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June 7, 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 Exceptions 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)
Office of Special Assistants (CD only)

CERTIFICATE OF SERVICE

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

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Dated: June 7, 2012

Deanne M. O'Dell, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF CORE COMMUNICATIONS, INC.

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Dated: June 7, 2012

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I. INTRODUCTION

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

The practical effect of XO's actions is that Core continues to remain uncompensated for some 8,000,000-plus minutes of use ("MOUs") of telecommunications traffic generated by XO end users (or carriers whom XO serves on a wholesale basis) and terminated by Core to its enhanced service provider customers in Pennsylvania. As if that were not enough, however, XO continues to send Core traffic which Core must terminate and for which XO continues to refuse to pay anything. Unlike a traditional commercial setting where a provider of a service can simply stop providing the service if it does not get paid, Core is without recourse because it cannot simply stop accepting XO's traffic. Instead, Core is forced to continue to terminate the traffic, at its own cost, and seek compensation through litigation as it has done here.

As explained further below, the Commission should direct XO to pay Core for the termination of past traffic pursuant to Core's intrastate access tariff, Pa. P.U.C. Tariff No. 4,

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

II. EXCEPTIONS

Core excepts to the following findings of fact ("FOFs") and conclusions of law ("COLs") from the I.D.:

FINDINGS OF FACT

Core Exception No. 1—The I.D. erred in finding that: "Core has no tariff in Pennsylvania which establishes a rate for terminating locally-dialed ISP traffic." I.D., at 14 (FOF # 21).

Core Exception No. 2—The I.D. erred in finding that: "XO has acted in good faith in disputing Core's bills." I.D., at 15 (FOF # 28).

CONCLUSIONS OF LAW

Core Exception No. 3—The I.D. erred in concluding that:

> Core's alternative position that the TELRIC rate can be applied to the local traffic is also unavailing. As Core must adhere to its tariffs, it also cannot charge the untariffed TELRIC rate. There is no evidence of record, or case law cited, that would provide for the application of TELRIC rates to other than traffic terminated pursuant to interconnection or traffic exchange agreements. Core and XO have no such agreement. I.D., at 30.

Core Exception No. 4—The I.D. erred in concluding that:

> The PacWest decision, which was issued on June 21, 2011, subsequent to the Commission's ruling on the material questions in Core v. AT&T, Docket Nos. C-2009-2108186, C-2009-2108239, by Opinion and Order entered September 8, 2010, requires a re-examination of Commission authority to resolve intercarrier compensation disputes concerning local ISP-bound traffic exchanged between two CLECs. See, AT&T Communications of California, Inc. et al. v. PacWest Telecomm, Inc. et al., 651 F.3d 980 (9th Cir. 2011) (PacWest). I.D., at 34 (COL # 2).

Core Exception No. 5—The I.D. erred in concluding that: "The FCC's interpretation of the ISP Remand Order, as indicated in PacWest, is entitled to deference. See, PacWest." I.D., at 35 (COL # 5).

Core Exception No. 6—The I.D. erred in concluding that:

> The Commission's regulatory authority to resolve intercarrier compensation disputes concerning local ISP-bound traffic exchanged between two CLECs has been preempted by the FCC in the ISP Remand Order. PacWest; 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). I.D., at 35 (COL # 6).

Core Exception No. 7—The I.D. erred in concluding that: "Core has not met its burden of proof as to the application of switched access rates or TELRIC rates to termination of XO's indirect local ISP-bound traffic." I.D., at 35 (COL # 10).

Core Exception No. 8—The I.D. erred in concluding that: "Core has not met its burden of proof regarding the requested imposition of civil penalties and costs on XO in this proceeding. 66 Pa. C.S. §3301." I.D., at 36 (COL #12).

Core Exception No. 9—The I.D. erred in finding that:

> In regard to CIC 5607, I find that the record does not support Core's classification of this traffic as "intra toll" and therefore, I cannot conclude that this traffic is subject to the Commission's regulatory authority. Core admitted that it was impossible for it to determine whether these calls were interstate, intrastate, or local. Core St. No. 1, p. 5; Core St. No. 1-SR, pp. 11-12. Core has the burden of proof under 66 Pa. C.S. §332(a), and clearly did not meet that burden as to the jurisdictional prerequisite for CIC 5607. Therefore, I will disregard the MOUs designated as intrastate "intra toll" for CIC 5607 in Core Ex. BLM-28. I.D., at 31.

A. The Commission's *AT&T Material Question Order* Correctly Found that Jurisdiction to Resolve Disputes Between CLECs With Respect to ISP-Bound Traffic Compensation Has Not Been Preempted. (Core Exceptions Nos. 4, 5 and 6)

In its 2010 *AT&T Material Question Order*, the Commission affirmed its jurisdiction over CLEC-CLEC traffic, including ISP-bound traffic, and demonstrated its authority to adjudicate intercarrier compensation disputes arising from the exchange of such traffic.[1] The I.D. rejects this established Commission precedent by adopting the views and analysis of an *amicus* brief drafted by FCC staff and an opinion issued by the U.S. Court of Appeals for the Ninth Circuit. This collateral attack on the *AT&T MQO* gives rise to three related exceptions.

