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February 1, 2012

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

Re: Core Communications, Inc. v. XO Communications, Inc.
Docket No. C-2009-2133609

Dear Secretary Chiavetta:

On behalf of Core Communications, Inc. enclosed is the original of its Main Brief along with the electronic filing confirmation page. Copies have been served in accordance with the attached Certificate of Service.

Sincerely yours,

Deanne M. O'Dell

Deanne M. O'Dell, Esq.

DMO/lww

cc: Hon. Kandace Melillo (w/enc)
Cert. of Service (w/enc)

CERTIFICATE OF SERVICE

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

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Dated: February 2, 2012

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF OF CORE COMMUNICATIONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations **Page(s)**

Administrative Cases

Administrative Cases (continued) **Page(s)**

Administrative Cases (continued) **Page(s)**

I. INTRODUCTION

The crux of this case is whether an originating carrier should be permitted to take a "free ride" on the network of a terminating carrier—one that is forced to incur uncompensated costs to terminate traffic—by proffering strained interpretations of the law to justify the very simple fact that it refuses to pay anything though it is legally required to do so.[1] Core Communications, Inc. ("Core") operates a statewide facilities-based network that enables Pennsylvania consumers who either do not have access to or do not want to pay for higher priced broadband services, to choose an alternative way to access the Internet, that is, plain, unvarnished and reliable dial-up access. Pursuant to the law, the originating carrier, in this case XO Communications, Inc. ("XO"), is required to compensate the terminating carriers, in this case Core, for its termination of traffic originated by XO's end-users. XO has refused to do this and that is why Core was forced to file this complaint.

The practical effect of XO's actions is that Core continues to remain uncompensated for some 8,000,000-plus minutes of use ("MOUs") of telecommunications traffic generated by XO end users (or carriers whom XO serves on a wholesale basis) and terminated by Core to its enhanced service provider customers in Pennsylvania. As if that were not enough, however, XO continues to send Core traffic which Core must terminate and for which XO continues to refuse to pay anything. Unlike a traditional commercial setting where a provider of a service can

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[1] On November 18, 2011, the FCC released its long-awaited Report & Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund*, WC Docket No. 10-90, FCC 11-161 ("*ICC Reformation Order*"). In this order, the FCC fundamentally transformed the intercarrier compensation landscape, requiring, among other things, a multi-year transition to bill-and-keep for all traffic. Several parties, including the Commission, have appealed the *ICC Reformation Order*, and the appeals have been consolidated in the Tenth Circuit. In Re: FCC 11-161, U.S.C.A. (10th Cir.), Docket No. 11-9900. In any event, the FCC's order is prospective only in effect and, even by its own terms, does not require bill-and-keep for reciprocal compensation arrangements until 2018 in price-cap territories and until 2020 in rate-of-return areas. *See*, *ICC Reformation Order*, ¶ 801. In the meantime, nothing in the FCC's order prevents the Commission from granting Core any of the retroactive or prospective relief that it requests herein.

simply stop providing the service if it does not get paid, Core is without recourse because it cannot simply stop accepting XO's traffic. Instead, Core is forced to continue to terminate the traffic, at its own cost, and seek compensation through litigation as it has done here.

As explained further below, the Commission should direct XO to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4, since the plain language of the tariff applies and there is no other agreement between the parties. If, however, the Commission decides not to apply Core's tariff to the previously terminated traffic (which it should), Core requests in the alternative that XO be directed to pay Core at the Commission-approved tandem termination rate, as determined by using the total long-run incremental cost model ("TELRIC"), for the locally-dialed portion of XO's traffic; and at the tariffed rates for that portion that is not locally-dialed. TELRIC provides for recovery of joint and common costs, and is a generally-accepted rate methodology for the exchange of telecommunications traffic between LECs in Pennsylvania. Finally, Core requests—in view of the special circumstances in this case—that the Commission issue an appropriate civil penalty on XO to address its prior actions in refusing to compensate Core for its substantial use of Core's network and to ensure future good faith performance. As XO's behavior clearly shows, it will simply continue to engage in its brand of lawless gamesmanship at the expense of Core and the public until ordered to do otherwise.

II. STATEMENT OF THE CASE

Core filed its complaint in this matter on September 23, 2009 (the "Complaint"). The Commission ordered XO to satisfy or answer the Complaint within twenty (20) days by letter order dated October 5, 2009. XO filed its preliminary objections ("POs") on October 26, 2009, challenging the Commission's jurisdiction to adjudicate the Complaint on the basis that some or all of the traffic at issue was bound for Internet service providers. Core filed its Answer to XO's

POs on November 5, 2009. ALJ Susan D. Colwell denied XO's POs, and required XO to file a responsive pleading within twenty (20) days, by order dated December 14, 2009. XO filed its answer to the Complaint, affirmative defenses and new matter on January 4, 2010. Core filed its reply to new matter on January 25, 2010.

On March 4, 2010, Core and XO filed a joint motion for stay of this matter, pending Commission resolution of petitions for answer to material question concerning the Commission's jurisdiction over (1) ISP-bound traffic exchanged by two competitive local exchange carriers ("CLECs"); and (2) voice-over-Internet protocol ("VOIP") traffic in another proceeding, *Core Communications, Inc. v. AT&T Communications of PA, LLC* and *Core Communications, Inc. v. TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239 (the "Core AT&T Case"). ALJ Kandace F. Melillo granted the joint motion by order dated March 5, 2010. In the Core/AT&T Case, the Commission affirmed its jurisdiction over both CLEC-CLEC ISP-bound traffic and VOIP traffic in its material question order entered September 8, 2010 in Docket Nos. C-2009-2108186 and C-2009-2108239 ("*AT&T Material Question Order*"). Core filed a letter requesting that the stay in this matter be lifted on September 16, 2010. ALJ Melillo lifted the stay by order dated September 16, 2010.

A notice scheduling the prehearing conference in this matter on November 1, 2010 was issued September 22, 2010. Core filed its petition for protective order, motion for admission *pro hac vice* of Core General Counsel Christopher Van de Verg, and prehearing conference memorandum on October 27, 2010. XO filed its prehearing conference memorandum on October 27, 2010. ALJ Melillo granted Core's motion for admission *pro hac vice* on October 28, 2010. Core filed its supplemental petition for protective order on October 29, 2010. The prehearing

conference was duly held on November 1, 2010. ALJ Melillo granted Core's Petition for Protective Order by order dated November 1, 2010.

ALJ Melillo issued a procedural order setting forth deadlines for testimony, hearings and briefing on November 5, 2010. Core filed the Direct Testimony of Bret L. Mingo on January 5, 2011. XO filed the Rebuttal Testimony and Exhibits of Gary Case and Richard Jackson on February 28, 2011. Core filed the Surrebuttal Testimony of Bret L. Mingo on March 28, 2011. Hearings were held on May 3, 2011.

At the hearing, ALJ Melillo requested that Core provide (1) an updated claim amount, to account for XO traffic terminating on Core's network through the end of April, 2011; and (2) a breakdown of the XO traffic terminating on Core's network throughout the period at issue between intrastate toll and local based on a comparison of originating and terminating NPA-NXXs. Core filed its motion for admission of exhibits addressing ALJ Melillo's in-hearing data requests on May 9, 2011. XO filed its response and objection to Core's motion for admission on May 31, 2011. Core filed its motion to strike XO's objection on June 15, 2011. XO filed its letter in response to Core's motion to strike on July 5, 2011. ALJ Melillo issued an order granting in part and denying in part Core's motion for admission by order dated July 13, 2011 and permitted Core to file new proposed exhibits addressing the in-hearing data requested.

Core filed its new motion for admission of exhibits on August 16, 2011. XO filed its response, objection and motion to partially strike Core's new motion for admission on September 29, 2011, along with a newly proposed XO exhibit. ALJ Melillo issued an order dated October 21, 2011 granting in part and denying in part Core's new motion for admission, denying XO's motion to partially strike and rejecting XO's proposed exhibit. Core filed revised exhibits for admission into the record pursuant to ALJ Melillo October 21, 2011 order on October 26, 2011.

ALJ Melillo issued a briefing order on November 1, 2011. XO filed its petition for clarification or reconsideration of ALJ Melillo's October 21, 2011 order on November 3, 2011. ALJ Melillo issued a rescission of the November 1, 2011 briefing order on November 7, 2011. Core filed its answer in opposition to XO's petition for clarification or reconsideration on November 14, 2011. ALJ Melillo issued an order granting the petition for clarification and denying the petition for reconsideration on December 2, 2011. ALJ Melillo issued a revised briefing order on December 14, 2011, requiring the parties to file main briefs no later than 4:30 p.m. on February 1, 2012 and reply briefs no later than 4:30 p.m. on February 15, 2012.

III. STATEMENT OF FACTS

Core is a CLEC authorized by the Commission to provide local exchange telecommunications service throughout Pennsylvania. Core St. No. 1, at 1. Core is in good standing with the Commission, and maintains a CLEC tariff (Pa. PUC Tariff No. 1), an IXC tariff (Pa. PUC Tariff No. 2), and an intrastate switched access service tariff (Pa. PUC Tariff No. 4) with the Commission. *Id.*, at 1-2. Core has traditionally focused on the provision of telecommunications services to dial-up internet service providers ("ISPs"), which provide unregulated "enhanced" services like web-surfing and email. *Id.*, at 2. Dial-up ISPs serve as a low-cost alternative for consumers in rural areas and consumers who are not heavy Internet users but still want access. *Id.*, at 3. Because ISPs handle large volumes of inbound modem calls, ISPs are intensive users of telecommunications services. *Id.* Since September, 2009, Core has also provided telecommunications services to voice-over-Internet protocol ("VOIP") providers,[2] which similarly handle large call volumes and are intensive users of telecommunications

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[2] In this proceeding, Core takes no position on the issue whether the traffic it handles on behalf of its wholesale VOIP customers constitutes "VoIP-PSTN Traffic" as set forth in the FCC's new rules. *See, ICC Reformation Order*, at ¶943 *et seq.*

services. *Id.*, at 2; *and see, AT&T Material Question Order*, at 12 ("[T]here has been a dichotomy of traffic terminated by Core. Traffic terminated prior to September, 2009 was ISP-bound... Traffic terminated after September, 2009 may be mixed containing VoIP traffic termination and ISP-bound traffic.").

XO is authorized by the Commission to provide CLEC and interexchange service in Pennsylvania. Core St. No. 1, at 3. XO provides wholesale communications services such as "XO Carrier Long Distance Termination Services" which permit other carriers to "complete interstate calls in all 50 states" and "avoid negotiation and interconnection with multiple local/regional vendors." Core St. No. 1-SR, Exh. BLM-22 (XO Sales Literature). XO sends and has sent substantial volumes of traffic to Core indirectly, via the tandem switch network of Verizon Pennsylvania, Inc. ("Verizon"). Core St. No. 1, at 1 and 4; *and see*, Exh. BLM-1 (Diagram of Indirect Interconnection). Core's Pennsylvania network and services enable XO customers to complete calls to their ISPs, which in turn increases the utility of the XO customer's local phone service. *Id.*, at 3-4. XO's customers compensate XO for the use of its local exchange services, but XO is refusing to share this compensation with Core for completing the calls originated by XO's customers. *Id.*, at 4.

