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December 31, 2012

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Core Communications, Inc. v. AT&T Communications of Pa., LLC and TCG Pittsburgh, Inc., Docket Nos. C-2009-2108186 and C-2009-2108239

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Core Communications, Inc.'s Answer to AT&T's Petition for Reconsideration & Stay to Commission Opinion and Order with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service..

Sincerely yours,

Deanne M. O'Dell

Deanne M. O'Dell, Esq.

DMO/lww
Enclosure

cc: Hon. Angela Jones, w/enc.
Cheryl Walker Davis, w/enc.
Cert. of Service, w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Core Communications, Inc.'s Answer to AT&T's Petition for Reconsideration & Stay to Commission Opinion and Order upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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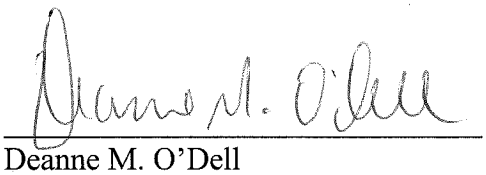

Deanne M. O'Dell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF CORE COMMUNICATIONS, INC. TO AT&T'S PETITION FOR RECONSIDERATION & STAY OF THE COMMISSION'S DECEMBER 5, 2012 OPINION & ORDER

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December 31, 2012

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Pursuant to 52 Pa. Code § 5.572(e), Core Communications, Inc. ("Core") hereby answers the Petition for Reconsideration and Stay ("Petition") of the Commission's December 5, 2012 Opinion & Order in the above-captioned proceeding ("*Order*") filed by AT&T Corp. and TCG Pittsburgh, Inc. (collectively "AT&T") on December 19, 2012. In further support of this Answer, Core avers as follows:

I. THE COMMISSION CAN AND DID APPLY BOTH STATE AND FEDERAL LAW IN RESOLVING THE ISSUES IN THESE CASES

AT&T misconstrues and greatly exaggerates the Commission's reliance on federal law to resolve this case. *See generally*, Petition, at 2-5. The Commission never stated that it intended to apply federal law to every aspect of this case. Rather, the Commission applied federal law only in order to establish a *rate* for CLEC-CLEC ISP-bound traffic in the absence of a TEA. The Commission found that the *ISP Remand Order* preempted its ability to set a rate for CLEC-CLEC ISP-bound traffic, but also found that the FCC never preempted it from resolving the remaining issues in this case consistent with that directive. *Order*, at 24. ("this Commission may resolve this dispute, involving the appropriate rate for compensation for Core's transport and termination services for ISP-bound local traffic, by applying federal law... the FCC has *not* preempted state regulation of local ISP-bound CLEC-CLEC traffic that is consistent with the FCC's intercarrier compensation regime... In this case we conclude that the FCC has *not* preempted the Commission's regulation of the traffic at issue in a manner that is consistent with the FCC's intercarrier compensation regime.").

Having acknowledged FCC preemption on the central issue of applicable rate, the Commission proceeded to fashion a resolution to this case premised on its underlying authority over jurisdictional carriers and facilities, as well as traffic flows which are both local and (according to the FCC's analysis) interstate as well. *Core Communications, Inc. v. F.C.C.*, 592

F.3d 139, 144 (D.C. Cir. 2010)("Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251–252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within that intersection.").

Deferring to *PacWest*, the Commission determined in the *Order* that federal law applied to the central issue in the case, *i.e.*, the rate applicable to the AT&T Indirect Traffic. The Commission found that the FCC's $0.0007/MOU rate cap preempted any inconsistent state law-based rate. However, the Commission never found that federal law supplants *all* state law which may apply to *any* ancillary issues in the case. Indeed, the Commission relied on several state law provisions to develop a complete order. For these non-rate issues, the Commission was fully entitled to rely on its state law jurisdiction over intrastate carriers and traffic termination services provided in the Commonwealth. *See, e.gs., Order*, at 25 (citing to 66 Pa. C.S. § 314) and 82 (citing to 66 Pa. C.S. § 1312).

