PAINTER LAW FIRM, PLLC

13017 DUNHILL DRIVE
FAIRFAX, VIRGINIA 22030

MICHELLE PAINTER
ATTORNEY AT LAW

703.201.8378
FAX 703.968.5936
E-mail: painterlawfirm@verizon.net

May 3, 2011

Via Electronic Filing

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 Pennsylvania, LLC, and TCG Pittsburgh, Inc., Docket Nos. C-2009-2108186 and C-2009-2108239

Dear Secretary Chiavetta:

Please find enclosed AT&T's Answer to Core's Petition to Reopen the Record to Admit Additional Evidence filed electronically today in the above-referenced matter.

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

Very truly yours,

Michelle Painter

cc: Certificate of Service
Administrative Law Judge Angela Jones

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

AT&T'S ANSWER TO CORE'S PETITION TO REOPEN THE RECORD TO ADMIT ADDITIONAL EVIDENCE

AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh ("AT&T" and "TCG," collectively "AT&T") hereby submit to the Pennsylvania Public Utility Commission ("Commission") their Answer to Core Communications Inc.'s ("Core") Petition to reopen the record to admit additional evidence ("Petition").

Core is asking the Commission to reopen the record to submit a brief and the transcript of an oral argument in a proceeding recently litigated before the United States Supreme Court ("*Talk America*").[1] As explained further below, the proffered exhibits do not represent a "material change of fact or law" relevant to this case as required under 52 Pa. Code § 5.571 to reopen the record – indeed, they do not reflect law or fact at all, for they simply reflect an argument raised in an unrelated proceeding on an unrelated topic. The exhibits (which argue that the Federal Communications Commission's ("FCC") amicus brief filed with the Supreme Court

[1] *In the Matter of Talk America Inc., et al v. Michigan Bell Telephone Company, et. al.,* Case Nos.: 07-2469, 07-2473.

in *Talk America* is not entitled to deference) would add no value to the issues in this case for they are entirely irrelevant to it. The FCC's amicus briefs in the *Talk America* case were not entitled to deference due to facts and circumstances that are entirely different than the FCC's Ninth Circuit amicus brief.[2] Therefore, AT&T's arguments in the *Talk America* case are irrelevant and have no bearing on the issues in this matter.

The issue in *Talk America* was about the difference between interconnection facilities and entrance facilities, and whether entrance facilities are subject to TELRIC pricing. During the course of the litigation the FCC changed its position on that issue multiple times through amicus briefs that conflicted not only with each other, but with prior FCC orders and regulations. In stark contrast, with respect to the issue of ISP-bound traffic (the precise issue facing the Commission here), the FCC has never wavered or changed the positions it set forth in the *ISP Remand Order*,[3] and the FCC's Ninth Circuit amicus brief is fully consistent with the language of the rules set forth therein. That brief is therefore entitled to deference.

In short, admission of the irrelevant exhibits proffered by Core would only create confusion and unnecessary diversion when we are at a very late stage of the proceeding and on the verge of a recommended decision from the Administrative Law Judge ("ALJ"). Accordingly, Core's Petition should be denied.

In further support of this Answer, AT&T states as follows:

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[2] *AT&T Communications v. Pac-West Telecomm, Inc.*, No. 08-17030, Amicus Brief for the FCC in Partial Support of Plaintiff-Appellant Urging Reversal, at 15-29 (filed Feb. 2, 2011) ("FCC 9th Cir. Br.").

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

1. On May 19, 2009, Core filed its Formal Complaint against AT&T, seeking to recover more than $7.5 million in access charges for the termination of local traffic.

2. After Core made clear in its prefiled testimony that all of the traffic at issue is locally dialed, ISP-bound traffic, AT&T on December 8, 2009 filed a Motion to Dismiss on the grounds that (i) the Commission does not have subject matter jurisdiction over ISP-bound traffic because it is jurisdictionally interstate, and (ii) the Commission lacked authority to adjudicate Core's complaint because the FCC had explicitly preempted state commission authority to set rates for locally dialed, ISP-bound calls in the *ISP Remand Order*.

