

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

REPLY BRIEF OF XO COMMUNICATIONS SERVICES, INC.

February 15, 2012

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

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

**I. SUMMARY OF REPLY**

Core has failed in its burden of establishing its claim that XO owes Core any amount of money for the ISP-bound traffic that it accepts from XO. Core has no tariff that permits it to charge for this type of traffic, nor does it have any contractual basis for subjecting this traffic to anything but the bill and keep arrangement that is standard among CLECs in the state.

Core claims that the traffic at issue is subject to the terms of its intrastate switched access tariff, but nowhere does this tariff explicitly provide that Core may charge for terminating ISP-bound traffic or any traffic other than traditional toll traffic. Core’s defense of this claim is based on misleading and illogical interpretations of certain terms of its switched access tariff that do not support any conclusion that the switched access charge apply to this traffic.

Core also argues, in the alternative, that if the switched access rates in its tariff do not apply, then the Commission should enforce payment at TELRIC rates based on Verizon’s costs. However, Core has failed to provide any support for how these rates would apply to this traffic, nor how the Commission could impose such rates without violating state statutes related to the filed rate doctrine and prohibitions against retroactive ratemaking.

Even if the Commission finds that bill and keep does not apply in this case, the FCC has made it clear that the rate caps in the *ISP Remand Order* applied to all ISP-bound traffic, including traffic exchanged between CLECs. Core argues at length that this is incorrect, but can only support its argument by taking various statements from the FCC out of context, or implying context where none exists or, when faced with unambiguous statements of FCC intent, by making erroneous conclusory statements that the FCC is wrong or is without authority to issue such statement.

Core has failed to establish any basis for its demands for payment, and XO's refusal to pay Core's unlawfully billed charges is reasonable and justified. Core's request that XO be penalized for this refusal is preposterous and, like the rest of Core's demands, has no support in the law. XO respectfully submits that the Commission should deny all of Core's requests for relief.

## **II. XO DISPUTES CORE'S STATEMENTS OF FACT AND LEGAL BACKGROUND**

Before responding to Core's arguments, XO must address certain of Core's assertions in its Statement of Facts and its Legal Framework section. Without conceding any of Core's other statements of fact, XO disputes the following assertions.

Core has produced no evidence to support its assertion that traffic accompanied by a Carrier Identification Code ("CIC") "generally denote[s] long-distance, or toll, calls."<sup>1</sup> As XO explained in its Rebuttal Testimony,<sup>2</sup> which Core did not rebut, the CIC is a feature of the call records that Verizon transmits with the traffic it delivers to terminating carriers and is intended to identify the originating carrier of the traffic. The CIC does not nor is it intended to identify the

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<sup>1</sup> Core Main Brief at 6-7.

<sup>2</sup> XO Rebuttal Testimony at 10.

jurisdiction of the traffic. Thus, there is no validity to the argument that the traffic XO sent to Core is toll traffic solely because Verizon assigned a CIC in to the record for locally dialed, non-toll calls.

Core has produced no evidence whatsoever to support its position that the benefit to XO of its traffic exchange with Core is not balanced by an equal or greater benefit to Core.<sup>3</sup> As XO explained in its Rebuttal Testimony,<sup>4</sup> which Core did not rebut, the balance of benefits is overwhelmingly in favor of Core and its customers, who rely on the call origination services of other LECs, such as XO, particularly given that Core charges its ISP customers only nominally for call termination services. This also conforms to the findings of the FCC which, after years of studying this issue, has determined that “[m]ore recent analyses have recognized that both parties generally benefit from participating in a call, and therefore, that both parties should split the cost of the call.”<sup>5</sup>

Core has produced no evidence to support its insinuation that XO strips out call detail information for the traffic it sends to Core.<sup>6</sup> As XO explained in its Rebuttal Testimony,<sup>7</sup> which Core did not rebut, XO transmits all of the information available to it and neither strips nor alters this information. XO, using standard industry protocols, sent Verizon all the appropriate call detail information along with the call. XO does not control how Verizon captures this information in the call records.

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<sup>3</sup> Core Main Brief at 6. (“Core’s Pennsylvania network and services enable XO customers to complete calls to their ISPs, which in turn increases the utility of the XO customer’s local phone service.”)

<sup>4</sup> XO Rebuttal Testimony at 7.

<sup>5</sup> *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 ¶ 744 (rel. Nov. 18, 2011) (“*CAF Order*”).

<sup>6</sup> Core Main Brief at 7.

<sup>7</sup> XO Rebuttal Testimony at 19.

XO disputes Core's assertion that payment of transit traffic charges to Verizon undermines XO's contention that bill and keep applies to traffic exchanges with Core.<sup>8</sup> Verizon and XO have an interconnection agreement that governs XO's exchange of traffic with Verizon. Bill and keep, however, is the established arrangement for local or ISP-bound traffic exchanged between CLECs.

