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August 16, 2013

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

Re: Core Communications, Inc.
v. Verizon Pennsylvania Inc. and Verizon North LLC;
Docket Nos. C-2011-2253750 and C-2011-2253787

Dear Secretary Chiavetta:

Enclosed please find Verizon's Exceptions to Initial Decision, filed on behalf of Verizon Pennsylvania LLC and Verizon North LLC (collectively, "Verizon") in the above captioned matter.

If you have any questions, please feel free to contact me.

Very truly yours,

Suzan D. Paiva

SDP/slb

Via E-Mail and Federal Express
cc: The Honorable Susan D. Colwell
Cheryl Walker Davis, Office of Special Assistants
Attached Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Verizon's Exceptions to Initial Decision, upon the parties listed below, in accordance with the requirements of §1.54 (relating to service by a party) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 16th day of August, 2013.

Via E-Mail and Federal Express

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Core Communications, Inc.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2011-2253750
	:	Docket No. C-2011-2253787
Verizon Pennsylvania Inc. and	:	
Verizon North LLC,	:	
Respondents.	:	

VERIZON'S EXCEPTIONS TO INITIAL DECISION

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Counsel for Verizon Pennsylvania LLC and Verizon North LLC

Dated: August 16, 2013

Pursuant to 52 Pa. Code § 5.533 and the revised schedule adopted via the Commission's July 17, 2013 Secretarial Letter, Verizon[1] excepts in limited part to the Initial Decision of Administrative Law Judge ("ALJ") Susan D. Colwell issued on July 11, 2013 ("ID") in the complaint cases brought by Core Communications, Inc. ("Core") against Verizon.

I. INTRODUCTION

After thorough review of the extensive evidentiary record, the ID confirms that Core has been overbilling Verizon for years, while at the same time refusing to pay millions of dollars in valid invoices for the wholesale services Verizon provided to keep Core's network running. Core's unlawful business practices are fundamentally anti-consumer. It systematically and illegitimately siphons money away from Verizon – a company that provides local exchange and other important services to consumers and businesses in Pennsylvania – to prop up an apparently unsustainable business model that does not serve a single retail customer. Effectively, Core has been financing its cut-rate service to dial-up Internet Service Providers ("ISPs") and wholesale traffic aggregators – the foundation for its traffic stimulation practices – on the backs of Verizon's Pennsylvania ratepayers. It is telling that the ID reaches the same conclusion on all important legal and factual issues as the independent findings recently reached by a federal district judge in Virginia, after reviewing a separate evidentiary record of Core's similar abusive business practices against Verizon in that state. *See CoreTel Virginia, LLC v. Verizon Virginia LLC et al.*, 2013 U.S. Dist. LEXIS 58649 (E.D. Va. April 22, 2013).[2]

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1 "Verizon" refers to Verizon Pennsylvania LLC ("Verizon PA") and Verizon North LLC ("Verizon North").

2 Verizon filed a copy of the Virginia federal court decision in this proceeding on April 24, 2013.

The Commission's September 23, 2011 emergency order has already compelled Verizon to pay roughly $1.3 million (and counting) to Core during the litigation of this proceeding,[3] a substantial portion of which the ID found is improper billing for other carriers' traffic. Indeed, just yesterday, the Commission affirmed on reconsideration its earlier order requiring AT&T to pay Core for the termination of ISP-bound traffic routed to Core through Verizon's tandems[4] – the same traffic for which the ID concluded that Core has improperly collected terminating charges from Verizon through double-billing. ID at 11, 50. Application of the 35% overcharge factor discussed below (derived from an analysis of Core's call detail records to identify the third-party traffic improperly billed to Verizon) to the $1.3 million paid to date under the Commission's emergency order results in $455,000 in Verizon overpayments made to Core as a direct result of that order (for traffic that the ID concluded was most likely double-billed to the originating carrier as well).

It is high time for the Commission to put an end to the tactics of the FCC[5]-dubbed "poster boy of reciprocal compensation gamesmanship."[6] The Commission should promptly free Verizon from the obligations imposed by its September 23, 2011 emergency order, require Core to pay for the millions of dollars in facilities and services it has obtained from Verizon pursuant to the parties' interconnection agreements ("ICAs"), together with the late payment charges

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3 This represents the amount Verizon has paid Core through July 2013 as a result of the Commission's September 23, 2011 "Opinion and Order," which required Verizon to make monthly payments to Core during the pendency of this case, subject to refund. Because traffic levels have dwindled over time, on a monthly basis, this amount averages out to less than the $75,441.67 total of Core's May 2011 invoices to Verizon, for which Core originally sought the emergency order compelling payment. *See* July 22, 2011 "Petition of Core Communications, Inc. for Interim Emergency Order" at ¶ 19.

4 *See* "Opinion and Order on Reconsideration," *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC and TCG Pittsburg, Inc.*, Docket Nos. C-2009-210186 and C-2009-2108239 (August 15, 2013) ("*Core/AT&T Reconsideration Order*").

5 "FCC" refers to the Federal Communications Commission.