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

4. On March 5, 2010, Core filed a Petition for Interlocutory Review. On September 8, 2010, the Commission issued an interlocutory order reversing ALJ Jones' decision, thereby asserting jurisdiction over this dispute ("Material Question Order"). The case was then sent back to ALJ Jones for a hearing on the merits.

5. A hearing was held on November 18, 2010. Main briefs were filed on December 14, 2010 and reply briefs were filed on January 14, 2011. The record was closed by order dated January 12, 2011.

6. In its post-hearing legal briefs, AT&T demonstrated that the precise issue addressed in the Material Question Order – *i.e.,* whether the FCC's *ISP Remand Order* preempts state commission authority over locally, dialed ISP-bound traffic exchanged between two CLECs – was currently before the Ninth Circuit Court of Appeals in *AT&T Communications v. Pac-West*

Telecomm, Inc., No. 08-17030, and that the Ninth Circuit had invited the FCC to opine on the issue through an amicus brief.

7. The FCC accepted the Ninth Circuit's invitation and filed its amicus brief on February 2, 2011, explaining that the intercarrier compensation rules set forth in its *ISP Remand Order* apply to CLEC to CLEC exchanges of ISP-bound traffic.

8. By letter dated February 3, 2011, Core submitted the FCC's amicus brief for the Commission's consideration, and AT&T submitted a response letter on February 4, 2011. The ALJ noted that the FCC's brief "importantly contains the FCC's rationale for intercarrier compensation for ISP-bound telecommunications traffic when CLECs are the exchangers," and that "[i]t is most important . . . to resolve disputes while referring to the most current precedents and federal guidance where appropriate." The ALJ found good cause to reopen the record to admit the FCC's amicus brief and the parties' letters into the record because "the substance of the FCC Brief and letters demonstrate conditions or more accurately interpretation of law previously relied upon by this Commission have changed." Order #11 at 3.

9. Core now asks the Commission to reopen the record once again to admit a brief and the transcript of the oral argument before the Supreme Court in *Talk America*. Core claims that the FCC's amicus brief in the Ninth Circuit (which Core itself submitted here) should not be given any deference in this case, and wants to use the *Talk America* brief and transcript to support that argument.

10. Under 52 Code § 5.431(b), "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." Core has not shown "good cause" for re-opening the record to enter the two proffered exhibits. To the contrary, there is good reason *not* to permit

these exhibits to come into the record at this late stage. Specifically, the exhibits are irrelevant and only serve to confuse and divert from the issues presented for decision in this case.

11. The *Talk America* case involves issues that are wholly unrelated to the issues being litigated here. *Talk America* does not involve ISP-bound traffic or reciprocal compensation. Instead, *Talk America* involves the issue of whether entrance facilities are different from interconnection facilities, and therefore whether entrance facilities must be offered by incumbents at TELRIC rates.

12. In the *Talk America* case, the FCC had espoused a completely new position on that issue when it filed an amicus brief at the Sixth Circuit that was directly contrary to prior FCC orders and rulings. In fact, the Sixth Circuit refused to defer to the FCC's position in its amicus brief, finding it to be "so plainly erroneous" that the Sixth Circuit could "only conclude that the FCC has attempted to create new *de facto* regulation under the guise of interpreting the regulation."[4] When the case went to the Supreme Court, the FCC filed an amicus brief in which it espoused yet another differing position – one that conflicted not only with prior FCC orders and rulings, but also with its Sixth Circuit amicus brief.

13. The *Talk America* oral argument and brief that Core is trying to admit reflect three arguments demonstrating why the FCC's Supreme Court amicus brief filed in that case did not meet the standard for deference under *Auer v. Robbins,* 519 U.S. 452, 461-62 (1997) (an agency's "interpretation" of its "own regulation[]" is entitled to deference unless it is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question") and *Christensen v. Harris County,* 529 U.S. 576, 588 (2000) (deference to any agency is unwarranted where the agency seeks, "under the guise of interpreting

[4] See *Talk America*, Brief for Respondent, March 1, 2011, p. 16.

a regulation, to create *de facto* a new regulation"). Each of those arguments just as clearly shows why the FCC's Ninth Circuit amicus brief that was admitted in the record of this case merits such deference.

