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June 13, 2011

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

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

Dear Secretary Chiavetta:

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

Sincerely yours,

Deanne M. O'Dell

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Angela Jones, w/enc.
Cheryl Walker Davis, w/enc. (and cd)
Cert. of Service, w/enc.

CERTIFICATE OF SERVICE

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

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Dated: June 13, 2011

Deanne M. O'Dell

Deanne M. O'Dell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF CORE COMMUNICATIONS, INC.

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Dated: June 13, 2011

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I. INTRODUCTION

Even though this case has been pending for over two years and has involved a substantial amount of paper, the underlying question for the Commission needs to address is quite simple – can one telecommunications carrier refuse to pay a competitive telecommunications carrier when the competitor uses its network to ensure that the originating carrier's telecommunications traffic reaches the intended recipient? The answer is no.

Core Communications, Inc. ("Core") provides these type of transport and termination services for AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. (collectively "AT&T"). Without this valuable service, the telephone calls of AT&T's customers would not reach their intended recipients, i.e., Core's customers. Core incurs costs to provide AT&T this service. Despite this, AT&T will not pay Core for services rendered. AT&T does this by refusing to enter into any business relationship that has a contractual commitment requiring it to pay for these services. Then, AT&T hides behind the failure to establish a mutually acceptable contractual relationship as a justification for bypassing the well-established law requiring carriers using the services of another carrier to pay the tariffed rate for these services.

Why does AT&T do this? The only answer can be that by refusing to pay Core, AT&T creates an extremely self-serving but unfair competitive advantage which enables it to squeeze its competitors out of the market. AT&T's refusal to pay for services requires the owed carriers, who are also AT&T's competitors in the marketplace, to absorb the costs of AT&T's nonpayment while AT&T can use the "saved" money to offer services to customers priced artificially lower because they are subsidized by the money "saved" from not paying Core. Particularly significant in this case is the fact that AT&T is the largest telecommunications carrier in the world and, as such, has significant resources to ensure the continuation of its transparently self-serving agenda. By requiring AT&T – and all originating carriers – to pay terminating carriers for services rendered, all competing carriers will be given a fair and equal opportunity to provide telecommunications services which will result in more choices and better prices overall for consumers.

Unfortunately, this will not occur by adopting the recommendations of the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Angela T. Jones issued May 24, 2011. At its essence, the I.D. erroneously finds that the Commission does not have subject-matter jurisdiction to use state law to resolve this dispute. I.D. at 29. As this determination is based on several legal and factual errors and the recommendations of the I.D. should be rejected.

As explained in Exception Nos. 1 and 2, the I.D. incorrectly overturned clear, current and controlling Commission precedent developed in the course of this case. *See* Opinion and Order, *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239 at 11 (September 8, 2010) ("*Material Question Order*"). Instead, the ALJ chose to give improper deference to an *amicus* brief submitted by Federal Communications Commission ("FCC") Staff in another jurisdiction.

As explained in Exception No. 3, the I.D. improperly concluded that whether Core's customers provide Voice over Internet Protocol ("VOIP") or Internet Service Provider ("ISP") services was relevant to the underlying nonpayment issue in this proceeding.

As explained in Exception No. 4, the I.D. incorrectly finds that Core ever argued for the application of the $0.0007/MOU rate incumbent local exchange carriers ("ILECs") are required to pay competitive local exchange carriers ("CLECs") pursuant to the *ISP Remand Order*. *See* Order on Remand & Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, at ¶ 78 (Apr. 27, 2001) ("*ISP Remand Order*").

As explained in Exception Nos. 5-8, the I.D. also makes several flawed findings of fact regarding the applicability of Core's intrastate switched access tariff, the use of bill-and-keep, the pricing of Core's services to its customers, and the harm to Core from nonpayment by carriers for termination services.

Finally, as explained in Exception No. 9, the I.D. errs in failing to fine AT&T's bad faith behavior to substantially utilize Core's services while refusing to pay anything for services rendered.

For these reasons, the Commission should reject the recommendations of the I.D. and direct AT&T to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4. Core Main Brief ("M.B.") at 17-25. If, however, the Commission decides not to apply Core's tariff to the previously terminated traffic (which it should), Core requests in the alternative that AT&T be directed to pay Core at the Commission-approved tandem termination rate as determined by using the total long-run incremental cost model ("TELRIC"), which provides for recovery of joint and common costs. *Id.* at 25-29. To govern future traffic, Core requests that the Commission direct AT&T to negotiate in good faith with Core to reach a mutually acceptable reciprocal compensation arrangement governing payment. *Id.* at 29-37. Finally, Core requests that – due to the circumstances in this case – the Commission issue an appropriate civil penalty on AT&T to address its prior actions to refuse to compensate Core for its substantial use of Core's network and to ensure future good faith performance. *Id.* at 43-46. As AT&T's behavior clearly shows, it will simply continue to engage in its brand of lawless gamesmanship at the expense of Core and the public until ordered to do otherwise.

II. STATEMENT OF THE CASE

Core filed its Complaint in this case against AT&T on May 19, 2009. AT&T filed an Amended Answer on June 18, 2009. ALJ Jones issued a Prehearing Conference Order on June 29, 2009. Core filed a Protective Order governing production of confidential material on July 21, 2009. ALJ Jones issued Prehearing Order #2 on September 11, 2009, bifurcating Docket No. C-2009-2108366 from Docket Nos. C-2009-2108186 and C-2009-2108239. ALJ Jones issued a Prehearing Order scheduling hearings for February 2 and 3, 2010. Core filed its Entry of Appearance and Substitution of Counsel on October 13, 2009. Core served St. No. 1, the Direct Testimony of Bret L. Mingo on November 16, 2009.

AT&T filed a Motion to Dismiss on December 8, 2009. AT&T argued that the Commission has no subject matter jurisdiction over ISP-bound traffic exchanged between CLECs such as AT&T and Core, or in the alternative, that the FCC had preempted the Commission's authority to resolve the issue of compensation for such traffic. AT&T also sought a suspension of the procedural schedule and requested oral argument on its Motion to Dismiss. AT&T served Statement No. 1, the Reply Panel Testimony of E. Christopher Nurse and Sal D'Amico (who was later substituted with Mark Cammarota) on December 14, 2009.

Core filed its Answer to AT&T's Motion to Dismiss on December 28, 2009. AT&T filed a Motion for Leave to File Reply to Core's Answer and a Request for Oral Argument on jurisdictional issues on January 6, 2010. AT&T filed a letter requesting immediate suspension of the procedural schedule on January 14, 2010. Core filed a response to that letter the following day. Core served St. No. 1SR, the Surrebuttal Testimony of Bret L. Mingo on January 11, 2010. Core filed its Answer to AT&T's Motion for Leave to File Reply and Request for Oral Argument on January 26, 2010. ALJ Jones issued Order #5 on February 1, 2010, converting the previously scheduled evidentiary hearing to an oral argument on AT&T's Motion to Dismiss and suspending the procedural schedule pending a ruling on AT&T's Motion to Dismiss. Oral argument was conducted on February 3, 2010.

ALJ Jones issued Order #6 on February 26, 2010, granting AT&T's Motion to Dismiss in part, ruling that the Commission has no subject matter jurisdiction over CLEC-CLEC ISP-bound traffic, and denying in part, finding that there remained material factual issues with respect to VOIP traffic exchanged by the parties. Core filed a Petition for Interlocutory Commission Review and Answer to Material Question on March 5, 2010 and AT&T filed a Petition for Interlocutory Review and Answer to Material Question on March 5, 2010. By Order #7 entered April 7, 2010, ALJ Jones granting the parties' joint request to stay the proceeding pending resolution of the Material Questions.

The parties filed briefs regarding the Material Questions on March 15, 2010 and the Commission issued its Opinion and Order resolving both petitions for interlocutory review on September 8, 2010. The Commission answered the Material Question raised by Core in the affirmative, ruling that it does have subject matter jurisdiction to adjudicate a formal complaint regarding compensation for CLEC-CLEC ISP-bound traffic. The Commission also answered the Material Question raised by AT&T in the affirmative, ruling that it has jurisdiction to address intercarrier compensation issues related to VOIP traffic. *Material Question Order*, at 14.

Core filed a Motion for Interim Relief on October 5, 2010 seeking an order directing AT&T to pay Core within 10 days for traffic previously terminated or, alternatively, to establish an escrow account equal to the amount in dispute. AT&T filed its Answer to Core's Motion on October 25, 2010. ALJ Jones issued Order #9 on November 9, 2010, denying Core's interim motion.

Evidentiary hearings were conducted on November 18, 2010. At that time the Core St. No. 1, Core St. No. 1SR, and AT&T Statement No. 1 were admitted into the record. Also, Core

Hearing Exh. Nos. 1-5, Core Cross Examination Exh. Nos. 1-5, and AT&T Cross Exh. Nos. 1-20 were admitted into the record. By Order #10 dated January 12, 2011, AT&T's Motion to Re-Open the Record was granted and AT&T Cross Examination Exhibit 21 was entered into the record.

