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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

QWEST COMMUNICATIONS CORPORATION (U-5335-C)

Complainant

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (U-5253-C), XO COMMUNICATIONS SERVICES, INC. (U-5553-C), TW TELECOM OF CALIFORNIA, L.P. (U-5358-C), GRANITE TELECOMMUNICATIONS, INC. (U-6842-C), ADVANCED TELCOM, INC. dba INTEGRA TELECOM (fdba ESCHELON TELECOM, INC.) (U-6083-C), LEVEL 3 COMMUNICATIONS (U-5941-C), COX CALIFORNIA TELECOM II, LLC (U-5684-C), ACCESS ONE, INC. (U-6104-C), ACN COMMUNICATIONS SERVICES, INC. (U-6342-C), ARRIVAL COMMUNICATIONS, INC. (U-5248-C), BLUE CASA COMMUNICATIONS, INC. (U-6764-C), BROADWING COMMUNICATIONS, LLC (U-5525-C), BUDGET PREPAY, INC. (U-6654-C), BULLSEYE TELECOM, INC. (U-6695-C), ERNEST COMMUNICATIONS, INC. (U-6077-C), MPOWER COMMUNICATIONS CORP. (U-5859-C), NAVIGATOR TELECOMMUNICATIONS, LLC (U-6167-C), NII COMMUNICATIONS, LTD. (U-6453-C), PACIFIC CENTREX SERVICES, INC. (U-5998-C), PAETEC COMMUNICATIONS, INC. (U-6097-C), TELEKENEX, INC. (U-6647-C), TELSCAPE COMMUNICATIONS, INC. (U-6589-C), U.S. TELEPACIFIC CORP. (U-5721-C), AND UTILITY TELEPHONE, INC. (U-5807-C)

Defendants

Case No. 08-08-006

**RESPONSE OF MCIMETRO ACCESS TRANSMISSION SERVICES L.L.C. (U-5253-C)
OPPOSING MOTION OF QCC TO REDESIGNATE OFF-TARIFF AGREEMENTS AS
NON-CONFIDENTIAL**

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Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure, defendant MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (“MCImetro” or “Verizon Business”) submits this Response in Opposition to the Motion of Qwest Communications Company, LLC (“QCC”) to Redesignate Off-Tariff Agreements as Non-Confidential. Verizon Business opposes the motion on the grounds that it is premature and unnecessary and would contravene a Bankruptcy Court Order upholding the confidentiality of the subject agreements—the “*2004 Contracts*,”¹—which were part of a comprehensive bankruptcy settlement agreement between WorldCom and AT&T and attached as an exhibit thereto. Consistent with the Bankruptcy Court’s Order, Public Utilities Commissions in both Minnesota and Colorado maintained the confidentiality of the Settlement Agreement, including the subject MCImetro–AT&T switched access agreement, in related cases in those states. This Commission should also maintain the confidentiality of the *2004 Contracts* consistent with well-established principles of comity and consistency across jurisdictions.

DISCUSSION

QCC’s needlessly voluminous motion is missing a key component: any evidence that the confidential nature of the *2004 Contracts* actually harms QCC or otherwise precludes it from effectively presenting its case to the Commission. In fact, QCC cannot show actual harm because the parties have addressed the confidentiality of the contracts consistent with well-established Commission practice.² Moreover, in a parallel proceeding in Colorado, QCC has been able to proceed with its complaint case, including the filing of direct and rebuttal testimony by its witnesses, without publicly disclosing the *2004 Contracts*.

In this case, Verizon Business has produced the contracts subject to nondisclosure agreement providing QCC with full access to the agreements for purposes of litigating this case. Consequently, there is no need for the Commission to act on QCC’s motion, *particularly now* that

¹ The *2004 Contracts* are attached to *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), as ***Confidential Exhibits 4a and 4b***.

