PAINTER LAW FIRM, PLLC
13017 DUNHILL DRIVE
FAIRFAX, VIRGINIA 22030

MICHELLE PAINTER
ATTORNEY AT LAW

703.201.8378
FAX 703.968.5936
E-mail: painterlawfirm@verizon.net

December 31, 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 the Response Of AT&T In Opposition To Core's Petition For Reconsideration And Clarification Of The Commission's December 5, 2012 Opinion And Order 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

cc: Certificate of Service
Jonathan Nase, OSA *via e-mail*

Enclosure

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Response Of AT&T In Opposition To Core's Petition For Reconsideration And Clarification Of The Commission's December 5, 2012 Opinion And Order 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 31st day of December 2012.

## VIA E-MAIL AND FIRST CLASS MAIL

Deanne O'Dell
Eckert Seamans Cherin & Mellott, LLC
213 Market St – 8th Floor
Harrisburg, PA 17101
DODell@eckertseamans.com

Michelle Painter

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

# RESPONSE OF AT&T IN OPPOSITION TO CORE'S PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE COMMISSION'S DECEMBER 5, 2012 OPINION AND ORDER


AT&T Corp. and
TCG Pittsburgh

Michelle Painter
PA Bar ID No. 91760
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
painterlawfirm@verizon.net

Theodore A. Livingston
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
tlivingston@mayerbrown.com
kgibney@mayerbrown.com

AT&T Corp.[1] and TCG Pittsburgh (collectively, "AT&T") respectfully submit this response in opposition to the petition of Core Communications, Inc. ("Core") for "reconsideration and clarification" of the Commission's December 5, 2012 Opinion and Order ("Order") in this proceeding.

In its petition, Core asks the Commission to order AT&T to pay interest at either the rate of "6 percent per annum" established in 66 Pa. C.S.A. § 1312(a) and 41 P.S. § 202 *or* the 1.5% per month "late payment charge" rate established in Core's intrastate switched access services tariff. In what follows, AT&T demonstrates that Core has failed to provide any support for, and is not entitled to, the relief it seeks.

Core also asks the Commission to eliminate the finding that Core's intrastate switch access services tariff "applies only to the settlement of toll charges between interexchange carriers." AT&T takes no position on that request.

* * *

In Part I below, AT&T sets out the reasons why Core's requests for an award of interest should be denied. In Part II, AT&T responds to each of the numbered paragraphs in Core's petition.

## I. Core's Request for Interest Should Be Denied Because Neither The Statute It Purports To Rely On Nor Its Intrastate Switched Access Services Tariff Applies.

Core presents three fundamental arguments in support of its claim for interest.

First, Core asserts that an award of interest at a 6% per year rate is expressly authorized by 66 Pa. C.S.A. § 1312(a). This assertion fails because, as the Commission correctly found, (1) federal not state law governs the parties' dispute, and (2) "the arguments of the Parties regarding

[1] AT&T Communications of Pennsylvania, LLC was merged into its parent AT&T Corp. effective October 31, 2012.

the application of state law to this proceeding are no longer relevant to the disposition of Core's Complaint" (Order at 80). Core does not challenge this determination or ask the Commission to reconsider it. This determination makes § 1312(a), a state law, irrelevant, no matter what it provides.

Core's assertion also fails because, even assuming *arguendo* that state law were relevant, § 1312(a) is, on its face, inapplicable. This provision applies only to Commission orders requiring refunds when the Commission has determined that a public utility has charged too much. This Commission itself has previously held that this section "applies only to refunds." *Pennsylvania Public Utility Commission v. Bell Telephone Company of Pennsylvania, 68 Pa.P.U.C. 430, p. 4.* The provision plainly does not apply to the situation present here.[2] "The Public Utility Commission has no equitable powers and may only act in accordance with the specific grants of authority included in the Code itself. *Id.*, citing *Barasch v. Pennsylvania Pub. Utility Commission*, 516 Pa. 142, 532 A.2d 325 (1987), *prob. juris. noted* 108 S.C. 1105 (1988)." Thus, where an explicit statutory provision does not permit an award of interest, the Commission may not order it. Core cited to no explicit statutory provision (and there is none), that permits the Commission to order interest when it is establishing a new rate that a carrier can charge to another carrier.

