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September 29, 2011

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA HAND DELIVERY

RE: Core Communications, Inc. v. XO Communications Services, Inc.;
Docket No. C-2009-2133609

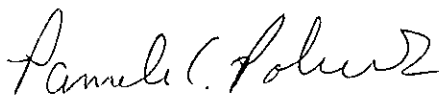
Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") are the original and three (3) copies of the Response, Objection and Motion to Partially Strike of XO Communications to Core Motion for Admission of Exhibits in the above-referenced proceeding.

As indicated on the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and Response, and kindly return them for our filing purposes.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Pamela C. Polacek

Counsel to XO Communications Services, Inc.

PCP:cf

Enclosures

c: Administrative Law Judge Kandace F. Melillo (via E-mail and Hand Delivery)
Certificate of Service

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are not competent evidence. Moreover, they again comprise an alternate, and inflated, claim for relief that should be rejected.

The hearing on Core's complaint was held on May 3, 2011. In response to questioning from ALJ Melillo, Core agreed to provide two additional exhibits, which were pre-marked BLM-24 and BLM-25. The purpose of BLM-25 was "to supply information regarding a breakout between local and nonlocal minutes and associated charges"¹ owed by XO to Core. Accordingly, on May 9, 2011, Core filed its Motion for Admission of Exhibits ("First Motion") which, among other things, attached a pre-marked copy of Core proposed Exhibit BLM-25, seven pages of which claims to list the number of minutes of use ("MOUs") sent by XO to Core from June 2004 through April 30, 2011, categorized into non-locally dialed MOUs (or "Intra Toll MOUs") and locally dialed MOUs (or "Local MOUs"). In addition, Exhibit BLM-25 claimed to show "updated" amounts due on the invoices that have been submitted to XO for this time period, including a claim for late payment charges that Core had never billed.

In its Response and Objection to the First Motion ("First Response") dated May 31, 2011, XO objected to the admission of Exhibit BLM-25 on the grounds that it did not accurately reflect the MOUs or indicate whether the traffic was locally dialed or not. XO further objected in that Exhibit BLM-25 was inconsistent with the invoices that Core has rendered to XO. In her consequent Order dated July 13, 2011 ("Order"), the ALJ granted this objection. In that Order, the ALJ reiterated that her request for an update and breakdown of MOUs did not provide Core the opportunity to back bill for additional amounts such as late payment charges, nor did it allow for the inclusion of additional MOUs, beyond those set forth in the original invoices, *or for the*

¹ Tr. 117:12-14. XO reiterates that it has not agreed that the jurisdiction of the traffic is a relevant consideration, and reserves all rights to argue this point, since it has been established that all of the traffic prior to September 2009 is ISP-bound traffic, and Core by its own admission is unable to establish that any traffic after that date is not ISP-bound traffic.

reclassification of billed interstate MOUs as intrastate, finding that “[t]o allow for new claims in updated information, at this late date, would constitute unfair prejudice to XO and will not be permitted.”²

However, citing the potential importance of the local/nonlocal breakdown that she originally sought, the ALJ offered Core “one final opportunity” to submit this information for the record, warning that “[n]o further opportunities will be given.”³ She also reiterated that “[t]he MOUs in the breakdown *must be consistent with billed usage*”⁴ based on copies of invoices that XO would provide. XO provided these invoices to Core, and on August 16, 2011, Core submitted a Motion for Admission of the its proposed Exhibits BLM-25 (rev), BLM-26, BLM-27 and BLM-28 (“Second Motion”).

A. Violation of the ALJ’s Order

As previously noted, XO does not object to the admission of Exhibits BLM-25 (rev) and BLM-26. However, Exhibits BLM-27 and BLM-28 blatantly violate the ALJ’s Order and should be rejected. The ALJ has clearly and repeatedly directed that the MOU breakdown should reflect only the billed usage, as reflected in the actual invoices, and she has unmistakably prohibited Core from reclassifying billed interstate MOUs as intrastate. Yet this is precisely what Core has done, plainly admitting that it has “reevaluated”⁵ and “re-categorized”⁶ the MOUs. Core justifies this defiance with the weak explanation that since the redistributed minutes still add up to the same total, there are no “new” MOUs overall. Regardless of how

² See Order at 5.

³ *Id.* at 6.

⁴ *Id.* (emphasis supplied).

⁵ Second Motion at 7.

⁶ *Id.* at 8.

Core labels this reclassification, it has the effect of shifting over *four million MOUs* from the interstate to the intrastate jurisdiction, revising and grossly inflating Core's claim accordingly.

