

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF OF XO COMMUNICATIONS SERVICES, INC.

February 1, 2012

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**MAIN BRIEF OF XO COMMUNICATIONS SERVICES, INC.**

XO Communications Services, Inc. (“XO”) files this Main Brief to the Formal Complaint of Core, and states as follows:

**I. SUMMARY OF ARGUMENT**

Core’s Formal Complaint represents an improper and unlawful attempt to retroactively bill tens of thousands of dollars in charges that are neither authorized by Core’s intrastate switched access service tariff, any agreement, or applicable law. Core’s claims should be rejected, and the relief it requests denied. Switched access charges apply to the origination and termination of traditional long distance (also known as “toll”) calls, not to the origination and termination of dial-up calls to Internet service providers (“ISPs”) such as Core’s customers in this case. The Federal Communications Commission (“FCC”) has ruled that the type of dial-up Internet (“ISP-bound”) traffic at issue in this case is jurisdictionally interstate. Even though this Commission may have determined that compensation for this traffic is within its jurisdiction<sup>1</sup> (which is directly contrary to the express and unambiguous statements of the FCC, which were recently confirmed in its recent amicus brief to the federal 9th Circuit,<sup>2</sup> the fact remains that the calls being delivered to Core are not toll calls and intrastate switched access charges do not

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<sup>1</sup> Core Comms., Inc. v. AT&T Comms. *et al.*, C-2009-2108186, Opinion and Order (Sep. 8, 2010) (“Core-AT&T Proceeding”).

<sup>2</sup> See *infra* Section VI.

apply.

The FCC has already determined, consistent with XO's position, that bill-and-keep should apply to the traffic at issue here in the absence of an agreement specifying a different compensation scheme. Furthermore, even if bill and keep does not apply, the FCC has expressly stated that the \$.0007 per minute of use ("MOU") rate cap established in its *ISP Remand Order* is the highest rate any state commission may apply to ISP-bound traffic. Nothing in this Commission's rules, Pennsylvania law, federal law, Core's tariffs, or any agreement between the parties (of which there is none) supports Core's attempt to impose switched access charges on XO for this traffic.

## II. STATEMENT OF THE FACTS

Core has been certificated to operate as a CLEC in the Commonwealth of Pennsylvania since 2000.<sup>3</sup>

There is no dispute that prior to September 2009, Core's only customers in Pennsylvania were ISPs and that all traffic to Core was ISP-bound traffic.<sup>4</sup> Beginning in or about October 2009, Core claims to have begun providing service to Voice over Internet Protocol ("VoIP") providers - i.e., companies that serve end user customers that receive VoIP calls. As of May 2011, all of Core's traffic was still inbound, although Core claimed it was conducting one trial with outbound service.<sup>5</sup>

As of May 9, 2011, Core states that it has "approximately" 53 ISP customers and 16 non-ISP customers.<sup>6</sup> Core does not distinguish or differentiate between traffic to ISP customers and

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<sup>3</sup> Complaint at 5; Mingo Direct Testimony at 1.

<sup>4</sup> Tr. at 34-35.

<sup>5</sup> *Id.* at 35.

<sup>6</sup> Exhibit BLM-24.

traffic to non-ISP customers.<sup>7</sup>

Core's ISP customers rely on the call origination services of LECs, such as XO, so that customers can reach Core's ISP customers.<sup>8</sup> Core charges its ISP customers only nominally for call termination services.<sup>9</sup> Thus, Core's business model relies on recovering its costs primarily, if not completely, through intercarrier compensation charges to other LECs.<sup>10</sup>

The networks of XO and Core have never been directly interconnected, but have been indirectly interconnected through a Verizon tandem.<sup>11</sup> That is, both are interconnected to Verizon's tandems, which pass traffic from one CLEC to the other. Because of the significant facilities costs associated with direct interconnection, most CLECs opt for this indirect method of interconnecting with one another.<sup>12</sup> Accordingly, XO-originated traffic destined for one of Core's customers transits Verizon's tandem bound for Core.<sup>13</sup> Because information regarding a call is transmitted along with the traffic, indirect interconnection does not facilitate the avoidance of payment.<sup>14</sup>

Since at least as early as June 2004, XO has originated traffic that was forwarded to Verizon, and by Verizon to Core for termination. On each of its calls throughout the period June 2004 to the present, XO has passed call detail information on to Verizon.<sup>15</sup> Verizon in turn

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<sup>7</sup> Tr. at 36.

<sup>8</sup> XO Rebuttal Testimony at 7.

<sup>9</sup> Exhibit XO-7 (Core - AT&T Proceeding, Mingo Surrebuttal Testimony at 11.) On May 19, 2009, in Docket No. C-2009-2108186, Core filed a complaint against AT&T involving the same issues as those in this case and similar, if not identical, facts. Some of the testimony and exhibits from that case have been entered into the record of this one.

<sup>10</sup> XO Rebuttal Testimony at 7-8.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Mingo Direct Testimony at 6; XO Rebuttal Testimony at 4.

<sup>13</sup> Mingo Direct Testimony at 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 20.

passed call records along to Core.<sup>16</sup> Indeed, at all relevant times since at least June 2004, Verizon has provided Core with Carrier Access Billing System (“CABS”) records on a daily basis.<sup>17</sup> The CABS records received by Core included all traffic, local and toll, originated by third party carriers and terminated by Core.<sup>18</sup> For each call, a CABS record is generated that provides 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 minutes of use.<sup>19</sup>

Yet, Core did not attempt to analyze the CABS records until the end of 2007.<sup>20</sup> Mr. Mingo testified that although he was responsible for “all facets of network management and billing for Core,”<sup>21</sup> he and Core were incapable of reading the industry standard CABS records.<sup>22</sup> The records, according to Mr. Mingo, “cluttered” Core’s office, unread and unused for years.<sup>23</sup> Core hired a consultant to read the CABS records at the end of 2007.<sup>24</sup>

Core knew (1) that XO and a large number of other carriers were operating as CLECs in Pennsylvania;<sup>25</sup> and (2) that Core did not have a direct connection with XO and other CLECs.<sup>26</sup> When Core began operations in 1999 or 2000 “each and every other LEC and IXC operating in Pennsylvania was notified” that “Core applied to the North American Numbering Plan Administrator (NANPA) for telephone numbers,” “so that [those carriers] could load Core’s new

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<sup>16</sup> Exhibit XO-6 (Core - AT&T Proceeding, Tr. at 65), Mingo Direct Testimony at 8.

<sup>17</sup> Exhibit XO-6 (Core - AT&T Proceeding, Tr. at 64-65).

<sup>18</sup> Tr. at 64.

<sup>19</sup> Mingo Direct Testimony at 8.

<sup>20</sup> *Id.* at 8-9.

<sup>21</sup> *Id.* at 1.

<sup>22</sup> Exhibit XO-6 (Core - AT&T Proceeding, Tr. at 64-65).

<sup>23</sup> *Id.* at 64.

<sup>24</sup> Mingo Direct Testimony at 8-9.

<sup>25</sup> *Id.* at 5-6.