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1 Opinion & Order, *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 and C-2009-2108239, at 10 (Sept. 8, 2010) ("*AT&T Material Question Order*").

Core Exception No. 4 involves the I.D.'s conclusion that "[t]he PacWest decision... requires a re-examination of Commission authority to resolve intercarrier compensation disputes concerning local ISP-bound traffic exchanged between two CLECs." I.D., at 34 (COL # 2). **Core Exception No. 5** challenges the I.D.'s conclusion that: "The FCC's interpretation of the ISP Remand Order, as indicated in PacWest, is entitled to deference. See, PacWest." I.D., at 35 (COL # 5). **Core Exception No. 6** excepts to the I.D.'s conclusion that "[t]he Commission's regulatory authority to resolve intercarrier compensation disputes concerning local ISP-bound traffic exchanged between two CLECs has been preempted by the FCC in the ISP Remand Order." I.D., at 35 (COL # 6). The I.D.'s conclusions regarding the Commission's jurisdiction over the traffic at issue in this case are erroneous. The Commission's jurisdiction in this regard has never been preempted, and the *AT&T Material Question Order* remains good law.

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

Instead, XO relies on an *amicus* brief filed by FCC legal staff in the Ninth Circuit, XO St. No. 1-R, at 14-16; *and*, XO Exh. 9 (FCC Staff *Amicus* Brief to the U.S. Court of Appeals for the Ninth Circuit) and on the subsequent Ninth Circuit decision, *AT&T Communications Of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011)("*PacWest*"), which adopted FCC staff's brief in large part. But as Core demonstrated in the Core/AT&T Case, both the brief, and the Ninth Circuit's wholesale adoption of the FCC staff's retroactive "interpretation" of the *ISP Remand Order* is riddled with faults, and provides no basis to ignore a standing order of this Commission. Following XO's advocacy, the I.D. relies on the Ninth Circuit's *PacWest* opinion and the FCC staff's *amicus brief* for its jurisdictional analysis. *See* I.D., at 27-29.

1. The FCC Staff's *Amicus Brief* in *PacWest* Fails to Demonstrate a Clear Intent to Preempt

FCC staff's *Amicus* Brief fails to provide "sound reasoning" for the Commission to overturn its own *AT&T Material Question Order*. To begin with, FCC staff fails to demonstrate that the *ISP Remand Order* clearly preempts state commission orders adjudicating compensation for CLEC-CLEC ISP-bound traffic.[2] Indeed, on the crucial issue of preemption, the *amicus* brief provides only minimal analysis. *See*, XO Exh. 9, at 25-29. However, in order to establish preemption, there must be "a clear indication that an agency intends to preempt state regulation." *Hillsborough County Automated Med. Labs., Inc.* 471 U.S. 707 (1985). While "[p]re-emption may result... from action taken by... a federal agency acting within the scope of its congressionally delegated authority," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69

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

(1986), the law requires a clear indication that an agency intends to preempt state regulation and ambiguity will not be sufficient to establish preemption. *See, Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006)("The requirement of a clear indication of the agency's intent to preempt is especially important in the context of the [Telecommunications Act of 1996], which divided authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states.")(citations omitted); *and see, Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100, n.7 (2nd Cir. 2006)("a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.").

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

Contrary to FCC staff's primary substantive argument, *id.*, at 16-19, the "language" of the *ISP Remand Order* fails to demonstrate any intention to regulate CLEC-CLEC traffic. Importantly, the *ISP Remand Order* is utterly silent about *how* to implement its rules as between two CLECs. Although the plain language of the *ISP Remand Order* frequently specifies the relationship between *incumbent* LECs and *competitive* LECs, it never discusses dealings between two CLECs. Instead, the structure of the order and its rules indicate that the FCC was addressing ILEC-CLEC traffic only. The order created a complicated set of interrelated rules including a price cap, growth cap, three-to-one ratio, and new market bar. *See*, *ISP Remand Order*, at ¶¶ 78, 79, 81.

