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December 19, 2012

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

Re: Core Communications, Inc. v. AT&T Corp. (formerly AT&T Communications of Pennsylvania, LLC), and TCG Pittsburgh, Docket Nos. C-2009-2108186 and C-2009-2108239

Dear Secretary Chiavetta:

Please find enclosed for filing a Petition for Reconsideration and Stay filed on behalf of AT&T Corp. (formerly AT&T Communications of Pennsylvania, LLC) and TCG Pittsburgh in the above-referenced dockets.

Please contact me if you have any questions or concerns with this matter.

Very truly yours,

Michelle Painter

Michelle Painter

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Petition for Reconsideration and Stay upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Fairfax, Virginia, this 19th day of December 2012.

VIA E-MAIL AND FIRST CLASS MAIL

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Michelle Painter

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Core Communications, Inc.	)	
	)	
Complainant	)	
	)	
v.	)	
	)	
AT&T Communications of PA, LLC (now AT&T Corp)	)	**Docket No. C-2009-2108186**
	)	**Docket No. C-2009-2108239**
	)	
and	)	
	)	
TCG Pittsburgh	)	
	)	
Respondents		

PETITION FOR RECONSIDERATION AND STAY

AT&T Corp. and
TCG Pittsburgh

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AT&T Corp.[1] and TCG Pittsburgh ("AT&T" and "TCG," collectively "AT&T") hereby submit to the Pennsylvania Public Utility Commission ("Commission") their Petition for Reconsideration and Stay of the Commission's December 5, 2012 Opinion and Order ("Order") in this matter.

I. PETITION FOR RECONSIDERATION

A Petition for Reconsideration pursuant to 66 Pa. C.S. 703(g) "may properly raise matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part." *Duick v. Pa. Gas and Water Co.*, 56 Pa. PUC 553, 559 (Dec. 17, 1985). In a Petition for Reconsideration, a party should raise issues that it may not have had an opportunity to address prior to the issuance of the Commission's Order. *Id.* at 559. AT&T's Petition more than satisfies the standards for reconsideration.

As AT&T has demonstrated in the past, the Commission lacks the authority, under both federal law and state law, to regulate and establish rates for the interstate traffic at issue here. That matter has been fully briefed, and the Commission has rejected AT&T's arguments, erroneously we believe, and has ruled instead that it possesses the jurisdiction to interpret and apply federal law to resolve the instant dispute. While AT&T vigorously disagrees with the Commission on these threshold jurisdictional issues, AT&T will not raise those issues as matters as to which the Commission should grant reconsideration – although AT&T expressly preserves its position on these issues for later judicial review, should that occur.

AT&T, however, was not given the opportunity to address *how* federal law applies if one assumes *arguendo* that the Commission possesses the authority in this case to apply it. In

[1] Effective October 31, 2012, AT&T Communications of Pennsylvania, LLC merged into AT&T Corp. *See* Order dated September 13, 2012 in Docket No. A-2012-2313336 et al.

applying federal law, the Commission erred in three principal respects. Those errors, which AT&T has not previously had the opportunity to raise and address, are the sole subjects of this Petition for Reconsideration.

The Administrative Law Judge's ("ALJ") May 2011 Initial Decision ruled that the *ISP Remand Order*[2] contains FCC rules that apply to the traffic in question – *i.e.*, locally dialed, ISP-bound traffic – and that preempt states from "using state law to set rates" for ISP-bound traffic or "making rulings that are inconsistent with the FCC intercarrier compensation regime for ISP-bound traffic." Order at 14. The Initial Decision further ruled that the Commission possesses the authority to apply federal law to resolve this compensation dispute associated with ISP-bound traffic, but expressly deferred ruling on how federal law applies, stating that the parties would address that issue in future briefing. *Id.* The Commission adopted the Initial Decision in large part, agreeing that federal law applies to this dispute, that the use of state law is preempted, and that "arguments of the Parties regarding the application of state law to this proceeding are no longer relevant to the disposition of Core's Complaint." Order at 14, 24-25, 80. The Commission, however, struck the part of the Initial Decision stating that the parties would brief how federal law applies to Core's Complaint, explaining that "[i]n lieu of requesting briefs on this issue, we shall exercise our authority to establish rates consistent with the FCC's intercarrier compensation regime for ISP-bound traffic." *Id.* at 14-15. The Commission then went on to purportedly "hear and decide this case by applying federal law," and found that the FCC's rate cap of $0.0007 per MOU would apply to the locally dialed, ISP-bound traffic at issue. *Id.* at 24.

