



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

IN REPLY PLEASE
REFER TO OUR FILE

August 28, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: Petition of the Pennsylvania Public Utility Commission for Declaratory Order On Whether State Public Utility Commissions Are Entitled to Adjudicate Intercarrier Compensation Disputes Involving the Exchange of Local Dial-Up Internet Traffic Between Carriers with Indirect Interconnection, WC Docket No. 14-70

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's (FCC) rules, undersigned counsel files this notice concerning a meeting between the Pennsylvania Public Utility Commission (PAPUC) and the FCC staff held on August 26, 2014. The meeting generally discussed the above-captioned proceeding.

Those in attendance from the FCC were Victoria Goldberg, Kalpak Gude, Robin Cohn, Deena Shetler, and Pamela Arluk of the Wireline Competition Bureau and Laurence Bourne and Marcus Maher of the Office of General Counsel. Those in attendance from the PAPUC were Norm Kennard, counsel to the PAPUC Chairman Powelson; Matt Totino, counsel to Vice-Chairman Coleman, Jr.; Joseph Witmer, counsel to Commissioner Brown, and Labros Pilalis, Telecommunications Analyst to Commissioner Cawley, and Assistant Counsel Shaun Sparks and Assistant Counsel David E. Screven of the PAPUC's Law Bureau (collectively "attendees").

The attendees discussed the PAPUC Petition for Declaratory Order (Pa PUC Petition), including the reasons why the Pa PUC filed the Pa. PUC Petition. The PAPUC reiterated its view that the 2001 *ISP Remand Order* and related subsequent FCC orders and directives provide the PAPUC and other state commissions with appropriate authority to enforce and adjudicate the intercarrier compensation rates and terms established by the FCC for locally dialed ISP-bound traffic exchanged between competitive local exchange carriers. As part of that discussion, the PAPUC provided a slide presentation attached as Exhibit A.

The PAPUC emphasized the need for a timely clarification from the FCC on how, as a whole, the states and the FCC are to work collectively to achieve the goals the FCC outlined in the *ISP Remand Orders*. The PAPUC summarized the procedural status of proceedings in Pennsylvania now on hold because of uncertainty of the state role in the enforcement of federally-established intercarrier compensation rates from the *ISP Remand Order*.

The PAPUC discussed the reply brief it recently filed in its pending federal appellate litigation concerning its authority to enforce the intercarrier compensation rates and terms established by the FCC in the *ISP Remand Orders*. See *AT&T Corp., et al. v. Core Communications, Inc. et al.*, No. 12-7157 (E.D. Pa. Jan. 31, 2014 Memorandum Decision, March 10, 2014 Order), *appeal pending, AT&T Corp., et al. v. Core Communications, Inc. et al.*,

Docket Nos. 14-1499 and 14-1664, (3rd Cir.). The PAPUC provides a copy of the reply brief, attached hereto as Exhibit B, to be incorporated into the record of the above-captioned proceeding.

Thank you for your attention to this correspondence.

Sincerely,

The Pennsylvania Public Utility Commission,
P.O. Box 3265
Harrisburg, PA 17105

/s/ David E. Screven

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Attachments

Attachment A



PA Public Utility Commission

Presentation to the FCC
WC Docket No. 14-70
August 26, 2014

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Introduction

- Why the PAPUC seeks declaratory relief
- What the PAPUC is asking the FCC to do
- Reasons for the Commission to act in the PAPUC's Favor
- Downside to the Commission not acting in the PAPUC's favor

Why the PAPUC Seeks Declaratory Relief



- In resolving the underlying Core/AT&T ICC dispute, the PAPUC **enforced** the *ISP Remand Order* and the **federally-established** ICC rate of \$0.0007 per MOU for local ISP-bound traffic exchanged from 2004-2009
- **Question presented.** Whether the PAPUC has jurisdiction to enforce the *ISP Remand Order* to resolve ICC disputes:
 - Between CLECs
 - With indirect interconnection and without an ICA or traffic exchange agreement
 - Involving the indirect exchange of locally dialed ISP-bound traffic

What the PAPUC is Asking the FCC to Do



- **First request.** That the Commission act quickly
- **Second request.** That the Commission grant the PAPUC's petition and clarify that states have jurisdiction to enforce the *ISP Remand Order* to resolve ICC disputes between two indirectly interconnected CLECs involving the exchange of locally dialed ISP-bound traffic