Second, in the alterative, Core asserts that the Commission should order AT&T to pay interest at the 1.5% per month rate established in Core's intrastate switched access services tariff for late payment charges. This assertion fails for multiple reasons:

[2] Core also references 41 P.S. § 202, but that statute cannot provide grounds for an award of interest in this matter. Like § 1312(a), § 202 is irrelevant because it is state law and the Commission correctly determined that state law is "no longer relevant to the disposition of Core's Complaint." (Order at 80). Moreover – except for § 1312(a), which, as shown above and below, is inapplicable – Core does not identify any "reference" to a "legal rate of interest" or "an obligation to pay a sum of money 'with interest'" in any "law or document." Therefore, § 202 is inapplicable in any event.

1. As this Commission already correctly decided, "it is clear that Core's Switched Access Tariff No. 4 is not applicable here." (Order at 60). Core conceded this point in its Petition noting that the traffic at issue in this case "is all, without dispute, locally-dialed" (Petition at ¶ 25), and the tariff applies to toll but not local or locally dialed traffic (*id*). Core cannot request that one section of its Switched Access tariff apply when the Commission has already found that the tariff is not applicable to the traffic at issue in this case. Core did not request reconsideration of that finding.

2. The tariff also does not apply because, as the Commission correctly determined, the traffic at issue is all jurisdictionally interstate, and the tariff apples only to intrastate traffic. (Order at 61).

3. Further, the tariff does not apply because it is "state law," and state law, as the Commission also correctly found, is "no longer relevant to the disposition of Core's Complaint." (Order at 80).

4. Finally, even if the tariff could be applied to the traffic at issue, the tariff applies the 1.5% per month rate *only* to [a]mounts not paid within 30 days after the date of invoice." Tariff § 2.5.2 (Original Sheet No. 33).[3] It is undisputed that Core has never invoiced AT&T for this traffic at the rate of $0.0007 per minute, the rate imposed by the Commission.[4]

Third, having no legal basis for its interest claim, Core argues that an award of interest is "appropriate" because AT&T's "nonpayment harmed Core" (Petition at ¶ 13), and because "AT&T could have, and should have, been paying Core this rate [$0.0007] all along." (Petition at ¶ 15). These are not legal arguments; they are simply unsupported requests that the Commission relieve Core of the consequences of its own actions. Even if the Commission had the legal authority to grant such requests (which it does not), Core certainly is not deserving in any event.

Core knew about the FCC's *ISP Remand Order* and the FCC's rate cap of $0.0007 since 2001; yet it has never filed a tariff at the FCC that covers locally-dialed, ISP bound calls – even though at all times it was completely able to do so. Nor has Core ever approached AT&T and

[3] It should be noted that this tariff provision was not effective until July 2, 2008 – yet Core seeks to apply it beginning May 2008.

[4] For that matter, Core has never invoiced AT&T for any amount other than the tariffed switched access services rate which the Commission has already found (and Core itself concedes) does not apply to the locally-dialed traffic at issue here.

requested a traffic exchange agreement that sets the rate for such traffic at or below the $0.0007 rate cap level. Moreover, Core did not bill AT&T at all until 2008. And when it did, it billed at the intrastate switched access services rate that the Commission found does not apply to AT&T's traffic. What is more, AT&T was willing to talk with Core about a traffic exchange agreement, but Core stopped any possible negotiations dead in their tracks – by demanding as a precondition to any agreement that AT&T pay for past traffic exchanges at the tariffed rate for toll traffic and by making clear that in no event would Core ever agree to or even discuss a $0.0007 rate. AT&T Reply Brief at p. 52; Tr. at 93-95 (Mingo).

Assuming for the sake of argument that Core has been "harmed," such harm is, indisputably, wholly self-inflicted.