All of the XO Indirect Traffic at issue in this case originates on XO's network, transits Verizon's tandem network, and is bound for Core's wholesale customers (ISP and VOIP) located in Pennsylvania. *Id.* That is, the traffic is switched and terminated by Core at Core's Pennsylvania wire centers, which include Altoona, Erie, Harrisburg, Philadelphia, Pittsburgh and Wilkes-Barre. *Id.* Once the traffic is terminated, Core delivers, or "hands off" the traffic to its ESP customers. *Id.* All of the XO Indirect Traffic is accompanied by a carrier identification code ("CIC"), which is assigned to interexchange ("IXC") carriers and generally denote long-distance,

or toll, calls. *Id.* The XO Indirect Traffic is associated with two different CICs: CIC 5119 and CIC 5607. *Id.* The CIC 5119 traffic, with very few exceptions, comes into Core's network with CIC, calling party number ("CPN"), and dialed number ("DN"). *Id.* CPN and DN together permit Core to distinguish between intrastate and interstate calls. *Id.* An intrastate call can be distinguished from an interstate call by comparing the calling party's phone number (CPN) with the called party's phone number (CN). *Id.* If both numbers are associated with rate centers located in the same state, then the call is intrastate. *Id.* But if one number is associated with a rate center in state A, and the other number is tied to a rate center in state B, the call is interstate. *Id.* For CIC 5119, XO has sent Core both interstate traffic and intrastate traffic, but Core is not asking the Commission to resolve issues relating to interstate traffic. *Id.*, at 4-5. So, with respect to CIC 5119, the only XO Indirect Traffic at issue in this case is Pennsylvania intrastate. *Id.*

Unlike the CIC 5119 traffic, the CIC 5607 traffic comes into Core's network without any CPN. *Id.* This makes it impossible for Core to distinguish between interstate and intrastate calls. *Id.* We do not know whether XO intentionally strips out the CPN when it delivers its traffic to Verizon's tandem, or whether the CPN is somehow lost as it passes through the tandem. *Id.* In any event, the lack of CPN has the effect of making billing and collection more difficult for the terminating carrier. *Id.* Even assuming XO takes no affirmative steps to create the problem, XO benefits from the resulting confusion, and XO to our knowledge has taken no steps to correct the problem. *Id.* Indeed, the CIC 5607 traffic is a classic example of the infamous "phantom traffic," a phenomenon that has plagued the intercarrier compensation system for years. *Id.*

From June, 2004 through April, 2011, XO end users using XO CICs 5119 and 5607 have originated over 8,000,000 MOUs for termination on Core's network in Pennsylvania, Exhs. BLM-27 & -28 (Breakdown of MOUs for CICs 5119 & 5607), for which XO forswears any

financial obligation. *See*, XO St. No. 1-R (Rebuttal Testimony and Exhibits of Gary Case and Richard Jackson)("the FCC has determined that bill-and-keep should apply [to the XO Indirect Traffic in] the absence of an agreement specifying a different compensation scheme." Although XO claims that it "was (and is) willing to enter into an agreement that compensates Core for terminating [the XO Indirect Traffic] at a rate of $0.0007 per MOU," XO has never negotiated with Core on the basis of Core's template traffic exchange agreement, which Core offered to forward to XO in August, 2009. *See*, Core St. No. 1, at 11-12; *and see*, Exh. BLM-12 (8/13/2009 email and letter from Chris Van de Verg to Rich Jackson). Nor has XO ever provided Core with a proposed agreement of its own.

XO does not interconnect directly with Core, but instead sends all of its originating traffic to the Verizon tandems for indirect termination on Core's network. Core St. No. 1, at 5-6. This permits XO to avoid negotiation with Core over terms of interconnection, such as intercarrier compensation. *Id.* at 6. Instead of dealing directly with Core, XO makes use of its interconnection agreement ("ICA") with Verizon, by which XO is entitled to send traffic to the Verizon tandems for delivery to third-party carriers, such as Core. *Id.* In turn, Verizon is entitled to charge XO a per-MOU rate for the service of transiting the XO's traffic from XO to Core. *Id.*; *and see*, Tab 2 (Diagram of Indirect Interconnection). Pursuant to this ICA and the intrastate access tariff referenced therein, XO pays Verizon at a tandem switching rate of $0.000836/MOU, a transport fixed rate of $0.000152/MOU and a transport per mile rate of $0.000004/mile/MOU. *Id.*; *and*, Exh. BLM-2 (Verizon/XO ICA excerpts). So, XO pays some intercarrier compensation on all of the XO Indirect Traffic (a fact which guts XO's theory that bill-and-keep applies) but it only pays Verizon for the use of its network, not Core. *Id.*, at 6-7.

XO's ICA with Verizon states, at Section 7.3:

> Each Party shall exercise all reasonable efforts to enter into reciprocal local traffic exchange arrangements (either via written agreement or mutual tariffs) with any wireless carrier, ITC, or other LEC or CLEC to which it sends, or from which it receives, local traffic that transits the other Party's facilities over Traffic Exchange Trunks…
>
> In all cases, each Party shall follow the Exchange Message Record ("EMR") standard and exchange records between the Parties and with the terminating carrier to facilitate the billing process to the originating network. Core St. No. 1, at 7; *and*, Exh. BLM-2 (Verizon/XO ICA excerpts).

But XO has never sought, and indeed has studiously avoided, entering into a traffic exchange agreement with Core. *See, e.gs.*, Core St. No. 1, at 11-12. In an ordinary commercial context, Core's "real world" recourse for non-payment would be to discontinue its terminating of XO's calls. However, federal and state law require Core to terminate all the calls it receives, and if it is not compensated for that termination service, Core must seek payment through the regulatory complaint process. Core St. No. 1, at 7.

Core receives and has received Carrier Access Billing System ("CABS") or "Category 11" records from Verizon on a regular basis for the period at issue in this matter. *Id.*, at 8. CABS records are generated by Verizon's tandem switches and their purpose is to provide information about calls that pass through the tandems on their way to Core's network, so that Core can bill the carriers whose end users originated the calls. *Id.* For each call, CABS records (or should record) the carrier identification code ("CIC") of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in MOUs. *Id.*

In 2007, Core was preparing its network to provide wholesale telecommunications services on a large scale to VOIP customers. *Id.* As part of its preparations, Core purchased special equipment and hired a consultant to "read" an historical sampling of the records Verizon had been sending Core. *Id.*, at 8-9. Because Core knew that traffic to and from VOIP carriers

would include a substantial proportion of toll calls, Core wanted to understand the CABS format, the information provided in the CABS records, and generally how to both audit and invoice CABS bills. *Id.*, at 9.

At that time, Core did not know about, and had no reason to be aware of, the substantial volumes of telecommunications originated by XO and delivered to Core via Verizon's tandem switches. *Id.* Since Core's customers were traditionally limited to dial-up ISPs, and this traffic was, to Core's knowledge, generated by Verizon end users, Core did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records. *Id.* Instead, Core found that XO, since at least 2004, has been sending Core substantial volumes of traffic. *Id.* Once Core found evidence of XO and other CLEC indirect traffic, it embarked on a larger project of systematically processing several years' worth of magnetic tapes, in order to get a complete picture of this traffic. *Id.* Prior to Core's analysis of the Verizon CABS records, XO never notified Core that it was sending the XO Indirect Traffic to Core for termination to Core's end users. *Id.* at 9. As a result, other than reading the magnetic tapes which Core reasonably believed contained only trace usage, Core had no way of knowing that the Respondents were sending the XO Indirect Traffic to Core for many years. *Id.*, at 10.

Based on its analysis of the CABS records, Core determined that XO originated the traffic associated with XO CIC codes 5119 and 5607. *Id.* In March, 2008, Core sent its initial invoice to XO, for the XO Indirect Traffic terminated by Core in CY 2007. *Id.* Core subsequently billed XO for CY 2004-2006 in December, 2008, and for CY 2008 in May, 2009. *Id.* Currently, Core bills XO each month for the prior month's usage. *Id.* As of the date of this brief, Core has submitted intrastate switched access service bills to the Respondents for the termination of the XO Indirect Traffic for the periods from June, 2004 through December, 2011,

including interstate minutes pursuant to Core's interstate switched access FCC Tariff No. 1 and intrastate minutes in accordance with Core's intrastate switched access Pa. PUC Tariff No. 4. *Id.*

For almost an entire year following the initial invoice, XO did not dispute any of these invoices. *Id.* On February 26, 2009, Core sent XO a demand letter seeking payment of $55,246.96 per the invoices transmitted through that date. *Id.*; *and see*, Exh. BLM-4, (2/26/2009 letter from Bret Mingo to XO Communications, Inc.). On March 11, 2009 XO sent Core an email disputing all invoiced amounts because "[w]e dispute any backbilling prior to 90 days." XO failed to acknowledge that it had received many of the invoices a full year before its initial response. *Id.*; *and see*, Exh. BLM-5 (4/17/2009 email from Lee Churchill to Bret Mingo). At XO's request, Core sent XO the call detail records (CDRs) associated with XO's traffic in April, 2009. *Id.*; *and see*, Exh. BLM-5 (acknowledging XO's receipt of Core's invoices). Core's counsel escalated the dispute with XO's legal counsel, and they held a conference call on May 7, 2009. *Id.*, at 11; *and see*, Exh. BLM-6 (5/7/2009 email from Chris Van de Verg to Karen Potkul). On that call, XO's counsel once again raised the issue of backbilling. *Id.*

At Core's suggestion, the parties initiated "business-to-business" talks aimed at breaking the impasse regarding the backbilling issue. *Id.*; *and see*, Exh. BLM-7 (6/5/2009 email from Chris Van de Verg to Karen Potkul). On June 8, 2009, XO's business contact informed Core that XO had reviewed the CDRs Core provided in March, and that XO had determined that XO's traffic was "local" in nature. *Id.*; *and see*, Exh. BLM-8 (6/8/2009 email from Bret Mingo to Karen Potkul). XO questioned Core's ability to charge any rate whatsoever for "local" traffic. *See*, Exh. BLM-9 (6/16/2009 email from Rich Jackson to Bret Mingo). XO requested citations to Core's tariffs and Core provided them, including citations to specific provisions of Core's

switched access service tariff, Pa. P.U.C. Tariff No. 4. *See*, Exh. BLM-10 (6/26/2009 email from Chris Van de Verg to Rich Jackson).

Even after receiving the citations, XO denied any responsibility to pay anything for Core's termination of the XO Indirect Traffic. *Id.* On August 5, 2009, XO sent Core a two page letter stating that XO's Traffic was "local and ISP traffic" and "subject to reciprocal compensation, including bill-and-keep." *Id.*; *and see*, Exh. BLM-11 (8/5/2009 email and letter from Rich Jackson to Bret Mingo and Chris Van de Verg). XO refused to pay any amount on the open invoices, and demanded a refund of amounts it claims it had already paid Core. *Id.* On August 13, Core responded in writing to XO. Core noted that "bill-and-keep" applies only where the traffic exchanged between two parties is "roughly balanced," and that XO's Traffic is not roughly balanced. *Id.* at 11-12; *and see*, Exh. BLM-12 (8/13/2009 email and letter from Chris Van de Verg to Rich Jackson). Core stated its desire to negotiate a traffic exchange agreement to cover XO's locally-dialed traffic at the Commission-approved, total element long-run incremental cost ("TELRIC") tandem reciprocal rate. *Id.*, at 12. That is, Core offered to settle at the lowest existing Commission-approved rate for traffic termination. On September 21, 2009, XO responded to Core's letter. Unfortunately, XO declined to join Core in the negotiation of a traffic exchange agreement. *Id.*; *and see*, Exh. BLM-13 (9/21/2009 email and letter from Karen Potkul to Chris Van de Verg). At this juncture, Core believes that XO has made clear its position that it does not believe it has an obligation to pay any of the Core invoices it has received.

