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May 29, 2012

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY
Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Core Communications, Inc. v. Verizon of Pennsylvania, Inc. and Verizon North, LLC
Docket Nos. C-2011-2253750 and C-2011-2253787

Dear Secretary Chiavetta:

Enclosed for filing please find the original plus four copies of the Answer of Core Communications, Inc. to the Preliminary Objections filed by Verizon of Pennsylvania, Inc, and Verizon North, LLC. A copy of the Answer has been served upon the parties of record in accordance with the attached Certificate of Service. Upon filing, please return a time-stamped copy of the Answer to me in the enclosed self-addressed stamped envelope.

If you have any questions, please feel free to contact me.

Sincerely,

STEVENS & LEE

Michael A. Gruin

Enclosures
cc: Certificate of Service
Honorable Susan Colwell, Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CORE COMMUNICATIONS, INC. Complainant	:	
v.	:	Docket No. C-2011-2253750 Docket No. C-2011-2253787
VERIZON PENNSYLVANIA INC. and	:	
VERIZON NORTH, LLC Respondents	:	

CORE COMMUNICATIONS, INC.'S
ANSWER TO THE PRELIMINARY OBJECTIONS OF VERIZON PENNSYLVANIA, INC. AND VERIZON NORTH, LLC

Core Communications, Inc. ("Core"), pursuant to 52 Pa. Code §§5.101(f), hereby Answers the Preliminary Objections filed by Verizon Pennsylvania, Inc. and Verizon North, LLC. (collectively "Verizon").

All four of Verizon's Preliminary Objections are meritless and should be rejected. Similar to Verizon's Preliminary Objections to Core's original Complaint, Verizon's latest Preliminary Objections are flawed because they rely largely on documents and testimony that are beyond the four corners of Core's Amended Complaint, and it is well-settled that such material is not considered when ruling on a preliminary objection. In resolving Verizon's preliminary objections, only the facts pled in Core's Amended Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.[1] Verizon's latest

[1] When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402, 408 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602, 604 (Pa.

Preliminary Objections again contain multiple unverified factual assertions which are wholly inappropriate for this type of filing, and which cannot be considered in ruling on the Preliminary Objections. In addition, Verizon's Preliminary Objections contained numerous blatant falsehoods. For instance, Verizon's Preliminary Objections repeatedly allege that Core utilized information obtained during the mediation process to calculate revised switched access bills. This is a reckless falsehood that has no basis in the truth. Had this statement been made in a verified pleading, the signer of the verification would be subject to prosecution. As set forth in more detail below, Core based its revised access billings solely on records which were in Core's possession well before the start of mediation, in fact, well before this litigation was commenced. The minimal information provided by Verizon during the course of mediation was not utilized whatsoever in the calculation and preparation of Core's amended switched access bills.

Verizon's Preliminary Objections seek to dismiss Core's Amended Complaint Counts II and III. However, it must be noted that the minutes of telecommunications traffic at issue in Core's Amended Complaint Counts II and III are some or all of the same minutes that Verizon claimed it was overbilled for and which were at issue in Core's original Complaint in this case and in Core's Petition in Docket No. P-2011-2253650. There is no practical way to litigate Verizon's claims that it was overbilled for these minutes of use ("MOUs") separate and apart from Core's claims that Verizon owes additional amounts for these MOUs. Indeed, Core is compelled by *res judicata* concerns to raise its claims with respect to these MOUs now, or risk being barred from raising these same claims later.[2]

Cmwlth. 1988). The Commission must view the complaints in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

[2] The doctrine of res judicata encompasses both technical res judicata and collateral estoppel. *Marano v. Workers' Compensation Appeal Board (Bienenfeld)*, 751 A.2d 1196, 1199 (Pa.Cmwlth.2000). Collateral estoppel forecloses litigation of specific issues of law or fact that have been litigated and were necessary to a previous final judgment. Id.

Verizon's Preliminary Objections seek to insert discussion of facts beyond those stated in Core's Complaint. In that respect, Verizon's Preliminary Objections are akin to a premature motion for summary judgment. Such a motion is clearly improper when the pleadings in the case are not yet closed (Core's Answer to Verizon's New Matter is not due until June 5, 2012). To be clear, Core believes that the totality of the evidence in the case, once elicited, will clearly demonstrate that Core's Complaint should be sustained. However, at the Preliminary Objection stage of the proceeding, the focus is not on the totality of the evidence but rather on the four corners of the Complaint, and whether that Complaint can be dismissed for one of the permitted reasons set forth in the 52 Pa. Code 5.101. As set forth below, Verizon has clearly not met the necessary burden to prevail on its Preliminary Objections.

I. Verizon's Introduction

1. Core denies paragraph 1 in its entirety. In response to the first sentence of paragraph 1, Core states that, "in the spring and summer of 2011," Verizon had no reason "to suspect that the monthly bills Core was sending Verizon for termination charges... were overstated and inaccurate." The Commission has already recognized that "Verizon has instituted what amounts to a "self-help" remedy by unilaterally deciding to withhold payment to Core for the traffic at issue without providing a factual or legal basis for such unilateral action."[3] Rather, at the beginning of 2011, Verizon made a business decision to withhold all intercarrier compensation from Core and its affiliates in order to put Core out of business, an effort that very nearly succeeded. As of today,

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Technical res judicata forecloses litigation between the same parties on a cause of action that has already been resolved in a final judgment. *Id.* Generally, causes of action are identical when "the subject matter and the ultimate issues are the same in both the old and the new proceedings." *Id.* The doctrine of res judicata applies both to matters that were actually litigated and to matters that could have been litigated. *Id.*

[3] Opinion & Order, *Core Communications, Inc. v. Verizon Pennsylvania Inc. and Verizon North LLC, Pa.* P.U.C. Docket No. P-2011-2253650, at 16 ("*Material Question Order*").

