BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Core Communications, Inc.	:	
for Arbitration of Interconnection Rates, Terms	:	A-310922F7002
and Conditions with The United Telephone	:	
Company of Pennsylvania d/b/a Embarq	:	
Pursuant to 47 U.S.C. §252(b)	:	

RECOMMENDED DECISION

Before
David A. Salapa
Administrative Law Judge
(Acting as an Arbitrator)

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HISTORY OF THE PROCEEDING

On April 21, 2006, Core Communications, Inc., (Core) filed a petition for arbitration pursuant to 47 U.S.C. §252(b) requesting that the Commission arbitrate the terms and conditions for interconnection with The United Telephone Company of Pennsylvania, Inc. (United) According to United, effective May 18, 2006, as a result of the Commission order entered April 7, 2006 at A-313200F0007 and A-311379F0002 approving the separation of United Telephone Company of Pennsylvania d/b/a Sprint from Sprint Nextel Corporation, it would be doing business as The United Telephone Company of Pennsylvania d/b/a Embarq. I have modified the caption of this proceeding to reflect that change and will refer to the new entity as Embarq.

By notice dated May 11, 2006, the Commission scheduled a pre-arbitration conference in this case for May 25, 2006 at 10:00 a.m. in Hearing Room #3, Commonwealth Keystone Building in Harrisburg and assigned the case to me. I issued a pre-arbitration conference order on May 12, 2006 setting forth the procedural matters to be addressed at the pre-arbitration conference.

On May 16, 2006, Embarq filed a motion to stay and dismiss Core's petition for arbitration and a response to Core's petition for arbitration. In the motion, Embarq alleged that the Commission approved Core's application to amend its certificate of public convenience by order entered May 25, 2001 and authorized Core to "furnish services as a Competitive Local Exchange Carrier within the service territory of Sprint/United Telephone Company of Pennsylvania and Verizon-North, Inc., consistent with this Order." (Motion paragraph 4, pg. 3) Embarq asserted that Core had filed an application at A-310922F0002, Am.A for Commission authority to provide local exchange service in all areas of Pennsylvania. Embarq asserted that several rural telephone carriers had protested the application and that the application was currently pending before Administrative Law Judge (ALJ) Wayne L. Weismandel.

Embarq also alleged that on January 25, 2006, Core filed a petition for arbitration pursuant to 47 U.S.C. §252(b) requesting that the Commission arbitrate the terms and conditions for interconnection with numerous rural incumbent local exchange carriers. The

Commission docketed these arbitration proceedings at A-310922F7003, A-310922F7005-A-310922F7007, A-310922F7009-A-310922F7016, A-310922F7018, and A-310922F7020- A-310922F7038. According to Embarq, Core and the rural incumbent exchange carriers had filed a stipulation staying these proceedings pending the Commission's decision in the application proceeding at A-310922F0002, Am.A.

Embarq further alleged that on March 30, 2006, Core filed a petition for arbitration pursuant to 47 U.S.C. §252(b), requesting that the Commission arbitrate the terms and conditions for interconnection with Alltel Pennsylvania, Inc. The Commission docketed this arbitration proceeding at A-310922F7004. Embarq noted that, at the pre-arbitration conference in that case on May 10, 2006, I granted Alltel Pennsylvania, Inc.'s motion to stay. Embarq contended that the issues raised by Core in the above referenced arbitration proceedings were identical to the issues in this proceeding.

Embarq alleged that the key issue in the application proceeding at A-310922F0002, Am.A was the nature of the services provided by Core and whether the Commission had jurisdiction over those services. According to Embarq, the Commission's decision in that proceeding would have a significant impact on this proceeding and the rights and obligations of Core and Embarq. Since the presiding ALJs in the above-referenced arbitration proceedings had issued orders staying those proceedings pending the Commission's decision in the application proceeding at A-310922F0002, Am.A, Embarq argued that I should either stay or dismiss this proceeding as well.

On May 24, 2006, Core filed a motion for admission *pro hac vice* on behalf of Michael B. Hazard, Esquire. The motion requested that Mr. Hazard be admitted *pro hac vice* to represent Core in this proceeding.

I conducted a pre-arbitration conference in this case as scheduled on May 25, 2006 at 10:00 a.m. in Harrisburg. Present were counsel for Core and Embarq. In accordance with my pre-arbitration conference order dated May 12, 2006, Core and Embarq filed pre-arbitration conference memoranda addressing the issues listed in paragraph 8 of that order. At the pre-arbitration conference I denied Embarq's motion to stay or dismiss and

relieved Core from filing an answer to that motion. (N.T. 8-9) I also stated that I would incorporate the terms of Embarq's proposed protective order into a pre-arbitration order. I issued pre-arbitration conference order #2 on May 30, 2006, denying Embarq's motion to stay or dismiss, granting Core's motion for admission *pro hac vice,* establishing a litigation schedule, granting Embarq's petition for a protective order and adopting its proposed protective order.

By notice dated June 15, 2006, the Commission scheduled this matter for hearing on July 31, 2006 and August 1, 2006 at 10:00 a.m. in Hearing Room #3, Commonwealth Keystone Building in Harrisburg. On June 20, 2006, Core filed a motion to stay this proceeding and revise the litigation schedule. In the motion, Core alleged that ALJ Weismandel had issued an initial decision in the proceeding at A-310922F0002, Am.A denying Core's application to amend its certificate of public convenience to include all of Pennsylvania. According to Core, the initial decision contained numerous errors of law and fact that could impact this proceeding. Core alleged that ALJ Weismandel's initial decision was not confined to the scope of that case but included findings of fact and conclusions of law regarding broader aspects of telecommunications regulation that affected this proceeding. Core requested that this matter be stayed pending a final Commission order in the proceeding at A-310922F0002, Am.A.

On June 26, 2006, Embarq filed an answer to Core's motion for stay. In its answer, Embarq asserted that Core did not demonstrate that it was entitled to a contested stay. Embarq claimed that there was no statutory authority for the Commission to extend the deadlines imposed by 47 U.S.C. §252 without the consent of both parties. Embarq also argued that a stay was not warranted at this stage of the litigation because it had already expended much time and effort preparing for the hearing in this proceeding. Embarq contended that regardless of the final ruling in A-310922F0002, Am.A, the Commission must still resolve the factual issues in this proceeding on the basis of the record developed by the parties.

On June 28, 2006, I issued an order staying this proceeding until at least thirty days after a final Commission order in the proceeding at A-310922F0002, Am.A. I reasoned that a final Commission order at A-310922F0002, Am.A could affect Core's authority to provide local exchange service in Embarq's territory. Staying this arbitration proceeding

appeared to be a reasonable course of action, consistent with the stay orders issued in Core's other arbitrations. I directed that within thirty days of a final Commission order in the proceeding at A-310922F0002, Am.A, a pre-arbitration conference would be scheduled to establish a new arbitration schedule.

Subsequently, the parties informed me that the Commission had issued a final order in the proceeding at A-310922F0002, Am.A on December 4, 2006. That order reversed ALJ Weismandel's initial decision and granted Core's application to amend its certificate of public convenience to include all of Pennsylvania. The parties agreed to a further pre-arbitration conference for this proceeding on January 31, 2007. By notice dated January 10, 2007, the Commission scheduled this matter for a pre-arbitration conference on January 31, 2007 at 10:00 a.m. in Hearing Room #4, Commonwealth Keystone Building in Harrisburg. Subsequently, the parties agreed to reschedule the pre-arbitration conference to February 16, 2007 and by notice dated January 29, 2007, the Commission scheduled this matter for a pre-arbitration conference on February 16, 2007 at 10:00 a.m. in Hearing Room #4, Commonwealth Keystone Building in Harrisburg.

On February 15, 2007, Core filed a motion for partial summary judgment. In the motion, Core alleges that on certain issues there were no disputed issues of fact and that a ruling on these issues would eliminate the opportunity for the parties to file unnecessary and burdensome discovery requests, testimony and briefs with respect to certain legal issues. Core contended that on these issues, it was entitled to a favorable judgment as a matter of law.

I conducted a pre-arbitration conference in this case as scheduled on February 16, 2007 at 10:00 a.m. in Harrisburg. Present were counsel for Core and Embarq. At the pre-arbitration conference, Core moved for the admission *pro hac vice,* of Christopher F. Van de Verg, Esquire for the purpose of representing Core in this proceeding. The parties also agreed to a litigation schedule and agreed to certain discovery procedures. (N.T. 36-37) I issued pre-arbitration conference order #3 dated February 16, 2007, granting Core's motion for admission *pro hac vice,* establishing a litigation schedule and adopting the parties' proposed discovery procedures.

By notice dated February 22, 2007, the Commission scheduled this matter for hearing on June 27, 2007 and June 28, 2007 at 10:00 a.m. in Hearing Room #4, Commonwealth Keystone Building in Harrisburg. On March 7, 2007, Embarq filed an answer to Core's motion for partial summary judgment.