6 Response of the Federal Communications Commission to Emergency Motion for a Stay and Motion for Expedited Consideration, *WorldCom, Inc. v. FCC*, No. 01-1218 at 14 (D.C. Cir., June 12, 2001) ("*FCC Stay Response*").

required by the ICAs,[7] order Core to refund all amounts Verizon overpaid due to Core's illegal billing practices with interest, and direct Core to cease its improper billings and chronic non-payment going forward.

Adoption of the ID – which generally reaches sound conclusions about Core's misconduct and Verizon's right to relief – would accomplish all of these important outcomes. Verizon seeks modification of the ID on two limited issues: (1) the appropriate statute of limitations and tolling date for Verizon's claims for payment on its unpaid invoices to Core; and (2) the amount of the refund due from Core for past overpayments by Verizon, and the means by which that refund should be made.

As discussed below, the appropriate statute of limitations – if any – to apply to Verizon's claims for payment of its unpaid invoices is 42 Pa. C.S. § 5525's four-year statute of limitations for contract actions (since Core's non-payment is a breach of the parties' Commission-approved ICAs), rather than 66 Pa. C.S. § 3314's three-year statute of limitations applicable to actions for penalties and forfeitures for violations of the Public Utility Code. ID at 22, 61. In addition, the limitations period should be tolled as of the August 16, 2011 filing of Verizon's counterclaims to Core's *original* complaint, not the May 16, 2012 filing of Verizon's counterclaims to Core's *amended* complaint. *Id.*

As to the refund Core owes Verizon for past overpayments, the Commission should revise the "conservative" $1 million that the ID deemed sufficient to "make the point to Core that double-billing is a serious violation which will not be tolerated" to the full $2,725,140 that the

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[7] The ID correctly held that the ICAs require Core to pay late payment charges of 18% per year for unpaid invoices from Verizon North and 9% per year on those from Verizon PA. ID at 55-56 (*see* Conclusion of Law 15). Moreover, the Commission held in the *Core/AT&T Reconsideration Order* that 66 Pa. C.S. §§ 1409 and 1509 implicitly recognize the validity of late payment charges, and that the Commission has the authority to impose late payment charges under its implied powers to ensure just and reasonable utility rates (citing case law, 66 Pa. C.S. §§ 502 and 102 and the Commission's Chapter 56 regulations). *Core/AT&T Reconsideration Order* at 22-25.

record firmly establishes Core owes Verizon for the January 2008 to June 2012 time frame, plus 35% of amounts Verizon has paid to Core from June 2012 through the date of the Commission's final order, plus interest at the statutory rate of 6%, as required by 66 Pa. C.S. § 1312(a). ID at 50; *see also Core/AT&T Reconsideration Order* at 19-22. The Commission also should require Core to disgorge this amount via a refund payment to Verizon,[8] rather than through the account credit process described in the ID (ID at 50, 61), which would allow Core to retain large sums illegally collected from Verizon for many months or years to come, and possibly, to avoid *ever* disgorging the wrongfully collected amounts.

With these limited revisions, the Commission's final order will properly implement the ID's findings regarding Core's liability to Verizon, putting an end to Core's perpetual efforts to game the intercarrier compensation system at the expense of Verizon and its Pennsylvania ratepayers.

II. EXCEPTIONS

Verizon Exception #1: Verizon Excepts to the ID's Application of the Three-Year Statute of Limitations For *Penalties* (66 Pa. C.S. § 3314) to Verizon's Counterclaims for Payment of Past Due Bills, Rather Than the Four-Year Statute of Limitations For *Contract Claims* (42 Pa. C.S. § 5525), and to the Failure to Calculate the Limitations Period From the August 16, 2011 Filing of Verizon's Counterclaims to Core's Original Complaint.

The ID contains two intertwined errors – one factual and one legal – relating to the application of the statute of limitations to Verizon's claims for payment of past due bills. Unless corrected, these errors will inappropriately reduce the long-overdue amounts Core must pay Verizon.

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[8] As the Commonwealth Court has observed, where a regulated utility makes the choice to continue billing rates that are at risk of being declared unlawful, the utility must "bear the consequences" of billing those higher rates by refunding the over-collections to its ratepayers. *Pa. Gas & Water Co. v. Pa. Public Util. Com*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984); *see also Duquesne Light Co. v. Pa. Public Util. Com*, 117 Pa. Commw. 28, 34-35, 543 A.2d 196, 200 (Pa. Commw. Ct. 1988).

1. The ID Should Have Used the August 16, 2011 Filing of Verizon's Counterclaims to Core's *Original* Complaint as the Relevant Date for Application of the Statute of Limitations to Verizon's Claims for Payment of Past Due Bills, Rather than the May 16, 2012 Filing of Verizon's Counterclaims to Core's *Amended* Complaint.

The ID calculates the limitations period for Verizon's claims for payment of past due bills based on the May 16, 2012 filing of Verizon's counterclaims to Core's *amended* Complaint, rather than on the August 16, 2011 filing of Verizon's counterclaims to Core's *original* Complaint.[9] ID at 22 ("Verizon is limited to the time period after May 16, 2009, which is three years prior to the filing of its Counterclaims") and 61, Ordering Paragraph ("OP") 8 ("Core Communications, Inc. shall pay the bills tendered on or after May 17, 2009…").

