nothing. *Id.*

Core's proposal here is that AT&T be required to pay an MOU rate of $0.014 (Core's intrastate access rate) or, in the alternative, $.002439 (Verizon's tandem-based reciprocal compensation rate). Even if Core could overcome its failure to properly establish an applicable rate under Pennsylvania law – which it cannot – it would still need to demonstrate a difference in costs required to serve AT&T relative to the other CLECs with which Core exchanges traffic on a bill and keep basis. *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.").

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more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron.")

That is something Core cannot do because it admits that it uses exactly the same network facilities in exactly the same manner and incurs exactly the same costs whenever it terminates locally dialed, ISP-bound traffic – whether the call is originated by Verizon, AT&T, or another CLEC. Tr. 49. Because it has no basis that would justify *any* rate differential from the compensation scheme which it has with the vast majority of Pennsylvania CLECs, *i.e.,* bill-and-keep, Core must apply that same compensation scheme to AT&T. 66 Pa. C.S.A. § 1304. Moreover, because Core has "more than one rate applicable to service rendered to a patron [AT&T]" (*i.e.,* $0.00 for the vast majority of CLECs, the $0.002439 rate agreed to by PAETEC/Cavalier (for one year), and the $0.0007 rate paid by Verizon) Core is statutorily required to "compute [its] bills under the rate most advantageous to" AT&T – which, again, is 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).

Here again Core does not have an answer. Instead, Core makes the irrelevant claim that the Commission should overlook any possible discrimination because Core "has done everything within its limited ability to resolve compensation issues" by "fil[ing] two other complaints against CLECs." Core Br. at 43. That is not a basis to ignore the law – and it is also untrue. Far from doing "everything" it could, Core has failed to act at every relevant stage, as explained fully in Part IV.B: (1) Core has never filed a tariff for the termination of locally dialed traffic – even though it was legally required to do so as a prerequisite for charging a rate for it (66 Pa. C.S.A. §§ 1302, 1303); (2) at all relevant times, Core received billing records *on a daily basis* that it knew contained information about its termination of CLEC-originated traffic and that it admits gave Core all the information it needed to bill CLECs (including AT&T) for the termination of that traffic (Tr. 64-71); (3) Core did not bother to hire anyone capable of reading and

understanding the records until the end of 2007 (Mingo Direct at 8); (4) even then, Core did not file a tariff covering the termination of locally dialed traffic; (5) Core did not approach AT&T to negotiate a contract rate until 2008 – eight years after it entered the Pennsylvania market (*see* Mingo Direct at 11); and (6) Core did not send AT&T a single bill until nearly eight years after Core entered the Pennsylvania market despite having all the information it needed to identify AT&T's traffic and bill AT&T for it (Mingo Direct at 10).

D. Core's Remaining Arguments In Support Of Applying The Verizon Tandem-Based Reciprocal Compensation Rate Are Without Merit

Core raises several other baseless arguments in support of its proposal to apply the Verizon tandem-based reciprocal compensation rate to the local traffic at issue here. For example, Core (at 26-29) spends pages discussing the merits of the TELRIC methodology used to calculate the Verizon tandem-based reciprocal compensation rate. But even if everything Core says about the TELRIC methodology were true, it would not matter. Core has never had an agreement or tariff establishing the Verizon tandem-based reciprocal compensation rate (or any other rate) as the applicable rate for the traffic at issue here. And if the Commission were to decide to create a rate for that traffic now, that rate could not be applied to the traffic at issue here for the reasons explained in Part I above.[38]

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[38] Core also claims that Commission-approved TELRIC rates are routinely incorporated into Commission-approved interconnection agreements, and cites to an AT&T agreement with North Pittsburgh Telephone Company. Core's argument is grossly and intentionally misleading. It should first be noted that this is not a rate that is specific to ISP-bound traffic – it is a rate for the termination of *all* traffic from *one* carrier with which AT&T is directly connected, whether it be ISP-bound traffic or any other section 251(b)(5) traffic. Second, AT&T collects this rate for terminating section 251(b)(5) traffic, including ISP-bound traffic, from a *single* carrier. That carrier is Consolidated Communications of Pennsylvania ("Consolidated"). There are at least four reasons why that rate has no relevance to this case. First, Consolidated is an *incumbent* LEC, not a CLEC like Core and AT&T. Second, the $.002814/MOU rate is specified in a negotiated interconnection agreement between Consolidated and AT&T; AT&T has no interconnection agreement with Core (or with any other Pennsylvania CLEC). Third, AT&T and Consolidated are directly interconnected,

Core also claims (at 42-43) that AT&T would not be "harmed" if the Verizon tandem-based reciprocal compensation rate is applied to the traffic at issue here because that rate is lower than Core's tariffed switched access rate. But the fact that Core's alternative proposal (to apply the Verizon tandem-based reciprocal compensation rate) is not as bad as Core's primary proposal (to apply Core's inapplicable and notoriously high switched access rate) is hardly a legal basis for adopting that alternative proposal – indeed, as explained above, Core's alternative proposal is just as unlawful as its primary proposal (both violate 66 Pa. C.S.A. §§ 1302, 1303, 1304, and the rule prohibiting retroactive ratemaking).

Moreover, AT&T in fact would be harmed if the Verizon tandem-based reciprocal compensation rate were applied to past traffic exchanges. 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. And since that time only two CLECs have paid anything. Tr. 50-51, 152-153. Finally, since October 2004 ILEC Verizon has paid Core an MOU rate of $.0007 for precisely the same sort of traffic at issue here (and prior to that, paid Core nothing). Tr. 44-47. It would not only be discriminatory and unlawful, but also "harm[ful]" to AT&T, to require AT&T to pay a rate that is three and a half

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unlike Core and AT&T. Fourth, Consolidated and AT&T operate in contiguous serving territories (AT&T serves customers in Verizon's serving territory, not in Consolidated's serving territory). Calls originated by one party are not terminated by the other party in the same local calling area. This is different from the situation with Core, where, as Core acknowledges, the calls from AT&T subscribers are locally-dialed. Thus, the traffic from Consolidated is primarily EAS traffic (billable at local rates) and the traffic from AT&T is primarily toll, and the compensation arrangement agreed-to by the parties reflects this reality. As an ILEC, Consolidated is free to request the lower rate of $.0007/MOU by agreeing to exchange all section 251(b)(5) traffic at that rate. See *ISP Remand Order* at ¶ 89. For reasons that are beyond this case (and not known to AT&T), Consolidated's business interests led it to negotiate higher rates for the termination of Section 251(b)(5) traffic. Contrary to Core's claims of hypocrisy, when it comes to CLEC-to-CLEC arrangements where the carriers are indirectly interconnected, AT&T, without exception, collects *nothing* "for its own termination of ISP-bound traffic" from any other CLEC in Pennsylvania.

times the rate paid by ILEC Verizon ($.0007 per minute) and that is infinitely greater than the rate ($0) paid by *all* CLECs prior to October 2010 and virtually every CLEC since that time.[39]

Core suggests that in the *Palmerton* case the Commission found that Palmerton could charge for the termination of traffic simply because it incurred costs. Core Br. at 26. The Commission did no such thing; nor could it without violating state law as described above. Indeed, it is critical to recognize that the facts in this case are vastly different from those in *Palmerton.* In *Palmerton*, (1) the traffic at issue was interexchange (*i.e.,* toll) traffic, (2) Palmerton had a tariff that indisputably applied to and established a rate for the termination of that interexchange traffic, and (3) carriers other than Global NAPs were paying Palmerton's tariffed rates. *Palmerton* at 1, 13, 15-18, 21-23. So the Commission was simply enforcing a tariff that was plainly applicable to the traffic at issue, and did not (as Core suggests) conclude that a carrier incurring costs could charge for services even in the absence of an applicable tariff. Had the Commission done as Core suggests, it would have violated established law. *See Popowsky,* 647 A.2d at 306-307 (holding 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); *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 . . . ."). *See also Phone Talk, Inc. v. Bell Telephone Company of Pennsylvania, et. al.*, 75 Pa.P.U.C. 256 (September 12, 1991) (Attachment 2 hereto), and Covista (Attachment 1 hereto) (*http://www.puc.state.pa.us/general/press_releases/press_releases.aspx?ShowPR=2618.*)

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[39] Core ignores that it is Verizon – not other CLECs – that is the largest carrier in Pennsylvania and is therefore AT&T's largest competitor. Therefore, whether the Commission likes the $.0007 MOU rate or not, there can be no question that forcing AT&T to pay a substantially higher rate than its competitor must pay for the exact same type of traffic is highly discriminatory and harmful to AT&T.

Core also claims (at 43) that it has been willing to negotiate an agreement with AT&T (and other CLECs) for the termination of local traffic. Even if that were true (which it is not), it has no bearing on whether Core's proposal here violates state law. Moreover, Core's negotiation tactics with AT&T were aimed more at receiving compensation for past traffic (to which no applicable, lawful rate applied) than at obtaining a traffic exchange agreement going forward. Indeed, Core would not even consider entering into an agreement going forward unless and until AT&T agreed to pay either Core's switched access tariff rates or the Verizon tandem reciprocal compensation rate for *all* past traffic exchanges – which amounted to millions of dollars. AT&T Panel Reply Testimony at 18-20; Tr. 94-95 (Mingo).[40]

III. CORE'S SO-CALLED "BACKBILLING" IS UNLAWFUL

Core tries to defend its proposals by arguing (at 38) that backbilling "is a fact of life" and therefore there is nothing wrong with Core "backbilling" AT&T for over four years of traffic. Core is wrong. In the first place, as a matter of state law, backbilling necessarily requires a proper basis for billing, *i.e.*, an applicable tariff or agreement. Indeed, the cases cited by Core show that while backilling can be allowed to correct mistakes that were to one degree or another "excusable," it is allowed only when done in a manner consistent with the applicable tariff. Core selectively quotes *St. Francis of Assisi*[41] (suggesting that the Commission found that backbilling is permissible whenever a customer receives utility service for which the utility neglected to

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[40] Core claims (at 11) that during negotiations AT&T's Mr. Carmmarata purportedly "disappeared" and would not respond to Core's calls. While that is not true, by that point in time, Core had made clear that it would not even discuss any agreement with AT&T going forward unless AT&T paid for *all* past traffic exchanges (for which there was and is no lawful rate), at least at the Verizon tandem-based reciprocal compensation rate. Core's unreasonable position left the parties with nothing more to discuss.

[41] *St. Francis of Assisi Catholic Church c/o Rev. William J.P. Langan v. PG Energy, A division of Southern Union Company*, 2005 PA PUC LEXIS 16, C-20042391 (May 19, 2005).

charge), but Core leaves off the Commission's statement, which is determinative here: "It is a given however, that the bill rendered must be determined *in accordance with the tariff and regulations*." *Id.* at * 16 (emphasis added). In fact, the utility in *St. Francis of Assisi* was not only prohibited from backbilling its customer, it was also ordered to pay civil penalties because of its "pervasive lack of the professionalism expected of a utility company" and its violations of statutory and regulatory provisions. *Id.* at * 21-22. Here, Core's tariff does not authorize billing for local traffic at all, much less backbilling for it. And Core's failure to bill in a timely manner is plainly inexcusable – the product of Core's sheer incompetence and failure to act. Core's attempted "backbilling" is not backbilling at all, but an ill-disguised attempt at retroactive ratemaking.[42]

Core claims (at 38) that it should be permitted to "backbill" AT&T because there was "theft of service." That is a ludicrous assertion. Core did not send a bill to AT&T for the termination of locally dialed, ISP-bound traffic for nearly four years (from June 2004 until early 2008). Mingo Direct at 10. Failing to pay bills that were never submitted is not stealing. Moreover, AT&T never hid its traffic from Core; quite the contrary, AT&T was the one that provided Core with all the information it needed to identify and bill AT&T for locally dialed, ISP-bound traffic. Indeed, AT&T passed on to Verizon on each and every one of its calls its CIC and the calling and called parties telephone numbers. Panel Reply Testimony of AT&T at 14; Tr. 66-71 (Mingo). And Verizon passed this information on to Core in the records that were sent to Core each and every day. Tr. 64-71. Yet, Core waited until 2008 before even trying to bill for

[42] Moreover, even if one were to accept Core's argument that it can backbill AT&T for the termination of local traffic, Core's attempted backbilling violates state law. Under 52 Pa. C.S.A. § 64.19, Core can backbill four years. Core did not bill AT&T for the period June 2004 through December 2006 until January 2009. Mingo Direct at 10. Under the four year limitations period, Core would not in any event be entitled to recover terminations charges prior to January 2005.

AT&T's traffic. Under these circumstances, it was reasonable for AT&T to conclude that it was Core's intention to terminate local traffic on a bill-and-keep basis, like all other Pennsylvania CLECs. Finally, there has never been a lawful rate for Core's termination of locally dialed traffic. Accordingly, Core's bills were and are completely unlawful. Refusing to pay unlawful bills cannot be labeled "theft."[43]

IV. CORE IS WRONG IN ALLEGING THAT AT&T IS A BAD ACTOR AND THAT CORE IS AN INNOCENT VICTIM HARMED BY AT&T'S REFUSAL TO PAY CORE'S BILLS

Core uses overblown rhetoric and misstatements in an attempt to convince the Commission that AT&T has acted badly in not paying Core's unlawful bills and that Core is an innocent victim that has been harmed by "unscrupulous" carriers such as AT&T. Neither is true. AT&T has done nothing wrong. Core alone is responsible for the situation in which it finds itself, *i.e.*, having no legal basis to charge AT&T for the termination of locally dialed traffic. And any "harm" Core may believe it has suffered is a result of its own incompetence and failure to act, and does not give it *carte blanche* to violate Pennsylvania law to fix its mistakes.

A. AT&T Has Not Acted Unlawfully

Core's complaint with respect to AT&T's conduct is that AT&T did not pay Core's bills that charged switched access rates for the termination of locally dialed traffic. But AT&T had every right not to pay, for several reasons. *First,* Core's bills covering the time frame prior to

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[43] In *Angie's Bar v. Duquesne Light Company,* 1990 Pa. PUC LEXIS 4, 72 Pa. PUC 213, C-81881 (March 27, 1990) – cited by Core – the Commission stated: "In light of [the customer's] lack of culpability for this situation, we find that this is not a 'theft of service' case." Of course, as explained in the text, AT&T is not "culpabl[e]" in any way, as it has done nothing wrong, and therefore did not commit "theft." It is also noteworthy that *Angie's Bar* (1) involved backbilling for unmetered electric service, so the utility had a legal basis for charging the customer, and (2) the Commission in that case did not permit the utility to charge interest on the backbilling – as Core is requesting here – because the customer did not know it owed any money and was not responsible for the underbillings. *Id.* *15-16.

January 2005 were issued after the four year limitation on backbilling expired. *Second*, Core's bills sought payment for the termination of locally dialed traffic, but Core did not have (and still does not have) a tariff or agreement establishing a lawful rate for that traffic, which under Pennsylvania law means that Core can not charge for it. *Finally*, Core's bills sought to charge a discriminatory rate for the termination of locally dialed traffic, one that is 20 times the rate paid by ILEC Verizon for precisely the same kind of traffic ($0.0007 per minute), and that is infinitely greater than the rate ($0) paid by virtually every other CLEC in the state.

