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June 13, 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 Brief on Exceptions To The Initial Decision, which was 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

Michelle Painter

cc: Certificate of Service
Administrative Law Judge Angela Jones
Cheryl Walker-Davis, Office of Special Assistants

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 BRIEF ON EXCEPTIONS TO THE INITIAL DECISION

AT&T Communications of PA, LLC and
TCG Pittsburgh

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page

Page

OTHER AUTHORITIES

AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh ("AT&T" and "TCG," collectively "AT&T") hereby respectfully submit to the Pennsylvania Public Utility Commission ("Commission") their Brief on Exceptions to the Initial Decision in this matter.

INTRODUCTION

At this juncture, the case presents a single fundamental question: Does this Commission have subject matter jurisdiction over this dispute? As the FCC has recently made crystal clear, that question must be answered "no" and this case dismissed.

* * *

The FCC more than a decade ago declared that ISP-bound traffic is "jurisdictionally interstate"; the D.C. Circuit has affirmed that ruling and the FCC has consistently adhered to it ever since. Relying on that determination, the FCC exercised its jurisdiction to regulate rates for "interstate" telecommunications in the *ISP Remand Order*[1] to establish federal compensation rules for ISP-bound traffic.

Notwithstanding this binding determination, the Commission earlier in this case concluded that the *ISP Remand Order* applies only to ILEC-originated traffic and that therefore the Commission has jurisdiction to hear and decide this case – which involves exclusively *CLEC* (AT&T)-originated ISP-bound traffic – by applying state law.

The FCC has now weighed in and made clear that that decision was incorrect. At the express invitation of the Ninth Circuit, the FCC on February 2 submitted an amicus brief providing the FCC's authoritative answer to the question whether the *ISP Remand Order* applies

[1] *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*").

to CLEC-originated traffic. Its answer is "yes; it applies to *all* LEC-originated ISP-bound traffic." This authoritative interpretation is binding here, as the Initial Decision correctly finds.

What does this mean? Quite simply, it means that the application of state law to resolve this case is expressly preempted. It also means that all of the traffic at issue here is "interstate." And that, in turn, means this Commission lacks jurisdiction, and the case should be dismissed in its entirety.

The Initial Decision properly recognizes the preemptive force of the *ISP Remand Order* and declares that state law cannot be used to resolve the dispute. But the Initial Decision fails to recognize that because all of the traffic is *interstate*, the Commission lacks the power, authority and jurisdiction even to hear the case. Instead, the Initial Decision determined that the Commission may hear and decide the case by applying federal law and, because the parties' merits briefs had focused exclusively on state law, proposes that the parties submit additional briefs addressing the application of federal law to the facts of this case.

AT&T respectfully disagrees with this latter determination. The Commission, it is well settled, is purely a creature of statute, and as such, its powers, authority and jurisdiction are limited to what is conferred by its enabling statute. That enabling statute gives the Commission the authority to hear and decide matters involving intercarrier compensation for *intrastate* telecommunications traffic; it does not, however, confer any power, authority or jurisdiction to hear and resolve matters involving intercarrier compensation for *interstate* telecommunications traffic. Because all ISP-bound traffic is "interstate," it therefore follows necessarily that the Commission lacks jurisdiction to hear this case, no matter what the source of substantive law might be. Accordingly, the Initial Decision should be revised to reflect this, and the case should be dismissed.

*   *   *

In what follows, we summarize for the Commission's convenience the facts proven at the merits hearing. In the Argument section, we first present our principal exception: That the Initial Decision should be revised to reflect that the Commission lacks the power, authority and jurisdiction to hear and decide the case because the traffic is all *interstate*. In the second part, we set out a collection of exceptions to certain of the Initial Decision's findings of fact. Finally, in the third part, we explain that the Initial Decision should set forth the reasons why Core would not be entitled to any relief even if the Commission were to (erroneously) apply state law. (These reasons are set out in full in AT&T's Merits and Reply Briefs.)

STATEMENT OF FACTS

1. All of the locally-dialed traffic in this case is ISP-bound traffic. This fact is undisputed. (Because Core maintains it cannot identify any specific call as being directed to a VoIP provider as opposed to an ISP (Tr. at 43), the Commission is compelled to assume that all AT&T-originated traffic delivered subsequent to September 2009 has been ISP-bound traffic.)

2. At all times Core knew (or should have known) that it was receiving traffic originated by carriers other than Verizon. AT&T Br. at 40-42; AT&T Reply Br. at 43. Among other reasons, Verizon "marked" all traffic as either its own or that of another carrier. Tr. 76-79. *See also* AT&T Cross Ex. 1 (Core Response to Interrogatory 6-6) ("Core bills Verizon for the traffic Verizon marks as self-originated; and Core bills other carriers for the traffic Verizon marks as originated by such other carriers"). 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. Panel Reply Testimony of AT&T at 14; Tr. 64-72. Verizon

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

3. Core 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. 64-71; Mingo Direct at 8. If it had done so earlier, Core admits that the records would have provided everything Core needed to identify AT&T-originated calls and bill AT&T for those calls on a minute-of-use basis. Tr. 64-72; Mingo Direct at 8-9.

4. Core did not tariff a local reciprocal compensation rate in 2000 when it began operations, and has still not tariffed a local reciprocal compensation rate in Pennsylvania. AT&T Br. at 2, 22-27, 43; AT&T Reply Br. at 2-4, 8-15. This is despite the fact that Core has tariffed such a rate in virtually every other state where Core operates. Tr. 17-18, 122-132; AT&T Cross Exs. 13-16, 18, 19.

5. All of Core's invoices to AT&T for locally dialed, ISP-bound traffic (none of which were sent prior to January 2008) billed for the traffic at its tariffed intrastate switched access service rate – a rate that under the plain language of the tariff applies only to intrastate toll traffic ($0.014 per minute). AT&T Br. at 22-27; AT&T Reply Br. at 8-15; Tr. 38. AT&T, which had properly assumed that such traffic was subject to the bill-and-keep compensation convention (the universally recognized practice for CLEC-to-CLEC exchanges of local traffic and the way in which it exchanges traffic with every other CLEC in Pennsylvania, AT&T Br. at 36-39), refused to pay the non-local switched access service rate for any of the locally dialed traffic.

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

7. Since October 2004, ILEC Verizon has paid Core $0.0007 per minute for the termination of precisely the same kind of traffic that is at issue here – locally dialed ISP-bound traffic. AT&T Tr. 44-45, 86-87. Before that, Verizon paid Core *nothing* at all for this traffic. *Id.*

8. Up until October 2010, no Pennsylvania CLEC has paid Core an explicit rate for the termination of locally dialed traffic. Tr. 50-55; 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19. Since October 2010, no CLEC has paid anything with the possible exception of PAETEC/Cavalier and Comcast. *Id.* When Core terminates locally dialed traffic originated by ILEC Verizon and other carriers, its network performs exactly the same functions and Core incurs exactly the same costs as it does when Core terminates AT&T-originated locally dialed calls. Tr. 49.

