

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

January 12, 2015

VIA ELECTRONIC FILING

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Reply Brief of Core Communications, Inc. in the above-referenced matter. A copy of this document has been served upon the parties of record in accordance with the attached Certificate of Service.

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

Respectfully submitted,

STEVENS & LEE



Michael A. Gruin

Encl.

cc: Honorable Susan Colwell, Administrative Law Judge
Certificate of Service

Philadelphia • Reading • Valley Forge • Lehigh Valley • Harrisburg • Lancaster • Scranton
Wilkes-Barre • Princeton • Cherry Hill • New York • Wilmington

A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CORE COMMUNICATIONS, INC.
Complainant

v.

VERIZON PENNSYLVANIA LLC
Respondent

:
:
:
:
Docket No. C-2014-2406550
:
:
:
:

REPLY BRIEF OF CORE COMMUNICATIONS, INC.

Michael A. Gruin Esq.
Stevens & Lee
Attorney ID No.: 78625
17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
mag@stevenslee.com

*Counsel for Complainant Core
Communications, Inc.*

Filed: January 12, 2014

Table of Contents

I.	Counter Statement of Legal & Factual Background.....	1
A.	Verizon’s ASRs to Core.....	1
B.	Core’s Facilities Bills to Verizon.....	2
C.	Verizon Disputes.....	3
D.	Technical Configuration.....	4
II.	Argument.....	5
A.	Core’s Facilities Bills Are Consistent with the ICA.....	5
1.	Core’s Charges for Trunk Ports Are Valid.....	5
2.	Core’s Charges for Multiplexing Are Valid.....	8
3.	Core’s Transport Charges Are Valid.....	9
4.	Core’s Altoona Charges Are Valid.....	14
B.	Verizon’s Affirmative Defenses Lack Basis in Law or Fact.....	15
1.	Verizon’s Ripeness Defense is Baseless.....	15
2.	Verizon’s Preclusion Defenses Are Baseless.....	16
a.	Claim Preclusion.....	16
b.	Issue Preclusion.....	19
3.	Verizon’s Unclean Hands Defense is Baseless.....	23
III.	Conclusion.....	24

Table of Authorities

Bullock v. City of Philadelphia, 61 Pa. D. & C.4th 300 (Com. Pl. 2002), *aff'd*, 815 A.2d 45 (Pa. Commw. Ct. 2002).....19

Choice One Communications of Pennsylvania Inc. and CTC Communications Corporation v. Verizon Pennsylvania Inc. and Verizon North Inc., Pa. P.U.C. Docket Nos. C-2008-2029477 & C-2008-2029479, 2010 WL 637080 (Jan. 28, 2010).....2

Core Commc'ns, Inc. v. Verizon Pennsylvania, Inc., 493 F.3d 333 (3d Cir. 2007).....22

CoreTel Virginia, LLC v. Verizon Virginia, LLC, 752 F.3d 364 (4th Cir. 2014).....1,5,6,9,20

CoreTel Virginia, LLC v. Verizon Virginia LLC, 2013 WL 1755199 (E.D. Va. Apr. 22,2013)...20

Global Naps, Inc. v. Massachusetts Dep't of Telecommunications & Energy, 427 F.3d 345 (1st Cir. 2005).....21

In the Matter of Sprint Commc'ns Co. L.P., Complainant, 26 F.C.C. Rcd. 10780, 10789-90 (2011).....22

Merkel v. W.C.A.B. (Hofmann Indus.), 918 A.2d 190 (Pa. Commw. Ct. 2007).....18

Namani v. W.C.A.B. (A. Duie Pyle), 32 A.3d 850 (Pa. Commw. Ct. 2011).....18

New Castle Cnty., Del. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 174 F.3d 338 (3d Cir. 1999).....14

Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78 (3d Cir. 2000)..... 11

Weney v. W.C.A.B. (Mac Sprinkler Sys., Inc.), 960 A.2d 949 (Pa. Commw. Ct. 2008).....18

Pursuant to the Scheduling Order in the above-captioned case, Core Communications, Inc. (“Core”), by its attorneys Stevens & Lee, hereby files its Reply Brief in this matter, responding to the Initial Post-Hearing Brief, dated December 12, 2014, filed by Verizon Pennsylvania, Inc. (“V. Br.”).

I. Counter Statement of Legal & Factual Background

Verizon states that the Commission should reject “Core latest baseless complaint against Verizon.” V. Br., at 1, apparently referencing litigation between Core’s and Verizon’s affiliates in Virginia. Contrary to Verizon’s insinuation, Core’s affiliate’s claims in that case were anything but baseless. In fact, the Fourth Circuit ultimately agreed with Core’s affiliate with respect to primary issue in that case, finding that Verizon’s inflated special access facilities bills were not supported by the Virginia ICA or the Telecommunications Act of 1996 (“TCA”). *CoreTel Virginia, LLC v. Verizon Virginia, LLC*, 752 F.3d 364, 372 (4th Cir. 2014). (“We therefore conclude that the CoreTel/Verizon ICA entitles CoreTel to order entrance facilities for interconnection at TELRIC.”).

