



December 19, 2006

BY ELECTRONIC FILING

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte; WC Docket Nos. 06-100 and 01-92

Dear Ms. Dortch:

Core Communications, Inc. (“Core”) files this letter to direct the Commission’s attention to a recent Pennsylvania Public Utility Commission (“PaPUC”) order,¹ which puts to rest definitively specious and *ad hominem* attacks leveled against Core in comments previously filed by the Pennsylvania Telephone Association (“PTA”).

On December 4, 2006, the PaPUC issued a unanimous final *Opinion and Order* granting Core authority to operate as a facilities-based competitive local exchange carrier (“CLEC”) in the rural telephone company (“RTC”) territories of Pennsylvania, including areas controlled by several members of the PTA. In its Comments and Reply Comments in WC Docket No. 06-100, PTA filed with an Administrative Law Judge’s initial decision from that same PaPUC case (the “*Initial Decision*”), inserting extensive quotations from the *Initial Decision* in an effort to distract the Commission’s focus away from the substantive issues raised in Core’s pending forbearance petition.²

¹ Opinion and Order, *Application of Core Communications, Inc. for Authority to Amend its Existing Certificate of Public Convenience*, Pa. P.U.C. Docket Nos. A-310922F002AMA and A-310922F002AMB (Dec. 4, 2006) (“*Opinion and Order*”) (attached hereto as Exhibit A).

² See, e.g., WC Docket No. 06-100, Comments of the Pennsylvania Telephone Association (June 5, 2006), at 9-20 (anticipating the ALJ’s wholesale acceptance of PTA’s own arguments against Core) and Reply Comments of the Pennsylvania Telephone Association, at 2-4 (June 26, 2006). Somewhere between one-third and one-half of PTA’s entire advocacy in this proceeding has been dedicated to denigrating Core, and by extension, Core’s employees, consultants, and customers.

In its *Opinion and Order*, the PaPUC reversed and thoroughly dismantled the *Initial Decision*, which PTA has referred to as “thorough and thoughtful.”³ The PaPUC not only granted Core the entire expansion of facilities-based CLEC authority into the requested RTC territories, but also generally granted all of Core’s exceptions to the *Initial Decision*.⁴ The PaPUC affirmed that Core is unquestionably a facilities-based local exchange carrier and will compete as such in rural Pennsylvania.⁵ Simply put, the PaPUC’s *Opinion and Order* leaves no basis for this Commission to even consider the irresponsible diatribes leveled by PTA against Core.

In rejecting the views of the PTA as set forth in the ALJ’s *Initial Decision*, the PaPUC specifically found the following:

- We conclude that Core has met its burden to establish that its operations are sufficiently facilities-based services. We are, therefore, able to further conclude that Core will provide service over a distinctly independent network.⁶
- The record supports a conclusion that several ILECs, CLECs, and/or their affiliates, offer VNXX, or a VNXX-like service. The record indicates that VNXX is not exclusively used by Core. Based on our conclusion that Core has sufficiently invested in facilities and by a preponderance of the evidence has demonstrated a commitment for more investment so as not to fall in the category of reseller, we find the emphasis on its VNXX use misplaced in this regard.⁷
- We find the ALJ’s conclusion of what constitutes service to the public to be unduly narrow in that it fails to recognize a discreet subset of the public to whom Core provides services, indiscriminately. We have, in this Order, recognized the competitive nature of the niche market for telecommunications service to ISPs. We agree with Core that ISPs are a class of the public to whom Core holds itself out to provide service to any member of that class.⁸

³ WC Docket No. 06-100, Reply Comments of the Pennsylvania Telephone Association at 2 (June 26, 2006).

⁴ See e.g., *Opinion and Order* at 39 (concluding paragraph).

⁵ *Id.*, 20-21.

⁶ *Id.*

⁷ *Id.*, 31.

⁸ *Id.*, 33.

- We conclude that the public interest benefits of [Core's] Application clearly outweigh the asserted detriments. This Commission has been continually faced with the concerns of the incumbents when faced with telecommunications competition in the local exchange market.... Substantially similar to the concerns that this Commission addressed when we initially authorized competitive entry into the local exchange market..., the public interest is not promoted by foreclosing competition until such time as difficult regulatory problems are resolved.⁹

Of course, the outcome and specifics of Core's application to provide service in areas controlled by PTA are not strictly germane to the Commission's consideration of Core's pending forbearance petition. But given the vitriolic rhetoric that PTA has chosen to heap on Core in this case, Core is compelled to provide the Commission with the PaPUC's actual decision, which fully supports Core.

If there is a lesson worth learning here, it is that rural ILECs (including but not limited to PTA) will stop at nothing to delay any meaningful intercarrier compensation in order to preserve its existing revenue streams. It is truly the rural ILECs, and not competitors such as Core, who seek (in the PTA's own words) "an opportunity to pick the real LECs' pockets for a little while longer."¹⁰

Sincerely yours,

/s/

Michael B. Hazzard
Counsel to Core Communications, Inc.

Attachment

⁹ *Id.*, 38.

¹⁰ WC Docket No. 06-100, Reply Comments of the Pennsylvania Telephone Association at 4 (June 26, 2006).

EXHIBIT A

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105**

Public Meeting held November 30, 2006

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Kim Pizzingrilli
Terrance J. Fitzpatrick

Application of Core Communications, Inc. for Authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the Provision of competitive residential and business Local exchange telecommunications services throughout the Commonwealth of Pennsylvania

A-310922F0002, AmA

Alltel Pennsylvania, Inc.'s Motion for Stay and Record Incorporation

A-310922F0002, AmB

OPINION AND ORDER

I. Matter Before the Commission

Before the Commission for consideration are the Exceptions filed to the June 8, 2006, Initial Decision (I.D.) of Administrative Law Judge (ALJ) Wayne L. Weismandel at Docket No. A-310922F0002, AmA. Exceptions were filed by Core Communications Inc. (Core) on June 28, 2006. Replies to Exceptions were filed by the

Rural Telephone Company Coalition (RTCC) and the Pennsylvania Telephone Association (PTA) on July 10, 2006.

We also consider in this Order, Alltel Pennsylvania, Inc.'s Motion for Stay and Record Incorporation (Alltel Motion) filed April 24, 2006, at Docket No. A-310922F0002, AmB.

II. Alltel Motion

Before addressing the merits on the Exceptions to ALJ Weismandel's Initial Decision, we shall dispose of the Alltel Motion.

The Alltel Motion references several related, but separately docketed, proceedings involving Core's applications for certificate authority to provide service as competitive local exchange Telecommunications Company in the service territories of certain rural incumbent local exchange companies and related Interconnection Requests.¹ In particular, Alltel advises that by Order Staying Proceeding dated March 6, 2006 (March 6, 2006 Order), presiding Administrative Law Judges Weismandel and David Salapa granted a Joint Stipulation for Stay of Proceedings whereby Core and various rural incumbent local exchange carriers (RLECs) that are involved in consolidated arbitration proceedings adjudicating, *inter alia*, Core's rights arising pursuant to the federal Telecommunications Act of 1996 (TA-96) and this Commission's Implementation Orders, *infra*, have agreed to stay those proceedings.

¹ The dockets are: Nos. A-310922F0002, A-310922F7004, AmB, A-310922F7003; A-310922F7005; A-310922F7007; A-310922F7009 through A-310922F70016; A-310922F70018; and A-310922F70020 through A-310922F70038. (Alltel Motion at 4).

Specifically, the parties to those consolidated proceedings have stipulated to stay the proceedings until, at least, thirty-five days after a final Commission decision is entered in the instant docket. (Alltel Motion at 4). Alltel advises that the resolution of the issues in this matter will have the same “impact” on the consolidated proceedings as with its pending proceeding with Core (redocketed at No. A-310922F7004, AmB). As such, Alltel requests the same relief for its proceeding at Docket No. A-310922F7004, AmB, as was granted to the various RLECs by the March 6, 2006 Order. (Alltel Motion at 3, 6).

In addition, Alltel requests that the record in the instant proceeding be incorporated by reference into the record at Docket No. A-310922F7004, AmB. Alltel submits that such incorporation will permit the Commission’s Bureau of Fixed Utility Services (FUS) to consider fully the Commission’s final Order in the instant proceeding and its impact on the Core CLEC Application applicable to the Alltel service territory.