* * *

Core asks the Commission to establish and order AT&T to pay an amount certain within 10 days of the Commission's ruling on Core's reconsideration petition (Petition at ¶ 19). Even assuming that the Order stands as currently written, before AT&T has an obligation to pay anything, Core must at a minimum cancel or issue credits equal to the face amount of each of its outstanding invoices (all of which demand payment at the tariffed switched access services rate) and issue new invoices that request payment only at the Commission-imposed $0.0007 rate. It is elementary that a payment obligation requires a bill to trigger it. And Core has yet to perform even that simple, elementary act.

In addition, it is also elementary, both in state and federal law, that a utility cannot charge a rate other than one that is established in a tariff or via contract.[5] The applicable federal statute,

[5] Although state law does not apply here, the Commission is certainly well aware that 66 Pa C.S.A. §1303 unequivocally states that "No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service

47 U.S.C. §203(c), states that a carrier shall not "charge, demand, collect, or receive" compensation for charges that are not tariffed. Core has not tariffed the $0.0007 rate and, therefore, in the absence of a traffic exchange agreement with AT&T, Core cannot charge AT&T until it has filed such a tariff and the tariff becomes effective. And, it follows, if Core has never had any basis to charge AT&T, it is certainly not entitled to interest.

## II. AT&T's Response to the Specific Numbered Paragraphs in Core's Petition.

1-3. AT&T admits that Core correctly sets out the standards that apply to a petition for reconsideration but denies that Core qualifies for the interest award it seeks, for the reasons set out both above and below. In addition, in response to Paragraph 2, AT&T denies that reconsideration is appropriate on the issue of interest. As Core itself acknowledged, Core already asked the Commission to direct AT&T to pay interest and late payment charges (Petition at ¶¶2, 4-6), but the Commission's December 5, 2012, decision did not grant the request. That Order expressly stated that "any issue ... that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984)." Order at 15. Because the issues of interest and late payment charges were already raised by Core, and Core does not provide any new arguments that it could not have raised below, the issue is not appropriate for reconsideration.

---

rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto."

4. AT&T admits that Core correctly quotes from its own Complaint, but denies that Core is entitled to late payment charges as specified in its switched access services tariff, for the reasons set out both above and below.

5. In response to this paragraph, AT&T agrees that Core has correctly quoted a request made in its December 14, 2010 Main Brief, but denies that Core is entitled to any award of interest, for the reasons set out above and below.

6. In response to paragraph 6, AT&T agrees that Core has correctly quoted from its Proposed Order, but denies that Core is entitled to late payment charges as specified in its switched access services tariff, for the reasons set out above and below.

7. AT&T admits that the ALJ's Initial Decision was issued on May 11, 2011 and that it did not rule on Core's request for interest. AT&T states that the Initial Decision speaks for itself and denies the remaining assertions in this paragraph.

8. AT&T agrees that Core correctly quotes from the Commission's Order.

9. Responding to this paragraph, AT&T states that the Commission's Order speaks for itself, and denies the remaining assertions in this paragraph. AT&T denies Core's speculation as to why the Commission did not consider the issue of interest in its Order. The Commission is not required to address each and every issue raised below. That does not make the issue appropriate for reconsideration. Further, AT&T denies that $0.0007 as established by the FCC is a "rate;" rather, it is a rate *cap*.

10. AT&T states that the Commission's Order speaks for itself, but agrees that the Commission cites to § 1312 apparently in support of its application of a 4-year period. Further responding, AT&T states that sections 1312 and 202 speak for themselves, and denies that either, separately or together, applies in this case, for the reasons set out above and below.

11-12. AT&T agrees that Core correctly quotes from sections 1312 and 202, but denies that either provision applies in this case, for the reasons set out above and below. More specifically, section 1312(a) on its face only applies in a proceeding in which "the commission shall determine that [a] rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff," and states that in such a case the Commission has the authority to order a refund "together with interest at the legal rate." The instant case, indisputably, is not such a case. Moreover, even if that were not true, neither § 1312 nor § 202 could lawfully apply, because they are state laws, and as such are not "relevant to the disposition of Core's Complaint." (Order at 80).