Verizon and its affiliates are withholding at least $1,213,889.65 in switched access charges and considerable amounts of intercarrier compensation charges for locally-dialed traffic from Core and its affiliates. These amounts do not include Core's claims in this case or the same or analogous claims Core and its affiliates may have in other states. Core believes that Verizon took these actions (at least in part) in retaliation for Core's victory over Verizon in the U.S. Court of Appeals for the Fourth Circuit, which found that Verizon had unlawfully delayed interconnection with Core and remanded the case to the federal District Court in Baltimore, Maryland for a determination of damages flowing from Verizon's delays.[4] That case is now proceeding at full bore in that court. Verizon's current goal is to divert Core's resources away from reaching a successful verdict for damages in that case, and to continue to starve Core's operations through massive and coordinated self-help nonpayment. In response to the second sentence of paragraph 1, Core states that it provided Verizon with the requested call detail records ("CDRs") in August, 2011, stands ready to make further records available upon reasonable request, and Verizon can no longer complain that Core failed to respond to Verizon's requests. Further, Core states that it is absurd for Verizon to conclude that Core had invoked the "dispute resolution procedures of the parties' ICAs." The ICAs state that the billed party (i.e., Verizon) is to initiate any billing disputes, as common sense would dictate.

2. Core denies that it attempted to "short circuit" the ICAs' dispute resolution procedures. Rather, Verizon did so by "unilaterally deciding to withhold payment to Core for the

[4] *Verizon Maryland, Inc. v. Core Communications, Inc.*, 405 F. App'x 706, 714 (4th Cir. 2010)("we find that Verizon had a duty to provide Core with the requested interconnection and therefore breached its contract. The district court's grant of summary judgment is reversed and this matter is remanded for further proceedings consistent with this decision including a determination of damages.").

traffic at issue without providing a factual or legal basis for such unilateral action."[5] Core admits the remainder of paragraph 2.

3. Core admits that Verizon answered Core's original complaint in this matter, and raised a number of counterclaims. Core denies the remainder of paragraph 3. Core has submitted valid, good faith disputes with respect to the trunks that are supposed to carry Core's traffic to Verizon, but Verizon has never addressed Core's concerns. Core is not obligated to pay for the trunks that carry "terminating traffic sent by Verizon to Core." Rather, the Act and the ICAs require Verizon to carry its traffic to Core without charge. The "$4.4 million" Verizon demands is based on special access pricing which is not applicable to any of the services Core has attempted to order from Verizon.

4. Core admits the statements set forth in paragraph 4.

5. Core admits the statements set forth in paragraph 5.

6. Core states that its Amended Complaint speaks for itself, and no further response is required. Core states that its reciprocal compensation bills are valid and accurate and issued in compliance with the ICAs. Core denies that its claim is "limited to non-payment for the 88-day period running from July 2, 2011 to September 28, 2011". While Verizon has paid Core's reciprocal compensation bills, it has only done so upon Order of the Commission, and Verizon continues to dispute the validity of Core's bills. As set forth in paragraph 1 herein, and as will be discussed at length in Core's upcoming Answer to Verizon's New Matter and Counterclaims, Verizon neither had, nor currently has, any "legitimate reasons to doubt the validity of Core's bills."

7. Core denies that Count II of its Amended Complaint "was developed using confidential information shared during the mediation." Core states that Count II is based on a

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5 *Material Question Order*, at 16.

straightforward, NPA-NXX analysis of Core's **own switch records** relating to traffic sent by Verizon to Core as well as CDRs generated by Verizon's tandems. Core has maintained these records for years, and has made them fully available to Verizon, although Verizon has never accepted Core's offer to share these records. In fact, these are precisely the sort of records Verizon demanded that Core generate in June of last year. Core states that no CDRs or related call information regarding traffic from Verizon to Core, or any other type of traffic, was exchanged during the mediation. Core states that its methodology for rating calls is simple, straightforward and fully consistent with the ICAs. That methodology is to rate each incoming Verizon call, regardless of whether that call comes over a local interconnection trunk or an access toll connecting trunk, as local, intrastate switched access, or interstate switched access, depending on the NPA-NXX combination of the calling and called parties. Core admits that it submitted back bills to Verizon, as the ICAs and associated tariffs permit. Core admits that Verizon has issued a vague, conclusory, one page letter that purports to dispute an amalgam of charges across multiple states and multiple ICAs. In response to this letter, Core offered to provide CDRs that demonstrate Verizon's accountability for the traffic, but Verizon has yet to respond. Core states that Verizon has no intention of analyzing, reviewing or paying any kind of Core's invoices, and that Verizon's attempt to invoke "dispute resolution procedures" here is no more sincere now than it was in July of last year.

8. Core admits that its Amended Complaint includes a Count alleging that Verizon failed to mirror its rates for intercarrier compensation in violation of the *ISP Remand Order*. Verizon's inappropriate characterizations of the procedural history of the *ISP Remand Order* have nothing to do with its argument that Core's Amended Complaint is legally insufficient. Core's challenges to the *ISP Remand Order* had valid bases, although ones that ultimately proved unsuccessful. Indeed, had Core not challenged the order, it may have stood for all time without any

substantive judicial review, a state of affairs the D.C. Circuit itself deplored.[6] Core notes that the D.C. Circuit's "pettifoggery" comment was limited to a technical argument regarding the scope of a previous panel's mandate to the FCC, not to the thrust of Core's statutory, arbitrary and capricious and policy arguments. Core notes that the Pennsylvania Public Utility Commission was a co-petitioner for *certiorari* with Core before the Supreme Court of the United States, and shared many of Core's arguments challenging the *ISP Remand Order* in that forum. Core denies that it seeks to "evade the *ISP Remand Order*" or "rescind" the Commission's 2003 order implementing the *ISP Remand Order* as between Core and Verizon. Core seeks to enforce the literal terms and policy aims of the *ISP Remand Order* by giving effect to the order's "mirroring rule," which "ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic."[7]

II. LEGAL STANDARD

9. A demurrer will not be sustained unless the face of the pleadings shows that the law will not permit recovery.[8] In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by

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[6] *In re Core Communications, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008)("The Federal Communications Commission (FCC) has twice failed to articulate a valid legal justification for its rules governing intercarrier compensation for telecommunications traffic bound for Internet service providers (ISPs)... Core Communications, Inc., which is injured by the FCC's rules, has filed a petition for a writ of mandamus, seeking an order compelling the Commission to explain the legal authority upon which the rules are based, on pain of vacatur if it fails to do so within a fixed time. This is Core's second petition seeking such relief. We dismissed its first in 2005, "without prejudice to refiling in the event of significant additional delay." That delay has now come to pass. It has been three years since we dismissed Core's first petition and six years since we remanded the case to the FCC to do nothing more than state the legal justification for its rules. At this point, the FCC's delay in responding to our remand is egregious. We therefore grant the writ of mandamus sought by Core and direct the FCC to explain the legal basis for its ISP-bound compensation rules within six months of the date of the oral argument in this case.").