On May 4, 2006, Core filed its Objection and Answer to Alltel’s Motion for Stay and Record Incorporation. Core initially objects to the Alltel Motion on the ground that it is an out-of-time attempt to revive its previously withdrawn Protest. Core vigorously opposes Alltel’s Motion, stating that it is filed in bad faith and is unfair in that it attempts to stay FUS’ review of Core’s Application. In particular, Core points out that ALJ Weismandel provided Alltel with an opportunity to reconsider its withdrawal from the instant proceeding, until February 24, 2006, and Alltel declined to do so. Core also points out that the deadline established by the presiding ALJ gave Alltel ample time to digest all of the evidence and testimony submitted in the protested proceedings.

Core additionally urges the rejection of the Alltel Motion, stating that it would be inherently prejudicial to allow a company to join a Protest to the Application after the close of the discovery and after the evidentiary hearing has been concluded. Core characterizes Alltel’s Motion to “open the door” to strategic maneuvering by the rural ILECs in future application proceedings and to jump in and out of protests or wait until the

record closes in a protested proceeding and then seek a stay of FUS' review of applications without ever participating in the evidentiary hearing and briefing process. This, states Core, would lead to unnecessary uncertainty for future applicants as well as Commission Staff. (Core's Answer at 8).

Core responds to Alltel's argument of "misunderstanding" of Core's business intentions as a reason for its current change of mind from its prior withdrawal from its earlier Protest. Core denies there is merit to this contention. It points out that that Alltel's counsel in this matter was present during the entire evidentiary hearing and that no new information has emerged for a grant of this Petition. (Core Answer at 10, 11).

Disposition

On consideration of the Alltel Motion and Core's Objection and Answer, we find Alltel's request extraneous and untimely. Accordingly, we shall deny said Motion. Concerning the merits of Alltel's position, we also conclude that granting Alltel's request would not be in the public interest as it would severely operate to the prejudice of Core, the party seeking affirmative Commission action in the instant Application. The record indicates that the presiding ALJ in this case, ALJ Weismandel, has given Alltel ample time (until February 24, 2006) to reconsider its position.²

Unless I receive a written objection from you on or before Friday, February 24, 2006, I intend to issue an order requesting the Commission Secretary's Bureau to assign a separate and distinct docket number for the Core application as to each of your companies and then assign those eight cases to the Commission Bureau of Fixed Utility Services for appropriate action.

² See, ALJ Weismandel's February 6, 2006, letter at Docket No. A-310922F0002, AmA, and ID at 5.

We also find that Alltel will not be harmed by the denial of this Motion since it has other opportunities in the Interconnection Arbitration proceeding to address all relevant issues. Core, on the other hand, would not have such opportunity if we were to grant the Alltel Motion. Accordingly, the Alltel Motion for Stay and Record Incorporation is denied.

III. History of the Proceeding

This matter is the application of Core, filed May 27, 2005 (Application), pursuant to the provisions of the Public Utility Code, 66 Pa. C.S. §§ 1101, *et seq.*, and Commission regulations, to Amend its Certificate of Public convenience to begin to offer, render, furnish or supply Competitive Local Exchange Telecommunications Services to the public in the Commonwealth of Pennsylvania and Petition to Establish Competitively Viable Resale Rates (Application). On August 22, 2005, Core filed an amended Application³ to include the provisioning of competitive residential and business local exchange telecommunications services throughout the Commonwealth of Pennsylvania.

On July 2, 2005, notice of the filing of the Application was published in the *Pennsylvania Bulletin* at 35 *Pa. Bull.* 3747. On July 18, 2005, Core filed proofs of publication of notice of the filing of the Application. (I.D. at 2).

On July 18, 2005, timely Protests were filed by the PTA and RTCC. The PTA Protest did not identify by name the individual telephone companies on whose behalf the Protest was filed. Subsequently, in its Prehearing Conference Memorandum, the PTA specifically identified in footnote 1, the following seven telephone Companies that it represents: The Bentleyville Telephone Company, Citizens Telephone Company of

³ The significant difference between the original Application and the amended Application is that Core's Application no longer requests the establishment of competitive resale rates from the ILECs.

Kecksburg, Commonwealth Telephone Company, Ironton Telephone Company, Marianna & Scenery Hill Telephone Company, Mahanoy & Mahantango Telephone Company and Sugar Valley Telephone Company.

The RTCC Protest specified in footnote 1, by name, twenty-one telephone companies comprising its members for the purposes of this litigation. The companies were: Alltel Pennsylvania, Inc.⁴ (now known as Windstream Communications Inc. (hereinafter, Windstream)); Armstrong Telephone Company – North; Armstrong Telephone Company – Pennsylvania; Bentleyville Communications Corporation;⁵ Buffalo Valley Telephone Company; Conestoga Telephone and Telegraph Company; D & E Communications, Inc.; Hancock Telephone Company; Hickory Telephone Company; Lackawaxen Telecommunications Services; Laurel Highland Telephone Company; The North-Eastern Pennsylvania Telephone Company; North Penn Telephone Company; North Pittsburgh Telephone Company; Palmerton Telephone Company; Pennsylvania Telephone Company; Pymatuning Independent Telephone Company; South Canaan Telephone Company; Venus Telephone Corporation; West Side Telecommunications; and Yukon-Waltz Telephone Company.

Core's Application pertaining to Windstream, the Frontier Communications of Breezewood Inc., Frontier Communications of Canton Inc., Frontier Communications of Pennsylvania Inc., Frontier Communications of Lakewood Inc., Frontier Communications of Oswayo River Inc., Citizens Telecommunications Company of New York, and TDS Telecom/Deposit Telephone Company service territories were either not

⁴ Subsequently, on January 26, 2006, Alltel Pennsylvania Inc. withdrew its protest to Core's Amended Application.

⁵ Although Bentleyville Telephone Company was initially represented by the RTCC, as indicated by the PTA in its Prehearing Memorandum filed on September 28, 2005, Bentleyville Telephone Company is being represented by the PTA. (PTA Pre Memo at 2). This was confirmed by PTA during the hearing of February 21, 2006 (*See*, Tr. at 69)

protested or were filed untimely and have been separately docketed and assigned to the Commission's Bureau of Fixed Utility Services for further processing as unprotected applications. (I.D. at 6).

An Initial hearing was held on October 5, 2005. Evidentiary hearings were held on February 21 and 22, 2006, resulting in a transcript of 614 pages. Core, the PTA and the RTCC filed Main Briefs and Reply Briefs on March 24, 2006, and April 14, 2006, respectively. The record was closed upon receipt of the final brief on April 14, 2006. (I.D. at 6).

The Initial Decision was issued June 8, 2006. Exceptions and Replies were filed as noted.

IV. Discussion

A. Introduction and Background

This Application presents several issues relative to CLEC entry into the service territories of rural ILECs and the nature of local exchange service provided by a CLEC. Core is seeking certificate authority as a facilities-based, competitive local exchange carrier (CLEC), to provide telecommunications services to the public in the service territories of rural ILECs.⁶ The PTA and RTCC oppose Core's Application and raise various issues in opposition to the Application, including allegations that Core's proposed services are not "local," are not facilities-based, and are not "telephone exchange" service within the jurisdiction of this Commission. The protesting rural

⁶ As noted, Core's Applications pertaining to Windstream, the five Frontier companies and Deposit Telephone Company are bifurcated from the original application and are dealt with separately. (I.D. at 6).

ILECs also challenge Core's fitness to provide competitive service. The rural ILECs also raise issues pertaining to interconnection arrangements with Core.

Core is currently certified by this Commission to provide facilities-based local exchange service in the service territories of Verizon Pennsylvania, Inc. (Verizon), Verizon North Inc. (Verizon North) and The United Telephone Company of Pennsylvania d/b/a Sprint (Sprint).⁷ It has held this authority since 2000. (Core Stmt. 2.0 at 1).