Core's allegations regarding AT&T's alleged bad conduct raise irrelevant and incorrect points. For example, Core argues (at 35) that AT&T's "non-payment based on regulatory uncertainty is unacceptable." The regulatory uncertainty to which Core alludes is whether the *ISP Remand Order* applies to CLEC-to-CLEC traffic exchanges, an issue that will be decided by the 9th Circuit. But that "regulatory uncertainty" is entirely irrelevant to whether Core's proposal here violates *state* law – which is the only issue AT&T is now raising since the Commission has rejected AT&T's arguments with respect to the *ISP Remand Order.*[44] As AT&T has shown, Core's primary and alternative proposals are plainly unlawful under state law.

Along this same line, Core claims (at 36) that in *Palmerton* the Commission "has been unequivocal in its position that leveraging regulatory uncertainty into complete denial of any intercarrier compensation obligation is simply unacceptable." But, again, the facts of *Palmerton* are far different from the facts here. There, the Commission found that Global NAPs' nonpayment of access charges to Palmerton could not be condoned because the traffic was indisputably *toll* traffic, and Palmerton had on file with the Commission a lawful switched access

[44] AT&T does not agree with this Commission's determination on the jurisdictional issue, and the FCC may moot this case on February 2, 2011 by clarifying that the *ISP Remand Order* does apply to CLEC-to-CLEC traffic. Regardless, for all of the reasons stated herein, Core's case must fail even under state law.

tariff that plainly applied to that traffic. *Palmerton*, 1, 13, 15-18, 21-22. And since other carriers were paying those access charges, it was discriminatory for Global NAPs to refuse to do so. *Id.*, 15, 23. In stark contrast, the traffic at issue here is local, Core does not have a tariff applicable to local traffic, and virtually every CLEC in the state does not pay Core for the termination of local traffic. In addition, the Commission recognized that Global NAPs had a habit of not paying its bills throughout the country, and using every possible legal maneuver to avoid even legitimately billed charges. Core has not, and could not, make a similar allegation against AT&T as Core did not raise even one other instance in which AT&T refused to pay its bills. To the contrary, AT&T has paid Core's tariffed access charges for traffic that was "toll" based on the NPA-NXX of the called and calling parties (AT&T Panel Reply Testimony at 10, fn. 12), even though AT&T has a very valid legal argument that such traffic cannot be subject to intrastate access charges given the FCC's *ISP Remand Order.*

Core also claims (at 40) that "AT&T has refused to enter into a direct interconnection arrangement with Core" "because doing so permits AT&T to escape its payment obligations to Core." The notion that indirect interconnection is somehow a way to "escape" payment obligations is simply not true. When AT&T delivers indirect traffic to Core through Verizon, AT&T transmits with each and every call its CIC and the calling and called parties' telephone numbers, and Verizon passes that information on to Core. Panel Reply Testimony at 14; Tr. 64-72; Mingo Direct at 8. Accordingly, if Core had a lawful rate for the traffic at issue, it was armed at all times with all of the information to bill for it. Moreover, the fact that AT&T indirectly interconnects with Core is based on industry-standard practices, and based on the most efficient manner of operating its network. Even Core's witness, Mr. Mingo, recognizes that 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. Finally, AT&T has the right under 47 U.S.C. § 251(a)(1) of the 1996 Act to interconnect indirectly with Core and it has no obligation to interconnect directly. Tr. at 202-203. Therefore, Core's criticisms of AT&T's indirect interconnection with Core should be ignored.

B. Core Is Not An Innocent Victim And Has Not Suffered Any Harm

Core attempts to paint itself as an innocent victim, but that is not true. At every turn, Core failed to act and ignored important information readily available to it.

(1) Core knew when it entered the market in 1999 or 2000 that it would be terminating local traffic for carriers other than Verizon.[45] Specifically,

- Core knew that AT&T and many 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).

- Core knew 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.

- Verizon's traffic was "marked as Verizon on [Core's] switches," so that Verizon's traffic was "not hard" to identify and Core never billed Verizon for traffic from other carriers. Tr. 76-79.

- Other carriers' traffic was "marked" as such by Verizon, so Core has known at all relevant times that it has been receiving traffic from other carriers. *Id.*

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[45] Core claims (Br. at 10) that it had no way of knowing that AT&T was sending indirect traffic to Core through Verizon. Given the information that AT&T passed to Verizon on each and every call and the records that Verizon delivered to Core each and every day, that claim is obviously and transparently false. *See* Tr. 64-73; Mingo Direct at 8.

(2) Despite knowing in 1999 or 2000 that it would be terminating local traffic for CLECs, Core did not file a tariff or enter any agreements establishing rates for such termination.

(3) Ever since at least 2004, AT&T passed on to Verizon on each and every one of its calls its CIC and the calling and called parties' numbers, and Verizon passed this information along to Core on a daily basis in CABS records. Panel Reply Testimony at 14; Tr. 64-72; Mingo Direct at 8. Core admits that it received these records from Verizon on a daily basis and that they gave Core all the information it needed to identify and bill AT&T and other carriers for the termination of local traffic. Tr. 64-72; Mingo Direct 8-9. Core also admits that it lacked the basic competence necessary to read and understand the daily records. Tr. 64-65. Yet, despite the obvious importance of the billing records, Core made a conscious decision not to hire anyone that could read the records until the end of 2007. Tr. 64; Mingo Direct at 8.

(4) Even after it finally hired someone to read the billing records provided by Verizon on a daily basis, Core still did not file a tariff for the termination of local traffic and still did not enter any agreements for the termination of the traffic.

(5) From 2000 until early 2008, Core never sent a single bill to AT&T, nor did it ever once approached AT&T to request negotiation of a contract for the exchange of local traffic. Mingo Direct at 10-11. AT&T had no reason to believe that Core intended to exchange traffic with AT&T on any basis other than bill-and-keep.

(6) To this day Core has not even attempted to collect payments for local traffic termination from the vast majority of carriers. Panel Reply Testimony, Att. C (Core's Response to AT&T I-9 & II-5).

Core does not take any responsibility or offer any justification for its utter failure to operate as a competent telecommunications company. Instead, it cries "foul" – claiming that

AT&T's refusal to pay Core's unlawful bills has somehow "harmed" Core. Again, that is not true.

For example, Core claims that AT&T's non-payment threatens Core's ability to maintain a robust and reliable network and expand or upgrade its network. But Core admits that from 1999 or 2000 (when it began operations) until the end of 2007 it did not even notice that AT&T was using its network. Core Br. at 9-10. If AT&T's use of Core's network was somehow "threatening" Core during that eight year period when AT&T's use of Core's network was by far at its highest (97% of the traffic at issue having been delivered before the end of 2007, Mingo Direct, Ex. BLM-1), surely Core would have noticed and tried to do something about it. Moreover, since the complaint here was filed, AT&T's traffic has been virtually non-existent (*id.*) (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), and certainly cannot be said to be "threatening" Core's network in any way.

Core also claims that it has been harmed because AT&T is responsible for causing a substantial portion of Core's network costs that Core allegedly has not recovered. That claim is not supported by any record evidence – indeed, Core did not bother to put on any evidence regarding its costs. Moreover, because current traffic flows from AT&T are virtually non-existent, AT&T plainly could not possibly be responsible for more than a trivial, *de minimus* amount of Core's network costs. And with respect to past traffic exchanges, again, Core either did not notice or did not care that AT&T was "using" its network because it did not even bother to look at the industry standard CABS records until 2007. Mingo Direct at 8. If AT&T was causing a "substantial portion" of Core's costs that Core was not recovering, surely Core would have noticed and done something about it.

Along this same line, Core accuses AT&T of wanting to "assume[]" Core's costs "into non-existence." Core Br. at 26. But, again, Core has not put on any evidence regarding its costs. And even if it had, Core's purported costs are entirely irrelevant to the legal issues here, *i.e.*, whether Core's proposal to charge AT&T switched access rates or, in the alternative, the Verizon tandem-based reciprocal compensation rate for the termination of locally dialed traffic violates 66 Pa. C.S.A. §§ 1302 (filing of tariffs), 1303 (adherence to tariffs), 1304 (non-discrimination), and the rule prohibiting retroactive ratemaking. As previously explained, Core's proposal violates each of these and, under Pennsylvania law, the mere fact that Core may have incurred costs does not entitle it to violate these provisions by collecting charges.

Core complains (at 16) that it has been required to terminate traffic first and then seek payment through Commission intervention without the ability to block the flow of traffic. The fact that that has happened is Core's own fault. Core admits that as far back as 2000 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 nearly eight years later. Tr. 64-71; Mingo Direct at 8. If Core had bothered to look at that information, it could have acted in 2000 by either filing a tariffed rate for the termination of locally dialed traffic, approaching AT&T for an agreement, or seeking Commission assistance. Core did none of those things, and cannot complain about the consequences of its inactions. If Core had acted in 2000, or even in 2004, the dispute being litigated now would have been resolved years ago, long before Core terminated most of the traffic at issue here. Moreover, the fact that Core could not block AT&T's traffic did not even come into play until 2008 because Core did not even notice or care that it was terminating AT&T-originated traffic. And by that time blocking the traffic was essentially a non-issue

because the dial up traffic flow from AT&T's customers had become virtually non-existent as customers shifted to DSL, cable modem service, and other high speed forms of internet access.

The bottom line is that Core is not an innocent victim here. Core's voluntary choices, incompetence, and failure to act are responsible for the situation in which it finds itself, and its attempt to blame AT&T should be rejected.

V. THE COMMISSION SHOULD NOT REQUIRE CLECS TO ENTER AGREEMENTS FOR THE EXCHANGE OF LOCAL TRAFFIC

Core asserts that AT&T should be singled out among all other CLECs and compelled to enter into a traffic exchange agreement ("TEA") with Core. Setting aside the question of whether the Commission has the authority to do anything with respect to locally dialed ISP-bound traffic, if the Commission were to do as Core asks, the explicit rate established by the traffic exchange agreement could only apply prospectively. Moreover, both the requirement of a traffic exchange agreement and the rate would – consistent with 66 Pa. C.S.A. § 1303's "most favored nation" provision and § 1304's ban on discriminatory rates – need to be applied to all CLECs.[46] AT&T respectfully submits that the Commission should not lightly take action that would scrap completely the "existing CLEC-to-CLEC practices" of "bill-and-keep compensation" for local traffic, which has served both the CLEC community and the Commonwealth very well over the past 15 years.[47] *Supra,* I.C. Indeed, the practical effect

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[46] Moreover, the rate could not exceed that paid by Verizon – $0.0007 per minute. *See* 66 Pa. C.S.A. §§ 1304 and 1303.

[47] Core seems to suggest that if it is not compensated at an explicit rate for the traffic at issue, its business model and dial-up access will both be imperiled. Core of course could charge its ISP customers rates that recover Core's costs; other Pennsylvania CLECs that serve ISPs evidently do just that. Moreover, any LEC can serve ISPs; one does not need Core's business model to do so. Finally, Core's model evidently was not imperiled by its failure to even attempt to bill for substantial volumes of traffic delivered over a four-year stretch when virtually all of the traffic at issue was delivered.

would be that every CLEC would have to enter an agreement with every other CLEC for the termination of local traffic. If each of the 136 facilities based CLECs in Pennsylvania, as of August 19, 2009, was to enter into an agreement with every other facilities based CLEC, 9,180 separate agreements would be required. It is unlikely that any CLEC would find it worth the time and effort to negotiate and administer all these agreements, or that the Commission would find the resources necessary to resolve the many disputes such agreements are likely to prompt. *See* AT&T Main Br. at 38-39.

Moreover, Core's specific proposal here is that AT&T be required to pay the Verizon tandem reciprocal compensation rate for "both past traffic and future traffic," using Core's "*recently negotiated*" TEA with PAETEC/Cavalier as a model. Core Main Br. at 31. This thinly veiled attempt at retroactive ratemaking is unlawful and should be rejected for the reasons explained above.

In any event, both the facts surrounding its execution and its terms make it plain that the PAETEC/Cavalier agreement cannot serve as a reasonable template for any agreement between Core and other carriers – much less as proof that Core is entitled to compensation in this proceeding. Core is very candid that PAETEC/Cavalier agreed to pay Core for the termination of local traffic only because Core essentially coerced an agreement by filing a protest in their pending merger proceeding. Tr. 50-51, 55, 152-153. It is clear that PAETEC/Cavalier did not see any merit to Core's demand that it pay for the termination of local traffic, because the agreement includes the following "[d]isclaimer:" "It is PAETEC's position that nothing in the Communications Act or other applicable federal or state law requires . . . the payment of the particular rate specified here for Section 251(b)(5) Traffic." Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶ 6). The agreement also states 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." *Id.* at ¶ 4(b).

Even in the face of Core's coercive tactics, PAETEC agreed to pay the Verizon reciprocal compensation rate of $0.002439 per MOU on a going forward basis *only for one year*. Tr. 50-51; Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶¶ 3(b) & 4(a)). And with respect to past traffic exchanges, the fact that PAETEC agreed to settle in order to finalize its merger should have no bearing on the issues in this case, and certainly does not give the Commission authority to engage in prohibited retroactive ratemaking.[48] Moreover, **BEGIN CONFIDENTIAL**

END CONFIDENTIAL

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[48] **BEGIN CONFIDENTIAL**

END CONFIDENTIAL See AT&T Cross Examination Exhibit #21.

VI. IF PENALTIES ARE TO BE ISSUED AGAINST ANYONE, IT SHOULD BE AGAINST CORE, NOT AT&T

Core asks the Commission to impose civil penalties on AT&T for its purported "refus[al] to make any payment for services rendered" – including penalties for the four year period 2004-2007 during which AT&T did not even receive any bills from Core. That request is outlandish. The statute explaining the circumstances under which the Commission can impose penalties is found at 66 Pa.C.S.A. § 3301 – a section that Core does not bother to quote because it plainly shows that the only penalty that could possibly be imposed in this case is one against Core.

Section 3301 states:

> If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding $1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

Core does not allege any conduct falling within the scope of this statute – nor could it. AT&T has not violated any statutory provision, has not failed to perform any duty, has not failed to obey any regulation or final Commission determination, and has not failed to comply with any court order. The only thing AT&T has done is decline to pay a rate that is not specified in either a contract or a tariff and to take the position that it would not pay bills that sought to collect unlawful rates. The undisputed facts show that Core alone is responsible for the situation in

which it finds itself and that AT&T has done nothing wrong.[49]

- From 2000 until early 2008, Core never sent a single bill to AT&T.[50] Mingo Direct at 10. How could AT&T be subject to civil penalties for failing to pay bills that Core never sent?
- On each of its calls throughout the period 2000 to the present, AT&T passed on to ILEC Verizon and Verizon passed on to Core on a daily basis: (a) AT&T's CIC, (b) the calling party's number, and (c) the called party's number (Panel Reply Testimony of AT&T at 14; Tr. 65-71; Mingo Direct at 8) – which Core admits is all the information Core needed to bill AT&T for the termination of locally dialed, ISP-bound traffic (Tr. 64-72; Mingo Direct at 8-9). How could AT&T be subject to civil penalties when it gave Core all relevant information showing that it was delivering local traffic to Core, what that traffic was and its volume?
- Core's CEO Bret Mingo freely admits that he and Core had no idea how to read the industry standard records that Verizon provided to Core *on a daily basis* since 2000, and that they did not bother to hire someone to read those records until the very end of 2007. Tr. 64-72; Mingo Direct at 8. How could AT&T be subject to civil penalties because Core – out of sheer laziness and incompetence – chose to

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[49] Core claims that a penalty is appropriate given that AT&T is a larger company than Core. Core Main Br. at 45. That, of course, is not one of the factors listed in 52 Pa. Code § 69.1201(c) to guide the Commission's determination of the proper amount for a penalty, and it would be entirely inappropriate to consider.