Reasons for the Commission to Uphold the PAPUC's Enforcement



- Resolve regulatory and financial uncertainty.** The District Court decision upends existing practice and creates precedent that this type of ICC dispute is within the *exclusive* jurisdiction of the FCC. This is inconsistent with the FCC's pronouncement in its 9th Circuit Amicus Brief that the *ISP Remand Order* preempts only inconsistent state regulation of local ISP traffic. The District Court also did not resolve the underlying ICC dispute
- Promote efficient use of resources.** States have and will continue to expend resources to adjudicate CLEC/CLEC disputes involving both ISP-bound traffic and other enforcement matters arising under FCC rules and orders
- Judicial activism.** Courts, including the Third Circuit, will determine the FCC's authority by acting if the FCC does not

Reasons for the FCC to Act



- Respect primary jurisdiction.** Interpretation of Commission orders should rest principally with the Commission
- Avoid wasteful two-tier litigation.** Under the District Court's decision, a CLEC would have to navigate through a two-tier agency approach – one for the states under Sections 251 and 252 and another for the FCC. This two-tier approach could be viewed as applying to disputes involving both ISP-traffic and VoIP traffic
- The PAPUC has jurisdiction under applicable law.** The PAPUC's exercise of jurisdiction to adjudicate this ICC dispute is based upon both state and federal law, and the PAPUC provides a readily available, accessible, and experienced forum for the full evidentiary adjudication of ICC disputes between carriers

Potential Adverse Impacts From Commission Inaction



- No downside to granting the PAPUC's Petition
- Downside to not acting/denying the PAPUC's petition
- The Commission will have to devote resources to potentially resolving ICC disputes in all 50 states involving many disputes, including those between indirectly interconnected CLECs exchanging ISP-bound traffic or other matters like VoIP

PAPUC Determination (December 2012 Order)



- Fully litigated complaint proceeding with live on-the-record hearings and full briefing
- Involved two indirectly interconnected CLECs exchanging local ISP-bound traffic from January 1, 2004 through March 31, 2009
- Found *ISP Remand Order* applies to CLEC-to-CLEC locally dialed ISP-bound traffic
- Enforced the \$0.0007 per MOU rate cap from the *ISP Remand Order*

Appellate Activity



- **District Court.** Locally dialed ISP-bound traffic is interstate in nature and subject to exclusive FCC jurisdiction. Because the Core complaint did not arise under Section 252, the PAPUC did not have jurisdiction to establish a rate for the ISP-bound traffic sent by AT&T to Core
- The PAPUC had requested a stay, pending resolution by the Commission. That request was denied
- **Third Circuit Court of Appeals.** The PA PUC has appealed to the Third Circuit Court
- Briefs and Reply Briefs have been filed by the parties before the Court
- The PAPUC requested that the Third Circuit stay its consideration until the Commission ruled on the PAPUC's petition for declaratory order. The stay request was denied

Attachment B

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 14-1499 & 14-1664

**AT&T CORPORATION and TELEPORT
COMMUNICATIONS OF AMERICA, LLC,
Appellees**

v.

**ROBERT F. POWELSON, JOHN F. COLEMAN, JR.,
WAYNE E. GARDNER, JAMES H. CAWLEY, PAMELA A. WITMER**

and

**CORE COMMUNICATIONS INC.,
Appellants**

**AMENDED REPLY BRIEF OF APPELLANT PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Consolidated Appeals from the United States District Court for the
Eastern District of Pennsylvania Orders of January 31, 2014, and March 11, 2014

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Dated: August 15, 2014

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Pa. PUC principal brief argues that the *ISP Remand Order*¹ and its progeny govern this proceeding. All Parties and the District Court agree on this point. District Court Memorandum, JA 24 (“It is undisputed that the *ISP Remand Order* governs this case”). At its essence, the ATT Brief attempts to argue that TA96 directs that even the FCC is unable to address CLEC-to-CLEC relations regarding ISP-bound calls. The Verizon Amicus Brief, while raising matter largely irrelevant to local ISP-bound call regulation, presents similar argument. It is well past time for ATT (or Verizon) to attack the ISP-bound intercarrier compensation regime of the *ISP Remand Order*. There can be no serious argument that the *ISP Remand Order* and its progeny control this proceeding.

