



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR
FILE

April 29, 2014

Received & inspected

APR 30 2014

FCC Mail Room

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

Re: PETITION FOR DECLARATORY ORDER OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
WC Docket No. 14-_____

Dear Secretary Dortch:

Enclosed with this transmittal letter is the Petition for Declaratory Order of the Pennsylvania Public Utility Commission and related documents. The Petition concerns matters of wireline telecommunications.

The Petition requests that the Federal Communications Commission remove uncertainty on whether the Pennsylvania Public Utility Commission has jurisdiction to adjudicate intercarrier compensation disputes when they arise between competitive local exchange carriers outside 47 U.S.C. §§ 251 and 252, involve the exchange of local dial-up Internet traffic, and when resulting decisions properly enforce the *ISP Remand Order* and are otherwise consistent with Federal Communications Commission rules.

Associated with this transmittal letter are the following documents:

1. Petition for Declaratory Order of the Pennsylvania Public Utility Commission;
2. Appendix A – AT&T Corp., et al. v. Core Communications, Inc. *et al.*, No. 12- 7157 (E.D. Pa., Jan. 31, 2014 Memorandum Decision & Order), and March 10, 2014 Order;
3. Appendix B – Jan. 31, 2014 Order Granting AT&T's Motion to Dismiss Core's Counterclaims; and
4. Appendix C – Pa. PUC Order entered December 5, 2012, and Reconsideration Order entered August 15, 2013.

Please note that the Pennsylvania Public Utility Commission will serve this Petition on the affected carriers AT&T Corporation and Core Communications, Inc. as a part of proceedings currently pending in the Third Circuit Court of Appeals at *AT&T Corp., et al. v. Core Communications, Inc. et al.*, Consolidated Case Nos. 14-1499 (PUC) and 14-1664 (Core). Please address any correspondence regarding this filing to my attention at the following address:

Shaun A. Sparks
Assistant Counsel
Pennsylvania Public Utility Commission
Third Floor West Keystone Building
400 North Street
Harrisburg, PA 17120
Phone: 717-787-3464
Email: shsparks@pa.gov

Sincerely,

A handwritten signature in black ink, appearing to read 'Shaun A. Sparks', with a long horizontal flourish extending to the right.

Shaun A. Sparks
Assistant Counsel

cc: Julie Veach, Chief, Wireline Competition Bureau

Enclosures

Received & Inspected

APR 30 2014

FCC Mail Room

Before the
Federal Communications Commission
Washington, D.C., 20544

In the Matter of)	
)	
Petition of the Pennsylvania Public Utility)	
Commission for Declaratory Order On)	
Whether State Public Utility Commissions)	WC Docket No. 14-____
Are Entitled to Adjudicate Intercarrier)	
Compensation Disputes Involving the)	
Exchange of Local Dial-Up Internet Traffic)	
Between Carriers with Indirect)	
Interconnection)	

PETITION FOR DECLARATORY ORDER
OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Shaun A. Sparks
Assistant Counsel

Colin W. Scott
Assistant Counsel

Kathryn G. Sophy
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel

*Counsel for Pennsylvania Public
Utility Commission*

P.O. Box 3265
Harrisburg, PA 17105-3265
Phone: 717-787-5000

Date: April 29, 2014

TABLE OF CONTENTS

A.	Background.....	5
	Declaratory Relief Standard.....	10
B.	The Commission Should Grant Declaratory Relief To Remove Uncertainty Created By The District Court Regarding The Types Of Intercarrier Compensation Disputes To Be Adjudicated By The Pa. PUC And Under Applicable Federal And State Law	11
1.	Applicable Federal Law – TA-96	11
2.	Applicable Federal Law – The <i>Pac-West</i> Decision, The FCC <i>Amicus Brief</i> , And The <i>ISP Remand Order</i>	14
3.	Applicable State Law	16
4.	Other Issues.....	18
C.	The District Court Decision Blocks The Timely Disposition Of Similar Intercarrier Compensation Disputes That Are Currently Pending Before The Pa. PUC.....	21
D.	The Commission Is Not Legally Barred From Issuing An Appropriate Declaratory Ruling Clarifying that the Pa. PUC Can Lawfully Enforce A Federal Rate.....	22
E.	Relief Requested	23

**Before the
Federal Communications Commission
Washington, D.C., 20544**

In the Matter of)	
)	
Petition of the Pennsylvania Public Utility Commission for Declaratory Order On Whether State Public Utility Commissions Are Entitled to Adjudicate Intercarrier Compensation Disputes Involving the Exchange of Local Dial-Up Internet Traffic Between Carriers with Indirect Interconnection)	WC Docket No. 14-_____

**PETITION FOR DECLARATORY ORDER
OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In accordance with 47 C.F.R. § 1.2, the Pennsylvania Public Utility Commission (Pa. PUC), respectfully submits a Petition for Declaratory Order (Petition) to the Federal Communications Commission (Commission or FCC) seeking formal clarification to resolve a controversy and remove uncertainty on whether the Pa. PUC can adjudicate intercarrier compensation disputes when they arise between competitive local exchange carriers (CLECs) outside Sections 251 and 252, 47 U.S.C. § 251 and 252, when they involve the exchange of local dial-up Internet traffic, and when the Pa. PUC decision properly enforces the *ISP Remand Order*¹ and is consistent with Commission rules. The Pa. PUC petitions the FCC to rule that the Pa. PUC has jurisdiction to adjudicate such disputes so long as the result is consistent with the *ISP Remand Order* and applicable federal law.²

¹ *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001).

² See *WorldCom, Inc. v. FCC*, 288 F.3d 429, 431-432 (D.C. Cir. 2002) (regarding interim cost-recovery transition).

Traditionally, the Pa. PUC and other state commissions have adjudicated intercarrier compensation disputes. Such adjudications have taken place both for telecommunications carriers that have interconnection agreements under Sections 251 and 252 of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. §§ 251 and 252, as well as for carriers, including CLECs, that exchange traffic through indirect interconnection without applicable interconnection agreements or formalized intercarrier compensation arrangements.

The Petition is necessary because of a recent decision and an accompanying Memorandum of Law of the U.S. District Court for the Eastern District of Pennsylvania (District Court), which overturned a ruling of the Pa. PUC on an intercarrier compensation dispute between Core Communications, Inc. (Core), AT&T Communications of Pennsylvania, LLC, and TCG Pittsburgh, Inc. (collectively, AT&T). The District Court decision has called into question the traditional practice of the Commission and the states addressing intercarrier compensation disputes between CLECs that involve the exchange of dial-up Information Service Provider or ISP-bound traffic. The AT&T appeal arose after the Pa. PUC issued a series of Orders adjudicating formal complaints filed by Core against AT&T on the indirect exchange and termination of local dial-up ISP-bound access traffic.³

Declaratory Relief is necessary because:

- First, the District Court decision blocks the Pa. PUC, and possibly other states, from timely concluding similar local dial-up ISP-bound traffic intercarrier compensation disputes awaiting final disposition before the Pa. PUC.⁴ Similarly, the District Court

³ *AT&T Corp., et al. v. Core Communications, Inc. et al.*, No. 12- 7157 (E.D. Pa., Jan. 31, 2014 Memorandum Decision, March 10, 2014 Order), Appendix A (District Court decision).

⁴ See generally *Core Communications, Inc. v. XO Communications, Inc.*, Pa. PUC Docket No. C-2009-2133609, Formal Complaint filed September 23, 2009, Initial Decision issued May 18, 2012, *Order Pending*.

Order may place at risk Pa. PUC rulings and their results on previously adjudicated intercarrier compensation disputes that have been in place for a period of time and have not been appealed.

- Second, the District Court decision creates regulatory and financial uncertainty for all affected carriers with a judicial result that upends existing practice. The resulting two-track agency approach to adjudicate intercarrier compensation disputes between indirectly interconnected carriers involving local dial-up ISP traffic created by this decision, one for the states under Sections 251 and 252 and another for the FCC in all other instances, puts business plans in jeopardy. There is now uncertainty as to whether carriers are entitled to any compensation for terminating traffic during the transition to bill and keep under the Commission's *USF/ICC Transformation Order*⁵ and whether they can seek relief before state commissions acting in accordance with Commission policy and federal law.
- Third, the District Court decision markedly departs from existing practice, while creating precedent that this type of intercarrier compensation dispute — and possibly others involving Internet Protocol (IP) based traffic — is within the *exclusive* jurisdiction of the Commission and that only the Commission may resolve any such matters. The District Court's decision appears to conflict with applicable federal and Pennsylvania law that such jurisdiction is not exclusive.

⁵ *In re Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *appeals pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir., Argued Nov. 19, 2013).

- Fourth, the District Court creates a division between the categories of intercarrier compensation disputes that can be litigated before the Pa. PUC and those that must be litigated before the Commission. The District Court decision would permit interconnection agreement disputes about local dial-up traffic arising under Section 251 and 252 to be resolved by the state commissions but require other CLEC-to-CLEC compensation disputes governing local dial-up ISP-bound traffic to be heard by the Commission. Such a result is not competitively neutral under 47 U.S.C. § 253.
- Fifth, the Pa. PUC questions whether the District Court decision meshes with Section 251(a)(1) of TA-96, which specifies that each telecommunications carrier has the duty to interconnect directly *or indirectly* with other telecommunications carriers. The District Court decision jeopardizes the ability of an aggrieved carrier that is interconnected indirectly with another carrier to seek appropriate relief from a state commission in an intercarrier compensation dispute that the state commission has otherwise been permitted to adjudicate through the proper application of federal and state law.
- Finally, the Pa. PUC is uncertain whether this departure from existing practice set out in the District Court decision is compatible with past Commission pronouncements on TA-96, particularly the Commission's statement in the Ninth Circuit *Pac-West* proceeding that the *ISP Remand Order* preempts only inconsistent state regulation of local ISP-bound traffic.⁶

For these reasons, the Pa. PUC petitions the Commission to issue a Declaratory Order post-haste. The Commission must provide affirmative guidance on whether state commissions retain jurisdiction to deal with matters arising from the exchange of traffic between directly and

⁶ *AT&T Communications of Cal. v. Pac-West Telecom*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*).

indirectly interconnected carriers, including intercarrier compensation disputes involving local ISP-bound traffic, through the proper application of federal and state law. The Pa. PUC submits that the Commission should declare that state commissions retain jurisdiction over these types of disputes as long as the result is consistent with applicable federal law. Doing so will provide definitive authority.

Alternatively, if the Commission determines that this is not the case, the Pa. PUC asks the Commission to explain in a Declaratory Order how the Pa. PUC, and possibly other states, is to transfer all existing adjudications to the Commission and the procedures for directing all new matters to the FCC for future disposition.

A. Background.

The federal District Court for the Eastern District of Pennsylvania (District Court) overturned the Pa. PUC's rulings and found that the Pa. PUC did not have jurisdiction to adjudicate an intercarrier compensation dispute involving the exchange of local ISP traffic between two indirectly interconnected CLECs. The Pa. PUC rulings relied, in part, on a prior Ninth Circuit decision in *Pac-West* and a Commission *Amicus* brief filed in the relevant *Pac-West* appeal.⁷ In *Pac-West*, the FCC's brief stated that the *ISP Remand Order* does apply to CLEC-CLEC dial-up ISP-bound traffic, although the Commission refrained from advising the Ninth Circuit whether a state commission "would have jurisdiction, acting outside the context of a section 252 arbitration, to adjudicate the dispute applying federal legal standards."⁸

⁷ *AT&T Communications of Cal. v. Pac-West Telecom.*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*). (The Ninth Circuit ruled that state commissions could not impose intrastate switched carrier access rates for dial-up ISP bound calls.)

⁸ Brief for the Federal Communications Commission as *Amicus Curiae*, at 29, *AT&T v. Pac-West*, 651 F.3d 980 (9th Cir. 2011). (FCC *Amicus* Brief).

On May 19, 2009, Core filed Formal Complaints with the Pa. PUC against AT&T for the non-payment of intercarrier compensation for local dial-up ISP-bound traffic that originated with AT&T's end-users and terminated at Core's switched access network facilities. Both Core and AT&T operate as CLECs under the intrastate jurisdiction of the Pa. PUC.

The dispute arose because the traffic at issue was exchanged through an indirect interconnection arrangement involving the tandem switching network facilities of Verizon Pennsylvania LLC (Verizon), an incumbent local exchange carrier (ILEC) also operating under the Pa. PUC's intrastate jurisdiction. Core and AT&T do not have an interconnection agreement with one another in Pennsylvania. The Pa. PUC affirmatively asserted subject matter jurisdiction through a September 8, 2010 ruling on petitions for interlocutory review and answers to material questions.⁹

The Core Formal Complaints were fully adjudicated before the Pa. PUC's Office of Administrative Law Judge (OALJ), and such adjudication involved an evidentiary hearing with cross-examination of witnesses. Following the issuance of an Administrative Law Judge (ALJ) Initial Decision on May 24, 2011, and the receipt of exceptions and reply exceptions, the Commission ruled on this matter by Order entered on December 5, 2012,¹⁰ and through a

⁹ *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC, et al.*, Docket Nos. C-2009-2108186, C-2009-2108239, Order entered September 8, 2010 (Pa. PUC Material Question Order).

¹⁰ The Pa. PUC determined that the intercarrier compensation amount at issue is approximately \$250,000. This amount excludes applicable interest based on the federal rate cap rate of \$0.0007 per minute of use (MOU) applied to the traffic in dispute consistent with the *ISP Remand Order*.

subsequent Reconsideration Order entered on August 15, 2013.¹¹ The main points of the Pa. PUC Orders in this matter are summarized as follows:

1. The Pa. PUC was “not persuaded by AT&T’s arguments that” it “may not hear and decide this case by applying federal law.”¹² The Pa. PUC concluded that the Commission had not preempted the Pa. PUC regulation of the traffic at issue where such regulation is consistent with the Commission’s regulation of the relevant intercarrier compensation regime. The Pa. PUC noted that the Commission’s *ISP Remand Order* has preempted inconsistent state regulation and “[b]y implication, the FCC has *not* preempted state regulation of local ISP-bound CLEC-CLEC traffic that is consistent with the FCC’s intercarrier compensation regime.”¹³ Furthermore, the Pa. PUC observed “that it would be reasonable and efficient to resolve matters that have mixed traffic, ISP-bound and VoIP [voice over the Internet Protocol], in one forum, rather than sending parties to two different forums based on the type of traffic at issue.” Finally, the Pa. PUC stated that, under AT&T’s flawed theory, “a CLEC would be required to pursue compensation for local ISP-bound traffic at the FCC, but would be required to litigate a separate proceeding involving the same carrier before a state commission to obtain compensation for the small portion of ISP-bound traffic that is non-local.” This “would be the inefficient use of resources and an unreasonable burden on CLECs seeking compensation for terminating ISP-bound traffic.”¹⁴

2. The Pa. PUC reexamined its prior Material Question Order in light of the *Pac-West* decision of the U.S. Court of Appeals for the Ninth Circuit and the relevant Commission *Amicus* brief that had been submitted in that case.¹⁵

3. The Pa. PUC reached the determination that “because the record evidence did not support a breakdown of traffic between ISP-bound traffic and VoIP traffic, the ALJ reasonably decided that all traffic in this proceeding would be presumed to be locally dialed ISP-bound traffic.”¹⁶

4. The Pa. PUC also concluded that the “absence of intercarrier compensation from AT&T to Core generates an adverse and self-evident financial impact

¹¹ *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC, et al.*, Docket Nos. C-2009-2108186, C-2009-2108239, Order entered December 5, 2012, Reconsideration Order entered August 15, 2013, Appendix C.

¹² Pa. PUC December 5, 2012 Order, at 24.

¹³ Pa. PUC December 5, 2012 Order, at 24 (emphasis in the original). The Pa. PUC relied in part for this determination on *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006).

¹⁴ Pa. PUC December 5, 2012 Order, at 25 (citations omitted).

¹⁵ *Pac-West*; FCC *Amicus* Brief.

¹⁶ Pa. PUC December 5, 2012 Order, at 55.

for Core's operations, irrespectively of Core's internal economic costs in operating its carrier access network facilities and services." The Pa. PUC noted that, consistent with one of its prior decisions, it does "not expect regulated telecommunications carriers that operate within this Commonwealth [Pennsylvania] to provide carrier access network facilities and services for free."¹⁷

5. The Pa. PUC "determined that the FCC has preempted the States from establishing intercarrier compensation rates for the type of traffic at issue in this proceeding, namely ISP-bound local CLEC-to-CLEC traffic, in a manner that is inconsistent with the FCC's *ISP Remand Order*," that the Pa. PUC retained "the authority to apply the FCC's capped rate of \$0.0007 MOU established by the FCC's *ISP Remand Order* to the traffic at issue," and "that States have not been precluded from adjudicating intercarrier compensation disputes in a manner that is consistent with the FCC's intercarrier compensation regime, which is what" the Pa. PUC accomplished with its December 5, 2012 Order.¹⁸ The Pa. PUC concluded that Core was "entitled to compensation from AT&T at the FCC's capped rate of \$0.0007 per MOU for the ISP-bound local traffic at issue in this proceeding" and for certain traffic volumes.¹⁹

6. The Pa. PUC affirmatively established that "while bill and keep may be an appropriate form of reciprocal compensation between some carriers, especially in instances where the traffic between the two carriers is balanced, it has not been deemed a just and reasonable form of compensation where there is a significant imbalance in the amount of traffic."²⁰

7. During the reconsideration phase of this proceeding, the Pa. PUC established a lawful rate of interest to be prospectively applied to the intercarrier compensation principal amounts that AT&T owed Core.²¹ In addition, the Pa. PUC rejected AT&T's arguments that the Pa. PUC December 5, 2012 Order violated Sections 203(a), 203(c)(1), and 201(b) of the federal Communications Act of 1934 as amended by TA-96, 47 U.S.C. §§ 2013(a), 203(c)(1), and 201(b). The Pa. PUC found that AT&T's unfounded arguments would place the Pa. PUC "in the untenable position of declaring that the FCC's rate cap [\$0.0007/MOU] is 'by definition' unjust and unreasonable in the absence of a [federal] tariff, and therefore unlawful" where the Pa. PUC had determined that it was "preempted from establishing a rate that is inconsistent with the FCC's rate cap."²² The Pa. PUC also rejected the AT&T argument that the December 5, 2012 Order allegedly violated Section 251(b)(5) of TA-96 because Core did not have an agreement,

¹⁷ Pa. PUC December 5, 2012 Order, at 69 (citing *Palmerton Tel. Co. v. Global NAPs South, Inc., et al.*, Pa. PUC Docket No. C-2009-2093336 (March 16, 2010) at 45-46 (*Palmerton Tel. v. GNAPs*)).

¹⁸ Pa. PUC December 5, 2012 Order, at 79-80.

¹⁹ Pa. PUC December 5, 2012 Order, at 82.

²⁰ Pa. PUC December 5, 2012 Order, at 63.

²¹ Pa. PUC August 15, 2013 Reconsideration Order, at 19, 30.

²² Pa. PUC August 15, 2013 Reconsideration Order, at 44.

tariff or any other arrangement addressing the traffic at issue and, thus, Core could not recover Section 251(b)(5) charges. 47 U.S.C. § 251(b)(5). The Pa. PUC reasoned that Core was not required under Section 251(b)(5) “to have a reciprocal compensation arrangement in place as a condition to receiving compensation for the ISP-bound traffic at issue in this case” and that “the FCC has determined that ISP-bound traffic is not subject to the Section 251(b)(5) reciprocal compensation regime.”²³ Finally, the Pa. PUC established that its December 5, 2012 Order did not violate federal rules against retroactive ratemaking.²⁴

On December 21, 2012, AT&T appealed the Pa. PUC Orders to the District Court. The District Court issued its decision on January 31 and March 10, 2014. The January 31, 2014, District Court decision overturned the Pa. PUC’s rulings that relied, in part, on a prior Ninth Circuit decision in *Pac-West* and a Commission *Amicus* brief filed in the relevant *Pac-West* appeal. In *Pac-West*, the Commission’s brief stated that the *ISP Remand Order* does apply to CLEC-CLEC dial-up ISP-bound traffic. However, the FCC refrained from advising the Ninth Circuit whether a state commission “would have jurisdiction, acting outside the context of a section 251 arbitration, to adjudicate the dispute applying federal legal standards.”²⁵ The District Court subsequently issued another order on March 10, 2014 in which it denied a Pa. PUC motion to stay the proceeding pending the filing of, and Commission deliberation on, the instant Petition. In order to safeguard its substantive legal rights, the Pa. PUC filed a timely notice of appeal of the District Court decision to the U.S. Court of Appeals for the Third Circuit on February 28, 2014.

In the District Court case, AT&T claimed that the states are totally preempted and lack jurisdiction to resolve such intercarrier compensation disputes between CLECs without an interconnection agreement because the relevant exchange of ISP-bound traffic between the

²³ Pa. PUC August 15, 2013 Reconsideration Order, at 50, 53 (citation omitted).

²⁴ Pa. PUC August 15, 2013 Reconsideration Order, at 59-62.

²⁵ FCC *Amicus* Brief, at 29.

indirectly interconnected CLECs falls outside the scope of Sections 251 and 252. The District Court adopted AT&T's position and overturned the Pa. PUC rulings. However, the District Court decision did not resolve the underlying intercarrier compensation dispute. This situation has created uncertainty for the Pa. PUC, and possibly other state commissions, indirectly interconnected carriers, and the Commission itself.

Declaratory Relief Standard.

Under 47 C.F.R. § 1.2, the Pa. PUC may petition the Commission to issue a declaratory order terminating a controversy or removing uncertainty. In addition, the Pa. PUC submits that seeking declaratory relief here is consistent with its powers under Section 314 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 314. Under this section, the Pa. PUC may seek declaratory relief from the appropriate federal regulatory body following a Pa. PUC determination on the lawfulness, justness and reasonableness of an interstate rate.

A controversy and uncertainty now exists due to the District Court's decision that the Pa. PUC does not have jurisdiction to resolve an intercarrier compensation dispute involving local dial-up Internet traffic between carriers that do not have an interconnection agreement in place under Sections 251 and 252. Although the Commission has not specifically addressed this issue, the District Court's decision does so by creating a dual regulatory regime in which the Pa. PUC is permitted to resolve an intercarrier compensation dispute involving local dial-up traffic for carriers that are directly interconnected but not for carriers that are indirectly interconnected or not subject to Sections 251 and 252. It is the opinion of the District Court that the Commission alone could resolve such a dispute. Among other things, the Pa. PUC submits that such an outcome conflicts with the Pa. PUC's jurisdiction to resolve this type of dispute under TA-96, the

Commission's *Amicus* brief filed in the Ninth Circuit, the *ISP Remand Order*, and independent state law.

B The Commission Should Grant Declaratory Relief To Remove Uncertainty Created By The District Court Regarding The Types Of Intercarrier Compensation Disputes To Be Adjudicated By The Pa. PUC And Under Applicable Federal And State Law.

1. Applicable Federal Law – TA-96.

The District Court decision creates a division between the types of intercarrier compensation disputes adjudicated before the Pa. PUC, and probably other state commissions, under applicable federal and state law based on technology or the nature of the traffic. The District Court opined that:

The TCA [TA-96] gave state commissions jurisdiction over interstate traffic in the context of sections 251 and 252 only. The PPUC [Pa. PUC] has jurisdiction to establish intercarrier compensation rates for ISP-bound traffic, subject to the rate caps in the ISP Remand Order, through its powers in § 252 to approve, mediate, and arbitrate agreements between ILECs and CLECs. That section does not give the PPUC authority to establish a rate for ISP-bound traffic between CLECs as it did here.

District Court decision, January 31, 2014, at 29 (Attached as Appendix A).

The District Court's reasoning divides local ISP-bound traffic — and associated intercarrier compensation disputes — between traffic that is covered under Sections 251 and 252 interconnection agreements (typically ILEC-CLEC agreements approved by the Pa. PUC and other state commissions), and traffic that is exchanged indirectly between CLECs that have neither an interconnection agreement nor an explicit intercarrier compensation arrangement. Essentially, the District Court reaches the conclusion that only entities with an operative interconnection agreement under Sections 251 and 252, i.e., typically a CLEC and an ILEC, can seek relief from the Pa. PUC (or another state commission) on any intercarrier compensation

dispute, including a dispute about local dial-up ISP-bound traffic. Under the District Court decision, the same relief is totally unavailable to two CLECs that indirectly exchange the same type of traffic. Consequently, the Pa. PUC under the District Court's decision is able to adjudicate an intercarrier compensation dispute involving local ISP traffic if it arises under a pre-existing interconnection agreement but is not permitted to adjudicate the dispute if it arises outside a Section 252 interconnection agreement.

The Pa. PUC now seeks a conclusive legal determination that the states' jurisdiction to resolve local dial-up compensation disputes is not limited to disputes arising under Sections 251/252. Although the Commission did not explicitly reach the issue of state commission jurisdiction in *Pac-West*, it nevertheless envisions significant state involvement on a going-forward basis under its *USF/ICC Transformation Order* reforms. Such reforms go well beyond the routine state oversight of matters covered under Sections 251 and 252. The Pa. PUC does not agree as a matter of law with the District Court that CLECs cannot seek appropriate relief from the Pa. PUC, or possibly other states, because the states do not have that jurisdiction.

The Pa. PUC seeks clarification on its role under Sections 251(a)(1) and 251(d)(3) of TA-96, 47 U.S.C. §§ 251(a)(1) and 251(d)(3), that when read *in pari materia*, indicate the Pa. PUC properly exercised its jurisdiction over the underlying intercarrier compensation dispute that involved two indirectly interconnected CLECs. Section 251(a)(1) of TA-96 specifies that each "telecommunications carrier has the duty to interconnect directly *or indirectly* with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a) (emphasis added). Similarly, Section 251(d)(3) preserves state jurisdiction over matters involving LEC access and interconnection obligations, including indirect interconnection, and reads as follows:

- (3) PRESERVATION OF STATE ACCESS REGULATIONS. — In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of *any regulation, order, or policy of a State commission that —*
- (A) establishes access and interconnection obligations of local exchange carriers;
 - (B) is consistent with the requirements of this section; and
 - (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3) (emphasis added).

The District Court decision effectively obstructs the Pa. PUC’s exercise of its lawful jurisdiction under Sections 251(a)(1) and 251(d)(3) regarding a dispute that arises between *indirectly* interconnected CLECs that are “local exchange carriers” under TA-96, and operate under the statutory authority, regulations, orders, or policies of the Pa. PUC. In a past decision, the Commission refrained from limiting Pa. PUC jurisdiction to adjudicate an intercarrier compensation dispute that arose between an ILEC and a CLEC that were indirectly interconnected without a relevant agreement or a formal intercarrier compensation arrangement, and exchanged long-distance VoIP call traffic that terminated at the ILEC’s public switched telecommunications network (PSTN).²⁶ Therefore, the Pa. PUC seeks clarification from the Commission that the Pa. PUC may enforce *federal* standards and state mandates through the adjudication and resolution of intercarrier compensation disputes between indirectly interconnected carriers that exchange local ISP-bound traffic.

The Pa. PUC seeks clarity to remove any uncertainty on whether the Commission intends to exercise exclusive jurisdiction over all disputes arising from the obligation to carry indirect

²⁶ See generally *Palmerton Tel. Co. v. Global NAPs South, Inc., et al.*, Pa. PUC Docket No. C-2009-2093336 (Order entered March 16, 2011), (*Palmerton Tel. v. GNAPs* — partially overturned by the *USF/ICC Transformation Order* through the prospective application of interstate switched carrier access rates for intrastate toll VoIP-PSTN traffic, n. 39 *infra*).

ISP-bound traffic except where interconnection agreements and related state arbitrations governed by Sections 251 and 252 apply. Under the District Court’s decision, CLECs operating in Pennsylvania would no longer be able to seek relief from the Pa. PUC if such a dispute relates to local dial-up ISP-bound traffic exchanged indirectly between two CLECs. Rather, the Commission would be the only entity with jurisdiction to handle any local dial-up traffic dispute that is beyond the scope of Sections 251 and 252 interconnection agreements and arbitrations.

2. Applicable Federal Law – The *Pac-West* Decision, The FCC *Amicus* Brief, And The *ISP Remand Order*.

The Pa. PUC believes that the division created by the District Court’s decision appears to conflict with the Commission’s view in *Pac-West* that state commissions have jurisdiction to adjudicate CLEC-CLEC intercarrier compensation disputes involving local ISP-bound traffic. In its *Amicus* brief, the Commission made clear that the *ISP Remand Order* compensation regime applies to CLEC-CLEC ISP-bound traffic:

The FCC’s statements delineating both the scope of its proceeding and its rules confirm that the FCC’s compensation regime applies to CLEC-to-CLEC ISP-bound traffic. The FCC stated at the outset of its intercarrier compensation proceeding that it would broadly examine ISP-bound traffic exchanged between LECs [local exchange carriers], a term of art broadly defined in the Communications Act as “any person that is engaged in the provision of telephone exchange service or exchange access.” The FCC explicitly decided *not* to conduct a “more narrow[]” inquiry limited to ILEC-to-CLEC exchanges, explaining that “the pertinent provision of the 1996 Act pertains to all LECs.”²⁷

Nevertheless, the Pa. PUC seeks a definitive Commission order resolving the specific unanswered question of the Commission *Amicus* brief in the *Pac-West* case where the Commission informed the Ninth Circuit:

²⁷ FCC *Amicus* Brief, at 18, (emphasis in the original, citations omitted).

[T]he Court can reverse the district court's affirmance of the CPUC's resolution of the dispute under state law on the grounds of federal preemption without addressing the broader issue of whether the CPUC would have jurisdiction, acting outside the context of a section 252 arbitration, to adjudicate the dispute applying federal legal standards. *The FCC to date has not directly spoken to the broader jurisdictional issue in its rules and orders and therefore does not take a position on this issue in this amicus brief.*²⁸

Although the Commission in its *Amicus* brief in *Pac-West* may not have directly addressed the jurisdictional question at issue here, the Commission confirmed that CLEC-CLEC local ISP traffic was within the scope of the *ISP Remand Order* and stated the following regarding its authority to preempt the states:

[T]he FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic pre-empted inconsistent state regulation. The FCC explained, ... it has 'exercise[d] [its] authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic,' ...and thus 'state commissions will no longer have authority to address this issue.'²⁹

The Pa. PUC in its December 5, 2012 Order determined that, by implication, the Commission has *not* preempted state regulation of local ISP-bound traffic. Therefore, the Pa. PUC determined it could act as long as it acted consistent with the Commission's intercarrier compensation regime established in the *ISP Remand Order*.

Based on the above, the Pa. PUC believes that it acted within the scope of the *Pac-West* decision, the relevant Commission *Amicus* brief, and the *ISP Remand Order* when it issued its rulings. In light of the District Court decision, however, the Pa. PUC is in the unenviable position of having to request the Commission to clarify the broader legal issue: whether a state commission has jurisdiction to adjudicate an intercarrier compensation dispute between two carriers involving local ISP-bound traffic outside the context of Section 252

²⁸ FCC *Amicus* Brief, at 29, emphasis added.

²⁹ FCC *Amicus* Brief, at 10-11 (note and citation omitted); I.D. at 28.

interconnection agreements and arbitrations when the decision clearly applies federal legal standards and enforces a Commission-established intercarrier compensation rate.

In addition, the District Court decision did *not* resolve the underlying intercarrier compensation dispute.³⁰ The District Court decision simply found that the Pa. PUC does not have jurisdiction to adjudicate a dispute by enforcing federal law. Rather, only the Commission has jurisdiction to do so.³¹

The Pa. PUC Orders, however, have never asserted authority to “*establish* a rate for ISP-bound traffic between CLECs,” as the District Court concluded. Rather, based on the result in *Pac-West*, which prohibits states from imposing intrastate access charges on local ISP-bound traffic, the Pa. PUC understands that the Commission established a rate-cap that the states enforce but are not permitted to exceed—a point reflected earlier in Footnote 103 and Paragraph 29 of the *ISP Remand Order*. The Pa. PUC’s December 2012 ruling sought only to *enforce* a federally-established rate. As a result, the Petition seeks to remove any uncertainty by requesting a declaration that the Pa. PUC has the jurisdiction to *enforce* a pre-existing Commission-established intercarrier compensation rate applicable to local ISP-bound traffic.

3. Applicable State Law.

The Pa. PUC believes that this division created by the District Court’s decision also conflicts with the Pa. PUC’s jurisdiction under state law to adjudicate this intercarrier compensation dispute between Core and AT&T and others like it. The Pa. PUC notes that both Core and AT&T are facilities-based CLECs certified by the Pa. PUC to provide local exchange

³⁰ “The Court notes that it is not implementing a bill-and-keep arrangement, or any rate, for the traffic exchanged between AT&T and Core.” District Court Decision, January 31, 2014, n. 9, at 33.

³¹ District Court Decision, January 31, 2014, at 33.

telecommunications services in Pennsylvania. The Pa. PUC further notes that AT&T, Core and Verizon³² operate the switches and other network facilities used to support AT&T's indirect ISP-bound traffic at issue here, including the switched access termination function provided by Core, within Pennsylvania.³³ Consequently, the Commission has jurisdiction under the Pennsylvania Public Utility Code, including Chapters 3, 7, and 11,³⁴ to adjudicate Core's Complaint and to enforce the federally-established capped rates for the local ISP-bound traffic at issue here.

In addition, independent state law has permitted the Pa. PUC to implement numerous federal provisions and intercarrier compensation rates as prescribed in the Commission's *USF/ICC Transformation Order*. For example, commencing in December 2011, the Pa. PUC has reviewed and approved numerous tariff revisions from both ILECs and CLECs reflecting the Commission's intercarrier compensation regime for Voice over Internet Protocol – Public Switched Telephone Network (VoIP-PSTN) traffic as prescribed at 47 C.F.R. §51.913(a) *et seq.* Also, the Pa. PUC instituted an implementation docket at M-2012-2291824 to address the various rate adjustments directed by the Commission. At that docket, the Pa. PUC established templates and issued Orders and Secretarial Letters examining and approving intrastate switched carrier access tariffs that became effective in July 2012 and July 2013.³⁵ Further, the Pa. PUC, in accordance with the provisions of TA-96 and the Commission's *USF/ICC Transformation*

³² Verizon Pennsylvania LLC f/k/a Verizon Pennsylvania Inc.

³³ Pa. PUC Material Question Order, p. 10.

³⁴ In applying for and obtaining certification under Section 1102 of the Pennsylvania Public Utility Code, AT&T agreed to comply with all aspects of the Public Utility Code. This includes compliance with Section 313 of the Code, which authorizes the Pa. PUC to act as an agent of the relevant federal regulatory body under certain circumstances. This also includes compliance with Code Section 701, which gives Core the right to file its complaint against AT&T at the Pa. PUC, and Code Sections 701 and 703, which give the Pa. PUC the jurisdiction to adjudicate Core's complaint.

³⁵ See generally *Implementation of the Federal Communications Commission's Order of November 18, 2011 as Amended or Revised and Coordination with Certain Intrastate Matters*, Pa. PUC Docket No. M-2012-2291824, (Order entered May 10, 2012; Secretarial Letter issued May 30, 2012; Order entered April 18, 2013).

Order, has approved numerous amendments to existing interconnection agreements reflecting the intercarrier compensation rates prescribed by the Commission for ILECs, CLECs and wireless carriers exchanging traffic. Throughout Pennsylvania's implementation of the 2011 federal directives, AT&T has not objected to the Pa. PUC implementing federal intercarrier compensation rates as mandated by the Commission's *USF/ICC Transformation Order*.

4. Other Issues.

To remove any uncertainty, the Pa. PUC further seeks clarification from the Commission regarding the implications of this new paradigm on Pa. PUC adjudications of disputes related to local ISP-bound traffic exchanged indirectly between two carriers when the Pa. PUC acts consistent with, and relies on, federal standards. The Pa. PUC seeks clarification because it increasingly encounters carriers exchanging Internet Protocol-based (IP) traffic both directly (e.g., under Sections 251 and 252 interconnection agreements) and indirectly without formal intercarrier compensation arrangements.

Now, absent Commission clarification, the Pa. PUC, and possibly any other state commission, is precluded from performing an adjudicatory function in conjunction with the Commission and consistent with the principles of cooperative federalism. Accordingly, while the Pa. PUC has traditionally assumed the burden of adjudicating complex intercarrier compensation disputes in a timely manner to *enforce* these federal standards,³⁶ it will cease and desist from all such proceedings until the Commission removes the uncertainty and addresses this controversy. Depending on the FCC's clarification, the Pa. PUC, and possibly any other

³⁶ As a matter of both federal law and Pennsylvania law and policy, the Pa. PUC does not condone non-payment of lawful intercarrier compensation. *See generally, Palmerton Tel. v. GNAPS.*

state commission, is prepared to forward all current and future unresolved disputes to the FCC for resolution beyond those subject to Sections 251 and 252.

The Pa. PUC reiterates that, without a timely Commission clarification that removes these uncertainties and resolves the controversy, adjudicatory and enforcement actions will eventually be redirected to the Commission. Regarding the dispute that prompted this Petition, the Pa. PUC notes that it remains wholly unresolved and there are others in a similar vein as well. The Pa. PUC stands ready to certify and transmit its records to the Commission for appropriate determinations.

Because of the implications of the District Court decision, the Pa. PUC seeks clarification from the Commission on the appropriate allocation of intercarrier compensation litigation between the Pa. PUC and the Commission in cases where the traffic exchanged is jurisdictionally mixed. The Pa. PUC seeks a Commission ruling on how it should allocate litigation of one part of such a dispute before the Pa. PUC and the remainder of the dispute before the Commission. As the Pa. PUC observed in its December 5, 2012 Order, intercarrier compensation disputes often involve traffic exchanges of various types and communication protocols:

We further are persuaded by the ALJ's observation that it would be reasonable and efficient to resolve matters that have mixed traffic, ISP-bound and VoIP,²⁴ in one forum, rather than sending parties to two different forums based on the type of traffic at issue. I.D. [Initial Decision] at 30. The same observation holds with respect to local ISP-bound traffic and non-local ISP-bound traffic. The FCC has preempted the states with respect to the former, but has *not* preempted the states with respect to the latter.²⁵ Under AT&T's theory, a CLEC would be required to pursue compensation for local ISP-bound traffic at the FCC, but would be required to litigate a separate proceeding involving the same carrier before a state commission to obtain compensation for the small portion of ISP-bound traffic that is non-local. The result of AT&T's argument would be the inefficient use of resources and an unreasonable burden on CLECs seeking compensation for terminating ISP-bound traffic.

²⁴ Under *Palmerton* [*Palmerton Tel. v. GNAPs*], the [Pa. PUC] has jurisdiction over intercarrier compensation issues related to VoIP traffic.
²⁵ *Pac-West* at 8384, 8392.

Pa. PUC December 5, 2012 Order, at 25 (emphasis in the original).

Therefore, the Pa. PUC seeks a clarification that removes the uncertainty on how the Pa. PUC may advise Pennsylvania carriers to initiate proceedings before the Commission and on how the Pa. PUC is to transfer all existing adjudications to the Commission. The District Court decision imposes additional administrative and financial burdens on the Commission and affected carriers by its current ruling.

The Pa. PUC also seeks clarification given the potential harm from this District Court decision on the Pa. PUC role, and possible other states, in the implementation of the Commission's more recent *USF/ICC Transformation Order*.³⁷ The Commission's *USF/ICC Transformation Order* generally preserves the existing practice of recognizing considerable state oversight and enforcement regarding intercarrier compensation.³⁸ The Pa. PUC and other states are required to impose the Commission-established intercarrier compensation rates that have

³⁷ *In re: Connect America Fund*, WC Docket No. 10-90, *et al.*, (FCC Rel. November 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), appeals pending sub nom. *In re: FCC 11-161*, No. 11-9900 (10th Cir., Argued Nov. 19, 2013). The *USF/ICC Order* has not been stayed.