9. AT&T exchanges local traffic with all other CLECs in Pennsylvania on a bill-and-keep basis and has done so without exception since the passage of the 1996 federal Telecommunications Act. Panel Reply Testimony of AT&T at 13; Tr. 181, 207-208.

10. In 2006 the Commission recognized that the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania" is "bill-and-keep compensation." *PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, * 1 (Pa. P.U.C. June 22, 2006) ("*MCImetro Access*") (AT&T Cross Ex. 4).

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

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

ARGUMENT

I. EXCEPTION ONE: THE DETERMINATION THAT THE COMMISSION MAY HEAR AND DECIDE THIS CASE BY APPLYING FEDERAL LAW IS INCORRECT; THE INITIAL DECISION SHOULD BE REVISED TO CONCLUDE THAT THE COMMISSION LACKS THE AUTHORITY AND JURISDICTION TO HEAR AND DECIDE THE CASE AND THE MATTER SHOULD BE DISMISSED.

The Initial Decision (at 26-30) correctly determines that the amicus brief filed by the Federal Communications Commission ("FCC") in the Ninth Circuit Court of Appeals in *AT&T Communications of California, Inc. v. Pac-West Telecomm, Inc.*, No. 08-17030, is entitled to deference; that in that amicus brief the FCC makes crystal clear that its *ISP Remand Order* applies to *all* locally dialed ISP-bound traffic, including traffic delivered by an ILEC to a CLEC as well as traffic delivered by a CLEC to another CLEC; that the Commission is bound by that interpretation; that the *ISP Remand Order* expressly preempts the application of state law to resolve intercarrier compensation disputes involving locally dialed ISP-bound traffic; and that therefore the Commission is precluded from applying state law to resolve the instant controversy, to the extent it involves locally dialed ISP-bound traffic.

The Initial Decision (at 35-36) also correctly determines that *all* of the traffic at issue in this case is ISP-bound traffic. Core acknowledges that 100% of the traffic at issue that was delivered up to and through September 2009 is locally dialed ISP-bound traffic. Testimony of Bret Mingo at 2; Response to Interrogatory AT&T-II-13 & 14; Response to Interrogatory AT&T-III-3. And, while Core asserts that *a small amount* of the locally dialed traffic at issue that was delivered subsequent to September 2009 is traffic delivered to VoIP providers rather than ISPs, Core concedes that it cannot show what amount if any of the post-September 2009 traffic is directed to VoIP providers. Tr. 42-43; Response to Interrogatory ATT-III-4; FOF 55. Because Core, as the complaining party, has the burden both of going forward and of ultimate proof on each element of its claim (66 Pa. C.S.A. § 332), its complete lack of evidence and failure of proof on this point leaves the Commission no choice but to find that all post-September 2009 traffic, like all pre-October 2009 traffic, is locally dialed ISP-bound traffic. Initial Decision at 36.

The Initial Decision, however, errs when it concludes (at 30) that the Commission has jurisdiction, and should proceed, to decide this matter based on federal law. This conclusion cannot be squared with either federal or state law, or with the Initial Decision's determination concerning the applicability of the *ISP Remand Order*. In fact, the threshold predicate of the *ISP Remand Order*, repeated and endorsed in the FCC's amicus brief, coupled with Pennsylvania state law, leads necessarily and inexorably to the conclusion that this Commission lacks the authority and jurisdiction to decide any aspect of Core's complaint, irrespective of the source of the substantive law that applies.

The linchpin of the entire *ISP Remand Order*, as well as the *2008 ISP Mandate Order*,[2] which reaffirmed the *ISP Remand Order's* rules, is the FCC's determination that locally dialed ISP-bound traffic is *jurisdictionally interstate*. Absent that determination, the FCC would have lacked the authority to issue those Orders and the associated rules. That determination has been affirmed by the D.C. Circuit in *Bell Atlantic Tele. Cos. v. FCC,* 206 F.3d 1, 5 (D.C. Cir. 2000) and *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 143-44 (D.C. Cir. 2010). Accordingly, 100% of the traffic at issue in the instant case is jurisdictionally interstate. That is beyond debate.[3]

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[2] *In the Matter of High-Cost Universal Service Support,* Order On Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 2008 WL 4821547 (Nov. 5, 2008) ("*2008 ISP Mandate Order*").

[3] Core itself agrees that the FCC's *ISP Remand Order* (1) declared that ISP-bound traffic is jurisdictionally interstate, (2) set rules for the compensation of ISP-bound traffic, and (3) "specifically preempt[ed] state commissions from making different compensation rules for that traffic." Core Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question, March 15, 2010, p. 9.

The Commission is purely a creature of statute. Therefore, the Commission can only exercise that authority that is conferred on it by the General Assembly. *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission,* 875 A.2d 1243, 1249 (Pa. Cmwlth. 2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission,* 664 A.2d 664 (Pa. Cmwlth. 1995). The Commission's enabling statute gives the Commission the authority to address intercarrier compensation "for intrastate telecommunications traffic"; it does *not* authorize the Commission to determine compensation "for ***inter***state telecommunications traffic." 66 Pa. C.S.A. § 104. Therefore, the Commission lacks the authority and jurisdiction to hear and decide this case.[4] The Initial Decision therefore should be revised accordingly and the case dismissed.

A. The FCC Has Now Made Unmistakably Clear That The *ISP Remand Order* Applies To The Traffic At Issue In This Case; That The Traffic At Issue In This Case Is "Interstate"; And That The Order And The Rules It Establishes Preempt State Law With Respect To The Appropriate Compensation For Such Traffic.

On November 4, 2010, the Ninth Circuit, acting in *AT&T Communications of California v. Pac-West Telecomm, Inc.*, issued an order inviting the FCC to answer the following question:

> Does the interim compensation regime established by the FCC's order *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (*Order on Remand*), 16 F.C.C.R. 9151 (2001), apply so as to govern the compensation due one competitive local exchange carrier ("CLEC") for the termination of presumptively ISP-bound traffic originating with another CLEC, where the traffic is indirectly exchanged and the two CLECs do not have an interconnection agreement?

The FCC answered this question in the affirmative in an amicus brief filed on February 2, 2011. Not only does the amicus brief answer the question, but it provides a very cogent and very compelling explanation for why that answer is correct.

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[4] As we show below, federal law, standing alone, dictates the same conclusion.

