Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition For Declaratory Order	)	WC Docket No. 14-70
Regarding State Jurisdiction	)	
To Adjudicate Intercarrier	)	
Compensation Disputes	)	
Concerning Dial-Up Isp-Bound	)	
Traffic	)	

REPLY COMMENTS OF CORE COMMUNICATIONS, INC.

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I. INTRODUCTION & SUMMARY

Core Communications, Inc. ("Core") respectfully submits these comments in reply to comments submitted by parties in response to the Commission's notice seeking comments dated May 16, 2014 in the above-referenced docket.

Core supports the Petition for Declaratory Ruling (the "Petition") filed by the Pennsylvania Public Utility Commission ("PAPUC") on April 29, 2014 in this docket. Core also agrees with the comments filed by the California Public Utilities Commission ("CALPUC") on June 30, 2014. Core disagrees in several respects with the comments filed by AT&T Services, Inc. ("AT&T") on June 30, 2014.

The PAPUC Petition seeks "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* and is consistent with Commission rules." Petition, at 1. Core supports the PAPUC's modest, well-reasoned request to clarify its role, and that of state commissions generally, in the enforcement and implementation of Commission requirements with respect to intercarrier compensation disputes that do not fall neatly within the classic ILEC/CLEC interconnection arbitration context which is the centerpiece of section 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252 *et seq.* ("TA-96").

Core further concurs in the CALPUC Comments' position that "state commissions do in fact have and retain jurisdiction to adjudicate such disputes so long as the result is consistent with the *ISP Remand Order* and applicable law," CALPUC Comments, at 1, and that "[s]tate commissions are given authority to mediate disputes between local carriers, even when this

touches on jurisdictionally interstate traffic, and even where Section 252 of the 1996 Act (arbitration) is not implicated," CALPUC Comments, at 2.

Core disagrees with the legal basis and implicit policy ramifications of the AT&T Comments. The thrust of the AT&T Comments is that "the [PAPUC] does not have authority over jurisdictionally interstate traffic outside a § 252 proceeding," AT&T Comments, at 22, such that the PAPUC, and presumably all state commissions, must forswear any formal complaint brought before them which would require it to enforce federal law. As set forth herein (Section III.B.) Core disagrees with this overly-restrictive and counter-productive interpretation of Commission precedent and state commission practice. Permitting states to adjudicate such cases furthers the goals of comity and the orderly and efficient resolution of carrier disputes. It is also fully consistent with existing law.

II. BACKGROUND

A. The Role of State Commissions in the Implementation of Local Telephone Competition

In the mid-1990's state commissions, including the PAPUC, began to approve applications for a new kind of telephone company—the competitive local exchange carrier, or "CLEC." Prior to this time, each state regulated one or more incumbent local exchange carriers, or "ILECs," entities which for decades enjoyed a monopoly in the market for local exchange telephone services to consumers and businesses. Each state also regulated multiple interexchange carriers, or "IXCs", which transported calls between local areas within the same state. Meanwhile, the Commission regulated IXCs which carried calls between local areas in different states. Often, as is the case with AT&T, the same company operated as an intrastate IXC, an interstate IXC and a CLEC or ILEC. Like many state commissions around the country, the

PAPUC was determined to permit CLECs to open up the market for local telecommunications in direct competition with the ILECs.[1]

The PAPUC created whole new set of rules to establish CLECs as regulated entities and police their interactions with the preexisting ILECs. The PAPUC created market entry requirements, including a certification process.[2] The PAPUC required ILECs to interconnect with CLECs, so that a CLEC's end users could exchange calls with an ILECs' end users.[3] After giving CLECs and ILEC an opportunity to negotiate, the PAPUC had to intervene in order to establish an intercarrier compensation regime, known as "reciprocal compensation," applicable to traffic exchanged between the ILEC and CLECs.[4] At that time, the PAPUC was not confronted with CLEC-CLEC disputes, and therefore focused on the ILEC-CLEC relationship.

In 1996, Congress enacted TA-96, ushering in the competitive principles established by Pennsylvania and other states on a nationwide basis. As is relevant here, the Act established that "[e]ach local exchange carrier has the… [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications;"[5] and directed state commissions to establish reciprocal compensation rates at cost-based rates.[6] In its initial TA-96 rulemaking, the Commission declared that "[t]he Telecommunications Act of 1996 fundamentally changes telecommunications regulation… [i]n the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and

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1 *Application of MFS Intelenet of Pennsylvania*, Dockets A-310203F0002 *et al*., 1995 WL 945204 (Pa.P.U.C.), at 5 ("We have firmly expressed our wholehearted commitment to opening the local telecommunications market to competition. It is a legislative mandate provided for in Chapter 30 that we have fully and actively supported.").

2 1995 WL 945205 (Pa.P.U.C.), at 39.

3 1995 WL 945205 (Pa.P.U.C.), at 38.

4 1995 WL 945204 (Pa.P.U.C.), at 2.

5 47 U.S.C.A. § 251(b)(5).

6 47 U.S.C.A. § 252(d)(2)(A).

affirmatively promote efficient competition using tools forged by Congress."[7] The Commission further stated that "[t]he 1996 Act forges a new partnership between state and federal regulators,"[8] one in which the Commission "sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets."[9] According to the Commission, "[t]he 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues."[10]

With respect to reciprocal compensation, the Commission found that state commissions would set symmetrical prices based on the ILEC's forward-looking economic costs, using the FCC-mandated total long-run incremental cost ("TELRIC") methodology when establishing rates for transport and termination.[11] As the Supreme Court recognized, "[i]t is the States that will apply those [TELRIC] standards and implement that methodology, determining the concrete result in particular circumstances."[12] "The approach was deliberate, through a hybrid jurisdictional scheme with the Commission setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates."[13]

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[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499 (1996)("*Local Competition Order*"), ¶ 1.

[8] *Local Competition Order*, at ¶ 2.

[9] *Local Competition Order*, at ¶ 22.

[10] *Local Competition Order*, at ¶ 24.

[11] *Local Competition Order*, at ¶ 35.

[12] *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384, 119 S. Ct. 721, 732, 142 L. Ed. 2d 835 (1999).

[13] *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 489, 122 S. Ct. 1646, 1661, 152 L. Ed. 2d 701 (2002); *also see, In re FCC 11-161*, 753 F.3d 1015, 1127 (10th Cir. 2014)("the Supreme Court concluded that the FCC has rulemaking authority to implement a pricing methodology for the states to implement, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.")(internal quotes omitted).

B. The Role of State Commissions in the Implementation of the *ISP Remand Order*

In the 2001 *ISP Remand Order*, the Commission determined that state commission-set TELRIC rates were too high for ISP-bound traffic; such that CLECs that served ISPs were earning too much revenue. So the Commission limited further application of TELRIC to ISP traffic with a new regime including (1) a rate cap;[14] (2) a growth cap;[15] (3) the 3:1 ratio;[16] (4) the "new market bar";[17] and (5) the "mirroring rule."[18] This new regime was to be implemented by state commissions according to Commission rules. Most important, states were charged with establishing the rate for ISP traffic, subject to the rate cap.[19] States were also directed to identify ISP-bound traffic using the 3:1 ratio.[20]

The Commission strived for years to articulate the appropriate jurisdictional basis for this ISP regime. Ultimately, the Commission and the courts recognized that ISP traffic has a dual local/interstate character. "Dial-up internet traffic is special because it involves interstate

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[14] *ISP Remand Order*, at ¶ 78 (capping the rate at which state commission could impose reciprocal compensation for ISP traffic).

[15] *ISP Remand Order*, at ¶ 78 (capping the number of minutes for which a particular carrier could collect any compensation from another carrier).

[16] *ISP Remand Order*, at ¶ 79 (establishing a 3:1 inbound-outbound traffic ratio for carriers to identify ISP traffic, and designating states to adjudicate cases to rebut this presumption).

[17] *ISP Remand Order*, at ¶ 81 (barring any compensation at all for carriers that were not exchanging ISP traffic pursuant to an agreement prior to the effective date of the order).

[18] *ISP Remand Order*, at ¶ 89 (requiring ILECs to "mirror" the capped rates for termination of voice traffic on their own networks, as a precondition to capping the rates they paid for ISP traffic).

[19] *ISP Remand Order*, ¶ 80("because the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic).

[20] *ISP Remand Order*, at ¶ 79 ("We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in this Order. Using a rebuttable presumption in this context is consistent with the approach that numerous states have adopted to identify ISP-bound traffic or "convergent" traffic (including ISP traffic) that is subject to a lower reciprocal compensation rate. A carrier may rebut the presumption, for example, by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers. In that case, the state commission will order payment of the state-approved or state-arbitrated reciprocal compensation rates for that traffic. Conversely, if a carrier can demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio, the state commission will relieve the originating carrier of reciprocal compensation payments for that traffic, which is subject instead to the compensation regime set forth in this Order.").

communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251–252."[21] Having secured this jurisdictional basis for the ISP regime, the Commission preserved and continued that regime in its 2008 *ISP Mandamus Order*.[22]

State commissions, including the PAPUC, have for many years and in countless proceedings, implemented the nuts and bolts of the ISP regime, especially in ILEC-CLEC arbitration proceedings pursuant to section 252 of TA-96.[23] The PAPUC was first confronted with a wave of "change of law" cases disputing whether the ISP regime applied immediately to existing ICAs.[24] The PAPUC applied the *ISP Remand Order* to find that a change-of-law provision in an existing ICA was triggered, and ordered parties to adopt FCC's rate cap

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[21] *Core Commc'ns, Inc. v. F.C.C.*, 592 F.3d 139, 144 (D.C. Cir. 2010).

[22] *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.R. 6475, 6584-85 (2008)("*ISP Mandamus Order*)("We note that we already have an interim intercarrier compensation regime for ISP-bound traffic, and to avoid disruption in the marketplace, we will apply on a transitional basis the pricing standards we adopted for ISP-bound traffic in the *ISP Remand Order*,[644] as modified by the *CoreForbearance Order*.[645] Currently, two rules remain in effect: (1) ISP-bound traffic is currently subject to a reciprocal compensation rate cap of $.0007 per minute-of-use; and (2) under the mirroring rule, the $.0007 cap applies to traffic exchanged with an incumbent LEC only if it offers to exchange all traffic subject to section 251(b)(5) at the same rate. As explained below, we conclude that it is appropriate to retain these rules, but only on a transitional basis until a state commission, applying the "additional costs" standards adopted in this order, has established reciprocal compensation rates that are at or below $.0007 per minute-of-use.").

[23] 47 U.S.C. § 252. This section delegates to state commissions the task of arbitrating "interconnection agreements" or "ICAs" between ILECs and CLECs that implement the federal standards set forth in TA-96 and the FCC's rules.

[24] Opinion & Order, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process*, Pa. P.U.C. Docket No. A-310752F7000, 2002 WL 34560276, Entered May 29, 2002, 98 Pa.P.U.C. 272, 2003 WL 21327014 (Pa.P.U.C.)("Based upon our review of the Interconnection Agreement and the *ISP Remand Order*, a plain reading of both of those documents leads us to conclude that the rate-specific change-of-law provision does apply in this instance. Accordingly, the reciprocal compensation rates should be modified to reflect those permitted to be in effect by the FCC."); *and see, Re Core Communications, Inc.* Application 310922F7000 Entered May 27, 2003, 2003 WL 21327014 (Pa.P.U.C.), 7 ("The *Order on Remand* provides that existing state law remains undisturbed, as do existing interconnection agreements, unless there are change of law provisions. *Order on Remand*, ¶ 82. Section 2.1 of the Core adoption agreement is a change of law provision triggered by the FCC's *Order on Remand*.").

retroactive to the effective date of the *ISP Remand Order*. The PAPUC then decided a number of cases in which carriers disputed whether the ISP regime applied to so-called "VNXX" traffic.[25]

The *ISP Remand Order* arose out of disputes between ILECs and CLECs, and there arose a question whether the order was intended to apply to CLEC-CLEC traffic. For example, in its 2001 intercarrier compensation *NPRM*, issued the same day as the *ISP Remand Order*, the FCC noted that it had generally found no reason to regulate CLEC-CLEC traffic.[26] However, the only federal circuit court of appeals to address that issue found that the FCC did intend for the *ISP Remand Order* to apply in the CLEC-CLEC context. According to Ninth Circuit, "[w]e… take the *NPRM* footnote at face value: the FCC did not contemplate a need to adopt *new* rules governing CLEC–to–CLEC ... arrangements—that is, rules other than those already adopted in the *ISP Remand Order*."[27]

C. Proceedings Before The Ninth Circuit

In 2004, a CLEC called Pac-West Telecomm sued AT&T's CLEC affiliate before the CALPUC, asking that commission to enforce the terms of Pac-West's intrastate switched access tariff and thereby require AT&T to compensate Pac-West for the termination of AT&T's ISP traffic. The CALPUC agreed with Pac-West and ordered payment pursuant to the tariff. AT&T filed a complaint in federal district court. When the court upheld the CALPUC's order, AT&T

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[25] *Rural Tel. Co. Coal. v. Pub. Util. Comm'n*, 941 A.2d 751, 758 (Pa. Commw. Ct. 2008)("Core's placement of its NXXs within a LATA, but outside of the rural carrier's local calling area, would still be a local call. Based on the above, the [PAPUC] properly determined that Core was a local exchange service."). As for ISP-bound traffic, the [PAPUC] held in 2006 that, per the *ISP Remand Order*, the FCC's mirroring rates apply to ILEC-CLEC VNXX traffic. Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Pa. P.U.C. Docket No. A-310814F7000 (entered Jan. 18, 2006), at 10. ("we are of the opinion that, based on federal law, Verizon PA's proposal with regard to the definition of "Measured Internet Traffic" in Section 2.56 of the Glossary attempts to achieve a result relative to VNXX that is not the state of federal law.").

[26] Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001)(noting the absence of any "symptoms of market failure," the Commission concluded that "we do not contemplate a need to adopt new rules governing CLEC-to-CLEC… arrangements.").