[7] Order on Remand & Report & Order, *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996—Intercarrier Compensation for ISP-Bound Traffic*16 F.C.C.R. 9151, 16 FCC Rcd. 9151, 2001 WL 455869 (F.C.C.)(Rel. Apr. 27, 2001), at ¶ 89.

[8] *Giordano v. Ridge*, 737 A.2d 350 (Pa. Cmwlth. 199), Order affirmed, 559 Pa. 283, 739 A.2d 1052 (1999).

Verizon cannot be considered.[9] As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.[10] Furthermore, a preliminary objection on the ground of legal insufficiency is the improper vehicle to raise affirmative defenses.[11]

Preliminary Objections

First Preliminary Objection

10. Verizon's First Preliminary Objection omits a crucial phrase from Core's Amended Complaint. Core's Amended Complaint states that "Verizon's failure to pay Core's properly invoiced intrastate and interstate switched access invoices breaches the ICAs insofar as the ICAs incorporate Core's Tariffs by reference." Am. Compl., ¶ 117. (Emphasis added). Core's Amended Complaint further identifies specific provisions of the ICAs which incorporate the parties' respective intrastate and interstate switched access tariffs. Am. Compl., ¶¶ 107-117.

11. Core denies that "the Commission lacks jurisdiction over Core's claim to enforce payment of interstate [switched] access charges tariffed before the FCC..." in this case because the ICAs incorporate Core's FCC interstate switched access tariff by reference. Core admits that the Commission would have "no jurisdiction over services provided pursuant to an FCC-approved tariff" if a party attempted to enforce an FCC tariff that was not incorporated into the terms of a

[9] When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaints in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

[10] *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

[11] *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).

Commission-approved ICA. The case Verizon relies upon does not involve an FCC tariff that was incorporated into the terms of a Commission-approved ICA, and is therefore not relevant to an analysis of Core's Amended Complaint. Rather, based on a review of the initial decision in that matter, that case involved a claim that Verizon failed to adhere to the terms of its own FCC tariff, standing alone.[12] ICAs generally cover a mix of intrastate and interstate services, a fact which Verizon itself appears to acknowledge when it claims amounts allegedly due under intrastate and interstate special access tariffs.[13] It is black-letter law in the Third Circuit that matters involving interpretation and enforcement of ICAs are subject, in the first instance, to the delegated authority conferred by the FCC to state commissions, including the Commission.[14] Accordingly, the Commission has jurisdiction to enforce Core's FCC switched access tariff, because the FCC switched access tariff is explicitly incorporated into the parties' ICAs.

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[12] *See*, Initial Decision, *MilleniaNet Corporation v. Verizon Pennsylvania Inc.*, Docket No. C-20055173, at 15 ("Verizon alleges that the Complaint should be dismissed because the issues are related to non-jurisdictional services and facilities. It asserts that the services and facilities which are the subject of the Complaint are provided pursuant to Verizon's Federal Communications Commission (FCC) Tariff No. 20, relating to the Information Service Provider (ISP) aspect of MilleniaNet's business and therefore are not subject to the Commission's jurisdiction.").

[13] *See*, Verizon New Matter and Counterclaims, ¶¶ 164 ("Section I.C. of the Verizon North/Core pricing schedule provides that, "Entrance Facility and Transport for Interconnection" should be billed at rates set by the "Intrastate Special Access Tariff." Exhibit B. Thus, Verizon has billed entrance facilities to Core in accordance with its Tariff PA-P.U.C.-No. 9 and for interstate services, Verizon has billed Core according to its tariff F.C.C. No. 1, Sec. 6, 7.") and 167 ("Section 2.7.2(c) of the Verizon North/Core ICA provides that, "Switched Exchange Access Service and InterLATA and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable Tariffs." Exhibit B § 2.7.2(c). Thus, Verizon has billed Core for originating and terminating access charges in interstate toll traffic in accordance with its Tariff F.C.C. No. 1, and for intrastate toll traffic in accordance with Tariff PA-PUC No. 9."). For reasons to be set forth in Core's upcoming Answer to Verizon's New Matter and Counterclaims, the ICAs only incorporate the parties' FCC tariffs only with respect to switched access, not with respect to special access.

[14] *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 342 (3d Cir. 2007)("[G]iven the FCC's behavior and the structure of the statutory scheme as a whole, we believe that more can be drawn from the FCC's conclusion "that dispute[s] arising from interconnection agreements and seeking interpretation and enforcement of those agreements [are] within the states' 'responsibility' under section 252." As an initial matter, the FCC's language—calling interpretation and enforcement disputes part of the states' "responsibility" under § 252—suggests that there is not a shared role for the federal courts in the first instance. To be fair, the FCC was echoing the language in § 252(e)(5), but in reaching its conclusion it did not rely at all on the fact that Starpower had chosen to litigate before the state commission. Rather, it concluded that such a delegation of responsibility best fit the statutory scheme created by Congress. In addition, we can find no indication in other FCC decisions that the state commissions' jurisdiction over post-formation disputes is shared with the federal courts. To the contrary, every indication is that "the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete.")(internal citations omitted).

12. Because Core's interstate switched access tariff is incorporated into the parties' ICAs, and because matters involving interpretation and enforcement of ICAs are subject, in the first instance, to the delegated authority conferred by the FCC to state commissions, it is proper for Core to seek enforcement of its interstate access tariff in this proceeding before the Pennsylvania Commission.