Verizon's August 16, 2011 "Answer, New Matter and Counterclaims Seeking Affirmative Relief" – which Verizon filed in response to Core's *original* complaint – included Verizon's counterclaims for payment of its outstanding invoices to Core. *See* Verizon's August 16, 2011 Answer, New Matter and Counterclaims Seeking Affirmative Relief at ¶¶ 71-100 (Counterclaims I and II). As such, the Commission's final order should calculate the limitations period applicable to Verizon's claims for unpaid bills from the August 16, 2011 filing of Verizon's *original* counterclaims, rather than from May 16, 2012, when Verizon responded to Core's *amended* complaint (and reiterated its earlier counterclaims). Failure to do so would be an error of law.[10]

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[9] The ID's "History of the Proceeding" (ID at 1-5) omits reference to Verizon's original August 16, 2011 Answer, New Matter and Counterclaims, but does discuss Core's argument that Verizon is only entitled to seek payment of bills accruing after *August 16, 2007*, confirming Core's acknowledgement of both Verizon's August 16, 2011 counterclaims and the applicability of the four-year statute of limitations. ID at 46; *see also* file-stamped copy of Verizon's August 16, 2011 filing posted on Commission's website at http://www.puc.state.pa.us//pcdocs/1143452.pdf (the Commission's electronic docket sheet incorrectly lists this filing as having been made on August 18, 2011).

[10] *See, e.g., Richard Sanderman v. LP Water & Sewer Company*, Docket No. C-00956966, 1997 Pa. PUC LEXIS 112, *16 (Opinion and Order entered October 28, 1997) (statute of limitations tolled by ongoing litigation), *aff'd, LP Water And Sewer Company v. Pennsylvania Public Utility Commission*, 722 A.2d 733; 1998 Pa. Commw. LEXIS 912 (Pa. Commonwealth Ct. October 21, 1998); *Pennsylvania Public Utility Commission v.*

In addition, as explained below, any applicable statute of limitations for Verizon's claims for payment of its past-due bills to Core would be *four* years, not three.

2. The ID Mistakenly Applies the Three-Year Statute of Limitations For *Penalties* (66 Pa. C.S. § 3314) to Verizon's Counterclaims for Payment of Past Due Bills, Rather Than the Four-Year Statute of Limitations For *Contract Claims* (42 Pa. C.S. § 5525).

The ID mistakenly applies the *three*-year statute of limitations in 66 Pa. C.S. § 3314 to Verizon's counterclaims for payment of its overdue invoices. ID at 22; 61 (OP 8). By its express terms, the three-year statute of limitations in 66 Pa. C.S. § 3314 applies only to "action[s] for the recovery of any penalties or forfeitures incurred under the provisions of this part [the Public Utility Code]...." *See* 66 Pa. C.S. § 3314(a).

Verizon's claim does not seek "penalties or forfeitures" for violating the Public Utility Code, but rather is a billing claim seeking to recover payment for past due bills.[11] ID at 28-29. Core's longstanding refusal to pay Verizon's bills constitutes a breach of the parties' Commission-approved ICAs. ID at 53, OP 6 ("Core breached the ICAs by failing to pay Verizon's bills for facilities, traffic termination and directory listings.").

The Commission does not apply the three-year statute of limitations in 66 Pa. C.S. § 3314 to billing disputes.[12] Rather, the Commission has made clear that this section applies only in

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Metropolitan Edison Co., Complaint Docket No. 21597, 1977 Pa. PUC LEXIS 66, *7-8; 51 Pa. PUC 242 (Opinion and Order entered October 13, 1977) (original complaint sufficient to toll statute of limitations); *Metropolitan Edison Co. v. Pennsylvania Public Utility Com.*, 62 Pa. Commw. 460, 474-75 (Pa. Commw. Ct. 1981) (original complaint sufficient to toll statute of limitations).

[11] Verizon also sought a refund of amounts previously overpaid to Core as a result of paying incorrect bills that Core rendered in violation of the parties' ICAs. ID at 28-29; *see also* ¶¶ 101-117 (Counterclaim III) of Verizon's August 16, 2011 Answer, New Matter and Counterclaims Seeking Affirmative Relief; ¶¶ 187-203 (Counterclaim III) of Verizon's May 16, 2012 Answer, New Matter and Counterclaims Seeking Affirmative Relief to Core's Amended Complaint. Because this is a refund claim for overcharges on past bills, the four-year limitation of 66 Pa. C.S. §1312(a) applies. *See, e.g., Metropolitan Edison Co. v. PA Pub. Util. Comm'n*, 437 A.2d 76, 84 (Pa. Commw. 1981).