But that regime only "kicks in" if and when two conditions are met: (1) the incumbent LEC "opts-in" to the regime on a state-by-state basis, by lowering the price of termination on its own network to the FCC's rate cap (the so-called "mirroring rule"), *id.*, at ¶ 89; and (2) the interconnection agreement governing reciprocal compensation between a particular incumbent LEC and a particular competitive LEC includes an applicable change-of-law provision. *Id.*, at ¶ 82. Both of these predicate conditions presume an ILEC-CLEC relationship, not a CLEC-CLEC relationship. Under the mirroring rule, the FCC ruled that *only an ILEC* may "opt-in" to the interim pricing regime, on a state-by-state basis. *Id.*, at ¶ 89 ("Because we are concerned about the superior bargaining power of *incumbent LECs*, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an *incumbent LEC* offers to exchange all traffic subject to section 251(b)(5) at the same rate...")(emphases added). Importantly, if the ILEC does not opt in, previous state commission rulings regarding ISP-bound traffic will continue to apply to the ISP-bound traffic that the ILEC

originates. *Id.* The *ISP Remand Order* says nothing about how a CLEC such as XO would opt-in or otherwise avail itself of the interim compensation regime. Nor does the *ISP Remand Order* explain what happens if one CLEC opts in and another CLEC does not.

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

Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Pa. P.U.C. Docket No. R-2011-2234464 (May 19, 2011).

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

Perhaps most damning to FCC staff's interpretation of "interconnection agreement" is a key footnote in which the 2001 FCC identified the "recently negotiated interconnection agreements" that served as a factual premise for the FCC's rate caps. *Id.*, at ¶ 85. In it, the FCC "takes notice of the following interconnection agreements: (1) Level 3 Communications and SBC Communications... (2) ICG Communications and BellSouth... (3) KMC Telecom and BellSouth (4) Level 3 Communications and Verizon." *Id.* at n.158. Of course, it is indisputable

that all four of these seminal interconnection agreements conform to the ordinary use of that term, that is, all four are agreements between an ILEC and a CLEC, and subject to the negotiation and arbitration provisions of section 252.

FCC staff points to "[t]he FCC's statements delineating both the scope of its proceeding and its rules..." to buttress its reading of the *ISP Remand Order*. While it is true that one fleeting reference to "all LECs" in a footnote to the now-vacated 1999 *ISP Declaratory Order* could be read to encompass CLEC-CLEC traffic, every other FCC statement regarding the scope of the FCC's ISP-bound traffic proceedings, and the *ISP Remand Order* itself, confirms what everyone involved already knows: the order only was intended to resolve disputes between ILECs and CLECs regarding compensation for ISP-bound traffic. In its 1997 Public Notice initiating the proceedings which lead to the *ISP Remand Order*, the FCC recognized that the issue of compensation for ISP-bound traffic was an issue between ILECs and CLECs. Public Notice, CCB/CPD 97-30 (Rel. July 2, 1997)("ALTS requests clarification that nothing in the Local Competition Order requires information service traffic to be treated differently than other local traffic handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs.").[3] Similarly, the FCC's 1999 *ISP Declaratory Ruling* (despite staff's proffered footnote) also makes this clear. Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Comp. for ISP-Bound Traffic*, 14 F.C.C.R. 3689-3690 (1999)("Generally, competitive LECs (CLECs) contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications

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3 A courtesy copy of the public notice is attached to Core's Main Brief in this proceeding, as Attachment A.

Act of 1996" while "[i]ncumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5)... parties should be bound by their existing interconnection agreements, as interpreted by state commissions.").

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

In its 2004 *Core Forbearance Order*, the FCC again confirmed that the scope of the *ISP Remand Order* was limited to ILEC-CLEC traffic. *See, e.g.,* Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order,* WC Docket No. 03-171, 19 FCC Rcd. 20179, 2004 WL 2341235 at ¶ 8 (Oct. 18, 2004) *("Core Forbearance Order")*("The Commission also determined that the rate caps for ISP-bound traffic . . . should apply only if an *incumbent LEC* offered to exchange all traffic subject to section 251(b)(5) at the same rates... The Commission adopted this "mirroring" rule to ensure that *incumbent LECs* paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic.")(emphasis added); *Id.*, at ¶ 9 ("In this situation, if an *incumbent LEC*

has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period (the "new markets" rule).")(emphasis added). In its 2006 *amicus* brief to the First Circuit, FCC staff affirmed that the scope of the *ISP Remand Order* is limited to ILEC-CLEC traffic. Brief for Amicus Curiae Federal Communications Commission, *Global Naps, Inc., v. Verizon New England, Inc.*, 2006 WL 2415737 (C.A.1), 4 ("Disputes arose between *ILECs and CLECs* about the intercarrier payment mechanism that governs such calls.")(emphasis added).

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

Nor is FCC staff properly able to rely on public policy concerns. Although staff portrays itself as implementing "the regulatory purposes underlying the enactment of the FCC's rules," XO Exh. 9, at 20, such an exercise is simply beyond staff's purview.[4] The FCC's policy

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[4] Federal agency use of *amicus* briefs to broaden agency jurisdiction is an increasingly controversial practice. In a recent case involving the FCC's rules governing section 251(c)(2) interconnection issues, Justice Scalia took issue with the continuing practice of applying *any* deference to agency interpretations of its own rules, including the use of *amicus* briefs. According to Justice Scalia, "when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." Opinion, *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ___, 131 S.Ct. 2254, 2266, 2011 U.S. LEXIS 4375, at *31-*32 (June 9, 2011) (Scalia, J., concurring).[4] Justice Scalia continues: "deferring to an agency's

concerns are only relevant to the scope of traffic it actually regulated, i.e., ILEC-CLEC traffic. As noted above, the FCC in 2001 found no "symptoms of market failure" with respect to CLEC-CLEC traffic. Staff cannot retroactively enlarge the scope of the *ISP Remand Order* in an attempt to further a decade-old policy for a class of traffic (dial-up Internet access) that is by all accounts rapidly diminishing in significance.