³⁸ See generally *USF/ICC Transformation Order*, ¶¶ 813, 815, *slip op.* at 277-278, 26 FCC Rcd 17940-17941. The Pa. PUC and other states have appealed the Commission's *USF/ICC Transformation Order*. However, enforcement of the *USF/ICC Transformation Order* has not been legally stayed. The present Pa. PUC Petition should not be construed as relevant to the Pa. PUC positions and arguments in the appeal that is still pending before the U.S. Court of Appeals for the 10th Circuit.

been prescribed on a prospective basis, including interstate switched carrier access rates as default “intercarrier compensation rates for toll VoIP-PSTN traffic.”³⁹

The Pa. PUC is particularly concerned that the District Court decision would require the Pa. PUC, and possibly any other state commission, to refer *all* intercarrier compensation disputes outside Sections 251 and 252 interconnection agreements – where interstate rates are involved – to the Commission for resolution. The Pa. PUC seeks Commission clarification on how to manage intercarrier compensation disputes arising under, and the Pa. PUC’s role in assisting in the implementation of the *USF/ICC Transformation Order*.

The Pa. PUC Petition is seeking clarity to resolve the uncertainty and the controversy concerning its rulings and the District Court decision. The Pa. PUC rulings and the District Court decision may appear to apply to a limited case in a narrow market. However, the thrust of the District Court’s ruling may impact cases on a national level. Therefore, the Pa. PUC is very concerned that administrative delay could prove fatal for smaller carriers that are lawfully entitled to compensation. Such an outcome would have detrimental effects on the overall level of competition and on end-user consumers.

C. The District Court Decision Blocks The Timely Disposition Of Similar Intercarrier Compensation Disputes That Are Currently Pending Before The Pa. PUC.

As previously discussed, the District Court decision precludes the Pa. PUC from issuing final determinations in similar intercarrier compensation disputes that have been fully

³⁹ *USF/ICC Transformation Order*, ¶¶ 933, 944, 951 *slip op.* at 339, 345, 349, 26 FCC Rcd 18002, 18008, 18012. *Id.* ¶¶ 975, 1419, *slip op.* 367, 489, 26 FCC Rcd 18030, 18152 (partially overturning the result of *Palmerton Tel. v. GNAPs* through the prospective application of interstate switched carrier access rates for toll VoIP-PSTN traffic).

adjudicated but are currently pending final disposition before the Pa. PUC.⁴⁰ The Pa. PUC is in the unenviable position of having to await either a final appellate determination of the District Court decision or an affirmative action by the Commission in this proceeding. This avoidable delay greatly increases the financial uncertainty for the litigants involved in the underlying intercarrier compensation disputes where, as in the instant case, the issue involves ISP-bound traffic exchanged between indirectly interconnected CLECs that do not have a formal interconnection or intercarrier compensation agreement.⁴¹

To avoid further administrative delays, the Pa. PUC seeks Commission guidance on how it is to deliver these proceedings to the Commission for final resolution. It is likely that other states will be concerned about conforming to the Commission's wishes in this regard.

D. The Commission Is Not Legally Barred From Issuing An Appropriate Declaratory Ruling Clarifying that the Pa. PUC Can Lawfully Enforce A Federal Rate.

The Commission is not legally barred from issuing an appropriate declaratory ruling clarifying the obligations of the Pa. PUC or other state commissions. The Commission is authorized with the appropriate jurisdiction to act here and can lawfully enforce an appropriate federal intercarrier compensation rate involving the exchange of ISP-bound traffic between indirectly interconnected CLECs. For example, the Commission acted affirmatively in response to the petitions for a declaratory ruling by the Nebraska Public Service Commission (NE PSC) and the Kansas Corporation Commission (KSCC) regarding contribution assessments on the intrastate revenues of nomadic VoIP service providers for state-specific universal service fund

⁴⁰ See generally *Core Communications, Inc. v. XO Communications, Inc.*, Pa. PUC Docket No. C-2009-2133609, Formal Complaint filed September 23, 2009, Initial Decision issued May 18, 2012, *Order Pending*.

⁴¹ As indicated previously, the Pa. PUC determined that AT&T owes Core approximately \$250,000 exclusive of any applicable interest.

(USF) purposes.⁴² This Commission action was taken when such lawful state-specific USF contribution assessments initially appeared to be barred by certain federal court rulings.⁴³

The Pa. PUC believes this issuance of a Declaratory Order in this proceeding is appropriate as well. It is more prudent to resolve this matter without first resorting to additional litigation through the federal court system as occurred in the *Kansas-Nebraska Contribution Order*.

The Pa. PUC recognizes that the Commission is the final arbiter of this matter. The Pa. PUC asks the Commission to expedite this Declaratory Order post-haste to promptly clarify the uncertainty and resolve the controversy about the underlying question of law in a manner favorable to the Pa. PUC. A prompt clarification will provide greater certainty to the industry than is currently present in light of the District Court decision.

E. Relief Requested.

The Commission should remove the uncertainty created by the District Court decision regarding the jurisdiction of state commissions to address intercarrier compensation disputes, including disputes involving local ISP-bound traffic exchanged between indirectly interconnected carriers. It is imperative for the Commission to affirmatively and expeditiously act to resolve this matter by issuing a declaratory order providing appropriate instruction to the Pa. PUC.

⁴² *In re Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, (FCC, Rel. Nov. 5, 2010), WC Docket No. 06-122, Declaratory Ruling, *slip op.* FCC 10-185, 25 FCC Rcd 15651, (FCC *Kansas/Nebraska Contribution Order*).

⁴³ *FCC Kansas/Nebraska Contribution Order*, ¶ 9 and nn. 27-29, *slip op.* at 5, citing *Vonage Holdings Corp. v. Neb. Pub. Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008), and *Vonage Holdings Corp. v. Neb. Pub. Service Comm'n*, 564 F.3d 900 (8th Cir. 2009).

The Pa. PUC cannot continue as before under this new precedent. The same is probably true for other states whose federal courts may choose to follow this District Court decision. This Petition requests that the Commission issue a declaratory order that clearly defines the Pa. PUC's adjudicatory role in these matters. The Pa. PUC seeks definitive clarification that it continues to have jurisdiction to apply *federal law and Commission-developed rates* as part of its decisions to resolve such disputes, subject to federal appeal. This is consistent with the long-standing practice in which the Pa. PUC has handled certain intercarrier compensation disputes in the past.

The Pa. PUC believes that this is the preferred process because all disputes concerning a matter are resolved in the same forum, subject to federal appeal. This is better than having one aspect of the dispute handled in one forum by the Pa. PUC, and possibly other states, while another aspect of the same dispute is handled exclusively by the Commission.

However, if the Commission ratifies the dual-track approach reflected in the District Court decision, the Pa. PUC alternatively asks the Commission to issue a declaratory order describing the procedures that the Pa. PUC, and possibly other states, are to follow for transferring all current and future intercarrier compensation disputes and adjudications involving local dial-up ISP-bound traffic exchanged between indirectly interconnected CLECs to the Commission.

The Commission's attorneys could intervene in the Pa. PUC appeal in the Third Circuit and participate as it did in the Ninth Circuit. However, the Pa. PUC submits that granting the requested declaratory order providing the clarity needed to resolve the uncertainties and controversy is the preferred alternative. It would resolve the uncertainty and controversy with finality. The Commission need only answer the question of whether the Pa. PUC, and possibly

other state commissions, has jurisdiction acting outside the context of Section 252
interconnection agreements and arbitrations, to adjudicate disputes of the type addressed here.

Respectfully submitted,



Shaun A. Sparks
Pa. Attorney ID No. 87372

Colin W. Scott
Pa. Attorney ID No. 311440
Assistants Counsel

Kathryn G. Sophy
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel

*(Counsel for
Pa. Public Utility Commission)*

PO Box 3265
Harrisburg, PA 17105-3265
Phone: 717-787-5000
Email: shsparks@pa.gov; colinscott@pa.gov

Dated: April 29, 2014

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T CORP., et al. : CIVIL ACTION
 :
 v. :
 :
 CORE COMMUNICATIONS, INC., :
 et al. : NO. 12-7157

MEMORANDUM

McLaughlin, J.

January 30, 2014

This case involves the exchange of dial-up internet traffic between two telecommunications carriers. AT&T Corp. ("AT&T") and Core Communications, Inc. ("Core") are telecommunications carriers registered to do business in Pennsylvania. Since at least 2004, AT&T sent calls to Verizon Pennsylvania ("Verizon"), which were then sent to Core in order for AT&T's customers to connect to the internet. When Core received those calls, it connected them with its customers which were Internet Service Providers ("ISPs"). Core and AT&T have never had an agreement governing the exchange of this traffic. Core did not bill AT&T for these calls until 2008, at which time it sought payment according to Core's long-distance tariff filed with the Pennsylvania Public Utility Commission ("PPUC"). When AT&T refused to pay, Core filed a complaint with the PPUC.

The PPUC attempted to resolve the dispute by applying federal law. The PPUC ordered AT&T to pay Core at a rate of

\$0.0007 per minute of use ("MOU"). The PPUC based that rate on the FCC's rate caps for the exchange of ISP-bound traffic established in a 2001 Order. Although ISP-bound traffic is interstate communication over which the FCC has jurisdiction, the PPUC found that it could assert jurisdiction over this dispute involving ISP-bound traffic by applying the FCC's established "rate." The PPUC ultimately ordered AT&T to pay Core approximately \$250,000 for traffic dating back to 2005 by September 18, 2013.¹

Before the Court is AT&T's Motion for Preliminary Injunction, which is in essence a request to stay the enforcement of the PPUC's orders. During oral argument, however, the parties agreed that this matter involves only questions of law, and requires no further development of evidence. The parties agreed that re-briefing of the same legal arguments at a later point would be unnecessary. The parties had no objection to the resolution of the case on the merits at

¹ On September 4, 2013, following a telephone conference with the Court, the parties agreed that AT&T would not be required to pay Core on September 18, 2013. The parties agreed that AT&T would not be required to pay until AT&T's motion for preliminary injunction is resolved, but that interest would begin to run on September 18, 2013, as contemplated by the PPUC orders.

this time. The Court will therefore decide this case on the merits, rather than ruling on the preliminary injunction motion.²

AT&T asserts five independent reasons why the PPUC's orders are invalid. The Court finds that this dispute can be resolved on AT&T's first argument. AT&T argues that the PPUC did not have jurisdiction to establish a rate for the traffic sent by AT&T to Core. According to AT&T, the dial-up internet traffic at issue is interstate traffic, over which the FCC has exclusive jurisdiction. Core and the PPUC argue that the PPUC had jurisdiction to resolve the dispute between Core and AT&T by applying federal law. They argue that the FCC gave state commissions the authority to set rates for dial-up internet traffic consistent with the FCC's Orders.

The Court concludes that the FCC's jurisdiction over the traffic at issue is exclusive. ISP-bound traffic is "interstate communication." The FCC has exclusive jurisdiction over interstate communication, except where authority has been delegated to the states. The Telecommunications Act of 1996 delegated some authority to state commissions to set rates for

² The Court notes that there are pending counterclaims asserted by Core, as well as a motion to dismiss those counterclaims filed by AT&T. Also pending is AT&T's motion to strike parts of PPUC's answer to the complaint. The Court will address Core's counterclaims and the pending motions in separate orders.

interstate telecommunications traffic, but only in the context of approval, mediation, and arbitration of interconnection agreements. That authority is not relevant here because AT&T and Core did not have an agreement.

I. Facts

The facts in this case are not disputed. Core is a competitive local exchange carrier ("CLEC") which operates in Pennsylvania. Between 2004 and September 2009, Core's only customers were Internet Service Providers ("ISPs") which provided "dial-up" internet connections to at-home internet users. Core sold telephone lines to the ISPs over which Core sent dial-up internet connections. Compl. ¶ 11.

AT&T Communications of Pennsylvania, LLC was a company certified as a CLEC in Pennsylvania which provided local telephone exchange service and intrastate long distance service to customers in Pennsylvania. AT&T Communications was merged into its parent company, AT&T Corp., in October 2012. Between 2004 and 2009, AT&T provided telephone exchange service to Pennsylvania customers, which allowed them to make and receive calls. Id. ¶¶ 5, 6, 12.

Between 2004 and 2009, AT&T's customers placed calls to Core's ISP customers in order to gain dial up access to the

internet. All of these calls were local, meaning they originated and were delivered in the same area. For each of these ISP-directed calls, an AT&T customer's call was delivered by AT&T to Verizon which then delivered the call to Core, and Core "terminated" the call to the ISP. Id. ¶¶ 13, 14.

During this time, Core had on file with the PPUC an "intrastate switched access tariff" that specified Core's rate for terminating in-state long distance calls. For this purpose, long distance calls are defined as a call that originates in one Pennsylvania "local exchange area" and ends in a different Pennsylvania "local exchange area." The tariff does not specify a rate for calls that begin and are terminated in the same local exchange area. Core has had tariffs on file with other state commissions that specify rates for local calls, but has never had such a tariff on file in Pennsylvania. AT&T has never had contracts with Core establishing a rate for these local calls. Id. ¶¶ 15-17.

Since 2004, AT&T originated, Verizon delivered, and Core terminated these ISP-bound calls. Core did not bill AT&T for any of these calls until January 2008. At that time, Core billed AT&T for calls dating back to 2004 at its state-filed rate for long distance calls. AT&T refused to pay the bill. Id. ¶¶ 19-20.

During this time, AT&T also originated calls that were terminated with CLECs other than Core. These calls were exchanged on a "bill-and-keep" basis, which means that neither CLEC paid anything to the other for handling local calls. Under a bill-and-keep system, companies recover costs from their own customers rather than charging each other for the exchange of traffic. AT&T alleges that it assumed it was exchanging traffic with Core on a bill-and-keep basis as well. Id. ¶ 21; Pl.'s Mot. at 10.

On May 19, 2009, Core filed a complaint against AT&T with the PPUC, seeking compensation for the local calls at Core's long distance rate. AT&T moved to dismiss the complaint, arguing that the calls were subject to the exclusive jurisdiction of the FCC. On May 11, 2011, the Administrative Law Judge (ALJ) issued an initial decision finding that federal law governed the dispute, but that the PPUC had jurisdiction to resolve the dispute by applying federal law. On December 5, 2012 the PPUC issued a decision which held that federal law, including the ISP Remand Order, applied and that the PPUC had jurisdiction. The PPUC decided the matter by setting a rate of \$0.0007/MOU for all calls that Core terminated for AT&T dating back to May 19, 2005, pursuant to Pennsylvania's four year statute of limitations. Compl. ¶¶ 24-27.

Both parties petitioned the PPUC for reconsideration. On August 15, 2013, the PPUC issued its Order on Reconsideration ("August 2013 Order"), which denied AT&T's petition. The PPUC rejected all of the arguments that AT&T raises in its complaint in this case, and ordered AT&T to pay a total of \$254,029.89 to Core by September 18, 2013. Pl.'s Mot. at 2, 11.

II. Federal Statutory and Regulatory Background

A. Communications Act of 1934 ("Communications Act")

The Communications Act of 1934 created the FCC and gave it the authority to "regulat[e] interstate and foreign . . . communication by wire and radio." 47 U.S.C. § 151. The Communications Act divided telephone regulation into two separate components - interstate and intrastate. The Act gives jurisdiction to the FCC over interstate communication, 47 U.S.C. § 152(a), while preserving the states' power to regulate "intrastate communication service." 47 U.S.C. § 152(b). The infrastructure of telephone service, however, relies on overlapping interstate and intrastate components. See Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325, 1329 (D.C. Cir. 1989). This division of jurisdiction has created a "persistent jurisdictional tension," which is the source of the dispute in this case. Id.

B. Telecommunications Act of 1996 ("TCA")

Until 1996, local telephone services were operated by state-authorized monopolies. The TCA was passed in order to foster competition in the telecommunications industry. It altered the balance between state and federal regulation by giving the FCC jurisdiction over some traditionally intrastate communication, and by giving states some power over interstate communication. The TCA sought to encourage competition and reduce regulation by relying on private agreements between the then existing telephone monopolies, labeled "incumbent local exchange carriers" ("ILECs"), and new competitors called "competitive local exchange carriers" ("CLECs"). See AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371 (1999); MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001); 1 Peter W. Huber et al., Federal Telecommunications Law § 3.3.4 (2d ed. 1999).

To assist with the TCA's primary reliance on private agreements, it gave state public utility commissions a role in making sure that "local competition was implemented fairly." Huber, supra, at § 3.3.4. The TCA enlisted state commissions specifically through sections 251 and 252 of the TCA, which are relevant here. Id.

1. Section 251

Section 251 imposes several duties on telecommunications carriers. Much of § 251 is directed toward ILECs, in order to open the market to new competitors. See MCI Telecomm. Corp., 271 F.3d at 498-99 (explaining the requirements of § 251). Relevant here, though, is section 251(b)(5) which imposes on all LECs (including CLECs) a “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5).

Section 251(c)(1) imposes a duty on ILECs specifically to “negotiate in good faith” the “terms and conditions of agreements” to fulfill the duties established in this section. 47 U.S.C. § 251(c)(1). It imposes the same duty to negotiate in good faith upon the “requesting telecommunications carrier,” which was typically a CLEC entering the market. Id.

2. Section 252

Section 252 delegates authority to state commissions to oversee the negotiation of interconnection agreements between ILECs and CLECs. Section 252(a)(1) allows an ILEC to “negotiate and enter into a binding agreement with” other carriers for reciprocal compensation. 47 U.S.C. § 252(a)(1). Such an agreement is required to include a detailed itemization of

charges. Id. These agreements must be submitted to the state commission for approval. 47 U.S.C. § 252(a)(1), (e)(1).

State commissions are specifically given authority under § 252 to review, mediate, and arbitrate interconnection agreements.³ Either an ILEC or CLEC that is negotiating an interconnection agreement with the other can ask the state commission to mediate the negotiation. 47 U.S.C. § 252(a)(2). Either carrier can also “petition the state commission to arbitrate any open issues.” 47 U.S.C. §§ 252(b)(1).

C. The Rise of Dial-Up Internet Service

Following the TCA, CLECs could enter the telecommunications market to compete with ILECs. With the growth of dial-up internet access, CLECs recognized an opportunity to profit from the regulatory scheme. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd. 9151, 9162 (2001) (“ISP Remand Order”). Historically, the telephone companies in a local area worked together to complete calls and operated under reciprocal compensation agreements. Id. As the Ninth Circuit explained,

³ Because § 252 is directed toward negotiations between an ILEC and a CLEC, the provisions in § 252 do not apply to a negotiation between two CLECs.

the reciprocal compensation scheme is based on the assumption of an equal exchange of telecommunications traffic:

When a customer of telephone company A places a local call to a customer of telephone company B, the two companies cooperate to complete the call. Traditionally, the telephone company of the individual receiving the call (company B) would bill the originating phone company (company A) for completing, or "terminating," the call, on a per-minute basis. When the phone call went in the opposite direction - from a company B customer to a company A customer - the billing, too, would be reversed. Underlying this 'reciprocal compensation' arrangement was the empirically-based assumption that, over time, the telephone traffic going in each direction would even out.

AT&T Comm. of Cal., Inc. v. Pac-West Telecomm, Inc., 651 F.3d 980, 981 (9th Cir. 2011).

With the exchange of dial-up internet traffic, on the other hand, company A connects its customer with company B, which connects the call to an ISP. Id. at 982. These phone calls last substantially longer than a regular phone call, and the ISP will never return the call. Id. As CLECs amassed ISPs as customers, therefore, they could charge the connecting LEC for lengthy internet calls without ever reciprocating the call. See ISP Remand Order, 16 FCC Rcd. 9151, 9162 (2001) ("ISP Remand Order").

D. ISP Remand Order

The FCC sought to address this “regulatory arbitrage” problem in 2001 in the ISP Remand Order⁴ which created a new compensation scheme for ISP traffic. See ISP Remand Order, 16 FCC Rcd. 9151, 9156. As an initial matter, the FCC concluded that “ISP-bound traffic is jurisdictionally interstate and thus subject to the Commission’s section 201 jurisdiction.” Id. at 9154. Since the FCC found that ISP-bound traffic falls within its jurisdiction, it went on to “establish an appropriate cost recovery mechanism for delivery of this traffic.” Id. at 9153.

First, the FCC concluded that ISP traffic “is not subject to the reciprocal compensation obligations of section 251(b)(5).” Id. at 9154. Rather, the FCC found that the best method for cost allocation of ISP traffic is probably a “bill-and-keep” system, “whereby each carrier recovers costs from its

⁴ The FCC first addressed the ISP-bound traffic issue in a 1999 Declaratory Ruling, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd. 3689 (1999) (“Declaratory Ruling”). The ruling established that ISP-bound traffic is largely interstate, and the reciprocal compensation scheme is not mandatory for the exchange of ISP-bound traffic. Id. at 3703. Notably, the Declaratory Ruling discussed at length the authority of state commissions to set rates. That authority was discussed solely in the context of state commission § 252 mediation or arbitration when LECs could not agree on a rate. Id. at 3704-06. The Declaratory Ruling was vacated by the D.C. Circuit Court of Appeals. Bell Atl. Tel. Cos. v. F.C.C., 206 F.3d 1 (D.C. Cir. 2000).

own end-users" instead of collecting from each carrier. Id. Because the FCC needed more information before implementing a complete bill-and-keep system, it established an "interim" compensation scheme. Id. at 9155. Specifically, the FCC established a declining rate cap on "the amount that carriers may recover from other carriers for delivering ISP-bound traffic." Id. at 9156.

The FCC based its compensation scheme on existing interconnection agreements. Id. at 9190-91. The compensation scheme began with a cap for intercarrier compensation for ISP-bound traffic at \$0.0015/MOU. Id. After six months, the cap declined to \$0.0010/MOU. Id. After twenty-five months, the cap declined to \$0.0007/MOU, which was to remain in place until further FCC action. Id. That \$0.0007/MOU rate cap remains in place today. See In the Matter of High-Cost Universal Serv. Support Fed.-State Joint Bd. on Universal Serv. Lifeline & Link Up Universal Serv. Contribution Methodology Numbering Res. Optimization Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Developing A Unified Intercarrier Comp. Regime Intercarrier Comp. for ISP-Bound Traffic IP-Enabled Servs., 24 F.C.C. Rcd. 6475, 6489 (2008) ("ISP Mandamus Order").

Additionally, the FCC created a "new markets rule" which required new LECs which were not already party to an interconnection agreement to exchange ISP-bound traffic on a "bill and keep" basis.⁵ Id. at 9188. It also established "growth caps" that limited the total number of minutes for which a LEC could be compensated for ISP-bound traffic. Id. at 9187. Finally, the FCC created a "mirroring rule" which required an ILEC to offer to terminate its own traffic according to the rate caps if the ILEC expected to benefit from the rate caps. Id. at 9193-94.

The FCC emphasized that this scheme established "caps on intercarrier compensation." Id. at 9188 (emphasis in original). Thus, the caps had "no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps . . . or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic)." Id.

Finally, the FCC declared its intent to preempt state regulation going forward. Although the FCC did not intend to "alter existing contractual obligations . . . or preempt any state commission decision regarding compensation for ISP-bound

⁵ A bill-and-keep arrangement effectively has a rate of \$0.00/MOU.

traffic for the period prior to" the ISP Remand Order, the FCC declared that, "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue." Id. at 9189.

E. WorldCom, Inc. v. FCC

The D.C. Circuit reviewed the ISP Remand Order in 2002 in Worldcom, Inc. v. F.C.C., 288 F.3d 429 (D.C. Cir. 2002). The Court rejected the FCC's reasoning for determining that ISP-bound traffic did not fall within the reciprocal compensation scheme in § 251(b)(5). Id. at 430. Nonetheless, the Court determined that there were probably "other legal bases for adopting the rules chosen by" the FCC, so the Court remanded the matter to the FCC without vacating the rules. Id.

F. Core Forbearance Order

On October 18, 2004, the FCC partially granted a petition by Core to forbear from enforcing the provisions of the ISP Remand Order. See Petition of Core Comm., Inc. for Forbearance under 47 U.S.C. § 160(C) From Application of the ISP Remand Order, 19 FCC Rcd 20179, 20186 (2004) ("Core Forbearance Order"), aff'd In re Core Communications, Inc., 255 F.3d 267

(D.C. Cir. 2006). Core sought to have the FCC forbear from enforcing the entirety of the interim compensation scheme established in the ISP Remand Order including the rate caps, the growth caps, the new markets rule, and the mirroring rule. Id. at 20182. The FCC granted Core's request to forbear from enforcing the new markets rule and the growth cap rule, which it found were no longer in the public interest. Id. at 20186. The rate caps and mirroring rule remained in effect. Id.

G. Mandamus Order

The FCC finally addressed the D.C. Circuit's remand of the ISP Remand Order in 2008. See ISP Mandamus Order, 24 FCC Rcd. 6475. In the ISP Mandamus Order, the FCC reexamined whether ISP-bound traffic is subject to the reciprocal compensation requirement in § 251(b)(5). Id. at 6479-80. The FCC determined that since the D.C. Circuit held that ISP-bound traffic does not fall within the exception of § 251(g), such traffic does fall within the scope of § 251(b)(5). Id. This ruling, however, did not undermine the FCC's determination that ISP-bound traffic is interstate in nature and subject to its § 201 authority.

As to the FCC's continued jurisdiction over charges for ISP traffic, the ISP Mandamus Order stated:

[A]ddressing ISP-bound traffic through the section 251 framework does not diminish the Commission's independent jurisdiction or authority to regulate traffic under other provisions of the Act. Specifically, we retain our authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic. With respect to interstate services, the Act has long provided us with the authority to establish just and reasonable "charges, practices, classifications, and regulations." The Commission thus retains full authority to regulate charges for traffic and services subject to federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework.

Id. at 6484. The FCC further declared that ISP-bound traffic is "clearly interstate in nature" and that the FCC "unquestionably has authority to regulate intercarrier compensation with respect to . . . ISP-bound traffic." Id. at 6483.

Having reaffirmed its jurisdiction over ISP-bound traffic, the FCC explained the limitations on the authority of state commissions over this type of traffic. The FCC acknowledged that sections 251 and 252 of the TCA altered the balance between state and federal regulation of telecommunications, giving state commissions authority to address some interstate issues through their sections 251 and 252 delegated powers. Id. at 6483. The FCC recognized state commissions' authority over ISP-bound traffic only in the context of sections 251 and 252 of the TCA and declared that the state authority provided in those sections shall not be

“construed to limit or otherwise affect the [FCC’s] authority under section 201.” Id. at 6484 (quoting 47 U.S.C. § 251(i)).

H. Ninth Circuit’s Decision in Pacific Bell

In 2011, the Ninth Circuit interpreted the ISP Remand Order in AT&T Comm. of California, Inc. v. Pac-West Telecomm, Inc., 651 F.3d 980 (9th Cir. 2011). AT&T and Pac-West were both CLECs licensed in California. AT&T v. Pac-West, 651 F.3d at 988-89. Pac-West had intrastate tariffs on file with the California Public Utilities Commission (“CPUC”) which were to apply to locally dialed traffic that was not covered by an interconnection agreement. Id. at 988. AT&T and Pac-West did not have an interconnection agreement, but they exchanged traffic with each other nonetheless. Id. The traffic at issue involved calls that AT&T originated and that Pac-West terminated to ISPs. Id. at 988-89.

After several years during which Pac-West did not bill AT&T for the traffic, Pac-West billed AT&T and AT&T refused to pay. Id. at 989. At that point, Pac-West requested to negotiate an interconnection agreement with AT&T for that traffic. Id. AT&T refused, asserting that it had no obligation to enter into an interconnection agreement, and that it would

prefer to continue to exchange traffic on a bill-and-keep basis, pursuant to the "new markets rule." Id.

Pac-West then filed a complaint with the CPUC, alleging that AT&T owed it millions in reciprocal compensation for the ISP-bound traffic. Id. The CPUC held that the "new markets rule" did not apply in an exchange of traffic between two CLECs without an interconnection agreement, and ordered AT&T to pay Pac-West at the local tariff rate. Id. AT&T filed suit in the district court. Id. at 990. The district court agreed with CPUC. Id. On appeal, the Ninth Circuit addressed the issue of whether the ISP Remand Order applied to traffic exchanged between two CLECs in addition to traffic between an ILEC and a CLEC. Id. at 989.

The Ninth Circuit noted, as an initial matter, that "there is no question that, for jurisdictional purposes, ISP-bound traffic is interstate in nature. ISP-bound traffic is therefore subject to the FCC's congressionally-delegated jurisdiction. Within this ambit, the FCC's actions can preempt state regulation to the contrary." Id. at 990-91 (internal citations omitted). The Court also found that "it is well settled that the ISP Remand Order has preemptive effect with regard to the ISP-related issues it encompasses." Id. at 991.

The Court examined the language in the ISP Remand Order, along with an amicus brief filed by the FCC. See Id. at 993-95, 998. The Court found that the purpose of the ISP Remand Order was to address the problem of "regulatory arbitrage created by application of the prevailing reciprocal compensation scheme to local ISP-bound traffic." Id. at 994. The FCC sought to correct that problem generally, and did not intend to limit its order to ILEC-CLEC traffic. Id. The Court held that the ISP Remand Order was applicable to CLEC-CLEC traffic, and that nothing in the language of the Order suggested otherwise. Id. at 996. The Court's conclusion was supported by the FCC's interpretation of the Order. Id. at 998.

AT&T also argued that the CPUC did not have jurisdiction to resolve the dispute, as the FCC has exclusive jurisdiction over compensation for ISP-bound traffic. Id. at 989, 991. Because the CPUC's orders were invalid for the independent reason that they were inconsistent with the ISP Remand Order, neither the Ninth Circuit nor the FCC addressed the issue of whether the CPUC had jurisdiction to resolve the dispute between AT&T and Pac-West. Id. at 993-99.

II. Preliminary Injunction Motion⁶

Federal Rule of Civil Procedure 65(a)(2) allows a court to consolidate a preliminary injunction hearing with a hearing on the merits. The court is required to give notice to the parties, "either before or after the commencement of the hearings, sufficient to enable them to present all their evidence." Fenstermacher v. Philadelphia Nat. Bank, 493 F.2d 333, 337 (3d Cir. 1974).

AT&T's Complaint seeks declaratory relief and a permanent injunction preventing the enforcement of the PPUC's Orders. This case involves a dispute solely over the interpretation of the law. The parties do not dispute any facts. Thus, the ultimate resolution of the cause of action would require no further development of the evidence. AT&T brought a preliminary injunction motion in the interest of time, in order to avoid payment to Core by September 18, 2013. Tr. Hr'g 10/1/13 5:20-25.

During the preliminary injunction hearing, the Court inquired as to whether additional evidence would be necessary to

⁶ The Court has jurisdiction, under 28 U.S.C. § 1331, to review a decision by a state public utility commission to ensure compliance with federal law. See MCI Telecomm. Corp. v. Bell Atlantic Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001); Global NAPs California, Inc. v. Public Utilities Comm'n of California, 624 F. 3d 1225, 1231 n.3 (9th Cir. 2010); Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 642 (2002)).

decide this case on the merits. Tr. Hr'g 10/1/13 6:1-6. The parties agreed that no further evidence would be necessary. Tr. Hr'g 10/1/13 6:13. At the end of the hearing, the Court asked whether the parties had any objection to the Court deciding the merits of this case, rather than ruling on the preliminary injunction. Tr. Hr'g 10/1/13 119:25-120:5. The parties did not object. Tr. Hr'g 10/1/13 120:9-121:2. Accordingly, the Court will proceed to decide whether the PPUC's Orders violate federal law, and whether AT&T is entitled to a permanent injunction barring enforcement of the Orders.

III. Discussion

AT&T sets forth five independent reasons that the PPUC Orders violate federal law: (1) the PPUC did not have jurisdiction to resolve the dispute; (2) the PPUC Orders violate 47 U.S.C. § 203 by awarding charges at a rate not contained in any tariff or contract and, therefore, the rate was "unjust or unreasonable" in violation of 47 U.S.C. § 201; (3) "the [PPUC] Orders violate 47 U.S.C. § 251(b)(5) by allowing Core to recover compensation without a reciprocal compensation arrangement"; (4) "the [PPUC] Orders impermissibly engaged in retroactive ratemaking by ordering AT&T to pay a rate not set forth in any contract or tariff for a period extending back to 2005"; and (5)

"the [PPUC] Orders impermissibly applied a four-year state law statute of limitations." Pl.'s Mot. 13-14.

The Court finds that the FCC has exclusive jurisdiction to set rates for ISP-bound traffic, which is interstate communication, except for the state-delegated authority in 47 U.S.C. § 252. Because this dispute did not arise under the confines of § 252, the PPUC did not have jurisdiction to establish a rate for the ISP-bound traffic sent by AT&T to Core. Because the Court finds that PPUC did not have jurisdiction, the PPUC's orders are invalid, and the Court does not reach the merits of AT&T's additional arguments.

A. FCC's Jurisdiction

AT&T argues that ISP-bound traffic is jurisdictionally interstate and the FCC, therefore, has exclusive jurisdiction over disputes involving ISP-bound traffic. Core and the PPUC argue that ISP-bound traffic is a hybrid of interstate and intrastate traffic, and state commissions were given a role in regulating that activity. The Court agrees with AT&T and finds that, because the FCC has classified ISP-bound traffic as interstate communication, the FCC has exclusive jurisdiction.

It is well-settled that ISP-bound traffic is characterized by the FCC as "jurisdictionally interstate." In

several orders, the FCC has characterized ISP-bound traffic as interstate communication, and has thus determined that the FCC has jurisdiction to regulate such activity. See ISP Remand Order, 16 FCC Rcd. 9151; Core Forbearance Order, 19 FCC Rcd 20179; ISP Mandamus Order, 24 FCC Rcd. 6475. That determination has been affirmed by the D.C. Circuit and the Ninth Circuit. See Core v. F.C.C., 592 F.3d at 144; AT&T v. Pac-West, 651 F.3d at 990.

It is also undisputed that the ISP Remand Order governs this case. The FCC asserted, and the Ninth Circuit held, that the ISP Remand Order applies to CLEC-CLEC traffic in addition to ILEC-CLEC traffic. See Pl.'s Mot. Exh. 2, FCC Amicus Brief at 15; AT&T v. Pac-West, 651 F.3d at 996. PPUC and Core do not dispute that the ISP Remand Order governs compensation for ISP-bound traffic between two CLECs. Tr. Hr'g 10/1/13 17:25-18:14. Since the ISP Remand Order applies to the traffic at issue in this case, and that traffic is classified as interstate communication, the question before the Court is therefore whether the ISP Remand Order allows the PPUC to address issues of compensation for ISP-bound traffic.

The FCC was given jurisdiction over interstate communication by the Communications Act of 1946. Several courts have characterized the FCC's jurisdiction over interstate

traffic, under the Communications Act, as exclusive. See Crockett Tel. Co. v. F.C.C., 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("Interstate communications are totally entrusted to the FCC"); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 491 (2d Cir. 1968) ("[Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and the states are precluded from acting in this area."); AT&T Corp. v. PAB, Inc., 935 F. Supp. 584, 590 (E.D. Pa. 1996) ("The FCC retains exclusive jurisdiction over interstate communication by wire"); AT&T Comm. of Mountain States, Inc. v. Public Service Comm'n, 625 F. Supp. 1204, 1208 (D. Wy. 1985) ("Exclusive FCC jurisdiction over interstate matters is well-established, absent a clear, express deferral.").

The ISP Remand Order also expresses the intention to limit state commissions' jurisdiction over compensation for ISP-bound traffic specifically. The FCC declares that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . .

. state commissions will no longer have authority to address this issue.” ISP Remand Order, 16 FCC Rcd. 9151, 9189. This indicates that state commissions no longer have authority to establish rates for ISP-bound traffic, as the FCC has expressly preempted state authority in that area.

The ISP Mandamus Order also reiterated the FCC’s jurisdiction over ISP-bound traffic, and made clear that the authority of state commissions under sections 251 and 252 have no impact on the FCC’s jurisdiction. The FCC declared that “addressing ISP-bound traffic through the section 251 framework does not diminish the [FCC’s] independent jurisdiction or authority to regulate traffic under other provisions of the Act. Specifically, [the FCC] retain[s its] authority under section 201 to regulate ISP-bound traffic” ISP Mandamus Order, 24 FCC Rcd. 6475, 6484.

Although the FCC may not have addressed specifically whether state commissions have jurisdiction outside of § 252 to resolve disputes regarding intercarrier compensation for ISP-bound traffic,⁷ the FCC has declared its exclusive jurisdiction over interstate communication generally in several FCC Orders.⁸

⁷ Pl.’s Mot. Exh. 2, FCC Amicus Brief at 29.

⁸ See, e.g., In the Matter of Vonage Holdings Corp., 19 FCC Rcd. 22404 (2004); In re applications of Mobile Telecomm. Tech. Corp. U.S. Central, Inc., 6 F.C.C.R. 1938, 1941 n.16 (1991) (“The

For example, in In the Matter of Vonage Holdings Corp., 19 FCC Rcd. 22404 (2004), the FCC explained that, “[i]n section 2(a) of the [Communications] Act, Congress has given the Commission exclusive jurisdiction over ‘all interstate and foreign communication’ and ‘all persons engaged . . . in such communication.’” 19 FCC Rcd. 22404, 22412 (quoting 42 U.S.C. § 152(a)). The FCC went on to explain that it typically applies its end-to-end analysis to determine whether a communication is interstate or intrastate:

[W]hen the end points of a carrier’s service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for determining appropriate regulations to govern such service. When a service’s end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission’s exclusive control.

Id. at 22412-13 (2004) (emphasis added).

The FCC distinguished interstate services from those that are “mixed-use” or “jurisdictionally mixed,” which are services that could be either interstate or intrastate services at any given time. Id. at 22413. Those services are subject to

Act grants this Commission exclusive authority to regulate the charges and services of interstate common carriers.”); In the Matter of Am. Telephone & Telegraph Co. and the Assoc. Bell Sys. Cos., 56 F.C.C.2d 14 (1975) (“[T]he States do not have jurisdiction over interstate communications.”), aff'd, California v. F.C.C., 567 F.2d 84 (D.C. Cir. 1977) (per curiam).

“dual federal/state jurisdiction, except where it is impossible or impractical to separate a service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies.” Id. Regarding those services, the FCC can “exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations.” Id.

Core and the PPUC argue that ISP-bound traffic is not exclusively interstate traffic, and thus not subject to the FCC’s exclusive jurisdiction. However, the FCC has determined, according to its end-to-end analysis, that ISP-bound traffic is interstate communication for jurisdictional purposes. ISP Remand Order, 16 FCC Rcd. 9151, 9154. The FCC has litigated this position for several years, and that determination has been affirmed. In fact, the FCC first classified ISP traffic as “jurisdictionally mixed” in its 1999 Declaratory Ruling. See Declaratory Ruling, 14 FCC Rcd. 3689, 3690. That ruling was overturned. Bell Atl. Tel. Cos. v. F.C.C., 206 F.3d 1 (D.C. Cir. 2000). The FCC changed its mind in its next order, the ISP Remand Order, and has since classified ISP traffic as jurisdictionally interstate. The traffic, therefore, is not

mixed for jurisdictional purposes. The FCC has expressed its intention to classify ISP-bound traffic as interstate only.

The TCA gave state commissions jurisdiction over interstate traffic in the context of sections 251 and 252 only. The PPUC has jurisdiction to establish intercarrier compensation rates for ISP-bound traffic, subject to the rate caps in the ISP Remand Order, through its powers in § 252 to approve, mediate, and arbitrate agreements between ILECs and CLECs. That section does not give the PPUC authority to establish a rate for ISP-bound traffic between CLECs as it did here.

The TCA did not give state commissions any general rulemaking authority over interstate traffic. In another case similar to this one, the Ninth Circuit held that “[i]t is clear from the structure of the [TCA] . . . that the authority granted to state regulatory commissions is confined to the role described in § 252 - that of arbitrating, approving, and enforcing interconnection agreements.” Pac. Bell v. Pac. W. Telecomm, Inc., 234 F.3d 1114, 1126 (9th Cir. 2003). The Ninth Circuit held that the TCA did not give states any general rulemaking power over ISP-bound traffic. Id. at 1127. The Court quoted a Third Circuit opinion, which stated:

Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking State commissions

have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

Id. (quoting MCI Telecomm. Corp. v. Bell-Atl. Pa., 271 F.3d 491, 516 (3d Cir. 2001)). The Ninth Circuit held, therefore, that the California PUC did not have jurisdiction to promulgate a general regulation over ISP-bound traffic. Id. at 1125.

