

Suzan DeBusk Paiva  
Assistant General Counsel



1717 Arch Street, 3 East  
Philadelphia, PA 19103

Tel: (215) 466-4755  
Fax: (215) 563-2658  
Suzan.D.Paiva@Verizon.com

March 13, 2014

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Re: Core Communications, Inc. v. Verizon Pennsylvania LLC  
Docket No. C-2014-2406550

Dear Secretary Chiavetta:

Enclosed please find Verizon's Preliminary Objections to the Complaint of Core Communications, Inc., being filed on behalf of Verizon Pennsylvania LLC in the above captioned matter.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzan D. Paiva".

Suzan D. Paiva

SDP/slb

**Via E-Mail and Federal Express**  
cc: Attached Certificate of Service

**CERTIFICATE OF SERVICE**

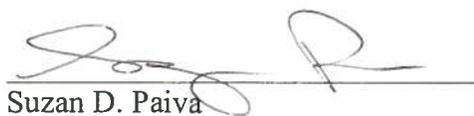
I hereby certify that I have this day served a true copy of Verizon's Preliminary Objections, upon the party, listed below, in accordance with the requirements of §1.54 (relating to service by a party) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 13<sup>th</sup> day of March, 2014.

**Via E-Mail and Federal Express**

Michael A Gruin, Esquire  
Stevens & Lee  
17 North Second St., 16<sup>th</sup> Fl.  
Harrisburg, PA 17101

Christopher F. Van de Verg, Esquire  
General Counsel  
Core Communications, Inc.  
209 West Street, Suite 302  
Annapolis, MD 21401



Suzan D. Paiva  
Pennsylvania Bar ID No. 53853  
1717 Arch Street, 3<sup>rd</sup> Floor  
Philadelphia, PA 19103  
(215) 466-4755

Attorney for Verizon

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2014-2406550
	:	
Verizon Pennsylvania LLC,	:	
	:	
Respondent.	:	

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**NOTICE TO PLEAD**

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TO: Michael A. Gruin  
Stevens & Lee  
17 North Second St., 16<sup>th</sup> Floor  
Harrisburg, PA 17101

You are hereby notified that Verizon Pennsylvania LLC ("Verizon PA") pursuant to 52 Pa. Code §§5.101 et seq. has filed Preliminary Objections to which you may answer within ten (10) days unless otherwise provided in Chapter 5 of Title 52 of the Pennsylvania Code. Your failure to answer will allow the presiding officer to rule on the Preliminary Objections without a response from you, thereby requiring no other proof. All Pleadings such as a reply to these Preliminary Objections must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Verizon PA.

Date: March 13, 2014



Suzan D. Paiva, I.D. No. 53853  
Verizon  
1717 Arch Street, 3<sup>rd</sup> Floor  
Philadelphia, PA 19103  
Phone: (215) 466-4755  
Fax: (215) 563-2658

*Counsel for Respondent  
Verizon Pennsylvania LLC*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2014-2406550
	:	
Verizon Pennsylvania LLC,	:	
	:	
Respondent.	:	

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**VERIZON’S PRELIMINARY OBJECTIONS TO CORE’S COMPLAINT**

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Pursuant to 52 Pa. Code § 5.101, Verizon Pennsylvania LLC<sup>1</sup> (“Verizon PA”) hereby submits its Preliminary Objections seeking dismissal, or, in the alternative, a stay of Core Communications, Inc.’s (“Core”) Complaint (“Complaint”).

**Introduction**

1. The Commission should dismiss this case, which is the latest in a series of piecemeal, baseless billing complaints Core has launched against Verizon PA and other Verizon affiliates, as well as the rest of the industry. Core’s apparent strategy is to collect money from other carriers through litigation,<sup>2</sup> rather than actually earning it by providing services to Core’s own customers. Indeed, Core’s litigation tactics led the FCC to name it the “poster boy of

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<sup>1</sup> Although the Complaint names “Verizon Pennsylvania, Inc.,” the entity’s proper name is “Verizon Pennsylvania LLC.”