On February 2, 2011, the FCC Staff filed an *amicus* brief in a still pending current proceeding before the Ninth Circuit Court of Appeals which is addressing a complaint filed by Pac-West Telecomm against AT&T Communications of California dealing with the exchange of CLEC-to-CLEC ISP-bound traffic. *AT&T Communications of California, Inc. et al. v. Pac-West Telecomm, Inc. et al.*, U.S.C.A. (9th Cir.) Dkt. No. 08-17030. ("*AT&T v. Pac-West").* In that case, the California Public Utility Commission ("California Commission") found that it has subject matter jurisdiction over CLEC-CLEC ISP-bound traffic and that it was not preempted by the 2001 *ISP Remand Order*. *Pac-west Telecomm, Inc. v. AT&T Communications of California, Inc. et. al.*, 2007 Ca. PUC LEXIS 310 (Cal. PUC 2007). On appeal, a federal district court agreed. *AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal. Aug. 12, 2008). AT&T then appealed to the Ninth Circuit. The Ninth Circuit asked the FCC to submit a brief on the issue, and the FCC agreed. Order, *AT&T v. Pac-West* (Nov. 4, 2010). The FCC staff's *amicus* brief to the Ninth Circuit contradicts the California Commission, the federal district court, and the Commission's own *Material Question Order*, and claims that the *ISP Remand Order* was intended to cover CLEC-CLEC traffic. Amicus Brief of the Federal Communications Commission, *AT&T v. Pac-West* (Feb. 2, 2011) ("*FCC Staff Amicus Brief").*

The FCC Staff's *Amicus* Brief sets forth a conflicting opinion from the Commission's *Material Question Order*. An informational copy of the FCC Staff's *Amicus* Brief was provided by Core in a letter dated February 3, 2011 and AT&T submitted a response letter dated February 14, 2011. By Order #11 dated March 18, 2011, ALJ Jones *sua sponte* reopened the record to admit the two letters from counsel and the FCC Staff's *Amicus* Brief into the evidentiary record. A decision from the Ninth Circuit remains pending.

On April 13, 2011, Core filed a Petition to Reopen Record To Admit Additional Evidence for the limited purpose of admitting into the evidentiary record proposed pre-marked exhibits: (1) Cross Examination Exh. No. 6, a transcript of an oral argument held before the United States Supreme Court on March 30, 2011 in the matter of *Talk America Inc., et. al v. Michigan Bell Telephone Company, et. al.*, Case Nos.: (07-2469, 07-2473); and, (2) Core Cross Examination Exh. No. 7, the brief submitted by AT&T on March 1, 2011 in that Supreme Court proceeding. Order #12 granted AT&T's request for an extension of time to file an answer to the Petition and Order #13 denied Core's Petition.

On May 24, 2011, the I.D. was issued recommending dismissal, in part, of Core's complaint. As explained further below, Core recommends that the I.D. be reversed and that the relief requested by Core's complaint be granted.

III. EXCEPTIONS

A. Exception No. 1: The ALJ Erred In Finding That The Commission's Previously Established Subject Matter Jurisdiction Over Intrastate CLEC-CLEC Traffic Should Be Reexamined In Light Of The FCC Staff's *Amicus* Brief Filed In The Ninth Circuit

The I.D.'s recommendation to dismiss, in part, Core's complaint is based on the ALJ's erroneous statement "that the paramount issue of whether the Commission has jurisdiction needs to be addressed anew due to the development of the FCC *Amicus* Brief declaring its intent in the *ISP Remand Order*." (I.D. at 23). By embarking on this analysis, the ALJ disregarded the fact that the Commission had already determined in the context of this specific complaint case that: (1) it has subject matter jurisdiction to resolve a formal complaint regarding payment for CLEC-CLEC ISP-bound traffic; (2) the FCC's *ISP Remand Order* does not apply to CLEC-CLEC traffic; and,

(3) it maintains jurisdiction over CLEC-CLEC ISP-bound traffic that is originated and terminated within Pennsylvania. Specifically, the Commission found:

> [W]e agree with Core's contention that this Commission has jurisdiction in this matter because both Core and AT&T are facilities-based CLECs certified by the Commission to provide local exchange telecommunications services in Pennsylvania, and that AT&T, Core and Verizon operate the switches and other facilities used to support AT&T's Indirect Traffic, including the termination function provided by Core, within the state of Pennsylvania. We also agree with Core that AT&T's interpretation of the ISP Remand Order is too broad. Compensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the ISP Remand Order, and reliance on that order to resolve the jurisdictional issue in this case is misplaced. *Material Question Order* at 10.

While the ALJ acknowledges the existence of this order, no analysis is offered to challenge its continuing validity, nor the reasoning on which it is based. As discussed further below in Exception No. 2, the ALJ's reliance on the FCC Staff's *Amicus* Brief was erroneous as neither this Commission nor the FCC – through formal FCC action – have acted to alter the currently applicable precedent which is as stated in the *Material Question Order.*

The ALJ is charged with implementing the currently applicable Commission precedent and Pennsylvania law pursuant to the doctrine of the law of the case.

> The doctrine of law of the case provides that if an appellate court has considered and decided a question on appeal, neither that court nor any trial court may revisit that question during another phase of the same case. The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case. *Gateway Towers Condo. Ass'n v. Krohn*, 845 A.2d 855, 861 (Pa. Super. 2004)(citations omitted).

Under the law of the case doctrine, "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of the matter." *In re De Facto Condemnation and Taking of WBF Associates, L.P.*, 903 A.2d 1192, 1207 (Pa. 2006). As the Pennsylvania Supreme Court has explained:

> This rule serves not only to promote the goal of judicial economy, but also: (1) to protect the settled expectations of the parties; (2) to ensure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end. *Id.* at 1207-08.

Applying the law of the case is consistent with Commission precedent where, as here, the Commission in an earlier phase has adjudicated a legal issue and that determination has not been reversed or otherwise altered by the Commission. *See, e.g.,* Opinion and Order, *Pennsylvania Public Utility Commission v. The Pennsylvania Telephone Association*, Pa. P.U.C. Docket Nos. P-00981397 and P-00981397C0001, at 16-17 (June 8, 2001)(Commission adopted ALJ's recognition that a prior Commission order had stated "the law of the case" for the pending formal complaint).

In this case, the Commission thoroughly considered and answered the same issue that the I.D. chooses to consider "anew." Therefore, the ALJ's analysis of Core's complaint should have begun with the presumption that the Commission's precedent, as set forth in the *Material Question Order*, remains in effect. As there has been no subsequent action by the Commission to reverse the precedent of the *Material Question Order* in this or any other case, the I.D. erred in addressing "anew" those determinations. Instead, the ALJ should have focused on the substantive issues presented by Core's complaint which would have lead to a decision to grant Core's complaint.

Even if the ALJ did have any valid justification to reconsider "anew" the *Material Question Order,* she failed to engage in the appropriate analysis necessary to justify a departure from the law of the case. Such departure is allowed only in exceptional circumstances where:

> . . . there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed. *Nat'l R.R. Passenger Corp. v. Fowler,* 788 A.2d 1053, 1060 (Pa. Commw. Ct. 2001).

None of these circumstances are present here. The controlling law for Core's complaint remains as set forth in the *Material Question Order.* The Commission has taken no action to reverse or otherwise change its determination and, in fact, no party has formally asked that it do so. As explained below in Exception No. 2, the ALJ's reliance on FCC Staff's *Amicus* Brief filed in another jurisdiction does not constitute a change in the controlling law to justify ignoring the law of the case. Further, there has been no substantial change in the underlying facts in this case and there has been no showing that the prior holding was "clearly erroneous and would create a manifest injustice if followed." On the contrary, doing at the I.D. recommends here and ignoring the Commission's precedent would be clearly erroneous and would create a manifest injustice against Core if followed.

In sum, the I.D. erred in starting from the presumption that it had to look "anew" at the *Material Question Order* and then compounded that error by failing to engage in an appropriate analysis to justify the ultimate decision to ignore the current law of the case. For these reasons, Core's Exception No. 1 should be granted and the Commission should apply the law as set forth in the *Material Question Order* to Core's complaint.

B. Exception No. 2: The ALJ Erred In Finding That The FCC Staff's *Amicus* Brief To The Ninth Circuit Overrides This Commission's Previously Established Subject Matter Jurisdiction Over Intrastate CLEC-CLEC Traffic

As explained in the previous section, the ALJ erred by failing to adjudicate Core's complaint consistent with the *Material Question Order* which has not been reversed or altered by this Commission or through any official action by the FCC. The ALJ's apparent reliance on FCC Staff's *Amicus* Brief in a proceeding in another jurisdiction is mistaken. As explained further below, the interpretation offered by the FCC staff in its *amicus* brief is based on the same arguments that the Commission considered – and rejected – in deciding the *Material Question*

Order, Core has not conceded that the brief is entitled to deference, and the ALJ erred in affording the staff interpretation deference.

1. FCC Staff's Reading of the *ISP Remand Order* is Contrary to the Language, Premises and Structure of the Order

The ALJ erred in finding that "the FCC *Amicus* Brief provides sound reasoning…that the Commission does not have subject-matter jurisdiction to use state law to resolve this dispute regarding the appropriate rate for compensation for Core's transport and termination services for ISP-bound traffic." (I.D. at 29.) Accordingly, the I.D. rejects the Commission's own finding that "[c]ompensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the *ISP Remand Order*, and reliance on that order to resolve the jurisdictional issue in this case is misplaced." *Material Question Order*, at 10. However, as demonstrated above in section III.A, the Commission's findings remain applicable law. And, contrary to the I.D., FCC Staff's *Amicus* Brief fails to provide "sound reasoning" for the Commission to overturn its own *Material Question Order*.