A. Verizon’s ASRs to Core

Verizon continues to maintain that the ASRs it sent Core were not orders for service, but rather a kind of “heads up” to Core that Verizon would be self-provisioning its own facilities. V. Br., at 7, n. 13. As Core demonstrated in its Main Brief, at 6-9, this notion is not consistent with the ICA’s plain language, which provides that ASRs are how the parties should order interconnection trunks from each other. Responding to Verizon’s allegation that Core’s invoices do not explain how Verizon ordered each facility, Core notes that it sends Verizon a spreadsheet with each monthly facilities bill, which ties every facility line item in the bill to a specific purchase order number (“PON”), as listed on the ASRs Verizon sends Core. **Core Stmt. 1.0**, at

14; **Core Stmt. 2.0**, at 5-6; and **Core Exh. A (Sample Invoice)**(Column labelled “PON”). Core explained at great length how it translates Verizon’s ASRs into provision of facilities and resulting bills. **Core Stmt. 1.0**, at 12-13, and **Core Exhs. B-G (ASRs, FOCs and Confirmations)**. For its part, Verizon never explains how it orders interconnection trunks to Core at all, if not through ASRs. Finally, while it is true that the district court in the Virginia litigation accepted (without analysis) Verizon Virginia’s assertion that its ASRs were not orders, *see*, V. Br., at 7, n.13, on appeal the Fourth Circuit viewed the issue of ASRs as moot, finding instead that the Virginia ICA did not permit facilities charges in the circumstances present in that case (orders or no orders).

B. Core’s Facilities Bills to Verizon

Verizon feigns surprise that Core would issue facilities bills after a period in which Core did not bill for those facilities. V. Br., at 7-8. Yet, such retroactive billing adjustments are commonplace in the telecommunications industry, as Verizon’s own billing and dispute practices demonstrate. *See, Choice One Communications of Pennsylvania Inc. and CTC Communications Corporation v. Verizon Pennsylvania Inc. and Verizon North Inc.*, Pa. P.U.C. Docket Nos. C-2008-2029477 & C-2008-2029479, 2010 WL 637080 (Jan. 28, 2010). (“The dispute in this case arose when Verizon issued Industry Notices... which informed all CLECs operating in Pennsylvania that Verizon will make an adjustment to its billing of ‘dedicated tandem trunk Port’ charges associated with ATC Trunks... Verizon informed the CLECs that that it would impose a one-time charge to collect the unbilled charges for the prior two years and that it would begin assessing the CLECs with the proper allocation factor prospectively.”). In another example, in prior litigation before this Commission at Docket Nos. C-2011-2253750 & 2011-2253777, Verizon suddenly concluded after years of paying reciprocal compensation to Core without

complaint, that it had allegedly overpaid Core millions of dollars, based on the alleged newly-discovered presence of third-party traffic that Verizon sent Core without notice.

C. Verizon Disputes

Core demonstrated in its Main Brief, at 24-25 that it resolutely followed the ICA's dispute resolution process, whereas Verizon made almost zero effort to articulate its position in a manner that was amenable to a negotiated resolution. Verizon's suggestion that Core should have known its position in Pennsylvania, because of ongoing litigation between the parties' affiliates in Virginia, V. Br., at 10, only serves to further demonstrate that Verizon had no intention of voluntarily paying Core any compensation for the Pennsylvania facilities.

Verizon's allegation that Core "refused to include its Pennsylvania claims" in the Virginia case is supported only by the testimony of its accounting witness, Mr. Bando, **Verizon Stmt. 1.1**, at 6, who has no personal knowledge of any discussions between counsel for the parties involved. Moreover, his testimony is inaccurate. Mr. Mingo, who has first-hand knowledge, testified that the proposal to consolidate various claims in the Virginia litigation fell through when Verizon balked at the inclusion of claims involving New York. **Core Stmt. 2.0**, at 7.

Verizon unfairly chides Core's controller for citing (in response to Verizon's request for citations) to a provision of the ICA which specifically sanctions backbilling. V. Br., at 9, n. 14, insinuating that the citation was somehow misleading. However, the reason he did so was quite simply because one of Verizon's initial form letter disputes referenced "Invalid Back Billing." **Core Exh. I (Dispute Correspondence)**(Letter dated August 31, 2011 from Megan Terrell, Verizon, to Chris Van de Verg, Core).

D. Technical Configuration.

Core has explained the technical configuration of the parties' Pennsylvania interconnection at length in its direct testimony. **Core Stmt. 1.0**, at 4-9.

Verizon contends that it "self-provisioned facilities to carry its traffic all the way to Core's switch..." V. Br., at 12. This statement is inaccurate. In fact, Verizon generally self-provisions transport facilities which extend to some point within the same building as Core's switch, or within a nearby building, but not all the way to Core's switch. **Core Stmt. 1.0**, at 4 and **Figures BLM-2 (IP/POI Diagram)**. The reality is that Core completes these transport links by furnishing collocation space, cross connects, multiplexing and trunk ports. *Id.* In Philadelphia, Verizon delivers traffic to Core within Verizon's own Race Street central office, and Core provides the transport facilities which reach Core's switch at 401 N. Broad Street. *Id.*

Verizon claims that it is "perfectly capable of delivering traffic to Core for termination in the Philadelphia LATA over Verizon's own self-provisioned, in-place facilities..." This too is inaccurate. There is no evidence that Verizon has any transport facilities that reach Core's central office at 401 N. Broad Street, Fourth Floor. The Verizon transport facilities which reached Core's former switch location at 401 N. Broad Street, Ninth Floor, have no terminus on the Fourth Floor, and thus "were of no practical use once [Core] moved to the fourth floor." **Core Stmt. 2.0**, at 16-17. Responding to Verizon's attorney's hypothetical, positing that Verizon could have asked to move its transport facilities to the fourth floor, Core witness Mr. Mingo pointed out that "I don't think there's any space on the fourth floor" for Verizon to move into. **Tr.**, at 62:19-25.

