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November 27, 2007

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Re: Petition of Core Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. §252(b) with Windstream Pennsylvania, Inc. f/k/a Alltel Pennsylvania, Inc.
Docket No. A-310922F7004

Dear Sir:

Enclosed for filing on behalf of Windstream Pennsylvania, Inc., are an original and nine (9) copies of its Main Brief (Proprietary and Public versions) in the above-referenced matter. A Certificate of Service is attached.

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By

D. Mark Thomas

Enclosures
cc: Certificate of Service (w/enclosure)
Kimberly K. Bennett (w/enclosure)
(via email only)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Administrative Law Judge
David A. Salapa, Presiding

Petition of Core Communications, Inc., for Arbitration of Certain Terms and Conditions of the Proposed Agreement with Windstream Pennsylvania, Inc., Pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	**No. A-310922F7004**

**** PUBLIC VERSION - CONTAINS REDACTED MATERIAL ****

REPLY BRIEF OF WINDSTREAM PENNSYLVANIA, INC.

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Dated: November 27, 2007

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I. INTRODUCTION

Windstream Pennsylvania, Inc. ("Windstream") files this Reply Brief in response to the Main Brief of Core Communications, Inc. ("Core") filed on October 25, 2007. As an initial matter, the characteristics of each party are key to understanding why Core's analysis in its Main Brief is flawed. Windstream is an incumbent local exchange carrier ("ILEC") certified to operate and maintaining network only in its certificated ILEC exchanges. Windstream is not a Bell Operating Company ("BOC") as defined in the Telecommunications Act of 1996 ("the Act") (47 U.S.C. §153(4)) and does not provide LATA-wide ubiquitous service. Windstream has accelerated broadband obligations in Pennsylvania pursuant to Act 2004-183 ("House Bill 30") and certain obligations to interconnect with CLECs like Core within Windstream's network.

Core was certified by the Commission on December 4, 2006 to operate in Windstream's ILEC service territory. (*See*, Docket Nos. A-310922F0002, AmA and A-310922F0002, AmB.) This arbitration proceeding concerns Core's provision of service within Windstream's territory, and Core's provision of service outside of Windstream's network is the subject of other pending proceedings before the Commission. Core intends to serve as an aggregator of Internet service provider traffic ("ISP-bound traffic") whereby Windstream customers using dial-up Internet service will access ISPs by dialing phone numbers rate centered by Core in Windstream's serving area. Much of the traffic between the parties is expected to be one-way traffic which gives rise to concerns regarding routing of traffic and intercarrier compensation in order to eliminate potential for arbitrage by any carrier operating under the Interconnection Agreement.

Petition of Global NAPs South, Inc. for Arbitration pursuant to 47 U.S.C. §252(b) Interconnection Rates, Terms and Conditions with Verizon Pennsylvania, Inc., Opinion a Order, Docket No. A-310771F7000 (April 17, 2003).

In the Matter of Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitrati

These distinctions are lost in Core's Main Brief. Core treats Windstream as a BOC in some instances arguing that Windstream should interconnect with Core anywhere in the LATA and in other instances views Windstream as an entity charged with maintaining network

anywhere in Pennsylvania that Core desires. Core's positions are unsupported in law or fact. For instance, contrary to applicable authorities, Core suggests that the Commission's certification of Core conclusively resolved all compensation issues with respect to the functions Core provides to dial-up ISPs and that its interconnection with Windstream should take place at any technically feasible point of Core's choosing. Core overlooks key facts such as this proceeding (and Core's certification by the Commission to operate in Windstream's territory) pertains to Core's interconnection with Windstream within Windstream's certificated ILEC territory only and not across Major Trading Areas ("MTAs") or ubiquitously throughout the LATA.

Further, Core seeks to provide the function of rate centering telephone numbers in Windstream's territory in order to provide dial-up ISPs a "local" number for end users to call to access the ISPs. Because these numbers are rated as "local" Core would then have traffic with respect to these numbers compensated as local despite the fact that the traffic is not routed as local traffic. Core set forth no facts to suggest how it will be responsible for the associated transmission path or transport costs but nevertheless asserts that Windstream should be denied applicable access charges for providing transport services for such traffic. Core also attempts a policy argument in favor of dial-up ISPs, although this argument is inconsistent with the Commonwealth's clear policy in favor of broadband.[1] Core fails to acknowledge that the General Assembly's broadband policy is in stark contrast to Core's contention that technical and financial responsibilities for VNxx traffic should be shifted to ILECs and their customers for what is otherwise interexchange traffic simply to benefit the business operations of dial-up ISPs.

In summary, Core's positions set forth in its Main Brief are unsupported in law or fact. For example, the unrefuted facts in this matter demonstrate that Core's virtual Nxx ("VNxx")

[1] The General Assembly has tasked alternatively regulated ILECs such as Windstream with accelerated broadband deployment in some cases with 80% availability by 2010 and 100% availability by 2013. (*See*, House Bill 30.)

service is not traffic routed as local traffic, and most of the authorities relied upon by Core have little or no applicability to the facts in this proceeding. Resolution of the issues in a reasonable and lawful manner demands that Windstream's positions on the remaining issues be adopted for inclusion in the parties' resulting interconnection agreement.

II. REPLY ARGUMENT

Issue No. 1: General Terms and Conditions ("GTC") Issue No. 3 – Security Deposits should be resolved in favor of Windstream's position that the Interconnection Agreement should include language providing for reasonable security deposits in advance of provision of service.

Discussion: Windstream proposed language in Section 8.0 of the Interconnection Agreement that would require Core (or any other CLEC electing to operate under the Interconnection Agreement) to post a security deposit prior to Windstream providing service or processing orders and to increase any such deposit if circumstances warrant. In its Main Brief, Core acknowledged that it had accepted most of Windstream's proposed security deposit language but stated that it continued to oppose certain sections which Core believed were "unilateral and unconstrained." (Core Main Brief at page 15.) Core never proposed any changes to Section 8.0 to make the provisions mutual such that Core's opposition to Section 8.0 on the basis that it is "unilateral" is unjustified. (*See*, Appendix 33 attached to Core's Arbitration Petition.) Moreover, there is nothing on the record to suggest that the remaining language in dispute in Section 8.0 is "extreme" or "out of line with standard industry practice" (Core Main Brief at page 16). Windstream explained in detail in its main brief why Core's opposition to the remaining security deposit language is illogical as those sections are consistent with the existing language to which Core already agreed with Windstream and also consistent with language to which Core has already agreed with Verizon. As recognized by the United States Supreme Court, additional

costs (and thus, lower profits) do not necessarily indicate that a CLEC such as Core has been impaired from providing any services. [2] This recognition holds true for the security deposit requirement at issue herein.

