PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Petition of Core Communications, Inc. For Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. 252, Subparagraph B with Windstream Pennsylvania, LLC

Public Meeting held July 9, 2011
1198655-OSA
Docket No. A-310922F7004

DISSENT OF COMMISSIONER GLADYS M. BROWN

Because the procedural and substantive issues were not disposed of as set forth below, I dissent.

Procedural Issues. The first issue is whether Windstream waived their due process right to object to our October 4, 2012 Secretarial Letter (Letter) even though they did not object until five months later. The Letter asked the parties to address the FCC's ICC/USF Order's impact on this dispute. I believe that waiting until five months after issuance of the Letter constitutes a waiver of any objection to that Letter when it seeks the most recent information and relevant data given the time and the opportunity to be heard. Timely objection to a Letter does not turn on what an opposing party's substantive response will be when they file their response later.

The second issue is whether Core's substantive replies to the Letter, including affidavits, should be struck because they are beyond the scope of the Letter. Core's filings address matters we asked about in the Letter. Core addresses VoIP, Points of Interconnection (edges), and Rating of Traffic – all matters discussed in the ICC/USF Order.[1] The Commission should not strike a substantive response that addresses issues the Commission asked about if the opposing party had a meaningful opportunity to be heard and doing so precludes any potential error of law claim alleging that we ignored Pennsylvania precedent prohibiting the Commission from ignoring recent information and requiring consideration of the latest available data. *Bell Telephone v. Pa. PUC,* 524 A.2d 1009, 1015 (Pa. Cmwlth. 1987) *(Bell)*; *Duquesne Light v. Pa. PUC,* 99 A.2d 61, 64 (Superior Court 1953) *(Duquesne).*

The third issue is whether to refuse to consider changes in Core's business plan since the dispute began as an application protest in 2006 and evolved into an interconnection dispute in 2008 that is decided today. Then, Core was a business largely focused on specialized one-way service for ISPs with no end customers and no outbound traffic. Today, it is a business that includes two-way traffic and VoIP. We must address these related *voice* and *dial-up internet access* issues not avoid them by striking the updated information or data on them as extra-record.

[1] See e.g., *In re: ICC/USF Reform,* Docket No.10-90 (November 11, 2011), aff'd *In re: FCC,* Docket No. 11-9900 (10th Cir.)(May 23, 2014). VoIP (Paragraphs 933-975 VoIP rates for toll and other PSTN-VoIP, interconnection dispute resolution, and the states' role). Points of Interconnection (paragraphs 790, 776, and 1321) ("states role in the transition includes interconnection negotiation and arbitrations as well as setting "edge" for bill-and-keep"), ("depending on how the edge is defined, in conjunction with how carriers physically interconnect, payments could still change hands even under a bill-and-keep regime"), ("states are to set the edge pursuant to Commission guidance."). Rating of Traffic (934, 960, 962 "end-points of a call are not always geographic").

This proceeding's history, the parties' ample opportunity to be heard, and precedent support considering Core's change in their business plan. FCC and Pennsylvania precedent consider wholesale service as telecommunications regardless of the services provided over it, including information service.[2] Precedent allows the Commission to issue a certificate of public necessity so the parties can negotiate wholesale interconnection[3] and the FCC requires carriers to negotiate interconnection in good faith.[4] The record shows ample opportunity to be heard.

Importantly, the direction of traffic is no longer critical. One-way traffic of the type Core initially focused on can be wholesale telecommunications sufficient to secure a Certificate of Public Convenience even if opposing parties claim that Core should not be certificated because wholesale service used to deliver dial-up internet access service is not telecommunications.[5] The FCC's precedent subjects one-way traffic to reform, including VoIP,[6] and they are no longer as concerned with traffic imbalances like those allegedly arising from one-way traffic associated with *dial-up internet access* service or compensation rates between carriers.[7] Finally, Core's changed business plan is recent information and available data which Windstream had an opportunity to address and we must consider under precedent, particularly *Bell* and *Duquesne.*

Substantive Issues. The first issue is where two carriers can be required to interconnect to exchange traffic i.e., the Point of Interconnection (POI) and how they will pay each other for it. By striking Core's claim that Windstream had facilities installed at Verizon's tandems (which Windstream has a chance to refute but did not), facilities that effectively extend or are part of Windstream's network cannot be addressed. Windstream is thus able to limit interconnection to facilities in disparate service areas. Core wants interconnection at any technically feasible point on Windstream's network and it wants the same from Windstream.

Windstream facilities installed at a tandem effectively extend their network and they should constitute facilities for purposes of interconnection. However, that interconnection obligation is limited to their network or facilities. Windstream cannot be required to interconnect otherwise. However, in doing that, Windstream may have to arrange to have its customer traffic carried from there to Core's facilities and those costs must not be borne by Core or others without compensation.

The ancillary matter is compensation. If Windstream traffic is *dial-up internet access* service, the compensation is governed by the *ISP Remand Order* rate cap rate of $.0007 per Minute of Use (MOU) unless the parties agree otherwise. If Windstream traffic is not dial-up

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[2] *RTCC v. Pa. PUC,* 941 A.2d 751 (Cmwlth. 2008); *In re: Time Warner,* Docket No. WC 06-55 (March 1, 2007); *DQE v. North Pittsburgh Telephone Company,* File No. EB-05-MD-027 (February 2, 2007) and Fiber Optics Technologies v. North Pittsburgh, File No. EB-05-MD-014 (February 23, 2007).