Second Preliminary Objection

13. Core denies that it seeks to "undo the *ISP Remand Order.*" Rather, Core seeks to enforce the literal terms and policy aims of the *ISP Remand Order* by giving effect to the order's "mirroring rule," which "ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic."[15] Core states that the Commission declared the *ISP Remand Order* effective as between Core and Verizon in 2003, but never concluded that "Verizon PA is entitled to pay the lower FCC rate to Core for ISP-bound traffic." The issue of whether or not Verizon adheres to the mirroring rule was not at issue in that case. Instead, the central issue was whether or not the ICA contained a change-of-law provision which permitted the Commission's *Global Order* to be superseded by the terms of the *ISP Remand Order.*[16] The Commission found that there was an applicable change-of-law provision, but stopped short of mandating particular terms and conditions to modify the ICA, or otherwise direct the parties as to implementation of the *ISP Remand Order.*[17] Nor does Verizon cite to any case in which its lengthy views on the mirroring rule have been affirmed.

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[15] Order on Remand & Report & Order, *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996—Intercarrier Compensation for ISP-Bound Traffic*16 F.C.C.R. 9151, 16 FCC Rcd. 9151, 2001 WL 455869 (F.C.C.)(Rel. Apr. 27, 2001), at ¶ 89.

[16] *See*, Opinion & Order, *Re Core Communications, Inc.*, Pa. P.U.C. Docket No. A-310922F7000, 98 Pa.P.U.C. 272, 2003 WL 21327014 (Pa. P.U.C.)(May 27, 2003).

[17] *Id.*, at *5 ("We also agree with the ALJ that the interplay between the FCC's *Order on Remand*, our *Global Order* and Section 2.1 of the Core adoption agreement serve to trigger the operation of Section 2.1 as a change of law provision in the Core/Verizon PA interconnection agreement. This permits Verizon PA to follow the FCC's pronouncements in the *Order on Remand* regarding reciprocal compensation for Internet-bound traffic and change of

14. Verizon's second preliminary objection cites various legal authorities, and those authorities speak for themselves. Core denies that that "[o]riginally it was assumed that the traffic exchanged would be relatively balanced," and states that Verizon's own predecessor-in-interest (Bell Atlantic) predicted in 1996 that competitors would seek intercarrier compensation for terminating traffic associated with ISPs.[18] Core denies that it engages in "regulatory arbitrage" or "reciprocal compensation gamesmanship." Although it has challenged the legal validity and policy bases of the *ISP Remand Order*, as has the Pennsylvania Commission, Core has continued to provide local telecommunications services to ISPs for over a decade despite Verizon's implementation of the *ISP Remand Order* and the resulting drastic lowering of rates Verizon pays for ISP-bound traffic.

15. This paragraph paraphrases the *ISP Remand Order*, and that order speaks for itself.

16. This paragraph paraphrases the *ISP Remand Order*, and that order speaks for itself.

17. Paragraph 17 of Verizon's Preliminary Objections paraphrases the *ISP Remand Order*, and that order speaks for itself. Paragraph 89 of the *ISP Remand Order* states in full:

> It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. 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. Thus, if the applicable rate cap is $.0010/mou, the ILEC must offer to

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law provisions in interconnection agreements.").

[18] *See*, Reply Comments of Bell Atlantic, Inc., FCC Docket No. CC-96-98 (May 30, 1996)("T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and internet access providers.").

> exchange section 251(b)(5) traffic at that same rate. Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and keep basis in a state that has ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis. For those incumbent LECs that choose not to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This "mirroring" rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

Accordingly, the order sets forth a bargain which Verizon may either accept or reject on a state-by-state basis: lower the rate you charge competitors for the termination of section 251(b)(5) traffic, and you may lower the rate you pay competitors for the termination of ISP-bound traffic. Core states that Verizon has failed to accept its end of the bargain, as it continues to bill Core and (upon information and belief) other CLECs reciprocal compensation and switched access rates for the termination of section 251(b)(5) traffic. Clearly, the mirroring rule applies to incumbent LECs only. The order specifically does not restrict a CLEC's ability to charge the full reciprocal compensation rate for the termination of section 251(b)(5) traffic.

18. Core admits that its original business plan centered on serving ISPs, and that it depends on intercarrier compensation as do many LECs.

19. Core admits that it challenged the legal validity of the *ISP Remand Order* in various forums. The remainder of this paragraph paraphrases various legal authorities, and those authorities speak for themselves.

20. This paragraph paraphrases the Commission's 2003 order giving effect to the *ISP Remand Order* as between Core and Verizon, and that order speaks for itself. Core denies any factual averments made in this paragraph.

21. Core's position on the mirroring rule is not baseless, and Verizon cannot point to the holding of any court or administrative agency which contradicts Core's position. The issue of

whether Core's interpretation of the mirroring rule is correct or Verizon's is correct is an issue of first impression before the Pennsylvania Commission, and therefore it is impossible to argue that this Count fails for legal insufficiency. Verizon's Preliminary Objection cannot be granted if only the facts averred in Core's Amended Complaint are considered, and if all doubt is resolved in Core's favor as is required by law. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). Clearly, Core raises a colorable claim that Verizon failed to adhere to the mirroring rule, and it is necessary for the Commission to review testimony and briefs in order to make a determination on this issue.

22. Core's position is correct, and under the *ISP Remand Order's* mirroring rule, Verizon is required to pay Core at the rate of $.002814 for the locally-dialed traffic that it sent to Core's network because Verizon does not charge Core the lower $.0007/MOU rate for traffic for that Core sends to Verizon.

23. As stated in Core's Amended Complaint, Verizon charges Core full reciprocal compensation or switched access rates for its termination of Core's section 251(b)(5) traffic, and has never charged Core the mirroring rate of $.0007/MOU.