The Commission's assertion of jurisdiction over this case, and its use of state law to resolve ancillary issues, is fully consistent with the Act and the Commission's own precedent in intercarrier compensation cases. *See*, *BellSouth, Inc. v. Sanford,* 494 F.3d 439 (4th Cir. 2007)., at 448-49. (Citations omitted). ("States' continuing exercise of authority over telecommunications issues forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so."). Indeed, the FCC staff *Amicus* brief also recognizes this state commission role. *Amicus* Brief, at 4. ("The 1996 Act gives both the FCC and the state commissions a role in implementing the reciprocal compensation obligations of section 251.").

As for its state law authority, the Commission found in a previous order in this case:

> [W]e agree with Core's contention that this Commission has jurisdiction in this matter because both Core and AT&T are facilities-based CLECs certified by the Commission to provide local exchange telecommunications services in Pennsylvania, and that AT&T, Core and Verizon operate the switches and other facilities used to support AT&T's Indirect Traffic, including the termination function provided by Core, within the state of Pennsylvania." *Core Communications, Inc. v. AT&T Communications of PA, LLC, and TCG Pittsburgh, Inc.*, Pa. P.U.C. Docket Nos. C-2009-2108186 & C-2009-2108239 (Order entered Sept. 8, 2010)("*Material Questions Order*"), at 10.

This fundamental authority over jurisdictional carriers and their intercarrier compensation rights and obligations has been further developed in other cases. For example, in a dispute between a CMRS carrier and a CLEC over reciprocal compensation charges, the Commission stated:

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

> General Assembly and consistent with then applicable federal law, we assert subject matter jurisdiction over this proceeding to further review the alleged facts of the case during the time frame described in the Formal Complaint. *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 (Order entered March 15, 2012)("*CCES*") , at 39.

Accordingly, the Commission has a broad reservoir of authority which it can use to resolve intercarrier compensation disputes such as the present case, even where federal law preempts that authority with respect to a particular issue.

II. THERE IS NO REQUIREMENT THAT CLEC-CLEC ISP-BOUND TRAFFIC CHARGES BE TARIFFED AT THE INTERSTATE LEVEL

AT&T's argument that the *Order* violates sections 201 and 203 of the federal Communications Act, 47 U.S.C. §§ 201, 203, Petition, at 5-6, rests on the mistaken premise that Core was permitted or required to file an interstate tariff with the FCC to implement the $0.0007/MOU rate. There is absolutely no evidence in the *ISP Remand Order*, the *Amicus* Brief, or *PacWest* to suggest that the FCC has or had any intent that CLECs file ISP-bound traffic termination charges in their FCC interstate switched access tariffs.[1] Core is aware of only one CLEC that ever attempted to take the interstate tariff route, and the FCC roundly rebuffed those attempts, resulting in multiple trips to the U.S. Circuit Court of Appeals for the District of Columbia Circuit, which affirmed the FCC's rejection of such tariffs. *See*, *Global NAPs, Inc. v.*

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[1] Indeed, AT&T has argued throughout this case that Core's state switched access tariff cannot possibly cover locally-dialed ISP-bound traffic.

F.C.C., 247 F.3d 252 (2001)(rejecting CLEC's attempt to tariff ISP-bound traffic charges because the tariff contained cross-references); *and, Global Naps, Inc. v. F.C.C.*, 80 Fed.Appx. 114 (2003)(rejecting CLEC's attempt to tariff ISP-bound traffic charges because tariff language was "indeterminate.").

In any event, the FCC has recognized that compensation may be due even where an interstate tariff has been found not to apply. *New Valley Corp.*, 15 F.C.C.R. 5128, 5136 (2000). ("[T]he Commission found only that Pacific Bell could not lawfully apply its tariffed channel termination charges to the subject intrabuilding circuits. The Commission left open the question of whether the charges imposed for the intrabuilding circuit services provided, were just and reasonable in relation to Pacific Bell's cost of providing the circuits.").

III. THE COMMISSION'S ASSERTION OF AUTHORITY TO RESOLVE THIS CASE IS CONSISTENT WITH SECTION 251(B)(5) OF THE ACT

Nothing in section 251(b)(5) limits the Commission's authority to craft a resolution to a CLEC-CLEC intercarrier compensation dispute where the FCC has mandated a rate cap, but set no other parameters. Nor can AT&T cite to any authority that reads section 251(b)(5) in such a restrictive manner. In fact, AT&T cites to FCC statements 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." Petition, at 7. This is correct; the FCC has imposed no rule preempting state commission authority over CLEC-CLEC intercarrier compensation disputes arising under section 251(b)(5).