<sup>2</sup> Core’s record of litigation before this Commission alone is substantial. Core has filed three formal complaints against Verizon PA and its affiliates, as well as an alternative dispute resolution case. It has filed formal complaints against a number of other Pennsylvania CLECs, including AT&T, XO and Choice One. It has protested applications by Talk America, Cavalier, PAETEC, Earthlink and Sprint, demanding Core-specific conditions, and Core or its affiliates are also parties to many cases before other state commissions, the federal courts and the FCC, including two in the Fourth Circuit against Verizon affiliates (one of which was last week decided in Verizon’s favor) and one against AT&T in the Pennsylvania federal district court.

reciprocal compensation gamesmanship,”<sup>3</sup> while the United States Court of Appeals for the D.C. Circuit found that Core’s arguments “give[] pettifoggery a bad name.”<sup>4</sup> Just last week, the United States Court of Appeals for the Fourth Circuit – ruling in Verizon’s favor on Core’s appeal of yet another complaint (this one originating from the Maryland state commission) – accused Core of an “apparent effort to manipulate our court system.”<sup>5</sup>

2. Here, Core launches another baseless complaint against Verizon PA, seeking to collect \$4 million in facilities charges that are unsupported by the parties’ contract or the facts, charges that a federal court in Virginia found to be invalid in a ruling Core is currently appealing at the Fourth Circuit (and in which a decision is expected shortly).<sup>6</sup> Not only are Core’s new claims invalid, it failed to bring them at the appropriate time and is barred from doing so now.

3. Core already has a prior complaint case against Verizon PA pending before the Commission (Docket C-2011-2253750). The Commission is currently considering exceptions from an initial decision on the merits that rejected the bulk of Core’s arguments and found that Core breached the parties’ interconnection agreement in multiple respects and owes Verizon PA millions of dollars. Core started billing and back-billing the facilities charges it now seeks to collect in this proceeding during the 2012 mediation of that earlier complaint case, although it had not billed them during the many years Verizon PA had been delivering traffic to Core. When the C-2011-2253750 docket returned to active litigation after the termination of the

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<sup>3</sup> 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).

<sup>4</sup> *Core Communications, Inc. v. FCC*, 592 F.3d 139, 145 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 597 (2010). “Pettifoggery” is defined as “the activity of conducting unimportant cases, as a lawyer of inferior status, esp one who is unscrupulous or resorts to trickery.” See Collins English Dictionary (online at <http://www.collinsdictionary.com/dictionary/english/pettifoggery>).

<sup>5</sup> *Core Communications, Inc. v. Verizon Maryland, LLC*, 2014 U.S. App. LEXIS 4187, \*29 (4<sup>th</sup> Cir. March 6, 2014).

<sup>6</sup> *CoreTel Virginia LLC v. Verizon Virginia, LLC*, 4<sup>th</sup> Cir. Case No. 13-1765.

mediation, Core never attempted to include its facilities charges claim so that it could be disposed of efficiently along with the parties' other disputes, even though Core amended its complaint to include claims based on other back-bill invoices issued to Verizon PA at the same time.<sup>7</sup> Because Core could have and should have asserted its facilities charges claim in Docket C-2011-2253750 and failed to do so, it may not do so now and the Commission must dismiss the Complaint.

4. Verizon PA and its affiliates have already been forced to expend tremendous resources in discovery and litigation of Core's other complaints, including (but not limited to) ongoing litigation before this Commission at Docket Nos. C-2011-2253750 and C-2011-2253787, which raise most of the same issues in Core Virginia's ("Core VA") federal court case in Virginia. With those cases nearing an end, and with Verizon having prevailed on the merits before the Administrative Law Judge ("ALJ") and the Virginia federal district court, Core has slapped Verizon PA with yet another resource-sapping complaint.

5. Core's complaint should be dismissed for the following reasons:

- Core once again failed to follow the mandatory dispute resolution provisions of its interconnection agreement with Verizon PA upon which it bases its claims, provisions that the ALJ found Core also twice breached during the disputes at issue in Docket No. C-2011-2253750.
- Core has failed to plead sufficiently that Verizon PA ordered any facilities from Core, a condition predicate to Core's attempt to bill the facilities charges at issue.
- Core should have brought its facilities invoice claims against Verizon PA in Docket No. C-2011-2253750, which involved the same parties, the same interconnection agreement, and the same January 2012 back-billing by Core (which improper billing has continued since then). The doctrine of claim preclusion prohibits Core's attempt to collect on those invalid facilities bills now, in a new proceeding. Moreover, the doctrine of issue preclusion bars Core from re-litigating any issue of fact or law decided against Core VA in the final

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<sup>7</sup> Docket No. C-2011-2253750, which was litigated simultaneously with a parallel docket against Verizon North LLC (C-2011-225387), is fully briefed and awaiting a Commission decision.

judgment of the Virginia district court, or the soon-expected judgment of the Fourth Circuit.

- The Commission should dismiss Core’s Complaint because a prior proceeding addressing the same issues is pending in the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit heard oral argument on January 30, 2014 and its decision is expected shortly.

