ECKERT SEAMANS

Eckert Seamans Cherin & Mellott, LLC
213 Market Street - 8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Deanne M. O'Dell
717.255.3744
dodell@eckertseamans.com

February 15, 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 Reply 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 Reply Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and/or First Class Mail

Pamela C. Polacek, Esq.
McNees Wallace & Nurick
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
ppolacek@mwn.com

Harry N. Malone, Esq.
Devine, Millimet & Branch
111 Amherst Street
Manchester, NH 03101
hmalone@devinemillimet.com

Karen Potkul, Esq.
Corporate Counsel
External Affairs
XO Communications
1601 Trapelo Rd.
Waltham, MA 02451
Karen.potkul@xo.com

Dated: February 15, 2012

Deanne M. O'Dell, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF CORE COMMUNICATIONS, INC.

Deanne M. O'Dell, Esquire
Attorney ID 81064
Eckert Seamans Cherin & Mellott LLC
213 Market Street, 8th Fl.
Harrisburg, PA 17108-1248
(717) 237-6000

Christopher Van de Verg, Esq.
Admitted pro hac vice
General Counsel
Core Communications, Inc.
209 West Street, Suite 302
Annapolis, Maryland 21401
Tel (410) 216-9895

Date: February 15, 2012

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I. INTRODUCTION

Despite the best efforts of XO Communications, Inc. ("XO") to create a murky and confusing picture of this case, it really is quite simple and involves one issue – resolving a payment dispute between two competitive local exchange carriers ("CLECs"). Core has presented several legally sound and reasonable theories under which the Commission can and should order XO to pay something more than $0.00 for services rendered either by application of Core's tariff or by imposition of the Commission-approved Total Element Long Run Incremental Cost ("TELRIC") rate. XO, on the other hand, adamantly disavows any payment responsibility. In sum, XO's entire Main Brief is nothing more than an effort to clutter this case with advocacy that has no solid legal or practical foundation and includes many red herring arguments. After sorting out fact from fiction, the reality is this – Core has performed a service for XO and XO refuses to pay for it. While Core anticipated and fully addressed most of these theories in its Main Brief, which it incorporates by reference herein, the fallacies implicit in several of XO's more outlandish arguments will be further addressed below.

II. REPLY TO XO

A. Core's Tariff Covers Locally-Dialed Traffic

Citing to a brief passage *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.), (Order entered September 30, 1999)("*Global Order*"), XO argues that switched access charges *cannot* apply to "local traffic." XO M.B., at 12. However, the referenced passage simply stands for the proposition that switched access tariffs do apply to "toll" and "interexchange" traffic. No one disputes this. However, XO never explains how this one fleeting reference *precludes* application of switched access rates to locally-dialed traffic where, as here, the plain terms of Core's duly filed and controlling tariff apply unambiguously to all intrastate

"terminating communications," including locally-dialed traffic. Tariff, at Original Sheet No. 10. The real issue in this case remains whether the plain language of Core's Tariff covers locally-dialed traffic. As Core demonstrated in its Main Brief, the Tariff most assuredly does. Core M.B., at 20-22.

As Core predicted, Core M.B., at 21 and n. 4, XO mistakenly relies on the Tariff's definition of "Access Service" in an effort to muddy the plain language analysis. XO M.B., at 12. Despite XO's musings, Core is suing XO for the application of "*Switched Access Service*," not "*Access Service*," which is an entirely separate and very different definition. Therefore, Core 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"). Indeed, 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*" (emphasis added), "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 XO with access to another carrier's interexchange network. In fashioning its arguments, XO seems to have completely failed to read the plain language of these definitions. Notably, XO deliberately sidesteps any mention of the operative definition—"Switched Access Service"—in its Main Brief.

XO further relies, with no more success, on the Tariff's definitions of "Local Traffic" and "Mutual Traffic Exchange." XO M.B., at 12-13. Because the Tariff includes a definition for

"Local Traffic" and references the possibility of an "in kind" compensation mechanism, so XO reasons, the Tariff bars any monetary compensation for local traffic exchange. *Id.* This logic, however, is easily dismissed since the definition of Mutual Traffic Exchange is simply descriptive, and not prescriptive. That is, the definition contemplates, although it does not mandate, (it is after all, only a definition) that "local exchange carriers pay each other 'in kind' for terminating local exchange traffic on the other's network." It simply recognizes that LECs are free to enter into an 'in kind' arrangement if they so desire. Of course, payment in-kind only works where traffic is roughly balanced, so that each LEC is providing equivalent services to each other. Here, a payment in-kind arrangement is not appropriate, since both parties acknowledge that Core is providing all of the terminating services and XO none.

