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June 23, 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 Reply 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

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

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| **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 REPLY BRIEF ON EXCEPTIONS TO THE INITIAL DECISION


AT&T Communications of PA, LLC and
TCG Pittsburgh

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**

**STATUTES AND REGULATIONS**



**OTHER AUTHORITIES**

## TABLE OF AUTHORITIES
(continued)

**Page**

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

## INTRODUCTION

Core claims in its Exceptions (at 1) that the only question before the Commission is whether a carrier can refuse to pay a competing carrier for the use of the competing carrier's network. Core is wrong. The ***only***, and dispositive, question is whether the Commission has subject matter jurisdiction to hear this case. The law is clear that it does not. But even if this case could be decided based on Pennsylvania state law – and it cannot – to rule in Core's favor would require the Commission to ignore the requirements of state law and allow Core to charge AT&T a retroactive, untariffed, unlawful and discriminatory rate.[1] Moreover, to rule in Core's favor the Commission would have to defy federal law and ignore the FCC's authoritative interpretation of its own *ISP Remand Order*. Indeed, the FCC's February 2, 2011 amicus brief to the Ninth Circuit slammed the door on Core's complaint here, when it:

> (1) clarified that the *ISP Remand Order* covered *all* LEC-originated ISP-bound traffic, including the CLEC-originated ISP-bound traffic that is at issue here;
>
> (2) explained cogently and in substantial detail why that is the only interpretation that is consistent with the language, structure and purpose of, as well as the policy underlying, the *ISP Remand Order*;

[1] What Core ignores is that even if there never was an *ISP Remand Order,* and even if all the traffic at issue here were to be treated as locally dialed intrastate traffic, that would not help Core at all. Core has no lawful rate for local traffic originated by AT&T, and never has. AT&T Main Br. at 22-27; AT&T Reply Br. at 8-15. Therefore, Core is not legally permitted to charge *any* rate for this traffic. The relief it seeks violates multiple provisions of state law. AT&T Excpt. Br. at 28-32. And that is the result of Core's own doing. In other states in which it operates, Core has tariffed a local termination rate; in Pennsylvania, however, it has not. Tr. 17-18, 98-99, 122-132; AT&T Cross Exs. 12-16. Core complains that AT&T has declined to negotiate a traffic exchange agreement, but it is Core that killed such negotiations by demanding as a precondition to any agreement that AT&T pay for all past traffic at a rate many times higher than the rate Verizon pays ($.0007) and infinitely higher than virtually every other CLEC pays ($0). Panel Reply Testimony of AT&T at 18-20; Tr. 94-95 (Mingo).

(3) made clear that in the *ISP Remand Order* the FCC established rules, specifically the new markets and rate cap rules, that are to govern intercarrier compensation for *all* LEC-originated traffic; and

(4) underscored that the FCC in the *ISP Remand Order* expressly preempted the application of state law to decide compensation for ISP-bound traffic.

The FCC's amicus brief also made clear, as does the *ISP Remand Order* itself, that the foundation of that Order is the FCC's determination, affirmed by the D.C. Circuit, that ISP-bound traffic is all "interstate" and therefore subject to regulation by the FCC – and only the FCC – pursuant to Section 201 of the Communications Act.

If there was ever any doubt as to whether the *ISP Remand Order* applies to the traffic in this case, the Ninth Circuit has now nailed that door shut. Two days ago, on June 21, that court issued its decision in *AT&T Comm. v. Pac-West Telecomm* (No. 08-17030) (9th Cir. 2011) ("*Pac-West*").[2] In its decision, the court held that the *ISP Remand Order* and its compensation regime apply to all LEC-originated traffic, including the precise kind of traffic at issue in this case: CLEC-originated traffic. Based on that holding, the court reversed the district court and California commission's rulings to the contrary and declared that the "CPUC's decision to rely on Pac-West's state-filed tariffs to set the rate . . . is preempted." *Pac-West,* slip op. at 8396. The court supported its holding with a lengthy, well-reasoned analysis that both mirrored and expanded on that in the FCC's amicus brief, as well as AT&T's position in this case. *See id.* at 8383-8396. In addition, the court deferred to the FCC's interpretation of the *ISP Remand Order,* noting that it was compelled to do so by controlling Supreme Court jurisprudence, and "that the FCC is best positioned to describe the reach of its own orders." *Id.* at 8397.

As the I.D. found, the FCC's amicus brief is fatal to Core's state law claims. The I.D. correctly determined (1) that the FCC's interpretation is entitled to deference (a determination

[2] A copy of the court's slip opinion is attached for the Commission's convenience (Att. 1).

that has been confirmed as correct by the Supreme Court in its *Talk America* decision[3]); and (2) that because the *ISP Remand Order* applies to the ISP-bound traffic at issue in this case, the FCC had expressly preempted the Commission's authority to resolve Core's complaint by applying state law. Desperate to avoid that outcome, Core pretends that the FCC's amicus brief is the ill-reasoned work of mere "staff" that can be ignored with impunity by the Commission. Just two weeks ago, however, the U.S. Supreme Court held that an FCC amicus brief interpreting the FCC's own rules and orders, like the FCC's Ninth Circuit amicus brief, is entitled to deference, and that the FCC's interpretation is binding on courts and agencies alike as a statement of federal law in all but the most extraordinary of circumstances – none of which are remotely present here. *Talk America, Inc. v. Michigan Bell Telephone Co., d/b/a AT&T Michigan,* __ U.S. __, 2011 WL 2224429, *6 (2011). And just two days ago the Ninth Circuit held that the FCC's interpretation in the very amicus brief being debated here is entitled to deference and is binding on courts and agencies. *Pac-West,* slip op. at 8396-97.

As AT&T explained in its Brief on Exceptions ("AT&T Excpt. Br."), at 7-19, the FCC's authoritative interpretation, now endorsed and held binding by the Ninth Circuit, means that this case must be dismissed. Core has presented no viable legal or factual basis for the extraordinary relief it seeks in this case. Accordingly, its Exceptions should be rejected, AT&T's Exceptions should be sustained, and Core's complaint should be dismissed in its entirety.[4]

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[3] A copy of the *Talk America* decision is attached for the Commission's convenience (Att. 2).

