PAINTER LAW FIRM, PLLC
13017 DUNHILL DRIVE
FAIRFAX, VIRGINIA 22030

MICHELLE PAINTER
ATTORNEY AT LAW

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

July 15, 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 Opposition to Core's Motion For Leave To File Update To Core's Reply To The Exceptions Of AT&T, which was filed electronically today in the above-referenced matter.

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

Very truly yours,

Michelle Painter

Michelle Painter

Enclosure

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

AT&T'S OPPOSITION TO CORE'S MOTION FOR LEAVE TO FILE UPDATE TO CORE'S REPLY TO THE EXCEPTIONS OF AT&T

AT&T Communications of PA, LLC and
TCG Pittsburgh

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

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

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 Opposition to Core Communications, Inc.'s Motion for Leave to File Update to Core's Reply to the Exceptions of AT&T in this matter.

INTRODUCTION

Core's motion seeks a belated do-over of its Reply Exceptions so that it can address a Ninth Circuit decision[1] that was entered two days *before* Reply Exceptions were due, and that emanated from a proceeding that Core was not only fully aware of, but was closely following – so much so that Core filed a letter submitting the FCC's amicus brief to this Commission the morning after it was filed with the Ninth Circuit. Core's request should be denied. There simply is no excuse for Core's failure to address the Ninth Circuit decision, especially given that both parties understood it squarely addresses the preemption issue that has been at the forefront of this proceeding since it began. Allowing Core to correct its negligence (putting its omission in the best light) in failing to address the Ninth Circuit decision (which is adverse to Core's position in this case) would be unfair and prejudicial to AT&T, particularly given that Core has taken nearly two weeks to mull over AT&T's Reply Exceptions before filing its Motion. Moreover, Core's arguments in its "update[d]" Exceptions add nothing new for the Commission to consider, for they simply rehash arguments Core raised earlier in this proceeding – arguments that are wrong for the reasons set forth in the Ninth Circuit decision, the FCC's amicus brief, and AT&T's prior briefs.

---

[1] *AT&T Comm. v. Pac-West Telecomm* (No. 08-17030) (9th Cir. 2011) ("*Pac-West*"). A copy of the court's slip opinion was Attachment 1 to AT&T's Reply Exceptions.

ARGUMENT

A. The Commission Should Deny Core's Motion To "Update" Its Reply Exceptions

The usual purpose of a supplemental filing, like Core's request here to "update" its Reply Exceptions, is to address something relevant to the case that came about *after* briefs were filed, not to address something that existed and therefore could have been addressed in briefs. The Ninth Circuit decision that Core wants to address in its "update[d]" Reply Exceptions, however, was entered *before* those Exceptions were due. If Core wanted to address the decision it should have done so at that time. Core (for whatever reason) did not. And it should not be permitted to file yet another brief to cure its failure.

Of course, the timing of the Ninth Circuit decision should not have come as a surprise to Core. Core has been aware of and closely following the Ninth Circuit appeal throughout this proceeding because both parties understood it would resolve the same preemption issue facing the Commission here. For example, Core's witness Mr. Mingo discussed the California commission decision (which ultimately led to the Ninth Circuit appeal) in his testimony (at 25-26) filed on November 16, 2009, stating that it reached "exactly the same result Core seeks in this case." In its Answer to AT&T's Motion to Dismiss (at 2, 9, 13-15) filed on December 28, 2009, Core discussed the Ninth Circuit appeal and attached as exhibits the California Commission decision and federal district court decision leading to it, and heavily relied upon those decisions to oppose AT&T's preemption argument – touting them as the "only precedent squarely addressing the matter at issue." Core also discussed and relied upon those decisions in its Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question filed on March 15, 2010. But most telling, when the FCC filed its amicus brief in the Ninth Circuit on February 2, 2011, Core filed a letter submitting that brief to this Commission by

11:57 a.m. the next day. Obviously, Core understood the importance of the Ninth Circuit appeal and was closely monitoring it.