B. The Filed Rate Doctrine Supports Core's Position That the Plain Terms of the Tariff Apply to the XO Indirect Traffic

Since, as demonstrated above, the plain language of Core's Tariff covers locally-dialed traffic, the filed rate doctrine applies, and the Commission need only enforce the rates set forth therein. Ironically, XO's reference to the "filed rate doctrine (codified at 66 Pa. C.S.A § 1303)" XO M.B., at 13, supports Core's position with respect to the Tariff's coverage, not XO's. Similarly, XO's quibble that "Core has no tariff that establishes any rate for terminating the traffic in question," XO M.B., at 15, simply ignores the plain language of the Tariff, which literally applies to all "terminating communications" within the state of Pennsylvania. "Local Traffic" however that may be reasonably defined, is clearly a subset of "terminating communications." Further, as XO concedes, the Tariff explicitly incorporates "Local Traffic" in its definitions section.

XO also argues that "Core asks the Commission to create a new rate… to be applied retroactively." *Id.* However, Core is asking the Commission to require XO to comply with its

existing tariff and, therefore, it is not seeking a "new rate" to apply retroactively. Even if Core's alternate request is granted and the TELRIC rate is applied to this traffic, XO would not be "harmed" by application of that rate which is many times less than the tariffed access rate.[1] By the same token, XO's implicit request that the Commission apply an effective rate of $0.00/MOU is no more or less "retroactive" than Core's position in this case. Finally, XO should not be heard to complain about possible retroactive effects when it has done nothing to help the Commission resolve compensation for the XO Indirect Traffic.

C. Bill and Keep Does Not Apply to the XO Indirect Traffic

In defense of its position that bill-and-keep governs the XO Indirect Traffic, XO states that it "sent traffic to Core, and stood ready to receive traffic from Core." XO M.B., at 17. Other than the unsupported testimony of its own witnesses, however, XO offers no hard evidence that it "stood ready" to terminate Core's traffic, nor what the relevance of such an offer might be. In a related vein, XO claims there are "no agreements" relating to the exchange of local traffic in Pennsylvania, rather, that such arrangements are "implicit." *Id.* Yet, XO itself produced a copy of an agreement between itself and another CLEC that provides for the payment of reciprocal compensation in Pennsylvania and other states. Core Cross Exh. 4, at Table 1.

XO argues that the FCC has "strongly endorsed" bill and keep "as an appropriate compensation arrangement for the termination of local traffic." XO M.B., at 17. Be that as it

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[1] The Commission clearly has jurisdiction and authority to determine the appropriate rate or rates to apply to the XO Indirect Traffic. As just one example, the Commission could determine that the plain language of Core's Tariff applies, but that the rates set forth in the Tariff would be unjust and unreasonable as applied to the XO Indirect Traffic, and then cap Core's recovery at the TELRIC rate. Since the Commission has the power to declare tariffed rates unjust and unreasonable and order refunds accordingly, 66 Pa. C.S.A. § 1312 ("Refunds"), then it surely has power to cap a tariffed rate in the context of a complaint case. *See, 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 ("*AT&T Material Question Order,*" at 7 (referencing the "Commission's subject matter jurisdiction to resolve intercarrier compensation disputes").

may, *In the Matter of Connect America Fund*, WC Docket No. 10-90, FCC 11-161 ("*ICC Reformation Order*") is prospective only in effect, and provides a transition to bill-and-keep that will not affect existing reciprocal compensation rates for several years. Nothing in that order restrains the Commission from resolving this case in the manner Core has requested.