<sup>26</sup> *Id.* at 5.

numbers into their switches and thereby enable calling between their end users and Core's end users."<sup>27</sup> This means that Core knew at all times during the period June 2004 through December 2007 that it was receiving significant volumes of traffic from carriers other than Verizon. Nevertheless, during this period, Core did not conduct any inquiry regarding this traffic nor send a single bill to any other carrier, including XO.

Core subsequently billed XO for calendar year 2004-2006 in December 2008, and for calendar year 2008 in May 2009.<sup>28</sup> During the period June 2004 through April 2011, XO terminated 3,695,227 minutes of intrastate traffic, all of which must be presumed to be ISP-bound traffic in light of Core's inability to distinguish such traffic from any other type of traffic.<sup>29</sup> Nevertheless, Core billed for all of the traffic at its tariffed intrastate switched access rates.

XO paid \$17,993.10 of these charges, on the assumption that they were for intrastate toll traffic at the lawful rate.<sup>30</sup> XO, which had properly assumed that such locally dialed and ISP bound traffic was subject to the bill-and-keep compensation convention (the universally recognized practice for CLEC-to- CLEC exchanges of local traffic), refused to pay the switched access rates for any of this traffic. There was no lawful tariff establishing a rate for locally dialed and ISP bound traffic. XO and Core have never had any contract that specified a rate for terminating locally dialed traffic or for ISP-bound traffic. Furthermore, Core has never had on

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<sup>27</sup> Exhibit XO-7 (Core - AT&T Proceeding, Mingo Surrebuttal at 5-6.)

<sup>28</sup> Mingo Direct Testimony at 10.

<sup>29</sup> Exhibit BLM-28. Because Core maintains it cannot identify any specific call as being directed to a VoIP provider as opposed to an ISP, Core has not met its burden in this case and, thus, the Commission is compelled to conclude that all XO-originated traffic delivered since September 2009 has been ISP-bound traffic.

<sup>30</sup> Exhibit BLM-25 (rev).

file with the Commission a tariff that specifies a rate for such traffic.<sup>31</sup>

XO exchanges local traffic with all other CLECs in Pennsylvania on a bill-and-keep basis.<sup>32</sup> To XO's knowledge, no other Pennsylvania CLEC has attempted to bill or backbill another CLEC for terminating local traffic. In 2006 the Commission recognized that the "existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania" is "bill-and-keep compensation."<sup>33</sup>

Core receives \$.0007 per minute for terminating ISP-bound traffic from ILEC Verizon pursuant to the rate cap or ceiling established by the FCC in the *ISP Remand Order*.<sup>34</sup> Core petitioned for review of the *ISP Remand Order* and the *ISP Mandate Order*<sup>35</sup> in the D.C. Circuit. The D.C. Circuit ultimately affirmed the FCC's Orders on January 12, 2010 and denied petitions for rehearing filed by Core and the Pennsylvania Commission on March 26, 2010.<sup>36</sup> Core petitioned for review by the Supreme Court of the United States. The Supreme Court denied that petition and the like petition of the Commission on November 15, 2010.<sup>37</sup>

In February 2009 Core sent a letter to XO demanding that XO pay for all locally dialed and ISP bound traffic delivered from June 2004 forward at the tariffed intrastate switched access

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<sup>31</sup> XO Rebuttal Testimony at 20.

<sup>32</sup> *Id.* at 17.

<sup>33</sup> PUC v. MCImetro Access Transmission Services, LLC, 2006 WL 2051138, \*1 (2006).

<sup>34</sup> XO Rebuttal Testimony at 22. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

<sup>35</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd (2008) ("*Mandamus Remand Order*").

<sup>36</sup> *Core Comm'ns Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010); Order, *Core Comm'ns Inc. v. FCC*, No. 08-1365 (D.C. Cir. March 26, 2010).

<sup>37</sup> *Core Comm'ns, Inc. v. FCC* (Case No. 10-185) and *Pennsylvania Pub. Util. Comm'n v. FCC* (Case No. 10-189).

service rate (\$.014 per minute at the time).<sup>38</sup> XO responded by pointing out that the calls in question were all locally dialed and ISP bound and that the tariff in question applies only to non-local, toll, interexchange traffic.<sup>39</sup> In an effort to resolve the matter short of litigation, XO engaged Core in discussions.<sup>40</sup> The discussions failed because Core insisted that it receive payment for 100% of the locally dialed minutes originated by XO; that the least it would accept under any circumstances would be the switched access rate for 100% of the minutes going back to June 2004 and that it would not consider under any circumstances a rate of \$.0007 per minute (the approved rate for ISP-bound traffic and the rate paid by Verizon to Core) for any of the minutes in question.<sup>41</sup>

Core's intrastate access tariff, PA P.U.C. Tariff No. 4, sets out the rules and regulations related to intrastate switched access service. The tariff defines "Access Service" as "Switched Access to the network of *an Interexchange Carrier* for the purpose of originating or terminating communications."<sup>42</sup> An "Interexchange Carrier" is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, between two or more exchanges." An "exchange carrier" is defined as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service."<sup>43</sup>

Core's intrastate access tariff also includes the following definition for "Local Traffic":

(i) the call originates and terminates in the same exchange area; or (ii) the call originates and

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<sup>38</sup> Mingo Direct Testimony at 10.

<sup>39</sup> Exhibit BLM-11.

<sup>40</sup> Mingo Direct Testimony at 12.

<sup>41</sup> XO Rebuttal Testimony at 21-22.

<sup>42</sup> Tariff No. 4, Original Sheet No. 6 (emphasis added).

<sup>43</sup> *Id.*

terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.<sup>44</sup> Core’s intrastate access tariff also includes a definition of “Mutual Traffic Exchange,” which the tariff characterizes as “[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other ‘in kind’ for terminating local exchange traffic on the other’s network.”<sup>45</sup>

On August 13, 2009, Core issued a letter to XO in which, notwithstanding its claim to be “reiterat[ing]” such desire, it raised for the first time the concept of negotiating a traffic exchange agreement with XO.<sup>46</sup> However, it also asserted that the traffic at issue would be subject to the Commission’s access charge regime and TELRIC pricing.<sup>47</sup>

On September 21, 2009, XO responded to Core’s August 13th letter, seeking an explanation as to why bill-and-keep was not an appropriate pricing arrangement.<sup>48</sup>

Core did not respond. Instead, two days later, on September 23, 2009, Core filed its Complaint against XO, seeking to recover \$55,246.96 for the termination of locally dialed, ISP-bound traffic plus various penalties — amounts ostensibly reflecting a tariffed switched access terminating rate of \$.014 per MOU although Core assessed much higher rates, rates that range from a low of 1.4 cents to as high of 22 cents per MOU.<sup>49</sup> This figure has increased since then,

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<sup>44</sup> *Id.* at Original Sheet No. 8.

<sup>45</sup> *Id.* at Original Sheet No. 9.

<sup>46</sup> Exhibit BLM-12.

<sup>47</sup> *Id.*

<sup>48</sup> Exhibit BLM-13.