II. Argument

A. Core's Facilities Bills Are Consistent with the ICA

1. Core's Charges for Trunk Ports Are Valid

Verizon does not argue that Core never provided it with trunk ports, or that those ports were not necessary for interconnection. Instead, Verizon contends that the ICA, Attachment IV, § 2.2, does not permit Core to charge for trunk ports. V. Br., at 17. But Core demonstrated in its Main Brief, at 11, that tandem trunk ports are the “trunk-connect facilities” referenced in the ICA’s definition of “Tandem Switching,” and that “Tandem Switching” is one of several categories of charges specifically permitted by Attachment IV, §§ 2.2.1.1 and 2.4.2. Core further demonstrated that the pricing for tandem trunk ports is set forth in the ICA, Appendix 2, Section III, which includes a separate and independent monthly recurring rate for “Trunk Ports—Tandem.” The fact that the ICA’s pricing schedule also provides for “Tandem Switching Usage” means that tandem trunk ports and tandem switching usage are distinct elements, the former being billed on a monthly recurring basis, and the latter on a per-minute usage basis. Accordingly, per the ICA, tandem trunk ports are not subsumed within the tandem reciprocal compensation rate, or any other per-minute rate, as Verizon contends.

Verizon further contends that the Fourth Circuit’s decision in *CoreTel Virginia* dictates that “Core’s exclusive compensation for trunk ports on its side of the IP is reciprocal compensation.” V. Br., at 18. But the ICA at issue in *CoreTel Virginia* did not include interconnection language that resembles Attachment IV of the ICA here. Nowhere in the Fourth Circuit’s opinion are terms such as “Transport,” “Termination,” “Tandem Switching” or “trunk connect facilities” analyzed. That is because those terms do not figure prominently in the Virginia ICA that was before the court. Conversely, the court’s opinion revolved primarily

around the Verizon Virginia ICA's definition of "Entrance Facility"—a term that does not even appear in Attachment IV to the Pennsylvania ICA.¹

Verizon argues that the rate Core charged for trunk ports "does not appear in a Core tariff and is not Core's otherwise generally available rate," as set forth in the Pricing appendix, Section B, Item V. V. Br., at 19.² Although Core's facilities rates are not tariffed, they are generally available within the broad parameters set forth in the pricing appendix, and Core has clearly made them available to Verizon. C. Br., at 19. The only stricture on these generally available rates is that such rates not exceed Verizon's rates for equivalent services, a stricture with which Core has fully complied. *Id.*

Here and elsewhere, Verizon makes much of the fact that most of the ICA's specific element rates appear in Section A of the Pricing appendix, the heading to which reads "Verizon Services, Facilities and Arrangements." However, the ICA, § 38 ("Headings Not Controlling"), provides that "[t]he headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement." In a similar context, the Fourth Circuit has cautioned that headings in an ICA pricing appendix should not be accorded undue substantive weight, especially where the ICA itself speaks to that precise interpretive issue.³

¹ The court's central holding with respect to CoreTel Virginia's facilities charges was "[w]e agree with Verizon that the multiplexing and trunk ports at issue are not entrance facilities under the ICA. ICA § 4.3.5 therefore provides no basis for CoreTel's facilities charges." *CoreTel Virginia*, 752 F.3d, at 372-73.

² In relying on this provision of the ICA's pricing appendix, Verizon runs afoul of its own argument that the pricing appendix was superseded automatically by Verizon's 2004 updates to its TELRIC complicate tariff.

³ The court stated: "Verizon suggests that, because rates for entrance facilities are listed in Exhibit A only under the heading "Unbundled Transport," they are available only to entrance facilities ordered under § 11, "Unbundled Access." The ICA, however, specifically provides that headings "are not intended to be a part of or to affect the meaning" of the agreement." *CoreTel Virginia*, 752 F.3d, at 371.

Verizon claims that *its* trunk port charges “are embedded in its reciprocal compensation rates,” and that it “does not bill tandem port charges, on top of reciprocal compensation.” V. Br., at 20. Verizon’s argument is that, since Verizon supposedly does not charge such a rate, neither may Core, pursuant to the Pricing appendix B.V.’s stricture that Core’s rates are “not to exceed [Verizon’s] rates for equivalent services available to Core.” As a factual matter, Verizon *does* bill Core for dedicated trunk ports when Core orders trunks to deliver its traffic to Verizon. **Core Stmt. 2.0**, at 15; and **Proprietary Exh. Q (Spreadsheet of Verizon charges to Core for multiplexing and trunk ports)**.

According to Verizon, its witness Mr. D’Amico demonstrated that Verizon’s reciprocal compensation charge “included all three relevant port charges,” V. Br., at 20, thereby allegedly demonstrating that tandem ports are subsumed within reciprocal compensation. In its Main Brief, Core identified of the chief errors which undermine Mr. D’Amico’s analysis of this issue. C. Br., at 12-13. At best, Mr. D’Amico attempted to demonstrate that *common* or *shared* tandem trunk ports are subsumed with reciprocal compensation. *See, Core Exh. P (Verizon Response to Core Interrogatory III-7)*(Mr. D’Amico’s chart of rate components on second page identifies a “Common Tandem Trunk Port”); *and see, Core Proprietary Cross Exh. 5 (Verizon Pennsylvania End Office and Tandem Reciprocal Compensation)*, at 3d page (“Meet Point B – Termination at Tandem,” which denotes a “Shared Trunk Port” component). But the tandem trunk ports for which Core billed are not *shared*, they are, indisputably, *dedicated* to Verizon. **Core Stmt. 2.0**, at 14. Mr. D’Amico never claims that such charges, dedicated to one carrier’s interconnection, are part of reciprocal compensation.

Verizon continues to claim that the rate for tandem trunk ports in the ICA was automatically superseded by rates Verizon filed in a tariff to implement the Commission’s 2004

TELRIC compliance order. V. Br., at 21-23. This argument is fully refuted in Core's Main Brief, at 19-21. Briefly stated, the ICA requires that any change thereto be effectuated by means of a written amendment, "signed by both Parties," ICA, Part A, § 36, and that any change to either party's tariff(s) which materially impacts the ICA be effectuated by (1) the other party's "written consent" or (2) "an affirmative order of the Commission." *Also see*, Verizon Proposed FOF #109 ("The parties' interconnection agreement can only be amended in writing, signed by both parties and approved by the Commission.").