6. The Commission should dismiss this case on multiple grounds, but if it does not, at minimum it should stay Core’s complaint pending resolution of: (1) the Fourth Circuit appeal of the district court order against Core VA on the same issue; and (2) Core’s other complaint cases before this Commission, in which the ALJ found that Core breached the parties’ interconnection agreement in numerous ways and owes Verizon PA (and its Pennsylvania affiliate, Verizon North, LLC) millions of dollars. It is well settled that this Commission “need not . . . sanction the duplication of effort and waste of judicial resources that would result” from allowing two cases raising the same issues “to proceed simultaneously, in a race to judgment,” and the Commission “has the inherent power to stay the proceedings in the second suit during the pendency of the first.” *Klein v. Philadelphia*, 77 Pa. Commw. 251, 253-254 (Pa. Commw. Ct. 1983).

7. For the following reasons, Core’s latest attempt to saddle Verizon and its affiliates with piecemeal, duplicative litigation of invalid payment demands should be dismissed, or at the very least stayed, pending resolution of the Fourth Circuit case and Core’s other complaint case before this Commission.

### **Background**

8. On February 21, 2014, the Commission served Verizon PA with a formal complaint by Core, docketed at C-2014-2406550, which appeared to have been filed on February 18, 2014.

9. The Complaint seeks to collect on facilities invoices that Core began to send in 2012 (for back-billing dating to 2008 and continuing to the present), allegedly pursuant to the terms of the parties' interconnection agreement. Specifically, Core began billing Verizon for Multiplexing and Tandem Ports, and added billing for Entrance Facilities and Transport in 2013. Complaint at ¶¶ 9-30.

10. This is not the Core companies' first attempt to collect on invalid bills sent to a Verizon affiliate. After Core filed billing complaints against Verizon PA and Verizon North before this Commission in 2011, Core's Virginia affiliate ("Core VA") brought an analogous action at the Virginia State Corporation Commission against Verizon's Virginia affiliates, asserting claims essentially identical to those it made in Commission Docket Nos. C-2011-2253750 and C-2011-225387. The Virginia State Corporation Commission dismissed Core VA's complaint the following month.<sup>8</sup>

11. Twelve days later, Core VA filed a virtually identical complaint in the U.S. District Court for the Eastern District of Virginia, incorporating facilities bill claims identical to those at issue here during the course of that case. On summary judgment, the federal court rejected Core VA's claims in their entirety and ruled in favor of Verizon's Virginia affiliates on their counterclaims against Core VA for payment of unpaid bills and refunds of past overpayments to Core VA<sup>9</sup> – counterclaims analogous to those of Verizon's Pennsylvania affiliates in Docket Nos. C-2011-2253750 and C-2011-225387. The district court rejected

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<sup>8</sup> See "Dismissal Order," *Petition of CoreTel Virginia, LLC for Resolution of Billing Issues with Verizon Virginia and Verizon South Inc.*, Virginia Corporation Commission Case No. PUC-2012-00033, 2011 Va. PUC LEXIS 902 (June 27, 2012). LEXIS erroneously lists the order date as June 27, 2011.

<sup>9</sup> See *Memorandum Opinion, CoreTel Virginia, LLC v. Verizon Virginia LLC et al.*, 2013 U.S. Dist. LEXIS 58649 (April 22, 2013).

Core's attempt to bill Verizon for multiplexing and trunk ports, the same type of bills at issue here.

12. Twenty-two days after Core VA's loss before the federal district court in Virginia, the same Core affiliate that is the Complainant here filed a complaint very similar to the one on which the Virginia court had just entered summary judgment against Core (and to the ones in Docket Nos. C-2011-2253750 and C-2011-225387) at the Maryland Public Service Commission. Core's Maryland complaint likewise sought to collect on invoices rendered to Verizon's Maryland affiliate during Core's January 2012 spate of back-billing.

13. Throughout this time frame, the Verizon companies urged Core more than once to litigate all such billing disputes in a single omnibus proceeding, to maximize efficiency and avoid expending resources unnecessarily through piecemeal litigation. *See* September 27, 2012, October 9, 2012 and June 12, 2013 letters from the Verizon companies' counsel to Core's in-house counsel, true and correct copies of which are attached to Verizon's Answer as Exhibit 2. Although Core's outside counsel told the Virginia court that the Core companies were willing to do just that,<sup>10</sup> Core ultimately refused to do what its counsel had represented to the court. The Core companies have instead continued their campaign of baseless, piecemeal billing complaints against the Verizon companies.