[4] Core's Exceptions #4 and #7 have been fully rebutted in the I.D. and in AT&T's Main and Reply Briefs. There is no need for AT&T to present supplemental arguments in these Reply Exceptions.

## ARGUMENT

### I. REPLY TO CORE EXCEPTION NO. 1: The Doctrine Of "Law Of The Case" Does Not Apply.

Core claims that the doctrine of "law of the case" precludes the ALJ and Commission from addressing the Commission's subject matter jurisdiction over ISP-bound traffic. That is wrong for several reasons.

*First,* it is well-established that the doctrine of "law of the case" does not apply when a court is examining subject matter jurisdiction, which is precisely what is happening in this case, *i.e.,* ALJ Jones is recommending that the Commission reconsider its decision on its subject matter jurisdiction over ISP-bound traffic. Indeed, in *Village Charter School v. Chester Upland School District,* 813 A.2d 20, 25 (Pa. Cmwlth. Ct. 2002), the court rejected the claim that the doctrine of "law of the case" precluded a judge from reconsidering the issue of subject matter jurisdiction even though another judge previously had decided the issue, stating that "'whenever a court discovers that it lacks jurisdiction over the subject matter or the cause of action *it is compelled to dismiss the matter under all circumstances,* even where we erroneously decided the question in a prior ruling.'" (Quoting *Hughes v. Pennsylvania State Police,* 619 A.2d 390, 393 (Pa. Cmwlth. 1992) (emphasis added)). *See also Balfour Beatty Construction, Inc., v. Dept. of Transportation,* 783 A.2d 901, 906 (Pa. Cmwlth. Ct. 2001) ("[L]aw of the case doctrine will not preclude reconsideration by the full Court on a question of subject matter jurisdiction, even when there has been no formal request for reconsideration.").

*Second,* the doctrine of "law of the case" cannot be applied to prevent a trial judge from reconsidering its own decisions (*Clearwater Concrete & Masonry, Inc., v. West Philadelphia Financial Services Institution*, 18 A.3d 1213, 2011 WL 1136216, * 3 (Pa. Super. 2011)) – and that is all the Commission would be doing here, *i.e.,* reconsidering its own determination on

jurisdiction. Specifically, "[t]he 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." *Gateway Towers Condominium Association v. Krohn,* 845 A.2d 855, 861 (Pa. Super. 2004). "[T]he doctrine applies only to the actions of an *appellate court*" – there is no appellate court action here – "and cannot be applied to prevent a trial judge from reconsidering his or her prior ruling." *Id.* (emphasis in original, citations omitted). Indeed, "a trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine." *Clearwater Concrete & Masonry, Inc.*, 18 A.3d 1213, 2011 WL 1136216, * 3. "In this case, only one judge" *i.e.,* the Commission, "[will be] involved in both decisions, so the law of the case doctrine does not apply." *Id.*[5]

*Third,* as even Core acknowledges, there are exceptions to the law of the case doctrine where "there has been an intervening change in the controlling law" or "where the prior holding was clearly erroneous and would create a manifest injustice if followed." *Baker v. Cambridge Chase, Inc.,* 725 A.2d 757, 774 (Pa. Super. 1999) (citations omitted). Those exceptions plainly would apply in this case if the law of the case doctrine otherwise was applicable. "Controlling law" here is federal law, specifically, the *ISP Remand Order.* The Commission recognized that in its *Material Question Order;* it simply misinterpreted the FCC's Order. The FCC has now interpreted its *ISP Remand Order,* and the Ninth Circuit has too, and their interpretation makes clear that the Commission's interpretation is not correct. Accordingly, the doctrine of "law of the case" does not apply. *See Baker,* 725 A.2d at 774 ("the law of the case doctrine . . . do[es] not nullify the obligation to reject decisions which are without support in the law"; reversing trial

[5] The related "coordinate jurisdiction" rule "may prevent one trial judge from revising the rulings of another trial judge on the same question" where the "second judge purports to review the order of a different judge." But, again, that rule "does not prevent a judge from re-examining and correcting his or her own rulings." *Gateway Towers Condominium Association,* 845 A.2d at 861. Rather, "the fact that the order [the judge] review[s] [is] one of her own insulates the resulting decision from the coordinate jurisdiction rule."

judge's decision adhering to law of the case doctrine where the prior judge's determination was not supported).[6]

## II. REPLY TO CORE EXCEPTION NO. 2: The Initial Decision Was Correct To Find That The FCC's Interpretation Is Entitled To Deference And Is Binding On The Commission.

Core's attack on the FCC's interpretation of its own *ISP Remand Order* and on the I.D.'s recognition that the Commission must defer to that interpretation is specious. That attack stubbornly ignores what the FCC actually said in the amicus brief and *ISP Remand Order* and boldly mischaracterizes and misrepresents both documents. The attack also ignores the Supreme Court authority, including in particular the *Talk America* decision (authority which Core itself cites), that compels the conclusion that the ALJ had no choice but to accord deference to the FCC's interpretation and rule accordingly. Finally, the attack is foreclosed completely by the Ninth Circuit's decision in *Pac-West,* which agrees with the FCC's interpretation and holds that it is entitled to deference.

1. In the AT&T Excpt. Br. (at 7-16), we explained in detail, quoting extensively from the amicus brief itself, the careful, cogent and compelling analysis that supports the FCC's interpretation of its own Order.[7] We will not repeat that explanation here. Instead, we will focus on responding to Core's ill-founded and scattershot attacks on the merits of the FCC's interpretation.

a. First, Core asserts that "on the critical issue of preemption, the amicus brief provides only minimal analysis." Core Exceptions at 11. Core clearly has a peculiar definition

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[6] Core (at 10) argues that the "controlling law" is the Commission's *Material Question Order,* and that the exceptions to the law of the case doctrine do not apply because the Commission has not "reverse[d] or otherwise change[d] its determination." Core's argument is illogical and circular: The purpose of the ALJ's Initial Decision is to recommend that the Commission reverse its prior erroneous decision; but Core claims that the ALJ cannot make that recommendation until the Commission somehow reverses itself first.