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[2] *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").*

While the Commission correctly found that federal, not state, law applies to this dispute, it did not have authority to go on to apply federal law to the interstate traffic at issue in this case. But even if it did, the Order violates federal law in at least three ways. *First,* the Order violates 47 U.S.C. § 203(a) and (c), which provide that, in the absence of a contract, a carrier may charge (for traffic that is jurisdictionally interstate – like the traffic at issue here) only the rate specified or established in a tariff on file at the FCC. Because Core does not have (and has never had) any contract or federal tariff that covers the traffic at issue, it is not entitled to charge anything for its termination. The Order also violates 47 U.S.C. § 201(b), which renders unlawful any "unjust and unreasonable" charge, because, as the courts and the FCC have held, charging a rate not specified in a tariff or a contract is an "unjust and unreasonable" charge. The Order also violates the federal prohibition against retroactive ratemaking by having the Order extend to traffic four years prior to the filing of Core's complaint. *Second,* the order violates Section 251(b)(5) of the Telecommunications Act of 1996 by allowing Core to receive compensation for the transport and termination of telecommunications without establishing "a reciprocal compensation arrangement." *Third,* the Order fails to apply the federal two year statute of limitations for actions by carriers to recover charges for traffic that is jurisdictionally interstate (which the Commission's Order agrees is what the locally dialed ISP-bound traffic at issue here is) established in 47 U.S.C. § 415, and instead applies a state four year statute of limitations – even though the Order explicitly found that the use of state law was preempted and not "relevant."

AT&T did not have the opportunity to raise these issues prior to this Petition for Reconsideration because the parties were not permitted to submit briefs on the application of federal law to this dispute. And because new issues are being raised, the Order is an appropriate

one for reconsideration. The Commission should revisit the portions of its Order affected by these errors and rescind or amend the Order accordingly.

A. THE ORDER VIOLATES SECTIONS 203 AND 201 OF THE FEDERAL COMMUNICATIONS ACT

A competitive local exchange carrier ("CLEC") like Core is permitted to assess charges on jurisdictionally interstate traffic (which the traffic at issue here is) in one of two ways: by filing a federal tariff or by negotiating a contract or agreement with the other carrier. *In re Sprint Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 F.C.C.R. 10780, 10782 (2011). *See also In re Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 F.C.C.R. 8332, 8335 (2011). Here, Core did not negotiate a contract or agreement, and had not even attempted to negotiate such an agreement when it first sent AT&T a bill.[3] In the absence of a contract or agreement, in order to assess charges on jurisdictionally interstate traffic, a CLEC like Core is required to file a federal tariff establishing a rate for such traffic (47 U.S.C. § 203(a)), and is prohibited from charging any rate other than the one established in its tariff. 47 U.S.C. § 203(c)(1). Here, Core did not do that either. Core still does not have an interstate tariff in place that would permit it to charge any rate to AT&T for the termination of the traffic at issue.[4] Accordingly, the Order violates Section 203 by allowing Core to charge for the traffic at issue here. In addition, a CLEC like Core violates 47 U.S.C. § 201(b), which prohibits "unjust and unreasonable" charges, by charging a rate that is not established in either a filed tariff or a negotiated contract – because such charges are by definition unjust and unreasonable. *Connect Insured Telephone, Inc. v. Qwest Long Distance,*

[3] AT&T did attempt to reach an agreement with Core; however, the negotiations could not move forward when Core refused to discuss an acceptable rate until AT&T first agreed to pay Core for all backbilled amounts at the intrastate switched access rate, and when Core insisted that it would not even discuss $.0007 as a possible rate. AT&T Reply Brief at p. 52; Tr. at 94-95 (Mingo).

[4] Of course, this Commission does not have authority to establish federally tariffed rates.

Inc., 2012 WL 2995063 (N.D. Tex. July 23, 2012). The Order therefore violates Section 201(b) by allowing Core to do just that.

B. THE ORDER VIOLATES SECTION 251(b)(5) OF THE TELECOMMUNICATIONS ACT OF 1996

Section 251(b)(5) of the Telecommunications Act of 1996 obligates all LECs, including Core, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." This provision on its face is not self-executing. That is, nothing entitles Core to 251(b)(5) compensation unless and until it "establish[es]" an "arrangement[]" for such compensation. The Order correctly found that Core does not have an agreement, tariff or any other arrangement establishing compensation for the traffic at issue in this case. Order at 2, 59-60. The Order nevertheless allows Core to recover 251(b)(5) charges in the absence of such an "arrangement[]." That is inconsistent with the plain language of the statute.