The ATT Brief fails to present clear evidence of a conflict between the Pa. PUC Orders and the federal law and policy those Orders support. As the Pa. PUC has consistently argued, its Orders follow the guidance provided by the FCC amicus brief in *AT&T Comms. of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*). December 5, 2012 Pa. PUC Opinion and Order, JA 242, 244-251 (Pa. PUC Material Question Order overtaken by the FCC Amicus Brief and the Ninth Circuit decision in *Pac-West*.) The FCC is entitled to

¹ *In the Matter of Implementation of the Local Competition Provisions In the Telecommunications Act of 1996, Intercarrier Compensation For ISP-Bound Traffic*, 16 FCC Rcd 9151 (*ISP Remand Order*).

deference where it expressly stated that it had not yet addressed whether states have jurisdiction to adjudicate CLEC-to-CLEC intercarrier compensation disputes involving ISP-bound traffic outside of the statutory jurisdiction provided under Section 252 of TA96. JA 401, FCC Amicus Brief at 29 (“The FCC to date has not directly spoken to the broader jurisdictional issue in its rules and orders and therefore does not take a position on this issue in this *amicus* brief”). The FCC has never concluded that state adjudications concerning this traffic and consistent with federal law are troubling to the Telecommunications Act of 1996 (TA96). The FCC has authority to address the ambiguities of TA96 as regards CLEC-to-CLEC ISP-bound traffic. Argument to the contrary or argument that federal courts are better suited to this task is misplaced.

The ATT brief also incorrectly argues that the FCC has established a bill-and-keep regime for all ISP-bound traffic in the absence of an intercarrier compensation agreement between two carriers. However, the FCC rescinded the “new markets rule” in 2004, foreclosing argument that a bill-and-keep regime is the default compensation regime for this ISP-bound traffic. District Court Memorandum, JA 15-16 (“The FCC granted Core’s request to forbear from enforcing the new markets rule”); *see also* FCC Amicus Brief at 27-28, JA 399-400 (“the FCC exercised its authority to forebear from enforcing the new markets rule”); 19 FCC Rcd 20179, 20186 (¶ 21) (F.C.C. 2004). Instead, the rate

cap compensation regime of the *ISP Remand Order* applies. ATT contradicts itself on this point when it simultaneously argues on one hand that it owes nothing to Core, and on the other hand, that Core could have established a contract with ATT to charge ATT for terminating ISP-bound traffic. ATT fails to show why, as a CLEC, it does not share in the obligations it ascribes to Core.

The ATT Brief also raises four alternative arguments presented to, but never addressed by, the District Court. ATT contends that the Pa. PUC Orders violate 47 U.S.C. §§ 201, 203, and 251(b)(5) by requiring ATT to compensate Core in the absence of a federal tariff or contract. However, ATT admits that tariffs are not necessary for compensation under the *ISP Remand Order*; ATT tariff arguments are irrelevant. Regarding contracts for payment, ATT seeks to escape obligations it argues apply to CLECs, but not to itself. In response to this argument, the Pa. PUC shows how the Pa. PUC Orders represent a valid state commission adjudication of contract terms subject to the *ISP Remand Order*.

ATT also argues that the absence of a tariff or contract rate above \$0/minute of use (MOU) constitutes retroactive ratemaking. This is error; the federal rate the Pa. PUC applied has been in effect since the FCC issued the *ISP Remand Order* in 2001. In addition, the \$0/MOU rate claimed by ATT has not been the default rate since 2004 when the FCC rescinded its “new markets rule.” JA 15-16. In any event, ATT admits that the prohibition is against retroactive rate “increases,” and

the District Court determined that the \$0.0007/MOU rate is not an increase. Rather, it determined that it is an authorized federal rate effective at all applicable times. Under that applicable rate, ATT also attempts to limit its obligation by arguing that a two-year statute of limitations applies under 47 U.S.C. § 415(a). The Pa. PUC contends that 28 U.S.C. § 1331 applies, which imposes a four year statute of limitations and points out that Eastern District Court precedent applies this latter statute.

The Verizon Brief sheds no light on how the Court should address these issues under the *ISP Remand Order*. The Verizon Brief provides proof that the District Court engaged in over-reaching beyond the confines of the *ISP Remand Order*. The Verizon Statement of Interest shows that Verizon believes the District Court determination reaches all interstate traffic outside the context of an interconnection agreement, rather than the much smaller subset of locally dialed ISP-bound traffic addressed in this proceeding.

At heart, the Verizon Brief fails to address controlling law – namely the *ISP Remand Order*. Rather, it devotes a great deal of discussion to long distance toll calls and non ISP-bound calling matters that ATT concedes are not relevant to this proceeding. Like ATT, Verizon essentially argues to extend the holding of the District Court well beyond the confines of the *ISP Remand Order* into areas not properly addressed in this proceeding.