Core primarily markets services that provide connectivity between information service providers and the Public Switched Telephone Network (PSTN). Target customers of Core are integrated telephony service providers (ITSPs), Internet Service Providers (ISPs), inbound voice recognition providers, interconnection vendors, PBX installers and fax bureaus. (Core Stmt. 1.0). Core's basic service is its Managed Modem Services tariffed as a local exchange service in Pennsylvania since 2000, and is a replacement for Primary Rate Interface (PRI) service that ISPs purchase from incumbent telephone companies. (Core Stmt. 2.1, Tr. 133).

Core utilizes "virtual" NXX (VNXX) arrangements to provision local calling numbers for its customers. Core intends to provision "loops" in the rural ILEC territories by leasing high capacity lines such as T-1 and T-3 lines that would connect one of Core's network locations to various locations in the Rural ILEC territories. (Tr. 348).

A key consideration in this Application and a consideration, on which Core places great emphasis, is regulatory and competitive parity. *See generally,*

⁷ We note Sprint's recent name change from The United Telephone Company of Pennsylvania d/b/a Sprint to The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania (Embarq).

47 U.S.C. § 253. Core explains that it is seeking CLEC authority to expand and compete with the rural ILECs within their service territories. Core provides the competitive backdrop of the Application by explaining that there is a robust, competitive market for telecommunications service geared toward ISPs in the non-rural parts of Pennsylvania. It explains that there is nothing unique about the service it provides in the non-rural parts of the Commonwealth. Its competitors in these markets include Verizon, Qwest, Sprint, and other CLECs such as Telcove, Level 3, MCI, and US LEC. *See* Core Stmt. 1.1.

In the ISP markets, Core maintains that the rural ILECs and their affiliates are among its “fiercest” competitors. *See* Core Exceptions at 4, *infra*. Core states that certain of the rural ILECs are engaged in a “rural edge-out strategy” by which it is alleged that the rural ILECs leverage their financial resources and regulatory protections (exemption and suspension provisions of TA-96, 47 U.S.C. § 251(f)(1) and (2)), to expand into neighboring service territories. (Core Exc. at 4, citing Stmt. 2.0, *infra*). Core seeks certification as a CLEC because only with certification may it obtain interconnection pursuant to Section 251 of TA-96, 47 U.S.C. § 251, *et seq.* *See* Exceptions.

B. ALJ Recommendation

For reasons discussed below, we shall reverse the ALJ and grant the Application, as amended, consistent with our discussion. We conclude that granting the Application, consistent with the discussion contained in this Opinion and Order, will promote the public interest, convenience and necessity. *See* 66 Pa. C.S. § 1103:

. . . A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such

certificate, may impose such conditions as it may deem to be just and reasonable . . .

See also 66 Pa. C.S. § 3019(a):

The commission may certify more than one telecommunications carrier to provide local exchange telecommunications service in a specific geographic location. The certification shall be granted upon a showing that it is in the public interest and that the applicant possesses sufficient technical, financial and managerial resources.

On review of the record, we conclude that the public benefits in granting the Application substantially outweigh those considerations interposed by Protestants. We, therefore, deny the PTA and RTCC protests, consistent with the discussion in this Order.

ALJ Weismandel reached 54 Findings of Fact and drew 22 Conclusions of Law. Said Findings of Fact and Conclusions of Law shall be rejected, modified or adopted and incorporated in our discussion and resolution solely to the extent consistent with the discussion contained in this Opinion and Order. We expressly reject the following Conclusions of Law:

* * *

8. In Pennsylvania, a “facilities-based” CLEC is understood to be one owning its own switches and transmission lines.

9. In Pennsylvania, under Chapter 30 to the Pennsylvania Public Utility code, a “local exchange telecommunications company”, a term functionally synonymous with the term “local exchange carrier”, must offer “local exchange telecommunications service”, *i.e.*, the transmission of messages

or communications that originate and terminate within a prescribed local calling area for a fee to the public.

10. Core's business plan, which relies on the use of VNXX to provide Core's retail ISP customers with the ability to offer "local" calls to their Internet dial-up customers despite the ISP's POP not being in the dial-up customer's local calling area, does not offer the transmission of messages or communications within a prescribed local calling area.

11. Core's customer base, consisting of 26 retail ISPs in Pennsylvania, does not comport with its obligation to offer services "to the public" under Chapter 30 of the Pennsylvania Public Utility Code.

12. Core's Amended Application for authority to be a "facilities-based local exchange carrier" in the service territories of the RTCC and PTA RLECs is a sham. Core is not, and does not intend to be, either "facilities-based" nor a "local exchange carrier".

13. Even if Federal law applied, Core does not meet the definition of a "local exchange carrier" found at 47 U.S.C. §153.

* * *

16. The applicant in this case, because though certificated to provide facilities-based local exchange service actually does not provide such service, is not entitled to the usual rebuttable presumptions regarding fitness.

17. Core failed to prove by a preponderance of the evidence that it is technically fit to render the service applied for in its Amended Application.

18. Core failed to prove by a preponderance of the evidence that it is managerially fit to render the service applied for in its Amended Application.

19. Core failed to prove by a preponderance of the evidence that it is financially fit to render the service applied for in its Amended Application.

20. Core failed to prove by a preponderance of the evidence that it has a commitment to compliance with Pennsylvania law.

21. Core's Amended Application must be denied because Core does not intend to actually render the service for which authority is sought.

22. Core's Amended Application must be denied because Core failed to bear its burden of proof by a preponderance of the evidence.

(I.D. at 27-29).

ALJ Weisman del concluded that the nature of Core's service offerings did not amount to a "facilities-based" carrier. The ALJ cited several Commission decisions regarding CLEC entry into the rural ILEC service territories for the proposition this Commission has required, for purposes of facilities-based classification that the proposed service be provided over distinctly independent networks:

Based upon Core's method of operation in the Pennsylvania territories of Verizon Pennsylvania Inc., Verizon North Inc., and Sprint/United Telephone Company of Pennsylvania, it is, at best, dubious that Core will own its switches and transmission lines in the service territories of each of the 26 RLECs comprising RTCC and PTA in this case. Core currently owns and operates five switch equivalents, all located in the territory of Verizon Pennsylvania Inc. Core leases capacity on other carrier's transmission lines to connect its ISP customers to Core's switch equivalents. Core provides no connections from end users to Core's ISP customers, but relies on the use of VNXX to permit its ISP customers to make a "local" telephone number available which uses the ILEC's facilities to connect the end user with the ISP. Despite the representations made in its Amended Application, evidence adduced at the Hearing in this case establishes that Core is not now, and would not be in the future, a facilities-based CLEC as that term has been

understood in Pennsylvania since enactment of the Telecommunications Act of 1996.

(I.D. at 17-18).

The ALJ further referenced the requirements of 66 Pa. C.S. § 3012 (Definitions) and concluded that a “local exchange carrier” must offer the transmission of messages or communications that originate and terminate within a prescribed local calling area for a fee to the public. He concluded that Core does not originate or terminate communications in this manner, nor does Core contemplate doing so in the territories of the rural ILECs. (I.D. at 18).

ALJ Weismandel also found that Core was not engaged in the provision of either “telephone exchange service” or “exchange access,” because it did not meet the definition of a “local exchange carrier” under federal law in at least four respects.

First, ALJ Weismandel concluded that Core does not provide “telecommunications.” This conclusion was based on the observation that the end user of dial-up Internet service does not specify the end point of a transmission over the Internet and the form of the information sent by the end user, TDM (Time Division Multiplexing) format, is changed by Core to IP (Internet Protocol) format before the information continues its transmission. (I.D. at 20).

Second, ALJ Weismandel concluded that Core does not offer “telecommunications” directly to the public, or to such classes of users as to be effectively available to the public, for a fee. The ALJ reasoned that the “public” contemplated by TA-96, would be the dial-up ISP end users. Rather, the ALJ found that Core does not offer anything to the end users for a fee. Rather, Core’s business deals with twenty-six (26) retail ISP providers, and it is only those entities to which Core provides service for a fee. (I.D. at 21).

Third, the ALJ reasoned that Core does not provide “telephone exchange service” because it does not furnish subscribers, *i.e.*, the end users, either service within a telephone exchange or intercommunicating service covered by the exchange service charge. Nor does Core provide comparable service by which a subscriber (again, the end user) can originate and terminate a “telecommunications service.” (*Id.*).