[7] The interpretation is supported by the equally careful, cogent and compelling analysis of the Ninth Circuit. *See Pac-West,* slip op. at 8383-96.

of "minimal," because by any reasonable measure the analysis the FCC provides in its amicus brief is substantial – and compelling. *See* Amicus at 25-29.

The FCC points out, first, the well-settled rule that "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'" *Barrientos v. Morton, LLC,* 583 F.3d 1197, 1208 (9th Cir. 2009) (*quoting City of New York v. FCC*, 486 U.S. 57, 63-64 (1988)); *Fid. Fed. Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). The FCC then observes that in order to determine whether preemption has occurred, a "court asks 'whether [the federal agency] meant to pre-empt [the state law], and, if so, whether that action is within the scope of the federal agency's delegated authority.'" *Barrientos,* 583 F.3d at 1208 (*quoting de la Cuesta*, 458 U.S. at 154 (brackets in original)).

The FCC in its amicus brief (at 26) correctly notes that both tests are easily satisfied here. First, the FCC points out that the FCC's expression of its intent to preempt state authority is "quite clear." And it is. The FCC in the *ISP Remand Order* expressly declares that the FCC had "exercise[d] [its] authority . . . to determine the appropriate intercarrier compensation for ISP-bound traffic" and consequently "state commissions will no longer have authority to address this issue." *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82). Just as clearly, the FCC was acting within the scope of its Congressionally-delegated authority. Because ISP-bound traffic is "interstate," and because Section 201(b) gives the FCC express authority to regulate "interstate" communications, the FCC clearly had the authority to issue the *ISP Remand Order* and the new markets and rate cap rules, as the D.C. Circuit has held in upholding the Order. *Core Communications v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597 (2010).

Moreover, the Ninth Circuit has now held that the *ISP Remand Order* does indeed expressly preempt state law in disputes involving CLEC-originated ISP-bound traffic. *Pac-West,* slip op. at 8395-96. This forecloses any argument to the contrary.[8]

b. Core further asserts that "staff" merely "assumes" what the court asked the FCC "in the first place" – *i.e.*, whether the *ISP Remand Order* applies to CLEC-originated ISP-bound traffic. Core Exceptions at 12-13. This assertion has no basis whatever.

First, the amicus brief is the FCC speaking, not merely some unidentified "staff." Second, the FCC certainly knows what it intended; it "is best positioned to describe the reach of its own orders." *Pac-West,* slip op. at 8397. And third, most critically, the FCC in its amicus brief demonstrates that its interpretation is not only consistent with the language, structure and purpose of the *ISP Remand Order*, but that that interpretation is compelled by the Order's language, structure and purpose. *See* Amicus at 15-24; AT&T Excpt. Br. at 9-14. That demonstration and conclusion is echoed by the Ninth Circuit. *Pac-West,* slip op. at 8383-96.

c. Core (at 13-14) points out that the mirroring rule, by its terms, applies only to ILEC-originated traffic. That is true. But that does not mean that the same is true of the new markets and rate cap rules. Just the contrary. As the FCC points out in its amicus brief:

> 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

[8] Application of principles of conflict preemption yields the same result. Under the Supremacy Clause, federal law prevails over conflicting state law. U.S. Const., Art. VI, cl. 2. Federal law includes "statutorily authorized regulations of an agency"; accordingly, the *ISP Remand Order* and its new markets and rate cap rules would "preempt any state or local law that conflicts with such regulations." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). And that is true even if the FCC had not expressly declared its intent to preempt. This means that the new markets rule, which until October 18, 2004 required a bill-and-keep compensation mechanism between LECs like AT&T and Core who did not have an interconnection agreement, and the rate cap rule, which prohibits termination charges in excess of $.0007 per MOU, "quite clearly" preempt the state law compensation mechanisms advocated by Core. This is not to say that state law if not preempted would provide any solace to Core. It would not. *See* AT&T Main Br. at 30-36; AT&T Reply Br. at 26-35.

> 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.[ ]

Amicus at 16-17 (footnotes omitted).

The Ninth Circuit's independent analysis comes to exactly the same conclusion. *Pac-West,* slip op. at 8385, 8389, 8392.

d. At p. 16 of its Exceptions, Core suggests that except for a single "fleeting reference" to "all LECs" in a footnote in the 1999 *ISP Declaratory Ruling,* 14 FCC Rcd 3689 (1999), there is absolutely nothing in that Order or in the *ISP Remand Order* itself to suggest that it was directed at anything other than "disputes between ILECs and CLECs regarding compensation for ISP-bound traffic."

Core's "suggestion" is demonstrably wrong. As the FCC took pains to point out in the discussion quoted above (and as the Ninth Circuit recognized), while the FCC used terms like "incumbent LEC," "ILEC" and "incumbents" no less than 14 times in describing and explaining the mirroring rule, in describing and explaining the new markets and rate cap rules the FCC consistently used the term "carriers," a broad term that encompasses both ILECs and CLECs.

That deliberate choice of language demonstrates that the FCC intended its new markets and rate cap rules to have a broader reach than its mirroring rule. And a broader reach, one that includes both CLEC-originated and ILEC-originated ISP-bound traffic, was essential if the regulatory purpose underlying the *ISP Remand Order* was to be satisfied and not thwarted. *See* Amicus at 20-21; AT&T Excpt. Br. at 15.[9]

As the Ninth Circuit recognized, the "FCC's overriding concern" was "the arbitrage opportunities created by ISP traffic generally . . . [A]rbitrage related to ISP-bound traffic in no way depends on the participation of an ILEC. The *ISP Remand Order* reflects this reality, imposing its rules on *all* LECs, with the exception of the 'mirroring' rule, which the FCC singled out as applicable only to ILECs." *Pac-West,* slip op. at 8392 (emphasis in original).[10]

e. Core seems fixated on the fact that the *ISP Remand Order* at multiple places talks about interconnection agreements. Core suggests that "interconnection agreement" means an

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[9] Core claims that in the 2004 *Core Forbearance 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), the FCC confirmed that the scope of the *ISP Remand Order* is limited to ILEC-originated traffic. *See* Core Exception at 18. To support this claim, Core presents several quotes from the Order. *Id.* All of these quotes refer to and address the mirroring rule (which everyone acknowledges applies only to ILEC-originated traffic) and its implementation. Accordingly, the quotes prove absolutely nothing about the new markets and rate cap rules. The Ninth Circuit agrees. *Pac-West,* slip op. at 8392. Core also points to two statements made by the FCC in its Unified Regime NPRM (Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9679 and n.1 (2001)), and claims that these show that the *ISP Remand Order* is limited to ILEC-originated traffic. Core Exceptions at 17-18. The NPRM in question started a rulemaking to consider what *if any* amendments the FCC should make *in the future* "to the broad universe of existing intercarrier compensation arrangements." *Id.* at 9612 (¶ 2). In these statements, the FCC did not say anything about *existing* rules or the *ISP Remand Order*. The rules the parties are talking about – the new markets and rate cap rules – were at that time *existing*. Again, the Ninth Circuit agrees. *Id.* at 8391-8395.