Summary: Windstream's language in Subsections 8.1.2, 8.1.4, and 8.1.5 of the Interconnection Agreement is consistent with language already accepted by Core and should be included in the parties' Interconnection Agreement.

Issue No. 2: Network Interconnection Architecture ("NIA") Issue No. 1 – Points of Interconnection between Windstream and Core, by law, must be established within Windstream's network and certificated service territory.

Discussion: The language differences between the parties with respect to NIA Issue No. 1 is subtle but crucial. At page 17 of its Main Brief, Core includes its proposed language for Attachment 4 of the parties' Interconnection Agreement which would provide for interconnection simply at "any technically feasible point." According to Core's Proposed Finding of Fact No. 9, each party would have to deliver its originating traffic to any point designated by the other party. (Core Main Brief at page 5.) Yet, Core's language and suggested findings of fact are conflicting as Core's proposed language in Attachment 4 also requires interconnection to be in accordance with "47 U.S.C. §251, FCC implementing regulations, and state law governing interconnection." (*Id.*) The federal authorities which Core references provide that (i) as to additional obligations of ILECs like Windstream, interconnection must occur at be "at any technically feasible point within the carrier's network" (see, §251(c)(2)(B); emphasis added) and (ii) an ILEC shall provide interconnection "with the incumbent LEC's network...at any technically feasible point within the incumbent LEC's network" (see, FCC regulation

[2] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (U.S. 1999) at 389. (The Court's analysis supports the position in this instance that a reasonable security deposit is nothing more than a cost of doing business which does not impair

§51.305(a)(2) implementing §251; emphasis added). Thus, on the one hand, Core's language for Attachment 4 purports to allow interconnection merely at any technically feasible point as designated by Core but at the same time purports to require compliance with federal authorities. If Core's intent truly is to comply with the federal authorities it references, then Core should not object to clarifying in Attachment 4 that interconnection must occur at any technically feasible point(s) within Windstream's network.

In attempting to circumvent the requirement that interconnection must be within Windstream's network, Core sets forth several analyses in its Main Brief, each of which is flawed. **First**, Core contends that its proposal is acceptable because it allows interconnection within the LATA. (Core Main Brief at page 18). Specifically, Core offers Proposed Finding of Fact No. 12 that Core should have the "sole right and discretion to initiate interconnection in each LATA." (Core Main Brief at page 6; emphasis omitted.) Core's proposed finding of fact is inconsistent with its proposed language in Attachment 4 which would on the one hand require interconnection merely at any technically feasible point of Core's choosing but on the other hand also require compliance with the Act and FCC's implementing regulations. Additionally, Core's argument is fundamentally flawed as Core fails to acknowledge that Windstream is not a BOC and is not certified to and does not offer ubiquitous service throughout the LATA. Thus, interconnection anywhere in the LATA, as suggested by Core, is not within Windstream's network and, therefore, is not consistent with applicable law or FCC regulations.

Second, Core incorrectly suggests that Windstream's language would require Core to establish a single point of interconnection at Windstream's switch. (*Id.* at page 19; Core Proposed Finding of Fact No. 8.) Core's statement is unsupported by the facts. Windstream repeatedly has stated throughout this proceeding that it does not oppose dual points of

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Core's ability to provide service).

interconnection provided they are lawfully within Windstream's network. Indeed, Windstream's proposed interconnection language expressly allows interconnection at any technically feasible point(s) within Windstream's network – and not a single point at Windstream's switch.

Third, Core suggests that its proposal to require Windstream to deliver traffic to any technically feasible point selected by Core, regardless of whether that point is outside of Windstream's network, *is consistent with industry practice.* (*Core Main Brief at page 24; Core* Proposed Finding of Fact No. 11.) Core's statement is unsupported by the facts in this proceeding. Core's discovery responses in this matter demonstrate that its points of interconnection with Verizon are on Verizon's network. *****INSERT CONFIDENTIAL MATERIAL ***** [redacted] *****END CONFIDENTIAL MATERIAL *****

As a BOC, Verizon maintains network throughout the LATA. Thus, when Core asserts in its Main Brief (at page 24) that its other agreements with Verizon "implement the principle that

the originating carrier is responsible to provide its own transport", Core tells only half the story. More accurately, as reflected in Core's discovery responses discussed above, Core maintains the points of interconnection with Verizon on Verizon's network, and each party is responsible for the transport to its side of the point within Verizon's network. Consequently, Core's assertion is without merit that it is standard practice for interconnection to occur outside of the ILEC's network. The facts of this case, as presented by Core, demonstrate that Core's assertion is not consistent with even Core's own practice with Verizon in Pennsylvania, Maryland, or Washington, D.C.

Fourth, Core attempts to rely on FCC rules which Core asserts preclude a carrier from imposing charges on another carrier "in connection with traffic that originates on its own network." (Core Main Brief at page 19; Core Proposed Conclusion of Law No. 1.) Again, Core's analysis is flawed. The FCC rule on which Core relies (47 C.F.R. §51.703(b)) excludes interexchange traffic. Traffic that extends beyond Windstream's ILEC exchange boundary is interexchange traffic and is not subject to the FCC regulation cited by Core. In fact, the FCC regulation expressly allows one carrier to charge another carrier for its originating interexchange traffic.[3] Similarly, although Core fails to note the distinction in its analysis, the cases Core cites as relying upon this FCC rule involve intra-MTA wireless traffic or intraexchange traffic within the LATA in the case of a serving BOC. Simply, the FCC regulation on which Core relies has no applicability on the facts of this proceeding where Core proposes to exchange interexchange traffic with Windstream which Core merely relabels as "local."