The TCA, therefore, did not give state commissions jurisdiction over interstate communication, including ISP-bound traffic, outside the confines of § 252. That section gives state commissions power over interstate communication only in the context of approving, mediating, and arbitrating interconnection agreements between ILECs and CLECs. The TCA has not given state commissions any authority to make rules or set rates outside of that context, and state commissions do not have authority to “fill gaps in the statute through binding rulemaking.” MCI Telecomm. Corp., 271 F.3d at 516.

In support of its argument, Core states several times, without authority, that the ISP Remand Order gave state commissions authority to set rates according to the Order’s compensation scheme. See Core Opp’n 20, 21, 23. For example, Core argues:

[T]he FCC preempted the Commission from setting a rate in excess of the FCC's rate cap, while authorizing the Commission to set a rate at or under the cap. With the FCC conceding state commission authority to set the rate consistent with the cap, it is simply illogical to infer that the FCC meant to preempt state commissions from enforcing that rate and requiring payment.

Core Opp'n 20. The brief cites no authority for that assertion, and the defendants could not point to any authority during the hearing either. Tr. Hr'g 10/1/13 34:7-40:13. The ISP Remand Order says nothing about authorizing a state commission to set a rate under the cap. The only state authority that the ISP Remand Order references is the authority to arbitrate interconnection agreement disputes under § 252. The Court is not persuaded, therefore, by Core's conclusory statements that the FCC has given state commissions authority to set rates for ISP-bound traffic.

AT&T points out that the ALJ cited two sections of the 1996 Act in support of its conclusion that the PPUC had jurisdiction to resolve the dispute by applying federal law. First, it cited 47 U.S.C. § 251(b)(1), which has no relevance to this matter. See Pl.'s Mot. Ex. 1, ALJ Decision 30. That section imposes a duty on LECs not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations

on, the resale of its telecommunications services. 47 U.S.C. § 251(b)(1). It is not informative as to PPUC's jurisdiction.

Second, the ALJ cited § 252(d)(2)(A). That section establishes standards for state commissions to use in determining whether the conditions for reciprocal compensation are "just and reasonable." 48 U.S.C. § 252(d)(2)(A). That section is limited to evaluating "compliance by an incumbent local exchange carrier with section 251(b)(5)." It is also not informative as to the PPUC's jurisdiction.

The defendants have not pointed to any authority for the PPUC's exercise of jurisdiction. The PPUC's enabling statute provides that PPUC only has jurisdiction over interstate communication where federal law or the Constitution allows. 66 Pa. C.S.A. § 104. The defendants have not cited any federal statutes, regulations, or Constitutional provisions that give the PPUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here.

The Court finds, therefore, that the PPUC lacked jurisdiction. The FCC has exclusive jurisdiction over interstate communication. ISP-bound traffic, including such traffic exchanged between two CLECs, is categorized as interstate communication for jurisdictional purposes. The FCC has exclusive jurisdiction to regulate ISP-bound traffic.

Specifically, the FCC has asserted its intention to preclude the states from regulating rates for the exchange of ISP-bound traffic in the ISP Remand Order.

The authority given to state commissions under sections 251 and 252 in the TCA does not impact the FCC's jurisdiction. Although the PPUC may have jurisdiction to set rates for the exchange of ISP-bound traffic pursuant to an interconnection agreement under its § 252 arbitration powers, that authority does not apply here. Congress and the FCC have not delegated jurisdiction to state commissions over interstate communication outside the context of sections 251 and 252. The PPUC, therefore, did not have jurisdiction and its Orders of December 5, 2012 and August 15, 2013 are invalid.⁹

An appropriate order shall issue separately.

⁹ The Court notes that it is not implementing a bill-and-keep arrangement, or any other rate, for the traffic exchanged between AT&T and Core.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T CORP., et al. : CIVIL ACTION
 :
 v. :
 :
 CORE COMMUNICATIONS, INC., :
 et al. : NO. 12-7157

ORDER

AND NOW, this 30th day of January, 2014, upon consideration of the plaintiff's Motion for Preliminary Injunction (Doc. No. 20), the oppositions and reply thereto, and following an oral argument held on October 1, 2013, and whereas the parties agreed during oral argument that the record was complete and the Court could proceed to decide the case on the merits, IT IS HEREBY ORDERED that:

1. Pursuant to Fed. R. Civ. P. 65(a)(2), the Court consolidates the oral argument with a hearing on the merits in this case;

2. The Pennsylvania Public Utility Commission ("PPUC") lacked jurisdiction to issue its December 5, 2012 Opinion and Order ("December 5, 2012 Order") and August 15, 2013 Opinion and Order on Reconsideration ("August 15, 2013 Order"), which ordered AT&T to pay Core Communications, Inc. in the amount of \$254,029.89, the rate of \$0.0007/MOU for the traffic at issue in this case; and

3. The defendants are permanently enjoined from enforcing the PPUC's December 5, 2012 Order and August 15, 2013 Order. The plaintiff is not obligated to make any payments under the terms of the PPUC Orders.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T CORP., et al. : CIVIL ACTION
: :
v. : :
: :
CORE COMMUNICATIONS, INC., :
et al. : NO. 12-7157

ORDER

AND NOW, this 10th day of March, 2014, whereas the Court issued a Memorandum and Order dated January 30, 2014 which held that the Pennsylvania Public Utility Commission ("PPUC") lacked jurisdiction to issue its December 5, 2012 Opinion and Order and August 15, 2013 Opinion and Order on Reconsideration which ordered AT&T to pay Core Communications, Inc. in the amount of \$254,029.89, the rate of \$0.0007/MOU for the traffic at issue in this case; and WHEREAS the Court ordered the parties to show cause as to why the Court should not enter judgment in favor of the plaintiff and close this case; and WHEREAS the plaintiff did not respond to that order; and WHEREAS the Court denied the PPUC's motion in response to that order; IT IS HEREBY ORDERED THAT:

1. Judgment is ENTERED for the plaintiff and against the defendants on Count I of the plaintiff's Complaint;

2. Because the Court's decision on Count I of the Complaint is dispositive of this case, the Court will DISMISS Counts II, III, IV, V, and VI as moot;

3. The Clerk of Court may close this case.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T CORP., et al. : CIVIL ACTION
 :
 v. :
 :
 CORE COMMUNICATIONS, INC., :
 et al. : NO. 12-7157

ORDER

AND NOW, this 30th day of January, 2014, upon consideration of the plaintiff's Motion to Dismiss Defendant Core Communications, Inc.'s Counterclaims (Doc. No. 41), and the opposition and reply thereto, IT IS HEREBY ORDERED that the motion is GRANTED.

Core Communications, Inc. ("Core") has raised two counterclaims in its answer to AT&T's Complaint. First, Core seeks a declaratory judgment that AT&T owes Core \$254,029.89, the amount that the PPUC ordered AT&T to pay in its August 15, 2013 Order on Reconsideration. Second, Core asserts a claim of unjust enrichment. In support of that claim, Core argues that, if the PPUC lacks jurisdiction to award that amount to Core, this Court has jurisdiction to do so. The Court has held in its Memorandum and Order on AT&T's motion for preliminary injunction that PPUC lacked jurisdiction to order AT&T to pay that amount to Core, because the FCC has exclusive jurisdiction over ISP-bound traffic and has not delegated authority to state

commissions to resolve disputes such as the one involved in this case. Accordingly, the Court will dismiss both of Core's counterclaims because the PPUC did not have jurisdiction to order AT&T to pay Core that amount, and neither does this Court.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

APPENDIX C

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held December 5, 2012

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley, Concurring in Result Only
Pamela A. Witmer

Core Communications, Inc.

C-2009-2108186

C-2009-2108239

v.

AT&T Communications of Pennsylvania, LLC
and
TCG Pittsburgh, Inc.

OPINION AND ORDER

BY THE COMMISSION:

I. Matter Before the Commission

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Core Communications, Inc. (Core or Complainant) and the jointly filed Exceptions of AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh, Inc. (collectively, AT&T or Respondent), filed on June 13, 2011, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Angela T. Jones, which was issued on May 24, 2011. Core and AT&T filed Reply

Exceptions on June 23, 2011. On July 7, 2011, Core filed a Motion for Leave to File Update to Core's Reply to the Exceptions of AT&T.¹

II. Background

This proceeding involves two Formal Complaints (Complaints) that were filed by Core against AT&T at Docket Nos. C-2009-2108186 and C-2009-2108239 for AT&T's alleged refusal to pay Core for the use of Core's access facilities used to terminate calls originated by AT&T's customers that are routed through Verizon's access tandem switches to Core's end-user customers.

Core refers to the telecommunications traffic at issue in this proceeding as "AT&T Indirect Traffic," which is traffic from AT&T that is routed through a Verizon access tandem before connecting to Core's terminating facilities. Core avers that it does not have an interconnection agreement or traffic exchange agreement (TEA) with AT&T. As such, Core alleges that its intrastate switched access service tariff controls the compensation it should receive from AT&T for terminating AT&T Indirect Traffic. Core also avers that AT&T has not paid any type of compensation to Core for terminating this traffic and that AT&T has outstanding balances due for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009. Core requests that the Commission direct AT&T to pay all intrastate switched access charges that are due, as well as charges that may accrue in the future.

On the other hand, AT&T alleges that the Parties were paying each other in-kind for access service through a bill-and-keep arrangement from January 1, 2004

¹ On July 15, 2011, AT&T filed an Answer in Opposition to Core's Motion. However, after reviewing Core's Motion and AT&T's Answer, we issued a Secretarial Letter dated August 5, 2011, that granted the Motion and indicated that we consider AT&T's responsive argument to Core's updated Replies to Exceptions.

through December 31, 2007. AT&T avers that the bill-and-keep arrangement is the industry standard method for intercarrier compensation.² With regard to compensation after 2007, AT&T alleges that the Parties were in negotiations over compensation without having reached any agreement. AT&T opined that the compensation at issue should be resolved on a going-forward basis, and that virtually all of the traffic at issue is Internet Service Provider (ISP)-bound local traffic that is governed by the Federal Communications Commission's (FCC's) *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) (*ISP Remand Order*), remanded but not vacated, *Worldcom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). AT&T avers that the bill-and-keep method was by default the in-kind payment for the access service from January 1, 2004 through March 2008, and that this bill-and-keep arrangement is appropriate for the same intrastate access services charges in the future. AT&T does not agree to pay Core for local ISP-bound access charges at its tariff rate or at the Verizon tandem reciprocal compensation rate.

Core disputes AT&T's argument that the Commission lacks jurisdiction to make a determination because the terminated traffic is ISP-bound. Furthermore, Core does not agree that the alleged industry standard of a bill-and-keep arrangement applies to the subject traffic, especially in light of the fact that the volume of traffic was at times heavily skewed to services performed by Core for the termination of AT&T Indirect Traffic to Core's customers.

² Core does not abide by the bill-and-keep arrangement for compensation of its termination service. Core contends that for intrastate traffic, which it alleged is at issue here, Core's Pennsylvania tariff should dictate the compensation it should receive for termination service rendered. The traffic here for which Core seeks compensation is traffic prior to September 2009, which is discussed below.

From initial telecommunications service performed by Core to and through September 2009, Core's only customers in Pennsylvania were ISPs. In or about October 2009, Core alleged that it began providing service to Voice-Over-Internet-Protocol (VoIP) providers. Core claims that in or around April 2010, Core's VoIP customers began to originate communications. N.T. at 20. Prior to April 2010, Core handled only inbound traffic which was terminated to its customers. Core originated no outbound traffic at that time. N.T. at 18.

III. History of the Proceedings

The following is an updated history of the proceeding, most of which is obtained from pages 1-11 of the ALJ's Initial Decision.

As stated above, on May 19, 2009, Core filed the instant Complaint against AT&T alleging non-payment by AT&T for terminating calls from AT&T's customers to Core's end-user customers. Core averred that it does not have an interconnection agreement or traffic exchange agreement with AT&T and thus alleged that Core's tariff controls the compensation it should receive for providing AT&T with intrastate switched access service.

On June 9, 2009, AT&T filed its Answer to the Complaint alleging, *inter alia*, that the Parties were paying each other in-kind for access service through a bill-and-keep arrangement from January 1, 2004 through December 31, 2007. For compensation after 2007, AT&T claimed that the Parties were in negotiations over compensation but that they have been unable to reach an agreement. AT&T claimed that virtually all of the traffic at issue is ISP-bound, which is governed by the FCC's *ISP Remand Order*. AT&T also averred that the compensation at issue should be resolved on a going-forward basis.

On December 8, 2009, AT&T filed a Motion to Dismiss the Complaint, based on its argument that the Commission lacked subject-matter jurisdiction or, in the alternative, the relief sought had been preempted by the FCC. AT&T also requested that the ALJ suspend the instant proceeding while the Motion to Dismiss was pending.

By letter dated December 9, 2009, Core responded, stating that it objected to any suspension of further testimony while the Motion to Dismiss was pending as well as to the Motion itself.

On December 28, 2009, Core filed its Answer to AT&T's Motion to Dismiss. Core stated that the FCC has never preempted the Commission's authority to address issues relating to intercarrier compensation between two competitive local exchange companies (CLECs). Core contended that the *ISP Remand Order* applied only to intercarrier compensation between an incumbent local exchange company (ILEC) and a CLEC. In this case, the exchange of traffic is between two CLECs; thus, Core is of the opinion that the *ISP Remand Order* is not applicable. Core also contended that even if the *ISP Remand Order* applied, the Commission still would have jurisdiction as the Telecommunications Act of 1996 TA-96³ contemplated shared state and federal authority over all aspects of competition. Core also argued that the *AT&T Communications v. PAC-West Telecomm, Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal Aug. 12, 2008) (*Pac-West District Court Decision*) was directly on point with the issues in this proceeding and makes clear that state commissions have not been preempted from applying intrastate tariff rates to ISP-bound traffic exchanged between two CLECs.⁴

³ Pub. L. No. 104-104, 110 Stat. 56 (Codified as amended in scattered sections of Title 47, United States Code).

⁴ As discussed, *infra*, the *Pac-West District Court Decision* was reversed by the Ninth Circuit Court of Appeals on June 21, 2011.

By Order dated February 26, 2010 (*Order No. 6*), the ALJ granted the Motion to Dismiss regarding the traffic prior to September 2009 and denied the Motion to Dismiss regarding traffic after September 2009.⁵

On March 5, 2010, both Core and AT&T filed separate Petitions for Interlocutory Review and Answer to Material Questions with respect to *Order No. 6*. On March 15, 2010, both Core and AT&T filed separate Briefs in Support of their respective Petitions for Interlocutory Review and Affirmative Answers. Also, on March 15, 2010, Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and XO Communications, Inc., submitted a Joint Brief as *amicus curiae* pursuant to 52 Pa. Code § 5.502(e). On March 26, 2010, Core filed a letter with the Secretary of the Commission questioning whether the filing of the *amicus* brief was appropriate.

On March 23, 2010, Core and AT&T filed a Joint Motion to Stay the Proceeding until such time that the Commission issued an Order regarding the Petitions for Interlocutory Review. On April 7, 2010, the ALJ issued *Order No. 7*, which granted the Joint Motion to Stay the Proceeding.

By Opinion and Order entered on September 8, 2010, we ruled on the material questions presented by the Petitions for Interlocutory Review (*Material Question Order*). On the issue of whether we had jurisdiction over traffic prior to September 2009,

⁵ The ALJ indicated that she made this ruling based on the understanding that compensation for a call was to be determined by the point of origin and the point of destination, also known as the “end-to-end” analysis. The ALJ ruled that the purpose or destination of the calls was to reach the services of an ISP and concluded that the application of the “end-to-end” analysis resulted in the calls being under the jurisdiction of the FCC. However, the traffic after September 2009 required the resolution of material facts, including whether the mix of traffic after September 2009 included VoIP traffic. Thus, the Motion to Dismiss was denied regarding all calls after September 2009, because the end-to-end analysis did not result in traffic being under the jurisdiction of the FCC.

the Commission concluded that the holding in *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006) (*Global NAPs*) was applicable to this proceeding and did not accept the end-to-end analysis. We stated:

The First Circuit Court established that the Massachusetts DTE (effectively the public utility commission of the state of Massachusetts) was not preempted by the FCC's *ISP Remand Order* on deciding an interconnection agreement dispute even when it related to information or ISP bound traffic between GNAPs [Global NAPs] and Verizon New England.

Material Question Order at 9-10. We further stated, “[W]e decline to supplement our focus by application of the ‘end-to-end’ analysis where doing so would effectively cede jurisdiction without legal basis and require applying that analysis to two Commission-certificated CLECs.” *Id* at 9. Lastly, the Commission stated, “[N]on-payment of appropriate intercarrier compensation from one CLEC to another CLEC cannot be condoned as a matter of law and as a matter of sound regulatory policy.” *Id* at 11.

Regarding the traffic after September 2009, we stated, “[t]his Commission unequivocally stated in *Global NAPs*⁶ that it has jurisdiction to address intercarrier compensation issues related to VoIP traffic.” *Id.* at 14. The Commission found that the ALJ properly denied the Motion to Dismiss regarding VoIP traffic. The Commission agreed that there remained outstanding genuine issues of fact. *Id.* at 13.

An evidentiary hearing was held in this matter on November 18, 2010. Core presented one witness, Mr. Bret Mingo. AT&T presented two witnesses,

⁶ *Palmerton Telephone Co. v. Global NAPs South, Inc., et al.*, Docket No. C-2009-2093336 (Order entered March 16, 2010; Petition for Reconsideration denied July 29, 2010) (*Palmerton*).

Mr. Christopher Nurse and Mr. Mark Cammarota. Various statements and exhibits were presented by Core and AT&T and were admitted into the record.⁷

Main Briefs were filed by both Parties on December 14, 2010, and Reply Briefs were filed by both Parties on January 14, 2011.⁸

By letter dated February 3, 2011, Core filed a letter with the Commission noting the filing of an *Amicus* Brief by the FCC in the appeal of the *Pac-West District Court Decision* then pending in the Ninth Circuit Court of Appeals at *Pac-West Telecomm, Inc. v. AT&T Communications of California, et al.*, Docket No. 08-17030. The FCC provided its reasoning as to why the *ISP Remand Order* applies to CLEC-to-CLEC ISP-bound traffic (FCC *Amicus* Brief). By letter dated February 4, 2011, AT&T concurred with the significance of the FCC *Amicus* Brief and responded to Core's February 3, 2011 letter.

By Order dated March 18, 2011, the ALJ admitted the FCC *Amicus* Brief into the evidentiary record.

On May 24, 2011, the ALJ's Initial Decision was issued, which dismissed the Complaint, in part, and concluded that the matters in dispute were subject to federal law. The ALJ recommended that the record be reopened to receive briefs from the Parties on the application of federal law to the instant proceeding.

As noted, Exceptions to the Initial Decision were filed by Core and AT&T on June 13, 2011, and Replies to Exceptions were filed by Core and AT&T on June 23,

⁷ A detailed list of the statements and exhibits presented by AT&T and Core is contained on pages 8-9 of the ALJ's Initial Decision.

⁸ Both Reply Briefs contained proprietary information and are marked pursuant to the Protective Order issued at these dockets.

2011. In addition, on July 7, 2011, Core filed a Motion of Core Communications, Inc. for Leave to File Update to Core's Reply to the Exceptions of AT&T to which AT&T filed an Answer in opposition on July 15, 2011. As noted *supra* on July 15, 2011, we granted the Motion and indicated that we also would consider AT&T's responsive argument to Core's updated Replies to Exceptions.

IV. Burden of Proof

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by a Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa.

433, 461 A.2d 1234 (1983). While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

V. The ALJ's Initial Decision

The ALJ made eighty Findings of Fact and reached seventeen Conclusions of Law. I.D. at 11-22, 36-38. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ summarized the allegations in these Complaints as follows:

This dispute involves transport and termination services for AT&T to end-user customers of Core. Core provided the services and has not received compensation. Both AT&T and Core are CLECs. Therefore, in simplest terms, this is an intercarrier compensation dispute between two certificated CLECs operating in the Commonwealth of Pennsylvania. One CLEC (AT&T) has failed to pay the other (Core) for services rendered and services that continue to be rendered.

Core alleged that:

- (1) The services at issue are under the subject-matter jurisdiction of the Commission;⁹
- (2) The services at issue are covered by its state tariff and therefore AT&T should pay Core according to the terms of the tariff;

⁹ This issue was determined by the Commission in its *Material Question Order*, entered September 8, 2010.

- (3) In the alternative, the services at issue are applicable to the Commission-approved TELRIC rate and should be paid accordingly;
- (4) On a going-forward basis, the Commission should direct AT&T to enter a TEA with Core; and
- (5) As a matter of public policy, the Commission should levy a civil penalty against AT&T for its conduct regarding the termination service it has received in this matter for which it has failed to pay Core.

AT&T countered that:

- (1) The state tariff does not cover the service that is provided;
- (2) Verizon's tandem reciprocal compensation rate does not apply to the traffic at issue;
- (3) The relief sought is barred as it would violate Commission statutory law;
- (4) A bill-and-keep arrangement is the industry standard germane to the services provided so AT&T owes no compensation;
- (5) Core is responsible for the situation it finds itself in;
- (6) The Commission should not require CLECs to enter TEAs for local traffic exchange;
- (7) AT&T's conduct does not oblige a civil penalty; and
- (8) Respectfully noting the Commission's decision, Material Question Order, entered September 8, 2010, the Commission fails to have subject-matter jurisdiction over this matter because the traffic is ISP-bound.

I.D. at 22-23.

The ALJ indicated that that, despite the Commission’s *Material Question Order*¹⁰ in this proceeding, the “paramount issue” in these proceedings is to first address anew whether the Commission has jurisdiction over the subject matter of the Complaint in light of the FCC *Amicus* Brief in the Appeal of the *Pac-West District Court Decision*, which was admitted into the instant record. The ALJ opined that the FCC *Amicus* Brief declares the FCC’s intent in the *ISP Remand Order* and provides persuasive precedent on the issue of jurisdiction. I.D. at 23-24.

If it is determined that the Commission has jurisdiction, the ALJ averred that the Commission should then resolve to determine: (1) whether there is any monetary compensation that is due to Core for its services involved in terminating ISP-bound local traffic for AT&T; (2) whether the conduct of AT&T regarding non-payment for the services it received from Core warrants a civil penalty or fine. *Id.*

In determining whether there is any monetary compensation that is due to Core for its services involved in terminating AT&T’s indirect traffic, the ALJ further determined that it would be necessary to resolve the following issues:

- (1) whether the state tariff at issue is applicable;
- (2) whether the state tariff rate should be implemented;
- (3) whether there was a mix of traffic (traffic other than ISP-bound) after September 2009; and

¹⁰ As noted in the “History of the Proceedings” section of this Opinion and Order, our September 8, 2010 *Material Question Order* decided the jurisdictional issue regarding CLEC-to-CLEC ISP-bound traffic when we ruled that there had been no federal preemption of our authority to address compensation issues regarding locally dialed ISP-bound traffic exchanged between two CLECs. We also ruled that we have jurisdiction to address intercarrier compensation issues related to VoIP traffic consistent with our previous decision in *Palmerton*.

- (4) the corresponding compensation for the mixed traffic (if indeed it was mixed).

Id. at 24.

If it is determined that the ISP-bound traffic is not subject to this Commission's jurisdiction but falls under federal jurisdiction, the ALJ indicated that Core has requested that the Commission decide the following issues based on federal law:

- (1) whether the Commission should apply the federal law in this dispute at a rate of \$0.0007 per MOU pursuant to the *ISP Remand Order*.
- (2) whether compensation is due in the future for the type of traffic at issue.
- (3) whether the Commission should levy a civil penalty or fine against AT&T based on its conduct in the dispute of payment for services rendered by Core.

Id.

In summary, the ALJ determined the following in her Initial Decision:

- Because Core failed to fulfill its burden of proof pursuant to 66 Pa. C.S. § 332 regarding the quantity of VoIP traffic after September 2009 (the month in which Core began providing service to VoIP providers), all traffic exchanged between AT&T and Core from September 1, 2009 to August 31, 2010, is to be treated as CLEC-to-CLEC ISP-bound traffic in this proceeding. *I.D.* at 35-36.
- The subject-matter CLEC-to-CLEC ISP-bound traffic is properly classified as interstate for jurisdictional purposes because the FCC has held that it has authority under section 201(b) to establish pricing rules governing this traffic. *I.D.* at 27, citing the FCC *Amicus* Brief at 7-8.

- The Commission is permitted to resolve the compensation issue associated with ISP-bound traffic exchanged between two CLECs as long as its ruling is made consistent with the application of federal law. I.D. at 29-30.
- The FCC rules preempt any state commission from using state law to set the rates for CLEC-to-CLEC exchange of ISP-bound traffic. I.D. at 29 citing FCC *Amicus* Brief at 15.
- The FCC's *ISP Remand Order* contains FCC rules that: (1) govern the types of applicable compensation to be considered by the states in the resolution of disputes between CLECs involving intercarrier compensation disputes for CLEC-to-CLEC ISP-bound traffic; and (2) preempt states from making rulings that are inconsistent with the FCC intercarrier compensation regime for ISP-bound traffic. I.D. at 28 citing FCC *Amicus* Brief at 10-11.
- AT&T's conduct in this dispute does not warrant a civil penalty because Core failed to support its claim that AT&T's failure to pay was fraudulent, grossly negligent or willful misrepresentation. Rather the record shows that AT&T has not violated any state law, regulation or Commission Order, or acted in bad faith. I.D. at 31-34.
- The answer to Core's question, regarding what compensation should be applied to the traffic in dispute on a going-forward basis, shall be addressed after the Parties have had the opportunity to provide argument regarding the application of federal law to this dispute. I.D. at 36.

For all of the above reasons, the ALJ: (1) dismissed the Core Complaint in part; (2) declined to rule on the issue concerning the appropriate compensation to be applied to the traffic in dispute on a going-forward basis until the Parties have had an opportunity to submit briefs; and (3) directed that the record in this proceeding be reopened to receive briefs or memoranda.

For the reasons discussed in this Opinion and Order, *infra*, we shall, in large part, adopt the ALJ's Initial Decision, with the exception of her recommendation to reopen the record to receive briefs or memoranda on the issue of the applicable rate for

the termination of the traffic at issue in this proceeding. In lieu of requesting briefs on this issue, we shall exercise our authority to establish rates consistent with the FCC's intercarrier compensation regime for ISP-bound traffic. We conclude that, consistent with federal law, it is appropriate for this Commission to determine that the FCC's rate cap of \$0.0007 per MOU is the appropriate reciprocal compensation rate that should apply to the locally-dialed ISP-bound local traffic at issue that AT&T sends to Core for termination on Core's network.

VI. Exceptions

As a preliminary matter before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

AT&T generally argues in its Exceptions that the ALJ erred in determining that the Commission may hear and decide this case by applying federal law; that the Initial Decision should be revised to conclude that the Commission lacks the authority and jurisdiction to hear and decide the case; and that the Complaint should be dismissed because the Commission lacks the jurisdiction to hear and decide this case. AT&T Exc. at 7-19. However, AT&T asserts that, should the Commission rule that state law controls the resolution of this case, the Commission should rule that Core is not entitled to any relief. AT&T Exc. at 28-33. AT&T also submits that the Initial Decision should be revised to remove certain Findings of Fact that are not supported by any record evidence and/or which conflict with other, fully supported findings and state and federal law. AT&T Exc. at 19-28.

Core generally argues in its Exceptions that the ALJ erred in finding that the Commission's previously established subject matter jurisdiction over intrastate CLEC-to-CLEC traffic should be reexamined in light of the FCC *Amicus* Brief. Core Exc. at 7-10. Core also objects to the ALJ's finding that the FCC *Amicus* Brief overrides the Commission's previously established subject matter jurisdiction over intrastate CLEC-CLEC traffic. Core Exc. at 10-25. In this regard, Core submits that: (1) the FCC staff's interpretation in its *Amicus* Brief is based on the same arguments that this Commission considered and rejected in deciding the *Material Question Order* (Core Exc. at 11-20); (2) it has not conceded that the FCC *Amicus* Brief is entitled deference (Core Exc. at 20-21); and (3) the ALJ erred in affording the FCC staff interpretation deference because the Commission owes no deference to the FCC *Amicus* Brief (Core Exc. at 21-25). The remainder of Core's Exceptions comprise its objections to certain Findings of Fact or Conclusions of Law which Core contends are erroneous and should be reversed or corrected before the Commission makes its final decision in this proceeding. Core Exc. at 25-39.

Before addressing the Exceptions, it is significant to note that on June 21, 2011, or two days prior to the deadline to file Reply Exceptions, the Ninth Circuit Court issued its decision in the *AT&T v. Pac-West* proceeding.¹¹ In its decision, the Ninth Circuit generally mirrored and expanded on the FCC *Amicus* Brief and concluded that the *ISP Remand Order* and its compensation regime apply to all LEC-originated, including CLEC-to-CLEC traffic, which is the traffic at issue in this case. In making its determination, the Ninth Circuit reversed the district court and preempted the California Public Utility Commission's ruling that relied upon state-filed tariffs to set rates on locally dialed ISP-bound traffic. The Ninth Circuit also deferred to the FCC's

¹¹ *AT&T Communs. of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*).

interpretation of the *ISP Remand Order* noting that the FCC is best positioned to describe the reach of its own orders.

A. Did the ALJ Err in Determining that the Commission May Hear and Decide This Case By Applying Federal Law? (AT&T Exception No. 1 at 7 - 19).

1. The ALJ's Initial Decision

The ALJ found that the Commission can apply FCC pricing rules to the local ISP-bound traffic at issue in this proceeding, consistent with the FCC's statement in its *Amicus* Brief that its *ISP Remand Order* pre-empted "inconsistent state regulation." I.D. at 28. The ALJ concluded that, by implication, the FCC has not pre-empted state regulation that is consistent with federal law. *Id.* at 30. In this regard, the ALJ stated:

Furthermore, it appears that the structure set in place to adjudicate the issues of ISP-bound traffic and reciprocal compensation do not prohibit or deter state commissions to adjudicate the issues applying the federal law. See U.S.C. §§ 251(b)(1) and 252(d)(2)(A). Additionally, if the Commission uses federal law to resolve this dispute, then the Commission should be acting consistent with the FCC regarding intercarrier compensation. FCC *Amicus* Brief at 8. Therefore, the undersigned ALJ finds that the Commission can resolve the issue of ISP-bound traffic exchanged between two CLECs through application of federal law.

Id.

In making this determination, the ALJ found it compelling that Core stated that "... it is important to remember that even under the theory espoused by FCC staff, this Commission still maintains jurisdiction to conclude that AT&T is required to

compensate Core at the rate of \$0.0007 . . .”¹² *Id.* at 29. The ALJ opined that this statement implies that Core has conceded that the Commission does not have subject-matter jurisdiction to settle a dispute regarding the CLEC-to-CLEC ISP-bound traffic at issue in this proceeding based on *state law*. However, the ALJ stated that it appears that Core has conceded that this Commission can resolve this dispute by applying *federal law*. *Id.* at 29.

As stated above, the ALJ also found it persuasive that the FCC stated the following in its *Amicus* Brief: “[T]he FCC expressly declared [in the *ISP Remand Order*] that its intercarrier compensation regime for ISP-bound traffic pre-empted **inconsistent** state regulation.”¹³ The ALJ noted that a corollary to this statement is that the intercarrier compensation for ISP-bound traffic does not pre-empt state regulation that is consistent with federal law. This corollary, in conjunction with Section 251(b) of the TA-96, 47 U.S.C. § 251(b),¹⁴ and this Commission’s declaration in the *Material Question Order* that “[t]his Commission unequivocally stated in *Global NAPs* that it has jurisdiction to address intercarrier compensation issues related to VoIP traffic,”¹⁵ convinced the ALJ that the Commission is not pre-empted from resolving issues in this proceeding in a manner consistent with federal law. *Id.* at 30.

2. Exceptions

AT&T’s primary objections to the ALJ’s Initial Decision are based on its arguments that the Commission does not have subject jurisdiction over this dispute, and

¹² \$0.0007/MOU is the current federal rate cap in the *ISP Remand Order*.

¹³ FCC *Amicus* Brief at 8 (emphasis added).

¹⁴ Section 251(b) gives both the FCC and state commissions roles in implementing reciprocal compensation obligations through arbitrated interconnection agreements.

¹⁵ *Material Question Order* at 14.

that the Complaint must be dismissed because the Commission lacks the authority and jurisdiction to hear and decide the case. AT&T Exc. at 7.

Specifically, AT&T objects to: (1) the ALJ's conclusion that the Commission has jurisdiction to decide this matter based on federal law,¹⁶ and (2) the ALJ's decision to reopen the record for the filing of briefs or memoranda of law regarding the appropriate compensation under federal law for the traffic at issue. I.D. at 30, 36, Ordering Paragraph Nos. 3 and 4 at 39.

AT&T is of the opinion that the threshold predicate of the *ISP Remand Order* was repeated and endorsed in the FCC *Amicus* Brief and, when coupled with Pennsylvania state law, leads to the conclusion that this Commission lacks the authority and jurisdiction to decide any aspect of Core's Complaint, irrespective of the source of the substantive law that is applied. AT&T Exc. at 8. AT&T asserts that, in light of the *ISP Remand Order*, the *2008 ISP Mandate Order*,¹⁷ *Bell Atlantic Tele. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) and *Core Communications v. FCC*, 592 F.3d 139, 143-44 (D.C. Cir. 2010), it is clear that ISP-bound traffic is jurisdictionally interstate. *Id.*

AT&T further opines that all of the traffic in this case is jurisdictionally interstate and that this Commission therefore lacks the authority and jurisdiction to hear and decide this case. AT&T argues that the Commission's enabling statute at 66 Pa. C.S. § 104, 66 Pa. C.S. § 104,¹⁸ gives the Commission the authority to address intercarrier

¹⁶ I.D. at 30.

¹⁷ *In the Matter of High-Cost Universal Service Support*, Order On Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 2008 WL 4821547 (Nov. 5, 2008) (*2008 ISP Mandate Order*).

¹⁸ Section 104 of the Code states: “[t]he provisions of this part, except when specifically so provided, shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.”

compensation for *intrastate* telecommunications traffic but not for *interstate* telecommunications traffic. *Id.* Exc. at 9.

AT&T quotes liberally from the FCC *Amicus* Brief for the proposition that the FCC has made it crystal clear that the *ISP Remand Order* and the *2008 ISP Mandate Order* apply to CLEC-to-CLEC ISP-bound traffic, and that ISP-bound traffic is jurisdictionally interstate. According to AT&T, state commissions therefore are preempted from deciding controversies over intercarrier compensation for ISP-bound traffic exchanged between CLECs.¹⁹ *Id.* at 11-14.

AT&T also argues that the FCC *Amicus* Brief is not only entitled to deference but is binding on the Commission. *Id.* at 14. In this regard, AT&T asserts that the FCC's interpretation of its own rules in its *Amicus* Brief is not "plainly erroneous or inconsistent with the regulation." Rather, AT&T avers that the FCC interpretation is the only one that can be squared with the language of the *ISP Remand Order*, the *2008 ISP Mandate Order* and the associated regulations. *Id.* at 15.

In light of the above, AT&T construes the FCC's position to mean that: (1) the *ISP Remand Order*, the *2008 ISP Mandate Order* and the new markets and rate cap rules all apply to the traffic at issue in this proceeding; (2) the application of state law to resolve the instant controversy is preempted; and (3) the traffic at issue in the instant case is all "interstate" telephone communications. *Id.* at 16.

AT&T notes that the ALJ's Initial Decision is consistent with the first two interpretations above, but not the third. AT&T avers that, because the traffic at issue here is interstate in nature, the Commission lacks the jurisdiction, as a matter of state and federal law, to hear and decide this case. *Id.* at 16.

¹⁹ *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82), FCC *Amicus* Brief at 10-11, 25-29.

AT&T also argues that Congress granted the FCC exclusive jurisdiction over all interstate and foreign communication by wire or radio, with only one exception, which permits state commissions to deal with and address intercarrier compensation for ISP-bound traffic in the context of a Section 252 (47 U.S.C. § 252) proceeding directed at arbitrating or enforcing the terms of an interconnection agreement. AT&T asserts that, when acting in such a capacity, the state commission operates as a “deputized federal regulator,” which doesn’t apply in this case because AT&T and Core do not have an interconnection agreement. *Id.* at 17.

With regard to whether a state commission has jurisdiction to hear a dispute concerning the applicable compensation for ISP-bound traffic between two CLECs, AT&T submits that the FCC stated in its *Amicus* Brief that “[t]he FCC in its rules and orders has not directly spoken to the issue whether the CPUC [California PUC] would have jurisdiction to resolve this dispute applying federal law and accordingly the FCC in its *amicus* brief takes no position on that issue.”²⁰ AT&T asserts that any inference by the ALJ from this statement that the matter is an open subject that gives the Commission the option to choose whether it has jurisdiction to decide the instant case based on “federal standards” would be incorrect. *Id.* at 18.

AT&T also disagrees with the ALJ’s suggestion that the Commission could hear the entire case if there was a mix of VoIP and ISP-bound traffic. AT&T submits that the record indicates that, because Core did not meet its burden of proving that a small portion of the traffic terminated after September 2009 may have been VoIP, the ALJ concluded that all traffic would be treated as ISP-bound. Accordingly, AT&T opines that the ALJ’s conjecture that the Commission would have jurisdiction if the traffic were mixed is not pertinent and should be rejected. *Id.* at 19, fn 8.

²⁰ FCC *Amicus* Brief at 14, 29.

Core disagrees with AT&T's argument that the Complaint must be dismissed because the Commission lacks the authority and jurisdiction to hear and decide the case. Core submits that AT&T makes several inaccurate and misleading comments which merit correction and/or clarification.

First, with regard to AT&T's argument that 100% of the traffic at issue in the instant case is jurisdictionally interstate, Core opines that AT&T is simply rehashing the same unsuccessful arguments that it previously raised in connection with the *Material Question Order*. In the *Material Question Order*, the Commission held that it "has jurisdiction in this matter because both Core and AT&T are facilities-based CLECs certified by the Commission to provide local exchange telecommunications services in Pennsylvania, and that AT&T, Core and Verizon operate the switches and other facilities used to support AT&T's Indirect Traffic, including the termination function provided by Core, within the state of Pennsylvania."²¹ Core R.Exc. at 9.

In the *Material Question Order*, Core avers that the Commission relied on case law from two federal circuit courts for its finding that, despite the FCC's "interstate" analysis, the *ISP Remand Order* does not apply indiscriminately to *all* ISP-bound

²¹ *Material Question Order* at 10.

traffic.²² Core claims that nothing has changed since the *Material Question Order* and the Commission can, therefore, safely rely on its previous analysis. *Id.* at 9.

Core also contends that AT&T’s insinuation, that the FCC *Amicus* Brief relies on the “interstate” nature of the ISP-bound traffic in order to deny the California Commission subject matter jurisdiction over CLEC-CLEC traffic, is misleading for two reasons.