[10] Core faults the FCC for showing that interpreting the *ISP Remand Order* to include CLEC-to-CLEC traffic within the compensation regime "furthers the regulatory purpose underlying" the new markets and rate cap rules. Core claims that it is improper to consider regulatory purpose in interpreting an order or rule. Core Exceptions at 19. That is clearly wrong. *See AT&T v. Pac-West,* slip op. at 8391-8395; *Crown Pacific v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1040 (9th Cir. 1999) (the "regulatory purpose" is considered in interpreting an agency regulation). Under the well-established canon of statutory and regulatory interpretation, an enactment is construed in light of its "object and policy." *U.S. Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). *See, e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *Holloway v. U.S.*, 526 U.S. 1, 9 (1999). The whole purpose of the *ISP Remand Order* was to "diminish the substantial economic distortions and opportunities for regulatory arbitrage arising from the operation of the reciprocal compensation regime for ISP-bound traffic." Amicus at 20.

Interconnection Agreement under Section 252 of the 1996 Act – which Core asserts can only be between an ILEC and a CLEC. From this assertion, Core divines that the *ISP Remand Order* can only be talking about ILEC-originated traffic. Besides the fact that this conclusion is a *non sequitur*, the premise is flatly wrong as well. As the FCC recognized (indeed, as Core itself recognizes), CLECs can and do enter into traffic exchange agreements which serve as interconnection agreements with one another. Amicus at 22. Moreover, as the FCC also points out, a significant portion of the references to "interconnection agreements" is *not* modified in any way, explicitly or implicitly, by "Section 252." *Id.*[11]

2. Core argues that the Commission should decline to defer to the FCC's interpretation and instead adhere to the interpretation reflected in the Commission's *Material Question Order*. But this argument flies in the face of uniform Supreme Court precedent, including the Supreme Court's *Talk America* decision of just two weeks ago. It is also completely foreclosed by the decision in *Pac-West,* in which the Ninth Circuit held that the precise amicus brief being debated in this case *is* entitled to deference and *is* binding. *Pac-West,* slip op. at 8396-97. The Ninth Circuit has thus ended the debate, once and for all, and has fully vindicated the I.D. Moreover, even apart from the Ninth Circuit's dispositive decision, controlling Supreme Court precedent compels the conclusion that the I.D. is correct on this point. It is well settled 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*, ___ U.S. ___, 131 S. Ct. 871, 880 (2011). And an agency's construction of its own regulation is "controlling

[11] Core also argues that the *ISP Remand Order* talks about an ILEC opting into the compensation scheme, but does not discuss how a CLEC "can opt into" that scheme. *See* Core Exceptions at 14. There is an obvious explanation for that. Before an *ILEC* can avail itself of the rate cap ($.0007), it must opt into the federal rate cap scheme and thereby make that rate cap apply to all Section 251(b)(5) traffic that is exchanged. This is an integral part of the mirroring rule, which of course everyone acknowledges applies only to ILEC-originated traffic. *See Pac-West,* slip op. at 8392.

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).[12] Finally, 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).

Application of these principles to this case clearly demonstrates that the I.D. was correct in determining that the FCC's amicus brief is entitled to deference. The FCC clearly interpreted the *ISP Remand Order*; it did not write a new order. As for the second requirement, while one could take the position that the *ISP Remand Order* could have been clearer,[13] that does not make

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[12] Core cites four cases which it claims support the position that the Commission may decline to defer to the FCC's amicus brief. These cases fail to support Core at all. In three of them (*U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004); *U.S. Department of Labor v. Mangifest*, 826 F.2d 1318, 1323-24 (3rd Cir. 1987); *Bethlehem Steel Corp. v. OSHA*, 573 F.2d 157, 160-61 (3rd Cir. 1978)), the agency was a party to the litigation and the interpretation was contained in a litigation brief filed by litigation counsel. Accordingly, the interpretations in these cases had all the earmarks of "post hoc rationalizations for agency action" by litigation counsel, which the "courts may not accept." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168-69 (1962). In the fourth case, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), the Court declined to defer to an agency interpretation contained in a Labor Department opinion letter because the regulation in question was clear and unambiguous on its face. The Court made clear that the threshold requirement for deference is that the regulation *not* be clear and unambiguous. If it were, there would be no need for an agency interpretation in the first place. In addition, Core's "attempt" to distinguish the cases relied on by the I.D. is unavailing. In *Chase Bank*, 131 S. Ct. at 880-81, the regulation was ambiguous; the Ninth Circuit had interpreted it one way, and the agency's amicus brief another. The Court held that deference to the agency's interpretation was required. In *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 872 and n.7 (2009), the Court held that an interpretation contained in a Treasury Department amicus brief was "controlling" even though the regulation at issue had been interpreted differently earlier by another agency. And in *Dreiling v. American Express*, 458 F.3d 942, 953 (9th Cir. 2006), contrary to Core's characterization, the Ninth Circuit *did* rely on the SEC's amicus brief, finding that its interpretation was "controlling."