24. Verizon's interpretation of the mirroring rule is simply incorrect. The *ISP Remand Order* does not contemplate that a CLEC make any election or "accept" any offer, only that the incumbent offer termination of section 251(b)(5) traffic at the mirroring rate. The central infirmity in Verizon's position is that the FCC was concerned that incumbents would "benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed." *ISP Remand Order*, ¶ 89. Accordingly, "[t]his "mirroring" rule ensures that incumbent LECs will pay the same rates for

ISP-bound traffic that they receive for section 251(b)(5) traffic." *Id.* The FCC admittedly was concerned that CLECs were collecting too much compensation with respect to ISP-bound traffic, and it was also concerned that its new regime would unfairly permit incumbents to collect reciprocal compensation rates for other types of traffic, such as voice traffic, in the section 251(b)(5) classification. But nowhere did the FCC express any concern for, or address, CLEC's collection of reciprocal compensation for section 251(b)(5) traffic. Verizon's "offer" is in truth a demand that CLECs lower their rates for termination of section 251(b)(5) traffic. By conditioning its "offer" on a CLEC's waiver of its right to bill reciprocal compensation rates for the termination of section 251(b)(5) traffic, Verizon violates the mirroring rule.

25. Paragraph 25 of Verizon's Preliminary Objections includes numerous factual averments which cannot be considered in evaluating Verizon's Preliminary Objections[19], and for this reason alone Verizon's second Preliminary Objection should be denied. For purposes of this response to Preliminary Objections, Core denies all such averments. Core will address such averments in more detail in its upcoming answer to Verizon's New Matter and Counterclaims. Core denies that "the Commission's numerous orders approving agreements" established that Verizon adheres to the mirroring rule.

26. Paragraph 26 of Verizon's Preliminary Objections characterizes various passages from the ICA between Core and Verizon North, Inc. That ICA speaks for itself. Core denies that Sprint's voluntary negotiation of an amendment to its ICA with Verizon in any way waives Core's right to challenge Verizon's adherence to the mirroring rule.

27. Contrary to Verizon's assertions, the amount of traffic that Core has historically sent to Verizon is irrelevant for purposes of implementing the mirroring rule. The key determinant is

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[19] *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402, 408 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602, 604 (Pa. Cmwlth. 1988).

that Verizon has billed Core at the full reciprocal compensation rate ($.02814/MOU) or at switched access rates. Because this is the case, Verizon is not entitled to receive the benefit of the mirroring rule's $.0007/MOU rate. Core denies that Verizon's "offer" adheres to the mirroring rule set forth in paragraph 89 of the *ISP Remand Order*.

28. Paragraph 28 of Verizon's Preliminary Objections again includes numerous factual averments which cannot be considered in evaluating Verizon's Preliminary Objections[20], and for this reason alone Verizon's second Preliminary Objection should be denied. In response to Verizon's new factual averments, Core denies that "Verizon billed Core the standard reciprocal compensation rate." In many cases, Verizon billed Core at switched access rates.

29. This paragraph characterizes various passages from the ICA between Core and Verizon North, Inc. As set forth in detail in Core's Amended Complaint, ¶¶ 122 and 123, the ICAs incorporate the terms of the *ISP Remand Order*. Paragraph 29 of Verizon's Preliminary Objections again includes numerous factual averments which cannot be considered in evaluating Verizon's Preliminary Objections[21], and for this reason alone Verizon's second Preliminary Objection should be denied. In response to Verizon's new factual averments, there is no such thing as a "de minimis" exception to the mirroring rule, and Verizon's admission that it billed Core at a rate other than $.0007 certainly does not bolster Verizon's demurrer. To the contrary, Verizon's admission provides support for Core's position that Verizon is precluded from taking the benefit of the mirroring rule.

30. Verizon's interpretation of the *ISP Remand Order* in paragraph 30 of its Preliminary Objections is again incorrect. The *ISP Remand Order* does not require a CLEC such as Core to

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[20] *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402, 408 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602, 604 (Pa. Cmwlth. 1988).

[21] *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402, 408 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602, 604 (Pa. Cmwlth. 1988).

lower its rate for the termination of section 251(b)(5) traffic, only its rate for the termination of ISP-bound traffic. The FCC was concerned that CLECs were collecting too much compensation in connection with ISP-bound traffic, not other types of traffic. Core denies Verizon's characterization of the Commission's 2003 order. Core denies Verizon's characterization of the *ISP Remand Order*. Furthermore, Verizon's statements regarding an "offer" and "acceptance" of a "Rate B" amendment constitute additional factual allegations that have no bearing whatsoever on the resolution of Verizon's Preliminary Objections.

31. Core denies that its claim that Verizon does not adhere to the mirroring order is "precluded" by its previous representations in this case or in Docket No. P-2011-2253650. In the referenced statement, Core simply notes that, as a factual matter, Verizon pays the FCC's rate of $0.0007 pursuant to the *ISP Remand Order*. Verizon's failure to adhere to the mirroring rule was not at issue in that case. Further, Core was not required to raise each and every grievance it has against Verizon (and these are legion) in the context of a petition for interim emergency relief. In filing its original complaint and petition, Core simply sought a return to the status quo prior to Verizon's sudden and unjustified decision to stop making any intercarrier compensation payments whatsoever, to include its ordinary practice of paying the FCC's $0.0007 rate. Indeed, Core's Original Complaint states that "even though the parties disagreed over various interconnection and billing issues, there never was any disagreement regarding Verizon's obligations to pay reciprocal compensation at a rate of at least $0.0007 per MOU for locally-dialed traffic that Verizon delivers to Core for termination." Original Compl., at ¶ 14, Petition for Emergency Relief at ¶13.

32. Core denies that its claim that Verizon does not adhere to the mirroring order is "precluded" by its previous representations in this case or in Docket No. P-2011-2253650. In the referenced statement, Core simply noted the existence of an informal billing arrangement designed to implement the Ratio Rule. Core's original Complaint, the Petition for Emergency Relief, and

Core's Amended Complaint all indicate that the billed amounts that are not paid by Verizon remain subject to dispute between the parties. See Complaint at ¶¶ 12-14, Petition for Emergency Relief at ¶ 13, Amended Complaint at ¶¶ 13-15.