XO also claims that the Commission itself also has endorsed bill and keep "for the exchange of local traffic between CLECs." XO M.B., at 18. This claim is based on a superficial and inaccurate reading of Commission's order in *Pennsylvania Public Utility Commission v. MCImetro Access Transmission Services, LLC. dba Verizon Access Transmission Service*, Pa. P.U.C. Docket No. R-00050799, (Order adopted June 22, 2006)("*Verizon ATS*"). There, the Commission rejected a tariff specifically implementing the reciprocal compensation regime as between CLECs. MCImetro Access Transmission Services, LLC d/b/a Verizon ATS filed a tariff supplement to introduce Local Traffic Termination Service ("LTTS") and thereby to establish a "default" compensation rate for Verizon ATS's termination of locally-dialed MOUs sent by any CLEC with whom Verizon ATS did not have an interconnection agreement. The Commission concluded that there was "ambiguity" and "uncertainty" regarding its authority to approve default compensation rates by tariff and, because of that, rejected the proposed tariff. *Id.* at 6. In reaching this decision, however, the Commission made clear that it "could have the authority to approve a default compensation rate for CLEC-to-CLEC arrangements" and that the FCC precedent did not "contain express language addressing state commission authority to approve default compensation rates for CLEC-to-CLEC in the absence of a CLEC-to-CLEC interconnection agreement." *Id.* at 7. Based on this, the Commission chose a "cautious approach" until "after state commissions have the benefit of clarity from the FCC." *Id.* at 7. Far

from approving bill-and-keep for CLEC-CLEC traffic, the Commission appears simply to have decided to defer taking any stance on such traffic.

Indeed, *Verizon ATS* actually bolsters Core's position here. First, in recent years, the Commission has been clear that it can no longer wait for the FCC to address these types of intercarrier compensation issues and, thus, the decision in *Verizon ATS* case to await FCC guidance is no longer appropriate. *See Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund*, Docket No. I-00040105, Order entered August 5, 2009 at 18-19. The FCC's *ICC Reformation Order*, which says nothing about CLEC-CLEC arrangements, only validates the Commission's new approach. Moreover, the Commission has already determined that such guidance is not even necessary through its *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 (*"AT&T Material Question Order"*) because it made clear that it does have jurisdiction to address the CLEC-to-CLEC compensation issues in this case and to set forth an appropriate rate. The Commission has now rejected bill-and-keep for CLEC-CLEC traffic, finding 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." *AT&T Material Question Order*, at 7 (emphasis added).

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

XO continues to maintain the untenable position that "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." XO M.B., at 19. While XO fails to provide authority for this position, it seems XO is relying on the "new markets rule," paragraph 81 of the *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*"), from which the FCC forbeared in 2004. 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 2004 FCC LEXIS 5873 at ¶ 8 (Oct. 18, 2004). Of course, XO's position assumes that the *ISP Remand Order* applies at all to CLEC-CLEC traffic, which it surely does not.

Following the FCC's a*micus* brief to the Ninth Circuit, XO argues the FCC's policy concerns "are just as valid whether those other carriers being harmed are CLECs or ILECs." XO M.B., at 19. However, as Core noted in its Main Brief, neither XO nor FCC staff may use "public policy" claims to retroactively enlarge the scope of the 2001 *ISP Remand Order*. That order speaks for itself, and (as the Commission has found) it simply does not address CLEC-CLEC traffic. *See*, Core M.B., at 41. Notably, the FCC's recent *ICC Reformation Order* says nothing about CLEC-CLEC traffic, whether ISP-bound or otherwise. If the FCC truly wanted to clarify the scope of the *ISP Remand Order*, it could have done so in the context of a notice-and-comment rulemaking proceeding, as opposed to filing an *amicus* brief in a litigated case between private parties.

XO cites to passages from the FCC staff's *amicus* brief claiming that the 2001 FCC intended to "broadly examine ISP-bound traffic exchanged between LECs..." XO M.B., at 20, including presumably, CLEC-CLEC traffic. But as noted in Core's Main Brief, this theorem is undermined by the FCC's own actions in 2001. Indeed, on the same day it issued the *ISP Remand Order*, the FCC also issued a Notice of Proposed Rulemaking in which it stated that it had never regulated CLEC-CLEC traffic and had no intention of doing so. *See*, Core M.B., at 40.

Finally, XO argues that Core waived its right to contest the applicability of the *ISP Remand Order* to CLEC-CLEC traffic, through its testimony in an ICA arbitration against Embarq. XO M.B., at 11 and n. 59. The context in which Core's statements arose was the issue of so-called "VNXX traffic," calls which are locally dialed and which originate and terminate in the same LATA, although in different exchange areas. *See, id., and see,* BLM-23, Excerpt from the Main Brief of Core Communications, Inc. in Pa. P.U.C. Docket No. A-310922F7002 (July 31, 2007), at 46-61. In the Embarq case, Core argued (correctly) that the *ISP Remand Order* applied equally to VNXX traffic and to "local" traffic that physically originates and terminates in the same exchange area. *See, id.* When Core stated, in that case, that the *ISP Remand Order* applies to "all" ISP-bound traffic, it clearly intended "all" to mean both "VNXX" and "local." In addition, the Embarq case is an ILEC-CLEC interconnection arbitration, in which the *ISP Remand Order* clearly applies, and not a CLEC-CLEC dispute, in which the *ISP Remand Order* has no application.