To begin with, FCC staff fails to demonstrate that the *ISP Remand Order* clearly preempts state commission orders adjudicating compensation for CLEC-CLEC ISP-bound traffic.[1] Indeed, on the crucial issue of preemption, the *amicus* brief provides only minimal analysis. *See*, *FCC Staff Amicus Brief*, at 25-29. As Core has consistently argued throughout this proceeding, there must be "a clear indication that an agency intends to preempt state regulation." *See, e.g.,* Core Answer to AT&T Motion to Dismiss dated December 28, 2009 at 8-15; *Hillsborough County*

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[1] FCC staff's brief does not challenge the California Commission's underlying subject matter jurisdiction over intrastate CLEC-CLEC ISP-bound traffic on the basis that such traffic is inherently interstate. Rather, staff appears to presume that the California Commission has jurisdiction, but that its resolution of CLEC-CLEC compensation issues was preempted by the *ISP Remand Order*. *See*, *FCC Staff Amicus Brief*, at 25 ("The question thus becomes whether [FCC] rules preempt the [California Commission] from relying on state law to set the rate…").

Automated Med. Labs., Inc. 471 U.S. 707 (1985). While "[p]re-emption may result… from action taken by… a federal agency acting within the scope of its congressionally delegated authority," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986), the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption. *See, Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006)("The requirement of a clear indication of the agency's intent to preempt is especially important in the context of the [Telecommunications Act of 1996], which divided authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states.")(citations omitted); *and see, Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100, n.7 (2nd Cir. 2006)("a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.").

Instead of meeting head-on the burden for preemption to be clear and unambiguous, FCC staff starts with the premise that the *ISP Remand Order* addresses CLEC-CLEC ISP-bound traffic; and that the California Commission's orders conflict with the *ISP Remand Order*. That is, staff assumes what the court asks it to establish in the first place. *First*, staff states bluntly that "the FCC's expression of its intent to pre-empt state authority is quite clear." *FCC Staff Amicus Brief*, at 26. It may be "quite clear," perhaps, with respect to ILEC-CLEC traffic, but not so with CLEC-CLEC traffic. Otherwise, two state commissions and a federal district court would not have found that the *ISP Remand Order* does not encompass CLEC-CLEC traffic. *Second*, staff claims "conflict preemption" because the rate applied by the California Commission exceeds the *ISP Remand Order's* $0.0007 rate cap. *FCC Staff Amicus Brief*, at 27. But that conflict only exists if one assumes, with staff, that the *ISP Remand Order* clearly and unambiguously applies to CLEC-CLEC traffic. For a wide variety of reasons, it does not.

Contrary to FCC staff's primary substantive argument, *FCC Staff Amicus Brief*, at 16-19, the "language" of the *ISP Remand Order* fails to demonstrate any intention to regulate CLEC-CLEC traffic. Importantly, the *ISP Remand Order* is utterly silent about *how* to implement its rules as between two CLECs. Although the plain language of the *ISP Remand Order* frequently specifies the relationship between *incumbent* LECs and *competitive* LECs, it never discusses dealings between two CLECs. Instead, the structure of the order and its rules indicate that the FCC was addressing ILEC-CLEC traffic only. The order created a complicated set of interrelated rules including a price cap, growth cap, three-to-one ratio, and new market bar. *See ISP Remand Order*, at ¶¶ 78, 79, 81.

But that regime only "kicks in" if and when two conditions are met: (1) the incumbent LEC "opts-in" to the regime on a state-by-state basis, by lowering the price of termination on its own network to the FCC's rate cap (the so-called "mirroring rule"), *ISP Remand Order*, at ¶ 89; and (2) the interconnection agreement governing reciprocal compensation between a particular incumbent LEC and a particular competitive LEC includes an applicable change-of-law provision. *Id.*, at ¶ 82. Both of these predicate conditions presume an ILEC-CLEC relationship, not a CLEC-CLEC relationship.

Under the mirroring rule, the FCC ruled that *only an ILEC* may "opt-in" to the interim pricing regime, on a state-by-state basis. *ISP Remand Order*, at ¶ 89 ("Because we are concerned about the superior bargaining power of *incumbent LECs*, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an *incumbent LEC* offers to exchange all traffic subject to section 251(b)(5) at the same rate...")(emphases added). Importantly, if the ILEC does not opt in, previous state commission rulings regarding ISP-bound traffic will continue to apply to the ISP-bound traffic that the ILEC originates. *Id.* The *ISP Remand Order* says nothing about how a CLEC such as AT&T would opt-in or otherwise avail itself of the interim compensation regime. Nor does the *ISP Remand Order* explain what happens if one CLEC opts in and another CLEC does not. Notably, the record in this case shows that AT&T has never opted into the FCC's pricing regime, and continues to collect at a rate far higher than $0.0007 for the termination of ISP-bound traffic on its network in Pennsylvania. BLM-15, at Amendment Exhibit B (a TELRIC rate – $0.002814/MOU – applies to ISP-bound and other traffic exchanged and terminated by AT&T pursuant to its Commission-approved traffic termination agreement with North Pittsburgh Telephone Company. Notably, this agreement was entered into well *after* the *ISP Remand Order* was issued).

Likewise, the *ISP Remand Order's* insistence on implementation via the interconnection agreement process presumes an ILEC-CLEC relationship since, under the Telecommunications Act, a CLEC may invoke its rights to negotiation and arbitration of an Interconnection Agreement ("ICA") only with an "incumbent local exchange carrier." 47 U.S.C. § 252(a)-(b). While FCC staff claims the *ISP Remand Order's* reference to "interconnection agreements" was meant to include private carriage CLEC-CLEC traffic exchange agreements, *FCC Staff Amicus Brief*, at 22, there is no evidence the FCC, in drafting the *ISP Remand Order*, had any such intent. Of the *ISP Remand Order's* twenty-two references to an "interconnection agreement" *none* supports FCC staff's newfound theory that the *ISP Remand Order* encompasses CLEC-CLEC traffic. By contrast, *all* of these references are consistent with an order that addresses ILEC-CLEC disputes. Indeed, many of the FCC's references to "interconnection agreements" are only intelligible in an ILEC-CLEC context. For example, the FCC found that "in the absence of conflicting federal law, parties could voluntarily include ISP-bound traffic in their interconnection agreements under sections 251 and 252 of the Act," *Id.*, at ¶ 15, and that "[p]ending adoption of a federal rule . . . state commissions exercising their authority under section 252 to arbitrate, interpret, and enforce interconnection agreements would determine whether and how interconnecting carriers should be compensated for carrying ISP-bound traffic." *Id.* Of course, CLECs do not generally enter into "interconnection agreements under sections 251 and 252 of the Act" and state commissions do not generally "exercise[e] their authority under section 252" relative to CLEC-CLEC traffic exchange agreements. *See, e.g.* Statement of Commissioner James H. Cawley, *Pennsylvania Public Utility Commission v. Verizon Pennsylvania* Docket No. R-2011-2234464 (May 19, 2011).

The FCC also noted that: (1) "[m]any CLECs argue that the *current traffic imbalances between CLECs and ILECs* are the product of greediness on the part of ILECs that insisted on above-cost reciprocal compensation rates in the course of negotiating or arbitrating initial interconnection agreements," *Id.*, at ¶ 75 (emphasis added); (2) ordered that "as of the date this Order is published in the Federal Register, *carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement* with regard to the rates paid for the exchange of ISP-bound traffic," *Id.*, at ¶ 82 (emphasis added),;(3) found that "although the process has proceeded too slowly to address the market distortions discussed above, we note that negotiated reciprocal compensation rates continue to decline as *ILECs and CLECs negotiate new interconnection agreements*," *Id.*, at ¶ 84 (emphasis added); and, (4) that "section 251 has expanded upon our historic functions by providing us with the authority to set the framework for pricing rules applicable to *unbundled network elements, purchased under interconnection agreements*." *Id.*, at ¶ 50, n.96 (emphasis added). Each of these references presumes the existence of an "interconnection agreement" negotiated or arbitrated between an ILEC and a CLEC under state commission supervision pursuant to section 252.

Perhaps most damning to FCC's staff's interpretation of "interconnection agreement" is a key footnote in which the FCC identified the "recently negotiated interconnection agreements" that served as a factual premise for the FCC's rate caps. *Id.*, at ¶ 85. In it, the FCC "takes notice of the following interconnection agreements: (1) Level 3 Communications and SBC Communications… (2) ICG Communications and BellSouth… (3) KMC Telecom and BellSouth (4) Level 3 Communications and Verizon." *Id.* at n158. Of course, it is indisputable that all four of these seminal interconnection agreements conform to the ordinary use of that term, that is, all four are agreements between an ILEC and a CLEC, and subject to the negotiation and arbitration provisions of section 252. In its own *amicus* brief to the Ninth Circuit, the California Public Utility Commission ("California Commission") identified the inherent weakness of FCC staff's position. Noting that "a CLEC has no way of compelling another CLEC to contract with it," the California Commission Brief concluded that FCC staff's reading of "interconnection agreement" to include CLEC-CLEC traffic exchange agreements "simply ignores the structure of 47 USC §§ 251-252, which gives CLECs a right to compel arbitration of an interconnection agreement with an ILEC but not with another CLEC..." Response of Appellee and Defendant Commissioners of the California Public Utilities Commission to Amicus Brief of Federal Communications Commission, *AT&T v. Pac-West* (Feb. 22, 2011)("*California Commission Brief*"), at 2-3.