The Commission has previously found such authority in state law. *Material Questions Order*, at 10 and note 5. ("We also find without merit AT&T's contention that because these Parties do not have an interconnection agreement, in as much as CLECs cannot compel other CLECs to negotiate interconnection agreements under the 1996 Telecommunications Act, 47

U.S.C. §§151 *et seq*., as amended, Core is somehow precluded from making its Complaint before this Commission."). In *CCES*, the Commission relied on sections 1308 and 1309 of its enabling statute, 66 Pa. C.S. §§ 1308 & 1309, to clarify its authority to establish rates in a formal complaint proceeding. *CCES*, at 11 ("In conclusion we agree with CCES that T-Mobile's argument is based upon the unfounded and unsupported conclusion that the reference in Section 1309(a) to 'complaint' is limited in scope by Section 701, which only authorizes complaints against a public utility or the Commission itself. As CCES argues, nothing in the Code states that Chapter 7 restricts the Commission's authority under Section 1309, which sets no limits on the rate setting complaint process.")(internal quotations omitted).

In attempt to bolster its argument that Core can collect nothing without an agreement, AT&T continues to portray itself as a willing, good faith participant in traffic exchange agreement ("TEA") negotiations. However, the record reflects that Core attempted to negotiate a TEA with AT&T, but AT&T refused to communicate with Core "[b]etween roughly, August, 2008 and March, 2009." Core Statement 1.0 (Direct Testimony of Bret L. Mingo), at 12. The record also reflects that Core has successfully negotiated TEAs with CLECs other than AT&T. *Order*, at 63 ("Core has demonstrated that other carriers have opted to enter into agreements with Core"). Finally, it is worth noting that AT&T negotiated a deal with at least one LEC other than Core, one which entitles AT&T to *collect* the Commission's TELRIC tandem reciprocal compensation of $0.002814/MOU rate for its termination of ISP-bound traffic. *See*, Core Exhibit BLM-15 (attached to Core Statement 1.0).

IV. THE *ORDER* DOES NOT ENGAGE IN RETROACTIVE RATEMAKING

AT&T's "retroactive ratemaking" argument is makeweight. This doctrine applies where an established tariffed rate is superseded retroactively by a new rate, announced after the fact. Here, the Commission is simply applying a rate that has existed since 2001, when the *ISP*

Remand Order was first promulgated. *See*, *Qwest Corp. v. Koppendrayer*, 436 F.3d 859, 864 (8th Cir. 2006)("The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability. Therefore, the rule does not apply in situations where there is adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service."). Here, AT&T had plenty of notice that the FCC's rate could be applied to its traffic—its position in this case is that the *ISP Remand Order* plainly applies to CLEC-CLEC traffic. The bottom line is, no matter what the resolution of this case, a rate will be applied to the AT&T Indirect Traffic. AT&T is simply hoping that this traffic will "fall between two stools" resulting in an effective rate of zero. But AT&T never bargained for that rate, and is not entitled to free termination.

V. THE FEDERAL STATUTE OF LIMITATIONS DOES NOT APPLY, AND IN ANY EVENT, HAS NO PRACTICAL IMPACT ON THE RELIEF GRANTED IN THE *ORDER*

The Commission was fully within its authority in relying on 66 Pa. C.S. § 1312 to find a reasonable limit on backbilling. Nor was the Commission required to apply the federal Communications Act two-year statute of limitations. Even if it had, the parties' dispute over the AT&T Indirect Traffic did not arise until 2008, when Core began to invoice AT&T. Core Exhibit BLM-1 (Direct Testimony of Bret L. Mingo)(showing that Core's first invoice to AT&T was dated January 1, 2008). Core filed its complaint in this case in 2009, less than two years later, so the federal statute (even if it did apply) is simply not implicated by the facts in these cases. ."). *Cent. Scott Tel. Co. v. Teleconnect Long Distance Services & Sys. Co.*, 832 F. Supp. 1317, 1320-21 (S.D. Iowa 1993) ("Central Scott contends its claim did not arise until it learned Teleconnect had no intention of paying Central Scott's bills. According to Central Scott, this date is in full accord with FCC interpretations of the limitations period as beginning to run when discovery of the right or wrong or of the facts on which such knowledge is chargeable in

law...The Court finds the statute of limitations for the federal claim began to run on January 26, 1990, the due date of the December 26, 1989 bills."). (Internal quotations omitted).