The FCC begins by noting its authority to regulate *interstate* telephone communications: "Section 201(b) of the Act, for example, gives the FCC responsibility to ensure that the charges 'for and in connection with' interstate communications services are 'just and reasonable.' 47 U.S.C. § 201(b). Any such charge that the FCC finds to be 'unjust or unreasonable is . . . declared to be unlawful.'" *Id.*; Amicus at 3. The FCC further notes that although locally dialed ISP-bound traffic is covered by the 1996 Act's reciprocal compensation provision, 47 U.S.C. § 251(b)(5), that does not limit the FCC's authority to establish rules governing compensation for such traffic. That is because section 251(i) expressly provides "[n]othing in [section 251] limit[s] or otherwise affect[s] the Commission's authority [over interstate services] under section 201." *See* Amicus at 4-5.

In the *ISP Remand Order* and the *2008 ISP Mandate Order*, the FCC exercised its authority under Section 201 to promulgate its new markets and rate cap rules.[5] And these Orders were blessed by the D.C. Circuit in a decision rejecting Core's challenges to these Orders. *Core Communications v. FCC*, 592 F.3d 139, *cert. denied*, 131 S. Ct. 597 (2010).

The linchpin of all this is the determination that locally dialed ISP-bound traffic qualifies as "interstate telephone communications." The FCC in its amicus brief points out that the FCC "has consistently held that ISP-bound communications are jurisdictionally interstate" and that the courts have endorsed that view, most recently in *Core Communications*, 592 F.3d at 143-44. Amicus at 7-8. Indeed, that has been true for over a decade. In its 1999 *Declaratory Ruling*,[6] the FCC held that all ISP-bound traffic, including the locally dialed ISP-bound traffic at issue here,

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[5] The new markets rule specified that carriers that did not have an interconnection agreement prior to the effective date of the *ISP Remand Order*, ¶¶ 13, 66-67, 80-81, which of course includes AT&T and Core, were required to exchange ISP-bound traffic on a bill-and-keep basis. The rate cap rule specified the ceiling beyond which the regulatorily imposed rate for terminating locally dialed ISP-bound traffic could not lawfully go. *Id.* ¶¶ 7-8, 77-80, 84-85, 98. At all times relevant to this case, the federal rate cap, or ceiling, has been $.0007 per MOU.

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*").

is "jurisdictionally interstate." That determination was affirmed by the D.C. Circuit. *See Bell Atlantic*, 206 F.3d at 5. *See also ISP Remand Order*, 16 FCC Rcd at 9175 (¶ 52). *See 2008 ISP Mandate Order*, 24 FCC Rcd at 6485 n.69 (The FCC has "consistently found that ISP-bound traffic is jurisdictionally interstate."). *See also Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1153 (9th Cir. 2006) (The "FCC had defined ISP traffic as 'interstate' for jurisdictional purposes in the ISP Remand Order"). *See generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986).

In specifically addressing the Ninth Circuit's question, the FCC begins by noting that when it commenced examining the reciprocal compensation issue raised by ISP-bound traffic, the FCC expressly rejected the suggestion that it should look at only whether an ILEC must pay reciprocal compensation to a CLEC for the delivery of ILEC-originated ISP-bound traffic. Because reciprocal compensation obligations apply "to all LECs," ILECs *and CLECs*, the FCC stated that it would "examine this issue in the broader context" of *all* LEC (ILEC and CLEC) ISP-bound traffic. 1999 *ISP Declaratory Ruling*, 14 FCC Rcd at 3689 n.1. *See* Amicus at 5. Accordingly, from the outset, the FCC has expressly intended to address both ILEC and CLEC generated ISP-bound traffic in its various ISP/reciprocal compensation orders and rules.

The amicus brief points out that this is clear from the language of the *ISP Remand Order* itself. Rather than paraphrase the FCC's analysis of the Order's language and why it so clearly shows that the FCC intended its new market and rate cap rules to apply to CLEC-to-CLEC traffic as well as ILEC-originated traffic, we repeat below the FCC's analysis:

> The starting point in the interpretation of a statute or agency rule is its language.[ ] "Absent a clearly expressed . . . intention to the contrary, that language must ordinarily be regarded as conclusive."[ ] The FCC in adopting the new markets and rate cap rules repeatedly used the word "carriers," a broad term that includes both ILECs (incumbent local exchange *carriers*) and

CLECs (competing local exchange *carriers*).[ ] For example, the new markets rule requires "*carriers*" to "exchange ISP-bound traffic on a bill-and-keep basis" if those "*carriers* [were] not exchanging traffic pursuant to interconnection agreements" before the *ISP Remand Order* was adopted.[ ] Similarly, the rate cap rule restricts "the amount that *carriers* may recover from other *carriers* for delivering ISP-bound traffic."[ ] Not once does the FCC in the passages of the *ISP Remand Order* adopting the rate cap or new markets rules use the term "ILEC," "incumbent carrier," or similar restrictive language.

The FCC's language choice is "a decision that is imbued with legal significance."[ ] In contrast to the broad term "carrier" used in the rate cap and new markets rules, the FCC used the more restrictive terms "incumbent LEC[s]," "ILEC[s]," or "incumbent[s]" at least 14 times in adopting or describing the mirroring rule,[ ] a rule that applies only to ISP-bound traffic originated by ILECs.[ ] Under the "well-established canon" of interpretation,[ ] the use of "different words in connection with the same subject"[ ] "demonstrates that [the drafter] intended to convey a different meaning for those words."[ ] The unmodified word "carrier" the FCC used in adopting the rate cap and the new markets rules has a different meaning than the narrower term "ILEC" (and its synonyms) that it used in adopting the mirroring rule. The use of the broad term "carrier" shows that the rate cap and new markets rules apply to exchanges of ISP-bound traffic between two CLECs.[ ]

The FCC's statements delineating both the scope of its proceeding and its rules confirm that the FCC's compensation regime applies to CLEC-to-CLEC ISP-bound traffic. The FCC stated at the outset of its intercarrier compensation proceeding that it would broadly examine ISP-bound traffic exchanged between LECs,[ ] a term of art broadly defined in the Communications Act as "*any* person that is engaged in the provision of telephone exchange service or exchange access."[ ] The FCC explicitly decided *not* to conduct a "more narrow[ ]" inquiry limited to ILEC-to-CLEC exchanges, explaining that "the pertinent provision of the 1996 Act pertains to all LECs."[ ]

In the *ISP Remand Order,* the FCC made it clear that its compensation regime applies "when *carriers* collaborate to deliver calls to ISPs."[ ] Indeed, as the district court acknowledged, the FCC in describing the scope of its compensation regime "use[d] the terms 'LEC' and 'carrier' without modifiers throughout the *ISP Remand Order*."[ ] The FCC, for example, described its compensation regime as "limiting *carriers'* opportunity to recover

> costs from other *carriers*."[ ] The FCC explained that its regime initiated "a more rational cost recovery mechanism under which *LECs* recover more of their costs from their own customers."[ ] The FCC established a "rebuttable presumption that *traffic exchanged between LECs* that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to [FCC's] compensation mechanism."[ ] The FCC would not have used repeatedly the inclusive terms "carriers" and "LECs" had it intended its compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic.[ ]

Amicus at 16-19 (footnotes omitted).