13. In response to the assertions in this paragraph, AT&T denies that interest is "appropriate" in this case (for all of the reasons set forth above and below). AT&T also states that to the extent, if any, that Core has been harmed, any such harm is wholly self-inflicted, as described more fully above.

14. AT&T agrees that Core has accurately quoted the Commission's Order, but states that the "options" available to AT&T were not as characterized by the quoted language. AT&T further states that the only options afforded it by Core were to pay for past traffic exchanges at the tariffed switched access services rate and to pay for current and future traffic exchanges at a rate no less than the Verizon tandem-based reciprocal compensation rate *or* defend against a claim for compensation at the tariffed switched access services rate for all exchanges of locally dialed ISP bound calls beginning in 2004, and that faced with this choice, AT&T "chose" to defend itself. Core made clear at all times during negotiations and throughout this case that it would never accept $0.0007 as an appropriate rate.

15. AT&T denies that $0.0007 is a rate and states, instead, that this is a rate cap. Paying Core $0.0007 was never an option available to AT&T because Core was never willing to even discuss payment at such a rate, opting instead to demand its tariffed switched access services rate and, on a going forward basis only, Verizon's tandem-based reciprocal compensation rate. Core emphasized to AT&T that negotiations would not proceed if AT&T took the position that $0.0007 was an appropriate rate. Faced with this, the negotiations stalled.

16. In response to this paragraph, AT&T states that it would be unlawful as well as not "appropriate" for the Commission to impose the 1.5% per month rate for late payment charges specified in Core's switched access services tariff, for all of the reasons set forth above.

17. In response to this paragraph, AT&T states that Core's purported calculation is based on an incorrect premise. Even if the Commission had the jurisdiction to decide this case by applying federal law (which it does not) and even if federal law permitted the Commission to impose retroactively a rate that was not (and still is not) specified in either a contract or a tariff (which it does not), the most Core would be able to recover for would be calls terminated beginning May 19, 2007, pursuant to the federal limitations period established by 47 U.S.C. § 415(a).

18. In response to this paragraph AT&T denies that Core is entitled to any award of interest, for all of the reasons set forth above. AT&T further notes that while Core's purported "interest calculation" appears to be based on the premise that Core timely issued invoices every thirty days, which is required by the language in Core's tariff, that premise is indisputably wrong. The undisputed facts show that Core did not begin issuing any invoices until 2008 and has never issued an invoice based on a $0.0007 rate.

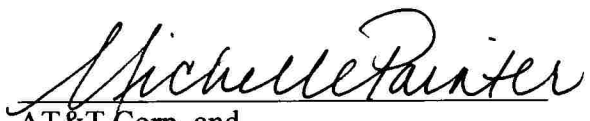
19. In this paragraph, Core explicitly requests relief pursuant to section 1312(a), but that provision on its face only applies to proceedings involving refunds of excessive rates charged by a public utility and plainly does not apply to the instant case. Moreover, in any event, the provision in question is a state law which the Commission has correctly determined is not "relevant to the disposition of Core's Complaint." (Order at 80). Even assuming that the Order as currently written stands, before it would be appropriate to order AT&T to pay anything, Core at a minimum must cancel or issue credits equal to the face amount of each of its outstanding invoices (all of which demand payment at the tariffed switched access services rate), add the $0.0007 rate to its interstate tariff, and issue new invoices that request payment only at the Commission-prescribed rate of $0.0007.

20.-30. AT&T takes no position with respect to the statements contained in these paragraphs, except that AT&T agrees that Core's switched access services tariff applies only to "toll" or "interexchange" traffic and does not apply to "local" or "locally-dialed" traffic.

**Conclusion**

Based on the foregoing, AT&T asks that the Commission deny Core's request that the Commission award interest or late payment charges to Core. AT&T also asks that the Commission deny Core's request that the Commission order AT&T to pay an amount certain.

Respectfully submitted



AT&T Corp. and
TCG Pittsburgh

Michelle Painter
PA Bar ID No. 91760
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
painterlawfirm@verizon.net

Theodore A. Livingston
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
tlivingston@mayerbrown.com
kgibney@mayerbrown.com

DATED: December 31, 2012