VI. A STAY IS NOT APPROPRIATE IN THIS CASE

AT&T requests a stay of the *Order* pursuant to Pa. R.A.P. 1781(a)[2] and 52 Pa. Code § 5.572. Petition, at 9. AT&T's stay request is scant on facts, misreads or ignores applicable law and comes nowhere close to meeting its burden for such extraordinary relief.

A. AT&T Is Not Likely To Prevail On The Merits

AT&T's central dispute with the Commission is the notion that the Commission may not resolve the present case consistent with federal law. AT&T argues that the Commission is preempted from doing so because ISP-bound traffic is "jurisdictionally interstate." Petition, at 10.

The Commission, having considered AT&T's arguments at length, *Order*, at 18-21, has clearly and correctly rejected them:

> We are not persuaded by AT&T's arguments that this Commission may not hear and decide this case by applying federal law. As the ALJ noted in her Initial Decision, the FCC's *Amicus* Brief supports her conclusion that this Commission may resolve this dispute, involving the appropriate rate for compensation for Core's transport and termination services for ISP-bound local traffic, by applying federal law. As she noted, the FCC stated that its *ISP Remand Order* preempted *inconsistent* state regulation. By implication, the FCC has *not* preempted state regulation of local

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[2] AT&T's reference to Pa. R.A.P. 1781(a) is puzzling, since it has already sought declaratory relief with respect to the *Order* in the federal district court for the Eastern District of Pennsylvania.

> ISP-bound CLEC-CLEC traffic that is consistent with the FCC's intercarrier compensation regime. A matter may be subject to the FCC's jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006). In this case we conclude that the FCC has *not* preempted the Commission's regulation of the traffic at issue in a manner that is consistent with the FCC's intercarrier compensation regime. *Order*, at 24.

AT&T raises no new argument or authority in its request for stay, and the Commission has no basis or reason to reconsider the jurisdictional analysis set forth in the *Order*. Simply put, neither the *ISP Remand Order* nor the subsequent staff *Amicus* Brief expresses any intent by the FCC to preempt state commission authority to resolve an intercarrier compensation dispute between two jurisdictional CLECs consistent with the FCC's rate cap for ISP-bound traffic.

B. AT&T Will Suffer No Irreparable Harm

AT&T's attempt to show "irreparable harm" rests on the unsupported assumption that "Core's provision of dial-up internet service to ISPs is a failing business model" because the dial-up traffic AT&T sent Core slowed to a trickle by 2009. Petition, at 11. Nothing in the record supports the unspoken premise that the AT&T Indirect Traffic is a good proxy for dial-up traffic overall. The decline in the AT&T Indirect Traffic from 2007 through 2009 is probably attributable to AT&T's own decision to withdraw from the mass market residential POTs market. Moreover, Core's experience with the dial-up market is that, as overall dial-up usage continues to decline, larger LECs exit the market, leaving Core with opportunities to serve an expanding proportion of a declining market. Finally, the record reflects that Core has been serving the wholesale market for telecommunications services to carriers that use VOIP, including cable companies, since 2009. *See*, Core Statement 1.0, at 2 (Direct Testimony of Bret L. Mingo); *and see*, *Order*, at 4. Thus, Core's business model is not solely reliant on revenues associated with dial-up traffic. Similarly, while non-payment tactics and subterfuge by AT&T

and other carriers is a continuing challenge to Core's financial health (and that of numerous other small LECs in Pennsylvania), there is nothing in the record to support AT&T's claim that Core is about to go out of business because the Commission did not award Core the tariff charges Core sought in this case. Petition, at 12.