Specifically, the exhibits present two different categories of information: a "Breakdown" section, in columns D, E, and F, and an "Invoiced" section in columns H and I. The Invoiced section corresponds to the actual invoices, but presents no breakdown of local/nonlocal minutes. The Breakdown section provides the breakdown of local/nonlocal minutes, but does not conform to the actual invoices. Instead, it reflects Core's unilateral reclassification of large amounts of interstate traffic as intrastate traffic instead. Furthermore, Core provides no substantiation for the breakdown, nor does it even describe the mechanism by which it was produced. Core merely references its "current and updated" billing system⁷ which we are led to infer, with no other support, is not the same one that generated the actual invoices that form the basis of its claim.

The situation is even more egregious in regard to CIC 5607, where Core has, as it did with original Exhibit BLM-25 in the First Motion, unilaterally shifted *all* interstate minutes into the intrastate jurisdiction. Core attempts to justify this by repeating its assertion that the CIC 5607 traffic from XO arrives without CPN information, even though XO has established that it does forward this information and that there is other information in the call records (*i.e.* AMA call codes) that Core can use to determine the jurisdiction of the call.⁸ XO raised the alert regarding this defect in Core's evidence in the First Response, and Core has done nothing to cure it. XO referenced its testimony which states that XO provides industry standard call information in Category 11 records that would enable Core to determine the jurisdiction of this traffic, and that such information would establish that calls from XO are local. XO also described the

⁷ *Id.* at 8.

⁸ Tr. 86:15-87:3; SR-1 at 9:10-10:4

implausibility that Core, a carrier in the business of providing local access to ISPs, would have any significant proportion of Intra Toll traffic from XO.

Any billing system (particularly an “updated” one, such as Core’s) should be able to handle the jurisdictional data that accompanies XO’s traffic. Rather than perform this analysis, however, Core has merely “revaluated” its records based on an unexplained and undocumented billing system policy.⁹ As a result, between the revaluations for CIC 5119 and CIC 5607, Core has by sleight of hand added 4,095,969 intrastate MOUs to its claim, in clear defiance of the ALJ’s Order. For this reason alone, the ALJ should reject the Exhibits.

B. Lack of Support for the Exhibits

Even if the ALJ is willing to countenance this defiance, Core’s reevaluated Exhibits do not stand up to scrutiny, based on the switch records, *i.e.* call data records (“CDRs”) that Core claims it used to develop the Exhibits. Some of these CDRs were provided to XO, either as an accompaniment to Core’s invoices to XO or pursuant to discovery responses that were provided by Core on September 20, 2011.¹⁰ As an initial matter, notwithstanding XO’s discovery requests and follow-up correspondence between counsel for XO and Core, Core has never provided CDRs for calendar years 2004 through 2006 for CIC 5119. Accordingly, any claimed MOUs for those three years should be summarily rejected. As to the other months, XO was not able to analyze all 52 months of data that was provided, due to time and resource constraints. However, it did sample 23 months in order to gauge the reliability of Core’s analysis. The results,

⁹ Second Motion at 8.

¹⁰ XO has not consistently received CDRs with the invoices that Core has submitted each month. For example, in calendar 2011, XO did not receive CDRs for the months of January, March, May, and June. In calendar 2010, XO did not receive CDRs for the months of February, March, August, and September. Furthermore, even in months when it has sent CDRs, Core occasionally has failed to include the CDRs for a particular CIC. For example, Core failed to provide CDRs for CIC 5607 in June 2010, November 2010 and April 2011, and failed to provide CDRs for CIC 5119 in December and October 2010.

displayed in the attached XO Exhibit No. 170, indicate that whatever support there is for Exhibit's BLM-27 and BLM-28 is not found in the CDRs on which these Exhibits are supposedly based. In fact, there are substantial and material variances. Notably, in regard to CIC 5119, these variances overwhelmingly favor Core.

XO submits that if the CDRs on which Core relies do not even support the total number of MOUs that Core has billed, which they do not, it is inconceivable that they support Core's breakdown between local and non-local traffic. Core asserts that Exhibits BLM-27 and BLM-28 "clarify" the inquiries made by the ALJ and XO,¹¹ but they do nothing of the sort. Instead they muddy the issues even more and push this proceeding even further from resolution. Again, Core has failed to substantiate its claim, and Exhibits BLM-27 and BLM-28 should be rejected.

C. Motion to Strike

As a further note, XO objects – again – to Core's continued practice of pleading out of order. Within the body of the Second Motion, Core exceeds the leave granted by the ALJ's Order and presses its case on a number of fronts. For example, it argues yet again to shift the burden of production and persuasion in this proceeding;¹² it repeats prior testimony¹³ and introduces new testimony regarding its "updated" billing system;¹⁴ it reiterates its alternative claims for relief¹⁵ and, on top of it all, seeks reconsideration of the ALJ's Order that XO be permitted further discovery.¹⁶

¹¹ Second Motion at 9.

¹² *Id.* at ¶¶ 10, 13, 15, 21.