In sum, XO has never denied that its end users originate the XO Indirect Traffic to Core for ultimate delivery to Core's end user customers. So long as it does so, XO will be responsible for causing a substantial portion of Core's network costs. *Id.* As a result, XO's non-payment challenges Core's ability to maintain a robust and reliable network, let alone upgrade and expand

its network to offer additional services, such as wholesale VOIP origination and termination services. *Id.*

IV. LEGAL FRAMEWORK

Pennsylvania has long been in the vanguard of the states in terms of opening its telecommunications market to facilities-based and other forms of competition. In 1995, the Commission approved four applications for competitive local exchange service, thereby establishing local telecommunications competition in Pennsylvania. *See generally, Application of MFS Intelenet of Pennsylvania, Incorporated et al. for a Certificate of Public Convenience and Necessity in Order to Operate As a Local Exchange Telecommunications Carrier*, Pa. P.U.C. Docket Nos. A-310203F0002 *et al.*, 1995 WL 945205 (Pa.P.U.C.) (Order entered October 4, 1995). Among the first issues the Commission faced was to structure a reciprocal compensation regime to account for traffic exchanged between CLECs and incumbent local exchange carriers ("ILECs"). Although it considered CLEC requests for a universal "bill-and-keep" regime, the Commission instead required the parties "to negotiate a resolution of the reciprocal compensation issue...," *Id.* at *29, and "to explore the interconnection costs and an appropriate mechanism for recovering such costs." *Id.*

In 1996, Congress enacted substantial amendments to the federal Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, known as the "Telecommunications Act of 1996," Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 *et seq.*)(the "1996 Act"). The 1996 Act built upon the market-opening efforts of Pennsylvania and other states, and included reciprocal compensation provisions which (1) required all LECs to "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. §251(b)(5); and (2) granted state commissions authority to establish rates that "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each

carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. §252(c)(2) and (d)(2). The FCC subsequently promulgated rules implementing the 1996 Act, including a cost-based, forward-looking pricing methodology known as total element long-run incremental cost ("TELRIC") for state commissions to use in setting rates for reciprocal compensation and other services. *See generally, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (First Report & Order, 1996)(the FCC's rules governing reciprocal compensation were codified at 47 C.F.R. Subpart H, §51.701 *et seq.*).

Following passage of the 1996 Act, the Commission duly established reciprocal compensation rates using the FCC's TELRIC methodology. *See, In Re MFS Intelenet of Pennsylvania, Inc.*, Pa.P.U.C. Docket No. A-310203F0002, 1998 WL 842283 (Pa.P.U.C.), at *13 (Opinion and Order entered July 27, 1998)(approving "reciprocal compensation rates [of] $0.002902 per minute of use for termination at the Tandem… and $0.001864 per minute of use for termination at the End Office"); *and see, Petition of Focal Communications Corporation of Pennsylvania For Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Pa. P.U.C. Docket No. A-310630F0002, 2000 WL 35798624 (Pa.P.U.C.), at WL page 4 (Opinion and Order entered August 17, 2000)("*Focal*")("Upon careful review of BA-PA's MFS III TELRIC… cost study, competitors comments thereon, and the subsequent adjustments to that study reviewed in connection with the Global Order in 1999, the Commission set reciprocal compensation rates at $.001723 per minute for end office termination and $.002814 per minute for termination at a tandem, effective December 31, 1999.") *and see, Generic Investigation Re Verizon Pennsylvania Inc.'s Unbundled Network Element Rates*, Pa. P.U.C. Docket No. R-00016683, Appendix A, Exhibit Part C-4 at 6 (Compliance Order entered July 16,

2004)("*Generic Rate Investigation*")(establishing reciprocal compensation rates of $0.002439/MOU for "Termination at Tandem" and $0.000987/MOU for "Termination at End Office").

Once it had established TELRIC reciprocal compensation rates, the Commission rejected subsequent ILEC requests to apply a different, lower, rate to traffic bound for Internet service providers ("ISPs"). *In Re Nextlink Pennsylvania, Inc.*, Pa. P.U.C. Docket Nos. P-00991648 and P-00991649, 196 P.U.R.4th 172, 93 Pa.P.U.C. 172, 1999 WL 1041892 (Pa.P.U.C.), at *89 (Order entered September 30, 1999)("*Global Order*")("we direct that calls to local ISPs shall be considered local and that reciprocal compensation shall be applied on all ISP traffic for all future interconnection agreements filed with this Commission."); *and*, *Focal*, at WL page 11 ("BA-PA, as the proponent of a rate other than those set forth in the Global Order is the party having the burden of proof. Notwithstanding that BA-PA submitted a cost study attempting to show that the rates prescribed in the Global Order should not be adopted... BA-PA has failed to convince us that the rates for the termination of ISP traffic are not consistent with TA-96, the FCC rules interpreting TA-96, or the Public Utility Code.").

In 2001, the FCC issued an order mandating a rate cap of $0.0007/MOU on ISP-bound traffic exchanged pursuant to ILEC-CLEC interconnection agreements. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, at ¶ 78 (Order on Remand & Report and Order, Apr. 27, 2001) ("*ISP Remand Order*"). However, the Commission found, in the *AT&T Material Question Order*, that the *ISP Remand Order* does not govern CLEC-CLEC ISP-bound traffic. *AT&T Material Question Order*, at 10 ("Compensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the *ISP Remand Order*").

In addition to reciprocal compensation matters, the Commission has also exercised its authority to resolve intercarrier compensation disputes involving switched access charges and tariffs. Most notably, the Commission recently found that an incumbent LEC was entitled to charge a competitive LEC pursuant to its intrastate switched access tariff for the termination of VOIP traffic exchanged indirectly through the tandem network of Verizon. *Palmerton Telephone Company v. Global NAPs South, Inc., et al.*, Pa. P.U.C. Docket No. C-2009-2093336, at 25 (Opinion and Order entered March 16, 2010) ("*Palmerton*") ("In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.")

Finally, both the Commission and the FCC have mandated that telecommunications carriers cannot cease providing service to other telecommunications carriers based on a payment dispute. *See, In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers—Call Blocking by Carriers,* WC Docket No. 07-135, 22 FCC Rcd. 11629, 2007 WL 1880323 (F.C.C.)(Declaratory Ruling and Order, June 28, 2007), at ¶¶ 5-6; *and see, Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Pa. P.U.C. Docket No. C-20028114 (Opinion and Order, Aug. 8, 2002), at 9 ("all carriers are obligated to complete calls where it is technically feasible to do so ***regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.***")(Emphasis added). The reason for this prohibition is to prevent stopping the flow of telecommunications traffic over a payment dispute because such disruption might result in preventing consumers from making and receiving the telephone calls of their choosing. This is very different from a

traditional commercial setting wherein businesses are not forced to provide service to other businesses for free. In fact, if a business fails to pay another for services rendered, the business providing the service has the right—usually through a contract—to cease providing the service. This is also different from the perspective of providing public utility service to an end-user as all public utilities have the right—pursuant to the law and Commission regulations—to terminate service to a retail customer who fails to pay his or her bills. 52 Pa. Code §§ 64.61-64.111. While prohibiting carriers from blocking the flow of traffic does serve a public policy goal of ensuring uninterrupted telecommunications services, in a case like this one, it also results in requiring a carrier like Core to terminate indirect traffic first and to seek payment for that service later, through Commission intervention.

V. ARGUMENT

As the Commission found in the Core/AT&T Case:

> This dispute involves transport and termination services to end-user customers by Core for AT&T. Core provided the services and has not received compensation. Both AT&T and Core are CLECs. Therefore, in simplest terms, this is an intercarrier compensation dispute between two CLECs. One CLEC (AT&T) has failed to pay the other (Core) for service rendered and services that continue to be rendered. *AT&T Material Question Order*, at 7.

Like AT&T, XO has never denied that its end users originate the XO Indirect Traffic to Core for ultimate delivery to Core's end user customers. Likewise, there is no dispute that XO has refused to pay anything for Core's termination of this traffic. As explained below, Core's tariff applies to the XO Indirect Traffic and the Commission should order XO to pay accordingly. In the alternative, if the Commission concludes that the tariff does not apply (which it should not), then the Commission must order XO to pay at the Commission-approved TELRIC

tandem reciprocal compensation rate for locally-dialed traffic,[3] and at the tariff rates for traffic dialed on a non-local basis.

A. Core's Tariff Applies to the XO Indirect Traffic

1. The Filed Rate Doctrine Requires That the Commission Strictly Enforce the Terms of Properly Filed Tariffs

The Commission's enabling statute provides that "every public utility shall file with the commission... tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission." 66 Pa. C.S.A. § 1302. Indeed, "[n]o public utility shall... demand or receive... a greater or less rate for any service rendered... than that specified in the tariffs of such public utility applicable thereto." 66 Pa. C.S.A. § 1303. Further, "[t]he rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part." *Id.* Should the Commission "find[ ] that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law..." then it "shall determine the just and reasonable rates... to be thereafter observed and in force..." 66 Pa. C.S.A. § 1309.

The Commission and its reviewing courts have consistently found that "[t]he filed-rate doctrine also known as the commission-made rate doctrine, provides that rates and tariffs established by the Commission are prima facie reasonable and have the force of law until modified or changed by the Commission or after judicial review." *See, e.g., Application for Authority to Transfer Control of Tri-gen-Philadelphia Energy Corporation by the Sale of All of its Stock, Currently Owned by Trigen Energy Corporation, to Thermal North America, Inc.*, Pa. P.U.C. Docket No. A-130375F5000, 2005 WL 6502674 (Pa. P.U.C.), at 8 and note 36 (Opinion

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[3] Locally-dialed traffic is traffic for which the NPA-NXX of the calling and called parties are associated with rate centers located in the same local calling area.

& Order, April 7, 2005), *citing*, *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Shenango Township Board of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); and *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997).

Specifically for tariffs filed by CLECs, the Commission has found that "[u]pon filing of an initial access tariff by a CLEC, the rates contained therein will be allowed by the Commission to go into effect by operation of law. The Commission will presume that CLEC access charge rates that are at or below the corresponding access rates (for origination and termination) of the local ILEC in whose certificated territory the CLEC is providing service are reasonable without requiring cost documentation... Any party that files a complaint against the existing access charge rates of the CLECs will have the burden of proof of demonstrating that the rates are not just and reasonable." *Global Order*, at 93 Pa.P.U.C. 172, *19.

In this case, Core filed its Tariff with the Commission, and the Tariff has been thoroughly reviewed and permitted to go into effect. By its own terms, Core's Tariff governs compensation for the termination of intrastate communications, which is clearly "within the jurisdiction of the commission." Indeed the Commission has already found that it "has jurisdiction in [the AT&T] matter because both Core and AT&T are facilities-based CLECs certified by the Commission to provide local exchange telecommunications services in Pennsylvania, and that AT&T, Core and Verizon operate the switches and other facilities used to support AT&T's Indirect Traffic, including the termination function provided by Core, within the state of Pennsylvania." *AT&T Material Question Order*, at 10. As demonstrated below, Core's Tariff provides the rates and terms applicable to its provision of switched access service within Pennsylvania. Accordingly, the rates set forth in Core's Tariff apply to its provision of switched access service to XO in

Pennsylvania unless and until those rates are modified or found to be inapplicable to the XO Indirect Traffic.