Fourth, the ALJ found that Core does not offer “exchange access” because it does not offer access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service. Core’s entire business plan, in the determination of the ALJ, revolves around having no connection, of any kind, to toll telephone service, but the use of VNXX. *See* I.D. at 21.

Additionally, the ALJ concluded that Core did not meet its burden of proving its fitness to render the proposed service. ALJ Weismandel declined to adopt a rebuttable presumption that Core was fit to provide service based on the existence of certificated authority from the Commission. He found that Core did not provide facilities-based local exchange service and, therefore, held that Core should not be the beneficiary of the usual Commission presumptions in evaluating its Amended Application in this case. (I.D. at 24-25).

On review of the criteria for technical, managerial, and financial fitness, the ALJ additionally concluded that Core was not fit to provide the proposed service. He, therefore, recommended that the Application be denied.

C. Issues for Resolution

In order to better manage the numerous issues raised by the Application, we shall address the following issues which are identified as key issues in this matter and are

grouped together for disposition. Any issues or contentions not expressly discussed are either considered in this fashion or shall be deemed considered and rejected.

1. Facilities-based Nature of Core's Services

This issue considers the extent to which Core seeks to provide service on a “distinctly independent network” so as to be certificated as a facilities-based carrier.

In concluding that “facilities-based” CLECs are those CLECs owning their own switches and transmission lines to render service, as opposed to those CLECs relying on “resale” of ILEC services, the ALJ cited several Commission determinations involving entry into rural ILEC service territories. (I.D. at 23). He also found his understanding in this regard was in accord with the definition of “Facilities-based Carrier” found in *Newton's Telecom Dictionary*. See also I.D. at 17:

In requiring “distinctly independent networks” the Commission allowed entry into RLEC territories only for those CLECs willing to invest the capital to install and own its switches and transmission lines in the RLEC territories. “Facilities-based” CLECs were, therefore, understood to be those CLECs owning their own switches and transmission lines, as opposed to those CLECs relying on “resale” of ILEC's installed and owned facilities to be able to render service. (Note omitted).

Exceptions

In Exceptions, Core argues that the ALJ applied the wrong test for determining whether a LEC is “facilities-based” and that he improperly concluded that a facilities-based CLEC must own, outright, 100% of the facilities it uses to provide services. See Exception No. 3, pp. 13-16.

Here, Core attempts to distinguish the rural ILEC entry cases cited by ALJ Weismandel on the basis that none of the cases involved the issue of what facilities are required to be put in place for certification and that these cases predate the Commission's subsequent termination of the TA-96 Section 251(f)(2) suspension for rural ILECs. (Exc. at 13).⁸ Core goes on to argue that the ALJ did not support his determination that Core lacked facilities-based status with legal authority. (*Id.*).

Core takes the position that a reference to and review of definitions in *Newton's Telecom Dictionary*, in fact, supports its position that it is a facilities-based carrier. (Exc. at 13-14). Core emphasizes that this Commission has concluded that it is acceptable for a CLEC to provide services using a combination of its own facilities and, where necessary, leased or resold facilities of other carriers. (Exc. at 14). Core states that only a carrier that operates wholly as a reseller of other carriers' services that would not qualify as having its own facilities. (Exc. at 15, citing 47 C.F.R. § 54.201(d)-(f)).

Core continues with its comparison of the Federal Communications Commission's (FCC's) use of the term, "facilities-based," and references those requirements addressing universal service and "eligible telecommunications carrier" (ETC) status in rural areas. Core observes that the FCC, in the context of setting criteria applicable to carriers seeking ETC status in rural, high cost areas, has determined that the TA-96 Section 254 "facilities" requirement mandates only that a carrier own some but not all of the facilities needed to provide service. (*Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997), Report and Order, at Par. 24).

Core relies on the evidence in this proceeding and takes the position that this evidence establishes that Core and its affiliates own and operate no less than fourteen Cisco switches: five in Pennsylvania, five in Maryland, three in Virginia and one in New York

⁸ See *Petition of Rural Incumbent Local Exchange Carriers . . .*, Docket No. P-00971177 (Order entered January 15, 2003)(Suspension Termination Order).

(Core Stmt. 1.0 and PTA Exhibit GMZ-6). Based on these facts, Core argues that it is a facilities-based provider. That Core connects its wire centers and its customers by leasing dedicated circuits from fiber based carriers and, alternately, relies on leased transport and loops is infinitely preferable for Core, its customers, and the general public, than building out yet another fiber network in Pennsylvania. *See* Tr. at 348.

Additionally, Core emphasizes its clearly stated intent to extend its existing network in order to place whatever facilities are necessary in the rural territories in order to establish interconnection with the rural ILECs and provide service. (Exc. at 15). The type of facilities that will be put in place will ultimately depend on a number of factors, including market demand, interconnection terms, and the availability of leased transport and loops. Core also notes that key interconnection issues, such as transport, point of interconnection, and VNXX, will also dictate the parameters of Core's network investment. (Exc. at 15-16).

Core, in its Exception No. 1, specifically addresses ALJ Weisman's Finding of Fact No. 15. Core asserts that Finding No. 1 is inconsistent with his finding at No. 27. At Finding No. 27, the ALJ concluded that Core neither owns nor leases any physical connections from a subscriber's premise to Core's Point of Presence (POP) in the Local Access And Transport Area (LATA), *i.e.*, Core has no local loops in Pennsylvania certified service area.

Core states that it permits its customers to collocate within its wire centers, thereby eliminating the need for traditional loop, and that that it does provide the functional equivalent of a loop to deliver traffic, analogous to a collocated PRI. Core claims that the record indicates that it intends to provision loops in the rural ILEC areas by leasing lines from third party fiber carriers to Core's wire centers to customer premises. (Exc. at 6-7, citing Tr. at 348).

In its Exception No. 7, Core also argues that the ALJ's conclusions regarding Core's status as a facilities-based CLEC are erroneous, contrary to controlling law and the evidence in the record, or outside the scope of this case. Core claims that under Pennsylvania and federal law, it is unquestionably a facilities-based CLEC.

Core complains that the ALJ ignored extensive evidence demonstrating Core's longstanding and unchallenged status as a CLEC. Core points out that Core and its affiliates have interconnected its facilities-based network directly with Verizon in five different wire centers in Pennsylvania. (Core Stmt. 1.0, Mingo Direct at 2). It also states that Core has established and maintained inbound and outbound interconnection trunks for the exchange of telecommunications traffic and maintains both local and IXC trunks for the exchange of telecommunication traffic with Verizon in Pennsylvania. (Core St. 1.0, Mingo Direct at 7).

Core also responds that it originates and terminates telecommunications traffic over interconnection trunks. (Core St. 1.0, Mingo Direct at 5). Core references a Maryland Commission's finding in which that commission is to have unequivocally found that Core's services are indeed "local exchange service(s)." *See Proposed Order, In the matter of Core Communications, Inc. v. Verizon Maryland Inc.*, MDPSC Case 8881, at 8-9 (Sept. 9, 2003) Order findings confirmed in Order No. 78989 (Feb. 27, 2004).

In Replies, the PTA claims that in its business operation, Core has invested capital and ownership for its gateway site and Core's entire original cost asset before being transferred to an affiliate in 2003 was only slightly more than \$600,000. This consisted of sets of Cisco systems AS5800 and AS5850 "Universal Gateways" located at Core's LATA POIs. (Tr. at 226).

PTA claims that even with the five Cisco "gateways," Core cannot claim to own a switch. These gateways, states the PTA, are used to aggregate dial-up Internet-bound

traffic and convert the TDM protocol to IP protocol. That Core does not intend to provide a loop by stating it “intends to provision ‘loops’ in the rural ILEC territories” asks the Commission to find that it currently provides “the functional equivalent of a loop.”

In its Replies, the RTCC concedes that the Commission has not established a rigid standard that defines “what facilities are sufficient to constitute the provision of facilities-based service.” However, it believes that the Commission has consistently declared that the provision of facilities-based service by CLEC is provided over a “distinctly independent network” in the applied-for service territory. And, the Commission has encouraged CLECs who want to invest their own capital and build their own networks in areas served by rural companies.