The FCC has been faced with disputes over "whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers." *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4855, ¶ 4 (Feb. 24, 2005). The FCC found that, in the absence of an interconnection agreement, a tariff is a permissible means to establish a reciprocal compensation arrangement under 251(b)(5). *Id.*, ¶¶ 9-10. The FCC explained that "[i]In light of existing carrier disputes, we find it necessary to clarify the *type of arrangements necessary to trigger payment obligations*." *Id.*, ¶ 9 (emphasis added). And "[b]ecause the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs [for terminating intra-MTA wireless traffic] and CMRS providers were obligated to accept the terms of applicable state tariffs." *Id.* The FCC's language referring to "the type of arrangements necessary to trigger payment obligations"

supports the notion that Section 251(b)(5) is not self-executing, but requires some sort of "arrangement" before payment obligations are triggered. *Id.* *See also id.*, ¶ 10 ("Our finding that tariffed arrangements were permitted under the existing rules is based on the fact that neither the Commission's reciprocal compensation rules [nor other rules applicable to wireless carriers not relevant here] . . . specify the types of arrangements that trigger a compensation obligation. Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff.")

Consistent with this analysis, Core itself has acknowledged that "[c]arriers generally bill one another either by tariff or by agreement." Mingo Direct at 17. *See also* Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund,* 2011 WL 5844975 ¶ 828 (Nov. 18, 2011) ("Regulated intercarrier compensation payments among carriers have been imposed in two basic ways: through tariffs and through carrier-to-carrier agreements.") To this day, however, Core has not filed a tariff or entered into any agreement or other compensation arrangement with AT&T that would trigger the reciprocal compensation payment obligations of Section 251(b)(5) with respect to the locally dialed, ISP-bound traffic at issue in this case.[5] In the absence of an established compensation arrangement, the Commission erred in determining that Core is entitled to charge AT&T a positive rate for the termination of that traffic both on a going forward basis and for past traffic exchanges.

[5] The Commission is wrong to suggest that AT&T engaged in any form of self help. Core could have filed a federal tariff at any time, but chose not to do so. The record shows that AT&T tried to negotiate a contract with Core, but the negotiations failed when the parties could not agree upon a rate (and AT&T was told that Core would not even discuss $.0007). Tr. at 94-95. Regardless of the reason for the failure of agreement on a contract between AT&T and Core, the bottom line is that there is no contract and there is no tariff, and therefore no legal compensation arrangement as required by federal law.

C. THE ORDER VIOLATES THE FEDERAL PROHIBITION AGAINST RETROACTIVE RATEMAKING

The provisions of the Order applying a rate to traffic exchanges that occurred prior to the filing of Core's Complaint violate the federal rule against retroactive ratemaking. *TRT TeleCommunications Corp. v. FCC,* 857 F.2d 1535, 1547 (D.C. Cir. 1988) ("the rule against retroactive rate increases is one that emerges from sections 201-205 of the Communications Act."). *See also Qwest Corp. v. Koppendrayer,* 436 F.3d 859, 863-64 (8th Cir. 2006). Although the Commission found, correctly, that the state law prohibition against retroactive ratemaking was "no longer relevant," once the Commission found that federal law controlled (Order at p. 80), the Commission then failed to recognize and apply the federal law against retroactive ratemaking. Assuming for the sake of argument this Commission has jurisdiction to establish a rate for the traffic at issue, the federal prohibition against retroactive ratemaking precludes the application of any such rate for traffic exchanges prior to May 19, 2009, the date Core filed its Complaint.

D. THE ORDER ERRONEOUSLY APPLIES A STATE FOUR YEAR STATUTE OF LIMITATIONS, INSTEAD OF THE FEDERAL TWO YEAR STATUTE OF LIMITATIONS, TO CORE'S COMPLAINT

Even assuming *arguendo* that the Commission possessed the authority to apply federal law to resolve this dispute, and that the federal prohibition against retroactive ratemaking somehow did not bar the Commission from directing AT&T to pay Core for traffic exchanged prior to the date of Core's complaint, the Commission was still was obligated to apply the federal statute of limitations.[6] The applicable *federal* statute of limitations is established in 47 U.S.C. § 415, which provides that a Complaint to recover charges must be filed "within two years from

[6] As discussed above, federal law against retroactive ratemaking prohibits the establishment of any rate prior to the date Core filed its Complaint. Even if that were not the case, the federal statute of limitations bars any Core claim arising more than two years from the date of the Core Complaint.