Since it is undisputed that Core's filed rates are set "at or below the corresponding access rates" of the incumbent LECs within whose territories Core provides service, Core's Tariff is entitled to a presumption that its rates are "reasonable." Further, XO, as the party challenging Core's Tariff, bears the "burden of proof of demonstrating that the rates are not just and reasonable," a burden XO does not even pretend to carry. The filed-rate doctrine applies, and XO's sole remedy would be to file a formal complaint challenging Core's Tariff, and demonstrate that Core's rates, and the application of those rates to the XO Indirect Traffic "are not just and reasonable." Yet, XO has never pursued this remedy, even though it has been on notice that Core would apply the Tariff rates to the XO Indirect Traffic since early 2008—almost four years ago.

2. The Plain Terms of Core's Tariff Apply to the XO Indirect Traffic

Core's Pa. P.U.C. Tariff No. 4 (the "Tariff") requires compensation for the XO Indirect traffic at the filed intrastate switched access rates set forth therein, which rates mirror the intrastate switched access rates and rate structures of Verizon and all the other incumbent LECs operating in Pennsylvania, in their respective territories. This is a case of straightforward application of tariffed rates to tariffed services. Core's Tariff defines "Switched Access Service" (the service Core provided XO) as: "[a]ccess to the switched network of an ***Exchange Carrier*** for the purpose of originating or ***terminating communications***. Switched Access is available to ***carriers*** as defined in this rate sheet." Core St. No. 1, at 19-20; *and* Tariff, at Original Sheet No.

10 (emphasis added).[4] The Tariff defines the term "Exchange Carrier" as: "[a]ny individual, partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service." *Id.*, at 20; *and*, Tariff, at Original Sheet No. 7. The Tariff defines the term "Carrier" as an "Interexchange Carrier or Exchange Carrier." *Id.*; *and*, Tariff, at Original Sheet No. 6. Core's Tariff further states that "Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises." *Id.*; *and*, Tariff, at Original Sheet No. 44. The Tariff defines "Customer" as: "[t]he person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations. The Customer could be an interexchange carrier, a wireless provider, ***or any other service provider***." *Id.*; *and*, Tariff, at Original Sheet No. 7 (emphasis added). And the Tariff defines the term "Constructive Order" as the "[d]elivery of calls to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein." *Id.*; *and*, Tariff, at Original Sheet No. 7.

Core's Tariff clearly applies to the traffic XO sends Core. *Id.* XO obtained Switched Access Service from Core, as defined by the Tariff, i.e., XO clearly obtained "access to the Switched Network of Core for the purpose of originating or terminating Communications." *Id.*

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[4] XO's reliance on the Tariff's definition of "Access Service," XO St. No.1-R, at 12, is misplaced because Core is suing XO for the provision of "Switched Access Service" and therefore relies on the Tariff provisions permitting Core to apply switched access service rate elements to the XO Indirect Traffic. *See, e.gs.*, Tariff, §§ 4 ("Switched Access Service") and 5 ("Switched Access Rates"). The Tariff only contains terms and rates for "Switched Access Service." By contrast, the Tariff does not establish any terms or rates for "Access Service," nor does it specify how one would provide "Access Service." Indeed, while "Switched Access Service" is defined as "access to the switched network of an Exchange Carrier," "Access Service" is defined as "Switched Access to the network of an Interexchange Carrier..." Core is a LEC, or "Exchange Carrier" within the meaning of the Tariff, not an "Interexchange Carrier," and it is meaningless to suggest that Core is somehow providing access to another carrier's interexchange network.

As a CLEC, Core is an "Exchange Carrier" as defined by the Tariff; and XO is a "carrier" because it, too, is a CLEC and thus an "exchange carrier." *Id.* XO is also a "Customer" of Core for Switched Access Service, as defined by the Tariff. *Id.*, at 20-21. By delivering calls to Core's end users, over Core's switched local exchange services, XO "Constructively Ordered" switched access services from Core, under the plain terms of the Tariff. *Id.*, at 21. Accordingly, under Core's Tariff, XO is responsible for the payment of all applicable charges for Core's Switched Access Service. *Id.* Core billed XO in accordance with its rate sheet for terminating switched access, as set forth in the Tariff. *Id.* XO has clearly refused to pay Core's lawfully invoiced terminating switched access charges, in violation of the Tariff. *Id.*

The Commission should enforce the plain terms of Core's Tariff to the XO Indirect Traffic, and order XO to pay for all of the CIC 5119 intrastate MOUs and all of the CIC 5607 MOUs terminated by Core, at the applicable Tariff rates, through the date of the Commission's order.[5] In addition, the Commission should order XO to pay late payment charges at the Tariff rate of 1.5% per month, Tariff, Original Sheet No. 33, accruing from the due date of each Core invoice XO has not paid as of such date. *See*, Exhs. BLM-25 and BLM-26 (chart showing actual invoice activity for CICs 5119 and 5607 through April, 2011). In order to determine MOUs, applicable switched access charges, and late payment charges through the date of the Commission's order, the Commission should order the parties to cooperate in the development of joint compliance filing within thirty (30) days of such order. Finally, the Commission should order XO to continue paying Core's switched access invoices unless and until XO and Core negotiate a mutually-acceptable traffic exchange agreement that provides otherwise.

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5 By way of illustration, as of April, 2011, Core had terminated 3,358,206 intrastate MOUs on behalf of XO on CIC 5119, Exh. BLM-27, at 3; and 3,485,138 total MOUs on CIC 5607. Exh. BLM-28, at 3. The CIC 5607 MOUs cannot be classified on a jurisdictional basis because XO does not deliver CPN on that CIC.

3. Switched Access Rates May Be Applied to Locally-Dialed Traffic

Nothing in Core's Tariff or the Commission's precedent precludes application of a switched access tariff and rates to locally-dialed traffic, where, as here, the plain terms of a tariff apply to all intrastate "communications." Although locally-dialed CLEC-CLEC calls should ultimately be covered by a TEA, (which XO steadfastly has refused to negotiate) there are cases in which an intrastate access tariff can and does apply, including in cases where, as here, there is no TEA in place. According to the Multiple Exchange Carrier Access Billing ("MECAB") Guidelines published by the Alliance for Telecom Industry Solutions ("ATIS")(and produced by XO in discovery), "[a]ccess and interconnection services may be billed as usage-sensitive and flat-rated charges, which may include intraLATA non-subscribed toll, wireless and local services." *See*, Core St. No. 1, at 17; *and see*, Exh. BLM-16 (Excerpts from MECAB Guidelines), at 1-1. Similarly, the guidelines state that "[t]he term access may encompass Interstate, Intrastate, and Local." *See id.*, at unnumbered page.

In the case of locally-dialed wireless calls, LECs' intrastate access tariffs applied for many years, both in Pennsylvania and elsewhere. For example, in the landmark ICA arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., the Commission noted that "[p]rior to April 2002, ALLTEL was paid the rate of approximately $0.03 (3 cents) per minute with respect to indirect traffic that Verizon Communications terminated on its network. ***This rate is the intrastate access rate of ALLTEL and included all wireless traffic originated by Verizon Wireless***." *Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.*, Pa. P.U.C. Docket No. A-310489F7004, 2005 WL 6502686, at WL page 11 (Pa.P.U.C.)(Opinion Order entered Jan. 18, 2005). Indeed, Verizon Wireless' entire goal in that proceeding was to replace the existing access regime, which applied to its locally-

dialed wireless traffic, with a reciprocal compensation regime that would produce a much lower termination rate. *Id.* (comparing switched access rate to lower reciprocal compensation rate). Core would welcome such a result in this case, although it is XO that should logically be seeking to replace access with reciprocal compensation.

Similarly, in a case involving LECs charging wireless carriers at intrastate access rates for indirect, locally-dialed traffic, the Alabama Public Service Commission permitted the access rates to apply until the wireless carriers stepped forth and negotiated a reciprocal compensation arrangement. The Alabama Commission described the problem as follows:

> [T]his Commission has a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question. It is that fundamental concept that drives our decision in this cause...
>
> [T]he Wireless Carriers are indirectly terminating CMRS traffic on the networks of the Rural Carriers over common facilities operated by BellSouth... [T]he Rural LECs incur costs in terminating such traffic... [but] a substantial portion of the indirect CMRS traffic at issue is being terminated by the Rural LECs without compensation at present. *Re Compensation for Indirect CMRS Traffic Petitioners*, Ala. P.S.C. Docket No. 28988, 232 P.U.R.4th 148, 2004 Ala. PUC LEXIS 27 (Ala.P.S.C.), at *48 (Order, Jan. 26, 2004).
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> The Alabama Commission ruled:
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> [T]his Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act's provisions. We find that strict enforcement of the tariffs in question with respect to indirect CMRS traffic would ensure that the Rural LECs receive compensation for the use of their respective networks until such time as the provisions of the Telecom Act regarding compensation for the traffic in question are implemented by the Wireless Carriers... *Id.*, at *54.
>
> [F]ederal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Telecom Act. In this case, it is not the Commission's intention to supplant or circumvent the provisions of the Telecom Act which would likely address the issues raised in this proceeding. We are merely seeking to provide a justified measure of relief for what we see as a void in the Telecom Act's coverage by virtue of the status of the parties to this dispute. *Id.*

The problems the Alabama Commission identified are the same problems that led to the dispute in this case, and show why it is appropriate to apply intrastate switched access charges to locally-dialed traffic in the absence of a TEA. XO is using a "void in the Telecom Act's coverage" to claim exemption from the fundamental, bedrock principle of reciprocal compensation. This is because, just as the Act did not permit incumbent LECs in the Alabama case to seek compulsory arbitration of an ICA with wireless carriers, so too in this case, the Act does not permit a CLEC like Core to seek arbitration with another CLEC like XO. Notably, the Alabama Commission vacated its order, but only after the parties to the case entered into a settlement including traffic exchange agreements governing compensation for the traffic at issue ("Under the terms of the proposed settlement, each Participating Wireless carrier agreed to enter into a comprehensive Traffic Termination Agreement with each Participating ILEC except in those instances in which the Settlement Parties are presently parties to an interconnection agreement."). *Request For A Declaratory Ruling Upholding The Applicability Of Tariff Provisions Governing Compensation For Indirect CMRS Traffic*, Ala. P.S.C. Docket No. 28988, 2004 Ala. PUC LEXIS 263 (Ala.P.S.C.), at *3 (Order, July 30, 2004).

B. In the Alternative, the Commission-approved TELRIC Rate Applies to the XO Indirect Traffic

In the event the Commission determines that Core's Tariff (despite its plain terms) does not apply to the XO Indirect Traffic, then the Commission should exercise its "subject matter jurisdiction to resolve intercarrier compensation disputes," *Palmerton*, at 25, and apply the current, Commission-derived total elemental long-run incremental cost ("TELRIC") tandem rate ($0.002439/MOU) to the locally-dialed portion of the XO Indirect Traffic, and apply the Tariff rates to the remainder. The TELRIC tandem reciprocal compensation rate is generally applicable

to CLEC termination of traffic in Pennsylvania in a variety of contexts, and therefore TELRIC is the only credible alternative to Core's Tariff.