FCC staff points to "[t]he FCC's statements delineating both the scope of its proceeding and its rules…" to buttress its reading of the *ISP Remand Order*. While it is true that one fleeting reference to "all LECs" in a footnote to the now-vacated 1999 *ISP Declaratory Order* could be read to encompass CLEC-CLEC traffic, every other FCC statement regarding the scope of the FCC's ISP-bound traffic proceedings, and the *ISP Remand Order* itself, confirms what everyone involved already knows: the order only was intended to resolve disputes between ILECs and CLECs regarding compensation for ISP-bound traffic. In its 1997 Public Notice initiating the proceedings which lead to the *ISP Remand Order*, the FCC recognized that the issue of compensation for ISP-bound traffic was an issue between ILECs and CLECs. Public Notice, CCB/CPD 97-30 (Rel. July 2, 1997)("ALTS requests clarification that nothing in the Local Competition Order requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs.").[2] Similarly, the FCC's 1999 *ISP Declaratory Ruling* (despite staff's proffered footnote) also makes this clear. Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Comp. for ISP-Bound Traffic*, 14 F.C.C.R. 3689-3690 (1999)("Generally, competitive LECs (CLECs) contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996" while "[i]ncumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5)… parties should be bound by their existing interconnection agreements, as interpreted by state commissions.").

In its 2001 intercarrier compensation *NPRM*, issued the same day as the *ISP Remand Order*, the FCC noted that it had never regulated CLEC-CLEC traffic, and had no intention of doing so. Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001)(noting the absence of any "symptoms of market failure," the FCC concluded that "we do not contemplate a need to adopt new rules governing CLEC-to-CLEC… arrangements."). FCC staff's attempt to distinguish this statement, *FCC Staff Amicus Brief*, at 24 ("[t]he FCC in these statements expressed its tentative views on possible

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2 A courtesy copy of the public notice is attached hereto as Attachment A.

future rule revisions"), is simply not credible. The FCC found no "symptoms of market failure" with respect to "CLEC-CLEC arrangements" *on the same day* it released the *ISP Remand Order*. Accordingly, the FCC would have had no rational basis to lump CLEC-CLEC traffic into its contemporaneous *ISP Remand Order*.

In its 2004 *Core Forbearance Order*, the FCC again confirmed that the scope of the *ISP Remand Order* was limited to ILEC-CLEC traffic. *See, e.g.,* 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 at ¶ 8 (Oct. 18, 2004) *("Core Forbearance Order")*("The Commission also determined that the rate caps for ISP-bound traffic . . . should apply only if an *incumbent LEC* offered to exchange all traffic subject to section 251(b)(5) at the same rates… The Commission adopted this "mirroring" rule to ensure that *incumbent LECs* paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic.")(emphasis added); *Id.*, at ¶ 9 ("In this situation, if an *incumbent LEC* has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period (the "new markets" rule).")(emphasis added). In its 2006 *amicus* brief to the First Circuit, FCC staff affirmed that the scope of the *ISP Remand Order* is limited to ILEC-CLEC traffic. Brief for Amicus Curiae Federal Communications Commission, *Global Naps, Inc., v. Verizon New England, Inc.*, 2006 WL 2415737 (C.A.1), 4 ("Disputes arose between *ILECs* and *CLECs* about the intercarrier payment mechanism that governs such calls.")(emphasis added)

Following the FCC's lead, courts reviewing the *ISP Remand Order* and its progeny have generally presumed that the order is limited to ILEC-CLEC traffic. *See, e.g., In re Core Communications, Inc.*, 455 F.3d 267, 270 (2007)("If ISP-bound traffic were governed by § 251(b)(5), then reciprocal compensation arrangements would be required for the *ILEC-to-CLEC* hand-off described above, and *ILECs* would be required to compensate CLECs for completing their customers' calls to ISPs. . . "); *and id.*, at 273 ("As an adjunct to the rate caps, the Commission established a "mirroring rule," which provided that the rate caps on ISP-bound traffic would apply only if the *ILEC* also offered to charge the CLEC the same capped rate to terminate local traffic that originated on the CLEC's network.").

Nor can FCC staff properly rely on public policy concerns. Although staff portrays itself as implementing "the regulatory purposes underlying the enactment of the FCC's rules," *FCC Staff Amicus Brief*, at 20, such an exercise is simply beyond staff's purview. The FCC's policy concerns are only relevant to the scope of traffic it actually regulated, i.e., ILEC-CLEC traffic. As noted above, the FCC in 2001 found no "symptoms of market failure" with respect to CLEC-CLEC traffic. Staff cannot retroactively enlarge the scope of the *ISP Remand Order* in an attempt to further a decade-old policy for a class of traffic (dial-up Internet access) that the FCC itself recently admitted is of "rapidly diminishing significance." Brief for Federal Respondents in Opposition, *Core Communications, Inc. v. FCC,* Sup. Ct. Dkt. No. 10-185, and, *Pa.P.U.C. v. FCC*, Sup. Ct. Dkt. No. 10-189, (October 2010), at 12.

FCC staff's remaining arguments are makeweight. Staff argues that the ILEC's sole exercise of the "mirroring rule" does not prove the order is limited to ILEC-CLEC traffic, because "CLECs… were not thought to have superior bargaining power and hence there was no reason to apply the mirroring rule to them." *FCC Staff Amicus Brief*, 23. However, staff provides no citation to any language of the *ISP Remand Order*, or any other authority for this proposition. Staff also argues that "[a]lthough the FCC identified a state commission section 252 proceeding as one way in which a carrier could rebut the presumption, it did not hold that a rebuttal could occur 'only' in a section 252 proceeding." *FCC Staff Amicus Brief*, at 24. As the California Commission noted: "the FCC implies that venues other than section 252 arbitration proceedings exist where one CLEC can rebut the presumption that traffic above a 3:1 ratio of terminating-to-originating traffic is ISP-bound, but the FCC does not identify those venues." *California Commission Brief*, at 3-4.

Finally, FCC staff's *amicus* brief notably declines to address the Ninth Circuit court's inquiry about whether a state commission has jurisdiction to implement the *ISP Remand Order* as between two CLECs. This leaves implementation issues for CLEC-CLEC traffic – issues state commissions have been working to resolve – in a newfound state of confusion and delay. As the California Commission lamented, "[t]he FCC, apparently, would leave the parties in limbo." *California Commission Brief*, at 7. In essence, FCC staff (and the I.D. by extension) asks the Commission to defer to a set of federal rules for which nobody knows (1) who should implement them; or (2) how they should be implemented. For all these reasons, the Commission should reject staff's reading of the *ISP Remand Order* to include CLEC-CLEC traffic and the I.D.'s reliance on that flawed interpretation to justify its ultimate recommendation to ignore the *Material Question Order*.

2. The I.D. Erred In Finding That Core Failed To Deny That The FCC's Interpretation Is To Be Viewed As Deferential

The ALJ erred in finding that "Core failed to deny that the FCC's interpretation is to be viewed as deferential although it was provided through an *Amicus* Brief." (I.D. at 26). At the hearing in this case, the parties informed the ALJ that the Ninth Circuit Court of Appeals had requested the FCC to submit an *amicus* brief addressing jurisdictional issues relating to CLEC-CLEC ISP-bound traffic. Tr. at 216-217. The FCC submitted the brief to the Ninth Circuit after briefing and the close of the record in this case. Although Core did bring the brief to the attention of the ALJ via an informal letter, Core was careful to note that "[FCC] staff's opinion…conflicts with the Commission's September 8, 2010 *Material Question Order* which found that the *ISP*

Remand Order does not apply to CLEC-to-CLEC ISP-bound traffic" and that "the arguments set forth in support of this conflicting viewpoint were before the Commission in deciding its *Material Question Order*." *See* February 3, 2011 letter from counsel for Core to ALJ Jones. Despite receiving informal letters from both parties contesting the relevance and content of the *amicus* brief, the ALJ declined to order or permit additional briefing on the issue of deference, and therefore Core had no opportunity to "deny that the FCC's interpretation is to be viewed as deferential." Indeed, the ALJ rejected Core's attempt to introduce additional evidence relevant to the deference issue. *See*, I.D., at 11.

