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December 8, 2016

VIA ELECTRONIC FILING

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street,
Harrisburg, PA 17120


Re: Core Communications, Inc. v. XO Communications Services, Inc.
Docket No. C-2009-2133609

Dear Secretary Chiavetta:

Enclosed for filing please find the Petition for Reconsideration and Clarification 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.

Best regards,

STEVENS & LEE



Michael A. Grun

cc: Certificate of Service
Cheryl Walker Davis, Director, Office of Special Assistants

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.

v.

XO Communications Services, Inc.

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:

C-2009-2133609

**PETITION OF CORE COMMUNICATIONS, INC.
FOR RECONSIDERATION & CLARIFICATION OF
COMMISSION OPINION & ORDER**

Pursuant to 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572, Core Communications, Inc.

(“Core”) requests that the Commission reconsider and clarify its November 23, 2016 Opinion & Order in the above-captioned proceeding (“*Order*”). In further support of this Petition, Core avers as follows:

1. Core files the present petition to respectfully request that the Commission address two specific issues arising from issuance of the *Order*.¹ *First*, Core requests reconsideration of the Commission’s conclusion that toll-dialed ISP-bound traffic is subject to the FCC’s rate cap of \$0.0007/MOU and not the switched access rates that would normally apply to toll-dialed traffic, and; *Second*, Core requests reconsideration and/or clarification of the *Order*’s limitation of Core’s claim to the period from February, 2010 forward, which is not consistent with the clear and undisputed findings of the I.D.

¹ Core greatly appreciates the Commission’s conscientious efforts to resolve the issues raised in this case. Core continues to evaluate whether to exercise its legal rights to appeal or otherwise seek judicial review of the *Order*, including the Commission’s analysis of the jurisdictional and preemption issues raised in this case. The filing of this petition, and the arguments raised herein, do not constitute, and shall not be construed to constitute, any estoppel, modification or waiver of Core’s rights with respect to judicial review, or of any argument Core may raise on judicial review.

Standard for Reconsideration

2. The Commission has articulated the circumstances under which a petition for reconsideration under 66 Pa. C.S. § 703(g) is appropriate:

The Public Utility Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g) of the Public Utility Code (Code)... relating to rehearings, rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572(b) of our Regulations... relating to petitions for relief following the issuance of a final decision. The standards for a petition for relief following the issuance of a final decision were addressed in *Duick v. PG&W...* (*Duick*). *Duick* held that a petition for rehearing under Subsection 703(f) of the Code must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record... A petition for reconsideration under Subsection 703(g), however, may properly raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Furthermore, such petitions are likely to succeed only when they raise "new and novel arguments" not previously heard or considerations which appear to have been overlooked or not addressed by us.²

The Toll-Dialed ISP-Bound Traffic Issue

3. Regarding the intercarrier compensation appropriate to toll-dialed ISP-bound traffic, the I.D.³ found:

Core has argued for the application of its Pennsylvania switched access rates to all the XO indirect traffic at issue herein, and I have rejected that position for the reasons previously stated. However, a remaining question is whether switched access rates apply to the non-local ISP-bound traffic which is subject to the Commission's regulatory authority.

² Opinion & Order, *In re Department of Transp. of Pennsylvania*, 2006 WL 3511224 (Pa. P.U.C.)(2006) A-00119288 (entered November 15, 2006)(emphasis added)(internal citations omitted).

³ Initial Decision, *Core Communications, Inc. v. XO Communications Services, Inc.*, Pa. P.U.C. Docket No. C-2009-2133609 (May 11, 2012).

Core's tariff defines "Switched Access Service" as "[a]ccess to the switched network of an Exchange Carrier for the purpose of originating or terminating communications." "Access Service" is defined as "[s]witched [a]ccess to the network of an Interexchange Carrier for the purpose of originating or terminating communications." The Commission has held that "[s]witched access charges are those that LECs bill to IXCs or other LECs, for using their facilities in the placement or receipt of *toll* calls." Global Order, supra (emphasis supplied).