[27] *AT&T Communications of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (2011), at 997 (internal quotations and notations omitted).

appealed to the Ninth Circuit. AT&T asked the court to strike the CALPUC's order because the *ISP Remand Order* applied to its traffic, and preempted Pac-West's tariffed rate, which exceeded the FCC's rate cap.[28]

AT&T argued that "the *ISP Remand Order*… indicates again and again that its rate regime applies to all ISP-bound traffic exchanged between LECs, which therefore includes ISP-bound traffic exchanged between CLECs."[29] AT&T argued that the Commission intended to apply bill and keep when one CLEC sends ISP-bound traffic to another.[30] Although AT&T acknowledged that "[o]utside the context of ISP-bound traffic, CLECs are generally not subject to rate regulation today and are generally acknowledged not to have market power,"[31] AT&T argued that because it and Pac-West "exchanged traffic without an [interconnection agreement] prior to the *ISP Remand Order*; that fact places them within the bill-and-keep regime under *ISP Remand Order* ¶ 81."[32] When Pac-West responded that the FCC had eliminated the new markets rule in 2004, AT&T argued that the "*Core Order*… establishes, for the period of time after October 18, 2004 (when the *Core Order* issued), that the rates set forth in that Order, rather than bill-and-keep, should apply."[33]

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[28] Brief for Plaintiff-Appellants AT&T et al., *AT&T Communications of California, Inc., et al. v. Pac-West Telecomm, Inc. et al.*, U.S.C.A. (9th Cir.) Docket 08-17030, Doc. No. 19-1, at 31-32 (Jan. 28, 2009)(" *AT&T Brief*").

[29] *AT&T Brief*, at 31-32.

[30] Under the *ISP Remand Order*'s "new markets" rule, if two parties exchanging ISP-bound traffic did not have a pre-existing interconnection agreement as of the date the order became effective (and AT&T and Pac-West did not), then bill-and-keep applies between those two carriers immediately (*i.e.*, without a transition or rate caps). *AT&T Brief*, at 47.

[31] *AT&T Brief*, at 54.

[32] Reply Brief for Plaintiff-Appellants AT&T et al., *AT&T Communications of California, Inc., et al. v. Pac-West Telecomm, Inc. et al*., U.S.C.A. (9th Cir.) Docket 08-17030, Doc. No. 34-1, at 26 (Apr. 13, 2009)(" *AT&T Reply Brief*").

[33] *AT&T Reply Brief*, Doc. No. 34-1, at 27.

The Ninth Circuit asked the Commission to help it determine whether the *ISP Remand Order* was intended to apply to CLEC-CLEC traffic. In its *Amicus Brief* to the court,[34] the Commission stated "[t]he 1996 Act gives both the FCC and the state commissions a role in implementing the reciprocal compensation obligations of section 251."[35] The *Amicus Brief* explained that "[t]he FCC ultimately determined that ISP-bound traffic falls within the scope of the reciprocal compensation provisions of section 251(b)(5)… however, the FCC affirmed that it has authority under section 201(b) to establish pricing rules governing this interstate traffic."[36] The brief noted that 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;"[37] and that "the FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic pre-empted inconsistent state regulation."[38]

According to the *Amicus Brief*, the CALPUC violated the *ISP Remand Order* because it "did not apply a bill-and-keep regime in the period before October 18, 2004 as required by the new markets rule, and the state termination charges it enforced against AT&T exceeded the maximum amount that the FCC, acting pursuant to its section 201(b) authority, had found to be just and reasonable."[39] The Commission cautioned that it took no position on "the broader issue whether the [CALPUC] would have jurisdiction, acting outside the context of a section 252

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[34] Brief of *Amicus Curiae* Federal Communications Commission, *AT&T Communications of California, Inc., et al. v. Pac-West Telecomm, Inc. et al.*, U.S.C.A. (9th Cir.) Docket 08-17030, Doc. No. 50 (Feb. 2, 2011)("*Amicus Brief*"). This brief is attached to the AT&T Comments as Exhibit A.

[35] *Amicus Brief*, at 4.

[36] *Amicus Brief*, at 8.

[37] *Amicus Brief*, at 10.

[38] *Amicus Brief*, at 10-11.

[39] *Amicus Brief*, at 28.

arbitration, to adjudicate the dispute applying federal legal standards," because "[t]he FCC to date has not directly spoken to the broader jurisdictional issue in its rules and orders…"[40]

The Ninth Circuit accepted the Commission's conclusion that the *ISP Remand Order* applied to CLEC-CLEC traffic so as to limit compensation for ISP traffic consistent with the rate cap. The Ninth Circuit's analysis was instructive:

> We begin with a few well-settled principles. First, 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. But, as the district court noted, a matter may be *subject* to FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation. Determining whether the FCC has chosen to displace state law turns on the scope of its intent in exercising its jurisdiction. In issuing the *ISP Remand Order*, the FCC clearly understood that it was displacing at least some state laws… Nonetheless, it is also well settled that, with the *ISP Remand Order* and related pronouncements, the FCC has *not* exercised its jurisdiction over *all* manifestations of ISP-bound traffic. For example, this Court held in *Peevey* that the CPUC correctly interpreted the *ISP Remand Order* as not applying to interexchange (that is, non-local) ISP-bound traffic. Other courts have reached the same conclusion. In sum, it is well settled that the *ISP Remand Order* has preemptive effect with regard to the ISP-related issues it encompasses. The operative question in this case, then, is whether the *ISP Remand Order* evidences the FCC's intent to exercise its jurisdiction over local ISP-bound traffic exchanged between two CLECs.[41]

The Ninth Circuit concluded that "the district court and the [CALPUC] erred in holding that the *ISP Remand Order's* interim compensation regime did not apply to the ISP-bound traffic exchanged between AT & T and Pac–West,"[42] and ruled that "[i]n light of our holding, we do not reach AT&T's alternative argument that the [CALPUC] lacked jurisdiction to adjudicate the dispute in this case."[43]

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[40] *Amicus Brief*, at 29.

[41] *AT & T Commc'ns of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980, 990-91 (9th Cir. 2011)(citations omitted)(emphasis in original).

[42] *Pac-W. Telecomm, Inc.*, 651 F.3d, at 998.

[43] *Pac-W. Telecomm, Inc.*, 651 F.3d, at 999.

D. Proceedings Before the PAPUC

Core filed its formal complaint against AT&T and TCG with the PAPUC on May 19, 2009.[44] Core averred that both it and respondents were each a competitive local exchange carrier certificated to provide local exchange service in Pennsylvania.[45] Core averred that AT&T "acknowledged that [it]send[s] considerable volumes of traffic to Core via the Verizon tandem switches for termination to Core's end users... In essence, AT&T wants Core to terminate AT&T's traffic for free, forever."[46] Core averred that "[t]he [PAPUC] has jurisdiction over the subject matter of this complaint and the parties..."[47] Core asked the PAPUC to require AT&T to compensate Core for the termination of AT&T's traffic pursuant to three alternative theories: (1) that AT&T pay Core at the rate set forth in Core's Pennsylvania intrastate switched access tariff (roughly, $0.014/minute); (2) that AT&T pay Core at the PAPUC-set TELRIC rate for termination (based on the Verizon ILEC cost-study proceedings) pursuant to section 251(b)(5) of the Act, 47 U.S.C. § 251(b)(5)(roughly $0.0024/minute); or (3) that AT&T pay Core at a rate determined by the PAPUC pursuant to the doctrine of *quantum meruit*.[48]

Core stated that, in March, 2008, it initially invoiced AT&T for the AT&T Indirect Traffic.[49] AT&T then paid Core for certain interstate calls delivered during that time period, at Core's tariffed interstate switched access rates.[50] However, AT&T later stated that it would not pay anything at all for a large segment of the AT&T Indirect Traffic because "AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to

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44 Formal Complaint of Core Communications, Inc. v. AT&T Communications of PA, LLC and TCG Pittsburgh, Inc., Pa. P.U.C. Dockets C-2009-2108186 and C-2009-2108239 (May 19, 2009). This is attached hereto as **Exhibit A.** ("*Core Complaint*").

45 *Core Complaint* , at ¶¶ 3 and 5.

46 *Core Complaint* , at ¶ 22.

47 *Core Complaint* , at ¶ 27.

48 *Core Complaint* , at ¶¶ 28-66.

49 *Core Complaint* , at ¶ 16.

50 *Id.*

discuss."[51] Although AT&T engaged in limited preliminary negotiations with Core towards that end, AT&T abruptly discontinued talks without explanation, and then ignored numerous attempts by Core to restart talks, or at least clarify the situation.[52] AT&T's continuing refusal to respond to Core's inquiries lasted, roughly, from August, 2008, through April, 2009.[53]

In its answer before the PAPUC, AT&T stated that it "operates under a bill and keep arrangement with every other competitive local exchange carrier in Pennsylvania."[54] AT&T averred that "[t]he traffic in dispute is all local traffic (and virtually all local ISP-bound traffic)."[55] AT&T told the PAPUC that Core's requests were "inconsistent with Pennsylvania law."[56] AT&T argued that Core's intrastate Pennsylvania switched access tariff did not apply because AT&T's traffic was "purely local telecommunications traffic."[57] AT&T argued that Core's own tariff required bill and keep for local traffic.[58] TELRIC could not apply because it was "neither authorized by Core's tariffs nor consistent with the FCC's *ISP Remand Order*."[59] AT&T admitted that it is certificated by the [PAPUC] to provide local exchange service in Pennsylvania;[60] and that "the [PAPUC] has jurisdiction over the subject matter of the Complaint…"[61]

On December 8, 2009, AT&T filed a motion to dismiss Core's complaint, arguing that the PAPUC lacked subject matter jurisdiction or, in the alternative, that the relief sought has

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51 *Id.*
52 *Id.*
53 *Id.*
54 AT&T's Amended Answer to the Formal Complaint of Core Communications, Inc., *Core Communications, Inc. v. AT&T Communications of PA, LLC and TCG Pittsburgh, Inc.*, Pa. P.U.C. Dockets C-2009-2108186 and C-2009-2108239, at 2 (June 18, 2009)("*AT&T Answer*"). This is attached hereto as **Exhibit B.**
55 *AT&T Answer*, at 4.
56 *AT&T Answer*, at 4.
57 *AT&T Answer*, at 5.
58 *AT&T Answer*, at 5.
59 *AT&T Answer*, at 4.
60 *AT&T Answer*, at 7.
61 *AT&T Answer*, at 19.

been preempted by the FCC.[62] On February 26, 2010, the presiding ALJ granted AT&T's motion, in relevant part, finding that the Commission had sole jurisdiction and authority over ISP traffic and related compensation.[63] Core sought interlocutory review by the full Commission to answer the following question:

> Does the Commission have subject matter jurisdiction to adjudicate a formal complaint by one Pennsylvania Competitive Local Exchange Carrier (CLEC) against another Pennsylvania CLEC for traffic that originates and terminates in Pennsylvania and is terminated to the CLEC's Internet Service Provider (ISP) end users?[64]

The PAPUC answered Core's question in the affirmative, and remanded the matter to the ALJ for further proceedings.

The PAPUC found that it had "jurisdiction in this matter because both Core and AT&T are facilities-based CLECs certified by the PAPUC 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.[65] The PAPUC also found 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."[66] Futher, "[w]e… 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

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62 Opinion and Order, *Core Communications, Inc. v. AT&T Communications of PA, LLC and TCG Pittsburgh, Inc.*, Pa. P.U.C. Dockets C-2009-2108186 and C-2009-2108239, 2010 WL 3617207 (entered September 8, 2010)("*Material Question Order*"). *Material Question Order*, at 3.

63 *Material Question Order*, at 2.

64 *Material Question Order*, at 2.

65 *Material Question Order*, at 10.

66 *Material Question Order*, at 10.

Commission."[67] Finally, the PAPUC warned that "[t]he non-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."[68]

Following the Ninth Circuit's decision in *Pac-West*, and notwithstanding the Commission's own *Material Question Order*, the ALJ concluded on remand that the matters in dispute were subject to federal law, and recommended that the record be reopened to receive briefs from the Parties on the application of federal law to the instant proceeding.[69] The ALJ found that "[t]he [PAPUC] 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."[70] When AT&T excepted from this ruling, the PAPUC found 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."[71]

The PAPUC noted that "the FCC's *Amicus* Brief supports [the ALJ's] 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," reasoning that "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

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67 *Material Question Order*, at 10 and n. 5.

68 *Material Question Order*, at 11.

69 *See*, Opinion and Order, *Core Communications, Inc. v. AT&T Communications of PA, LLC and TCG Pittsburgh, Inc.*, Pa. P.U.C. Dockets C-2009-2108186 and C-2009-2108239, 2012 WL 6208428 (Pa.P.U.C.)(December 5, 2012)("*PAPUC Merits Order*"), at 8. This is attached to the PAPUC's Petition as Appendix C.

70 *PAPUC Merits Order*, at 14.

71 *PAPUC Merits Order*, at 15.

CLEC-CLEC traffic that is consistent with the FCC's intercarrier compensation regime."[72] The PAPUC noted that "AT&T itself argues that the FCC's *Amicus* Brief is binding on the [PAPUC]... AT&T seemingly 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."[73]

The PAPUC stated that it was "not aware of any prohibition against state commissions from applying federal law to resolve disputes pertaining to the compensation for ISP-bound traffic."[74] The PAPUC also found that 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… we do not expect regulated telecommunications carriers that operate within this Commonwealth to provide carrier access network facilities and services for free."[75]

On December 19, 2012, AT&T filed its Petition for Reconsideration and Stay of the PAPUC Merits *Order*. AT&T argued that the order violated federal law, and 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 PAPUC 's Order.[76] In rejecting AT&T's petition, the PAPUC stated 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. 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

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72 *PAPUC Merits Order*, at 24.
73 *PAPUC Merits Order*, at 24-25.
74 *PAPUC Merits Order*, at 25.
75 *PAPUC Merits Order*, at 69.
76 *Opinion and Order on Reconsideration, Core Communications, Inc. v. AT&T Communications of PA, LLC and TCG Pittsburgh, Inc.*, Pa. P.U.C. Dockets C-2009-2108186 and C-2009-2108239, 2013 WL 4499089 (Pa.P.U.C.), 5 (August 15, 2013)("*Commission Recon Order*"), at 8.

intercarrier compensation regime.[77]

> [W]e 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. 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." In our view, however, the adoption of a rate cap established by the FCC in a PAPUC 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 [Pennsylvania Public Utility] Code was appropriate and consistent with the FCC's intercarrier compensation regime.[78]

Having considered AT&T's request for a stay, and Core's responses thereto, the PAPUC lifted its stay on reconsideration and denied further stay pending judicial review,[79] and ordered AT&T to "pay the amount due to Core Communications, Inc. under the terms of the instant Opinion and Order on Reconsideration."[80]

E. Proceedings Before the Eastern District of Pennsylvania

The district court found that the PAPUC's orders were preempted by federal law, *District Court Memorandum*,[81] at 33 ("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"); and that the PAPUC had no jurisdiction to issue its orders. *District Court Order*,[82] Doc. 48, at 1 ("The Pennsylvania Public Utility Commission [ ] lacked jurisdiction to issue its December 5, 2012 Opinion and Order [ ] and August 15, 2013 Opinion and Order on Reconsideration [ ]."). The district court enjoined enforcement of the PAPUC's orders. *District Court Order*, at 2. The

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77 *Commission Recon Order*, at 28.
78 *Commission Recon Order*, at 33-34.
79 *Commission Recon Order*, at 63 (Ordering ¶ 3).
80 That amount is roughly $250,000, plus interest from the date of *PAPUC Merits Order*.
81 *AT&T Corp., et al. v. Core Communications, Inc. et al.*, No. 12- 7157, Doc. No. 47 (E.D. Pa., Jan. 30, 2014)("*District Court Memorandum*"). This is attached to the PAPUC Petition as Appendix A.
82 *AT&T Corp., et al. v. Core Communications, Inc. et al.*, No. 12- 7157, Doc. No. 48 (E.D. Pa., Jan. 30, 2014)("*District Court Order*").

district court then entered judgment in favor of AT&Ts and against Core and the PAPUC.[83] Core and the PAPUC appealed the district court's orders, and those appeals are currently pending before the U.S. Circuit Court of Appeals for the Third Circuit.[84]

III. ARGUMENT

A. *Res Judicata* Does Not Bar the PAPUC's Petition

Core disagrees with AT&T's assessment that *res judicata* bars the Commission from considering the PAPUC's petition in this proceeding. *See*, AT&T Comments, at 16-21. The Commission has previously set forth the standard for *res judicata*: "the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."[85]

The declaratory relief sought by the PAPUC in its Petition is a quantum leap from that sought by Core in its formal complaints before the PAPUC. Simply put, whereas the AT&T/Core cases which began at the PAPUC and is currently before the Third Circuit involves resolution of intercarrier compensation complaints lodged by Core against two AT&T entities in Pennsylvania, the PAPUC's petition asks for a declaratory ruling that would apply generally to carriers and state utility commissions across the nation. According to the Petition itself, "[t]he 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," Petition, at 1

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[83] *AT&T Corp., et al. v. Core Communications, Inc. et al.*, No. 12- 7157, Doc. No. 50 (E.D. Pa., Jan. 30, 2014).