the time the cause of action accrues, and not after." The Commission, however, did not apply this federal two year statute of limitations to Core's Complaint. Instead, the Commission found that the Order extended back four years, citing to 66 Pa. C.S. § 1312.[7] The Commission explained that its Order "does not extend to traffic terminated by Core prior to May 19, 2005" (Order at 82) – in other words, that Core could recover for the *four* years prior to its May 19, 2009 Complaint. But a four year state statute of limitations cannot apply to a Complaint governed exclusively by federal law – indeed, the Commission itself found that it was preempted from applying state law to Core's Complaint, but then it went ahead and did just that. Because the Order erroneously applies a state statute of limitations instead of the federal statute of limitations to Core's Complaint, at a bare minimum, the Order should be amended to correct this error by replacing "May 19, 2005" with "May 19, 2007" on page 82 of the Order.

II. REQUEST FOR STAY

Pursuant to Pa. R.A.P. 1781(a) and 52 Pa. Code § 5.572, AT&T respectfully requests a stay or supersedeas of the Commission's order – specifically, the directive that AT&T "pay the FCC's capped rate of $0.0007 per MOU to Core" – pending resolution of AT&T's Petition for Reconsideration and any subsequent judicial review of the Commission's Order. The Commission must grant a stay or supersedeas of its order if AT&T shows (1) that it is likely to prevail on the merits; (2) that without the requested relief, AT&T will suffer irreparable injury; (3) that the issuance of a stay will not substantially harm interested parties in the proceedings; and (4) that issuance of the stay will not adversely affect the public interest. *Application of West*

[7] Even if state law did apply here, which it does not, this section cited by the Commission is inapplicable here. Section 1312 deals with providing refunds due to overpayment by customers as a result of unjust and unreasonable rates; rates that are in violation of a Commission Order; or rates that are in excess of a tariffed rate. None of those scenarios are present here. Section 1312 does not apply to the establishment of new rates.

PenPower Company, 2011 WL 544710, *slip op.* at 2 (Pa. P.U.C. 2011). Each requirement has been met.

(1) *Likelihood Of Prevailing On The Merits*: For the reasons explained in Part I, AT&T is likely to prevail on the merits of its Petition for Reconsideration and in any subsequent judicial review of the Commission's Order. The Order determined that Core's Complaint was governed exclusively by federal law and purported to apply federal law to the Complaint. AT&T's Petition for Reconsideration, however, identifies three instances where the Order plainly violates federal law – including one where the Order erroneously applies state law (which the Order itself found the Commission was preempted from applying) instead of federal law. AT&T is also likely to prevail on the merits of any appeal of the Commission's Order. In addition to the points of error identified in AT&T's Petition for Reconsideration (which can also be raised on appeal), the Order is unlawful for reasons explained in AT&T's prior briefs. Specifically, while the Commission possessed the authority to determine the jurisdictional nature of the traffic at issue and whether Core's intrastate switched access tariff applies, once the Commission decided that the traffic was jurisdictionally interstate and that Core's tariff did not apply, the Commission's jurisdiction was at an end. AT&T Motion to Dismiss Formal Complaint of Core Communications at 1-3, 8-23; AT&T Main Br. at 44-46. As a matter of federal law, the Commission lacks authority to set rates for the interstate traffic at issue because that authority rests exclusively with the FCC. Moreover, as a matter of state law, the Commission lacks authority to set rates for interstate traffic because under its own enabling statute the Commission can only regulate and set rates for intrastate traffic. 66 Pa. C.S.A. § 104.[8]

[8]"As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers." *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Commission,* 875 A.2d 1243, 1249 (Pa. Cmwlth.2005) (citing *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission,* 664 A.2d 664 (Pa. Cmwlth. 1995)).