[50] Core claims that the Commission has concluded that refusing to pay billed charges is conduct "of a serious nature." But here, Core did not bill AT&T for any of the traffic at issue until early 2008. Moreover, in the *Palmerton* case cited by Core, Palmerton had a tariff that set a rate for the traffic at issue (*Palmerton,* 1, 13, 15-18, 21-22) – and here, Core does not have a tariff or an agreement establishing a lawful rate. And in *Palmerton,* Global NAPs was not ordered to pay civil penalties because of its non-payment, but because it had failed to comply with a Commission order to "obtain a surety bond in favor of Palmerton." *Id.,* 26.

ignore the records in its own possession that it received on a daily basis for years?[51]

- During its negotiations with AT&T, Core refused to reach agreement on a rate for future traffic unless and until AT&T agreed to pay for all past-billed amounts. With respect to such past-billed amounts, Core made it clear that it would not accept a rate any lower than Verizon's tandem rate (even though Verizon does not even pay that rate), and Core also informed AT&T that it would not even discuss the rate that Verizon pays to Core for the exact same type of traffic at issue in this case (*i.e.*, $0.0007). AT&T Panel Reply Testimony at 18-20; Tr. 94-95 (Mingo). How could AT&T be subject to civil penalties when Core's unreasonable negotiation positions were responsible for the parties' inability to reach agreement on future traffic exchanges?
- AT&T paid Core's bills for the termination of toll traffic at Core's switched access service tariff rates. AT&T Panel Reply Testimony at 10, fn. 12. How could AT&T be subject to civil penalties when it paid all lawful, tariffed charges?

There is one other thing we know: Core has never filed a tariff authorizing it to charge AT&T for the termination of locally dialed traffic, despite the very clear requirement in sections 1302 and 1303 of the Public Utility Code that it do so. Core's failure to file an applicable tariff prior to billing AT&T for the termination of locally dialed traffic is a violation of these sections

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[51] Core tries to defend itself by claiming (at 39) that it invoiced AT&T as soon as it became aware of the traffic. Core never adequately explains why it was unaware of the fact that AT&T was sending it traffic. For the reasons stated in AT&T's Main Brief and this Reply Brief, Core should have been aware that it was receiving traffic from AT&T back in 1999 or 2000. Core's claim that it was unaware of the traffic initiated by AT&T for nearly eight years undercuts completely its claim that AT&T's "use" of Core's network for "free" has substantially harmed Core.

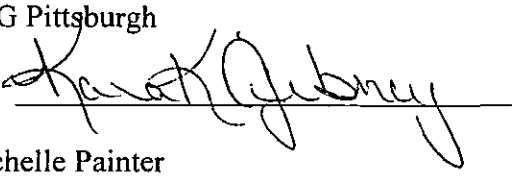
of Code. And Core committed another violation of the Code (section 1304) when it billed AT&T at a rate that is plainly and unreasonably discriminatory. These statutory violations fall squarely within the scope of 66 Pa. C.S.A. 3301. Accordingly, if any party should be subject to civil penalties, it is Core.[52]

CONCLUSION

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

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

By: 

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Its Attorneys

DATED: January 14, 2011

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[52] *See Phone Talk, Inc. v Bell Telephone Company of Pennsylvania, et. al.*, 75 Pa. P.U.C. 256 (September 12, 1991) (Attachment 2 hereto) and Covista (Attachment 1 hereto) (http://www.puc.state.pa.us/general/press_releases/press_releases.aspx?ShowPR=2618.)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Reply 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 January 2011.

VIA E-MAIL AND OVERNIGHT MAIL

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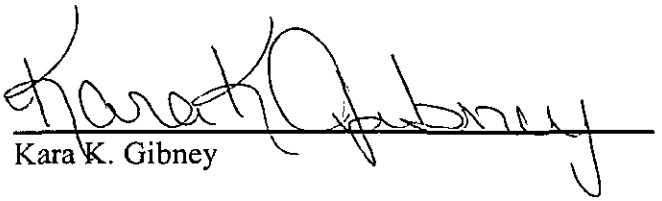

Kara K. Gibney

Press Releases

PUC Approves Settlement Agreement Regarding Covista Billing and Service Termination Practices and Charges

October 14, 2010

HARRISBURG – The Pennsylvania Public Utility Commission today approved a settlement agreement regarding an investigation into the billing and service termination practices and charges of Covista Inc.

The settlement stems from the Commission's Law Bureau Prosecutory Staff's (LBPS) investigation, which found that Covista Inc.:

- Was charging customers an unauthorized $2 per month paper billing fee that had not been included in the company's tariff;
- Offered its customers a promotional bundled service offering at an unauthorized rate of $21.99 per month that had not been included in its tariff; and
- Increased the non-tariffed bundled service offering by $5 from $21.99 to $26.99 per month, effective Jan. 1, 2009, without Commission approval.

As part of the settlement, Covista:

- Will refund $67,048 to its customers for failure to tariff the "bundled service rate" plan;
- Will provide a $5 refund per customer per month to those affected customers whose bundled service package rates were increased during the period January 2009 through May 2009;
- Will refund an overcharge of $17,783 to affected customers;
- Will pay a $3,000 civil penalty; and
- Has agreed to several practices recommended by the Commission's Bureau of Consumer Services regarding suspension and termination notices.

Covista Communications provides telecommunications services to business and residential customers, mostly in Georgia, New Jersey, New York, Pennsylvania, and Tennessee.

The Pennsylvania Public Utility Commission balances the needs of consumers and utilities to ensure safe and reliable utility service at reasonable rates; protect the public interest; educate consumers to make independent and informed utility choices; further economic development; and foster new technologies and competitive markets in an environmentally sound manner.

For recent news releases, audio of select Commission proceedings or more information about the PUC, visit our website at www.puc.state.pa.us.

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Docket Number M-2009-2067766

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75 Pa.P.U.C. 256
126 P.U.R.4th 179, 75 Pa.P.U.C. 256, 1991 WL 501894 (Pa.P.U.C.)
(Cite as:75 Pa.P.U.C. 256)

Phone Talk, Inc.
v.
Bell Telephone Company of Pennsylvania
Additional complainants: Carmel Communications, Inc.; California Communication, Inc.; Dial Phone Recording, Inc.; Pittsburgh Audiotex Center, Inc.; Asten Martin Productions, Inc.; Goldstrike, Inc.
C-882009 et al.

126 PUR4th 179.

Pennsylvania Public Utility Commission
August 29, 1991; entered September 12, 1991

ORDER requiring a local exchange carrier to make refunds to sponsors of "audiotex" programs for amounts improperly withheld from them as representative of estimated uncollectibles.

P.U.R. Headnote and Classification

1.
EVIDENCE

s11 - Burden of proof - Complaint cases.
Pa.P.U.C. 1991
Because any party seeking affirmative relief before the commission has the burden of proof, it follows that the complainant in complaint proceedings has the burden of proof.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

2.
RECORDS

s6 - Preservation - Period of time - Audiotex billing adjustments.
Pa.P.U.C. 1991
By tariff, a local exchange telephone carrier was required to retain for at least one year all records pertaining to adjustments afforded customers of "audiotex" services for calls made from the customer's equipment without authority or knowledge; additionally, information on such adjustments was to be given the sponsors of the audiotex services when the local carrier adjusted the revenues passed on to the sponsors through normal billing procedures.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

3.
PROCEDURE

s16 - Discovery and production of evidence - Effect of failure to produce.
Pa.P.U.C. 1991
When a party refuses or otherwise fails to produce requested information or data which it has available or should have available if complying with recordkeeping requirements, the party will be subject to any adverse inference which can be drawn as a result of the failure to produce the information.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

4.
PROCEDURE

s16 - Discovery and production of evidence - Privacy concerns - Customer billing adjustment agreements.
Pa.P.U.C. 1991
Although a local exchange telephone carrier making adjustments to revenues passed on to sponsors of "audiotex" services for calls made without authorization or knowledge of the subscriber needed to provide the sponsors with some billing information, the carrier was not required to provide the sponsors with copies of customer billing adjustment agreements signed by the subscriber, as to do so would be in violation of policies governing the privacy rights of customers, which prevent a telephone company from distributing information on customer names, addresses, and telephone numbers outside of the company.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

5.
REPARATION

s46 - Procedural matters - Evidence - Inadequate recordkeeping.
Pa.P.U.C. 1991
Where a local exchange telephone carrier had failed to abide by recordkeeping requirements for billing adjustments made for "audiotex" services, the carrier was ordered to make refunds, with interest, to all sponsors of audiotex services for whom deductions from compensation paid to the sponsors could not be documented.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

6.
REPARATION

s41 - Period of reparation - Tariff provisions as a factor - Retroactive rate making.
Pa.P.U.C. 1991
Where a local exchange telephone carrier's tariff provisions for treating unpaid "audiotex" charges as estimated uncollectibles to be deducted from compensation paid sponsors of audiotex services did not go into effect until June 1, 1988, the carrier was prohibited from treating any unpaid charges from calls before that date as uncollectibles or deductions from payments owed sponsors; to allow billing adjustments for audiotex calls made prior to that date would constitute improper retroactive rate making.

Phone Talk, Inc. v Bell Telephone Company of Pennsylvania

Commissioners Present:
William H. Smith, Chairman
Joseph Rhodes, Jr., Vice-Chairman
Wendell F. Holland, Commissioner
David W. Rolka, Commissioner

BY THE COMMISSION:

OPINION AND ORDER

Before us for consideration are the timely filed *Exceptions* of the Bell Telephone Company of Pennsylvania ("Bell", "Company", or "Respondent") to the Initial Decision issued by Administrative Law Judge ("ALJ") George M. Kashi on March 22, 1990. Reply to Exceptions were filed by Goldstrike, Inc., Asten Martin Productions, Inc., Phone Talk, Inc., Carmel Communications, Inc., California Communications, Inc. and Dial Phone Recording, Inc.

HISTORY OF THE PROCEEDING

On September 7, 1988, Phone Talk, Inc., Carmel Communications, Inc., California Communications, Inc. and Dial Phone Recording, Inc. ("Phone Talk/Complaints") filed Complaints against the Respondent, herein, alleging various billing disputes relative to Bell's Audiotex service. The Pittsburgh Audiotex Center, Inc. (PAC) filed a similar Complaint on September 9, 1988. [FN1]The Asten Martin Productions, Inc. ("Asten Martin/Complaints") and Goldstrike, Inc. ("Goldstrike/Complaints") filed, on October 12, 1988 and December 27, 1988, respectively, Complaints alleging billing disputes.

A Pre-hearing Conference, in this proceeding, was held on November 2, 1988, in Harrisburg, Pa. All of the Complaints were consolidated for hearing. The ALJ issued a protective order on February 7, 1989, at the request of Bell.

The evidentiary hearings in this proceeding were held on April 18 and 19, 1989 and June 9, 1989. The record consists of 37 exhibits and a transcript totaling 496 pages. Main Briefs and Reply Briefs were filed by all parties with the exception of Asten Martin who only filed a Main Brief. A Joint Stipulation of Facts between Phone Talk and Bell was filed on July 31, 1989.

Based on his evaluation and analysis of the record, the ALJ made the following Findings of Fact:

Findings of Fact

1. Phone Talk, Inc., 2789 Philmont Avenue, Suite 110, Huntington Valley, Pennsylvania 19006, a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882009.

2. Carmel Communications, Inc., a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882010.

3. California Communications, Inc., a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882011.

4. Dial Phone Recording, Inc., a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882012.

5. Pittsburgh Audiotex Center, Inc., P.O. Box 23071, Pittsburgh, Pennsylvania 15222, a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882026.

6. On July 31, 1989, Pittsburgh Audiotex petitioned to withdraw its Complaint at C-882026.

7. Asten Martin Productions, Inc., Unit 414 Haverford Village, 700 Ardmore Road, Ardmore, Pennsylvania, 19003, a corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36 and Section 36A, C-882073.

8. Goldstrike Enterprises, Inc., 1141 #C Mentor Drive, Boulder, Colorado 80303, A [sic] Colorado corporation organized under the laws of the Commonwealth, is a customer of Bell Telephone Company of Pennsylvania, providing services described under Bell's "Audiotex Service" tariff, Pa. P.U.C. - No. 1, Section 36, and Section 36A, C-882198.

9. The above named Complainants are sponsors of Audiotex Service, as that term is defined at Tariff Pa. P.U.C. No. 1, Section 36, Fourth Revised Sheet 2, Section B, part 5:

The sponsor is the individual, partnership or corporation who contracts with the Telephone Company for the transport and billing of calls and collection of associated charges to a passive recorded announcement, interactive recorded announcement or live program. A caller to Audiotex Service is a client of the Sponsor, as well as a customer of the Telephone Company.

10. The original Audiotex service is set forth in the Company's 1984 tariff and covered such things as dial-a-joke and dial-a-horoscope and then expanded as people's markets increased (N.T. 203).

11. Prior to June 9, 1987 Complainants' relationships with Bell were governed by the provisions of the Information Delivery Services Tariff, effective November 25, 1984 (N.T. 203, 452).

12. Under the pre-June 1987 tariff sponsors, such as Complainants, would determine a fee for their service and Bell would deduct a percentage of that fee for billing, transport and collection and remit the balance to the sponsor (N.T. 417-418 Pre-June 87 Tariff).

13. Under the pre-June 1987 tariff there were no provisions for billing or charging back to sponsors any adjustments made by Bell or any amounts deemed uncollectible or estimated to be uncollectible by Bell.

14. Under the pre-June 1987 tariff Bell, or rather its ratepayers, bore the brunt of any and all adjustments and/or uncollectibles.

15. Between January and June, 1987 Bell absorbed losses of $1,523,145.00 attributable to Audiotex adjustments (Bell Stmt. No. 1, p. 2, Bell Ex. No. 5).

16. In early 1987 Bell became aware of the large amounts of adjustments being given to Audiotex customers, specifically those involving live lines (N.T. 398).

17. In March of 1987 Bell devised a new tariff for Audiotex service which after due notice and publication became effective June 9, 1987:

The June 9, 1987 tariff in relevant part provided:

Where applicable, the Telephone Company will issue a monthly remittance to the sponsor based on the total number of reimbursable calls from within the designated

976 Audiotex Service Serving Area completed to the 976 Audiotex Service. *Such remittance will be net of any adjustments granted by the Telephone Company to customer for the 9796 [sic] Audiotex Service during the billing period in accordance with Paragraph A.3.aa. of this Tariff.* The amount of remittance is dependent upon the type of call (recorded announcement or live programming) and the transport, billing, and collection rate category (Telephone Company or Participating Independent Telephone Company.

Pa. P.U.C. - No. 1, Section 36, Paragraph A.3.4, Second Revised Sheet 10, emphasis added.

The referenced paragraph read:

Effective thirty days from the effective date of this Tariff, the Telephone Company will track all adjustments made to each 976 Audiotex Service. All adjustments made in accordance with the adjustment policy of the Telephone Company will be charged to the Audiotex sponsor at the Sponsor Selected Price. A summary of adjustments will appear on the Audiotex monthly bill.