<sup>49</sup> *See, e.g.* Exhibit XO-11 at 1 (June 2004 usage at a rate of \$.029 per MOU); Exhibit XO-72 at 9-27 (November 2009, Core’s effective rates are as high as:

\$ .22 (Mariana & Scenery Hill territory, 3 MOU @ \$.66)

and now stands at \$78,734.98 as of April 2011.<sup>50</sup>

A hearing was held in this matter on May 3, 2011. Mr. Bret Mingo testified on behalf of Core. Messrs. Gary Case and Richard Jackson testified on behalf of XO. During the hearing, ALJ Melillo requested a breakdown as to the number of intrastate local vs. nonlocal MOUs Core was claiming that it had terminated from XO as of the date of the hearing, and provided that this information could be filed as a late filed exhibit following the hearing. After a certain amount of motions practice regarding the competency of the proffered exhibits, such information for the period February 2010 to April 2011 was entered into the record as Exhibits BLM-27 and BLM-28.

**III. THE OVERWHELMING MAJORITY OF THE TRAFFIC AT ISSUE IN THIS CASE IS LOCALLY DIALED AND ISP-BOUND TRAFFIC TO WHICH ACCESS CHARGES, AND CORE'S SWITCHED ACCESS RATES, DO NOT APPLY, AND CORE CANNOT IDENTIFY AND SEGREGATE THE REMAINDER OF THE TRAFFIC.**

Core by its own admission has a very limited, narrow business model. It does not provide local exchange services, interexchange services or other telecommunications services to the general public.<sup>51</sup> Instead, from 1997 until September, 2009, Core only provided service to Internet Service Providers ("ISPs"), customers that only receive inbound calls and make no outbound calls at all. This imbalance of traffic creates opportunities for the terminating carrier,

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\$ .183 (Armstrong territory, 30 MOU @ \$5.48)  
\$ .173 (Yukon Waltz territory, 17 MOU @ \$2.94)  
\$ .148 (Palmerton territory, 14 MOU @ \$2.07)  
\$ .129 (Commonwealth territory, 19 MOU @ \$2.45)  
\$ .0783 (United territory, 18 MOU @ \$1.41))

<sup>50</sup> Exhibits BLM-25 (rev), BLM-26. For all the reasons stated herein, Core has no legal basis to backbill XO for the termination of the locally dialed traffic at issue. However, it should be noted that even if it could, Pa. C.S.A § 5525 bars Core from any recovery more than four years prior to the filing of its Complaint. Accordingly, under the four year limitations period, Core is not entitled to recover any charges prior to September 23, 2005.

<sup>51</sup> Responses to Interrogatories XO-CORE-1-26, 27, 37, 38 (XO Rebuttal Testimony Exhibit 1).

such as Core, to take advantage of asymmetrical payment obligations under the reciprocal compensation rules for local and ISP bound traffic, which require that the originating carrier compensate the terminating carrier. In its *ISP Remand Order*, the FCC described the problems that this can create:

Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.<sup>52</sup>

Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.<sup>53</sup>

As the current controversy about ISP-bound traffic demonstrates, reciprocal compensation encourages carriers to overuse competing carriers' origination facilities by seeking customers that receive high volumes of traffic.<sup>54</sup>

As discussed more fully below, the FCC established the \$.0007 MOU rate cap for ISP-bound traffic in order to curb this abuse and create proper incentives for carriers.<sup>55</sup>

Until September 2009, Core's *only* customers were ISPs and the record shows that the

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<sup>52</sup> *ISP Remand Order* ¶ 21.

<sup>53</sup> *Id.* ¶ 68.

<sup>54</sup> *Id.* ¶ 73.

<sup>55</sup> *Id.* ¶ 8.

vast majority of Core's customers still are ISPs. As of May 9, 2011, Core has 53 ISP customers. Core claims to have an additional 16 non-ISP customers that Core alleges are VoIP providers that, like ISPs, receive only inbound calls.<sup>56</sup> The traffic that XO sent to Core prior to September 2009 was all ISP-bound traffic and after that date the traffic was either ISP-bound or Voice over Internet Protocol ("VoIP"), although Core is unable to distinguish the two. As such, the traffic at issue in this case must be considered locally dialed, ISP bound, non-toll traffic. As Core's witness, Mr. Mingo, stated in his direct testimony, "calls to dial-up ISPs are almost always locally-dialed calls, not toll calls."<sup>57</sup> In the related Core-AT&T Proceeding, he also testified that "the AT&T Indirect Traffic . . . consists of locally dialed calls placed by AT&T's local service customers in order to reach Core's customers."<sup>58</sup> Core's entire service is predicated on establishing a local calling presence for its ISP customers. Its service would be of little or no interest to ISPs if the ISPs' customers had to dial long distance and incur toll charges to access the Internet.

Core claims that its tariffed switched access rate applies to the locally dialed and ISP-bound traffic that it receives from XO (notwithstanding its previous assertions to this Commission that switched access charges do not apply to ISP-bound traffic.)<sup>59</sup> However, Core is incorrect. Core's switched access service rates apply only to non-local, toll, interexchange traffic; it does not apply to locally dialed calls of any sort. Furthermore, the Commission has

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<sup>56</sup> Response to Interrogatories XO-CORE-1-8, 37, 39 (XO Rebuttal Testimony Exhibit 1) and Exhibit BLM 24.

<sup>57</sup> Mingo Direct Testimony at 9.

<sup>58</sup> Exhibit XO-8, Core-AT&T Proceeding, Mingo Direct Testimony at 4 (Nov. 16, 2009).

<sup>59</sup> Exhibit XO-10. "[W]hatever else it may be, ISP-bound traffic cannot be 'access traffic.'" Petition of Core Communications, Inc.; Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the United Telephone Company of Pennsylvania d/b/a Embarq, Docket No. A-310922F7002, Supplemental Comments of Core Communications Inc. at 11, Inc. (January 26, 2009).

made clear that, as a matter of state law, switched access charges apply only to non-local, toll, interexchange traffic, and not to local traffic.<sup>60</sup> Indeed, XO is not aware of a single instance in which this Commission or any other state Commission has imposed or approved the use of switched access charges with respect to locally dialed traffic. There is no basis for Core's assertion that intrastate toll access charges apply to traffic that it admits is not toll traffic.

This Commission has long held that “[s]witched access charges are those that LECs bill to IXCs or other LECs, for using their facilities in the placement or receipt of *toll* calls,”<sup>61</sup> not local calls. Moreover, the plain language of Core's tariff itself makes clear (1) that the switched access rates apply only to non-local, toll, interexchange traffic and (2) that the tariff does not establish any rate at all for the termination of locally dialed traffic of any sort, including locally dialed and ISP-bound traffic. Core's PA P.U.C. Tariff No. 4 is titled “Switched Access Service” and sets out the rules and regulations related to Core's intrastate switched access service. The tariff defines “Access Service” as “Switched Access to the network of an Interexchange Carrier for the purpose of originating or terminating communications.”<sup>62</sup> Accordingly, “Access Service” is a service provided to an “Interexchange Carrier,” which is defined as “[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, *between two or more exchanges.*”<sup>63</sup> Furthermore, the tariff defines “Local Traffic” as traffic in which: “(i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended

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<sup>60</sup> Nextlink Pennsylvania, Inc., Docket No. P-00991648; P-00991649, 93 PaPUC 172 (Sep. 30, 1999) (emphasis supplied).