(2) *Irreparable Harm:* AT&T will likely suffer irreparable harm if a stay or supersedeas of the Order is not granted. Core's business model is the provision of service to dial-up internet service providers. Mingo Direct at 2. The demand for dial-up internet service, however, has declined significantly over the years due to the fact that virtually all Internet traffic has moved away from dial-up service to DSL, cable modem service, or some other high-speed arrangement. Indeed, of the more than 400 million minutes for which Core sought compensation in this case, fully 97% were delivered to Core during the period 2004-2007. Mingo Direct, Ex. BLM-1. For the period June 2008 through October 2009, the amount of traffic had slowed to barely a trickle. *Id.* Given these facts, there can be little doubt that Core's provision of dial-up internet service to ISPs is a failing business model. And as Core's business declines, it becomes increasingly unlikely that AT&T would be able to recover any payments made to Core pursuant to the Order in the event a court (or the Commission on reconsideration) reverses the Order and finds that AT&T was not required to pay Core for the termination of the traffic at issue. Such monetary losses can satisfy the irreparable harm requirement. *See West Penn Power Co v. Pennsylvania Public Utility Commission,* 150 Pa. Cmwlth 349, 363, 615 A.2d 951, 959 (Pa. Cmwlth 1992) (finding irreparable harm where energy corporation "might have sustained [monetary] losses . . . that it would not be able to recover later under any cause of action."); *Pennsylvania Public Utility Commission v. Process Gas Consumers Group,* 502 Pa. 545, 554, 467 A.2d 805, 809-810 (Pa. 1983).

Core itself has argued throughout this proceeding that not receiving the money it claims AT&T owes "threatens [its] economic viability" (Mingo Direct at 14) and could force Core to "go out of business" (Mingo Surrebuttal at 9). Core, of course, has been awarded only a small fraction of the amount it sought and claimed to be so vital to its survival: more than $7.5 million

requested by Core as compared to approximately $250,000 awarded by the Commission. And going forward the revenue stream Core had hoped to gain will be virtually non-existent, even if the Order is upheld, due to the steep decline of dial-up internet service. This further underscores the significant risk that AT&T will not be able to recover any money paid to Core in the event the Order is ultimately reversed.

Core has also suggested that it could use the money AT&T supposedly owes to "upgrade and expand [its] network" and "expand into new lines of business." Mingo Direct at 14. *See also* Core Br. at 11-12 & Proposed Finding of Fact 31 (claiming that "non-payment challenges Core's ability to maintain a robust and reliable network" and to "upgrade and expand its network to offer additional services, such as VOIP and outbound calling"). Core has an incentive to do just that in light of the dwindling use of dial-up internet service and the resulting sharp decline in Core's business. Of course, if Core uses any money paid by AT&T pursuant to the Order to invest in a new business model or network architecture, there is obviously a substantial risk that AT&T will be unable to recover that money in the event the Commission's Order is ultimately reversed. Such losses constitute irreparable harm. *See Pennsylvania Public Utility Commission v. Process Gas Consumers Group,* 502 Pa. 545 at 467 ("sufficient showing of irreparable harm" where "monies . . . may be spent.")

Harm To Interested Parties. A stay or supersedeas of the Order will not substantially harm interested parties in this dispute. The only interested party other than AT&T is Core, and delaying payment until the conclusion of AT&T's Petition for Reconsideration and any appeal of the Order will not substantially harm Core, but rather will maintain the status quo. Core has been terminating locally dialed traffic for other carriers since 1999 or 2000, but to this day has not filed a tariff establishing rates for that traffic, and has only entered into limited agreements

with two carriers. AT&T Reply Br. at 33. Moreover, from 2000 until 2008 Core never sent a single bill to AT&T for the termination of the traffic at issue – in fact, Core apparently did not even notice AT&T was sending its ISP-bound calls until late 2007. Mingo Direct at 9-10. Having gone so many years without seeking or receiving compensation for the traffic at issue, Core will not be harmed if it has to wait a little longer, *i.e.*, until the resolution of AT&T's Petition for Reconsideration and any judicial review of the Order, to collect the money. There can be no question that AT&T is able to pay it, and Core can be compensated for any delay by applying the judicial interest rate as of the date of the Commission's Order – which substantially exceeds what Core could achieve in the open market.

Affect On The Public Interest: Issuance of a stay or supersedeas will not adversely affect the public interest. Since 2009 the parties have exchanged little if any traffic, so there is not even a remote risk of service interruption. On the other hand, the public interest is affirmatively disserved by allowing carriers to collect charges that are unlawful because they are not established in either a tariff or a contract. And that is precisely what will occur if the stay is not issued.

For these reasons, the Commission should grant a stay of its Order pending resolution of AT&T's Petition for Reconsideration and any subsequent judicial review. In the event the Commission denies that request, in the alternative, AT&T requests that it approve AT&T placing any amounts due to Core under the Order as it now stands into an interest bearing escrow account to be distributed to the prevailing party at the conclusion of the Commission's reconsideration and any subsequent judicial review.

Respectfully submitted,

AT&T Corp. and TCG Pittsburgh

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DATED: December 19, 2012