

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

REPLY TO CORE EXCEPTIONS TO THE RECOMMENDED DECISION

Pursuant to 52 Pa. Code §5.535, XO Communications Services, Inc. (“XO”) hereby submits this Reply to the Exceptions filed by Core Communications, Inc. on June 6, 2012 (“Exceptions”) to the Recommended Decision of Administrative Law Judge Kandace F. Melillo (“ALJ”), dated May 11, 2012 and issued May 18, 2012, in the subject Complaint. In its Exceptions, Core simply repeats its arguments, almost completely verbatim, that it raised in its Initial Brief. Indeed, the only new material consists of large blocks of quoted material from a recent, and irrelevant, decision (since reconsidered), the *T-Mobile Material Question Order*.¹ For that reason, XO will not respond to those arguments here at length, because XO responded to those in its briefs and does not believe it is a necessary to repeat those arguments herein.

A. The Recommended Decision (“RD”) Correctly Agreed with the *PacWest* Court that the FCC’s ISP Remand Order Applied to CLEC-to-CLEC Traffic and Preempted the Commission.

Core’s arguments, in Section A of its Exceptions,² that the FCC’s authoritative interpretation of its *ISP Remand Order* is incorrect are meritless. Without any legitimate basis, Core attacks the

¹ 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 (Mar. 15, 2012) (*reconsideration granted*, 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 (Apr. 12, 2012) (*T-Mobile Material Question Order*).

² See also Core Main Brief at 33-45.

merits of the FCC's interpretation of the *ISP Remand Order* and would have the ALJ and the Commission ignore the careful and compelling analysis set forth in the FCC's Amicus Brief in *PacWest*, even though the Ninth Circuit found the FCC's analysis convincing and adopted it. The Ninth Circuit order held that the *ISP Remand Order* and its compensation regime applies to all LEC-originated ISP bound traffic, including CLEC-originated traffic.³

Core disparages the Amicus Brief, asserting that "staff" misinterpreted the *ISP Remand Order*. However, the Amicus Brief is the FCC's interpretation of its order and not merely that of "staff," as Core claims.⁴ Moreover, the FCC certainly knows what it intended and its interpretation is supported by the language and the purpose of the *ISP Remand Order* itself and the rulings of the U.S. Supreme Court require deference to the FCC's interpretation of its own order. Core would have the Commission ignore (instead of deferring to) the FCC's interpretation and adhere to the interpretation reflected in the Commission's *AT&T Material Question Order*.⁵ However, this would be inconsistent with Supreme Court precedent, including the recent *Talk America* case, which found that the FCC's amicus brief in that case *was entitled to deference* in deciding the issues.⁶ In fact, Core's position, based on the case law, is simply not permitted.

It is well-settled that an "agency's reading of its own rule[s] is entitled to substantial

³ *AT&T Commc'ns of California, Inc. et al. v. PacWest Telecomm, Inc. et al.*, 651 F.3d 980, 996 (9th Cir. 2011) ("*PacWest*").

⁴ Core Exceptions at 4.

⁵ *Core Commc'ns, Inc. v. AT&T Commc'ns of PA, LLC, and TCG Pittsburgh, Inc., Pa. P.U.C.* Docket Nos. C-2009-2108186 and C-2009-2108239, Opinion & Order at 10 (Sept. 8, 2010) ("*AT&T Material Question Order*").

⁶ *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254; 2011 WL 2224429 at *3 (June 9, 2011). In describing the applicable standard, the Court stated that "we defer to an agency's interpretation of its regulations, *even in a legal brief*, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. (emphasis supplied).

deference.”⁷ This principle applies to the FCC’s interpretation of the *ISP Remand Order* contained in the FCC Amicus Brief. The RD correctly concluded that such deference was appropriate noting:

The Court also relied heavily on the FCC amicus brief, and indicated that it was deferring to the FCC’s interpretation of the compensation regime it created, barring some “reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”⁸

The RD also correctly holds that there is no reason to substitute a different judgment for the FCC’s:

The Court in PacWest did not find any reason to substitute a different judgment for the FCC’s, particularly since the FCC’s reasoning mirrored its own, and concluded that the FCC was in the best position to describe the scope of its own orders. Thus, the Court reversed the lower court’s decision and found that the ISP Remand Order did govern compensation for local ISP-bound traffic exchanged between two CLECs.

I find the PacWest analysis to be convincing and agree, for the above-stated reasons, that the ISP Remand Order does apply to local ISP-bound traffic exchanged between two CLECs.⁹

B. All ISP Bound Traffic Is Jurisdictionally Interstate, so Intrastate Rates and an Intrastate Tariff Do Not Apply.

In Section B of its Exceptions,¹⁰ Core continues to argue that it should be found that intrastate rates should apply to this traffic.¹¹ However, ISP bound traffic is interstate traffic, not intrastate. Core’s tariffs, by its own admission, only cover intrastate traffic and do not apply to the interstate traffic at issue in this case.

⁷ *Riegel v. Medtronic*, 552 U.S. 312 (2008).