[12] *See, e.g., LP Water And Sewer Company v. Pennsylvania Public Utility Commission*, 722 A.2d 733, 738, 1998 Pa. Commw. LEXIS 912, *12 (Pa. Commonwealth Ct. October 21, 1998), *app. denied*, 560 Pa. 690, 742 A.2d 678 (1999) (four-year limitations period of Section 1312 applies in a refund action, not three-year period in

cases seeking penalties for violations of the Public Utility Code.[13] In back-billing situations, the Commission routinely applies the four-year limitations period in 66 Pa. C.S. § 1312 where the customer had no culpability (and has found that no limitations period applies if theft of service was involved), and it has not applied the shorter three-year limitations period of 66 Pa. C.S. § 3314 in the billing context.[14] Similarly, under facts involving timely-issued but unpaid bills, the Commission has ruled that the Public Utility Code contains *no restriction* on how far back it can award relief, and the Commission has not applied the three-year period of 66 Pa. C.S. § 3314.[15] This is the situation with respect to Verizon's unpaid bills to Core, which were legally and timely rendered, but remain unpaid. Based on Commission precedent in similar cases, there is no applicable limitations period in the Public Utility Code for Verizon's claims for payment of its unpaid bills, and the three-year period of Section 3314 does not apply.

As such, the Public Utility Code does not require the Commission to apply a limitations period at all. If it nonetheless chooses to impose one, it would have to be the four-year period set forth in 42 Pa. C.S. § 5525 for contract claims. The parties' briefs reflect agreement on this

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Section 3314); *Beverly Layne v. Philadelphia Gas Works*, F-00820471, 2003 Pa. PUC LEXIS 4, *4 (Opinion and Order entered February 24, 2003) (ALJ's reliance on Section 3314 in refund proceeding misplaced; instead, Section 1312 applies).

13 *See, e.g., Kevin P. Maloney v. West Penn Power Company*, F-2010-2189973, 2011 Pa. PUC LEXIS 383, *13 (Opinion and Order entered November 10, 2011) (Section 3314(a) applies to actions "under the Code"); *Petition of Dominion Retail, Inc. For Refund of Assessments Paid to the Public Utility Commission; Petition of Select Energy, Inc. For Refund of Assessments Paid To the Public Utility Commission,* M-00061940; M-00061941, 2006 Pa. PUC LEXIS 69, *15-16 (ID of ALJ Colwell, July 5, 2006) (Section 3314(a) limited to penalties and forfeitures).

14 *See, e.g., Core/AT&T Reconsideration Order* at 33 (citing *Angie's Bar* line of precedent in applying Section 1312 to Core's back-billing claims); *Angie's Bar v. Duquesne Light Company,* 72 Pa. PUC 213, 1990 Pa. LEXIS 4, *11-13 (1990); *Nona Lewis v. Philadelphia Gas Works*, F-2010-2171442, 2011 Pa. PUC LEXIS 1701, *6-7 (Opinion and Order entered July 15, 2011); *Roderick Berry v. Philadelphia Gas Works*, F-01184412, 2004 Pa. PUC LEXIS 27, 12-13 (Opinion and Order entered April 15, 2004).

15 *See, e.g., Charles Souders v. PECO Energy Company*, Docket No. C-2008-2053281, 2009 Pa. PUC LEXIS 378, *11-12 (Opinion and Order entered April 30, 2009) (four-year limitations period in Section 1312 does not limit utility's attempt to collect amounts lawfully billed more than four years prior to complaint being filed); *Deborah Brown v. PECO Energy Company,* C-2009-2097007, 2010 Pa. PUC LEXIS 571, *8-10 (Opinion and Order entered January 29, 2010) (Section 1312 does not prohibit recovery of billed charges older than four years because refund is not at issue for amounts legally billed).

point. *See* Verizon's March 18, 2013 Post-Hearing Reply Brief ("Verizon RB") at 18-20; Core's January 23, 2013 Main Brief ("Core MB") at 22.[16] To the extent the Commission's final order applies a statute of limitations to Verizon's claims against Core for unpaid invoices, it should apply the four-year limitations period found in 42 Pa. C.S. § 5525, not the three-year limitations period in 66 Pa. C.S. § 3314.[17]

Verizon Exception #2: Verizon Excepts to the ID's Reduction of the Amount Due from Core to Verizon for Past Overbilling to $1 Million, and the ID's Finding That This Amount Should Be Applied as an Account Credit, Rather Than a Refund Payment.

The record shows that, simply for the improper billing of Verizon for other parties' traffic (and without considering other errors in Core's bills), Core overbilled Verizon – and Verizon overpaid Core – at least $2,725,140 in local traffic termination services from January 2008 through June 2012, plus 35% of the amounts paid by Verizon since June 2012. ID at 49, 50; *see*