<sup>61</sup> *Id.*

<sup>62</sup> Tariff No. 4, Original Page No. 6 (emphasis added).

<sup>63</sup> *Id.* (emphasis added).

Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.”

Consequently, in delivering local traffic, XO is not an interexchange carrier but an “exchange carrier” (“any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.”) Accordingly, Core’s tariff does not apply to the traffic at issue. This is consistent with Pennsylvania’s filed rate doctrine (codified at 66 Pa. C.S.A. § 1303), which provides that tariffs are strictly enforced in accordance with their express terms and no deviation therefrom is permitted.<sup>64</sup>

In fact, to the extent that the tariffs address the exchange of local traffic at all, they actually prescribe a bill and keep arrangement, *not* access charges. “Mutual Traffic Exchange” is a “compensation arrangement between certified local exchange service providers where local exchange service providers pay each other ‘in kind’ for terminating local exchange traffic on the other’s network.” Core Communications, Inc. Tariff PA P.U.C. No. 3, Original Sheet No. 8 (eff. Oct. 9, 2000); Tariff PA P.U.C. No. 4, Original Sheet No. 9 (eff. July 2, 2008). The fact that the tariff, at all relevant times (even today), has included this provision, and has not contained any provision establishing an explicit rate for terminating local traffic, is a reasonable basis for all other CLECs, including XO, to believe and understand that bill-and-keep is the only arrangement that applies to local traffic exchanged between Core and other CLECs. Furthermore, the fact that Core did not send bills to XO for the local traffic at issue for a number of years establishes a course of dealing that confirms that Core recognized and intended that bill-and-keep was the arrangement that applies to this traffic.

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<sup>64</sup> PECO Energy Co. v. Township of Upper Dublin, 922 A.2d 996, 1004 (Pa. Commw. Ct. 2007).

Core has not produced a single instance in which this Commission - or any other state commission - has ever ruled that intrastate switched access rates apply to local traffic. Mr. Mingo claims that this Commission authorized access charges to be applied to local traffic in the arbitration between Verizon Wireless and Alltel Pennsylvania, Inc., and that the Alabama Public Service Commission did so as well.<sup>65</sup> However, the Alltel/Verizon Wireless arbitration dealt with wireless, not wireline ISP-bound, traffic, and in that case, the Commission merely observed the fact that at some time in the past Verizon Wireless had paid switched access charges for all intrastate calls originated by its customers. Core's witness Mr. Mingo admitted on cross examination in the Core-AT&T Proceeding case that the Commission required the use of cost-based reciprocal compensation instead of switched access charges for all intraMTA wireless to wireline calls.<sup>66</sup>

The Alabama case also dealt with wireless traffic, not wireline ISP-bound traffic. The Alabama commission approved the use of state tariffs to establish a rate that wireless carriers were required to pay rural ILECs for terminating wireless-originated local traffic. But contrary to Mr. Mingo's assertion, these were not switched access service tariffs and the rates were not switched access rates - the tariff rates were actually one-half of the applicable switched access rates, as Core's witness Mr. Mingo admitted at the hearing in the Core-AT&T Proceeding.<sup>67</sup> Consequently, there is no support to be found anywhere for Core's contention that its tariffed switched access charges apply to the traffic originated by XO.

#### **IV. CORE HAS NO OTHER AUTHORITY UNDER STATE LAW TO IMPOSE CHARGES FOR TRAFFIC ORIGINATED BY XO.**

According to Core, it has been terminating ISP-bound calls originated by XO and other

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<sup>65</sup> Mingo Direct Testimony at 17-19.

<sup>66</sup> Exhibit XO-6 (Core-AT&T Proceeding, Tr. at 110-111).

<sup>67</sup> *Id.*, Tr. at 115.

Pennsylvania CLECs for over six and a half years. However, during that period of time it has never had an agreement or other understanding that establishes a rate for terminating the locally dialed, ISP-bound traffic at issue in this case.<sup>68</sup> In order to impose a charge for any intrastate service, absent an agreement, Core is required to file tariffs with the Commission establishing rates for each of the services it provides that are within the Commission's jurisdiction. Specifically, 66 Pa. C.S.A. § 1302 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." Furthermore, "[n]o public utility shall, directly or indirectly, *by any device whatsoever, or in anywise*, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto."<sup>69</sup> Core has no tariff that establishes any rate for terminating the traffic in question, other than the bill-and-keep arrangement referenced in its tariff.<sup>70</sup> Accordingly, it is barred from demanding or receiving any payment for terminating this traffic.<sup>71</sup>

Anticipating such an absence of any other authority to enforce its unlawful charges, Core has requested that the Commission impose a TELRIC termination rate or "some fair rate of compensation" on all XO terminated traffic, past, present, and future, including Core's

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<sup>68</sup> As Mr. Mingo notes in his testimony, "[c]arriers generally bill one another either by tariff or by agreement." Mingo Direct Testimony at 16.

<sup>69</sup> 66 Pa. C.S.A. § 1303.

<sup>70</sup> See *supra* at 14.

<sup>71</sup> See, e.g. *Popowsky v. Pa. PUC*, 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994) (Because the public utilities in question did not have lawful tariffs on file with the Commission, the utilities could not lawfully charge customers anything for the provision of utility service, and that therefore the PUC was in error when it ordered customers to pay utilities's bills.) See also *Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 829 (Pa. Commw. Ct. 1980) ("a public utility may not charge any rate for services other than that lawfully tariffed . . .").

termination of the XO Indirect Traffic.<sup>72</sup> In other words, Core asks the Commission to create a new rate out of whole cloth, to be applied retroactively. However, this too would be unlawful, as it similarly violates the filed rate doctrine discussed above and would also invoke state law prohibiting retroactive rulemaking. The only rate that may be demanded for the provision of service at any given time is the approved rate governing that service *that was in effect at that time*. Neither Core nor the Commission may create a new rate today and apply it retroactively to earlier periods. Otherwise, Core would be permitted to demand and receive a rate that is not specified in its tariffs.

**V. THE TRAFFIC AT ISSUE IS SUBJECT TO A BILL-AND-KEEP ARRANGEMENT.**

Core has asserted that XO is using the tandems in part as a means to help escape its payment obligations to Core,<sup>73</sup> forcing Core into a position where it is “giving away its services for free.”<sup>74</sup> It also implies that XO employs Verizon’s tandem to somehow disguise the fact that XO is delivering traffic to Core’s ISP customers. These assertions are without merit. As XO’s witness Mr. Case testified, interconnecting at the ILEC tandem is a common industry arrangement that is utilized by virtually all carriers. With hundreds of potential carriers terminating traffic on each other’s networks, and new ones emerging routinely, it is impractical to establish direct interconnections with each and every carrier. That is why the industry employs Carrier Identification Codes (“CIC”)s and exchanges call records so that bills can be exchanged – or not – in accordance with applicable tariffs, interconnection agreements, traffic exchange agreements or, in the vast majority of cases, bill and keep arrangements. A bill and keep arrangement is eminently practical for CLECs, and is commonplace in the industry.