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

Finally, FCC staff's *amicus* brief notably declines to address the Ninth Circuit court's inquiry about whether a state commission has jurisdiction to implement the *ISP Remand Order* as between two CLECs. This leaves implementation issues for CLEC-CLEC traffic – issues state commissions have been working to resolve – in a newfound state of confusion and delay. In essence, FCC staff (and the I.D. by extension) asks the Commission to defer to a set of federal rules for which nobody knows (1) who should implement them; or (2) how they should be

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interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Id.* Notably, the Justice pinpointed the FCC in particular as suspect in its use of *amicus* briefs: "[t]he seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Id.* at *32.

implemented. For all these reasons, the Commission should reject staff's reading of the *ISP Remand Order* to include CLEC-CLEC traffic, and reject the I.D.'s reliance on that flawed interpretation to justify its ultimate recommendation to ignore the *AT&T MQO*.

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

For the most part, the Ninth Circuit's opinion in *PacWest* simply tracks FCC staff's *amicus* brief, as is evident from the court's lengthy quotations from that document. However, the court makes a number of additional assertions which cloud its analysis of the central issue of FCC preemption of state commission authority.

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

The Ninth Circuit's preemption analysis, however, is deeply flawed. First, the court never acknowledges that the standard for finding preemption is that a federal agency must make its intention to preempt state regulation *clear*. Indeed, the court candidly admits that "the *ISP Remand Order* could be clearer" with respect to whether the FCC intended it to apply to "ISP-bound traffic exchanged between two CLECs." *Pac-West*, at *10. In the absence of a clearly

expressed intent to preempt existing state commission authority over this traffic (an authority which neither the court nor FCC staff denies), the court simply erred in finding preemption.

The Ninth Circuit reasons that "in adopting an interim compensation regime for ISP-bound traffic, the FCC was primarily concerned with arbitrage opportunities created by traffic of a particular nature," *Id.*, at *14, implying that the thrust of this underlying "concern[]" overrides the lack of clear preemption for CLEC-CLEC traffic. But as Core noted with respect to FCC staff's policy arguments, the FCC's policy concerns are only relevant to the scope of the traffic it actually regulated, i.e., ILEC-CLEC traffic. For any other traffic, such as CLEC-CLEC traffic, the FCC underlying policy concerns are irrelevant, because the FCC never clearly stated its intent to regulate that traffic and thereby preempt state commission authority.

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

covered such "arrangements." Thus, the Commission should reject the court's attempt to retrofit the *ISP Remand Order* to cover CLEC-CLEC traffic.

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

> [T]he TCA leaves something of an enforcement gap: CLECs have statutory duties to interconnect with other LECs and to provide reciprocal compensation, but there is no procedure specified for one CLEC to require another CLEC to enter into an interconnection agreement that would govern the terms of those duties. *PacWest*, at n. 3.

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

For all of the foregoing reasons, the Commission should reject the I.D.'s Conclusions of Law Nos. 2, 5 and 6, and reaffirm that its jurisdiction over CLEC-CLEC ISP-bound traffic has never been preempted.

B. Core's Tariff Plainly and Unambiguously Covers All Pennsylvania Intrastate Telecommunications (Core Exceptions Nos. 1 and 7)

The I.D. declines to enforce the plain language of Core's Tariff, giving rise to two of Core's Exceptions. **Core Exception No. 1** involves the I.D.'s erroneous finding that "Core has no tariff in Pennsylvania which establishes a rate for terminating locally-dialed ISP traffic." I.D., at 14 (FOF # 21). **Core Exception No. 8** challenges the I.D.'s conclusion that: "Core has not

met its burden of proof as to the application of switched access rates or TELRIC rates to termination of XO's indirect local ISP-bound traffic." I.D., at 35 (COL # 10). Core's tariff covers a wide range of traffic, including the intrastate traffic XO has delivered Core over the years. Although the I.D. presents the parties' disputes over the application of Core's tariff to XO's traffic as factual issues, for which "Core has not met its burden of proof," issues of tariff interpretation are issues of law, not fact. Notably absent from the I.D. is any discussion of the actual language of Core's tariff. However, this case cannot be resolved without first looking to the plain language of the tariff.