The RTCC complains that Core has no network facilities connecting to any carrier’s network in Pennsylvania other than Verizon. Also, Core has no local exchange facilities in any RTCC service territory. RTCC claims that Core will not deploy any network facilities within the service territory of a CLEC for the provision of local exchange service to residential and business customers located in those service areas. (RTCC Stmt. 1 at 6-7; Tr. 429-31; Finding of Fact Nos. 15, 16, 32, 33).

The RTCC states that the information provided by Core in its plan for facilities was vague, incomplete and lacking candor. Accordingly, RTCC takes the view that Core has no plans to expand its network into rural service areas.

In its Replies to Exceptions, PTA complains that Core obtained certification in the territories of Verizon and Sprint based on its verified statement to the Commission in 2000 that it plans to offer facilities-based interexchange, exchange access, and local exchange services in the Commonwealth of Pennsylvania. It states that Core provides services to 26 retail ISPs offering dial-up Internet service. Based on this observation, PTA

points out that it is misleading for Core to now assure the Commission that it markets services to a wide variety of enhanced service providers.

PTA also points out that Core maintains a local tariff in Pennsylvania in which is offered all of those services in order to appear as a CLEC, but it actually offers only two services. PTA complains that Core relies upon local exchange carriers to originate, transmit, switch and deliver the dial-up calls to its single LATA location. Core uses CLEC status to obtain virtual numbers (VNXX) and does not invest in any facilities that will actually provide service within a local calling area.

PTA continues in its Replies, that Core demands to be paid reciprocal compensation because it deems all ISP-bound VNXX traffic to be local, notwithstanding the geographic remoteness of origination or the ultimate delivery point, the Internet. PTA states that even though Core intends to mirror the RLEC local calling areas in its tariff, VNXX is a critical aspect of Core's operation.

PTA does not dispute the fact that CLECs have no obligation to replicate all the service offerings of the rural ILECs. PTA also does not care for the type of network Core would build as long as it will actually provide facilities-based local service in the applied-for service area. PTA's analogizes its position to that of the Commission's position in the *Vanguard* decision where the CLEC application for local services was to be based on the type of service that is being proposed rather than on the underlying technology to provide that service.

Disposition

For the reasons outlined below, we shall grant Core's Exceptions, consistent with the discussion in this Opinion and Order. We conclude that Core has met its burden to establish that its operations are sufficiently facilities-based services. We are,

therefore, able to further conclude that Core will provide service over a distinctly independent network. We reach this conclusion, notwithstanding that Core's business model strains this concept in that Core does not, as a general proposition, provide the last mile facility to the customer premises. However, we reject the notion that Core's operations are that of a reseller.

In *Petition For Streamlined Form of Regulation and Network Modernization Plan of Citizens Telephone Company of Kecksburg . . .* Docket Nos. P-00971229, et al., (Order entered March 4, 1999), 1999 Pa. PUC LEXIS 61), we concluded that our review of facilities-based applications should be narrow as the intent of TA-96 is to promote competition. In the present case, Core's Application is attacked as lacking in facilities-based infrastructure. On review of the record, we would disagree with the presiding ALJ on this issue.

This Commission has not established a rigid standard that defines what facilities are sufficient to constitute the provision of "facilities-based service." At the one end of the spectrum, we have CLECs who are engaged solely in resale. These entities clearly do not qualify as facilities-based. At the other end of the spectrum, there is the CLEC which is able to provide service over a fully independent, *i.e.*, distinctly independent network. In the present case, we have the CLEC that provides service over a combination of facilities.⁹ However, the provision of services over a combination of facilities, while blurring the "distinctly independent network" conclusion, is an achievement that we presently envision can only be obtained, for example, by cable companies or broadband over power lines (BPL) entities.

⁹ We note that Core has made it clear that it will lease necessary elements from alternative service providers and not from the rural ILECs on a UNE or resale basis. (Exc. at 16, n. 57).

We would agree with the observation of Core, that the use of a combination of facilities, including self-provisioning, leased, or resold, is acceptable in the current telecommunications environment. *See* Exc. at 14, referencing *Application of Level 3 Communications, LLC*, Docket No. A-310633F0002, AmA (Initial Decision dated June 10, 2003). We, therefore, concluded that the deployment of a combination of facilities, in a variety of configurations, does not exclude the CLEC from being facilities-based. We would further agree with the argument of Core, that to the extent the CLEC is not wholly reliant on the resale of another carrier's (the incumbent's) services and has invested in facilities necessary for its subscribers to originate and terminate a call, we are able to find that the carrier qualifies as facilities-based.

Core, admittedly, provides service to a "niche" market. Its business model is geared towards aggregating dial-up access to ISPs. In this regard, its service is assailed by the PTA as not investing in any facilities that will actually provide service within a local calling area. However, we conclude that Core's business provides more than this. The service Core provides is comparable to and in direct competition to the service offerings provided by certain of the rural ILECs through affiliates. We expressly acknowledge and reject the contention of the PTA that rural ILEC affiliates provide services to ISPs, but provide these services in ways that are different from Core. *See* PTA R.Exc. at 5. Here, PTA asserts that we should draw a distinction between Core's ISP-oriented business and those of the rural ILEC affiliates because:

These RLEC affiliates operating in Verizon's territory provide service to ISPs, but in ways that are completely different from Core. In CTSI's example, only 17% of its revenues are from ISPs, compared to Core's 100% ISP-related revenue stream. CTSI provides regular dial tone service to its ISP customers, unlike Core, which refuses to provide originating service to anyone. By way of contrast, Core's ISP customers must seek out a real local telephone

service provider to be able to make (originate) a call.

(PTA R. Exc. at 5).

We are cognizant of the fact that the “dial up” ISP market has developed significant competition and we have required investment in facilities for purposes of CLEC entry into rural service territories. We conclude that Core’s facilities, which, at minimum, provide switch functionality, meet these criteria.

Finally, we agree with Core’s position on the facts of its proposed service. Core leases interconnection facilities from fiber based carriers and uses a self-provision switch, or switch equivalent, for service. Based on the foregoing, we shall reverse the ALJ on this issue.

2. Do Core's Services Satisfy Definition of a "Local Exchange Carrier"?

In Conclusion of Law Nos. 9, 12, 13, the ALJ found that Core’s operations do not meet the definition of a “local exchange carrier.” Consequently, he concluded that Core is not, and would not be in the future, a facilities-based CLEC nor satisfy the definition of local exchange carrier under federal law. However, the ALJ acknowledged that Chapter 30 of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. §§ 3011 – 3019, does not define the term “local exchange carrier.”

Exceptions

In its Exception No. 4, Core argues that the ALJ failed to apply the correct definition of “local exchange carrier” in evaluating Cores’ application. *See* also discussion at Exception No. 6. Core finds that the ALJ erroneously concluded that that term “local exchange telecommunications company” is functionally synonymous with the term “local

exchange carrier” as defined in Chapter 30. Core observes that the definition in Chapter 30 clearly states that it refers only to incumbent carriers and not competitors (66 Pa. C.S. § 3012). Core claims that a definition that is more applicable to its service is “Alternate service provider,” which is defined as an entity that provides telecommunications services in competition with a local exchange telecommunications company. (Exc. at 17).

Core also observes that the Chapter 30 law was not drafted nor designed to regulate CLECs or CLEC market entry and, therefore, is not an appropriate reference for a definition of “local exchange carrier.” Core states that the overriding purpose of Act No. 183 is to craft a revised alternative regulation regime for incumbent telephone companies, including network modernization plans and broadband deployment. 66 Pa. C.S. § 3011. (Exc. at 17).

Core states that TA-96 defines “local exchange carrier” as “any person that is engaged in the provision of telephone exchange service or exchange access.” (47 U.S.C. § 153(26)). Thus, a CLEC, like any other local exchange carrier, is a company that provides either telephone exchange service or exchange access service. Telephone exchange service is defined either as service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. (47 U.S.C. § 153 (47)).