The first reason is that the Ninth Circuit never asked the FCC to address the “interstate” nature of ISP-bound traffic. Rather, the Court focused instead on the issue of whether the rules in the *ISP Remand Order* “apply so as to govern the compensation due ... one CLEC from another.” Core asserts that this focus on the application of the FCC’s rules, and not their underlying jurisdictional basis, shows that the Court is approaching the issue as one of preemption, not subject matter jurisdiction. Core Exc. at 11, fn 1; R.Exc. at 10. The second reason is that the FCC *Amicus* Brief does not challenge the California Commission’s underlying subject matter jurisdiction over intrastate CLEC-CLEC ISP-bound traffic on the basis that such traffic is “interstate.” In this regard, Core’s opines that the FCC staff appears to presume that the California Commission has jurisdiction to hear the case but that its resolution of CLEC-CLEC compensation issues is

²² *Material Question Order* at 9 (“we decline to supplement our focus by application of the ‘end-to-end’ analysis where doing so would effectively cede jurisdiction without legal-basis and require applying that analysis to two Commission-certificated CLECs.”); *see also*, *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006) (“matter may be *subject to* FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation. The 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.”), *citing*, *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir. 2004) (“There is no dispute in this case that the FCC has the *power* to preempt states from establishing standards and requiring reports, relating to special access services. The fighting issue is whether the FCC actually intended to do so”).

preempted by the *ISP Remand Order*.²³ For these reasons, Core asserts that the FCC *Amicus* Brief offers no new analysis or reason for the Commission to unilaterally surrender its jurisdiction over intrastate carriers, facilities and traffic. Core R.Exc. at 10.

3. Disposition

We are not persuaded by AT&T's arguments that this Commission may not hear and decide this case by applying federal law. As the ALJ noted in her Initial Decision, the FCC's *Amicus* Brief supports her conclusion that this Commission may resolve this dispute, involving the appropriate rate for compensation for Core's transport and termination services for ISP-bound local traffic, by applying federal law. As she noted, the FCC stated that its *ISP Remand Order* preempted *inconsistent* state regulation. By implication, the FCC has *not* preempted state regulation of local ISP-bound CLEC-CLEC traffic that is consistent with the FCC's intercarrier compensation regime. A matter may be subject to the FCC's jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006). In this case we conclude that the FCC has *not* preempted the Commission's regulation of the traffic at issue in a manner that is consistent with the FCC's intercarrier compensation regime.

AT&T itself argues that the FCC's *Amicus* Brief is binding on the Commission. AT&T Exc. at 14. AT&T's assertion that the FCC has preempted the Commission from resolving the instant dispute in a manner consistent with federal law is contrary to the FCC's own interpretation of its *ISP Remand Order*. AT&T seemingly

²³ See FCC *Amicus* Brief at 25 ("the FCC's rules cover CLEC-to-CLEC ISP-bound calls and thus govern the resolution of the dispute ... [t]he question thus becomes whether [FCC] rules preempt the [California Commission] from relying on state law to set the rate ...").

would create an exception to its rule that the FCC's statements are binding, such that the FCC's statements are binding except for the statements with which AT&T disagrees.

We further are persuaded by the ALJ's observation that it would be reasonable and efficient to resolve matters that have mixed traffic, ISP-bound and VoIP,²⁴ in one forum, rather than sending parties to two different forums based on the type of traffic at issue. I.D. at 30. The same observation holds with respect to local ISP-bound traffic and non-local ISP-bound traffic. The FCC has preempted the states with respect to the former, but has *not* preempted the states with respect to the latter.²⁵ Under AT&T's theory, a CLEC would be required to pursue compensation for local ISP-bound traffic at the FCC, but would be required to litigate a separate proceeding involving the same carrier before a state commission to obtain compensation for the small portion of ISP-bound traffic that is non-local. The result of AT&T's argument would be the inefficient use of resources and an unreasonable burden on CLECs seeking compensation for terminating ISP-bound traffic.

The ALJ further observed that the structure set in place to adjudicate issues related to the compensation for ISP-bound traffic does not prohibit state commissions from adjudicating these issues by applying federal law. We likewise are not aware of any prohibition against state commissions from applying federal law to resolve disputes pertaining to the compensation for ISP-bound traffic. *See also* 66 Pa. C.S. § 314. For all of the foregoing reasons, we shall deny AT&T's Exception.

²⁴ Under *Palmerton*, the Commission has jurisdiction over intercarrier compensation issues related to VoIP traffic.

²⁵ *Pac-West* at 8384, 8392.

B. Did the ALJ Err in Re-examining the Commission’s Previously Established Subject Matter Jurisdiction in the *Material Question Order* Over Intrastate CLEC-CLEC Traffic in Light of the FCC *Amicus* Brief? (Core Exception No. 1 at 7-10).

1. The ALJ’s Initial Decision

The ALJ stated in her Initial Decision that, despite the Commission’s *Material Question Order*, the “paramount issue” in this proceeding is to address anew whether the Commission has jurisdiction over the subject matter of the Complaint in light of the FCC *Amicus* Brief in the appeal of the *Pac-West District Court Decision*, which was admitted into the instant record. I.D. at 23. Based on her interpretation of the FCC *Amicus* Brief, and as explained in more detail below, the ALJ determined that the Commission does not have subject-matter jurisdiction to resolve this dispute by application of state law to determine the appropriate compensation that AT&T must pay to Core. However, the ALJ is of the opinion that this Commission has the authority, governed, to resolve this dispute by applying federal law. I.D. at 29-30.

First, based upon her analysis of the FCC’s *Amicus* Brief, the ALJ concluded that the subject-matter of this case, CLEC-to-CLEC exchange of local ISP-bound traffic, is governed by federal law:

It is evident that the FCC *Amicus* Brief provides sound reasoning in the application of the *ISP Remand Order* as federal law and precedent that the Commission does not have subject-matter jurisdiction to use state law to resolve this dispute regarding the appropriate rate for compensation for Core’s transport and termination services for ISP-bound traffic. In compliance with the *ISP Remand Order*, the subject-matter of this case, CLEC-to-CLEC exchange of ISP-bound traffic, is governed by federal law.

I.D. at 29.

In making this determination, the ALJ first noted that it is not disputed that Core and AT&T are public utilities under the personal jurisdiction of the Commission pursuant to the definition of “public utility” at 66 Pa. C.S. § 102. I.D. at 26. The ALJ also determined that it was undisputed that the traffic from June 2004 through 2009 was ISP-bound local traffic exchanged between two CLECS. *Id.*; FOFs 53, 54.

In support of her determination that CLEC-to-CLEC exchange of local ISP-bound traffic is governed by federal law, the ALJ cited the following pertinent language from the FCC *Amicus* Brief:

Based on its ‘traditional’ end-to-end analysis to determine whether a particular call falls within the FCC’s jurisdiction over interstate communications, the FCC explained that ISP-bound traffic should be analyzed ‘for jurisdictional purposes as a continuous transmission’ from the ISP’s customer who initiated transmission to the Internet website (or websites) ‘often located in another state.’ ... ‘ISP traffic is properly classified as interstate’ for jurisdictional purposes... the FCC held that it had authority under section 201(b) to establish pricing rules governing this traffic.²⁶

FCC *Amicus* Brief, at 7-8 (notes and citation omitted); I.D. at 27.

With regard to compensation, the FCC stated:

The compensation rules adopted in the *ISP Remand Order* had four components - rate caps, a new markets rule, a growth cap and a mirroring rule. The rate caps consisted of gradually declining limits on the rates that ‘carriers may recover from other carriers for delivering ISP-bound traffic. The initial cap was set at \$.0015/MOU and declined in increments to

²⁶ 47 U.S.C. § 201(b).

\$.0007/MOU. The new markets rule denied any intercarrier compensation for ISP-bound traffic (and thus mandated a bill-and-keep regime) in markets where the ISP's LEC was 'not exchanging traffic pursuant to [an] interconnection agreement[] prior to adoption' of the *ISP Remand Order*. The growth cap limited the total minutes for which a LEC could receive intercarrier compensation for the ISP-bound traffic. ... [T]he mirroring rule, which applies only to ILECs, provides that an ILEC can avail itself of the rate caps and new markets rule only if it charges other carriers the same rate to terminate traffic subject to section 251(b)(5) originating on those carriers' networks.²⁷

Exercising authority delegated to it by Congress in 47 U.S.C. § 160, the FCC subsequently issued an order granting a petition requesting forbearance from the growth cap rule and the new markets rule. That order rendered those two rules no longer enforceable as of October 18, 2004.

FCC Amicus Brief at 9-10 (note and citations omitted); I.D. at 28.

With regard to the authority of the FCC to preempt the states, the FCC stated:

[T]he FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic pre-empted inconsistent state regulation. The FCC explained, ... it has 'exercise[d] [its] authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic,' ...and thus 'state commissions will no longer have authority to address this issue.'

FCC Amicus Brief at 10-11 (note and citation omitted); I.D. at 28.

The ALJ concluded that, most significantly, the FCC affirmatively stated:

²⁷ 47 U.S.C. § 251(b)(5).

The *ISP Remand Order* established an intercarrier compensation regime that applies to ISP-bound traffic exchanged between **CLECs**. ...[T]he FCC’s description of the scope of its compensation regime, and the regulatory purpose ... apply to **CLEC-to-CLEC ISP-bound traffic**.

FCC Amicus Brief at 15 (emphasis added); I.D. at 29.

As such, the ALJ determined that it is evident from the sound reasoning of the *FCC Amicus* Brief that, under the *ISP Remand Order*, the Commission cannot use *state law* to resolve this dispute regarding the appropriate rate for compensation for Core’s transport and termination services for ISP-bound local traffic. Therefore, the ALJ concluded that, in order to comply with the *ISP Remand Order*, the subject-matter of this case, CLEC-to-CLEC exchange of ISP-bound local traffic, is governed by federal law. I.D. at 29.

2. Exceptions

Core argued in its Exceptions that the ALJ erred in re-examining the Commission’s subject matter jurisdiction, previously established in the *Material Question Order*, over intrastate CLEC-CLEC traffic in light of the *FCC Amicus* Brief, and in finding that the *FCC Amicus* Brief overrides this Commission’s previous determination that it has subject matter jurisdiction over intrastate CLEC-CLEC traffic. Core Exc. at 7.

Core opines that the ALJ’s statement “that the paramount issue of whether the Commission has jurisdiction needs to be addressed anew due to the development of the *FCC Amicus* Brief declaring its intent in the *ISP Remand Order*”²⁸ disregarded the fact that the Commission has already determined in the *Material Question Order* that: (1) it has subject matter jurisdiction to resolve a formal complaint regarding payment for

²⁸ I.D. at 23.

CLEC-CLEC ISP-bound traffic; (2) the FCC’s *ISP Remand Order* does not apply to CLEC-CLEC traffic; and (3) it maintains jurisdiction over CLEC-CLEC ISP-bound traffic that is originated and terminated within Pennsylvania.²⁹ Core Exc. at 7-8.

Core opines that the ALJ’s reliance on the FCC *Amicus* Brief was erroneous as neither this Commission nor the FCC – through formal FCC action – have acted to alter the currently applicable precedent established in the *Material Question Order*. Core Exc. at 8. Core argues that the ALJ is charged with implementing the currently applicable Commission precedent and Pennsylvania law pursuant to the doctrine of “the law of the case,”³⁰ which stands for the proposition that “a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of the matter.”³¹ Core Exc. at 8.

Core contends that in the instant case, the Commission has already thoroughly considered and answered the same issue that the ALJ chose to consider “anew.” As such, Core asserts that the ALJ’s analysis of Core’s Complaint should have begun with the presumption that the Commission’s precedent, as set forth in the *Material Question Order*, remains in effect. Core Exc. at 9.

Core also argues that, even if the ALJ did have a valid justification to reconsider “anew” the *Material Question Order*, she failed to engage in the appropriate

²⁹ *Material Question Order* at 10.

³⁰ The doctrine of the law of the case provides that if an appellate court has considered and decided a question on appeal, neither that court nor any trial court may revisit that question during another phase of the same case. The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case. *Gateway Towers Condo. Ass’n v. Krohn*, 845 A.2d 855, 861 (Pa. Super. 2004)(citations omitted). Core Exc. at 8.

³¹ *In re De Facto Condemnation and Taking of WBF Associates, L.P.*, 903 A.2d 1192, 1207 (Pa. 2006).

analysis to establish exceptional circumstance that is necessary to depart from the law of the case. In this regard, Core cites to a Pennsylvania Commonwealth Court decision holding that such departure is allowed only in exceptional circumstances where “. . . there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.”³² Core Exc. at 9.

In its Reply Exceptions, AT&T offers three reasons why the doctrine of the “law of the case” does not preclude the ALJ or the Commission from addressing the Commission’s subject matter jurisdiction over ISP-bound traffic in this proceeding.

First, AT&T submits that it is well-established that the doctrine of the “law of the case” does not apply when a court is examining subject matter jurisdiction, which is precisely what is happening in this case, where the ALJ is recommending that the Commission reconsider its decision on its subject matter jurisdiction over ISP-bound traffic. In support of its position, AT&T cites to two Pennsylvania Commonwealth Court decisions where the Court rejected the claim that the doctrine of the “law of the case” precluded a judge from reconsidering the issue of subject matter jurisdiction even though another judge previously had decided the issue.

The first case cited by AT&T, *Village Charter School v. Chester Upland School District*,³³ involved a proceeding where the Court rejected the claim that the doctrine of the “law of the case” precluded a judge from reconsidering the issue of subject matter jurisdiction even though another judge previously had decided the issue. The Court stated that “whenever a court discovers that it lacks jurisdiction over the subject matter or the cause of action *it is compelled to dismiss the matter under all*

³² *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1060 (Pa. Cmwlth. 2001).

³³ *Village Charter School v. Chester Upland School District*, 813 A.2d 20, 25 (Pa. Cmwlth. 2002).

circumstances, even where we erroneously decided the question in a prior ruling.” (emphasis added). Similarly, in the second case cited by AT&T, *Balfour Beatty Construction, Inc., v. Dept. of Transportation*,³⁴ the Court ruled that the “law of the case doctrine will not preclude reconsideration by the full Court on a question of subject matter jurisdiction, even when there has been no formal request for reconsideration.” AT&T R.Exc. at 4.

AT&T next argues that, pursuant to *Clearwater Concrete & Masonry Inc. v. West Philadelphia Financial Services Institution*,³⁵ the doctrine of the “law of the case” cannot be applied to prevent a trial judge from reconsidering its own decision. AT&T opines that in this proceeding, all the Commission is doing is reconsidering its own determination on jurisdiction.

Finally, AT&T points out that, as even Core acknowledges, there are exceptions to the “law of the case” doctrine where “there has been an intervening change in the controlling law” or “where the prior holding was clearly erroneous and would create a manifest injustice if followed.”³⁶ AT&T submits that those exceptions plainly would apply in this case if the law of the case doctrine otherwise were applicable.

AT&T maintains that the controlling law here is federal law, specifically, the *ISP Remand Order*. As such, AT&T contends that the ALJ correctly recognized that the *Material Question Order* simply misinterpreted the *ISP Remand Order* as a result of the FCC’s (and now the Ninth Circuit’s) recent interpretation of its *ISP Remand*

³⁴ *Balfour Beatty Construction, Inc., v. Dept. of Transportation*, 783 A.2d 901, 906 (Pa. Cmwlth. 2001).

³⁵ *Clearwater Concrete & Masonry, Inc., v. West Philadelphia Financial Services Institution*, 18 A.3d 1213, 2011 WL 1136216, * 3 (Pa. Super. 2011).

³⁶ *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757, 774 (Pa. Super. 1999) (*Baker*) (citations omitted).

Order. Accordingly, AT&T concludes that the doctrine of the “law of the case” does not apply in this proceeding.³⁷

3. Disposition

We agree with AT&T that the doctrine of the “law of the case” cannot be applied to prevent a trial judge from reconsidering its own decision regarding subject matter jurisdiction. In this case, the ALJ recognized that Commission’s *Material Question Order* has been overtaken by subsequent events, namely the FCC *Amicus* Brief and the Ninth Circuit’s decision in *Pac-West*. These authorities provide persuasive precedent on the question of jurisdiction over the subject matter in this proceeding, namely ISP-bound local CLEC-CLEC traffic. As AT&T has argued, there has been an intervening change in the controlling law since we issued the *Material Question Order* that persuades us to re-examine our prior determination regarding subject matter jurisdiction over ISP-bound CLEC-CLEC local traffic.

Therefore, consistent with the court decisions cited by AT&T in its Reply Exceptions, we conclude that the ALJ did not err in re-examining the Commission’s prior determination regarding subject matter jurisdiction over ISP-bound CLEC-CLEC local traffic. Accordingly, we shall deny Core’s Exceptions in which it argued that the doctrine of the “law of the case” prevents the Commission from revisiting our *Material Question Order*.

³⁷ See *Baker*, 725 A.2d at 774 (“the law of the case doctrine ... do[es] not nullify the obligation to reject decisions which are without support in the law.”).

C. Did the ALJ Err in Finding that the FCC *Amicus* Brief Overrides this Commission’s Previously Established Subject Matter Jurisdiction Over Intrastate CLCE-CLEC Traffic? (Core Exception No. 2 at 10 -- 25).

1. Exceptions

In this Exception, Core argues that the ALJ erred in finding that the FCC *Amicus* Brief overrides this Commission’s previous determination in the *Material Question Order* that the Commission has subject matter jurisdiction over intrastate CLCE-CLEC ISP-bound traffic for the following two reasons: (a) the FCC Staff’s reading of the *ISP Remand Order* is contrary to the language, premises and structure of that Order; and (b) the Commission owes no deference to the FCC *Amicus* Brief.

a. Is the FCC Staff’s Reading of the *ISP Remand Order* Contrary to the Language, Premises and Structure of the Order?

Core claims that ALJ erred in finding that “the FCC *Amicus* Brief provides sound reasoning . . . that the Commission does not have subject-matter jurisdiction to use state law to resolve this dispute regarding the appropriate rate for compensation for Core’s transport and termination services for ISP-bound traffic.”³⁸ Core Exc. at 11.

Core notes that the Initial Decision rejects the Commission’s own finding that “[c]ompensation applicable from CLEC to CLEC for ISP-bound traffic, was not addressed in the *ISP Remand Order*, and reliance on that order to resolve the jurisdictional issue in this case is misplaced.”³⁹ In addition to relying on its arguments made in Exception No. 1, above, that the Commission’s findings in the *Material Question Order* remain applicable law, Core also argues that, contrary to the Initial Decision, the

³⁸ I.D. at 29.

³⁹ *Material Question Order* at 10.

FCC *Amicus* Brief fails to provide “sound reasoning” for the Commission to overturn its own *Material Question Order*.⁴⁰ *Id.* at 11.

Core contends that the FCC Staff failed to demonstrate that the *ISP Remand Order* clearly preempts state commissions from adjudicating compensation for CLEC-CLEC ISP-bound traffic because the FCC *Amicus* Brief provides only minimal analysis on the crucial issue of preemption.⁴¹ *Id.* at 11. Core argues that there must be “a clear indication that an agency intends to preempt state regulation.”⁴² Core claims that, instead of meeting the requirement head-on that preemption must be clear and unambiguous, the FCC Staff starts with the premise that the *ISP Remand Order* addresses CLEC-CLEC ISP-bound traffic and that the California Commission’s orders conflict with the *ISP Remand Order*. *Id.* at 11-12.

Core also argues that, contrary to the FCC Staff’s primary argument in the FCC *Amicus* Brief, the language of the *ISP Remand Order* fails to demonstrate any intention to regulate CLEC-CLEC traffic. Core claims that the *ISP Remand Order* is utterly silent about *how* to implement its rules as between two CLECs. Core contends that, although the plain language of the *ISP Remand Order* frequently specifies the relationship between *incumbent* LECs and *competitive* LECs, it never discusses dealings between two CLECs. Instead, the structure of the Order and its rules indicate that the FCC was addressing ILEC-CLEC traffic only. *Id.* at 12.

In its Replies to Exceptions, AT&T disagrees with Core’s assertion that the FCC *Amicus* Brief provides only minimal analysis because, in AT&T’s opinion, the

⁴⁰ Because we rejected Core’s arguments in its Exception No. 1, we will not reiterate them here.

⁴¹ FCC *Amicus* Brief at 25-29.

⁴² Core Answer to AT&T Motion to Dismiss dated December 28, 2009 at 8-15; *Hillsborough County Automated Med. Labs., Inc. v. Auto. Med. Labs.*, 471 U.S. 707 (1985).

analysis the FCC provides in its *Amicus* Brief is substantial and compelling.⁴³ AT&T R.Exc. at 6-7.

AT&T notes that the FCC first pointed out the well-settled rule that a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.⁴⁴ AT&T notes that the FCC then observed that, in order to determine whether preemption has occurred, a “court asks ‘whether [the federal agency] meant to pre-empt [the state law], and, if so, whether that action is within the scope of the federal agency’s delegated authority.’”⁴⁵ *Id.* at 7.

AT&T further avers that the FCC *Amicus* Brief correctly notes that both tests are easily satisfied here. In support of its averment, AT&T offers the following:

First, the FCC points out that the FCC’s expression of its intent to preempt state authority is “quite clear.” And it is. The FCC in the *ISP Remand Order* expressly declares that the FCC had “exercise[d] [its] authority . . . to determine the appropriate intercarrier compensation for ISP bound traffic” and consequently “state commissions will no longer have authority to address this issue.” *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82). Just as clearly, the FCC was acting within the scope of its Congressionally-delegated authority. Because ISP-bound traffic is “interstate,” and because Section 201(b) gives the FCC express authority to regulate “interstate” communications, the FCC clearly had the authority to issue the *ISP Remand Order* and the new markets and rate cap rules, as the D.C. Circuit has held in upholding

⁴³ See FCC *Amicus* Brief at 25-29.

⁴⁴ *Barrientos v. Morton, LLC*, 583 F.3d 1197, 1208 (9th Cir. 2009) (*Barrientos*); *Fid. Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (*de la Cuesta*).

⁴⁵ *Barrientos*, 583 F.3d at 1208 (quoting *de la Cuesta* at 154 (brackets in original)).

the Order. *Core Communications v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597 (2010).

AT&T R.Exc. at 7.

Moreover, AT&T asserts that the Ninth Circuit in *Pac-West* has now held that the *ISP Remand Order* does indeed expressly preempt state law in disputes involving CLEC-originated ISP-bound traffic⁴⁶ and this forecloses any argument to the contrary.

Next, Core argues that the *ISP Remand Order* created a complicated set of interrelated rules including a price cap, growth cap, three-to-one ratio, and a new market bar.⁴⁷ Core Exc. at 13. In support of its argument, Core submits that two of the *ISP Remand Order*'s pricing rules apply only in an ILEC-CLEC relationship and not a CLEC-to-CLEC relationship. The two pricing rules are: (1) the incumbent LEC "opts-in" to the regime on a state-by-state basis, by lowering the price of termination on its own network to the FCC's rate cap (the so-called "mirroring rule")⁴⁸ and (2) the interconnection agreement governing reciprocal compensation between a particular incumbent LEC and a particular competitive LEC includes an applicable change-of-law provision.⁴⁹ Core Exc. at 13. Because the *ISP Remand Order* did not establish rules specifically for CLEC-CLEC traffic, Core submits that it was not intended to apply to CLEC-CLEC traffic.

AT&T replies that, just because some of the rules in the *ISP Remand Order*, such as the mirroring rule apply only to ILEC-originated traffic, this does not mean that the same is true of all of the rules (*i.e.*, the new markets and rate cap rules).

⁴⁶ *Pac-West*, slip op. at 8395-96.

⁴⁷ *ISP Remand Order* at 78, 79, 81.

⁴⁸ *ISP Remand Order* at ¶ 89.

⁴⁹ *ISP Remand Order* at ¶ 82.

AT&T submits that, as demonstrated by the text of the FCC *Amicus* Brief, certain rules also apply to CLEC-to-CLEC traffic:

The FCC in adopting the new markets and rate cap rules repeatedly used the word “carriers,” a broad term that includes both ILECs (incumbent local exchange *carriers*) and CLECs (competing local exchange *carriers*). For example, the new markets rule requires “*carriers*” to “exchange ISP-bound traffic on a bill-and-keep basis” if those “*carriers* [were] not exchanging traffic pursuant to interconnection agreements” before the *ISP Remand Order* was adopted. Similarly, the rate cap rule restricts “the amount that *carriers* may recover from other *carriers* for delivering ISP-bound traffic.” Not once does the FCC in the passages of the *ISP Remand Order* adopting the rate cap or new markets rules use the term “ILEC,” “incumbent carrier,” or similar restrictive language.

The FCC’s language choice is “a decision that is imbued with legal significance.” In contrast to the broad term “carrier” used in the rate cap and new markets rules, the FCC used the more restrictive terms “incumbent LEC[s],” “ILEC[s],” or “incumbent[s]” at least 14 times in adopting or describing the mirroring rule, a rule that applies only to ISP-bound traffic originated by ILECs. Under the “well-established canon” of interpretation, the use of “different words in connection with the same subject” “demonstrates that [the drafter] intended to convey a different meaning for those words.” The unmodified word “carrier” the FCC used in adopting the rate cap and the new markets rules has a different meaning than the narrower term “ILEC” (and its synonyms) that it used in adopting the mirroring rule. The use of the broad term “carrier” shows that the rate cap and new markets rules apply to exchanges of ISP-bound traffic between two CLECs.

FCC *Amicus* Brief at 16-17 (footnotes omitted). AT&T notes that the Ninth Circuit’s independent analysis comes to exactly the same conclusion.⁵⁰

⁵⁰ *Pac-West*, slip op. at 8385, 8389, 8392.

Next Core argues that the *ISP Remand Order's* insistence on implementation via the interconnection agreement process presumes an ILEC-CLEC relationship since, under TA-96, a CLEC may invoke its rights to negotiation and arbitration of an Interconnection Agreement (“ICA”) only with an “incumbent local exchange carrier.” 47 U.S.C. § 252(a)-(b). While the FCC staff claims the *ISP Remand Order's* reference to “interconnection agreements” was meant to include private carriage CLEC-CLEC traffic exchange agreements,⁵¹ Core argues that there is no evidence that the FCC, in drafting the *ISP Remand Order*, had any such intent. Core Exc. at 14-16.

AT&T rejoins that Core seems fixated on the fact that the *ISP Remand Order* at multiple places talks about interconnection agreements. Core argues that the term “interconnection agreement” means only an Interconnection Agreement under Section 252 of TA-96 – which Core asserts can only be between an ILEC and a CLEC. From this assertion, Core interprets the *ISP Remand Order* as dealing only with ILEC-originated traffic. Beside the fact that this conclusion is a *non sequitur*, AT&T contends that the premise is flatly wrong as well. AT&T notes that, as the FCC recognized (and as Core itself also recognizes), CLECs can and do enter into traffic exchange agreements which serve as interconnection agreements with one another.⁵² Moreover, as the FCC also points out, a significant portion of the references to “interconnection agreements” is *not* modified in any way, explicitly or implicitly, by “Section 252.” AT&T R.Exc. at 10-11.

As further justification as to why the FCC *Amicus* Brief is contrary to the *ISP Remand Order*, Core argues that the *Amicus* Brief points to the FCC’s statements delineating both the scope of its proceeding and its rules to buttress its reading of the *ISP Remand Order*. Core notes that only one fleeting reference to “all LECs” in a footnote to

⁵¹ *FCC Amicus* Brief at 22

⁵² *FCC Amicus* Brief at 22.

the now-vacated 1999 *ISP Declaratory Order*⁵³ could be read to encompass CLEC-CLEC traffic, while every other FCC statement regarding the scope of the FCC's ISP-bound traffic proceedings, and the *ISP Remand Order* itself, confirms that the *ISP Remand Order* was intended only to resolve disputes involving compensation for ISP-bound traffic between ILECs and CLECs. Furthermore, in the FCC's 1997 Public Notice initiating the proceedings which led to the *ISP Remand Order*, Core claims that the FCC recognized that the issue of compensation for ISP-bound traffic was an issue between ILECs and CLECs. Core Exc. at 16-17.

AT&T retorts that Core's further justification is demonstrably wrong. AT&T contends that, as the FCC pointed out in its *Amicus* Brief (and as the Ninth Circuit recognized), while the FCC used terms like "incumbent LEC," "ILEC" and "incumbents" no less than fourteen times in describing and explaining the mirroring rule, in describing and explaining the new markets and rate cap rules the FCC consistently used the term "carriers," a broad term that encompasses both ILECs and CLECs. That deliberate choice of language demonstrates that the FCC intended its new markets and rate cap rules to have a broader reach than its mirroring rule. According to AT&T, a broader reach, one that includes both CLEC-originated and ILEC-originated ISP-bound traffic, was essential if the regulatory purpose underlying the *ISP Remand Order* was to be satisfied and not thwarted.⁵⁴ AT&T R.Exc. at 9.

Core further argues that the FCC's 2004 *Core Forbearance Order*.⁵⁵ also confirmed that the scope of the *ISP Remand Order* was limited to ILEC-originated

⁵³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (*ISP Declaratory Order*).

⁵⁴ FCC *Amicus* Brief at 20-21.

⁵⁵ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of the ISP Remand Order*, WC Docket No. 03-171, 19 FCC Rcd 20179, 2004 WL 2341235 at ¶ 8 (Oct. 18, 2004) (*Core Forbearance Order*).

traffic. In support of its claim, Core cites to several quotations from the *Core Forbearance Order*. Core Exc. at 18.

AT&T responds that all of the quotations cited by Core refer to and address the mirroring rule (which everyone acknowledges applies only to ILEC-originated traffic) and its implementation. Accordingly, they prove absolutely nothing about the new markets and rate cap rules. AT&T also notes that the Ninth Circuit agrees that the mirroring rule is limited to ILEC-originated traffic.⁵⁶ AT&T R.Exc.at 10, fn 9.

In its Exceptions, Core also references statements that were made by the FCC in its Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610 (2001) (*Unified Carrier Compensation Order*) that demonstrate that the *ISP Remand Order* is limited to ILEC-originated traffic. Core Exc. at 17-18. Core notes that the FCC stated, noting the absence of any “symptoms of market failure,” that “we do not contemplate a need to adopt new rules governing CLEC-to-CLEC . . . arrangements.” *Unified Carrier Compensation Order* at 3. Core explains that the FCC *Amicus* Brief attempted to distinguish this statement when it said “[t]he FCC in these statements expressed its tentative views on possible future rule revisions.”⁵⁷ Core submits that the FCC *Amicus* Brief is not credible because the FCC found no “symptoms of market failure” with respect to “CLEC-to-CLEC arrangements” on the same day it released the *ISP Remand Order*. Core avers that the FCC would have no rational basis to lump CLEC-to-CLEC traffic into its contemporaneous *ISP Remand Order*. (Core Exc. at 18).

In response, AT&T states that the FCC’s *Unified Carrier Compensation Order* started a rulemaking to consider what, if any, amendments the FCC should make

⁵⁶ *Pac-West*, slip op. at 8392.

⁵⁷ FCC *Amicus* Brief at 24.

in the future “to the broad universe of existing intercarrier compensation arrangements.”⁵⁸ AT&T avers that the FCC did not say anything in these statements about *existing* rules or the *ISP Remand Order*. AT&T notes that the rules the Parties are talking about – the new markets and rate cap rules – were at that time *existing* and that the Ninth Circuit agrees with this validation.⁵⁹ AT&T R.Exc. at 10, fn 9.

Core also faults the FCC for arguing that interpreting the *ISP Remand Order* to include CLEC-to-CLEC traffic within the compensation regime because it “furthers the regulatory purpose underlying” the new markets and rate cap rules. Core claims that it is improper to consider regulatory purpose in interpreting an order or rule. Core Exc. at 19.

AT&T replies that Core’s accusation is clearly wrong. AT&T cites *Pac-West*, slip op. at 8391-8395 and *Crown Pacific v. Occupational Safety & Health Review Comm’n*, 197 F.3d 1036, 1040 (9th Cir. 1999) for the proposition that the “regulatory purpose” is considered in interpreting an agency regulation. AT&T asserts that under the well-established canon of statutory and regulatory interpretation, an enactment is construed in light of its “object and policy.”⁶⁰ AT&T notes that, as stated in the FCC *Amicus* Brief, the whole purpose of the *ISP Remand Order* was to “diminish the substantial economic distortions and opportunities for regulatory arbitrage arising from the operation of the reciprocal compensation regime for ISP-bound traffic.”⁶¹

⁵⁸ *Unified Carrier Compensation Order* at 9612 (¶ 2).

⁵⁹ *Pac-West*, slip op. at 8391-8395.

⁶⁰ *U.S. Nat’l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). *See, e.g., Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *Holloway v. U.S.*, 526 U.S. 1, 9 (1999).

⁶¹ FCC *Amicus* Brief at 20.

b. Disposition

We are of the opinion that Core’s allegation that the FCC’s reading of the *ISP Remand Order* is “contrary to the language, premises and structure of the order” is unwarranted. In light of the Ninth Circuit’s *Pac-West* decision, which adopted the arguments advanced by the FCC in the FCC’s *Amicus* Brief, we are of the opinion that our previous determinations in our *Material Question Order* “that AT&T’s interpretation of the *ISP Remand Order* is too broad” and that “[c]ompensation applicable from CLEC to CLEC for ISP-bound traffic was not addressed in the *ISP Remand Order*, [footnote omitted] and reliance on that order to resolve the jurisdictional issue in this case is misplaced,” must be revisited. As such, we shall apply the latest pronouncement from the FCC, as expressed in its *Amicus* Brief, and the Ninth Circuit’s decision in *Pac-West* to this proceeding.

In making this determination, we note that, as the Ninth Circuit stated, the FCC “is best positioned to describe the reach of its own orders.” Furthermore, we note that the FCC in its *Amicus* Brief, as echoed by the Ninth Circuit, pronounced that its interpretation is not only consistent with the language, structure and purpose of the *ISP Remand Order*, but that that interpretation is compelled by the Order’s language, structure and purpose. See FCC *Amicus* Brief at 15-24.⁶²

We are not persuaded by Core’s arguments that the *ISP Remand Order* is applicable only to ISP-bound traffic between an ILEC and a CLEC. We are persuaded by the Ninth Circuit’s decision, which recognized that the “FCC’s overriding concern” was “the arbitrage opportunities created by ISP traffic generally ... [A]rbitrage related to ISP-bound traffic in no way depends on the participation of an ILEC. The *ISP Remand Order* reflects this reality, imposing its rules on *all* LECs, with the exception of the ‘mirroring’

⁶² *Pac-West*, slip op. at 8397

rule, which the FCC singled out as applicable only to ILECs.” *Pac-West*, slip op. at 8392 (emphasis in original).

c. Did the ALJ Err in Finding that the Commission Should Defer to the FCC *Amicus* Brief?

Core argues in its Exceptions that the ALJ erred in finding that “Core failed to deny that the FCC’s interpretation is to be viewed as deferential although it was provided through an *Amicus* Brief.”⁶³ In support of this argument, Core explains:

At the hearing in this case, the parties informed the ALJ that the Ninth Circuit Court of Appeals had requested the FCC to submit an *amicus* brief addressing jurisdictional issues relating to CLEC-CLEC ISP-bound traffic.⁶⁴ The FCC submitted the brief to the Ninth Circuit after briefing and the close of the record in this case. Although Core brought the *amicus* brief to the attention of the ALJ via an informal letter, Core states that it was careful to note that “[FCC] staff’s opinion ... conflicts with the Commission’s September 8, 2010 *Material Question Order* which found that the *ISP Remand Order* does not apply to CLEC-to-CLEC ISP-bound” traffic” and that “the arguments set forth in support of this conflicting viewpoint were before the Commission in deciding its *Material Question Order*.”⁶⁵ Despite receiving informal letters from both parties contesting the relevance and content of the FCC *Amicus* Brief, the ALJ declined to order or permit additional briefing on the issue of deference, and, therefore, Core had no opportunity to “deny that the FCC’s interpretation is to be viewed as deferential.” Indeed, the *ALJ* rejected Core’s attempt to introduce additional evidence relevant to the deference issue.⁶⁶

Core Exc. at 20-21.

⁶³ I.D. at 26.

⁶⁴ N.T. at 216-217.

⁶⁵ See February 3, 2011 letter from Core to ALJ Jones.

⁶⁶ I.D. at 11.

Core asserts that the Commission owes no deference to the FCC *Amicus* Brief and that the Initial Decision concludes without discussion that the Commission owes “deference” to the FCC *Amicus* Brief.⁶⁷ Core avers that the Initial Decision accepts that deference is due to the views of an agency as set forth in an *amicus* brief, but fails to acknowledge that there is no blanket “deference rule.” Core Exc. at 21.

Core also asserts that deference to an agency brief is a doctrine riddled with exceptions and increasingly under attack. Most importantly, Core argues that an agency brief is worthy of deference *only where the brief interprets an existing regulation, and does not create a new one.*⁶⁸ In the instant proceeding, Core opines that the FCC *Amicus* Brief is not worthy of deference because, consistent with its argument above, it does not merely interpret the *ISP Remand Order*. Rather, it rewrites and expands the *ISP Remand Order* to encompass CLEC-CLEC traffic. Core Exc. at 21.

Core also cites a Third Circuit ruling for the proposition that no deference is due where the agency’s interpretation of its own rules is inconsistent with the actual language of those rules.⁶⁹ As such, Core opines that the FCC *Amicus* Brief is not consistent with the language, premises or structure of the *ISP Remand Order* and therefore is not worthy of deference. Core Exc. at 22.

⁶⁷ I.D. at 26.

⁶⁸ See, *Christensen v. Harris County*, 529 U.S. 576 (2000) (*Christensen*) (“To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation”); and see, *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 568 (1st Cir. 2004) (“Deference to the agency’s view does not mean abdication . . . The Department is free to interpret reasonably an existing regulation without formally amending it; but where, as here, the interpretation has the practical effect of altering the regulation, a formal amendment-almost certainly prospective and after notice and comment-is the proper course.”).

⁶⁹ *U.S. Dept. of Labor v. Mangifest*, 826 F.2d 1318, 1324 (3rd Cir. 1987)(“we defer to a policymaker’s plausible explanation of the language in a regulation . . . The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend.”).

AT&T takes issue with Core’s interpretation of *Christensen*. AT&T argues that the U.S. Supreme Court in that case declined to defer to an agency interpretation contained in a Labor Department opinion letter because the regulation in question was clear and unambiguous on its face. The Court made clear that the threshold requirement for deference is that the regulation *not* be clear and unambiguous. If it were, there would be no need for an agency interpretation in the first place. AT&T R.Exc. at 12, fn 12.

With regard to Core’s citation to three court decisions that it claims support the position that the Commission may decline to defer to the FCC *Amicus* Brief, AT&T claims that, in all three of these cases, the agency was a party to the litigation and the interpretation was contained in a litigation brief filed by litigation counsel. Accordingly, AT&T argues that the interpretations in these cases had all the earmarks of “post hoc rationalizations for agency action” by litigation counsel which the “courts may not accept.”⁷⁰ AT&T R.Exc. at 12, fn 12.

Core also observes that agency use of *amicus* briefs to broaden agency jurisdiction is an increasingly controversial practice. It notes that in a recent case involving the FCC’s rules governing Section 251(c)(2) interconnection issues, Justice Scalia took issue with the practice of applying *any* deference to agency interpretations of its own rules, including the use of *amicus* briefs. According to Justice Scalia, “when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.” *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. ___, ___, 2011 U.S. LEXIS 4375, at *31-*32 (June 9, 2011) (Scalia, J., concurring) (*Talk America*). Justice Scalia continued: “deferring to an agency’s interpretation of its own

⁷⁰ *Burlington Truck Lines, Inc. v. U.S.*, 156, 168-69 (1962).

rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.” *Id.* Notably, the Justice pinpointed the FCC in particular as suspect in its use of *amicus* briefs: “[t]he seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.” *Id.* at *32. Core Exc. at 22-23.

AT&T rejoins that in *Talk America*, the Supreme Court endorsed and affirmed these principles, holding that an FCC *amicus* brief that had been submitted to – and then rejected by – a lower court was entitled to deference and in fact was binding on the courts.⁷¹ AT&T submits that the Court’s decision is instructive because there, as here, the FCC interpreted its existing rules and orders. While there was arguably room for disagreement as to the correct interpretation of the rules and orders in question, the FCC’s interpretation was not “clearly erroneous.” In addition, there, as here, there was no “reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.” AT&T Exc. at 14-16. The Court in *Talk America* didn’t hesitate to hold that the FCC’s interpretation was controlling even though, as the FCC itself conceded, the FCC advanced a novel interpretation of its longstanding interconnection regulations. Here, by contrast, AT&T notes that there is nothing novel about the FCC’s interpretation of its *ISP Remand Order* in light of the fact that it is fully consistent with both the language and the regulatory purpose of the Order, and the FCC’s interpretation has been held to be entitled to deference and binding pursuant to the Ninth Circuit’s decision in *Pac-West*, slip op. at 8396-97.