Commission precedent generally contemplates two primary groupings of methods for determining rates, the forward-looking TELRIC method and various methods based on historical or embedded costs which are used to determine access rates, such as the fully distributed cost ("FDC") method. *See*, *Verizon Pennsylvania Inc., et al. v. CTSI, LLC*, Pa. P.U.C. Docket No. C-20077332, at 6-12 (Order entered August 29, 2008) ("The Commission has traditionally availed itself of a number of generally accepted methodologies and standards for deriving the costs of various telecommunications services and establishing their lawfully just and reasonable rates. "Just and reasonable rates" have been deemed to be "cost justified" if they have been based on a reasonable measure of cost.")

Core is aware of ***no*** Commission precedent to support XO's wishful thinking that Core's costs can simply be assumed into non-existence. In *Palmerton*, the Commission concluded that "[c]osts indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities." *Palmerton*, at 25. Rather than foregoing any attempt to reach a reasonable estimate of cost, the Commission instead relies on generally acceptable costing principles whenever it applies a rate to a particular class of traffic. In the Commission's own words, "[t]he utilization of generally accepted methodologies and standards for the derivation of telecommunications services costs cannot be reasonably confined to a select group

of telecommunications carriers that operate under our jurisdiction or to select groups of wholesale and retail services that are offered within Pennsylvania." *Id.*

TELRIC is clearly one such "generally accepted methodolog[y]," and would constitute a reasonable rate for the Commission to apply to the XO Indirect Traffic. According to the Commission, "[c]ertain standards and methodologies for the derivation of costs for the services and operations of telecommunications carriers including forward-looking economic cost standards and methods have been approved by the [FCC] and subsequently adopted by this Commission. In accordance with the federal [1996 Act], this Commission has implemented and utilized the total element long-run incremental cost standard and methods for deriving certain costs and rates for interconnection between ILECs and CLECs, including the costs and rates for unbundled network elements (UNEs)." *Id.*

The Commission has reiterated that TELRIC applies in the context of "reciprocal compensation rates for the exchange of local exchange traffic between interconnected ILECs such as Verizon PA and CLECs..." as well as "in the intercarrier compensation arrangements between local wireline telecommunications carriers, e.g., ILECs, and wireless carriers for the exchange of intra-MTA (within the major trading area) traffic." *Palmerton*, at 34 and note 21. There is no logical or policy reason to prevent the Commission from finding that TELRIC applies to CLEC-CLEC traffic as well.

TELRIC is well-established and broadly applicable in Pennsylvania. The Commission approves TELRIC reciprocal compensation and other rates only after extensive multi-party proceedings involving massive evidentiary records. Core St. No. 2, at 7; *and see*, *supra.* at 14 (listing Commission TELRIC reciprocal compensation proceedings). Although these proceedings focus on the costs attributable to incumbent LEC networks (Verizon Pennsylvania in

particular), FCC rules and Commission practice apply the resulting reciprocal compensation rate equally to ILEC and CLEC networks. 47 C.F.R. § 51.711(a)(1) ("Rates for transport and termination of telecommunications traffic shall be symmetrical... symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.")

Commission-approved TELRIC rates are routinely incorporated into Commission-approved interconnection agreements. *E.gs.*, *Re NEXTLINK Pennsylvania, L.L.P.*, Pa. P.U.C. Docket No. A-310260 F0002, at *1 (Opinion & Order entered July 23, 1998) (setting "[r]eciprocal compensation for terminating local traffic at the rate of $0.001864 per minute of use (MOU) for traffic delivered at Bell's end office and at the rate of $0.002902 per MOU for traffic delivered at Bell's tandem or local serving wire center.") Prior to the *ISP Remand Order*, the Commission ruled that "calls to local ISPs shall be considered local and that reciprocal compensation shall be applied on all ISP traffic for all future interconnection agreements filed with this Commission." *Global Order*, 1999 WL 1041892 (Pa.P.U.C.), at *89.

Finally, the Commission has steadfastly defended the TELRIC methodology, and rejected application of below–TELRIC rates (such the FCC's $0.0007/MOU rate for ILEC-CLEC ISP-bound traffic) as a "confiscatory" in its 2010 Petition for Certiorari to the Supreme Court. Core Exh. BLM-20, at 20 ("The [*ISP Remand Order*], with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that... bears no relationship to cost... the [FCC's] rate is set so far below actual costs as to be unjust and confiscatory.") While Core acknowledges that a filing does not constitute binding precedent,

there is no reasonable way to interpret the Commission's advocacy on behalf of TELRIC as consistent with XO's refusal to pay *any* compensation whatsoever.

Accordingly, should the Commission decline to enforce the plain terms of Core's Tariff to the XO Indirect Traffic, the Commission should in the alternative permit Core to rerate its invoices to XO for the CIC 5119 traffic, using the current Commission-approved TELRIC tandem reciprocal compensation rate of $0.002439/MOU for locally-dialed traffic, and the Tariff rates for traffic that is not locally-dialed, through the date of the Commission order. Locally-dialed traffic can be identified based on a comparison of the NPA-NXXs of the calling and called parties. Since XO does not pass CPN on the CIC 5607 traffic, making it impossible to compare NPA-NXXs, the Commission should treat all such traffic as not locally-dialed, and therefore subject to Core's Tariff.[6] In addition, the Commission should order XO to pay late payment charges at the Tariff rate of 1.5% per month, Tariff, Original Sheet No. 33, accruing from the due date of each Core invoice XO has not paid as of such date. *See*, Exhs. BLM-25 and BLM-26 (chart showing actual invoice activity for CICs 5119 and 5607 through April, 2011). In order to determine MOUs, applicable TELRIC and switched access charges and late payment charges through the date of the Commission's order, the Commission should order the parties to cooperate in the development of joint compliance filing within thirty (30) days of such order. Finally, the Commission should order XO to continue paying Core at TELRIC and switched access rates, using NPA-NXXs to identify locally-dialed traffic, moving forward unless and until XO and Core negotiate a mutually-acceptable traffic exchange agreement that provides otherwise.

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6 It should be noted that XO has made absolutely no effort to provide Core with CPN on the CIC 5607 traffic, nor has XO suggested any methodology to classify this traffic.

C. As a Policy Matter, the Commission Must Condemn XO's Blatant Attempt to Take a "Free Ride" on Other Carrier's Networks

XO raises many red herring arguments in an effort to justify its willful refusal to compensate Core for termination of XO's Indirect Traffic. As discussed herein, none of these arguments have any merit and must be rejected. Because XO's claims stretch way beyond any reasonable factual, policy or legal justifications, the Commission should exercise its discretion and assess an appropriate civil penalty against XO consistent with 66 Pa. C.S. 3301. In addition to directing XO to pay Core for past and continuing termination of the XO Indirect Traffic, the facts of this record support imposing a civil penalty on XO for its unreasonable and bad faith actions to refuse to make any payment for services rendered and to ensure that XO pays Core as directed for the termination of future traffic. To arrive at an appropriate civil penalty, the Commission considers the following factors set forth in 52 Pa. Code § 69.1201(c):

> (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
>
> (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
>
> (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
>
> (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

The Commission has already concluded that refusing to pay billed charges is conduct "of a serious nature" despite any efforts on the non-paying carrier's part to claim a legal right or entitlement to justify the non-payment. *Palmerton,* at 57. The Commission's very clear and recent pronouncements regarding its viewpoint that carriers are required to compensate each other for termination and XO's continued insistence that the rate is $0.00 counsel in support of a higher penalty. In *Palmerton*, defendant Global NAPs took the position that it had no duty to pay plaintiff Palmerton any intercarrier compensation because of the specific (VOIP) nature of traffic. The Commission examined an extensive factual record and concluded "[i]n view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes." *Palmerton*, at 47 (emphasis added). In the *AT&T Material Question Order*, the Commission echoed its findings in

Palmerton, concluding that "[t]he non-payment of appropriate intercarrier compensation from one CLEC to another CLEC cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes." *Id.*, at 7 (emphasis added). The Commission also found "without merit AT&T's contention that because these Parties do not have an interconnection agreement, in as much as CLECs cannot compel other CLECs to negotiate interconnection agreements under the 1996 Telecommunications Act... Core is somehow precluded from making its Complaint before this Commission." *Id.*, at 10 and note 5 (emphasis added).

XO is not entitled to a free ride on Core's network simply because the Commission has yet to issue a ruling specifically addressing CLEC-CLEC traffic. The fact that this case raises certain issues of first impression does not imply (as XO suggests) that no compensation applies to the traffic at issue here.

XO's behavior knowingly and willfully put Core in the position of absorbing the costs to terminate XO's traffic. When approached by Core to negotiate an agreement, XO stonewalled and forced Core to engage in this litigation in an effort to recover its costs. Core St. No. 1, at 9-13. Obviously delaying this matter has advantaged XO given the fact that Core cannot block calls from XO customers and XO has not been required to pay Core a nickel for this traffic. XO's stubborn intransigence should not be rewarded. Without strong and serious action by the Commission—such as assessment of an appropriate civil penalty—Core believes that XO will have every incentive to continue to withhold any payment to Core for the continuing use of its termination services while, because of its significant resources, it erects every conceivable legal maneuver to delay the final resolution of this proceeding. Such an unfair result permits XO to

continue to do what it has always done—utilize Core's termination services (at significant cost to Core) for free. Therefore, Core recommends that XO be required to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's order in this matter. Further, Core recommends that XO be fined $1,000/day for each day that it fails to comply with the Commission's order in this matter directing it to pay Core for use of its services and facilities.

D. The *ISP Remand Order* Does Not Apply to the XO Indirect Traffic

XO's principal defense in this matter appears to be that the FCC's 2001 *ISP Remand Order* applies to the traffic it sends Core, thereby lowering the applicable rate to the FCC's $0.0007/MOU or perhaps negating XO's obligation to pay whatsoever. *See*, XO St. No. 1-R, at 3 and 14-16.[7] However, the Commission found, in the *AT&T Material Question Order*, that the *ISP Remand Order* only applies to ILEC-CLEC traffic, and does not govern CLEC-CLEC ISP-bound traffic. *AT&T Material Question Order*, at 10 ("AT&T's interpretation of the *ISP Remand Order* is too broad. Compensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the *ISP Remand Order*, and reliance on that order to resolve the jurisdictional issue in this case is misplaced."). Shockingly, *XO does not even acknowledge the Commission's order anywhere in its testimony*, even though XO took the position, at a previous juncture in this case, that "the outcome of the jurisdictional issue in the [Core/AT&T Case] would have a direct impact on the instant proceeding." Order Granting Joint Motion for Stay, at 1. Instead, XO relies on an *amicus* brief filed by FCC legal staff in the Ninth Circuit, XO St. No. 1-R, at 14-16; *and*, XO Exh. 9 (FCC Staff *Amicus* Brief to the U.S. Court of Appeals for the Ninth Circuit) and

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[7] By addressing certain arguments raised in XO's Rebuttal Testimony, Core does not waive, and specifically reserves, its rights to address in its reply brief any and all arguments XO may choose to raise in its initial brief in this matter.

presumably will rely on the subsequent Ninth Circuit decision, *AT&T Communications Of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011)("*Pac-West*"), which adopted FCC staff's brief in large part. But as Core demonstrated in the Core/AT&T Case, both the brief, and the Ninth Circuit's wholesale adoption of the FCC staff's retroactive "interpretation" of the *ISP Remand Order* is riddled with faults, and provides no basis to ignore a standing order of this Commission.

