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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

**Motion of Windstream Pennsylvania, LLC to Strike Affidavit Containing
Information Not of Record**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Motion of Windstream Pennsylvania, LLC to Strike Affidavit Containing Information Not of Record 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 :**

**MOTION OF WINDSTREAM PENNSYLVANIA, LLC
TO STRIKE AFFIDAVIT CONTAINING
INFORMATION NOT OF RECORD**

NOW COMES Windstream Pennsylvania, LLC (“Windstream”) by its attorneys, and, pursuant to 52 Pa. Code § 5.103, moves to strike, in its entirety, the “Technical Affidavit of Bret L. Mingo” as filed by Core Communications, Inc. (“Core”). In support of its Motion, Windstream submits the following:

I. INTRODUCTION

1. This proceeding concerns a Petition for Arbitration filed by Core pursuant to 47 U.S.C. § 252(b) requesting that the Pennsylvania Public Utility Commission (“Commission”) arbitrate the terms and conditions of an interconnection agreement (“ICA”).

2. The Commission has previously ruled that arbitrations are to be transcribed, on-the-record proceedings where disputed facts are resolved by hearings.¹

¹ *Implementation of the Telecommunications Act of 1996*, Docket No. M-960799 (Order entered June 3, 1996); *see also* 26 Pa. B. 3851 (August 10, 1996) (“If disputed, material facts are present, the arbitrator will schedule oral arbitration proceedings required to resolve the disputed material facts. Oral arbitration proceedings shall be strictly confined to the material facts disputed by the parties. Other advocacy or evidence will not be permitted. Any oral

3. Testimony was submitted by Core and Windstream on twelve specific issues that the parties were unable to resolve by negotiation.

4. Hearings were held in this matter on September 20, 2007 before Administrative Law Judge (“ALJ”) David A. Salapa, who issued a Recommended Decision (“RD”) on January 9, 2008.

5. ALJ Salapa ruled that: “The record closed on November 27, 2007, upon the filing of reply briefs.”²

6. The Commission has not yet issued a final order in this matter.

7. On October 4, 2012, by Secretarial Letter, the Commission requested Supplemental Briefs to address specific points, among other things, the impacts of the FCC’s *Transformation Order*³ on the outstanding issues in this proceeding, as well as “other relevant FCC, state utility commission, or court decisions.”

8. The Secretarial Letter purports to “reopen” the evidentiary record and solicits “appropriately executed technical evidentiary affidavits” on general issues such as merger conditions and whether the pending issues have been successfully resolved with other telecommunications carriers.⁴

9. The Parties filed Supplemental Briefs on January 11, 2013 and Supplemental Reply Briefs are due to be filed on February 15, 2013.

arbitration proceedings shall be transcribed.... Parties to the arbitration proceeding shall submit evidence in support of their position regarding material, disputed facts consistent with the procedural format adopted by the arbitrator.”).

² RD at 5.

³ *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), and subsequent Reconsideration and Clarification rulings (collectively “*Transformation Order*”).

⁴ Secretarial Letter at 1 (“The Commission believes that the timely and comprehensive disposition of this matter requires that the evidentiary record of this proceeding be reopened for the very limited purpose of submitting supplemental initial and reply briefs that can correspondingly be accompanied by appropriately executed technical evidentiary affidavits.”).

10. In its Supplemental Brief, Windstream declined to submit extra record evidence and limited its presentation to legal arguments only.⁵

11. Conversely, Core submitted a multipage Affidavit which purports to present evidence on various issues including new business ventures (described as “VoIP wholesale”) and Windstream’s network interconnection with Verizon.

12. Windstream moves to strike that Affidavit and any and all reference and argument derived therefrom in Core’s Supplemental Brief and Reply.

II. CORE AFFIDAVIT

13. In its Affidavit, Core presents facts not previously contained in the record of this case, which constitutes new, extra record evidence submitted after the close of the record on key and important issues.

14. Specifically, the “Technical Affidavit of Bret L. Mingo” claims that:

(a) Beginning in 2009, Core began to offer “wholesale telecommunications services to unregulated service providers using various voice-over-IP (“VOIP”) technologies” first on an inbound basis and then outbound. ¶¶ 3 and 5. Various estimates of the amount of such traffic are offered. ¶¶ 4 and 5. Core’s investment is claimed to now be “in the millions of dollars.” ¶ 7.

(b) Core’s previous record claim that its business “focused exclusively” on the provision of Internet dial-up services to ISPs should now be “ignored or rejected.” ¶ 7.