[84] The case is styled *AT&T Corp. et al. v. Core Communications, Inc. et al.*, U.S.C.A. (3d Cir.) Case Nos. 14-1499 & 1664.

[85] *Teleservices Indus. Ass'n v. AT&T Corp.*, 15 F.C.C. Rcd. 21454, 21457 (2000), *citing, Cromwell v. Sac. County*, 94 U.S. 351, 352 (1876).

(emphasis added). The PAPUC noted that "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." The PAPUC noted that at least one other case is currently pending before it involved the issues raised in the Petition.[86]

Further, the CALPUC commented that it "has taken such a position [as set forth in the Petition] in its orders as well as before federal courts (and indeed, has exercised jurisdiction to hear disputes between CLECs over the termination of indirectly-exchanged ISP-bound traffic originating with another CLEC), and likely will be confronted with challenges to its jurisdiction in future cases." CALPUC Comments, at 6. The CALPUC noted that "[t]he District Court decision creates regulatory and financial uncertainty and the CPUC concurs with the Pa. PUC's request for the Commission to provide affirmative guidance on the matter." *Id.*

The PAPUC petition is a straightforward attempt to provide additional clarity to an issue that has arisen in multiple cases before multiple state commissions.[87] It is fundamentally different from a formal complaint between two carriers. If the Commission's jurisdiction were barred from resolving questions of general applicability whenever two carriers litigate a dispute which involves such questions, the FCC's ability to provide guidance and leadership on the important issues of the day would be greatly inhibited. For these reasons, Core concurs in the PAPUC's statement thtat "[t]he Commission is not legally barred from issuing an appropriate declaratory ruling clarifying the obligations of the Pa. PUC or other state commissions." Petition, at 22.

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[86] *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.*

[87] As a technical matter, the CALPUC's participation as a commenter in this proceeding eliminates application of the privity requirement for *res judicata.*

AT&T attempts to distinguish the Petition from a similar petition at issue in the *Kansas/Nebraska Contribution Order* because, it asserts, that order "was uniquely with the FCC's expertise because it involved the preemptive effect of an FCC Order." AT&T Comments, at 20. *Also see*, Petition, at 22-23 (discussing the precedential value of the *Kansas/Nebraska Contribution Order*). According to AT&T, "[t]his case does not involve preemption." AT&T is wrong. Preemption *is* the issue raised by the PAPUC's Petition. The district court clearly found preemption. *See*, *District Court Memorandum*, at 14 ("the FCC declared its intent to preempt state regulation going forward."); and 26 ("state commissions no longer have authority to establish rates for ISP-bound traffic, as the FCC has expressly preempted state authority in that area"). And the PAPUC just as clearly argues that it is not preempted. *See*, Petition, at 15 ("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*.").

B. The Commission Should Reaffirm That State Commissions May Resolve CLEC-CLEC Disputes *Consistent* With the *ISP Remand Order*

Core disagrees with AT&T's conclusion that "the District Court applied well-established and long-standing precedent in ruling that the PUC does not have authority over jurisdictionally interstate traffic outside a § 252 proceeding." *See*, AT&T Comments, at 30. For the reasons set forth herein, Core takes issue with AT&T's conclusions and legal reasoning, and agrees with the PAPUC's statement that "states' jurisdiction to resolve local dial-up compensation disputes is not limited to disputes arising under Sections 251/252." Petition, at 12, as well as the CALPUC's statement that "[s]tate commissions are given authority to mediate disputes between local carriers, even when this touches on jurisdictionally interstate traffic, and even where Section 252

of the 1996 Act (arbitration) is not implicated." CALPUC Comments, at 2.

1. State Commissions Have Plenary Jurisdiction Over Competitive Local Exchange Carriers

Like all public utilities operating in Pennsylvania, CLECs are subject to the PAPUC's plenary jurisdiction. "The [PAPUC] shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The [PAPUC] may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties." 66 Pa. Cons. Stat. Ann. § 501. The PAPUC's jurisdiction over CLECs extends to interstate matters "insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress." 66 Pa. Cons. Stat. Ann. § 104.

The PAPUC's December 12, 2012 and August 15, 2013 orders were clearly issued pursuant to its authority to supervise and regulate certificated carriers, consistent with federal law. *See, e.g., PAPUC Merits Order*, (August 15, 2013), at 34 ("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 PAPUC has exercised this authority in other cases involving certificated carriers and payment of appropriate intercarrier compensation. *See, e.g., Consolidated Communications Enterprise Services, Inc.v. Omnipoint Communications, Inc. d/b/a T-Mobile, et al.* Pa. P.U.C. Docket No. C-2010-2210014, 2012 WL 3879124 (entered August 31, 2012)(Commission resolved intercarrier compensation dispute between a CLEC and a wireless carrier which did not have an agreement in place).

2. Congress Never Preempted the Commission's Authority Over Competitive Local Exchange Carriers

The Constitution provides Congress with the power to preempt state law. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898, 90 L. Ed. 2d 369 (1986). Preemption can take many forms, including (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, (2) when there is actual conflict between federal and state law, (3) where compliance with both federal and state law is impossible, (4) where there is implicit in federal law a barrier to state regulation, (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Id.*, at 368-69.

The district court found that field preemption applied to the Commission's orders, on the theory that Congress, in the Communications Act of 1934, had occupied the entire field of interstate communications, of which ISP-bound traffic is a subset, leaving state commissions no room whatsoever to operate.[88] According to the *District Court Memorandum*, "[t]he FCC was given jurisdiction over interstate communication by the Communications Act of [1934]. Several courts have characterized the FCC's jurisdiction over interstate traffic, under the Communications Act, as exclusive." *District Court Memorandum*, at 24-25. However, the cases cited by the district court for this proposition, *id.*, either predate the Telecommunications Act of 1996 ("TCA"), or do not acknowledge its groundbreaking significance.

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[88] The district court correctly avoided relying upon other theories of preemption. The Commission's orders, which simply required AT&T to pay Core for termination of ISP-bound traffic at a rate permissible pursuant to the FCC's rate cap, are fully consistent with federal law. Thus, forms of preemption which are based on a conflict between federal and state law (whether express, actual, implicit or practical) do not and cannot apply to a CLEC-CLEC dispute over ISP-bound traffic.

The TCA fundamentally restructured the balance of power between state commissions and the FCC. "[T]he model under the TCA is to divide authority among the FCC and the state commissions in an unusual regime of cooperative federalism, with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states."[89]

The district court appeared to acknowledge that the TCA was an important event for preemption purposes, but ultimately decided that the TCA continued Congress' pre-existing field preemption over interstate traffic from the Communications Act of 1934, while returning to the states a limited measure of authority. According to the district court, "[t]he TCA… did not give state commissions jurisdiction over interstate communication, including ISP-bound traffic, outside the confines of § 252." *District Court Memorandum*, at 30. The district court found that TCA section 252, 47 U.S.C. § 252, "gives state commissions power over interstate communication only in the context of approving, mediating, and arbitrating interconnection agreements between ILECs and CLECs." *Id*. This was significant to the district court because "[t]he TCA has not given state commissions any authority to make rules or set rates outside of that context." *Id*.

Whatever came before, the TCA bears no indicia of field preemption with respect to interstate traffic or regulation of CLECs. Although TCA section 251(a), 47 U.S.C. § 251(a), applies generally to all telecommunications carriers, and section 251(b), 47 U.S.C. § 251(b) applies to all local exchange carriers, the requirements of these sections do not explicitly preempt state regulation, and are not nearly detailed or comprehensive enough to establish field preemption. *See*, *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 337 (3d Cir. 2009)("field

[89] *Global Naps, Inc. v. Massachusetts Dep't of Telecommunications & Energy*, 427 F.3d 34, 46 (1st Cir. 2005), *citing, Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd. of Puerto Rico*, 189 F.3d 1, 8 (1st Cir.1999).

preemption requires a demonstration that "Congress ... left no room for state regulation of these matters.").

Notably, the U.S. Circuit Court for the Eigth Circuit has found that section 251(b)(5), 47 U.S.C. § 251(b)(5), the federal statutory provision which addresses reciprocal compensation between LECs, does not preempt the field. *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)("[i]n the absence of a clear mandate from the FCC or Congress stating how [reciprocal compensation] charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise.").

The relatively detailed requirements of TCA section 252, 47 U.S.C. § 252, which covers the negotiation, arbitration and approval of ILEC-CLEC interconnection agreements, evidence a careful delineation of responsibility and authority between the Commission and state commissions. Thus, with respect to the oversight of ILEC-CLEC interconnection agreements, a strong case can be made that Congress occupied the field, leaving state commissions no authority except those expressly delegated to them. However, there is no evidence in the TCA that Congress intended to preempt state commissions' jurisdiction over CLEC-CLEC interactions, CLECs' operations generally, or bar any state regulation of matters pertaining to interstate traffic, consistent with federal law.

Further, Congress directed that state commission oversight of LEC-LEC interconnection rules be maintained, so long as such rules were consistent with federal law:

(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.A. § 251(d)(3).

This statutory provision by itself belies the district court's conclusion that Congress intended TA-96 to preempt the field of LEC-LEC interactions.

Furthermore, the Commission itself has found that TA-96 envisions a far greater state commission role in matters that previously were considered to be exclusively interstate. "[TA-96] fundamentally restructures local telephone markets." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 726, 142 L. Ed. 2d 835 (1999). In the seminal 1996 "Local Competition Order," the Commission examined the new federal-state partnership envisioned in the TCA. "The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C. Rcd. 15499 (1996), ¶ 24. The Commission concluded that "the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the Commission establishes uniform national rules for some issues, the states, and in some instances the Commission, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition." *Id*.

Continuing, the Commission explained that its new rules implementing the TCA were "minimum requirements upon which the states may build." *Id*. With reference to the TCA's

specific reservation of state commission authority over access and interconnection issues, 47 U.S.C.A. § 251(d)(3), the Commission found that "in order to be consistent with the requirements of section 251 and not "substantially prevent" implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations." *Local Competition Order*, 11 F.C.C. Rcd. 15499, 15518. ¶ 103. *BellSouth Telecommunications, Inc. v. Cinergy Commc'ns Co.*, 297 F. Supp. 2d 946, 953 (E.D. Ky. 2003). ("When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).")(citations omitted).

The PAPUC's orders were simply an attempt to implement a federal rate structure in a case involving local traffic exchanged between two certificated LECs. *See, e.g., PAPUC Merits Order*, at 80 ("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.").

But nothing in the Act or the Commission's rules—other than the *ISP Remand Order's* rate cap—precludes state commission regulation of CLEC-CLEC intercarrier compensation. Indeed, the Commission has long held that, but for the *ISP Remand Order*, it had never regulated CLEC-CLEC traffic, and has no intention of doing so. Notice of Proposed Rulemaking, *In Re Developing A Unified Intercarrier Comp. Regime*, 16 F.C.C.R. 9610, 9679 and n1 (2001)(noting

the absence of any "symptoms of market failure," the FCC concluded that "we do not contemplate a need to adopt new rules governing CLEC-to-CLEC… arrangements.")

3. The FCC Never Preempted the Commission's Authority Over Competitive Local Exchange Carriers

"Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana*, 476 U.S., at 368-69. The district court found that "[t]he ISP Remand Order [ ] expresses the intention to limit state commissions' jurisdiction over compensation for ISP-bound traffic specifically." *District Court Memorandum*, at 24. Citing to the *ISP Remand Order*, 16 FCC Rcd. 9151, 9189, the district court found that "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.' 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." *Id*., at 368-69. Memorandum, Doc. 47, at 25-26. The district court erred in basing its theory of agency preemption on this single statement, while ignoring the remainder of the order and cases interpreting that order. Indeed, a careful reading of the entire *ISP Remand Order* demonstrates that the FCC envisioned a prominent state commission role in the implementation of that order, analogous to the role state commissions play in other aspects of TCA implementation.

Where agency action is the purported basis for preemption, there must be "a clear indication that an agency intends to preempt state regulation." *Hillsborough County Automated Med. Labs., Inc*. 471 U.S. 707 (1985). Ambiguity is not sufficient to establish preemption. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-72 (1st Cir. 2006)("*Global NAPs I*")("The requirement of a clear indication of the agency's intent to preempt is especially

important in the context of the [TCA], which divided authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states.")(citations omitted); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 100, n.7 (2nd Cir. 2006)("*Global NAPs II*")("a federal agency may preempt state law only if it is acting within the scope of its congressionally delegated authority and the agency makes its intention to preempt clear.").