⁷¹ AT&T notes that all but one of the voting justices deferred to the FCC’s interpretation. Justice Scalia, while agreeing with the others, wrote in a separate opinion that he would have reached the same result even in the absence of deference. AT&T argues that Core doesn’t even attempt to distinguish *Talk America*.

With regard to Core’s argument that the Commission should decline to defer to the FCC’s interpretation and instead adhere to the interpretation reflected in the Commission’s *Material Question Order*, AT&T submits that Core’s argument flies in the face of uniform Supreme Court precedent, including the Supreme Court’s *Talk America* decision. AT&T further asserts that Core’s argument is also completely foreclosed by the decision in *Pac-West*, in which the Ninth Circuit held that the precise FCC *Amicus* Brief being debated in this case *is* entitled to deference and *is* binding. *Pac-West*, slip op. at 8396-97. As such, according to AT&T, the Ninth Circuit has fully vindicated the Initial Decision. AT&T R.Exc. at 11. Moreover, even apart from the Ninth Circuit’s dispositive decision, controlling Supreme Court precedent compels the conclusion that the Initial Decision is correct on this point. AT&T avers that it is well settled that an “agency’s reading of its own rule[s] is entitled to substantial deference.”⁷² AT&T asserts that these principles apply to an interpretation that is contained in an *amicus* brief and there is no reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter. AT&T R.Exc. at 11-12.

According to AT&T, application to this case of the three principles that (1) an agency’s reading of its own rules is entitled to deference; (2) an agency’s construction of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation; and (3) no reason should exist to suspect that the interpretation of the agency does not reflect fair and considered judgment, which have been derived from controlling Supreme Court precedent, clearly demonstrate that the Initial Decision was correct in determining that the FCC *Amicus* brief is entitled to deference.

AT&T contends that the FCC clearly interpreted the *ISP Remand Order* and did not write a new order. As for the second requirement, while one could take the position that the *ISP Remand Order* could have been clearer, that does not make the

⁷² *Riegel v. Medtronic*, 552 U.S. 312, 328 (2008).

FCC’s interpretation “clearly erroneous.” To the contrary, the actual language of the *ISP Remand Order* and its underlying regulatory purpose make the FCC’s interpretation more easily defensible than Core’s strained interpretation, as the Ninth Circuit’s independent analysis confirms. As to the third requirement, AT&T opines that not even Core claims that there is any “reason to suspect that the interpretation does not reflect the fair and considered judgment” of the FCC, especially in the wake of the Ninth Circuit’s decision in *Pac-West*. AT&T R.Exc. at 13.

d. Disposition

We will deny Core’s Exception without reaching the question of whether or not the FCC’s *Amicus* Brief is entitled to deference. Regardless of whether or not we are obligated, as a matter of law, to defer to the FCC’s pronouncements in its *Amicus* Brief, the FCC’s reasoning has been adopted by the Ninth Circuit Court of Appeals in *Pac-West*. There, the Court held that the FCC has preempted inconsistent state regulation of intercarrier compensation for local ISP-bound CLEC-to-CLEC traffic. In light of the FCC’s interpretation of its *ISP Remand Order*, and the Ninth Circuit’s decision adopting the FCC’s interpretation, we are persuaded that the better course is to revise our *Material Question Order*, and conform to the FCC’s interpretation of the *ISP Remand Order* and the decision of the Ninth Circuit. Given the *Pac-West* decision, it is unnecessary to reach the question regarding whether the FCC’s pronouncements in its *Amicus* Brief are entitled to deference as a matter of law.

D. Did the ALJ Err in Determining in Conclusion of Law No. 10 that the Nature of the Traffic Transported and Delivered by Core is Determinative of the Commission’s Jurisdiction? (Core Exception No. 3 at 25 - 27).

1. The ALJ’s Initial Decision

The ALJ concluded in her Initial Decision that the issue of “whether there was a mix of traffic (traffic other than ISP-bound) after September 2009” is an issue that must be addressed in this proceeding “if the Commission retains subject-matter jurisdiction.” I.D. at 24.

2. Exceptions

Core submits in its Exceptions that the ALJ erroneously found that “Core, failed to provide evidence to parse out the traffic that is VoIP versus ISP-bound traffic.” Therefore, the ALJ recommended that “all traffic through August 31, 2010 ... is to be treated as ISP-bound traffic.”⁷³ Core Exc. at 25.

Core argues that, under the ALJ’s recommendation, the intercarrier compensation amount that AT&T owes to Core would be based on the retail services that Core’s ISP and VoIP customers provide to their *end users*. Core contends that this would mean that different rates, based on the wholesale customer’s offerings, would apply. For example, Core states that if a terminating carrier’s *wholesale* customer offers traditional landline service to its end users, then rate “A” would apply, and if a terminating carrier’s customer provides VoIP service, then rate “B” would apply. Core claims that such distinctions would be impossible to effectuate in fact. Core Exc. at 25.

⁷³ I.D. at 35-36; FOF Nos. 54-57.

Core claims that the Commission put this issue to rest in the *Palmerton* case, *supra.*, in which Global NAPs, an originating carrier, argued that its customers sent VoIP traffic to Palmerton and, therefore, the compensation Global NAPs owed Palmerton for termination was something different than if the traffic originated in a traditional telecommunications protocol. Core cites to the Commission’s Order in *Palmerton*, where the Commission rejected this argument:

First, excluding any consideration of the interstate versus intrastate *jurisdictional* classification of the traffic at issue—a matter that is addressed below – *we find that strict reliance on the traffic protocols for the related calls that are being transmitted by GNAPs and eventually terminate in Palmerton’s network is not determinative of the Commission’s subject matter jurisdiction both in terms of applicable Pennsylvania and federal law and sound policy. We find that strict reliance on these traffic protocols for these calls places the legal and technical analysis in this matter on a legally unsustainable course. This approach also has the capacity of creating undesirable regulatory policy results.*

* * *

GNAPs’ function of transmitting and then indirectly accessing and terminating traffic at Palmerton’s network facilities is a common carrier telecommunications service, and the Commission has subject matter jurisdiction. *GNAPs’ fundamental telecommunications service function is not altered by the fact that GNAPs transports a “mix” of traffic including the “unique type” of VoIP calls.* A large part of the evidentiary record in this proceeding has been consumed in an attempt to ascertain whether the Commission’s subject matter jurisdiction is dependent upon the traffic protocols of the calls transported by GNAPs and indirectly terminated at Palmerton’s facilities rather than on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service *irrespective* of the technical protocol classification of the traffic being carried. This telecommunications service is clearly provided by a common carrier telecommunications

utility that has been duly certificated to operate as such by this Commission within specific areas of the Commonwealth.

Core Exc. at 26, citing *Palmerton* at 6-8 (additional emphasis added).

Core alleges that in this proceeding, AT&T attempts to use a similar “type of traffic” defense to justify its nonpayment, and that the ALJ should not have relied upon AT&T’s position in concluding that the nature of the traffic transported and delivered by Core is determinative of the Commission’s jurisdiction. Rather, Core argues that, consistent with *Palmerton*, the ALJ should have concluded that AT&T’s “function of transmitting and then indirectly accessing and terminating traffic” at Core’s “network facilities is a common carrier telecommunications service” regardless of what Core’s customers “do” with the traffic that is sent by AT&T. Core Exc. at 26-27.

In light of the above, Core opines that the relevant inquiry here is whether AT&T sent traffic to Core, whether Core terminated that traffic, and what amount AT&T is required to pay for that service. As such, Core submits that the ALJ’s determination must therefore be reversed. Core Exc. at 27.

AT&T rejoins that Core is wrong in its claim that the ALJ erroneously found that Core “failed to provide evidence to parse out the traffic that is VoIP versus ISP-bound traffic,” and therefore all traffic in the case would be “treated as ISP-bound traffic.” AT&T R.Exc. at 14. AT&T notes that Core does not even attempt to disprove the ALJ’s conclusion that Core failed to identify any traffic at issue as VoIP. Furthermore, AT&T submits that during the proceeding, Core acknowledged that 100% of the traffic at issue that was delivered up to and through September 2009, was locally dialed ISP-bound traffic.⁷⁴ And, while Core asserted that *a small amount* of the locally

⁷⁴ Testimony of Bret Mingo at 2; Attachment C to AT&T St. No. 1.0 (Response to Interrogatory AT&T-II-13 & 14; Response to Interrogatory AT&T-III-3).

dialled traffic that was delivered subsequent to September 2009, was traffic delivered to VoIP providers rather than ISPs, Core admitted that it could not show whether any of the post-September 2009 traffic sent by AT&T was VoIP traffic.⁷⁵ AT&T R.Exc. at 14.

As such, AT&T contends that it was reasonable for the ALJ to treat all of the traffic at issue as ISP-bound given Core's failure of proof, and its admission that the vast majority of the traffic at issue was ISP-bound. AT&T opines the ALJ applied the same logic here, in concluding that all traffic should be considered ISP-bound, as did the FCC when it concluded in its end-to-end analysis that all ISP-bound traffic shall be treated as interstate, because ISP-bound traffic "is jurisdictionally mixed and largely interstate," and "interstate and intrastate components cannot be reliably separated."⁷⁶ AT&T R.Exc. at 14-15.

AT&T also opines that Core's claim that the nature of traffic is not determinative of jurisdiction defies reason because it is well-established that traffic categorized as *interstate* falls under the exclusive jurisdiction of the FCC, and traffic categorized as *intrastate* falls under the jurisdiction of state commissions⁷⁷ – so the nature of the traffic as *interstate* or *intrastate* clearly matters and is determinative of jurisdiction.

AT&T also argues that Core is wrong in arguing that the *Palmerton* case supports its position that the nature of the traffic is not determinative of jurisdiction, and that Core was not required to distinguish between ISP-bound traffic and VoIP traffic in this proceeding. AT&T points out that all of the traffic in the *Palmerton* case involved

⁷⁵ N.T. at 42-43; Attachment C to AT&T St. No. 1.0 (Response to Interrogatory ATT-III-4); FOF 55. AT&T R.Exc. at 14.

⁷⁶ *ISP Remand Order* at ¶ 14.

⁷⁷ 47 U.S.C. § 201(b) and 66 Pa. C.S. § 104.

VoIP traffic and, as such, ISP-bound traffic was not addressed.⁷⁸ AT&T notes that at that time, the FCC had not (and still has not) spoken on the jurisdictional nature of VoIP as this Commission acknowledged.⁷⁹

AT&T contends that the fact that the Commission in *Palmerton* treated the termination of VoIP traffic just like the termination of traditional landline service is immaterial because Core has not proven that there is any VoIP traffic at issue in this case.⁸⁰ Since Core failed to identify any specific call as being directed to a VoIP provider as opposed to an ISP in this proceeding, AT&T believes that the Commission is compelled to assume that all the traffic at issue is ISP-bound, especially because the FCC has determined that ISP-bound traffic falls under the exclusive jurisdiction of the FCC. AT&T R.Exc. at 14-15.

Finally, with regard to Core's argument that intercarrier compensation should not depend on the nature of the terminating carrier's customer (VoIP vs. ISP) because it "would be impossible to effectuate in fact," AT&T replies that Core has not shown that it is impossible for it to distinguish between its customers, but only that it has chosen not to.

3. Disposition

We shall deny Core's Exception. We disagree with Core's argument that the nature of the traffic transported and delivered to Core is not determinative of the outcome of this proceeding. In light of the FCC *Amicus* Brief and *Pac-West*, the nature

⁷⁸ *Palmerton* at 5. We note that the traffic implicated in *Palmerton* also included calls transmitted and terminated in protocols other than IP-based protocols, e.g., asynchronous transfer mode (ATM) and time division multiplexing (TDM). *Palmerton* at 31.

⁷⁹ *Id.*

⁸⁰ N.T. at 43.

of the traffic at issue must be ascertained. As AT&T succinctly states, the nature of the traffic “clearly matters.”⁸¹ In this proceeding the ALJ attempted to gather the appropriate facts in order to make a ruling consistent with federal law. However, because the record evidence did not support a breakdown of traffic between ISP-bound traffic and VoIP traffic, the ALJ reasonably decided that all traffic in this proceeding would be presumed to be locally dialed ISP-bound traffic.

As the proponent of a Commission Order in this proceeding, Core clearly had the burden of proving the extent to which the traffic in question was ISP-bound v. VoIP traffic. Having failed to meet its burden of proof, Core cannot be heard to complain that, in the absence of record evidence, the ALJ treated all of the traffic in question as ISP-bound. This determination was reasonable, given that 100% of the traffic at issue through September 2009 was locally dialed ISP-bound traffic, and Core had asserted that only a small portion of the traffic delivered after September 2009 was VoIP traffic.

We also note that it is ultimately up to the parties involved in the origination, transport and termination of traffic to agree upon a method to comply with the FCC’s rules and regulations for jurisdictionally interstate traffic and to comply with this Commission’s rules and regulations for jurisdictionally intrastate traffic. This issue could have been avoided if the Parties involved could have entered into a TEA in which they agreed to a level of reasonable compensation based on, for example, an estimated breakdown of each type of traffic and the amount of compensation that would apply.

⁸¹ In *Palmerton* the exercise of Commission jurisdiction focused not “upon the traffic protocols of the calls transported by GNAPs and indirectly terminated at Palmerton’s facilities” but “on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service *irrespective* of the technical protocol classification of the traffic being carried.” *Palmerton* at 8-9 (emphasis in the original).

E. Did the ALJ Err in Finding that Core Argued for the Application of the FCC’s \$0.0007 per MOU Rate in this Proceeding? (Core Exception No. 4 at 27-28).

1. The ALJ’s Initial Decision

The ALJ stated that, “[i]f it is determined that the ISP-bound traffic falls under federal jurisdiction, then Core has requested the Commission to decide whether the Commission should apply federal law in this dispute at a rate of \$0.0007 per MOU.” I.D. at 24.

2. Exceptions

Core excepts to the ALJ’s finding that it argued for the application of the FCC’s \$0.0007/MOU rate in this proceeding. Core submits that from the date it filed its Complaint through the testimony and in all of the pleadings that have been filed by Core in this proceeding, Core has advocated that – in the absence of a mutually acceptable agreement to the contrary – AT&T should be directed to compensate Core at its intrastate tariffed access rate.⁸² Core also submits that the only alternate rate it offered was the Commission-derived TELRIC reciprocal compensation rate.⁸³ Core Exc. at 27-28.

AT&T did not file any Reply Exceptions on this issue.

3. Disposition

We agree with Core’s Exception. The record demonstrates that Core argued first, that it be compensated by AT&T based on its intrastate access charge tariff at a terminating rate of \$0.014 per MOU and, as an alternative, the Commission-derived

⁸² Core M.B. at 17-25.

⁸³ Core M.B. at 25-29.

intrastate TELRIC reciprocal compensation rate of \$0.002439 per MOU. However, in no instance does the record demonstrate that Core requested that the \$0.0007 FCC rate cap from the *ISP Remand Order* should apply. As such, we shall grant Core's Exception on this issue.

F. Did the ALJ Err in Finding of Fact No. 59 that Core's Intrastate Switched Access Tariff Only Applies to Origination and Termination of Non-Local, Toll, Interexchange Traffic and Not to the AT&T Indirect Traffic? (Core Exception No. 5 at 28-32).

1. The ALJ's Initial Decision

The ALJ's Finding of Fact No. 59 states:

Core has a filed intrastate switched access tariff, Pa. P.U.C. Tariff No. 4 entitled Switched Access Tariff with the Commission. This tariff established access rates for the origination and termination of non-local, toll, interexchange traffic with a terminating access rate of \$0.014 MOU. AT&T Cross Exam. Exh. 12.

I.D. at 20.

2. Exceptions

Core claims that the ALJ erred in making this finding because it is at odds with the plain terms of Core's Switched Access Tariff (Tariff), which it claims is not limited to "non-local, toll, interexchange traffic ...," as the Initial Decision contends. Rather, Core submits that its Switched Access Tariff applies to all intrastate "communications."⁸⁴ Core submits that the term "non-local" does not appear anywhere in the Tariff and that the terms "toll" and "interexchange" appear, but only in connection with "Toll Presubscription" provisions, Tariff, § 3.7.5, which it claims are irrelevant to this case. Core Exc. at 28.

⁸⁴ See Core M.B. at 17-19; Tariff, at § 1 (definition of "Switched Access Service").

Core provides substantial argument in its Exceptions, on pages 28-32, as to why it believes the Tariff should, rather than does, apply to AT&T indirect traffic. Based on Core's opinion that its Tariff extends to all "communications" within the Commission's jurisdiction, and its claim that nothing in its Tariff limits its applicability in the manner determined by the ALJ, Core argues that the Initial Decision should be reversed. Core Exc. at 28-32.

AT&T replies that Core's own advocacy defeats its claim. AT&T submits that Core repeatedly points out in its Exceptions that its Tariff extends to all *intrastate* communications and clearly covers *intrastate* traffic.⁸⁵ However, AT&T asserts that ISP-bound traffic is *interstate* traffic and not intrastate traffic.⁸⁶ In light of Core's own admission, AT&T argues that Core's Tariff does not apply to the *interstate* traffic at issue in this case. AT&T R.Exc. at 16.

AT&T points to references in Core Exceptions on pages 28-29, where Core cites snippets from its Tariff to come up with "the strained theory" that its Switched Access Tariff applies to the termination of local traffic. However, AT&T observes that when actually looking at the Tariff as a whole, the only logical reading of the Tariff is that it very clearly applies only to non-local, toll, interexchange traffic, and does not establish any rate at all for the termination of locally dialed traffic of any sort, including locally dialed, ISP-bound traffic.⁸⁷ AT&T R.Exc. at 16.

AT&T also notes that Core's Tariff is not applicable to AT&T's indirect traffic because the Commission has observed that "[s]witched access charges are those

⁸⁵ See Core Exceptions at 28-29 (emphasis added). See also PA P.U.C. Tariff No. 4 (titled "Core Communications, Inc. Regulations and Schedule of *Intrastate* Charges Applying to Switched Access Service").

⁸⁶ AT&T Exc. at 7-14.

⁸⁷ AT&T M.B. at 22-27.

that LECs bill to IXC's or other LECs, for using their facilities *in the placement or receipt of toll calls.*"⁸⁸ Furthermore, AT&T cites to Section 3017(b) of the Code, 66 Pa. C.S. § 3017(b), which provides that "[n]o person or entity may refuse to pay tariffed access charges for *interexchange services* provided by a local exchange telecommunications company." (Emphasis added.) Nevertheless, AT&T states that Core claims that the Commission's statement and the statutory provision just mean that switched access tariffs apply to "toll" and "interexchange" traffic, and do not address the issue of whether switched access tariffs also apply to locally dialed traffic in the absence of a traffic exchange agreement. AT&T R.Exc. at 18.

AT&T asserts that Commission's statement and the Pennsylvania statute are clear that switched access charges apply only to toll charges, and that this view of switched access charges is consistent with how every state commission in the country views switched access. AT&T R.Exc. at 18.

3. Disposition

We agree with AT&T that Core has not identified any instances in which this Commission, or any other state commission, has applied intrastate switched access rates to local traffic generally, or to locally dialed ISP-bound traffic specifically. The primary purpose of a switched access charge tariff is to establish compensation for the origination and termination of toll or non-local calls. The reciprocal compensation scheme addressed in the federal Telecommunications Act of 1996 and in subsequent FCC Orders, such as the *ISP Remand Order*, was created primarily for the settlement between local exchange companies for the transport and termination of local calls. The reciprocal compensation regime is the counterpart to the switched access charge regime, which involves the settlement between interexchange carriers for the origination, transport and

⁸⁸ *Global Order*, Docket Nos. P-00991648, *et al.* (Order entered September 30, 1999) at 12 (emphasis added).

termination of long distance calls. Furthermore, we take administrative notice that, as noted in our *Global Order*,⁸⁹ we have held that “[s]witched access charges are those that LECs bill to IXC’s or other LECs, for using their facilities in the placement or receipt of *toll* calls.” As such, from a historical perspective, switched access charge tariffs do not apply to the termination of local calls. And since the traffic in this proceeding is limited to local ISP-bound traffic, it is clear that Core’s Switched Access Tariff No. 4 is not applicable here.

Based upon our review of Core’s Switched Access Charge Tariff, we conclude that the Tariff applies only to the settlement of toll charges between interexchange carriers. This is clearly demonstrated in the definitions in Original Sheet No. 6 in Section 1 (Definitions), which defines “Access Service” as follows:

Access Service: Switched Access to the network of an *Interexchange Carrier* for the purpose of originating or terminating communications.

Furthermore, Original Sheet 11 of Section 2.1.1. (Scope) of Section 2.1 (Undertaking of Core Communications, Inc.) in Section 2 (Rules and Regulations) of the Tariff defines the Scope of the Tariff as follows:

Core’s services offered pursuant to this Rate Sheet are furnished for *Switched Access Service*. Core may offer these services over its own or resold facilities. Core installs, operates, and maintains the communications services provided herein in accordance with the terms and conditions set forth under this Rate Sheet. Core may act as the Customer’s agent for ordering access connection facilities provided by other carriers or entities as required in the Commission’s rules and orders, when authorized by the Customer, to allow connection of a Customer’s location to the Core network. The Customer shall be responsible for all charges due for such service agreement. The Company’s

⁸⁹ *Global Order at 12.*

services and facilities are provided on a monthly basis unless otherwise indicated, and are available twenty-four hours per day, seven days per week.

In addition, AT&T notes that Section 4.2.3 of the Tariff specifies that “Switched Access Service” is only provided for three types of calls – Originating Feature Group Access, Terminating Feature Group Access and Originating 800 Feature Group Access - none of which include local calls. AT&T Exc. at 17.

In light of the above, and based on the clear reading of Core’s Tariff No. 4, we conclude that the Tariff applies only to compensation for the settlement of toll or non-local traffic. As such, Core’s Exception on this issue is denied.

G. Did the ALJ Err in Finding of Fact No. 61 in Finding that Bill-And-Keep is the Industry Standard Method of Reciprocal Compensation? (Core Exception No. 6 at 32- 34).

1. The ALJ’s Initial Decision

In Finding of Fact No. 61 on page 20, the ALJ found that “[b]ill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs.”

2. Exceptions

Core disagrees with the ALJ’s finding that bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs. Core opines that the ALJ confuses bill-and-keep (a form of reciprocal compensation) with the current trend of what it calls “carrier self-help and non-payment.” Core Exc. at 32.

In support of its argument, Core submits the following:

FCC rules define “bill-and-keep arrangements” as “those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier’s network.” 47 C.F.R.

§ 51.713(b). FCC rules state that “a state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so . . . “ 47 C.F.R.

§ 51.713(b). While carriers may agree to bill-and-keep arrangements, CLECs have never been “required” by the Commission to utilize it. In fact, Core has steadfastly refused to agree that such arrangement is reasonable or acceptable in this situation. Core R.B. at 4-11. The record also supports the fact that Core has entered into non-bill-and-keep arrangements with other CLECs. Core M.B. at 35.

Core Exc. at 32-33.

In light of the above and based on other Findings of Fact in the Initial Decision, Core argues that the record simply does not support this finding. Core Exc. at 33-34.

AT&T, on the other hand, opines that the ALJ correctly determined that bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs. AT&T argues that this finding reflects the Commission’s own prior determination that bill-and-keep is the “existing CLEC-to-CLEC intercarrier compensation practice in Pennsylvania.”⁹⁰ AT&T R.Exc. at 20.

⁹⁰ *PaPUC v. MCI metro Access Transmission Services, LLC*, 2006 WL 2051138, * 1,9 (Order entered June 22, 2006).

With regard to Core’s citation to 47 C.F.R. § 51.713 for the proposition that bill-and-keep can apply only when traffic flows are roughly balanced, AT&T argues that this section relates only to the Commission’s approval of interconnection agreements under the 1996 Act and, more importantly, applies only to an *incumbent LEC’s* rates for the transport and termination of traffic – which is not the issue here. AT&T R.Exc. at 21-22.

3. Disposition

We agree with Core that the ALJ erred in finding that bill-and-keep is the industry standard method of reciprocal compensation for local traffic exchanged between CLECs. While bill-and-keep may be an appropriate form of reciprocal compensation between some carriers, especially in instances where the traffic between the two carriers is balanced, it has not been deemed a just and reasonable form of compensation where there is a significant imbalance in the amount of traffic. The fact that Core has demonstrated that other carriers have opted to enter into agreements with Core adequately demonstrates that bill-and-keep cannot be considered the “standard” method of compensation between CLECs. Therefore, we shall grant Core’s Exception on this issue and modify the ALJ’s Initial Decision accordingly.

H. Did the ALJ Err in Finding of Fact No. 67 in Finding that Core Has “Charged Its Own Customers Very Close To Zero” (Core Exc. No. 7 at 35-36.)

1. The ALJ’s Initial Decision

The ALJ Finding of Fact No. 67 states that “Core has charged its own customers ‘very close to zero’ for the services it has rendered for AT&T to transport and terminate calls to ISPs when Core customers originate such calls.” I.D. at 21.

2. Exceptions

Cores submits in its Exceptions that, while the Initial Decision does not reference any reliance on Finding of Fact No. 67 in the discussion of its recommended resolution of this matter, it is an erroneous statement that is not supported by the record and must be rejected. Core Exc. at 35.

Core further avers that the ALJ merely misinterpreted the context of its witness Mingo's surrebuttal testimony, where he stated that "in the current environment of regulatory uncertainty, which AT&T and other originating carriers exploit, competitive carriers like Core have to price originating services at very close to zero, *i.e.*, give it away."⁹¹ *Id.*

AT&T did not file a Reply to this Exception.

3. Disposition

We shall grant this Exception based on our review of the record. We conclude that Finding of Fact No. 67 is not supported by record evidence.

⁹¹ Core St. 1-SR at 10-11.

I. Did the ALJ Err in Finding of Fact No. 75 that Core Failed to Provide Evidence of Any Economic Harm as a Result of a Bill-and-Keep Arrangement? (Core Exception No. 8 at 36 - 38).

1. The ALJ's Initial Decision

The ALJ's Finding of Fact No. 75 states: "Core failed to provide evidence of any economic harm as a result of a bill-and-keep arrangement with AT&T." I.D. at 21.

2. Exceptions

Core objects to the ALJ's Finding of Fact No. 75 as contrary to significant record evidence that Core presented showing the economic harm that can result with the continued nonpayment by AT&T and others who utilize Core's services. Core Exc. at 36.

Core argues that the ALJ failed to rely upon any record evidence to support this finding, and that this finding is not used anywhere in the ALJ's discussion with regard to the recommended resolution of this matter. Core Exc. at 36. Furthermore, Core submits that the entire purpose of Core's Complaint is to recover payment for services rendered because Core lacks other commercially reasonable alternatives and is prohibited from refusing to provide service to AT&T for non-payment. In this regard, Core notes that, in its Motion for Interim Relief, it stated as follows:

The general rule pursuant to both state and federal law is that telecommunications carriers cannot cease providing service to other telecommunications carriers based on a payment dispute. The reason for this prohibition is to prevent stopping the flow of telecommunications traffic over a payment dispute because such disruption might result in preventing consumers from making and receiving the telephone calls of

their choosing. This is very different from a traditional commercial setting wherein businesses are not forced to provide service to other businesses for free.

Core Motion for Interim Relief at 10 (footnotes omitted); Core Exc. at 36-37.

Core also submits that it argued that, while AT&T tries to hide behind “bill-and-keep” to justify its refusal to pay for services rendered, the record is clear that AT&T’s position is that it will pay nothing – under any theory – for Core’s termination services.⁹² Core Exc. at 36.

Furthermore, Core argues that, despite the Initial Decision’s finding, it provided record evidence that AT&T continues to send significant amounts of indirect traffic to Core for termination while refusing to compensate Core for the use of Core’s network. Core Exc. at 37. Core cites to its witness Mingo’s testimony to show how it claimed it is harmed:

As long as AT&T refuses to pay for this service, Core remains unable to recover a substantial portion of its network costs. This limits our ability to maintain the current network, let alone upgrade and expand the network. Indeed, coupled with similar refusals by other CLECs and IXC’s to pay lawfully billed amounts, AT&T’s refusal to compensate Core anything at all, after using Core’s network to the tune of 406,102,334 minutes of use, threatens Core’s economic viability. This, in turn, will impact the ability of Core to provide telecommunications services to ISPs or expand into new lines of business.

Core St. No.1 at 13-14 (emphasis added); Core Exc. at 37.

⁹² Core M.B. at 34-37.

Core concludes its argument on this issue by noting that the Commission itself has recognized that a failure to compensate carriers for termination services such as that provided by Core can result in an unconstitutional “taking” of the terminating carrier’s services. Core cites to this Commission’s Petition for Certiorari to the United States Supreme Court⁹³ [need a citation to this big case] where it stated:

The [*ISP Remand Order*], with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that . . . bears no relationship to cost ... the [FCC’s] rate is set so far below actual costs as to be unjust and confiscatory.

Core Cross Exh. No. 1 at 20; Core Exc. at 38.

Core explains that in the Supreme Court matter, the Commission was discussing the *ISP Remand Order* rate cap of \$0.0007/MOU paid by ILECs to CLECs for the termination of ISP-bound traffic, which it described as “confiscatory.” Core claims that application of bill-and-keep consistent with AT&T’s advocacy would result in an even more confiscatory rate of \$0.00, which, consistent with the Commission’s Petition for Certiorari, would constitute a taking of Core’s services that cannot be permitted.

In light of the above arguments, Core contends that the ALJ’s Finding of Fact that Core failed to provide any evidence of any economic harm as a result of a bill-and-keep arrangement with AT&T must be rejected. Core Exc. at 36.

AT&T, on the other hand, is of the opinion that the ALJ’s Finding of Fact No. 75 is correct and should stand. First, in response to Core’s claim that Mr. Mingo presented such evidence in his direct testimony, AT&T submits that Mr. Mingo presented

⁹³ *In re High-Cost Universal Service Support*, 24 F.C.C.R. 6475 (FCC 2008), *aff’d*, *Core Communications, Inc. v. F.C.C.*, 592 F.3d 139 (D.C. Cir. 2010), *pet. for cert. denied*, 2010 U.S. LEXIS 8982 (2010).

only conclusory remarks unsupported, and in fact disproven, by the record. In this regard, AT&T states:

For example, Mr. Mingo claimed that Core has been harmed because it is “unable to recover a substantial portion of its network costs,” (Core Excpt. at 37) but that claim is unsubstantiated because Core did not put on any evidence regarding its costs. Mr. Mingo also claimed that AT&T’s use of Core’s network “threatens Core’s economic viability.” *Id.* But, again, there is nothing to back up that claim. To the contrary, Core admits that from 1999 or 2000 (when it began operations) until the end of 2007 it consciously ignored that AT&T was “using” its network. AT&T Excpt. Br. at 22-24. If AT&T’s “use” of Core’s network was somehow “threatening Core’s economic viability” during that eight year period when AT&T’s use of Core’s network was by far at its highest (97% of the traffic at issue having been delivered before the end of 2007, Mingo Direct, Ex. BLM-1, Core Hearing Exhibit No.2), surely Core would have noticed and tried to do something about it. Moreover, since the complaint here was filed AT&T’s traffic has been virtually non-existent (*id*) (which coincides with the fact that virtually all Internet traffic has moved away from dial-up service to DSL, cable modem service, or some other high-speed arrangement), and certainly cannot be said to be “threatening” Core’s network in any way.

AT&T R.Exc. at 22-23 (footnote omitted).

AT&T also argues that Core’s argument, that it does not have the ability to block traffic from AT&T, is a “red herring” intended to cover up Core’s own failure to help itself. Core admits that, as far back as 2000, it had all the information it needed to bill AT&T for the termination of locally dialed, ISP-bound traffic but that it failed to act on that information until nearly eight years later.⁹⁴ AT&T contends that, if Core had bothered to look at that information, it could have acted in 2000 by filing a tariffed rate for the termination of locally dialed traffic, by approaching AT&T for an agreement, or

⁹⁴ N.T. at 64-71; Core St. No. 1 at 8.

by seeking Commission assistance. However, AT&T claims that Core did none of those things, and cannot now complain about the consequences of its inactions. Moreover, AT&T submits that the fact that Core could not block AT&T's traffic did not even come into play until 2008 because Core did not even notice or care that it was terminating AT&T-originated traffic. By that time blocking the traffic was a non-issue because the dial-up traffic flow from AT&T's customers had become virtually non-existent as customers shifted to DSL, cable modem service, and other high speed forms of internet access.

3. Disposition

We shall grant Core's Exception on this issue. The absence of intercarrier compensation from AT&T to Core generates an adverse and self-evident financial impact for Core's operations, irrespectively of Core's internal economic costs in operating its carrier access network facilities and services. In short, consistent with our prior decision in *Palmerton* we do not expect regulated telecommunications carriers that operate within this Commonwealth to provide carrier access network facilities and services for free. *See generally Palmerton at 45-46.*

J. Did the ALJ Err in Not Assessing a Civil Penalty Against AT&T? (Core Exception No. 9 at 38- 39).

1. The ALJ's Initial Decision

As noted, the ALJ ruled that the record evidence in this proceeding does not demonstrate that AT&T violated any state law, regulation or Commission Order. The ALJ also ruled that the record evidence does not demonstrate that AT&T acted in bad faith as alleged by Core.

In reaching this determination the ALJ considered Section 3301(a) of the Code, 66 Pa. C.S. §3301(a), regarding penalties as well as the Commission’s Policy Statement at Section 69.1201 of the Commission’s Regulations, 52 Pa. Code § 69.1201, which contains factors and standards that are utilized in determining if a fine for violating a Commission order, regulation or statute is appropriate. I.D. at 31-33.

2. Exceptions

In its Exceptions Core argues that the ALJ’s Conclusion of Law Nos. 16⁹⁵ and 17⁹⁶ are erroneous because the record clearly supports a civil penalty against AT&T for its unreasonable and bad faith refusal to make any payment to Core for services that were rendered. Core Exc. at 38.

In support of its argument Core submits that the ALJ is recommending rejection of Core’s request that a reasonable civil penalty be imposed on AT&T based on her finding that “AT&T acted in concert with *its* interpretation of applicable law.”⁹⁷ Core argues that this finding does not address the indisputable fact that AT&T made the legally unsupportable decision to not pay Core for services that it knows Core must perform and then offered strained and arguably deceptive interpretations of the law to justify its behavior.⁹⁸ Core opines that perhaps the most egregious example is the fact that AT&T strenuously argued that, under the *ISP Remand Order*, the only “payment” arrangement

⁹⁵ Conclusion of Law No. 16 states: “The instant case is distinguishable from *Palmerton Telephone Co. v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates*, Docket No. C-2009-2093336, Opinion and Order entered March 16, 2010, regarding civil penalty because this case has no underlying violation, action or inaction pursuant to Commission order, statute, regulation or otherwise by AT&T substantiated by record evidence.”

⁹⁶ Conclusion of Law No. 17 states: “Core failed to provide substantial evidence that the factors and standards were met for evaluating violations of the Public Utility Code and Commission regulations at 52 Pa. Code § 1201 and 66 Pa. C.S. § 3301(a).”

⁹⁷ I.D. at 33 (emphasis added).

⁹⁸ Core M.B. at 39-46.

potentially possible would be bill-and-keep.⁹⁹ Core notes, however, that that language had been reversed and AT&T's Witness Nurse subsequently conceded that point on cross-examination although it was never referenced in his initial testimony nor ever corrected.¹⁰⁰ Core Exc. at 38-39.

AT&T replies that the ALJ correctly rejected Core's request to impose civil penalties on AT&T. AT&T R.Exc. at 24. Contrary to Core's argument that AT&T's decision not to pay intrastate access rates for the termination of locally dialed, ISP-bound traffic was "legally unsupportable," AT&T opines that the FCC and the Ninth Circuit have clearly stated that AT&T was right, as follows:

In its recent Ninth Circuit amicus brief, the FCC reiterated its long-standing determination that all ISP-bound traffic (the only kind of traffic at issue here) is jurisdictionally interstate and therefore falls under the FCC's jurisdiction, and the Ninth Circuit reached the same conclusion just two days ago [on June 21, 2011,] – which means AT&T was correct that Core's intrastate access tariff could not apply to the traffic at issue. The FCC and the Ninth Circuit also make crystal clear that the *ISP Remand Order* applies to *all* locally dialed ISP-bound traffic, including CLEC-to-CLEC traffic; that the Commission is bound by that interpretation; that the *ISP Remand Order* expressly preempts the application of state law to resolve intercarrier compensation disputes involving locally dialed ISP-bound traffic – which, again, means *AT&T* was correct that Core's intrastate access tariff could not apply. .

AT&T R.Exc. at 24 (footnote omitted).

AT&T also submits that Core fails, nor is able, to allege any conduct falling within the scope of this statute at 66 Pa. C.S. § 3301, which contains the criteria under which the Commission can impose penalties. As such, AT&T agrees with the ALJ's

⁹⁹ See, e.g., AT&T St. No.1 at 9, 23.

¹⁰⁰ Core M.B. at 34.

conclusion that it has not violated any statutory provision, has not failed to perform any duty, has not failed to obey any regulation or final Commission determination, and has not failed to comply with any court order. AT&T R.Exc. at 24-25.

In continuing its argument on this issue, Core claims that the ALJ's attempt to distinguish AT&T's refusal to pay for services rendered by Core from the reasons underlying the fine levied by the Commission against Global NAPs fails to recognize the similarity between AT&T and Global NAPs (*i.e.*, Global NAPs, like AT&T in this case, refused to pay carriers that terminated telecommunications originated by customers of Global NAPs). Core is of the opinion that the ALJ failed to recognize that, like Global NAPs in *Palmerton*, AT&T's refusal to pay billed charges is conduct "of a serious nature" despite any efforts on the non-paying carrier's part to claim a legal right or entitlement to justify the non-payment.¹⁰¹ Core Exc. at 39.

In concluding its Exceptions on this issue Core urges the Commission to assess a penalty on AT&T for its refusal to pay compensation in this case just as it required Global NAPs to pay a penalty in *Palmerton*. More specifically, Core recommends that the Commission require AT&T "to pay a civil fine of \$1,000/day for each day it sent traffic to Core and failed to remit payment prior to the Commission's Order in this matter. Further, Core recommends that AT&T be fined \$1,000/day for each day that it fails to comply with the Commission's Order in this matter directing it to pay Core for use of its services and facilities."¹⁰² Core Exc. at 39.

AT&T retorts that there are major differences between GlobalNAPs' refusal to pay bills in *Palmerton* and this case. AT&T notes that in *Palmerton*, unlike the instant case, *Palmerton* (1) had a tariff that set a rate for the traffic at issue¹⁰³ and (2) all

¹⁰¹ *Palmerton* at 57.

¹⁰² Core M.B. at 46.

¹⁰³ *Palmerton* at 1, 13, 15-18, 21-22.

other carriers were billed and paid that rate. In this case, Core does not have a tariff establishing a lawful rate for the termination of ISP-bound traffic; up until October 2010, Core did not receive any compensation from any CLEC for terminating such traffic; and since October 2010 only two CLECs have agreed to pay Core something for this traffic. AT&T R.Exc. at 25. Finally, AT&T points out that, most importantly, and contrary to Core’s misleading claim that “the underlying reason that Global NAPs was fined was its failure to pay for services rendered,” Global NAPs was not ordered to pay civil penalties because of its non-payment, but because it had failed to comply with a Commission order to “obtain a surety bond in favor of Palmerton.”¹⁰⁴ AT&T submits that it has not failed to comply with any order in this proceeding. AT&T R.Exc. at 25.