(c) “Upon information and belief,” Core now claims that “Windstream has previously installed facilities into each of Verizon’s tandem offices in Pennsylvania”

⁵ Windstream Supplemental Brief at 3 (“This case has been litigated as an ‘on-the-record’ proceeding. Testimony was submitted and was subject to discovery and cross examination (waived). The Recommended Decision is based upon this record evidence. While the Secretarial Letter also solicits “technical evidentiary presentations” in the form of affidavits and schematic diagrams, Windstream’s presentation in this Supplemental Brief is limited to legal issues and no further factual development is offered. Were any participant to seek to adduce new or additional facts, then the case should be remanded to the ALJ for such purpose to preserve the parties’ due process rights. It would be inappropriate to admit additional evidence outside of the formal record.”).

and such facilities should be considered to be on Windstream's network and "a viable node" for interconnection. ¶ 12. The presence of such facilities "diminishes Windstream's advocacy on Issue NIA Issue. 1 (Point of Interconnection (POI))." ¶ 13. Transport into Verizon's tandems is "likely cheaper and easier to provision." ¶ 13.

(d) Core has entered into traffic exchange agreements with CLECs (not submitted for approval or otherwise publically available) that rates calls "based upon the NPA-NXX of the calling and called parties." ¶¶ 14-15.

(e) There is no "reliable or workable method" to rate calls other than using NPA-NXX. ¶ 16.

III. MOTION TO STRIKE

A. The Proper Procedure to Reopen the Record Has Not been Followed

15. The record in this case was re-opened on a very limited basis *sua sponte* by the Commission. Windstream does not agree with and objects to the procedure of employing untested affidavits in substitution of the process of testimony, discovery and cross examination that was used to develop the record in this case.

16. The legal authority cited in the October 4, 2012 Secretarial Letter to support such a procedure is a reference to the *RLEC Access Investigation*,⁶ which is inapposite and not a basis for Core's affidavit here. The affidavits submitted by the parties in that case explained the operation of the FCC's Transition Order, but did not attempt to supplement the record with fundamental new, updated facts about the parties or challenge the operations of other carriers.⁷

⁶ Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund, et al., Docket Nos. I-00040105, C-2009-2098380 et al., and M-2012-2291824 (Order entered March 20, 2012) ("RLEC Access Investigation").

⁷ See, e.g., *RLEC Access Investigation*, Verified Joint Statement of Gary Zingaretti and Jeffrey Lindsey Submitted on Behalf of the PTA and CenturyLink.

17. The *RLEC Access Investigation* cited to various sections of the Public Utility Code as support,⁸ but these sections do not justify what Core has done here. The Commission's general powers under § 501 are no basis for Core to employ non-record evidence. More significantly, the Commission had issued a Final Order in the *RLEC Access Investigation* (on July 18, 2011) and, as Petitions for Reconsideration were pending, the Commission cited to §§ 703(f) and 703(g) of the Public Utility Code, which address rehearing after order and recession and amendment of orders, respectively. Obviously, no Commission order has been issued here.

18. The procedures for reopening *prior to* a Commission order are different and absolutely require remand back to the ALJ for hearings. Section 5.571 of the Commission's regulations, 52 Pa. Code § 5.571 (Reopening prior to a final decision), requires that any party seeking to adduce new facts as Core does here must petition for a reopening⁹ and then additional hearings must be held.¹⁰

The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.¹¹

The Commission may reopen the record after the presiding officer has issued a decision or certified the record to the Commission.¹²

⁸ *RLEC Access Investigation* at 3, n.3 (citing §§ 501, 703(f) and 703(g) of the Public Utility Code).

⁹ 52 Pa. Code § 5.571(a).

¹⁰ *See, also* 52 Pa. Code § 5.431(b) ("After the record has closed, additional matter may not be relied upon or accepted unless allowed for good cause shown...").

¹¹ 52 Pa. Code § 5.571(d).

¹² 52 Pa. Code § 5.571(d)(2).

B. Hearings Are Required Before the Evidence Contained in the Affidavit is Considered

19. Core's Affidavit is an inappropriate attempt to insert unproved facts into the case in a manner that by-passes the closed record of this proceeding. Given the fundamental changes to the record evidence submitted by Core (change in business model and traffic, allegations about Windstream's network, etc.) hearing, not affidavits are required to present new evidence.

20. The situation is analogous to granting summary judgment on affidavits where the facts are contested, a practice proscribed in civil practice under the "*Nanty-Glo* Rule."¹³ This rule states that summary judgment may not be entered where the moving party relies exclusively on testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact except where the moving party supports the motion by using opposing party admissions.