Here, Verizon cannot produce a written amendment for rates, and cannot demonstrate either (1) Core's written consent; or (2) an affirmative order by the Commission which requires any change to the ICA's rates. Verizon never negotiated a rate amendment, never sought Core's consent, and never indicated at any time to Core in the ordinary course of business that it believed that the ICA's rates had changed. The ICA's pricing appendix (which itself amends the original ICA, explicitly replacing the rates set forth therein per Adoption Agreement, § 1.11) remains in effect. The rates in the ICA, then, apply to services provided pursuant to that ICA.

2. Core's Charges for Multiplexing Are Valid

Verizon claims that the ICA, Attachment IV, does not permit Core to charge for multiplexing, but only for Reciprocal Compensation and Dedicated Transport. V. Br., at 23. But Core demonstrated in its Main Brief that the ICA's definition of "Dedicated Transport" contemplates that multiplexing shall be made available "both together with and separately from Dedicated Transport." C. Br., at 15, quoting, ICA, Attachment III, § 10.2.4. In Philadelphia, Core provides multiplexing "together with" Dedicated Transport and in the other LATAs, Core provides multiplexing "separately from Dedicated Transport." **Figures BLM-2 (IP/POI**

Diagram) and **BLM-3 (IP/POI Diagram—Philadelphia)**. In both scenarios, Core's multiplexing charges are permitted by the ICA.

As with tandem trunk ports, Verizon argues that "Core does not have any tariffed rates for multiplexing and therefore has 'no tariffed or otherwise generally available rates, not to exceed [Verizon's] rates for equivalent services available to Core.'" V. Br., at 24. However, just as with tandem trunk ports, Core makes the ICA's TELRIC rates for multiplexing available to Verizon, which rates that do not exceed Verizon's rates for equivalent service. Unlike tandem trunk ports, Verizon does not claim that Verizon itself does not bill Core for multiplexing, on top of reciprocal compensation. That is because, as a matter of undisputed fact, Verizon does charge Core for multiplexing, for all of Core's local exchange trunks to Verizon. Core Stmt. 2.0, at 15; and **Proprietary Exh. Q** (spreadsheet showing Verizon charges to Core for multiplexing in multiple LATAs). Further, Verizon's multiplexing charges greatly exceed Core's for equivalent service. *Id.* (showing Verizon multiplexing charges of up to \$803.61 per month in the Philadelphia LATA).

Verizon further claims that the Fourth Circuit rejected CoreTel Virginia's multiplexing charges "under identical pricing appendix language." V. Br., at 24. But the Fourth Circuit, again, never considered the substantive language of the ICA here, Attachments III and IV, which govern charges for Dedicated Transport and the related provision of multiplexing on a combined or standalone basis. Further, the "pricing appendix language" in the Virginia ICA is not "identical" to that in the ICA here, as Verizon's own brief makes clear. *See*, V. Br., at 41 (setting forth verbatim language of each provision). Indeed, the Virginia ICA does not include the key phrase "not to exceed [Verizon's] rates for equivalent services available to Core"—a phrase

which the Pennsylvania ICA does include and which Verizon itself repeatedly relies upon in this case.

3. Core's Transport Charges Are Valid

Verizon does not contend that Core provides no transport in the Philadelphia LATA, nor does Verizon dispute that it uses Core's transport facilities to deliver its traffic to Core's Philadelphia switch. Nor does Verizon dispute the location of the POI or Core's IP (switch) in Philadelphia, or the unavoidable fact that the ICA requires each party that originates traffic to pay the other party for transport between the POI and the IP. ICA, Attachment IV, §§ 1.2.2 and 2.4.2. Rather, Verizon's entire excuse for avoiding payment of otherwise undisputed transport charges boils down to its attorneys' creative, post-hoc interpretations of the single word "abandoning" as it appears in an informal email, and the single term "necessary" as it appears in the ICA, Attachment IV, § 1.2.2.

Verizon's reliance on the word "abandoning," in an email from Core's President to Verizon's interconnection team, is over-wrought and unsustainable. It is absolutely true that Core was abandoning its leased space at 401 N. Broad Street, Ninth Floor, which is the point to which Verizon had theretofore interconnected its facilities. **Core Stmt. 2.0**, at 16-17; *and see*, *Tr.*, 62:2-16. This meant that the Verizon transport facility that connected to that space could no longer be used for interconnection. **Core Stmt. 2.0**, at 16-17. Verizon's engineers fully understood these facts. *Tr.*, at 63:10-14. ("We told you exactly what we were doing. We were abandoning the ninth floor and we were closing it in your space. If you wanted any other options, we told you explicitly where the switch was...."). Further, Verizon's own ASRs associated with the new Philadelphia interconnection arrangements in 2012 specify Core's 401 N. Broad Street switch location (PHLAPAFGGT8) in the "CSL" field, showing that Verizon's engineers were

fully aware that Core's switch CLLI remained, as before, at 401 N. Broad Street. **Core Stmt. 2.0**, at 17; **Core Exh. N (Verizon ASR dated 10/19/12)**; and **Core Exh. R (LERG Entry for Core's Switch)**.

If, as Verizon's brief claims, its engineers were concerned about the possible financial ramifications of Core's abandoning that space, Verizon has put forth absolutely no evidence thereof. Verizon's sole "evidence" of reliance is based on mischaracterizations of Core's witness' testimony on cross-examination. But Mr. Mingo's testimony on cross is wholly consistent with his written testimony. On the other hand, Verizon put forth no witness of its own who could speak to the actual facts surrounding the Philadelphia interconnection discussions. The witnesses Verizon did make available could only make conclusory conjectures about other employees' subjective impressions of the word "abandoning."