14. The Maryland Commission dismissed Core's complaint without prejudice, declining to open a duplicative and resource-consuming docket because active proceedings on the same issues were pending in two other forums: (1) the United States Court of Appeals for

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<sup>10</sup> *See* Excerpt of July 12, 2013 Hearing Transcript in *CoreTel Virginia, LLC v. Verizon Virginia LLC et al.* at 14 (a true and correct copy of which is attached to Verizon's Answer as Exhibit 1), in which Core VA's counsel stated: "We could do it [litigate the Core companies' claims] for Pennsylvania, Virginia, Maryland, D.C. We can do it all at one time and get this thing resolved, but they won't. Ask them when they stand up here if they're willing to sit down in front of a judicial officer and make this determination. We're willing to do it. We'll do it in Virginia only if that's what they want. We prefer doing it everywhere because there's a lot of money out there that they owe us, but they won't do it."

the Fourth Circuit (to which Core appealed its Virginia federal district court loss); and (2) this Commission (since Core's Maryland complaint was identical in many respects to its claims in Pennsylvania Docket Nos. C-2011-2253750 and C-2011-225387).<sup>11</sup>

15. Without awaiting the outcome of its Fourth Circuit appeal and the guidance that decision will bring to bear, Core now files in Pennsylvania the claims for payment of its invalid facilities bills that the Virginia court rejected. Worse yet, Core does so after having chosen *not* to pursue those claims when it amended its complaint against Verizon PA in Docket No. C-2011-2253750 in April 2012 to collect on other (and similarly invalid) back-bills that were issued at the same time. For the reasons below, the Complaint should be dismissed, or in the alternative, stayed to await the outcome of the other pending litigation between the parties.

### **Preliminary Objections**

#### **First Preliminary Objection: The Complaint Must Be Dismissed Because Core Failed To Invoke Mandatory Dispute Resolution.**

16. The parties' interconnection agreement includes a mandatory, multi-step dispute resolution process that the parties must follow before bringing a dispute to the Commission. As the ALJ's Initial Decision in Docket No. C-2011-2253750 found:

89. The ICAs require the parties to engage in mandatory dispute resolution before instituting litigation. Attachment VIII, Section 3.1.9.1 and Part A, Section 24 of the Verizon PA ICA (which outline a mandatory 120-day dispute resolution process tied to the date of the disputed invoice prior to seeking resolution from the Commission) ....

90. Core filed the instant complaint on July 22, 2011, rather than engaging in the formal dispute resolution processes outlined in the ICAs.

91. Core also did not initiate dispute resolution with regard to its switched access back-billing before filing its Amended Complaint on April 16, 2012.<sup>12</sup>

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<sup>11</sup> See Letter Dismissing Complaint, *Core Communications, Inc. v. Verizon Maryland, Inc. et al.*, ML#147326 (October 23, 2013), a true and correct copy of which is attached to Verizon's Answer as Exhibit 3.

<sup>12</sup> See Initial Decision, Docket Nos. C-2011-2253750 and C-2011-225387 (July 11, 2013) at 19-20 (Findings of Fact 89-91) (citations omitted) ("*Core/VZ ID*").

17. Attachment VIII, § 3.1.9.1 to the parties' interconnection agreement (included in Tab A to the Complaint) states that once a party is notified of a billing dispute, "the Parties will endeavor to resolve the dispute within sixty (60) days of the Bill Date on which such disputed charges appear" at the first level of management.

18. If resolution does not occur within that time frame, the dispute is to be escalated to a second level of management. Interconnection Agreement, Attachment VIII, § 3.1.9.1.1. If there is still no resolution within 90 days of the bill date, then the dispute must be escalated to a third level of management. *Id.* at § 3.1.9.1.2.

19. If the dispute remains unresolved after escalation to the third level of management and the passage of 120 days, then and only then does the dispute resolution process in Part A, § 24 of the interconnection agreement (which permits bringing an action before the Commission) come into play. Interconnection Agreement, Attachment VIII, § 3.1.9.1.3 ("If the dispute is not resolved within one hundred and twenty (120) days of the Bill Date, the dispute will be resolved in accordance with the dispute resolution procedures set forth in Part A of this Agreement."); *see also id.* at Part A, § 24 ("... the Parties agree that any dispute arising out of or relating to this Agreement *that the Parties themselves cannot resolve*, may be submitted to the Commission for resolution.") (emphasis added).

20. The Complaint makes clear that Core ignored the mandatory dispute resolution process in Attachment VIII, § 3.1.9 of the interconnection agreement, even though it is a contractual condition predicate to filing a complaint under Part A, § 24 thereof. Core acknowledges Verizon PA's repeated disputes of the invoices at hand (Complaint at ¶¶ 32, 36, 40, 43), but does not acknowledge or cite Interconnection Agreement, Attachment VIII, § 3.1.9 anywhere in the Complaint's allegations, much less plead compliance with its substantive

requirements (for example, escalating the disputed matters through the first, second and third levels of management within the required time frames).

