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February 15, 2013

Via Electronic Filing

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

Re: Petition of Core Communications, Inc. for Arbitration of Interconnection Rates,
Terms And Conditions With Windstream Pennsylvania, Inc. Pursuant to 47 U.S.C.
§ 252(b); Docket No. A-310922F7004
Supplemental Reply Brief of Windstream Pennsylvania, LLC

Dear Secretary Chiavetta:

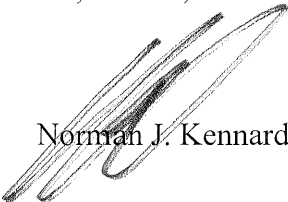
Enclosed for filing with the Commission is the Supplemental Reply Brief of Windstream Pennsylvania, LLC in the above-captioned proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

By:


Norman J. Kennard

NJK:tlt

cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Core Communications, Inc. for :
Arbitration of Certain Terms and :
Conditions of the Proposed Agreement With : Docket No. A-310922F7004
Windstream Pennsylvania, Inc., Pursuant to :
the Communications Act of 1934, as amended:
by the Telecommunications Act of 1996 :**

**SUPPLEMENTAL REPLY BRIEF OF
WINDSTREAM PENNSYLVANIA, LLC**

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Dated: February 15, 2013

I. INTRODUCTION

Windstream Pennsylvania, LLC (“Windstream”) files this Supplemental Reply Brief in response to the Supplemental Brief of Core Communications, Inc. (“Core”) filed on January 11, 2013. Windstream agrees with Core that the FCC’s Transformation Order¹ has “few direct impacts” on the issues in this arbitration. However, Windstream will demonstrate that:

a. Core continues to incorrectly assert that the Federal Communications Commission (“FCC”), in its *Transformation Order*, “again affirmed” that the ISP Remand Orders² are not limited to local traffic, but rather also affect the intercarrier compensation for the toll traffic at issue in this arbitration;

b. Core misinterprets the mirroring rule established by the FCC in the ISP Remand Order; and

c. Core misinterprets and then misapplies the traffic study used in the *Palmerton v. Global NAPs* case to incorrectly support its VNXX practices.³

In addition, Windstream submits that wholesale VoIP traffic was never an issue brought up during the arbitration between the parties and any reference to VoIP or the application of the *Transformation Order* on VoIP traffic is completely outside the scope of this arbitration and should not be addressed by this Commission.

II. REPLY ARGUMENT

1. ICC Issue No. 1 – VNXX Call Rating

According to Core, the FCC’s *Transformation Order* “again affirmed” that Section 251(b)(5) is not limited to “local traffic” and reaffirms that whether VNXX traffic is “local” is

¹ *In Re Connect America Fund, et al.*, WC Docket No. 10-90 et al. (FCC. Rel. Nov 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, FCC 11-61, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”).

² *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, Order on Remand and Report and Order released April 27, 2001 (“*FCC First ISP Remand Order*”). *In the Matter of High-Cost Universal Service Support et al.*, WC Docket No. 05-337 et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008) (“*FCC Second ISP Remand Order*”).

³ *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket No. C-2009-2093336 (Opinion and Order entered March 16, 2010) (“*Palmerton Order*”).

not dispositive under federal law.⁴ Core misconstrues the context of the Order, as the FCC is simply asserting jurisdiction over all types of traffic, including access traffic under the auspices of Section 251(b)(5).⁵ It is a *non sequitur* to assert that, because the FCC concluded that Section 251(b)(5) could be used to assert federal jurisdiction over toll traffic as well as local calling, therefore, all traffic became “local.” Obviously, such is not the case and the FCC has maintained the distinction between local and toll traffic by continuing both reciprocal compensation and access charges during the transition period.⁶

Nor is it accurate to maintain that the FCC previously ruled that all ISP-bound traffic is properly classified as local traffic, even if it is toll. As noted in Windstream’s Supplemental Brief,⁷ the United States First Circuit rejected this view and held that the FCC simply “clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage.”⁸

Indeed, the United States Ninth Circuit case cited by Core in its Supplemental Brief to address the mirroring rule also agrees with this outcome. The Ninth Circuit, in discussing the ISP Remand Orders, asserts that “the CPUC correctly interpreted the ISP Remand Order as not applying to interexchange (that is, non-local) ISP-bound traffic.”⁹ Nothing in the

⁴ Core Supplemental Brief at 2.