14. *First,* in *Talk America* AT&T argued that the Supreme Court amicus brief was not entitled to deference because the threshold predicate for deference (*i.e.,* that the amicus brief interpret a regulation) was lacking. Specifically, the amicus brief purported to construe specific language in two paragraphs of the *Triennial Review Order* and *Triennial Review Remand Order* ("*TRO*" and "*TRRO*"), but those paragraphs made clear that they were not creating a new rule or regulatory requirement or altering an existing rule or regulatory requirement. Because the FCC clearly was not interpreting a regulation, deference could not apply. Here, however, the FCC amicus brief in the Ninth Circuit did interpret FCC regulations, *i.e.,* those adopted in the *ISP Remand Order,* ¶¶ 77-88. [5]

15. *Second,* in *Talk America*, AT&T argued that the FCC's amicus briefs could not be given deference because they could not be "treated as the FCC's fair and considered judgment on the issues…because those two briefs offer shifting interpretations of the text of the *Triennial Review* orders."[6] AT&T further argued that the FCC's interpretation directly conflicted with the 1996 Act's policy of encouraging facilities-based competition.[7] AT&T also argued that the FCC failed to explain how its position in its amicus brief was consistent with the 1996 Act's purpose, and explained that such an omission "further undermines any claim for deference to the

[5] FCC 9th Cir. Br. at 9, 14.

[6] *Talk America*, Brief for Respondents, March 1, 2011 at p. 19.

[7] *Id.*

government's amicus brief...."[8] In addition, AT&T explained to the Supreme Court that the FCC's amicus brief could not be given deference because the FCC, rather than simply explaining a prior position, was actually saying something "radically different."[9] AT&T argued against deference on the basis that the FCC never explained how its position "squares with the text and structure of the statute, with their prior statements, or why there's any policy basis for interpreting what they claim is an ambiguous statute to require TELRIC pricing for things that are not bottleneck elements."[10]

16. In stark contrast, the FCC's amicus brief before the Ninth Circuit does not take positions that are inconsistent with prior FCC rules or orders – nor does Core claim that it does. Moreover, the FCC fully explained the basis and policy reasons for its positions. The FCC explained that the *ISP Remand Order* was always intended to apply to CLEC-to-CLEC traffic based on "the regulatory language, the FCC's description of the scope of its compensation regime and the regulatory purpose" of the *ISP Remand Order.*[11] The FCC explained that "the inclusion of CLEC-to-CLEC traffic within the compensation regime furthers the regulatory purpose underlying the enactment of the FCC's rules, *i.e.,* to diminish the substantial economic distortions and opportunities for regulatory arbitrage arising from the reciprocal compensation regime for ISP-bound traffic."[12] The FCC further explained that "the compensation mechanism for ISP-bound traffic had 'distorted the development of competitive markets' by driving ISP

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[8] *Id.* at p. 52.

[9] Transcript of Supreme Court argument at p. 34.

[10] *Id.* at p. 32.

[11] FCC 9th Cir. Br. at p. 15.

[12] *Id.* at p. 20.

rates to uneconomic levels, which in turn had 'disconnect[ed] costs from end-user market decisions. The opportunities for regulatory arbitrage and distortions of economic signals occur...regardless of the identity of the originating carrier as an ILEC or CLEC."[13]

17. *Third,* AT&T argued in *Talk America* that FCC regulations had previously been interpreted as requiring only two methods of interconnection (collocation and meet point arrangements), but through its amicus brief the FCC was attempting to add a third (entrance facilities). In that way, the *Talk America* amicus brief was not only inconsistent with the FCC's prior interpretation of FCC rules, but also attempted to create a new mandate without following the notice and comment rulemaking process. AT&T noted that "courts have rejected agency efforts to impose new mandates under the guise of 'interpreting' open-ended regulatory language."[14] By contrast, the FCC amicus brief before the Ninth Circuit does not create new requirements, but simply explains that its longstanding rules always applied to the specific case of CLEC-to-CLEC traffic.