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16 Core argued that the two-year federal statute of limitations in 47 U.S.C. § 415(a) bars certain portions of Verizon's claims for unpaid amounts billed (Core MB at 22), but as Verizon explained in its briefs, that argument misapprehends Verizon's claims as seeking state commission enforcement of federal tariffs, rather than enforcement of a state commission-approved ICA whose price schedules incorporate, *inter alia*, rates set forth in Verizon's state and federal tariffs. Verizon RB at 18-19. Core conceded this argument in its preliminary objections to Verizon's amended counterclaims ("[o]f course, the case is different where the ICA itself specifically incorporates provisions of an FCC tariff by reference"). *Id.* at 19. Core also argued *against* the application of the federal statute of limitations in its complaint case against AT&T involving intercarrier compensation payments, even though no ICA was involved. *See* "Answer of Core Communications, Inc. to AT&T's Petition for Reconsideration & Stay of the Commission's December 5, 2012 Opinion & Order," PA PUC Docket Nos. C-2009-2108186 and C-2009-2108239 (December 31, 2012) at unnumbered page 7. On reconsideration, the Commission accepted Core's argument, applying a four-year state statute of limitations rather than the two-year federal statute of limitations urged by AT&T. *See Core/AT&T Reconsideration Order* at 32-39. Moreover, as Verizon's reply brief noted, case law confirms that Congress has stated no clear intent to preempt state statutes of limitations with 47 U.S.C. § 415(a). *See* VZ RB at 19 (citing *Castro v. Collecto, Inc.*, 634 F.3d 779, 784-786 (5th Cir. 2011)). The Commission's *Core/AT&T Reconsideration Order* relied on *Castro* in rejecting AT&T's argument for the application of the federal statute of limitations in 47 U.S.C. § 415(a). *See Core/AT&T Reconsideration Order* at 34-36. The Commission further noted that in any event, the four-year federal default statute of limitations in 28 U.S.C. § 1658 applies to claims arising out of the Telecommunications Act of 1996 (which created the ICA process), not the two-year federal limitations period of 47 U.S.C. § 415(a). *Id.* at 36-38.

17 Alternatively, the Commission could reach the same result through application of the four-year statute of limitations in 66 Pa. 1312(a). *See Core/AT&T Reconsideration Order* at 33 ("Section 1312 establishes a four-year statute of limitations applicable to refunds paid by utilities, and it has been our established practice, as matter within our discretion, to apply the four-year statute of limitations to the amounts owed to utilities by customers....").

also Verizon Statement ("VZ Stmt.") 3.0 at 67-69; VZ Stmt. 1.0 at 70-74. Verizon seeks a refund of these amounts, plus interest at the statutory rate of 6%. ID at 29, 50.

Under 66 Pa. C.S. § 1312(a), this Commission has "the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron" when the Commission "determine[s] that any rate received by a public utility was unjust or unreasonable." 66 Pa. C.S. § 1312(a). Such refund shall go back four years and shall include "interest at the legal rate from the date of each such excessive payment." *Id.*[18] The courts have upheld the Commission's authority to order refunds under this statutory provision and its predecessor.[19]

The ID's findings detail and confirm the myriad ways in which Core systematically overbilled Verizon over the years, resulting in vast overpayments from Verizon to Core:[20]

- Core billed Verizon for traffic originated by CLECs, other ILECs and wireless carriers. ID at 11 (Finding of Fact ("FOF") 39).
- The law and the ICAs do not permit Core to bill Verizon for terminating traffic originated by these third party carriers. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (Aug. 8, 1996) at ¶ 1034; 47 U.S.C. § 252(d)(2)(A)(i); 47 C.F.R. § 51.700; ID at 56 (Conclusion of Law ("COL") 17).
- Core must refund all overcharges with interest at the legal rate of 6% per annum. ID at 56 (COL 19).
- Core has double billed Verizon and other carriers for terminating the same minutes of use, including specifically the traffic at issue in the *Core v. AT&T* case decided by this Commission yesterday. ID at 11 (FOF 40); ID at 50.
- Core's purported process for excluding third party minutes "did not serve to eliminate improper billing of Verizon." ID at 11 (FOF 41); ID at 12 (FOF 42).

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[18] The "legal rate" of interest is 6 percent per annum. 41 P.S. § 202. *See Duquesne Light Co.*, 117 Pa. Commw. at 36, 543 A.2d at 200.

[19] *See, e.g., Metropolitan Edison Co., supra*, 437 A.2d at 84.

[20] The ID also found that Core's later switched access back-bills (which the ID rejected in their entirety) were similarly rife with error. *See, e.g.*, ID at 14 (FOF 56-59); 15 (FOF 61-63); 16 (FOF 72-73); 51.

- Core billed Verizon for all third party minutes carried over the multi-frequency signaling (MF) trunks because it did not generate the ICA-required per-call Automatic Message Accounting (AMA) records for such traffic and thus rendered itself unable to exclude third party traffic. ID at 12 (FOF 43) (citations omitted).

- Core billed Verizon for all minutes originated by wireless carriers or from other carriers' multi-line accounts over SS7 trunks. ID at 12 (FOF 44).

- Core's process of estimating the billable minutes to Verizon failed to exclude third party traffic, including interexchange minutes that should have been billed to IXCs, and resulted in overstating the minutes billable to Verizon. ID at 12 (FOF 46).

- "Most of the traffic terminated by Core is VNXX traffic. As a result, Core billed Verizon (and Verizon paid Core) reciprocal compensation on significant amounts of VNXX traffic," although no reciprocal compensation is due on VNXX traffic. ID at 17 (FOF 77), 42 and 57 (COL 21) (citations omitted).