⁵ *Transformation Order* at ¶762 (“ After reviewing the record, we adopt our proposal and conclude that section 251(b)(5) applies to traffic that traditionally has been classified as access traffic. Nothing in the record seriously calls into question our conclusion that access traffic is one form of “telecommunications.” By the express terms of section 251(b)(5), therefore, when a LEC is a party to the transport and termination of access traffic, the exchange of traffic is subject to regulation under the reciprocal compensation framework.”).

⁶ *Id.* At ¶ 764 (“In this Order, we explicitly supersede the traditional access charge regime and, subject to the transition mechanism we outline below, regulate terminating access traffic in accordance with the section 251(b)(5) framework.”).

⁷ Windstream Supplemental Brief at 9-11.

⁸ *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010) at 81.

⁹ *AT&T Communications of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980, 991 (9th Cir. 2011) (“*PacWest Ninth Circuit*”).

Transformation Order altered the types of traffic subject to reciprocal compensation or access charges.

As Windstream explained in its Supplemental Brief, once the FCC asserted jurisdiction over access and non-access traffic pursuant to Section 251(b)(5), the FCC still continued to retain the preexisting traffic distinctions of toll and local for purposes of intercarrier compensation.¹⁰ Specifically, in the *Transformation Order*, the FCC added a definition for “Non-Access Telecommunications Traffic” which excludes interstate or intrastate exchange access, information access or exchange services for those services.¹¹ (Id.) “Access Reciprocal Compensation” is still access compensation.¹²

Nothing in the *Transition Order* changed the prior view, as articulated by a variety of courts and regulators, that ISP-bound traffic provided under VNXX arrangements, where the physical destination is outside of the local calling area, is interexchange traffic and, therefore, is not local traffic (or, using the phraseology of the *Transition Order*, “Non-Access Telecommunications Traffic”).¹³ This is critical because only Non-Access Telecommunications Traffic is subject to Non-Access Reciprocal Compensation which is defined as a bill and keep arrangement or a compensation arrangement for the transport and termination of Non-Access Telecommunications Traffic.¹⁴ Therefore, contrary to Core’s position, long distance dial-up ISP calling, whether provided via VNXX arrangements or other means is interexchange and continues to be subject to applicable access charges.

¹⁰ Windstream Supplemental Brief at 10.

¹¹ Id.

¹² 47 CFR § 51.903(h) (“Access Reciprocal Compensation. For the purposes of this subpart, Access Reciprocal Compensation means telecommunications traffic exchanged between telecommunications service providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.”).

¹³ Windstream Supplemental Brief at 11.

¹⁴ Id.

Core also asserts that this Commission's *Palmerton Order* endorsed the rating of VNXX traffic as local, because the Commission endorsed Palmerton's reliance upon NPA/NXX to determine the jurisdiction of the call for billing purposes.¹⁵ This attempt to justify VNXX on the basis of Palmerton's traffic study technique is distortive and ignores the true facts.

Palmerton rated traffic according to the actual, LERG-registered rate centers to which (and from which) the calls were routed (i.e., the rate centers into which the telephone numbers are "loaded").¹⁶ Under this method of call rating, the virtual rate center (i.e., the location, invariably local, that Core originally listed as the number's rate center when it opened the number block¹⁷) would be ignored and the real world routing of the call employed. Core's fiction of a call rated according to its originally listed rate center used in the application paperwork when it opened the codes with NANPA would be ignored as irrelevant. Had Palmerton studied Core's traffic, any calls terminating to a switch outside of the local calling area of the calling party would be toll. Where Core directs that one of its "local" numbers be re-homed ("loaded") to a Pittsburg switch (where Pittsburg is a toll call for the calling party), the call would be rated by Palmerton as toll. The Commission described this method as

¹⁵ Core Supplemental Brief at 6.

¹⁶ Palmerton Exceptions at 3 ("Each telephone number (or block of numbers) is formally assigned by Neustar, the North American Numbering Plan Administrator ("NANPA"), to a registered rate center (the physical location of a switch) into which the number is "loaded." That rate center is then listed in the official industry routing guide published by Telcordia known as the Local Exchange Routing Guide ("LERG"). All companies delivering and receiving traffic; irrespective of technology, obtain numbers and officially report a rate center address for each number in their possession. They are the "code holder" for the number.").