In this Commission's April 17, 2003 Opinion and Order in the *Petition of Global NAPs South, Inc. for Arbitration pursuant to 47 U.S.C. §252(b) of Interconnection Rates, Terms and*

[3] It is important to note also that such Windstream "originating traffic" about which Core complains results from end users in Windstream's service territory calling dial-up ISPs served by Core.

Conditions with Verizon Pennsylvania, Inc., this Commission relied on the FCC rule cited by Core as it considered the issue of interconnection at one point in the LATA (as Verizon is a BOC with network throughout the LATA) and a CLEC's choosing of a point of interconnection "on the network". (*Id.* at page 19.) In the Global NAPs decision, the Commission addressed interconnection points and the impact of the associated transport costs but all with respect to interconnection on Verizon's network. Likewise, Windstream has offered language to Core that does not dictate a specific point of interconnection that is cheapest or most efficient for Windstream but instead merely is at any technically feasible point(s) within Windstream's network. Windstream's position with Core is entirely consistent with FCC regulations and the Commission's Global NAPs decision which allow interconnection at any technically feasible point(s) on the ILEC's network.

Fifth, Core contends that this Commission's decision in *Petition of Cellco Partnership d/b/a Verizon Wireless* ("Verizon Wireless Order" or "Verizon Wireless Case")[4] supports Core's position on this issue. (Core Main Brief at page 20.) Again, Core's analysis is in error. Core first disregards the fact that the Verizon Wireless Order dealt with the particular issue of intra-MTA traffic and the specific differences between wireless carriers' local calling scopes and those of ILECs. (*Id.* at page 22.) Core also asserts that the Verizon Wireless Order addressed a dual interconnection arrangement "that exactly mirrors Core's proposal in this arbitration." (*Id.* at page 20; Core Proposed Conclusion of Law No. 7.) Core is wrong in both respects.

The Commission's findings in its order make clear that the issues in the Verizon Wireless Case were specific to ILEC-wireless interconnection only and also involved issues relative to the

[4] *In the Matter of Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Alltel Pennsylvania, Inc.*, Opinion and Order, Docket No. A-310489F70004.

ITORP process - none of which is applicable to this proceeding with Core. (See, *e.g.* Verizon Wireless Order at page 10 noting that a major area of concern was traffic indirectly routed pursuant to ITORP arrangements and at page 48 noting that "When the FCC concluded that IntraMTA traffic is local traffic, it expressed an intent to provide CMRS providers comparable interconnection and calling area treatment as wireline LECs.") As the Commission noted in the Verizon Wireless Order, "The MTA adds another layer of complexity to this proceeding...What is problematic in this proceeding is that a MTA encompasses a large geographic area which may cross several LATAs or extend beyond the local calling area of a wireline LEC." (*Id.* at page 17.) In the Verizon Wireless Order, the Commission determined that intra-MTA calls were classified as "local" under FCC regulations, but the traffic in this case that Core attempts to compare to wireless intra-MTA traffic and that Core would have Windstream deliver beyond Windstream's network and ILEC exchange boundaries is undeniably not local traffic. Rather, the traffic is interexchange traffic.

Core's conclusion that the Verizon Wireless Order "leaves no room for Windstream's position on this issue" (Core Main Brief at page 23) is unsubstantiated by the facts on the record herein. Core's position simply does not track the Commission's analysis in the Verizon Wireless Order which very clearly grappled with issues particular to wireless providers and ILECs. In sharp contrast, the issues here pertain to local interconnection with a CLEC whose relevant certified area for purposes of this arbitration involves only the CLEC's (*i.e.*, Core's) provision of service within Windstream's certificated ILEC area and not a larger area such as an MTA.

Further, based on the record in the Verizon Wireless Case, it is also evident that Core's conclusion is incorrect that the two cases involve exactly the same interconnection arrangements. In fact, it is impossible to reach such a conclusion since Core (unlike Verizon Wireless) has

failed in this case to identify where it proposes to interconnect with Windstream and instead has proposed language allowing interconnection merely at "any technically feasible point."

Significantly, despite Core's reliance on the Verizon Wireless Order which is misplaced as discussed above, Core disregards the Commission's full determination in that proceeding. Even if the Verizon Wireless Order could be considered to have any precedential impact on the instant proceeding, then the Commission should recognize (as it did in the case of Verizon Wireless) that Windstream should be allowed to assess a fee to Windstream's customers placing calls to dial-up ISPs supported by Core in order for Windstream to recover the costs associated with any decision by Core to place its point of interconnection at some distant location outside of Windstream's network.[5] Indeed, although Core attempts to discount this cost recovery mechanism as a "truism" (Core Main Brief at page 25), it is important to note that the Commission's findings in the Verizon Wireless Order (including its determination as to cost recovery) resulted in Verizon Wireless and Windstream (then called "Alltel") entering into an interconnection agreement lawfully providing for interconnection points within Windstream's network. Additionally, Core's argument rings hollow that "Windstream has done nothing in this proceeding to shed further light on its 'costs'" (Core Main Brief at page 25) given that Core, throughout the course of this proceeding, has failed to identify for Windstream exactly where Core proposes to interconnect with Windstream.

[5] Recovery of transport costs is particularly important here given that Core intends to function as an ISP aggregator. Unlike the Verizon Wireless Case, the traffic in Core's case is expected to be one-way traffic thereby making cost recovery associated with any decision by Core to maintain a point of interconnection at some distant location especially pertinent. In fact, this type of scenario gives rise to the potential for arbitrage as noted by the FCC in its *ISP Remand Order*. Consequently, Core's suggestion that "locating that single Core IP at a centralized location in Verizon territory appears all the more reasonable" rings true only if the Commission views as acceptable the shifting of all one-way transport costs associated with Core's business decisions in accommodating dial-up ISPs to Windstream and Windstream's end users. (See, Core Main Brief at page 27.) More appropriately, the Commission should discourage the potential for such arbitrage by making certain that Core is financially and technically responsible for its business decisions – including establishment of its point of interconnection with ILECs such as Windstream.