In accord with this Court's rules, and in the interest of convenience, this reply brief does not address every argument raised by the ATT or Verizon Brief. The Pa. PUC does not concede points not addressed in this reply brief. Rather, the Pa. PUC relies on its initial brief to rebut these arguments. For all these reasons, and as explained further below, the Pa PUC respectfully requests that this Court reverse the determination of the District Court that the FCC *ISP Remand Order* has preempted the states from applying federal law and federal rates to resolve CLEC-to-CLEC interconnection disputes involving locally dialed ISP-bound traffic. The FCC has clearly opined that it has not yet done so. The Pa PUC also respectfully requests that this Court dismiss the injunction against the enforcement of the Pa PUC Orders because those Orders do not conflict with controlling federal law as provided in the *ISP Remand Order* and its progeny.

II. ARGUMENT IN RESPONSE TO ATT BRIEF

As an initial matter, the Pa. PUC points out that ATT has not complied with LRAP 28.2 regarding appellee briefs in consolidated appeals. ATT has failed to provide the required index showing where and how it specifically answers the contentions of the appellants. This has and will continue to increase the difficulty of interpreting the arguments of ATT for both the appellants and the Court. To the extent that the Court would strike the ATT Brief because of this failure, the Pa. PUC would not object. Alternatively, where ATT has failed to show where

and how it specifically responds to the appellant's contentions, ATT has conceded those issues.

A. There Are No Conflicts Between The Pa. PUC Orders And The *ISP Remand Order* Or The FCC *Pac-West* Amicus Brief.

In its brief, ATT argues that TA96 preempted the field regarding state authority over local telephone competition and that this field preemption abolished state authority over competitive local exchange carriers (CLECs) beyond arbitrating, approving, and enforcing interconnection agreements between incumbent local exchange carriers (ILECs) and CLECs. ATT Brief 33-34. At the same time, ATT points out that TA96 does not expressly discuss CLEC-to-CLEC relationships. ATT Brief 35-36. While the Pa. PUC agrees that this is a statutory ambiguity, it also argues that the FCC has resolved this issue regarding ISP-bound traffic via its Ninth Circuit amicus brief. ATT provides no rational support for the argument that, through silence, TA96 directs that even the FCC cannot fill a statutory gap regarding CLEC-to-CLEC relations concerning locally dialed ISP-bound calls. The arguments advanced by ATT regarding the preemptive effect of TA96, specifically 47 U.S.C. § 252, are at odds with FCC interpretations of TA96 for purposes of the *ISP Remand Order*.

In direct opposition to the ATT position, in 2011 the FCC explained that CLEC-to-CLEC traffic is within the *ISP Remand Order* compensation regime.

JA 392. The FCC explained that an approach premised on the ambiguities in 47 U.S.C. § 252 would create loopholes that would undermine the goals the FCC sought to achieve in the *ISP Remand Order*. JA 393. The FCC opined that the term “interconnection agreements” in the *ISP Remand Order* broadly refers to agreements between all carriers, including CLEC-to-CLEC traffic exchange arrangements. JA 394. As will be discussed below, this aspect of the *ISP Remand Order* preserved a role for state adjudications of intercarrier compensation disputes including those between competitive carriers like ATT and Core.

Because the *ISP Remand Order* unquestionably establishes a state role in the administration of that Order, the question is whether the Pa. PUC exercise of that administrative role conflicts with the requirements of the *ISP Remand Order* and its progeny. All agree that the *ISP Remand Order* controls; the question is whether ATT has presented clear evidence of a conflict between the Pa. PUC Orders and the FCC rules and policy those Orders support. *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 75 (1st Cir. 2006). ATT has presented no such evidence because no conflict exists.

The decision most analogous to this proceeding is the Ninth Circuit’s *Pac-West* decision and its reliance on the FCC Amicus Brief filed in that case. The Pa. PUC Orders closely follow that decision and the guidance provided there by the FCC. ATT argued below that the Supreme Court has endorsed and affirmed the

principle that an FCC amicus brief is entitled to deference and is binding on the courts. JA 265-67. ATT specifically argued that deference is due regarding the FCC amicus filed in *Pac-West*. JA 265-67. ATT also argued below that including CLEC-to-CLEC traffic under the *ISP Remand Order* is essential if the regulatory purpose of that Order is to be satisfied and not thwarted. JA 258. The Pa. PUC agrees with ATT on these points. JA 261-2. The ATT Brief neither refutes nor repudiates ATT's tacit endorsement of the conclusion that *conflicts* between state enforcement and federal law are problematic. In the context of the *ISP Remand Order*, the FCC has never concluded that state adjudications consistent with federal law are troubling to TA96.