The Telephone Company will make adjustments for 976 calls in accordance with the following adjustment policy:

- When a customer makes a first time claim for 976 calls billed to his/her account that:

- 1) customer did not approve or have awareness that call was made, or 2) customer did not have knowledge of the price per call due to the sponsor's failure to comply with Sections of this Tariff.

- Customer will be required to sign an "Adjustment Agreement" before the Telephone Company makes the adjustment for the 976 calls in the claim.

- By signing the Adjustment Agreement, the customer waives any future claim(s) for adjustment on 976 calls.

Pa. P.U.C. - No. 1, Section 36, Paragraph A.3.aa., First Revised Sheet 13.

18. Due process before this Commission does not necessitate a hearing in all matters. 66 Pa. C.S. § 703(b).

19. The 1987 tariff was filed March 29, 1987 and a copy was sent at that time to the current Audiotex sponsors. When the tariff became effective June 9, 1987 Bell then sent a letter regarding the adjustment policy on July 7, 1987 (N.T. 395, Bell Ex. No. 2).

20. Bell specifically acknowledged to the sponsors that the new adjustment policy was to be prospective only (Bell Ex. No. 2).

21. The 1987 tariff calls for a document to be made and signed by the customer prior to an adjustment being made.

22. This Commission has ordered that Bell shall keep and preserve its records in conformity with the rules of the FCC (Bell General Instruction No. 400, p. 4, Para. 6.13).

23. Section 42.9 of the FCC requirements include the following:

Item No. and Description of records		*Period to be retained*
g.	Detailed records of adjustments of customer's accounts, including authorizations for refunds, adjustment vouchers, or other authorizations to correct charges due to errors, service failures, etc.: (1) Telephone carriers	1 year
h.	Uncollectible vouchers	6 years

	or other authorizations for writing off customers' accounts and other records and reports pertaining thereto.	
i.	Work papers used by telephone carriers in developing estimates of unbilled revenues and accounts receivable	6 years after estimate is superseded

24. Bell has steadfastly refused to provide the sponsors with the name and address of customers who have been granted an adjustment (Bell Ex. No. 2).

25. Prior to May 1988 Bell, for all practical purposes, has no record available to verify its adjustments (N.T. 105, 106, 171-172).

26. To retrieve the records of the more than 30,000 adjustments charged back to the sponsors prior to May 1988 would require the effort of eight people working full time for a year (N.T. 105, 171-172).

27. Beginning in June of 88 [sic], as a result of special programming, and our protective order, the information on adjustments is now available (N.T. 369).

28. Adjustments charged to Complainant Carmel Communications, from October 1987 through May 1988 total $243,973.66 (Attachment 6 to Complainants Memorandum in Support of Partial Summary Judgment).

29. Adjustments charged to Complainant Dial Phone from October 1987 through May 1988 total $10,433.62 (Attachment 6 to Complainants Memorandum in Support of Partial Summary Judgement).

30. Adjustments charged to Complainant California Communications from October 1987 through May 1988 total $1,811.20 (Attachment 6 to Complainants Memorandum in Support of Partial Summary Judgment.

31. Adjustments charged to Complainant Goldstrike from September 1987 through May 1988 total $65,057 (Goldstrike Ex. J, p. 3).

32. Adjustments charged to Complainant Asten Martin from September 1987 through May 1988 are unquantified.

33. The record keeping requirement ordered by this Commission inures also to the benefit of the sponsor.

34. Sometime in late 1987 and early 1988 it became increasingly apparent [to Bell] that many of its customers using Audiotex service were either unwilling or unable to pay their bills for this service (N.T. 360-361, 369).

35. One June 1, 1988, a new tariff went into effect designating an uncollectible as a deduction from remittances paid to Audiotex sponsors.

36. The 1988 tariff effective June 1, 1988 reads as follows:

Such remittance will also be net of any adjustments granted by the Telephone Company to customers for the Audiotex Service during the billing period in accordance with Paragraph C.27 of this Tariff and/or *net of any charges to customers the Telephone Company has written off as uncollectibles.*

Pa. P.U.C. - No. 1, Section 36, Paragraph C.18, Fourth Revised Sheet 10. (Emphasis added indicating new language).

37. Under the guise of the June 1, 1988 tariff Bell went back to November 1, 1987 and then wrote these pre-June 1, 1988 calls off as uncollectibles (N.T. 352-353, 326).

38. Ninety percent of the total $496,581.00 "uncollectibles" charged back to Phone Talk, or $441,116.00 represent pre-June 1, 1988 calls (Bell Stmt. No. 1, At-

tachment C revised).

39. Eighty-eight percent of the total $876,059.00 "uncollectibles" charged back to Asten Martin, or $787,314.00 represent pre-June 1, 1988 calls (Bell Stmt. No.1, Attachment C revised).

40. Almost the entire amount of the $113,765 charged back to Goldstrike as "uncollectibles" represent pre-June 1, 1988 calls (Bell Stmt. No. 1, Attachment C. Rev. [sic]

41. Evidence shows that the uncollectibles charged back to the Complainants were "written off" after June 1, 1988.

42. The Commission Opinion is [sic] discussing the tariff indicated a belief that Bell had already been charged back uncollectibles (May 26, 1988 Opinion at R-880970).

43. In writing off uncollectibles based on pre-June 1, 1988 calls Bell was engaged in retroactive ratemaking.

44. Bell's action in charging back uncollectibles based on calls made prior to June 1, 1988 violated Section 1302 and 1303 of the Public Utility Code.

45. The June 1, 1988 Audiotex tariff does not allow for the "estimating" of uncollectibles.

46. Complainant Carmel Communications, Inc. had an amount of $145,695.00 withheld by Bell for a period of four months as "estimated" uncollectibles (Phone Talk Ex. No. 4, N.T. 155-163).

47. Complainant Asten Martin had an amount of $112,690.00 withheld by Bell for a period of four months as "estimated" uncollectibles (Asten Martin Ex. No. 1, N.T. 209, 215-216).

48. Bell argues that since it had no mechanized process of charging back uncollectibles estimating was a reasonable and prudent thing to do (N.T. 352).

49. Bell is liable to Complainants Carmel Communications, Inc. and Asten Martin for the interest on the amount illegally held as "estimated" uncollectibles.

50. After June 1, 1988 Bell refused to divulge the names and addresses of those accounts which it declared uncollectible, had written off and had charged back to Complainants (N.T. 413, 444-445).

51. While Bell no longer considers these accounts "customers" it still maintains the information to be "confidential" (N.T. 375-376).

52. Since June 1, 1988 Bell has accelerated writing off uncollectibles and only sends dunning notices in the way of collection effort (N.T. 58, 327).

53. Under our order of March 1989 Complainants were provided with the information needed on the uncollectible accounts which had been written off by Bell in May and June of 1988.

54. Complainants were not deprived of remedies on uncollectible accounts that were nine or ten months old.

55. Refunds under Section 1312 of the Public Utility Code carry the legal interest of six (6) percent.

56. The utility's actions of retroactive ratemaking, refusal to keep records required by this Commission, and "estimating" uncollectibles are not reasonable nor are they prudent.

Initial Decision, pp. 65-75.

ALJ Kashi reached the following Conclusions of Law based on his evaluation and analysis of the record:

Conclusions of Law

1. The Commission has jurisdiction of the subject matter and over the parties.

2. The matter is properly before the Commission.

3. Failure of the Respondent to inform or warn Complainants of possible adverse financial effects relative to proposed tariff changes does not deny Complainants any due process right.

4. Bell properly filed and gave sufficient notice of the proposed tariff changes in both June of 1987 and June of 1988. 66 Pa. C.S. § 1308(a)(b).

5. Both the June 1987 tariff and the June 1988 tariff were properly approved by the Commission.

6. Bell is required by Commission order to maintain and preserve its records in conformity with the rules of the FCC.

7. Bell's records of some 30,000 adjustments given to customers prior to May of 1988 were not duly maintained for at least one year as required by the FCC.

8. Complainants as customers of Bell were entitled to the protection and verification provided by the required Adjustment Agreements.

9. A party is obligated to preserve such records despite the existence of a regular program which would normally purge them on a periodic basis. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 750, 751 (E.D.N.Y. (1980)).

10. Respondent's tariff effective June 1, 1988 allowing remittance to be made [to] Complainants "net of any charges to customers the Telephone Company has written off as uncollectibles" (Pa. P.U.C. - No. 1, Section 36, Para. C. 18, Fourth Revised Sheet 10) operates prospectively and not retroactively.

11. Respondent's tariff permits Complainants remittances to be reduced for uncollectibles representing calls made on or after June 1, 1988.

12. Complainants were provided with sufficient information regarding uncollectibles from May 1988 to present to allow them to take effective measures for collection of these amounts.

13. Respondents [sic] actions violate Sections 1302 and 1303 of the Public Utility Code.

14. 52 Pa. Code Section 64.171(3) does not apply in setting the interest rate to be applied in this matter.

15. The refunds of the amounts ordered herein must carry the legal interest rate of six percent. 66 Pa. C.S. § 1312*Duquesne Light Co. v. Pa P.U.C.* 543 A.2d 196 100 (1988).

16. Whenever the utility's management abuses its discretion, as it has here, the cost will not be passed on to ratepayers but must be borne by the utility. *National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 76 Pa. Commonwealth Ct. 102, 464 A.2d 546 (1983).

17. The cost of the refunds herein ordered together with associated interest costs are to be borne by the shareholders of Respondent, not by its other customers, in whole or in part.

Initial Decision, pp. 75-78.

Based upon the foregoing Findings of Fact and Conclusions of Law, the ALJ ordered the Respondent, *inter alia*, (1) to refund all monies it retained under the June 9, 1987 Tariff as adjustments for which Bell was unable to provide authentication before May 1988, with interest at the legal rate of six percent (6%); (2) to refund all amounts retained under the June 1, 1988 Tariff as uncollectibles where the underlying call was placed prior to June 1, 1988, with interest at six percent (6%); (3) to pay to Complainants interest on amounts retained for a period of four (4) months as "estimated" uncollectibles under the June 1, 1988 Tariff; and (4) to forfeit a penalty of two hundred twelve thousand dollars ($212,000) payable to the Commission.

Respondent's Exceptions

On April 11, 1990, the Respondent filed Exceptions to the ALJ's Initial Decision. We note that the Exceptions are not in accordance with our regulations at 52 Pa. Code § 5.533(b) which require that:

(b) An exception shall be stated in *specific, numbered paragraphs, identify the finding of fact or conclusion of law to which exception* is taken and cite relevant pages of the decision. Supporting reasons for the exception shall follow a specific exception. (Emphasis Added)

Complainants Phone Talk, Inc., Carmel Communications, Inc., California Communications, Inc. and Dial Phone Recording, Inc. point out, in their Reply to Exceptions, that the Respondent's Exceptions ". . . are a rehash of its previous Briefs in this case and are not stated in specific numbered paragraphs."(R.E., p. 2) Complainant Asten Martin Productions, Inc. also brings to our attention, in its Reply to Exceptions, the non conformity of Bell's Exceptions to our Rules of Administrative Practice.

52 Pa. Code § 1.2(a) provides for the liberal construction of our administrative procedure and authorizes that "[t]he Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of proce-

dure which does not affect the substantive rights of the parties."We do not find Bell's failure to strictly adhere to our regulations at 52 Pa. Code § 5.553(b) to have affected the substantive rights of the Complainants in this proceeding. Accordingly, we shall exercise our discretion and consider Bell's Exceptions. However, we caution the Respondent that we may not be so inclined to consider its Exceptions in the future that are not in accordance with our Rules of Administrative Practice.

Complainants Phone Talk, Inc., Carmel Communications, Inc., California Communications, Inc., and Dial Phone Recording, Inc., also argue, in their Reply to Exceptions, that ". . . Bell's attachment of tariff sheets, exhibits and other materials as Exhibits A through E was unnecessary and in violation of the requirement of 52 Pa. Code Section 5.533(a) that such material shall be incorporated by reference and citation."(R.E., p. 3) The Complainants, in their Reply to Exceptions, failed to include the clause "insofar as practicable" a party should incorporate by reference and citation. Accordingly, we find that Bell is not in violation of 52 Pa. Code § 5.533(c).

Discussion

[1] In the Initial Decision, the ALJ sets forth the standards to be applied in a Complaint proceeding, in particular which party has the burden of proof. In this regard, the ALJ stated that "[i]n a complaint case involving a validly approved tariff, the burden of proof is on the complainant. *E.g.* , *Brockway Glass v. Pa. P.U.C.*, 437 A.2d 1067, 1070 (Pa. Commw. Ct. 1981)." (I.D., pp. 30-31).

Section 332(a) of the Public Utility Code, 66 Pa. C.S.A. § 332(a), generally provides that a party seeking affirmative relief from the Commission has the *burden of proof.* The Pennsylvania Supreme Court has held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). The term preponderance of the evidence means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. The Commission has held that a Complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the Complaint. *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976).

As required by these decisions, the record in this proceeding must be reviewed to determine whether the Complainants satisfied their burden of proof. If the review indicates that the burden of proof has been satisfied, it must be determined whether Bell has submitted evidence of co-equal value or weight to refute the Complainant's evidence. If this has occurred, the burden of proof cannot be deemed to have been satisfied, unless additional evidence has been presented by the party having the burden of proof. *Morissey v. Pa. Dept. of Highways*, 424 Pa. 87, 255 A.2d 895 (1967), and *Burleson v. Pa. P.U.C.*, 66 Pa. Commonwealth Ct. 282, 443 A.2d 1373 (1982)*aff'd* , 501 Pa. 443, 461 A.2d 1234 (1983).

We recognize that in order to determine whether or not a party has satisfied its burden of proof, it is incumbent upon us to ensure that our decision is supported by substantial evidence in the record (Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704). We hasten to point out that the term "substantial evidence" has been defined by the Pennsylvania Supreme, Superior, and Commonwealth Courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Com. Dept. of Public Welfare, White Haven Center*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

ALJ Kashi determined that the Complainants met their burden of proof in this proceeding, and he ordered the Respondent to make refunds to the Complainants.

The issues in this proceeding relate to Bell's Audiotex tariff that was in effect (1) pre June 9, 1987, (2) June 1987 through May 1988, and (3) after June 1, 1988. Specifically, the issues are what was the Respondent allowed to do relative to adjustments, uncollectibles and estimated uncollectibles during the aforementioned time frames. As previously noted, the Respondent filed Exceptions to the ALJ's Initial Decision. The main thrust of the Respondent's Exceptions is that "[t]he ALJ has inappropriately rewritten Bell's Commission-approved Audiotex tariffs and required Bell to guarantee revenues for Audiotex sponsors even where their customers do not pay the sponsors' charges."(Exc., p. 1.) The Respondent attempts, in its Exceptions, to reargue these issues which have been carefully considered and decided against the Company by ALJ Kashi.

Bell, at page 3 of its Exceptions, asserts that the Company fully complied with its valid tariff by charging adjustments back to the Complainants. In support of its assertion, Bell states the following:

In June 1987, Bell revised its Audiotex tariff to charge Audiotex sponsors for adjustments given to callers to Audiotex programs. Pa. P.U.C. No. 1, Sec. 36, in ("1987 Tariff"). [FN1] These revisions authorized Bell to credit customer accounts when a customer complains about or disputes a charge on the customer's bill and to deduct these adjustments from the compensation Bell pays to sponsors. Without the ability to charge adjustments to sponsors, Bell would compensate sponsors for calls when customers did not pay for them.