21. Instead, Core breached the requirements of Attachment VIII, § 3.1.9 of the interconnection agreement by jumping straight to the complaint process referenced in Part A, § 24 thereof, which is the only interconnection agreement provision that Core cites or relies upon as the basis for the Commission's jurisdiction (Complaint at ¶ 8). However, as noted above, Attachment VIII, § 3.1.9.1.3 of the interconnection agreement requires exhaustion of the process outlined in § 3.1.9 as a predicate to filing a Commission complaint, as Part A, § 24 acknowledges. It is not enough for Core to allege that it waited more than 120 days after the issuance of the first challenged bill (Complaint at ¶ 44), because Attachment VIII, § 3.1.9 of the interconnection agreement required Core to follow the escalation process through the three mandated levels of management, but Core did not do so.

22. This is the *third* time Core has breached the parties' interconnection agreement by bypassing its mandatory dispute resolution provisions and instead immediately filing a complaint. As noted above, the ALJ's Initial Decision in Docket No. C-2011-2253750 found that Core did so *twice* there – first in filing the initial complaint (resulting in the Commission referring the case to mediation<sup>13</sup>), and again in filing an amended complaint seeking to collect on the rash of back-bills it began issuing in January 2012. *See Core/VZ ID* at 19-20 (Findings of Fact 89-91) and 35-36. The very same interconnection agreement provisions are at issue here, and while Core is well aware of them from Docket No. C-2011-2253750, it has nonetheless disregarded them again.

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<sup>13</sup> *See* Opinion and Order, Docket No. P-2011-2253650 (September 23, 2011) at 19.

23. The Commission should not countenance Core's continuing attempts to pick and choose with which provisions of the interconnection agreement it will comply. The parties agreed to the mandatory dispute resolution provisions to avoid the time and expense of premature litigation such as this Complaint. The Commission deemed that process consistent with the federal Communications Act and good public policy and approved the parties' interconnection agreement. The Commission must now enforce the provisions of the interconnection agreement that it approved.

24. Because of Core's failure to comply with the mandatory dispute resolution provisions of the parties' interconnection agreement, the dispute alleged in the Complaint has not yet ripened into an actual case or controversy subject to Commission adjudication.<sup>14</sup> This renders the Complaint legally insufficient, requiring dismissal pursuant to 52 Pa. Code § 5.101(a)(4).

25. Moreover, the existence of the parties' unfulfilled agreement to use alternative dispute resolution requires dismissal of the Complaint pursuant to 52 Pa. Code § 5.101(a)(6).

**Second Preliminary Objection: The Complaint Must Be Dismissed Because Core Has Not Sufficiently Alleged That Verizon Ordered the Relevant Facilities.**

26. Core misrepresents Verizon PA's internal Access Service Requests ("ASRs") for the *self-provisioned Verizon facilities* used to carry traffic from the POI to Core's IP as documents "submitted to Core to establish the commence date for billing each element, as well as the individual elements to be billed." Complaint at ¶ 19. The federal district court in Virginia rejected identical mischaracterizations by Core VA, noting that "[t]he ASR that was provided to

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<sup>14</sup> The ripeness doctrine is a prerequisite for review reaching the merits of a dispute. *Treski v. Kemper Nat'l Life Ins. Cos.*, 674 A.2<sup>nd</sup> 1106, 1114 (Pa. Super. 1996). The Commission grants preliminary objections for lack of ripeness. *Norbeck v. PECO Energy Co.*, Docket No. C-2008-2051267 (Oct. 29, 2008 Initial Decision of ALJ Koster granting preliminary objection based on ripeness; *aff'd* by Order entered Aug. 23, 2010).

this Court as evidence of an order was in fact part of an email and only evidences the sharing of this data with CoreTel so CoreTel could configure its own network.”<sup>15</sup>

27. Core’s Complaint mentions the ASRs (Complaint at ¶ 19), but does not attach copies, which would confirm that Verizon PA provided copies of the ASRs simply so Core could configure its network to receive the traffic delivered over Verizon PA’s *self-provisioned* facilities.

28. Verizon PA acknowledges that for purposes of these preliminary objections, all well-pleaded material facts of the non-moving party must be accepted as true.<sup>16</sup> *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977). However, “[t]he pleader’s conclusions or averments of law are not considered to be admitted.” *County of Allegheny v. Commonwealth*, 507 Pa. 360, 372 (Pa. 1985). Nor need the Commission consider “unwarranted inferences from the facts, argumentative allegations, or expressions of opinion.” *Bullock v. City of Phila.*, 61 Pa. D.&C.4<sup>th</sup> 300, 306 (Pa. Common Pleas, Phila. Cty. 2002), *aff’d*, 815 A.2d 45 (Pa. Commw. 2002), *app. denied*, 573 Pa. 699 (2003). The Commission may consider the fatal pleading failures of Core’s Complaint.