1. Core's Tariff Covers All Intrastate "Telecommunications"

This is a case of straightforward application of tariffed rates to tariffed services. Core's Pa. P.U.C. Tariff No. 4 (the "Tariff") requires compensation for the XO Indirect traffic at the filed intrastate switched access rates set forth therein, which rates mirror the intrastate switched access rates and rate structures of Verizon and all the other incumbent LECs operating in Pennsylvania, in their respective territories. Core's Tariff defines "Switched Access Service" (the service Core provided XO) as: "[a]ccess to the switched network of an ***Exchange Carrier*** for the purpose of originating or ***terminating communications***. Switched Access is available to ***carriers*** as defined in this rate sheet." Core St. No. 1, at 19-20; *and* Tariff, at Original Sheet No. 10 (emphasis added).[5] The Tariff defines the term "Exchange Carrier" as: "[a]ny individual,

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

partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service." *Id.*, at 20; *and*, Tariff, at Original Sheet No. 7. The Tariff defines the term "Carrier" as an "Interexchange Carrier or Exchange Carrier." *Id.*; *and*, Tariff, at Original Sheet No. 6. Core's Tariff further states that "Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises." *Id.*; *and*, Tariff, at Original Sheet No. 44.

The Tariff defines "Customer" as: "[t]he person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations. The Customer could be an interexchange carrier, a wireless provider, ***or any other service provider***." *Id.*; *and*, Tariff, at Original Sheet No. 7 (emphasis added). And the Tariff defines the term "Constructive Order" as the "[d]elivery of calls to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein." *Id.*; *and*, Tariff, at Original Sheet No. 7.

Core's Tariff clearly applies to the traffic XO sends Core. *Id.* XO obtained Switched Access Service from Core, as defined by the Tariff, i.e., XO clearly obtained "access to the Switched Network of Core for the purpose of originating or terminating Communications." *Id.* As a CLEC, Core is an "Exchange Carrier" as defined by the Tariff; and XO is a "carrier" because it, too, is a CLEC and thus an "exchange carrier." *Id.* XO is also a "Customer" of Core for Switched Access Service, as defined by the Tariff. *Id.*, at 20-21. By delivering calls to Core's

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an "Interexchange Carrier," and it is meaningless to suggest that Core is somehow providing access to another carrier's interexchange network.

end users, over Core's switched local exchange services, XO "Constructively Ordered" switched access services from Core, under the plain terms of the Tariff. *Id.*, at 21. Accordingly, under Core's Tariff, XO is responsible for the payment of all applicable charges for Core's Switched Access Service. *Id.* Core billed XO in accordance with its rate sheet for terminating switched access, as set forth in the Tariff. *Id.* XO has clearly refused to pay Core's lawfully invoiced terminating switched access charges, in violation of the Tariff. *Id.*

The Commission should enforce the plain terms of Core's Tariff to the XO Indirect Traffic, and order XO to pay for all of the CIC 5119 intrastate MOUs and all of the CIC 5607 MOUs terminated by Core, at the applicable Tariff rates, through the date of the Commission's order.[6] In addition, the Commission should order XO to pay late payment charges at the Tariff rate of 1.5% per month, Tariff, Original Sheet No. 33, accruing from the due date of each Core invoice XO has not paid as of such date. *See*, Exhs. BLM-25 and BLM-26 (chart showing actual invoice activity for CICs 5119 and 5607 through April, 2011). In order to determine MOUs, applicable switched access charges, and late payment charges through the date of the Commission's order, the Commission should order the parties to cooperate in the development of joint compliance filing within thirty (30) days of such order. Finally, the Commission should order XO to continue paying Core's switched access invoices unless and until XO and Core negotiate a mutually-acceptable traffic exchange agreement that provides otherwise.

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

2. The Filed Rate Doctrine Requires that the Commission Enforce the Rates, Terms and Conditions of Core's Tariff

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

The Commission and its reviewing courts have consistently found that "[t]he filed-rate doctrine also known as the commission-made rate doctrine, provides that rates and tariffs established by the Commission are prima facie reasonable and have the force of law until modified or changed by the Commission or after judicial review." *See, e.g., Application for Authority to Transfer Control of Tri-gen-Philadelphia Energy Corporation by the Sale of All of its Stock, Currently Owned by Trigen Energy Corporation, to Thermal North America, Inc.*, Pa. P.U.C. Docket No. A-130375F5000, 2005 WL 6502674 (Pa. P.U.C.), at 8 and note 36 (Opinion & Order, April 7, 2005), *citing*, *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Shenango Township Board of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); and *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997).

Specifically for tariffs filed by CLECs, the Commission has found that "[u]pon filing of an initial access tariff by a CLEC, the rates contained therein will be allowed by the Commission

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

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

Since it is undisputed that Core's filed rates are set "at or below the corresponding access rates" of the incumbent LECs within whose territories Core provides service, Core's Tariff is entitled to a presumption that its rates are "reasonable." Further, XO, as the party challenging Core's Tariff, bears the "burden of proof of demonstrating that the rates are not just and

reasonable," a burden XO does not even pretend to carry. The filed-rate doctrine applies, and XO's sole remedy would be to file a formal complaint challenging Core's Tariff, and demonstrate that Core's rates, and the application of those rates to the XO Indirect Traffic "are not just and reasonable." Yet, XO has never pursued this remedy, even though it has been on notice that Core would apply the Tariff rates to the XO Indirect Traffic since early 2008—almost four years ago.