Bell took extraordinary steps with this tariff revision to protect the Audiotex sponsors. Specifically, Bell limited adjustments to first-time claimants and required all claimants to sign an Adjustment Agreement and return it to Bell before granting the adjustment. *Id.* Para. A.3.aa. In fact, although Bell grants adjustments for other services, there is no circumstance where Bell requires a customer to sign and return an Adjustment Agreement before adjusting their bill. Tr. 359. The Adjustment Agreements were designed to protect against repeat adjustments for the same customer.

FN1 Relevant portions of Bell's 1987 Tariff are produced in Attachment A to these Exceptions.

Exc., pp. 3-4. The Company further asserts that it satisfied its obligation to substantiate the adjustments. Bell alleges it provided "'[a] monthly summary of adjustments . . . on the Audiotex monthly bill' of each Audiotex sponsor. 1987 Tariff Sec. A.3aa. In addition, Bell agreed to provide, upon request, a report showing the adjusted customer's central office designation, the number of calls adjusted, the total dollar amount adjusted, and the number of minutes adjusted."(Exc., p. 4)

[2][3] The ALJ in his Initial Decision, concluded that Bell failed to substantiate the adjustments. To support his conclusion, the ALJ provided the following discussion:

Item No. and Description

Period to be

The issue here is what was Bell required to keep, if anything, in the way of records related to the adjustment and in what form? The June 9, 1987 Tariff provides in relevant part:

The Telephone Company will make adjustments for 976 calls in accordance with the following adjustment policy:

- When a customer makes a first time claim for 976 calls billed to his/her account that:

1) customer did not approve or have awareness that call was made, or 2) customer did not have knowledge of the price per call due to the sponsor's failure to comply with Sections of this Tariff.

- Customer will be required to sign an "Adjustment Agreement" before the Telephone Company makes the adjustment for the 976 calls in the claim.

- By signing the Adjustment Agreement, the customer waives any further claim(s) for adjustment on 976 calls.

Pa. P.U.C. - No. 1, Section 36, Paragraph A.3aa., First Revised Sheet 13.

The tariff is quite clear that there is a memorial to be made which is at least for the specified purpose of waiving any future claim(s) for adjustment on 976 calls. So now we have a document and a minimum purpose for it. The next questions arise as to how long should that document be kept, in what order, and to whom shall it be available?

In response to an Interrogatory from Complainants, Bell provided a copy of General Instruction 400, "Retention of Records" and relevant pages from the *Records Management Manual.* (See Phone Talk Motion for Summary Judgment attachments).

Bell notes in General Instruction No. 400, page 4, Paragraph 6.13, that "The Pennsylvania Public Utility Commission has ordered that the Company shall keep and preserve its records in conformity with the rules of the FCC." Section 42.9 of those requirements include the following:

of records	Retained	
g.	Detailed records of adjustments of customers' accounts, including authorizations for refunds, adjustment vouchers, or other authorizations to correct charges due to errors, service failures, etc.: (1) Telephone carriers	1 year
h.	Uncollectible vouchers or other authorizations for writing off customers' accounts and other records and reports pertaining thereto.	6 years
i.	Work papers used by telephone carriers in developing estimates of unbilled revenues and accounts receivable.	6 years after estimate is superseded

Thus, pursuant to Commission Order, Bell is required to keep detailed records of adjustment of customers' accounts for a period of 1 year.

By letter dated July 7, 1987, Bell informed all sponsors of the new adjustment policy. In particular, sponsors were told that they would be provided, upon request, a report showing the adjusted customer's central office designation, the number of calls adjusted, the total dollar amount adjusted, and the number of minutes adjusted. The providers were also expressly informed that "the entire customer telephone number, name and address is not provided in order to protect the privacy of these customers."

Bell believes that it has some legitimacy to this position by stating that at about the same time, J. J. Doherty, Jr., Bell's Vice President-Regulatory and Governmental Affairs, sent a letter to Commissioner Shane, stating, "The full customer telephone number, name and address will not be voluntarily provided to any sponsors, but only will be provided in order to comply with the lawful order of a court or competent authority." (See Bell Memorandum in Opposition to Complainants' Motion for Partial Summary Judgement p. 12, *Thielemann Affidavit*, Exhibit B, Bell Main Brief, p. 13, Bell Ex. 6).

While we are uncertain of the disposition of that letter we are sure it does nothing to relieve Bell of its duties under a Commission Order.

Bell argues, first, that the Complainants have mischaracterized the facts. Bell did not "destroy" or "purge" records which contain this information, as Complainants have claimed. Rather, as Bell witness Ms. Sprignoli has testified, records of the more than 30,000 adjustments charged back were not kept in a mechanized system and cannot be retrieved without substantial burden by Bell. Ms. Sgrignoli estimated that this effort would take approximately 16,000 hours - the equivalent of eight people working full time for a year (N.T. 105, 106, 171-172).

Second, Bell argues, it should not be surprising that such data is not easily retrievable, since Bell is not required by tariff or other authority to provide this information to the sponsors. We disagree.

A request for detailed data was made by Phone Talk September 2, 1988. According to the above FCC requirements for retention of records, these records should have been available, not from May 1988, but from September 1987. The September 1987 print-outs (had they been provided) would have shown the adjustments reflected on October 1987 bills, which is the earliest bill on which adjustments were made. The adjustments which showed up on Complainants' statements from Oct., 1987 through May, 1988, and for which no computer print-outs have been provided total the following amounts:

Carmel Comm.:	976-0300	$185,885.05
'	976-7278	158,086.61
Dial-Phone	976-6969	8,672.48
'	976-2385	1,760.14
Calif. Comm.:	976-5300	1,016.00
'	976-4500	795.20
	Total	$356,216.48

(For detailed charts showing the monthly figures for each line and summary totals for all lines, adjustments and uncollectibles, with and without computer print-out back-ups, and billed amounts, see Attachment 6 to Complainants' Memorandum in Summary Judgement.

Similarly, Goldstrike sued Bell in November of 1988 and filed a request for detailed data in December of 1988. According to the above FCC requirements for retention of records, these records should have been available, not from May 1988, but from November 1987. The November 1987 print-outs (had they been provided) would have shown the adjustments reflected on December 1987 bills, which is one of the earliest bills on which adjustments were made. The adjustments, which showed up on Goldstrike's statements from September, 1987 through May, 1988 and for which no computer print-outs or Adjustments Agreement have been provided, total $65,057. (Goldstrike M.B. p. 20).

Bell argues that the tariff is the contract governing the relationship between the parties and therefore any requirement to provide customer-specific information to the sponsor should be explicit *Delph v. Pa. P.U.C.* 406 A.2d 1211 (Pa. Commw. Ct. 1979).

We agree to an extent with Bell that the tariff governs. However, the tariff here regulates three relationships not just two. It seems to us that the records are to be kept for the three parties involved; first, to protect the ratepayers seeking an adjustment; secondly to protect the sponsor by proving that adjustments were legitimately given; and finally to protect Bell from having to give more than one adjustment - although the way the tariff is implemented there is no danger to Bell since it just charges back any and all adjustments to the sponsors and then refused to prove

that they were legitimate.

The supporting data for these amounts has been rendered virtually unavailable by the Respondent because of the way such data is periodically "purged" from computer records. This is the functional equivalent of destroying the data. A party is obligated to preserve such records despite the existence of a regular program which would normally purge them on a periodic basis. *In re "Agent Orange" Product Liability Litigation*, 506 F. Sup. 750, 751 (E.D.N.Y 1980). (Phone Talk Main Brief p. 33). Complainants argue and we agree that Bell has not met the obligation. Bell counters that the Complainants have not proved that the adjustments were improperly charged back. (Bell Reply Brief p. 13). Nice trick it would be without any records.

It has been repeatedly held that a party responsible for destroying, or failing to produce, data or information which is or was in its hands will, at the least, be subject to any adverse inference which can be drawn from the failure to produce. *Nation-Wide Check Corporation, Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218-220, (1st Cir. 1982) (tracing both evidentiary and policy reasons for the adverse inference rule); *The Motor Launch No. 12*, 65 F. Sup. 252 (E.D. Pa. 1946).

Such "non-retention" of evidence will also support a default judgment against the "non-retaining" party. *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F. 2d 5, 2 F.R. Serv. 3d 1126 (1st Cir. 1985) Cert. denied 475 U.S. 1018, 89 L. Ed. 2d 317, 106 S. Ct. 1204 (1986); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987)*Carbucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984), Rev'd. in part, 775 F.2d 1440 (1985); *Wm. T. Thompson Co. v. General Nutrition Corp.* 593 F. Supp. 1443 (C.D. Cal. 1984). Bell argues that these cases cited by Complainants involve the destruction of evidence after the commencement of, or after being requested in connection with, litigation. *E.G.* , *BrocktonSavings Bank v. Peat Marwick Mitchell & Co.*, 771 F.2d 5 (1st Cir. 1985), *cert. denied* , 475 U.S. 1018 (1986) (after motion to compel production of documents granted, party resisting production claimed for the first time that the had been destroyed); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla 1987) (sanctions granted for willful and flagrant destruction of records specifically called for in a request for production). Bell argues that nothing of the sort exists here; that Bell has plainly not destroyed any of the documents at issue since the filing of these Complaints in September 1988 (Bell Main Brief, p. 15).

We disagree. Complainants had a necessary and legitimate right to the information and Bell in violation of Commission and FCC orders "destroyed" that information.

As an appropriate sanction against the Respondent for its actions and/or omissions in the preservation or presentation of this virtually needed information, Complainants respectfully ask that we find that Bell has violated its duties under PUC/FCC requirements and the duty placed on party litigants with regard to preserving relevant information, and order that Phone Talk Complainants be returned the amount at issue, $356,216.48, and Goldstrike $65,057. We will make such an order together with the as yet unquantified amount due Asten Martin.

I.D., pp. 37-45

We agree, to a certain extent, with the ALJ's conclusion that Bell was required to substantiate the adjustments it made for 976 calls.

The 1987 tariff permitted Bell to make adjustments to first time claimants for 976 calls; however, the claimants were required to sign an "Adjustment Agreement." (Pa. P.U.C. No. 1, Sec. 36, Para. A 3aa, First Rev. Sheet 13). Specifically, Bell's tariff reads, in pertinent part, that:

Effective thirty days from the effective date of this Tariff, the Telephone Company will track all adjustments made to each 976 Audiotex Service. All adjustments made in accordance with the adjustment policy of the Telephone Company will be charged to the Audiotex sponsor at the Sponsor Selected Price. A summary of adjustments will appear on the Audiotex monthly bill.

The Telephone Company will make adjustments for 976 calls in accordance with the following adjustment policy:

- When a customer makes a first time claim for 976 calls billed to his/her account that:

1) customer did not approve or have awareness that call was made, or 2) customer did not have knowledge of the price per call due to the sponsor's failure to comply with Sections of this Tariff.

- Customer will be required to sign an "Adjustment Agreement" before the Telephone Company makes the

adjustment for the 976 calls in the claim.

- By signing the Adjustment Agreement, the customer waives any future claim(s) for adjustment on 976 calls.

From the period of October 1987 through May 1988, the Respondent made adjustments totaling $356,261.48 to the Phone Talk Complainants; $65,057 to Goldstrike; and an unquantified amount, as of the time of the hearing, to Asten Martin. To support the aforementioned adjustments, Bell alleges, at page 4 of its Exception, that it provided "'[a] monthly summary of adjustments . . . on the Audiotex monthly bill'." Bell asserts that the ALJ's Conclusion that it ". . . had an obligation 'to provide the sponsors with the name and address of customers who have been granted an adjustment (Bell Ex. No. 2.)' Rec. Dec. at 71 . . . is completely unfounded because neither Bell's tariff nor the PUC's rules impose any obligation on Bell to provide customer name and address information to sponsors."(Bell Exc. pp. 4-5.)

[4] We disagree with the ALJ's finding that Bell was required to provide the Complainants' with the written adjustment agreements filed out by end-user customers. Although Bell's tariff required the execution of adjustment agreements as a condition for granting 976 billing adjustments, there is no express requirement that copies of the agreements be given to the Audiotex sponsors.

Bell maintains that it did not turn over the agreements because it wanted to protect the privacy of the customers who obtained adjustments. The Company, in its Exceptions, states that it "deliberately" did not include the obligation to provide customer name and address information to sponsors in its tariff in order to protect the privacy of these individuals.

The Respondent asserts that:

At the time the tariff was approved, Bell carefully explained and specifically committed to the Commission that "[t]he full customer telephone number, name and address will not be voluntarily provided to any sponsor, but will only be provided in order to comply with the lawful order of a court of competent authority." Bell Exh. No. 6 (Attachment C). In addition, sponsors were specifically told that they would *not* be provided with the entire customer name, address or telephone number "in order to protect the privacy of these customers." Bell Exh. No. 2. The ALJ erred by neglecting to give proper weight to these facts.

Exc., p. 5

The ALJ found persuasive the Complainant's argument that it was a condition of the tariff that Bell turn over the agreements so that the Audiotex sponsors could verify the accuracy of the billing adjustments deducted from the compensation that Bell remitted to the sponsors. The ALJ further found Bell's action in failing to turn over these agreements constituted a violation of the Public Utility Code.

We disagree with ALJ Kashi's tariff interpretation that Bell's tariff required that the billing adjustment agreements must be turned over to the Audiotex sponsors. This requirement is not set forth expressly in the tariff. Rather, we find that the ALJ inferred that since the adjusted amounts were deducted from the compensation paid to the Audiotex sponsors, the agreements were necessary for verifying Bell's calculations. We agree that some verification is appropriate. However, we cannot agree that Bell's refusal to turn over the agreements constituted a tariff violation, considering that the tariff did not contain this express requirement.

We interpret Bell's refusal to turn over the agreements to be based on a legitimate privacy concern to protect the confidentiality of the customers who received adjustments. Our Bureau of Consumer Services ("BCS") has also recognized this concern in its ruling on Informal Complaints involving 900 charges. The BCS has sometimes restricted the local exchange company from providing to the information provider the name and address of the customer who received the adjustment. This policy helps to discourage third party collection activity for charges adjusted by the local exchange company.

Moreover, Bell's approach appears to be consistent with our proposed rulemaking entitled *Confidentiality of Customer Communications and Information* , at Docket No. L-890046, 20 Pa. Bulletin 2369 (May 18, 1991). There, the general rule is that "customer information" which includes the names, addresses and telephone numbers of customers (52 Pa. Code § 63.132) is not to be disclosed to "persons outside the telephone company." 52 Pa. Code § 63.135. None of the exceptions to the general rule appear to fit the circumstances of this case. We recognize that the proposed regulations are not binding on this proceeding; yet, the proposed regulations lend some guidance to the plausibility of Bell's position concerning refusal to turn over the documents at issue. We point out, as a caveat, that Bell's

letter from one of its vice-presidents to former Chairman Shane is not dispositive of this issue.

The question of how the Audiotex sponsors can verify the accuracy of Bell's calculations must still be resolved, however. A fairly straightforward solution would be for Bell to expurgate all "customer information" from the adjustment agreements and to provide an expurgated copy of each agreement to the Audiotex sponsor.

Bell further argues, in support of its contention that it has satisfied its obligations to substantiate the adjustment given to the sponsors' customer, that the ALJ ". . . made the unsupported finding that Bell did not adequately maintain records of Audiotex adjustments in accordance with PUC and FCC rulings that such records, be kept for one year."(Exc. p. 6). Bell asserts that its research has disclosed no requirement by the PUC or FCC that it maintain records of such adjustments for one year.