Core has produced no evidence to support its claim that XO has terminated "substantial volumes" of traffic on Core's network.<sup>9</sup> In fact, Core's bills to XO rarely approach \$2,000 per month, and have never exceeded \$7,000, even though Core is charging XO the extremely high switched access rates of rural LECs in Pennsylvania.<sup>10</sup> If Core were charging XO Verizon's switched access rates or the reciprocal compensation rate of \$.0007, the bills would be significantly lower. Thus, the amount of traffic is hardly "substantial" in any context and is more in line with the "trace usage" that Core had always surmised.<sup>11</sup> XO's impact on Core's network is negligible - so negligible that Core either did not notice or did not care that XO was "using" its network because it did not even bother to look at the industry standard CABS records until 2007.<sup>12</sup> For these reasons, XO also disputes Core's assertion that "XO's non-payment challenges Core's ability to maintain a robust and reliable network."<sup>13</sup> If this is truly the case, then there may be serious issues with Core's financial, technical, and managerial qualifications that merit Commission investigation as to its fitness to continue to operate in Pennsylvania.

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<sup>8</sup> Core Main Brief at 8.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> Exhibit BLM-25 (rev), Exhibit BLM-26.

<sup>11</sup> Core Main Brief at 10.

<sup>12</sup> Mingo Direct Testimony at 8.

<sup>13</sup> Core Main Brief at 12.

### III. CORE HAS NO TARIFF THAT PERMITS IT TO CHARGE FOR TERMINATING THE ISP-BOUND TRAFFIC THAT IS THE SUBJECT OF THIS PROCEEDING

In defense of its argument that its tariffed switched access rates apply to XO's traffic, Core begins by invoking the filed rate doctrine, as derived from Chapter 13 of Title 66 of the Pennsylvania Statutes. Core correctly reports that the doctrine "provides that rates and tariffs established by the Commission are *prima facie* reasonable and have the force of law until modified or changed by the Commission or after judicial review."<sup>14</sup> XO agrees that this doctrine is applicable to this case. Core carries this argument too far, however, when it alleges that the Commission "thoroughly reviewed" its tariff and that it has been "permitted to go into effect."<sup>15</sup> This implies that that the tariff has received the Commission's imprimatur and that, further, the Commission concurs in Core's interpretation of that tariff. However, this assertion is directly contradicted by Core itself two sentences prior, when it cites the provision in the *Global Order* that states that CLEC access tariffs like Cores will go into effect by "operation of law" when the access charges are at or below those of the ILEC.<sup>16</sup> Specifically, the *Global Order* provided that

[u]pon filing of an initial access tariff by a CLEC, the rates contained therein will be allowed by the Commission to go into effect by operation of law. The Commission will *presume* that CLEC access charge rates that are at or below the corresponding access rates (for origination and termination) of the local ILEC in whose certificated territory the CLEC is providing service are reasonable without requiring cost documentation . . . .<sup>17</sup>

This indicates that any "review" of Core's switched access tariff was likely superficial, at best, and even so, provides no support for Core's conclusion that the tariff "accordingly" applies to the

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<sup>14</sup> Core Main Brief at 19, citing *Application of Tri-gen-Philadelphia Energy Corporation*, Pa. P.U.C. Docket No. A-130375F5000, 2005 WL 6502674 (Pa. P.U.C.).

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

<sup>16</sup> *Id.*

<sup>17</sup> *In re Nextlink Pennsylvania, Inc.*, Docket No. P-00991648; P-00991649, 93 Pa.P.U.C. 172, 1999 WL 1041892 at \*19 (Sep. 30, 1999) ("*Global Order*") (emphasis supplied).

XO traffic at issue.<sup>18</sup>

Core also concocts a straw man argument in its relentless effort to shift the burden of proof to XO when it asserts that “XO, as the party challenging Core’s Tariff, bears the ‘burden of proof of demonstrating that the rates are not just and reasonable . . . .’”<sup>19</sup> Core proceeds to assert that this is “a burden XO does not even pretend to carry.”<sup>20</sup> Quite so. This is because XO is not challenging the validity or reasonableness of Core’s switched access tariff rates. XO does not argue (nor does it concede) that Core’s switched access tariff rates are presumptively valid as to the traffic *to which the rates apply* - *i.e.*, non-local, toll, interexchange traffic. The issue is not the validity of Core’s tariffs, as much as Core has attempted to reframe it as such. The issue here is whether Core’s tariffed switched access rates apply *at all* to ISP-bound traffic. The filed rate doctrine does not entitle Core to any presumption that they do.

In fact, the filed rate doctrine supports XO’s position, not Core’s. As XO explained in its Main Brief, 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

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<sup>18</sup> Core Main Brief at 19-20.

<sup>19</sup> *Id.* at 20.

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

than that specified in the tariffs of such public utility applicable thereto.”<sup>21</sup> Accordingly, Core is barred from demanding or receiving any payment for terminating this traffic.

Another aspect of the filed rate doctrine that has not been mentioned is that “[t]he last sentence of [66 Pa. C.S.A. §] 1303 embodies a well-known principle of construction; terms and conditions are strictly construed against the party drafting them.”<sup>22</sup> In other words, if the terms of the tariff are not plain, they must be construed against the issuer – in this case, Core. In this regard, the filed rate doctrine also undermines Core’s case. Core devotes a considerable amount of space to its assertion that the “plain terms” of its tariff apply to the XO traffic at issue. However, far from being “plain” the terms of the tariff are anything but. Indeed, Core attempts to exploit this ambiguity in order to force-fit XO’s traffic into its access tariff, implicitly imposing terms that the Commission has previously prohibited carriers from doing explicitly in *MCIMetro*, in which it rejected MCIMetro’s tariff filing that would have established local call termination charges.<sup>23</sup> Core explains, at length, these “plain terms” on pages 21 through 22 of its Main Brief. XO has earnestly worked to parse the language on these pages, and can make no sense of them. Core attempts to distinguish between “access service” and “switched access service,” clouds the differences between Core and its customers (as well as among carriers in general), and interprets the terms in its tariff in ways that defy their plain meaning and are at odds with standard industry practices. It then draws tenuous connections between these terms,

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<sup>21</sup> 66 Pa. C.S.A. § 1303.