Summary: The unambiguous language of §251 of the Act requires ILECs to provide for interconnection at any technically feasible point *within* their network. (47 U.S.C. §251(c)(2)(B).) The FCC's rules implementing this section of the Act are equally as clear, stating in Rule 51.305 that an ILEC "shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network...[a]t any technically feasible point within the incumbent LEC's network...." (47 C.F.R. §51.305(a)(2). Emphasis added.) For purposes of this arbitration, the local calling scopes of Windstream and Core are identical, and any determination peculiar to the comparison of calling scopes between LECs and wireless carriers is irrelevant. As a matter of law, a requesting CLEC such as Core must establish a point of interconnection with Windstream within Windstream's network. Core's proposed language is vague as it purports to require compliance with these federal authorities but stops short of clarifying that interconnection be within Windstream's network. Windstream's proposed language in Attachment 4 of the Interconnection Agreement, however, virtually mirrors the applicable law and states that interconnection shall be at any technically feasible point(s) on Windstream's interconnected network within the LATA or at a fiber meet point to which the Parties mutually agree under the terms of the agreement. Similarly, Windstream's language provides that each interconnection point must be located within Windstream's serving territory in the LATA. (*See*, Appendix 33 to the Arbitration Petition.) Windstream's language is consistent with applicable law, Commission precedent, and even Core's own practice with Verizon in Pennsylvania and neighboring states. Windstream's language with respect to NIA Issue No. 1 should be accepted.

Issue No. 3: NIA Issue No. 4 – It is reasonable and consistent with commission precedent and standard practice that indirect interconnection between parties be

subject to a traffic volume threshold (DS1) after which point the parties must establish direct interconnection.

Discussion: Core opposes Windstream's language in Section 12 of Attachment 4 which would apply a DS1 threshold to traffic exchanged between the parties via indirect interconnection at which point the applicable traffic would be subject to direct interconnection. (Core Main Brief at page 28 and Core Proposed Finding of Fact No. 17 that "neither party should limit arbitrarily the other party's interconnection options.") Core primarily objects to Windstream's language on NIA Issue No. 4 based on Core's contention that a DS1 volume limitation is "arbitrary" and Core's incorrect assertion that Windstream would require establishment of direct interconnection to "each and every Windstream end office." (Core Main Brief at page 29.) Core's arguments on both accounts are false.

While Windstream believes its main brief on this issue is sufficient to determine the outcome of this issue in Windstream's favor, it is important to respond particularly to the two misconceptions enumerated above. To begin, a DS1 threshold represents a standard unit of network capacity and an efficient network design (Respondent No. 1 at 19, lines 1-12; Respondent No. 1R at 10, lines 13-14) and, pursuant to this Commission's precedent, is not arbitrary. Curiously, Core relies extensively on the Verizon Wireless Order for its position on NIA Issue No. 1 which is flawed for the reasons explained previously, but Core makes no mention of the Commission's finding in the Verizon Wireless Order regarding a DS1 volume limitation on indirect interconnection. (Verizon Wireless Order at page 81.) Specifically, that order upheld a DS1 level as standard, efficient, and generally acceptable, and the Commission's finding on this point is directly analogous to the issue in this instant arbitration. (*Id.*)

Additionally, Core is incorrect that Windstream's language would require Core to "interconnect directly with each and every Windstream end office, if the total 'traffic volumes'

between Core and Windstream anywhere in Pennsylvania exceed a 'single DS1 of traffic per month.'" (Core Main Brief at page 30.) There is no support for Core's interpretation of this issue. To the contrary, Windstream has explained repeatedly on the record that its proposed language would require direct interconnection only to the particular Windstream end office(s) to which indirect traffic volumes between Core and Windstream exceeded a DS1 threshold.

Summary: Windstream's proposed language in Section 12 of Attachment 4 is reasonable, efficient, and consistent with applicable Commission precedent. Windstream's language should be adopted for inclusion in the parties' Interconnection Agreement.

Issue No. 4: NIA Issue No. 5 – It is improper for the Interconnection Agreement between Windstream and Core, which is a contractual arrangement between only two parties, to establish payment obligations of either Windstream or Core to third-party tandem providers who are not parties thereto.

Discussion: With respect to NIA Issue No. 5, Core recognized in its Main Brief (at page 31) the concern that payment obligations to third parties who are not parties to this Interconnection Agreement "should not be prejudged in an ICA between Core and Windstream." Core then explained that it is concerned that any third party charges that may exist should be payable by the originating party. (*Id.*) Windstream's language in Section 12.2.3 of Attachment 4 of the Interconnection Agreement addresses Core's concern and acknowledges that each party is responsible for its own arrangements with third parties. (*See*, Appendix 33 to the Arbitration Petition.) However, Windstream's language (unlike that proposed by Core) does not impose payment obligations within the Interconnection Agreement with respect to third parties that are not parties to the Interconnection Agreement. Windstream's approach is consistent with the Commission's prior determination in the Verizon Wireless Order, although Core omits any

reference to that precedent in its Main Brief. Again, while that order is not indicative of other issues in this instant proceeding, on this general legal issue it is relevant and held that "the terms and conditions of the agreement between the party choosing to interconnect indirectly and the third party transiting provider are legally immaterial to the interconnection agreement between Alltel and Verizon Wireless." (Verizon Wireless Order at page 53.)

Summary: Windstream's proposed language on NIA Issue No. 5 is legally sound, consistent with Commission precedent, and should be included in the parties' Interconnection Agreement.

Issue No. 5: Intercarrier Compensation ("ICC") Issue No. 1 – The issue of VNxx traffic is not ripe for consideration in this arbitration or by the Commission, and Core's attempts otherwise to establish VNxx traffic as local traffic subject to reciprocal compensation are fatally flawed.