Core has classified all of the intrastate non-local MOUs billed from February 2010 through the hearing date for CIC 5119 as "intra toll." As stated previously, XO was given the opportunity to submit evidence in opposition to this breakdown between non-local and local MOUs, and therefore could have challenged the designation of the traffic as "intra toll." XO failed to do so and therefore, no party has provided a specific designation for this traffic other than "intra toll."

XO has acknowledged the application of switched access rates to toll service and in fact claimed that it mistakenly paid over \$17,000 to Core to date because it assumed the invoices were related to toll traffic. XO St. No. 1-R, pp. 11, 20. I note that XO is certified by the Commission to provide IXC service, initially at Docket No. A-311331.

For all the foregoing reasons, I conclude that Core's switched access rates are appropriately applied to the 180,858 MOUs of "intra toll" traffic specified in Core Ex. BLM-27, and to future Core billings to XO for termination of "intra toll" ISP-bound traffic. I.D., at 33. (Emphasis added)

4. In overturning the I.D. on this issue, the *Order* made a number of findings regarding the intercarrier compensation appropriate to toll-dialed ISP-bound traffic:

- "The Commission is unpersuaded by claims that the rate for non-local dial-up ISP-bound traffic can be set higher than the \$0.0007 rate cap imposed on carriers in the *ISP Remand Order* for the reasons explained in the FCC's Amicus Brief. A carve-out for non-local dial-up ISP-bound traffic that results in rates that exceed the \$0.0007/MOU rate cap is not consistent with the *ISP Remand Order's* professed goal of stopping traffic arbitrage and contravenes Third Circuit precedent. Rate differences between

local dial-up ISP-bound traffic and non-local dial-up ISP-bound traffic will create the very arbitrage that the *ISP Remand Order* sought to eliminate.” *Order*, at 24-25.

- “With regard to the 180,858 minutes of *non-local dial-up traffic* sent from the 5119 CIC, we also believe that using the FCC’s capped rate of \$0.0007/MOU for these non-local dial-up minutes is a legally sound approach. The application of that rate does not exceed the \$0.0007/MOU rate cap the FCC imposed on dial-up traffic in its *ISP Remand Order*. That result is consistent with precedent in the Third Circuit upholding our application of a federal \$0.0007/MOU rate for CLEC-to-CLEC dial-up traffic and precedent in the Ninth Circuit holding that rates set by the states that are beyond the \$0.0007/MOU rate cap are preempted by federal law. Additionally, a \$0.0007/MOU rate is consistent with the *ISP Remand Order*’s professed goal of preventing dial-up internet rate arbitrage.” *Order*, at 33-34.
- “We are unpersuaded by claims that the rate for non-local dial-up ISP traffic can be higher because that traffic does not fall within the scope of the *ISP Remand Order* and its rate cap of \$0.0007/MOU. A carve-out for non-local dial-up traffic that results in a rate exceeding the \$0.0007/MOU rate cap is not consistent with precedent or the *ISP Remand Order*’s professed goal of stopping traffic arbitrage. Rate differences between local dial-up ISP-bound traffic and non-local dial-up ISP-bound traffic will create the very arbitrage that the *ISP Remand Order* sought to eliminate.” *Order*, at 34.
- “[T]he decisions in *Pac-West* and the *AT&T Third Circuit* on local dial-up ISP-bound traffic do not mean that non-local dial-up ISP-bound traffic is exempt from the *ISP Remand Order*. The *AT&T Third Circuit* decision found as much in affirming that ISP bound traffic is interstate. The Third Circuit also found that principles of conflict preemption would limit the Commission to setting a rate that did not exceed the \$0.0007/MOU rate cap; so long as the Commission recognized the primacy of federal law and lowered the rates, there is no conflict preemption precluding us from resolving the dispute. Finally, the FCC’s Amicus Brief arguments in *PAC-West* “confirm that the FCC’s compensation regime applies to CLEC-to-CLEC ISP-bound traffic” without differentiating between local and nonlocal.” *Order*, at 42-43.
- “The *AT&T Third Circuit* Decision limits the states’ authority to setting rates that do not exceed the federal rate cap because doing

otherwise raises conflict preemption. The Pac-West decision ruled that state rates exceeding the federal rate were preempted by federal law. And, the FCC's Amicus Brief plainly stated that the *ISP Remand Order* applied to CLEC-to-CLEC traffic without differentiating between local and nonlocal dial-up ISP-bound traffic.