[3] *RTCC v. Pa. PUC,* 941 A.2d 751 (Cmwlth. 2008).

[4] *ICC/USF Order* (November 2011), paragraph 839 and nn. 1603 on Section 251(c) generally.

[5] *RTCC v. Pa. PUC,* 941 A.2d 751 (Cmwlth. 2008) and more generally *In re: Time Warner,* Docket No. WC 06-55 (March 1, 2007); *DQE v. North Pittsburgh Telephone Company,* File No. EB-05-MD-027 (February 2, 2007) and Fiber Optics Technologies v. North Pittsburgh, File No. EB-05-MD-014 (February 23, 2007).

[6] *ICC/USF Order,* Docket No. 10-90 (November 2011), paragraph 940.

[7] ICC/USF Order (November 2011), paragraph 756 ("Given the understanding that both the calling and called party benefit from a call, the "direction" of the traffic—i.e., which network is originating or terminating the call—is no longer as relevant.").

internet access traffic, the compensation is governed by the rating of the telephone numbers (NPA-NXX). It is the rating of the telephone numbers (the NPA-NXX) and not the location or end-points which determine rates under FCC and Commission precedent[8] although the rates must now move in tandem with the ICC/USF Order.

The second issue is whether the Commission should impose threshold triggers which require direct interconnect between Core and Windstream instead of indirect interconnection, typically at Verizon's tandem. Our authority is somewhat murky given recent appellate developments on decisions involving *dial-up internet access* traffic between CLECs. The Commission should avoid a direct interconnection trigger based on Windstream arrangements with other carriers when there is no express trigger mandate in FCC rules or federal law.

The third issue is whether to address the obligation to pay compensation when one carrier relies on a transport service that is not short-haul switched access transport but will be provided by a party to a dispute, again usually indirect interconnection at tandems. We should address this issue and require compensation. We cannot avoid the issue by saying it involves third parties.

For one thing, this Commission has a long-standing and technologically neutral policy requiring one carrier to compensate another carrier for services rendered. *Palmerton Telephone Company v. Global NAPS,* Docket No. C-2009-2093336 (March 16, 2010) (*GNAPS).*

For another, the ICC/USF Order has not comprehensively addressed originating access charges or transport service like long-haul or special access, a form of transport that will likely be involved here. Until the FCC determines otherwise, this Commission should include Core's provision 12.2.3. It reiterates our *GNAPs* precedent requiring one carrier to pay another carrier for services rendered. If Windstream is not required to interconnect on Core's network (and it is not), Windstream or some other carrier (possibly Core) will incur costs to carry Windstream traffic. We are not concerned here if Windstream does it or uses a party other than Core. We are concerned here that Windstream not use Core and not pay for that service by claiming it involves a third party. Core's provision 12.2.3 requires Windstream to reimburse Core if Core incurs costs for Windstream. That would cover situations involving third parties used by either party.

The fourth issue is defining "local" or "non-local" traffic, and what the payments are, if Virtual NXX (VNXX) is used for *voice* or *dial-up internet access* service. VNXX occurs when a locally rated telephone number (NPA-NXX) is used outside a local calling area so it is not a toll call. We cannot say VNXX for *dial up internet access* is not within the *ISP Remand Order* citing case law if the FCC subsequently cited it as evidentiary precedent to regulate *all* traffic.

For *voice* service, this is a form of Remote or Foreign Exchange service wherein a long distance call between telephone numbers can become a local call. This is consistent with Commission and FCC precedent holding that it is the rating of a telephone number, the NPA-NXX, and not the end-point or geographic location that controls.[9]

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[8] *RTCC v. Pa. PUC,* 941 A.2d 751, 758 (Cmwlth 2008); *Virginia Arbitration Order,* Docket No. CC 00-218 (July 17, 2002), paragraphs 286-288.

[9] *RTCC v. Pa. PUC,* 941 A.2d 751, 758 (Cmwlth 2008); *Virginia Arbitration Order,* Docket No. CC 00-218 (July 17, 2002), paragraphs 286-288.

For *dial-up internet access* service, the *ISP Remand Order* rate cap rate of $.0007 controls irrespective of rating. For the reasons I explained in more detail in my earlier dissent, *dial-up internet access* compensation is governed by the *ISP Remand Order* rate cap rate of $.0007. I do not agree that we should carve out dial-up internet access service and subject it to bill-and-keep whenever it relies upon VNXX.

The last issue involves interconnection and payment if an interconnection is used for *dial-up internet access* by Windstream customers transmitted to Core's Internet Service Provider (ISP) customer. Windstream may not have to interconnect on Core's facilities to do that but this does not absolve Windstream of the obligation to bear the costs to carry Windstream traffic to Core's customer. Windstream must bear those costs on its own or by compensating any other carrier doing so for them. Windstream cannot avoid that obligation by claiming a third party outside the interconnection agreement is involved. If VNXX and *dial-up internet access* are involved, the *ISP Remand Order* rate cap rate of $.0007 governs the compensation. If VNXX and *voice* are involved, the rating of the telephone numbers as local or long distance controls the compensation although rates must now reflect the FCC's ICC/USF Order as appropriate as well.

July 9, 2014
Date

Gladys M. Brown, Commissioner