In the context of ISP-bound traffic, at least three U.S. Circuit Courts of Appeal have found that the *ISP Remand Order* does not preempt the entire field, or otherwise preclude state commission regulation generally. These courts found that the extent of the FCC's preemption of state commission regulation of ISP-bound traffic can only be determined in each case by reviewing the terms of the order to determine whether the FCC intended to preempt specific forms of state commission regulation. In *Global NAPs I*, the First Circuit approved the Massachusetts Commission's order imposing intrastate originating access charges for a certain type of ISP-bound traffic called "VNXX"—charges which are nowhere mentioned in the *ISP Remand Order*. According to the First Circuit, "[t]he question before us is whether the FCC intended in the *ISP Remand Order* to exercise its jurisdiction over the precise issue here, to the exclusion of state regulation." 444 F.3d, at 71.[90] Applying this analysis, the First Circuit found that "the *ISP Remand Order* does not clearly preempt state authority to impose access charges

[90] As support for this statement, the First Circuit cited to *Qwest Corp. v. Scott*, 380 F.3d 367, 371-72 (8th Cir. 2004), in which the Eigth Circuit ruled that "[f]ederal regulations, like federal statutes, may preempt state law, if the regulations are intended to have preemptive effect, and the agency is acting within the scope of authority delegated to it by Congress. The FCC has authority to preempt state regulation of telecommunications where it is not possible to separate the interstate and intrastate aspects of a communications service, and where the Commission concludes that federal regulation is necessary to further a valid federal regulatory objective. 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 when it promulgated the *10% Order.*").

for interexchange VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here." *Id.*, at 72.

In *Global NAPs II*, the Second Circuit approved the Vermont Commission's imposition of originating access charges on VNXX ISP-bound traffic. Rejecting the CLEC's position that the *ISP Remand Order* preempted all state commission jurisdiction over ISP-bound traffic, the Second Circuit found that "a more reasonable interpretation of the *2001 Remand Order* is not that the FCC has preempted the field relating to ISPs, but only that it intended to reserve jurisdiction over intercarrier compensation issues with respect to ISP-bound traffic on matters that would conflict with the FCC's specific directives about reciprocal compensation." 454 F.3d, at 101.

In *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006)("*Peevey*"), the Ninth Circuit reviewed the California Commission's imposition of a "carrier origination charge," or "COC," on certain ISP-bound calls. The court found that "Pac-West further contends that the COC ruling is contrary to the *ISP Remand Order* which preempts state commissions from imposing any intercarrier compensation not provided for in the order. We disagree, as the *ISP Remand Order* was exclusively concerned with the operation of § 251(b)(5) of the Act and the imposition of reciprocal compensation charges on ISP-bound traffic. " *Id.*, at 1158.

Reviewing *Global NAPs I*, *Global Naps II* and *Peevey*, the Ninth Circuit in 2011 stated the preemption issue as follows:

> [T]here 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.
>
> But, as the district court noted, a matter may be *subject* to FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation. Determining whether the FCC has chosen to displace state law turns

> on the scope of its intent in exercising its jurisdiction. *AT & T Commc'ns of Cal., Inc. v. Pac-W. Telecomm, Inc.*, 651 F.3d 980, 990-91 (9th Cir. 2011)("*PacWest*").

In *PacWest*, the Ninth Circuit found that the *ISP Remand Order* did preempt the California Commission's award of compensation from one CLEC to another, but only because the state commission's order conflicted with the terms of the FCC's order. "[B]ecause we hold that the *ISP Remand Order* does apply to the ISP-bound traffic at issue here, the CPUC's decision to rely on Pac–West's state-filed tariffs to set the rate in question is preempted." *Id.*, at 998.

There is no way to square the district court's analysis with that of the First, Second and Ninth Circuits. According to the district court, state commissions have zero authority over ISP-bound traffic because ISP-bound traffic is interstate and the FCC has exclusive authority over interstate traffic. But those courts found that, notwithstanding the interstate nature of ISP-bound traffic, state commissions retained the authority to regulate non-local ISP-bound traffic, because there was no indication the FCC intended to disturb the states' authority to establish local calling areas. The proper analysis for preemption, which the district court did not follow, is to examine the terms of the *ISP Remand Order* to determine whether the FCC intended to preempt states from implementing the order by ordering one CLEC to pay another at a rate consistent with the FCC's own rate caps.

4. The Commission Expected State Commissions to Implement the *ISP Remand Order*, Including Setting Rates Consistent with the Rate Caps

According to the district court, "[a]lthough the [PAPUC] 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." *District Court Memorandum*, at 33. But nothing in the *ISP Remand Order's* discussion of the rate caps is tied to section 252 of the Act. Indeed, the Commission's *Amicus Brief* to the Ninth Circuit in *Pac-West* rejected reading

the order as restricted to section 252 procedures. Reacting to the argument that the *ISP Remand Order* was limited to ILEC-CLEC disputes arising under section 252, the brief states that the Commission "[did] not refer to section 252, and there is no basis otherwise for the counterintuitive claim that the unmodified phrase "interconnection agreements" connotes the subset of interconnection agreements between ILECs and CLECs governed by section 252." FCC *Amicus Brief*, at 22.

Similarly, in rejecting the argument that the *ISP Remand Order's* "3:1 ratio" rule for identifying ISP-bound traffic necessarily presumed an enforcement action under section 252, the Commission's *Amicus Brief* noted that "[a]lthough the FCC identified a state commission section 252 proceeding as one way in which a carrier could rebut the presumption, it did not hold that a rebuttal could occur "only" in a section 252 proceeding." *Id*., at 24. These statements show that the Commission contemplated that state commissions might implement and enforce the terms of the order *outside of section 252 proceedings*. This, in turn, undermines the district court's conclusion that state commissions' only authority over ISP-bound traffic is limited to section 252 proceedings. Indeed, this is consistent with the Commission's expectation that state commissions implement and enforce the *ISP Remand Order within* the section 252 context, authority no one disputes. The district court never explained why it is reasonable to read the order to require state commissions to implement its terms in the ILEC-CLEC context, but not the CLEC-CLEC context.

The district court found that "[t]he ISP Remand Order says nothing about authorizing a state commission to set a rate under the cap." *District Court Memorandum*, at 31. The district court erred in looking for an affirmative grant of authority to state commissions, rather than looking for an affirmative preemption of state commission authority. The *ISP Remand Order*

must be read in the context in which it arose: the Commission wanted to cap the rates LECs were permitted to charge for ISP-bound traffic. The state commission-set reciprocal compensation rates were too high, in the Commission's view, necessitating imposition of the caps. According to the Commission, "[t]o limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates,"[85] the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at $.0015 per minute of use and declining to $.0007 per minute of use, the current cap."[91]

A cap, by its very nature, is a limit on some numeric variable: in this case, state-set reciprocal compensation rates. Paragraph 80 of the *ISP Remand Order* demonstrates that the Commission deferred to state commissions the authority to designate the rate for ISP-bound traffic, subject to the FCC's rate caps.

Paragraph 80 provides:

> 80. We acknowledge that carriers incur costs in delivering traffic to ISPs, and it may be that in some instances those costs exceed the rate caps we adopt here. To the extent a LEC's costs of transporting and terminating this traffic exceed the applicable rate caps, however, it may recover those amounts from its own end-users.[151] We also clarify that, ***because the rates set forth above are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic).***[152] The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation. *In Re Implementation of Local Competition Provisions in*

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91 *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, 6487 (2008)("*Intercarrier Compensation NPRM*").

> *Telecommunications Act of 1996*, 16 F.C.C. Rcd. 9151, 9188 (2001). (Emphasis added).

Notably, the rate cap applies to all LECs, and presumes state commission authority to set the rates which are capped, so long as those rates are consistent with the cap.

Further undermining the district court's expansive reading of the *ISP Remand Order's* preemptive effect is the Commission's own subsequent proposal to reform the entire intercarrier compensation regime. In the 2008 *Intercarrier Compensation NPRM*, the Commission noted that it expected and state commissions to set the rate for ISP-bound traffic going forward:

> We note that we already have an interim intercarrier compensation regime for ISP-bound traffic, and to avoid disruption in the marketplace, we will apply on a transitional basis the pricing standards we adopted for ISP-bound traffic in the *ISP Remand Order*,[644] as modified by the *CoreForbearance Order*.[645] Currently, two rules remain in effect: (1) ISP-bound traffic is currently subject to a reciprocal compensation rate cap of $.0007 per minute-of-use; and (2) under the mirroring rule, the $.0007 cap applies to traffic exchanged with an incumbent LEC only if it offers to exchange all traffic subject to section 251(b)(5) at the same rate. As explained below, we conclude that it is appropriate to retain these rules, but only on a transitional basis until ***a state commission, applying the "additional costs" standards adopted in this order, has established reciprocal compensation rates that are at or below $.0007 per minute-of-use***."). *Intercarrier Compensation NPRM*, 24 F.C.C.R., at 6584-85.

At bottom, the district court believed that any and all state commission authority over ISP-bound traffic ended as of the effective date of the *ISP Remand Order*, and only survived to the extent that section 252 permitted states to set rates in ILEC-CLEC agreements. *See*, *District Court Memorandum*, at 14 (acknowledging the thrust of paragraph 80's deference to state commissions, but then stating that "the FCC declared its intent to preempt state regulation going forward."). But the *ISP Remand Order* does not make either distinction, and certainly not with the clarity needed to establish preemption. The PAPUC's orders merely designated a rate consistent with the Commission's rate caps, and directed AT&T to pay the resulting amount.

This modest regulatory action was well within the scope of state commission authority that is contemplated by TA-96, courts, the Commission and the *ISP Remand Order*.

C. There is No Industry Standard of Bill-and-Keep Between CLECs

Core disagrees with AT&T's statement that "CLECs historically have voluntarily exchanged all locally-dialed traffic (including dial-up) on a bill-and-keep basis." AT&T Comments, at 31. In the AT&T/Core case before it, the PAPUC rejected this assertion:

> 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. *PAPUC Merits Order*, at 63.

As referenced in the PAPUC's order, Core itself has negotiated and entered into voluntary traffic exchange agreements ("TEAs") with multiple CLECs in Maryland and Pennsylvania which provide for the payment of reciprocal compensation for ISP-bound and other forms of locally-dialed traffic.

IV. CONCLUSION

The Commission should clarify that state commissions retain authority to adjudicate disputes between CLECs which involve dial-up ISP-bound traffic, or the *ISP Remand Order* rate regime, consistent with Commission directives and requirements.

Respectfully submitted,

Chris Van de Verg

Christopher F. Van de Verg
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CORE COMMUNICATIONS, INC.
209 West Street, Suite 302
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Tel. (410) 216-9865
Fax (410) 216-9867
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Filed: July 30, 2014

EXHIBIT A

STEVENS & LEE
LAWYERS & CONSULTANTS

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www.stevenslee.com

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May 19, 2009

Secretary James McNulty
Pennsylvania Public Utility Commission
400 North Street, Filing Room
Commonwealth Keystone Building
Harrisburg, PA 17120

Re: Core Communications, Inc. v. AT&T Pennsylvania, LLC and TCG Pittsburgh, Inc.
Docket No._____

Dear Secretary McNulty:

Enclosed please find the Formal Complaint of Core Communications, Inc. against AT&T Pennsylvania, LLC and TCG Pittsburgh, Inc., which was filed electronically today. If you have any questions, please do not hesitate to contact me. Thank you.

Best regards,

STEVENS & LEE

Michael A. Gruin

Enclosure

cc: Christopher Van de Verg, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Core Communications, Inc.	)	
	)	
Complainant	)	
	)	
v.	)	
	)	
AT&T Communications of PA, LLC,	)	
	)	**Docket No. _____**
and	)	**Docket No. _____**
	)	
TCG Pittsburgh, Inc.	)	
	)	
Respondents	)	
	)	
	)	
	)	
	)	
	)	
	)	

FORMAL COMPLAINT OF CORE COMMUNICATIONS, INC.
AGAINST
AT&T COMMUNICATIONS OF PA, LLC AND TCG PITTSBURGH, INC.

And Now, comes Core Communications, Inc. ("Core"), pursuant to 52 Pa. Code § 5.21 and 66 Pa.C.S. § 701, and files the Formal Complaint with the Pennsylvania Public Utility Commission against AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. (Collectively, "AT&T" or "Respondents"), and in further support thereof, avers as follows:

THE PARTIES

1. The name of address of the Complainant is as follows:

   Core Communications, Inc.
   209 West St.
   Suite 302
   Annapolis, MD 21401

2. All pleadings, orders, notices and other correspondence with respect to this docket should be addressed to:

Michael A. Gruin
Stevens & Lee
17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
E-mail: mag@stevenslee.com

3. Core is a Competitive Local Exchange Carrier ("CLEC") authorized to provide competitive local exchange services in every service territory in the Commonwealth of Pennsylvania. Core is in good standing with the Pennsylvania Public Utility Commission ("Commission"), and maintains a CLEC tariff (PA PUC Tariff No. 1), an IXC tariff (PA PUC Tariff No. 2), and an intrastate switched access service tariff (PA PUC Tariff No. 4) with the Commission. Core also maintains an interstate switched access service tariff with the Federal Communications Commission ("FCC").

4. Upon information and belief, the names and addresses of the Respondents are:

AT&T Communications of PA, LLC,
One AT&T Way
Room 2B115E
Bedminster, NJ 07921
and

TCG Pittsburgh, Inc.
One AT&T Way
Room 2B115E
Bedminster, NJ 07921

5. Both Respondents are certificated by the Commission as Competitive Local Exchange Carriers and Interexchange Carriers ("IXCs") in Pennsylvania.

6. Upon information and belief, both Respondents are wholly owned subsidiaries of AT&T Corporation.

7. Upon information and belief, both Respondents provide local exchange telecommunications service and interexchange service to business and residential customers in the Commonwealth of Pennsylvania.

8. Upon information and belief, Respondents indirectly connect with Core through tandem switches of Verizon Pennsylvania, Inc.

BACKGROUND

9. Core receives third-party call records from Verizon on a regular basis, in tape and, more recently, electronic formats. These Verizon call records are generated by Verizon's tandem switches and their purpose is to provide Core with information on calls that Verizon deems to be toll calls. These Verizon call records are provided to Core to enable Core to generate Carrier Access Billing System (CABS) invoices to third party carriers who use Verizon's tandems to interconnect indirectly with Core.

10. In late 2007, Core performed a detailed review and analysis of the Verizon call records in order to indentify and quantify the telecommunications traffic that was being sent to Core from other carriers through Verizon tandem switches.