Consequently, any reliance on state law to set a rate for non-local ISP-bound traffic can be done only if the resulting rate does not exceed the \$0.0007/MOU rate cap to avoid conflict preemption. Any reliance on federal law to set a rate for non-local traffic is consistent with the Third Circuit holding that the FCC's jurisdiction is not exclusive but, again, the resulting rate cannot exceed the rate cap established under federal law. Finally, the Commission can still set rates consistent with the \$0.0007/MOU rate cap given the states' constitutional authority and duty to apply federal statutes and determine statutorily appropriate remedies. In this case, our decision resolves a federal remedy of compensation for dial-up ISP bound traffic subject to the federal \$0.0007/MOU rate cap." *Order*, at 44-45.

5. Neither the FCC nor any federal court has ever found that the *ISP Remand Order* preempts state jurisdiction over intrastate access regimes or toll-dialed ISP-bound traffic, or caps the rate applicable to such traffic. On the contrary, application of intrastate switched access rates to toll-dialed traffic is consistent with *Global NAPS I* and *II*, *Pac-West*, the FCC amicus brief in *PacWest*, the *AT&T Third Circuit* and the Commission's own orders in *Core v. AT&T*, the *CenturyLink ICA Arbitration* and the *Windstream ICA Arbitration*, as well as industry standards as enshrined in Pennsylvania ICAs filed with the Commission.

6. Application of switched access rates to toll-dialed traffic by a state commission is consistent with *Global NAPS I* and *II*. In *Global NAPS I*, the First Circuit approved the Massachusetts Commission's order imposing access charges for a certain type of ISP-bound traffic called "VNXX"—charges which are nowhere mentioned in the *ISP Remand Order*. According to the First Circuit, "[t]he question before us is whether the FCC intended in the *ISP*

Remand Order to exercise its jurisdiction over the precise issue here, to the exclusion of state regulation.”⁴ Applying this analysis, the First Circuit found that “the *ISP Remand Order* does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here.”⁵

7. In approving state commission application of access charges to ISP-bound traffic, the *Global NAPS I* court was guided by an FCC amicus brief submitted in that case, in which the agency stated that:

[T]he administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area.

The administrative history does not indicate that the Commission's focus broadened on remand. The *ISP Remand Order* repeats the Commission's understanding that “an ISP's end-user customers typically access the Internet through an ISP service located in the same local calling area.” The Order refers multiple times to the Commission's understanding that it had earlier addressed - and on remand continued to address - the situation where “more than one LEC may be involved in the delivery of telecommunications within a local service area.”⁶

8. In the *Global NAPS Amicus Brief*, the FCC spoke directly to the issue of application of access charges to toll-dialed ISP-bound traffic:

The dispute before the Court involves a variation on the typical ISP dial-up access scenario. The calls at issue are not delivered to an ISP that is located in the caller's local calling area. Instead, the dialing-in customer, served by Verizon, an ILEC, is located in one

⁴ Global Naps, Inc. v. Verizon New England, Inc., 444 F.3d 59, at 71 (1st Cir. 2006).

⁵ *Id.*, at 72.

⁶ FCC Amicus Brief, GLOBAL NAPS, INC., Plaintiff-Appellant, v. VERIZON NEW ENGLAND, INC., et al., Defendants-Appellees., 2006 WL 2415737 (C.A.1), 12 (“*Global NAPS Amicus Brief*”).

exchange and the equipment of the ISP, served by Global Naps, a CLEC, is located in a different exchange. Ordinarily, such a call would be subject to a toll paid by the caller to the IXC (in many cases, the originating LEC acts as the de facto IXC), which would carry the call to the facilities of the terminating LEC. In that way, the originating LEC, acting in the role of an IXC, would pay a terminating access charge to the terminating LEC.⁷

9. The *Order's* findings relative to toll-dialed ISP-bound traffic conflict with the FCC's amicus brief in *Global NAPS I*. The *Order* finds that the *ISP Remand Order* applies to toll-dialed traffic, whereas the amicus brief finds that such traffic is subject to terminating access charges.⁸ Further, it does not appear that the Commission considered the *Global NAPS Amicus Brief* in drafting the *Order*.