33. Core denies that its claim that Verizon does not adhere to the mirroring order is "precluded" by its previous representations in this case or in Docket No. P-2011-2253650. In the referenced statement, Core simply describes the status quo prior to Verizon's sudden and unjustified decision to stop making any intercarrier compensation payments whatsoever, to include its ordinary practice of paying the FCC's $0.0007 rate. Mr. Mingo was not discussing the mirroring rule in detail. In any event, partial references to the hearing transcript have no part in a Preliminary Objection, and in resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.[22] As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.[23]

34. Core denies that its claim that Verizon does not adhere to the mirroring order is "precluded" by its previous representations in this case or in Docket No. P-2011-2253650. Core was not required to raise each and every grievance it has against Verizon (and these are legion) in the context of a petition for interim emergency relief, and the relief granted by the Commission in no way depended upon Core's decision to forego discussion of complicated, ancillary matters, such as

[22] When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaints in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

[23] *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

Verizon's failure to adhere to the mirroring rule. Indeed, under Verizon's position, it would be estopped from pursuing it alternative claim that Core owes compensation for interconnection facilities at TELRIC rates,[24] since it has pled that special access rates are due[25] and has consistently invoiced Core at special access rates.

35. As set forth above, Verizon's interpretation of the mirroring rule is flawed and incorrect. Verizon's billing of Core at a rate other than $.0007 precludes Verizon from taking the benefit of the mirroring rule, and there is no de minimis exception to the mirroring rule. Far from supporting a demurrer on Core's Count III, Verizon's Preliminary Objection actually support's Core's factual position with respect to Verizon's failure to mirror rates.

Third Preliminary Objection

36. As set forth above, Core denies that Count II of its Amended Complaint is "based on information obtained through the Commission-mandated mediation." This allegation by Verizon is reckless and baseless. Core's January 2012 billings to Verizon were based on a straightforward, NPA-NXX analysis of Verizon's tandem records and Core's own switch records relating to traffic sent by Verizon to Core. These records were in Core's possession for years before the mediation commenced. Core has maintained these records for years, and has made them fully available to Verizon, although Verizon has never accepted Core's offer to share these records. In fact, these are precisely the sort of records Verizon demanded that Core generate in June of last year. As set forth in the Amended Complaint, Core initiated a re-examination of these records after Verizon ceased paying Core's bills. Core states that its methodology for rating calls is simple, straightforward and

[24] Verizon Motion for Bilateral Payment Obligations, at 3 ("[T]he Commission should require Core to pay Verizon for its use of these facilities at TELRIC rates...").

[25] Verizon Answer, New Matter and Counterclaims, at ¶¶ 162-66.

fully consistent with the ICAs. That methodology is to rate each incoming Verizon call, regardless of whether that call comes over a local interconnection trunk or an access toll connecting trunk, as local, intrastate switched access, or interstate switched access, depending on the NPA-NXX combination of the calling and called parties. Am. Compl., at ¶ 78. The minimal information provided by Verizon during the mediation process was completely irrelevant to this methodology.

37. DENIED in full. Core states that its Amended Complaint speaks for itself, and no further response is required.

38. Core's demand for the correct compensation for traffic that Verizon sent to Core's network is not faulty and is not precluded by the doctrine of "accord and satisfaction". The doctrine of accord and satisfaction is an affirmative defense that requires affirmative proof of several factual elements. It is well-settled that a preliminary objection on the ground of legal insufficiency is the improper vehicle to raise affirmative defenses.[26]

39. Factually, Core's Amended Complaint speaks for itself, and Core denies Verizon's mischaracterizations of the legal impact of the payment history between the parties. Core clearly did not "accept[] Verizon's payment of the lower rate in satisfaction of the invoices." Core states the parties have disputed numerous aspects of Core's billing and Verizon's payments for intercarrier compensation over the years, including disputes over Verizon's implementation of the Ratio Rule and the Mirroring Rule. The doctrine of accord and satisfaction simply does not apply to this case. "The elements of accord and satisfaction are: (1) a disputed debt (2) a clear and unequivocal offer of payment in full satisfaction and (3) acceptance and retention of payment by the offeree... An accord is contractual in nature and rests upon the elements of a valid contract."[27] There is no evidence that Core and Verizon replaced their original contract, the ICAs, with a new one in which Verizon's

[26] *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).
[27] *PNC Bank, Nat. Ass'n v. Balsamo*, 430 Pa.Super. 360, 381, 634 A.2d 645 (1993).

payment of Core's bills at $0.0007 would supersede all prior understandings and prevent any further disputes. Verizon's payments do not constitute "a clear and unequivocal offer of payment in full satisfaction" of amounts billed by Core, and Core did not accept or retain them on that basis. Indeed, Verizon's standardized monthly dispute letters, which are transmitted contemporaneously with its payments, all contain a passage that reads "Verizon wants to work with [Core] in resolving outstanding billing disputes between our companies." To claim that Verizon's payments somehow negate the parties' numerous disputes over intercarrier compensation is simply not credible. Indeed, if Verizon's payments constituted an accord and satisfaction of Verizon's payment obligations to Core, Verizon could not maintain its claim for amounts allegedly overbilled or seek reimbursement of amounts already paid.[28] Further, Verizon's argument that Core waived its right to claim additional amounts for services rendered, beyond what Verizon actually paid, is nullified by Section 17 of the ICA between Core and Verizon, which provides that "[a] failure or delay of either Party (including any course of dealing or course of performance) to enforce any of the provisions of this Agreement, or any right or remedy available under this Agreement... shall in no way be construed to be a waiver of such provisions, rights, remedies or options."

40. For the same reasons set forth in paragraph 39, above, Core denies that "acceptance of those payments at the $0.0007 rate constitutes an accord and satisfaction."

41. As stated above, the doctrine of accord and satisfaction is an affirmative defense that requires affirmative proof of several factual elements. Even if it were proper to evaluate the applicability of accord and satisfaction in the context of preliminary objections, and even if Verizon's characterizations were accepted as true, Verizon has failed to establish the criteria for accord and satisfaction. Verizon never indicated that its payment of $.0007 for the minutes at issue was a "clear and unequivocal offer of payment if full satisfaction", and Core never

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28 *See*, Verizon Answer, New Matter and Counterclaims, Counts III and IV (Billing and Bill Validation).

acknowledged that the receipt of such payment was meant to fully satisfy Verizon's debt. To the contrary, each month, Verizon issues disputes of Core's invoices, and Core continues to issue invoices to Verizon which reflect the unpaid balances, which grow monthly. Core may have accepted payment from Verizon, but this acceptance by Core was never understand to constitute full and final satisfaction of Verizon's unpaid debt.