Much like the District Court, ATT fails to address how the Pa. PUC Orders conflict with: (1) the requirements of the *ISP Remand Order*; (2) the guidance of the *Pac-West* FCC Amicus brief; or (3) the holding of *Pac-West*. Rather, ATT (like the District Court) looks to the ambiguity of TA96 for support as opposed to the FCC resolution of that ambiguity in the context of the *ISP Remand Order*. The District Court was correct to the extent that it determined that it did not have jurisdiction to resolve the ambiguities of 47 U.S.C. §§ 251 and 252 in the context of the *ISP Remand Order*. Where the District Court and ATT err is in failing to recognize that the FCC has addressed the issue, and if need be, only clarify the intention of its own Order.

B. FCC Forbearance On The New Markets Rule Preserved A State Role In The Adjudication Of Disputes Over ISP-Bound Local Call Compensation.

The ATT Brief erroneously argues that, in the absence of some form of intercarrier compensation agreement between two carriers, the FCC has established a bill-and-keep regime for all ISP-bound traffic. ATT Brief 14. However, ATT fails to address the fact that in 2004 the FCC rescinded its “new markets rule” – the part of the *ISP Remand Order* that established a bill-and-keep regime for traffic exchanged without a contract. JA 399-400; 19 FCC Rcd 20179, 20188 (F.C.C. 2004); Pa. PUC Brief 18-19. By eliminating the new markets rule, the FCC foreclosed arguments that bill-and-keep was the default compensation regime for ISP-bound traffic. While carriers could voluntarily agree to bill-and-keep, that regime was not required. Because bill-and-keep is no longer the default regime, the FCC *ISP Remand Order* compensation regime (i.e., rates at or below the cap of \$0.0007/MOU) applies to the exchange of ISP-bound traffic by all *carriers*. JA 390. There can be no reasonable argument that the procedures developed by the FCC to implement the *ISP Remand Order* rate regime are equally applicable to all *carriers*. JA 390.

When the FCC rescinded the default “new markets” rate of \$0/MOU in 2004, the alternative rate cap regime of the *ISP Remand Order* then applied. ATT admits as much through repeated argument that Core could and should have

established a contract with ATT to trigger authority for Core to charge ATT. ATT Brief 9, 25, 46, 47, 49, 50, 51, 52. It is an uncontroverted fact that Core sought such a contract with ATT. JA 195-197. The *ISP Remand Order* establishes how carriers are to realize such a contract if they are unable to voluntarily consummate an intercarrier compensation agreement for the exchange of locally dialed ISP-bound traffic. The *ISP Remand Order* provides that carriers may litigate compensation issues via state commissions. *ISP Remand Order* ¶ 79.

With the new markets rule rescinded, the *ISP Remand Order* directs carriers without an agreement for the exchange of ISP-bound traffic to the *ISP Remand Order* section “*Inter-carrier Compensation for ISP-bound Traffic*” for instruction on how to set the appropriate rate if the carriers are unable to agree. *Id.* That section provides that if a carrier can demonstrate to a *state commission* that the traffic it delivers to another carrier is locally dialed ISP-bound traffic, the *state commission* is to impose the *ISP Remand Order* compensation regime, i.e., a rate at or below the \$0.0007/MOU cap. *ISP Remand Order* ¶ 79. The Order also provides that during the pendency of such a proceeding, the originating local exchange carrier (ATT in this instance) remains obligated to pay at a reciprocal compensation rate subject to true-up at the conclusion of the *state commission* proceeding. *ISP Remand Order* ¶ 79. Given that the FCC has opined that

47 U.S.C. § 252 applies to all carriers for purposes of the *ISP Remand Order*, there can be no serious argument against the premise that the intercarrier compensation procedures of the *ISP Remand Order* are equally applicable to this proceeding.

JA 393-94. While the Pa. PUC has repeatedly raised the issue of how FCC forbearance from the new markets rule affects this proceeding, ATT has consistently failed to offer a meaningful response, or to show how or why the new markets rule continues to apply. ATT Brief 14.

All Parties agree that the *ISP Remand Order* governs the ISP-bound traffic exchanged between Core and ATT. It would be absurd to conclude that the rate regime of *ISP Remand Order* applies but the intercarrier compensation procedure designed to achieve that rate regime does not. *ISP Remand Order* ¶¶ 79-80.