<sup>22</sup> *Phone Talk, Inc. v. Bell Telephone Company of Pennsylvania*, 75 Pa.P.U.C. 256, 274; 1991 WL 501894 (Pa.P.U.C.).

<sup>23</sup> *Pennsylvania Pub. Util. Comm’n v. MCIMetro Access Transmission Servs., LLC*, 2006 WL 2051138 at \*10 (Pa.P.U.C. 2006) (“*MCIMetro*”).

all of them implied, to arrive at an illogical conclusion that its tariff “clearly applies to the traffic XO sends to Core.”<sup>24</sup>

XO disagrees, and submits that no sense can be made of the twisted and tortured explanation provided by Core, which is anything but plain. Nothing in this tariff, or in Core’s explanation, establishes that switched access rates apply to the termination of local traffic or ISP-bound traffic.

Core’s tariff provides that only three call types are subject to switched access rates, none of which are local calls. Specifically, the tariffed switched access rates apply to Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access.<sup>25</sup> The term “Feature Group” refers to one of “four separate switching arrangements available from local exchange carrier end central to interexchange carriers. These switching arrangements allow the LEC’s end users to make toll calls via their favorite long distance carrier.”<sup>26</sup> As the FCC explained,

Local exchange carriers offer four types of switched access arrangements to interexchange carriers (IXCs): Feature Group A (formerly ENFIA A) provides carriers with a line-side connection to the local switch and a local seven-digit access number; Feature Group B (formerly ENFIA B and C) provides carriers with a trunk-side connection to the local switch and a 950-1XXX access number; Feature Group C, available only to AT & T, provides a trunk-side connection and “1 +” service; FGD provides every carrier with “1 +” service and a 10XXX access code, a trunk-side connection to the switch, and several additional features.<sup>27</sup>

Thus, whatever Core purports to be offering in its tariff, the only switched access services that actually are offered are services to and for interexchange carriers, for the origination or

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<sup>24</sup> Core Main Brief at 21.

<sup>25</sup> Core PA P.U.C. Tariff No. 4 (“Core Tariff No. 4”), Section 4.2.3.

<sup>26</sup> Newton’s Telecom Dictionary at 469 (25th ed. 2009) (emphasis added).

<sup>27</sup> *GTE Sprint Communications Corporation, et al. Joint Petition for Expedited Rulemaking*, CC Docket No. 85–348, Report and Order, FCC 86-280 n.1 (June 19, 1986), 1986 WL 291864 (F.C.C.).

termination of interexchange traffic, not local or ISP-bound traffic. This is consistent with the established understanding of what a switched access tariff involves. As XO noted in its Main Brief, XO is not aware of a single instance - and Core has not identified any - in which this Commission, or any other state commission, has applied intrastate switched access rates to local traffic generally, or to ISP-bound traffic specifically. In fact, far from applying switched access rates to local or ISP-bound traffic, the Commission has stated that “the use of bill and keep compensation” is the “existing CLEC-to-CLEC intercarrier compensation practice in Pennsylvania.”<sup>28</sup> Indeed, this is actually consistent with Core’s tariff, which contains provisions regarding “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>29</sup>

In a last gasp attempt, Core reaches back ten years to recall a time (now past) when access charges were imposed on non-toll traffic. Core reports the observation of the Commission in *Cellco Partnership* that ALLTEL collected access charges from Verizon with respect to indirect traffic that Verizon Wireless terminated on its network.<sup>30</sup> What Core fails to report is that that even ALLTEL conceded that this was no longer appropriate, and that the *Cellco Partnership* proceeding essentially relegated this to the past.<sup>31</sup>

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<sup>28</sup> *MCImetro* at \*1, 9.

<sup>29</sup> Core Tariff No. 4 at Original Sheet No. 9.

<sup>30</sup> Core Main Brief at 23, citing *Petition of Cellco Partnership d/b/a Verizon Wireless*, Pa. P.U.C. Docket No. A-310489F7004, 2005 WL 6502686 (“*Cellco Partnership*”)

<sup>31</sup> *Cellco Partnership* at sheet 3-4.

As expected, Core also references another case, in Alabama.<sup>32</sup> However, as XO explained in its Main Brief, this case is hardly applicable here. The Alabama case also dealt with wireless traffic, not wireline ISP-bound traffic. And while 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, 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>33</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 and at issue in this case,.