[5] We believe that the ALJ has adequately addressed this issue in his Initial Decision, and we reference pages 38-39 of the Initial Decision which we restated at pages 18-19 of this Opinion and Order. We would point out, however, the following additional facts. First, General Instruction 400, "Retention of Records" and relevant pages from the *Records Management Manual* was obtained from Bell in response to an Interrogatory from the Complainants. Second, the Respondent's witness, Ms. Sgrignoli, presented the following testimony regarding Bell's General Instruction 400:

BY MS: KENNY:

Q. Referring you to the first page of the three page document, that is Phone Talk Exhibit No. 12, it is called General Instruction Number 400. Would you please explain to me what General Instruction Number 400 is, is it a part of a series of instructions?

A. Yes, we have instructions for almost everything and one of the important instructions that we have is on the retention of records.

Q. And is this - these instructions, who are these instructions given to, are there certain people?

A. *Every employee in the company is responsible for following the requirements of this instruction.*

Q. There is a section marked Section 6, I think it may be on the second page of the General Instruction Number 400. Section 6.14. *The federal rules; in conformity of the FCC, is that your understanding - the Pennsylvania Public Utility Commission has ordered that the company shall keep and preserve its records in conformity with the rules of the FCC is that your understanding?*

A. *Yes.*

Q. It has been provided by the FCC rules and regulations related to retention of records. It is very blurry. In looking at that, I hope that your copy is somewhat legible. Is this third page of this exhibit, is this your understanding of the rules and regulations that apply to the phone company records?

A. Yes.

Q. And would that help refresh your recollection as to how long certain records would be kept?

A. Yes.

Q. Going back to adjustments. Customers that have had their bills adjusted by Bell, how long is Bell required to keep those records.

A. Well, according to this, it says detailed records of adjustments of customer accounts including authorization for refunds, adjustment vouchers or other authorizations to correct charges due to errors, service failures, et cetera, for telephone carriers only.

Q. How long do you keep those records?

A. *Well, I have to confess that in most cases, we keep them longer than that, but we are required to keep them for one year.*

Q. Okay. And how about disputed records of customers that may not be an adjustment, but someone who has a dispute with Bell over their bill?

A. We have detailed records of all accounts for that period of time. We do not distinguish between disputed records and undisputed records. We keep all of the records for that period of time.

Q. And that is for a one year period?

A. At least.

[Emphasis Added]

Tr., pp. 289-292.

Thus, all of Bell's employees are required to operate under the provisions of General Instruction 400, as testified by Witness Sgrignoli. Finally, Bell never revised, modified, or otherwise adjusted the testimony of Witness Sgrignoli nor did the Respondent object to the admission, into the record, of General Instruction 400. We find Bell's argument that is now being raised in its Exceptions to be without merit. Since Bell failed to retain a copy of the adjustment agreements for the required one year period, these documents appear not to be available to substantiate Bell's calculations concerning adjustments deducted from the compensation paid to the Audiotex sponsors. Consequently, we agree that the ALJ's ordering of refunds for adjustments made before May, 1988 which were not authenticated by the adjustment agreements, expurgated or otherwise, is appropriate. Accordingly, based on the ALJ's analysis, as contained in his Initial Decision to the extent it is consistent with our discussion, we deny Bell's Exception that it fully complied with its valid tariff by satisfying its obligation to substantiate the adjustments.

Bell contends, in its second Exception, that it fully complied with its valid tariff by charging back uncollectible amounts to the Complainants. In support of its contention, Bell offers the following discussion in its Exceptions:

In June 1987, Bell modified its tariff to insure that audiotex sponsors are not compensated for calls which their customers do not pay for. This tariff provides that Bell will compensate the audiotex sponsor for only "a portion of the amount billed" to the sponsor's customer "based upon the amount collected or adjusted and the specific rates set forth elsewhere in this Tariff." 1987 Tariff, Sec. 36A.2.c. This tariff provision was approved by the Commission on June 5, 1987, and became effective three days later. It authorized Bell to deduct uncollectible amounts from the compensation it pays to sponsors.

In early 1988, Bell filed clarifying tariff language to eliminate any question that audiotex sponsors - rather than Bell - bear the cost of uncollectibles. This tariff filing made clear that compensation paid to audiotex sponsors will be "net of any charges to customers the Telephone Company has written off as uncollectibles." Pa. P.U.C.- No. 1, Sec. 36 C.18 ("1988 Tariff"). [FN5]

On May 26, 1988, the Commission approved the reinforcing language filed by Bell. The Commission indicated it "had the impression that Bell was already billing [audiotex] Sponsors for uncollectible accounts" under the authority of the tariff modification approved one year earlier, (1987 Tariff, Sec. 36A.2.c.).*Pa. P.U.C. v. The Bell Tel. Co. of Pa.*, Docket No. R-880970, Opinion and Order at 5 (May 26, 1988). The Commission went on to find "no valid objection to allowing Bell to strengthen the Tariff language pertaining to Bell's authority to charge sponsors for uncollectible accounts." *Id.*

After this tariff language became effective, Bell began to charge back to the sponsors amounts written off as uncollectible. Some of the accounts which Bell wrote off included charges for calls made as early as November 1987.

FN5 Relevant Sections of the 1988 Tariff are reproduced as Attachment E to these Exceptions.

In discussing and resolving this matter, the ALJ states, as follows, in his Initial Decision:

The next question before us involves whether that revision to Respondent's Tariff effective June 1, 1988 allowing remittances to be made complainants "net of any charges to customers the Telephone Company has written off as uncollectibles" (Pa. P.U.C. - No. 1, Section 36, Paragraph C.18, Fourth Revised Sheet 10) and whether it operates prospectively and not retroactively, and whether amounts otherwise due to Complainants can be reduced only for uncollectibles representing calls made on or after June 1, 1988 and not before, and whether all amounts retained by Respondent under order of this tariff provision should be restored to Complainants.

The facts regarding this issue are straight forward. Sometime in late 1987 and early 1988, it became increasingly apparent that many of its customers utilizing tariffed Audiotex service were either unwilling or unable to pay their bills for this service (N.T. 360-361, 369). This caused serious consequences to Bell which had already remitted the amount due to the sponsors (Bell Main Brief p. 3). [FN8]

FN8 The magnitude of this problem is captured in Bell's Exhibit No. 5, which shows that Bell wrote off approximately $7 million of uncollectibles attributable to Audiotex services from June, 1987 to the end of 1988, none of which was charged back to the sponsors. Bell's witness Elizabeth Sgrignoli testified that Bell has been able to collect only 58.9% of amounts billed to customers for calls to Audiotex programs, as compared to Bell's overall collection rate of 97%. Bell Exh. No. 5.

In March of 1988, Bell requested certain changes to its Audiotex tariff. On June 1, 1988, a new Tariff went into effect designating an "uncollectible" as a deduction from remittances paid to Audiotex sponsors under the 1987 Tariff at Pa. P.U.C. - No. 1, Section 36, Paragraph A.3.r., *Second Revised Sheet and quoted in part herein at Page 4.*

The new 1988 Tariff effective June 1, 1988 reads as follows:

Such remittance will also be net of any adjustments granted by the Telephone Company to customers for the Audiotex Service during the billing period in accordance with Paragraph C.27 of this Tariff and/or *net of any charges to customers the Telephone Company has written off as uncollectibles.*

Pa. P.U.C. No. 1, Section 36, Paragraph C.18, Fourth Revised Sheet 10 (Emphasis added indicating new language).

After June 1, 1988, Bell started identifying Audiotex uncollectibles and charging these amounts back to information providers. Bell went back to *November 1, 1987* records to find these calls (N.T. 352-353; 326). Some of the uncollectibles charged back to sponsors represented calls made nine, ten, even twelve or more months earlier (N.T. 258-260; 325; 355; 493). Review of computer print-outs of the "uncollectibles" charged against these Phone Talk Complainants indicates that $441,116.00 or almost ninety percent of the total $496,581.00 "uncollectibles" represent pre-June 1, 1988 calls; that of Asten Martin total "uncollectibles" of $876,059.00 almost 88% or $787,314 represent pre-June 1, 1988 calls; that of Goldstrike total 99.9% or $113,765 represent pre-June 1, 1988 calls [FN9] (Bell's Statement No. 1, Attachment C, revised).

FN9 Complainant Goldstrike has been out of business since *June 12, 1987.*

Complainants argue that this is illegal retroactive ratemaking. Respondent claims its tariff expressly permits Bell to charge back to sponsors amounts that Bell "has written off as uncollectible." Further, Bell claims that the uncontradicted evidence shows that the uncollectibles charged back were in fact "written off" after June 1. Bell seeking its ultimate authority looks to the Order and Opinion of this Commission dated May 26, 1988 which permitted the tariff changes. In its *Opinion* the Commission stated:

Although we had the impression that the Company was already billing IDS sponsors for uncollectible accounts . . ., we perceive no valid objection to allowing Bell to strengthen the Tariff language pertaining to Bell's authority to charge sponsors for uncollectible accounts. [FN10]

FN10 Opinion and Order, Docket R-880970, slip op. at 5 (May 26, 1988) ("May 26 Opinion").

We are not sure how the Commission became misinformed, for prior to June 1, 1988 there was no language in the tariff to "strengthen" regarding uncollectibles. Uncollectibles are first tariffed in the June 1, 1988 tariff. Additionally, not even the Commission can authorize retroactive ratemaking.

All Complainants succinctly argue the matter in their Main Brief (Phone Talk M.B. pp. 21-26, Goldstrike M.B. P. 24-34, Asten Martin M.B. pp. 10-12).

It is a fundamental rule of due process that you do not change the rules after the game has been played. This is why the United States Constitution forbids ex post facto laws. Article I, Section 9. The Commission is "clearly bound by the due process provisions of constitutional law and by the principles of fairness." *Town Development, Inc. v. Pa. P.U.C.*, 50 Pa. Commonwealth Ct. 104, 107, 411 A.2d 1317 (1980), citing *Smith v. Pa. P.U.C.*, 192 Pa. Superior Ct. 424, 162 A.2d 80 (1960). See also *Soja v. Pa. State Police*, 500 Pa. 188, 193, 455 A.2d 613 (1982): "The principal that due process is fully applicable to adjudicative hearings involving substantial property rights before

administrative tribunals is well established." This responsibility is recognized by the Commission. *Randall R. Schubert v. Smith Hauling, Inc.*, 50 Pa. PUC 259, 261, (1976); *Re Dela Cab Co.*, 50 Pa. PUC 451, 454 (1976).

To meet the requirement, the Commission and courts have long required that changes in a utility's rates apply only to service provided in the future. For example, the court said of a Commission Order in a Pennsylvania Power and Light Company case, "That order, allowing an increase in the rates of the utility, could operate prospectively only." Magee Carpet Co. v. Pa. P.U.C., 174 Pa. Superior Ct. 438, 448, 102 A.2d 229 (1954). See also *Pennsylvania Gas & Water Co. v. Pa. P.U.C.*, 79 Commonwealth Ct. 417, 428 (1984). This also reflects the Commission's position:

On August 15, 1983, the respondent, The Peoples Natural Gas Company filed a petition seeking permission to file a Competitive Energy Rate (CER) that would be effective on June 21, 1983 or alternatively, on August 15, 1983 . . .

. . .

The adoption of either effective date by this Commission would constitute the retroactive establishment of a rate. This Commission is not amenable to such a request for legal and practical reasons. Instead, the CER rate, as revised pursuant to the Commission imposed conditions, will be allowed to become effective upon one day's notice.

Pa. P.U.C. v. Peoples Natural Gas Co., 57 Pa. PUC 555, 556, 557-558 (1983). And again: "Our general policy is that proper ratemaking principles permit these changes to be accounted for only on a prospective basis." Pa. P.U.C. v. Philadelphia Electric Co., 56 Pa. PUC 191,228 (1982).

Once a tariff filing is approved by the Commission, both the Utility and its customers are entitled to rely on it until a change is made by the Commission acting in its quasi legislative capacity. Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 369 (1942), appeal dismissed, 317, U.S. 588 (1942); Suburban Water Co. v. Oakmont Borough, 268 Pa. 243, 248-249 (1920). The Complainants here have a right to rely upon the procedures and rates established by the June 9, 1987 tariff for all calls made to their services between that date and June 1, 1988. There was no notice in the tariff during that time that, at some undetermined moment in the future, Bell could reach back - sometimes by as much as a year - and retroactively change the rules and rates on reimbursement.

Tariffs cannot be filed covering past periods. Chambersburg Gas Co. v. Pub. Serv. Comm., 120 Pa. Superior Ct. 206, 217 (1935). In a 1980 decision involving Bell Telephone Company, the Commonwealth Court emphasized that under 66 Pa. C.S. Section 1303, "There can be no lawful rate except the last tariff published as provided by law, and the effective rate thus published supersedes all prior rates relating to the service therein called for." *Bell Telephone Co. of Pa. v. Pa. P.U.C.* , 53 Commonwealth Ct. 241 244 (1980), citing Duquesne Light Co. v. Pub. Serv. Comm., 273 Pa. 287, 117(A) 63 (1922) (Emphasis in original). See also *Pa. P.U.C. v. Commonwealth* , 23 Commonwealth Ct. 566, 575 (1976); *Pennsylvania R.R. Co. V. Silberman*, 23 Dauph. 1, 48 C.C. 375, 8 Corp. 313, 290 Dist. 605 (1920).

Further, the rate to be charged is the rate in effect at the time that the service is delivered. *Bell Telephone Co. of Pa. v. Pa. P.U.C.*, 53 Commonwealth Ct. 241, 245 (1980) and numerous cases there cited. In this instance, the service provided is the connection of a customer with Complainants' Audiotex service, which occurred on the day the call was made. Prior to June 1, 1988, the tariff provisions called for the cost of that call, if uncollectible from the customer, to be borne by Bell. The tariff made effective June 1, 1988 was powerless to reach back in time and change that provision. Not even the Commission can do so. See West Penn Power Co. v. Pa. P.U.C., 174 Pa. Superior Ct. 123, 131 (1953): "Consequently, after it had previously approved the rates, the Commission could not give retroactive effect to its order of February 16, 1953, and direct refunds to consumers for charges made beginning October 29, 1951."

Complainants argue and we agree that it is no defense to say that, although the calls [were] made during the period that the 1987 tariff was in effect, the calls were not declared uncollectible until after the 1988 tariff became effective. Complainants submit that is a subterfuge to get around the clear requirements of the law. Bell had - and has - arrogated to itself the exclusive determination of what bills become uncollectible, and when, and what is to be done about them. To allow it to succeed in changing the rules that were in effect when those calls were made would be to allow it to do indirectly what it is forbidden to do directly. (Phone Talk M.B. p. 25). We agree. Bell "cannot demand or receive directly or indirectly a greater or lesser rate than specified in its tariff." West Penn Power Co. v. Nationwide Mutual Insurance Co., 209 Pa. Superior Ct. 509, 512 (1967) (Emphasis Added).