18. Core's theory on reopening the record to admit the exhibits containing these arguments seems to be that because AT&T argued that deference should not be given to the FCC amicus brief in *Talk America*, it should be precluded from arguing here that the FCC's amicus brief in the Ninth Circuit (on an issue directly pertinent to the matter before this Commission) is entitled to deference. That is baseless.

19. To begin, AT&T did not say in the *Talk America* case that FCC amicus briefs are *never* entitled to deference. The law states that they are entitled to deference in instances where the FCC is providing consistent interpretations of its regulations. However, in certain

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[13] *Id.* at pp. 20-21.

[14] *Id.* at p. 38.

circumstances (which are present with the *Talk America* amicus brief, but are not presented with the Ninth Circuit amicus brief), deference simply does not apply. Indeed, as discussed above, the FCC's Ninth Circuit amicus brief (which actually addresses the issue facing the Commission here) presents a completely different circumstance than the *Talk America* brief.

20. In sum, the FCC's amicus brief to the Ninth Circuit meets the criteria for deference. The fact that the FCC's amicus brief in a completely different case involving vastly different facts did not meet the criteria for deference is utterly irrelevant to the issues to be resolved in this matter. Permitting Core to introduce the exhibits at this late stage, thereby requiring the ALJ and the Commission to cull through hundreds of pages of history of a totally unrelated case, would be a waste of the Commission's resources and should not be allowed.

21. A few other items are worth noting. Core itself was the party who filed the FCC's Ninth Circuit amicus brief in this case. *Letter of February 3, 2011 from Deanne O'Dell.* Nowhere in Core's letter did it argue that the FCC's brief is *not* entitled to deference. Core cannot now claim, based solely on an argument made by AT&T in a completely unrelated and factually different matter, that the FCC's Ninth Circuit brief does not meet the legal criteria for deference.

22. In addition, in order to re-open the record, Core must prove that there has been a material change of fact or law that has occurred since the conclusion of the hearing. 52 Pa. Code § 5.571(b). AT&T's oral argument and brief in the *Talk America* case are not legal authority. They do not come from the FCC, a court, or any other decision-making body. They do not address any of the issues in this case (ISP-bound traffic, reciprocal compensation rates, or reciprocal compensation). The brief and transcript argue that a FCC amicus brief filed in *Talk America* (on substantive issues far different than those being litigated here) was not entitled to

deference, for reasons that have no bearing here. That does not constitute a "material change of fact or law" relevant to this case as required under 52 Pa. Code § 5.571 to reopen the record – indeed, it does not reflect a change in law or fact at all. Nor is there any inconsistency between AT&T's position here (that the FCC's Ninth Circuit amicus brief on ISP-bound traffic is entitled to deference) and AT&T's position in *Talk America* (that an entirely different FCC amicus brief on an entirely different subject is not entitled to deference). The *Talk America* brief and transcript are simply irrelevant diversions from the issues at hand.

23. Finally, Core's two proposed exhibits are irrelevant for purposes of deciding the merits of this case. AT&T continues to maintain that this Commission does not have jurisdiction over the subject matter of this Complaint. Moreover, the evidence presented conclusively proves that Core's case must fail on the merits. AT&T's positions taken in the *Talk America* proceeding have no bearing whatsoever on the merits of this case, and on the overwhelming evidence and law proving that Core's complaint must be dismissed.

Based on the foregoing, AT&T respectfully submits that the Commission deny Core's petition to reopen the record to admit additional evidence.

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

By: Michelle Painter

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

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

Its Attorneys

DATED: May 3, 2011

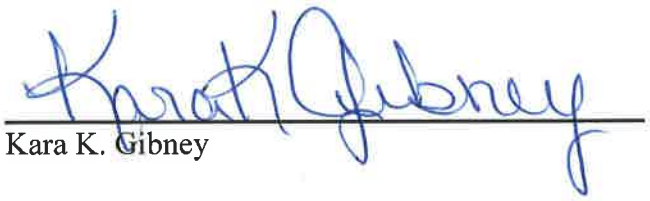
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Answer to Core's Petition to Reopen the Record to Admit Additional Evidence 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 3rd day of May 2011.

VIA E-MAIL AND OVERNIGHT MAIL

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



Kara K. Gibney