21. As a Commonwealth agency, the Commission must comply with the Administrative Agency Law, including § 504,¹⁴ which provides that parties must be given reasonable notice and the opportunity to be heard.¹⁵ In *Kovalchik*, the Commonwealth Court held:

Further, our Supreme Court, in construing the requirements of Section 504, has held that no adjudicatory action is valid unless there has been "a hearing wherein each party has opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument." *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 465, 431 A.2d 946, 948 (1981).¹⁶

¹³ *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932).

¹⁴ 2 Pa.C.S. § 504.

¹⁵ *Id.*; see also *Kovalchik v. Pa. State Police*, 613 A.2d 150, 153 (Pa. Cmwlth. 1992)

¹⁶ *Id.* at 153.

Pennsylvania appellate courts have reversed Commission orders that were based, even in part, on facts outside the administrative record.¹⁷

22. The dictate of a hearing is reflected in the Commission's own regulations, which provide: "After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion."¹⁸ 52 Pa. Code § 5.431(b). Pursuant to the Commission's regulations and principles of fundamental fairness and due process of law, Administrative Law Judges have rejected efforts, like that of the Core here, to introduce new "evidence" in parties' briefs.¹⁹

23. This Commission has condemned prior attempts to foreclose the opportunity to challenge, by formal hearings, the substance of new facts that supplement the record.

But basic notions of fairness and due process absolutely mandate that the Protestants be given an opportunity to address the Complete Amended Applications in some fashion. We need not speculate how the Protestants would respond to such an opportunity. The fact is that the opportunity must be afforded.²⁰

24. In conclusion, the Commission may not accept Core's proposed new facts, without affording Windstream the opportunity to contest those facts in an on-the-record proceeding.

¹⁷ See, e.g., *Equitable Gas Co. v. Pa. P.U.C.*, 405 A.2d 1055, 1059 (Pa. Cmwlth. 1979); *United Natural Gas Co. v. Pa. P.U.C.*, 33 A.2d 752, 758 (Pa. Super. 1943) ("None of these figures appear in this record and ... [n]o opportunity was afforded appellant to dispute or discuss them or show their inapplicability to the question.")

¹⁸ 52 Pa. Code § 5.431(b).

¹⁹ See, e.g., *Third Ave. Realty Ltd. Partners v. Pennsylvania-American Water Co.*, Docket No. C-2008-2072920 (Initial Decision dated October 4, 2010), 2010 Pa. PUC LEXIS 1615 ("I will strike off those portions of the Complainant's reply brief that improperly attempt to introduce new evidence or raise arguments contrary to evidence presented by its witness.")

²⁰ *Applications of Deer Haven, L.L.C.*, Docket Nos. A-210069F2000, A-210124, A-230061F2000, and A-230106 (Order entered February 11, 2009), slip op. at 11.

C. Windstream Contests Core's Claimed Facts

1. Point of Interconnection

25. Nowhere in its Supplemental Brief does Core address the issue of interconnection points, whereas Windstream expressly renewed its objection to being forced to bear the cost of delivering to a point of interconnection chosen by Core that is not on Windstream's network in contradiction of 47 C.F.R. § 51.305.²¹

26. In the Affidavit by Mr. Bret L. Mingo submitted as an attachment to Core's Supplemental Brief, the factual assertion is made that "on information and belief" Windstream has "installed facilities into each of the Verizon's tandem offices in Pennsylvania."²²

27. This assertion is patently untrue. Windstream has most definitely not installed facilities into the Verizon tandem offices. To the extent that a Windstream end office subtends a Verizon tandem office, Windstream's facilities categorically end at the Windstream/Verizon meet point which is located in Windstream's service territory. That is the same hand off point that Windstream proposes for Core.

28. Windstream can only speculate about the nature of the "information and belief" upon which Mr. Mingo relies, except to say that, if the reference is to a CLEC affiliate of Windstream, then interconnection facilities are *on Verizon's ILEC network* in accordance with the CLEC/Verizon ICA. The only relevance of this configuration is that Windstream here is also asking that Core, as the CLEC, interconnect with *Windstream on its own network*.

29. Moreover, claims that presence of such facilities "diminishes Windstream's advocacy on Issue NIA Issue. 1 (Point of Interconnection (POI))"²³ and renders transport into

²¹ Windstream Supplemental Brief at 4-5.

²² Technical Affidavit of Bret L. Mingo at ¶ 12.

²³ Technical Affidavit of Bret L. Mingo at ¶ 13.

Verizon's tandems is “likely cheaper and easier to provision”²⁴ are completely unfounded and self-serving with no demonstration of veracity.