Now that the Ninth Circuit has reversed the decisions that Core so heavily relied upon, Core inexplicably claims that it could not have known about the Ninth Circuit decision because it "was not a party." That not only is implausible, it is no excuse. The Ninth Circuit proceeding unquestionably was going to affect the outcome of this case – indeed, the anticipated decision was going to either affirm or reverse the lone precedent Core relied upon to support its claim that the *ISP Remand Order* does not apply to the traffic at issue and that its complaint is therefore governed by state law. In its Reply Exceptions (at 1), for example, Core stated that "[t]here has been no contrary decision or order from . . . any court . . . reversing or altering" the Commission's Material Question Order. Core should have confirmed the validity of that statement before making it by checking to see if the Ninth Circuit had ruled. In today's electronic age, court rulings are available virtually immediately online, so Core cannot claim that there was no way for it to know about the Order upon its release. Core also (*id.* at 1, 8-13) criticized the FCC amicus brief filed with the Ninth Circuit for contradicting the California commission's decision, the federal district court decision, and this Commission's Material Question Order, and relied heavily on the California commission's brief filed with the Ninth Circuit. Again, before doing so Core should have checked the status of the Ninth Circuit appeal. Whether Core's failure to do so was the result of a conscious choice, neglect, or something else, there is no reason to allow Core to cure its failure now.[2]

---

[2] Permitting carriers to supplement briefs to address authority that existed at the time briefs were filed would open the door for parties to make the strategic decision *not* to address negative authority, and then after having the benefit of seeing the other side's analysis, seek to get the last word through a supplemental filing. AT&T does not know whether that is the case here; however, the Commission should not have to make judgment calls on such matters. Instead, the Commission should take the position that supplemental filings are to address only new matters, not add arguments that for whatever reason – choice or neglect – were excluded from the original filing.

Indeed, allowing Core to submit argument on the Ninth Circuit decision would be unfair and prejudicial to AT&T now that Core has taken nearly two weeks to review AT&T's Reply Exceptions before filing its "update." AT&T attached the actual Ninth Circuit decision to its Reply Exceptions, so Core had the decision on June 24. It nevertheless inexplicably waited almost two weeks (longer than the parties were given for Reply Exceptions) before it bothered to file its Motion and updated reply. Core offers absolutely no reason, and there can be no legitimate one, for taking nearly two weeks before it bothered to file its "updated" pleading.

Core (at ¶ 2) makes much out of the fact that the Ninth Circuit decision was not available prior to exceptions, claiming that since the decision "was not referenced in AT&T's exceptions" then "Core could not have addressed AT&T's advocacy regarding the opinion in its reply exceptions." If Core's point is that addressing the Ninth Circuit decision would have been beyond the scope of Reply Exceptions because it was not addressed in AT&T's Exceptions, Core is obviously wrong. Throughout this proceeding, the parties have been anticipating the Ninth Circuit's decision. In fact, in its own exceptions (at pp. 5-6), Core specifically discussed the Ninth Circuit case, and recognized that a decision was still pending. No party reasonably could argue that addressing the Ninth Circuit decision in Reply Exceptions was beyond the scope of replies – indeed, Core has not made that argument with respect to AT&T's Reply Exceptions.

* * *

Based on the foregoing, AT&T respectfully requests that the Commission deny Core's motion for leave to file "update[d]" Reply Exceptions. In the event the Commission grants Core's motion, AT&T requests that the Commission consider AT&T's response to Core's arguments as set forth below.

B. Core's Arguments In Its "Updated" Exceptions Are Without Merit

Core claims that the Ninth Circuit opinion contains "a number of novel assertions" that Core should be allowed to address. But as explained above, the time has come and gone for Core to do so.[3] Moreover, the Ninth Circuit's analysis is hardly "novel," for it reflects the very same arguments AT&T has been making throughout this proceeding, including in its December 8, 2009 Motion to Dismiss. Core presented its arguments to the contrary in its earlier briefs, and its "updated" Reply Exceptions in large part just rehash those arguments, which are wrong for the reasons set forth in the Ninth Circuit decision, the FCC's amicus brief, and AT&T's prior briefs. The Commission should not permit Core yet another opportunity to raise the same issues it has previously argued in the guise of addressing a decision Core should have known about prior to the filing of its Reply Exceptions.