C. The Commission Has Ample Authority to Apply TELRIC to the XO Indirect Traffic in the Context of This Formal Complaint Case (Core Exception No. 3)

Core's alternative position in this case is that Commission-approved TELRIC rates should ultimately apply to CLEC-CLEC traffic, and has offered to enter into a traffic exchange agreement with XO to effectuate that result. **Core Exception No. 3** involves the I.D.'s erroneous conclusion that:

> Core's alternative position that the TELRIC rate can be applied to the local traffic is also unavailing. As Core must adhere to its tariffs, it also cannot charge the untariffed TELRIC rate. There is no evidence of record, or case law cited, that would provide for the application of TELRIC rates to other than traffic terminated pursuant to interconnection or traffic exchange agreements. Core and XO have no such agreement. I.D., at 30.

In this respect, the I.D. is at odds with Commission policy, which is to promote the orderly classification and payment of appropriate intercarrier compensation, even in cases where no tariff is found to exist.

The Commission's policy with respect to payment of appropriate intercarrier compensation was restated most recently in the *T-Mobile Material Question Order*:

> Consistent with Commission precedent adjudicating other carrier-to-carrier intercarrier compensation disputes, we find that this case is within our subject matter jurisdiction. CCES is providing wholesale telecommunications services to T-Mobile so that the wireless carrier can access CCES' network to terminate inbound

> wireless traffic. Similar to the claims set forth in *Palmerton, supra.*, CCES' fundamental telecommunications access service function is not altered by the fact that the traffic may have entered CCES' network while first originating through a wireless capability or tower. This telecommunications service clearly is provided by a common carrier telecommunications utility that has been duly certificated to operate as a CLEC within specific areas of this Commonwealth. Thus, T-Mobile's access of CCES' network facilities constitutes a common carrier telecommunications service that falls squarely within this Commission's jurisdiction.[7]

The Commission continued:

> We also find that this matter clearly falls within our jurisdiction because of our broad statutory and regulatory policies as more fully discussed in our March 16, 2010 *Palmerton* Order. Specifically, Chapter 30 of the Public Utility Code provides a statutory policy directive to "promote and encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates." 66 Pa. C.S. § 3011(8). We have considered this statutory directive in developing broad regulatory policies concerning intercarrier compensation cases before this Commission. In our March 16, 2010 Order sustaining Palmerton's complaint against Global NAPs, we noted that, if "certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." The same broad principle is applicable for the movement of wireless traffic and its use of access termination services by landline networks during the time period at issue (notwithstanding the prospective effects of the November 18, 2011 FCC Order). In order to assure that the Commission implements the statutory directives prescribed by the Pennsylvania General Assembly and consistent with then applicable federal law,

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[7] Opinion & Order, *Consolidated Communications Enterprise Services, Inc. v. Omnipoint Communications, Inc. d/b/a T-Mobile, et al.*, Pa. P.U.C. Docket No. C-2010-2210014, at 37 (Mar. 15, 2012)(*T-Mobile Material Question Order*).

> we assert subject matter jurisdiction over this proceeding to further review the alleged facts of the case during the time frame described in the Formal Complaint. *T-Mobile Material Question Order*, at 39.

Consistent with these policies, the Commission concluded that Pennsylvania law authorizes it to adjudicate intercarrier compensation disputes (even in the absence of an applicable tariff) in the context of a formal complaint proceeding:

> Section 1309 of the Code therefore provides a clear answer to the question of whether the Commission can establish non-tariffed rates in a proceeding that is initiated by the filing of a complaint. Section 1309 authorizes "rates fixed on complaint" and provides that the Commission shall fix such rates by the issuance of an "order." In our view, this disposes of T-Mobile's argument that CCES's Complaint must be dismissed because the Code does not provide the Commission with a non-tariff mechanism for setting a utility's rates. *T-Mobile Material Question Order*, at 42.