[13] Core improperly conflates the requirements for express preemption and the precision required of a rule or order. Core seems to suggest that before the Commission is compelled to defer to the FCC's interpretation, that interpretation must establish that the *ISP Remand Order* "clear[ly] and unambiguous[ly]" applies to CLEC-originated traffic. *See* Core Exceptions at 11-13, 24. Core is badly confused. The Order does not have to be clear and unambiguous. If it were, there would be no need to ask the agency to interpret it in the first place. It is only the intent to expressly preempt that must be clear and unambiguous. And here, not even Core could contend that the FCC's intent was not clear as a bell. *See* supra pp. 6-8; AT&T Excpt. Br. at 7-14; *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82).

the FCC's interpretation in the amicus brief "clearly erroneous." To the contrary, the actual language of the Order and its underlying regulatory purpose make the FCC's interpretation more easily defensible than Core's strained interpretation, as the Ninth Circuit's independent analysis confirms. *Pac-West,* slip op. at 8389-8398. As to the third requirement, not even Core claims that there is any "reason to suspect that the interpretation does not reflect the fair and considered judgment" of the FCC. Nor could it in the wake of the Ninth Circuit's decision in *Pac-West,* slip op. at 8397.

In *Talk America*, __ U.S. __, 2011 WL 2224429, the Supreme Court endorsed and affirmed these principles, holding that an FCC amicus brief that had been submitted to – and then rejected by – a lower court was entitled to deference and in fact was binding on the courts.[14] The Court's decision is instructive. There, as here, the FCC interpreted its existing rules and orders. There, as here, while there was arguably room for disagreement as to the correct interpretation of the rules and orders in question, the FCC's interpretation was not "clearly erroneous." And there, as here, there was no "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See* AT&T Excpt. Br. at 14-16. The Court in *Talk America* didn't hesitate to hold that the FCC's interpretation was controlling even though, as the FCC itself conceded, the FCC "advanc[ed] a novel interpretation of its longstanding interconnection regulations." 2011 WL 2224429, *9. Here, by contrast, there is nothing novel about the FCC's interpretation of its *ISP Remand Order*: it is fully consistent

[14] All but one of the voting justices relied on *Auer*, 519 U.S. 452, and deferred to the FCC's interpretation. Justice Scalia, while agreeing with the others, wrote in a separate opinion that he would have reached the same result even in the absence of deference. *Talk America,* __ U.S. __, 2011 WL 2224429, **11-12. (Scalia, J. concurring). Core doesn't even attempt to distinguish *Talk America.* Instead, Core (at 22-23) points out that Justice Scalia, in his concurring opinion, said he would be "receptive to" reconsidering the *Auer* decision. Unless and until that happens, *Auer* is a controlling statement of federal law and must be adhered to by all courts and agencies. Even Justice Scalia noted the "undoubted advantages to *Auer* deference," stating: "It makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process."

with both the language and the Order's regulatory purpose. And it has been held to be entitled to deference and binding. *Pac-West,* slip op. at 8396-97.

## III. REPLY TO CORE EXCEPTION NO. 3: The Nature Of The Traffic As ISP-Bound Is Determinative Of Jurisdiction.

Core claims (at 25) that the ALJ erroneously found that Core "failed to provide evidence to parse out the traffic that is VOIP versus ISP-bound traffic," and therefore all traffic in the case would be "treated as ISP-bound traffic." Core is wrong.

Core does not even attempt to disprove the ALJ's conclusion that Core failed to identify any traffic at issue as VoIP. Nor could it. 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; Attachment C to AT&T Statement 1.0 (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 that was delivered subsequent to September 2009 is traffic delivered to VoIP providers rather than ISPs, Core admitted that it could not show whether any of the post-September 2009 traffic sent by AT&T was VoIP traffic. Tr. 42-43; Attachment C to AT&T Statement 1.0 (Response to Interrogatory ATT-III-4); FOF 55.

Given Core's failure of proof, and its admission that the vast majority of the traffic at issue was ISP-bound, it was reasonable for the ALJ to treat all of the traffic at issue as ISP-bound traffic. By way of example, in its ISP orders the FCC applied its end-to-end analysis and determined that ISP-bound traffic "is jurisdictionally mixed and largely interstate." *ISP Remand Order,* ¶ 14. However, because the "interstate and intrastate components cannot be reliably separated," it determined that all ISP-bound traffic is to be treated as interstate, falling under the FCC's section 201 jurisdiction. *Id.* ¶ 52. *See also ISP Declaratory Ruling,* ¶ 12-13. The ALJ reasonably applied the same logic here, finding that since Core could not distinguish ISP-bound

traffic from the small amount of VoIP traffic allegedly terminated after September 2009 (and it is possible that no VoIP traffic was even sent by AT&T), all of the traffic would be treated as ISP-bound.

Core's claim (at 25-27) that the nature of traffic is not determinative of jurisdiction defies reason. It is well-established that traffic categorized as *interstate* falls under the exclusive jurisdiction of the FCC, and traffic categorized as *intrastate* falls under the jurisdiction of state commissions (*see* 47 U.S.C. § 201(b) and 66 Pa. C.S.A. § 104) – so the nature of the traffic as *interstate* or *intrastate* clearly matters and is determinative of jurisdiction.

Core nevertheless argues that the *Palmerton* case supports its position that the nature of the traffic is not determinative of jurisdiction, and that Core was not required to distinguish between ISP-bound traffic and VoIP traffic. Core is wrong. There was no ISP-bound traffic involved in the *Palmerton* case; rather, the traffic at issue was VoIP. *Palmerton,* 5. The FCC had not (and still has not) spoken on the jurisdictional nature of VoIP traffic – *i.e.,* whether it is interstate or intrastate – as this Commission readily acknowledged. *Id.* The fact that the Commission in *Palmerton* treated the termination of VoIP traffic just like the termination of traditional landline service is immaterial to this case because Core has not proven that there is any VoIP traffic at issue in this case. Core failed to identify any specific call as being directed to a VoIP provider as opposed to an ISP (Tr. at 43), and therefore the Commission is compelled to assume that all the traffic at issue is ISP-bound. Unlike VoIP traffic, the FCC has spoken on the jurisdictional nature of ISP-bound traffic. The FCC stated that *all* ISP-bound traffic is jurisdictionally interstate, thus falling under the FCC's exclusive jurisdiction, and that state commissions are preempted from determining compensation for the termination of ISP-bound traffic. So the nature of the traffic as ISP-bound versus VoIP does matter, and Core's failure to

identify any traffic as VoIP leads necessarily and inexorably to the conclusion that all of the traffic is ISP-bound (*i.e.,* interstate) traffic falling under the exclusive jurisdiction of the FCC.[15]

## IV. REPLY TO CORE EXCEPTION NO. 5: Core's Intrastate Switched Access Tariff Does Not Apply To The Interstate Traffic At Issue.