The ICA establishes the financial duties of each party. It is not Core's responsibility to guide Verizon through the interconnection process; nor would Verizon be likely to take Core's advice. **Tr.**, at 65:8-66:13. Verizon's unsubstantiated, undocumented claim that it relied on the word "abandoning" so as to think that it had no financial responsibility to reach Core's Philadelphia IP (switch) was (if true) remarkably naïve. Any such reliance cannot be considered reasonable for purposes of any bad faith or similar claim.⁴ The precise location of Core's Philadelphia switch is and always has been available to Verizon in the Local Exchange Routing

⁴ The legal underpinning of Verizon's claim that Core misled its engineers appears to be a claim of bad faith in the performance of a contract. Pennsylvania courts "recognize[] an independent cause of action for breach of a duty of good faith and fair dealing only in very limited circumstances." *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91 (3d Cir. 2000). "Courts have utilized the good faith duty as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term." *Id.*, at 91. Here, Verizon cites to no "specific clause[]" in the ICA which Core's allegedly misleading comments breached; nor does Verizon offer any cogent reason why the allegedly misleading comments should permit it to override the ICA's express terms, which require the originating party to pay the other party for transport from the POI to the IP.

Guide, and that location never changed during the entire course of events at issue in this case.

Core Stmt. 2.0, at 17-18; *and, Tr.*, at 65:23-25 (“[Verizon personnel] fully understood what they were doing, where our switches were.”).

Verizon marshals various extraneous allegations about Core’s transport facilities, such as the monthly recurring cost to Core (which exceeds the amount Core bills Verizon each month), *V. Br.*, at 25; the unsubstantiated allegation that Core intended for Verizon “to finance the fiber ring Core built for its own purposes,” *V. Br.*, at 27; and the unfounded speculation that Core cannot possibly have built the ring to avoid Verizon’s inflated access charges, because Core does not pay those charges, *V. Br.*, at 25 and n. 27, apparently in an attempt to cast Core’s charges in a bad light. None of this nonsense has any bearing on the outcome of this case, or Core’s charges for transport in the Philadelphia LATA. Simply put, Verizon uses Core’s transport facilities to reach Core’s Philadelphia switch. Under the ICA, Verizon must pay Core transport charges.

Verizon suggests that it may avoid Core’s transport charges because the ICA permits it to “request relief from the Commission if [Verizon] reasonably believes that [Core] has manipulated the designation of POIs in order to maximize the transport revenues [Verizon] must pay to [Core].” *V. Br.*, at 26-27, *citing*, ICA, Attachment IV, § 1.2.2. However, Verizon never explains how it believes this process is supposed to work. For example, Verizon does not even acknowledge that Core should receive *any* transport revenues, so it cannot possibly allege that Core has, in fact, “maximize[d]” such revenues. Further, Verizon has not, and cannot, demonstrate that Core “manipulated the designation of POIs” to maximize transport revenues. As Verizon itself admits, Core transport charges “represent only a tiny fraction of the disputed charges at issue.” *V. Br.*, at 25. In fact, Core’s monthly recurring charges for transport total less than \$3,000. **Core Exh. A** (sample invoice).

Nor is there any sinister motive behind Core's network design in Philadelphia. Core simply decided to consolidate its two leased spaces at 401 N. Broad Street into one, and thereby, stopped making free collocation on the ninth floor available to Verizon, stopped providing free cross-connects from the ninth to the fourth floor, and stopped giving Verizon any basis to levy its inflated special access charges for traffic from Core to Verizon. **Core Stmt. 2.0**, at 16-17; *and*, **Tr.**, at 67:3-69:7 (explaining valid business factors behind Core's network consolidation). To facilitate the consolidation, and ensure the existence of a viable transport link with Verizon, Core constructed a fiber-optic transport facility between its switch and Verizon's Race Street central office. **Core Stmt. 1.0**, at 11; **Core Stmt. 2.0**, at 16. To date, Verizon has yet to pay Core a dime for its efforts, belying Verizon's insinuation that Core is somehow trying to turn a quick buck.

Similarly, Verizon reads far too much into the term "necessary" as it appears in ICA, Attachment IV, § 1.2.2. In an attempt to undermine Core's witness' very reasonable reading of that term ("if the POI and the IP are in the same place, then no transport is necessary"),⁵ Verizon ultimately reverts, as it must, to the language of the ICA itself. Verizon notes that § 1.2.2 contemplates that transport from the POI to the IP (if necessary) may be purchased specifically "from the other party"—not some third party. That language is not only entirely consistent with Mr. Mingo's lay reading of § 1.2.2, it also establishes—in the clearest possible terms—that Verizon is liable to *Core* when *Core* provides the transport between the POI and the IP, as it indisputably does in Philadelphia.

⁵ For example, Core is *not* liable to Verizon for transport charges in Philadelphia because Core delivers its traffic to Verizon at Verizon's Race Street central office, which is where both the POI and Verizon's IP (switch) are located. Similarly, Verizon is not liable to Core for transport charge in the other LATAs, for the same reason. **Figures BLM-2 (IP/POI Diagram) and BLM-3 (IP/POI Diagram—Philadelphia).**

As with trunk ports and multiplexing, Verizon claims that Core may not bill Verizon at the rates set forth in the Pricing appendix. V. Br., at 29-30. For all of the same reasons identified herein, at 6-8, and in Core's Main Brief, at 18-21, the rates in the ICA's pricing appendix apply to services provided pursuant to the ICA.