¹⁷The Location Routing Number Assignment Practices published by the Industry Numbering Committee state that a Location Routing Number ("LRN"), the 10 digit number, "should be selected and assigned based upon the following considerations ...Do not select and assign the LRN from an NPA/NXX that is planned to be re-homed to another switch." Industry Numbering Committee 98-0713-021, September 28, 2001 at ¶ 4; See also ATIS-0300065, Location Routing Number (LRN) Assignment Routing Practices, September 30, 2011, at ¶ 4. Thus, industry practices in this regard advise, but do not require, that the NPA/NXX's LERG and physical location be the same.

<http://www.atis.org/inc/Docs/finaldocs/LRN-Assignment-Practices-Final-Document-09-30-11.doc>

“established industry practices for the purposes of establishing the appropriate level of intercarrier compensation.”¹⁸ It is careless and inaccurate for Core to claim otherwise.¹⁹

Nor can Core find support for VNXX arbitrage in the Commission’s recent decision addressing its complaint against AT&T. The topic of VNXX simply never came up.²⁰ The entire case presumes that the traffic at issue is “locally dialed” and, therefore, switched access tariffs do not apply. Indeed, it may have been that the calls were all legitimately local according to standard industry practices. We do not know from the record or briefing of that case and speculation is useless. Thus, there is no basis for anyone to conclude that VNXX “type of analysis” was “accepted” by AT&T, the Commission or anyone else.²¹

When directly addressing VNXX, this Commission has clearly and consistently ruled that the physical end points of a call are used to determine whether a call is toll or local for intercarrier compensation purposes.²² Section 3012 of Act 183 defines jurisdictionality: “Interexchange service” is “the transmission of interLATA or intraLATA toll messages or data

¹⁸ *Palmerton Order* at 42

¹⁹ The Commission *Palmerton Order* never explains what is meant by the observation that Palmerton’s reliance on NPA/NXX to jurisdictionalize traffic for billing purposes is “consistent in some other but still important aspects” with the Commonwealth Court’s affirmation of the Commission’s certification of Core as a CLEC. VNXX was never at issue, as GNAPs never presented a VNXX defense. Were a call originated by Core involved in the Palmerton study, it would have been rated by the location of the Core switch, not the VNXX location.

²⁰ *Core Communications v. AT&T Pennsylvania and TCG Pittsburg*, Docket Nos. C-2009-2108186 and C-2009-2108239, Opinion and order entered December 5, 2012.

²¹ Core Supplemental Brief at 6 (note 2).

²² *Joint Petition of Nextlink Pennsylvania, et al*, Docket No. P-00991648 and *Joint Petition of Bell Atlantic Pennsylvania, Inc., et al.*, P-00991649 (Opinion and Order entered September 30, 1999); *Generic Investigation in re: Impact On Local Carrier Compensation If A Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier’s Local Calling Areas but Consistent With Established Commission Precedent*, Docket No. I-00030096 (Investigation Order entered June 26, 2003); *Application of MFS Intelenet of Pennsylvania, Inc.*, Docket No. A-310203F0002, Docket No. A-310258F0002, Opinion and Order adopted July 18, 1996 at 19; *Petition of Focal Communications*, Docket No. A-310630F0002, Opinion and Order entered January 24, 2001 at 11; *Petition of Global NAPs South, Inc.*, A-310771F7000, Recommended Decision of ALJ Herbert Smolen dated October 10, 2002.

outside the local calling area.”²³ "Local exchange telecommunications service," in turn, is defined as “the transmission of messages or communications that originate and terminate within a prescribed local calling area.”²⁴ That local calling area is “prescribed” by the Commission in the ILEC’s tariff (and, notably, as “mirrored” in Core’s tariff).

Nothing in the *Transformation Order* alters this view. Therefore, the parties’ interconnection agreement must include provisions that recognize that, for VNXX, the actual routing of the call determines the proper rating (toll or local) and not a fictionalized location that has no physical relevance to the call itself.

2. ICC Issue No. 4 – Scope of ISP Remand Order

According to Core, the mirroring rule only applies to ILECs and, as a result, Core need not cap its own reciprocal compensation rates for terminating traffic in the event that Windstream elects to exchange local traffic at \$0.0007/MOU.²⁵ This is a blatant attempt on Core’s part to mischaracterize two different components of the ISP Remand Order, namely the rate caps rule and the mirroring rule.