Core begins by arguing that the Ninth Circuit rejected AT&T's position that a state commission has no subject matter jurisdiction over ISP-bound traffic by virtue of its interstate nature. Core is wrong. The Ninth Circuit said loud and clear that all ISP-bound traffic is *interstate* and therefore falls under the FCC's jurisdiction. *Pac-West,* slip op. at 8383. While the Ninth Circuit (slip op. at n.20) and the FCC (Amicus at 14) declined to decide whether the *California commission* had subject matter jurisdiction to decide the issue applying federal law, that is irrelevant here. This Commission is purely a creature of statute. Therefore, the Commission can only exercise that authority that is conferred on it by the General Assembly. *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission,* 875 A.2d 1243, 1249 (Pa. Cmwlth. 2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission,* 664

---

[3] Even if this Commission were to agree that Core's failure to address the Ninth Circuit decision in its Reply Exceptions was somehow excusable (even though it is not), Core certainly should not have taken nearly two weeks after it was most definitely aware of, and had within its possession, the Ninth Circuit's decision. In fact, Reply Exceptions were due only 10 days after Exceptions were filed – for Core to give itself even more time to absorb and respond to AT&T's arguments in the Reply Exceptions is completely indefensible.

A.2d 664 (Pa. Cmwlth. 1995). The Commission's enabling statute gives the Commission the authority to address intercarrier compensation "for *intra*state telecommunications traffic"; it does *not* authorize the Commission to determine compensation "for *inter*state telecommunications traffic." 66 Pa. C.S.A. § 104 (emphasis added). Because all ISP-bound traffic is "interstate," it therefore follows necessarily that the Commission lacks jurisdiction to hear this case, no matter what the source of substantive law might be. Accordingly (as AT&T argued in its Brief on Exceptions), the Initial Decision should be revised to reflect this, and the case should be dismissed.[4]

Core's remaining substantive arguments in its updated Reply Exceptions essentially ask this Commission to ignore a federal circuit court's ruling on federal law and on the primary issue in this case, and instead to substitute Core's own interpretations, which have been soundly rejected by both the FCC and the Ninth Circuit. This, the Commission cannot and should not do. For example, Core (at 2) conflates the clarity required for express preemption and that required when determining the scope of an order. Specifically, Core claims that the *ISP Remand Order* must be clear with respect to whether the FCC intended it to apply to ISP-bound traffic exchanged between two CLECs. Core made this exact same argument in its Exceptions at pages 11-13 and 24. Core is wrong. If the meaning and scope of an order were required to be clear and unambiguous, there would never be any need for an agency interpretation – indeed, the only

---

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

time a court can properly rely on an agency's interpretation of its own order is when that order is not clear. *See Christensen v. Harris County,* 529 U.S. 576, 588, 120 S.Ct. 1655 (2000) ("an agency's interpretation of its own regulation is entitled to deference . . . only when the language of the regulation is ambiguous").

What needs to be clear and unambiguous is the intent to preempt. And here – as the Ninth Circuit held – the FCC's intent to preempt could not have been more clear. *Pac-West,* slip op. at 8384 ("it is well-settled that the *ISP Remand Order* has preemptive effect with regard to the ISP-related issues it encompasses"); Amicus at 26 (pointing out that the FCC's expression of its intent to preempt state authority is "quite clear."); *ISP Remand Order,* ¶ 82 (declaring 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.") *See also* AT&T Excpt. Br. at 7-14; AT&T Reply Excpt. Br. at 6-8. Having found that the intent to preempt was clear, the Ninth Circuit then went on to determine the scope of the order, *i.e.,* whether it applied to ISP-bound traffic exchanged between two CLECs, and correctly determined that it does. *Pac-West* slip op. at 8395-96.

Core also (at 4) re-raises the argument that the *ISP Remand Order* applies only to traffic exchanged between an ILEC and a CLEC because the FCC intended the order to be implemented via interconnection agreements, which Core assumes can only be entered between an ILEC and CLEC. Core raised this issue in its Exceptions at pages 14-16. Core is wrong. The FCC recognizes that 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 in the *ISP Remand Order* to "interconnection agreements" is *not* modified in any way, explicitly or implicitly, by "Section 252." *Id.*[5]

Core suggests that the Ninth Circuit allowed the FCC's policy concerns underlying the *ISP Remand Order* (*i.e.*, the "arbitrage opportunities created by ISP-bound traffic generally," *Pac-West, slip op.* at 8392) to "override[ ]" the lack of clear preemption. This is yet again an argument that Core raised in its Exceptions (at page 19), and Core is wrong. As just discussed, the FCC's intent to preempt was clear, so policy considerations did not override anything.