By order dated March 20, 2007, I granted Core's motion for partial summary judgment with regard to Issues 1-5 and denied Core's motion for partial summary judgment with regard to Issues 6-8 set forth in its motion. Specifically, I ruled that the Commission has jurisdiction over the services Core offers and Core's arbitration petition, that Core qualifies as a facilities-based local exchange carrier throughout Pennsylvania, that Core provides telecommunications services rather than information services, that Core's use of VNXX is consistent with its status as a local exchange carrier and that Core is a public utility.

On June 14, 2007, Core and Embarq submitted their final best offers. (Core Direct Ex. 1, Eq Pa. Direct Ex. 1) The parties' final best offers listed ten unresolved issues. On June 19, 2007, Embarq filed a motion for admission *pro hac vice* for Kevin K. Zarling, Esquire.

I conducted hearings on this case as scheduled on June 27, 2007. Michael A. Gruin, Esquire and Chris Van de Verg, Esquire represented Core. Zsuzanna E. Benedek, Esquire and Kevin Zarling, Esquire represented Embarq. The hearings resulted in a transcript of 268 pages (numbered 32 through 300).

By letter dated July 3, 2007, Core provided a response to an on the record data request made by Embarq at the June 27, 2007 hearing. The on the record data request appears at page 95 of the transcript. By letter dated July 9, 2007, Embarq provided a response to an on the record data made by Core at the June 27, 2007 hearing. The on the record data request appears at page 254 of the transcript. Both requests were moved and accepted into evidence at pages 95-97 and 253-257 of the transcript. By memo dated July 11, 2007, I filed copies of these requests as late filed exhibits marked EQ PA Cross Exhibit #3 and Embarq PA Direct Exhibit #2 and directed the Commission's Secretary to place them in the exhibit folder.

On July 12, 2007, Embarq filed transcript corrections pursuant to 52 Pa. Code §5.253. Core did not file any objections to the proposed corrections. On July 27, 2007, I issued an order correcting the transcript.

Core filed its main brief on July 31, 2007. Embarq filed its main brief on August 1, 2007. Both parties filed reply briefs on September 20, 2007. The record closed on September 20, 2007, upon the filing of reply briefs. The parties have waived the nine-month deadline for rendering an arbitration decision set forth in 47 U.S.C. §252 and waived their right to petition the Federal Communications Commission (FCC) under 47 U.S.C. §252(e)(5) for failure of the Commission to act on the arbitration within the statutory deadline.

This recommended decision shall address the ten unresolved issues set forth in the parties' final best offers and their unresolved issues matrix. (Core Direct Ex. 1, Eq Pa. Direct Ex. 1, Joint Exhibit 1) I shall refer to these unresolved issues by the numbers contained in the parties' final best offers.

THE UNRESOLVED ISSUES

ISSUE 1. "Local Traffic" versus "Section 251(b)(5) Traffic".
ISSUE 2. Point of Interconnection (POI)
ISSUE 3. Interconnection Methods/Collocation
ISSUE 4. Loop Interconnection
ISSUE 5. Tandem v. End Office Rates for Transport and Termination
ISSUE 6. Reciprocal Compensation for Section 251(b)(5)
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DISCUSSION AND RECOMMENDED RESOLUTION

Many of the unresolved issues in this case involve reciprocal compensation and the application of the FCC's decision captioned In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd. 9151 (April 27, 2001) (ISP Remand Order). I will provide a brief factual background of Core's business and a brief explanation of the ISP Remand Order in order to provide a context for the unresolved issues.

According to its web site, Core provides service dedicated to internet service provider (ISP) services. Core at this time does not originate any traffic. (N.T. 69-72) Its web site states that Core does not provide services to end users, only to ISPs. (Eq. Pa. St. 1.0, pg. 5) Core does this by having ported numbers out of Embarq's local exchanges and has ported other numbers from other carriers that exchange local traffic with Embarq in nearby rate centers. (Eq. Pa. St. 2.0, pg. 7) Core also has several number blocks of its own from the North American Numbering Plan Administration (NANPA). Core directs that dial up calls to these numbers be routed to its gateway via Verizon LATA tandems. The gateway is in Verizon territory and internet-bound traffic to Core terminates there. (Eq. Pa. St. 2.0, pg. 7)

Embarq provided the example of an Embarq customer in Mercersburg dialing a number that the Local Exchange Routing Guide (LERG) indicates terminates to the Chambersburg rate center. That number has been ported out of Chambersburg and is directed to Core's gateway in Harrisburg. (Eq. Pa. St. 2.0, pg. 8) Harrisburg is not within Embarq's service area and is not a local call from Mercersburg. Traffic that originates in Embarq's territory is not terminating to customers in Embarq's Chambersburg territory but is terminating to the internet via Core's gateway in Harrisburg using a Chambersburg telephone number. (Eq. Pa. St. 2.0, pg. 9) Core's customer may be physically located elsewhere.

Core and Embarq argue over how the Commission should apply the FCC ruling in the ISP Remand Order to the facts of this proceeding. The ISP Remand Order addressed certain issues regarding compensation for ISP-bound traffic. Core and Embarq disagree as to the scope

of the ISP Remand Order and its applicability to Core's ISP-bound traffic. I will attempt to generally explain the ruling in the ISP Remand Order.

The ISP Remand Order is the FCC's attempt to address the issue of intercarrier compensation for telecommunications traffic delivered to ISPs consistent with the provisions of the Telecommunications Act of 1996. The FCC recognized that the then-existing intercarrier compensation system for delivery of traffic to ISPs, requiring the originating carrier to pay the carrier serving the ISP, had created opportunities for what it called "regulatory arbitrage." (¶2 ISP Remand Order) The then-existing intercarrier compensation system, according to the FCC, distorted economic incentives relating to entry into the local exchange and exchange access markets. (¶2 ISP Remand Order) The FCC observed that regulatory arbitrage associated with intercarrier payments was particularly apparent with regard to ISP-bound traffic because of the large volume of traffic and the fact that the traffic moved one way to the ISP. The FCC stated that some carriers targeted ISPs as customers to take advantage of these intercarrier payments. The FCC asserted that it would take interim steps in the ISP Remand Order to limit regulatory arbitrage with regard to ISP-bound traffic. (¶2 ISP Remand Order)

The FCC alleged that carriers had incentive to compete, not on the basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, creating a distortion that prevented market forces from distributing limited investment resources to their most efficient uses. (¶4 ISP Remand Order) In the case of some carriers the FCC found that delivery of traffic to ISPs was eighteen times more traffic than they originated. This imbalance resulted in annual reciprocal compensation billing of approximately $2 billion, ninety percent of which was ISP-bound traffic. The FCC observed that under the then current intercarrier compensation system, it was conceivable that a carrier could serve an ISP free of charge and recover all its costs from originating carriers. (¶5 ISP Remand Order)

The FCC found a need for immediate action with regard to ISP-bound traffic and stated that the ISP Remand Order would implement an interim system that would: 1) Move to eliminate arbitrage opportunities presented by the then existing compensation system for ISP-bound traffic; and 2) Initiate a thirty-six month transition toward a bill and keep system.

(¶7 ISP Remand Order) Under a bill and keep system, each carrier would recover its costs from its respective end users. The originating carrier would recover its costs from the customer that initiated the call and the receiving carrier would recover its costs from the ISP customer to which it delivered the call. The FCC reasoned that a bill and keep system would eliminate regulatory arbitrage. (¶74 ISP Remand Order) The thirty-six month transition period toward a bill and keep system has expired but because the FCC has not acted further on this matter, the "interim" system set forth in the ISP Remand Order remains in effect. The FCC has initiated a proceeding captioned In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, in order to resolve intercarrier compensation issues but as of the date of this order, the FCC has not issued a final order in that proceeding.

Having generally explained the ISP Remand Order, I will now attempt to generally explain its holding as it relates to this proceeding. Courts have observed that the ISP Remand Order is not a model of clarity. Qwest Corp. v. Washington State Util. and Trans. Comm'n., 484 F. Supp. 2d 1160 (W.D. Wa. 2007) I will attempt to clarify several important points regarding the ISP Remand Order that are relevant to this proceeding. The United States District Court for the Western District of Washington in the Qwest case has provided what I find to be a clear explanation of these points in the ISP Remand Order. I will summarize its holding here.

First, the ISP Remand Order does not apply to all ISP-bound traffic. The ISP Remand Order did provide for reciprocal compensation for telecommunications pursuant to 47 U.S.C. §251(b)(5) but removed ISP-bound traffic from the definition of "telecommunications traffic." (¶ 44 ISP Remand Order) The ISP Remand Order provides that ISP-bound traffic is governed by either the rate scheme established by the ISP Remand Order or by the access charge regime regulated by the state commissions that existed prior to the Telecommunications Act of 1996.