29. The Commission should dismiss the Complaint pursuant to 52 Pa. Code § 5.101(a)(3) as insufficiently pled because of Core’s failure to allege that Verizon PA actually ordered – *from Core* – the facilities for which Core now seeks to collect from Verizon PA. While Core claims that it “provided” facilities to Verizon PA, Core neither alleges that Verizon PA ordered facilities *from Core* via the ASRs or by any other method, nor attaches the ASRs that

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<sup>15</sup> *CoreTel Virginia, supra*, 2013 U.S. Dist. LEXIS 58649 at \*8-10.

<sup>16</sup> As set forth in Verizon PA’s Answer, Verizon PA disputes Core’s bills because the ICA does not permit Core to bill Verizon PA for these items, Verizon PA did not order any facilities from Core, and Verizon PA *self-provisions* the facilities that carry traffic to Core.

Core claims form the basis for the “commencement” of its billings to Verizon PA, and “the individual elements to be billed.”

**Third Preliminary Objection: The Complaint Must Be Dismissed Because of the Core’s Actions Before This Commission and Federal Courts in Virginia.**

30. The Core companies currently have two ongoing cases against Verizon PA and its affiliates, and Core should not be permitted to bring another one here. First, if Core wished to litigate the instant facilities billing claim against Verizon PA, it could have and should have brought that claim in the ongoing complaint case before this Commission at Docket No. C-2011-2253750, when it brought claims against Verizon PA for other simultaneously-rendered back-bill invoices. Having failed to do so then, and with that proceeding now litigated and an initial decision on the merits awaiting Commission action, the doctrine of claim preclusion bars Core from bringing a new complaint to pursue those claims here, as Core could have brought the instant claims in the earlier proceeding and chose not to. Complaint at ¶ 20.<sup>17</sup>

31. Second, Core VA litigated the facilities claim before the federal district courts in Virginia, which entered final judgment against Core VA. Core VA’s pending Fourth Circuit appeal, which has been briefed and argued, is a pending prior proceeding that requires dismissal of Core’s new complaint on the same issue.

32. The doctrine of claim preclusion (sometimes called “technical res judicata”) bars “claims that were actually litigated” in a prior proceeding, “as well as those matters that *should have been litigated*” therein. *Weney v. Workers’ Comp. Appeal Bd. (Mac Sprinkler Sys.)*, 960 A.2d 949, 954 (Pa. Commw. 2009), *app. denied*, 601 Pa. 691 (2009) (emphasis in original);

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<sup>17</sup> Core disingenuously claims that it refrained “to avoid further complicating the issues between the parties” (Complaint at ¶ 20), but it would have been much more efficient to litigate all billing disputes arising from Core’s January 2012 back-billing at the same time, before the dispute doubled in size because of Core’s delay. Core instead chose a piecemeal approach that would increase Verizon’s costs and unnecessarily consume additional resources by forcing a second proceeding and all that it entails (discovery, testimony, hearing, briefing).

citing *Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.)*, 776 A.2d 362 (Pa. Commw. 2000)). “Technical res judicata applies when four conditions exist: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued.” *Merkel v. Workers' Comp. Appeal Bd. (Hoffman Indus.)*, 918 A.2d 190, 192-93 (Pa. Commw. 2007) (citing *Henion, supra*).

33. Based on the previous complaint case before this Commission, all four conditions for applying claim preclusion are met here, as Core could have and should have brought its claims for breach of the parties' interconnection agreement for non-payment of Core's facilities bills in its earlier proceeding against Verizon PA (Docket No. C-2011-2253750).<sup>18</sup> *See, e.g., Wenev, supra*, 960 A.2d. at 954-56 (affirming dismissal of plaintiff's attempt to raise new claims arising from same injury addressed in prior litigation, noting that technical res judicata prevents “piece-meal review petitions without any justification for doing so, thereby requiring others to continually waste time and resources defending against issues that should have been raised in earlier proceedings”); *Merkel, supra*, 918 A.2d at 193 (plaintiff's claim regarding calculation of average weekly wage dismissed since claim could have and should have been raised in prior proceeding); *see also Naimani v. Workers Comp. Appeal Bd. (A. Duie Pyle)*, 32 A.2d 850 (Pa. Commw. 2011), *app. denied*, 616 Pa. 640 (2012) (plaintiff's new claims of injuries arising out of same injury litigated in prior case barred by technical res judicata); *Bullock, supra*, 61 Pa.