3. The Commission Owes No Deference to FCC Staff's Brief

The I.D. concludes without discussion that the Commission owes "deference" to FCC staff's *amicus* brief. *See*, I.D., at 26. However, the I.D. accepts that deference is due to the views of an agency as set forth in an *amicus* brief, but the I.D. fails to acknowledge that there is no blanket "deference rule." In fact, deference to an agency brief is a doctrine riddled with exceptions and increasingly under attack. Most important, an agency brief is worthy of deference *only where the brief interprets an existing regulation, and does not create a new one. See, Christensen v. Harris County*, 529 U.S. 576 (2000)("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."); *and see, United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 568 (1st Cir. 2004)("Deference to the agency's view does not mean abdication… The Department is free to interpret reasonably an existing regulation without formally amending it; but where, as here, the interpretation has the practical effect of altering the regulation, a formal amendment-almost certainly prospective and after notice and comment-is the proper course."). FCC Staff's *Amicus* Brief is not worthy of deference because, as demonstrated above, it does merely interpret the *ISP Remand Order*. Rather, it rewrites and expands that order to encompass CLEC-CLEC traffic.

Further, the Third Circuit has ruled that no deference is due where the agency's interpretation of its own rules is inconsistent with the actual language of those rules. *See*, *U.S. Dept. of Labor v. Mangifest*, 826 F.2d 1318, 1324 (3rd Cir. 1987)("we defer to a policymaker's plausible explanation of the language in a regulation... The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend."); *citing*, *Bethlehem Steel v. OSHA,* 573 F.2d 157, 161 (3rd Cir. 1978). As demonstrated above, staff's brief is simply not consistent with the language, premises or structure of the *ISP Remand Order*, and is thus not worthy of deference.

Finally, agency use of *amicus* briefs to broaden agency jurisdiction is an increasingly controversial practice. In a recent case involving the FCC's rules governing section 251(c)(2) interconnection issues, Justice Scalia took issue with the continuing practice of applying *any* deference to agency interpretations of its own rules, including the use of *amicus* briefs. According to Justice Scalia, "when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." Opinion, *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ____, ___, 2011 U.S. LEXIS 4375, at *31-*32 (June 9, 2011) (Scalia, J., concurring).[3] Justice Scalia continues: "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Id.*

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3 While the Court deferred to the FCC's interpretation of its own interconnection rules, it did so on the grounds that "the Commission's interpretation of its regulations is neither plainly erroneous nor inconsistent with the regulatory text," Opinion at *22, factors not present in this case. Further, the FCC's brief in *Talk America* simply reiterated the interpretation the FCC had previously advanced in the *Triennial Review Order* and the *Triennial Review Remand Order*. Opinion at *26-*27.

Notably, the Justice pinpointed the FCC in particular as suspect in its use of *amicus* briefs: "[t]he seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Id.* at *32.

The I.D. cites without discussion three cases, none of which are comparable to the present case. I.D. at 26. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011) posed a straightforward question of how to interpret specific terms in a Federal Reserve Board regulation. *See*, *Chase Bank*, at 880 ("In short, Regulation Z is unclear with respect to the crucial interpretive question: whether the interest-rate increase at issue in this case constitutes a 'change in terms' requiring notice."). In *Chase Bank*, the agency's brief provided a straightforward reading of specific language set forth in a previously published regulation. Here, there is no particular term or phrase that is open to interpretation. As demonstrated herein, FCC staff's *amicus* brief is a wide-ranging dissertation on the language, structure and policy behind the original *ISP Remand Orde*r and the retroactive application of staff-driven views of public policy to CLEC-CLEC traffic. This is a much more elaborate and questionable undertaking than the simple interpretive gloss provided by the Board in *Chase Bank*.

Nor do either of the remaining cases cited by the I.D. provide any justification for deference to the FCC Staff's *Amicus* Brief. In *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009), the Court considered an odd scenario in which two federal agencies collaborated to file an *amicus* brief, even though one of the agencies had previously adopted a different position on the same issue. *Kennedy*, 129 S. Ct. 865, 878, n7. Meanwhile, in *Dreiling v. Am. Express Co.*, 458 F.3d 942 (9th Cir. 2006), the Ninth Circuit simply relied on the "plain text" of the promulgated rule, as well as the agency's *amicus* brief, which was evidently conformed to that "plain text." *Dreiling v. Am. Exp. Co.,* 458 F.3d 942, 953 n.11 (9th

Cir. 2006)("We thus reject Dreiling's argument because it conflicts with the plain text of the 1996 version of Rule 16b-3(d) as well as the SEC's controlling interpretation of it."). Here, FCC Staff's *Amicus* Brief does not hew to the plain text of the existing rule; rather it attempts to apply existing rules to a whole new class of carriers.

Finally, unlike the cases cited in the I.D., the present case involves a federal agency's attempt to preempt a state agency's regulation of issues that are clearly within the subject matter jurisdiction of the state agency. This distinction is highly significant, since, as shown above, federal agency preemption of existing state regulation must be clear and unambiguous. Conversely, the doctrine of deference to agency views expressed in an *amicus* brief is premised on the fact that the agency order at issue is ambiguous. *See, e.g., Chase Bank* ("we conclude that the text of the regulation is ambiguous, and deference is warranted to the interpretation of that text advanced by the Board in its *amicus* brief."). However, assuming for the sake of argument, that the *ISP Remand Order* is ambiguous on the issue of preemption,[4] FCC staff cannot effect preemption by attempting, in a brief written ten years after the fact, to make clear and unambiguous that which is neither. Had the FCC's purported preemption of preexisting state authority over CLEC-CLEC ISP-bound traffic been clear and unambiguous from the start (and it was not), the Commission and the California Commission would not have found otherwise, a federal district court would not have agreed, and the Ninth Circuit never would have asked the FCC for clarification in the first place. Accordingly, because preemption doctrine requires the FCC's clear intent to preempt, and because FCC staff cannot retroactively supply that clarity, its brief holds no more weight than that of any other party. For all these reasons, the Commission

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4 To be clear, Core's position as outlined herein, *infra.*, section III.b.1, is that the clear and unambiguous scope of the *ISP Remand Order* is limited to ILEC-CLEC traffic, and does not encompass CLEC-CLEC traffic.

owes no deference to FCC Staff's *Amicus* Brief and the I.D. recommending the contrary must be rejected.

C. **Exception No. 3: Conclusion of Law #10 Is Erroneous As The "Nature" of the Traffic Transported And Delivered By Core Is Not Determinative Of The Commission's Jurisdiction**

The I.D. concludes that the issue of "whether there was a mix of traffic (traffic other than ISP-bound) after September 2009" is an issue "if the Commission retains subject-matter jurisdiction." (I.D. at 24). With that in mind, the ALJ erroneously finds that "Core, failed to provide evidence to parse out the traffic that is VOIP versus ISP-bound traffic" and, therefore, the I.D. recommends that "all traffic through August 31, 2010. . . is to be treated as ISP-bound traffic."[5] (I.D. at 35-36; FOF Nos. 54-57). The effect of this is the ALJ's recommendation that the determination of the amount due should be based on *the retail services offered by the terminating carrier's customers to their end users*. Thus, in accordance with the reasoning of the I.D., if a terminating carrier's *wholesale* customer offers traditional landline service to its end users, then rate "A" would apply. If a terminating carrier's customer provides VOIP service, then rate "B" would apply. Such distinctions would be impossible to effectuate in fact. As Core witness Mingo testified:

> We offer local telecommunications services to enhanced service providers ("ESPs"), including ISPs and increasingly, VOIP carriers. ESPs are entitled to purchase telecommunications services out of local business tariffs, and we have structured our network and company to provide them with that local service. What they do with that service . . . is their business, not ours. Core St. No. 1SR at 6.

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[5] The ALJ chooses August 31, 2010 based on Core's Motion for Interim Relief identifying the amounts due to Core by AT&T through August 31, 2010 – the most current time period for which information was available at the time Core filed its Motion. I.D. at n. 16. From this, the I.D. appears to conclude that Core's claims are somehow limited to August 31, 2010. This is not correct. Core's complaint seeks a determination of what AT&T was required to pay through the date a final Commission order is entered as well as a determination regarding what AT&T will be required to pay prospectively. Core's complaint for retroactive payments is not limited to a specifically defined time period nor could it be as AT&T continues to send Core traffic for termination and continues to refuse to pay anything for Core's services.

Moreover, the Commission put this issue to rest in the *Palmerton* case in which GlobalNAPs, an originating carrier, argued that its customers sent VoIP traffic and, therefore, the compensation GlobalNAPs owed for termination was something different than if the traffic originated in a traditional telecommunications protocol. The Commission rejected this argument, stating:

> First, excluding any consideration of the interstate versus intrastate *jurisdictional* classification of the traffic at issue – a matter that is addressed below — *we find that strict reliance on the traffic protocols for the related calls that are being transmitted by GNAPs and eventually terminate in Palmerton's network is not determinative of the Commission's subject matter jurisdiction both in terms of applicable Pennsylvania and federal law and sound policy. We find that strict reliance on these traffic protocols for these calls places the legal and technical analysis in this matter on a legally unsustainable course. This approach also has the capacity of creating undesirable regulatory policy results.*
>
> . . .
>
> GNAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service, and the Commission has subject matter jurisdiction. *GNAPs' fundamental telecommunications service function is not altered by the fact that GNAPs transports a "mix" of traffic including the "unique type" of VoIP calls.* A large part of the evidentiary record in this proceeding has been consumed in an attempt to ascertain whether the Commission's subject matter jurisdiction is dependent upon the traffic protocols of the calls transported by GNAPs and indirectly terminated at Palmerton's facilities rather than on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service *irrespective* of the technical protocol classification of the traffic being carried. This telecommunications service is clearly provided by a common carrier telecommunications utility that has been duly certificated to operate as such by this Commission within specific areas of the Commonwealth. Order, *Palmerton Telephone Co. v. Global NAPs South, Inc. et. Al,* Pa. PUC Docket No. C-2009-209336 at 6-8 (March 16, 2009) ("*Palmerton*")(additional emphasis added).