#### **IV. TELRIC RATES DO NOT APPLY TO THE ISP-BOUND TRAFFIC THAT IS THE SUBJECT OF THIS PROCEEDING**

Core's alternative proposal is that the Commission apply the Verizon tandem-based reciprocal compensation rate (\$.002439 per minute) - which not even Verizon pays - to XO's ISP-bound traffic. Core alleges that "[t]he TELRIC tandem reciprocal compensation rate is generally applicable to CLEC termination of traffic in Pennsylvania in a variety of contexts"<sup>34</sup> and that "TELRIC is well-established and broadly applicable in Pennsylvania."<sup>35</sup> However, it has provided no examples of this "variety," nor any evidence of its "broad applicability" to any kind of traffic exchange other than with ILECs.<sup>36</sup> The only authority that it discusses in this

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<sup>32</sup> Core Main Brief at 25, citing *Compensation for Indirect CMRS Traffic Petitioners*, Ala. P.S.C. Docket No. 28988, 232 P.U.R.4th 148, 2004 Ala. PUC LEXIS 27.

<sup>33</sup> Exhibit XO-6 (Core-AT&T Proceeding, Tr. at 115).

<sup>34</sup> Core Main Brief at 25-26.

<sup>35</sup> *Id.* at 27.

<sup>36</sup> Core states that "Commission-approved TELRIC rates are routinely incorporated into Commission-approved interconnection agreements," *id.* at 28, but of course only to the extent applicable.

argument is *Palmerton*, a case that did not involve the application of TELRIC, made no holding regarding TELRIC, and did not discuss local or ISP-bound traffic at all.<sup>37</sup>

Core relies on the *Palmerton* case to support its contention that it should be able to charge for the termination of traffic simply because it incurred costs, and accuses XO of “wishful thinking that Core’s costs can simply be assumed into non-existence.”<sup>38</sup> This is another straw man argument with no basis in the record. XO has never denied that Core incurs costs. XO, however, incurs costs too. XO’s position is that, while Core may have incurred costs, the standing arrangement for carriers to recover those costs is bill and keep, where each carrier recovers those costs from its own customers rather than foisting them on its competitors. Other than bill and keep, Core has established no other lawful method for explicitly billing XO for the traffic in question.

Neither *Palmerton* nor any other Commission holding supports the type of *post hoc* ratemaking that Core is advocating with its TELRIC proposal. The facts and issues in *Palmerton* are not remotely applicable to this case. In *Palmerton*, the traffic at issue was interexchange (*i.e.*, toll) traffic, *Palmerton* had a tariff that applied to and established a rate for the termination of interexchange traffic, and carriers other than respondent Global NAPs were paying *Palmerton*’s tariffed rates.<sup>39</sup> Consequently, the Commission was simply enforcing a tariff that it concluded was applicable to the non-local, non- ISP-bound traffic that was at issue in that case, and did not

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<sup>37</sup> *Palmerton Telephone Company v. Global NAPs South, Inc., et al.*, Pa. P.U.C. Docket No. C-2009-2093336, Opinion and Order (March 16, 2010) (“*Palmerton*”). In fact, the only discussion of TELRIC was in an incidental paragraph and footnote describing its applicability to ILEC - CLEC traffic: “The clear inference here is that the GNAPs intercarrier compensation with *Palmerton* for IP-enabled traffic should be based on the total element long-range incremental cost (TELRIC) standard that this Commission has utilized for deriving reciprocal compensation rates for the exchange of local exchange traffic *between interconnected ILECs such as Verizon PA and CLECs.*” *Palmerton* at n.21 (emphasis supplied).

<sup>38</sup> *Id.* at 26.

<sup>39</sup> See *Palmerton* at 1, 13, 15-18, 21-23 (March 16, 2010) (“*Palmerton*”).

(as Core implies) conclude that a carrier incurring costs could charge for services even in the absence of an applicable tariff. To conclude otherwise would have violated the filed rate doctrine<sup>40</sup> and the prohibition against retroactive ratemaking.<sup>41</sup>

Core maintains that “[t]here is no logical or policy reason to prevent the Commission from finding that TELRIC applies to CLEC-CLEC,”<sup>42</sup> but there are indeed many policy and legal reasons that militate against this. There is no support for Core’s proposal that TELRIC rates apply.

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

Core asserts that XO’s principal defense in this matter is grounded in the FCC’s *ISP Remand Order*, in which the FCC preempted state jurisdiction over compensation for ISP-bound traffic.<sup>43</sup> This is not true, and is another example of the straw man arguments that Core has concocted. XO’s principal argument is that Core is without any authority whatsoever to bill switched access rates to the traffic that it has terminated from XO, and that bill and keep is the appropriate compensation arrangement. Only to the extent that this Commission determines that some form of net compensation is due does XO invoke the *ISP Remand Order*, for the proposition that any rate must be capped at \$.0007 per MOU.

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<sup>40</sup> See *Popowsky v. Pa. PUC*, 647 A.2d 302, 306-307 (Pa. Commw. Ct. 1994) (holding that because the public utilities in question did not have lawful tariffs on file with the PUC, the utilities could not lawfully charge customers anything for the provision of utility service); *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 . . .”). See also *Phone Talk, Inc. v. Bell Telephone Company of Pennsylvania, et. al*, 75 Pa.P.U.C. 256, 1991 WL 501894 (September 12, 1991) (“*Phone Talk*”).

<sup>41</sup> See *Phone Talk*, 1991 WL 501894 at 17. “[T]he Commission and courts have long required that changes in a utility’s rates apply only to service provided in the future. . . . That order, allowing an increase in the rates of the utility, could operate prospectively only.” (internal citations omitted)

<sup>42</sup> Core Main Brief at 27.

<sup>43</sup> *Id.* at 33.