The record contained substantial evidence to quantify how much Core overbilled Verizon for the termination of third party traffic. Verizon reviewed approximately 18 months of call detail records provided by Core for calls terminated over the SS7 trunks[21] and enriched them to identify which carrier had actually acted as the local service provider at the time of each call. VZ Stmt. 3.0 at 67-69. Verizon found that 35% of the minutes of use for which Core billed Verizon reciprocal compensation actually originated from telephone numbers for which Verizon was *not* the local service provider at the time of the call (meaning that *another* carrier, *not* Verizon, was responsible for compensating Core for the termination of the traffic). VZ Stmt. 3.0 at 68-69. Multiplying this 35% factor by the $7,786,114.95 that Verizon paid Core from January 2008 through June 2012 for local traffic termination services, Verizon determined that it had overpaid Core by $2,725,140 for that time period. *Id.* Moreover, Verizon's overpayments have

[21] Verizon could not undertake such an analysis for calls terminated over the MF trunks because, as noted above, Core violated the ICAs by failing to generate Automated Message Accounting ("AMA") call records for such calls. ID at 12 (FOF 43) and 57 (COL 20); *see also* VZ Stmt. 2.0 at 32-34 and Ex. 12-R.

grown since June 2012, given the Commission's order requiring Verizon to pay Core's inflated bills while this case is pending.

Yet, after cataloguing the above array of errors in Core's bills, the ID deems it "appropriate" to require Core to refund "a lesser amount which will, nonetheless, make the point to Core that double-billing is a serious violation which will not be tolerated." ID at 50. The ID thus reduces the refund owed to Verizon to "a conservative $1,000,000" and suggests that the refund may be applied as a credit to Verizon's accounts with Core, rather than mandating a refund payment from Core to Verizon. ID at 50, 61 (OP 7).

The Commission's final order should compel Core to refund, with interest, all amounts overpaid by Verizon after August 16, 2007 (four years before the filing of Verizon's original counterclaims). It should also require Core to repay these amounts immediately, rather than through an account credit. Otherwise, Core will profit from its misconduct and will be able to retain the inappropriately-acquired funds for months or years to come. Indeed, as noted above, Core has over-collected close to a half million dollars from Verizon just in the time since the Commission entered its emergency order in September of 2011. The ID's limited refund, in the form of an account credit only, would wrongly reward Core for its many years of misconduct and overcharging before this litigation commenced.

1. The ID's Decision To Reduce the Refund Due to Verizon to $1 Million Is Unsupported by the Record.

As detailed above, the ID recounts an exhaustive catalog of flaws in Core's billings to Verizon. The ID contains no criticism of the calculations Verizon performed to arrive at the overcharge calculation of $2,725,140 for amounts it paid Core for local traffic termination services from January 2008 through June 2012 as a result of Core's erroneous bills. Nor does the ID reject Verizon's position that the Commission should require Core to refund 35% of the

amounts paid by Verizon since June 2012 (an amount that can only be determined once there is a final order), plus interest at the statutory rate of 6% on all amounts to be refunded. To the contrary, the ID states that:

> Core has overbilled Verizon by charging for terminating traffic originated by third parties. These charges were unlawful, unjust and unreasonable. *Core must refund all overcharges with interest* at the legal rate of 6% per annum.[22]
>
> ID at 56 (COL 19) (emphasis added).

Yet, the ID reduces the refund due to Verizon to $1 million and suggests that Core may credit Verizon for that amount, rather than refund anything directly via a payment to Verizon. ID at 50, 61 (OP 7). The ID offers no basis for reducing the amount due to Verizon when the record plainly supports a significantly higher figure, other than to say that $1 million is a "lesser" and "conservative" amount that "will, nonetheless, make the point to Core that double-billing is a serious violation which will not be tolerated." ID at 50.

This explanation does not warrant excusing Core from repaying the additional $1.7+ million that the record demonstrates it overbilled and over-collected from Verizon through June 2012, or the substantial amount that the Commission's September 23, 2011 emergency order has forced Verizon to pay Core since June 2012. Verizon did not seek a penalty that would "make a point" to Core (although it certainly could be argued that such a penalty is warranted). Verizon sought a refund of all amounts Core wrongly collected from Verizon by issuing unjust and unreasonable bills in violation of the parties' ICAs and Core's tariffs, and in particular, for charging Verizon to terminate other parties' traffic, some of which Core also double-billed to the originating carrier.

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[22] The *Core/AT&T Reconsideration Order* supports this conclusion. There, the Commission ordered a 6% interest rate based on the guidance of 66 Pa. C.S. 1312, even though the Core/AT&T case did not involve a refund claim. *See Core/AT&T Reconsideration Order* at 20-22. The instant proceeding does.