Core claims (at 28) that the ALJ erred in finding that Core's intrastate switched access tariff does not apply to the locally dialed, ISP-bound traffic at issue in this case. But Core's own advocacy defeats its claim. Core repeatedly points out (at 28-29) that its tariff "extends to all *intrastate* 'communications'" and "clearly covers *intrastate* . . . traffic." (Emphasis added). *See also* PA P.U.C. Tariff No. 4 (titled "Core Communications, Inc. Regulations and Schedule of *Intrastate* Charges Applying to Switched Access Service"). ISP-bound traffic, however, is *interstate* traffic – not intrastate. AT&T Excpt. Br. at 7-14; supra at part II. Because – as even Core admits – its tariff "extends to" and "covers" only *intrastate* traffic, it does not apply to the *interstate* traffic at issue in this case.

Core (at pp. 28-29) cites snippets from its intrastate access tariff to come up with the strained theory that its switched access tariff applies to the termination of local traffic. However, when actually looking at the tariff as a whole, the only logical reading of the tariff is that it very clearly applies only to non-local, toll, interexchange traffic, and that the tariff does not establish any rate at all for the termination of locally dialed traffic of any sort, including locally dialed, ISP-bound traffic.[16] AT&T Main Br. at 22-27.

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[15] Core complains that intercarrier compensation should not depend on the nature of the terminating carrier's customer (VoIP vs. ISP) because it "would be impossible to effectuate in fact." Core (at 25), however, has not shown that it is impossible for it to distinguish between its customers, but only that it has chosen not to. And regardless, the FCC has clearly stated that the nature of the traffic is determinative of jurisdiction.

[16] Core is asking this Commission to apply its access tariff to local traffic because Core does not have a tariffed rate for the termination of local traffic. However, the Commission must recognize that Core is the party who is responsible for failing to tariff a local termination rate in Pennsylvania. Core tariffed such a rate in virtually all other states where Core does business. It is not this Commission's responsibility to find alternative and illegal ways for Core to charge for a service that Core voluntarily chose not to tariff.

(1) The tariff defines the term "Access Service" as a service provided to an "Interexchange Carrier," and an "Interexchange Carrier" is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, *between two or more exchanges*." Tariff, Section 1 (emphasis added).[17]

(2) The tariff specifies that Switched Access Service is only provided for three types of calls – Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access – none of which are local calls. Tariff, Section 4.2.3.

(3) The tariff's discussion of the termination of "local [] traffic" – which Core's witness Mr. Mingo admits includes the locally dialed, ISP-bound traffic at issue here, Tr. 98-99, 118, 129 – makes clear that local traffic is subject to bill and keep. Tariff, Section 1 at Original Sheet No. 9 (AT&T Cross Exhibit 12); Panel Reply Testimony at 26, fn 25; Tr. 99 (Mingo).

Core's own conduct shows that it never believed that its switched access tariff covers AT&T's locally dialed traffic.

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

(2) In the ongoing *Embarq* arbitration, Core emphatically and categorically maintained that locally dialed, ISP-bound traffic is not and cannot be access traffic – which means that it is not and cannot be subject to switched access charges.[18]

(3) In the states of Delaware, New Jersey, West Virginia, and Alabama (Tr. 17-18, 122-132), Core has filed switched access service tariffs that are, in pertinent part, substantively identical to Core's Pennsylvania tariff, except that these other state tariffs include a tariffed rate for the termination of *local traffic*.[19] Tr. 123; Cross Ex. 13-16, Section 6.[20] Of course, it would

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[17] Core ignores the definition of Access Service and relies on the definition of "Switched Access Service" (Core Br. at 29) – which uses the terms "exchange carrier" and "carrier" instead of "interexchange carrier." Core argues that AT&T is an "exchange carrier" and a "carrier," and therefore Core's switched access rates apply to AT&T's local traffic. As explained in the text, the definition of "Access Service" is plainly limited to service provided to an interexchange carrier providing service between two or more exchanges, and all other provisions of the tariff confirm that Core's switched access service was not intended to apply to the locally dialed traffic at issue.

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

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

[20] Likewise, in New York and Maryland – two other states where Core is certificated – Core's tariffs include a section establishing rates for local traffic, titled "Local Exchange Traffic Termination Service" and "Reciprocal Compensation Arrangements," respectively. Cross Ex. 18, Section 5 and Cross Ex. 19, Section 7.

have been unnecessary for Core to tariff a local rate if its switched access service already covered local traffic.

Moreover, the Commission has observed that "[s]witched access charges are those that LECs bill to IXCs or other LECs, for using their facilities *in the placement or receipt of toll calls*,"[21] and 66 Pa. C.S.A. § 3017(b) provides that "[n]o person or entity may refuse to pay tariffed access charges for *interexchange services* provided by a local exchange telecommunications company." (Emphasis added.) Core nevertheless claims (at 30) that the Commission's statement and the statutory provision just mean that switched access tariffs apply to "toll" and "interexchange" traffic, and do not address the issue here of whether switched access tariffs can apply to locally dialed traffic in the absence of a traffic exchange agreement. Core is grasping at straws. The Commission's statement and the Pennsylvania statute are clear that switched access charges apply only to toll charges – and that is consistent with how every state commission in the country views switched access. Indeed, AT&T is not aware of a single instance – and Core has not identified any – in which this Commission, or any other state commission, has applied intrastate switched access rates to local traffic generally, or to locally dialed ISP-bound traffic specifically.

Core claims (at 30-31) that this Commission authorized access charges to be applied to local traffic in the arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., but that arbitration dealt with wireless traffic,[22] and all the Commission said there was that at some time in the past Verizon Wireless had paid switched access charges for all intrastate calls originated by its customers. Core's witness Mr. Mingo admitted (Tr. 110-111) that the Commission did not

[21] *Global Order,* Docket Nos. P-00991648, *et al,* September 30, 1999, at p. 12 (emphasis added).