In implicit agreement that these procedures were applicable and available to Core, ATT blames Core for the lack of such a contract. ATT argues “Core could have negotiated a contract with AT&T covering this traffic.” ATT brief 25, 46. ATT claims “Core neglected to negotiate a contract” and that “Core’s neglect” to pursue such an agreement is the root of this proceeding. ATT brief 47. The ATT brief sheds light on why no “contract” exists between ATT and Core. ATT claims that, as a CLEC, it is under no duty to negotiate such contracts with other CLECs. ATT Brief 11, 13. ATT fails to explain why the terminating carrier (Core) would be obligated to form such a contract under the *ISP Remand Order*, but the *ISP*

Remand Order provides no reciprocal duty on the originating carrier (ATT). In any event, ATT conducted itself according to its beliefs; uncontroverted record evidence shows Core's diligence in pursuit of an agreement with ATT and ATT efforts to thwart the formation of an agreement. JA 195-197. The ATT Brief provides no direct support for the contradictory nature of the ATT position and fails to explain how the adoption of that position would not work to undermine the goals of the *ISP Remand Order*.

While ATT devotes a great deal of effort to explain the effect of having a federal tariff for this traffic, ATT also explains why federal tariffs are irrelevant to this proceeding. ATT correctly reasons that under "permissive detariffing" the FCC permits CLECs to collect interstate access charges via contract. ATT brief 9. ATT argument based on federal tariff requirements is, as it points out, irrelevant. Similarly, ATT's argument that a contract would have required ATT to compensate Core shows that a federal tariff is neither required nor relevant.

C. The Four Alternative Arguments Advanced By ATT Are Without Merit.

ATT argues that the Pa. PUC Orders violate 47 U.S.C §§ 201 and 203 because the Orders require ATT to compensate Core in the absence of a contract or federal tariff. ATT brief 49. Regarding federal tariffs, ATT pointed out that tariffs are not required for compensation under the *ISP Remand Order*. ATT Brief 9. Therefore, arguments regarding federal tariffs are irrelevant. This proceeding

concerns the Pa. PUC adjudication of, in part, ATT's refusal to negotiate a contract under the *Intercarrier Compensation for ISP-bound Traffic* provisions of the *ISP Remand Order*. Here, ATT attempts to use its refusal as a means of escape from its obligations under the *ISP Remand Order*. The ATT argument is without merit. If originating carriers like ATT could escape *ISP Remand Order* payment obligations simply by refusing to negotiate, significant parts of the *ISP Remand Order* would lose all meaning. Alternatively, if ATT is displeased with how the FCC fashioned the *ISP Remand Order* under its 47 U.S.C. § 201 authority, ATT was obligated to raise its challenge against the *ISP Remand Order* at the appropriate time.

ATT next argues that the Pa. PUC Orders violate 47 U.S.C. § 251(b)(5) because Core has neither a tariff nor a contract with ATT. ATT brief 51. The Pa. PUC has addressed ATT tariff arguments above and will not repeat that matter here. Regarding the availability of a contract, it is uncontested fact that Core attempted to form such a contract with ATT. JA 195-97. ATT also admits that a contract under the terms of the *ISP Remand Order* would require it to compensate Core. ATT Brief 9, 25, 46, 47, 49, 50, 51, 52. The Pa. PUC established that its Orders are in agreement with the *ISP Remand Order* and its progeny. To this extent, like any commercial contract subject to litigation, the Pa. PUC Orders represent an adjudication of constructive contract terms between ATT and Core

subject to the *ISP Remand Order*. That is, through its Orders, the state commission imposed the *ISP Remand Order* compensation terms between two carriers unable to agree on those terms, i.e., voluntarily agree to a rate at or below the \$0.0007/MOU cap. *ISP Remand Order* ¶¶ 79-80.

Regarding 47 U.S.C. § 251(b)(5), ATT cannot accept only those aspects of Section 251(b)(5) that support its position. The District Court reasoned that Section 251(b)(5) affirmatively required all LECs (including CLECs like ATT) to establish reciprocal compensation agreements for the transport and termination of telecommunications. JA 9. As concerns the *ISP Remand Order*, the FCC has opined that the obligations of 47 U.S.C. § 252 apply to all carriers, ILECs and CLECs alike. JA 393-94. Applying the ATT and District Court legal conclusions regarding Sections 251 and 252 to the instant facts would lead to the determination that this proceeding falls under Pa. PUC jurisdiction. That is, the *ISP Remand Order* provides that CLECs do not escape the requirements of 47 U.S.C. § 252, and ATT has tacitly agreed (in accord with the District Court) that 47 U.S.C. § 251(b)(5) required ATT to establish an agreement with Core. Thus, the proceeding would fall squarely within the state jurisdiction established by 47 U.S.C. §§ 251 and 252 as determined by the District Court.