The Court in the Qwest case notes that the ISP Remand Order does not eliminate the distinction between local and non local traffic and the compensation regimes that apply to each. (¶37, ISP Remand Order); Global Naps, Inc. v. Verizon New England, Inc., 444 F.3d 59

(1st Cir. 2006) (Global Naps) The ISP Remand Order does reevaluate the FCC's use of the term "local" because it is not a term used in either 47 U.S.C. §251(b)(5) or §251(g). ISP Remand Order, ¶34 However, as noted in Global Naps, the ISP Remand Order reaffirmed the distinction between reciprocal compensation and access charges for local and inter-exchange traffic respectively. As the Qwest decision notes, the reference to the term "local" in the ISP Remand Order at ¶34 addresses only Section 251(b)(5) traffic which, according to the ISP Remand Order at ¶35, excludes ISP-bound traffic.

The scope of the ISP Remand Order is limited to ISP-bound traffic within a single local calling area. The Qwest court notes that the issue decided by the ISP Remand Order as set forth at ¶13, is whether reciprocal compensation applies to delivery of calls from the customer of one local exchange carrier to an ISP in the same local calling area served by a competing local exchange carrier. The scope of the ISP Remand Order is therefore confined to the context of that question. The Qwest court observes that every federal appeals court that has addressed the scope of the ISP Remand Order has reached the same conclusion. Global Naps; Global Naps, Inc. v. Verizon New England, Inc., 454 F.3d 91 (2nd Cir. 2006); WorldCom, Inc. v. Federal Communications Comm'n., 288 F.3d 429 (D.C. Cir. 2002); Verizon California, Inc. v. Peevey, 462 F.3d 1142 (9th Cir. 2006) While these decisions are not controlling on the Commission, they are highly persuasive. The Qwest court also points out that the FCC took this position as *amicus curiae* in the Global Naps decision.

The Global Naps court quotes the FCC's *amicus curiae* brief as stating that the history that led to the ISP Remand Order indicates that the FCC was focused on calls between dial up users and ISPs in a single local calling area. I admitted the entire FCC *amicus curiae* brief filed in the Global Naps appeal as a late filed exhibit. (Embarq PA Direct Exhibit #2) According to the FCC's brief as quoted in Global Naps, the ISP Remand Order is not clear that it intended to preempt states from establishing a requirement of intercarrier compensation for inter-exchange virtual NXX (VNXX) ISP-bound traffic.

In order to explain how it differs from calls in a single local calling area, I will provide a brief overview of VNXX. According to the Global Naps decision, whether a call is

"local" or "interexchange" depends on geographically defined local calling areas. In order to determine whether a call is "local" or "interexchange," a carrier such as Embarq compares the NXX numbers, the term used for the middle three digits of the ten digit telephone number, of the caller and the recipient. The NXX is generally associated with a particular switch, the term used for the equipment that routes telephone calls to their destination, physically located within local calling areas. According to the Global Naps court, NXXs have served as proxies for geographic locations. If the NXX numbers of the caller and recipient were within the same local calling area, a telecommunications carrier could assume that the caller and recipient were physically within the same calling area and would bill the call as a local call.

In the Global Naps decision, Global Naps had the ability to assign its customers VNXX so that Global Naps customers could be given VNXX numbers that were different than those that would normally be assigned to that customer based on its physical location. This arrangement allowed the Global Naps customer to call what appeared to be a "local" number. However, the call was actually routed to a different local calling area. In this case, when the party making such a call is an Embarq customer, Embarq transmits the call outside its local calling area.

In the Global Naps decision, many of Global Naps' customers used the VNXX arrangement and many of its ISP end user customers used the incumbent carrier, Verizon, for local telephone service. In the Global Naps case, to access the internet, the end user dialed to a VNXX number assigned to his or her local calling area. Verizon would then transport the call across local callings areas to Global Naps' point of interconnection with the Verizon network. Under the VNXX arrangement in Global Naps, the end user's call to the ISP server was toll-free to the end user whether or not the ISP's server was located in the same local exchange area in which the end user originated the call. The FCC's *amicus* brief filed in Global Naps states that the FCC has not addressed the application of the ISP Remand Order to ISP-bound calls outside a local calling area or decided the implications of using VNXX numbers for intercarrier compensation more generally.

I conclude, based on the Global Naps decision and the decisions of the other federal appeals courts cited above, that the ISP Remand Order does not address compensation for ISP-bound calls outside a single local calling area. Consistent with this conclusion, the ISP Remand Order does not address compensation of VNXX ISP-bound calls. Finally, the ISP Remand Order does not preempt states from addressing compensation for VNXX ISP-bound calls. Having briefly explained the ISP Remand Order, I will now address the unresolved issues in this proceeding.

ISSUE 1. "Local Traffic" versus "Section 251(b)(5) Traffic"

Core proposes a definition of Section 251(b)(5) traffic that it claims is consistent with applicable FCC rules. (Core St. 1.0, pg. 4) Cores proposed language (Core's §1.97) states:

> Section 251(b)(5) Traffic means (1) telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access or exchange services for such access (see FCC ISP Order on Remand, 34, 36, 39, 42-43); and/or (2) telecommunications traffic exchanged by a LEC and a CMRS provider that originates and terminates within the same Major Trading Area, as defined in 47 CFR §24.202(a).

Core's proposal repeats verbatim the definition of "telecommunications traffic" set forth at 47 C.F.R. §51.701(b). Core states that the difference between section 251(b)(5) traffic and other traffic is important for reciprocal compensation purposes. Core states that Embarq has rejected this definition and advocated a definition that incorporates the term "local traffic." Core contends that the FCC has clarified its reciprocal compensation rules and eliminated references to "local" and amended its rules to eliminate such references. According to Core, the ISP Remand Order explained that it has deleted the term "local traffic" because the term "local" is not a statutorily defined category and is not a term used in 47 U.S.C. §§251(b)(5) or 251(g). (Core St. 1.0, pg. 5, N.T. 43-44)

Core argues that its proposed definition is consistent with the FCC's ISP Remand Order because 47 U.S.C. §251(b)(5) imposes on each local exchange carrier the duty to establish

reciprocal compensation arrangements for the transport and termination of telecommunications. (Core St. 1.0, pgs. 5-6) If the Commission were to adopt Embarq's proposed language, Core contends that it would deprive Core of compensation and jeopardize its ability to recover its costs. (Core St. 1.0, pg. 6) Core concludes that the Commission should require the parties to adopt Core's proposed definition in the interconnection agreement between the parties.

Embarq proposes a definition of 251(b)(5) traffic as follows:

> "251(b)(5)Traffic" for purposes of this Agreement, the Parties shall agree that "251(b)(5)Traffic" means traffic (excluding Commercial Mobile Radio Service ("CMRS" traffic) that is originated and terminated within Embarq's local calling area, or mandatory extended area service (EAS) area, as defined by the Commission or, if not defined by the Commission, then as defined in existing Embarq Tariffs. For this purpose, Local Traffic does not include any ISP-Bound Traffic. (Eq. Pa. St. 1.0, pg. 10)

Embarq contends that whether the Commission uses the term "251(b)(5) Traffic" or "Local Traffic" in the agreement, it should define the term as traffic that physically originates and terminates within Embarq's local calling area, excluding VNXX traffic. Embarq asserts that the term used for determining traffic subject to reciprocal compensation cannot include any traffic that physically originates and terminates outside of Embarq's local calling area such as VNXX-enabled traffic. Embarq states that it is amenable to using the term "251(b)(5) Traffic" as long as the definition requires traffic that physically originates and terminates within Embarq's local calling area and excludes VNXX-enabled traffic. (Eq. Pa. St. 1.0, pg. 6)

According to Embarq, the FCC's ISP Remand Order found that Section 251(b)(5) imposes a duty on all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Embarq asserts that the ISP Remand Order excludes certain services, including ISP-bound traffic from the reciprocal compensation requirements of Section 251(b)(5). (Eq. Pa. St. 1.0, pgs. 6-7) According to Embarq, the ISP Remand Order created a mirroring rule that allows Embarq to offer a lower compensation rate for all Section 251(b)(5) non-VNXX-enabled traffic exchanged with other carriers. In this case, Embarq contends that to the extent that Core accepts Embarq's offer, the

lower rate of $.0007 applies to non-VNXX-enabled ISP-bound traffic that Embarq sends to Core but also applies to voice traffic that originates and terminates within Embarq's local calling area. The same compensation rate therefore applies to both Section 251(b)(5) traffic and local ISP-bound traffic as a result of the mirroring rule. (Eq. Pa. St. 1.0, pgs. 6-7)

Embarq claims that Core's proposed definition includes all telecommunications exchanged between Embarq and Core but does not distinguish between traffic subject to reciprocal compensation based on the origin and termination points of the traffic. Core's proposed definition of Section 251(b)(5) traffic includes VNXX-enabled traffic contrary to the ISP Remand Order. (Eq. Pa. St. 1.0, pgs. 7-8)

According to Embarq, its proposed definition is consistent with Pennsylvania law, citing the definition of local exchange telecommunications service at 66 Pa. C.S. §3012 as communications that originate and terminate within a prescribed local calling area. (Eq. Pa. St. 1.0, pgs. 9) Embarq states that its proposed definition includes only traffic that physically originates and terminates within its local calling area and excludes VNXX-enabled ISP-bound traffic. Embarq frames the issue as simply whether Embarq should pay Core $.0007/MOU for non-local VNXX-enabled ISP-bound traffic or whether Core should pay Embarq originating access when Core utilizes VNXXs to provision and terminate non-local ISP-bound traffic. (Eq. Pa. St. 1.0, pg. 9)

After reviewing the evidence and law in this case, I find in favor of Embarq. I do this for several reasons. First, contrary to Core's assertions, its definition is not consistent with the ISP Remand Order. As I stated above, the ISP Remand Order addresses ISP-bound traffic only within a local calling area. Core's definition includes any ISP-bound traffic, including VNXX traffic. According to Embarq, only 3.3% of the minutes Embarq sent to Core on December 13, 2006 was traffic that would be considered local traffic under its proposed definition.