2. VoIP Operations

30. This case was litigated on the premise that Core’s sole service is the collection of dial-up traffic for Internet Service Providers (“ISPs”). As Core admits, during the period that this matter was tried, Core “focused exclusively” on the provision of dial-up services.²⁵ It now argues that this operation should be “ignored or rejected.”

31. Core now claims VoIP status, but only explains its service in the vaguest possible terms as “wholesale” service to “unregulated service providers” using “various voice-over-IP (‘VOIP’) technologies.”²⁶ On the basis of such vague assertions, Core claims that it is delivering/receiving “VoIP-PSTN” traffic as that term is defined under the FCC’s *Transformation Order*.²⁷

32. Windstream also disputes this factual claim. Whether traffic is VoIP-PSTN is a fact specific inquiry. The FCC’s definition of the new calling category at 47 C.F.R. § 51.701 (b)(3) defines “VoIP-PSTN” traffic as “... telecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format that ... originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.”²⁸

²⁴ Technical Affidavit of Bret L. Mingo at ¶ 13.

²⁵ Technical Affidavit of Bret L. Mingo at ¶ 7.

²⁶ Technical Affidavit of Bret L. Mingo at ¶ 3.

²⁷ Core Supplemental Brief at 3-4.

²⁸ *Transformation Order*, Appendix A at 500; *November 29th Federal Register*, 76 Fed. Reg. at 73855 (emphasis added).

33. The FCC's *Transformation Order* narrowly specifies a service that "originates from and/or terminates to an end-user customer" in Internet protocol and "requires 'Internet protocol-compatible customer premises equipment.'" The definition describes the specific placement of the technology in the network and, thus, each network must be reviewed before the label can attach. The FCC Order expressly rejects any wider application of the new rule.²⁹ The new definition is fact specific, and, Core has failed to demonstrate that the label applies. Core's Affidavit simply presumes that the term "VoIP-PSTN" applies without any demonstration of the facts needed to support such a finding.

34. Nor does Core explain how, as a wholesale entity, it would know the specifics of its customers' origination of traffic. Core, if it is a wholesale entity, does not originate traffic, it is a middle man. Is Core then relying upon its customers' representations to reach this conclusion? Or is the assertion simply unfounded and without any support (just a term thrown out to claim a different type of arbitrage advantage)?

35. The issue of how to handle VoIP traffic was never raised by Core before the ALJ, and the terms does not appear once in the ALJ's Recommended Decision. There is no factual record upon which to render a decision on VoIP traffic now. Windstream disputes Core's VoIP-related claims.

3. Rating Traffic

36. Next, Core claims that there is no "reliable or workable method" to rate calls other than using NPA-NXX³⁰ and that it has entered into traffic exchange agreements with

²⁹ *Transition Order* at ¶ 941(n. 1895).

³⁰ Technical Affidavit of Bret L. Mingo at ¶ 16.

CLECs, which are not submitted for approval or otherwise publically available that rate calls “based upon the NPA-NXX of the calling and called parties.”³¹

37. Although not explained very well, the Affidavit seems to be designed to further support the rating of VNXX as a local call. The proper jurisdiction (*i.e.*, local vs. toll) of Core’s ISP dial-up traffic has been a key dispute throughout this proceeding. Had Core anything to say on the efficacy of any particular billing method versus another, it should have said so on the record of this case. Core offers no excuse for not doing so before, and its late filed testimony now should be ignored.

38. Windstream contests Core claims regarding billing and should Core insist upon introducing further testimony, then it must submit its witnesses to a hearing.

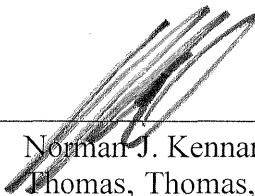
³¹ Technical Affidavit of Bret L. Mingo at ¶¶ 14-15.

IV. CONCLUSION

Core has inappropriately sought to introduce new facts into the record of this case on key and important questions without reopening the record as is required under regulations and due process case law. Core cannot do this without affording Windstream the basic due process rights of our legal system, including the right to cross-examine and to rebut.

This case has been an open docket for some time, but not for any reason caused by Windstream. If Core desires to adduce new facts before the Commission decides this arbitration, then the record must be reopened. Otherwise, Core should let the Commission decide the issues that have been already been defined and on the record that has been developed. If Core desires an ICA that addresses other additional issues, VoIP traffic for example, then it should do so after this case is resolved. Windstream respectfully requests that its Motion to Strike be granted.

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).


Via Electronic and First Class Mail

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