10. In *Global NAPS II*, the Second Circuit approved the Vermont Commission's imposition of access charges on VNXX ISP-bound traffic. Rejecting the CLEC's position that the *ISP Remand Order* preempted all state commission jurisdiction over ISP-bound traffic, the Second Circuit found that "a more reasonable interpretation of the *2001 Remand Order* is not that the FCC has preempted the field relating to ISPs, but only that it intended to reserve jurisdiction over intercarrier compensation issues with respect to ISP-bound traffic on matters that would conflict with the FCC's specific directives about reciprocal compensation."⁹

11. In *Pac-West*, the Ninth Circuit found that "with the *ISP Remand Order* and related pronouncements, the FCC has *not* exercised its jurisdiction over *all* manifestations of

⁷ Global NAPS Amicus Brief, at 8-9.

⁸ *Id.*, 12-13.

⁹ Global NAPS, Inc. v. Verizon New England, Inc., 454 F.3d 91, at 101 (2d Cir. 2006).

ISP-bound traffic. For example, this Court held in *Peevey* that the CPUC correctly interpreted the *ISP Remand Order* as not applying to interexchange (that is, non-local) ISP-bound traffic.”¹⁰

12. In *Peevey*, the Ninth Circuit reviewed the California Commission’s imposition of a “carrier origination charge,” or “COC,” on certain ISP-bound calls. The court found that “Pac-West further contends that the COC ruling is contrary to the *ISP Remand Order* which preempts state commissions from imposing any intercarrier compensation not provided for in the order. We disagree, as the *ISP Remand Order* was exclusively concerned with the operation of § 251(b)(5) of the Act and the imposition of reciprocal compensation charges on ISP-bound traffic.”¹¹ *Id.*, at 1158.

13. The FCC amicus brief in *Pac-West* does not address—directly or indirectly—the issue whether a state commission may impose access charges on toll-dialed ISP-bound traffic. The *Pac-West Amicus Brief* repeatedly restricts its discussion to local traffic and the reciprocal compensation regime.¹² The Ninth Circuit’s decision in *Pac-West* too, which relied substantially on the *Pac-West Amicus Brief*, is clearly limited to reciprocal compensation for locally-dialed traffic. For example, the court noted that the CLEC tariffs at issue there were *not* intrastate switched access tariffs, but rather Pac-West’s “intrastate tariffs... purport[ing] to set Pac-West’s

¹⁰ *AT & T Commc'ns of Cal., Inc. v. Pac-W. Telecomm., Inc.*, 651 F.3d 980, 991 (9th Cir. 2011); *citing*, *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (“*Peevey*”).

¹¹ *Peevey*, 462 F.3d, at 1158.

¹² *See, e.g.*, FCC Amicus Brief, *AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm., Inc.*, U.S.C.A. (9th Cir.) Docket No. 08-17030, at 11 (“The volume of *local exchange traffic* terminated by Pac-West for AT&T is many times greater than the volume of local exchange traffic terminated by AT&T for Pac-West.”); *and*, at 20 (“Because ISP-bound communications produce large volumes of one-way traffic, *reciprocal compensation payments* for ISP-bound traffic flow overwhelmingly from the originating LEC to the LEC serving the ISP.”)(Feb. 2, 2011)(Emphasis added).

rates for... terminating local traffic originating with another LEC; [and] apply only in the absence of an interconnection agreement.”¹³

14. Application of switched access rates to toll-dialed ISP-bound traffic is consistent with the Commission’s reconsideration order in *Core v. AT&T*. There, the Commission found that “Core’s Switched Access Tariff applies to the settlement of charges for the origination and termination of toll or non-local calls between Core and *all other carriers* that originate and/or terminate these types of calls.”¹⁴ While the Commission did not speak directly to the issue of toll-dialed ISP-bound traffic in that finding, ISP-bound traffic was the sole type of traffic at issue in that case, and the Commission has noted repeatedly that Core historically terminated ISP-bound traffic exclusively or to a large extent. The *Order* does not address why the Commission now deems Core’s intrastate access tariff to be void with respect to toll-dialed traffic, when just three years ago, it specifically found that Core’s tariff applies to any toll traffic, no matter what type of carrier delivers it.¹⁵