Verizon next claims that Core may not charge Verizon for entrance facilities and dedicated transport, and argues that the latter is the more appropriate charge. V. Br., at 30-31. Verizon states that the ICA "does not permit Core to bill a dedicated transport charge on top of the entrance facility charge." V. Br., at 31. But the ICA permits Core to bill both "transport" and "Dedicated Transport." *Compare*, ICA, Attachment IV, §§ 1.2.2 ("transport") and 2.4.2 ("Dedicated Transport"). Reading these provisions to limit the universe of applicable transport charges to Dedicated Transport would render § 1.2.2's generic reference to "transport" superfluous.⁶ The Entrance Facility is the transport charge specifically applicable to the entry point into Core's network. It is in addition to and separate from the Dedicated Transport charge. **Core Stmt. 1.0**, at 11.

4. Core's Altoona Charges Are Valid

Core anticipated and addressed most of Verizon's arguments relative to Altoona facilities, and the "Altoona Amendment," in its Main Brief, at 25-26.

In a new wrinkle, Verizon asserts that the term "transport," as it appears in the Altoona Amendment, encompasses trunk ports and multiplexing, so that it may avoid these charges in Altoona. V. Br., at 32; and, Verizon Proposed FOF # 104. Core has consistently maintained that trunk ports and multiplexing are technically not "transport," although all of these elements may

⁶ *New Castle Cnty., Del. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 174 F.3d 338, 349 (3d Cir. 1999) ("this Court takes care not to render other portions of a provision or contract superfluous when construing contract language.").

be provided together or on an independent basis. However, if the Commission accepts Verizon's position that "transport" includes trunk ports and multiplexing, then it must apply that same reasoning to the same term as it appears in ICA, Attachment IV, § 1.2.2 ("The Party delivering traffic to the other Party's IP(s) shall do so by purchasing from the other Party transport between the POI(s) and the IP(s), if necessary."). Such a reading would further bolster Core's claims for trunk ports and multiplexing throughout Pennsylvania.

Verizon also asserts that Core is in violation of the Altoona Amendment because it moved its switch across the street. Contrary to Verizon's tortured reading, the amendment simply records the location of Core's switch in 2003. There is no actual or implied requirement that Core keep its switch locked into that location. Nor does Verizon identify any negative technical or other practical impact stemming from Core's move. The only practical consequence to Core's moving its switch across the street, was to increase Core's own costs, by maintaining the old switch space solely for Verizon's interconnection, as well as aerial cabling to connect the old location to the new. Finally, there can be no question that Verizon itself does not abide by the terms of the Altoona Amendment, since it bills Core at special access rates for transport facilities, in violation of § 1.D. **Core Stmt. 2.0**, at 20.

B. Verizon's Affirmative Defenses Lack Basis in Law or Fact

1. Verizon's Ripeness Defense is Baseless

Verizon claims, in essence, that Core's complaint in this matter was not ripe when filed, because Core allegedly did not follow the ICA's dispute resolution process prior to filing. Core addressed this affirmative defense in its Main Brief, at 23-25. In sum, Core waited out the 120-day window for dispute resolution (and more), and escalated Verizon's disputes to the highest level (Core's President and General Counsel), prior to filing the Complaint in this matter.

Moreover, it was Core, and Core alone, which endeavored to actually resolve Verizon's disputes prior to filing. Core only filed after Verizon stopped responding to its inquiries. In response to these incontrovertible facts, Verizon now offers a purported explanation of the ICA's dispute resolution provisions' "design[]" and "structure[]," V. Br., at 36, to argue that Core should have done even more to resolve Verizon's disputes. But Verizon fails to tie its speculative conclusions to the plain language of the ICA, or to identify any ambiguity in that language which would permit imposition of extrinsic requirements.

2. Verizon's Preclusion Defenses Are Baseless

Verizon raises two preclusion affirmative defenses: claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*). Neither has a basis in the law or in fact.

a. Claim Preclusion

Verizon cannot meet the standard for claim preclusion/*res judicata* because there is no identity of the "thing sued upon" or of the "cause of action" between the present case and prior litigation between Core and Verizon in Commission Docket No. C-2011-2253750 (the "2011 Litigation"). *See*, V. Br., at 39 (setting forth four-prong standard for claim preclusion). Contrary to Verizon's assertions, Core could not have asserted its current claims in the 2011 Litigation. Core filed the 2011 Litigation because Verizon, without any apparent justification, stopped paying reciprocal compensation that it had been paying for years, and because that refusal to pay threatened Core's ability to operate immediately. Core's complaint in this case involves Verizon's refusal to pay for facilities it uses to interconnect with Core in Pennsylvania, pursuant to the parties' Pennsylvania ICA. This dispute did not ripen until the latter half of 2012,⁷ after

⁷ Verizon itself states that the parties became "familiar with each other's positions" relative to Core's Pennsylvania facilities charges in "the summer and fall of 2012." V. Br., at 10.

the ICA's dispute resolution process had run, by which time the 2011 Litigation was largely complete.

Core's 2011 complaint against Verizon in Pennsylvania involved intercarrier compensation owed by Verizon to Core for telecommunications traffic Verizon sent to Core's network. Verizon alleged that it had been sending third-party carrier traffic to Core for years, and that Core should refund amounts Verizon had previously paid Core to terminate that alleged third-party traffic. The parties exchanged extensive testimony about how third-party traffic can be reliably identified, and who is responsible to pay for it. As a result of discussions with Verizon, Core learned that one of Verizon's objections to Core's reciprocal compensation bills was that Core should have treated some of the reciprocal compensation traffic as switched access traffic instead. Accordingly, Core rebilled some of the reciprocal compensation traffic as switched access and amended its Complaint in April, 2012 to incorporate a switched access claim.