The FCC further explains that construing the *ISP Remand Order* to apply to CLEC-to-CLEC traffic exchanges is not only consistent with the regulatory purpose underlying the Order, but that construing it in that fashion is absolutely essential if that purpose is not to be thwarted. Again, in the FCC's own words:

> Moreover, 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 operation of the reciprocal compensation regime for ISP-bound traffic.[ ] Because ISP-bound communications produce large volumes of one-way traffic, reciprocal compensation payments for ISP-bound traffic flow overwhelmingly from the originating LEC to the LEC serving the ISP.[ ] As the FCC explained in its *ISP Remand Order*, these potentially massive one-way payments gave LECs an incentive to target ISP customers with little regard to the costs of serving them — in some cases enabling LECs to provide free service or even to pay ISPs to be their customers.[ ] By encouraging the inefficient entry of LECs targeting ISP customers, the compensation mechanism for ISP-bound traffic had "distort[ed] the development of competitive markets" by driving ISP 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 under a reciprocal compensation system regardless of the identity of the originating carrier as an ILEC or a CLEC. Interpreting the compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic would create a loophole in the FCC's regulatory regime for CLEC-originated ISP-bound calls. As to that

> traffic, it would thwart full achievement of the regulatory purpose by leaving unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.

Amicus at 20-21 (footnotes omitted).

Having made crystal clear that the *ISP Remand Order* (and the *2008 ISP Mandate Order*) apply to CLEC-to-CLEC traffic exchanges (precisely the same traffic exchanges at issue in this case), the FCC goes on to point out that this means that these Orders preempt the ability of a state commission to decide a controversy over intercarrier compensation for ISP-bound traffic exchanged between CLECs. Specifically, the *ISP Remand Order* states that the FCC has "exercise[d] [its] authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic," which is jurisdictionally interstate, and thus "state commissions will no longer have authority to address this issue." *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82). *See* Amicus at 10-11, 25-29.

B. The Initial Decision Correctly Decides That The FCC's Interpretation Of Its Own Orders And Rules In The Ninth Circuit Amicus Brief Not Only Is Entitled To Deference But Is Binding On The Commission.

It is well established that an "agency's reading of its own rule[s] is entitled to substantial deference." *Riegel v. Medtronic*, 552 U.S. 312, 328 (2008). *See Chase Bank, N.A. v. McCoy*, 131 S. Ct. 871, 880 (U.S. Jan. 24, 2011). Indeed, an agency's construction of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted). *Accord Chase Bank*, 131 S. Ct. at 880; *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1167 (9th Cir. 2010). Moreover, these principles apply to an interpretation that is contained in an amicus brief where there is not any "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter." *Chase Bank*, 131 S. Ct. at

880-81 (*quoting Auer*, 519 U.S. at 462). *See Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 129 S. Ct. 865, 872 n.7 (2009); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 953 n.11 (9th Cir. 2006).

Here, all of these "tests" are satisfied. First, the FCC in the amicus brief has interpreted its own rules. Second, that interpretation is not "plainly erroneous or inconsistent with the regulation." Just the contrary. The FCC's interpretation is the only one that can be squared with the language of the *ISP Remand Order*, the *2008 ISP Mandate Order* and the associated regulations. Moreover, it is the only one that satisfies, and does not thwart, the regulatory purpose underlying these Orders and regulations. Finally, there is no reason to suspect that the interpretation does not "reflect the [FCC]'s fair and considered judgment on the matter." In fact, the amicus brief's careful, cogent analysis, and the fact that it comes from the office of the FCC's General Counsel, make clear that the interpretation in fact "reflect[s] the [FCC's] fair and considered judgment on the matter." This conclusion is buttressed by the fact that in accepting the Ninth Circuit's invitation, the FCC notes at the outset of its amicus brief that in filing the brief it is furthering its "interest in ensuring that its rules and its precedents, including those governing intercarrier compensation, are interpreted correctly." Amicus at 1-2.

What does this mean for Core's complaint? It means three obvious things:

- The *ISP Remand Order*, the *2008 ISP Mandate Order* and the new markets and rate cap rules all apply to the traffic exchanges that Core has placed at issue.[7]
- The application of state law to resolve the instant controversy is preempted.

[7] The FCC forbore from enforcing the new markets rule subsequent to October 8, 2004. Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order*, WC Docket No. 03-171, 19 FCC Rcd 20179, 2004 WL 2341235 (F.C.C.) (Oct. 18, 2004) ("*Core Forbearance Order*"). To the extent that this case involves traffic delivered on or before that date, the new markets rule clearly applies. The rate cap rule has been in effect at all times relevant to this case and remains in effect.

- The traffic at issue in the instant case is *all* "interstate telephone communications."

The Initial Decision correctly recognizes and reflects the implications of the first and second of these. But, as we demonstrate in the next section, the Initial Decision fails to fully grasp and reflect the implications of the third.

C. Because The Traffic At Issue Is Interstate, The Commission Lacks The Jurisdiction To Hear And Decide This Case And The Complaint Therefore Should Be Dismissed.

It is of course well settled that the Commission is purely a creature of statute. As such, its powers, jurisdiction and authority are limited to those enumerated in its enabling statute. *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission,* 875 A.2d 1243, 1249 (Pa. Cmwlth. 2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission,* 664 A.2d 664 (Pa. Cmwlth. 1995) ("As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers.")

As Core itself has repeatedly pointed out, the Commission's enabling statute gives the Commission the power, jurisdiction and authority to address intercarrier compensation "for intrastate telecommunications traffic." *See* Core's Answer to AT&T's Motion to Dismiss Formal Complaint at 1-2 & n.2. *See also* 66 Pa. C.S.A. § 104. The conclusion therefore is inescapable: The Commission lacks any power, jurisdiction or authority, as a matter of state law, to address compensation issues for telecommunications traffic that is "interstate."

Federal law standing alone yields the same result. Congress granted the FCC exclusive jurisdiction over "*all* interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (emphasis added). *See also Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir.1968); *Illinois Telephone Corp. v. Illinois Commerce Comm'n*, 260 Ill. App. 3d 919, 922-23, 632 N.E.2d 210, 213 (1st Dist. 1994). There is one exception: State commissions, like this Commission, may deal with and address intercarrier compensation for ISP traffic in the context of a section 252 (47 U.S.C. § 252) proceeding directed at arbitrating or enforcing the terms of an interconnection agreement. *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir. 2003). When acting in such a capacity, the state commission is operating as a "deputized federal regulator." *MCI Telecommunications v. Illinois Bell*, 222 F.3d 323, 342-43, 344 (7th Cir. 2000). But contrary to the suggestion in the Initial Decision (at 30), that exception does not apply here because AT&T and Core do not have an interconnection agreement.