Second, adopting Core's definition greatly expands the amount of ISP-bound traffic that is subject to reciprocal compensation and promotes the regulatory arbitrage that the

ISP Remand Order disapproved. Embarq's analysis of Core-terminated traffic for a single day, December 13, 2006, reveals that traffic terminating with Core's ISP customers uses a huge amount of Embarq's bandwidth. (Eq. Pa. St. 2.0, pgs. 11-15) As Embarq points out, this traffic poses problems for its network by using its network in ways for which it was not designed. In order to accommodate Core's traffic, Embarq asserts that it has to construct a network that is much more costly than it would otherwise need to be. (Eq. Pa. St. 2.0, pgs. 15-16) This cost is born by Embarq with no compensation from Core.

Third, adopting Core's position is also inconsistent with the FCC's statements in the ISP Remand Order disfavoring regulatory arbitrage. The FCC stated that the ISP Remand Order is to be an interim step toward developing a bill and keep system. The FCC was concerned that immediately adopting a bill and keep system in the ISP Remand Order would disrupt the business expectations of carriers and their customers. (¶ 77 ISP Remand Order) However, the ISP Remand Order leaves no doubt that the FCC wishes to move in the direction of having each carrier recover its network costs from its own customers.

Adopting Core's proposed definition would mean that all of the traffic terminating with Core's ISP customers would be the subject of reciprocal compensation. The amount of reciprocal compensation estimated by Embarq is substantial. Under Embarq's definition only the traffic that is within the local area would be subject to reciprocal compensation, a much smaller number. Core has not cited any Commission decisions indicating that the Commission ever intended that all ISP-bound traffic should be subject to reciprocal compensation.

My own research reveals that in Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered April 18, 2003) the Commission stated at page 57, n. 46 that the ISP Remand Order has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic. The Commission affirmed this ruling in a subsequent order in Petititon of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the

Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered January 18, 2006) and stated that the Commission lacked the authority to resolve the issue of whether intercarrier compensation rates for ISP-bound traffic includes both VNXX ISP-bound traffic as well as ISP-bound traffic where the caller is in the same local calling area. Since these Commission decisions, several federal appeals courts have issued decisions concluding that the ISP Remand Order does not address compensation for ISP-bound calls outside a single local calling area, does not address compensation of VNXX ISP-bound calls and does not preempt states from addressing compensation for VNXX ISP-bound calls. I agree with the reasoning set forth in these recent federal appeals court decisions and their conclusions.

My conclusion that the ISP Remand Order does not preempt states from addressing compensation for VNXX ISP-bound calls is based on the Federal Appeals Court's decision in Global Naps, Inc. v. Verizon New England, Inc., 444 F.3d 59 (1st Cir. 2006) (Global Naps), and other federal appeals court decisions decided after the Commission's decisions in US LEC. In particular, the *amicus* brief filed by the FCC in the Global Naps decision, as quoted in that decision, sets forth the FCC's position that the ISP Remand Order does not preempt states from addressing this issue. The Commission did not have the benefit of the Global Naps decision or the FCC's *amicus* brief when it issued its decision in US LEC. While the Global Naps and the other federal court decisions cited above are not controlling on the Commission, they are well reasoned and persuasive. For all the above reasons, I find in favor of Embarq.

ISSUE 2. Point of Interconnection (POI)

Core proposes dual interconnection points with Embarq. Under this proposal, each party would designate an interconnection point on its network at which the other party may deliver its originating traffic. Core's proposal requires each party to bear the financial and operational responsibility to deliver its originating traffic to the switch location of the other party. (Core St. 1.0, pg. 7) Under Core's proposal, each party designates an interconnection point on its network at which the other party is responsible to deliver its originating traffic. (Core St. 1.0, pg. 14) Core also points out that the Commission has approved a dual interconnection point arrangement in Petition of Cellco Partnership d/b/a Verizon for Arbitration

Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Alltel Pennsylvania, Inc., Docket No. A-310489F7004 (Order entered January 18, 2005) (Verizon Wireless/Alltel Arbitration Order).

Core states that Embarq has rejected this proposal and advocates that there be one interconnection point at one or more of Embarq's switches. According to Core, Embarq's proposal will cause Core to bear all the costs to deliver Core's originating traffic to Embarq at the interconnection point and pick up traffic originating on Embarq's network at the same interconnection point and transport it to Core's switch. (Core St. 1.0, pg. 7) Core characterizes Embarq's proposal as an attempt to have Core pay Embarq's costs.

Core argues that the FCC has recognized at 47 C.F.R. §51.703(b) that each carrier should bear the financial responsibilities for interconnection with respect to its own originating traffic. This rule, according to Core, prohibits a carrier from shifting the costs of transporting its originated traffic to other carriers. Core claims that the decision in MCIMetro Access Trans. Serv., Inc. v. Bellsouth Telecommunications, Inc., 352 F.3d 872 (4th Cir. 2003) supports its position that 47 C.F.R. §51.703(b) prohibits Embarq from shifting costs to Core for traffic that originates on Embarq's network. (Core St. 1.0, pg. 10) Core states that under Embarq's proposal, Core will have to acquire or construct new facilities for access at each point on Embarq's network. (Core St. 1.0, pg. 11)

Core also argues that according to FCC, Core has the right to select the interconnection point, not Embarq. According to Core, the FCC recognized that incumbent carriers, such as Embarq have an incentive to discriminate against competitors by providing them less favorable terms and conditions of interconnection than it would for itself. (Core St. 1.0, pg. 11) Core concludes that Embarq is under FCC mandate to open its network to competition by providing interconnection under reasonable terms and conditions. Embarq's proposal is not reasonable because it will require Core to invest in facilities that are not justified from a market or engineering standpoint. (Core St. 1.0, pg. 13)

Embarq contends that it has a duty under 47 U.S.C. §251(c)(2) to provide for interconnection at any technically feasible point within its network. (Eq. Pa. St. 1.0, pgs. 10-11) This point is where the traffic is physically exchanged, establishes the technical interface and the point where one carrier hands off operational responsibility to the other carrier. (Eq. Pa. St. 1.0, pg. 10) Embarq proposes that Core establish one interconnection point per LATA on Embarq's network. Embarq contends that the most efficient network architecture arrangements require Core to establish an interconnection point at each of four tandems. (Eq. Pa. St. 1.0, pg. 11)

Embarq claims that Core's proposal will shift the cost of the facility connecting the two networks onto Embarq. Core's dual interconnection point proposal will make each party responsible for transporting its originating traffic to an interconnection point on the terminating carrier's network. Core's proposal will force Embarq to bear the cost of transporting ISP-bound traffic to Core's network which is physically located outside of Embarq's territory, according to Embarq. Since Core does not originate any traffic, it will not bear similar costs transporting traffic to Embarq and will not need to establish an interconnection point on Embarq's network. (Eq. Pa. St. 1.0, pg. 13)

Embarq also contends that Core's proposal does not promote good policy. Core's proposal would force Embarq to bear costs of transporting Core's ISP-bound traffic to points beyond its territory to Core's switches located in Verizon's territory. This is contrary to 47 U.S.C. §251(c) which requires an incumbent such as Embarq to provide interconnection at any technically feasible point on its network. This provision contemplates that competitive carriers such as Core expend resources to connect and transport to the incumbent's network.

According to Embarq, Core's proposal is also contrary to Commission decisions. Embarq points out that the Commission has ruled in Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered April 18, 2003); Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered October 7, 2003); and Petition of US LEC of Pennsylvania, Inc.

for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered January 18, 2006) that competitive carriers such as Core are not permitted to designate an interconnection point outside the incumbent's network. (Eq. Pa. St. 1.0, pgs. 14-15)

Embarq asserts that Core's dual interconnection point proposal would require Embarq to lease a substantial amount of bandwidth between its tandems and Core's network. In addition, other carriers could require Embarq to provide the same arrangement for their networks.

After reviewing the evidence and law in this case, I find in favor of Embarq. I do this for several reasons. First, Embarq's language is consistent with both federal law and Commission decisions. In Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered January 18, 2006) the Commission stated that the FCC's binding regulation at 47 C.F.R. § 51.305(a)(2) specifies that an interconnection point must be within the incumbent's network. The Commission explained that while parties are not prohibited from mutually agreeing upon locating an interconnection point outside the incumbent's network, in the absence of such an agreement, 47 C.F.R. §51.305(a)(2) mandated that the interconnection point be within the incumbent's network. The United States Court of Appeals for the Third Circuit in MCI v. Bell Atlantic Pennsylvania, Inc., 271 F.3d 491 (3rd Cir. 2001) similarly ruled that a competitor could have access at any point on the incumbent's network where a connection is technically feasible. If the incumbent denies interconnection at a particular point, it must show that interconnection at that point is not technically feasible.