AT&T argues there is no guarantee Core can or will repay the roughly $250,000 AT&T admits it owes pursuant to the *Order*. Petition, at 11-12. Accordingly, the sole "irreparable harm" AT&T can muster is the specter of a purely monetary loss. And while AT&T points out defensively that monetary harm *can* constitute irreparable harm, the fatal flaw in AT&T's argument is that the harm it alleges has a readily available judicial remedy, *i.e.*, if it wins on appeal, it can petition the court to order Core to pay it back. The Commission has found that a stay will not issue where there is clear administrative or judicial remedy to the claimed harm. "Indeed, Pennsylvania courts have held that an irreparable injury is one which cannot be compensated through legal or administrative remedies." *Application of AAA Alpine Taxicab Company, LLC*, 2007 WL 1029217, Pa. P.U.C. Docket No. A-00121832 (Order entered March 26, 2007).

In the cases AT&T cites, the harm alleged had a monetary aspect but more importantly had no established remedy. *See, Pa. P.U.C. v. Process Gas Consumers Group*, 502 Pa. 545, 554-55 (1983)("Although the realities of the controversy here go to the disposition of money, we believe that there is a sufficient showing of irreparable harm likely to result to the appellee. Without a stay, the surcharge monies accumulated prior to August 13, 1982 may be spent on the conservation project ordered by the Commission. If, after the monies are so spent, it is determined that the Commission had no right to order such a disposition, exempt gas users will have been harmed to the extent that they were deprived of rebates of these funds in the form of

lower gas rates for exempt uses… As the PUC has failed to explain satisfactorily how full rebates could be effectuated, we believe that, under the circumstances, appellee has made a sufficient showing of a probability of irreparable harm.); *and see*, *West Penn Power Co. v. Pa. P.U.C.*, 150 Pa. Commw. 349, 363-64 (1992)("West Penn argues that monetary loss is not a sufficient reason to issue an emergency order. As Mon Valley and the commission point out, although monetary losses generally are insufficient to support an emergency order, such losses can satisfy the rule's irreparable injury requirement. In this case, if the commission had not issued the order, Mon Valley might have sustained losses, due to no fault of its own, that it would not be able to recover later under any cause of action… the commission could order that [Mon Valley's] funds be used as an offset to revenue requirements for the benefit of ratepayers in a rate case. Hence, there was a great deal of uncertainty as to whether or not Mon Valley could recover its good faith deposits. Accordingly, this court concludes that the irreparable harm criterion was satisfied.").

C. A Stay Will Harm Core But Not AT&T

AT&T's cynical proffer on relative harm is that since Core has gone for years without receiving any compensation, it can go on for one or two more years as AT&T's judicial challenges to the *Order* play out. Petition, at 12-13. This makes a mockery of the requirement. The modest sum due under the *Order*—approximately $300,000 including interest at the legal rate—would clearly help repair the economic injury the Commission has recognized as the result of AT&T's nonpayment. The Commission has already found that: "[t]he absence of intercarrier compensation from AT&T to Core generates an adverse and self-evident financial impact for Core's operations… we do not expect regulated telecommunications carriers that operate within this Commonwealth to provide carrier access network facilities and services for free. *Order*, at

69. Just as clearly, payment of this sum would have no direct impact on AT&T whatsoever. *See*, *e.gs.*, http://www.att.com/gen/pressroom?pid=23448&cdvn=news&newsarticleid=35518 (touting "[r]ecord cash from operations of $11.5 billion and record free cash flow of $6.5 billion in third quarter; full-year free cash flow guidance increases $2 billion to $18 billion or higher.")

D. A Stay Would Not Benefit The Public Interest

Permitting nonpayment to continue in the intercarrier compensation context is detrimental to the public interest. In the VOIP context, the Commission has found that:

> [I]f certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services. *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates*, Pa. P.U.C. Docket No. C-2009-2093336, Order entered May 5, 2009, at 45.

So too, AT&T's continuing refusal to provide *any* compensation for the AT&T Indirect Traffic helps create "an anticompetitive environment" in which some carriers pay appropriate intercarrier compensation, *see*, *Order*, at 63, while others, like AT&T, pay nothing.

WHEREFORE, Core respectfully requests that the Commission reject AT&T's Petition for Reconsideration and Stay in its entirety, for the reasons set forth herein.

Respectfully submitted,

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Date: December 31, 2012