* * *

Core may point out that the Ninth Circuit in *AT&T Communications* asked a second question, on which the FCC declined to take a position. That question is:

> In the absence of an interconnection agreement, does the California Public Utilities Commission ("CPUC") have jurisdiction to hear a dispute over compensation due one CLEC for the termination of indirectly-exchanged, presumptively ISP-bound traffic originating with another CLEC?

In response, the FCC wrote: "The FCC in its rules and orders has not directly spoken to the issue whether the CPUC [California PUC] would have jurisdiction to resolve this dispute applying federal law and accordingly the FCC in this *amicus* brief takes no position on that issue." Amicus at 14. *See also id.* at 29 ("Thus, the Court can reverse the district court's affirmance of the CPUC's resolution of the dispute under state law on the grounds of federal pre-emption without addressing the broader issue whether the CPUC would have jurisdiction, acting outside the context of a section 252 arbitration, to adjudicate the dispute applying federal legal standards. The FCC to date has not directly spoken to the broader jurisdictional issue in its rules and orders and therefore does not take a position on this issue in this *amicus* brief.").

The ALJ may have inferred from this statement that it is an open question whether this Commission has jurisdiction to decide the instant case "applying federal standards," and that the Commission is therefore free to decide that it does in fact have such jurisdiction. If so, that inference is incorrect.

All the FCC says in its amicus brief is that "to date [it] has not directly spoken to the broader jurisdictional issue *in its rules and orders*." Amicus at 29 (emphasis added). The fact that the FCC has not "to date" directly addressed the question of whether a state commission, acting outside a section 252 arbitration, has the jurisdiction to determine the appropriate intercarrier compensation for ISP-bound traffic does *not* mean that that question is in any sense "open," or that it has not been answered by existing, established law. All it means is that because the FCC has not directly addressed that question in its rules and orders, the FCC declined to take a position in the amicus brief. That is because the FCC in its amicus brief quite clearly limited itself to interpreting existing FCC rules and orders; because the broader jurisdictional question did not call on the FCC to interpret *its* existing rules and orders, it would have been improper for the FCC to weigh in with a legal opinion – so it said it would not take a position.

Existing, established law, however, does provide an answer. And that answer precludes the Initial Decision's implicit determination that the Commission possesses the jurisdiction to hear and decide this case "applying federal legal standards." As discussed above, the Commission plainly lacks such jurisdiction as a matter of state law. The Commission's enabling statute gives it the power, authority and jurisdiction to resolve and determine intercarrier compensation for "*intrastate* telecommunications"; the enabling statute does not give the Commission the power, authority and jurisdiction to resolve and decide intercarrier compensation for "*interstate* telecommunications." Because the Commission's exercise of jurisdiction is limited to that conferred by the legislature, and because the ISP-bound traffic at issue is unquestionably "interstate," it follows, necessarily, that the Commission lacks the power, authority and jurisdiction to hear this case. That is, the Initial Decision's implicit determination is foreclosed by binding, well-settled state law. That implicit determination is also foreclosed by binding, well-settled federal law. *See* the discussion *supra* at 16-17.[8]

II. EXCEPTION TWO: THE INITIAL DECISION SHOULD BE REVISED TO REMOVE CERTAIN FINDINGS OF FACT THAT ARE NOT SUPPORTED BY ANY RECORD EVIDENCE AND/OR WHICH CONFLICT WITH OTHER, FULLY SUPPORTED FINDINGS AND STATE AND FEDERAL LAW.

AT&T takes exception to findings of fact numbers 6, 10, 13, 16-18, 22-23, 25-26, 30-34, 42-43. The Initial Decision does not address whether these "findings" were supported by the record or consistent with the law. Instead, they appear to be a regurgitation of portions of Core's statement of "facts" that were not supported by the record and, indeed, were refuted by the record and in some instances defeated by federal and/or state law. Findings of fact are supposed to be *findings* supported by substantial evidence – not a statement of what one of the parties had hoped to prove. Moreover, these "findings" conflict irreconcilably with (1) other findings in the Initial Decision which are fully supported by the record evidence and/or (2) legal propositions

[8] The Initial Decision (at 30) suggests that the Commission could hear the entire case if there was a mix of VoIP and ISP-bound traffic. But the ALJ correctly concluded that the traffic in this case is not mixed. While Core alleged that some small portion of the traffic terminated after September 2009 *might* have been VoIP, the ALJ found that Core had not met its burden of proof (in fact, Core admitted that it could not distinguish between VoIP and ISP-bound traffic), and therefore all the traffic would be treated as ISP-bound. Since there is not a mix of traffic involved in this case, the ALJ's conjecture regarding the Commission's jurisdiction in situations where there is a mix of traffic is unnecessary to the decision and should be rejected. Moreover, even if there was a mix of interstate and intrastate traffic, the Commission does not have jurisdiction to hear and decide issues relating to the interstate traffic for all the reasons stated in the text. If the Commission were to exercise jurisdiction in such cases, it would impermissibly expand the Commission's jurisdiction beyond that conferred by its enabling statute in violation of state law. It would also open the door for carriers to circumvent the FCC's exclusive jurisdiction simply by piggybacking an intrastate claim.

that the Initial Decision determines are correct. The Commission should reject these findings for the reasons discussed below.

Finding of Fact 13: This finding states that "the only traffic at issue in this case is intrastate." That finding should be removed because it is wrong as a legal matter – given the Initial decision's correct interpretation of the effect of the FCC's amicus brief and the *ISP Remand Order*, all of the traffic at issue in this case is jurisdictionally *interstate*.

Findings of Fact 16 and 17: These findings state that "[l]ocal and toll dialing are retail concepts," and that "[t]he difference between locally dialed and 'toll' calls is that locally dialed calls are generally included with the consumer's flat-rate local service charge, whereas toll calls incur a per-minute charge or 'toll.'" Core made these factual allegations in an attempt to support its position that its intrastate switched access tariff (which applies only to toll traffic) should be applied to the locally dialed traffic at issue in this case. Specifically, Core argued 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. These findings should be rejected for multiple reasons.

First, the findings are not necessary to the decision for nothing in the decision relies upon (or even relates to) them.