15. *AT&T Third Circuit* is inapposite to the issue of whether state commission may impose access charges on toll-dialed ISP-bound traffic because, in that case, “[a]ll of the calls at issue were local, originating and terminating in the same local exchange area.”¹⁶

16. ICAs do not always speak to this precise issue, because the industry standard is that toll-dialed calls are almost always rated as switched access. However, the Core-CenturyLink

¹³ *AT & T Commc'ns of Cal., Inc. v. Pac-W. Telecomm., Inc.*, 651 F.3d 980, 988 (9th Cir. 2011).

¹⁴ Opinion & Order, *Core Communications, Inc. v. AT&T*, Pa. P.U.C. Docket No. C-, at 42 (C-2009-2108186 & C-2009-2108239)(Aug. 15, 2013)(Emphasis added).

¹⁵ *Bell Atl.-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 672 A.2d 352, 354 (Pa. Commw. Ct. 1995). (“[P]rior adjudications of the Commission have no precedential value before this Court. Nor is an administrative agency bound by the rule of *stare decisis*; however, as Bell correctly notes, an administrative agency must render consistent opinions and should either follow, distinguish or overrule its own precedent.”).

¹⁶ *AT & T Corp. v. Core Commc'ns, Inc.*, 806 F.3d 715, 723 (3d Cir. 2015).

ICA, recently approved by the Commission after lengthy litigation revolving around ISP-bound traffic and VNXX arrangements, does speak very directly to this issue:

A call placed on a non-local basis (e.g., a toll call or 8yy call) to an ISP shall not be treated as ISP-Bound Traffic for compensation purposes. The Parties agree that, to the extent such "non-Local" ISP calls are placed, that the rates, terms and conditions for IntraLATA and/or InterLATA calling shall apply, including but not limited to rating and routing according to the terminating parties' Exchange Access intrastate and/or interstate tariffs.¹⁷

17. Similarly, the Core-Windstream ICA states:

With the exception of VNXX ISP-Bound Traffic, any intercarrier telecommunications traffic utilizing the Public Switched Telephone Network, regardless of transport protocol method, where the originating and terminating points, are in different LATAs, or in different local calling areas as defined by the originating Party and delivered to the terminating Party using switched access services shall be considered Switched Access Traffic.¹⁸

18. The *Order's* conclusion that the *ISP Remand Order* preempts state commission authority over toll-dialed ISP-bound traffic is inconsistent with the Commission's orders in the *CenturyLink ICA Arbitration* and *Windstream ICA Arbitration*, in which the Commission found that it is preempted only with respect to local ISP-bound traffic. In the *CenturyLink ICA Arbitration*, the Commission found: "we do not believe that the FCC has expanded the intercarrier compensation regime established in the *ISP Remand Order* for local ISP-bound

¹⁷ Interconnection Agreement, Petition of Core Communications, Inc. for Arbitration of Rates, Terms, and Conditions with the United Telephone Company of Pennsylvania LLC d/b/a CenturyLink, Pa. P.U.C. Docket No. A-310922F7002, at 77 (ICA § 55.5)(August 6, 2014).

¹⁸ Interconnection Agreement, Petition of Core Communications, Inc. for Arbitration of Rates, Terms, and Conditions with Windstream Pennsylvania, Inc., Pa. P.U.C. Docket No. A-310922F7004, at 85 (ICA Att. 12, § 3.4)(Dec. 15, 2014).

traffic to other types of traffic, including VNXX ISP-bound traffic.”¹⁹ In the *Windstream ICA Arbitration*, the Commission found that “the FCC has not preempted state regulation of non-local ISP-bound traffic.”²⁰ While the Commission, again, is not subject to the rule of *stare decisis*, nevertheless the Commission offers no reason why it should now deviate from its previous findings with respect to the scope of the *ISP Remand Order*.²¹

19. The FCC has never preempted the Commission from application of intrastate switched access charges to toll-dialed ISP-bound traffic, or applied any rate cap particular to such traffic.