Similarly in this case, AT&T attempts to use a "type of traffic" defense to justify its nonpayment. As the Commission clearly and articulately rejected such argument in *Palmerton*, AT&T's attempt here should not have been relied upon by the ALJ. Rather, like the traffic in *Palmerton*, AT&T's "function of transmitting and then indirectly accessing and terminating traffic" at Core's "network facilities is a common carrier telecommunications service" regardless of what Core's customers "do" with the traffic that is sent by AT&T.

Therefore, the I.D. erred in concluding that Core was required to "parse" out what its customers "do" with the traffic originated by AT&T's customers and destined for Core's customers. As there is no such legal requirement to do this, the ALJ's determination to the contrary was erroneous and must be reversed. In sum, the relevant inquiry here is whether AT&T sent traffic to Core, whether Core terminated that traffic, and what amount AT&T is required to pay for that service.

D. <u>Exception No. 4: The ALJ Erred In Finding That Core Ever Argued For The Application Of The FCC's $0.0007/MOU Rate In This Proceeding</u>

The ALJ erred in finding that "[i]f it is determined that the ISP-bound traffic falls under federal jurisdiction, then Core has requested the Commission to decide whether the Commission should apply federal law in this dispute at a rate of $0.0007 MOU." (I.D. at 24). Notably, the I.D. provides no record cite for this proposition. This is because there is none. Since the filing of its complaint through the testimony and consistently in all the other pleadings that have been filed by Core in this proceeding, Core has advocated that – in the absence of a mutually acceptable agreement to the contrary (and Core does *not* agree that such agreement can be "bill-and-keep") – AT&T should be directed to compensate Core at its tariffed access rate. Core M.B. at 17-25. The only alternate rate offered by Core was the current, Commission-derived TELRIC reciprocal compensation rate approved by the Commission. *Id.* at 25-29.

Core has never agreed nor advocated that the rate ILECs are required to pay pursuant to the *ISP Remand Order* should be applied in this case. In fact, Core has noted the following position of the Commission:

> The [*ISP Remand Order*], with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that... bears no relationship to cost... the [FCC's] rate is set so far below actual costs as to be unjust and confiscatory. Core Cross Exh. 1, at 20; *and see,* Core M.B. at 29.

Despite the fact that it has not advocated for the applicability of the ILEC rate here, Core has repeatedly highlighted the fact that the ILECs, pursuant to the *ISP Remand Order* and contrary to AT&T's position, pay Core *something* for Core's termination of their traffic. Core R.B. at 18-19. Clearly, this advocacy has always been intended to contrast the difference between the ILEC's legal requirement to pay Core something and AT&T's advocacy in this case that it, as a CLEC, should be required to pay *nothing*. The ALJ erred in translating this advocacy into "a request" by Core to apply the ILEC's *ISP Remand Order* rate to the traffic at issue here.

E. Exception No. 5: Finding Of Fact # 59 Is Erroneous As Core's Intrastate Switched Access Tariff Applies To The AT&T Indirect Traffic

The ALJ erred in finding that Core's intrastate switched access tariff, Pa. P.U.C. Tariff No. 4 (the "Tariff") "established access rates for the origination and termination of non-local, toll, interexchange traffic with a terminating access rate of $0.014 MOU." (I.D. at 20). This finding is at odds with the plain terms of Core's Tariff, which is not limited to "non-local, toll, interexchange traffic...," as the I.D. contends, but extends to all intrastate "communications." *See* Core M.B. at 17-19; Tariff, at § 1 (definition of "Switched Access Service").[6] Indeed, the term "non-local" does not appear anywhere in the Tariff. The terms "toll" and "interexchange" do appear, but only in connection with "Toll Presubscription" provisions, Tariff, § 3.7.5, which are irrelevant to this case. As Core's Tariff extends to all "communications" within the Commission's jurisdiction, and

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6 The terms of Core's Tariff are available at: http://www.tariffs.net/tariffs/100139lpqa/tempPA%20TRF%20LOCALF%20CoreTel%20061809%20CUR01.pdf

as nothing in Core's Tariff limits its applicability in the manner recommended by the I.D., the I.D. should be reversed.

Furthermore, if the I.D. were correct, then Core's Tariff would be limited to IXC-CLEC traffic, since IXCs normally deliver "non-local, toll, interexchange traffic" to CLECs, which terminate such traffic. Core R.B. at 12-13. But Core's Tariff is not so limited. Indeed, it clearly applies to CLECs just as much as IXCs. Core's Tariff defines "Switched Access Service" (the service Core provided AT&T) as: "[a]ccess to the switched network of an ***Exchange Carrier*** for the purpose of originating or terminating communications. Switched Access is available to <u>carriers</u> as defined in this rate sheet." Tariff, at § 1 (definition of "Switched Access Service")(emphasis added). The Tariff defines the term "Exchange Carrier" as any entity "engaged in the provision of local exchange telephone service," *Id.* at § 1 (definition of "Exchange Carrier"), which clearly encompasses a terminating CLEC such as Core. The Tariff defines the term "Carrier" as an "Interexchange Carrier or Exchange Carrier," *Id.* at § 1 (definition of "Carrier"), which clearly encompasses originating CLECs, such as AT&T, *in addition to* IXCs. Core's Tariff further states that "Switched Access Service, which is available to ***Customers*** for their use in furnishing their services to end users, provides a two-point communications path between a ***Customer's*** Premises and an End Users Premises." *Id.*, at § 4.1 (emphasis added). The Tariff clarifies that the term "Customer" could include "an interexchange carrier, a wireless provider, ***or any other service provider***." *Id.*, at § 1 (definition of "Customer")(emphasis added). An originating CLEC easily falls within the Tariff's definition of "Customer" since a CLEC clearly fits within the category of "any other service provider." Thus, Core's Tariff is not limited to "interexchange" or IXC traffic, and clearly covers intrastate, locally-dialed, CLEC-CLEC traffic, as well.

Nothing in the Commission's precedent precludes application of switched access tariffs and rates to "local" traffic, where, as here, the plain terms of a tariff apply to all intrastate "communications." Core M.B. at 21-25. While AT&T cites to passages from a Commission order and a Pennsylvania statute, AT&T St. No. 1, at 26, these authorities simply stand for the undisputed proposition that switched access tariffs apply to "toll" and "interexchange" traffic. However, neither authority even attempts to address the issue presented here, which is whether the specific terms of Core's Tariff can also apply to "local" or "locally-dialed" traffic in the absence of a traffic exchange agreement.

Although locally-dialed CLEC-CLEC calls should ultimately be covered by a TEA, (which AT&T steadfastly has refused to negotiate) there is precedent for application of an intrastate access tariff such as Core's Tariff to locally-dialed traffic. According to the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines published by the Alliance for Telecom Industry Solutions ("ATIS"), "[a]ccess and interconnection services may be billed as usage-sensitive and flat-rated charges, which may include intraLATA non-subscribed toll, wireless and local services." *See*, Core St. No. 1, at 19, *and see*, Exhibit BLM-9 at 1-1. Similarly, the guidelines state that "[t]he term access may encompass Interstate, Intrastate, and Local." *See id.*, at unnumbered page.

In the case of locally-dialed wireless calls, incumbent LECs' Pennsylvania intrastate access tariffs applied for many years. For example, in the landmark ICA arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., the Commission noted that "[p]rior to April 2002, ALLTEL was paid the rate of approximately $0.03 (3 cents) per minute with respect to indirect traffic that Verizon Communications terminated on its network. ***This rate is the intrastate access rate of ALLTEL and included all wireless traffic originated by Verizon Wireless***." Opinion and Order, *Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With*

ALLTEL Pennsylvania, Inc., Pa. P.U.C. Docket No. A-310489F7004, (Jan. 18, 2005), 2005 WL 6502686, at *11 (emphasis added). Indeed, Verizon Wireless' entire goal in that proceeding was to replace the existing access regime, which applied to its locally-dialed wireless traffic, with a reciprocal compensation regime that would produce a much lower termination rate. *Id.* Core would welcome such a result in this case as it would lead to payment from AT&T for services rendered.