Nor is it a defense for Bell to complain that forcing it to bear these uncollectibles is a financial hardship for it: The Commission must order that the Complainants be charged only the tariffed rate applicable when the service was rendered "without considering whether or not the effect will be to reduce the utility's total revenue below that to which it is entitled; for in no event can it charge more than the schedule rate . . . "*Duquesne Light Co. v. Pub. Serv. Commn*,273, Pa. 287, 295-296, 117 A. 63 (1922). If the Respondent's failure to file a tariff allowing chargebacks of uncollectibles much earlier than it did represented an unreasonable decision, then argue Complainants, the Commission would require that the burden of that decision be borne by the Respondent and its shareholders rather than by Respondent ratepayers. There is just no magic in the written words Bell relies on nor is there any in the word "strengthen" in the Commission Opinion of May 26, 1988 (Bell Main Brief pp. 7-11).

Bell has claimed the right to adjust Complainants' statements for "uncollectibles" which it, in its sole discretion, determined would be given that classification, and which it adamantly refused to divulge to Complainants until forced to do so by discovery in a formal complaint proceeding - and then only six months after such information was requested. (See N.T. 413 for refusals in June 1988 to provide names and addresses for uncollectible calls). Bell's activities have amounted to setting its own rates. There was never any way for Complainants to determine what "uncollectible" total would show up on the next bill, how old the calls were that were being charged back, or whether any real bills underlay the gigantic numbers appearing on their statements. One of the primary purposes of regulating public utilities is to assure its customers of certainty of the rules of the game: They are to be public and publicly known. "To allow a utility to implement rates on its own volition would be tantamount to delegating, to the very party we are bound by law to regulate, the authority to establish its own rates. Such a delegation of authority is clearly impermissible." *National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 81 Commonwealth Ct. 148, 159 (1984).

Complainants summarize by arguing that allowing Bell to retroactively charge back to these Complainants uncollectible amounts arising from calls made before June 1, 1988 would violate Constitutional requirements of fairness and due process and would specifically violate 66 Pa. C.S. Section 1302 and 1303, which require as follows:

. . . every public utility shall file with the Commission, within such time and in such form as the Commission may designate, tariffs showing all rates established by it and collected or enforced, within the jurisdiction of the commission.

[Section 1302, in relevant part]

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable of [sic] service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

[Section 1303]

This means exactly what it says, and when a utility tries to charge a rate or impose a condition not provided for in its tariff, the only proper response is to order a refund to the customer. Action contrary to Sections 1302 and 1303 is *per se* illegal and unjust, fulfilling the requirements of Section 1312 for a refund. *Arthur E. Simmons v. West Penn Power Co.*, 53 Pa. PUC 285, 288 (1979).

The last sentence of 1303 embodies a well known principle of construction; terms and conditions are strictly construed against the party drafting them. Nothing prevented Bell from putting language regarding uncollectible[s] in any prior tariff. The Commission has always stopped the collection of rates which are not tariffed. Bell's arguments that the Complainants "conveniently ignore the fact" that they are not out-of-pocket any money is just insulting. If these losses wipe out an entire contribution generated by Audiotex service as Bell claims is threatened, then so be it. These are some of the problems inherent with the Baby Bells going it alone in new ventures. (Bell Reply Brief p. 2).

We conclude that Respondent's actions in charging back uncollectibles on calls made prior to June 1, 1988 violate Sections 1302 and 1303 of the Public Utility Code and we will order that Respondent refund charges made as "uncollectibles" to Complainants prior to June 1, 1988. We will also enjoin Respondent from implementing such charges until such time as a new tariff is approved. *Pa. P.U.C. v. Tenny*, 28 Commonwealth Ct. 496, 368 A.2d 1362 (1977).

I.D. pp. 45-56.

The Respondent asserts, in its Exceptions, that the ALJ is wrong in his interpretation of the tariff change made in 1987. Bell suggests that the 1987 tariff provided the Company with the authority to charge back for uncollectibles. The Respondent specifically states that the tariff ". . . expressly provided that Bell will compensate the Audiotex sponsor '*based upon the amount collected* or adjusted and the specific rates set forth elsewhere in this Tariff.' 1987 Tariff, Parg. A.2 c. (Emphasis Supplied)." (Exc., p. 11). Bell argues that the 1988 tariff "simply strengthened the existing provision regarding Bell's authority to charge sponsors for uncollectible accounts and described how these chargebacks would be made."Furthermore, the Respondent argues that ". . . the ALJ's belief that the 1988 Tariff only permitted Bell to charge back uncollectible amounts for calls made after the effective date of that tariff is contrary to the plain language of that tariff provision."(Exc., pp. 11-12).

Complainant's Phone Talk, Inc., Carmel Communications, Inc., California Communications, Inc. and Dial Phone Recording, Inc. offer, in their Reply to Exceptions, the following response to the Respondent's arguments:

This is the first mention of that argument since this proceeding was instituted in September 1988. When specifically asked to identify all tariff provisions upon which it would rely to support its charge-backs and adjustment, Bell identified only Pa. P.U.C. No. 1, Section 36, Paragraph C.18, fourth revised sheet 10 (effective June 1, 1988) and Pa. P.U.C. No. 1, Section 36, Paragraph A.3.r. (Bell's Response to Complainants' Interrogatory No. 1). This answer was never supplemented and the record contains no discussion of any other tariff provisions. Bell's failure to supplement its Interrogatory response now estops it from asserting a new theory of its case at this late stage, when the record has long been closed. (R.E. pp. 10-11).

Complainant Goldstrike, in its Reply to Exceptions, makes the following observations:

Bell, however, presents for the first time in its Exceptions a novel argument. In fact it is so novel to real life, to this proceeding and to factual evidence to rise to Bell's second misrepresentation contained in its Exceptions to the Commission. Obviously it was the product of immense scrambling in the Bell legal office resulting from the severity of the ALJ's findings. (R.E. p. 13).

Additionally, Complainant Asten Martin offers the following response to the Respondent's arguments:

This argument is more than disingenuous. A brief answer is that Bell never raised this argument previously, during discovery, the hearing, or in the briefs to the ALJ, and has accordingly waived its right to raise this argument. The purpose of the hearing process established under the Code is to permit the parties to assert their respective positions, in an *orderly* fashion, at a hearing. 66 Pa. C.S. § § 355, 703. Saving up any arguments a party may wish to assert for later violates the due process rights of the other parties and waives the party's right to assert that position. See 52 Pa. Code § 5.431(a), § 5.571. We respectfully submit that the Commission is totally justified in refusing to consider this argument because Bell has waived its right to assert it at this late date.

We agree, to a certain extent, with the Complainants observation. Our review of the record in this proceeding reveals that the Respondent did not raise the argument that the 1987 tariff permitted the Company to charge back uncollectibles during discovery, the hearing or in its Briefs. However, a party to a proceeding before this Commission may advance new and novel arguments, not previously heard, in its Exceptions so long as the arguments rely upon evidence in the record. In this proceeding, Bell's argument that the 1987 tariff permitted the Company to charge back uncollectibles is premised on the following language from its 1987 tariff:

The Telephone Company or Participating ICO will transport, bill and collect for dial station-to-station, calling card, or billed to third party calls originating within the specific 976 Audiotex Serving Area by Telephone Company or Participating ICO customers respectively. The Telephone Company will remit a portion of the amount billed to the particular 976 Audiotex Service Sponsor based upon the amount collected or adjusted and the specific rates set forth elsewhere in this Tariff.

1987 Tariff, Sec. 36A. 2.C

The aforementioned tariff section was admitted into evidence as a part of the Respondent's Statement No. 1. (Tr. p. 494). Accordingly, we shall consider the Respondent's argument.

Before we address the merits of the Respondent's argument

that it had the authority to charge back uncollectibles, we believe a discussion of Bell's billing and collection process is appropriate.

Bell Witness Crane, who is responsible for billing and collection procedures for Bell Atlantic, testified that its collection practices are broken into the categories of business and residential. (Tr., p. 59). Witness Crane further testified that its customers receive monthly bills for current charges. If those charges remain unpaid at the next billing date, the charges are referred for collection activity. (Tr., p. 60). Written notice for payment is sent out giving the customer seven days to pay the bill. If payment is still not made, Bell's service representative will take a number of additional actions, including a telephone contact and payment arrangements, in an attempt to secure payment (Tr., pp. 61-71). If payment is still not made within sixty to ninety days of the initial bill, the unpaid charges are deemed uncollectible by Bell and referred to an outside collection agency (Tr., pp. 72-80).

Bell Witness Crane testified that "[a]n uncollectible would be an amount of money that the customer is unwilling to - or unable to pay and we cannot collect."(Tr. p. 93). If the bill remains unpaid six months later, Witness Crane testified that "[i]t is written off as a bad debt on our . . . corporate books."(Tr., p. 92). If the amount in question is under $25.00. it is written off as an uncollectible at the end of 30 days. (Tr., p. 94).

Bell Witness Sgrignoli, who is the manager in charge of billing products, testified that "[a]n uncollectible is an account we have not been successful in collecting, and we have to write off the corporate books."(Tr., pp. 243-244). Witness Sgrignoli provided the following testimony with regard to Bell's uncollectible practices after June 1, 1988:

MS. KENNEY:

Q. Why don't you then tell me what those uncollectible practices are?

JUDGE KASHI: That's after June 1?

MS. KENNEY: After June 1.

THE WITNESS: Of 1988?

MS. KENNEY: Yes.

THE WITNESS: As they affect Audiotex accounts?

MS. KENNEY: Yes.

THE WITNESS: For those accounts where the bill is over $25.00, those would be referred to the credit manager. To the extent that we are able to identify that there are Audiotex charges on those bills, we must manually identify those calls and then charge them back from the bills for recovery from the sponsor. That action will not occur within the 180 day time frame after June 1st, 1988.

BY MS. KENNEY:

Q. When would it occur after June 1st, 1988?

A. After June of '88, it occurs rather quickly, within maybe 30 days.

Q. Within 30 days. So that for calls - for bills under $25.00 -

A. Bills under $25.00 are not affected with respect to Audiotex.

Q. Are not affected with respect to Audiotex?

A. No.

Q. So they would not appear - they would not be written off in the accelerated time period? It would still take 180 days for those bills?

A. The bills under $25.00 are always written off the company books in an accelerated time frame. Those are not investigated for Audiotex calls. Therefore, they are not charged back to the sponsors.

Q. They are not charged back to the sponsors. No bills under $25.00 are charged back to the sponsors.

A. The reason is because of the highly manual effort that has to be done.

Q. So that for the names of the parties listed on the printouts provided by Bell, they all had uncollectibles of over $25.00. Is that correct?

A. That's correct.

Q. These bills were referred to the credit manager. And for a period of 180 days, there are collection actions taken by Bell?

A. Are you talking about after June 1st, 1988?

Q. After June 1st, 1988.

A. For the calls - the account that has Audiotex calls?

Q. Right.

A. These are not held for 180 days.

Q. How long were they held for?

A. They are held for a period of time. I'm not sure that I can pin it down. It depends - this is not a mechanical process that causes these recharges to be generated and recovered by the sponsors. It's a manual process. So what we have to do is search the data base and determine which of those final bills has Audiotex calls on it.

When we do that, a service representative or a clerk must physically use our BOSS/BAC system. I don't know if you are familiar with that. It's the support system that they use in the business office to determine what charges are on customers' bills and that sort of thing.

So they access that system, and they look for every single call that is an Audiotex call. And every one of those has to be adjusted line by line.

Q. So that it's a manual process that someone is - an individual is going through a final bill and pulling out the 976 numbers?

A. That's right.

Q. Is that for calls made after June 1st, 1988, or for bills that become uncollectible after June 1st, 1988?

A. That uncollectible after June 1st, 1988.

Q. They may have calls that were made prior to June 1st, 1988?

A. That's possible.

(Tr., pp. 246-249).

Witness Sgrignoli provided the following testimony with regard to the actual remittances to the audiotex sponsors:

Q. When Bell creates a bill for a customer and a customer uses a 976 service and a charge is created, Bell at that time would file a month's printout that would list the calls that were made and make the necessary payment for 976 provider for the services that were used.

From that money that Bell is giving to the 976 providers, does Bell take a certain percentage back for fees, for the servicing, the collection, and the lines that were being used by that 976 provider?

A. There is a certain amount. I'm not sure what that is. There is billing and collection and transport fees.

Q. And that is for every call that was made that a 976 provider receives money for?

A. That's my understanding.

Q. And when a call is uncollectible, does Bell - the part of the bill that Bell receives as their service fee, is that also charged back to the 976 provider because that has not been collected?

A. It is included in the amount that's being charged back.

Q. So the amount that Bell is receiving then, if I am correct, includes the fee for Bell plus the amount that the customer did not pay?

A. No. It includes the whole amount that the customer did not pay. Included in that amount is the billing and transport fee. At least that's my understanding.

Q. That would have been already been deducted from the money received by the 976 providers when the money was originally paid to them?

A. That's correct.

Tr., pp. 255-256.

The Respondent argues that the 1987 tariff change, spe-

cifically Paragraph A.2, provided the Company with the authority to charge back for uncollectibles. If the Respondent relied on Paragraph A.2 for its authority to charge back uncollectibles, we are positive that Bell would not have waited until we approved its 1988 tariff to begin its process of charging back the uncollectibles. Bell's actions covering the period from June 9, 1987 until now demonstrates that it relied upon the June 1, 1988 tariff revision for its authority to charge back uncollectibles.

The Respondent's witnesses were unaware of Bell's authority to charge back uncollectibles pursuant to the 1987 tariff. Bell's witness Noel, who is the audiotex manager for implementation in Pennsylvania, testified that:

Q. Now, if you know, under the initial 976 tariff the one that happened in '84, what was charged back to Audiotex 976 information providers - whatever you want to call them. What did Bell charge back, if you know?

A. I don't know, not being familiar with the tariff.

Q. Am I correct in 1987 Bell, under the tariff that you are familiar with, charged back costs of billing, collection, transport to the Audiotex providers?

A. Yes.

Q. And, in addition, for the first time they were allowed to charge back adjustments they had made to customers; correct?

A. Correct.

Q. And that tariff subsequently changed in June of 1988 to allow Bell to also charge back amounts they had written off as uncollectible. Is that right?

A. That's correct.

* * *

Q. But you do interpret, if I understand it - let's me just ask a preamble question. Uncollectibles became a new thing in the 1988 tariff, did they not?

A. Became a new thing?

Q. In other words, there were no uncollectibles before the 1988 tariff?

A. That's correct.

Tr., pp. 204-205, 226.

Bell's witness Sgrignoli provided the following testimony with regard to what Bell was permitted to charge back under its Audiotex tariffs:

Q. Now, prior to June of 1987, June tariff, what could Bell charge back to audiotex providers under the existing tariff?

A. We were allowed to charge back adjustments, one-time adjustments.

Q. Prior to June of '87?

A. Prior to June of '87, we did not charge anything back to sponsors.

Q. What about your charges for transport, things of that nature?

A. We did not charge anything back to sponsors prior to June of '87, to my knowledge.

Q. You did deduct, however, from what was paid for the sponsors calls, an amount for billing transport and collection, did you not?

A. That's right.

Q. And then the remainder of that was remitted back to the sponsor?

A. That's right.

Q. Now, that first changed with the 1987 tariff provisions?

A. That's right.

Q. And then you were allowed to charge back in addition to deducting your billing charges and transport charges?

A. I think that there might be some misunderstanding regarding what we charge back. When we bill the end user, the sponsor charge includes, to our way of thinking, the

billing and transport charge, so that when we charge back an adjustment, we are also charging the billing and transport piece back with that adjustment with that call.

Q. So, essentially what you are saying is that Bell has than collected that little piece on that kind of a call, correct?