The 2011 Litigation also involved Verizon's counterclaim against Core for alleged non-payment of certain Verizon facilities bills. Core had disputed Verizon's facilities bills for many years, based on pricing on various technical issues, none of which are present in this case. Overall, the claims and counterclaims made in the 2011 Litigation have little relation to claims being made by Core in the present complaint, and the current claims by Core implicate an entirely different set of issues. Verizon's attempt to conflate the disputes involved in the 2011 Litigation with the disputes underlying the current Complaint is disingenuous. Other than vague and conclusory references to "Verizon's non-payment of Core's back-bills," V. Br., at 39-40, and a single email which happens to reference switched access as well as facilities bills, Verizon makes no attempt to establish an identity of the "thing sued for" or the "cause of action."

Core could not have and should not have raised the matters set forth in the Complaint during the 2011 Pennsylvania litigation. There, Verizon disputed Core per-minute usage charges for traffic allegedly attributable to third-party carriers. Here, Core sues Verizon for flat-rated dedicated facilities charges. The factual basis (i.e., the thing sued for) and calculation of these two types of charges are fundamentally different, as are the relevant ICA provisions, applicable law, and the issues inherent in their resolution. In the 2011 Litigation, Verizon argued that it was not responsible for a portion of the reciprocal compensation charges Core had billed, and demanded a refund. Verizon argued that Core should have identified third-party carrier carriers who used Verizon to reach Core, and charged them for the traffic. Here, Verizon simply argues that Core does not provide the physical facilities for which it bills, or else, even if Core provides the facilities, Verizon did not order them or is otherwise not responsible to pay for them. There is no allegation (nor could there be), that some third-party carrier is actually on the hook to pay for Core's facilities.

None of the cases Verizon cites supports its position that Core's current facilities claims are identical to its previous reciprocal compensation and switched access claims, or sufficiently similar such that *res judicata* applies. In *Weney v. W.C.A.B. (Mac Sprinkler Sys., Inc.)*, 960 A.2d 949, 954 (Pa. Commw. Ct. 2008), the court stated: “[g]enerally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings.” The court there found *res judicata* because “the subject matter of both the Review Petition I and Review Petition II proceedings was the nature and extent of the injuries that Claimant sustained as a result of the October 21, 2005 work incident, and the ultimate issue in both proceedings was whether the NCP accurately reflected the nature and extent of Claimant's injuries. *Weney*, at 955. Similarly, in *Merkel v. W.C.A.B. (Hofmann Indus.)*, 918 A.2d 190, 193

(Pa. Commw. Ct. 2007), the court found res judicata because “the subject matter in both the old and new proceedings is Employer's calculation of Claimant's AWW in connection with Claimant's March 13, 1998, work injury,” and that “[t]he ultimate issue in both the old and new proceedings is whether Employer erred in calculating the AWW.”

Similarly, *Namani v. W.C.A.B. (A. Duie Pyle)*, 32 A.3d 850 (Pa. Commw. Ct. 2011) involved an alleged newly-discovered injury arising out a previously-litigated workplace accident. *Id.*, at 857 (“the issue of whether Claimant suffered a cervical injury as a result of his December 23, 2004 work-related accident could have been litigated during the termination proceedings.”). Finally, in *Bullock v. City of Philadelphia*, 61 Pa. D. & C.4th 300, 307-08 (Com. Pl. 2002) *aff'd*, 815 A.2d 45 (Pa. Commw. Ct. 2002), “plaintiff argue[d] that she was discharged from her city position for reason(s) other than just cause.” The court applied res judicata because “[t]his is exactly the same claim she made in the initial proceedings heard in 1997 before the commission.” In all of these cases, the courts found an identity of subject matter (the thing sued for) and ultimate issue (relief sought) because the litigant sought the same relief, based on the same factual incident, with the only difference being a new legal theory of recovery. Here, again, Core is not suing Verizon for any of the things it sought in the 2011 Litigation or the 2012 amended complaint in that case. The ultimate issue in Core’s complaint—whether Verizon should pay Core for the Pennsylvania facilities Verizon uses to interconnect with Core—has never been adjudicated, anywhere, at any time.

b. Issue Preclusion

Verizon cannot meet the standard for issue preclusion/collateral estoppel quite simply because there is no identity of the issue between the present case and prior litigation between Core’s and Verizon’s affiliates in Virginia (the “Virginia Litigation”). Core’s Virginia affiliate

(“CoreTel Virginia”) filed the Virginia Litigation in 2012 when Verizon’s Virginia affiliate threatened to terminate those parties’ ICA (which is distinct from and contains different terms than Core’s Pennsylvania ICA with Verizon) and run that affiliate out of business.

Verizon’s references to the Virginia Litigation are irrelevant. The present Complaint relates to Verizon’s use of Core’s facilities in Pennsylvania, pursuant to facilities provisioned and billed in Pennsylvania under the Pennsylvania ICA between the parties. The Virginia Litigation involved two different Virginia entities, operating under a different ICA, with different physical facilities and a different timeline altogether. For example, the Virginia court’s rationale for denying CoreTel Virginia’s facilities claim was that “[t]he ICA itself does not authorize CoreTel to bill Verizon for these facilities because they do not provide entrance facilities to Verizon.” *CoreTel Virginia, LLC v. Verizon Virginia LLC*, 1:12-CV-741, 2013 WL 1755199 (E.D. Va. Apr. 22, 2013). Here, however, there is a factual distinction in that Core unquestionably provides the facility linking the POI in Verizon’s central office to Core’s IP/switch in Philadelphia, that is, what the Fourth Circuit called the “facility connecting and, crucially, lying ‘between’ the interconnecting carrier’s premises and the other party’s central office.” *CoreTel Virginia*, 752 F.3d, at 373.