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

endorse, approve, or impose the practice in that arbitration,[23] but rather required the use of cost-based reciprocal compensation instead of access for all intraMTA wireless to wireline calls.[24]

Core argues (at 31-32) that under the filed rate doctrine its switched access tariff is entitled to a presumption that its rates are reasonable and that AT&T failed to follow the correct procedures to challenge the tariff. That argument is wrong for it misconstrues the whole purpose of this proceeding. AT&T plainly is not challenging the validity or reasonableness of Core's switched access tariff rates. AT&T agrees that Core's switched access tariff rates are presumptively valid *as to the traffic to which the rates apply – i.e.,* non-local, toll, interexchange traffic. In fact, AT&T *has* paid Core's switched access tariff rates for the termination of AT&T's non-local, toll, interexchange traffic. Tr. 35-37; AT&T Panel Testimony at 11, fn. 12. So that is not the issue here. The issue here is whether Core's switched access tariff is applicable to *locally-dialed traffic*. The filed rate doctrine does not entitle Core to any presumption that it does and AT&T demonstrated in its briefs that the tariff does not apply to locally dialed traffic.

Finally, even if it were possible to fashion an argument that Core's access charges are applicable here – and it is not, for all the reasons set forth above – imposing those charges on the traffic at issue in this case would not serve any Commission objective. As this Commission found more than a decade ago, intrastate access rates, and the Carrier Common Line Charge ("CCL") in particular,[25] were set "above cost as a means of generating additional revenues that

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[23] Moreover, we do not know what the Alltel tariff said. Unlike the Core tariff at issue here, it may have covered and applied to all intrastate traffic, at least to all intrastate wireless traffic.

[24] Core (at 30) cites two general statements from the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines as purported support for its position that access charges can apply to local traffic. The guidelines, however, say no such thing.

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

can be used to subsidize local rates and, thus, keep basic local service affordable."[26] And while the Commission is currently re-assessing whether access subsidies should be eliminated as anticompetitive and unsustainable in today's highly competitive telecommunications market, the relevant point here is that *Core does not even offer basic local residential service.* Thus, whatever access subsidies Core is generating are not supporting basic local services, and are certainly at odds with access reform initiatives being undertaken at both the national and state level, including here in Pennsylvania.

## V. REPLY TO CORE EXCEPTION NO. 6: Finding of Fact 61 Correctly States That Bill-And-Keep Is The Industry Standard Method Of Reciprocal Compensation For The Exchange Of Local Traffic Between CLECs.

Finding of Fact 61 correctly states that "Bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs." That finding does not – as Core claims (at 33) – reflect "flawed and legally unsupported advocacy," but rather reflects the Commission's own prior determination that "the use of bill-and-keep compensation" is the "existing CLEC-to-CLEC intercarrier compensation practice [ ] in Pennsylvania."[27]

Core's overblown rhetoric, including (at 33) accusing AT&T of being an "anarch[ist]" that uses "self-help and market power" to "strong arm all the other CLECs . . . to accept nonpayment under the guise of" bill-and-keep, is bereft of evidentiary support. Core does not even cite to any record evidence for these claims because there is none. To the contrary, the only record evidence on bill-and-keep demonstrates that virtually all CLECs operate on a bill-and-keep basis with each other, not just with AT&T. AT&T Cross Exhibit 4. In addition, the record evidence demonstrates that, other than Core, there is not a single CLEC (including those which

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

[27] *PUC v. MCImetro Access Transmission Services, LLC,* 2006 WL 2051138, * 1, 9 (Pa. P.U.C. June 22, 2006) (AT&T Cross Ex. 4).

have terminated significant volumes of locally dialed ISP-bound calls) who has ever complained to AT&T about having a bill-and-keep arrangement. Tr. 208 (AT&T Panel redirect).

Core points to its recent arrangements with two other CLECs as proof that bill-and-keep is not the existing compensation practice for the exchange of local traffic between CLECs. Those arrangements, however, were entered in late 2010. Prior to that time Core did not have any agreement with any CLEC for the termination of local traffic. Moreover, PAETEC/Cavalier agreed to pay Core for the termination of local traffic *only for one year*. Tr. 50-51; Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶¶ 3(b) & 4(a)). And Core is very candid that PAETEC/Cavalier agreed to pay only because Core essentially coerced an agreement by filing a protest in their pending merger proceeding. Tr. 50-51, 55, 152-153. It is clear that PAETEC/Cavalier did not see any merit to Core's demand that it pay for the termination of local traffic, because the agreement includes the following "[d]isclaimer:" "It is PAETEC's position that nothing in the Communications Act or other applicable federal or state law requires . . . the payment of the particular rate specified here for Section 251(b)(5) Traffic." Core Hearing Ex. 5 (Supplemental Response to Interrogatory 6-5, Attachment A at ¶ 6). The agreement also states that it may be terminated in the event the Pennsylvania Commission, the FCC, or a court declares or holds "that the PUC does not have jurisdiction over intercarrier compensation between two CLECs for local traffic, or that a rate other than $0.002439 applies to such traffic." *Id.* at ¶ 4(b).[28]

Core (at 34) cites 47 C.F.R. § 51.713 for the proposition that bill-and-keep can apply only when traffic flows are "roughly balanced." But that provision relates only to the Commission's approval of interconnection agreements under the 1996 Act and, more importantly, applies only

[28] Given the FCC's amicus brief and the Ninth Circuit decision, AT&T expects that the agreement will (or certainly can) be terminated.

to an *incumbent LEC's* rates for the transport and termination of traffic – which is not the issue here. 47 C.F.R. § 51.705 ("An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of," among other things, "[a] bill-and-keep arrangement, as provided in §51.713."). When it comes to bill-and-keep arrangements between CLECs, the fact of the matter is that all CLECs in Pennsylvania operate under a bill-and-keep arrangement *without checking to see if the traffic is in balance* (Tr. 208) – including those CLECs who, like Core, terminate locally dialed, ISP-bound calls.[29]

## VI. REPLY TO CORE EXCEPTION NO. 8: Finding Of Fact 75 Correctly States That Core Failed To Provide Evidence Of Economic Harm.