Core's citation of Petition of Cellco Partnership d/b/a Verizon for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Alltel Pennsylvania, Inc., Docket No. A-310489F7004 (Order entered January 18, 2005) (Verizon Wireless/Alltel Arbitration Order) as authority for the proposition that the Commission has previously approved a dual interconnection point arrangement is misplaced. As I noted in my order dated March 20, 2007, granting, in part, Core's motion for

partial summary judgment, the Commission's decision in the Verizon Wireless/Alltel Arbitration Order involves a wireless carrier and is neither factually nor legally similar to this proceeding such that its decision is controlling on the outcome of this litigation.

Core's citation of MCIMetro Access Trans. Serv., Inc. v. Bellsouth Telecommunications, Inc., 352 F.3d 872 (4th Cir. 2003) for the proposition that 47 C.F.R. §51.703(b) prohibits Embarq from shifting costs to Core for traffic that originates on Embarq's network is also misplaced. The provision at 47 C.F.R. 51.701(b)(1) states that 47 C.F.R. §51.703(b) does not apply to traffic that is interstate or intrastate exchange access. The provision at 47 C.F.R. §51.703(b) excludes inter-exchange traffic. As set forth earlier in this decision, only a small percentage of Core's traffic on Embarq's network actually originates and terminates within a local calling area. The balance of Core's traffic on Embarq's network would be inter-exchange traffic and not subject to the provisions of 47 C.F.R. §51.703(b).

Finally, the facts as set forth in this proceeding indicate that there is no need for a dual connection point arrangement. Core provides service for ISPs. Its customers do not originate any traffic. (N.T. 69-72) Its current business plan does not contemplate providing service to any customers that would originate traffic. Core will not be delivering any traffic to Embarq. Therefore, it has no need to designate a point on Embarq's network where it will deliver traffic. For all the above reasons, I find in favor of Embarq.

ISSUE 3. Interconnection Methods/Collocation

This issue is tied to Issue 2. Core proposes that each party be permitted to chose from three generic types of delivery: 1) Establish collocation at the other party's interconnection point; 2) Sublease a third party's preexisting collocation at the other party's interconnection point; or 3) Purchase transport links into the other party's interconnection point from the other party or from a third party transport provider. Core contends that its proposal is consistent with standard industry practice.

Embarq contends that Core's proposal is consistent with its position on Issue 2 and merely is the various means by which the dual interconnection point arrangement advocated in Issue 2 is implemented. According to Embarq, Core's proposal would subject Embarq to conditions beyond those required by the FCC to provide interconnection. (Eq. Pa. St. 1.0, pg. 17)

Embarq also asserts that Core's proposed language is already found in the proposed agreement. (Eq. Pa. St. 1.0, pg. 18) Embarq argues that the existing language only addresses interconnection by Core on Embarq's network. Core's proposal requires Embarq to pick any of the described interconnection options to collate at a Core central office. (Eq. Pa. St. 1.0, pgs. 18-19) Embarq concludes that the Commission should reject Core's proposal here for the same reasons it should reject Core's proposal in Issue 2.

After reviewing the evidence and law in this case, I find in favor of Embarq for the same reasons that I found in its favor on Issue 2. The language that Core proposes is based on its dual interconnection point proposal set forth in Issue 2. I agree with Embarq that its proposed interconnection agreement already contains a provision that addresses interconnection and collocation methods. Core has not objected to any of these provisions. Because I have rejected Core's dual interconnection point proposal, there is no reason to adopt its language for Issue 3. For all the above reasons, I find in favor of Embarq.

ISSUE 4. Loop Interconnection

Core proposes language that will allow it to interconnect with Embarq at a non-switch location, such as where Embarq has loop facilities in place to serve high capacity users. Core contends that according to 47 U.S.C. §251(c)(2), it can choose to interconnect with Embarq at any technically feasible point on Embarq's network. (Core St. 1.0, pg. 17) Core states that it wishes to establish an entrance facility connection with Embarq.

Core argues that it has interconnected with Verizon in both Maryland and Pennsylvania using Verizon's loop facilities. Core states that its interconnection agreement with

Verizon provides for a loop interconnection in Altoona. Core contends that this is substantial evidence that a similar interconnection with Embarq is technically feasible.

Embarq objects to this proposal on several grounds. According to Embarq, what Core proposes is that it interconnect at an outside plant location that is not within Embarq's network. Embarq contends that Core should build its network to Embarq's tandem switches in order to exchange traffic. Embarq asserts that since Core's proposal does not designate a point of interconnection on Embarq's network, there is no right to interconnection and Core's argument that its proposal is technically feasible is inapplicable. Only if Core interconnects with Embarq at a point within Embarq's network should the issues of technical feasibility and loop interconnection arise.

According to Embarq, FCC regulations have set forth what constitutes interconnection within a network. The FCC regulations state that interconnection is found at the incumbent's end office switch or tandem switch. This is not what Core proposes. According to Embarq, the issue then is what to charge for the fiber facility from the outside plant location where Core proposes to connect to Embarq's switch. According to Embarq, Core is attempting, through its proposal, to obtain loop pricing instead of entrance facility or transport facility pricing. The FCC has held that a link such as an entrance facility connecting a competing carrier's network to an incumbent's network is not part of the incumbent's local network but is a transmission facility that exists outside the incumbent's local network. (Eq. Pa. St. 1.0, pg. 20)

Embarq argues that Core can either buy entrance facilities or provide its own transport from an outside plant location to Embarq's switch but that it is not entitled to loop interconnection if that entails loop pricing for the fiber facility from the outside plant location to Embarq's switch or if Embarq must provide those facilities. According to Embarq, the point of interconnection remains at Embarq's switch location and each party is financially and operationally responsible for getting traffic to or receiving traffic at the interconnection point. Embarq argues that Core's language is not necessary since other provisions in the proposed agreement provide that when Core has a physical network presence in Embarq's territory within

each LATA and when Core wishes to establish a direct interconnection, it may order an entrance facility. (Eq. Pa. St. 1.0, pg. 21)

After reviewing the evidence and law in this case, I find in favor of Embarq. In Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000, (Order entered January 18, 2006), the Commission stated that the FCC's binding regulation at 47 C.F.R. §51.305(a)(2) specifies that interconnection point must be within the incumbent's network. The Commission explained that while parties are not prohibited from mutually agreeing upon locating an interconnection point outside the incumbent's network, in the absence of such an agreement, 47 C.F.R. §51.305(a)(2) mandated that the interconnection point be within the incumbent's network.

I agree with Embarq that Core's proposal does not provide for an interconnection point within Embarq's network. What Core proposes does not constitute interconnection within Embarq's network. The FCC regulations state that interconnection is found at the incumbent's end office switch or tandem switch. The FCC has held that a link such as an entrance facility connecting a competing carrier's network to an incumbent's network is not part of the incumbent's local network but is a transmission facility that exists outside the incumbent's local network. (Eq. Pa. St. 1.0, pg. 20)

Furthermore, Core's language is not necessary since other provisions in the proposed agreement provide that when Core has a physical network presence in Embarq's territory within each LATA and when Core wishes to establish a direct interconnection, it may order an entrance facility. For all the above reasons, I find in favor of Embarq.

ISSUE 5. Tandem v. End Office Rates for Transport and Termination

Core proposes that a carrier pay the tandem or end office rate based on the point at which the carrier delivers its originating traffic on the other carrier's network. Core points out that the difference in language between its proposal and Embarq's is based on the difference in

definitions for Section 251(b)(5) traffic. (Core St. 1.0, pg. 20) Core argues that whether a carrier pays the tandem or end office rate is based on the point at which that carrier delivers its originating traffic on the other carrier's network. Core alleges that its language is consistent with industry practice. Core argues that Embarq's proposal is not consistent with FCC precedent and should be rejected. (Core St 1.0, pg. 21)

Embarq contends that Core is incorrect and that FCC rules at 47 C.F.R. §51.711(a)(3) provide that a competitor is entitled to tandem rates for call completion if its switch serves a geographically comparable area to Embarq's tandem. (Eq. Pa. St. 1.0, pg. 22) Embarq's proposed language requires Core to be connected at the tandem in order for the tandem rate to apply. According to Embarq, Core's position is that as long as its switch serves a geographically comparable area to its Embarq's tandem, it may be interconnected at either the tandem or at a subtending end office and still receive the tandem rate for call completion.