Verizon now asserts that issue preclusion should apply because “[t]he Virginia and Pennsylvania pricing appendices contain virtually identical language.” Of course, the language in the two pricing appendices is *not* identical, and the additional language in the Pennsylvania appendix (“...not to exceed [Verizon’s] rates for equivalent services available to Core”) has substantial application in this case, as Verizon’s own brief acknowledges. Further, the Virginia court’s rationale for denying CoreTel Virginia’s facilities claim was that “[t]he ICA itself does not authorize CoreTel to bill Verizon for these facilities because they do not provide entrance

facilities to Verizon.” *CoreTel Virginia, LLC v. Verizon Virginia LLC*, 2013 WL 1755199. The Fourth Circuit accepted and expanded upon this logic. “We agree with Verizon that the multiplexing and trunk ports at issue are not entrance facilities under the ICA. ICA § 4.3.5 therefore provides no basis for CoreTel's facilities charges.” *CoreTel Virginia*, 752 F.3d, at 372.

Thus, the Virginia case courts relied on a provision of the Virginia ICA—section 4.3.5—which has no analogue in the Pennsylvania ICA. Instead, the Pennsylvania ICA contains its own distinct provisions to establish the parties’ obligation relative to facilities for interconnection. *See*, ICA, Attachment IV, §§ 1.1, 1.2, 2.1, 2.2, & etc. Attachment IV does not even specifically use the term “entrance facility,” much less limit Core’s ability to recover facilities charges on the factual issue whether or not Core provides an entrance facility.

Finally, by raising preclusion arguments in the context of a case of ICA enforcement, Verizon ignores important federal law precedent about which Verizon should be especially cognizant. Reviewing a case of ICA enforcement between Verizon’s New England affiliate and a CLEC, the First Circuit found that “we must first answer the preliminary question of whether application of a federal common law rule of issue preclusion would be consistent with Congress's intent in enacting the TCA.” *Global Naps, Inc. v. Massachusetts Dep't of Telecommunications & Energy*, 427 F.3d 34, 45 (1st Cir. 2005). In that case, the CLEC had won an important decision before the Rhode Island commission, involving interpretation of an ICA clause, and argued that the Massachusetts commission was bound, by the Full Faith and Credit clause of the Constitution, and by issue preclusion, to interpret the same clause the same way as the Rhode Island Commission. *Id.*, at 40. (“Global argued that since it and Verizon had fully litigated the issue of whether the *Internet Traffic Order* was “resolution of this issue” under the

identically worded Rhode Island agreement before the RIPUC, the DTE was collaterally estopped from relitigating the same.”)

Rejecting the CLEC’s application of issue preclusion, the court reasoned:

[I]ssue preclusion rules are about allocation of authority to decide a question. General application of the federal common law of issue preclusion would threaten two different allocations of power under the TCA: the allocation among the commissions of each state as to the effectuation of their state’s policies and the allocation of power between the FCC and the states.

After carefully reviewing the language, history, structure and implementation of the TCA, the court concluded that the “general implementation of default common law issue preclusion rules could threaten the authority allocated to the FCC.” *Id.*, at 47.

In a similar vein, the Third Circuit has found, in another ICA enforcement involving Verizon, that “every indication is that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete.” *Core Commc’ns, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 342 (3d Cir. 2007). “Pursuant to the FCC’s guidance, we hold that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission’s decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one.” *Id.*, at 344.

Verizon’s attempt to apply common law issue preclusion principles is inconsistent with these federal law precedents. Application of issue preclusion would deny the Commission its rightful role in the interpretation and enforcement of ICAs which it has approved and which governs the actions of carriers which it has certificated.

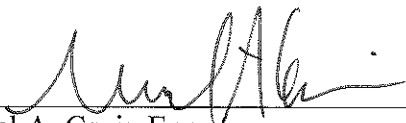
3. Verizon's Unclean Hands Defense is Baseless

Unclean hands does not apply here. This affirmative defense, as the very language Verizon quotes makes clear, *V. Br.*, at 43-44, is a defense to relief sought in *equity*. Core seeks no equitable relief here—only the enforcement of its contract with Verizon. Further, “[t]he unclean hands doctrine does not apply unless the alleged misconduct relates directly to the transaction that is the subject of the complaint.” *In the Matter of Sprint Commc'ns Co. L.P., Complainant*, 26 F.C.C. Rcd. 10780, 10789-90 (2011). Verizon complains that Core does not pay Verizon special access bills, which are not at issue in this case. *V. Br.*, at 43-44. Core can readily make the same complaint relative to its own bills to Verizon. Core can also make the case that Verizon continues to bill Core at inflated special access rates, contrary to the very Virginia case precedent that it seeks to enforce against Core. But Verizon's bills to Core are not the subject of the complaint in this matter. None of these allegations is relevant to the case at bar.

III. Conclusion

For all of the foregoing reasons, Core respectfully requests that the Commission reject the contentions raised in Verizon's Initial Post-Hearing Brief, and grant Core the relief sought in its Main Brief.

Respectfully submitted,



Michael A. Gruin Esq.
Attorney ID No.: 78625
17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
mag@stevenslee.com

*Counsel for Complainant Core
Communications, Inc.*

January 12, 2015

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CORE COMMUNICATIONS, INC.
Complainant

v.

VERIZON PENNSYLVANIA LLC
Respondent

Docket No. C-2014-2406550

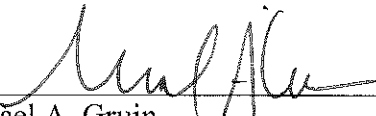
CERTIFICATION OF SERVICE

I hereby certify that I have this day served by First Class U.S. Mail and Electronic Mail a true and correct copy of the foregoing Reply Brief upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Suzan D. Paiva, Esq.
Verizon Pennsylvania, Inc.
1717 Arch Street, 3 East
Philadelphia PA 19103

January 12, 2015



Michael A. Gruin