Indeed, Section 251 provides that the FCC shall “not preclude the enforcement of any regulation, order, or policy of a State commission that — (A)

establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.” 47 U.S.C. §251(d)(3). As to the *ISP Remand Order*, the Pa. PUC has done no more than what this provision authorizes. To the extent that the *ISP Remand Order* indisputably controls, the far-flung ATT reliance on *MCI Telecom. Corp. v. Bell Atlantic-PA*, 271 F.3d 491 (3rd Cir. 2001), is misplaced. That case dealt with a conventional interconnection arbitration between a CLEC (MCI) and an ILEC (Bell Atlantic-PA now Verizon PA) under Sections 251(c) and 252 of TA96. 47 U.S.C. §§ 251(c) and 252. It did not deal with the intricacies of the *ISP Remand Order* or the applicability of Sections 251 or 252 in the context of locally dialed ISP-bound traffic indirectly exchanged between CLECs.

ATT also argues that the absence of a tariff or contract rate above \$0/MOU raises the prohibition against retroactive ratemaking. ATT brief 52. The Pa. PUC will not repeat arguments regarding federal tariffs or the effect of a contract. The ATT argument is meritless because the federal rates for ISP-bound traffic have been in effect since the FCC issued the *ISP Remand Order* in 2001. Similarly, ATT had notice that a \$0/MOU rate was unavailable to it as a default rate since late 2004 when the FCC rescinded its new markets rule. JA 399-400. In fact, the federal rate applied by the Pa. PUC was in effect for the entire duration of ATT’s

use of Core's facilities – as the District Court determined. JA 13. In any event, the ATT argument is specious from the outset, as the ATT Brief shows. ATT points out that, specifically, the rule is against retroactive rate “increases.” ATT Brief 52. The rate applied by the Pa. PUC Orders was not an “increase.” Rather, as the District Court determined, the \$0.0007/MOU rate is an authorized federal rate in effect at all applicable times. The Pa. PUC Orders applied that authorized rate to unbilled past ATT usage synchronous with the applicable federal rate. ATT Brief 52. The Pa. PUC did not increase the federal rate.

ATT also attempts to limit its obligations by arguing that a two-year, rather than a four-year statute of limitations applies under 47 U.S.C. § 415(a). ATT brief 52. ATT argues that a two-year limitation is appropriate under that Section because a Core tariff is required. ATT previously established that tariffs are not required; its tariff argument is irrelevant. ATT Brief 9. In addition, the jurisdictional code provision on which ATT relies, 28 U.S.C. § 1331, imposes a four-year statute of limitations via 28 U.S.C. § 1658 for post-1990 federal enactments lacking statute of limitations provisions. ATT is in error that Section 1658 is inapplicable. The Pa. PUC points out that Eastern District Court precedent

applies the four-year statute of limitations set out in Section 1658, 28 U.S.C. § 1658, to TA-96.² This is consistent with precedent in other courts.³

III. REPLY TO VERIZON AMICUS BRIEF

A. Introduction

On August 7, 2014, Verizon Wireless and unidentified subsidiaries of Verizon Communications, Inc. submitted a motion to this court requesting leave to participate in this proceeding as amicus curiae and submit an amicus brief. Verizon Amicus Brief, Corporate Disclosure Statement. In compliance with R.A.P. 29, the Pa. PUC provides this reply to the Verizon arguments as a part of the Pa. PUC reply brief.⁴ The Pa. PUC will show that the Verizon contentions are irrelevant to this proceeding because Verizon fails to address controlling law and overstates the issues before this Court.

B. The Verizon Brief Fails To Address Controlling Law.

1. The *ISP Remand Order* And Its Progeny Control This Proceeding.

The Pa. PUC points out that Verizon fails to discuss the effect of the *ISP Remand Order* on this proceeding. Rather, it makes general argument about

² *Bell Atlantic v. Pa. PUC*, 107 F.Supp. 2d 653 (E.D. Pa. 2000).

³ *BACA v. E.Spire*, 269 F.Supp. 2d 1310 (D.N.M. 2003) *aff'd* 392 F.3d 1204 (10th Cir. N.M. 2004)

⁴ F.R.A.P. 29(e) (opposing party may address amicus arguments in the party's responsive pleading).

47 U.S.C. §§ 251 and 252 in other contexts without discussing how the FCC has interpreted those sections in the *ISP Remand Order*. Verizon describes its interests in this proceeding as follows:

Verizon therefore has an interest in the disposition of this case because it will determine the extent of state commission authority to implement that statutory provision [47 U.S.C. § 251(b)(5)] with respect to interstate traffic outside the context of an interconnection agreement entered into under 47 U.S.C. § 252.

Verizon Brief 1. The point of this appeal is that this case *should not* make such a sweeping determination. It should only address state authority within the confines of the *ISP Remand Order*, nothing more. That is all that was ever before the District Court. Verizon fails to address this critical aspect of this appeal.