Discussion: Core devotes much of its attention in its Main Brief to the issue of VNxx traffic. Nevertheless, Core's assertions with respect to ICC Issue No. 1 remain unsubstantiated in law and fact. Despite the almost twenty pages of discussion, Core fails to address the threshold matter that this issue may not properly be considered within the context of this arbitration. Core does not refute and cannot deny that Appendix 33 to the Arbitration Petition, which is the last redlined draft interconnection agreement exchanged between the parties during negotiations, contains no reference to VNxx traffic or Core's proposed compensation arrangements of VNxx traffic. Further, Core set forth no facts on the record to evidence or even suggest that the parties engaged in any negotiations with respect to whether VNxx traffic would be exchanged or how it would be compensated. (*See*, Core Main Brief pages 33 – 52.) Similarly, Core fails to address that by federal law (47 U.S.C. §252(b)(2)(A)(i)), the party petitioning for arbitration (here, Core) must submit with its petition all relevant documentation regarding unresolved issues or that none of the documentation attached to Core's Arbitration Petition addressed the issue of VNxx.

Rationally, it follows that an issue cannot be unresolved and ripe for arbitration if that issue was not discussed or addressed during negotiations. Due to the particular circumstances surrounding Core's certification, this proceeding has been ongoing for an extensive period of time, and based on Core's testimony in this matter, Core apparently has intended to base its business *plans* around a VNxx offering. Yet, Core failed to offer any reason in its Main Brief or otherwise on the record in this proceeding why it did not raise the issue of VNxx during negotiations with Windstream. Likewise, Core offered no explanation as to how it believes that ICC Issue No. 1 is ripe for consideration in this arbitration proceeding.

Notwithstanding that the threshold issue above necessitates dismissal of ICC Issue No. 1, Core's remaining arguments supporting its contention that VNxx traffic should be subject to reciprocal compensation are unsubstantiated. Windstream believes that its main brief on this issue is sufficient to thoroughly address the reasons why VNxx traffic is not fairly considered or compensated as local traffic, but Windstream also believes that it is necessary to address particular misperceptions and flawed reasoning as set forth in Core's Main Brief:

(a) *VNxx traffic is "rated and routed" as local traffic.* (Core Main Brief at page 33. Core Proposed Finding of Fact No. 25.) Such a contention is necessarily false as the rating and routing points of VNxx traffic are different which is the very essence of what makes VNxx traffic "virtual" traffic. As clearly set forth in the record in this proceeding and in the Commission's order regarding VNxx codes on which Core relies, a code is associated with a rate center or local calling area other than the area where a customer is physically located. Thus, VNxx traffic necessarily is not and cannot be "routed" as local traffic as Core suggests.

(b) *VNxx traffic serves the same functionality as foreign exchange ("FX") service.* (Core Main Brief at page 33; Core Proposed Finding of Fact No. 20.) As discussed in extensive

detail in Windstream's testimony and main brief, true FX service (as supported by Windstream's own tariff on file with the Commission) provides for an end user's payment of associated transport costs in lieu of access charges. In contrast, Core's proposed VNxx service merely relabels interexchange traffic as "local" without any consideration of the associated transmission path or transport costs.

(c) *VNxx calls are compensable as Section 251(b)(5) traffic.* (*Id.* at page 34-35.) Core itself acknowledges that the FCC has excluded intrastate exchange access traffic from the scope of traffic that is subject to reciprocal compensation but claims that Windstream has failed to offer any justification for why VNxx traffic is exchange access traffic exempt from reciprocal compensation. (*Id.* at 35.) Core's attempt to simply discount Windstream's extensive testimony on this issue is to no avail. It is unrefuted on the record herein that Core's proposed VNxx traffic would extend across exchange boundaries without any corresponding treatment for the transmission path or transport costs. It is undisputed that Windstream's tariff allows a caller subscribing to true FX service to send or receive toll calls from callers in another exchange and to have the jurisdiction and rating of those calls treated as local by *paying for a dedicated transmission path (or certain transport costs)*. It is further undisputed that Windstream's tariff clarifies that a customer subscribing to FX service will be billed for all applicable charges, including inter-exchange mileage charges (in lieu of per minute toll charges) and that FX service is limited to trunk lines extending from one exchange to another between which toll charges are applicable.[6] Core does not refute that it proposes to utilize VNxx service without providing a

[6] Core states that Windstream treats FX calls placed by its own retail end users as local calls and does not impose access charges on its end users. (Core Main Brief at page 36. Core Proposed Finding of Fact No. 23.) This statement again tells only half the story and ignores Windstream's testimony and clear tariff language which establish that end users are responsible for associated transport costs in lieu of access charges. However, with its proposed VNxx, Core suggests that it should not be responsible for any associated costs and instead would actually have Windstream pay reciprocal compensation to Core although Windstream would be providing the transmission path and transport.

transmission path or applicable transport costs. It is undisputed that companies seeking to establish extended area service ("EAS") establish and maintain a dedicated transmission path and provide a mechanism through which the additional transport costs are recovered (typically in the form of a rate additive). It is undisputed that remote call forwarding service is not available to provide the VNxx function as Core suggested and that customers utilizing Windstream's remote call forwarding are responsible for toll charges incurred for calls between the forwarding number and the terminating number. Thus, it is undisputed on the record herein that Core failed in each of its attempts to compare VNxx service to other services which Core claims are "exempt" from access charges. Therefore, but for Core's attempt to place a retail label on VNxx traffic as "local," the facts demonstrate very clearly that VNxx traffic is routed as interexchange traffic and is subject to wholesale access compensation.

(d) *Unlike an access call, a VNxx call involves two LECs and no IXC.* (Core Main Brief at page 35.) To begin, Core sets forth this statement in its brief although this contention is not on the record. Nevertheless, Core's statement is false. Access calls may also involve two ILECs such as is the case with intraLATA toll.

(e) *Application of the access regime to VNxx calls yields absurd results.* (*Id.*) There is nothing absurd about requiring a carrier like Core to pay appropriate wholesale compensation for traffic that is routed as interexchange traffic despite the carrier's intent to offer the VNxx service as "local" traffic to its retail customers. Indeed, the concept of requiring compensation for such transmission and transport costs is commonly accepted and approved by the Commission with true FX service and EAS additives.