E. XO's Backbilling, "Course of Dealing" and Statute of Limitations Arguments Are Makeweight and Have No Merit

XO's terse claim that "Core has no legal basis to backbill XO," XO M.B., at 9 and n. 50, is demonstrably false. The Commission has concluded that "the interests of justice will best be promoted by allowing the 'back-billing' of a commercial customer who has knowingly received and used the public utility service for which, due to mutual inadvertence and due to the negligence of the public utility, the said ratepayer paid nothing. A contrary result would unjustly enrich Complainant at the expense of the other ratepayers." *St. Francis of Assisi Catholic Church c/o Rev. William J. P. Langan v. PG Energy, a Division of Southern Union Company*, Docket No. C-20042391, 2005 Pa. PUC LEXIS 16, 15-16. Moreover, there is Commission precedent for permitting a utility to backbill for theft of service without any time limit. *See*

Polan v. Duquesne Light Company, Docket No. F-8156073 (September 17, 1982). Cases regarding backbilling in the absence of theft of service or the Complainant's culpability have set reasonable limits on the amount of time that a utility can reach back to rebill. *See, e.g., Pa. P.U.C. v. Duquesne Light Company*, 50 Pa. P.U.C. 555, 50 Pa. PUC 173 (1977) (six-year statute of limitations applied to company's rebillings due to inaccurate calculation of bills). Since Section 1312 of the Public Utility Code permits ratepayers to seek rate refunds when certain findings are made, up to a four-year past period measured from the date that the improper billing was discovered, the Commission has concluded that "[p]arity and equity warrant that a utility should likewise be limited to a four-year past period for recoupment of underbillings." *Angie's Bar v. Duquesne Light Company,* Docket No. C-81881, 1990 Pa. PUC LEXIS 4. Accordingly, Core's actions to backbill XO were consistent with industry practice and the Commission's guidelines regarding backbilling.

Nor is XO correct in claiming that "the fact that Core did not send bills to XO for the local traffic for a number of years establishes a course of dealing," XO M.B., at 13, which presumably bars Core from ever billing XO. Core invoiced XO as soon as it became aware of the substantial volumes of telecommunications traffic originated by XO's end-users and terminated by Core. Core St. No. 1 at 10. Prior to that time, Core and XO had *no* course of dealing. Core subsequently followed up with XO, including letters, phone calls and extensive discussions, and insisted on payment in some degree. *Id.*, at 10-12. To the extent the parties have any dealings, Core has always taken the position that XO should be held accountable for the XO Indirect Traffic. Further, XO's course of dealing claim proves too much. If the *absence* of billings during a certain period is enough to establish a course of dealing, a utility could never backbill, since the

utility customer could simply claim, as XO does here, that the course of dealing established no billing.

Finally, XO's claim that "under the four year limitations period, Core is not entitled to recover any charges prior to September 23, 2005," XO M.B., at 9 and n.50, is not in accordance with Pennsylvania law. Under Pennsylvania's four year statute of limitations for contract actions, 42 Pa. C.S.A. § 5525(a)(8), the limitations period begins to run starting "from the time the cause of action accrued," 42 Pa. C.S.A. § 5502. A cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. *Kapil v. Association of Pa. State College and Univ. Faculties*, 470 A.2d 482, 485 (Pa. 1983). Essentially, the statute of limitations will begin as soon as the right to institute suit arises. *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). In this case, the dispute arose in March, 2009, when XO finally got around to issuing its initial dispute letter. Core St. No. 1, at 10.

F. XO Misstates the Facts to Hide Its Own Willful Refusal to Negotiate in Good Faith

In an attempt to smear Core and cover its own tracks, XO promotes a number of obvious falsehoods:

1. XO states that "Core's ISP customers rely on the call origination services of LECs, such as XO, so that customers can reach Core's ISP customers." XO M.B., at 3. In actuality, the reverse is true. XO benefits from the ISPs' services because they encourage XO's landline end users to use XO service, thereby increasingly the utility of that service. Core St. No. 1, at 3-4. Thus, it is XO that relies on Core for the termination services needed to complete XO's end users' calls. XO simply does not want to compensate Core for its part in completing calls.