The Commission further found that:

> Finally, although Section 1308 encompasses the filing of proposed tariffs by utilities, the term tariff in turn encompasses contracts involving rates, in addition to what commonly are referred to as the "tariffs" that utilities file with the Commission. The Commission's jurisdiction over utility rates exists regardless of whether those rates are established by deed, contract, ordinance, or other otherwise. *Blythe Township Municipal Authority v. Pa. PUC*, 185 A.2d 628 (Pa. Super. 1962). "The rule of exclusive [Commission] jurisdiction over utility rates is not affected by the nature of the agreement between the utility and its customers. This principle has been definitely and repeatedly stated." *Byer*, 380 A.2d at 386. Consistent with the broad definition of "rates" under Section 102 of the Code, the term "tariff" similarly is broadly defined to include "all schedules of rates, all rules, regulations, practices, *or contracts* involving any rate or rates, including contracts for interchange of service." 66 Pa. C.S. § 102 (emphasis supplied). In the instant case, CCES filed a proposed thirty-page "Traffic Exchange Agreement" between CCES and T-Mobile with its Complaint. As a proposed contract involving rates, this proposed Traffic Exchange Agreement falls within the Section 102 definition of a tariff. Accordingly, we conclude that we have the express, as well as the implied, authority under Section 1308(b) to

establish rates for the termination of T-Mobile's traffic. *T-Mobile Material Question Order*,, at 45-46.

Like CCES, Core has proposed a traffic exchange agreement to XO. In pre-filing discussions, Core noted that "bill-and-keep" applies only where the traffic exchanged between two parties is "roughly balanced," and that XO's Traffic is not roughly balanced. *Id.* at 11-12; *and see*, Exh. BLM-12 (8/13/2009 email and letter from Chris Van de Verg to Rich Jackson). Core stated its desire to negotiate a traffic exchange agreement to cover XO's locally-dialed traffic at the Commission-approved, total element long-run incremental cost ("TELRIC") tandem reciprocal rate. *Id.*, at 12. That is, Core offered to settle at the lowest existing Commission-approved rate for traffic termination. On September 21, 2009, XO responded to Core's letter. Unfortunately, XO declined to join Core in the negotiation of a traffic exchange agreement. *Id.*; *and see*, Exh. BLM-13 (9/21/2009 email and letter from Karen Potkul to Chris Van de Verg). In addition, Core appended an eight-page proposed traffic exchange agreement to its Direct Testimony. Exh. BLM-17 ("Traffic Exchange and Billing Agreement").

Core's repeated attempts to enter into a traffic exchange agreement with XO, using the Commission-approved TELRIC tandem reciprocal compensation rate, gives the Commission the jurisdictional basis required to adjudicate Core's alternative request that the Commission apply that rate to the XO Indirect Traffic in the context of this formal complaint proceeding.

D. The Commission Should Impose Civil Penalties on XO for Refusing to Pay Reasonable Compensation or Negotiate a Traffic Exchange Agreement (Core Exceptions Nos. 2 and 8)

Despite XO's stubborn refusal to enter into any type of reasonable intercarrier compensation arrangement, the I.D. declined to impose any civil penalty. **Core Exception No. 2** involves the I.D.'s erroneous finding that: "XO has acted in good faith in disputing Core's bills." I.D., at 15 (FOF # 28), and **Core Exception No. 8** challenges the I.D.'s conclusion that:

"Core has not met its burden of proof regarding the requested imposition of civil penalties and costs on XO in this proceeding. 66 Pa. C.S. §3301." I.D., at 36 (COL #12).

Throughout prefiling discussions and in its advocacy in this case, XO has raised numerous red herring arguments in an effort to justify its willful refusal to compensate Core for termination of XO's Indirect Traffic. As discussed herein, none of these arguments have any merit and must be rejected. Because XO's claims stretch way beyond any reasonable factual, policy or legal justifications, the Commission should exercise its discretion and assess an appropriate civil penalty against XO consistent with 66 Pa. C.S. 3301. In addition to directing XO to pay Core for past and continuing termination of the XO Indirect Traffic, the facts of this record support imposing a civil penalty on XO for its unreasonable and bad faith actions to refuse to make any payment for services rendered and to ensure that XO pays Core as directed for the termination of future traffic.

To arrive at an appropriate civil penalty, the Commission considers the following factors set forth in 52 Pa. Code § 69.1201(c):

> (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
>
> (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
>
> (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
>
> (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue

and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

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

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

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

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

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

The Commission has already concluded that refusing to pay billed charges is conduct "of a serious nature" despite any efforts on the non-paying carrier's part to claim a legal right or entitlement to justify the non-payment. *Palmerton,* at 57. The Commission's very clear and recent pronouncements regarding its viewpoint that carriers are required to compensate each other for termination and XO's continued insistence that the rate is $0.00 counsel in support of a higher penalty. In *Palmerton*, defendant Global NAPs took the position that it had no duty to pay complainant Palmerton any intercarrier compensation because of the specific (VOIP) nature of traffic. The Commission examined an extensive factual record and concluded "[i]n view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access

charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes." *Palmerton*, at 47 (emphasis added).