(f) *The FCC has stated on numerous occasions that VNxx arrangements are properly rated as local and are subject to section 251(b)(5) of the Act for intercarrier compensation*

purposes. (Core Main Brief at page 36.) The cases cited by Core for this contention generally do not stand for the proposition which Core claims. For example, the *Starpower* decision (*Id.* at page 37) was fact-specific and turned on the fact that Verizon South provisioned service itself through the use of VNxx arrangements (as even noted by Core on page 38 of its Main Brief) and also on an asserted agreement between Verizon South and Starpower Communications to provide VNxx service. Those facts are lacking in this instant proceeding. Indeed, it is unrefuted on the record herein that Windstream does not provision service to its customers through the use of VNxx arrangements. (Refuting Core Proposed Conclusion of Law No. 8.) Accordingly, the *Starpower* decision can be said to have little relevance, if any to this arbitration. In fact, the only case addressed in the parties' briefs which squarely deals with compensation as to VNxx traffic is the July 5, 2006 decision by the United States Court of Appeals for the Second Circuit in *Global Naps, Inc. v. Verizon New England, Inc. et. al.* (454 F.3d 91) cited by Windstream. There, the Court reached a conclusion entirely consistent with that of Windstream that VNxx service disguises the nature of calls, provides a carrier an opportunity to avoid paying the cost of doing business, and is not fairly likened to FX service. (*Id.* at 31-32.) In short, the Court concluded that VNxx should not preclude users from "obtaining nongeographically correlated numbers" but merely requires that someone pay the ILEC for the use of its infrastructure. (*Id.*) Thus, Core is misguided when it suggests that Windstream's position on this issue requires Core to structure its retail offerings more like a rural ILEC. (Core Main Brief at page 48. Core Proposed Finding of Fact No. 29.) To the contrary, Core is free to structure its retail offers in whatever manner Core chooses, but Core must recognize that its retail services do not dictate wholesale compensation.

(g) *It is industry standard that calls are rated based on the NPA-Nxx combinations, not geographical end points.* (Core Main Brief at page 38. Core Proposed Finding of Fact No.

32.) Core's discussion on this point is misguided. Windstream's position is simple. Because the very nature of VNxx traffic conceals the actual routing of calls and is intended to have interexchange calls appear as local calls, the only way to ensure proper compensation to the carrier providing the associated transmission path and transport (here, Windstream) is to use the geographic end points of a call to determine applicable compensation.[7]

(h) *ISP VNxx calls are Compensable under the ISP Remand Order.* (*Id.* at pages 38-41.) Core's contention is false. As supported by the United States District Court for the Western District of Washington,[8] the FCC's *ISP Remand Order* does not apply to non-local ISP-bound traffic. Indeed, the court was clear that although the FCC did reevaluate its use of the term "local" the FCC did not eliminate the distinction between "local" and "interexchange" traffic and the appropriate compensation regimes for each. (*Id.*) Thus, Core's claim is in error that Windstream cannot explain "why 'local' is relevant at all now that the FCC has disposed of the ambiguous 'local/non local' dichotomy." (Core Main Brief at page 42.)

(i) *The Commission has resolved treatment of ISP VNxx traffic in the Core RTC Certification Order.* (*Id.* at 43.) Although Core asserts that this issue already has been conclusively determined by the Commission, Core fails to explain why it did not seek summary judgment of this issue in this arbitration if that were the case. More importantly, Core does not address the distinction that although the Commission may have determined Core's service as an ISP aggregator to be sufficient for certification purposes, the Commission did not determine issues with respect to compensation of such ISP traffic. Indeed, evidence with respect to such compensation was not even before the Commission at that time. Core relies on the Commission's

[7] This also is the case with VoIP traffic that utilizes the public switched network but otherwise may be transmitted in a manner in which the actual locations of the calling and called parties (and therefore the proper jurisdiction of calls) may be concealed in an effort to avoid appropriate compensation. Windstream addresses this issue in response to Core's Main Brief at pages 49-51 although the issue of VoIP traffic is not before the Commission in this arbitration.

statement that Core's service is "local in nature", but Core cannot point to any dispositive finding that VNxx traffic is routed as local and exempt from access charges merely because such traffic is rated local in nature. Indeed, if that were the case and if Core's interpretation of the Commission's findings in its generic VNxx investigation were accurate, then it logically follows that the Commission would have conclusively predetermined all VNxx compensation issues in the context of Core's certification proceedings. Yet, the Commission did not do so, and the overwhelming facts and legal analysis presented in this proceeding necessitate a finding that VNxx traffic is not routed as local traffic and is clearly interexchange traffic subject to access compensation.

(j) *Requiring Compensation for VNxx calls is in the Public Interest.* (Id. at 45. Core Proposed Finding of Fact Nos. 33-34.) Core's policy arguments on this point are diametrically opposed to the Commonwealth's policy in House Bill 30 advocating stringent broadband deployment.[9] Essentially, Core's position is that it is in the public interest to rate center numbers as local numbers, have the ILECs (here Windstream) provide all associated transmission and transport functionalities, and at the same time have the ILECs pay reciprocal compensation to Core for such traffic for the purpose of benefiting the business operations of dial-up ISPs and Core. (*Id.*) Indeed, this scenario would be efficient for dial-up ISPs and Core because it transfers all transport responsibilities and costs to ILECs like Windstream who are at the same time charged by the Pennsylvania legislature with stringent broadband deployment schedules. There are no efficiencies gained or technological advancements made by Core's approach. Rather, Core's proposal and asserted policy arguments merely advocate the shifting of functions from

[8]Qwest Corporation v. Washington State Utilities and Transportation Commission, 484 F. Supp. 2d 1160; 2007 U.S. *Dist.* LEXIS 26194 (April 9, 2007). ("Qwest Decision")

Core to Windstream while also shifting all financial responsibilities to Windstream and its end users as well.[10] Again, the policy arguments Core espouses in furtherance of its dial-up ISP proposal seem misguided given the clear policy of Pennsylvania in favor of broadband.