1. FCC Staff's *Amicus* Brief Fails to Establish that the 2001 *ISP Remand Order* Preempts Commission Authority Over CLEC-CLEC ISP-bound Traffic

FCC Staff's *Amicus* Brief fails to provide sound reasoning for the Commission to overturn its own *Material Question Order*. To begin with, FCC staff fails to demonstrate that the *ISP Remand Order* (issued more than a decade ago) clearly preempts state commission orders adjudicating compensation for CLEC-CLEC ISP-bound traffic.[8] Indeed, on the crucial issue of preemption, the *amicus* brief provides only minimal analysis. *See*, XO Exh. 9, at 25-29. However, in order to establish preemption, there must be "a clear indication that an agency intends to preempt state regulation." *Hillsborough County Automated Med. Labs., Inc.* 471 U.S. 707 (1985). While "[p]re-emption may result... from action taken by... a federal agency acting within the scope of its congressionally delegated authority," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986), the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption. *See, Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006)("The requirement of a

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8 FCC staff's brief does not challenge the California Commission's underlying subject matter jurisdiction over intrastate CLEC-CLEC ISP-bound traffic on the basis that such traffic is inherently interstate. Rather, staff appears to presume that the California Commission has jurisdiction, but that its resolution of CLEC-CLEC compensation issues is preempted by the *ISP Remand Order*. *See*, XO Exh. 9, at 25 ("The question thus becomes whether [FCC] rules preempt the [California Commission] from relying on state law to set the rate...").

clear indication of the agency's intent to preempt is especially important in the context of the [Telecommunications Act of 1996], which divided authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states.")(citations omitted); *and see, Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100, n.7 (2nd Cir. 2006)("a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.").

Instead of meeting head-on the burden for preemption to be clear and unambiguous, FCC staff starts with the premise that the *ISP Remand Order* addresses CLEC-CLEC ISP-bound traffic; and that the California Commission's orders conflict with the *ISP Remand Order*. That is, staff assumes what the Ninth Circuit asks it to establish in the first place. *First*, staff states bluntly that "the FCC's expression of its intent to pre-empt state authority is quite clear." XO Exh. 9, at 26. It may be "quite clear," perhaps, with respect to ILEC-CLEC traffic, but not so with CLEC-CLEC traffic. Otherwise, two state commissions and a federal district court would not have found that the *ISP Remand Order* does not encompass CLEC-CLEC traffic. *Second*, staff claims "conflict preemption" because the rate applied by the California Commission exceeds the *ISP Remand Order's* $0.0007 rate cap. *Id.*, at 27. But that conflict only exists if one assumes, with staff, that the *ISP Remand Order* clearly and unambiguously applies to CLEC-CLEC traffic. For a wide variety of reasons, it does not.

Contrary to FCC staff's primary substantive argument, *id.*, at 16-19, the "language" of the *ISP Remand Order* fails to demonstrate any intention to regulate CLEC-CLEC traffic. Importantly, the *ISP Remand Order* is utterly silent about *how* to implement its rules as between

two CLECs. Although the plain language of the *ISP Remand Order* frequently specifies the relationship between *incumbent* LECs and *competitive* LECs, it never discusses dealings between two CLECs. Instead, the structure of the order and its rules indicate that the FCC was addressing ILEC-CLEC traffic only. The order created a complicated set of interrelated rules including a price cap, growth cap, three-to-one ratio, and new market bar. *See*, *ISP Remand Order*, at ¶¶ 78, 79, 81.

But that regime only "kicks in" if and when two conditions are met: (1) the incumbent LEC "opts-in" to the regime on a state-by-state basis, by lowering the price of termination on its own network to the FCC's rate cap (the so-called "mirroring rule"), *id.*, at ¶ 89; and (2) the interconnection agreement governing reciprocal compensation between a particular incumbent LEC and a particular competitive LEC includes an applicable change-of-law provision. *Id.*, at ¶ 82. Both of these predicate conditions presume an ILEC-CLEC relationship, not a CLEC-CLEC relationship. Under the mirroring rule, the FCC ruled that *only an ILEC* may "opt-in" to the interim pricing regime, on a state-by-state basis. *Id.*, at ¶ 89 ("Because we are concerned about the superior bargaining power of *incumbent LECs*, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an *incumbent LEC* offers to exchange all traffic subject to section 251(b)(5) at the same rate...")(emphases added). Importantly, if the ILEC does not opt in, previous state commission rulings regarding ISP-bound traffic will continue to apply to the ISP-bound traffic that the ILEC originates. *Id.* The *ISP Remand Order* says nothing about how a CLEC such as XO would opt-in or otherwise avail itself of the interim compensation regime. Nor does the *ISP Remand Order* explain what happens if one CLEC opts in and another CLEC does not.

Likewise, the *ISP Remand Order's* insistence on implementation via the interconnection agreement process presumes an ILEC-CLEC relationship since, under the Telecommunications Act, a CLEC may invoke its rights to negotiation and arbitration of an Interconnection Agreement ("ICA") only with an "incumbent local exchange carrier." 47 U.S.C. § 252(a)-(b). While FCC staff claims the *ISP Remand Order's* reference to "interconnection agreements" was meant to include private carriage CLEC-CLEC traffic exchange agreements, XO Exh. 9, at 22, there is no evidence the FCC, in drafting the *ISP Remand Order*, had any such intent. Of the *ISP Remand Order's* twenty-two references to an "interconnection agreement" *none* supports FCC staff's newfound theory that the *ISP Remand Order* encompasses CLEC-CLEC traffic. By contrast, *all* of these references are consistent with an order that addresses ILEC-CLEC disputes. Indeed, many of the FCC's references to "interconnection agreements" are only intelligible in an ILEC-CLEC context. For example, the FCC found that "in the absence of conflicting federal law, parties could voluntarily include ISP-bound traffic in their interconnection agreements under sections 251 and 252 of the Act," *id.*, at ¶ 15, and that "[p]ending adoption of a federal rule . . . state commissions exercising their authority under section 252 to arbitrate, interpret, and enforce interconnection agreements would determine whether and how interconnecting carriers should be compensated for carrying ISP-bound traffic." *Id.* Of course, CLECs do not generally enter into "interconnection agreements under sections 251 and 252 of the Act" and state commissions do not generally "exercise[e] their authority under section 252" relative to CLEC-CLEC traffic exchange agreements. *See, e.g.* Statement of Commissioner James H. Cawley, *Pennsylvania Public Utility Commission v. Verizon Pennsylvania* Docket No. R-2011-2234464 (May 19, 2011).

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

Perhaps most damning to FCC's staff's interpretation of "interconnection agreement" is a key footnote in which the FCC identified the "recently negotiated interconnection agreements" that served as a factual premise for the FCC's rate caps. *Id.*, at ¶ 85. In it, the FCC "takes notice of the following interconnection agreements: (1) Level 3 Communications and SBC Communications... (2) ICG Communications and BellSouth... (3) KMC Telecom and BellSouth (4) Level 3 Communications and Verizon." *Id.* at n.158. Of course, it is indisputable that all four of these seminal interconnection agreements conform to the ordinary use of that term, that

is, all four are agreements between an ILEC and a CLEC, and subject to the negotiation and arbitration provisions of section 252.

FCC staff points to "[t]he FCC's statements delineating both the scope of its proceeding and its rules..." to buttress its reading of the *ISP Remand Order*. While it is true that one fleeting reference to "all LECs" in a footnote to the now-vacated 1999 *ISP Declaratory Order* could be read to encompass CLEC-CLEC traffic, every other FCC statement regarding the scope of the FCC's ISP-bound traffic proceedings, and the *ISP Remand Order* itself, confirms what everyone involved already knows: the order only was intended to resolve disputes between ILECs and CLECs regarding compensation for ISP-bound traffic. In its 1997 Public Notice initiating the proceedings which lead to the *ISP Remand Order*, the FCC recognized that the issue of compensation for ISP-bound traffic was an issue between ILECs and CLECs. Public Notice, CCB/CPD 97-30 (Rel. July 2, 1997)("ALTS requests clarification that nothing in the Local Competition Order requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs.").[9] Similarly, the FCC's 1999 *ISP Declaratory Ruling* (despite staff's proffered footnote) also makes this clear. Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Comp. for ISP-Bound Traffic*, 14 F.C.C.R. 3689-3690 (1999)("Generally, competitive LECs (CLECs) contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996" while "[i]ncumbent LECs contend that this is interstate traffic beyond the scope of

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[9] A courtesy copy of the public notice is attached hereto as Attachment A.

section 251(b)(5)... parties should be bound by their existing interconnection agreements, as interpreted by state commissions.").

In its 2001 intercarrier compensation *NPRM*, issued the same day as the *ISP Remand Order*, the FCC noted that it had never regulated CLEC-CLEC traffic, and had no intention of doing so. Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001)(noting the absence of any "symptoms of market failure," the FCC concluded that "we do not contemplate a need to adopt new rules governing CLEC-to-CLEC... arrangements."). FCC staff's attempt to distinguish this statement, XO Exh. 9, at 24 ("[t]he FCC in these statements expressed its tentative views on possible future rule revisions"), is simply not credible. The FCC found no "symptoms of market failure" with respect to "CLEC-CLEC arrangements" *on the same day* it released the *ISP Remand Order*. Accordingly, the FCC would have had no rational basis to lump CLEC-CLEC traffic into its contemporaneous *ISP Remand Order*.

In its 2004 *Core Forbearance Order*, the FCC again confirmed that the scope of the *ISP Remand Order* was limited to ILEC-CLEC traffic. *See, e.g.,* Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order,* WC Docket No. 03-171, 19 FCC Rcd. 20179, 2004 FCC LEXIS 5873 at ¶ 8 (Oct. 18, 2004) *("Core Forbearance Order")*("The Commission also determined that the rate caps for ISP-bound traffic . . . should apply only if an *incumbent LEC* offered to exchange all traffic subject to section 251(b)(5) at the same rates... The Commission adopted this "mirroring" rule to ensure that *incumbent LECs* paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic.")(emphasis added); *Id.*, at ¶ 9 ("In this situation, if an *incumbent LEC* has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange

this traffic on a bill-and-keep basis during the interim period (the "new markets" rule).")(emphasis added).

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

Nor is FCC staff properly able to rely on public policy concerns. Although staff portrays itself as implementing "the regulatory purposes underlying the enactment of the FCC's rules," XO Exh. 9, at 20, such an exercise is simply beyond staff's purview.[10] The FCC's policy concerns are only relevant to the scope of traffic it actually regulated, i.e., ILEC-CLEC traffic. As noted above, the FCC in 2001 found no "symptoms of market failure" with respect to CLEC-CLEC traffic. Staff cannot retroactively enlarge the scope of the *ISP Remand Order* in an

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[10] Federal agency use of *amicus* briefs to broaden agency jurisdiction is an increasingly controversial practice. In a recent case involving the FCC's rules governing section 251(c)(2) interconnection issues, Justice Scalia took issue with the continuing practice of applying *any* deference to agency interpretations of its own rules, including the use of *amicus* briefs. According to Justice Scalia, "when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." Opinion, *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ____, 131 S.Ct. 2254, 2266, 2011 U.S. LEXIS 4375, at *31-*32 (June 9, 2011) (Scalia, J., concurring). Justice Scalia continues: "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Id.* Notably, the Justice pinpointed the FCC in particular as suspect in its use of *amicus* briefs: "[t]he seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Id.* at *32.

attempt to further a decade-old policy for a class of traffic (dial-up Internet access) that is by all accounts rapidly diminishing in significance.