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<sup>72</sup> Complaint ¶ 65.

<sup>73</sup> Mingo Direct Testimony at 6.

<sup>74</sup> *Id.* at 2.

The fact is that XO sent traffic to Core, and stood ready to receive traffic from Core, if it originated any, under the same bill and keep arrangement under which it exchanges traffic with every other competitive carrier in Pennsylvania. XO does not pay any other CLEC for the exchange of local traffic in Pennsylvania. There are no agreements that memorialize this understanding; rather, it is implicit.

From the beginning, bill-and-keep has been strongly endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic. This policy first appeared in the original *Local Competition Order*,<sup>75</sup> and in the *ISP Remand Order*, the FCC observed that “it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users.”<sup>76</sup> Most notably, as recently as November 2011 the FCC confirmed bill-and-keep as the main principle underlying the landmark *Connect America Fund Report and Order*.<sup>77</sup> In that Order, the FCC explained that:

We adopt a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC. Under bill-and-keep, carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary. Bill-and-keep has worked well as a model for the wireless industry; is consistent with and promotes deployment of IP networks; will eliminate competitive distortions between wireline and wireless services; and best promotes our overall goals of modernizing our rules and facilitating the transition to IP.<sup>78</sup>

Furthermore, the FCC further determined that, contrary to Core’s complaints that it has been the “victim” of unrelenting and recalcitrant traffic terminators, Core benefits from receiving the call:

we reject the notion that only the calling party benefits from a call and therefore

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<sup>75</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”).

<sup>76</sup> *ISP Remand Order* ¶ 4.

<sup>77</sup> *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*CAF Order*”).

<sup>78</sup> *Id.* ¶ 18.

should bear the entire cost of originating, transporting, and terminating a call. As a result, we now abandon the calling-party-network-pays model that dominated ICC regimes of the last century.

This Commission also has recognized that bill-and-keep is the existing and appropriate intercarrier compensation practice for the exchange of local traffic between CLECs. In *PUC v. MCI Metro Access Transmission Services, LLC*, 2006 WL 2051138 (2006)<sup>79</sup> the Commission rejected a tariff filed by MCI that would have established rates for the termination of local traffic exchanged between two CLECs. In doing so, the Commission observed that the tariff would “substantially alter existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania by replacing the use of bill-and-keep compensation with a reciprocal compensation regime.”<sup>80</sup> The Commission further acknowledged that, in the ISP Remand Order, the FCC “established interim federal reciprocal compensation rates for dial-up access to the Internet for” ISPs on a MOU basis “as part of an overall policy of moving Internet access compensation from a MOU basis to a Bill-and-Keep system.”<sup>81</sup>

Finally, Core’s course of dealing over the years established that it had adopted bill-and-keep as the default arrangement among CLECs. Core did not bill XO from the time Core entered the Pennsylvania market up until the beginning of 2008. Given the pronouncements of the governing regulatory agencies, the consistent practices of other CLECs in general, and Core’s behavior specifically, XO had every reason to believe that it was exchanging traffic with Core on a bill-and-keep basis.

**VI. EVEN IF BILL & KEEP DOES NOT APPLY, THE *ISP REMAND ORDER* APPLIES TO TRAFFIC EXCHANGED BETWEEN CLECS.**

The FCC’s *ISP Remand Order*, as recently confirmed by the FCC in an amicus brief filed at

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<sup>79</sup> 2006 WL 2051138 (Pa .P.U.C. June 22, 2006).

<sup>80</sup> *Id.* at \*1.

<sup>81</sup> *Id.* at \*9.

the request of the Ninth Circuit Court of Appeals earlier last year,<sup>82</sup> preempts the relief Core is requesting here. The FCC has already determined a compensation scheme for non-toll, ISP-bound traffic, and it provides for bill-and-keep arrangements when carriers do not have an interconnection or traffic exchange agreement, as is the case here between Core and XO.

In its *ISP Remand Order*, the FCC was concerned about the business practices of carriers like Core – carriers that provided service only to customers with inbound calls – and business models that largely were based on generating revenue from other carriers rather than their own end user customers. These concerns of the FCC are just as valid whether those other carriers being harmed are CLECs or ILECs. If Core’s interpretation of the FCC’s *ISP Remand Order* was correct, then, this would produce the perverse result in which ILECs would be protected from Core’s arbitrage scheme, but CLECs would not. Moreover, Mr. Mingo’s interpretation would produce an equally perverse result in which ISP-bound traffic from ILECs would be interstate, and not subject to this Commission’s jurisdiction, while ISP-bound traffic from CLECs would be intrastate traffic subject to the Commission’s jurisdiction.

In its Amicus Brief, the FCC unequivocally pronounced that “the FCC’s intercarrier compensation rules apply to the CLEC-to-CLEC ISP-bound traffic at issue in this case and have pre-emptive effect.”<sup>83</sup> In particular, the FCC reminded the parties that the *ISP Remand Order* was, as its name implies, issued as a result of a remand of a prior FCC order. Citing that prior order, the FCC explained that:

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<sup>82</sup> AT&T Comms. of Ca., Inc. *et al.* v. PacWest Telecomm, Inc. *et al.*, No. 08-17030, Amicus Brief for the Federal Communications Commission in Partial Support of Plaintiff-Appellant Urging Reversal (9<sup>th</sup> Cir. Feb. 2, 2011) (“*FCC Amicus Brief*”) (available at < [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-304430A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304430A1.pdf)>). This is a public document pursuant to 52 PA Code § 5.406(a), copies of which will be furnished upon request pursuant to 52 PA Code § 5.406(b).

<sup>83</sup> *FCC Amicus Brief* at 15.

The FCC's statements delineating both the scope of its proceeding and its rules confirm that the FCC's compensation regime applies to CLEC-to-CLEC ISP-bound traffic. The FCC stated at the outset of its intercarrier compensation proceeding that it would broadly examine ISP-bound traffic exchanged between LECs, a term of art broadly defined in the Communications Act as "any person that is engaged in the provision of telephone exchange service or exchange access." The FCC explicitly decided not to conduct a "more narrow[]" inquiry limited to ILEC-to-CLEC exchanges, explaining that "the pertinent provision of the 1996 Act pertains to all LECs."<sup>84</sup>

The FCC went on to explain that:

Moreover, the inclusion of CLEC-to-CLEC traffic within the compensation regime furthers the regulatory purpose underlying the enactment of the FCC's rules, i.e., to diminish the substantial economic distortions and opportunities for regulatory arbitrage arising from the operation of the reciprocal compensation regime for ISP-bound traffic. Because ISP-bound communications produce large volumes of one-way traffic, reciprocal compensation payments for ISP-bound traffic flow overwhelmingly from the originating LEC to the LEC serving the ISP. As the FCC explained in its ISP Remand Order, these potentially massive one-way payments gave LECs an incentive to target ISP customers with little regard to the costs of serving them — in some cases enabling LECs to provide free service or even to pay ISPs to be their customers. By encouraging the inefficient entry of LECs targeting ISP customers, the compensation mechanism for ISP-bound traffic had "distort[ed] the development of competitive markets" by driving ISP rates to uneconomic levels, which in turn had "disconnect[ed] costs from end-user market decisions."