Moreover, when it comes to interpreting the meaning and scope of an order, it is proper (and in fact necessary) for courts to consider the order's regulatory purpose. *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). Indeed, 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. That regulatory purpose could be satisfied and not thwarted only if the *ISP Remand Order* reaches both CLEC-originated and ILEC-originated ISP-bound traffic. *Pac-West,* slip op. at 8392 ("[A]rbitrage related to ISP-bound traffic in no way depends on the

---

[5] The Ninth Circuit decision and FCC amicus brief also correctly point out that the new markets and rate cap rules repeatedly use the word "carrier," a broad term that includes both ILECs and CLECs, further confirming that those rules apply to ISP-bound traffic exchanged between two CLECs. *Pac West,* slip op. at 8385, 8389, 8392; Amicus at 16-17. *See also* AT&T Reply Excpt. Br. at 8-10. Only the mirroring rule (which, unlike the new markets and rate cap rules, uses terms like "incumbent LEC," "ILEC" and "incumbents") is limited to ILEC-originated traffic. The FCC's 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.

participation of an ILEC. The *ISP Remand Order* reflects this reality, imposing its rules on *all LECs.*") (emphasis in original); Amicus at 20-21 ("The opportunities for regulatory arbitrage and distortions of economic signals occur under a reciprocal compensation system regardless of the identity of the originating carrier as an ILEC or a CLEC. Interpreting the compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic would create a loophole in the FCC's regulatory regime for CLEC-originated ISP-bound calls. As to that traffic, it would thwart full achievement of the regulatory purpose by leaving unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.")

Core argues that statements in a footnote to the Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime,* 16 F.C.C.R. 9610, 9679 and n.1 (2001), show that the FCC intended to limit the compensation scheme of the *ISP Remand Order* to ILEC-CLEC traffic exchanges. Specifically, from the FCC's statements that it does not "expect to extend compensation rules to other interconnection arrangements . . . *that do not exhibit symptoms of market failure*," and that it "do[es] not contemplate a need to adopt new rules governing CLEC-to-CLEC . . .arrangements," Core infers that the FCC did not intend the *ISP Remand Order* to apply to CLEC-CLEC traffic exchanges. Yet again, this is an argument that Core already made in this case. Core Exceptions at 17-18. And yet again, Core is wrong. As the Ninth Circuit and the Supreme Court have both recognized, the FCC is best positioned to know its intent and, as the FCC explained in its amicus brief, its statements in the Unified Regime NPRM "expressed its tentative views on possible *future* rule revisions" and "did not mention the *existing* ISP-bound compensation rules" (such as those set forth in the *ISP Remand Order*) "let alone purport to interpret their scope." Amicus at 24. Moreover, while Core takes

the Ninth Circuit's statements out of context in an attempt to support its position, the Ninth Circuit agrees with the FCC's interpretation of the footnote, explaining that "the FCC 'd[id] not contemplate a need to adopt *new* rules governing CLEC-to-CLEC arrangements," "that is, rules other than those already adopted in the *ISP Remand Order.*" *Pac-West,* slip op. at 8395-8396 (emphasis in original).

Core disagrees with the Ninth Circuit's decision to give deference to the FCC's interpretation of its own order as reflected in its amicus brief, and encourages this Commission not to do the same. That flies in the face of uniform Supreme Court precedent, including the Supreme Court's recent *Talk America* decision, which require deference under the circumstances present here. AT&T Excpt. Br. at 14-16; AT&T Reply Excpt. Br. at 11-14. Indeed, an agency's construction of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (internal quotations omitted). *Accord Chase Bank,* 131 S. Ct. at 880; *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1167 (9th Cir. 2010). This is equally true of 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 demonstrate that the Ninth Circuit and the Initial Decision were correct in determining that the FCC's amicus brief is entitled to deference: (1) the FCC clearly interpreted the *ISP Remand Order*, (2) the FCC's interpretation in the amicus brief is not "clearly erroneous," for it is consistent with the language of the Order and its underlying regulatory purpose, and (3) 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.

CONCLUSION

Based on the foregoing, AT&T respectfully requests that the Commission deny Core's Motion for Leave to File Update to its Reply to the Exceptions of AT&T.

Respectfully submitted,

AT&T Communications of PA, LLC and
TCG Pittsburgh

By: Michelle Painter

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

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

Its Attorneys

DATED: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Opposition To Core's Motion For Leave To File Update To Core's Reply To The Exceptions of AT&T upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated in Fairfax, Virginia this 15th day of July, 2011.

VIA E-MAIL AND FIRST CLASS MAIL

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

Michelle Painter