Core claims that its two existing services in Pennsylvania- Managed Port service (MPS) and Superport service, constitute telephone exchange services that are tariffed as “an interface to connect Customer with its dial-up clients.” Core explains:

MPS is purchased in increments of DS0 level modem ports. Core's MPS is a direct substitute for PRI service commonly offered by ILECs and CLECs. MPS is analogous to local exchange services that Verizon markets to ISPs, including its Internet Protocol Routing Service ("IPRC"), Enhanced IntellilinQ PRI Hub Service and Cyberpop. In fact, Core's MPS has been specifically approved by the Commission as a competitive local exchange service, based on an explicit comparison to Verizon's Enhanced IntellilinQ PRI HUB Service, another Commission-approved local exchange service. Similarly, Core's Superport service is tariffed as "a single interface to send and receiver large volumes of telecommunications traffic on a LATA-wide basis. Both services are purchased in increments of DS0 level ports . . . – the basic unit of telecommunications traffic. In essence Core sells its end users DS0 telecommunications capacity on Core's switches.

(Exc. at 26-27; notes omitted).

To support its position on the status of CLEC telecommunications service offerings to ISPs, Core quotes the FCC's *ISP Remand Order*. This order mandates that ILECs provide TA-96 Section 251 interconnection to CLECs for the exchange of ISP-bound traffic. Core takes the position that this presumes that LEC services to ISPs are indeed telephone exchange services under TA-96. *See In the Matter of the Implementation of the Local Competition provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, 16 FCC Rcd. 9151 (2001) at ¶ 78, note 149.

In Replies to Exceptions, the RTCC and the PTA agree with the ALJ's finding that Core is not a facilities-based CLEC. They also agree with the ALJ's application of the federal definition of "local exchange carrier" which "means any person that is engaged in the provision of telephone exchange service or exchange access." The RTCC states that Core provides only managed modem interface to ISP clients. PTA asserts that since Core does not serve any subscribers it fails that portion of the definition.

The PTA states that even when Core’s tariff defines local and toll calling areas by reference to customer’s physical presence within geographically-defined exchange local calling area, Core’s ISP customers are “not required to have any physical facilities . . . within that originating exchange.” (NT at 127). The PTA argues against Core’s claim that its calls are local based on the conceptual notion that its Internet-bound traffic is composed of two parts – a “telephone exchange service” piece and a non-regulated “information service” piece that flow through the Internet. The PTA maintains that the FCC continues to defend the “one call” approach and observed that the traffic is classified as interstate. (R. Ex. at 15).

Disposition

On consideration of the Exceptions of Core, they shall be granted, consistent with the discussion in this Order. We need not engage in an extended consideration of the nature of “dial up” access to ISP providers and address the myriad of questions as to the nature of the service, particularly whether it is local, non-local, or information versus telecommunications. The FCC, in its *Intercarrier Compensation for ISP-bound Traffic Order*, concluded that ISP-bound traffic was not subject to reciprocal compensation provisions of TA-96 Section 251(b)(5), (*See Order at ¶ 66*). In this same order, the FCC also made several observations which run counter to the position of Core in this Application. However, the FCC did make a jurisdictional determination regarding this traffic and established a compensation mechanism applicable to this traffic. We find the FCC’s treatment of dial-up access to ISPs to be more consistent with the Core position. That is, ISPs themselves, are treated as end users of telecommunications services, while the underlying service they provide to ISP subscribers, Internet access, is information.¹⁰

¹⁰ This observation is not to suggest a particular position on the “one-call” versus “two calls” debate associated with ISP-bound compensation litigation.

Based on the foregoing, we shall grant the Exceptions of Core.

3. VNXX and its use by CLECs

In Conclusion of Law No. 10, the ALJ found fault with Core's current operations in Verizon, Verizon North and Sprint service territories. Core's local service territory mirrors that of the local exchanges of these ILECs, but through the use of VNXX, Core allows its ISP customers to arrange for their end user customers to make a local call from Allentown to Philadelphia – a call which would, otherwise, be classified as a toll call. ALJ Weismandel found that Core provides no connections from end users to Core's ISP customers, but relies on the use of VNXX to permit its ISP customers to make a "local" telephone number available which uses the ILEC facilities to connect the end user with the ISP. The ALJ concludes that this demonstrates that Core is not offering the transmission of messages or communications that originate and terminate within a prescribed local calling area. *See* Finding of Fact No. 17.

Exceptions

In its Exception No. 5, Core states that the ALJ selectively used the record in this case to erroneously conclude or imply that it relies exclusively on VNXX to provide local service to its customers and that communications delivered via VNXX are not properly rated as "local." Core objects to the ALJ's pejorative characterization of how it uses VNXX. Core further takes exception to the use of the record to conclude that all the traffic Core terminates on a VNXX basis. This conclusion, states Core, is based on one "vignette" of a VNXX call from Allentown to Philadelphia. Core does not discount its use of VNXX, but denies it uses VNXX assignments exclusively in rural ILECs' territory.

Core emphasizes that the calls it terminates on a VNXX basis are local as a matter of federal law. It refers to the decision of the FCC staff in the *Virginia Arbitration*

*Order*¹¹ to argue that the standard industry practice is for carriers to rate calls by comparing the origination and termination of NPA-NXX codes. (Exc. at 18). Core also states that the use of VNXX codes was found to be legal and acceptable by this Commission in its recent investigation of the issue and points out that there is no state or federal law or regulation that requires them to take any steps to prohibit the use of VNXX service in Pennsylvania. Core finally points out that the Investigation Report conducted by this Commission found that VNXX practices were positively beneficial to consumers and competition. *See Investigation Report, Generic Investigation Regarding Virtual NXX Codes*, Pa. P.U.C. Docket No. I-00020093, at 10 (Order entered Oct. 14, 2005).

Core further notes that, as stated by the FCC on numerous occasions, the calls that are handled on a VNXX basis do not just appear to be local. Rather, the calls are local and subject to Section 251(b)(5) of TA-96. *Virginia Arbitration Order*.

Core also claims that the record shows that ILECs and CLECs serve ISPs in Pennsylvania using various sorts of expanded calling area arrangements. According to Core, Verizon provides VNXX in conjunction with its tariffed Internet Protocol Routing Service which provides for the collection, concentration and management of the customers traffic within the LATA. (Core Exc. 15). Core also points out that Commonwealth Telephone Company is currently interconnected with a CLEC certified in its territory that principally serves ISP's by using VNXX codes. (Core Cross Exh. 36). Core also points out another instance of a rural carrier, North Pittsburgh Telephone Company, offering Foreign Exchange service to ISPs including its affiliate ISP, Pinnatech. (Core Cross Exh. 19-21).

¹¹ Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, 17 FCC Rcd. 27039, ¶ 301 (2002) (*Virginia Arbitration Order*).

In Replies to Exceptions, the PTA supports the ALJ's conclusion that Core's business plan consists of utilizing virtual numbering methods to generate a call that appears to be local, so that Core can obtain reciprocal compensation. PTA opines that the ALJ's observation in this regard is completely accurate. It also agrees that Core does this to expand local calling area to make what would otherwise be toll calls as toll-free dial-up internet calls. The PTA defers to Core's argument that most, if not all, of the traffic physically originates and terminates within the ILECs' and Core's local calling area, and it finds Core's reliance in a few instances insignificant.

The PTA states that it has consistently acknowledged the Commission's Statement of Policy on VNXX that it declines to take any steps to prohibit the use of VNXX service in Pennsylvania and will not make any conclusions on the issue of inter-carrier compensation for traffic that moves over VNXX arrangements. The PTA concedes that not all applications of VNXX violate local calling rules. However, in the case of Core, it is using VNXX as a device to claim local status for an Interexchange call.

The RTCC points out that the Commission, in its Statement of Policy on the use of VNXX, did not make any jurisdictional findings that the intraLATA boundaries were eliminated or that VNXX calls were all local. The RTCC adds that the Commission, in fact, recognized that the VNXX dispute is the applicable inter carrier compensation scheme and specifically deferred to the FCC's pending *Intercarrier Compensation Proceeding*. (RTCC R. Exc. at 13, 14, quoting Commission's *VNXX Statement of Policy* at 9, Order entered on October 14, 2005).

The RTCC also notes two recent decisions – the First Circuit¹² and the Second Circuit¹³ Courts of Appeals decisions – to refute Core’s argument that VNXX traffic is local traffic. The RTCC submits that the two decisions determined that VNXX traffic is Interexchange traffic, and thus, is subject to access charges. (RTCC R. Exc. at 16).