The ID plainly concludes that a full refund is proper (ID at 56 (COL 19)), but does not direct repayment of the entire amount Core improperly collected from Verizon. It instead directs Core to apply a $1 million credit to Verizon's accounts – not because that figure accurately represents the full amount due to Verizon, but because the ID deems it a sufficient portion of the millions the record establishes are actually due to "make a point" to Core. ID at 50. While the statutory language stating that the Commission "shall have the power and authority" to order a refund may imply some discretion, it is well-settled that the Commission cannot exercise its discretion in an arbitrary and capricious manner, and may only deny or reduce a refund if it has a sound legal and factual basis to do so – which is absent from the record here. An abuse of discretion occurs when "the law is over-ridden or misapplied, or the judgment exercised is manifestly unreasonable," which would be the case here if the refund is reduced without any legal or factual basis to do so.[23]

The record supports Verizon's refund calculations, which at $2,725,140 just through June 2012 are significantly higher than the $1 million refund ordered by the ID. *See* Verizon Statement ("VZ Stmt.") 3.0 at 67-69; *see also* VZ Stmt. 1.0 at 70-74. The record also reflects that a more precise calculation of the overcharge was not possible due to *Core's own failure to maintain proper records in accordance with the requirements of the ICAs* (*see, e.g.*, VZ Stmt. 2.0 at 32-34 and Ex. 12-R), a fact expressly recognized by the ID:

> Core did not match calls carried over the multi-frequency signaling (MF) trunks because it did not generate the ICA-required per-call Automatic Message Accounting (AMA) records for such traffic and thus would have nothing to match to Verizon's EMI records. VZ Stmt. 2.0 at 27, 32 and Ex. 12-R. Therefore all traffic originated by all carriers transmitted over the MF trunks was billed to Verizon.
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> * * *

[23] *In re Women's Homoeopathic Hospital*, 393 Pa. 313, 316, 142 A.2d 292, 294 (Pa. 1958).

> Core's failure to generate per-call AMA records for calls terminated over the MF trunks was a breach of the ICAs. VZ Stmt. 1.0 at 69-70 and Ex. 23; VZ Stmt. 2.0 at 32-33 and Ex. 12-R; VZ Stmt 3.0 at 58; Verizon PA ICA at Attachment IV, Section 7.1 and Verizon North ICA at Part V, Section 2.6.3.
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> ID at 12 (FOF 43) and 57 (COL 20).

Moreover, the ID found that the *ad hoc* "sampling" method Core used to bill Verizon for MF traffic instead of generating the required per-call AMA records "was wholly unreliable and certain to result in overcharging Verizon." ID at 16 (FOF 72). It would be unjust and unreasonable to allow Core's breach of the ICAs' record-keeping requirements to excuse it from repaying the full amount due Verizon, given that the MF trunks for which Core failed to keep the requisite records were used for the majority of the time period at issue (Core used MF trunking until 2012[24]). Core is responsible for the absence of more specific data about the historical MF traffic, not Verizon. To give Core the "benefit of the doubt" given its misconduct is unwarranted.

This is particularly true given that the ID makes clear that, in addition to improperly billing (and collecting from) Verizon for a wealth of third-party traffic for which Verizon was not liable, Core *also* billed the responsible carriers for the *same* third-party traffic,[25] resulting in deliberate double-billing:

> Core has used the Electronic Message Interface (EMI) records provided by Verizon to bill AT&T, XO, Choice One and others for locally dialed traffic they transited to Core through Verizon's tandems. VZ Stmt. 1.0 at 48-49 and Ex. 15 at 68-72, 78; VZ Stmt. 2.0 at 17-18; VZ Stmt. 3.0 at 48-49 and Exs. 11-SR and 12-SR; Tr. 250, 299-300, 304. Core also recently began billing some of the independent ILECs for transited traffic based on EMI provided by Verizon. Tr. 311. As a result, Core has double billed Verizon and other carriers for terminating the same minutes of use.

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[24] *See* ID at 16 (FOF 72).

[25] As noted above, just yesterday, the Commission ordered AT&T to pay Core for traffic for which Core has also improperly billed and collected payment from Verizon. *See generally Core/AT&T Reconsideration Order.*

* * *

> Verizon points out that the Commission's order in *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh, Inc.*, Docket Nos. C-2009-2108186 and C-2009-2108239 (Opinion and Order entered December 5, 2012), directs AT&T to compensate Core for a substantial number of MOUs transited by Verizon and terminated to Core on the basis of the Verizon EMIs. Core bills Verizon for 100% of the minutes Verizon transits, thereby creating a double-billing scenario that is wholly improper.
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> ID at 11 (FOF 40) and 50.

In fact, the record shows that even after Verizon raised the issue in this litigation, Core *has continued* to double bill Verizon and originating carriers for terminating the same traffic. Tr. 322 (Core continues to bill Verizon for 100% of traffic carried over Local Interconnection Trunk Groups while also billing third parties for same traffic); 328-29 (would be a "concession" for Core to stop double-billing Verizon and other carriers for the same traffic; Core would only stop if ICAs were amended).