In addition to ignoring the plain terms of Core's Tariff, the I.D.'s insertion of a "non-local, toll, interexchange traffic" restriction into the Tariff end-runs around the filed-rate doctrine. Core M.B. at 17-19. A public utility's tariff is the presumptive authority for the utility's provision of services to its customers. Under Pennsylvania law, "every public utility shall file with the commission… tariffs showing all rates established by it and collected or enforced… within the jurisdiction of the commission." 66 Pa. C.S. § 1302. Indeed, "[n]o public utility shall… demand or receive… a greater or less rate for any service rendered… than that specified in the tariffs of such public utility applicable thereto." 66 Pa. C.S. § 1303. Further, the filed-rate doctrine "provides that rates and tariffs established by the Commission are prima facie reasonable and have the force of law until modified or changed by the Commission..." *See, e.g.*, Opinion & Order, *Application for Authority to Transfer Control of Tri-gen-Philadelphia Energy Corporation*, Pa. P.U.C. Docket No. A-130375F5000, (April 7, 2005), at 8 and note 36 (citations omitted). No one disputes that Core has filed the Tariff with the Commission, that the Tariff has been accepted for filing, or that the Tariff governs compensation for the termination of intrastate communications, traffic which is clearly "within the jurisdiction of the commission." According to the filed-rate doctrine, the rates in the Tariff should apply to all intrastate communications, not just "non-local, toll, interexchange" traffic.

Further, under Commission rules, there is a specific procedure to challenge a CLEC's intrastate access rates and tariffs which AT&T has never utilized. Core R.B. at 20. More specifically:

> Upon filing of an initial access tariff by a CLEC, the rates contained therein will be allowed by the Commission to go into effect by operation of law. The Commission will presume that CLEC access charge rates that are at or below the corresponding access rates… of the local ILEC in whose certificated territory the CLEC is providing service are reasonable without requiring cost documentation… Any party that files a complaint against the existing access charge rates of the CLECs will have the burden of proof of demonstrating that the rates are not just and reasonable. Order, *In Re Nextlink Pennsylvania, Inc.*, Pa. P.U.C. Docket Nos. P-00991648 and P-00991649, 93 Pa.P.U.C. 172, at *19 (September 30, 1999) ("*Global Order*").

There is no dispute in this proceeding that Core's filed rates are set "at or below the corresponding access rates" of the incumbent LECs and Core's Tariff is thus entitled to a presumption that its rates are "reasonable." AT&T has never even attempted to meet the "burden of proof of demonstrating that the rates are not just and reasonable." The filed-rate doctrine applies, and AT&T's sole remedy is to file a formal complaint challenging Core's tariff to demonstrate that the application of the rates to the AT&T Indirect Traffic "are not just and reasonable." In sum, the I.D. errs by failing to conclude that Core's Tariff can and does apply to the traffic at issue in this case and, therefore, it must be reversed.

F. Exception No. 6: Finding Of Fact # 61 Is Erroneous As Bill-And-Keep Is Not The Industry Standard Method Of Reciprocal Compensation

The ALJ erred in finding that "[b]ill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs." (I.D. at 20). In so finding, the I.D. confuses bill-and-keep (a form of reciprocal compensation) with the current trend of carrier self-help and non-payment.

FCC rules define "bill-and-keep arrangements" as "those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network." 47 C.F.R. § 51.713(b). FCC rules state that "a state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so…" 47 C.F.R. § 51.713(b). While carriers may agree to bill-and-keep arrangements, CLECs have never been "required" by the Commission to utilize it. In fact, Core has steadfastly refused to agree that such arrangement is reasonable or acceptable in this situation. Core R.B. at 4-11. The record also supports the fact that Core has entered into non-bill-and-keep arrangements with other CLECs. Core M.B. at 35. Far from supporting the I.D.'s conclusion, the record shows that AT&T – who has significantly more market power than Core – has effectively utilized the power of that position to strong arm all the other CLECs with whom it deals to accept nonpayment under the guise of calling it a "bill-and-keep" arrangement.

Moreover, AT&T's refusal to enter into a TEA with Core cannot be interpreted as an "agreement" between the parties that "bill-and-keep" establishes a reasonable (and mutually agreeable) rate of compensation for Core's services. There is no legal authority or basis in fact that allows for such a conclusion to be reached. Core M.B. at 33-35; Core R.B. at 4-11. Rather, AT&T simply uses "bill-and-keep" as a euphemism for anarchy, self-help and market power. And, because AT&T refuses to enter into a TEA that provides for any type of reasonable intercarrier compensation despite all of Core's efforts to engage in good faith negotiations, AT&T is able to keep fanning the smoke for its "smoke and mirrors" argument that "bill-and-keep" is the appropriate resolution of this matter. By finding that "[b]ill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs," the ALJ appears to have erroneously accepted AT&T's flawed and legally unsupported advocacy regarding bill-and-keep.

The record simply does not support this outcome based on the following correct conclusions set forth in the I.D.:

- AT&T sends and has sent large volumes of telecommunications traffic to Core indirectly, via the tandem switch network of Verizon (FOF #6);
- Core's Pennsylvania network and services enable AT&T customers to complete calls to their ISP, which in turn increases the utility of the AT&T customer's local phone service (FOF #9);
- AT&T's customers compensate AT&T for the use of its local exchange services, but AT&T is refusing to pay Core for completing the calls originated by AT&T's customers (FOF #10);
- From June, 2004 through September, 2009, AT&T end users using the TCG network (CIC 0292) originated 406,102,334 MOUs for termination on Core's network, which AT&T has not paid (FOF #18);
- AT&T has not sought to enter into a TEA with Core (FOF #25); and,
- 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. FOF #26.

These findings support Core's position that AT&T is substantially using its network and not paying for it. While bill-and-keep may be acceptable to some carriers – regardless of whether they agree to it or are bullied into it by AT&T – it is not acceptable to Core and there is no legal or factual requirement that Core is required to accept it. Unless and until a mutually agreeable payment arrangement is negotiated, the Commission must direct AT&T to pay Core pursuant to its tariff. Allowing AT&T to continue to utilize Core's network while avoiding all responsibility for paying for it is not an appropriate resolution of this matter and, to the extent the I.D. is attempting to reach that result by referencing "bill-and-keep" as "the industry standard," it should be rejected.

G. Exception No. 7: Finding Of Fact # 67 Is Erroneous As No Evidence In The Record Supports The Finding That Core Has "Charged Its Own Customers Very Close To Zero"

While the I.D. does not reference any reliance on Finding of Fact #67 in the discussion of its recommended resolution of this matter, it is an erroneous statement that is not supported by the record and must be rejected. Finding of Fact #67 states that "Core has charged its own customers 'very close to zero' for the services it has rendered for AT&T to transport and terminate calls to ISPs when Core customers originate such calls." (I.D. at 21). This is a restatement of advocacy offered by AT&T throughout this proceeding which was never supported with any evidence in the record. On the contrary, the unrebutted surrebuttal testimony of Core witness Mingo, which is cited by the ALJ as support for her Finding of Fact #67, states:

> **Q: WHY DOESN'T CORE SIMPLY OFFER OUTBOUND SERVICES, AND DETER "ARBITRAGE" CLAIMS SUCH AS THOSE AT&T MAKES?**
>
> A: The first reason is that being called names by hypocritical telecom companies is not a good reason to change one's business plan. The second is that, in the current environment of regulatory uncertainty, which AT&T and other originating carriers exploit, competitive carriers like Core have to price originating services at very close to zero, i.e., give it away. The reality in the marketplace now is that many originating carriers do not pay terminating carriers for large amounts of traffic, using various excuses. We can not and will not compete with carriers who in essence steal the use of other carrier's networks. Core St. 1-SR at 10-11.

Here, Core witness Mingo is referring, not to the inbound ("terminating") services it provides to ISPs and VOIP carriers, but rather the outbound ("originating") services offered by other CLECs, including Global NAPs, primarily to VOIP carriers.

The context of this testimony is clear that continued use of Core's network without payment results in an anticompetitive and unequal marketplace where all the players are not operating on a level playing field. Carriers, like AT&T, who are able to "save money" because they refuse to pay other carriers for (termination) services rendered, acquire a clear competitive advantage in being able to offer lower (origination) prices to customers. Lower prices attract more customers away from competitors. This leaves competitors with two choices. First, a competitor may choose not to offer originating services and forgo the associated revenue opportunities. Second, a competitor may choose to enter the market for originating services, but only if it is willing to engage in the same nonpayment schemes pursued by AT&T, GlobalNAPs, and others. An honest accounting of originating service would take into account the costs of termination, including payment of appropriate charges to terminating carriers. However, in the current era of self-help and non-payment, a competitor offering originating service does not have the luxury to account for termination costs. Hence, to be competitive it must "price originating services at very close to zero" if it chooses to offer them at all.

H. <u>Exception No. 8: Finding Of Fact # 75 Is Erroneous As Core Presented Significant Record Evidence Showing The Economic Harm That Can Result With The Continued Nonpayment By AT&T And Others For Utilizing Core's Services</u>

Similar to Exception No. 7, the I.D. does not reference any reliance on Finding of Fact #75 in the discussion of its recommended resolution of this matter and it is an erroneous statement that is not supported by the record and must be rejected. Finding of Fact #75 states that "Core failed to provide evidence of any economic harm as a result of a bill-and-keep arrangement with AT&T." (I.D. at 21). This statement is not supported by the record.