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<sup>18</sup> Core may attempt to claim that because the Commission has not yet acted on the *Core/VZ ID* in Docket No. C-2011-2253750, there is no final judgment and res judicata (which encompasses, but is broader than the concept of technical res judicata) does not attach. However, the fact of Core's failure to raise its facilities claims in Docket No. C-2011-2253750 does not depend on a final judgment – that case has been tried and the record (of which the Commission may take administrative notice) conclusively establishes that Core did not raise the facilities claim there, when it could have done so in conjunction with its attempt to collect on the remainder of its January 2012 back-billing. This is sufficient to establish that Core could have and could have brought its facilities claims in the earlier case.

D.&C.4<sup>th</sup> at 308 (sustaining preliminary objections because plaintiff should have raised retaliatory discharge claim in litigation of prior wrongful discharge claim based on discrimination).

34. First, there is an identity of the issues because both proceedings involve the validity of invoices rendered by Core to Verizon PA in January 2012 and thereafter, allegedly pursuant to the same interconnection agreement between Core and Verizon PA.

35. Second, there is an identity of the causes of action because both complaints raise a cause of action against Verizon PA for alleged breach of the interconnection agreement because of Verizon's non-payment of those invoices. Compare Complaint at ¶¶ 21; 45-52 with Core's Amended Complaint in Docket No. C-2011-2253750 at ¶¶ 107-119.

36. Indeed, Core relies on the exact same e-mails to establish its claims in both proceedings. Compare April 23, 2012 and May 8, 2012 e-mails from Bret Mingo of Core to Ken Roos of Verizon regarding bills rendered by Core in January 2012 to multiple Verizon entities, including Verizon PA (included in Complaint, Att. E) with Ex. BLM-6 to Core Statement 1.0 in Docket No. C-2011-2253750 (same e-mails).

37. Third, there is an identity of persons and parties to the action because this proceeding and Docket No. C-2011-2253750 involve the same complainant and the same respondent.

38. Fourth, there is identity of the quality and capacity of the parties suing or sued because Core's and Verizon PA's status remains unchanged from the earlier proceeding. Both entities continue to operate as going concerns and have the same capacity to sue and to be sued as they did in the prior docket.

39. Pursuant to the doctrine of claim preclusion, the Commission must dismiss Core's complaint as legally insufficient (52 Pa. Code § 5.101(a)(4)), and/or because of the pendency of a prior proceeding in which Core could have and should have raised the instant claims (52 Pa. Code § 5.101(a)(6)).<sup>19</sup>

40. As noted above, the same issues raised by the Complaint are already pending before the Fourth Circuit, to which Core appealed its loss before the U.S. District Court for the Eastern District of Virginia. The Fourth Circuit heard oral argument on January 30, 2014 and is expected to render its decision shortly.

41. 52 Pa. Code § 5.101(a)(6) favors administrative economy by directing dismissal of matters that are already the subject of a prior pending proceeding. The parties' Virginia affiliates are parties to a prior pending proceeding addressing the same issues. In light of that, the Commission should not permit Core's Complaint to proceed here, when that prior pending proceeding may moot this proceeding.

42. This is particularly so given that the Verizon companies have repeatedly urged Core to litigate all such disputes in one omnibus proceeding, and Core has repeatedly refused, opting instead to forum shop by filing multiple proceedings in various forums. The purpose of 52 Pa. Code § 5.101(a)(6) is to prevent such conduct.

**Fourth Preliminary Objection (or Alternatively, Motion to Stay): If the Commission Declines to Dismiss the Complaint, It Should Issue a Stay.**

43. If the Commission finds that any of the above-cited standards for dismissal are not strictly met, it still should grant Verizon's alternative motion by staying the current

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<sup>19</sup> To the extent that the Commission concludes that the doctrine of claim preclusion should be treated as a basis for summary judgment and judgment on the pleadings pursuant to 52 Pa. Code § 5.102, rather than as a basis for dismissal pursuant to 52 Pa. Code § 5.101, Verizon PA respectfully requests that the Commission treat this preliminary objection as a motion for summary judgment and judgment on the pleadings.

complaint until the Fourth Circuit proceeding and the ongoing complaint cases before this Commission are resolved.