Embarq indicates that it has opted into the FCC's ISP Remand Order and that this issue only applies to traffic not subject to the ISP Remand Order's $.0007/MOU rate. If Core accepts Embarq's opt-in offer, all local voice and non-VNXX-enabled ISP-bound traffic will be subject to this rate and this issue becomes moot. (Eq. Pa. St. 1.0, pg. 23) Embarq points out that if Core rejects Embarq's offer, the only traffic that this issue applies to is any Embarq originated local voice traffic that falls below the 3:1 ratio. Embarq asserts there will never be any volume of minutes below the 3:1 ratio until Core starts originating traffic.

Embarq offers a solution. Because of the insignificant financial impact of the issue, Embarq will concede that if Core rejects Embarq's opt-in offer and to the extent that there is any non-ISP-bound traffic below the 3:1 ratio, Core may be interconnected at either its tandem or its end office in order to receive the tandem switching rate for call completion provided Core's switch serves a comparable geographic area.

In its main brief, Core states that it believes this issue is settled. In its main brief, Embarq states that the issue is moot because Core does not originate any voice traffic. In its reply brief, Core states that based on Embarq's discussion of this issue in its main brief, it

appears that the parties' differences on this issue relate completely to Issues 1 and 2. Core asserts that the language differences between Core and Embarq can be resolved consistent with the resolution of Issues 1 and 2. Core also states that it has no objection to the inclusion of Embarq's language at §55.1.1.5 as set forth in Embarq's main brief and final offer.

After reviewing the evidence and law in this case, I find in favor of Embarq. Since the language differences in §§55.1.2 and 55.1.1.3 are minimal, Core does not object to Embarq's additional language at §55.1.1.5 and because I have found in favor of Embarq on Issues 1 and 2, the Commission should adopt Embarq's language.

ISSUE 6. Reciprocal Compensation for Section 251(b)(5) and

ISSUE 7. Intercarrier Compensation for ISP-bound Traffic

Core and Embarq have grouped these two issues together. Core points out that the parties disagree on the definition of Section 251(b)(5) as set forth in Issue 1. Core argues that it is entitled to reciprocal compensation for its VNXX-enabled, ISP-bound traffic. (N.T. 55-56) Embarq disagrees and contends that VNXX service is by definition an interexchange service to which access charges must apply. Core identifies the issue as whether VNXX traffic is treated the same as Section 251(b)(5) traffic.

Core argues that the parties are bound by the ISP Remand Order with respect to compensation for ISP-bound traffic. According to Core, Embarq does not understand the mirroring rule set forth in paragraph 89 of the ISP Remand Order. (N.T. 58-62) According to Core, the mirroring rule only applies to incumbents, not the competitors. (Core St 1.0, pg. 23, N.T. 58-62) According to Core, when Embarq elects to opt into the mirroring rule, the rate that Core may charge for termination of ISP-bound traffic is capped at the FCC rate of $.0007/MOU. However, according to Core, by opting into this rate, all traffic, including Section 251(b)(5) traffic, is compensated at the same rate. (Core St. 1.0, pg. 24)

According to Core, Embarq's position in this case is not consistent with its position in previous Commission proceedings regarding VNXX and ISP-bound traffic. According to Core, in these other Commission proceedings, Embarq has agreed with Core's position that the FCC has preempted the states with respect to compensation for ISP-bound traffic. (Core St. 1.0, pg. 25)

According to Core, making long distance calls to ISPs is uneconomical for end users. It is important for ISPs that end users be able to reach them by means of a local call. Normally, ISPs do not have a physical presence in every local calling area where it may have customers. Core asserts that the standard operating arrangement in the industry is that ISPs obtain telephone numbers that are local to the areas where they have customers. Where either the incumbent or competitor are providing local numbers for the ISPs where they have no local presence, these numbers are called virtual NXX or VNXX service and identical from the customer's perspective to the foreign exchange service offered by Embarq. (Core St. 1.0, pg. 27)

According to Core, the ISP Remand Order mandates that ISP-bound traffic and non-toll or traffic that is not exchange access are to be treated the same. Core contends that its proposal for intercarrier compensation is consistent with the ISP Remand Order.

Embarq contends that Core's position on these issues is incorrect and not consistent with the ISP Remand Order. According to Embarq, the mirroring rule set forth in the ISP Remand Order applies to rates if Core accepts Embarq's opt-in offer. If Core accepts that offer, the rate applies only to any non-VNXX-enabled ISP-bound traffic that Embarq sends to Core and any other local Section 251(b)(5) traffic that originates and terminates in Embarq's local calling area. (Eq. Pa. St. 1.0, pg. 25)

If Core rejects Embarq's opt-in offer, not all Section 251(b)(5) traffic and local ISP-bound traffic are exchanged at the $.0007/MOU rate. Rather, according to Embarq, if Core rejects the opt-in offer, it is necessary to determine the volume of ISP-bound minutes and the volume of local voice minutes exchanged. The ISP-bound minutes will still be compensated at the $.0007/MOU rate but the local voice minutes are subject to the reciprocal compensation rates

in the pricing attachment. (Eq. Pa. St. 1.0, pg. 25) Embarq may determine what portion of traffic is local Section 251(b)(5) traffic versus local ISP-bound traffic by either performing a detailed traffic analysis or calculating the ISP-bound traffic using a 3:1 ratio established by the ISP Remand Order. Any local traffic that Embarq sends to Core that exceeds three times the volume of local calls that Core sends to Embarq is presumed to be ISP-bound. (Eq. Pa. St. 1.0, pg. 26)

As an alternative, Embarq states in its final offer that it is willing to implement a bill and keep arrangement if the Commission adopts its position with regard to Issue 2. (Embarq PA Direct Ex. 1) Bill and keep would be in lieu of specific reciprocal compensation rates. From Embarq's perspective, bill and keep is the status quo with Core and Embarq currently each bearing their costs. Core rejects Embarq's bill and keep alternative.

After reviewing the evidence and law in this case, I find in favor of Embarq for the same reasons that I ruled in its favor on Issue 1. Core's position is not consistent with the ISP Remand Order. The ISP Remand Order addresses ISP-bound traffic only within a local calling area. Core's position is that it includes any ISP-bound traffic, including VNXX traffic. Adopting Core's proposal would mean that all of the traffic terminating with Core's ISP customers would be the subject of reciprocal compensation. Embarq would have to pay Core reciprocal compensation for all its traffic. Embarq's customers would ultimately bear this burden.

Core's position regarding the mirroring rule is also incorrect. The mirroring rule set forth in the ISP Remand Order applies to rates if Core accepts Embarq's opt-in offer. If Core accepts that offer, the rate applies to any non-VNXX-enabled ISP-bound traffic that Embarq sends to Core. In return, Embarq must charge the same rate for any other local Section 251(b)(5) traffic that Core originates and that terminates in Embarq's local calling area. Re: Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006) For all the above reasons, I find in favor of Embarq.

With regard to Embarq's bill and keep proposal, the ISP Remand Order is an interim measure that it imposed prior to initiating a bill and keep arrangement. Since the FCC has not issued a ruling superseding the ISP Remand Order and instituting a bill and keep regimen, the ISP Remand Order remains in effect for Core's ISP-bound traffic within a single local calling area. The balance of Core's ISP-bound traffic is governed by the access charge regime regulated by the Commission that existed prior to the Telecommunications Act of 1996. The Commission has not replaced the access charges with a bill and keep arrangement. It would therefore appear to be inappropriate for the Commisison to mandate it in this proceeding. Nothing prevents Core and Embarq from agreeing to such an arrangement.

ISSUE 8. VNXX Traffic and Other Rating Issues (VOIP)

Core explains that it is important for end users to be able to reach an ISP by means of a local call. At the same time, according to Core, it is inefficient for an ISP to establish a physical presence in every local calling area where the ISP may have customers. Core contends that it is common operating practice for ISPs to obtain telephone numbers that are local to areas where they have customers. Because the incumbents or competitors are providing local numbers for the ISPs where they have no local physical presence, this service is referred to as virtual NXX or VNXX service.

Core provides its Managed Port service to ISPs where it is a certificated carrier. Core provides this service in conjunction with VNXX number assignments. According to Core, VNXX is another name for the same functionality provided for decades by Embarq and other incumbents under the name foreign exchange or FX service. (Core St. 1.0, pg. 34) Core points out that Embarq has provided favorable comments on the use of VNXX in previous Commission proceedings.

According to Core, VNXX calls to ISPs are routed in the same manner as non-VNXX local calls. (Core St. 1.0, pg. 35) Core argues that Embarq's responsibilities and costs are the same regardless of the physical location of the ISP equipment. Embarq must simply route the call to Core and Core sends the call to the ISP. The only difference, according to Core,

is whether the ISP's gear receiving the call is at the end of a short circuit, close to Core's switch end or at the end of a long circuit, far from Core's switch. Regardless of the distance, it is Core's responsibility to complete the call. (Core St. 1.0, pg. 36)

Core claims that Embarq's proposal to rate and distinguish traffic based on the actual geographic location of customers as opposed to the telephone numbers the customers are assigned has no operational basis in the telephone network and flies in the face of the way calls have been rated in the past. According to Core, Embarq is trying to prevent a more efficient competitor from entering the marketplace. (Core St. 1.0, pg. 37)

Core claims that there are negative consequences to Embarq's proposal. Foremost, it would impose additional costs on ISPs. If Core is required to pay access charges for calls to its ISP customers who use VNXX service, Core's cost of doing business will increase and it may have to raise its rates to its ISP customers. According to Core, its ISP customers would then have to either deploy facilities that are in the calling parties' local calling areas or keep their current arrangements but be subject to higher costs. In either event, the ISPs would have to raise their rates to their customers. (Core St. 1.0, pg. 38)

Core contends that Embarq's proposal would give Embarq an unfair competitive advantage over competitors. It would increase the cost of internet access and reduce competition to the detriment of consumers. It would put in jeopardy any competition for ISP dial up services, depriving consumers of choice. (Core St. 1.0, pg. 39)

Core asserts that Embarq's proposal would negate some of the efficiencies that Core has designed into its network. Core explains that its network is designed to operate most efficiently by serving large portions of the state.