Second, there is nothing in the record to support Findings of Fact 16 and 17. AT&T Reply Br. at 21-23. 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) – not by looking at the charges to the retail customer. If the originating and terminating numbers of a call are associated with the same exchange or local 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, admitted 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). In fact, the notion that intercarrier compensation could be determined by retail charges is illogical, for it would mean that: (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 telecommunications world works or should work.

Third, Findings of Fact 16 and 17 are irreconcilable with Findings of Fact 12 and 15, which are supported by the record evidence cited above and state that: "[a]n intrastate call can be distinguished from an interstate call by comparing the calling party's phone number with the called party's phone number," and "[a] 'locally dialed' call is one for which the NPA-NXX of the calling party and the called party are associated with a common local calling area."

Fourth, the Commission has previously rejected the claim that intercarrier compensation is determined by whether the retail customer is charged a toll.

> 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 – contrary to Findings of Fact 16 and 17 – the Commission has conclusively determined that 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. And, as the Commission pointed 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.*

Findings of Fact 30-34: These findings state that Core "did not know about the substantial volumes of telecommunications originated by AT&T and delivered to Core via Verizon's tandem switches" and "did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records," and that "AT&T did not notify Core that it was sending the AT&T Indirect Traffic to Core for termination to Core's end users." These findings should be rejected because there is nothing in the record to support them – in fact, all of the evidence is to the contrary.

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

passed on to Verizon on each and every one of its calls its carrier identification code ("CIC") and the calling party's number ("CPN"), and Verizon passed this information on to Core in the records that were sent to Core each and every day. Core admits that it received these records from Verizon on a daily basis throughout the entire period when it was terminating AT&T-originated traffic. Tr. 64-72; Mingo Direct 8-9; Panel Reply Testimony of AT&T at 14. Core also admits that it lacked the basic competence necessary to read and understand these 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. 64-71; Mingo Direct at 8. If it had done so earlier, Core admits that the records would have provided everything Core needed to identify AT&T-originated calls and bill AT&T for those calls on a minute-of-use basis. Tr. 71-72.

Moreover, at all relevant times, Core had every reason to know that AT&T (and other CLECs) were sending it significant volumes of traffic, but Core still chose to ignore the information available to it. AT&T Br. at 40-42; AT&T Reply Br. at 43. When it entered the market in 1999 or 2000, 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 also knew when it began operations in 1999 or 2000 that all other LECs and IXCs were notified that Core had applied for NANPA 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. Perhaps most significant, 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. And other carriers' traffic was "marked" as such by Verizon. *Id.* Accordingly, contrary to Findings of Fact 30-34, the record evidence shows that Core has known at all relevant times that it has been receiving traffic from other carriers.

Because Findings of Fact 30-34 are not supported by the record and, in fact, directly conflict with Findings of Fact 47-52 (which reflect and are supported by the evidence discussed above), they should be rejected.

Findings of Fact 10, 18, 22-23: These findings state that AT&T has "refus[ed] to pay" (#10), "has yet to pay" (#22), and "has not paid" (#18) Core for the termination of the locally dialed, ISP-bound traffic at issue, and that AT&T has "paid some intercarrier compensation" on the indirect traffic, but "not to Core for its services to transport and terminate the traffic" (#23). These findings suggest that by not paying Core's bills AT&T somehow acted unlawfully or in bad faith. That is not true – as the Initial Decision correctly concludes – and therefore Findings of Fact 10, 18, 22-23 should be rejected altogether or, alternatively, they should be revised to reflect that AT&T's refusal to pay Core's bills was legally justified.

AT&T pays lawful bills that contain lawful rates, and has not refused to pay any lawful rate. Core's bills, however, are not based on lawful rates and AT&T had every right not to pay Core's bills, for several reasons. *First and foremost,* AT&T's refusal to pay was justified under federal law. Core sought to charge rates from its intrastate switched access tariff, but the FCC has very clearly determined that all ISP-bound traffic (the only kind of traffic at issue here) is jurisdictionally interstate and therefore falls under the FCC's jurisdiction – so Core's intrastate tariff could not apply. Moreover, in the *ISP Remand Order,* the FCC explicitly preempted state authority over compensation for ISP-bound traffic – so, again, Core's intrastate tariff could not apply.

Second, AT&T's refusal to pay was justified under state law. Even if state law applied to ISP-bound traffic at issue (which it does not), the charges were unlawful because (i) Core's bills covering the time frame prior to January 2005 were issued after the four year limitation on backbilling expired; (ii) 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 state law means that Core can not charge for it; (iii) 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, which violates state law. AT&T Br. at 30-36; AT&T Reply Br. at 26-35.

Moreover, the Initial Decision rejected Core's argument that AT&T acted unreasonably and in bad faith by not paying Core's bills, finding (at 33) that the "record evidence does not demonstrate that AT&T acted in bad faith; rather, the evidence demonstrates AT&T consistently acted within its interpretation of existing federal law." The ALJ further found (at 33-34) that AT&T did not "violate[] any state law, regulations or any other matter prohibited by a public utility certified by this Commission," and that Core "never demonstrated that the rationale provided by AT&T for its failure to pay was fraudulent, grossly negligent, willful misrepresentation, or the like."

Based on the foregoing, each reference to AT&T not paying Core's bills should be rejected altogether or, alternatively, changed to clarify that Core billed AT&T for the traffic at intrastate switched access rates, but that AT&T did not pay the bills based on its reasonable interpretation of existing federal and state law.

Finding of Fact 25: This finding states that "AT&T has not sought to enter into a TEA with Core." It should be rejected because it is wrong, as demonstrated in Findings of Fact 39, 41, and 77, which make clear that AT&T did seek to enter such an agreement with Core: AT&T "extended [to Core] an invitation to discuss the traffic and rates," and "offered to 'forward a draft' of a standard switched access agreement . . . use[d] with CLEC's'"; the parties did "broach[ ] the possibility of establishing a rate for exchanged local traffic on a going-forward basis." *See also* Mingo Direct at 11-13 (discussing the parties' negotiations to enter an agreement).

Finding of Fact 25 should also be rejected because it only reflects Core's "insinuat[ion]" that AT&T acted in bad faith because it allegedly "failed to negotiate an agreement" for the termination of locally-dialed traffic, thereby "forcing Core to resort to litigation," and "used delay tactics, which is advantageous to AT&T to prolong any resolution to this dispute." Initial Decision at 31. The Initial Decision flatly rejected those claims in its ruling on civil penalties. *Id.* at 33. And rightfully so. When AT&T and Core discussed the possibility of establishing a rate for the exchange of local traffic, Core had made clear that it would not even discuss any agreement with AT&T going forward unless and until AT&T paid for past traffic exchanges (for which there was and is no lawful rate) at the very least at the Verizon tandem-based reciprocal compensation rate (which of course not even Verizon paid – it paid and pays less than one-third that amount). AT&T Panel Reply Testimony at 18-20; Tr. 44-45, 86-87; Tr. 94-95 (Mingo); AT&T Br. at 18; AT&T Reply Br. at 38. *See also* Finding of Fact 77 ("When AT&T and Core broached the possibility of establishing a rate for exchanged local traffic on a going-forward basis, Core required payment of service rendered at an agreed set rate as a condition.") Core's unreasonable position – not anything AT&T did or did not do – left the parties with nothing more to discuss.