FCC staff's remaining arguments are makeweight. Staff argues that the ILEC's sole exercise of the "mirroring rule" does not prove the order is limited to ILEC-CLEC traffic, because "CLECs... were not thought to have superior bargaining power and hence there was no reason to apply the mirroring rule to them." XO Exh. 9, at 23. However, staff provides no citation to any language of the *ISP Remand Order*, or any other authority for this proposition. Staff also argues that "[a]lthough the FCC identified a state commission section 252 proceeding as one way in which a carrier could rebut the presumption, it did not hold that a rebuttal could occur 'only' in a section 252 proceeding." *Id.*, at 24.

Finally, FCC staff's *amicus* brief notably declines to address the Ninth Circuit court's inquiry about whether a state commission has jurisdiction to implement the *ISP Remand Order* as between two CLECs. This leaves implementation issues for CLEC-CLEC traffic – issues state commissions have been working to resolve – in a newfound state of confusion and delay. In essence, adoption of the FCC staff position would ask the Commission to defer to a set of federal rules for which nobody knows (1) who should implement them; or (2) how they should be implemented. For all these reasons, staff's flawed interpretation of the *ISP Remand Order* to include CLEC-CLEC traffic cannot be used to justify ignoring the Commission's determinations in the *Material Question Order*.

2. The Ninth Circuit's Opinion in *PacWest* Similarly Fails to Establish Preemption

For the most part, the Ninth Circuit's opinion in *PacWest* simply tracks FCC staff's *amicus* brief, as is evident from the court's lengthy quotations from that document. However, the

court makes a number of novel assertions which cloud its analysis of the central issue of FCC preemption of state commission authority.

First, the court correctly identifies the central issue in the case as one of preemption, not subject matter jurisdiction. The court notes that "a matter may be subject to FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation," and "[d]etermining whether the FCC has chosen to displace state law turns on the scope of its intent in exercising its jurisdiction." *Pac-West*, at *9 (citations omitted). The court concludes, "the FCC has not exercised its jurisdiction over all manifestations of ISP-bound traffic." *Id.* Thus the court's analysis rejects XO's original position, in its POs, that a state commission has no subject matter jurisdiction over any ISP-bound traffic (CLEC-CLEC or otherwise) by virtue of its interstate nature. *See*, XO POs, at 2 and 8-12.

The court's preemption analysis, however, is deeply flawed. First, the court never acknowledges that the standard for finding preemption is that a federal agency must make its intention to preempt state regulation *clear*. Indeed, the court candidly admits that "the *ISP Remand Order* could be clearer" with respect to whether the FCC intended it to apply to "ISP-bound traffic exchanged between two CLECs." *Pac-West*, at *10. In the absence of a clearly expressed intent to preempt existing state commission authority over this traffic (an authority which neither the court nor FCC staff denies), the court simply erred in finding preemption.

The court reasons that "in adopting an interim compensation regime for ISP-bound traffic, the FCC was primarily concerned with arbitrage opportunities created by traffic of a particular nature," *Id.*, at *14, implying that the thrust of this underlying "concern[]" overrides the lack of clear preemption for CLEC-CLEC traffic. But as Core noted with respect to FCC staff's policy arguments, the FCC's policy concerns are only relevant to the scope of traffic it

actually regulated, i.e., ILEC-CLEC traffic. For any other traffic, such as CLEC-CLEC traffic, the FCC underlying policy concerns are irrelevant, because the FCC never clearly stated its intent to regulate that traffic and thereby preempt state commission authority.

The failure of the court to identify a clear intention to preempt state commission authority over CLEC-CLEC traffic is especially glaring in light of the court's own finding that "the FCC did not foresee the situation presented here," i.e., CLEC-CLEC disputes over compensation for ISP-bound traffic. *Id.* at *15. Indeed, the court acknowledges the FCC's own finding (contemporaneous with release of the 2001 *ISP Remand Order*) that "CLEC–to–CLEC relationships did not exhibit symptoms of market failure at the time; the market failure presented in this case is only possible because of the interim compensation rules themselves, which were issued the same day as the NPRM." *Id.* But if the alleged "market failure" only arose *because* of the FCC's rules, it simply cannot be said that those rules were designed to prevent them. Put another way, the FCC's 2001 finding that in the absence of any "symptoms of market failure... we do not contemplate a need to adopt new rules governing CLEC-to-CLEC... arrangements," Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001), cannot be squared with the notion that the FCC's rules covered such "arrangements." Thus, the Commission should reject the court's attempt to retrofit the *ISP Remand Order* to cover CLEC-CLEC traffic.

Finally, the court fails to come to grips with the plain fact that the FCC intended the *ISP Remand Order* to be implemented only through ILEC-CLEC interconnection agreements ("ICAs") and the change-of-law process. The court does correctly note:

> [T]he TCA leaves something of an enforcement gap: CLECs have statutory duties to interconnect with other LECs and to provide reciprocal compensation, but there is no procedure specified for one CLEC to require

> another CLEC to enter into an interconnection agreement that would govern the terms of those duties. *PacWest*, at n. 3.

Yet, the court fails to acknowledge that the *ISP Remand Order's* insistence on implementation via the interconnection agreement process presumes an ILEC-CLEC relationship since, under the Telecommunications Act, a CLEC may invoke its rights to negotiation and arbitration of an ICA only with an incumbent local exchange carrier. The court also ignores the *ISP Remand Order's* numerous references to ILEC-CLEC ICAs and the complete lack of any discussion regarding how the *ISP Remand Order* is to be implemented between CLECs, which have no statutory avenue to form ICAs with one another.

VI. CONCLUSION

For all the reasons discussed above, Core requests that the Commission grant the relief requested herein.

Respectfully submitted,

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Dated: February 1, 2012

APPENDIX A - PROPOSED FINDINGS OF FACT

1. Core is a CLEC authorized by the Commission to provide local exchange telecommunications service throughout Pennsylvania. Core St. No. 1, at 1. Core is in good standing with the Commission, and maintains a CLEC tariff (Pa. PUC Tariff No. 1), an IXC tariff (Pa. PUC Tariff No. 2), and an intrastate switched access service tariff (Pa. PUC Tariff No. 4) with the Commission. *Id.*, at 1-2.

2. Core has traditionally focused on the provision of telecommunications services to dial-up internet service providers ("ISPs"), which provide unregulated "enhanced" services like web-surfing and email. *Id.*, at 2.

3. Dial-up ISPs serve as a low-cost alternative for consumers in rural areas and consumers who are not heavy Internet users but still want access. *Id.*, at 3. Because ISPs handle large volumes of inbound modem calls, ISPs are intensive users of telecommunications services. *Id.*

4. Since September, 2009, Core has also provided telecommunications services to voice-over-Internet protocol ("VOIP") providers,[11] which similarly handle large call volumes and are intensive users of telecommunications services. *Id.*, at 2; *and see*, *AT&T Material Question Order*, at 12 ("[T]here has been a dichotomy of traffic terminated by Core. Traffic terminated prior to September, 2009 was ISP-bound... Traffic terminated after September, 2009 may be mixed containing VoIP traffic termination and ISP-bound traffic.").

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11 In this proceeding, Core takes no position on the issue whether the traffic it handles on behalf of its wholesale VOIP customers constitutes "VoIP-PSTN Traffic" as set forth in the FCC's new rules. *See, ICC Reformation Order*, at ¶943 *et seq.*

5. XO is authorized by the Commission to provide CLEC and interexchange service in Pennsylvania. Core St. No. 1, at 3. XO provides wholesale communications services such as "XO Carrier Long Distance Termination Services" which permit other carriers to "complete interstate calls in all 50 states" and "avoid negotiation and interconnection with multiple local/regional vendors." Core St. No. 1-SR, Exh. BLM-22 (XO Sales Literature).

6. XO sends and has sent substantial volumes of traffic to Core indirectly, via the tandem switch network of Verizon Pennsylvania, Inc. ("Verizon"). Core St. No. 1, at 1 and 4; *and see*, Exh. BLM-1 (Diagram of Indirect Interconnection).

7. Core's Pennsylvania network and services enable XO customers to complete calls to their ISPs, which in turn increases the utility of the XO customer's local phone service. *Id.*, at 3-4. XO's customers compensate XO for the use of its local exchange services, but XO is refusing to share this compensation with Core for completing the calls originated by XO's customers. *Id.*, at 4.

8. All of the XO Indirect Traffic at issue in this case originates on XO's network, transits Verizon's tandem network, and is bound for Core's wholesale customers (ISP and VOIP) located in Pennsylvania. *Id.* That is, the traffic is switched and terminated by Core at Core's Pennsylvania wire centers, which include Altoona, Erie, Harrisburg, Philadelphia, Pittsburgh and Wilkes-Barre. *Id.*

9. Once the traffic is terminated, Core delivers, or "hands off" the traffic to its ESP customers. *Id.* All of the XO Indirect Traffic is accompanied by a carrier identification code ("CIC"), which is assigned to interexchange ("IXC") carriers and generally denote long-distance, or toll, calls. *Id.*

10. The XO Indirect Traffic is associated with two different CICs: CIC 5119 and CIC 5607. *Id.*

11. The CIC 5119 traffic, with very few exceptions, comes into Core's network with CIC, calling party number ("CPN"), and dialed number ("DN"). *Id.* CPN and DN together permit Core to distinguish between intrastate and interstate calls. *Id.* An intrastate call can be distinguished from an interstate call by comparing the calling party's phone number (CPN) with the called party's phone number (CN). *Id.* If both numbers are associated with rate centers located in the same state, then the call is intrastate. *Id.* But if one number is associated with a rate center in state A, and the other number is tied to a rate center in state B, the call is interstate. *Id.*

12. For CIC 5119, XO has sent Core both interstate traffic and intrastate traffic, but Core is not asking the Commission to resolve issues relating to interstate traffic. *Id.*, at 4-5. So, with respect to CIC 5119, the only XO Indirect Traffic at issue in this case is Pennsylvania intrastate. *Id.*

13. Unlike the CIC 5119 traffic, the CIC 5607 traffic comes into Core's network without any CPN. *Id.* This makes it impossible for Core to distinguish between interstate and intrastate calls. *Id.* The lack of CPN has the effect of making billing and collection more difficult for the terminating carrier. *Id.* Even assuming XO takes no affirmative steps to create the problem, XO benefits from the resulting confusion, and XO to our knowledge has taken no steps to correct the problem. *Id.* Indeed, the CIC 5607 traffic is a classic example of the infamous "phantom traffic," a phenomenon that has plagued the intercarrier compensation system for years. *Id.*

14. From June, 2004 through April, 2011, XO end users using XO CICs 5119 and 5607 have originated over 8,000,000 MOUs for termination on Core's network in Pennsylvania, Exhs. BLM-27 & -28 (Breakdown of MOUs for CICs 5119 & 5607), for which XO forswears any financial obligation. *See*, XO St. No. 1-R (Rebuttal Testimony and Exhibits of Gary Case and Richard Jackson)("the FCC has determined that bill-and-keep should apply [to the XO Indirect Traffic in] the absence of an agreement specifying a different compensation scheme."

15. Although XO claims that it "was (and is) willing to enter into an agreement that compensates Core for terminating [the XO Indirect Traffic] at a rate of $0.0007 per MOU," XO has never negotiated with Core on the basis of Core's template traffic exchange agreement, which Core offered to forward to XO in August, 2009. *See*, Core St. No. 1, at 11-12; *and see*, Exh. BLM-12 (8/13/2009 email and letter from Chris Van de Verg to Rich Jackson). Nor has XO ever provided Core with a proposed agreement of its own.