11. Based on Core's review of the Verizon switch and call records, Core determined that the Respondents have been sending considerable amounts of telecommunications traffic to Core, via the Verizon tandem switches, which Core terminates to its end user customers. This traffic shall be hereinafter referred to as the "AT&T Indirect Traffic".

12. Prior to Core's analysis of the Verizon call records, neither of the Respondents had ever notified Core that they were sending the AT&T Indirect Traffic to Core for termination

to Core's end users, and none had ever taken the steps required under Core's tariffs to formally submit an order for Switched Access Service from Core. As a result, Core had no way of knowing that the Respondents were sending the AT&T Indirect Traffic to Core.

13. The Verizon call records clearly demonstrate that the Respondents had been sending the AT&T Indirect Traffic to Core for years, without ever notifying Core, knowing that Core would have no way of identifying this traffic as originating from the Respondents unless Core undertook a highly burdensome, expensive and time-consuming analysis of those same records.

14. Core has determined that the traffic in question was received from the Respondents by examining the "Carrier Identification Codes" ("CIC codes") associated with the Respondents in the Verizon call records.

15. Core does not have an interconnection agreement or traffic exchange agreement in place with the Respondents; therefore, Core's tariffs control the intercarrier compensation payable by the Respondents for the AT&T Indirect Traffic sent by the Respondents to Core for termination to Core's end user customers.

16. In March, 2008, Core initially invoiced AT&T for the AT&T Indirect Traffic for the periods from 2004 through December 31, 2007. AT&T then paid Core for certain interstate calls delivered during that time period, at Core's tariffed interstate switched access rates. However, AT&T later stated that it would not pay anything at all for a large segment of the AT&T Indirect Traffic because "AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to discuss." Although AT&T engaged in limited preliminary negotiations with Core towards that end, AT&T abruptly discontinued talks without explanation, and then ignored numerous attempts by Core to restart talks, or at least

clarify the situation. AT&T's continuing refusal to respond to Core's inquiries lasted, roughly, from August, 2008, through April, 2009.

17. As of the date of the filing of the Complaint, Core has submitted intrastate switched access service bills to the Respondents for the termination of the AT&T Indirect Traffic for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009, which include billings for the termination of intrastate traffic in accordance with Core's Switched Access Service tariff (PA PUC tariff No. 4). Core is still in the process of analyzing the voluminous Verizon call records for the year 2008 to identify the AT&T Indirect Traffic that was delivered to Core in 2008. Upon completion of its analysis of these records, Core will submit intrastate access service invoices to AT&T for access charges due for 2008.

18. Core's rates for Switched Access Services, as set forth in its Tariff, are just and reasonable, and have been approved by the Pennsylvania Public Utility Commission.

19. The Respondents have refused to pay considerable portions of the intrastate switched access services bills submitted by Core Communications, as set forth more fully below.

20. Core has sent numerous requests for payment of its outstanding intrastate switched access service bills to the Respondents, but Respondents have refused to make payment on the outstanding balances due.

21. Respondents have refused to pay the outstanding balances due on the grounds that the Respondents "have not reached agreement with {Core} regarding Intrastate rates."

22. The Respondents have never denied that they delivered the AT&T Indirect Traffic to Core for ultimate delivery to Core's end user customers. In fact, the Respondents have acknowledged that they send considerable volumes of traffic to Core via the Verizon tandem

switches for termination to Core's end users, and the Respondents have simply refused to pay significant portions of Core's lawfully invoiced switched access service charges. In essence, AT&T wants Core to terminate AT&T's traffic for free, forever.

23. Core has informed the Respondents that, with the exception of negotiated agreements, "bill & keep" has never been approved as an appropriate intercarrier compensation mechanism, either by the FCC or by the Pennsylvania Commission.

24. The following charges for Core's intrastate switched access services remain unpaid by the Respondents for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009:

AT&T Pennsylvania (CIC Code 5438): $216.83

AT&T Pennsylvania (CIC Code 288): $92,236.12

TCG Pittsburgh, Inc. (CIC Code 0292): $7,526,554.81

25. Additionally, upon information and belief, the Respondents will be responsible for significant additional charges for Core's intrastate switched access services for the AT&T Indirect Traffic delivered during 2008. Upon completion of its analysis of the Verizon call records, Core will submit switched access service charge bills to the Respondents for the year 2008, and will submit proof of such billings into the record in this proceeding.

26. As of the filing of this Complaint, the Respondents continue to send significant amounts of Indirect Traffic to Core for termination to Core's end users, while adamantly refusing to pay Core any compensation for the use of Core's Access Services and facilities, and refusing to enter in an reciprocal compensation arrangement to compensate Core for the use of Core's Access Services and facilities. Therefore, upon information and belief, the Respondents will

continue to incur significant additional charges for Core's intrastate switched access services for AT&T Indirect Traffic on a going-forward basis.

JURISDICTION

27. The Commission has jurisdiction over the subject matter of this complaint and the parties under 66 Pa C.S. § § 102, 104, 1301, 1303, 1304, and 3012.

COUNT I

Violation of Core's Switched Access Tariff

28. The averments of paragraphs 1 through 27 inclusive are incorporated herein by reference as if set forth fully herein.

29. Core's Switched Access Tariff sets forth the rates, terms, and conditions for the provision of switched access service.

30. Core's rates for Switched Access Service, as set forth in its Tariff, are just and reasonable, and have been approved by the Pennsylvania Public Utility Commission.

31. Core's Switched Access Tariff defines "*Switched Access Service" as:*

> *"Access to the switched network of an Exchange Carrier for the purpose of originating or terminating communications. Switched Access is available to carriers as defined in this rate sheet."*

32. Core's Switched Access Tariff further states that

> "*Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises*".

33. Core's Switched Access Tariff defines the term "Carrier" as an *"Interexhange Carrier or Exchange Carrier"*

34. Core's Switched Access Tariff defines the term "Exchange Carrier" as:

"Any individual, partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.

35. Core's Switched Access Tariff defines the term "Customer" as:

"The person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations. The Customer could be an interexchange carrier, a wireless provider, or any other service provider."

36. Core's Switched Access Tariff defines the term "Constructive Order" as

"Delivery of calls to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein. Similarly the selection by a Company's End User of the Customer as the presubscribed IXC constitutes a Constructive Order of switched access by the customer."

37. Core's Switched Access Tariff clearly applies to the AT&T Indirect Traffic.

38. Respondents are "Customers" of Core for Switched Access Service, as defined by Core's Switched Access Tariff.

39. Core is an "Exchange Carrier" as defined by Core's Switched Access Tariff.

40. Respondents clearly obtained Switched Access Service from Core, as defined by Core's Switched Access Tariff i.e., access to the Switched Network of Core for the purpose of originating or terminating Communications.

41. By delivering calls to Core's end users, over Core's switched local exchange services, Respondents "Constructively Ordered" switched access services from Core, under the terms of Core's Switched Access Tariff.

42. Under Core's Switched Access Tariff, Respondents are responsible for the payment of all applicable charges for Core's Switched Access Service.

43. Core billed the Respondents in accordance with its rate sheet for terminating switched access, as set forth in its Switched Access Tariff.

44. The Respondents have refused to pay Core's lawfully invoiced terminating switched access charges, in violation of Core's Switched Access Tariff.

45. Respondents have acted in bad faith, in violation of Core's Switched Access Tariff, by:

a. sending the AT&T Indirect Traffic to Core for termination to Core's end-users without notifying Core of the identity of the originating carrier

b. by failing to comply with Core's tariff provisions related to the ordering of Access Service

c. by refusing to respond to Core's request to negotiate a Mutual Traffic Exchange Agreement knowing that they were sending the AT&T Indirect Traffic to Core, and

d. by failing to pay Core's lawfully invoiced Switched Access Service bills knowing that they were sending the AT&T Indirect Traffic to Core.

COUNT II
(In the Alternative)

Violation of 47 U.S.C. 251(b)(5)

46. The averments of paragraphs 1 through 45 inclusive are incorporated herein by reference as if set forth fully herein.

47. Under Section 251(b)(5) of the Telecommunications Act of 1996 (47 U.S.C. § 251(b)(5)), and its implementing regulations, all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

48. Respondents are "local exchange carriers" under the Telecommunications Act of 1996.

49. Respondents are sending the AT&T Indirect Traffic to Core for termination to Core's end users.

50. In response to Respondents refusals to pay Core's lawfully billed Switched Access Charges, Core repeatedly requested that the Respondents enter into negotiations regarding a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic.

51. The Respondents refused to negotiate for the establishment of a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic.

52. Respondents refusal to negotiate for the establishment of a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic is in clear violation of the explicit terms of the Telecommunications Act of 1996.

53. Due to the Respondents' failure to comply with their obligations to establish reciprocal compensation arrangements for the transport and termination of telecommunications, if the Commission determines that Core's Switched Access Tariff does not apply to the AT&T Indirect Traffic, the Commission should find that the Commission-approved, TELRIC tandem reciprocal compensation rate of Verizon Pennsylvania applies to the AT&T Indirect Traffic, and that the Respondents must pay Core at this rate for all of the AT&T Indirect Traffic for which Core has sought compensation.

COUNT III
(In the Alternative)

Unjust Enrichment/Quantum Meruit

54. The averments of paragraphs 1 through 53 inclusive are incorporated herein by reference as if set forth fully herein.

55. Even if the Commission would conclude that Core's Switched Access Tariff somehow does not apply to the AT&T Indirect Traffic, the Respondents are not legally entitled to avoid paying for the use of Core's Switched Access Service and the use of Core's network facilities.

56. Public Utility Law vests the Public Utility Commission with jurisdiction over matters related to reasonableness of utility services, facilities and rates, as well as other matters concerning the utility's formation of reasonable rules and regulations governing the conditions under which service, facilities, and rates shall be rendered, constructed or imposed. *DiSanto v. Dauphin Consolidated Water Supply Co.*, 436 A.2d 197, 291 Pa. Super. 440 (1981).

57. The Pennsylvania Public Utility Code defines "Switched Access Service" as "A service which provides for the use of common terminating, switching and trunking facilities of a local exchange telecommunications company's public switched network. The term includes, but is not limited to, the rates for local switching, common and dedicated transport and the carrier charge." 66 Pa.C.S. § 3012.

58. The Respondents have utilized Switched Access Service provided by Core, as defined by the Public Utility Code.

59. The Respondents have utilized Core's network facilities to terminate calls on behalf of Respondent's customers.

60. The Respondents have realized a benefit from the utilization of Core's Switched Access Service and from the utilization of Core's network facilities.

61. The Respondents have not paid Core for utilizing Core's Switched Access Services or for utilizing Core's network facilities.

62. By refusing to pay for the use of Core's Switched Access Services and Core's facilities, the Respondents are seeking a free ride to the detriment of Core and its customers.

63. The Commission has the authority to require Respondents to pay reasonable rates to Core for the termination of the AT&T Indirect Traffic, for the utilization of Core's Switched Access Services, and for the utilization of Core's facilities.

64. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Stoeckinger v. Presidential Financial Corp. of Delaware Valley*, 948 A.2d 828, 833 (Pa. Super. 2008) (citations omitted).

65. The equitable doctrine of *quantum meruit* involves a class of obligations imposed by law, regardless of the intention or assent of the parties for reasons dictated by justice and is based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby. To avoid such unjust enrichment, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. *Dept' of Envtl. Res. v. Winn*, 597 A.2d 281, 284 (Pa. Commw. 1991) (emphasis added) (internal citations omitted).

66. Core is entitled to recover the value of the benefits that it conferred upon the Respondents under the doctrines of unjust enrichment and quantum meruit.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, Complainant respectfully requests that the Commission:

1. Find in favor of Core Communications, Inc. on its Complaint;

2. Direct that the Respondents immediately pay Core all amounts outstanding for intrastate switched access services provided, plus late payment charges and interest as specified in Core's Switched Access Service Tariff;

3. Direct the Respondents to pay all future instrastate switched access charges invoiced by Core for AT&T Indirect Traffic delivered in the year 2008,

4. Pending the outcome of this Complaint, direct that the Respondents either obtain a surety bond or to place in a bank escrow account an amount equal to the amount of unpaid switched access charges claimed by Core in this Complaint;

5. Direct that in the future, the Respondents shall timely pay Core all amounts due for intrastate switched access services provided by Core; and

6. Grant such other relief as may be just and reasonable.

Respectfully submitted,

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Attorney ID No.: 78625
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17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
E-mail: mag@stevenslee.com

Counsel for Core Communications, Inc.

May 19, 2009

VERIFICATION

I, Bret Mingo, verify that the information provided in the foregoing Complaint is true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsifications to authorities.

5/12/09
Date

EXHIBIT B

PAINTER LAW FIRM, PLLC
13017 DUNHILL DRIVE
FAIRFAX, VIRGINIA 22030

MICHELLE PAINTER
ATTORNEY AT LAW

703.201.8378
FAX 703.968.5936
E-mail: painterlawfirm@verizon.net

June 18, 2009

Via Overnight Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

Re: Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC, and TCG Pittsburgh, Inc., Docket Nos. C-2009-2108186 and C-2009-2108239

Dear Mr. McNulty:

Please find enclosed an original and three (3) copies of AT&T's Amended Answer to the Formal Complaint of Core Communications, Inc. in the above-referenced matter. Please also find enclosed a Notice to Plead. This Amended Answer is being filed at the request of Core. Although AT&T does not agree with the concerns raised by Core to AT&T's original Answer, in the spirit of compromise and to amicably resolve the parties' differences, AT&T has agreed to file an Amended Answer that addresses Core's concerns. The parties have mutually agreed that this Amended Answer should be considered timely filed. In addition, the parties jointly request that AT&T's original Answer filed on June 9, 2009 be withdrawn and removed from the file and the Commission's website and replaced with this Amended Answer.

Please also find enclosed a proof of filing copy that I ask you to date stamp and return to me in the enclosed self-addressed postage pre-paid envelope.

Please contact me if you have any questions or concerns with this matter.

Very truly yours,

Michelle Painter

cc: Certificate of Service
Office of Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of AT&T's Amended Answer and Notice to Plead upon the participant listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Fairfax, Virginia, this 18th day of June 2009.

VIA E-MAIL AND FIRST CLASS MAIL

Michael A. Gruin
Stevens & Lee
17 N. 2nd St., 16th Floor
Harrrisburg, PA 17101
mag@stevenslee.com

Michelle Painter

Michelle Painter

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Core Communications, Inc.	)	
	)	
Complainant	)	
	)	
v.	)	
	)	
AT&T Communications of PA, LLC	)	**Docket No. C-2009-2108186**
	)	**Docket No. C-2009-2108239**
and	)	
	)	
TCG Pittsburgh, Inc.	)	
	)	
Respondents	)	
	)	

AT&T'S AMENDED ANSWER TO THE FORMAL COMPLAINT OF CORE COMMUNICATIONS, INC.