Core devotes most of its Main Brief attempting to rebut the FCC's Amicus Brief in the *AT&T V. Pac-West* proceeding,<sup>44</sup> using arguments derivative of those that the 9th Circuit found unavailing. Core first asserts that while the *ISP Remand Order* may have preempted ILEC-CLEC traffic, it was not preemptive of CLEC-CLEC traffic. Core argues that "the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption."<sup>45</sup> And so there is a clear indication that the FCC has preempted state regulation. In the *ISP Remand Order*, the FCC stated that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue."<sup>46</sup> The FCC referred simply to "ISP-bound traffic," not "ILEC-CLEC traffic." While much of the Order may have been devoted to the mechanics of ILEC-CLEC interconnection (no party to the proceeding described any other kind of dispute), the FCC's unqualified assertion of authority is explicit and must be taken at face value. As the 9th Circuit stated,

[i]n sum, it is well settled that the ISP Remand Order has preemptive effect with regard to the ISP-related issues it encompasses. The operative question in this case, then, is whether the ISP Remand Order evidences the FCC's intent to exercise its jurisdiction over local ISP-bound traffic exchanged between two CLECs.<sup>47</sup>

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<sup>44</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>45</sup> Core Main Brief at 34.

<sup>46</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic*, CC Docket No. 96-98, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 82 (2001) ("*ISP Remand Order*").

<sup>47</sup> *AT&T Comms. of Ca., Inc. et al. v. PacWest Telecomm., Inc. et al.*, 651 F.3d 980, 991 (9th Cir. 2011) ("*PacWest*").

The 9th Circuit proceeded to answer that “operative question” in the affirmative, thus establishing that the FCC had also preempted CLEC-CLEC traffic.

Core disagrees with that holding, and continues to argue that the FCC never intended to address, and did not address, CLEC-CLEC traffic in the *ISP Remand Order*. However, it is important to note that the *ISP Remand Order* was one component of an overall proceeding. It was the progeny of a previous order on this subject, the *ISP Declaratory Ruling*.<sup>48</sup>

Core also argues that the FCC did not express any intent to address CLEC-CLEC traffic in the *ISP Declaratory Ruling*,<sup>49</sup> nor did it provide any notice of such a scope, other than a “fleeting” reference in a footnote to a prior order. Core’s argument is misleading. The footnote and the paragraph it supported were in fact the leadoff statement of purpose of the proceeding. Paragraph 1 of the *ISP Declaratory Ruling* makes it clear that it was addressing this issue for *all* LECs. The FCC stated that

the Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP). . . . This question sometimes has been posed more narrowly, *i.e.*, whether an incumbent LEC must pay reciprocal compensation to a competitive LEC (CLEC) that delivers incumbent LEC-originated traffic to ISPs. *Because the pertinent provision of the 1996 Act pertains to all LECs, we examine this issue in the broader context.* 47 U.S.C. § 251(b)(5).<sup>50</sup>

As the 9th Circuit noted, “[b]oth the 1999 Declaratory Ruling and the 2001 ISP Remand Order reflect that the FCC was well aware that the market distortion problem was not limited to ILEC-

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<sup>48</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-bound Traffic*, CC Docket No. 96-98, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Ruling*”).

<sup>49</sup> Core Main Brief at 35.

<sup>50</sup> *ISP Declaratory Ruling* ¶ 1 and n. 1 (emphasis supplied).

CLEC arrangements, and so addressed the problem of ISP-bound traffic generally, regardless of the precise type of LEC-to- LEC relationship in which it was manifested.”<sup>51</sup>

In its Main Brief, Core discounts this footnote, and selectively quotes the same paragraph for the proposition that “the FCC recognized that the issue of ISP-bound traffic was an issue between ILECs and CLECs” and that “parties should be bound by their existing interconnection agreements . . .”<sup>52</sup> The complete paragraph, which is reproduced in the footnote below, demonstrates that the FCC was only describing the positions of the two types of industry parties, and not describing the scope of the inquiry.

Core also asserts that, on the same day that it released the *ISP Remand Order*, the FCC issued a Notice of Proposed Rulemaking in which “the FCC noted that it had never regulated

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<sup>51</sup> *PacWest*, 651 F.3d at 994.

<sup>52</sup> Core Main Brief at 39-40. The complete paragraph reads as follows:

The Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP). Generally, competitive LECs (CLECs) contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996. Incumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5). After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

CLEC-CLEC traffic, and had no intention of doing so.”<sup>53</sup> The FCC said nothing of the sort, and Core has taken enormous liberties with its interpretation. What the FCC actually said was

[i]n issuing this NPRM, we do not expect that we will extend intercarrier compensation rules to Internet backbones, on which we do not currently impose rate-making regulation. Neither do we expect to extend compensation rules to other interconnection arrangements *that are not currently subject* to rate regulation and that do not exhibit symptoms of market failure. . . . Thus, we do not contemplate a need to adopt *new* rules governing CLEC-to-CLEC, IXC-to-IXC, CMRS-to-CMRS or CMRS-to-IXC arrangements.<sup>54</sup>