(k) *As the originating carrier in ISP-bound VNxx traffic scenarios, Windstream has a legal duty to deliver its traffic to Core free of charge.* (*Id.* at page 48. Core Proposed Conclusion of Law No. 9.) Again, for the reasons set forth above, Core wrongfully relies upon the FCC regulation which on its face does not apply to interexchange traffic. Again, as Core's VNxx traffic is interexchange traffic but for Core's decision to label it as "local" such traffic is not subject to reciprocal compensation or the FCC rule cited by Core.

Summary: The issues of jurisdiction and compensation of VNxx traffic were not negotiated by the parties and may not now be submitted for consideration by the Commission in the context of this arbitration. Core's proposal with respect to ICC Issue No. 1 should be rejected on this basis alone. Even if ICC Issue No. 1 had been negotiated between the parties, Core's analysis that VNxx traffic is "local" traffic subject to reciprocal compensation and exempt from access compensation fails on all fronts. In squarely deciding the issue of VNxx compensation, the United States Court of Appeals for the Second Circuit determined that VNxx proposals merely provide opportunities for entrepreneurs unwilling to pay the cost of doing business. Likewise, Core's proposal that it should be allowed to provide VNxx service without incurring any

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[9] In House Bill 30, the General Assembly determined that it is the policy of the Commonwealth to encourage the accelerated provision of advanced services and deployment of a "universally available, state-of-the-art, interactive broadband telecommunications network." (House Bill 30 §3011(2).)

[10] Core states, without any substantiation, that Windstream's claims reflect " the insular views of a rural telephone company obsessed with recovering its costs multiple times." (Core Main Brief at page 47.) This statement is wholly without merit. The overwhelming and unrefuted evidence shows that Core's VNxx service transfers all financial transport responsibilities to Windstream or its end users and that in the absence of applicable access compensation, Windstream would be left without any compensation for performing the transport functions, and under Core's proposal would actually remit reciprocal compensation to Core even though Windstream is the party performing the transport functions and providing the transmission path.

associated transport costs and without providing the transmission path functionalities should be rejected. If this issue were to be considered within the context of this arbitration, then the Commission should recognize that VNxx traffic is interexchange traffic subject to access compensation and not subject to reciprocal compensation.

Issue No. 6: ICC Issue No. 3 – The Interconnection Agreement should provide compensation mechanisms both for instances where local traffic is roughly balanced (subject to bill and keep) and where local traffic is not roughly balanced (subject to reciprocal compensation).

Discussion: Core's discussion on this issue (Core Main Brief at pages 52-53) sets forth an argument which inaccurately states that the FCC "frowned on bill and keep" and also continues to confuse the actual issue (which is whether the interconnection agreement should provide for bill-and-keep where traffic is roughly balanced) with Core's concern that traffic in its particular case as an ISP aggregator is not expected to be roughly balanced. First, Core's statement as to the FCC's opposition to bill and keep is confusing given that federal regulations expressly provide that when local traffic is roughly balanced between two parties, the most appropriate and efficient compensation method is bill and keep. (47 C.F.R. §§51.705(a)(3) and 51.713(b).) Second, Windstream has not proposed language that would deny compensation in the event that traffic is not roughly balanced. Rather, Windstream's language provides for bill and keep where traffic is roughly balanced in order to accommodates the federal regulations cited above as well as the fact that most CLECs who do not operate as ISP aggregators do maintain roughly balanced traffic. Nevertheless, Core disregards the fact that other CLECs may adopt this interconnection agreement and that the agreement should properly provide for bill and keep in the case where traffic may be roughly balanced. Core is misguided when it claims that Windstream has not proven that traffic will be roughly balanced. (*Id.* at 53.) Evidence of such a fact is irrelevant to

the issue at hand. Instead, Windstream merely needs to demonstrate (as it has done) that there is good cause for the agreement to provide for bill and keep in instances where traffic exchanged under the agreement may be roughly balanced.

Summary: Windstream's language for Section 3.0 of Attachment 12 of the Interconnection Agreement provides for bill and keep compensation until such time as either party demonstrates an imbalance of local traffic for three consecutive months. Thus, in the event that local traffic exchanged between Windstream and Core in fact is not roughly balanced, Core would not be precluded from moving away from bill and keep. However, under Core's proposal, any other carrier adopting the interconnection agreement would be precluded from bill and keep even where traffic was roughly balanced between the parties. Additionally, Core's proposed language expands the scope from local traffic to "Section 251(b)(5) traffic" and seeks to have all such traffic subject to reciprocal compensation. To the extent that Core seeks to include VNxx traffic within the scope of its term "Section 251(b)(5) traffic," Core's language could have the result of charging Windstream reciprocal compensation with respect to VNxx traffic which is inappropriate for the reasons set forth above. Windstream's language provides alternative compensation mechanisms in cases where traffic is and is not roughly balanced, is most reasonable and consistent with FCC regulations pertaining to bill and keep, and should be included in the Interconnection Agreement.

Issue No. 7: ICC Issue No. 4 – The FCC's *ISP Remand Order* on its own terms does not apply to the facts and parties in this proceeding and does not address ISP-bound traffic delivered through the use of VNxx arrangements.

Discussion: Core's apparent interest in this issue stems from Core's position that it should receive reciprocal compensation for non-local ISP-bound traffic that is exchanged with

Windstream through Core's use of VNxx arrangements. (Core Main Brief at page 54.) As discussed, VNxx traffic is not local traffic subject to reciprocal compensation. Windstream's main brief on this issue sufficiently rebutted Core's unsubstantiated claim that "Windstream is dead wrong" on this issue. (*Id.*) In fact, in support of Core's position that Windstream should pay reciprocal compensation rates for VNxx traffic, Core cites merely to its witness testimony. (Core Main Brief at page 55.) To reiterate, the FCC's *ISP Remand Order* does not apply to non-local ISP-bound traffic as recognized in the Qwest Decision (specifically that the FCC did reevaluate its use of the term "local" in the *ISP Remand Order* but did not eliminate the distinction between "local" and "interexchange" traffic and the compensation regimes that apply to each). (*See*, Qwest Decision.) Further, contrary to Core's assertion that the FCC eliminated any distinction of "local" as to ISP-bound traffic, the Court in the Qwest Decision determined that the better view is that *the ISP Remand Order* addressed the compensation structure of only ISP-bound traffic within a local calling area." (*Id.* at 31.) Thus, Core's attempt to place its VNxx ISP offering within the parameters of the FCC's *ISP Remand Order* should be rejected. Indeed, even as to local ISP traffic, the FCC itself stated in the *ISP Remand Order* that the large volumes of virtually all one-way traffic created with dial-up ISP-bound traffic creates the potential for arbitrage opportunities. (See, e.g., *ISP Remand Order* ¶7.)