Core points out that Embarq does not apply access charges such as it advocates for Core's VNXX service on Embarq's FX service even though the two services are very similar. (Core St. 1.0, pgs. 40-41) Core contends that VNXX is a competitive response to Embarq's FX

service and is the primary service used by ISPs to provide local dialing for their customers. (Core St. 1.0, pgs. 43-45)

With regard to VOIP traffic, Core takes the position that VOIP should be subject to reciprocal compensation. If Core delivers VOIP traffic originated by its VOIP provider to Embarq for termination, Core would pay Embarq at the reciprocal compensation rates the parties have agreed to. If Embarq delivers VOIP traffic to Core, Embarq would pay Core those same rates.

Core contends that VOIP traffic should be rated according to the calling and called parties' NPA-NXX. Local calls would be compensated under reciprocal compensation and toll calls under the access regime. Core argues that attempting to rate VOIP calls on the basis of geographic end points would be impossible because VOIP services are portable depending on where the user decides to log in to the VOIP service.

Embarq responds that Core's use of VNXX for ISP-bound traffic allows Core to use Embarq's and Verizon's networks at no cost to Core and no compensation to Embarq or Verizon for the use of their networks. Embarq asserts that Core's proposal will require Embarq to compensate Core for the traffic that Embarq routes to Core. (Eq. Pa. St. 1.0, pg. 32) According to Embarq, nearly all of Core's traffic is VNXX-enabled, ISP-bound traffic. Embarq contends that the end point of the call should be what determines intercarrier compensation, not the numbers assigned. Embarq's proposal states that VNXX traffic should be rated on the basis of the physical end points of the called and calling parties while Core's proposal ties compensation to the telephone number of the call. (Eq. Pa. St. 1.0, pg. 33) Embarq states that the VNXX-enabled traffic should be subject to access charges while Core states that it should be subject to reciprocal compensation.

Embarq contends that neither the FCC nor Congress has acted to preempt the states and prohibit them from finding that ISP-bound VNXX traffic is not local in nature or that the compensation scheme for ISP-bound traffic set forth in the ISP Remand Order is inapplicable

to such traffic. Embarq contends that it should receive originating access for Core's VNXX traffic. (Eq. Pa. St. 1.0, pg. 36)

With regard to VOIP, Embarq's position is that VOIP calls should be treated the same as all other voice traffic. In that event, compensation would be determined based on the jurisdiction of the call. (Eq. Pa. St. 3.0 pg. 5) Embarq points out that Core has proposed deleting Embarq's proposed language but has not proposed alternative language. Embarq contends that this leaves the agreement silent as to how VOIP traffic should be compensated. This silence leaves this issue open to billing disputes based on the parties' disagreement over what the appropriate compensation should be.

As an alternative, Embarq states in its final offer that it is willing to implement a bill and keep arrangement if the Commission adopts its position with regard to Issue 2. (Embarq PA Direct Ex. 1) Bill and keep would be in lieu of specific reciprocal compensation rates. Embarq states that bill and keep is appropriate because it is consistent with the ISP Remand Order in that it would decrease reliance on payments from one carrier to another and increase reliance on recovering costs from end users. This increased reliance on cost recovery from end users would lessen the market and financial distortions that exist with reciprocal compensation. Embarq also points out that Core and Embarq have been operating under a bill and keep arrangement without an interconnection agreement. Embarq argues that a bill and keep arrangement would maintain the *status quo* until the FCC addresses the issue. Embarq opines that a bill and keep arrangement is a party neutral solution that allows Core to continue operating as it currently does.

Core states that there is no support in the record for a bill and keep arrangement. Core contends that the FCC favors bill and keep arrangements when traffic volumes terminated by each party to an interconnection are balanced because such an arrangement will minimize administrative and transaction costs. Since there is no evidence in the record to support a conclusion that the volumes of traffic to be terminated by Core and Embarq are roughly equivalent, bill and keep is not appropriate.

After reviewing the evidence and law in this case, I find in favor of Embarq for the same reasons that I ruled in its favor on Issue 1. Core's position is not consistent with the ISP Remand Order. The ISP Remand Order addresses ISP-bound traffic only within a local calling area. Core's position is that it includes any ISP-bound traffic, including VNXX traffic. Embarq would have to pay Core reciprocal compensation for all its traffic. Embarq's customers would ultimately bear this burden.

Core argues that a ruling in Embarq's favor will cause Core to pass additional costs on to its ISP customers. However, the ISP Remand Order appears to favor such a result. As I stated earlier in this order, the ISP Remand Order initiated a thirty-six month transition toward a bill and keep system. Under a bill and keep system, each carrier would recover their costs from their respective end users. The originating carrier would recover its costs from the customer that initiated the call and the receiving carrier would recover its costs from the ISP customer to which it delivered the call. While the ISP Remand Order applies to ISP-bound traffic only within a local calling area, it is consistent with the ISP Remand Order that Core would recover its costs from its customers that use VNXX as well. In order to recover its costs, it may well have to increase its rates. As I concluded earlier, the ISP Remand Order does not preempt states from determining the nature of ISP-bound VNXX traffic; from determining that such traffic is outside the compensation scheme for ISP-bound traffic set forth in the ISP Remand Order or from determining that the access charge regime that existed prior to the Telecommunications Act of 1996 governs ISP-bound VNXX.

I also find in favor of Embarq with regard to VOIP. By removing Embarq's proposed language and not substituting an alternative, the agreement becomes silent as to VOIP. If Core intended that all VOIP traffic should be subject to reciprocal compensation, it should have suggested language in the agreement stating its position and eliminating any ambiguity. Deleting Embarq's proposed language leaves the agreement silent as to how VOIP traffic should be compensated. This silence leaves this issue open to billing disputes based on the parties' disagreement over what the appropriate compensation should be.

With regard to Embarq's bill and keep proposal, the ISP Remand Order is an interim measure that the FCC imposed prior to initiating a bill and keep arrangement. Since the FCC has not issued a ruling superseding the ISP Remand Order and instituting a bill and keep regimen, the ISP Remand Order remains in effect for Core's ISP-bound traffic within a single local calling area. The balance of Core's ISP-bound traffic is governed by the access charge regime regulated by the Commission that existed prior to the Telecommunications Act of 1996. The Commission has not replaced the access charges with a bill and keep arrangement. It would therefore appear to be inappropriate for the Commisison to mandate it in this proceeding. Nothing prevents Core and Embarq from agreeing to such an arrangement.

ISSUE 9. Indirect Traffic-Volume Limit

Core objects to Embarq placing a limit on the amount of traffic after which the parties must establish a direct interconnection. According to Core, there is no reason for the parties to impose restrictions on their own use of a third party tandem provider. Core currently uses Verizon facilities to transit traffic between Embarq's facilities and its facilities. (Core St. 1.0, pgs. 45-46) In the absence of such transiting arrangements, each carrier would have to establish direct interconnection with every other carrier that it exchanges traffic with and would lead to duplication of many networks. It is not cost effective or efficient to have such duplicative networks. It is likely that without such transiting not all carriers would be able to complete calls. (Core St. 1.0, pgs. 46-47)

Core states that Embarq's threshold is not necessary and even if necessary, too low. A DS1's worth of traffic is equal to twenty-four calls. Core contends that the market should determine when it is appropriate to establish direct interconnection between two carriers. (Core St. 1.0, pgs. 47-48) Core proposes that once traffic exceeds the DS1 level that the parties cooperate to establish a direct interconnection.

Embarq responds that Core currently enjoys unlimited free transport on Embarq's and Verizon's networks. This free transportation is only possible because Core has not established direct connections and has not compensated Embarq for originating access associated

with Core's non-local Section 251(b)(5) traffic. According to Embarq, Core has given Embarq no choice but to route this traffic over connections between Embarq and Verizon's network. (Eq. Pa. St. 1.0, pgs. 37-38)

Embarq believes it should not incur transit charges as a result of a competitive carrier's decision not to establish a direct connection with Embarq. Embarq's proposal limits indirect traffic volumes to a DS1 level and once this level is reached, Core has sixty days to establish a direct connection with Embarq. (Eq. Pa. St. 1.0, pg. 39)

Embarq indicates that the traffic between Embarq and Core is extremely heavy and equal to several dozen DS1's worth of traffic. Embarq argues that if Core had direct connections to each of Embarq's tandems, it could manage its network. It would have the ability to add more trunks to its network in order to insure a certain level of call completion. As it now operates, Core has no control over the network over which its traffic travels because it flows over networks owned by Embarq and Verizon. With its own network, Core would not be dependent upon the capacity of Embarq's or Verizon's network. (Eq. Pa. St. 1.0, pg. 41) Embarq indicates that the Commission has required parties to an interconnection agreement to establish a direct interconnection when the indirect traffic reaches a DS1 level.