20. In the absence of preemption, Core’s Pa. P.U.C. intrastate switched access tariff applies to XO’s intrastate toll-dialed traffic, as the I.D. found. While the Commission may wish to make a new rule governing toll-dialed ISP-bound traffic, unless and until it does so, the filed-rate doctrine applies to the toll traffic XO terminated on Core’s network. According to the Public Utility Code:

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part.”²²

¹⁹ Petition of Core Commc'ns, Inc. for Arbitration of Interconnection Rates, Terms, & Conditions with the United Tel. Co. of Pennsylvania d/b/a Centurylink, A-310922F7002, 2013 WL 6835139, at *45 (Dec. 19, 2013).

²⁰ Petition of Core Commc'ns, Inc. for Arbitration of Interconnection Rates, Terms, & Conditions with Windstream Pennsylvania, LLC Pursuant to 47 U.S.C. S252(b), A-310922F7004, 2014 WL 6386897, at *18 (Nov. 13, 2014).

²¹ Bell Atl.-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, 672 A.2d 352, 354 (Pa. Commw. Ct. 1995). (“[P]rior adjudications of the Commission have no precedential value before this Court. Nor is an administrative agency bound by the rule of *stare decisis*; however, as Bell correctly notes, an administrative agency must render consistent opinions and should either follow, distinguish or overrule its own precedent.”).

²² 66 Pa. Stat. and Cons. Stat. Ann. § 1303 (West).

As the Commonwealth Court has found, “[t]he Public Utility Code has gone through several iterations, and each version has been interpreted to require strict adherence to tariffs.”²³ Nor is the Commission’s professed interest in curbing arbitrage a sufficient grounds to abrogate Core’s tariff. “[A]n agency cannot waive a mandate of statute because it is in the public interest.”²⁴

21. There is no arbitrage opportunity associated with toll-dialed ISP-bound traffic. ISP end users are accustomed to dialing a local call in order to access the Internet.²⁵ To the extent ISP end users desire to access the Internet via a toll call, they are assessed a toll charge that is collected by the originating LEC, with a portion being paid to the terminating LEC.²⁶ The I.D. found that the toll-dialed traffic XO sent Core amounted to a mere 6% of all traffic on CIC 5119.²⁷ The ISP-bound traffic arbitrage opportunity is associated, not with toll traffic, but with local traffic arising under the reciprocal compensation regime. As the Ninth Circuit found, “[a]t base, the rules implemented by the *ISP Remand Order* addressed a particular problem: the opportunity for regulatory arbitrage created by application of the prevailing reciprocal compensation scheme to local ISP-bound traffic.”²⁸

22. For all the foregoing reasons, Core respectfully requests that the Commission reconsider and modify the *Order* to clarify: (1) that the Commission is not preempted from imposing access charges on toll-dialed ISP-bound traffic; (2) that intrastate toll-dialed ISP-bound traffic is subject to Core’s switched access tariff, as the I.D. found; and (3) that XO must

²³ Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm’n, 808 A.2d 1044, 1052 (Pa. Commw. Ct. 2002).

²⁴ Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm’n, 808 A.2d 1044, 1056 (Pa. Commw. Ct. 2002).

²⁵ AT & T Commc’ns of Cal., Inc. v. Pac-W. Telecomm. Inc., 651 F.3d 980, 981 (9th Cir. 2011).

²⁶ FCC Amicus Brief, at 8-9.

²⁷ I.D., at 32.

²⁸ AT & T Cominc’ns of Cal., Inc. v. Pac-W. Telecomm. Inc., 651 F.3d 980, 994 (9th Cir. 2011).

compensate Core for the small amount of CIC 5119 intrastate toll traffic identified in the I.D., at the rates set forth in Core's intrastate switched access tariff.

Scope of Traffic Issue

23. The I.D. found that the Commission was preempted by the FCC's *ISP Remand Order* from adjudicating any compensation with respect to the locally-dialed traffic XO sent Core. I.D., at 27-30, and Conclusion of Law # 6; but the I.D. found that the Commission was not preempted by the *ISP Remand Order* from adjudicating compensation for toll-dialed ISP-bound traffic, because the *ISP Remand Order* is limited to locally-dialed ISP-bound traffic. I.D., at 28 and Conclusion of Law # 7.