This statement does not in any way support Core’s interpretation. Furthermore, it must be remembered that this statement was made in the context of the *ISP Remand Order*, released contemporaneously, which had instituted a reciprocal compensation regime on one form of CLEC-CLEC traffic. As the *FCC Amicus Brief* explains, “[t]he FCC in these statements expressed its tentative views on possible future rule revisions. The FCC in those statements did not mention the existing ISP-bound compensation rules, let alone purport to interpret their scope.”<sup>55</sup> This was supported by the 9th Circuit, which held that “[w]e therefore take the NPRM footnote at face value: the FCC ‘d[id] not contemplate a need to adopt new rules governing CLEC-to-CLEC . . . arrangements’ -- that is, rules other than those already adopted in the *ISP Remand Order*.”<sup>56</sup>

Core latches on to the phrase “market failure” in arguing that since the *ISP Remand Order* had found no symptoms of CLEC-CLEC “market failure” (in those exact terms) in conjunction with the *ISP Remand Order*, the *ISP Remand Order* could not have involved CLEC-

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<sup>53</sup> Core Main Brief at 40.

<sup>54</sup> *Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 ¶ 2 and n. 2 (2001) (“*Intercarrier Compensation NPRM*”) (emphasis supplied).

<sup>55</sup> *FCC Amicus Brief* at 23-24 (emphasis supplied).

<sup>56</sup> *PacWest*, 651 F.3d at 997 (internal citations omitted.)

CLEC arrangements.<sup>57</sup> This is incorrect. The term “market failure” is used only once throughout the entire NPRM, and never defined. However, the NPRM goes on to describe what can only be considered an overall market failure regarding ISP-bound traffic:

The record developed in the ISP Intercarrier Compensation proceeding strongly suggested that we should consider adopting a bill and keep compensation rule for ISP-bound traffic. We now believe that adopting such a rule is the correct policy choice because the exchange of reciprocal compensation payments appears to have *distorted the development of competition* in the local exchange market.”<sup>58</sup>

If, as Core suggests, evidence of market failure is needed to establish that the *ISP Remand Order* applies to CLEC-CLEC traffic, then there it is. Core’s argument fails.

Core also attacks the 9th Circuit decision by arguing that the *ISP Remand Order* does not apply to CLEC-CLEC traffic because its provisions are triggered by actions that are characteristic to ILEC-CLEC traffic only. In particular, Core refers to the mirroring rule and rules regarding negotiation of interconnection agreements under Section 252 of the Act.<sup>59</sup> However, these rules do not act as *restrictions* on the applicability of the *ISP Remand Order* rate cap rules, but instead are an *expansion* of those general rules to specific situations involving ILECs. For example, in regard to the mirroring rule, the *FCC Amicus Brief* explained that the mirroring rule was not a predicate to enforcement of the rate cap, but an extension of that rule involving only ILEC traffic.

The FCC imposed this special “mirroring” requirement only upon ILECs because of its concern about the superior bargaining power of incumbent LECs. CLECs, in contrast, were not thought to have superior bargaining power and hence there was no reason to apply the mirroring rule to them. Therefore, the FCC’s decision to limit a mirroring requirement to ILEC-to-CLEC traffic does not signify that the compensation regime in its entirety is limited to ILEC-to-CLEC traffic.<sup>60</sup>

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<sup>57</sup> Core Main Brief at 40.

<sup>58</sup> *Intercarrier Compensation NPRM* ¶ 66 (emphasis supplied).

<sup>59</sup> Core Main Brief at 36-37.

<sup>60</sup> *FCC Amicus Brief* at 23 (internal citations omitted).

Core also asserts that the “FCC again confirmed that the scope of the ISP Remand Order was limited to ILEC-CLEC traffic” in the *Core Forbearance Order*, citing a passage related exclusively to the ILEC-CLEC mirroring rule.<sup>61</sup> The truth is that the *Core Forbearance Order* did not confirm that the *ISP Remand Order* applied only to ILEC-CLEC traffic. Nowhere does it state that it is confirming any such thing, and in fact its summary of the \$.0007 rate cap indicates that it applies to *all* carriers.

The interim regime adopted by the Commission consisted of a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute-of-use and declining to \$.0007 per minute-of-use.<sup>62</sup> These rate caps reflected the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements.<sup>63</sup> The rate caps limited only what *carriers* could recover from other *carriers*; *carriers* remained free to recover any additional costs from their ISP customers. Because the interim rates were *caps* on intercarrier compensation, the Commission determined that, to the extent the states had already set rates below the caps or imposed bill and keep for ISP-bound traffic (or otherwise had not required payment of compensation for this traffic), the lower rates would continue to apply.<sup>64</sup>

As the *FCC Amicus Brief* notes, nowhere in the rate cap portions of the *ISP Remand Order* did the FCC use the term “ILEC,” “incumbent carrier,” or similar restrictive language.<sup>65</sup>

It explains that

[t]he unmodified word ‘carrier’ the FCC used in adopting the rate cap and the new markets rules has a different meaning than the narrower term “ILEC” (and its synonyms) that it used in adopting the mirroring rule. The use of the broad term ‘carrier’ shows that the rate cap and new markets rules apply to exchanges of ISP-bound traffic between two CLECs.”<sup>66</sup>

Further, as to the *Core Forbearance Order*, the *FCC Amicus Brief* explains that

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<sup>61</sup> Core Main Brief at 40.

<sup>62</sup> *ISP Remand Order* ¶ 78.

<sup>63</sup> *Id.* ¶ 85.