The opportunities for regulatory arbitrage and distortions of economic signals occur under a reciprocal compensation system regardless of the identity of the originating carrier as an ILEC or a CLEC. *Interpreting the compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic would create a loophole in the FCC's regulatory regime for CLEC-originated ISP-bound calls.* As to that traffic, it would thwart full achievement of the regulatory purpose by leaving unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.<sup>85</sup>

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<sup>84</sup> *Id.* at 18 (citations omitted).

<sup>85</sup> *Id.* at 21 (citations omitted) (emphasis supplied).

As the FCC emphasized in its amicus brief, the deference to an agency's reading of its rules applies to an interpretation that is contained in an amicus brief.<sup>86</sup> Consequently, there can now be no question that the FCC's *ISP Remand Order* applies to the traffic between Core and XO and that Core's intrastate access tariff does not apply.

## VII. XO HAS ACTED IN GOOD FAITH

In its Complaint, Core alleged that XO had not negotiated in good faith for the establishment of a traffic exchange agreement, in violation of Section 251(b)(5) of the Act. Core asserted that "XO refuses to negotiate any type of agreement that would require it to pay anything for its use of Core's network" and is seeking a "free ride" on Core's network.<sup>87</sup> This, however, is a complete misrepresentation of the facts of this case. In the beginning, XO repeatedly requested support for Core's claims that it was owed access charges for the traffic at issue, only to be generally directed to Core's switched access tariff or pleadings in the Core – AT&T Proceeding, neither of which provided an explanation or support for Core's position that this was switched access traffic.<sup>88</sup> It was not until August 2009, six months after CORE first approached XO, that Core broached the subject of a traffic exchange agreement, but only on its terms.<sup>89</sup>

From the record of this case, it is clear that Core has never been interested in establishing a reciprocal compensation arrangement appropriate for traffic that is non-toll traffic. Instead, Core has argued that it should be allowed to charge (in fact, backbill for a period of over five years) *switched access* rates for the termination of *non-toll* traffic. Rates charged by Core – rates that Core insists in its Complaint that it be allowed to bill – are not authorized by Core's own

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<sup>86</sup> *Id.* at 15 (citations omitted.)

<sup>87</sup> Complaint ¶ 4.

<sup>88</sup> Exhibit BLM-8 to BLM-11.

<sup>89</sup> Exhibit BLM-12.

tariff and are inconsistent with Pennsylvania and federal law. Likewise, Core’s proposed “alternative” billing arrangement (utilizing Verizon’s tandem reciprocal compensation rate) for traffic that is ISP-bound<sup>90</sup> is neither authorized under Core’s tariffs nor consistent with the FCC’s *ISP Remand Order* or its *Mandamus Remand Order*.<sup>91</sup> Core filed its Complaint not because XO did not negotiate in good faith, but as demonstrated by its Complaint, because Core wanted to leverage the litigation process to impose charges that are not supported by its own tariff or Pennsylvania or federal law.

XO was within its rights to reject Core’s attempts to unjustly enrich itself at the expense of XO and other CLECs. XO and Core did not have an agreement, so Core could not have billed XO pursuant to such agreement. The record shows that all of the traffic at issue was ISP-bound traffic, which is indisputably jurisdictionally interstate traffic, and therefore not in any way covered by Core’s intrastate access tariff, since Core’s tariffs were not applicable to the termination of ISP-bound traffic, or any non-toll traffic for that matter. XO had every right to refuse to pay switched access charges for non-toll traffic.

Furthermore, the rate that Core assessed to XO is unjust and unreasonably discriminatory, since Verizon is subject to a much lower rate when Core terminates ISP-bound traffic from

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<sup>90</sup> *Id.* ¶ 53.

<sup>91</sup> *Mandamus Remand Order* n. 69. (“We have consistently found that ISP-bound traffic is jurisdictionally interstate.”). *See also id.* ¶ 24 (“[T]he Commission found that the one-way nature of ISP-bound traffic creates significant arbitrage opportunities. Due to the unbalanced nature of ISP-bound traffic, the Commission observed that reciprocal compensation arrangements created enormous incentives for competitive LECs to sign up ISPs as customers. The Commission cited evidence that competitive LECs, on average, terminated eighteen times more traffic than they originated, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, 90 percent of which was for ISP-bound traffic. The Commission concluded that ‘the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.’ This undermined the operation of competitive markets because competitive LECS were able to recover a disproportionate share of their costs from other carriers.”) (footnotes omitted).

Verizon's customers. Under current interconnection agreements between Core and Verizon and under current FCC rules, Core is not entitled to recover a rate beyond the cap established for the termination of non-toll, ISP-bound traffic, which is \$.0007 per MOU and which, in the FCC Amicus Brief, the FCC has clarified is the absolute maximum that any carrier, ILEC or CLEC, can expect. Not only does Core's offered rate for traffic termination represent an irrelevant, unlawful and artificially high rate, but agreeing to such a rate would put XO at a severe competitive disadvantage in the marketplace where XO's costs per minute would far exceed those of Verizon as well as other CLECs in Pennsylvania. The fact that Core refused to accept a rate of \$.0007 per MOU, insisted that its switched access rates applied, asserted that any rate would need to be applied retroactively to 2004, and refused to negotiate a prospective arrangement unless XO except under these terms, made Core's demands completely unreasonable.

It should also be emphasized that, contrary to Mr. Mingo's allegations, Core's purported ignorance of the traffic being exchanged with XO was not because XO acted in any way to hide the fact that it was sending traffic to Core.<sup>92</sup> If it is true that Core had no idea it was receiving traffic from XO, this was due to Core's willful disregard. It appears that until recently, Core's entire business model was predicated on selling exclusively to ISPs that could receive calls from customers served by any other LEC. By its very nature, incoming ISP traffic could come from any carrier whose end user customers want to reach their ISP using a dial-up Internet connection. In fact, because Core does not provide service to end users that make any outgoing calls, Core specifically relies on end users of other carriers to call its ISP customers. XO operates as a CLEC in Pennsylvania and provides services to Pennsylvania consumers – facts easily

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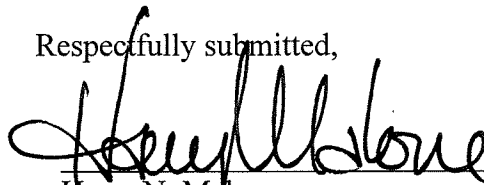
<sup>92</sup> Mingo Direct Testimony at 9.

discernible by perusing the Commission's website or the calling records in Core's possession. It is implausible, to say the least, that Core did not know that it was receiving traffic from carriers other than Verizon. Core's attempt to characterize itself as a good faith claimant being victimized by XO is exactly the opposite of the truth. The truth is that Core's behavior – providing service to ISP customers in an effort to generate only inbound calls, for which it can then attempt to extract extremely high payments from other carriers – is just the type of behavior that the FCC was focused on curtailing in the *ISP Remand Order*.