3. Disposition:

We shall deny Core’s Exception based on our view that AT&T’s refusal to pay the charges billed by Core did not constitute the type of conduct that warrants the imposition of a civil penalty. There has been considerable uncertainty regarding whether Core’s bills were valid under state law, as evidenced by the litigation of the instant case.¹⁰⁵ Core’s bills to AT&T sought payment for the termination of locally-dialed traffic, but it was unclear whether Core’s tariffed switched access rate applied. AT&T’s refusal to pay Core for billed charges that are in dispute is certainly not the same as a refusal to pay an unquestionably legitimate charge as was the case in *Palmerton*. Therefore, we agree with the ALJ’s analysis, pursuant Section 3301(a) of the Code and Section 69.1201 of our Regulations, that a penalty against AT&T is not warranted in this instance.

However, we must remind AT&T and all carriers that we disfavor any carrier from engaging in “self-help” to unilaterally resolve intercarrier compensation

¹⁰⁴ *Palmerton* at 26.

¹⁰⁵ AT&T M.B. at 30-36; AT&T R.B. at 26-35.

disputes. The Commission has repeatedly rejected carrier attempts to engage in “self-help” to address intercarrier disputes. *See, e.g., Palmerton Telephone Co. v. Global NAPs Pennsylvania, Inc.*, Docket No. C-2009-2093336 (Order entered May 5, 2009) and *Level 3 Communications v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002). While the record in this case does not support a civil penalty against AT&T, we remain concerned that AT&T failed to consider other options besides withholding payment entirely for the relevant traffic during the time periods in question. These options include placing disputed payment amounts in escrow at the amount of \$.0007 per MOU, as advocated by the Company on the federal level,¹⁰⁶ pending a resolution of the matter.

K. Is the Relief Sought by Core Barred by State Law? (AT&T’s Exception No. 3 at 28 – 34).

Although AT&T does not believe that the Commission has jurisdiction to resolve this case, if the Commission were to decide that state law controls, AT&T argues that the Initial Decision should have made it clear that Core is not entitled to any relief. AT&T Exc. at 28.

AT&T argues that Core has asked the Commission to award it more than \$7.5 million for the termination of more than 400 million minutes of locally dialed traffic at the rate specified in Core’s intrastate switched access service tariff for terminating non-local, toll, interexchange traffic (\$0.014 per minute), plus an unspecified amount of interest. In the alternative, Core asks that it be awarded an amount based on Verizon’s tandem-based reciprocal compensation rate of \$0.002439, plus an unspecified amount of interest. AT&T Exc. at 28-29.

¹⁰⁶ *See generally, Pac-West; America’s Broadband Connectivity Plan*, FCC WC Docket No. 10-90 *et al.*, *ex parte submission* by AT&T *et al.*, July 29, 2011, Attachment 1 at 9.

AT&T submits that Core does not have a contract with AT&T that covers the locally dialed traffic in question; nor does it have a tariff that specifies a rate for terminating locally dialed calls. As such, AT&T is of the opinion that there never has been a lawful rate for the service Core claims to have provided. AT&T claims that Core's Complaint would require the Commission to create a rate for the exchange of locally dialed, ISP-bound traffic and to impose that new rate prospectively and retroactively. AT&T Exc. at 29. AT&T argues that setting such a rate would violate Pennsylvania law for the following reasons:

1. Because Core has never filed a tariff in Pennsylvania that established a rate for terminating the traffic at issue in this case, Core is barred from collecting or enforcing any rate for terminating this traffic.¹⁰⁷ AT&T Exc. at 29-30.
2. The resulting rate would be discriminatory to AT&T and in violation of Section 1304 of the Code ("discrimination in rates") because AT&T would be required to pay either \$0.014 (Core's intrastate access rate) or, in the alternative, \$0.002439 (Verizon's tandem reciprocal compensation rate) for past and future terminations. In contrast, all CLECs prior to 2010, and all but two CLECs since October 2010 (PAETEC/Cavalier and Comcast), paid Core nothing for terminating the exact same type of traffic.¹⁰⁸ AT&T Exc. at 30-31
3. When a utility applies different rates for the same service, the utility is required to compute bills under the rate most advantageous to the customer pursuant to

¹⁰⁷ AT&T cites to Sections 1302 and 1303 of the Code which, when read together, mandate that a utility must have lawful tariffs on file with the Commission before it is permitted to charge for a service. *See Popowsky v. Pa. PUC*, 647 A.2d 302, 306-307 (Cmwlth. Ct. 1994) (holding that because the public utilities in question did not have lawful tariffs on file with the Commission, the utilities could not lawfully charge customers anything for the provision of utility service). *See also Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 829 (Cmwlth. Ct. 1980) (a public utility may not charge any rate for services other than that lawfully tariffed.).

¹⁰⁸ AT&T M.B. at 32-35; AT&T R.B. at 32-35; N.T. at 50-55, 152-153; Mingo Surrebuttal Testimony at 2, 8, 11; Panel Reply Testimony of AT&T at 19.

Section 1303 of the Code.¹⁰⁹ Since Core has maintained at least five different intercarrier compensation rates, including the bill-and-keep arrangement, for its termination of ISP-bound traffic, Core would be required to bill AT&T under the bill-and-keep arrangement because this would be the most advantageous compensation scheme for AT&T. AT&T Exc. at 31

4. Creating a new rate to compensate Core for the exchange of past traffic would constitute “retroactive ratemaking,” which is not permitted in Pennsylvania.¹¹⁰ AT&T Exc. at 31-32.
5. Providing the relief that Core seeks would require the Commission “to substantially alter existing CLEC-to-CLEC intercarrier compensation practices in Pennsylvania by replacing the use of bill-and-keep compensation” with a regime in which CLECs pay each other explicit rates for terminating local traffic.¹¹¹ AT&T Exc. at 32.

AT&T Exc. at 29-32.

In response, Core argues that, contrary to AT&T’s opinion, the relief Core is seeking here does not violate Pennsylvania state law. In support of this argument, Core refers to its previous argument, *supra*, that it has adequately demonstrated that Sections 1302-1302 of the Code and the filed-rate doctrine mandate Commission enforcement of Core’s Switched Access Tariff, unless and until the Switched Access Tariff is modified prospectively.

With regard to AT&T’s first argument above, Core argues that it is under no obligation to file a separate rate for locally dialed ISP-bound traffic. Core reiterates its

¹⁰⁹ Section 1303 of the Code provides that “[a]ny public utility, having more than one rate applicable to service rendered to a patron, shall . . . compute bills under the most advantageous to the patron.”

¹¹⁰ See *Popowsky v. Pennsylvania Public Utility Commission*, 642 A.2d 648, 651 (Pa. Cmwlth Ct. 1994). See also *Popowsky v. Pennsylvania Public Utility Commission*, 868 A.2d 606, 609 (Pa. Cmwlth. Ct. 2004).

¹¹¹ *MCI Metro Access*, 2006 WL 2051138, 1 (AT&T Cross Exh. 4). See AT&T M.B. at 36-39; AT&T R.B. at 23-26; N.T. at 207-208; Panel Testimony of AT&T at 13.

previous argument that its Switched Access Charge Tariff applies equally to all intrastate communications. Core argues that the fact that Core has no written agreement with AT&T only reinforces the importance of enforcing the filed-rate doctrine, unless and until AT&T enters into a traffic exchange agreement with Core. Core R.Exc. at 20-21.

With regard to AT&T's second and third arguments above, concerning rate discrimination and the "most advantageous rate," Core argues that its Switched Access Charge Tariff does contain a rate, and enforcement of that rate is not discriminatory, especially considering that Core has filed complaints against CLECs other than AT&T. Core further argues that pursuant to the TA-96 and the FCC's *ISP Remand Order*, different rates apply to the termination of traffic depending on what carriers are involved and the jurisdiction of the traffic in question. In this regard, Core claims it does not control the rates it is permitted to charge other carriers, and is therefore powerless to discriminate. Core submits that AT&T is demanding a rate specifically applicable to "locally dialed, ISP-bound traffic" that the statute, the filed-rate doctrine, and Commission precedent simply do not require. Core Exc. at 21.

Core also asserts that AT&T's fourth argument, that the Commission would have to create a new rate in order to grant the relief Core seeks, has no merit. Again, Core submits that it is asking the Commission to require AT&T to comply with Core's existing Switched Access Charge Tariff and, therefore, it is not seeking a "new rate" to apply retroactively.¹¹² Core submits that AT&T's implicit request that the Commission apply an effective rate of \$0.00 per minute (under the euphemism of "bill-and-keep") is no more or less "retroactive" than Core's position in this case. Core Exc. at 22-23.

Finally, with regard to AT&T's fifth argument, Core submits that requiring AT&T to pay Core for services rendered will not upset other carriers' legitimate bill-and-

¹¹² Core M.B. at 17-25.

keep arrangements. Core states that it is not seeking a declaratory order or asking the Commission to set forth a default reciprocal compensation arrangement applicable to all CLECs as a result of this proceeding. Rather, Core has filed a Formal Complaint against one carrier, and is asking the Commission to require that carrier to pay as required by Core's Tariff. Nor is Core asking the Commission to disrupt CLEC-to-CLEC arrangements governing the traffic of non-parties, as those arrangements would remain unchanged by the outcome of this case. Core R.Exc. at 23-24.

AT&T's final argument in its Exceptions on this issue is that the Commission's decision in this case bears no resemblance at all to *Palmerton*, because in *Palmerton* the Commission was concerned that Global NAPs was not paying legitimately tariffed and billed access charges to Palmerton. AT&T argues that, unlike *Palmerton*, in this case Core never established a tariffed rate that applies to the locally dialed traffic at issue even though it has done so in other states where it operates. Nevertheless, AT&T claims that Core attempted to establish that its intrastate access tariff applies to local traffic, even though Core's intrastate access tariff applies only to toll traffic. AT&T Exc. at 33.

AT&T also argues that, unlike *Palmerton*, Core was not regularly billing AT&T for the termination of locally dialed traffic for nearly the first eight years that Core was in business in Pennsylvania. AT&T submits that this was consistent with its understanding that the bill-and-keep method of compensation was the appropriate billing methodology. However, when Core began billing AT&T, Core inappropriately charged its switched access rates for the termination of local traffic. Finally, unlike *Palmerton*, AT&T asserts that there is no discrimination here because, prior to October 2010, all CLECs and since October 2010, all but two CLECs, paid Core nothing for terminating the same type of traffic. Thus, unlike *Palmerton*, where Global NAPs refused to pay legitimately tariffed rates, AT&T contends that its actions are consistent with the rest of

the industry in its refusal to pay access charges or non-tariffed Verizon tandem rates for locally dialed ISP-bound traffic. AT&T Exc. at 33-34.

In reply, Core submits that AT&T in this case is acting just like Global NAPs in *Palmerton* and that none of AT&T's arguments to the contrary are convincing. For example, Core argues that that in *Palmerton*, the Commission noted with disapproval that, following the receipt of Palmerton's billing invoices, GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic.¹¹³ Core compares AT&T to Global NAPs because AT&T has utilized Core's services for years without payment and then, when Core approached AT&T to address its nonpayment, AT&T refused and continues to refuse to pay anything for services rendered.¹¹⁴ Core R.Exc. at 24.

Core further asserts that AT&T's defense that "Core was not regularly billing AT&T" is not compelling because it does not address the fact that even with Core's regular billing of AT&T, AT&T still refuses to pay for services rendered. Core R.Exc. at 24.

Finally, Core argues that requiring AT&T to pay for services rendered would not lead to a discriminatory result. Rather, Core claims that it would be consistent with this Commission's clear and reasonable position that carriers must pay a reasonable rate for services rendered.

3. Disposition

This Exception assumes that state law controls resolution of this case. We previously have determined that the FCC has preempted the States from establishing

¹¹³ *Palmerton* at 35.

¹¹⁴ Core St. No.1 at 10-12.

intercarrier compensation rates for the type of traffic at issue in this proceeding, namely ISP-bound local CLEC-CLEC traffic, in a manner that is inconsistent with the FCC's *ISP Remand Order*. We also have determined that we retain the authority to apply the FCC's capped rate of \$0.0007 established by the FCC's *ISP Remand Order* to the traffic at issue. Under the FCC's recent pronouncements regarding preemption of state authority in its Pac-West *Amicus* Brief, the FCC stated that it has preempted state regulation of local ISP-bound traffic that is inconsistent with the FCC's intercarrier compensation regime. It follows that States have not been precluded from adjudicating intercarrier compensation disputes in a manner that is consistent with the FCC's intercarrier compensation regime, which is what we are accomplishing in the instant Opinion and Order. Accordingly, the arguments of the Parties regarding the application of state law to this proceeding are no longer relevant to the disposition of Core's Complaint. Consistent with our dispositions of the issues in this Opinion and Order, we will deny AT&T's third Exception because we already have determined that Core is entitled to relief at the FCC's capped rate of \$0.0007 per MOU in this proceeding.

L. Did the ALJ Err in Determining that Findings of Fact Nos. 6, 10, 13, 16-18, 22-23, 25-26, 30-34 and 42-43 were Supported by the Record or Consistent with the Law? (AT&T's Exception No. 2 at 19 -28).

AT&T takes exception to the ALJ's Findings of Fact Nos. 6, 10, 13, 16-18, 22-23, 25-26, 30-34 and 42-43. AT&T asserts that these "findings" should be rejected because the Initial Decision does not address whether these findings were supported by the record or are consistent with the law. Rather, AT&T contends that they appear to be a reiteration of portions of Core's statement of "facts" that were not supported by the record, but that were instead refuted by the record and in some instances inconsistent with federal and/or state law. AT&T Exc. at 19-28.

Core replies that all of the Findings of Fact challenged by AT&T are supported by the record. Core requests that all of AT&T's Exceptions be denied. AT&T Exc. at 14-20.

Based on our review of AT&T's Exceptions and in light of our previous determinations in this Opinion and Order, we shall decline to address AT&T's Exceptions on the Findings of Fact at issue here. We note that, as we will discuss, *infra*, we shall modify the ALJ's Initial Decision with regard to her recommendation to reopen the record to receive briefs or memoranda of law regarding the application of federal law to this dispute and adopt the ALJ's Initial Decision in all other respects, to the extent consistent with the discussion in this Opinion and Order. Accordingly, and for the sake of avoiding repetitious discussion, all Findings of Fact that are in accordance with our discussion and directives as set forth herein are accepted. Likewise, all Findings of Fact that are not in accordance with our discussion and directives as set forth herein are rejected.

Before concluding our discussion it is important to summarize the outcome of this Opinion and Order First, ruling out any intercarrier compensation rates that the Parties may ultimately agree upon between themselves for the subject matter traffic in the context of a TEA, federal law in this proceeding dictates that, pursuant to the *ISP Remand Order*, there are two reciprocal compensation rate options that may apply in this case, a rate at or below the FCC rate cap of \$0.0007 per MOU, or a bill-and-keep rate of \$0.000.

Because the bill-and-keep rate historically has not been applied in those instances where there is an imbalance in traffic flow between two carriers, the FCC rate cap is the more just and reasonable rate option for Core's termination of AT&T's ISP-bound local traffic in this case. We note that, although the ALJ "in extreme caution," stopped short of establishing a precise rate, we believe that the application of federal law

to the facts of this case is sufficiently clear. It is clear that the Ninth Circuit's clarification that the FCC's *ISP Remand Order* is applicable to CLEC-to-CLEC ISP-bound local traffic. It is clear that this Commission retains jurisdiction to hear this case and determine the appropriate rate in a manner that is consistent with the FCC's intercarrier compensation regime and the *ISP Remand Order*. Accordingly, we shall not adopt the ALJ's recommendation that the Parties brief the issue of the rates that are applicable to the traffic in question. As the ALJ noted, this is an issue of law rather than fact. I.D. at 30.

VII. Conclusion

Based on the record developed in this proceeding and the application of federal of law to the facts of record, we shall direct AT&T to pay the FCC's capped rate of \$0.0007 per MOU to Core for the ISP-bound local traffic at issue in this proceeding, until such time that Core and AT&T may agree to a mutually agreed-upon reciprocal compensation rate. We note that this determination is subject to future reductions to the FCC's \$0.0007 rate cap that may occur in accordance with the FCC's *Unified Compensation Order*. We also note that our Opinion and Order does not extend to traffic terminated by Core prior to May 19, 2005, in accordance with Section 1312 of the Code, 66 Pa. C.S. § 1312.

Consistent with the discussion in this Opinion and Order, we conclude that Core is entitled to compensation from AT&T at the FCC's capped rate of \$0.0007 per MOU for the ISP-bound local traffic at issue in this proceeding. As such, we shall grant the Exceptions of the Parties in part and deny them in part, and adopt the ALJ's Initial Decision as modified by this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Core Communications, Inc. are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Exceptions of AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. are granted, in part, and denied, in part, consistent with this Opinion and Order.
3. That the Initial Decision of Administrative Law Judge Angela T. Jones, issued May 24, 2011, is adopted, as modified consistent with this Opinion and Order.
4. That the Formal Complaint filed by Core Communications, Inc. against AT&T Communications of Pennsylvania, LLC at Docket No. C-2009-2108186, is sustained, in part, and dismissed, in part, consistent with this Opinion and Order.
5. That the Formal Complaint filed by Core Communications, Inc. against TCG Pittsburgh, Inc. at Docket No. C-2009-2108239, is sustained, in part, and dismissed, in part, consistent with this Opinion and Order.

6. That this case be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 5, 2012

ORDER ENTERED: December 5, 2012

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held August 15, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley, Statement Concurring in Part and Dissenting in Part
Pamela A. Witmer

Core Communications, Inc.

C-2009-2108186

C-2009-2108239

v.

AT&T Communications of Pennsylvania, LLC
and TCG Pittsburgh, Inc.

OPINION AND ORDER ON RECONSIDERATION

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the following matters: (1) Petition for Reconsideration and Clarification to Commission Opinion and Order (Core Petition) filed by Core Communications, Inc. (Core) on December 20, 2012, with respect to our Opinion and Order entered December 5, 2012 (*December 2012 Order*), in the above captioned proceedings; and (2) Petition for Reconsideration and Stay (AT&T Petition) of our

December 2012 Order jointly filed by AT&T Corp. (formerly AT&T Communications of Pennsylvania, LLC), and TCG Pittsburgh (collectively, AT&T) on December 19, 2012.¹

For the reasons set forth below, we shall: (1) grant Core's Petition in part and deny it in part; (2) deny AT&T's Petition; (3) lift the Stay of our *December 2012 Order* that was issued by an Opinion and Order entered on January 4, 2013; and (4) order AT&T to pay the amounts due to Core under the terms of this Opinion and Order on Reconsideration within thirty days of the receipt of a revised invoice from Core.

I. History of the Proceeding

On May 19, 2009, Core filed a Formal Complaint (Complaint) against AT&T alleging non-payment by AT&T for the termination of calls from AT&T's customers to Core's end-user customers. Core averred that it does not have an interconnection agreement or traffic exchange agreement with AT&T and thus alleged that Core's intrastate Switched Access Tariff controls the compensation it should receive for providing AT&T with intrastate switched access service.

On June 9, 2009, AT&T filed its Answer to the Complaint alleging, *inter alia*, that the Parties paid each other in-kind for access service through a bill-and-keep arrangement from January 1, 2004 through December 31, 2007. For compensation after 2007, AT&T claimed that the Parties were in negotiations over compensation but that they have been unable to reach an agreement. AT&T claimed that virtually all of the traffic at issue is bound to an Internet Service Provider (ISP), which is governed by the

¹ As discussed in our Opinion and Order entered January 4, 2013, we granted AT&T's request for a stay of our *December 2012 Order* pending resolution of the instant Petitions for Reconsideration, but denied AT&T's request for a stay pending judicial review.

Federal Communications Commission's (FCC's) *ISP Remand Order*.² AT&T also averred that the compensation at issue should be resolved on a going-forward basis, and that a bill-and-keep arrangement was appropriate for intrastate access service.

On December 8, 2009, AT&T filed a Motion to Dismiss the Complaint, based on its argument that the Commission lacked subject-matter jurisdiction or, in the alternative, the relief sought had been preempted by the FCC under the Federal Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. § 151 *et seq.* (collectively, the Act). AT&T also requested that the ALJ suspend the instant proceeding while the Motion to Dismiss was pending.

By letter dated December 9, 2009, Core responded, stating that it objected to any suspension of further testimony while the Motion to Dismiss was pending as well as to the Motion itself.

On December 28, 2009, Core filed its Answer to AT&T's Motion to Dismiss. Core stated that the FCC has never preempted the Commission's authority to address issues relating to intercarrier compensation between two competitive local exchange companies (CLECs). Core contended that the *ISP Remand Order* applied only to intercarrier compensation between an incumbent local exchange company (ILEC) and a CLEC. In this case, the exchange of traffic is between two CLECs; thus, Core is of the opinion that the *ISP Remand Order* is not applicable. Core also contended that, even if the *ISP Remand Order* applied, the Commission still would have jurisdiction because the Telecommunications Act of 1996 (TA-96)³ contemplated shared state and federal

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151 (2001) (*ISP Remand Order*), remanded but not vacated, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

³ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code).

authority over all aspects of competition. Core also argued that *AT&T Communications v. Pac-West Telecomm, Inc.*, 2008 U.S. Dist. LEXIS 61740 (N.D. Cal Aug. 12, 2008) (*Pac-West District Court Decision*) was directly on point with the issues in this proceeding and makes clear that state commissions have not been preempted from applying intrastate tariff rates to ISP-bound traffic exchanged between two CLECs.⁴

By Order dated February 26, 2010 (*Order No. 6*), the ALJ granted the Motion to Dismiss regarding the traffic prior to September 2009 and denied the Motion to Dismiss regarding traffic after September 2009.⁵

On March 5, 2010, both Core and AT&T filed separate Petitions for Interlocutory Review and Answer to Material Questions with respect to *Order No. 6*. On March 15, 2010, both Core and AT&T filed separate Briefs in Support of their respective Petitions for Interlocutory Review and Affirmative Answers. Also, on March 15, 2010, Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and XO Communications, Inc., submitted a Joint Brief as *amicus curiae* pursuant to 52 Pa. Code § 5.502(e). On March 26, 2010, Core filed a letter with the Secretary of the Commission questioning whether the filing of the *amicus* brief was appropriate.

⁴ As discussed, *infra*, the *Pac-West District Court Decision* was reversed by the Ninth Circuit Court of Appeals on June 21, 2011.

⁵ The ALJ indicated that she made this ruling based on the understanding that compensation for a call was to be determined by the point of origin and the point of destination, also known as the “end-to-end” analysis. The ALJ ruled that the purpose or destination of the calls in question was to reach the services of an ISP and concluded that the application of the “end-to-end” analysis resulted in the calls being under the jurisdiction of the FCC. However, the traffic after September 2009 required the resolution of material facts, including whether the mix of traffic after September 2009 included Voice-over-Internet-Protocol (VoIP) traffic. Thus, the Motion to Dismiss was denied regarding all calls after September 2009, because the end-to-end analysis did not result in traffic being under the jurisdiction of the FCC.

On March 23, 2010, Core and AT&T filed a Joint Motion to Stay the Proceeding until such time that the Commission issued an Order regarding the Petitions for Interlocutory Review. On April 7, 2010, the ALJ issued *Order No. 7*, which granted the Joint Motion to Stay the Proceeding.

By Opinion and Order entered on September 8, 2010, we ruled on the material questions presented by the Petitions for Interlocutory Review (*Material Question Order*). On the issue of whether we had jurisdiction over traffic prior to September 2009, the Commission concluded that the holding in *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006) was applicable to this proceeding and did not accept the end-to-end analysis. We stated:

The First Circuit Court established that the Massachusetts DTE (effectively the public utility commission of the state of Massachusetts) was not preempted by the FCC's *ISP Remand Order* on deciding an interconnection agreement dispute even when it related to information or ISP bound traffic between GNAPs [Global NAPs] and Verizon New England.

Material Question Order at 9-10. We further stated, “[W]e decline to supplement our focus by application of the ‘end-to-end’ analysis where doing so would effectively cede jurisdiction without legal basis and require applying that analysis to two Commission-certificated CLECs.” *Id.* at 9. Lastly, we stated, “[N]on-payment of appropriate intercarrier compensation from one CLEC to another CLEC cannot be condoned as a matter of law and as a matter of sound regulatory policy.” *Id.* at 11.

Regarding the traffic after September 2009, we stated, “[t]his Commission unequivocally stated in *Global NAPs*⁶ that it has jurisdiction to address intercarrier

⁶ *Palmerton Telephone Co. v. Global NAPs South, Inc.*, Docket No. C-2009-2093336 (Order entered March 16, 2010; Petition for Reconsideration denied July 29, 2010).

compensation issues related to VoIP traffic.” *Id.* at 14. The Commission found that the ALJ properly denied the Motion to Dismiss regarding Voice-over-Internet-Protocol (VoIP) traffic, and agreed that there remained outstanding genuine issues of fact. *Id.* at 13.

An evidentiary hearing was held in this matter on November 18, 2010. Core presented one witness. AT&T presented two witnesses. Various statements and exhibits were presented by Core and AT&T and were admitted into the record.⁷ Main Briefs were filed by both Parties on December 14, 2010, and Reply Briefs were filed by both Parties on January 14, 2011.⁸

On February 3, 2011, Core filed a letter with the Commission noting the filing of an *Amicus* Brief by the FCC in the appeal of the *Pac-West District Court Decision* then pending in the Ninth Circuit Court of Appeals (FCC *Amicus* Brief). The FCC provided its reasoning as to why the *ISP Remand Order* applies to CLEC-to-CLEC ISP-bound traffic. By letter dated February 4, 2011, AT&T concurred with the significance of the FCC *Amicus* Brief and responded to Core’s February 3, 2011 letter. By Order dated March 18, 2011, the ALJ admitted the FCC *Amicus* Brief into the evidentiary record.

On May 24, 2011, the ALJ’s Initial Decision was issued, which dismissed the Complaint, in part, and concluded that the matters in dispute were subject to federal law. The ALJ recommended that the record be reopened to receive briefs from the Parties on the application of federal law to the instant proceeding.

⁷ A detailed list of the statements and exhibits presented by AT&T and Core is contained on pages 8-9 of the ALJ’s Initial Decision.

⁸ Both Reply Briefs contained proprietary information and are marked pursuant to the Protective Order issued at these dockets.

Exceptions to the Initial Decision were filed by Core and AT&T on June 13, 2011, and Replies to Exceptions were filed by Core and AT&T on June 23, 2011. In addition, on July 7, 2011, Core filed a Motion for Leave to File Update to Core's Reply to the Exceptions of AT&T to which AT&T filed an Answer in opposition on July 15, 2011. On July 15, 2011, we granted the Motion and indicated that we also would consider AT&T's responsive argument to Core's updated Replies to Exceptions.

On June 21, 2011, two days before the deadline for filing Reply Exceptions, the Ninth Circuit issued its decision in the Pac-West proceeding. *AT&T Communications of California v. Pac-West Telecomm*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*). The Ninth Circuit reversed the *Pac-West District Court Decision*, and held that the FCC's *ISP Remand Order* applied to all LEC-originated ISP-bound traffic, including CLEC-to-CLEC traffic. The Ninth Circuit preempted the California Public Utility Commission's decision that relied upon state-filed tariffs to set rates for locally-dialed ISP-bound traffic, and instead deferred to the FCC's compensation regime established by the *ISP Remand Order*.

Our *December 2012 Order* sustained Core's Formal Complaint against AT&T, in part. More specifically, we determined that the FCC had *not* preempted state regulation of local ISP-bound CLEC-to-CLEC traffic in a manner that is consistent with the FCC's intercarrier compensation regime. *December 2012 Order* at 24. We further concluded that, in light of the Ninth Circuit's decision in *Pac-West*, the FCC had preempted the States from establishing *rates* for ISP-bound local CLEC-CLEC traffic that are inconsistent with the FCC's *ISP Remand Order*. *Id.* at 49, 79-80. Accordingly, we held that Core was entitled to compensation from AT&T at the FCC's capped rate of \$0.0007 per minute of use (MOU) for traffic terminated by Core on or after May 19, 2005. *Id.* at 81-82.

As noted above, on December 19, 2012, AT&T filed its Petition for Reconsideration and Stay of our *December 2012 Order*. In its Petition, AT&T requested a stay of the directive that AT&T pay the FCC's capped rate of \$0.0007 per MOU to Core pending resolution of the AT&T Petition and any subsequent judicial review of the Commission's Order. On December 20, 2012, Core filed its Petition for Reconsideration and Clarification of our *December 2012 Order*. On December 31, 2012, Core filed an Answer to AT&T's Petition (Core Answer), and AT&T filed a Response in Opposition to Core's Petition (AT&T Answer).

By Opinion and Order entered on January 4, 2013 (*January 2013 Order*), we granted Core's Petition for Reconsideration and Clarification and AT&T's Petition for Reconsideration, pending review of and consideration on the merits. With regard to AT&T's request that the Commission stay the directive in the *December 2012 Order* that AT&T pay the FCC's capped rate of \$0.0007 per MOU to Core pending resolution of the AT&T Petition and any subsequent judicial review of the Commission's *December 2012 Order*, the *January 2013 Order* granted AT&T's request only to the extent that it requested a stay pending resolution of the AT&T Petition, but denied AT&T's request for a stay pending judicial review. In denying this request, we determined that AT&T's request for stay or *supersedeas* during any judicial review is premature. We stated, however, that AT&T may renew its request for a stay pending judicial review following disposition of the Petitions for Reconsideration.⁹

The Petitions for Reconsideration of our *December 2012 Order* filed by AT&T and Core are now ripe for disposition.

⁹ We note that on December 21, 2012, AT&T filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Eastern District of Pennsylvania, seeking, *inter alia*, a permanent injunction barring enforcement of the *December 2012 Order*. This case is on hold pending a final decision by the Commission on the Parties' Petitions for Reconsideration addressed in this Opinion and Order.

II. Background

This proceeding involves AT&T's refusal to pay Core for the use of Core's access facilities to terminate calls originated by AT&T's customers that are routed through Verizon's access tandem switches to Core's end-user customers.

Core refers to the telecommunications traffic at issue in this proceeding as "AT&T Indirect Traffic," which is traffic from AT&T that is routed through a Verizon access tandem before connecting to Core's terminating facilities. Core averred that it does not have an interconnection agreement or traffic exchange agreement (TEA) with AT&T. As such, Core alleged that its intrastate Switched Access Tariff¹⁰ controls the compensation it should receive from AT&T for terminating AT&T Indirect Traffic. Core also averred that AT&T has not paid any type of compensation to Core for terminating this traffic, and that AT&T has outstanding balances due for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009. Core requested that the Commission direct AT&T to pay all intrastate switched access charges that are due, as well as charges that may accrue in the future.

AT&T alleged that the Parties were paying each other in-kind for access service through a bill-and-keep arrangement from January 1, 2004, through December 31, 2007. AT&T averred that the bill-and-keep arrangement is the industry standard method for intercarrier compensation.¹¹ With regard to compensation after 2007, AT&T alleged that the Parties were in negotiations over compensation without having reached any agreement. AT&T opined that the compensation at issue should be resolved on a going-

¹⁰ Switched Access Tariff - PA P.U.C. No. 4 (Switched Access Tariff).

¹¹ Core does not abide by the bill-and-keep arrangement for compensation of its termination service. Core contended that for intrastate traffic, which it alleged is at issue here, Core's Pennsylvania Switched Access Tariff should dictate the compensation it should receive for termination service rendered. The traffic here for which Core seeks compensation is traffic prior to September 2009, which is discussed below.

forward basis, and that virtually all of the traffic at issue is ISP-bound local traffic that is governed by the FCC's *ISP Remand Order*. AT&T averred that the bill-and-keep method was by default the in-kind payment for the access service from January 1, 2004 through March 2008, and that this bill-and-keep arrangement is appropriate for the same intrastate access services in the future. AT&T did not agree to pay Core for local ISP-bound access charges at its rate in its Switched Access Tariff or at the Verizon tandem reciprocal compensation rate.

Core disputed AT&T's argument that the Commission lacks jurisdiction to make a determination because the terminated traffic is ISP-bound. Furthermore, Core did not agree that the alleged industry standard of a bill-and-keep arrangement applies to the subject traffic, especially in light of the fact that the volume of traffic was at times heavily skewed to services performed by Core for the termination of AT&T Indirect Traffic to Core's customers.

From the time Core began providing telecommunications services in Pennsylvania through the end of September 2009, Core's only customers in Pennsylvania were ISPs. In or about October 2009, Core alleged that it began providing service to VoIP providers. Core claimed that in or around April 2010, Core's VoIP customers began to originate communications. Tr. at 20. Prior to April 2010, Core handled only inbound traffic which was terminated to its customers. Core originated no outbound traffic at that time. Tr. at 18.

In our *December 2012 Order*, we ruled that we are authorized to establish rates consistent with the FCC's intercarrier compensation regime for ISP-bound traffic. As such, we determined, consistent with federal law, that the FCC's rate cap of \$0.0007 per minute of use is the appropriate reciprocal compensation rate that should apply to the locally-dialed ISP-bound traffic that AT&T sends to Core for termination on Core's network. We also determined to apply the four-year statute of limitations set forth in

Section 1312 of the Public Utility Code (Code), 66 Pa. C.S. § 1312, to this proceeding. See *December 2012 Order* at 82 (“We also note that our Opinion and Order does not extend to traffic terminated by Core prior to May 19, 2005, in accordance with Section 1312 of the Code, 66 Pa. C.S. § 1312.”)

III. Discussion

A. Standard for Reconsideration

The Code establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) (Rehearing) and 703(g) (Rescission and amendment of orders), 66 Pa. C.S. §§ 703(f) and 703(g). Such requests for relief must be consistent with Section 5.572 of our regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. The standards for granting a petition for reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553 (1982) (*Duick*):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

56 Pa. P.U.C. at 559, citing *Pennsylvania Railroad Co. v. Pa. Public Service Commission*, 179 A. 850 (Pa. Super. 1935). Additionally, a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence that was not in existence or discoverable through the exercise of due diligence prior to the expiration of the time within which to file a petition for rehearing under the provisions of Subsection 703(g). *Id.* Accordingly, under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. It also has been held that, because a grant of relief on such petitions may result in the disturbance of final orders, reconsideration should be granted judiciously and only under appropriate circumstances. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *appeal denied*, 544 Pa. 619, 674 A.2d 1079 (1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

Applying these standards to the Petitions at hand, we are of the opinion that both Core and AT&T have provided adequate justification for reconsideration in their Petitions, which raise new and novel arguments that we previously have not heard or considered in this proceeding. As such, we shall consider the issues raised in their Petitions.

We note that any argument, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. The Petitions for Reconsideration

In its Petition for Reconsideration, Core requests that the Commission address the following two matters:

- (1) Clarify that AT&T is required to pay interest at the rate of six percent per annum and establish a date certain for payment of principal and interest; and
- (2) Reconsider and eliminate the finding in the *December 2012 Order* that Core's Switched Access Tariff applies only to the settlement of toll charges between interexchange carriers.

In its Petition, AT&T requests that the Commission rescind or amend the *December 2012 Order* for the following reasons:

- (1) It violates 47 U.S.C. § 203(a) and (c), which provide that, in the absence of a contract, a carrier may charge only the rate specified or established in a tariff or on file at the FCC for traffic that is jurisdictionally interstate;
- (2) It violates 47 U.S.C. § 201(b) because, by requiring Core to charge a rate that is not specified in a tariff or a contract, it requires Core to charge a rate that is "unjust and unreasonable";
- (3) It violates 47 U.S.C. § 251 (b)(5) by allowing Core to receive compensation for the transport and termination of telecommunications without establishing "a reciprocal compensation arrangement";
- (4) It violates a federal prohibition against retroactive ratemaking;
- (5) It fails to apply the federal two-year statute of limitations for action by carriers to recover charges for traffic that is jurisdictionally interstate, established in 47 U.S.C. § 415, and instead applies a four-year statute of limitation under state law even though the *December 2012 Order* found that the use of state law was preempted and not relevant.

AT&T notes in its Petition that, as it previously had argued in this proceeding, it remains of the opinion that the Commission lacks the authority, under both federal law and state law, to regulate and establish rates for the interstate traffic at issue. While AT&T disagrees with the Commission on these jurisdictional issues, AT&T has not raised these issues on reconsideration. Rather, AT&T states that it is preserving its position on jurisdictional issues for later judicial review, should that occur. AT&T Petition at 2.

In light of the above, we shall address the merits of Core's and AT&T's Petitions and each Party's Answer thereto.

- 1. Whether the Commission should clarify that AT&T should be required to pay interest at the rate of six percent per annum, and whether the Commission should establish a date certain for the payment of principal and interest (Core Petition at 3-7).**

- a. Positions of the Parties**

With regard to whether AT&T should be required to pay interest on the amounts that it owes to Core, Core submits that throughout this proceeding it requested several times that the Commission direct AT&T to pay all outstanding amounts owed to Core, plus any late payment charges and interest as specified in Core's Switched Access Tariff. Core Petition at ¶¶ 4, 5 and 6.¹² Core notes that, although the Commission's *December 2012 Order* directed AT&T to pay Core at the rate of \$0.0007 per MOU for the ISP-bound local traffic at issue from May 19, 2005, until such time that Core and AT&T may agree upon a reciprocal compensation rate, it never addressed the payment of interest on the amount owed by AT&T. Core Petition at ¶ 2. Core further notes that it did not address the interest issue in its Exceptions because the Initial Decision primarily

¹² See Core's Complaint of May 19, 2009 at 13; Core's Main Brief of Dec. 14, 2010 at 29.

focused on matters relating to the Commission’s jurisdiction, and did not rule on or otherwise address the issue of interest on amounts owed by AT&T. Core Petition at ¶ 7.

Core submits that, because the *December 2012 Order* relied on Section 1312 of the Code, 66 Pa. C.S. § 1312, to limit AT&T’s liability to amounts owed for traffic terminated by Core after May 19, 2005,¹³ Core should be entitled to the legal rate of interest at 6.0% per year as provided in Section 1312. Core Petition at ¶¶ 10-12. Core also argues that, in lieu of the legal rate of interest, the Commission could impose interest at the rate of 1.5% per month as set forth in its Switched Access Tariff, even though the Commission previously found that its Switched Access Tariff does not apply to the AT&T Indirect Traffic at issue. Core submits that the Commission could resort to Core’s Switched Access Tariff as a source for basic commercial terms and conditions in the absence of any FCC guidance on ancillary issues. Core Petition at ¶ 16. AT&T opposes Core’s suggestion for various reasons, and notes that Core’s Switched Access Tariff does not apply to interstate traffic. AT&T Answer at 3.

Core argues that requiring AT&T to pay interest is appropriate because, as the Commission recognized in its *December 2012 Order*, Core was harmed when AT&T refused to pay Core for the termination of AT&T’s Indirect Traffic. In support of this argument, Core cites to the statements in the *December 2012 Order* that “[t]he absence of intercarrier compensation from AT&T to Core generates an adverse and self-evident financial impact for Core’s operations irrespectively of Core’s internal economic costs in operating its carrier access network facilities and services,” and that “we do not expect regulated telecommunications carriers that operate within this Commonwealth to provide carrier access network facilities and services for free. Core Petition at ¶ 13, citing *December 2012 Order* at 69.

¹³ See *December 2012 Order* at 82 (“We also note that our Opinion and Order does not extend to traffic terminated by Core prior to May 19, 2005, in accordance with Section 1312 of the Code, 66 Pa. C.S. § 1312.”).

Core attached a Confidential Exhibit to its Petition setting forth the calculations of the amounts that AT&T owes for the locally-dialed MOUs that Core terminated on behalf of AT&T, from May 19, 2005, through the end of November 2012, based on the FCC ISP-bound traffic rate of \$0.0007. The Confidential Exhibit also includes alternative calculations of interest due at: (1) the legal interest rate of 6.0% per year, and (2) Core's tariffed interest rate of 1.5% per month, which is equivalent to a nominal rate of 18.0% per year. Core requests that, pursuant to Section 1312(a) of the Code, the Commission specify "the exact amount to be paid" by AT&T and "the reasonable time within which payment shall be made." Core further requests that the Commission order AT&T to pay Core the sum of the principal amount due with interest, either at Core's tariffed interest rate or the legal rate of interest, within ten days of the Commission's order on reconsideration. Core Petition at ¶ 19.