Disposition

On consideration of the positions of the parties, we shall grant Core’s Exceptions consistent with our discussion. In our recent *VNXX Statement of Policy*, we concluded:

Based upon the discussion above, we decline to take any steps at this time to prohibit the use of virtual NXX service in Pennsylvania. Additionally, since the FCC is currently considering to establish a unified intercarrier compensation regime for all telecommunications traffic that utilizes the public switched network, we will not make any conclusions at this time on the issue of intercarrier compensation for traffic that moves over VNXX arrangements

(*VNXX Statement of Policy* at 11).

Substantial focus has been directed to Core’s use of VNXX as part of its business plan. Particularly, ALJ Weisman del found disfavor with the practice in connection with his discussion of the local exchange carrier nature of Core’s services:

. . . through its use of VNXX, Core allows its ISP customers to arrange for their end user customers to make a “local” call from Allentown to Philadelphia – a call that is not a local call under Verizon Pennsylvania Inc.’s (and, hence, Core’s) Commission

¹² *Global NAPs, Inc. v. Verizon New England, Inc., et al.*, 444 F.3d 59 (1st Cir. 2006)

¹³ *Global NAPs, Inc. v. Verizon New England, Inc.* Docket No. 04-4685-cv (2nd Cir. Order Released July 5, 2006)

approved tariff. This demonstrates that Core is not offering “the transmission of messages or communications that originate and terminate within a prescribed local calling area” (emphasis added).

(I.D. at 19).

The record supports a conclusion that several ILECs, CLECs, and/or their affiliates, offer VNXX, or a VNXX-like service. The record indicates that VNXX is not exclusively used by Core. Based on our conclusion that Core has sufficiently invested in facilities and by a preponderance of the evidence has demonstrated a commitment for more investment so as not to fall in the category of reseller, we find the emphasis on its VNXX use misplaced in this regard.

With regard to the local nature of Core’s exchange service as a result of its use of VNXX, we would further agree with Core. Core’s reliance on VNXX has been emphasized to the extent it has been the subject of disputed questions of fact. Core explains:

Core’s services are telephone exchange services because each and every call is terminated on a local basis (whether geographically local, or VNXX), within the same LATA in which it originated, courtesy of Core’s direct interconnections with Verizon tandems in each LATA. . . .It is also important to differentiate between Core’s services, whereby each call is originated and terminated on a local basis, within the same LATA, and the service at issue in the Level 3 Application in Marianna & Scenery Hill territory. In the case of Level 3, it was determined that all Pennsylvania calls terminated by Level 3 were terminated at Level 3’s modem banks in Baltimore, Maryland. By contrast, as set forth above, all calls handled by Core originate and terminate on a local basis in the same LATA.

(Core Exc. at 27; notes omitted).

The Exceptions of Core are granted.

4. Public Nature of Service

In Conclusion of Law No. 11, ALJ Weismandel concluded that Core's customer base, consisting of 26 ISPs in Pennsylvania, does not comport with its obligation to offer services 'to the public' under the Chapter 30 of the Pennsylvania Public Utility Code. *See* I.D. at 19.

Exceptions

Core, in its Exception No. 6, states that the ALJ applied the wrong test to determine what constitutes service to the public. Core argues that the ALJ erroneously concluded that Core does not offer services to the public and, therefore, does not qualify as a public utility. Core adds that the ALJ failed to cite to any Commission or federal precedent but, instead, speculated as to the legal definition of the term "to the public." Core points out that under applicable law, ISPs are undoubtedly end users of telecommunications services. Core relies on language from the D.C. Circuit Court of Appeals that strongly suggested that an ISP is a communications-intensive business end user, to make the argument that the ISPs, themselves, are a class of the public which uses telecommunications services, whereas the ISP subscribers are not purchasers of telecommunications services. (Exc. at 21).

Core claims that it clearly serves the public under Section 102 of the Public Utility Code, 66 Pa. C.S. § 102. A "public utility" is defined as: "(a)ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for. . . (c)onveying or transmitting messages or communications. . . by telephone or telegraph. . . the public for compensation. . .". Core clarifies that the Pennsylvania courts have consistently stated the test for "public utility" and the phrase "for the public" is based on whether or not such person holds himself out, expressly or impliedly, as engaged in the

business of supplying his product or service to the public, as a class or to any limited portion of it, as contradistinguished from the holding himself out as serving or ready to serve only particular individuals. See Exc. at 22, citing *Waltman v. Pa. PUC*, 596 A.2d 1221 (Pa. Cmwlth. 1991),¹⁴ (*Waltman*). Core asserts that the Commission has used the holding of *Waltman* to find public utility service to a utility that served as few as two customers. *Id.* citing *UGI Utilities, Inc. v. Pa. PUC*, 684 A.2d 225 (Pa. Cmwlth Ct. 1996) (*UGI*).

In *UGI*, the court affirmed the Commission’s modification of a gas pipeline company’s certificate of public convenience to provide “transportation of gas products for the purpose of electric generation” to a class of customers that included two electric companies. *UGI*, 684 A.2d at 230. Core argues that the lack of residential customers also does not preclude a utility from being considered “public.” It cites *Dunmire Gas Co. v. Pa. P.U.C.*, 413 A.2d 473 (Pa. Cmwlth Ct. 1980), where the court found that a public utility which did not solicit residential customers was properly a public utility so long as the company provided gas service, to the extent of its capacity, to an indefinitely open class of customers.

Disposition

On consideration of the ALJ recommendation, we shall reject said recommendation. The Exceptions of Core are granted, consistent with our discussion. We find the ALJ’s conclusion of what constitutes service to the public to be unduly narrow in that it fails to recognize a discreet subset of the public to whom Core provides services, indiscriminately. We have, in this Order, recognized the competitive nature of the niche market for telecommunications service to ISPs. We agree with Core that ISPs are a class of the public to whom Core holds itself out to provide service to any member of that class.

¹⁴ *Appeal granted* 529 Pa. 642, 600 A.2d 1260, *affirmed* 533 Pa. 304, 621 A.2d 994 (1993).

In the present case, we conclude that the pertinent factors discussed in *Waltman* and in *Dunmire Gas Co.*, have been satisfied by Core.

5. Technical, Managerial, and Financial Fitness.

The Initial Decision calls into questions Core's technical, managerial and financial fitness. *See* Conclusions of Law Nos. 16-20. An applicant that has previously been issued a certificate of public convenience to render the kind of service for which additional territorial authority is sought enjoys a rebuttable presumption of fitness. The ALJ, however, concluded that the normal presumptions that apply to an applicant who has been issued a certificate of public convenience to render the kind of service should not be applied in the case of Core's application because Core does not provide the kind of service that it was authorized. Consequently, the ALJ found that Core has the burden to prove its technical, financial and managerial fitness. (I.D. at 23-25).

ALJ Weismandel concluded that Core did not bear its burden of proof as to its technical fitness to render the kind of service for which it applied for authority. Core presented evidence regarding the number of employees it utilizes over six states (including Pennsylvania) and five switch equivalents in Pennsylvania, all located in Verizon's service territory. The ALJ did not find this evidence to be credible as bearing on Core's technical fitness.

The ALJ also questioned Core's financial fitness. He found it significant to observe that when one takes into consideration reciprocal compensation that Verizon refused to pay to Core for a period of years, Core's operating margin is reduced from more than 81% to less than 5%. (I.D. at 25). The ALJ was additionally skeptical of the future financial prospects for Core. He noted that Core's business plan put heavy reliance on one-way reciprocal compensation and further relied on its definition of when a dial-up call to the

Internet “terminates.” The ALJ viewed this business plan as dubious in light of the FCC initiatives to eliminate or reduce “regulatory arbitrage.” (I.D. at 26).

The ALJ also found that Core was lacking in commitment to comply with the Public Utility Code. He cited instances of Core being penalized in a number of cases regarding number reclamation and proceedings wherein it failed to timely file Commission required reports. The ALJ also noted that the service offerings listed in Core’s Commission approved tariff are not really offered in the Pennsylvania territories where it has authority. Finally, the ALJ found that Core does not offer Lifeline, Emergency 911, operator services, or TRS.