42. Core denies Verizon's characterization of section 3.1.8.3[29] of the Core/Verizon PA ICA. The plain language of that provision requires that "[c]losure of a specific billing period shall occur by joint agreement of the Parties..." (Emphasis added). For the same reasons set forth in paragraph 39, above, no such agreement ever occurred. Nor does Verizon allege any facts upon which an agreement could be construed. Further, Verizon omits the first sentence of this section, which states "[a]lthough it is the intent of each Party as a providing Party to submit timely and accurate bills, failure by a providing Party to present bills to a purchasing Party in a timely or accurate manner shall not constitute a breach or default of this Agreement, or a waiver of a right of payment of the incurred charges, by the providing Party." Core/Verizon PA ICA, § 3.1.8.3. This passage is wholly inconsistent with Verizon's view that section 3.1.8.3 constitutes an automated accord and satisfaction mechanism whereby each bill is closed nine months after the bill date. Clearly, there are disputed issues of fact and legal interpretation that must be viewed in the light most favorably to Core for the purposes of resolving Verizon's Preliminary Objection. As such, Verizon's "accord and satisfaction" Preliminary Objection must be denied.

Fourth Preliminary Objection

43. Core denies that the ICAs preclude the parties from seeking Commission relief prior to the exhaustion of the dispute resolution procedures. As set forth in paragraph 90 of Core's Amended Complaint, the Core – Verizon ICA dispute resolution process explicitly states that disputes that the

[29] Verizon erroneously refers to this section as "Section 3.1.8.2."

Parties cannot resolve themselves may be submitted to the Commission for resolution on an expedited basis. The Core-Verizon North ICA clearly specifies that either party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction if negotiations fail to resolve a dispute in a reasonable time. Furthermore, to the extent there is any doubt as to the requirement to exhaust the dispute resolution process before initiating a complaint, under well settled law regarding disposition of preliminary objections, such doubt must be resolved in Core's favor. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections: *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlth. 1997). A demurrer will not be sustained unless **the face of the complaint** shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer. *Giffin v. Chronister*, 151 Pa.Cmwlth. 286, 290, 616 A.2d 1070, 1072 (1992).

44. Core denies that "it failed to exhaust the dispute resolution provisions of the ICAs with respect to its new claims." The invoices in question were issued on January 23, 2012, and that is the date listed on the bills. As Verizon admits, the entire goal of section 3.1.9 is "to endeavor to resolve the dispute within sixty (60) days of the Bill Date on which such disputed charges appear." (emphasis added). Yet Verizon, by its own admission, did not submit its cursory one-page dispute letter until April 13, 2012, some 81 days following the January 23, 2012 bill date. On April 23, 2012, Core responded by stating:

> With respect to the switched access billings, please be advised that Verizon's dispute is denied in full or materially so. As you recognize, the traffic billed is traffic which CoreTel VA previously billed Verizon VA & Verizon South (VA) as locally-dialed, but which, upon closer examination, is actually switched access traffic Verizon delivered over local interconnection arrangements. Accordingly, we are willing to

> issue you a credit for any MOUs you may have previously paid at the $0.0007/MOU rate. And, upon your request, we will ship you CDRs to detail each call billed. Those CDRs will conclusively demonstrate what you already know (since you already have the call data from your own tandem records), which is that this is all IXC traffic delivered by Verizon to CoreTel over the interconnection arrangements.[30]

More than thirty (30) days have passed, and Verizon has made no request the CDRs which would confirm its switched access usage on Core's network. Accordingly, it is impossible to credit Verizon's April 13 letter as a valid attempt to invoke the billing dispute procedures of the ICA, since it waited well past the sixty (60) day window from the Bill Date to even dispute the billed charges. Section 3.1.9.1.1 further provides that "[i]f the dispute is not resolved within sixty (60) days of the Bill Date, the dispute will be escalated to the second level of management for each of the respective Parties for resolution." No such escalation occurred, and Verizon does not claim that it did. Section 3.1.9.2 provides "[i]f the dispute is not resolved within one hundred and twenty (120) days of the Bill Date, the dispute will be resolved in accordance with the dispute resolution procedures set forth in Part A of this Agreement." One hundred and twenty days from the bill date is May 22, 2012, just a few days after Verizon filed its Preliminary Objections. Yet, instead of requesting and reviewing the CDRs Core offered back on April 23, 2012, Verizon has done nothing to substantiate its "dispute." If Verizon wants the benefit of delaying adjudication of Core's claims by way of the billing dispute procedures, it must at least make a colorable attempt to invoke those procedures, which it has not done.

45. Core admits that Verizon sent a letter dated April 13, 2012, as discussed in paragraph 44, above. That letter speaks for itself. Core denies the remainder of this paragraph. Core states that the question of whether Core received Verizon's putative dispute letter on April 13, or on May 8 is

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[30] Email dated April 23, 2012 from Bret Mingo to Ken Roos. The email references "CoreTel VA," "Verizon VA" and "Verizon South (VA)" because Core reasonably believed Verizon's April 13, 2012 dispute letter to be limited to Virginia matters. Core acknowledges that this letter was meant to refer to an amalgam of states, including Pennsylvania, although that was not initially clear.

largely immaterial. The ICAs' billing dispute time frames are dated from the "Bill Date" not any subsequent dispute communication. Core denies that "the dispute resolution provisions of the ICAs required Core to engage in dispute resolution before simply filing a complaint. As set forth in paragraph 90 of Core's Amended Complaint, the Core/Verizon PA ICA dispute resolution process explicitly states that disputes that the Parties cannot resolve themselves may be submitted to the Commission for resolution on an expedited basis. The Core/Verizon North ICA clearly specifies that either party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction if negotiations fail to resolve a dispute in a reasonable time. In any event, the entire resolution of this issue requires references to materials that are outside the scope of Core's Complaint, and as such it is improper to consider this matter as a preliminary objection. A demurrer will not be sustained unless the face of the pleadings shows that the law will not permit recovery.[31] In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.[32] As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.[33] Furthermore, a preliminary objection on the ground of legal insufficiency is the improper vehicle to raise affirmative defenses.[34]

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[31] *Giordano v. Ridge*, 737 A.2d 350 (Pa. Cmwlth. 199), Order affirmed, 559 Pa. 283, 739 A.2d 1052 (1999).