The rate caps rule established a rate cap that began at \$0.0015/MOU and transitioned to \$0.0007/MOU.²⁶ According to the FCC, if the rate caps did not allow LECs to adequately recover their costs, they could recover the remaining costs from their end user customers.²⁷ Note that the FCC in this case use the term “LEC” which is defined in the Telecommunications Act as “any person that is engaged in the provision of telephone exchange service or exchange

²³ 66 Pa. C.S. § 3012.

²⁴ *Id.*

²⁵ Core Supplemental Brief at 5.

²⁶ *FCC First ISP Remand Order* at ¶ 78; See also, *PacWest Ninth Circuit* at 986.

²⁷ *FCC First ISP Remand Order* at ¶ 80.

access.”²⁸ The definition is inclusive of ILECs and CLECs alike. Accordingly, if Windstream adopts a rate of \$0.0007 for the exchange of intraexchange dial up ISP traffic, Core also is subject to that cap and must charge Windstream that rate.

Second, Windstream agrees that the mirroring rule only applies to ILECs. But the mirroring rule simply requires that the ILEC adopt the lower rate for the exchange of dial-up ISP traffic to all traffic exchanged subject to Section 251(b)(5).²⁹ Therefore, if Windstream adopts the \$0.0007 for the exchange of intraexchange dial-up ISP traffic, it must also offer that rate to other CLECs for the exchange of local voice traffic, the other type of traffic subject to Section 251(b)(5).

3. Definition Issues

Core asserts that the *Transformation Order* affects the definition of Section 251(b)(5) Traffic. In support of this assertion, Core cites to the FCC’s treatment of VoIP-PSTN Traffic.³⁰ The prospective treatment of VoIP-PSTN Traffic should have no bearing on the outcome of this arbitration. VoIP traffic was never an issue in the arbitration between Core and Windstream. In fact, the term VoIP does not once appear in the Recommended Decision or Briefs filed by the parties.

As argued in Windstream’s companion Motion to Strike, any attempt by Core to now address VoIP concerns in the context of this arbitration is not appropriate, since the exchange of

²⁸ 47 U.S.C. 153(26).

²⁹ *FCC First ISP Remand Order* at 89 (“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)177 at the same rate. Thus, if the applicable rate cap is \$.0010/mou, the ILEC must offer to 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.”); See also, Ninth Circuit Order at 987.

³⁰ Core Supplemental Brief at 3.

VoIP traffic was not one of the issues submitted for arbitration and the record has been closed. Moreover, the “facts” that Core now seeks to present are contested by Windstream and cannot be accepted by the Commission. The Commission should refrain from addressing any VoIP related dispute since none was brought before it in this arbitration.

If Core now wants to address VoIP related issues, there are two options. First, this arbitration can be remanded back to the Administrative Law Judge to develop the facts required to address the controversy. Second, the Commission can close out this arbitration and Core, if it wishes can seek to amend the interconnection agreement.

Furthermore, it is important to note that the FCC did not, contrary to Core’s assertion, expand the scope of 251(b) traffic subject to reciprocal compensation or the rate cap of \$0.0007.³¹ In the Transformation Order, as discussed by Windstream in Section 1 above, the FCC simply used Section 251(b)(5) as its vehicle to assert jurisdiction over all traffic, including access traffic. However, the FCC retained the types of traffic subject to reciprocal compensation and access (intraexchange and interexchange) charges during the transition to bill and keep. Accordingly, dial up ISP traffic provided through VNXX arrangements continues to be subject to access charges since it is deemed interexchange traffic.

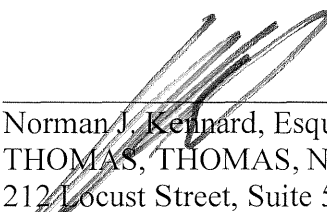
III. CONCLUSION

As demonstrated herein, Core’s assertions that distinctions between toll and local traffic have been extinguished with the FCC’s *Transformation Order* or that the order somehow endorses Core’s use of VNXX are without merit. In addition, both the *PacWest Ninth Circuit* decision and the *Palmerton Order* reject the use of VNXX to mask local traffic and evade access

³¹ Core Supplemental Brief at 2.

charges. Accordingly, Windstream requests that the Commission affirm ALJ Salapa in all respects.

Respectfully Submitted,



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Dated: February 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by participant).

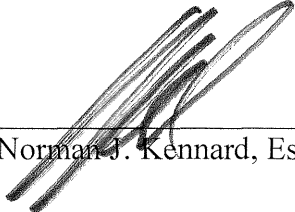
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