A. We haven't collected any of it.

Q. And since you were unable to collect it from the end user, it is being charged back to the service provider?

A. Well, the service provider has already received the money, so we are trying to recover it from the service provider.

Q. Now, as of June of 1988, you had the additional ability to charge back uncollectibles, per the 1988 tariff, is that right?

A. That's right.

Tr., pp. 322-324.

We note that the 1987 tariff change, specifically, Paragraph A. 2c which makes ". . . reference to payment being based on the amount 'collected or adjusted and the specified rates *set forth elsewhere* in the tariff' (emphasis added)", does not give the Respondent the necessary authority to charge back for uncollectibles (Asten Martin R. E., p. 10-11). This paragraph, which is under the description section of the tariff, is a general statement, and the specific provisions as contained in the section of the tariff entitled "Regulation" are controlling. Complainant Asten Martin points out that the aforementioned ". . . provision is contained only in the "Description" section of the tariff, and is at best a statement of policy underlying the changes in the tariff."(R.E., p. 11). We also agree with Complainants Phone Talk et. al. who state in their Reply to Exceptions that:

22. If Paragraph A.2.c were subject to the interpretation Bell now urges for it, it has taken almost three years for Bell to discover that interpretation. Bell's letter to sponsors dated July 7, 1987 (Bell Exh. No. 2; Bell's Exceptions, Attachment B) shows clearly that Bell interpreted its own tariff at that time to *only* authorize its one-time adjustment procedure for complaining customers, not an 'uncollectibles' chargeback as it now asserts. (R.E. p. 11).

Notwithstanding Bell's argument, we still find that Bell is only permitted to chargeback uncollectibles as of June 1, 1988, which was the effective date of the 1988 tariff.

The Respondent's tariffed remittance requirements applicable to its audiotex sponsors were clearly set forth in its 1987 Tariff, Sec. 36 A.3R. The regulations specifically state that:

Where applicable, the Telephone Company will issue a monthly remittance to the sponsor based on the total number of reimbursable calls from within the designated 976 Audiotex Service Serving Area completed to the 976 Audiotex Service. Such remittance will be net of any adjustments granted by the Telephone Company to customers for the 976 Audiotex Service during the billing period is [in] accordance with Paragraph A.3aa. of this Tariff. The amount of remittance is dependent upon the type of call (recorded announcement or live programming) and the transport, billing, and collection rate category (Telephone Company or Participating Independent Telephone Company).

The amount of remittance will be the difference between the Sponsor Selected Price per call or per minute, whichever is appropriate, and the Telephone Company's transport, billing, and collection rate per minute for the appropriate type and rate category of the call multiplied by the number of reimbursable minutes. Included in the Other Charges and Credits portion of the sponsor's monthly bill will be a summary of the number of calls or minutes which the amount of remittance is based.

The Telephone Company report of the number of calls originating within the specified 976 Audiotex Service Serving Area and completed to each 976 Audiotex program will serve as the sole document upon which remittance will be made. If the accuracy of this report is not disputed in writing within 30 days of the issuance of the remittance check, it will be deemed to be correct and no subsequent objection to the remittance will be accepted or honored.

There is no language contained in the above cited tariff provision that addresses uncollectibles. Additionally, Complainant Asten Martin Productions points, out at page 10 of its Reply to Exceptions, that:

Surely, Bell's July 7, 1987 letter explaining the adjustments procedure, which was sent out to all sponsors, contains no hint that Bell believed, at that time, that it *also* had the right

to charge back for uncollectibles. See Finding of Fact 19, Bell Exhibit No. 2; Attachment D to Bell's exceptions. It cannot now seriously be contended as Bell suddenly does, that no retroactive ratemaking occurred simply because the very power disputed in this case - Bell's authority to charge back for uncollectibles - was authorized by the 1987 tariff. The obvious answer is, had Bell *had* the power to do so, or *thought* it had the power to do so, it would have begun to charge back for uncollectibles then, in 1987 - no later, following passage of the new tariff in 1988.

Bell additionally argues, in support of its contention that it fully complied with its valid tariff by charging back uncollectible amounts to the Complainants, that the ALJ's interpretation of the June 1, 1988 tariff is contrary to the "plain language" of the tariff. Bell specifically states the following in support of its argument:

Moreover, the ALJ's belief that the 1988 Tariff only permitted Bell to charge back uncollectible amounts for calls made after the effective date of that tariff is contrary to the plain language of that tariff provision. Nothing in that tariff provision distinguishes charges for calls made before June 8, 1988, from charges for calls made after that date. The tariff simply provides that compensation paid to audiotex sponsors will be "net of *any* charges to customers the Telephone Company has written off as uncollectible." 1988 Tariff, Sec. 36 C.18 (emphasis supplied). All of the uncollectible amounts at issue were written off by Bell after June 8, 1988 using the same procedure in effect since 1984. [FN7]

The only way to interpret this tariff provision in the manner suggested by the ALJ is to add language to the provision which it does not presently contain. Absent such additional language distinguishing pre- and post-June 1988 calls, there is no support for the ALJ's interpretation of Bell's tariff. Bell fully complied with the tariff as it is written by charging back to the complainants all charges which became uncollectible after June 1988.

FN7 Bell's procedures require that an account be written off as uncollectible 180 days after it is referred to Bell's credit manager for collection. Tr. 58-59, 380-81. Amounts written off as uncollectible *before* the tariff effective date - amounting to almost $7 million - were borne by Bell. *See* Bell Exh. No. 5.

Applying the plain language of the 1988 Tariff revisions does not constitute "retroactive ratemaking", as Judge Kashi assumes. In fact, the opposite is true. Bell was *required* after June 1988 to reduce sponsor compensation by the uncollectible amounts written off after that date. If complainants wanted to challenge those provisions in the tariff, they had an opportunity to do so at the time the tariff was proposed. They failed to do so, and the Tariff applies prospectively to their claims.

Exc. pp. 11-12.

[6] The Respondent continues to argue that just because it waited until after June 1, 1988 to write off uncollectibles dating back to calls made in 1987 it conformed to its tariff. We find Bell's argument to be totally without merit and legal support. The *plain language* of the 1988 tariff provision can only be interpreted to apply to calls made after June 1, 1988, the effective date of the tariff, and later determined to be uncollectible. If we interpreted the tariff otherwise, we would allow Bell to engage in retroactive ratemaking which is unconstitutional. We agree with the ALJ's resolution of this matter as found at pages 30-39 of this Opinion and Order. Accordingly, for the reasons set forth by the ALJ in his Initial Decision and our discussion, herein, we shall deny the Respondent's Exception.

Bell asserts, in its last Exception, that there is no basis for assessing penalties. The Respondent argues that we are barred from imposing penalties because it fully complied with its tariff. Bell further argues that ". . . even if the Commission were to find that Bell violated its own tariff, which it did not, a penalty would not be warranted under the circumstances here."Exc., p. 14.

The ALJ, in addressing the issue of refunds and penalty, provided the following discussion:

The Complainants argue that all amounts refunded to Complainants should be refunded from the date of each excessive payment (Phone Talk Main Brief pp. 38-40; Asten Martin M.B. p. 17).

Phone Talk asks that we impose interest at 1.25% per month as required by 52 Pa. Code Section 64.171(3). The clear statement of purpose and policy behind that section specifically limits its application to residential telephone service.

Alternatively Complainants seek nine percent (9%) per

annum pursuant to 52 Pa. Code Section 64.41. As already stated we believe this to be limited to residential customers.

Finally, Complainants ask for refunds carrying the legal interest rate of six percent. We have found the actions of Bell to be in **violation** of 66 Pa. C.S. Sections **1302** and 1303 and to fulfill the requirement of Section 1312 for a refund and will order Respondent to pay refunds on amounts unjustly and unreasonably retained by Respondent.

The final question before us is who is to pay? The amounts in question approximate two million dollars before interest is added.

This Commission has held that whenever the utility's management abuses its discretion, the cost will not be passed on to ratepayers but must be absorbed by the utility. (*National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 76 Pa. Commonwealth Ct. 102, 464 A.2d 546 (1983). The standard is whether the utility's actions were reasonable and prudent given the facts known to it at the time. A public utility is only allowed to recover its reasonably incurred expenses. (*UGI Corp. v. Pa. P.U.C.*, 49 Pa. Commonwealth Ct. 69, 86-87, 410 A.2d 923, 933 (1980).

The facts involved clearly establish that the decisions were management driven. It is clear from that fact that William Mengle, the person charged with the responsibility for Audiotex service, had information withheld from him. It is clear that the amounts to be refunded here represent illegal retroactive ratemaking or were withheld in violation of tariff provisions. Nowhere does Bell allege, nor do the facts show, that they acted in good faith or make a mistake. Nor did Bell at any time seek an interpretation from this Commission. *Duquesne Light Co. v. Pa. P.U.C.*, 117 Pa. Commonwealth Ct. 28, 543 A.2d 196 (188). Thus we order that Bell not recover these costs from its ratepayers.

Finally, and this has not gone unnoticed, throughout the proceeding Bell appears to have looked down its corporate nose at the Complainants, as summed up in describing the Complainants in its brief:

. . . it would be grossly unfair to Bell and its 3.7 million ratepayers to permit these sponsors to pocket windfall profits . . .. Complainants, as sponsors of live and "GAB" Audiotex programs, generated enormous profits by preying on the customers who were . . . almost addicted to these programs. . . . Complainants conveniently ignore the fact that they are not out-of-pocket one penny . . ..

Bell Main Brief p. 2. Nowhere does Bell recognize that it, not the Complainants, has acted unjustly, unreasonably and *illegally in violation of the Public Utility Code. The pervasive* sentiment appears that because, of the class of Complainants, after all they're not residential customers, they can be treated with impunity.

We intend to disabuse Bell of this notion. Respondent has clearly violated public utility law and accordingly has left itself open to sanctions. Section 3301 of the Public Utility Code provides:

§ 3301. Civil penalties for violations

(a) General rule - If an public utility, or any other person or corporation subject to this part, shall violate any of the provision of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by an [sic] court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding $1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

Further, it has been held that this penalty is not limited to $1,000 but rather a penalty of $1,000 could be imposed on each violation each day (*Newcomer Trucking, Inc. v. Pennsylvania Public Utility Commission*, 109 Pa. Commonwealth Ct. 341, 531 A.2d 85 (1987)). The Respondent was in violation of Section 1302 and 1303 each day it continued its retroactive ratemaking based on calls made prior to June 1, 1988. Record evidence indicates that Bell went back (212 days) to November 1, 1987 in making the illegal charge backs for uncollectibles (N.T. 326). Accordingly, we will impose a penalty of $1,000 for each day beginning with November 1, 1987 until June 1, 1988 dur-

ing which time Bell persisted in illegal retroactive ratemaking, or a civil penalty of $212,000. (Emphasis Added)

I.D., pp. 61-65.

Based on our review of the record as discussed in this Opinion and Order and ALJ's Initial Decision, we have determined that Bell violated its tariff. Accordingly, Bell shall make the necessary refunds together with interest at the legal interest rate. Additionally, we find that Bell's actions of retroactive ratemaking, refusal to keep required records and estimating uncollectibles, as discussed on pages 56-58, of the Initial Decision, were unreasonable. Bell has acted unjustly and illegally in violation of Section 1302 and 1303 of the Public Utility Code, and we find the ALJ's imposition of a penalty in the amount of $212,000 to be wholly adequate and reasonable.

Conclusion

The business of Audiotex was established and marketed by Bell to potential sponsors similar to the Complainants in this proceeding. While we are interested in ensuring that consumers make informed decisions to use such services, we must make sure that the audiotex sponsors receive service from Carriers, such as Bell, in accordance with the law. In this proceeding, Bell failed to provide the Complainants with services in accordance with their approved tariffs and the Public Utility Code. It is apparent that Bell's initial entry into the Audiotex business was plagued with some problems. It is true that under the pre-June 1987 tariff Bell took some financial losses by bearing the brunt of any and all adjustments. Bell's failure to take necessary actions to protect itself is no fault of the Complainants.

Bell's failure to provide the necessary documents to substantiate the adjustments given to callers, to Audiotex providers is inexcusable. Bell's argument that the Complainants have not been harmed in any way by not having the documents to substantiate the adjustments is without merit. Unchallenged testimony has been given that a substantial number of adjustments were in error under the tariff because they had been granted to business rather than residential customers, including Bell (Tr. pp. 213, 214, 222, 252-255). While Bell has every legal right to make adjustments, it must be in a position to substantiate these adjustments.

Bell's writing off of uncollectibles based on pre-June 1, 1988 calls is clearly retroactive ratemaking and illegal. Nowhere does Bell allege, nor do the facts demonstrate, that they acted in good faith. Bell could have sought an interpretation from this Commission if it was unsure about its actions. We find that Bell's actions were unreasonable and illegal; THEREFORE,

IT IS ORDERED:

1. That the Exceptions of the Bell Telephone Company of Pennsylvania be, and hereby are, denied.

2. That the Initial Decision of Administrative Law Judge George M. Kashi be, and hereby is, adopted, in part, to the extent it is consistent with the body of this Opinion and Order and rejected in part.

3. That the Bell Telephone Company of Pennsylvania refund to Complainants, Phone Talk, Inc., Carmel Communications, Inc., California Communications, Dial Phone Recording, Inc., Asten Martin Productions, Inc., and Goldstrike, Inc., all amounts retained by the Bell Telephone Company of Pennsylvania under the June 9, 1987 Tariff as adjustments for which Respondent was unable to provide authentication before May of 1988 together with interest on such amounts at the legal interest rate of six percent.

4. That the Bell Telephone Company of Pennsylvania refund to Complainants, Phone Talk, Inc., Carmel Communications, Inc., California Communications, Dial Phone Recording, Inc., Asten Martin Productions, Inc., and Goldstrike, Inc., all amounts retained by the Respondent under the June 1, 1987 Tariff as uncollectibles where the underlying call was placed prior to June 1, 1988 together with interest on such amounts at the legal interest rate of six percent.

5. That the Bell Telephone Company of Pennsylvania pay to Complainants Phone Talk, Inc., Carmel Communications, Inc., California Communications, Dial Phone Recording, Inc., Asten Martin Productions, Inc., and Goldstrike, Inc., interest on those amounts retained by Bell for a period of four months as "estimated" uncollectibles under the June 1, 1988 Tariff.

6. That Bell Telephone Company of Pennsylvania not pass on the cost of any refunds and associated interest costs to its customers/ratepayers in whole or in part.

7. That Bell Telephone Company of Pennsylvania forfeit a penalty in the amount of Two Hundred Twelve Thousand

Dollars ($212,000) which sum represents $1,000 for each day Bell was engaged in illegal retroactive estimating, payable by certified check or money order to the Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, Pennsylvania, 17120, within twenty (20) days of the date of service of the Commission Order, as provided for in Sections 3301 and 3315 of the Public Utility Code, 66 Pa. C.S. § 3301 and 3315.

8. That the Petition of Pittsburgh Audiotex at C-882026 to withdraw its Complaint be, and hereby is, granted.

9. That the following dockets are closed: C-882009, C-882010, C-882011, C-882012, C-882026, C-882073, and C-882198.

FOOTNOTES

FN1 Under cover dated July 31, 1989, PAC filed a Petition for Withdrawal of Complaint pursuant to 52 Pa. Code § § 5.24 and 5.94.

END OF DOCUMENT

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