Exceptions

In its Exception Nos. 1, 8, and 9, Core objects that it was not afforded a rebuttable presumption of fitness. Core also asserts that many of the ALJ’s Findings of Facts regarding Core’s current operations are either incorrect, are not supported by the record, or relate to matters outside the scope of this proceeding. Core complains that the presiding ALJ exceeded the scope of authority in this proceeding by concluding that Core does not have the requisite fitness to render service in its currently certificated territory. *See* Exc. at 33 citing *Re: V.I.P. Travel Service, Inc.*, 56 PA PUC 625 (1982).

In its Replies, the PTA emphasizes that, to the extent Core was entitled to a presumption of fitness, that presumption has been rebutted. (PTA R.Exc. at 22-23).

In its Replies, RTCC references its proposed Findings of Fact and cites, as examples, Core’s 5% operating margin and \$10,000 cash total current assets if Core loses the ability to claim reciprocal compensation for the termination of intraLATA toll ISP-bound calls, and its lack of legal fitness as shown by Core’s representations in its business plan. (RTCC R. Exc. at 24).

Disposition

On consideration of the positions of the parties, we find that Core was entitled to a rebuttable presumption of fitness. To the extent the presiding ALJ was convinced that the burden had been sufficiently rebutted by the presentation of the protesting parties, we would emphasize our narrow review of facilities-based CLEC applications. While the prospects of Core's future success may seem daunting in light of regulatory policies under consideration involving intercarrier compensation, we have noted that the burden is on the facilities-based CLEC to make a go of its business. *See Petition For Streamlined Form of Regulation and Network Modernization Plan of Citizens Telephone Company of Kecksburg . . .* Docket Nos. P-00971229, et al., (Order entered March 4, 1999), 1999 Pa. PUC LEXIS 61.

Additionally, while the Commission-initiated proceedings against Core are a cause for mild concern, we do not conclude that the record shows a lack of propensity to operate in conformance with Commission Orders.

Based on the foregoing, we shall grant the Exceptions of Core, consistent with this discussion.

5. Public Interest

This Commission has, consistent with the clear statutory objectives of state and federal law, concluded that the benefits of local telephone competition are in the public interest. *See Amended Application of Vanguard Telecom Corp. . . .*, Docket No. A-310621F0002 (Order entered August 23, 2000). At page 24 of the Initial Decision, it is noted that Core's technical capability to provide the service to its current 26 retail ISP customers is not in question. However, the protesting parties challenged, and the presiding

ALJ agreed, that Core's technical fitness to provide facilities-based local exchange carrier service in the areas which are the subject of the present Application, was deficient.

The public interest challenge to Core's Application is based on several complaints of the protesting parties. Most notably, Core's Application is objectionable to the rural ILECs because Core's business plan targets dial-up service to ISPs and, apparently, does so in a manner which maximizes existing intercarrier compensation rules and minimizes the capital outlay necessary to enter the market. Core's current customer base is predominantly twenty-six ISPs who, themselves, provide Internet service. *See* PTA MB at 8, citing NT 82-83.

The protesting parties do not discount the value of dial-up Internet access, or the competitive nature of this market. Rather, our review of the record indicates that the protesting parties object to the manner in which Core is able to provide its service. As noted, Core is able to provide its service using a business strategy that is made viable by the current state of regulation, particularly regarding the intercarrier compensation regime for dial-up Internet calls. We are mindful of the assertions of the PTA that Core's proposed service will result in a loss of revenue for the rural ILECs; *see* PTA MB at 51:

The effects on the RLECs are several-fold, loss of revenue, imposition of new costs (*i.e.* reciprocal compensation) and continuation of the same costs of providing service, as Mr. Watkins explained:

When the incumbent LEC serves the ISP, the incumbent LEC receives service payment for the dial-up service capability that the ISP obtains; when the incumbent LEC serves Core under Core's scheme, the incumbent LEC receives nothing, the incumbent LEC still provides the same dial-up capability, but now faces the threatened burden of payment to Core for termination and the incurrence of additional costs associated with provisioning an

extraordinary network arrangement to accommodate Core's scheme.

(PTA MB at 51).

Additionally, the rural ILECs take the position that the public interest will be detrimentally impacted due to the effect of Core's operations on ISPs and IXCs. The Application is further questioned for the potential that it will result in a "waste" of numbering resources. (PTA MB at 52-53). On the question of Core's financial fitness, such fitness was attacked by the protesting parties who, on the one hand, observed that Core's operating revenues and net income indicated a profit margin of 81%. (PTA MB at 7). On the other hand, the protesting parties undermined this perception of profitability with the conclusion that Core's revenue stream is virtually and exclusively dependent upon reciprocal compensation. (PTA MB at 8).

On consideration of the positions of the protesting parties, we are constrained to deny their protests. We conclude that the public interest benefits of the Application clearly outweigh the asserted detriments. This Commission has been continually faced with the concerns of the incumbents when faced with telecommunications competition in the local exchange market, *i.e.*, the so-called "trilogy" argument.¹⁵ We find the protests of the protesting parties to be a variation of the trilogy argument whereby the trilogy is now to expressly include intercarrier compensation reform. Substantially similar to the concerns that this Commission addressed when we initially authorized competitive entry into the local exchange market, *see MFS-I*,¹⁶ the public interest is not promoted by foreclosing competition until such time as difficult regulatory problems are resolved. *See, generally, Chester Water Authority, v. Pa. PUC,*

¹⁵ *See Suspension Termination Order*, Docket No. P-00971177 (Order entered January 15, 2003), slip op. at 10 discussing the issues of access charge reform, interconnection, and universal service.

¹⁶ *Application of MFS Intelenet, Inc.*, Docket Nos. A-310203F0002, et al. (Order entered October 4, 1995).

868 A.2d 384 (Pa. Cmwlth. Ct. 2005) – the propriety of permitting competition in a particular field is an administrative question for the PUC in the exercise of its discretion. This Commission would not, however, condone an express shifting of costs by a new entrant where the record supports such a conclusion. We conclude that the record does not support such a conclusion.

Based on the foregoing, we conclude that the public interest will be advanced by our grant of the Application.

V. Conclusion

In light of the foregoing discussion, we shall grant Core's Exceptions, reverse the ALJ's Initial Decision and grant Core's Application to provide service as a facilities-based Competitive Local Exchange Carrier.

VI. Order

THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Core Communications, Inc. to the Initial Decision of Administrative Law Judge Wayne L. Weisman del are granted consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Wayne L. Weisman del is reversed consistent with this Opinion and Order.
3. That the Application of Core Communications, Inc. for Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a facilities-based Competitive Local Exchange Carrier to the Public in the Service Territories of Armstrong Telephone Company – North, Armstrong Telephone Company – Pennsylvania, Bentleyville Telephone Company, Buffalo Valley Telephone Company, Citizens Telephone Company of Kecksburg, Commonwealth Telephone Company, Conestoga Telephone and Telegraph Company, Denver and Ephrata Telephone and Telegraph Company, Hancock Telephone Company, Hickory Telephone Company, Iron ton Telephone Company, Lackawaxen Telecommunication Services, Laurel Highland Telephone Company, Mahanoy & Mahantango Telephone Company, Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, North Pittsburgh Telephone Company, Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Sugar Valley Telephone Company, Venus Telephone Corporation, West Side Telephone Company,

and Yukon-Waltz Telephone Company, at Docket Number A-310922F0002 AmA, is approved, consistent with this Opinion and Order.

4. That the Protest filed July 18, 2005, by the Pennsylvania Telephone Association at Docket Number A-310922F0002, AmA, is denied.

5. That the Protest filed July 18, 2005, by the Rural Telephone Company Coalition at Docket Number A-310922F0002, AmA, is denied.

6. That Alltel Pennsylvania, Inc.'s Motion for Stay and Record Incorporation (Alltel Motion) filed April 24, 2006, referenced to Docket Number A-310922F0002, AmB, is denied, consistent with the discussion in this Opinion and Order.

7. That the Secretary mark this docket closed.

BY THE COMMISSION

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: November 30, 2006

ORDER ENTERED: December 4, 2006