[32] When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaints in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

[33] *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

[34] *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).

46. Verizon's preliminary objection on the grounds of "prior agreement for alternative dispute resolution" must be dismissed. The dispute resolution processes outlined in the ICAs are plainly not "agreements for alternative dispute resolution" that would preclude a party from seeking Commission resolution of a dispute. The ICAs clearly do **not** include a mediation or arbitration clause, and clearly do **not** require the parties to mediate or arbitrate a dispute rather than litigate it. To the contrary, the ICAs explicitly state that the parties are permitted to seek Commission resolution of a dispute if the parties cannot resolve it themselves. As set forth in paragraph 90 of Core's Amended Complaint, the Core – Verizon ICA dispute resolution process explicitly states that disputes that the Parties cannot resolve themselves may be submitted to the Commission for resolution on an expedited basis. The Core-Verizon North ICA clearly specifies that either party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction if negotiations fail to resolve a dispute in a reasonable time. The ICAs are the exact opposite of agreements for alternative dispute resolution – rather than binding the parties to arbitrate a dispute, they in fact explicitly permit the parties to submit disputes to the Commission for resolution. Verizon's interpretation of the ICAs is simply incorrect. Verizon chooses to ignore the ICAs' express language which allows the parties to take a dispute to the Commission if they cannot resolve it themselves. Instead, Verizon reads an "exhaustion of remedies" clause into the ICAs that simply does not exist.

47. By now, it is patently obvious that "the parties cannot themselves resolve" the matters raised in Core's Amended Complaint. With respect to Count II, Core issued the switched access invoices on January 23, 2012. Verizon admittedly did not respond until April 13, 2012. Verizon indicated that it does not intend to pay the bills. Core offered to provide CDRs to substantiate Verizon's usage on April 23, 2012. Verizon has yet to respond. All of the time frames

listed in the ICAs' billing dispute procedures have passed, no escalation has occurred, and the parties are clearly at an impasse. Further, the MOUs at issue in Core's Amended Complaint Counts II and III are some or all of the same minutes at issue in Core's original Complaint in this case and in Core's Petition in Docket No. P-2011-2253650. There is no practical way to litigate Verizon's claims that it was overbilled for these MOUs separate and apart from Core's claims that Verizon owes additional amounts for these MOUs. Indeed, Core is compelled by *res judicata* concerns to raise its claims with respect to these MOUs now, or risk being barred from raising these same claims later.[35]

48. The dispute resolution processes outlined in the ICAs are plainly not "agreements for alternative dispute resolution" that would preclude a party from seeking Commission resolution of a dispute. The ICAs clearly do **not** include a mediation or arbitration clause, and clearly do **not** require the parties to mediate or arbitrate a dispute rather than litigate it. To the contrary, the ICAs explicitly state that the parties are permitted to seek Commission resolution of a dispute if the parties cannot resolve it themselves. To the extent there is a doubt on this point, such doubt must be resolved in Core's favor and Verizon's preliminary objections must fail. As such, 52 Pa.Code 5.101(a)(6) is not applicable to this case.

49. Verizon's Preliminary Objection on the Grounds of "prior agreement for alternative dispute resolution" must be dismissed. The dispute resolution procedures outline in the ICAs do not constitute agreements for alternative dispute resolution, and even if they did, Verizon's disputes were filed beyond the required deadlines, and it is clear that that parties are not able to resolve the

[35] The doctrine of res judicata encompasses both technical res judicata and collateral estoppel. *Maranc v. Workers' Compensation Appeal Board (Bienenfeld),* 751 A.2d 1196, 1199 (Pa.Cmwlth.2000). Collateral estoppel forecloses litigation of specific issues of law or fact that have been litigated and were necessary to a previous final judgment. Id. Technical res judicata forecloses litigation between the same parties on a cause of action that has already been resolved in a final judgment. *Id.* Generally, causes of action are identical when "the subject matter and the ultimate issues are the same in both the old and the new proceedings." *Id.* The doctrine of res judicata applies both to matters that were actually litigated and to matters that could have been litigated. *Id.*

dispute on their own. Accordingly, the ICAs clearly permit Core to seek Commission resolution of these issues. It is far from clear that Verizon's interpretation of the ICAs is correct. Verizon chooses to ignore the ICAs' express language which allows the parties to take a dispute to the Commission if they cannot resolve it themselves. Instead, Verizon reads an "exhaustion of remedies" clause into the ICAs that simply does not exist. Verizon has a very high burden to prevail on its preliminary objections, yet its sole argument in support of its objection requires an interpretation of the ICAs that is not supported by the plain language in the documents. Under the well-settled principles for resolving preliminary objections in general and demurrers in particulate, Verizon's objections simply cannot be upheld.

50. DENIED in full. Core raised the issue of Verizon's failure to adhere to the mirroring rule as far back as February 24, 2011, Am. Compl., at ¶ 29, but Verizon never responded. Even under Verizon's interpretation of the ICAs, Core is not obligated to initiate a dispute under the ICA in order to amend its Complaint to include additional argument in support of the relief it requests.

IV. Conclusion

For the reasons set forth above, Core respectfully requests that the Commission dismiss Verizon's Preliminary Objections.

Respectfully submitted,

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May 29, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CORE COMMUNICATIONS, INC. Complainant	:	
v.	:	Docket No. C-2011-2253750 Docket No. C-2011-2253787
VERIZON PENNSYLVANIA INC. and	:	
VERIZON NORTH, INC. Respondents	:	

CERTIFICATION OF SERVICE

I hereby certify that I have this day served by First Class U.S. Mail and Electronic Mail a true and correct copy of the foregoing Motion upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by a party)

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May 29, 2012

Michael A. Gruin

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Origin ID: MDTA

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Sec. Rosemary Chiavetta
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