Findings of Fact 42 and 43: These findings state that AT&T's Mr. Cammarota "has not been accessible" to discuss the payment for the indirect traffic and "never responded" to Core's attempts to reach him. As with Finding of Fact 25, Core made these allegations in its attempt to convince the Commission to impose penalties on AT&T for its alleged failure to negotiate an agreement in good faith. For the same reasons discussed above for number 25, Findings of Fact 42 and 43 should be rejected.

Finding of Fact 26: This finding states that "Core does not have as a recourse for failure to receive payment to discontinue terminating AT&T's calls because federal and state law require Core to terminate all the calls it receives, and if it is not compensated for its termination service, Core must seek payment through the regulatory complaint process." Because it is both irrelevant and untrue, Finding of Fact 26 should be rejected. Core did have options if it believed it was entitled to compensation for the termination of locally dialed traffic. For example, Core could have filed a tariff establishing nondiscriminatory rates for the termination of locally dialed traffic, something it did in other states in which it operates but did not do in Pennsylvania.

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. Accordingly, Finding of Fact 26 should be rejected.

Finding of Fact 6: This finding states that "AT&T sends and has sent large volumes of telecommunications traffic to Core indirectly." That finding is inaccurate. It is undisputed that by the time Core filed suit, the traffic flow from AT&T had slowed to barely a trickle. Indeed, through September 2009, Core claims that it terminated more than 406 million minutes of AT&T locally dialed ISP-bound traffic. Mingo Direct at 5. Of this total, all but about 12 million minutes – or 3% of the total – was terminated prior to the time Core submitted its first invoice (January 2008). And by June 2008, all but about 225,000 minutes of the total – or only five one-hundredths of one percent of the total – had been terminated. Mingo Direct at 5; Tr. 30, 33-34, 38. In 2009 the monthly average was about 15,000-16,000 minutes of locally dialed, ISP-bound traffic. And at the time briefs were filed, it was in the 4,500 minutes per month range. *Id.* In light of these undisputed facts, Finding of Fact 6 should be rejected altogether, or revised to reflect the change in traffic flow explained above.

III. EXCEPTION THREE: ASSUMING *ARGUENDO* THAT STATE LAW CONTROLS RESOLUTION OF THIS CASE, THE INITIAL DECISION SHOULD HAVE MADE CLEAR THAT CORE IS NOT ENTITLED TO ANY RELIEF.

As demonstrated above, the Commission does not have subject matter jurisdiction to decide this case. However, given the possibility (however remote) that the Commission may erroneously decide, contrary to the Initial Decision, to exercise jurisdiction and apply state law to this dispute, the ALJ's Initial Decision should have explained that the relief Core seeks is barred by state law.

A. The Relief Sought By Core Is Barred Because It Would Violate Pennsylvania State law

Core asks the Commission to award it more than $7.5 million, an amount it derives by multiplying the more than 400 million minutes of locally dialed traffic terminated by Core from AT&T customers by the rate specified in Core's intrastate switched access service tariff for terminating non-local, toll, interexchange traffic ($.014 per minute), plus an unspecified amount of interest. In the alternative, Core asks that it be awarded an amount equal to the same 400 million plus minutes multiplied by the so-called Verizon tandem-based reciprocal compensation rate ($.002439) – which not even Verizon pays – plus, again, an unspecified amount of interest.

Core does not have a contract with AT&T that covers the locally dialed traffic in question.[9] Nor does its tariff specify a rate for terminating locally dialed calls.[10] What this means is that there is no (and has never been any) lawful rate for the "service" that Core claims to have provided. So Core's complaint would require the Commission to create a rate that will apply to the exchange of locally dialed, ISP-bound traffic, and to impose that new rate prospectively and retroactively. Doing so would violate Pennsylvania state law. *See* AT&T Br. at 30-36; AT&T Reply Br. at 26-35.

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

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[9] Core did not approach AT&T to enter into a contract for the first nearly eight years Core was in business. Mingo Direct, Ex. BLM-7. When Core did request to negotiate a contract rate, Core refused to even discuss a rate going forward unless AT&T agreed to first pay the illegally billed past amounts. Panel Reply Testimony of AT&T at 18-20; Tr. 94-95 (Mingo). Core also told AT&T that it would never agree to the same rate that Verizon pays to Core for ISP-bound traffic. *Id.* Naturally, with these types of negotiation tactics, the talks between the parties failed to be productive or successful.

[10] Core's intrastate switched access tariff – on its face – does not cover locally dialed ISP-bound traffic; rather, it applies only to non-local, toll, interexchange traffic. AT&T Br. at 22-27; AT&T Reply Br. at 8-15. In fact, Core has emphatically and categorically maintained that locally dialed, ISP bound traffic is not and cannot be access traffic – which means that it is not and cannot be subject to switched access charges. AT&T Cross Exs. 9 and 10; *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. And the Commission stated in its September 30, 1999 *Global Order*, Docket Nos. P-00991648, *et al.* (at 12), 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***." (Emphasis added.) Similarly, 66 Pa. C.S.A. § 3017(b) provides that "No person or entity may refuse to pay tariffed access charges for ***interexchange services*** provided by a local exchange telecommunications company." (Emphasis added.) AT&T is not aware of a single instance in which this Commission has ever applied intrastate switched access rates to local traffic, and Core has not cited any. To AT&T's knowledge, there is no carrier – either in the Commonwealth or in the entire nation – that is required to pay switched access rates for local calls, much less locally dialed, ISP-bound calls.

companion statutory provision to § 1302 forbids a public utility from "demand[ing] or receiv[ing]" any rate that is different from "that specified in the tariffs of such public utility." 66 Pa. C.S.A. § 1303 ("adherence to tariffs"). Because Core has never filed a tariff in Pennsylvania establishing a rate for terminating the traffic at issue in this case (locally dialed, ISP-bound traffic) as a matter of statutory law and judicial precedent, Core is barred from "collect[ing] or enforc[ing]" any rate for terminating this traffic. Pennsylvania courts have confirmed that Sections 1302 and 1303, read together, mandate precisely this result. *Popowsky v. Pa. PUC,* 647 A.2d 302, 306-307 (Pa. Cmwlth. Ct. 1994) (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). *See also Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 829 (Pa. Cmwlth. Ct. 1980) ("a public utility may not charge any rate for services other than that lawfully tariffed . . . .").