AT&T Communications of PA, LLC and TCG Pittsburgh, Inc. ("AT&T" and "TCG," respectively, and collectively "AT&T"), pursuant to an agreement with counsel for Core Communications, Inc. ("Core"), file this Amended Answer to the Formal Complaint of Core, and state as follows:

INTRODUCTION AND SUMMARY OF POSITION

Core's Formal Complaint represents an improper and unlawful attempt to back bill more than $7.5 million for the termination of telecommunications traffic based on rates and charges to which AT&T never agreed and that are neither authorized by Core's intrastate switched access service tariff nor permitted by law. Core's claims should be rejected and the relief it requests denied.

The uncontestable facts, as provided in response to the allegations in the numbered paragraphs below, are these: AT&T and Core are indirectly interconnected with each other by means of each company's direct interconnection with Verizon, which provides transiting service for both. From at least January 2004 to the present, AT&T has sent traffic to Core, through Verizon, which Core has terminated to its own customers. Core, in turn, has sent traffic to AT&T, again through Verizon, for termination to AT&T's customers. To the extent the traffic in question was "local," *i.e.*, it both originated and terminated in the same local exchange area, AT&T has never billed Core for terminating the traffic Core originated. During the four-year period January 2004 through year-end 2007, Core followed the same practice: that is, it did not bill AT&T for terminating local traffic that AT&T originated. Clearly, then, the parties throughout this four-year period were "paying" each other "in kind" for terminating each other's local traffic, an arrangement known in the industry as "bill and keep." Bill and keep is a standard industry practice that AT&T, and many other telecommunications carriers, use when exchanging traffic, especially when such carriers have not entered into other contractual arrangements. In fact, AT&T operates under a bill and keep arrangement with every other competitive local exchange carrier in Pennsylvania. Moreover, the FCC has clarified that bill and keep is an appropriate and legally acceptable method of intercarrier compensation.

At all times (including throughout the four-year period 2004-2007), consistent with the industry's standard operating procedure, AT&T transmits CPN (calling party number), which permits Core to distinguish between local traffic and interexchange, or toll, traffic, and a CIC (carrier identification code), which identifies for Core that AT&T is the source of the traffic. This is the information used by carriers throughout the country to bill other carriers appropriate termination charges – reciprocal compensation where agreed to for local traffic and tariffed

access charges for intrastate and interstate interexchange, or toll, traffic. Accordingly, if during the period 2004-2007 Core believed that AT&T was obligated to pay it something for terminating AT&T's local traffic in addition to the "in kind" payment of terminating Core's local traffic, Core regularly received the information necessary to prepare and submit regular, periodic bills. Core, however, billed nothing for local traffic termination during the entire four-year period, and throughout that period the parties dealt with one another on a "bill and keep" basis with respect to each other's local traffic.

In March 2008, with no advance notice whatsoever, Core sent to AT&T an invoice that purported to back bill for termination charges for the entire four-year period from January 2004 through year-end 2007. The total sought by the invoice was about $7.5 million. AT&T promptly sought information concerning the basis for the charges that made up this total. After several months, Core eventually provided information that showed that a very small portion of the billing covered access charges for the termination of interexchange, or toll, traffic. AT&T paid these charges, less amounts that were found to be overbilled.[1] The rest of the $7.5 million was related to the termination of *local* traffic – virtually all of which AT&T believes was ISP-bound local traffic. As Core notes in its Formal Complaint, Core made clear that it was charging AT&T the switched access rates specified in its intrastate switched access service tariff for this local traffic. AT&T responded that these tariffed switched access charges apply only to interexchange, or toll, traffic and not to local traffic.

Core claims that AT&T engaged in "limited preliminary negotiations," "abruptly discontinued talks without explanation," and continuously "refused to respond to Core's

[1] AT&T found overbilling of less than $100,000 to CIC 288. In the event it appears after further review that AT&T underpaid any properly billed tariffed access charges, AT&T commits to pay any heretofore unpaid amount.

inquiries" from August 2008 through April 2009.[2] This is a false misrepresentation as to what occurred between the parties. As demonstrated by Core itself though its Formal Complaint and billing practices, Core argues that it should be allowed to charge (in fact, back-bill for a period of at least four years) access rates for the termination of local traffic and local ISP-bound traffic. Notwithstanding AT&T's willingness to engage in discussions with Core regarding reciprocal compensation arrangements going forward, it should be crystal clear from Core's Formal Complaint that Core left little room for good faith discussions between the parties. Rates charged by Core – rates that Core insists in its Formal Complaint that it be allowed to bill – are not authorized by Core's own tariff and are inconsistent with Pennsylvania law. Likewise, Core's newly proposed "alternative" billing arrangement (utilizing Verizon's tandem reciprocal compensation rate) for local traffic that is primarily ISP-bound[3] is neither authorized under Core's tariffs nor consistent with the FCC's *ISP Remand Order*.[4] Core filed its Formal Complaint not because AT&T did not negotiate in good faith, but as demonstrated by its Formal Complaint, because Core insists on billing AT&T charges that are supported neither by its own tariff nor Pennsylvania or federal law.

In a nutshell, Core's Formal Complaint should be dismissed and the relief it seeks denied because of the reasons stated in this Amended Answer, including:

- The traffic in dispute is all local traffic (and virtually all local ISP-bound traffic);

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[2] Core Formal Complaint at Paragraph 16.
[3] Core Formal Complaint at Paragraph 53.
[4] *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).

- Core's own intrastate switched access service tariff authorizes and imposes switched access charges only for non-local, toll traffic, and expressly recognizes that Core and other carriers may exchange local traffic on an "in kind" basis;
- The Commission has recognized, repeatedly, that switched access charges are rates charged by a local exchange carrier to other telephone carriers to carry non-local, or toll, calls destined to or originating from the local exchange carrier's local service customers – and are not rates charged to carry purely local telecommunications traffic;
- By exchanging local traffic on a "bill and keep" basis continuously from January 2004 until March 2008, Core represented to AT&T that it was agreeable to (and in fact had implicitly agreed to) such an arrangement, and Core is estopped to assert that it is now entitled to anything other than the "in kind" termination it received for local traffic terminated during that period;
- Given the lack of any agreement (other than the tacit "bill and keep" agreement) covering local traffic, it would be improper and unlawful to require AT&T to pay anything for past termination beyond the "in kind" payment Core has already received (and continues to receive);
- This is particularly so given the overreaching, bad faith positions Core has taken in the parties' discussions over the past year; and
- Going forward, "bill and keep" is an appropriate arrangement for the mutual termination of local traffic exchanged between AT&T and Core – indeed, it is the arrangement under which AT&T operates *vis a vis* all other competitive local exchange carriers in Pennsylvania.

Notwithstanding the foregoing, AT&T has been willing to engage in discussions with Core regarding the termination of local traffic, including ISP-bound local traffic. However, AT&T does not agree to pay access charges for local, including local ISP-bound, traffic, nor does it agree to pay the Verizon tandem reciprocal compensation rate for the termination of traffic that is predominantly ISP-bound.

* * *

In response to the specific individual paragraphs of Core's Formal Complaint, AT&T states as follows:

THE PARTIES

1. The name of address of the Complainant is as follows:

Core Communications, Inc.
209 West St.
Suite 302
Annapolis, MD 21401

ANSWER: On information and belief, AT&T admits the allegations of paragraph 1.

2. All pleadings, orders, notices and other correspondence with respect to this docket should be addressed to:

Michael A. Gruin
Stevens & Lee
17 N. 2nd St. 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
E-mail: mag@stevenslee.com

ANSWER: No answer is required; paragraph 2 does not contain any allegations.

3. Core is a Competitive Local Exchange Carrier ("CLEC") authorized to provide competitive local exchange services in every service territory in the Commonwealth of Pennsylvania. Core is in good standing with the Pennsylvania Public Utility Commission ("Commission"), and maintains a CLEC tariff (PA PUC Tariff No. 1), an IXC tariff (PA PUC Tariff No. 2), and an intrastate switched access service tariff (PA PUC Tariff No. 4) with the Commission. Core also maintains an interstate switched access service tariff with the Federal Communications Commission ("FCC").

ANSWER: On information and belief, AT&T admits the allegations of paragraph 3.

4. Upon information and belief, the names and addresses of the Respondents are:

AT&T Communications of PA, LLC,
One AT&T Way
Room 2B115E
Bedminster, NJ 07921
and
TCG Pittsburgh, Inc.
One AT&T Way
Room 2B115E
Bedminster, NJ 07921

ANSWER: ADMITTED. However, for purposes of this Complaint, all further service of documents should be made upon:

Michelle Painter, Esq.
PA Bar ID No. 91760
Painter Law Firm, PLLC
13017 Dunhill Drive
Fairfax, VA 22030
(703) 201-8378
painterlawfirm@verizon.net

5. Both Respondents are certificated by the Commission as Competitive Local Exchange Carriers and Interexchange Carriers ("IXCs") in Pennsylvania.

ANSWER: ADMITTED.

6. Upon information and belief, both Respondents are wholly owned subsidiaries of AT&T Corporation.

ANSWER: AT&T admits that both Respondents are wholly owned subsidiaries of AT&T Corp.

7. Upon information and belief, both Respondents provide local exchange telecommunications service and interexchange service to business and residential customers in the Commonwealth of Pennsylvania.

ANSWER: DENIED as stated. TCG does not offer service in Pennsylvania to residential customers. Further, while TCG is a certified interexchange carrier in Pennsylvania, TCG provides only minimal interexchange service in Pennsylvania. AT&T admits that TCG

provides local exchange service in Pennsylvania. As to AT&T Communications of Pennsylvania, AT&T admits that it provides local exchange telecommunications service and interexchange service to business and residential customers in Pennsylvania.

8. Upon information and belief, Respondents indirectly connect with Core through tandem switches of Verizon Pennsylvania, Inc.

ANSWER: ADMITTED.

BACKGROUND

9. Core receives third-party call records from Verizon on a regular basis, in tape and, more recently, electronic formats. These Verizon call records are generated by Verizon's tandem switches and their purpose is to provide Core with information on calls that Verizon deems to be toll calls. These Verizon call records are provided to Core to enable Core to generate Carrier Access Billing System (CABS) invoices to third party carriers who use Verizon's tandems to interconnect indirectly with Core.

ANSWER: At this time, because AT&T is not involved in Core's relations with Verizon, AT&T lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 and can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing.

10. In late 2007, Core performed a detailed review and analysis of the Verizon call records in order to indentify and quantify the telecommunications traffic that was being sent to Core from other carriers through Verizon tandem switches.

ANSWER: At this time, AT&T lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing.

11. Based on Core's review of the Verizon switch and call records, Core determined that the Respondents have been sending considerable amounts of telecommunications traffic to Core, via the Verizon tandem switches, which Core terminates to its end user customers. This traffic shall be hereinafter referred to as the "AT&T Indirect Traffic".

ANSWER: At this time, AT&T lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 11 as they relate to Core's review of records, and can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing. Answering further, AT&T admits that AT&T and Core are indirectly interconnected with each other through Verizon tandem switches. AT&T has sent (and continues to send) traffic to Core, through Verizon, for termination by Core to its customers. Core likewise has sent (and continues to send) traffic to AT&T, through Verizon, for termination by AT&T to its customers. With respect to the third sentence of paragraph 11, AT&T states that no answer is required.

12. Prior to Core's analysis of the Verizon call records, neither of the Respondents had ever notified Core that they were sending the AT&T Indirect Traffic to Core for termination to Core's end users, and none had ever taken the steps required under Core's tariffs to formally submit an order for Switched Access Service from Core. As a result, Core had no way of knowing that the Respondents were sending the AT&T Indirect Traffic to Core.

ANSWER: DENIED. AT&T and Core are not directly interconnected; rather, AT&T and Core connect to each other indirectly through Verizon switches. Both Core and AT&T have provisions in their publicly filed interconnection agreements ("ICAs") with Verizon pursuant to which each carrier purchases transit service from Verizon, whereby Verizon transmits AT&T's traffic to Core for termination to Core's customers, and transmits Core's traffic to AT&T for termination to AT&T's customers. During the entire period in question, and consistent with the industry's standard operating procedure, AT&T transmitted CPN (which permits Core to distinguish between local traffic and interexchange, or toll, traffic) and a CIC (which identifies AT&T as the source of the traffic) for its originating traffic. It is therefore AT&T's belief that

Core was or should have been aware that AT&T's traffic (and, in particular, local traffic) was being transmitted to Core. AT&T is unaware of any additional requirement to notify Core that AT&T's local traffic would be transited to Core by Verizon. Moreover, because the termination of local traffic is not governed by Core's switched access service tariff, any alleged "steps required under Core's tariffs to formally submit an order for switched access service from Core" are irrelevant. Answering further, AT&T states that local traffic indirectly passed between Core and AT&T has been and currently is subject to bill and keep, as described more fully in the Introduction and Summary of Position, which is incorporated as if fully restated herein. See also response to paragraph 13.

13. The Verizon call records clearly demonstrate that the Respondents had been sending the AT&T Indirect Traffic to Core for years, without ever notifying Core, knowing that Core would have no way of identifying this traffic as originating from the Respondents unless Core undertook a highly burdensome, expensive and time-consuming analysis of those same records.

ANSWER: DENIED. AT&T hereby incorporates its answer to paragraph 12 and the Introduction and Summary of Position as if fully restated herein. Answering further, AT&T states that consistent with the standard industry practice, AT&T transmits appropriate call detail information (*e.g.,* the carrier identification code or "CIC") so that terminating carriers will be able to identify AT&T as the source of the traffic when the traffic is delivered.

14. Core has determined that the traffic in question was received from the Respondents by examining the "Carrier Identification Codes" ("CIC codes") associated with the Respondents in the Verizon call records.

ANSWER: AT&T lacks knowledge or information regarding Core's examination of CICs and therefore can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing. Answering further, AT&T states that, consistent with the industry's standard operating procedure, AT&T transmitted a CIC for traffic it originated. AT&T admits

that CIC 288 is associated with AT&T Pennsylvania and that CIC 0292 is associated with TCG Pittsburgh, Inc. AT&T denies that CIC 5438 is associated with AT&T Pennsylvania. See answer to paragraph 24.