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

XO is not entitled to a free ride on Core's network simply because the Commission has yet to issue a ruling specifically addressing CLEC-CLEC traffic. The fact that this case raises certain issues of first impression does not imply (as XO suggests) that no compensation applies to the traffic at issue here. XO's behavior knowingly and willfully put Core in the position of absorbing the costs to terminate XO's traffic. When approached by Core to negotiate an agreement, XO stonewalled and forced Core to engage in this litigation in an effort to recover its costs. Core St. No. 1, at 9-13. Obviously delaying this matter has advantaged XO given the fact that Core cannot block calls from XO customers and XO has not been required to pay Core a nickel for this traffic. XO's stubborn intransigence should not be rewarded. Without strong and

serious action by the Commission—such as assessment of an appropriate civil penalty—Core believes that XO will have every incentive to continue to withhold any payment to Core for the continuing use of its termination services while, because of its significant resources, it erects every conceivable legal maneuver to delay the final resolution of this proceeding.

Such an unfair result permits XO to continue to do what it has always done—utilize Core's termination services (at significant cost to Core) for free. Therefore, Core requests that the Commission reject the I.D.'s finding of no civil penalty, and recommends that XO be required to pay a civil fine of $1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's order in this matter. Further, Core recommends that XO be fined $1,000/day for each day that it fails to comply with the Commission's order in this matter directing it to pay Core for use of its services and facilities.

E. While Core Is the Complainant, XO Has Withheld Information Key to the Resolution of Core's Claims (Core Exception No. 9)

While the I.D. correctly states that Core has the burden of proof in this proceeding, there is one key factual issue with respect to the XO Indirect Traffic that Core has been unable to resolve through no fault of its own. **Core Exception No. 9** involves the I.D.'s finding that:

> In regard to CIC 5607, I find that the record does not support Core's classification of this traffic as "intra toll" and therefore, I cannot conclude that this traffic is subject to the Commission's regulatory authority. Core admitted that it was impossible for it to determine whether these calls were interstate, intrastate, or local. Core St. No. 1, p. 5; Core St. No. 1-SR, pp. 11-12. Core has the burden of proof under 66 Pa. C.S. §332(a), and clearly did not meet that burden as to the jurisdictional prerequisite for CIC 5607. Therefore, I will disregard the MOUs designated as intrastate "intra toll" for CIC 5607 in Core Ex. BLM-28.

The XO Indirect Traffic is associated with two different CICs: CIC 5119 and CIC 5607. *Id.* The CIC 5119 traffic, with very few exceptions, comes into Core's network with CIC, calling

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

For CIC 5119, XO has sent Core both interstate traffic and intrastate traffic, but Core is not asking the Commission to resolve issues relating to interstate traffic. *Id.*, at 4-5. So, with respect to CIC 5119, the only XO Indirect Traffic at issue in this case is Pennsylvania intrastate. *Id.* Unlike the CIC 5119 traffic, the CIC 5607 traffic comes into Core's network without any CPN. *Id.* This makes it impossible for Core to distinguish between interstate and intrastate calls. *Id.* The lack of CPN has the effect of making billing and collection more difficult for the terminating carrier. *Id.* Even assuming XO takes no affirmative steps to create the problem, XO benefits from the resulting confusion, and XO to our knowledge has taken no steps to correct the problem. *Id.* Indeed, the CIC 5607 traffic is a classic example of the infamous "phantom traffic," a phenomenon that has plagued the intercarrier compensation system for years. *Id.*

From June, 2004 through April, 2011, XO end users using XO CICs 5119 and 5607 have originated over 8,000,000 MOUs for termination on Core's network in Pennsylvania, Exhs. BLM-27 & -28 (Breakdown of MOUs for CICs 5119 & 5607), for which XO forswears any financial obligation. *See*, XO St. No. 1-R (Rebuttal Testimony and Exhibits of Gary Case and Richard Jackson)("the FCC has determined that bill-and-keep should apply [to the XO Indirect Traffic in] the absence of an agreement specifying a different compensation scheme." By way of illustration, as of April, 2011, Core had terminated 3,358,206 intrastate MOUs on behalf of XO

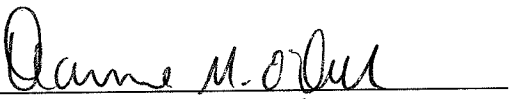
on CIC 5119, Exh. BLM-27, at 3; and 3,485,138 total MOUs on CIC 5607. Exh. BLM-28, at 3. The CIC 5607 MOUs cannot be classified on a jurisdictional basis using a traditional NPA-NXX analysis because XO does not deliver CPN on that CIC. 15. As the I.D. found : "[t]he CIC 5607 traffic... comes into Core's network without a CPN, which makes it impossible for Core to determine whether the calls are interstate, intrastate, or local. I.D., at 14 (FOF # 15).

Because XO transmits the CIC 5607 traffic to Core without any accompanying CPN, Core requests that the Commission permit Core to bill all such traffic pursuant to its Tariff, unless and until XO rectifies the lack of CPN, consistent with Core's advocacy in this case.

III. CONCLUSION

For all the reasons set forth herein, Core respectfully requests that the Commission grant the exceptions contained herein.

Respectfully submitted,



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