In its Answer, AT&T does not dispute the mathematical calculations presented by Core in its Confidential Exhibit, including the number of MOUs at issue per each monthly usage period from May 2005 through November 2012. Instead, AT&T disputes the legal underpinnings of the Commission's *December 2012 Order*, as described below.

AT&T argues that Core's request for interest is not appropriate because, as Core acknowledged in its Petition, it previously asked the Commission to direct AT&T to pay interest and late payment charges, but the Commission did not grant Core's request in the *December 2012 Order*. AT&T notes that the *December 2012 Order* expressly stated that "any issue . . . that we do not specifically address shall be deemed to have been duly considered and denied without further discussion." AT&T Answer at 5, quoting *December 2012 Order* at 15.

AT&T also asserts that Section 1312 of the Code is not relevant because the Commission correctly found that federal law, not state law, governs the Parties'

dispute and “the arguments of the Parties regarding the application of state law to this proceeding are no longer relevant to the disposition of Core’s Complaint.”¹⁴ AT&T Answer at 1-2. AT&T notes that Core has not challenged this determination nor asked the Commission to reconsider it. *Id.*

AT&T next argues that, even if state law were relevant, Section 1312(a) applies only to Commission orders requiring refunds, and there is no other statutory provision that permits the Commission to award interest when establishing a new rate.¹⁵ AT&T argues that the Commission may not award interest where an explicit statutory provision does not permit.¹⁶ AT&T Answer at 2. AT&T also argues this point in its Petition, where it submits that Section 1312 deals with refunds owed to customers arising from: (1) rates that are determined to be unjust and unreasonable; (2) rates that are in violation of a Commission order; or (3) rates that are in excess of a tariffed rates. AT&T contends that none of these scenarios are present here, and that Section 1312 does not apply to the establishment of new rates, such as the \$0.0007 rate established by the Commission in the *December 2012 Order*. AT&T Petition at 9, fn. 7.

With regard to Core’s argument that interest is appropriate because AT&T’s nonpayment harmed Core, AT&T submits that Core’s argument has no legal basis, and is simply an unsupported request that the Commission relieve Core of the consequences of its own actions. AT&T Answer at 3. AT&T submits that, although Core knew about the FCC’s *ISP Remand Order* and the FCC’s rate cap of \$0.0007 since

¹⁴ *December 2012 Order* at 80.

¹⁵ AT&T states that the Commission previously has held that Section 1312(a) “applies only to refunds” and cites *Pa. PUC v. The Bell Telephone Company of Pennsylvania*, 68 Pa. P.U.C. 430 at 4 (1988) (*Bell Telephone*). However, the portion of the *Bell Telephone* decision cited by AT&T is a summary of the arguments advanced by the Office of Consumer Advocate, as opposed to the Commission’s discussion and resolution of the issues in that case.

¹⁶ *Barasch v. Pa. PUC*, 516 Pa. 142, 532 A.2d 325 (1987).

2001, it never filed a tariff at the FCC for locally dialed, ISP-bound calls, or requested a traffic exchange agreement with AT&T with a rate at or below the \$0.0007 rate cap level. AT&T argues that it was not billed by Core until 2008, at which time it was billed at the intrastate switched access rate that the Commission determined does not apply to AT&T's Indirect Traffic at issue in this proceeding. For these reasons, AT&T opines that any "harm" that Core may have experienced is harm that has been wholly self-inflicted. AT&T Answer at 3-4.

Finally, AT&T argues that Core is not entitled to interest because AT&T does not owe the underlying principal to Core. AT&T asserts, in essence, that the Commission's *December 2012 Order* is invalid because, as a matter of both state and federal law, a utility cannot charge a rate other than one that is established by tariff or contract.¹⁷ AT&T argues that Core cannot legally charge AT&T until it has filed a tariff and the tariff becomes effective. AT&T maintains that, since Core never had any basis to charge AT&T for the principal amount owed, it is not entitled to interest. AT&T Answer at 4-5.

b. Disposition

The issue of whether interest should be paid by AT&T on the amount that it owes to Core for the termination of ISP-bound local traffic is an issue that we simply overlooked in our *December 2012 Order*. Core points out that it requested that the Commission direct AT&T to pay "late payment charges" or "interest charges" on the amounts owed for the intrastate switched access services that Core has provided to

¹⁷ AT&T also submits that, if the Commission's *December 2012 Order* stands, Core must cancel or revise its outstanding invoices (all of which demand payment at the tariffed switched access service rate) before AT&T has an obligation to pay anything pursuant to the Commission's directive. AT&T Answer at 4.

AT&T.¹⁸ Because this is an issue that we overlooked, it is an issue that falls squarely within the standards established by *Duick*, and appropriately was raised by Core in its Petition.

Core has requested that the Commission require AT&T to pay interest at the legal rate of 6.0% per year as provided in Section 1312.¹⁹ In the alternative, Core suggests that it would be appropriate to require AT&T to pay interest at the rate of 1.5% per month, or a nominal rate of 18.0% per year, in accordance with its Switched Access Tariff. Core acknowledges that the *December 2012 Order* determined that Core's Switched Access Tariff does not apply to the AT&T Indirect Traffic at issue; however, Core submits that the Commission could resort to its Switched Access Tariff as a source for basic commercial terms and conditions in the absence of any FCC guidance on ancillary issues.

Upon consideration of the arguments of both Parties, we conclude that it would be appropriate to require AT&T to pay interest at the legal rate of 6.0% on the amount that it owes to Core for the traffic at issue in this proceeding. The rate of interest that should be paid by a customer, including one of wholesale carrier access services, on the overdue amount owed to a utility is a matter within the Commission's discretion. We believe that it is appropriate to utilize the legal rate of interest of 6.0%, rather than the higher nominal rate of 18.0% set forth in Core's Switched Access Tariff. In this proceeding, there was a genuine dispute between the Parties regarding their legal

¹⁸ The terms "late payment charges" and "interest charges" are interchangeable. In its Complaint, Core requested "late payment charges and interest as specified in Core's Switched Access Service Tariff." Complaint at 13. In its Main Brief, Core requested "associated interest charges as a reasonable lawful rate, to accrue from the date of each invoice," and "late payment charges at the tariffed rate of 1.5% per month." Core M.B. at 29 and Appendix C, proposed Ordering Paragraph No. 1. Core Petition at 3.

¹⁹ The legal rate of interest is defined in 41 Pa. C.S. § 202 as "six percent per annum."

obligations and the appropriate rate to be applied to the traffic in question. Under these circumstances, and in today's economy where record-low interest rates prevail, we conclude that an interest rate of 6.0% is appropriate.

However, we agree with AT&T that it is not appropriate to reach back to May 2005 to begin assessing interest on the amounts due to Core under the Commission's *December 2012 Order*. The applicable rate, and hence the amounts due to Core, were vigorously disputed by the Parties, and were not established until the issuance of the *December 2012 Order*, now the subject of the instant petitions for reconsideration filed by both Parties. Accordingly, we conclude that interest should begin to accrue thirty days after the principal amount that is calculated in accordance with the *December 2012 Order* is due. We shall require Core to issue a revised invoice to AT&T based on the rate of \$0.0007, and require Core to give AT&T thirty days to pay this invoice.²⁰ Core may begin to assess interest on any unpaid amount beginning on the date that the invoice is due to be paid. AT&T has not contested the number of MOUs set forth in Core's Confidential Exhibit, or the simple calculation of the principal amount due at the rate of \$0.0007; therefore, we shall approve Core's calculation of the principal amount of the compensation due under the Commission's *December 2012 Order*.

Our determination is informed by, but is not compelled by, Section 1312 of the Code. Section 1312(a) provides, *inter alia*, that the Commission has the authority to order a utility to refund excess payments made by a customer within four years of the filing of a complaint, "together with interest at the legal rate from the date of each excessive payment." Section 1312 does not mandate the payment of the legal rate of interest of 6.0% in the case at hand, which does not involve the refund by a utility of

²⁰ Core's request that AT&T be given ten days to pay is inconsistent with Section 1509, which requires that nonresidential customers be given at least fifteen days to pay their bills before incurring any late payment charges. Given the complexity of this proceeding, providing thirty days to AT&T is reasonable.

amounts paid by a customer, and no other provision in the Code mandates a specific rate of interest to be applied to outstanding amounts owed to a utility. Accordingly, the rate of interest that is applied to customer arrearages is a matter that has been left to the Commission's discretion, and requiring payment of interest at the legal rate here is consistent with the treatment of interest for refunds owed to customers under Section 1312. For the reasons stated above, we believe that the lower of the two alternative interest rates suggested by Core is appropriate under the facts and circumstances of this proceeding.

In analogous situations, we similarly have determined, as matter within our discretion, to apply the four-year statute of limitations in Section 1312 to proceedings involving amounts owed to utilities, as follows:

Section 1312 of the Public Utility Code permits ratepayers to seek rate refunds when certain findings are made, up to a four-year past period measured from the date that the improper billing was discovered. Parity and equity warrant that a utility should likewise be limited to a four-year past period for recoupment of underbillings. Also, while expressly applying to residential customers, an analogy can be drawn from the four-year limitations contained in the Commission's regulations at Section 56.35 and 56.83(7). We can find no distinguishing factor which would suggest that a different time limitation for commercial customers should be applied.

Angie's Bar v. Duquesne Light Company, Docket No. C-81881, 72 Pa. P.U.C. 213 (Order entered March 27, 1990) (*Angie's Bar*) at 12. The Commission has followed the precedent established by *Angie's Bar* in a series of cases dating from 1990. *See e.g.*, *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program*, Docket No. P-2009-2143607 (Order entered August 24, 2010); *Encarnacion v. PPL Electric Utilities Corp.*, Docket No. C-20078087 (Order entered September 29, 2008); *Berry v. PGW*, Docket No. F-01184412 (Order entered April 15,

2004). The reasoning behind our decisions to apply the statute of limitations in Section 1312 to proceedings involving amounts owed to utilities applies with equal force to the rate of interest specified in Section 1312.

Regarding AT&T's argument that, because the instant case is not governed by Section 1312, the Commission does not have the statutory authority under the Code to require AT&T to pay interest on the amounts that it owes to Core, we note that this argument is contrary to the Code, the Commission's Regulations, and established Commission practice.

AT&T overlooks Section 1509 of the Code, 66 Pa. C.S. § 1509, which requires that a utility allow at least fifteen days after a transmittal of a bill to a nonresidential customer before assessing late payment charges. Section 1509 was added to the Code by Act 215 of 1976,²¹ and mandates that customers be given a specified number of days to pay their bills before incurring late payment charges. Stated another way, Section 1509 implicitly authorizes utilities to assess late payment charges on overdue bills, although, unlike Section 1312, a specific interest rate is not mandated. More recently, Section 1409 was added to the Code, 66 Pa. C.S. § 1409 (*Late payment charge waiver*), which also implicitly acknowledges the validity of late payment charges by authorizing a utility to waive late payment charges on residential customer accounts.²²

In addition to the implicit recognition of the validity of late payment charges in Sections 1509 and 1409, the Code provides the Commission with implied powers to ensure that utility rates are just and reasonable. *Pennsylvania Retailers' Association v. Pa. PUC*, 440 A. 2d 1267 (Pa. Cmwlth. 1982); *City of Pittsburgh v. Pa. PUC*, 423 A.2d 454 (Pa. Cmwlth. 1980); *City of Erie v. Pennsylvania Electric Company*,

²¹ Act of October 7, 1976 (P.L. 1057, No. 215).

²² Section 1409 also provides that the Commission may not waive late payment charges where household income exceeds 150% of the federal poverty level.

383 A.2d 575 (Pa. Cmwlth. 1978). Specifically, Section 501 of the Code, 66 Pa. C.S. § 501, provides that, in addition to the powers expressly enumerated by the Code, the Commission has the full power and authority to enforce, execute and carry out, by its regulations, orders or otherwise, the provisions of the Code and the full intent thereof. The Pennsylvania Supreme Court has held that the intent of Section 501 is to give the Commission full powers in regulating utility service and rates. *Fairview Water Company v. Pa. PUC*, 509 Pa. 384, 392, 502 A.2d 162, 166 (1985) (*Fairview Water*); *see also*, *Gilligan v. Pa. Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980) (agency is not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect).

Late payment charges fall within the definition of “rate” found at Section 102 of the Code, 66 Pa. C.S. § 102. The Courts have held that interest on utility bills constitutes a rate that compensates the utility for the cost of carrying customer debt. In a case involving the obligation of utilities to pay the gross receipts tax on revenue generated by late payment charges, the Commonwealth Court held that late payment charges are “part of the price of electricity sold” because costs incurred by the utility when customers do not pay their bills in a timely manner are recouped through the imposition of late payment charges. *Pennsylvania Power & Light Company v. Commonwealth of Pennsylvania, Board of Finance and Revenue*, 668 A.2d 620 (Pa. Cmwlth. 1995), *aff’d*, 553 Pa. 1, 717 A.2d 504 (1998). Similarly, the Commission has described late payment charges as equivalent to a rate for the service of carrying delinquent accounts. *Anderson v. Peoples Natural Gas Company*, Docket No. Z-09439330, 54 Pa. P.U.C. 312 (Order entered June 19, 1980).

In addition to the statutory provisions discussed above, the Commission’s regulations governing standards and billing practices for residential customers, 52 Pa. Code §§ 56.1 *et seq.* (Chapter 56), have provided for the payment of interest or late payment charges by customers on overdue utility bills since the regulations first were

promulgated in 1978.²³ The Commission’s Chapter 56 regulations, *inter alia*, established the maximum interest rate that a utility may charge on overdue utility bills owed by residential customers.²⁴ Although the Commission elected to promulgate regulations governing billing and payment standards that are applicable only to residential utility service, the fact that the Commission has not promulgated nonresidential billing regulations does not mean that the Commission lacks the statutory authority to do so. When the Commission issued its proposed Chapter 56 regulations in 1976, it stated as follows:

Act 215 [Act of October 7, 1976 (P.L. 1057, No. 215)] addressed, *inter alia*, discontinuance of service to all customers, not just residential customers. While it is clear that the adoption by the Commission of regulations limited to residential utility service was to remedy the unequal position residential customers had with respect to utilities, the adoption of formal procedures with respect to residential customers only should not be interpreted as precluding this Commission from applying the substantive concepts and principles of Chapter 56 to matters involving commercial and industrial customers of utilities.

Proposed Standards and Billing Practices for Residential Utility Service, 76 P.R.M.D. (Order entered November 24, 1976). Since Chapter 56 was promulgated, the Commission has held that, where appropriate, provisions in Chapter 56 will be applied to nonresidential customers. *St. Francis of Assisi Catholic Church v. PG Energy*, Docket

²³ The Commission’s Chapter 56 regulations also expressly acknowledge the ability of the Commission to eliminate late payment charges. 52 Pa. Code § 56.181(1).

²⁴ As originally promulgated in 1978, Section 56.22 of Chapter 56, 52 Pa. Code § 56.22 (Accrual of late payment charges), authorized utilities to assess late payment charges on overdue utility bills at a maximum interest rate of 1.25% per month, not to exceed a simple interest rate of 15% *per annum*. *Consumer Standards and Billing Practices for Residential Service*, 76 P.R.M.D. 10 (Order entered April 21, 1978), published at 8 *Pa. Bull.* 1655, 1659. The current version of Section 56.22 authorizes late payment charges on overdue balances up to “18% simple interest per annum.”

No. C-20042391 (Order entered May 19, 2005); *Cefalo v. Pennsylvania Gas and Water Company*, 65 Pa. P.U.C. 265 (1989).

Finally, Court decisions implicitly have sanctioned the imposition of late payment charges on customers, both residential and nonresidential. For example, in an opinion affirming the collection of the gross receipts tax on revenue generated by late payment charges paid by residential and nonresidential customers, the Commonwealth Court held that late payment charges are “part of the price of electricity sold” because costs incurred by the utility when customers do not pay their bills in a timely manner are recouped through the imposition of late payment charges. *Pennsylvania Power & Light Company v. Commonwealth of Pennsylvania, Board of Finance and Revenue, supra.*²⁵

The only case cited by AT&T for the proposition that the Commission does not have the authority under the Code to award interest is *Bell Telephone, supra*. However, the portion of the decision cited by AT&T is a summary of the arguments advanced by the Office of Consumer Advocate (OCA) in that proceeding, as opposed to the Commission’s discussion and resolution of the issues. The Commission’s brief discussion of the OCA’s arguments in *Bell Telephone* was limited to a conclusion that the facts and circumstances in that particular case did not support the award of rate case recoupment interest arising from the reversal and remand of a Commission rate order by the Commonwealth Court. “The Commission policy regarding the award of interest in connection with recoupment, is against an award, except in the most unusual of circumstances, when our view of the particular circumstances persuades us that an award of interest is dictated.” *Bell Telephone* at 8. Clearly the Commission in *Bell Telephone* indicated that it has the authority to award interest as a matter within its discretion, although its general policy is against the award of interest in recoupment cases arising from appeals and remands of rate case orders. The instant case is not a remand of a rate

²⁵ Late payment charges are equivalent to a rate for the service of carrying delinquent accounts. *Anderson v. Peoples Natural Gas Company, supra*.

case order by an appellate court; hence the policy announced in *Bell Telephone* is not applicable.

In addition to arguing that the Commission does not have the authority under State law to award interest to Core, AT&T also argues that we cannot award interest to Core under the Code's provisions because this proceeding is governed by federal law. AT&T Answer at 1-2. However, AT&T does not provide any case citations in support of its argument, or a citation to a federal statute or regulation that governs the award of interest. We note that the FCC itself sanctions the imposition of late payment fees on unpaid amounts due to a carrier as a reasonable practice. *See, In re Sprint Communications v. N. Valley Communications*, 26 F.C.C.R. 10780, 10787 (2011).

State law can be preempted only (1) where Congress has adopted explicit statutory language indicating a clear intent to preempt state law; (2) where Congress has legislated so comprehensively as to occupy an entire field of regulation, leaving no room for the States to supplement federal law; or (3) where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of Congressional objectives.²⁶ *International Paper v. Ouellette*, 479 U.S. 481 (1987). None of these three scenarios are present in the instant case. There is no express statutory language in the federal Act that governs the assessment of interest. Second, because telecommunications regulation is shared between the FCC and the States in a dual regulatory system, Congress clearly has not "occupied the field" of telecommunications regulation. *Ting v. AT&T*, 319 F.3d 1126, 1136-37 (9th Cir. 2003); *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989) (*Northwest Central Pipeline*) (under Natural Gas Act's system of dual federal and state regulation, a finding that Congress has

²⁶ Preemption may result from action taken by Congress itself or by federal agencies acting within the scope of their Congressionally-delegated authority. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

occupied the field would be an extravagant interpretation of federal power and would undermine the dual regulatory field established by Congress.). Finally, AT&T has cited to no specific federal law or regulation that conflicts with an award of interest to Core, or explained how interest on an overdue bill for utility service would frustrate the objectives of Congress.

In the telecommunications arena, the U.S. Supreme Court has held that the FCC is barred from preempting state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes. The Court relied on the express jurisdictional limitations on the powers of the FCC contained in Section 152(b) of the Communications Act of 1934, 47 U.S.C. § 152(b). *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986) (*Louisiana PSC*). Section 152(b) provides, in part, that “[Nothing] in this Act shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .”²⁷ The Court observed that this statutory provision “fences off from FCC reach or regulation intrastate matters – indeed, including matters ‘in connection’ with intrastate service.” *Louisiana PSC* at 370. The Court stated that the language fencing off intrastate matters from the reach of the FCC in this dual regulatory system was “as sweeping” as the provisions in the Communications Act of 1934 describing its purpose and the FCC’s role. The Court also rejected a narrow reading of Section 152(b) as limited to “customer charges,” and held that it encompassed the depreciation charges under consideration in that case.

²⁷ Section 152(b) was amended several times after the U.S. Supreme Court’s 1986 decision in *Louisiana PSC*. Specifically, the exceptions to the limitation on the FCC’s jurisdiction were expanded to include provisions in Section 223 (obscene or harassing telephone calls); Section 225 (services for hearing and speech impaired individuals); Section 226 (telephone operator services); Section 227 (telephone equipment); Section 301 (radio); Section 332 (mobile services); and Sections 521 *et seq.* (cable). These amendments to Section 152(b) are not relevant to the instant proceeding.

Louisiana PSC is significant because, like the instant case, it involved a regulatory matter where there is dual regulatory oversight by the FCC and the States. While ISP-bound traffic has been classified as interstate for the purpose of setting rates, it is in reality mixed traffic with both interstate and intrastate components. The award of interest by a State commission on the principal amount due after application of the FCC's rate caps for ISP-bound traffic cannot reasonably be construed as having been preempted by the Supremacy Clause of the U.S. Constitution. Similar to *Northwest Central Pipeline, supra*, this case concerns a matter subject to a system of dual federal and state regulation. In such a case, we believe that preempting an award of interest by a State commission on an amount calculated in accordance with rates established by the FCC would be an extravagant interpretation of federal power and would undermine the dual regulatory field established by Congress

In addition, we agree with Core's argument that "AT&T misconstrues and greatly exaggerates the Commission's reliance on federal law to resolve this case. The Commission never stated that it intended to apply federal law to every aspect of this case."²⁸ Core Answer at 1 (citation omitted). We applied federal law to resolve the substantive issue in this case, namely the rate for the ISP-bound traffic at issue. We also concluded that the FCC has not preempted state regulation of local ISP-bound CLEC-CLEC traffic in a manner that is consistent with the FCC's intercarrier compensation regime. *December 2012 Order* at 24. Having resolved the substantive issue in this case by adopting the FCC's rate, we conclude that the use of state law to resolve the ancillary

²⁸ Core's argument pertains to the statute of limitations in Section 1312, but is applicable to other ancillary issues such as the appropriate interest rate.

issues in this proceeding has not been preempted by federal law. AT&T cites no authority for a conclusion otherwise.²⁹

Based on our analysis, we conclude that we have the authority under the Code to require the payment of interest on overdue utility bills, and find the instant case to be an appropriate one for the award of interest at the rate of 6% on the amounts that AT&T owes to Core.

The remaining issues pertaining to the interest rate are the “mechanics” associated with interest, including the date at which interest will begin to accrue, the amounts to which interest will be applied, and the date that payment will be due. In its Confidential Exhibit attached to its Petition, Core has requested that interest be separately assessed on the amounts due for service provided in each month from May 2005 through November 2012, and that interest be calculated for a variable period ranging from zero months for service provided in November 2012 to fifty-nine months for December 2007. Core requests that the Commission require AT&T to pay the principal amount plus interest within ten days of the Commission’s order on reconsideration.

In response, AT&T avers that Core’s calculations are based on the incorrect premise that Core issued timely invoices every thirty days, when in fact Core did not

²⁹ In addition to the obvious conclusion that the Commission’s award of interest cannot conflict with nonexistent federal law, we observe that an award of interest to Core is appropriate for additional reasons. First, an award of interest is consistent with the FCC’s expectation that States are to resolve interconnection disputes, such as the one addressed by the instant proceeding, in an effective manner. *In re: Petition of UTEX Communications*, 24 FCC Rcd 12573, WC Docket No. 09-134 (October 9, 2009). Consistent with this obligation, State commissions must be allowed to award interest in appropriate cases to discourage delayed responses to reasonable requests for compensation and ensuing lengthy litigation. Second, the imposition of interest on amounts withheld from compensation is consistent with ensuring the continued quality of telecommunications services, and is permitted by Section 253(b) of the Act as long as it is competitively neutral.

begin issuing invoices until 2008, and never issued an invoice based on the \$0.0007 rate. AT&T states that, assuming *arguendo* that the Commission's *December 2012 Order* is correct, Core must issue new invoices based on the Commission-prescribed rate of \$0.0007, and that at most Core would be able to recover amounts for calls terminated beginning in May 19, 2007, pursuant to the federal limitations period established by 47 U.S.C. § 415(a).³⁰

As previously discussed, we agree with AT&T that it would not be appropriate to reach back to May 2005 to begin assessing interest on the amounts due to Core under the Commission's *December 2012 Order*. Rather, consistent with the process established in this Opinion and Order on Reconsideration, interest should begin to accrue thirty days after the principal amount that is calculated in accordance with the *December 2012 Order* is due.

2. Whether the *December 2012 Order* erroneously applied the four-year statute of limitations in Section 1312 of the Code rather than the two-year statute of limitations at 47 U.S.C. § 415 (AT&T Petition at 8-9).

a. Positions of the Parties

AT&T argues in its Petition that the federal two-year statute of limitations under 47 U.S.C. § 415³¹ should apply to this proceeding instead of the four-year statute of

³⁰ The appropriate statute of limitations applicable to this proceeding is discussed *infra*.

³¹ Section 415(a) provides as follows: "Recovery of charges by carrier. All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." Section 415(b), which is not relevant here, pertains to complaints filed against carriers for the recovery of damages not based on overcharges, and provides that such complaints must be filed with the FCC within two years from the time the cause of action accrues.

limitations under Section 1312 of the Code.³² AT&T submits that, assuming *arguendo* that the Commission has the authority to adjudicate this dispute, the Commission is obligated to apply the two-year federal statute of limitations to Core's Complaint. AT&T argues that a state statute of limitations cannot apply to a complaint governed exclusively by federal law. Accordingly, AT&T requests that the Commission amend its *December 2012 Order* so that it applies to traffic terminated on or after May 19, 2007 rather than May 19, 2005. AT&T Petition at 8-9.

In its Answer to AT&T's Petition, Core argues that AT&T misconstrues and exaggerates the Commission's reliance on federal law in this case. Core Answer at 1. Core submits that, while the Commission deferred to *Pac-West* and determined that the FCC's \$0.0007 rate cap preempted any inconsistent state rate, the Commission never determined that federal law supplants all state law provisions that apply to the ancillary issues raised by this proceeding. According to Core, the Commission's use of state law to resolve ancillary issues is consistent with TA-96 and its "deliberately constructed model of cooperative federalism." *Id.* at 2, citing *BellSouth, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007). Core points out that the FCC's *Amicus* Brief in *Pac-West* acknowledged the role of the States in implementing the reciprocal compensation obligations of Section 251 of TA-96. *Id.*

Core states that the Commission's *December 2012 Order* was premised on its underlying authority over jurisdictional carriers and facilities, as well as traffic flows that are both local and interstate. *Core Communications, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010) ("Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252. Neither regime is a subset of the other.

³² See *December 2012 Order* at 82. "We also note that our Opinion and Order does not extend to traffic terminated by Core prior to May 19, 2005, in accordance with Section 1312 of the Code, 66 Pa. C.S. § 1312."

They intersect, and dial-up internet traffic falls within that intersection.”). *Id.* at 1-2. Core submits that, in order to develop a complete order, the Commission correctly relied on its state law jurisdiction over intrastate carriers and traffic termination services provided in the Commonwealth to resolve the non-rate ancillary issues. *Id.* at 2. Core argues that the Commission’s assertion of jurisdiction over this case, and its use of state law to resolve ancillary issues, is fully consistent with the Act, the FCC *Amicus* Brief,³³ and the Commission’s own precedent in intercarrier compensation cases. *Id.*

In response to AT&T’s contention that the Commission erred by not applying the federal two-year statute of limitations under Section 415, Core submits that the Commission was not required to apply the federal statute of limitations and acted fully within its authority in relying on 66 Pa. C.S. § 1312 to find a reasonable limit on backbilling. *Id.* at 7. Core contends that, even if the federal statute of limitations applies, the Parties’ dispute over the AT&T Indirect Traffic did not arise until 2008, when Core began to invoice AT&T.³⁴ Core filed its Complaint in this case in 2009, less than two years after it began invoicing AT&T. *Central Scott Tel. Co. v. Teleconnect Long Distance Services & Sys. Co.*, 832 F. Supp. 1317, 1320-21 (S.D. Iowa 1993) (statute of limitations began running on the due date of the bills).

b. Disposition

Having considered the arguments of both Parties, we conclude that the two-year federal statute of limitations at 47 U.S.C. § 415(a) is not controlling in this proceeding, and that it was within our authority to utilize the four-year statute of

³³ FCC *Amicus* Brief at 4. (“The 1996 Act gives both the FCC and the state commissions a role in implementing the reciprocal compensation obligations of section 251.”).

³⁴ Core Exh. BLM-1 (showing that Core’s first invoice to AT&T was dated January 1, 2008).

limitation set forth at Section 1312 of the Code. As discussed above, Section 1312 establishes a four-year statute of limitations applicable to refunds paid by utilities, and it has been our established practice, as matter within our discretion, to apply the four-year statute of limitations to the amounts owed to utilities by customers, as follows:

Section 1312 of the Public Utility Code permits ratepayers to seek rate refunds when certain findings are made, up to a four-year past period measured from the date that the improper billing was discovered. Parity and equity warrant that a utility should likewise be limited to a four-year past period for recoupment of underbillings. Also, while expressly applying to residential customers, an analogy can be drawn from the four-year limitations contained in the Commission's regulations at Section 56.35 and 56.83(7). We can find no distinguishing factor which would suggest that a different time limitation for commercial customers should be applied.

Angie's Bar at 12. The Commission has followed the precedent established by *Angie's Bar* in a series of cases dating from 1990. See e.g., *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program*, Docket No. P-2009-2143607 (Order entered August 24, 2010); *Encarnacion v. PPL Electric Utilities Corp.*, Docket No. C-20078087 (Order entered September 29, 2008); *Berry v. PGW*, Docket No. F-01184412 (Order entered April 15, 2004). Thus, while 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.

The instant Complaint was filed by Core under its state Switched Access Tariff, which we determined is not applicable to the traffic at issue. *December 2012 Order* at 61. Instead, we resolved Core's Complaint by applying the FCC's capped rate of \$0.0007 established by the FCC's *ISP Remand Order* to the traffic at issue. *Id.* at 80. Having adopted the FCC's rate cap, we concluded that "States have not been precluded

from adjudicating intercarrier compensation disputes in a manner that is consistent with the FCC’s intercarrier compensation regime.” *Id.* In our view, however, the adoption of a rate cap established by the FCC in a Commission proceeding does not convert that proceeding to one governed exclusively by federal law, as AT&T contends. Nor does it turn the Commission into a “mini FCC” bound by, *inter alia*, all of the FCC’s procedural rules and regulations. In adjudicating the instant dispute, we conclude that application of non-rate provisions under the state authority granted to us by the Code was appropriate and consistent with the FCC’s intercarrier compensation regime.

The application of a state four-year statute of limitations, in lieu of the two-year statute of limitations under 47 U.S.C. § 415(a), is consistent with federal court precedent. The application of a state four-year statute of limitations was upheld by the Fifth Circuit Court of Appeals in a case involving a class action suit seeking to prevent the collection of cell phone debt that was approximately three years old. *Castro v. Collecto, Inc.*, 634 F.3d 779 (5th Cir. 2011) (*Castro*). In a preemption analysis, the Fifth Circuit held that Section 415(a) did not apply because Congress had not made it clear that it intended to preempt state statutes of limitations with respect to actions to collect debt.

Like the charges in the instant case addressing intercarrier compensation for ISP-bound local traffic, the charges at issue in *Castro* were non-tariffed. Because the two-year federal statute of limitations under Section 415(a) applies only to “lawful charges,” the Fifth Circuit reasoned that, given the detariffing of charges by the FCC in recent years, it is unclear whether the ambiguous term “lawful charges” is analogous to “tariffed charges.” The Fifth Circuit declined to interpret the ambiguous term “lawful charges” to include non-tariffed charges, and held that Congress has not indicated a “clear and manifest purpose” to preempt state statutes of limitations governing actions under state law to recover non-tariffed charges. 634 F.3d. at 788. “We conclude that § 415(a) does not apply to the plaintiffs’ debts, because Congress has not made it clear that it intended for § 415(a) to preempt state statutes of limitations with respect to actions to

collect debts like those at issue here. . . [W]e assume that Congress did not intend to preempt ‘the historic police powers of the states,’ absent a showing that this was ‘the clear and manifest purpose of Congress.’” *Id.* at 784 (quoting *Wyeth v. Levine*, 555 U.S. 555 (2009)).

The Fifth Circuit began its analysis by observing that Congress had not defined the term “lawful charges” in the Federal Communications Act of 1934, as amended by the Telecommunications Act of 1996, and that the legislative history of the Act did not provide clear guidance. The Fifth Circuit concluded that the term “lawful charges” in § 415(a) was ambiguous, as follows:

When the [Federal Communications Act] was enacted in 1934, it required all carriers to file their rates, also called “tariffs,” with the FCC. Under that regime, the term “lawful charges” was practically interchangeable with the term “tariffed charges,” because the only charges that any phone company could lawfully collect were those that had been filed with the FCC. That regime has been changed, however. Pursuant to congressional amendments to the [Federal Communications Act], the FCC has since released many telecommunications carriers from the requirement of filing tariffs. . . . Despite the fact that many telecommunications carriers were released from the requirement of filing tariffs, Congress did not change the language of § 415(a). As a result, although Congress and the FCC have drastically changed how a charge is determined to be in accordance with law, it is unclear whether the meaning of the term “lawful charges” in § 415(a) has expanded accordingly.

Castro at 785-786 (citations omitted).

The Fifth Circuit’s reasoning is compelling, and AT&T has cited no authority to the contrary. We therefore conclude that § 415(a) is not controlling over the intercarrier compensation charges at issue in this proceeding, and that it was within our

authority to adhere to our established practice of applying the four-year statute of limitations set forth at Section 1312 of the Code to this proceeding. Given that the rate that Core is authorized to charge AT&T has been adjudicated in a state commission proceeding, and concluded by the issuance of a state commission order, it seems logical that state law would govern with respect to ancillary issues such as the statute of limitations. *See, Qwest v. AT&T*, 2004 U.S. Dist. LEXIS 31729 (D. Co. 2004) (claims under a state tariff are governed by the statute of limitations of the state in which the tariff is filed); *Firstcom v. Qwest*, 555 F.3d 669 (2009) (state statute of limitations applies to fraud and promissory estoppel claims that are not dependent on the Act).

Even if it were determined that federal law controls the statute of limitations applicable to this proceeding,³⁵ the four-year federal default statute of limitations at 28 U.S.C. § 1658 would apply, rather than the two-year statute of limitations found at § 415(a) of the Act. Unless Congress clearly applies § 415 to a particular amendment to the Communications Act of 1934, claims that arise under TA-96 are governed by the general statute of limitations at § 1658, rather than § 415. Moreover, the U.S. Supreme Court has held that § 1658 applies, not only to new sections of the United States Code, but also to post-1990 amendments to existing statutes. *Jones v. R.R. Donnelley & Sons*, 541 U.S. 369 (2004). “[A] cause of action ‘aris[es] under an Act of Congress enacted’ after December 1, 1990 – and therefore is governed by 1658’s 4-year

³⁵ As discussed, *infra*, even if it were determined that a federal statute of limitations applies to this proceeding, Core has satisfied both the two-year limitation in § 415(a) and the four-year limitation of § 1658. Having satisfied the federal statute of limitations, whichever is applicable, Core should be able to “reach back” and seek compensation for traffic terminated before May 19, 2005. Unlike § 415(a) and § 1658, Section 1312 of the Code is not a “pure” statute of limitations. Rather, it is a special limitation on the Commission’s substantive power to order refunds under the Code. *Metropolitan Edison Company v. Pa. PUC*, 437 A.2d 76 (Pa. Cmwlth. 1981). If it were determined that the Commission’s reliance on Section 1312 was in error, then the “special limitation” on the Commission’s power in Section 1312 would not apply.

statute of limitations – if the plaintiff’s claim against the defendant was made possible by a post-1990 amendment.” *Id.* at 382.

Claims like Core’s in this case arising under §§ 251 and 252 of TA-96 were not possible before 1990, and the sections themselves do not contain a limitations period or make reference to § 415. Therefore, § 415 is not “clearly applicable,” and the catch-all four-year statute of limitations under § 1658 applies to the claims. *T-Mobile USA v. Qwest Communications*, 2007 U.S. Dist. LEXIS 83006 (W.D. Washington 2007). The instant case similarly involves traffic that was created and made possible by provisions of TA-96. Prior to the enactment of TA-96, CLECs did not exist, and there was no duty on the part of carriers to interconnect under § 251(a)(1).

The District Court for the Eastern District of Pennsylvania also has held that § 1658 applies in a case arising out of TA-96. In an appeal of the Commission’s 1999 *Global Order*, *infra*, the Court held that 28 U.S.C. § 1658 applied to the cross-petitions for review, rather than the fourteen-day period for filing cross-petitions under the Pennsylvania Rules of Appellate Procedure. *Bell-Atlantic Pennsylvania v. Pa. PUC*, 107 F. Supp. 2d 653 (E.D. Pa. 2000), *aff’d*, *Bell-Atlantic Pennsylvania v. Pa. PUC*, 273 F.3d 337 (3rd Cir. 2001), *cert. den.*, 537 U.S. 941 (2002) (*Bell-Atlantic Pennsylvania*). The Court stated that the federal default statute of limitations applied because the Act did not specify an alternative statute of limitations that was applicable to the proceeding. 107 F. Supp. 2d at 668.

The Commission’s *Global Order* under review in that case involved the implementation of provisions of TA-96 that sought to foster competition in local telecommunications services, particularly 47 U.S.C. §§ 251-252, and established rates for unbundled network elements. *Id.* at 655. In the instant case, the Commission determined that it was required to adopt the FCC’s intercarrier compensation regime established by the *ISP Remand Order* for AT&T’s ISP-bound traffic terminated by Core.

Although the Commission's *Global Order* established rates on a generic basis, and the instant proceeding established rates for one utility, both proceedings established rates for traffic arising out of TA-96. Therefore, if a federal statute of limitations were to apply in this case, the holding in *Bell-Atlantic Pennsylvania* would be applicable to this proceeding.

In addition, as discussed above, § 415(a) of the Act applies to “actions at law by carriers for recovery of their lawful charges,” and the Fifth Circuit has held that the term “lawful charges” is limited to tariffed rates. Therefore, assuming *arguendo* that, the state four-year statute of limitations has been preempted by a federal statute of limitations because the Commission applied the FCC's rate cap to the traffic at issue, a four-year statute of limitations would still apply in this proceeding. In accordance with the Fifth Circuit holding, the FCC's rate cap, as non-tariffed, would not be considered a “lawful charge” for statute of limitations purposes, and hence would not be subject to the two-year statute of limitations at § 415(a) of the Act. Rather, the four-year general statute of limitations at 28 U.S.C. § 1658 would apply.

Even if it were determined that § 415(a) applies, we agree with Core's observation that the Parties' dispute for the purposes of § 415(a) would not have arisen until Core began to invoice AT&T. Core's first invoice to AT&T was dated January 1, 2008, and Core filed its Complaint in 2009, less than two years after it began invoicing AT&T. Therefore, the filing of the instant Complaint by Core on May 19, 2009, would have been within the two-year statute of limitations established by § 415(a). *Central Scott Tel. Co. v. Teleconnect Long Distance Services & Sys. Co.*, 832 F. Supp. 1317, 1320-21 (S.D. Iowa 1993) (statute of limitations began running on the due date of the bills); *see also*, *American Cellular v. Dobson Cellular Systems*, 22 FCC Rcd 1083 (2007) (claim under § 415(b) accrues when a claimant receives an allegedly erroneous bill).

Finally, we note that Core filed its Complaint in May 2009 under its intrastate Switched Access Tariff on file with this Commission. Clearly, its Complaint was subject to the state statute of limitations at the time it was filed. However, in June 2011, two years after Core initiated this proceeding, the Ninth Circuit issued its *Pac-West* decision. In our *December 2012 Order*, we revisited our *Material Question Order*, determined that *Pac-West* now controlled, and applied the FCC's rate cap of \$.0007 to the traffic at issue. This change in law regarding whether the FCC's *ISP Remand Order* preempted state jurisdiction over the rates for ISP-bound traffic cannot, in our view, be used to retroactively change the statute of limitations applicable to this proceeding. Accordingly, even if it were determined that § 415(a) applied, we believe that there would be compelling reasons to toll the two-year statute of limitations.