2. XO states that "Core charges its ISP customers only nominally for call termination services." XO M.B., at 3. This is based on a willful misreading of Core' Testimony

in the *Core/AT&T Case*. There, Core testified that, in order to compete for wholesale telecommunications accounts in the outbound traffic market, Core would need to price its services at close to zero, since most of the carriers active in that market realize profits by refusing (much like XO) to pay terminating carriers any compensation. XO Exhibit No. 7 at 10-11.

3. XO states that "[b]ecause information regarding a call is transmitted along with the traffic, indirect interconnection does not facilitate the avoidance of payment," and "XO has passed call detail information on to Verizon." XO M.B., at 3. As Core has maintained repeatedly throughout this proceeding, with no meaningful rebuttal, XO CIC 5607 traffic comes into Core's network without any calling party number ("CPN"). Core St. No. 1, at 5. Without CPN, billing and collection is much more difficult, *id.*, especially when the originating carrier refuses to own up to the problem.

4. XO states that "Core knew at all times" that it was receiving third-party traffic. XO M.B., at 5. Core testified that it did not know about, and had no reason to be aware of, telecommunications originated by XO. Core St. No. 1, at 9. The only rebuttal evidence offered by XO is an excerpt from *AT&T's* testimony in the *Core/AT&T Case* regarding publishing of Core's number blocks by the North American Numbering Plan Administration. For better or for worse, simply publishing one's NANPA numbers (which is necessary for interconnection with Verizon) does not automatically establish interconnection with *every other carrier*.

5. XO states that "XO exchanges local traffic with all other CLECs in Pennsylvania on a bill-and-keep basis." XO M.B., at 6. As we have seen, XO produced an agreement between itself and another CLEC that provides for the payment of reciprocal compensation in Pennsylvania and other states. Core Cross Exh. 4, at Table 1.

6. XO states that "discussions failed because Core insisted that it receive payment for 100% of the locally dialed minutes originated by XO..." XO M.B., at 7. Yet it was Core that modified its initial position and offered to accept a lower TELRIC rate for locally dialed traffic. Core St. No.1, at 12. Meanwhile, it is XO that remains inflexible, continuing to maintain that it owes Core nothing. Indeed, despite previous insinuations to the contrary, XO's Main Brief argues that "bill-and-keep" (by which it means it will not pay anything) applies.

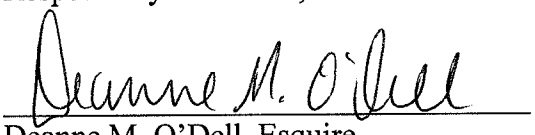
7. XO states that "Core... does not provide local exchange services... to the general public." XO M.B., at 9. Core offers wholesale telecommunications services to the general public, and its business plan has been thoroughly reviewed and approved by the Commission. *Application of Core Communications Inc.* Docket No. 310922F0002, (Opinion and Order entered December 4, 2006); *Rural Tel. Co. Coalition v. PUC*, 941 A.2d 751 (Pa. Commw. Ct. 2008). Any statement to the contrary is simply not offered in good faith.

8. XO states that "[i]n the AT&T case, Core testified that "the AT&T Indirect Traffic... consists of locally-dialed calls..." XO M.B., at 11. The traffic at issue in the *Core/AT&T Case* only involves locally-dialed calls because AT&T (unlike XO) agreed to pay for intrastate calls dialed on a long-distance basis pursuant to the rates and terms set forth in Core's Tariff.

III. CONCLUSION

For all the reasons discussed above, XO has presented no legal, rational or sound reason to deny Core's complaint. Therefore, Core requests that the Commission grant the relief requested herein.

Respectfully submitted,



Deanne M. O'Dell, Esquire
Attorney ID 81064
Eckert Seamans Cherin & Mellott LLC
213 Market Street, 8th Fl.
Harrisburg, PA 17108-1248
(717) 237-6000

Christopher Van de Verg, Esq.
Admitted pro hac vice
General Counsel
Core Communications, Inc.
209 West Street, Suite 302
Annapolis, Maryland 21401
Tel (410) 216-9895

Counsel for Core Communications, Inc.

Dated: February 15, 2012