<sup>64</sup> *Petition of Core Communications, Inc. for Forbearance*, WC Docket No. 03-171, Order, 19 FCC Rcd 20179 ¶ 6 (2004).

<sup>65</sup> See *FCC Amicus Brief* at 16.

<sup>66</sup> *Id.* at 17.

[t]o be sure, the FCC in the *Core Forbearance Order* also stated that “if an incumbent LEC has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill and keep basis during the interim period.” That statement, however, simply describes the application of the new markets and mirroring rules where the originating carrier is an ILEC. It does not demonstrate, as the district court and appellees claim, that the intercarrier compensation regime adopted in the *ISP Remand Order* applies only to ILEC-to-CLEC traffic. Nor did the FCC, in making that statement, intend to limit retroactively the new markets rule to ILEC-to-CLEC traffic.”<sup>67</sup>

Core also claims that “courts” reviewing the *ISP Remand Order* have “generally presumed” that the *ISP Remand Order* is limited to ILEC-CLEC traffic.<sup>68</sup> However, Core only lists one decision, *In re Core Communications*<sup>69</sup> and again, the cited passages are simply the court’s recitation of a typical (but not universal) ILEC-CLEC scenario<sup>70</sup> and the mirroring rule – after which the court proceeds to confirm the rate cap rules in the *ISP Remand Order* and denies Core’s appeal. In this case, Core had appealed the FCC’s denial of Core’s request that the FCC forbear from enforcing the rate cap rules. The D.C. Circuit denied the appeal, finding that it was reasonable for the FCC to determine that “there is no public policy rationale to support a subsidy running from all users of basic telephone service to those end users who employ dial-up Internet access, and that the caps were thus necessary to protect consumers of basic telephone service.”<sup>71</sup> Incidentally, to the extent that background recitations are at all dispositive, it should be noted that the D.C. Circuit’s recitation of the rate cap rule confirms that it applies to *all* carriers.

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<sup>67</sup> *Id.* at n. 44.

<sup>68</sup> Core Main Brief at 41.

<sup>69</sup> 455 F.3d 267 (D.C. Cir. 2007)

<sup>70</sup> *Id.* at 270. (Under the dial-up method, a consumer uses a line provided by a local exchange carrier (LEC) - *usually* an incumbent local exchange carrier (ILEC) - to dial the local telephone . . . . If ISP-bound traffic were governed by § 251(b)(5), then reciprocal compensation arrangements would be required for the ILEC-to-CLEC hand-off *described above*, and ILECs would be required to compensate CLECs for completing their customers’ calls to ISPs. (emphasis supplied.) Note: “usually,” but not always.

<sup>71</sup> *Id.* at 278 (internal citations omitted).

*Rate Caps.* The Commission adopted “rate caps,” which established a gradually declining maximum rate that a carrier (typically, a CLEC) could charge another carrier (typically, an ILEC) for delivering a call to an ISP. Although the rate caps limited how much carriers could recover from other carriers, the carriers remained free to recover “[a]ny additional costs ... from end-users,” that is, from their own customers.”<sup>72</sup>

Once again, a decision on which Core relies, and claims to “confirm” its argument, works against it.

Finally, Core accuses the FCC staff of using the *FCC Amicus Brief* to “retroactively enlarge the scope of the *ISP Remand Order*,” and it cites to Justice Scalia’s concurrence in *Talk America* and its warning about the role of agency amicus briefs.<sup>73</sup> What Core fails to divulge is that the Court in *Talk America* found that the FCC’s amicus brief in that case *was entitled to deference* in deciding the issues.<sup>74</sup> In describing the applicable standard, the Court stated that “we defer to an agency’s interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>75</sup> As XO has established above, and the 9<sup>th</sup> Circuit confirmed, in reliance in part on the FCC Amicus Brief, there was nothing erroneous or inconsistent about the interpretation therein, and its thorough and well developed nature demonstrated fair and considered judgment.

As demonstrated above, the inherent flaw in Core’s Main Brief is that Core pulls quotes out of context or it plucks background recitations or a specific examples within various orders

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<sup>72</sup> *Id.* at 273 (emphasis supplied, internal citations omitted).

<sup>73</sup> Core Main Brief at 41 and n.10, citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2266; 2011 WL 2224429; 2011 U.S. LEXIS 4375, at \*31-\*32 (June 9, 2011) (“*Talk America*”).

<sup>74</sup> *Talk America*, 2011 WL 2224429 at \*3.

<sup>75</sup> *Id.* at \*7 (internal citations omitted).

and erroneously elevates them to “confirmations” of the FCC’s overall intent. It has produced no evidence, however, that the *ISP Remand Order* is restricted to ILEC-CLEC traffic only and has failed to rebut ample authority cited by XO that this Order it applies to CLEC-CLEC traffic as well.

## **VI. XO ACTED APPROPRIATELY UNDER THE CIRCUMSTANCES**

Core has made a number of accusations regarding XO’s “bad faith” during the conduct of this dispute and has recommended that the Commission impose penalties on XO. These are irresponsible charges that have no basis in fact. If there is any bad faith to be found in this proceeding, it is with Core and its heavy-handed attempt to leverage the Commission’s authority in the service of a baseless claim.