Finding of Fact 75 correctly states that "Core failed to provide evidence of any economic harm as a result of a bill-and-keep arrangement with AT&T." Core claims that Mr. Mingo presented such evidence in his direct testimony, but that is not true – Mr. Mingo presented only conclusory remarks unsupported, and in fact disproven, by the record. For example, Mr. Mingo claimed that Core has been harmed because it is "unable to recover a substantial portion of its network costs," (Core Excpt. at 37) but that claim is unsubstantiated because Core did not put on any evidence regarding its costs. Mr. Mingo also claimed that AT&T's use of Core's network "threatens Core's economic viability." *Id.* But, again, there is nothing to back up that claim. To the contrary, Core admits that from 1999 or 2000 (when it began operations) until the end of 2007 it consciously ignored that AT&T was "using" its network. AT&T Excpt. Br. at 22-24. If AT&T's "use" of Core's network was somehow "threatening Core's economic viability" during that eight year period when AT&T's use of Core's network was by far at its highest (97% of the

[29] Core also claims (at 34) that Finding of Fact 61 should be rejected because it conflicts with Findings of Fact 6, 9-10, 18, and 25-26. For the reasons stated in AT&T's Brief on Exceptions (at 19-28), those Findings of Fact – not Finding of Fact No. 61 – should be rejected because they are not supported by the record and, in fact, were refuted by the record and in some instances defeated by federal and/or state law.

traffic at issue having been delivered before the end of 2007, Mingo Direct, Ex. BLM-1, Core Hearing Exhibit No. 2), surely Core would have noticed and tried to do something about it. Moreover, since the complaint here was filed AT&T's traffic has been virtually non-existent (*id.*) (which coincides with the fact that virtually all Internet traffic has moved away from dial-up service to DSL, cable modem service, or some other high-speed arrangement), and certainly cannot be said to be "threatening" Core's network in any way. [30]

Core reiterates its complaint (at 36) that it does not have the ability to block traffic from AT&T. That's a red herring intended to cover up Core's own failure to help itself. Core admits that as far back as 2000 it had all the information it needed to bill AT&T for the termination of locally dialed, ISP-bound traffic – it just failed to act on that information until nearly eight years later. Tr. 64-71; Mingo Direct at 8. If Core had bothered to look at that information, it could have acted in 2000 by either filing a tariffed rate for the termination of locally dialed traffic, approaching AT&T for an agreement, or seeking Commission assistance. Core did none of those things, and cannot complain about the consequences of its inactions. If Core had acted in 2000, or even in 2004, the dispute being litigated now would have been resolved years ago, long before Core terminated most of the traffic at issue here. Moreover, the fact that Core could not block AT&T's traffic did not even come into play until 2008 because Core did not even notice or care that it was terminating AT&T-originated traffic. Mingo Direct at 8-9. 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. Mingo Direct, Ex. BLM-1.

[30] Contrary to Core's claim that it continues to incur "significant expense" (at 37) due to AT&T's traffic, Core's Hearing Exhibit No. 2 shows that the amount of local traffic sent by AT&T has generally been less than $30/month since November 2009 and was only $10.95/month in August 2010 (and this is based on the non-tariffed Verizon tandem rate of $.002439/MOU).

## VII. REPLY TO CORE EXCEPTION NO. 9: The ALJ Correctly Rejected Core's Request To Impose Civil Penalties On AT&T.

The ALJ correctly rejected Core's request that the Commission impose civil penalties on AT&T. Core argues (at 38) that this determination is wrong because AT&T's decision not to pay intrastate access rates for the termination of locally dialed, ISP-bound traffic was "legally unsupportable." But the FCC and the Ninth Circuit have quite clearly stated that AT&T was right. In its recent Ninth Circuit amicus brief, the FCC reiterated its long-standing determination that all ISP-bound traffic (the only kind of traffic at issue here) is jurisdictionally interstate and therefore falls under the FCC's jurisdiction, and the Ninth Circuit reached the same conclusion just two days ago – which means AT&T was correct that Core's intrastate access tariff could not apply to the traffic at issue. The FCC and the Ninth Circuit also make crystal clear that the *ISP Remand Order* applies to *all* locally dialed ISP-bound traffic, including CLEC-to-CLEC traffic; 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 – which, again, means AT&T was correct that Core's intrastate access tariff could not apply.[31] How could AT&T be subject to penalties for following an interpretation of the law that is consistent with the FCC's and the Ninth Circuit's interpretation?

Moreover, 66 Pa. C.S.A. 3301 explains the circumstances under which the Commission can impose penalties, but Core does not allege any conduct falling within the scope of this statute. Nor could it. As the ALJ correctly concluded, AT&T has not violated any statutory

[31] AT&T's refusal to pay was also justified under state law (AT&T Main Br. at 30-36; AT&T Reply Br. at 26-35) – something Core does not even try to refute: (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 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 ($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.

provision, has not failed to perform any duty, has not failed to obey any regulation or final Commission determination, and has not failed to comply with any court order.[32]

Core claims that in *Palmerton* the Commission concluded that refusing to pay billed charges is conduct "of a serious nature." In that case, however, Palmerton (1) had a tariff that set a rate for the traffic at issue (*Palmerton,* 1, 13, 15-18, 21-22) and (2) all other carriers were billed and paid that rate. Here, Core does not have a tariff establishing a lawful rate for the termination of ISP-bound traffic; up until October 2010, Core did not receive any compensation from any CLEC for terminating such traffic; and since October 2010 only two CLECs have agreed to pay Core something for this traffic. Perhaps most important, contrary to Core's misleading claim (at 39) that "the underlying reason that Global NAPs was fined was its failure to pay for services rendered," Global NAPs was not ordered to pay civil penalties because of its non-payment, but because it had failed to comply with a Commission order to "obtain a surety bond in favor of Palmerton." *Id.,* 26. AT&T has not failed to comply with any order.

## CONCLUSION

Based on the foregoing and AT&T's Brief on Exceptions, AT&T respectfully requests that the Commission reject Core's exceptions and dismiss Core's complaint against AT&T.

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

By: _____

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

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Reply 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 23rd day of June, 2011.

VIA E-MAIL AND OVERNIGHT MAIL
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