24. Because it found that the Commission was preempted with respect to locally dialed traffic, the I.D. denied Core's complaint to the extent that it requested compensation for locally-dialed ISP-bound traffic. I.D., at 30 ("Core's Complaint against XO will be dismissed as to the local traffic component.").

25. Conversely, because the Commission was not preempted with respect to toll traffic, the I.D. granted Core's complaint to the extent that it requested compensation for 180,858 intra-LATA toll minutes-of-use on CIC 5119. I.D., at 30-33.

26. The I.D. restricted Core's claim for toll-dialed ISP-bound traffic to the period beginning February, 2010, because, for earlier periods, "the breakdown for these earlier months did not match the billed MOUs." I.D., at 31.

27. The I.D. intended to limit Core's claim for toll-dialed ISP-bound traffic, based on the breakdown, to the period beginning February, 2010. I.D., at 9 ("As this [pre-February, 2010] breakdown data was not in compliance with my directive that the data match the billed MOUs, I required that the mismatching data be redacted.").

28. However, the I.D. never found that Core could not claim *any* compensation for these earlier periods, prior to February, 2010. In fact, the I.D. preserved Core's rights to claim compensation for all billed periods, based on the actual minutes for which Core invoiced XO. I.D., at 9 ("Core was also permitted to include the monthly billed MOUs, to complete the record.").

29. Because the I.D. had separately found that the Commission could not award Core compensation for locally-dialed ISP-bound traffic, the I.D. did not rule on the statute of limitations or back-billing issues relative to that traffic.

30. The only traffic the I.D. found to be compensable was the toll-dialed traffic that is on the breakdown beginning in February, 2010. I.D., at 30.

31. The I.D. found that only 6% of the traffic that comprised Core's claim against XO for CIC 5119 was toll-dialed. I.D., at 32.

32. In so finding, the I.D. determined that the applicable statute of limitations applicable to Core's claim (assuming the Commission had jurisdiction) was four (4) years, consistent with 66 Pa. C.S. § 1312 and related caselaw, and that Core's claim would extend back to September, 2005. I.D., at 32.

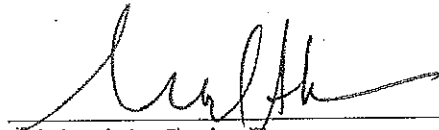
33. In *AT&T*, the Commission ruled on the statute of limitations applicable to locally-dialed CLEC-CLEC ISP-bound traffic and permitted Core to backbill accordingly,²⁹ and the

²⁹ *Core Commc'ns, Inc. v. AT&T Corp., et al.*, C-2009-2108186, 2013 WL 4499089, at *22 (Aug. 15, 2013) ("[W]hile Section 1312 does not mandate a four-year limitation on the collection by utilities of unpaid amounts due for service, the Commission has exercised its discretion and applied the four year-statute of limitations under Section 1312 to these situations since at least 1990.").

Commission should apply that same four-year limitations period here for toll-dialed traffic for which Core is to be compensated.

WHEREFORE, Core respectfully requests that the relief requested in this Petition be granted for the reasons set forth herein.

Respectfully submitted,



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On behalf of Core Communications, Inc.

December 8, 2016

VERIFICATION

I, Christopher Van De Verg, General Counsel of Core Communications, Inc.; hereby state that the facts set forth in the above Petition are true and correct to the best of my knowledge, information, and belief and expect to be able to prove the same at any hearing held in this matter. This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Chris Van de Verg

Dated: December 8, 2016

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.

v.

XO Communications Services, Inc.

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C-2009-2133609

CERTIFICATE OF SERVICE

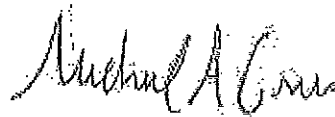
I hereby certify that I have this day served a true and correct copy of the enclosed Petition upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Harry N Malone Esquire
Devine Millimet & Branch
111 Amherst Street
Manchester, NH 03101

Pamela C Polacek Esquire
Shelby A Linton-Keddie Esquire
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December 8, 2016



Michael A. Gruin, Esq.