After reviewing the evidence and law in this case, I find in favor of Embarq. Indirect interconnection is intended for use between parties where they exchange small volumes of traffic and the costs of direct interconnection may not be financially feasible. Indirect interconnection is an efficient way to interconnect when carriers do not exchange significant amounts of traffic. As long as the volumes of traffic remain small, it is not reasonable to expect the parties to expend the funds to directly interconnect. However, once the volumes of traffic reach a significant level, the parties should directly interconnect so that the parties can control their own facilities and expand their capacity as needed.

Core should not utilize indirect interconnection as a permanent arrangement here merely because Core has concluded that it is less expensive than direct interconnection. Core has little incentive to construct or maintain its own network as long as it can use other carriers'

facilities for indirect interconnection at a cost lower than the amounts it would expend constructing and maintaining its own network for direct interconnection. Embarq's customers bear the cost of maintaining the facilities Core uses for indirect interconnection. Those customers subsidize Core's customers and allow Core's customers to pay an artificially low price for their service. As I stated earlier in this opinion, the ISP Remand Order contemplates that carriers such as Core pass the costs of their networks on to their ISP customers rather than rely on other carriers to bear those costs.

Core's proposal that once traffic exceeds the DS1 level, the parties cooperate to establish a direct interconnection does not solve the problem. According to Embarq, Core's traffic over Embarq's network already exceeds this level, yet there has apparently been no move by Core to establish a direct interconnection. As long as establishing a direct interconnection remains voluntary instead of mandatory, Core has no incentive to change the *status quo*. For all the above reasons, I find in favor of Embarq.

ISSUE 10. Pricing Attachment

Core requires the use of Embarq entrance facilities and dedicated transport for interconnection in some circumstances. Embarq will provide these services, proposing intrastate access rates. Core contends it should pay total element long run incremental costs (TELRIC) for the entrance facilities. If Embarq does not have TELRIC entrance facility rates, Core proposes using Verizon's entrance facility rates. (Core St. 1.0, pg. 53) In its final best offer, Core states that it will agree to adopt the actual entrance facility rates approved by the Commission in the Verizon TELRIC proceeding at Generic Investigation Re: Verizon Pennsylvania's Unbundled

Network Element Rates, Docket No. R-00016683 (Order entered July 16, 2004) (Core Direct Ex. 1, pg. 13)

According to Core, the FCC established TELRIC pricing for state commissions to follow when setting rates in certain circumstances. In general the prices for elements must be set at their forward looking economic cost which equals the sum of the TELRIC plus a reasonable

allocation of forward looking common costs. According to Core, an entrance facility can be used for either interconnection or as an unbundled network element. Interconnection facilitates exchange traffic between two networks while unbundled elements permit competitors to offer telecommunications services to customers using elements of the incumbent's network. Core contends that the FCC has stated that prices for interconnection and unbundled network elements should be set using TELRIC methodology. While the FCC has eliminated entrance facilities as an unbundled network element, Core argues that this does not prevent it from seeking cost based rates for interconnection.

Core rejects the cost study put forth by Embarq. According to Core the study is flawed because it has not considered factors that are outside the scope of this proceeding, including depreciation rates, cost of capital, capital structure and tax rates. Core advocates that the Commission reject Embarq's cost study pending a generic investigation into Embarq's cost based rates.

Alternatively, Core contends that if the Commission should accept Embarq's cost study, that the Commission modify certain aspects of the cost study. According to Core, the Commission should require Embarq to offer rates that would apply where Core is collocated within Embarq's tandem or end office or shares space with an existing collocator. Core also contends that the Commission should reject Embarq's assumptions regarding network utilization.

Embarq responds that this issue concerns the type of interconnection that Core will order to exchange traffic with Embarq and is related to Issue 2. The type of interconnection facility that Core requires depends on whether Core's equipment is inside or outside Embarq's exchange area. If Core retains its equipment behind Verizon tandems, it may provide its own facilities, lease transmission capacity or lease a meet-point facility arrangement provided jointly by Verizon and Embarq. A meet-point transport facility is an intrastate inter-exchange facility ordered from Verizon's and Embarq's tariff. The pricing and terms and conditions of the meet-point transport facility are controlled by Verizon and Embarq access tariffs, not by a Core/Embarq interconnection agreement. Embarq contends that if Core seeks interconnection

with Embarq from Verizon's territory, this arrangement is not an entrance facility and access tariff rates apply. (Eq. Pa. St. 1.0, pgs. 46-47)

If Core locates its equipment inside Embarq's territory it must have an entrance facility. These facilities may be provided by Core, leased from a third party or purchased from Embarq. According to Embarq, an entrance facility is not subject to TELRIC pricing. Embarq contends that the Commission has ruled that TELRIC pricing should not apply to entrance facilities. (Eq. Pa. St. 1.0, pgs. 47-49) Core should pay Embarq's tariff access rates for entrance facilities.

Embarq has set forth an alternate position by developing cost-based rates for entrance facilities. Embarq is willing to accept these cost-based rates for entrance facilities as set forth in its testimony (Eq. Pa. St. 4.0, pg. 46, Ex. KWD-1) if the Commission requires Core to interconnect in Embarq's territory on Embarq's network.

Embarq contends that Core's criticisms of its cost based rates are unwarranted. According to Embarq, it developed these rates at four tandem locations. The material prices, labor costs and operating expense components of the cost study are supported by the actual costs that Embarq pays.

Furthermore, according to Embarq, Core has not established that Verizon's entrance facility rate is a reasonable substitute for Embarq's cost study. Embarq argues that Verizon is much larger than Embarq. Verizon's size and scope give it an advantage in securing lower equipment costs from vendors due to its purchasing power. Its larger volume of traffic lowers unit costs for Verizon's entrance facilities.

After reviewing the evidence and law in this case, I find in favor of Embarq. I agree with Embarq that if Core retains its equipment behind Verizon tandems, it may provide its own facilities, lease transmission capacity or lease a meet-point facility arrangement provided jointly by Verizon and Embarq. A meet-point transport facility is an intrastate interexchange facility, not an entrance facility.

If Core locates its equipment inside Embarq's territory it must have an entrance facility. In Petition of Verizon Pennsylvania, Inc. and Verizon North, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order, Docket No. P-00042092, (Order entered July 21, 2006) the Commission ruled that TELRIC pricing should not apply to entrance facilities. In reaching its determination, the Commission referred to page 101 of its February 21, 2006 order at P-00042092. In the February 21, 2006 order, the Commission found that access to entrance facilities are to be at cost-based rates. However, the Commission noted that cost-based rates, need not be TELRIC. The Commission concluded that to the extent that entrance facilities fall under Section 251(c)(2), state commissions have jurisdiction to establish the price for entrance facilities.

I have ruled in favor of Embarq on Issue 2. My ruling requires Core to directly interconnect on Embarq's network in Embarq's territory. Therefore, Core must have an entrance facility. Since the Commission has not approved Embarq's cost study based rates for its entrance facilities, it would be inappropriate to use them in this proceeding. Core should pay Embarq's tariff access rates for entrance facilities. Core's request that the Commission initiate a generic investigation of Embarq's rates is outside the scope of this proceeding.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. The resolution of the parties' Unresolved Issues meet the requirements of Section 251 of the Telecommunications Act of 1996, 47 U.S.C. §251 and the regulations of the Federal Communications Commission.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the motion for admission *pro hac vice* filed on June 19, 2007 by Zsuzsanna E. Benedek, Esquire, on behalf of Kevin K. Zarling, Esquire is granted. Mr. Zarling is admitted *pro hac vice* to represent The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania in this proceeding. Ms. Benedek remains counsel of record for The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania in accordance with Pa. B.A.R. 301(a).

2. That in regard to the unresolved issues between Core Communications, Inc., and The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania, the proposal of each party for inclusion in the proposed amended interconnection agreement is approved, modified, or rejected consistent with this Order.

3. That within 30 days after the entry of the Pennsylvania Public Utility Commission's Order in this proceeding, Core Communications, Inc., and The United Telephone Company of Pennsylvania d/b/a Embarq Pennsylvania, shall file with the Pennsylvania Public Utility Commission for approval an amended interconnection agreement consistent with this Order.

4. That upon the filing of the amended interconnection agreement, as specified in Order Paragraph 3, above, and its approval by the Pennsylvania Public Utility Commission, this proceeding be marked closed.

Date: October 19, 2007

David A. Salapa
Administrative Law Judge