15. Core does not have an interconnection agreement or traffic exchange agreement in place with the Respondents; therefore, Core's tariffs control the intercarrier compensation payable by the Respondents for the AT&T Indirect Traffic sent by the Respondents to Core for termination to Core's end user customers.

ANSWER: DENIED as stated. AT&T admits that there is no written interconnection agreement or traffic exchange agreement in place between AT&T and Core. AT&T further states that Core's switched access service tariff – to the extent that it is consistent with applicable law – controls the compensation payable by AT&T for intrastate toll traffic terminated to Core's end user customers, and that AT&T has paid the applicable charges for the termination of such traffic. AT&T denies that Core's switched access service tariff controls the compensation payable by AT&T for local traffic and local ISP-bound traffic terminated to Core's end user customers, or that Core's tariff permits it to charge switched access service rates for the termination of local traffic or local ISP-bound traffic. As described more fully in the Introduction and Summary of Position, which is incorporated as if fully restated herein, the termination of such traffic has been and currently is subject to bill and keep, which is a valid and industry standard method of intercarrier compensation among telecommunications carriers.

16. In March, 2008, Core initially invoiced AT&T for the AT&T Indirect Traffic for the periods from 2004 through December 31, 2007. AT&T then paid Core for certain interstate calls delivered during that time period, at Core's tariffed interstate switched access rates. However, AT&T later stated that it would not pay anything at all for a large segment of the AT&T Indirect Traffic because "AT&T Corp. has not reached agreement with your company regarding Intrastate rates and extends an invitation to discuss." Although AT&T engaged in limited preliminary negotiations with Core towards that end, AT&T abruptly discontinued talks without explanation, and then ignored numerous attempts by Core to restart talks, or at least clarify the situation. AT&T's continuing refusal to respond to Core's inquiries lasted, roughly, from August, 2008, through April, 2009.

ANSWER: As to the first sentence of paragraph 16, AT&T admits that in March 2008, without advanced notice, Core initially sent an invoice to AT&T that purported to back bill for traffic terminated from 2004 through December 31, 2007. As to the second sentence of paragraph 16, AT&T admits that it paid Core for certain interstate calls delivered during the stated time period at Core's tariffed interstate switched access rates. As to the third sentence of paragraph 16, AT&T denies that it stated that AT&T would not pay for the termination of intrastate toll traffic terminated by Core, and states that AT&T has paid (and continues to pay) for the termination of such traffic at the rates currently set forth in Core's intrastate switched access service tariff. AT&T admits that it stated that AT&T would not pay for the termination of local traffic or local ISP-bound traffic at the rates set forth in Core's intrastate switched access service tariff. AT&T's refusal to pay switched access service rates for the termination of such traffic was legally justified because local traffic, including local ISP-bound traffic, is not subject to the switched access service rates set forth in Core's tariff. AT&T further states that although the parties had been operating for more than four years on a "bill and keep" basis with respect to local traffic, AT&T indicated that it was willing to discuss reciprocal compensation arrangements going forward – and thus "extend[ed] an invitation to discuss." As to the fourth sentence of paragraph 16, AT&T admits that the parties engaged in discussions, but denies that AT&T "abruptly discontinued talks without explanation, and then ignored numerous attempts by

Core to restart talks, or at least clarify the situation." Answering further, AT&T states that it has negotiated in good faith with Core, but the parties have been unable to reach agreement. As demonstrated by its Formal Complaint, Core insists that it should be allowed to charge (in fact, back-bill for a period of four years) access rates for the termination of local traffic and local ISP-bound traffic. Likewise, Core's newly proposed "alternative" billing arrangement (utilizing Verizon's tandem reciprocal compensation rate) for local traffic that is primarily ISP-bound is neither authorized under Core's tariffs nor consistent with the FCC's *ISP Remand Order*. Notwithstanding AT&T's willingness to engage in discussions with Core, it should be crystal clear from Core's Formal Complaint that Core left little room for good faith discussions between the parties. AT&T declines to pay rates that Core's own tariff did not authorize and that were inconsistent with Pennsylvania law. Core filed its Formal Complaint not because AT&T did not negotiate in good faith, but as demonstrated by its Formal Complaint, because Core insists on billing AT&T charges that are supported neither by its own tariff nor Pennsylvania or federal law. AT&T denies the allegations in the last sentence of paragraph 16.

17. As of the date of the filing of the Complaint, Core has submitted intrastate switched access service bills to the Respondents for the termination of the AT&T Indirect Traffic for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009, which include billings for the termination of intrastate traffic in accordance with Core's Switched Access Service tariff (PA PUC tariff No. 4). Core is still in the process of analyzing the voluminous Verizon call records for the year 2008 to identify the AT&T Indirect Traffic that was delivered to Core in 2008. Upon completion of its analysis of these records, Core will submit intrastate access service invoices to AT&T for access charges due for 2008.

ANSWER: As to the first sentence of paragraph 17, AT&T admits that Core has submitted bills to AT&T for the termination of traffic for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009. Answering

further, AT&T states that it has paid the rates currently set forth in Core's switched access service tariff for the termination of intrastate toll traffic. AT&T denies that local traffic is subject to Core's switched access service tariff and that the billings for the termination of local traffic were "in accordance with" Core's tariff. As to the second and third sentences of paragraph 17, AT&T lacks knowledge or information sufficient to form a belief as to the truth of the allegations therein, and can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing.

18. Core's rates for Switched Access Services, as set forth in its Tariff, are just and reasonable, and have been approved by the Pennsylvania Public Utility Commission.

ANSWER: DENIED as stated. AT&T admits that Core's rates for switched access service are set forth in its tariff and are subject to review by the Commission, but does not admit that such rates are just and reasonable. Answering further, AT&T states that while the rates in Core's switched access service tariff apply to intrastate toll traffic, such rates are not applicable to, or "just and reasonable" for, the termination of local traffic or local ISP-bound traffic; nor has the Commission approved the application of Core's switched access service rates to the termination of local traffic or local ISP-bound traffic. In fact, the Commission has made clear that switched access service charges apply only to non-local toll calls.

19. The Respondents have refused to pay considerable portions of the intrastate switched access services bills submitted by Core Communications, as set forth more fully below.

ANSWER: DENIED as stated. AT&T admits that it has refused to pay portions of the intrastate switched access service bills submitted by Core, but only those portions that purport to improperly apply tariffed switched access rates to local traffic and local ISP-bound traffic – traffic to which such rates do not apply. Answering further, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-18 as if fully restated herein.

20. Core has sent numerous requests for payment of its outstanding intrastate switched access service bills to the Respondents, but Respondents have refused to make payment on the outstanding balances due.

ANSWER: DENIED as stated. AT&T admits that Core has sent requests for payment of the intrastate switched access service bills and that AT&T has refused to pay the full amounts billed, but states that AT&T's refusal is legally justified, for the reasons explained above, and therefore denies that there are any "outstanding balances due." Answering further, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-19 as if fully restated herein.

21. Respondents have refused to pay the outstanding balances due on the grounds that the Respondents "have not reached agreement with {Core} regarding Intrastate rates."

ANSWER: DENIED as stated. AT&T denies there are any "outstanding balances due," because the only portions of Core's bills that AT&T has declined to pay, on the basis that the parties do not have a written agreement, are those that purport to charge tariffed switched access service rates for traffic to which such rates do not apply – local traffic and local ISP-bound traffic. Answering further, AT&T states that absent an agreement between the parties, such traffic is subject to bill and keep, which is a valid and industry standard practice for intercarrier compensation. By way of further Answer, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-20 as if fully restated herein.

22. The Respondents have never denied that they delivered the AT&T Indirect Traffic to Core for ultimate delivery to Core's end user customers. In fact, the Respondents have acknowledged that they send considerable volumes of traffic to Core via the Verizon tandem switches for termination to Core's end users, and the Respondents have simply refused to pay significant portions of Core's lawfully invoiced switched access service charges. In essence, AT&T wants Core to terminate AT&T's traffic for free, forever.

ANSWER: DENIED as stated. As to the first two sentences of paragraph 22, AT&T admits that it has delivered traffic to Core via Verizon tandem switches, and has refused to pay

portions of the switched access service charges billed by Core, but denies that such charges were "lawfully invoiced." Answering further, AT&T states that it has paid Core's currently tariffed switched access service rates for the termination of intrastate non-local toll traffic, but that the termination of local traffic and local ISP-bound traffic is not subject to the tariffed rates, and that therefore AT&T was legally justified in refusing to pay the charges billed by Core for the termination of such traffic. AT&T denies the third sentence of paragraph 22. AT&T has paid for the termination of local traffic "in kind" – *i.e.*, by terminating Core's local traffic. This is a legally permissible and industry standard method of intercarrier compensation. In addition, as AT&T has repeatedly made clear to Core, AT&T is willing to negotiate a reasonable reciprocal compensation arrangement for terminating local traffic on a going forward basis. By way of further Answer, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-21 as if fully restated herein.

23. Core has informed the Respondents that, with the exception of negotiated agreements, "bill & keep" has never been approved as an appropriate intercarrier compensation mechanism, either by the FCC or by the Pennsylvania Commission.

ANSWER: AT&T admits that Core has informed AT&T of its position that, with the exception of negotiated agreements, "bill & keep" has never been approved as an appropriate intercarrier compensation mechanism, either by the FCC or by the Commission. AT&T denies that Core's purported belief is supported by the law or facts. Answering further, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-22 as if fully restated herein.

24. The following charges for Core's intrastate switched access services remain unpaid by the Respondents for the periods from January 1, 2004 through December 31, 2007, and from January 1, 2009 through March 31, 2009:

AT&T Pennsylvania (CIC Code 5438): $216.83

AT&T Pennsylvania (CIC Code 288): $92,236.12

TCG Pittsburgh, Inc. (CIC Code 0292): $7,526,554.81

ANSWER: DENIED as stated. AT&T admits that Core has billed AT&T Pennsylvania $216.83 for traffic with CIC 5438, but AT&T denies that CIC 5438 is associated with AT&T Pennsylvania or that AT&T owes the billed amount. AT&T admits that CIC 288 is associated with AT&T Pennsylvania and that Core has billed the stated amount, but AT&T denies that it owes the amount indicated. The traffic associated with CIC 288 is intrastate toll traffic and therefore Core is entitled to compensation for the termination of that traffic at its currently tariffed switched access service rates. However, the charges billed for that traffic have been in excess of Core's tariffed rates. AT&T believes that it has paid the applicable switched access services rates for this traffic (CIC 288), but if AT&T has mistakenly paid less than legitimately billed switched access charges, AT&T agrees to pay the difference. Answering further, AT&T admits that CIC 0292 is associated with TCG Pittsburgh, Inc. and that Core has billed the stated amount, but AT&T denies that TCG owes the amount indicated. AT&T states that the entire $7,526,554.81 billed to TCG was for the termination of local traffic and local ISP-bound traffic. Core billed TCG for that traffic at its tariffed intrastate switched access service rates, but those rates do not apply to the termination of local traffic and local ISP-bound traffic. Accordingly, AT&T was fully justified in refusing to pay the billed amount. By way of further Answer, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-23 as if fully restated herein.

25. Additionally, upon information and belief, the Respondents will be responsible for significant additional charges for Core's intrastate switched access services for the AT&T Indirect Traffic delivered during 2008. Upon completion of its analysis of the Verizon call records, Core will submit switched access service charge bills to the Respondents for the year 2008, and will submit proof of such billings into the record in this proceeding.

ANSWER: AT&T denies the allegations in the first sentence of paragraph 25. As to the second sentence of paragraph 25, AT&T lacks knowledge or information sufficient to form a belief as to the truth of the allegations therein, and can neither confirm nor deny those allegations, and strict proof thereof is demanded at hearing. Answering further, AT&T incorporates its Introduction and Summary of Position and its responses to paragraphs 9-24 as if fully restated herein.

26. As of the filing of this Complaint, the Respondents continue to send significant amounts of Indirect Traffic to Core for termination to Core's end users, while adamantly refusing to pay Core any compensation for the use of Core's Access Services and facilities, and refusing to enter in an reciprocal compensation arrangement to compensate Core for the use of Core's Access Services and facilities. Therefore, upon information and belief, the Respondents will continue to incur significant additional charges for Core's intrastate switched access services for AT&T Indirect Traffic on a going-forward basis.

ANSWER: DENIED as stated. AT&T admits that it indirectly sends traffic to Core through Verizon tandem switches for termination to Core's end users, and states that Core likewise sends indirect traffic to AT&T through Verizon for termination to AT&T's end users. Answering further, AT&T denies that it has "refus[ed] to pay Core any compensation for the use of Core's Access Services and facilities" or "to enter in an reciprocal compensation arrangement to compensate Core for the use of Core's Access Services and facilities," as more fully explained above and in the Introduction and Summary of Position. In addition, AT&T states that it has paid and continues to pay Core for the termination of intrastate toll traffic at the rates set forth in Core's intrastate switched access service tariff and for the termination of local traffic "in kind" – *i.e.*, by terminating Core's local traffic. By way of further Answer, AT&T incorporates its

Introduction and Summary of Position and its responses to paragraphs 9-25 as if fully restated herein.

JURISDICTION

27. The Commission has jurisdiction over the subject matter of this complaint and the parties under 66 Pa C.S. § § 102, 104, 1301, 1303, 1304, and 3012.

ANSWER: AT&T admits that the Pennsylvania Commission has jurisdiction over the subject matter of this Complaint, but not necessarily under the sections listed by Core.

COUNT I

Violation of Core's Switched Access Tariff

28. The averments of paragraphs 1 through 27 inclusive are incorporated herein by reference as if set forth fully herein.

ANSWER: AT&T's responses to paragraphs 1 through 27 inclusive are incorporated by reference as if set forth fully herein.

29. Core's Switched Access Tariff sets forth the rates, terms, and conditions for the provision of switched access service.

ANSWER: ADMITTED.

30. Core's rates for Switched Access Service, as set forth in its Tariff, are just and reasonable, and have been approved by the Pennsylvania Public Utility Commission.

ANSWER: DENIED as stated. AT&T admits that Core's rates for switched access service are set forth in its tariff which is subject to review by the Commission. Answering further, AT&T hereby incorporates by reference its response to paragraph 18 as if fully restated herein.

31. Core's Switched Access Tariff defines "*Switched Access Service*" *as:*

"*Access to the switched network of an Exchange Carrier for the purpose of originating or terminating communications. Switched Access is available to carriers as defined in this rate sheet.*"

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 31 to the extent that they are consistent with the tariff and denies them to the extent they are not.

32. Core's Switched Access Tariff further states that

"*Switched Access Service, which is available to Customers for their use in furnishing their services to end users, provides a two-point communications path between a Customer's Premises and an End Users Premises*".