⁸ RD at 28 (internal citations omitted).

⁹ *Id.* at 29.

¹⁰ See also Core Main Brief at 18-22.

¹¹ Core even argues that a tandem transit rate is the applicable rate. There is no evidence in this case that Core is providing any tandem services. It is clear that Core is just seeking application of the highest possible rate.

In its ISP orders the FCC applied its end-to-end analysis and determined that ISP bound traffic is “jurisdictionally mixed and largely interstate.”¹² However, because the “interstate and intrastate components cannot be reliably separated” it determined that ISP-bound traffic is to be treated as interstate, falling under the FCC’s section 201 jurisdiction.¹³

C. The ALJ Correctly Rejected Core’s Request to Impose Civil Penalties on XO.

In Section D of its Exceptions,¹⁴ Core reiterates its demand for civil penalties on XO. The ALJ correctly concluded that the civil penalties that Core sought were not appropriate in this case.

The RD found:

XO was acting in good faith and within its rights in disputing the application of switched access rates to the XO indirect traffic terminated by Core. No violations of the Public Utility Code, or the regulations or Orders of the Commission are implicated. See, 66 Pa. C.S. §3301. Also, the imposition of penalties and costs, based upon this record, could well have a chilling effect on the future filing of billing disputes by customers, even *pro se* complainants.¹⁵

There is no reason to modify this conclusion. Core was assessing switched access charges on all ISP-bound traffic. The FCC in its Amicus Brief and the Ninth Circuit in its ruling in *PacWest* both concluded that Core was wrong. Consequently, XO’s billing dispute was justified. Moreover, the RD is also correct that imposing penalties and costs based on the record in this case could have a chilling effect on future billing disputes and complaints by customers who, like XO, believe that there is a legitimate basis for the dispute and, further, that their dispute is correct. Such an outcome would clearly not be in the public interest, as the RD properly concludes.

¹² *ISP Remand Order* ¶ 14.

¹³ *Id.* ¶ 52.

¹⁴ *See also* Core Main Brief at 30-33.

¹⁵ RD at 34.

D. Core's Reliance on the AT&T Material Question Order, the Global NAPs Cases and the T-Mobile Case Is Misplaced and Misguided.

Core maintains that the “*AT&T Material Question Order* remains good law.”¹⁶ This is clearly erroneous. In fact, to adopt Core’s position and uphold the conclusions in the *AT&T Material Question Order* would require the Commission to defy federal law and ignore the FCC’s authoritative interpretation of its own *ISP Remand Order*, which the Ninth Circuit adopted. The Ninth Circuit held that the *ISP Remand Order* applies to *all* LEC originated ISP bound traffic, including between CLECs. The Ninth Circuit also clearly explained why the interpretation in the FCC’s Amicus Brief was convincing and consistent with its own reasoning as well as with the language, structure, policy and purpose of the *ISP Remand Order*. Thus, there is no doubt that the *ISP Remand Order* applies to the traffic at issue in this case and Core’s position to the contrary must be rejected.

Core also generously quotes the *T-Mobile Material Question Order* for its position that the Commission has jurisdiction over all of the traffic at issue in this case, but this reliance is unavailing. As an initial matter, the *T-Mobile Material Question Order* is not good law, since the Commission has granted reconsideration of that Order.¹⁷ However, even if it were effective law, it would be irrelevant to this case for the same reason that two other cases on which Core relies (*Petition of Cellco*¹⁸ and *CMRS Traffic Alabama*¹⁹) cases are irrelevant – they all involve CMRS traffic for which, unlike ISP bound traffic, the FCC has not preempted the Intercarrier

¹⁶ Core Exceptions at 5.

¹⁷ 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 (Apr. 12, 2012).

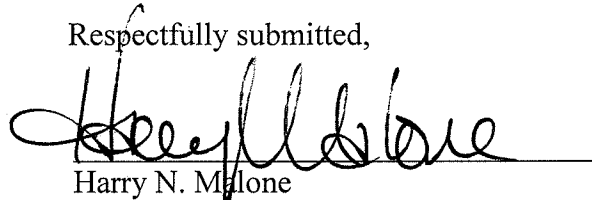
¹⁸ See, e.g., Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration with ALLTEL Pennsylvania, Inc., Docket No. A-310489F7004, Order entered January 18, 2005 (*Petition of Cellco*).

¹⁹ Request for a Declaratory Ruling Governing Compensation For Indirect CMRS Traffic, Ala. P.S.C. Docket No. 28988, 2004 Ala. PUC LEXIS 263 (July 30, 2004) (*CMRS Traffic Alabama*).

compensation regime. The T-Mobile case does not involve ISP bound traffic. It involves a wireline carrier and a wireless carrier. There is no ISP bound traffic at issue in that proceeding and, thus, the *ISP Remand Order* and the FCC's preemption with respect to ISP bound traffic does not apply in that case, as they do in this one.

Based on the foregoing and XO's Brief on Exceptions, XO respectfully requests the Commission reject Core's exceptions and dismiss Core's complaint against XO.

Respectfully submitted,



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