Thus, rather than "mak[ing] the point to Core that double-billing is a serious violation which will not be tolerated," the ID's significant reduction in the refund due to Verizon would signal to Core (and other arbitrageurs) that billing violations are a highly lucrative and potentially profitable venture in Pennsylvania. The ID would permit Core to profit from issuing highly flawed bills and double-billing multiple carriers for the same traffic – collecting many millions of dollars from carriers in the process – while issuing only a $1 million credit to Verizon as recompense, much of which would only represent the amount over-collected during the pendency of this litigation due to the Commission's emergency order, and which would not cover the overpayments that the Commission's emergency order still forces Verizon to make every month while awaiting a final Commission order – all while Core makes no payments whatsoever to Verizon. It would set a dangerous and counterproductive precedent to allow

carriers to profit, on the whole, from billing violations, even if required to disgorge a "lesser" and "conservative" portion of the improperly-collected amounts. The Commission's order should make Verizon whole for the period authorized by the statute of limitations,[26] not reward Core's illegal conduct with an unjustified windfall. Any other result would be bad policy and an abuse of discretion.

2. Allowing Core To "Repay" Amounts Owed Verizon Through Account Credit, Rather than a Refund Payment, Would Be Unjust and Unreasonable Under the Circumstances.

As described above, rather than requiring Core immediately to repay the amounts over-collected from Verizon, the ID seems to allow Core to avoid making an actual refund payment by allowing Core "to credit the Verizon accounts with a conservative $1,000,000 to compensate Verizon for the errors." ID at 50; *see also id.* at 61 (OP 7). It is unclear whether the ID intends that Core would then issue Verizon a check for the credit amount, but Core is certain to interpret any ambiguity as allowing it to put a "paper" credit on the books without paying Verizon anything. This would allow Core to continue to hold onto the ill-gotten funds for years, until the credited amounts are depleted by future billings.[27] As with arbitrarily reducing the proper refund amount, allowing Core to "pay" the refund due Verizon in the form of a credit against future billings would reward Core for its improper conduct by effectively forcing Verizon to finance a multi-year loan to Core (on top of a decade of Core's nonpayment of Verizon's invoices),

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[26] As noted above, the appropriate limitations period for refunds of overpayments is the four-year period found in 66 Pa. C.S. 1312(a), not the three-year period applicable to forfeitures and penalties. *See Core/AT&T Reconsideration Order* at 19-22. To the extent the ordered $1 million refund is based on application of a three-year statute of limitations, at bare minimum, that amount should be increased to reflect four years of refunds.

[27] At the current monthly billing level of approximately $40,000 per month – which still overstates proper billings by 35%, since Core continues to bill Verizon for much third-party traffic – it would take over two years for Verizon to realize the full credit amount.

sending absolutely the wrong message to carriers who overbill and game the system at the expense of other carriers.

The Commonwealth Court has made clear that when a company chooses to litigate or otherwise interprets its legal obligations in a way that turns out to be wrong – regardless of whether those positions were taken in good faith – it assumes the risk that it ultimately will not be entitled to the revenue collected through the questionable rates and will have to issue a refund.[28] By improperly billing and double-billing Verizon, and continuing these unsupportable practices even after Verizon pointed them out in this litigation, Core assumed the risk that its actions would be found illegal. Yet Core took absolutely no measures to ensure that it could pay a judgment against it.[29] ID at 18-19.

If Core cannot repay what it owes Verizon, the appropriate course is for it to file for bankruptcy protection and allow its creditors to pursue appropriate redress. Core should not be allowed to maintain its operations through what amounts to a multi-year loan from Verizon, nor should the Commission require Verizon to continue to incur the costs of providing service to Core while allowing Core to "work off" the refund it owes Verizon through account credits. While 66 Pa. C.S. § 1312(a) gives the Commission discretion to state "a reasonable time within which payment shall be made," the Commission must exercise that discretion in a reasonable manner that is supported by the record. Under the facts presented here, it would be an abuse of discretion to allow Core to credit, rather than refund, the money it has over-collected from Verizon, because this would effectively excuse Core from repayment for years, if not forever. It

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[28] *Pa. Gas & Water Co., supra*, 470 A.2d 1066 at 1073, 79 Pa. Commw. at 430 (by continuing pending litigation to charge rates that it knew were at risk of ultimate disapproval, "PG&W must now bear the consequences of implementing those higher rates, in the form of refunds to its customers. Although this is a difficult, and perhaps unfortunate, result for PG&W, we hold that it is mandated by statute and by the facts of the case.")

[29] Core could theoretically close down its Pennsylvania operations tomorrow, retain the millions of dollars it owes Verizon, and never make good on the account credits directed by the ID.

would also be inconsistent with the Commission's September 23, 2011 emergency order, which directed that Verizon's payments to Core "will be made subject to refund" should Verizon prevail in this case. *See* September 23, 2011 Opinion and Order at 20 (Ordering Paragraph 4). Consistent with 66 Pa. C.S. § 1312(a), the Commission's final order should require Core to repay Verizon's overpayments within a "reasonable time,"[30] and not via account credits.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt the ID, with the limited revisions discussed above. These changes will bring the Commission's final order into conformance with applicable statutes of limitations and refund requirements.

Respectfully submitted,

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Dated: August 16, 2013

[30] For example, the Commission could order an initial lump-sum refund payment of $500,000, plus monthly installment payments over a time period not to exceed six months, until the remainder is paid off.