For all of these reasons, we shall deny AT&T's request that we reconsider our decision to apply the four-year statute of limitations in Section 1312 of the Code to this proceeding.

3. Whether the Commission's finding in the *December 2012 Order* that Core's Switched Access Tariff applies only to the settlement of toll charges between interexchange carriers should be eliminated.

a. Positions of the Parties

In its Petition, Core requests that we eliminate our finding in the *December 2012 Order* that Core's Switched Access Tariff "applies only to the settlement of toll charges between interexchange carriers."³⁶ Core claims that this finding is superfluous and inaccurate. Core Petition, ¶¶ 3, 20-21, 25.

In support of its argument, Core first refers to the related discussion in our *December 2012 Order* where we stated:

³⁶ *December 2012 Order* at 60.

We agree with AT&T that Core has not identified any instances in which this Commission, or any other state commission, has applied intrastate switched access rates to local traffic generally, or to locally dialed ISP-bound traffic specifically. The primary purpose of a switched access charge tariff is to establish compensation for the origination and termination of toll or non-local calls. The reciprocal compensation scheme addressed in the federal Telecommunications Act of 1996 and in subsequent FCC Orders, such as the *ISP Remand Order*, was created primarily for the settlement between local exchange companies for the transport and termination of local calls. The reciprocal compensation regime is the counterpart to the switched access charge regime, which involves the settlement between interexchange carriers for the origination, transport and termination of long distance calls. Furthermore, we take administrative notice that, as noted in our *Global Order*, we have held that “[s]witched access charges are those that LECs bill to IXC’s or other LECs, for using their facilities in the placement or receipt of *toll* calls.” As such, from a historical perspective, switched access charge tariffs do not apply to the termination of local calls. And since the traffic in this proceeding is limited to local ISP-bound traffic, it is clear that Core’s Switched Access Tariff No. 4 is not applicable here.

December 2012 Order at 59-60 (footnote omitted).

Core submits that the Commission’s finding that Core’s Switched Access Tariff “applies only to the settlement of toll charges between interexchange carriers” is simply not necessary because the *December 2012 Order* already determined that Core’s Switched Access Tariff applies to toll traffic but not local traffic. Core argues that this finding alone is sufficient to eliminate the AT&T traffic at issue, which is all locally-dialed traffic, from the scope of Core’s Switched Access Tariff. Core Petition at ¶ 25.

Core also submits that the Commission’s finding is not accurate because its tariff does not address the settlement of charges “between interexchange carriers,” but rather charges imposed by Core upon all users of Core’s switched access services. Core

asserts that its Switched Access Tariff clearly applies to toll traffic sent *by any type of carrier*, including local exchange carriers (LECs)³⁷ and CMRS carriers, which may send toll traffic to Core. Core Petition at ¶ 26.

Core is concerned that the finding that its Switched Access Tariff “applies only to the settlement of toll charges between interexchange carriers” could have unintended, prejudicial impacts on unrelated disputes. Core submits that pursuant, to its Interconnection Agreements and Traffic Exchange Agreements with other LECs, each LEC is entitled to charge the other at tariffed switched access rates for toll usage that each LEC sends to the other. Core is concerned that a finding that its Switched Access Tariff “applies only to the settlement of toll charges between interexchange carriers” could prematurely and unfairly prejudice Core’s ability to bill and collect switched charges from other LECs pursuant to such agreements. Core Petition at ¶ 30.

AT&T takes no position on this issue, except that AT&T agrees that Core’s Switched Access Tariff applies only to “toll” or “interexchange traffic” and does not apply to “local” or “locally-dialed” traffic. AT&T Answer at 9.

b. Disposition

For the purpose of resolving this issue, it appears that Core concedes that its Switched Access Tariff does not apply to AT&T’s indirect traffic.³⁸ Core states that its Switched Access Tariff is fully consistent with the *Global Order*,³⁹ in which the Commission recognized that “[s]witched access charges are those that LECs bill to IXC

³⁷ The term “LECs” includes both ILECs and CLECs.

³⁸ Core Petition at ¶ 25.

³⁹ *Joint Petition of Nextlink Pennsylvania, Inc. et al.*, Docket Nos. P-00991648 and P-00991649 (Order entered September 30, 1999) (*Global Order*).

or other LECs, for using their facilities in the placement or receipt of toll calls.”⁴⁰ For the reasons discussed above, Core requests that we eliminate the language in the *December 2012 Order* stating that its Switched Access Tariff “applies only to the settlement of toll charges between interexchange carriers.”

Core’s argument has merit. Upon further examination of our statement in the *December 2012 Order* that Core’s Switched Access Tariff “applies only to the settlement of toll charges between interexchange carriers,” we agree with Core that this statement is too restrictive. In our attempt to emphasize the fact that Core’s Switched Access Tariff applies to charges for the origination and termination of toll or non-local calls, we inadvertently limited the types of carriers that transmit toll and non-local calls. However, as Core correctly notes in its Petition, carriers other than interexchange carriers, such as other local exchange carriers and wireless carriers that are not interexchange carriers, also transmit toll or non-local calls that are subject to Core’s Switched Access Tariff.

In light of the above, we shall grant Core’s request and amend our *December 2012 Order* to eliminate the conclusion on page 60 that “[b]ased upon our review of Core’s Switched Access Charge Tariff, we conclude that the Tariff applies only to the settlement of toll charges between interexchange carriers.” In granting this request, we agree 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. However, this does not alter our conclusion that Core’s Switched Access Tariff does not apply to the AT&T Indirect Traffic at issue in this proceeding.

⁴⁰ Core Petition, ¶ 29, citing *Global Order* at 60.

4. Whether the *December 2012 Order* violates 47 U.S.C. §§ 201(b) and 203

a. Positions of the Parties

AT&T argues that the *December 2012 Order* violates Sections 203(a) of the Act, which provides that, in the absence of a contract, a carrier is required to file a federal tariff in order to assess charges on interstate traffic. Second, AT&T argues that the *December 2012 Order* violates Section 203(c)(1), which prohibits rates other than those established in a tariff. Finally, AT&T argues that the *December 2012 Order* violates Section 201(b) by allowing Core to charge an “unjust and unreasonable” rate.

AT&T contends that Core is permitted to assess charges on jurisdictionally interstate traffic, such as the traffic at issue here, in one of two ways: (1) by filing a federal tariff; or (2) by negotiating a contract or agreement with the other carrier.⁴¹ AT&T Petition at 4-5. In the absence of a contract or agreement, AT&T submits that Core should have filed a federal tariff establishing a rate for such traffic pursuant to 47 U.S.C. § 203(a). Since Core never filed a federal tariff, AT&T argues that Core is prohibited from charging AT&T for the termination of jurisdictionally interstate traffic pursuant to § 203(c)(1), which prohibits Core from charging any rate other than a rate that has been established in a tariff. *Id.* at 5.

AT&T also advances the argument it made during the proceedings that the Commission does not have authority to establish federally tariffed rates. Accordingly, AT&T asserts that the *December 2012 Order* violates Section 203 because it would allow Core to charge for the traffic at issue here. Additionally, AT&T asserts that Core would be in violation of the prohibition in § 201(b) against “unjust and unreasonable” charges,

⁴¹ AT&T relies on two FCC decisions as support for its argument: *In re Sprint Communications Co. v. Northern Valley Communications, LLC*, 26 F.C.C.R. 10780, 10782 (2011). See also, *In re Qwest Communications Co. v. Northern Valley Communications, LLC*, 26 F.C.C.R. 8332, 8335 (2011).

by charging a rate that is not established in either a filed tariff or a negotiated contract.
Id.

Core rejoins that AT&T's argument that the *December 2012 Order* violates Sections 201 and 203 of TA-96 rests on the mistaken premise that Core was permitted or required to file an interstate tariff with the FCC to implement the \$0.0007/MOU rate. Core claims that no evidence is contained in the *ISP Remand Order*, the *FCC Amicus Brief* or *PacWest* to suggest that the FCC has or had any intent that CLECs file ISP-bound traffic termination charges in their FCC interstate switched access tariffs. Core Answer at 4.

b. Disposition

Reduced to its essentials, AT&T's argues that the FCC's rate cap of \$0.0007 is unjust and unreasonable, and in violation of Section 201(b) of the Act, in the absence of a perfunctory tariff filing by a carrier that mirrors the FCC's rate.⁴² AT&T would place this Commission in the untenable position of declaring that the FCC's rate cap is "by definition" unjust and unreasonable in the absence of a tariff, and therefore unlawful, where we have determined that we are preempted from establishing a rate that is inconsistent with the FCC's rate cap.

In effect, AT&T interprets Section 203 of the Act, 47 U.S.C. § 203, as prohibiting an individual carrier from charging a rate established by the FCC, applicable to all carriers nationwide, in the absence of a perfunctory tariff filing by an individual carrier that mirrors the FCC's rate. The weakness of this argument is apparent when one

⁴² Section 201(b) of the Act, 47 U.S.C. § 201(b), provides in relevant part that "[a]ll charges . . . for and in connection with such communication service, shall be just and reasonable, and any such charge . . . that is unjust or unreasonable is hereby declared to be unlawful."

considers the purpose of Section 203, which has been part of the Act since 1934. In short, the underlying policy reasons behind the Section 203 requirement for a tariff filing by an individual carrier are satisfied by virtue of the fact that the \$0.0007 rate for termination of ISP-bound local traffic is a national rate that has been established by the FCC.

Section 203's tariff filing requirement was based on the public interest in securing uniformity in rates, suppressing unjust discrimination and undue preferences, and preventing special and secret agreements. To that end, Congress required that rates be established publicly, be inflexible while in force, and be unalterable except in the manner prescribed by statute. *In re Applications of AT&T*, 42 FCC2d 654 (1973); *accord, AT&T v. Central Office Telephone*, 524 U.S. 214 (1998), *reh. den.*, 524 U.S. 972 (1998) (the purpose of the filed rate doctrine in Section 203 is to prevent discriminatory charges). Preventing secret and discriminatory charges is accomplished by the filing of public tariffs by individual carriers under Section 203. Secret and discriminatory charges also are prevented where nation-wide rates are established by the FCC itself in its rule-making capacity.

In this case, FCC-established rates, such as the rate caps applicable to ISP-bound traffic, are by definition uniform and non-discriminatory, not only with respect to one individual carrier, but nation-wide. Also by definition, a rate that has been established by the FCC itself is a rate that the FCC has determined to be just and reasonable. Accordingly, the underlying policy reasons for requiring a tariff filing by an individual carrier are satisfied when the rate in question is a national rate that has been established by the FCC.

Moreover, a tariff filing in this case is not required under FCC precedent. The FCC has recognized that the filing of a perfunctory tariff that simply reflects an FCC-established rate or benchmark is unnecessary. *In re Access Charge Reform; Reform*

of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001) (*Seventh Report and Order*). In this proceeding, the FCC determined that rates at or below the FCC’s benchmarks would be presumed to be just and reasonable. “CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established.” *Seventh Report and Order* at 9948. The FCC adopted permissive tariffing for rates at or below the benchmarks, under which mandatory tariffing of benchmark rates was no longer required.

The FCC also has indicated that establishing rates for ISP-bound traffic through a rulemaking process is an alternative to establishing rates through individual tariffs. In the FCC’s brief filed with the U.S. Circuit Court of Appeals for the District of Columbia (D.C. Circuit) in the appeal of the FCC’s 2008 *Second ISP Remand Order*⁴³ explaining its authority to establish intercarrier compensation rules for ISP-bound traffic, the Commission stated as follows:

[T]he [CLEC] intervenors misinterpret section 205. That provision sets out remedies that obtain when the Commission conducts a section 204 adjudicatory investigation of individual tariffed charges filed under section 203. Section 205 does not limit the Commission’s authority to adopt pricing methodologies using its section 201 ratemaking and rulemaking authority. Indeed, *the Commission on multiple occasions has prescribed rate levels through general notice and comment rulemaking proceedings, rather than through hearings on specific tariffs* under sections 204 and 205.

FCC Brief at 51 (May 1, 2009) (internal citation and footnote omitted; emphasis supplied). The FCC has long implemented § 201(b) through the issuance of rules and

⁴³ *In the Matter of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, 24 FCC Rcd 6475 (released November 5, 2008), summarized at 73 *Fed. Reg.* 72732 (Dec. 1, 2008).

regulations. *Global Crossing Telecommunications v. Metrophones Telecommunications*, 550 U.S. 45 (2007).

The recent federal district court decision cited by AT&T in support of its argument that Core cannot charge AT&T for the ISP-bound traffic at issue is not on point. *Connect Insured Telephone v. Qwest Long Distance*, 2012 U.S. Dist., LEXIS 101721 (N.D. Tex. 2012). The Court in that case held that a CLEC was required to have either a tariff or an agreement in place setting forth the applicable switched access charges for the traffic at issue, which was long-distance traffic sent to the CLEC by an interexchange carrier (IXC). However, unlike ISP-bound traffic, there were no nationwide rate caps prescribed by the FCC for the switched access charges at issue in that case.⁴⁴

Similarly, the two FCC decisions cited by AT&T to support its argument that Core cannot charge for the services it provided to AT&T because it had no applicable federal tariff or agreement are not on point. *In re Qwest Communications Corp. v. Northern Valley Communications, LLC*, 26 F.C.C.R. 8332 (2011); *In re Sprint Communications Co. v. Northern Valley Communications, LLC*, 26 F.C.C.R. 10780 (2011). These two cases involved a challenge to provisions in an existing tariff, and the issue addressed by the FCC was whether the tariff's provisions were consistent with the FCC's rules and orders governing CLEC access charges and otherwise just and reasonable. Here, the rates in question are non-tariffed national rates for ISP-bound traffic established by the FCC.

In fact, in the litigation that gave rise to the two cases cited by AT&T, the U.S. District Court for the District of South Dakota addressed the issue of whether the absence of a tariff would bar recovery of access charges for services provided by

⁴⁴ The FCC's regulations link a CLEC's access charge rates to the rates charged by the competing ILEC. 47 C.F.R. § 61.26.

Northern Valley Communications, LLC. (Northern Valley) to Qwest Communication Corp. (Qwest). In denying Qwest’s motion to dismiss, the Court held that the filed rate doctrine⁴⁵ would *not* apply to defeat Northern Valley’s claim. The Court explained that recovery of untariffed charges would not necessarily violate the antidiscrimination policy at the heart of the filed rate doctrine, as follows:

If the [antidiscrimination] policy does extend to non-tariff services, all that would be required is that Northern Valley provide such call termination services to all IXCs under the same terms and conditions. There is no claim, at this stage of the pleadings, that Northern Valley has failed to do so. In fact, Northern Valley has nearly identical claims pending against IXCs AT&T and Sprint, seeking payment for switched access service.

Northern Valley Communications, LLC v. Qwest Communications Corp., 659 F. Supp. 2d 1062 (D. South Dakota 2009) at 1068. The Court rejected Qwest’s contention that Northern Valley could not collect for its services because the services were not covered by either a tariff or an interconnection agreement. *Id.* at 1069. The Court concluded that “[w]here, as here, it is alleged that the charges as set out in Northern Valley’s tariffs do not apply . . . , the filed rate doctrine would not apply to defeat Northern Valley’s unjust enrichment claim.” *Id.* at 1070.

⁴⁵ Under the filed rate doctrine, also called the filed tariff doctrine, entities generally are required to adhere to tariffed rates, terms, and conditions of service. The filed rate doctrine is motivated by two principles: (1) preventing carriers from engaging in price discrimination as between ratepayers (the “nondiscrimination strand”); and (2) preserving the exclusive role of federal agencies in approving rates for telecommunications services that are “reasonable” by keeping courts out of the rate-making process (the “nonjusticiability strand”), since rate-making is a function that regulatory agencies are more competent to perform.

In a later Opinion and Order in this case, the Court noted that several of eleven related cases in the District of South Dakota had been stayed and referred to the FCC and/or the South Dakota Public Utilities Commission under the doctrine of primary jurisdiction. In denying a motion to lift the stay, the Court stated that it appeared that the FCC had indicated (in a series of orders addressing the conference calling services at issue in those cases) that LECs should receive compensation for the services they had provided. “Thus, it seems unlikely that the FCC foreclosed any compensation for services [Northern Valley] provided outside of the tariff or a negotiated contract, as defendant argues.” *Northern Valley Communications, LLC v. Qwest Communications Corp.*, 2012 U.S. Dist. LEXIS 89563 (2012).

Consistent with the reasoning of the Court, the filed rate doctrine should not act as a bar to Core collecting for the services it provided to AT&T. In the instant case, the rates in question are national rates, applicable to all ISP-bound traffic, that were established by the FCC. Application of these rates will not violate either of the two underlying purposes of the filed rate doctrine. First, Core will not be free to charge different rates to different customers, in violation of the antidiscrimination policy underlying the filed rate doctrine. Second, since the FCC has established the rate to be applied to the traffic in question, the courts will not be called upon to engage in ratemaking, in violation of the “nonjusticiability strand” of the filed rate doctrine. *Marcus v AT&T Corp.*, 138 F.3d 46 (2nd Cir. 1998).

For the foregoing reasons, we conclude that our *December 2012 Order* did not violate Sections 201 and 203 of the Act simply because Core did not have a tariff on file at the FCC before the issuance of our *December 2012 Order*. It must be remembered that Core’s position was that its Switched Access Charge Tariff on file with this Commission applied to the ISP-bound traffic at issue in this proceeding. This was a credible position to have taken, particularly before the issuance of the *Pac-West* decision by the Ninth Circuit Court of Appeals in June 2011, and this Commission’s adoption of

the Ninth Circuit's decision in the *December 2012 Order*. AT&T cannot argue that, on the one hand, Core must issue revised invoices at the FCC's \$0.0007 rate in accordance with the *December 2012 Order*, but on the other hand, that any such revised invoices are *per se* unjust and unreasonable because there was no tariff on file when the original invoices were issued beginning in 2008. In addition, we agree with Core that there is no indication in the FCC's *ISP Remand Order*, the FCC *Amicus* Brief, or *PacWest* to suggest that CLECs are required to file FCC-prescribed ISP-bound traffic termination charges in their FCC interstate switched access tariffs. The quotation from the FCC's brief, *supra*, indicates otherwise. AT&T's Petition on this point is denied.

5. Whether the *December 2012 Order* violates 47 U.S.C § 251(b)(5).

a. Positions of the Parties

In its Petition, AT&T also submits that the *December 2012 Order* violates Section 251(b)(5) of the Act, which obligates all LECs to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” AT&T Petition at 6. In support of its argument, AT&T submits that, because the *December 2012 Order* correctly found that Core does not have an agreement, tariff or any other arrangement establishing compensation for the traffic at issue in this case,⁴⁶ it should not have allowed Core to recover 251(b)(5) charges in the absence of such an arrangement. AT&T argues that the *December 2012 Order* is inconsistent with the plain language of Section 251(b)(5) because nothing therein entitles a carrier to compensation unless and until an arrangement has been established for such compensation. AT&T Petition at 6.

⁴⁶ *December 2012 Order* at 2, 59-60.

AT&T cites to the FCC's *Unified Intercarrier Compensation Order*⁴⁷ for the proposition that, in the absence of an interconnection agreement, a tariff is a permissible means to establish a reciprocal compensation arrangement under Section 251(b)(5). However, AT&T asserts that Section 251(b)(5) is not self-executing, but requires some sort of "arrangement" before payment obligations are triggered.⁴⁸ AT&T submits that to this day, Core has not filed a tariff or entered into any agreement or other compensation arrangement with AT&T that would trigger the reciprocal compensation payment obligations of Section 251(b)(5) with respect to the locally-dialed, ISP-bound traffic. For this reason, AT&T argues that the Commission erred in determining that Core is entitled to compensation from AT&T for the termination of that traffic on a going forward basis and for past traffic exchanges. AT&T Petition at 7.

In response to AT&T's position, Core contends that, contrary to AT&T's argument, nothing in Section 251(b)(5) limits the Commission's authority to craft a resolution of a CLEC-CLEC intercarrier compensation dispute where the FCC has mandated a rate cap, but set no other parameters. Core Answer at 5. Core submits that AT&T was unable to cite any authority that interprets Section 251(b)(5) in such a restrictive manner. *Id.*

Core takes the opposite view of AT&T's interpretation of the FCC's statement that "neither the Commission's reciprocal compensation rules [nor other rules applicable to wireless carriers not relevant here] . . . specify the types of arrangements that trigger a compensation obligation."⁴⁹ Whereas AT&T interprets this statement to mean that the *December 2012 Order* violates Section 251(b)(5) because it would allow Core to recover charges without such an arrangement, Core interprets it to mean that the

⁴⁷ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4855, ¶ 4 (Feb 24, 2005) (*Unified Intercarrier Compensation Order*).

⁴⁸ *Unified Intercarrier Compensation Order* at ¶¶ 9-10.

⁴⁹ AT&T Petition at 7.

FCC has imposed no rule that would preempt state authority over CLEC-CLEC intercarrier compensation disputes arising under Section 251(b)(5). *Id.*

In further support of its argument, Core notes that the Commission previously found such authority in state law when, in the *Material Question Order* in this proceeding, it stated as follows:

We also find without merit AT&T's contention that because these Parties do not have an interconnection agreement, in as much as CLECs cannot compel other CLECs to negotiate interconnection agreements under the 1996 Telecommunications Act, 47 U.S.C. §§151 *et seq.*, as amended, Core is somehow precluded from making its Complaint before this Commission.

Material Question Order, at 10 and fn. 5. In addition, Core submits that in *Consolidated Communications Enterprise Services, Inc. v. OmniPoint Communications, Inc.*, Docket No. C-2010-2210014 (Reconsideration Order entered August 31, 2012) (*CCES Reconsideration Order*), the Commission relied on Sections 1308 and 1309 of the Code to clarify its authority to establish rates in a formal complaint proceeding. Core Answer at 5-6. More specifically, the Commission stated:

In conclusion we agree with CCES that T-Mobile's argument is based upon the "unfounded and unsupported conclusion that the reference in Section 1309(a) to 'complaint' is limited in scope by Section 701, which only authorizes complaints against a public utility or the Commission itself." As CCES argues, nothing in the Code states that Chapter 7 restricts the Commission's authority under Section 1309, which sets no limits on the rate setting complaint process.

CCES Reconsideration Order at 11 (record citation omitted).

Finally, in response to AT&T's statement that Core still has not filed a tariff or entered into any agreement or other compensation arrangement with AT&T that would trigger the reciprocal compensation payment obligations of Section 251(b)(5) with respect to the locally-dialed, ISP-bound traffic, Core submits that the record reflects that Core has successfully negotiated TEAs with other CLECs, but that AT&T refused Core's offer to negotiate a TEA between August 2008 and March 2009.⁵⁰

b. Disposition

We agree with Core's observation that AT&T's argument is based on an overly prescriptive interpretation of the requirements of Section 251(b)(5) with regard to ISP-bound traffic. We do not believe that Core is required under Section 251(b)(5) to have a reciprocal compensation arrangement in place as a condition to receiving compensation for the ISP-bound traffic at issue in this case. For the purposes of the instant adjudication, the FCC has determined that ISP-bound traffic is not subject to the Section 251(b)(5) reciprocal compensation regime.⁵¹ Rather, ISP-bound traffic is subject to the compensation regime established in the *ISP Remand Order*, which does not require a separate or additional compensation arrangement prior to receiving compensation for terminating ISP-bound traffic. Therefore, we see no reasonable basis to conclude that the absence of a Section 251(b)(5) reciprocal compensation arrangement precludes Core from receiving compensation under the terms of the *December 2012 Order*.

Following the enactment of TA-96, the FCC initially took the position that Section 251(b)(5) and its reciprocal compensation provisions did not apply to ISP-bound

⁵⁰ Core St. 1.0 (Direct Testimony of Bret L. Mingo) at 12.

⁵¹ The positions expressed in this Opinion and Order on Reconsideration are intended to resolve the instant proceeding, and do not affect the legal arguments that the Commission has presented in the context of the pending appeal of the FCC's November 18, 2011 *USF/ICC Transformation Order*, WC Docket No. 10-90 *et al.*, before the 10th Circuit U.S. Court of Appeals.

traffic. In 1999, the FCC issued a *Declaratory Ruling*⁵² holding that ISP-bound traffic is jurisdictionally interstate since end users access websites across state lines. Because the FCC's *Local Competition First Report and Order*⁵³ had concluded that the reciprocal compensation obligation in Section 251(b)(5) applied only to local traffic, the FCC concluded that ISP-bound traffic was not subject to Section 251(b)(5). On appeal, the D.C. Circuit held that the FCC had not adequately explained how its jurisdictional analysis was relevant to determining whether a call to an ISP was subject to reciprocal compensation under Section 251(b)(5). *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

In response to the D.C. Circuit's decision in *Bell Atlantic*, the FCC released the *ISP Remand Order*, *supra*, on April 27, 2001, which concluded that ISP-bound traffic was excluded from Section 251(b)(5) by Section 251(g) of the Act, 47 U.S.C. § 251(g). Section 251(g), *inter alia*, maintained the pre-1996 compensation requirements for information access. The FCC reasoned that ISP-bound traffic constitutes "information access" and therefore is subject to the FCC's Section 201 jurisdiction over interstate communications rather than the reciprocal compensation provisions of Section 251(b)(5). On appeal, the D.C. Circuit once again found that the FCC had not provided an adequate legal analysis for the rules it adopted in the *ISP Remand Order*. The Court held that Section 251(g) did not provide a basis for the FCC's decision in the *ISP Remand Order* because there was no pre-1996 obligation with regard to intercarrier compensation for ISP-bound traffic. The Court remanded the *ISP Remand Order* to the FCC without

⁵² *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*), *vacated and remanded*, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

⁵³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*).

vacating the FCC's decision, observing that the Commission likely had the authority to adopt the rules set forth in the *ISP Remand Order*. *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (*WorldCom*). Consequently, the interim rules adopted in the *ISP Remand Order* remained in effect, notwithstanding the Court's decision in *WorldCom*.

In response to a petition filed by Core in 2007, the D.C. Circuit issued a writ of mandamus in 2008, directing the FCC to respond to the 2002 *WorldCom* remand with a final, appealable order explaining the legal authority for the FCC's rules that excluded ISP-bound traffic from the intercarrier compensation requirement of Section 251. *In re Core Communications*, 531 F.3d 849 (D.C. Cir. 2008). On November 5, 2008, the FCC released an Order on Remand and Report and Order and Further Notice of Proposed Rulemaking that, *inter alia*, responded to the *WorldCom* remand and explained its legal authority to exclude ISP-bound traffic from the intercarrier compensation regime. *In the Matter of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, 24 FCC Rcd 6475 (released November 5, 2008), summarized at 73 *Fed. Reg.* 72732 (Dec. 1, 2008) (*Second ISP Remand Order*).

In the *Second ISP Remand Order*, the FCC changed its reasoning, and concluded that “the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic” and that Section 251(b)(5) is not limited to local traffic. *Second ISP Remand Order* at 6479 (emphasis supplied). However, the FCC specifically held that “although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to our authority under sections 201 and 251(i)⁵⁴ of the Act.” *Id.* at 6478. The FCC reasoned that, although Section 251(b)(5) imposes the duty on all LECs to establish

⁵⁴ Section 251(i) provides that “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.”

reciprocal compensation arrangements for the transport and termination of telecommunications, ISP-bound traffic also is subject to the FCC's Section 201 authority to regulate intercarrier compensation because ISP-bound traffic is clearly interstate in nature. *Id.* at 6483.

Despite acknowledging that ISP-bound traffic is Section 251(b)(5) traffic, the FCC found that its independent authority to regulate ISP-bound traffic under Section 201 was not diminished. The FCC concluded that it “retains full authority to regulate charges for traffic and services subject to federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework.” *Id.* at 6484. Specifically, the FCC held that it has the authority under Section 201 to issue pricing rules for ISP-bound traffic. “Consequently, in the *ISP Remand Order*, the [FCC] properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.” *Id.* at 6485. The FCC indicated that the ISP-bound traffic rates it established under its Section 201 authority are the “reciprocal compensation rates” for the purposes of Section 251(b)(5). The FCC reasoned as follows:

[T]his result does not run afoul of the Eighth Circuit's decision on remand from the Supreme Court in the *Iowa Utilities Board* litigation, which held that ‘the FCC does not have the authority to set the actual prices for the state commissions to use’ under section 251(b)(5). At the time of that decision, under the *Local Competition First Report and Order*, section 251(b)(5) applied only to local traffic. Thus, the Eighth Circuit merely held that the Commission could not set the reciprocal compensation **rates** for local traffic. The court did not address the Commission's authority to set reciprocal compensation **rates** for interstate traffic. In sum, the Commission plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic under section 201(b). . .

73 Fed. Reg. at 72735. Noting that the D.C. Circuit had affirmed the FCC’s decision not to forbear from imposing the rate caps on ISP-bound traffic that the FCC had promulgated in the 2001 *ISP Remand Order*⁵⁵, the FCC observed that the policy reasons behind the rate caps had not been questioned by any court, and in fact had been upheld by the D.C. Circuit in 2006. The FCC’s *Second ISP Remand Order* accordingly maintained the rate caps on ISP-bound traffic, based on the FCC’s prior policy justifications and its legal authority under Section 201.

On appeal once again, the DC Circuit affirmed the FCC’s *Second ISP Remand Order*. *Core Communications, Inc. v. F.C.C.*, 592 F.3d 139, 144 (D.C. Cir. 2010), *cert. den.* 131 S. Ct. 597, 131 S. Ct. 626 (2010) (*Core Communications 2010*). In its decision, the DC Circuit observed that “[b]efore the FCC imposed a rate cap system, rates for [ISP-bound traffic] were governed, in practice, by the ‘reciprocal compensation provisions’ of the 1996 Act.” *Core Communications 2010* at 141. The DC Circuit further observed that the FCC had removed ISP-bound traffic from the reciprocal compensation provisions of Section 251(b)(5) due to concerns about the results of applying reciprocal compensation provisions to one-way, ISP-bound traffic. Citing the FCC’s 2001 *ISP Remand Order*, the D.C. Circuit described the concerns as follows: “Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. . . . It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone. . . . In some instances, this led to classic regulatory arbitrage. . . .” *Id.* at 142.

The D.C. Circuit adopted the FCC’s reasoning, and upheld the FCC’s determination to treat ISP-bound traffic differently than interstate traffic that is subject to the Section 251(b)(5) reciprocal compensation regime. Neither the FCC in its *Second*

⁵⁵ *In re Core Communications*, 455 F.3d 267 (2006)

ISP Remand Order, nor the DC Circuit in *Core Communications 2010*, addressed the mundane issue of whether any residual requirements under Section 251(b)(5) remained applicable to ISP-bound traffic, given the FCC's decision to remove ISP-bound traffic from the Section 251(b)(5) reciprocal compensation regime and place it under the FCC's Section 201 authority to establish just and reasonable rates. However, logically it would make little sense for the FCC to remove ISP-bound traffic from the Section 251(b)(5) reciprocal compensation regime, while still subjecting ISP-bound traffic to the Section 251(b)(5) requirement to establish a reciprocal compensation arrangement.

AT&T's argument that Section 251(b)(5) requires a "reciprocal compensation arrangement" for traffic that is not subject to the Section 251(b)(5) reciprocal compensation regime therefore does not make sense to us. At most, it seems that any residual requirement for an "arrangement" under Section 251(b)(5) for ISP-bound traffic would rise only to the level of a purely ministerial act, given that ISP-bound traffic is subject to prescribed rate caps promulgated by the FCC under Section 201. There is no mystery regarding the rates applicable to the ISP-bound traffic at issue, given the *Pac-West* decision and this Commission's *December 2012 Order*. Given the rate caps on ISP-bound traffic prescribed by the FCC under Section 201, at most any residual requirement under Section 251(b)(5) for a TEA or a tariff would require only a perfunctory and ministerial act.

Moreover, the record demonstrates that Core requested a TEA with AT&T in 2008, but the Parties were unable to agree on the appropriate rate for the termination of the ISP-bound traffic. The dispute between the Parties was not resolved until the issuance of the *December 2012 Order*, now the subject of the instant petitions for reconsideration filed by both Parties. AT&T would have us retroactively require that Core have had an uncontested tariff at the FCC or a TEA with AT&T prior to the initiation of this proceeding, before the appropriate rate for the traffic at issue was established by the Commission. Of course, if such a tariff or a TEA had existed, this

proceeding would not have been necessary. The absence of a prior “arrangement” in the form of a TEA or a tariff is a necessary corollary to the dispute between the Parties and the subsequent litigation before the Commission. AT&T, however, would place the adverse consequence emanating from the existence of this dispute between the two Parties solely on Core. This strikes us as unreasonable. Going forward, this position, if adopted, could lead other carriers to refuse to enter into even perfunctory TEAs for ISP-bound traffic to avoid any responsibility for the payment of charges.

In conclusion, we reject AT&T’s argument that the absence of a prior “reciprocal compensation arrangement” precludes Core from receiving compensation from AT&T under the terms of the Commission’s *December 2012 Order*, as amended by the instant Opinion and Order on Reconsideration.

6. Whether the *December 2012 Order* violates the federal prohibition against retroactive ratemaking

a. Positions of the Parties

AT&T cites two cases in support of its position that the provisions of the *December 2012 Order* that apply a rate to traffic exchanged prior to the filing date of Core’s Complaint on May 19, 2009, violate the federal rule against retroactive ratemaking.⁵⁶ AT&T submits that, although the Commission correctly found that the state law prohibition against retroactive ratemaking was “no longer relevant,” once the Commission found that federal law controlled,⁵⁷ the Commission then failed to recognize and apply the federal law against retroactive ratemaking. AT&T asserts that, even if this Commission had jurisdiction to establish a rate for the traffic at issue, the federal

⁵⁶ *TRT TeleCommunications Corp. v. FCC*, 857 F.2d 1535, 1547 (D.C. Cir. 1988) (“the rule against retroactive rate increases is one that emerges from sections 201-205 of the Communications Act.”). *See also Qwest Corp. v. Koppendrayner*, 436 F.3d 859, 863-64 (8th Cir. 2006).

⁵⁷ *December 2012 Order* at 80.

prohibition against retroactive ratemaking would preclude the application of any such rate for traffic exchanged prior to May 19, 2009.

Core disagrees with AT&T's "retroactive ratemaking" argument and claims that this doctrine applies where an established tariffed rate is superseded retroactively by a new rate, announced after the fact. Core Answer at 6. In this case, Core contends that the Commission simply is applying a rate that has existed since 2001, when the *ISP Remand Order* was first promulgated.⁵⁸ Core Answer at 6-7. Core notes that AT&T's position in this case was that the *ISP Remand Order* plainly applies to the CLEC-CLEC traffic at issue; Core argues that AT&T therefore had plenty of notice that the FCC's rate could be applied to this traffic. Core opines that AT&T simply is hoping that an effective rate of zero will be applied to traffic exchanged prior to May 19, 2009. Core Answer at 7.

b. Disposition

We agree with Core's position on this issue. We previously have determined that the four-year statute of limitations at Section 1312 of the Code should be applied to this proceeding, thereby authorizing Core to invoice AT&T for traffic exchanged on or after May 19, 2005. In arguing that the federal two-year statute of limitations should apply to this proceeding, AT&T has conceded that actions by carriers to recover charges for service rendered prior to the filing of a complaint are valid, at least with respect to traffic exchanged within the prior two years. AT&T's argument that *all* recovery for traffic exchanged before the filing of a complaint is barred by the prohibition

⁵⁸ See, *Qwest Corp. v. Koppendrayer*, *supra*. "The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability. Therefore, the rule does not apply in situations where there is 'adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.'" 436 F. 3d at 864 (citations omitted).

against retroactive ratemaking is inconsistent with its argument that the two-year federal statute of limitations applies.

Were we to agree with AT&T and conclude that the *December 2012 Order* violates the prohibition against retroactive ratemaking, we would eliminate the ability of carriers to file complaints seeking recovery of unpaid amounts due for prior service. Under AT&T's theory, all complaints would have to be forward-looking, *i.e.*, limited to speculation about future events and amounts that are unlikely to be recovered after the filing of the complaint. Eliminating the ability of complainants to seek redress for prior events would require the daily filing of speculative complaints to preserve a carrier's remedies. AT&T's theory that complaints are, as a matter of law, limited to seeking remedies for future events is novel indeed.

In this case, a legitimate controversy arose between the Parties regarding the rate that is applicable to the ISP-bound traffic at issue. AT&T vigorously argued that it owed nothing to Core because the traffic is subject to a bill and keep arrangement. Core just as vigorously argued that it was entitled to compensation under its Switched Access Tariff. It took over three years for this dispute to be resolved following the filing of Core's Complaint on May 19, 2009. Because there has been a precipitous drop in dial-up ISP-bound traffic since 2008, under AT&T's theory, which would limit recovery to traffic exchanged after May 19, 2009, this proceeding has been nothing but a stimulating intellectual exercise with no practical application.

We agree with Core that the doctrine against retroactive ratemaking applies where an established, Commission-made rate is superseded retroactively by a new rate, announced after-the-fact. The Pennsylvania Supreme Court has held that the Commission may not establish just and reasonable utility rates, and then in a subsequent proceeding, ignore its own pronouncement and retroactively repeal the rates that it previously established. In modifying a Commission order that retroactively reduced a

utility's rates, the Court held that "[t]he company . . . was entitled to rely upon the declaration of the commission as to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi legislative capacity." *Cheltenham & Abington Sewerage Co. v. Pa. PUC*, 344 Pa. 366, 369, 25 A.2d 334, 336 (1942). Commission-made rates are those rates that are "stamped with antecedent Commission-approval based upon notice, hearing and an adjudication of the claims." *Joint Petition of Citizen Power and Pennsylvania Steel and Cement Manufacturers Coalition for a Declaratory Order*, Docket No. P-2010-2195426 (Order entered July 15, 2011) at 16-17. In the instant case, there were no "Commission-made rates" that were changed retroactively by the *December 2012 Order*.

The purpose of the *December 2012 Order* was to establish, for the first time in Pennsylvania, the appropriate rate applicable to the ISP-bound traffic at issue. In establishing the appropriate rate, the Commission simply applied an FCC rate that has existed since 2001. As Core observes, AT&T had plenty of notice that the FCC's rate cap of \$0.0007 established in the 2001 *ISP Remand Order* could be applied to its traffic. Because the *December 2012 Order* did not replace a prior Commission-made rate with a new rate, the *December 2012 Order* cannot be construed as violating the principle against retroactive ratemaking.

Conclusion

For the foregoing reasons, we shall grant in part and deny in part the Petition for Reconsideration and Clarification filed by Core Communications, Inc., consistent with this Opinion and Order. We shall deny the Petition for Reconsideration filed by AT&T Corp. and TCG Pittsburgh, consistent with this Opinion and Order.

We further note that, by an Opinion and Order entered on January 4, 2013, we granted AT&T's request for a stay of our *December 2012 Order* pending disposition

of the instant petitions for reconsideration, and denied AT&T's request for a further stay pending any further judicial review. With the issuance of today's Opinion and Order on Reconsideration, the stay that we granted on January 4, 2013, automatically is lifted, and AT&T is directed to pay to Core the amount due under the terms of this Opinion and Order within thirty days of the receipt of a revised invoice from Core; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration and Clarification filed by Core Communications, Inc. on December 20, 2012, is granted in part and denied in part, consistent with this Opinion and Order.

2. That the Petition for Reconsideration and Stay filed by AT&T Corp. and TCG Pittsburgh on December 19, 2012, is denied, consistent with this Opinion and Order.

3. That the Stay of our *December 2012 Order*, which was issued by an Opinion and Order entered in January 4, 2013, is lifted.

4. AT&T Corp. and TCG Pittsburgh shall pay the amount due to Core Communications, Inc. under the terms of the instant Opinion and Order on Reconsideration within thirty days of the receipt of a revised invoice from Core Communications, Inc.

5. That this proceeding be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 15, 2013

ORDER ENTERED: August 15, 2013