¹³ *Id.* at ¶¶ 9, 10, 16

¹⁴ *Id.* at ¶¶ 12, 19

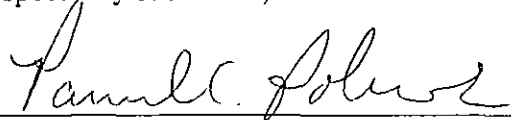
¹⁵ Second Motion at ¶ 8.

¹⁶ *Id.* at ¶¶ 15, 21, 24.

As XO has previously noted, a motion to strike is generally used to eliminate “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”¹⁷ The paragraphs that XO has cited are nothing if not redundant and constitute yet another improper pleading. XO respectfully requests that the ALJ disregard the subject paragraphs and any other material that she may deem to be outside the approved scope of the filing.

WHEREFORE, for all the foregoing reasons, XO respectfully requests that Your Honor issue an Order denying the Second Motion as it pertains to Exhibits BLM-27 and BLM-28, striking the redundant material, and dismissing Core’s claims as unproven.

Respectfully submitted,



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Attorneys for XO Communications Services, Inc.

Dated: September 29, 2011

¹⁷ Fed. Civ. Proc. Rule 12(f).

Comparison of Billed MOUs vs. Switch Call Data Records

<u>CIC</u>	<u>Usage Month</u>	<u>Billed MoUs</u>	<u>CDR MoUs</u>	<u>Variance</u>	<u>Notes</u>
5119	Jul-04	17,617	0	-17,617	Core did not provide CDR detail
5119	Dec-04	20,874	0	-20,874	Core did not provide CDR detail
5119	Jan-05	67,915	0	-67,915	Core did not provide CDR detail
5119	Jun-05	12,713	0	-12,713	Core did not provide CDR detail
5119	Mar-06	45,462	0	-45,462	Core did not provide CDR detail
5119	Sep-06	98,312	0	-98,312	Core did not provide CDR detail
5119	Feb-07	67,944	58,513	-9,431	
5119	Aug-07	268,912	248,074	-20,838	
5119	Apr-08	111,990	92,919	-19,071	
5119	Jun-08	82,418	70,805	-11,613	
5119	Jul-09	110,246	86,816	-23,430	
5119	Dec-09	63,021	39,931	-23,090	
5119	Mar-10	51,306	37,117	-14,189	
5119	Apr-10	65,352	45,640	-19,712	
5119	May-10	85,718	47,662	-38,056	
5119	Jul-10	60,136	36,799	-23,337	
5119	Sep-10	24,648	16,728	-7,920	
5119	Oct-10	39,559	30,908	-8,651	
5119	Nov-10	24,757	21,720	-3,037	
5119	Jan-11	21,421	19,665	-1,756	
5119	Mar-11	71,039	68,420	-2,619	
5119	Jun-11	49,959	47,519	-2,440	
5119	Jul-11	44,629	42,453	-2,176	
		601,545	454,562	-146,983	

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Comparison of Billed MOUs vs. Switch Call Data Records

XO Exhibit 170
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<u>CIC</u>	<u>Usage Month</u>	<u>Billed MoUs</u>	<u>CDR MoUs</u>	<u>Variance</u>	<u>Notes</u>
5607	Jul-04	28,854	28,569	-285	
5607	Dec-04	24,987	24,469	-518	
5607	Jan-05	25,834	25,532	-302	
5607	Jun-05	32,894	32,553	-341	
5607	Mar-06	89,538	89,090	-448	
5607	Sep-06	20,160	19,819	-341	
5607	Feb-07	14,289	14,029	-260	
5607	Aug-07	95,969	93,934	-2,035	
5607	Apr-08	66,127	65,316	-811	
5607	Jun-08	56,873	56,115	-758	
5607	Jul-09	33,311	32,978	-333	
5607	Dec-09	47,207	46,844	-363	
5607	Mar-10	39,591	39,238	-353	
5607	Apr-10	33,924	33,623	-301	
5607	May-10	32,716	32,474	-242	
5607	Jul-10	23,990	23,721	-269	
5607	Sep-10	22,463	19,188	-3,275	
5607	Oct-10	20,942	30,144	9,202	
5607	Nov-10	10,103	9,955	-148	
5607	Jan-11	15,469	12,418	-3,051	
5607	Mar-11	15,713	15,533	-180	
5607	Jun-11	8,407	8,299	-108	
5607	Jul-11	6,522	6,442	-80	
		277,047	277,879	832	

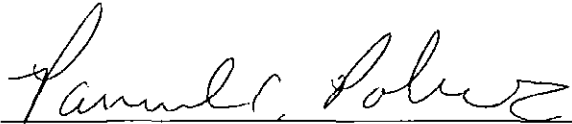
CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

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Dated this 29th day of September, 2011, at Harrisburg, Pennsylvania.

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