### VIII. CONCLUSION

Based on the foregoing, XO respectfully submits that the Commission should deny Core's primary and alternative requests for relief and dismiss Core's Complaint.

Respectfully submitted,



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## XO'S PROPOSED FINDINGS OF FACT

1. Core Communications, Inc. received authority to operate as a competitive local exchange carrier in Pennsylvania in August 2000.<sup>93</sup>
2. In December 2008, Core sent XO a bill for ISP-bound local traffic sent by XO from January 2004-December 2006.<sup>94</sup>
3. In May 2009, Core sent XO a bill for ISP-bound local traffic sent by XO for the entire year of 2008.<sup>95</sup>
4. XO and Core are not directly interconnected. Instead, XO and Core are indirectly interconnected through Verizon. This means that all calls sent by XO to Core must first go through Verizon's network.<sup>96</sup>
5. Core relies on Verizon to receive calling records showing all calls sent to Core by all carriers with whom Core is indirectly interconnected, including XO.<sup>97</sup>
6. At all times since Core has been operational in Pennsylvania, Verizon has sent records on a daily basis to Core that contain all information necessary to bill other carriers for all traffic indirectly sent to Core, including the identity of the carrier sending the traffic to Core, as well as the minutes associated with each carrier's traffic.<sup>98</sup>
7. Core did not even look at the Verizon call records until 2007.<sup>99</sup>
8. Core's witness Mr. Mingo admits that the Verizon call records provided Core with

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<sup>93</sup> Application of Core Communications, Inc. for Approval to Offer, Render, Furnish or Supply Telecommunication Services as an Interexchange Carrier, Competitive Local Exchange Carrier and as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania, Docket Nos. A-310922, A-310922F0002, and A-310922F0003, August 21, 2000.

<sup>94</sup> Mingo Direct Testimony at 10.

<sup>95</sup> *Id.*

<sup>96</sup> XO Rebuttal Testimony at 4.

<sup>97</sup> Exhibit XO-6 (Core - AT&T Proceeding, Tr. at 64-65); XO Rebuttal Testimony at 20.

<sup>98</sup> Exhibit XO-6 (Core - AT&T Proceeding, Tr. at 64-65).

<sup>99</sup> Mingo Direct Testimony at 8-9.

everything it needed to determine that it was receiving traffic from XO and to bill XO for the termination of that traffic.<sup>100</sup>

9. XO operates as a CLEC in Pennsylvania and provides services to Pennsylvania consumers. Core was on notice that it would receive traffic from XO customers.<sup>101</sup>
10. Core knew that XO and a large number of other carriers were operating as CLECs in Pennsylvania;<sup>102</sup>
11. Core knew that it did not have a direct connection with XO and other CLECs.<sup>103</sup>
12. When Core began operations in 1999 or 2000 “each and every other LEC and IXC operating in Pennsylvania was notified” that “Core applied to the North American Numbering Plan Administrator (NANPA) for telephone numbers,” “so that [those carriers] could load Core’s new numbers into their switches and thereby enable calling between their end users and Core’s end users.”<sup>104</sup>
13. Core was on notice at all times during the period June 2004 through December 2007 that it was receiving significant volumes of traffic from carriers other than ILEC Verizon. Nevertheless, during this period, Core did not conduct any inquiry into the scale of this traffic nor send a single bill to any other carrier.
14. Core failed to exercise proper managerial and technical fitness by failing to even look at the daily records sent by Verizon that contained all information necessary to send a bill to XO.
15. Prior to September 2009, Core’s only customers in Pennsylvania were ISPs and all traffic

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<sup>100</sup> *Id.* at 8.

<sup>101</sup> XO Rebuttal Testimony at 18.

<sup>102</sup> Mingo Direct Testimony at 5-6

<sup>103</sup> *Id.* at 5.

<sup>104</sup> Exhibit XO-7 (Core - AT&T Proceeding, Mingo Surrebuttal at 5-6.)

to Core was ISP-bound traffic.<sup>105</sup>

16. As of May 9, 2011, Core claims to have approximately 53 ISP customers and 16 non-ISP customers.<sup>106</sup>

17. Core does not distinguish between traffic to ISP customers and traffic to non-ISP customers<sup>107</sup> and cannot confirm that any of its traffic was not ISP-bound.

18. The bills Core sent and continues to send to XO charge, at a minimum, Core's tariffed rate for switched access traffic, even for traffic that Core admits is local traffic per BLM-28.<sup>108</sup>

19. Core has produced no evidence that any of the traffic at issue is other than ISP-bound traffic.

20. Core has never filed a tariff in Pennsylvania establishing a rate for terminating the traffic at issue in this case - locally dialed and ISP-bound traffic.<sup>109</sup>

21. At all relevant times, Core has had on file with the Commission an intrastate switched access tariff titled "Switched Access Tariff," which established access rates for the origination and termination of non-local, toll, interexchange traffic.

22. Core's intrastate access tariff, PA P.U.C. Tariff No. 4, sets out the rules and regulations related to intrastate switched access service. The tariff defines "Access Service" as "Switched Access to the network of an *Interexchange Carrier* for the purpose of originating or terminating communications."<sup>110</sup> An "Interexchange Carrier" is defined as "[a]ny individual, partnership, association, joint-stock company, trust, governmental

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<sup>105</sup> Tr. at 34-34.

<sup>106</sup> Exhibit BLM-24.

<sup>107</sup> Tr. at 36.

<sup>108</sup> Exhibits XO-11 thru 169.

<sup>109</sup> *Id.* at 20.

<sup>110</sup> Tariff No. 4, Original Page No. 6 (emphasis added).

entity or corporation engaged in state or foreign communication for hire by wire or radio, between two or more exchanges.” *Id.* (emphasis added).<sup>111</sup> An “exchange carrier” is defined as “any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.”<sup>112</sup>

23. Core’s intrastate access tariff also includes the following definition for “Local Traffic”:

(i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.<sup>113</sup> Core’s intrastate access tariff also includes a definition of “Mutual Traffic Exchange,” which the tariff characterizes as “[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other ‘in kind’ for terminating local exchange traffic on the other’s network.”<sup>114</sup>

24. In delivering local traffic, XO is not an interexchange carrier but a CLEC providing local exchange service and as such squarely falls within the tariff’s definition of an “exchange carrier” (“any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.”).

25. Given the fact that Core’s tariff at all relevant times has included the Mutual Traffic Exchange provision, and has not contained any provision establishing a positive rate for

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at Original Sheet No. 8.