16. XO does not interconnect directly with Core, but instead sends all of its originating traffic to the Verizon tandems for indirect termination on Core's network. Core St. No. 1, at 5-6. This permits XO to avoid negotiation with Core over terms of interconnection, such as intercarrier compensation. *Id.* at 6. Instead of dealing directly with Core, XO makes use of its interconnection agreement ("ICA") with Verizon, by which XO is entitled to send traffic to the Verizon tandems for delivery to third-party carriers, such as Core. *Id.* In turn, Verizon is entitled to charge XO a per-MOU rate for the service of transiting the XO's traffic from XO to Core. *Id.*; *and see*, Tab 2 (Diagram of Indirect Interconnection).

17. Pursuant to this ICA and the intrastate access tariff referenced therein, XO pays Verizon at a tandem switching rate of $0.000836/MOU, a transport fixed rate of $0.000152/MOU and a transport per mile rate of $0.000004/mile/MOU. *Id.*; *and*, Exh. BLM-2 (Verizon/XO ICA excerpts). So, XO pays some intercarrier compensation on all of the XO Indirect Traffic (a fact which guts XO's theory that bill-and-keep applies) but it only pays Verizon for the use of its network, not Core. *Id.*, at 6-7.

XO's ICA with Verizon states, at Section 7.3:

> Each Party shall exercise all reasonable efforts to enter into reciprocal local traffic exchange arrangements (either via written agreement or mutual tariffs) with any wireless carrier, ITC, or other LEC or CLEC to which it sends, or from which it receives, local traffic that transits the other Party's facilities over Traffic Exchange Trunks…
>
> In all cases, each Party shall follow the Exchange Message Record ("EMR") standard and exchange records between the Parties and with the terminating carrier to facilitate the billing process to the originating network. Core St. No. 1, at 7; *and*, Exh. BLM-2 (Verizon/XO ICA excerpts).

18. XO has never sought, and indeed has studiously avoided, entering into a traffic exchange agreement with Core. *See, e.gs.*, Core St. No. 1, at 11-12. In an ordinary commercial context, Core's "real world" recourse for non-payment would be to discontinue its terminating of XO's calls. However, federal and state law require Core to terminate all the calls it receives, and if it is not compensated for that termination service, Core must seek payment through the regulatory complaint process. Core St. No. 1, at 7.

19. Core receives and has received Carrier Access Billing System ("CABS") or "Category 11" records from Verizon on a regular basis for the period at issue in this matter. *Id.*, at 8. CABS records are generated by Verizon's tandem switches and their purpose is to provide information about calls that pass through the tandems on their way to Core's

network, so that Core can bill the carriers whose end users originated the calls. *Id.* For each call, CABS records (or should record) the carrier identification code ("CIC") of the originating carrier, the telephone number of the calling party, the telephone number of the called party, and the duration of the call in MOUs. *Id.*

20. In 2007, Core was preparing its network to provide wholesale telecommunications services on a large scale to VOIP customers. *Id.* As part of its preparations, Core purchased special equipment and hired a consultant to "read" an historical sampling of the records Verizon had been sending Core. *Id.*, at 8-9. Because Core knew that traffic to and from VOIP carriers would include a substantial proportion of toll calls, Core wanted to understand the CABS format, the information provided in the CABS records, and generally how to both audit and invoice CABS bills. *Id.*, at 9.

21. At that time, Core did not know about, and had no reason to be aware of, the substantial volumes of telecommunications originated by XO and delivered to Core via Verizon's tandem switches. *Id.* Since Core's customers were traditionally limited to dial-up ISPs, and this traffic was, to Core's knowledge, generated by Verizon end users, Core did not expect that CLECs would originate any substantial volume of traffic that would be captured in CABS records. *Id.* Instead, Core found that XO, since at least 2004, has been sending Core substantial volumes of traffic. *Id.*

22. Once Core found evidence of XO and other CLEC indirect traffic, it embarked on a larger project of systematically processing several years' worth of magnetic tapes, in order to get a complete picture of this traffic. *Id.*

23. Prior to Core's analysis of the Verizon CABS records, XO never notified Core that it was sending the XO Indirect Traffic to Core for termination to Core's end users. *Id.* at 9. As a

result, other than reading the magnetic tapes which Core reasonably believed contained only trace usage, Core had no way of knowing that the Respondents were sending the XO Indirect Traffic to Core for many years. *Id.*, at 10.

24. Based on its analysis of the CABS records, Core determined that XO originated the traffic associated with XO CIC codes 5119 and 5607. *Id.* In March, 2008, Core sent its initial invoice to XO, for the XO Indirect Traffic terminated by Core in CY 2007. *Id.* Core subsequently billed XO for CY 2004-2006 in December, 2008, and for CY 2008 in May, 2009. *Id.*

25. Currently, Core bills XO each month for the prior month's usage. *Id.* As of the date of this brief, Core has submitted intrastate switched access service bills to the Respondents for the termination of the XO Indirect Traffic for the periods from June, 2004 through December, 2011, including interstate minutes pursuant to Core's interstate switched access FCC Tariff No. 1 and intrastate minutes in accordance with Core's intrastate switched access Pa. PUC Tariff No. 4. *Id.*

26. For almost an entire year following the initial invoice, XO did not dispute any of these invoices. *Id.* On February 26, 2009, Core sent XO a demand letter seeking payment of $55,246.96 per the invoices transmitted through that date. *Id.*; *and see*, Exh. BLM-4, (2/26/2009 letter from Bret Mingo to XO Communications, Inc.).

27. On March 11, 2009 XO sent Core an email disputing all invoiced amounts because "[w]e dispute any backbilling prior to 90 days." XO failed to acknowledge that it had received many of the invoices a full year before its initial response. *Id.*; *and see*, Exh. BLM-5 (4/17/2009 email from Lee Churchill to Bret Mingo).

28. At XO's request, Core sent XO the call detail records (CDRs) associated with XO's traffic in April, 2009. *Id.*; *and see*, Exh. BLM-5 (acknowledging XO's receipt of Core's invoices). Core's counsel escalated the dispute with XO's legal counsel, and they held a conference call on May 7, 2009. *Id.*, at 11; *and see*, Exh. BLM-6 (5/7/2009 email from Chris Van de Verg to Karen Potkul). On that call, XO's counsel once again raised the issue of backbilling. *Id.*

29. At Core's suggestion, the parties initiated "business-to-business" talks aimed at breaking the impasse regarding the backbilling issue. *Id.*; *and see*, Exh. BLM-7 (6/5/2009 email from Chris Van de Verg to Karen Potkul). On June 8, 2009, XO's business contact informed Core that XO had reviewed the CDRs Core provided in March, and that XO had determined that XO's traffic was "local" in nature. *Id.*; *and see*, Exh. BLM-8 (6/8/2009 email from Bret Mingo to Karen Potkul). XO questioned Core's ability to charge any rate whatsoever for "local" traffic. *See*, Exh. BLM-9 (6/16/2009 email from Rich Jackson to Bret Mingo). XO requested citations to Core's tariffs and Core provided them, including citations to specific provisions of Core's switched access service tariff, Pa. P.U.C. Tariff No. 4. *See*, Exh. BLM-10 (6/26/2009 email from Chris Van de Verg to Rich Jackson).

30. Even after receiving the citations, XO denied any responsibility to pay anything for Core's termination of the XO Indirect Traffic. *Id.* On August 5, 2009, XO sent Core a two page letter stating that XO's Traffic was "local and ISP traffic" and "subject to reciprocal compensation, including bill-and-keep." *Id.*; *and see*, Exh. BLM-11 (8/5/2009 email and letter from Rich Jackson to Bret Mingo and Chris Van de Verg). XO refused to

pay any amount on the open invoices, and demanded a refund of amounts it claims it had already paid Core. *Id.*

31. On August 13, Core responded in writing to XO. Core noted that "bill-and-keep" applies only where the traffic exchanged between two parties is "roughly balanced," and that XO's Traffic is not roughly balanced. *Id.* at 11-12; *and see*, Exh. BLM-12 (8/13/2009 email and letter from Chris Van de Verg to Rich Jackson). Core stated its desire to negotiate a traffic exchange agreement to cover XO's locally-dialed traffic at the Commission-approved, total element long-run incremental cost ("TELRIC") tandem reciprocal rate. *Id.*, at 12. That is, Core offered to settle at the lowest existing Commission-approved rate for traffic termination. On September 21, 2009, XO responded to Core's letter. Unfortunately, XO declined to join Core in the negotiation of a traffic exchange agreement. *Id.*; *and see*, Exh. BLM-13 (9/21/2009 email and letter from Karen Potkul to Chris Van de Verg). At this juncture, Core believes that XO has made clear its position that it does not believe it has an obligation to pay any of the Core invoices it has received.

32. In sum, XO has never denied that its end users originate the XO Indirect Traffic to Core for ultimate delivery to Core's end user customers. So long as it does so, XO will be responsible for causing a substantial portion of Core's network costs. *Id.* As a result, XO's non-payment challenges Core's ability to maintain a robust and reliable network, let alone upgrade and expand its network to offer additional services, such as wholesale VOIP origination and termination services. *Id.*

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding.

2. As the proponent of a Commission order, Core has the burden of proof in this case.

3. To establish a sufficient case and satisfy the burden of proof, Core must show that the Respondents are responsible or accountable for the problem described in the Complaint.

4. The degree of proof required to establish a case before the Commission is a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602, 1990 Pa. Commw LEXIS 402, alloc. den., 602 A.2d 863 (Pa. Cmwlth. 1992); *Se-Ling Hosiery v. Marqulies*, 70 A.2d 854 (Pa. 1950).

5. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. 2 Pa. C.S. § 704; *Mill v. Pa P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

6. Core produced sufficient credible evidence to bear its burden of proof that XO has sent substantial amounts of traffic to Core, Core has terminated the traffic and XO has refused to compensate Core any amount for this service.

7. Core has produced sufficient credible evidence to bear its burden of proof that the traffic sent by XO to Core falls within the terms of Core's Tariff and should be compensated accordingly.

8. Core has produced sufficient credible evidence to bear its burden of proof that XO should be assessed a civil penalty pursuant to 52 Pa. Code § 69.1201.

APPENDIX C - PROPOSED ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

1. Respondent is directed to pay Complainant pursuant to the rate set forth in Core's Pa. P.U.C. Tariff No. 4 which is approximately $0.014 per minute-of-use in the service territory of Verizon Pennsylvania, Inc. Respondent shall also pay the late payment charges at the tariffed rate of 1.5% per month pursuant to Core Tariff, Original Sheet No. 33, from the due date of each invoice. To determine MOUs, applicable switched access charges, and late payment charges, the parties are directed to cooperate in the development of joint compliance filing within thirty (30) days.

2. Responded is directed to continue paying Core's switched access invoices unless and until XO and Core negotiate a mutually-acceptable traffic exchange agreement that provides otherwise.

3. Respondent is directed to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's Order in this matter.

4. Respondent is directed to pay a civil fine of $1,000/day for each day it fails to pay Core in compliance with the Commission's Order in this matter.

ATTACHMENT A

Attachment A

PUBLIC NOTICE
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554DA 97-1399

News media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: http://www.fcc.gov ftp.fcc.gov

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

CCB/CPD 97-30

Released: July 2, 1997

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

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

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

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

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

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

- FCC -