First, while AT&T tries to hide behind "bill-and-keep" to justify its refusal to pay for services rendered, the record is clear here that AT&T's position is that it will pay nothing – under any theory – for Core's termination services. Core M.B. at 34-37. Just as clear is the fact that the entire purpose of Core's complaint here is to recover payment for services rendered because Core lacks other commercially reasonable alternatives such as refusing to provide the service to AT&T. As explained in its Motion for Interim Relief:

> Core seeks this relief in consideration of the fact that the only other alternative to requiring AT&T to make payment would be to permit Core to cease accepting

traffic from AT&T for termination. The general rule pursuant to both state and federal law is that telecommunications carriers cannot cease providing service to other telecommunications carriers based on a payment dispute. [n. 23] The reason for this prohibition is to prevent stopping the flow of telecommunications traffic over a payment dispute because such disruption might result in preventing consumers from making and receiving the telephone calls of their choosing. This is very different from a traditional commercial setting wherein businesses are not forced to provide service to other businesses for free. In fact, if a business fails to pay another for services rendered, the business providing the service has the right – usually through a contract – to cease providing the service. This is also different from the perspective of providing public utility service to an end-user as all public utilities have the right – pursuant to the law and Commission regulations – to terminate service to a retail customer who fails to pay his or her bills. [n. 24]. Core Motion for Interim Relief at 10 (footnotes omitted)

The fact that Core, a significantly smaller company than AT&T, has had to embark upon this costly litigation to recover payment for services rendered makes clear the importance to Core from a business perspective of receiving payment for services rendered. This fact completely undermines the ALJ's conclusion to the contrary.

Second, despite the statement of the I.D., Core has provided ample evidence of the economic harm resulting from nonpayment by AT&T and others. In direct testimony, Core witness Mingo explained:

As of the filing of this testimony, AT&T continues to send significant amounts of indirect traffic to Core for termination to Core's end users, while adamantly refusing to pay Core any compensation for this use of Core's network. AT&T also continues in its refusal to enter into a reciprocal compensation arrangement with Core. Thus, it appears that *Core will continue to incur significant expense* to terminate AT&T Indirect Traffic on a going-forward basis. *As long as AT&T refuses to pay for this service, Core remains unable to recover a substantial portion of its network costs. This limits our ability to maintain the current network, let alone upgrade and expand the network. Indeed, coupled with similar refusals by other CLECs and IXCs to pay lawfully billed amounts, AT&T's refusal to compensate Core anything at all, after using Core's network to the tune of 406,102,334 minutes of use, threatens Core's economic viability. This, in turn, will impact the ability of Core to provide telecommunications services to ISPs or expand into new lines of business...* Core St. No. 1 at 13-14 (emphasis added).

AT&T has "never directly dispute[d]" Core's claims of economic harm. Core St. No. 1SR at 1-2. There is simply no basis in the record to support the ALJ's finding that Core has not provided any evidence of economic harm resulting from AT&T's refusal to pay for services rendered.

Finally, the Commission itself has recognized that a failure to compensate carriers for termination services such as that provided by Core here can result in an unconstitutional "takings" of the terminating carrier's services. More specifically, the Commission states in its Petition for Certiorari to the United States Supreme Court:

> The [*ISP Remand Order*], with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that... bears no relationship to cost... the [FCC's] rate is set so far below actual costs as to be unjust and confiscatory. Core Cross Exh. 1, at 20

Here the Commission is discussing *ISP Remand* rate of $0.0007/MOU paid by ILECs to CLECs for the termination of ISP-bound traffic which it describes as "confiscatory." Application of bill-and-keep consistent with AT&T's advocacy here would result in an even more confiscatory rate, $0.00 which, consistent with the Commission's statement would constitute a takings of Core's services that cannot be permitted.

I. <u>Exception No. 9: Conclusion of Law # 16 And #17 Are Erroneous As The Record Clearly Supports Fining AT&T's Unreasonable And Bad Faith Refusal To Make Any Payment To Core For Services Rendered</u>

The I.D. recommends rejection of Core's request that the Commission impose a reasonable civil penalty on AT&T based on her finding that "AT&T acted in concert with ***its*** interpretation of applicable law." (I.D. at 33)(emphasis added). This finding does not address the indisputable fact that AT&T made the legally unsupportable decision to not pay Core for services it well knows Core must perform and then offered strained and arguably deceptive interpretations of the law to justify its behavior. Core M.B. at 39-46. Perhaps the most egregious example is the fact that AT&T strenuously argued that under the *ISP Remand Order* the only "payment" arrangement potentially possible is bill-and-keep. *See, e.g.,* AT&T St. No. 1 at 9, 23. However, there was never any legal validity to AT&T's position because the language relied upon by AT&T had been reversed – a fact which AT&T witness Nurse only conceded on cross-examination though it was never referenced in his initial testimony nor ever corrected. Core M.B. at 34. Instead of referencing the precedent and distinguishing it, AT&T chose to ignore it.

Likewise, the ALJ's attempt to distinguish AT&T's refusal to pay for services rendered by Core from the reasons underlying the fine levied by the Commission against GlobalNAPs fails to recognize the similarity between AT&T and GlobalNAPs. GlobalNAPs, like AT&T, refused to pay carriers that terminated telecommunications originated by customers of GlobalNAPs. While GlobalNAPs also failed to file its annual financial reports, the underlying reason that GlobalNAPs was fined was its failure to pay for services rendered. In doing so, the Commission concluded that refusing to pay billed charges is conduct "of a serious nature" despite any efforts on the non-paying carrier's part to claim a legal right or entitlement to justify the non-payment. *Palmerton,* at 57. Placing AT&T's behavior in this context and in consideration of the other factual circumstances present here fully supports Core's position as stated below:

> AT&T's stubborn intransigence should not be rewarded. Without strong and serious action by the Commission – such as an assessment of an appropriate civil penalty – Core believes that AT&T will have every incentive to continue to withhold any payment to Core for the continuing use of its termination services while, because of its significant resources, it erects every conceivable legal maneuver to delay the final resolution of this proceeding. Such an unfair result permits AT&T to continue to do what it has always done – utilize Core's termination services (at significant cost to Core) for free. Therefore, Core recommends that AT&T be required to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's Order in this matter. Further, Core recommends that AT&T be fined $1,000/day for each day that it fails to comply with the Commission's Order in this matter directing it to pay Core for use of its services and facilities. Core M.B. at 46.

IV. CONCLUSION

For all the reasons set forth above, the Commission should reject the recommendations set forth in the I.D. issued May 24, 2011 and direct AT&T to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4. If, however, the Commission decides not to apply Core's tariff to the previously terminated traffic (which it should), Core requests in the alternative that AT&T be directed to pay Core at the Commission-approved tandem termination rate as determined by using the TELRIC model. To ensure payment for future traffic, Core also requests that the Commission direct AT&T to negotiate in good faith with Core to reach a mutually acceptable reciprocal compensation arrangement governing payment. Finally, Core requests that – due to the circumstances in this case – the Commission issue an appropriate civil penalty on AT&T to address its prior actions to refuse to compensate Core for its substantial use of Core's network and to ensure future good faith performance. As AT&T's behavior clearly shows, it will simply continue to engage in its brand of lawless gamesmanship at the expense of Core and the public until ordered to do otherwise.

Respectfully submitted,

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Dated June 13, 2011

Attorneys for Core Communications, Inc.

Attachment A

PUBLIC NOTICE
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PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST BY ALTS FOR CLARIFICATION OF THE COMMISSION'S RULES REGARDING RECIPROCAL COMPENSATION FOR INFORMATION SERVICE PROVIDER TRAFFIC

CCB/CPD 97-30

Released: July 2, 1997

Comment Date: July 17, 1997
Reply Date:July 24, 1997

On June 20, 1997, the Association for Local Telecommunications (ALTS) filed a letter with the Common Carrier Bureau requesting expedited clarification of the Commission's rules regarding the rights of a competitive local exchange carrier (CLEC) to receive reciprocal compensation pursuant to section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), for the transport and termination of traffic to CLEC subscribers that are information service providers. Section 251(b)(5) of the Act requires all local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 51.701(a) of the Commission's rules limits this obligation to "local telecommunications traffic." Section 51.701(b)(1), in instances of traffic exchange between LECs and non-CMRS providers, defines "local telecommunications traffic" as traffic that "originates and terminates within a local service area established by the state commission."

Specifically, ALTS requests clarification that nothing in the Local Competition Order requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs. We ask for comment on ALTS's request both with regard to information service providers, and, more specifically, with regard to enhanced service providers (ESPs).

Interested parties may file comments on these letters on or before July 17, 1997, and reply comments on or before July 24, 1997, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference CPD 97-30. An original and four (4) copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. □ 1.51(c). Additionally, two (2) copies should also be sent to Wanda Harris, Common Carrier Bureau, FCC, Room 518, 1919 M Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Parties wishing to view the above-referenced letter may do so in the Common Carrier Bureau Reference Room, Room 575, 2000 M Street, N.W., Washington, D.C. Copies can also be obtained from ITS at (202) 857-3800. Additionally, a copy of the letters have been filed in CC Docket No. 96-98. Finally, the ALTS letter is also available on the Commission Internet site at <http://www.fcc.gov/Common_Carrier/Public_Notices/1997/da971399.pdf>.

We will treat this proceeding as permit-but-disclose for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. □□ 1.1200-1.1206. For further information on this proceeding, please contact Edward B. Krachmer, Competitive Pricing Division, at (202) 418-0198.

- FCC -