<sup>114</sup> *Id.* at Original Sheet No. 9.

terminating local traffic; and the fact that Core did not bill XO for seven years, it was reasonable for XO to believe and understand that bill-and-keep is the only arrangement that applies to local traffic exchanged between Core and XO.

26. This Commission has previously recognized that “switched access charges are those that LECs bill to IXCs or other LECs, for using their facilities in the placement or receipt of toll calls.”<sup>115</sup>
27. The record of this proceeding does not establish that there is any Order, regulation or law from this Commission, or any other Commission in the country, that has ever found that switched access charges apply to local traffic or ISP bound traffic.
28. Bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs.<sup>116</sup>
29. XO operates on a bill-and-keep basis with every other CLEC in Pennsylvania.<sup>117</sup>
30. This Commission has previously found that bill-and-keep is the “existing CLEC-to-CLEC intercarrier compensation practice.”<sup>118</sup>
31. This Commission has also previously expressed concern with disturbing this existing CLEC-to-CLEC intercarrier compensation practice.<sup>119</sup>
32. Core charges its own customers “very close to zero,” and therefore has a business model that employs shifting its costs onto other CLECs rather than recover them from their own

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<sup>115</sup> PUC v. Bell Atlantic-Pennsylvania, Inc., Docket Nos. P-00991648 and P-00991649, Opinion and Order at 12 (Sep. 30, 1999).

<sup>116</sup> XO Rebuttal Testimony at 16-17.

<sup>117</sup> *Id.* at 17.

<sup>118</sup> PUC v. MCImetro Access Transmission Services, LLC, 2006 WL 2051138, \* 1 (Pa. P.U.C. June 22, 2006).

<sup>119</sup> *Id.*

customers.<sup>120</sup>

33. Bill-and-keep is the most appropriate compensation scheme for CLEC-to-CLEC compensation, even ISP-bound traffic that may be predominantly one-way.
34. Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic.<sup>121</sup> Also in the ISP Remand Order, the FCC observed that “it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users.”<sup>122</sup>
35. Furthermore, the FCC has rejected the notion that only the calling party benefits from a call and as a result has abandoned the calling-party-network- pays model adopted a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC.<sup>123</sup>
36. Verizon pays Core a rate of \$.0007/MOU for the termination of all ISP-bound calls.<sup>124</sup>

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<sup>120</sup> Exhibit XO-7 (Core Statement No. 1-SR at 11).

<sup>121</sup> See, e.g., *Local Competition Order* ¶ 1027.

<sup>122</sup> *ISP Remand Order* ¶ 4.

<sup>123</sup> *CAF Order* ¶ 18.

<sup>124</sup> XO Rebuttal Testimony at 22.

## XO'S PROPOSED CONCLUSIONS OF LAW

1. 66 Pa. C.S.A. §1302 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.”
2. 66 Pa. C.S.A. § 1303 forbids a public utility from “demand[ing] or receiving[ing]” any rate that is different from “that specified in the tariffs of such public utility.”
3. Pennsylvania courts have confirmed that Sections 1302 and 1303, read together, do not permit a carrier to charge any rate if it has not tariffed such rate.
4. Core failed to tariff any rate for the termination of local traffic, whether ISP- bound or VoIP, and therefore Core is prohibited by law from charging XO any rate for terminating such traffic.
5. Because of its failure to comply with Pennsylvania public utility law, Sections 1302 and 1303, Core is barred from collecting, enforcing, demanding or receiving anything for past traffic exchanges, and therefore cannot prevail on its claims in this case.
6. Core’s Complaint is also barred because switched access charges apply only to the origination and termination of non-local, toll, interexchange calls - not the local and ISP bound traffic at issue here.
7. On its face, Core’s switched access tariff does not apply to the local traffic at issue here. The tariff, PA P.U.C. Tariff No. 4, is titled “Switched Access Tariff and sets out the rules and regulations related to Core’s intrastate switched access service. The tariff defines “Access Service” as “Switched Access to the network of an Interexchange Carrier for the purpose of originating or terminating communications.” Tariff, Section 1 (emphasis added). Accordingly, “Access Service” is a service provided to an “Interexchange

Carrier,” which is defined as “[a]ny individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in state or foreign communication for hire by wire or radio, between two or more exchanges.”

8. In delivering local traffic, XO is not an interexchange carrier but a CLEC providing local exchange service. And as such, XO squarely falls within the tariffs definition of an “exchange carrier” (“any individual, partnership, association, joint-stock company, trust; governmental entity or corporation engaged in the provision of local exchange telephone service.”).
9. In addition, Core’s tariff defines “Local Traffic” as follows: Local Traffic: Traffic is “Local Traffic” under this rate sheet if: (i) the call originates and terminates in the same exchange area; or (ii) the call originates and terminates within different Core Exchanges that share a common mandatory local calling area, e.g., a mandatory Extended Local Calling Service (ELCS) or Extended Area Service areas (EAS) or other like types of mandatory local calling scopes.
10. Core’s tariff also characterizes the term “Mutual Traffic Exchange” as “[a] compensation arrangement between certified local exchange service providers where local exchange service providers pay each other ‘in kind’ for terminating local exchange traffic on the other’s network.” This is a bill-and-keep arrangement. Its inclusion in the tariff indicates that Core recognized that bill-and-keep is the compensation arrangement that should and does apply to CLEC-to-CLEC local traffic exchanges.
11. Under the plain terms of Core’s tariff, Core cannot charge XO its tariffed switched access rate for the termination of traffic of the locally dialed and ISP bound traffic at issue in this case.

12. The relief Core seeks also is barred because it would violate the Pennsylvania statutory ban on rate discrimination. 66 Pa. C.S.A. § 1304 provides that “[n]o public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage.”
13. 66 Pa. C.S.A. § 1303 provides that “[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the rate most advantageous to the patron.” Accordingly, Pennsylvania law prohibits charging different rates to similarly situated customers for the same service and at the same time confers on all utility customers “most favored nation” status in the event more than one rate is applicable to the service in question.
14. Core’s Complaint asks that XO be required to pay \$0.014/minute (Core’s intrastate access rate) or, in the alternative, \$.002439/minute (Verizon’s tandem reciprocal compensation rate) for both past and future terminations of locally dialed and ISP-bound traffic. Requiring XO to pay this amount would be discriminatory as to Verizon and virtually all CLECs.
15. In 2006, the Commission recognized that the “existing CLEC-to-CLEC intercarrier compensation practice[ ] in Pennsylvania” is “bill-and-keep compensation.” MCImetro Access, 2006 WL 2051138, \* 1.
16. The Commission refused to allow a tariffed rate to go into effect given that the tariffed rate would disrupt the CLEC-to-CLEC compensation practice of bill-and-keep. *Id.*
17. This Commission has recognized, in the ISP Remand Order the FCC “established . . . an overall policy of moving internet access compensation from an MOU [minute of use]

basis to a Bill-and-Keep system.” *Id.*

18. Bill-and-keep has been endorsed by the FCC as an appropriate compensation arrangement for the termination of local traffic.
19. Bill-and-keep is the appropriate compensation arrangement for the ISP-bound traffic at issue in this proceeding.