Core disingenuously portrays itself as a hapless victim and accuses XO of “free riding” on its network, when it is actually Core that has employed an arbitrage business plan predicated on shifting its costs to competitors like XO. As XO explained in its Main Brief, the balance of benefits is overwhelmingly in favor of Core and its customers. Core’s ISP customers rely on the call origination services of other LECs, such as XO, for their customers to dial up to Core’s ISP customers. Mr. Mingo testified in the Core-AT&T Proceeding that Core charges its ISP customers only nominally for call termination services,<sup>76</sup> leading to the inescapable conclusion that Core’s business model relies on recovering its costs primarily, if not completely, through intercarrier compensation charges to other LECs. This is precisely the type of manipulation that the FCC, with the *ISP Remand Order* and now the *CAF Order*, has sought to discourage for years.

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<sup>76</sup> Exhibit XO-7 (Core-AT&T Proceeding, Mingo Surrebuttal Testimony at 11).

Core accuses XO of “stonewalling” in negotiating a traffic exchange agreement and “forcing Core to engage in this litigation,”<sup>77</sup> which hardly seems plausible given that Core filed its complaint less than six weeks after it had “requested” negotiations – a request couched in a refutation of all of XO’s reasonable and well considered arguments and which demanded TELRIC rates.<sup>78</sup>

Core also claims that it has been harmed because XO is responsible for causing a “substantial portion of Core’s network costs.”<sup>79</sup> That claim is not supported by any record evidence - indeed, Core did not bother to put on any evidence regarding its costs. Furthermore, it is clearly ridiculous. Core’s bills to XO rarely approach \$2,000 per month, and have never exceeded \$7,000.<sup>80</sup> Such amounts are hardly “substantial” in any context. As previously noted, XO’s impact on Core’s network is negligible – so negligible that Core either did not notice or attempt to determine that XO was “using” its network because it did not even bother to look at the CABS records until 2007.<sup>81</sup> If XO was causing a “substantial portion” of Core’s costs that Core was not recovering, surely Core would have noticed and done something about it.

All of these unfounded assertions by Core lead to Core’s request that the Commission impose civil penalties on XO for its purportedly “unreasonable and bad faith actions to refuse to make any payment for services rendered”<sup>82</sup> -- including penalties for the period during which XO did not even receive any bills from Core!<sup>83</sup> Core asserts that this claim is justified “[b]ecause XO’s claims stretch way beyond any reasonable factual, policy or legal justifications . . . .”

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<sup>77</sup> Core Main Brief at 32.

<sup>78</sup> Exhibit BLM-12.

<sup>79</sup> Core Main Brief at A-9.

<sup>80</sup> Exhibit BLM-25 (rev), BLM-26.

<sup>81</sup> Mingo Direct Testimony at 8.

<sup>82</sup> Core Main Brief at 30.

<sup>83</sup> *Id.* at 33.

However, if this is the standard by which XO's actions must be gauged, then Core's claim must fail. As XO has explained above and in its Main Brief, it has every "factual, policy or legal justification" for its position.

XO had every right not to pay. First, Core's bills covering the time frame prior to September 2005 were issued after the four year limitation on backbilling expired. Second, Core's bills sought payment for the termination of ISP-bound traffic, but Core did not have (and still does not have) a tariff or agreement establishing a lawful rate for that traffic, which under Pennsylvania law means that Core cannot charge for it.<sup>84</sup> Finally, Core's bills sought to charge a discriminatory rate for the termination of locally dialed traffic, one that is 20 times the rate paid by Verizon for precisely the same kind of traffic (\$0.0007 per minute).

These are the factual justifications for XO's disputing any obligation to pay. As to the policy justification, XO has described at length the FCC's policy regarding the market distorting effects of the type of regulatory arbitrage in which Core has engaged, a policy that it described before Core ever began providing service in Pennsylvania. Finally, from a legal perspective, XO's position has been vindicated in the *FCC Amicus Brief* and the 9th Circuit's decision.

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<sup>84</sup> For the matter, even for the limited amount of traffic to which Core's access tariff might apply, Core is barred from *any* backbilling. Section 2.5.2 of Core's Tariff No. 4 (emphasis supplied) provides that:

The Company *shall bill on a current basis* all charges incurred by, and credits due to, the Customer under this rate sheet attributable to services established, provided, or discontinued *during the preceding billing period*.

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The Company *shall* present invoices for all Charges *monthly* to the Customer.

Further, a reading of 66 Pa. C.S.A. § 3301, which describes the Commission's authority to impose penalties plainly shows that XO is not subject to any penalty<sup>85</sup> Core does not allege any conduct by XO that falls within the scope of this statute - nor could it. XO has not violated any statutory provision, has not failed to perform any duty, has not failed to obey any regulation or final Commission determination, and has not failed to comply with any court order. The only thing XO has done is refuse to pay a rate that is not specified in either a contract or a tariff and to take the position that it would not pay bills that sought to collect unlawful rates. The undisputed facts show that Core alone is responsible for the situation in which it finds itself and that XO has not acted unlawfully.

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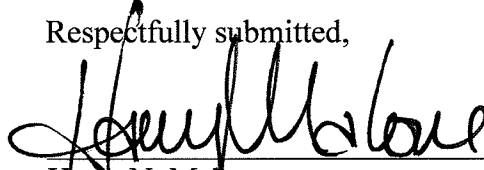
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If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

## VII. 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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