Second, 66 Pa. C.S.A. § 1304 ("discrimination in rates") provides: "No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage." Accordingly, Pennsylvania law prohibits charging different rates to similarly situated customers for the same service. Core, however, demands that AT&T be required to pay $0.014 (Core's intrastate access rate) or, in the alternative, $0.002439 (Verizon's tandem reciprocal compensation rate), for past and future terminations. That would be discriminatory since all CLECs prior to October 2010, and all but two CLECs since October 2010 (PAETEC/Cavalier and Comcast), paid Core nothing for terminating the exact same type of traffic. AT&T Br. at 32-35; AT&T Reply Br. at 32-35; Tr. 50-55, 152-153; Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19. Core, of course, cannot justify any rate deferential between CLECs because Core 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.

Third, 66 Pa. C.S.A. § 1303 provides that "[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron." Up until very recently Core has had two different compensation schemes for the exchange of locally dialed, ISP-bound traffic, if it were assumed *arguendo* that either the CLEC scheme (bill-and-keep) or the ILEC rate ($.0007 per MOU) could apply to AT&T-Core locally dialed, ISP-bound traffic. And in November and December of 2010, Core added two additional compensation schemes for PAETEC/Cavalier and Comcast. Tr. 50-55, 152-153. Under Pennsylvania law, the bill-and-keep scheme that applies to the overwhelming majority of CLECs would have to apply to AT&T, pursuant to Section 1303. In circumstances in which "more than one rate [is] applicable to service rendered to a patron [AT&T]," Core is statutorily required to "compute [its] bills under the rate most advantageous to" AT&T, in this case, the CLEC bill-and-keep compensation scheme. 66 Pa. C.S.A. § 1303. *See Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Cmwlth. Ct. 1995).

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

Pennsylvania Public Utility Commission, 642 A.2d 648, 651 (Pa. Cmwlth. Ct. 1994). *See also Popowsky v. Pennsylvania Public Utility Commission,* 868 A.2d 606, 609 (Pa. Cmwlth. Ct. 2004).

Fifth, the relief Core seeks would require the Commission "to substantially alter existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania by replacing the use of bill-and-keep compensation" with a regime in which CLECs pay each other explicit rates for terminating local traffic. *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4). *See* AT&T Br. at 36-39; AT&T Reply Br. at 23-26; Tr. 207-208; Panel Reply Testimony of AT&T at 13. That is something the Commission should not do. Bill-and-keep is the basis on which *all* other CLECs in Pennsylvania exchange local traffic with one another – including CLECs who, like Core, terminate locally dialed ISP-bound calls. Tr. 208 (AT&T Panel redirect). The Commission has expressly recognized that "the use of bill-and-keep compensation" is the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania." *MCImetro Access,* 2006 WL 2051138, * 1 (AT&T Cross Ex. 4). Far from being a disfavored compensation arrangement, as Core attempts to portray it, bill-and-keep is the universally *preferred* arrangement in the CLEC-to-CLEC world. And for good reason. If all CLECs were required to enter into intercarrier compensation agreements with one another providing for explicit payments for local traffic, the administrative costs associated with establishing and implementing the contracts and billing each other would dwarf many times over any conceivable benefit that any individual CLEC might realize. *See* AT&T Br. at 38-39; AT&T Reply Br. at 47-48.

B. The Commission's Decision in *Palmerton v. Global NAPs* Is Inapplicable

This case bears no resemblance at all to *Palmerton v. Global NAPs.*[11] In that case, the Commission was concerned that Global NAPs was not paying legitimately tariffed and billed access charges. *Palmerton,* pp. 5, 8. The Commission was also concerned that because virtually all other carriers billed by Palmerton were paying Palmerton's access charges, Global NAPs was receiving a discriminatory advantage by refusing to pay. *Id.* None of these concerns exist here.

First, unlike Palmerton, Core has never tariffed a rate that applies to the traffic at issue in this case (locally dialed traffic) even though it did so in other states where it operates. Because Core had no tariff that applied to the traffic sent by AT&T, Core decided to concoct a completely novel theory that AT&T should pay exorbitant and inflated intrastate access charges for local traffic because that was the only rate Core had bothered to tariff. As previously explained, Core's intrastate access tariff applies only to toll traffic, not local traffic.

Second, unlike in *Palmerton*, Core was not regularly billing AT&T (or any other CLEC) for the termination of locally dialed traffic. In fact, Core did not bill AT&T for the first nearly eight years Core was in business in Pennsylvania. Of course, this was not at all surprising to AT&T because AT&T operates on a bill-and-keep basis with every single CLEC in Pennsylvania, so it never expected to be billed. When AT&T did receive a bill from Core, AT&T analyzed the bills and realized that Core was charging access rates for local traffic. Naturally, AT&T refused to pay those bills for the reasons set forth above.

Third, there is no discrimination here. The record demonstrates that all CLECs prior to October 2010, and all but two CLECs since October 2010, paid Core nothing for terminating the exact same type of traffic. AT&T Br. at 32-35; AT&T Reply Br. at 32-35; Tr. 50-55, 152-153;

[11] Opinion and Order, *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates,* Docket No. C-2009-2093336 (May 5, 2009) ("*Palmerton*").

Mingo Surrebuttal at 2, 8, 11; Panel Reply Testimony of AT&T at 19.[12] Core has not even charged the vast majority of CLECs anything. Pursuant to an Interconnection Agreement and federal law, Verizon pays $.0007/minute. Thus, unlike in *Palmerton* where Global NAPs was an outlier by refusing to pay a legitimately tariffed rate, AT&T is acting entirely consistently with the rest of the industry by refusing to pay access charges (or non-tariffed Verizon tandem rates) for locally dialed ISP-bound traffic. And if the Commission were to grant Core's relief and force AT&T to pay a rate that is higher than what virtually all other carriers are paying to Core, this Commission would actually be creating the exact discrimination it was attempting to avoid in *Palmerton.*

CONCLUSION

Based on the foregoing, AT&T respectfully requests that the Commission revise the Initial Decision in accordance with the foregoing exceptions, and dismiss Core's complaint against AT&T.

Respectfully submitted,

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[12] At least one of these CLECs "agreed" to pay under circumstances that even Core admits were coercive, *i.e.*, Core intervened in its pending merger. Tr. 50-51, 55, 152-153. The agreement is for a period of only one year and provides that it may be terminated in the event the Pennsylvania Commission, the FCC, or a court declares or holds "that the PUC does not have jurisdiction over intercarrier compensation between two CLECs for local traffic, or that a rate other than $0.002439 applies to such traffic." Core hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶ 4(b)).

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DATED: June 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Brief on Exceptions to the Initial Decision 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 13th day of June 2011.

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