A prime example of Verizon's over-reaching is the unsupported Verizon argument that "Congress did not authorize the Pennsylvania PUC to adjudicate this dispute." It is beyond question that Congress did not specifically address how the FCC should handle intercarrier compensation for locally dialed ISP-bound calls. Through authority granted by Congress through TA96, the FCC developed the *ISP Remand Order* (and other related orders) to address this topic. It is the *ISP Remand Order*, and not TA96, that is at issue here.

There can be no reasonable argument over whether all Parties and the District Court agree that the *ISP Remand Order* and its progeny control the outcome of this proceeding. The questions presented here relate to how the FCC

has interpreted TA96 in the context of locally dialed ISP-bound calls. Verizon fails to show how the FCC was powerless to develop the *ISP Remand Order* rate regime, or was powerless to direct a state role in administering that rate regime. *ISP Remand Order* ¶ 79. What Verizon offers as support for its position amounts to an endorsement of the well-acknowledged (and undisputed) general authority of the FCC over interstate communications. It offers nothing to illuminate the meaning of the *ISP Remand Order*. This is but another example of how the Verizon Brief misses well wide of the *ISP Remand Order* mark. Verizon Brief 9 *citing* the FCC Amicus Brief in *MCImetro Access Transmission Servs. of Va. v. Christie*, 310 Fed. Appx. 601, 604 (4th Cir. 2009).

2. The Law Governing Long Distance Traffic Is Irrelevant To How The *ISP Remand Order* Treats Locally Dialed ISP-Bound Calls.

Regarding Verizon argument about 47 U.S.C. § 271 long distance authorization, i.e., the IntraLATA long-distance service markets for such calls, ATT has been very clear that toll telephone calls are not a part of this proceeding. JA 198-199 (“all disputed traffic in this proceeding is for non-toll, locally dialed traffic” *citing* AT&T Stmt. 1.0 at 8-9.) Thus, Verizon argument concerning toll traffic at pages 3-8 of its brief is irrelevant and provides no guidance or assistance whatsoever. It mainly works to confuse or misguide the Court.

Similarly, Verizon argument concerning local access transport area boundaries at page 5, and other matter unrelated to the *ISP Remand Order*, provides no assistance or clarity. The issues here concern how the FCC interpreted the requirements of TA96 in the context of its *ISP Remand Order* intercarrier compensation regime. In this regard, the reasoning of the Verizon Brief suffers error similar to that of ATT and the District Court – it tries to apply the general outlines of TA96 in an attempt to second-guess how the FCC resolved specific policy questions and ambiguities of TA96 within the *ISP Remand Order*. Without discussion of how the *ISP Remand Order* shapes intercarrier compensation issues surrounding locally dialed ISP-bound calls, the Verizon Brief is irrelevant.

C. Conclusion

The Verizon Brief fails to show how the perspective of Verizon, other than as an ally and sister regional bell operating company to ATT, sheds additional light or perspective on the interplay among TA96, FCC authority under TA96, the *ISP Remand Order*, and state authority under that Order. In addition, Verizon fails to present any compelling arguments, theories, insights, facts, or data that are not to be found in the Parties' briefs to this Court. For all these reasons, the Court should disregard the Verizon Brief.

IV. CONCLUSION

Based on the foregoing, the Pa PUC respectfully requests that this Court reverse the determination of the District Court that controlling law, in the form of the *ISP Remand Order*, has preempted the states from applying federal law and federal rates to resolve CLEC-to-CLEC interconnection disputes involving locally dialed ISP-bound traffic. The FCC has clearly opined that it has not yet done so. The Pa PUC also respectfully requests that this Court dismiss the injunction against the enforcement of the Pa PUC Orders because those Orders do not conflict with controlling federal law as provided in the *ISP Remand Order* and its progeny.

Respectfully submitted,

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Dated: August 15, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

Pursuant to 3d Cir. L.A.R. 31.1(c) the text of the hard copy Reply Brief is identical to the brief filed electronically herein.

Pursuant to 3d Cir. L.A.R. 31.1(c), a virus detection program, McAfee Virus Scan Enterprise 8.8.0 was run, and no known viruses were detected.

Pursuant to 3d Cir. L.A.R. 28.3(d) and 46.1(e), Shaun A. Sparks, attorney for appellants Pa. PUC and Commissioners, hereby certify that he is a member of the bar of this Court.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document, Reply Brief of the Pa. Public Utility Commission, upon the persons listed and in the manner indicated below:

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