Summary: The FCC's *ISP Remand Order* applies only to local ISP traffic and not to Core's VNxx traffic, and Core's position on this issue should be rejected. The parties' Interconnection Agreement should reflect compensation of local ISP traffic only at Windstream's reciprocal compensation rate until such time as Windstream may elect under the *ISP Remand Order*, in which case local ISP traffic must be compensated at the FCC mandated rate of $0.0007. For all

VNxx traffic, Windstream should be compensated by Core pursuant to Windstream's lawful access tariffs.

Issue No. 8: ICC Issue No. 5 – The Interconnection Agreement should provide for the CLEC's establishment of appropriate codes in Windstream's local serving territory to ensure proper rating of calls and to prohibit a party from masking the actual location of customers to avoid payment of appropriate compensation.

Discussion: Core's discussion on this issue is convoluted and indicates Core's apprehension to Windstream's language may be to ensure that Core can utilize its VNxx arrangements to avoid application of applicable access compensation. First, despite Core's misunderstanding of this issue, Windstream is not seeking to require Core to maintain multiple NPA-Nxx codes in the same rate center. (Core Main Brief at page 56.) Rather, Windstream's language on this issue simply recognizes that one Nxx code can be rate centered in only one service area. Specifically, Windstream's language in Section 5.0 of Attachment 12 would require Core or any other CLEC operating under the Interconnection Agreement to establish different Nxx codes for each exchange or group of exchanges that share a common mandatory local calling scope. Windstream's language further clarifies that the parties will determine the number of Nxx codes necessary to identify the jurisdictional nature of traffic for intercompany compensation purposes. Core proposes to delete this provision. The only argument advanced by Core in its Main Brief in support of its position appears to be Core's concern that it be allowed to utilize VNxx arrangements in order to avoid access compensation or associated transport costs to Windstream.

Summary: If one party like Core (through its stated intent to use VNxx arrangements) uses the same NPA-Nxx for multiple locations, the other party (in this case, Windstream) cannot determine the location of calls in order to determine accurate compensation (*e.g.*, local or reciprocal compensation or access compensation). Thus, Core's insistence on the use of a single

NPA-Nxx for multiple locations would allow Core (or any other CLEC operating under the Interconnection Agreement) to mask the actual location of its customer(s) and, thereby, avoid payment of appropriate access compensation due to Windstream. To avoid the potential for such arbitrage and to ensure consistency with the other issues herein on VNxx, this issue should be resolved by inclusion of Windstream's language in the Interconnection Agreement.

Issue No. 9: Definition Issues - The remaining four definitions in dispute should be resolved using Windstream's language to ensure consistency with Windstream's positions on the foregoing issues.

Discussion: Core's approach with respect to the disputed definitions is similar to that of Windstream - resolution of the other issues herein should determine which parties' definitions are adopted for inclusion in the Interconnection Agreement. (See, *e.g.*, Core Main Brief at page 59 noting that Core's definition for intra-LATA toll traffic is consistent with Core's position on ICC Issue No. 1.) For example, the definition of "interconnection point" is critical to ensuring appropriate resolution of NIA Issue No. 1 that interconnection is lawful and occurs within Windstream's network as required by the Act and FCC rules. (Refuting, Core Main Brief at page 60 that "Core fully expects Windstream to establish a corresponding IP on Core's network.") Similarly, Core proposes to define "Section 251(b)(5) Traffic" in an effort to advance its misguided position that VNXX traffic is local traffic subject to reciprocal compensation. (*Id.* at page 61.)

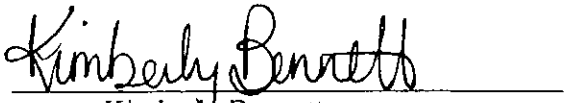
Summary: As addressed in greater detail in Windstream's main brief, Windstream's definitions on the remaining disputed terms should be included in the Interconnection Agreement in order to ensure consistency with appropriate resolution of the foregoing issues.

III. CONCLUSION

Windstream's positions on the remaining issues are lawful, reasonable, and consistent with standard practice (including Core's own practice in its interconnection with Verizon). To the contrary, Core's analysis set forth in its Main Brief as to the various issues is fundamentally flawed in key respects and factual unsubstantiated in others. As a result, Windstream's proposed language represents the most lawful, logical, and reasonable alternative and should be adopted for inclusion in the resulting Interconnection Agreement.

Respectfully submitted,

WINDSTREAM PENNSYLVANIA, INC.



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Core Communications, Inc. For Arbitration of Interconnection Rates, Terms and Conditions with Windstream Pennsylvania, Inc., Pursuant to 47 U.S.C. §252(b)	:	Docket No. A-310922F7004

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of November, 2007, served a true and correct copy of Windstream Pennsylvania, Inc.'s Main Brief upon the persons and in the manner set forth below:

EMAIL and HAND DELIVERY

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SUBJECT: A-310922F7004

TO: Office of Administrative Law Judge
Susan Hoffner

FROM: James J. McNulty
Secretary
nvl

DOCUMENT FOLDER

PETITION OF CORE COMMUNICATIONS, INC.

Copies of the Recommended Decision have been served upon all parties.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificate of mailings. A second memo will not be released for these exceptions.

DATE: March 11, 2008

SUBJECT: A-310922 F7004

DOCUMENT FOLDER

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James McNulty
Secretary
nvl

PETITION OF CORE COMMUNICATIONS, INC.

Copies of the Recommended Decision have been served upon all parties of interest.

Exceptions have been filed by:

CORE COMMUNICATIONS INC

Reply Exceptions have been received from:

WINDTREAM PENNSYLVANIA INC

cc: Annette Shelley