44. It is well-settled that if dismissal is not supported, a stay should be considered as an alternative in response to a preliminary objection based on the pendency of a prior proceeding. If “the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties, waste judicial resources and ‘create the unseemly spectacle of a race to judgment,’ the trial court may stay the later-filed action.” *Crutchfield v. Eaton Corp.*, 806 A.2d 1259, 1262-1263 (Pa. Super. Ct. 2002). Therefore, even if it denies dismissal based on the prior action, “[t]he trial court need not . . . sanction the duplication of effort and waste of judicial resources that would result from allowing both cases to proceed simultaneously, in a race to judgment. The trial court has the inherent power to stay the proceedings in the second suit during the pendency of the first.” *Klein v. Philadelphia*, 77 Pa. Commw. 251, 253-254 (Pa. Commw. Ct. 1983). *See also PNC Bank v. Bluestream Tech., Inc.*, 2010 PA Super 215 (Pa. Super. Ct. 2010); *Singer v. Dong Sup Cha*, 379 Pa. Super. 556, 560-561 (Pa. Super. Ct. 1988).

45. Core cannot seriously claim an immediate need to litigate the facilities bills given that it intentionally waited many years to commence this billing (Complaint ¶ 19) and knowingly passed up two opportunities to resolve these disputed bills earlier, either in the pending Commission complaint case against Verizon or in the federal case in Virginia, where Verizon offered several times to add the Pennsylvania claims to resolve more efficiently the same issues Core was raising in multiple states.

46. Both the Fourth Circuit case and the pending complaint case before this Commission will affect the outcome of this case, and it would conserve party and Commission

resources to stay this complaint pending completion of those proceedings even if the Commission finds that the grounds for dismissal are not strictly met.

47. The district court in Virginia addressed, and the Fourth Circuit is now reviewing on appeal, the same kind of facilities bills that are the subject of Core's complaint here. The federal courts' analysis of the validity of analogous facilities bills rendered by a Core affiliate to a Verizon affiliate will certainly be both relevant and informative. Indeed, any appeal of this Commission's decision would go to federal court pursuant to 28 U.S.C. § 1331, and that court would certainly look to how other federal courts have decided the issue. The outcome of the Fourth Circuit appeal is also apt to affect the parties' positions regarding settlement (something that has never been discussed because Core did not even attempt dispute resolution before filing the Complaint), or at bare minimum, impact the parties' litigation strategy here.

48. It is also likely that the outcome of the federal litigation will be binding on this Commission, at least with regard to certain issues and arguments, under the doctrine of issue preclusion (also known as collateral estoppel). Core cannot re-litigate issues of fact and law that were decided against its affiliate in Virginia. The doctrine of issue preclusion "is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise." *Pa. Bd. of Prob. & Parole v. Pa. Human Rels. Comm'n*, 66 A.3d 390, 395 (Pa. Commw. Ct. 2013); see also *Plaxton v. Lycoming County Zoning Hearing Board*, 986 A.2d 199, 208 (Pa. Cmwlth. 2009).

49. Nor does it matter that the Core and Verizon affiliates here are not the same entities involved in the Virginia case, as Core and Verizon PA are in privity with their respective Virginia affiliates. "Generally, collateral estoppel forecloses re-litigation of issues of fact or law

in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party *or in privity with a party to the prior adjudication*; (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) the determination in the prior proceeding was essential to the judgment.” *Pa Bd. Of Prob. & Parole, supra*, 66 A.2d at 395 (emphasis added).

50. Under this doctrine, Core arguably is already bound by the findings of the Virginia district court. However, to avoid duplicating efforts, it makes more sense to wait for the final Fourth Circuit decision before analyzing the issue preclusion effect of the Virginia case.

51. Similarly, the outcome of the pending Core complaint before this Commission will affect this case. For years Core has wrongfully overcharged Verizon and withheld payment on Verizon’s valid bills, so that even if Verizon were found to owe it some payment on the facilities bills here, which it should not, that amount would have to be off-set against the much larger sum Core owes Verizon (an amount that will be finally quantified when the Commission reviews the ALJ’s recommendation in Core’s previous complaint case). In addition, the prior case pending before this Commission will construe the interconnection agreement’s dispute resolution requirements.

52. Therefore, if the Commission does not dismiss Core’s complaint outright, at a minimum it should exercise its authority to stay the proceeding in the interest of party and administrative economy and an orderly decision-making process.

**Conclusion**

53. For the forgoing reasons, Verizon PA respectfully urges the Commission to dismiss Core's Complaint in its entirety, or in the alternative to stay it pending resolution of the prior proceedings before this Commission and the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



Suzan D. Paiva, I.D. No. 53853  
Verizon  
1717 Arch Street, 3<sup>rd</sup> Floor  
Philadelphia, PA 19103  
Phone: (215) 466-4755  
[Suzan.D.Paiva@verizon.com](mailto:Suzan.D.Paiva@verizon.com)

*Counsel for Respondent  
Verizon Pennsylvania LLC*

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