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 32 to the extent that they are consistent with the tariff and denies them to the extent they are not.

33. Core's Switched Access Tariff defines the term "Carrier" as an *"Interexhange Carrier or Exchange Carrier."*

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 33 to the extent that they are consistent with the tariff and denies them to the extent they are not.

34. Core's Switched Access Tariff defines the term "Exchange Carrier" as:

"Any individual, partnership, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service.

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 34 to the extent that they are consistent with the tariff and denies them to the extent they are not.

35. Core's Switched Access Tariff defines the term "Customer" as:

"The person, firm, other entity which orders Service and is responsible for the payment of charges and for compliance with the Company's rate sheet regulations The Customer could be an interexchange carrier, a wireless provider, or any other service provider."

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 35 to the extent that they are consistent with the tariff and denies them to the extent they are not.

36. Core's Switched Access Tariff defines the term "Constructive Order" as

"Delivery of calls to or acceptance of calls from the Company's End User locations over Company-switched local exchange services constitutes a Constructive Order by the Customer to purchase switched access services as described herein. Similarly the selection by a Company's End User of the Customer as the presubscribed IXC constitutes a Constructive Order of switched access by the customer."

ANSWER: AT&T states that Core's switched access service tariff speaks for itself, and AT&T admits the allegations contained in paragraph 36 to the extent that they are consistent with the tariff and denies them to the extent they are not.

37. Core's Switched Access Tariff clearly applies to the AT&T Indirect Traffic.

ANSWER: DENIED. AT&T denies that the portions of the switched access service tariff cited by Core in paragraphs 31 through 36 are applicable to the termination of the local traffic and local ISP-bound traffic at issue here. Answering further, AT&T states that the switched access service rates set forth in Core's switched access service tariff apply only to intrastate toll calls, not to local traffic and local ISP-bound traffic. To the extent, if any, that Core's switched access service tariff may apply to local traffic or local ISP-bound traffic, the tariff indicates that such traffic is subject to bill and keep.

38. Respondents are "Customers" of Core for Switched Access Service, as defined by Core's Switched Access Tariff.

ANSWER: DENIED as stated. With respect to the local and local ISP-bound traffic at issue here, AT&T denies that Respondents are "Customers" of Core for switched access service, as defined by Core's switched access service tariff. Answering further, AT&T hereby incorporates its responses to paragraphs 24 and 37 as if fully restated herein.

39. Core is an "Exchange Carrier" as defined by Core's Switched Access Tariff.

ANSWER: ADMITTED. Answering further, AT&T hereby incorporates its response to paragraph 37 as if fully restated herein.

40. Respondents clearly obtained Switched Access Service from Core, as defined by Core's Switched Access Tariff i.e., access to the Switched Network of Core for the purpose of originating or terminating Communications.

ANSWER: DENIED as stated. AT&T states that it has obtained and continues to obtain switched access service from Core for the termination of intrastate toll traffic, and that AT&T has paid Core for that service at the rates currently set forth in its switched access service tariff. Answering further, AT&T denies that Core's switched access service tariff applies to the local traffic and local ISP-bound traffic at issue here. By way of further Answer, AT&T hereby incorporates its response to paragraph 37 as if fully restated herein.

41. By delivering calls to Core's end users, over Core's switched local exchange services, Respondents "Constructively Ordered" switched access services from Core, under the terms of Core's Switched Access Tariff.

ANSWER: DENIED. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its response to paragraph 37 as if fully restated herein.

42. Under Core's Switched Access Tariff, Respondents are responsible for the payment of all applicable charges for Core's Switched Access Service.

ANSWER: AT&T admits that under Core's switched access service tariff AT&T is responsible for the payment of all *applicable* charges for Core's switched access service. Answering further, AT&T states that it has paid Core the applicable charges for the termination of intrastate toll calls, but denies that local traffic and local ISP-bound traffic are subject to access charges under Core's switched access service tariff. By way of further Answer, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26 and 37 as if fully restated herein.

43. Core billed the Respondents in accordance with its rate sheet for terminating switched access, as set forth in its Switched Access Tariff.

ANSWER: DENIED. As to CIC 288, AT&T states that the terminated traffic was intrastate toll traffic subject to the switched access rates currently set forth in Core's switched access service tariff, but that Core billed AT&T in excess of those rates. AT&T believes it has paid the properly billed tariffed access charges for the termination of intrastate toll traffic, but in the event it has underpaid such charges, it commits to pay any unpaid amount. As to CIC 0292, AT&T states that Core purported to bill AT&T for the termination of local and local ISP-bound traffic at the switched access rates set forth in its tariff, but states that those rates were not applicable to that traffic. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26, 37 and 42 as if fully restated herein.

44. The Respondents have refused to pay Core's lawfully invoiced terminating switched access charges, in violation of Core's Switched Access Tariff.

ANSWER: DENIED. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26, 37, and 42-43 as if fully restated herein.

45. Respondents have acted in bad faith, in violation of Core's Switched Access Tariff, by:

a. sending the AT&T Indirect Traffic to Core for termination to Core's end-users without notifying Core of the identity of the originating carrier

b. by failing to comply with Core's tariff provisions related to the ordering of Access Service

c. by refusing to respond to Core's request to negotiate a Mutual Traffic Exchange Agreement knowing that they were sending the AT&T Indirect Traffic to Core, and

d. by failing to pay Core's lawfully invoiced Switched Access Service bills knowing that they were sending the AT&T Indirect Traffic to Core.

ANSWER: DENIED. AT&T denies that it has acted in bad faith or in violation of Core's switched access service tariff. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26, 37, and 42-44 as if fully restated herein.

COUNT II
(In the Alternative)

Violation of 47 U.S.C. 251(b)(5)

46. The averments of paragraphs 1 through 45 inclusive are incorporated herein by reference as if set forth fully herein.

ANSWER: AT&T's responses to paragraphs 1 through 45 inclusive are incorporated herein by reference as if set forth fully herein.

47. Under Section 251(b)(5) of the Telecommunications Act of 1996 (47 U.S.C. § 251(b)(5)), and its implementing regulations, all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

ANSWER: AT&T states that section 251(b)(5) of the Telecommunications Act of 1996 speaks for itself, and no further response is required.

48. Respondents are "local exchange carriers" under the Telecommunications Act of 1996.

ANSWER: ADMITTED.

49. Respondents are sending the AT&T Indirect Traffic to Core for termination to Core's end users.

ANSWER: ADMITTED.

50. In response to Respondents refusals to pay Core's lawfully billed Switched Access Charges, Core repeatedly requested that the Respondents enter into negotiations regarding a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic.

ANSWER: DENIED. AT&T denies that the switched access charges billed by Core and that AT&T refused to pay were "lawfully billed." While AT&T denies the characterization that Core "repeatedly requested" that AT&T enter into negotiations, AT&T did engage in good faith negotiations with Core regarding the termination of local traffic and local ISP-bound traffic. Answering further, AT&T incorporates by reference its response to paragraph 16 and its Introduction and Summary of Position.

51. The Respondents refused to negotiate for the establishment of a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic.

ANSWER: DENIED. Answering further, AT&T incorporates by reference its response to paragraph 16 and its Introduction and Summary of Position.

52. Respondents refusal to negotiate for the establishment of a Mutual Traffic Exchange Agreement to govern the Respondents' reciprocal compensation obligations related to the AT&T Indirect Traffic is in clear violation of the explicit terms of the Telecommunications Act of 1996.

ANSWER: DENIED. Answering further, AT&T incorporates by reference its response to paragraph 16 and its Introduction and Summary of Position.

53. Due to the Respondents' failure to comply with their obligations to establish reciprocal compensation arrangements for the transport and termination of telecommunications, if the Commission determines that Core's Switched Access Tariff does not apply to the AT&T Indirect Traffic, the Commission should find that the Commission-approved, TELRIC tandem reciprocal compensation rate of Verizon Pennsylvania applies to the AT&T Indirect Traffic, and that the Respondents must pay Core at this rate for all of the AT&T Indirect Traffic for which Core has sought compensation.

ANSWER: DENIED. This is a request for relief that does not require a response. Answering further, AT&T incorporates by reference its Introduction and Summary of Position as if fully restated herein.

COUNT III
(In the Alternative)

Unjust Enrichment/Quantum Meruit

54. The averments of paragraphs 1 through 53 inclusive are incorporated herein by reference as if set forth fully herein.

ANSWER: AT&T's responses to paragraphs 1 through 53 inclusive are incorporated herein by reference as if set forth fully herein.

55. Even if the Commission would conclude that Core's Switched Access Tariff somehow does not apply to the AT&T Indirect Traffic, the Respondents are not legally entitled to avoid paying for the use of Core's Switched Access Service and the use of Core's network facilities.

ANSWER: DENIED. Answering further, AT&T incorporates its Introduction and Summary of Position.

56. Public Utility Law vests the Public Utility Commission with jurisdiction over matters related to reasonableness of utility services, facilities and rates, as well as other matters concerning the utility's formation of reasonable rules and regulations governing the conditions under which service, facilities, and rates shall be rendered, constructed or imposed. *DiSanto v. Dauphin Consolidated Water Supply Co.*, 436 A.2d 197, 291 Pa. Super. 440 (1981).

ANSWER: AT&T states that paragraph 56 asserts a legal conclusion to which no response is required.

57. The Pennsylvania Public Utility Code defines "Switched Access Service" as "A service which provides for the use of common terminating, switching and trunking facilities of a local exchange telecommunications company's public switched network. The term includes, but is not limited to, the rates for local switching, common and dedicated transport and the carrier charge." 66 Pa.C.S. § 3012.

ANSWER: AT&T states that the Pennsylvania Public Utility Code speaks for itself, and that no further response is required. AT&T denies that switched access charges apply to local traffic and local ISP-bound traffic.

58. The Respondents have utilized Switched Access Service provided by Core, as defined by the Public Utility Code.

ANSWER: AT&T states that it has utilized switched access service provided by Core for the termination of intrastate toll traffic and that AT&T has paid the legally applicable rates for that service. Answering further, AT&T states that local traffic and local ISP-bound traffic are not subject to Core's switched access service tariff. By way of further Answer, AT&T incorporates by reference its Introduction and Summary of position as if fully restated herein.

59. The Respondents have utilized Core's network facilities to terminate calls on behalf of Respondent's customers.

ANSWER: ADMITTED.

60. The Respondents have realized a benefit from the utilization of Core's Switched Access Service and from the utilization of Core's network facilities.

ANSWER: AT&T admits that both AT&T and Core receive benefits today under an arrangement whereby AT&T and Core each terminate each other's local and local ISP-bound traffic.

61. The Respondents have not paid Core for utilizing Core's Switched Access Services or for utilizing Core's network facilities.

ANSWER: DENIED. AT&T states that it has paid Core for the termination of intrastate toll traffic at the rates currently set forth in its switched access service tariff. Answering further,

AT&T states that it pays for the termination of local traffic through bill and keep, which is a legally accepted and industry standard method of intercarrier compensation.

62. By refusing to pay for the use of Core's Switched Access Services and Core's facilities, the Respondents are seeking a free ride to the detriment of Core and its customers.

ANSWER: DENIED. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26, 37, and 42-44 as if fully restated herein.

63. The Commission has the authority to require Respondents to pay reasonable rates to Core for the termination of the AT&T Indirect Traffic, for the utilization of Core's Switched Access Services, and for the utilization of Core's facilities.

ANSWER: AT&T states that paragraph 63 asserts a legal conclusion to which no response is required.

64. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Stoeckinger v. Presidential Financial Corp. of Delaware Valley*, 948 A.2d 828, 833 (Pa. Super. 2008) (citations omitted).

ANSWER: AT&T states that paragraph 64 asserts a legal conclusion to which no response is required.

65. The equitable doctrine of *quantum meruit* involves a class of obligations imposed by law, regardless of the intention or assent of the parties for reasons dictated by justice and is based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby. To avoid such unjust enrichment, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. *Dept' of Envtl. Res. v. Winn*, 597 A.2d 281, 284 (Pa. Commw. 1991) (emphasis added) (internal citations omitted).

ANSWER: AT&T states that paragraph 65 asserts a legal conclusion to which no response is required.

66. Core is entitled to recover the value of the benefits that it conferred upon the Respondents under the doctrines of unjust enrichment and quantum meruit.

ANSWER: DENIED. Answering further, AT&T hereby incorporates its Introduction and Summary of Position and its responses to paragraphs 9-26, 37, and 42-44 as if fully restated herein.

NEW MATTERS

1. Both Core and AT&T have provisions in their publicly filed interconnection agreements ("ICAs") with Verizon pursuant to which each carrier purchases transit service from Verizon, whereby Verizon transmits AT&T's traffic to Core for termination to Core's customers, and transmits Core's traffic to AT&T for termination to AT&T's customers.

2. From at least January 2004 to the present, Core has sent traffic to AT&T, indirectly through Verizon, which AT&T has terminated to its own customers.

3. To the extent the traffic exchanged between Core and AT&T was "local," *i.e.*, it both originated and terminated in the same local exchange area, AT&T has never billed Core for terminating the traffic Core originated.

4. During the four-year period of January 2004 through year-end 2007, Core did not bill AT&T for terminating local traffic that AT&T originated.

5. Bill and keep is a standard industry practice that many telecommunications carriers use when exchanging traffic, especially when such carriers have not entered into other contractual arrangements.

6. AT&T operates under a bill and keep arrangement with every other competitive local exchange carrier in Pennsylvania.

7. Core operates under a bill and keep arrangement with other telecommunications carriers in Pennsylvania, including, but not limited to, The United Telephone Company of Pennsylvania *d/b/a* Embarq Pennsylvania.

8. The FCC has clarified that bill and keep is an appropriate and legally acceptable method of intercarrier compensation.

AFFIRMATIVE DEFENSES

1. Core's Formal Complaint fails to state a claim on which relief can be granted.

2. Core's claims are barred by estoppel.

3. Core's claims are barred by laches.

4. Core's claims are barred by the doctrine of waiver.

Respectfully submitted,

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TCG Pittsburgh, Inc.

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Its Attorneys

DATED: June 18, 2009

VERIFICATION

I, Mark Cammarota, Lead Carrier Relations Manager at AT&T, verify that, in this capacity, I am authorized and do make this Verification, that the facts set forth in the foregoing Answer of AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh, Inc. to Formal Complaint are true to the best of my information, knowledge and belief, and I would be able to prove the same at any hearing thereof. I understand that the statements are made subject to the penalties of 18 Pa. C.S. §4904, (relating to falsifications to authorities).

Mark Cammarota