² See D.92-09-082, Cal. PUC LEXIS 956, *6 (“... this Commission does not ordinarily second-guess the parties’ confidentiality designations where data is made available subject to a nondisclosure agreement....”)

the Commission is set to rule on Defendants' various dispositive motions. Indeed, to the extent individual Defendants are dismissed from this case, any need to litigate the confidentiality of the subject contracts becomes moot. At a minimum, therefore, the Commission should defer any ruling on QCC's motion pending resolution of Defendants' dispositive motions, as a matter of efficient case management.

Lacking any basis in need, QCC's motion is designed to unduly complicate this proceeding at the same time the Commission is considering Defendants' motions to dismiss. QCC, for example, provides no explanation for why its motion necessitated attaching all fifty-one (51) confidential switched access agreements produced in discovery.³ Nor does QCC explain why it has sought confidential treatment of Defendants' various email responses to QCC's inquiries regarding the confidentiality of the agreements.⁴ Verizon Business, for example, never indicated that its response was to be treated confidentially. QCC's choice to bog down its motion with voluminous attachments and unnecessary confidential designations fuels the "complex and cumbersome"⁵ situation that QCC bemoans, although it is a situation largely of QCC's own making.

In perpetuating this sideshow, QCC continues to erroneously conflate the confidentiality of the agreements with their supposed "secrecy." But Verizon Business has already debunked that myth with Bankruptcy Court records proving that the nature and existence of the *2004 Contracts* were disclosed to QCC in a formal proceeding four-and-a-half years before QCC filed the instant Complaint against Verizon Business.⁶ Specifically, on February 23, 2004, WorldCom (the Debtor) filed a public motion (the "*Debtors' Settlement Motion*")⁷ with the United States Bankruptcy Court,

³ While QCC refers generally to "the MCI/AT&T Agreement ... entered into ... in 2004" (Motion at 13 – 15), the lack of precision in its motion causes some confusion as to which document or documents it seeks to make public, e.g., one or both *2004 Contracts*, the amendments, or all of the above.

⁴ QCC Motion to Redesignate (Oct. 9, 2009), Sherr Declaration, Attach. B, at ¶¶ 11–12, Exh. 56, pp. 7–8 (QCC designated Severy email dated Aug. 14, 2009 as confidential even though Verizon Business did not request confidential treatment thereof).

⁵ QCC Motion to Redesignate (Oct. 9, 2009) at 16.

⁶ See MCImetro Reply in Support of its Second and Alternative Motion to Dismiss the Complaint and all Causes of Action Against Verizon Business (Oct. 8, 2009) at 1–3.

⁷ The *Debtors' Settlement Motion* is attached to *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), as **Public Exhibit 1**.

Southern District of New York seeking approval of the *2004 Contracts* as part of a comprehensive settlement of all claims between WorldCom and AT&T.⁸ The Motion was served on hundreds of creditors and parties to the bankruptcy proceeding.⁹ QCC was a party to the WorldCom bankruptcy proceeding, and the Court's electronic filing records confirm that QCC and other parties were actually notified of the *Debtors' Settlement Motion*.¹⁰ QCC admits that it did not object or otherwise raise any concerns about the proposed settlement when the matter was before the Court.¹¹ The Court subsequently granted the motion and approved the settlement on March 2, 2004 after a public hearing of which QCC was also notified.¹² QCC's repeated assertions of a supposedly "secret" agreement thus ring hollow.

Importantly, the settlement agreement approved by the Bankruptcy Court included an express confidentiality clause prohibiting disclosure of the specific terms of the settlement, except under limited circumstances not present here.¹³ The *2004 Contracts* were attached as an exhibit to and incorporated in the settlement agreement.¹⁴ The Court's Order stated in pertinent part:

⁸ The WorldCom–AT&T settlement agreement is attached to *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), as **Confidential Exhibit 2**. The *2004 Contracts* were included as an exhibit to the settlement agreement, as indicated on page 7 of the settlement agreement.

⁹ See *Affidavit of Service and Service List*, attached to *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), as **Public Exhibit 3**.

¹⁰ *First Supplemental Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Aug. 14, 2009), **Attachment A** at ¶ 43c and **Public Exhibit 11** attached thereto, *Notice of Electronic Filing*, U.S. Bankruptcy Court, Southern District of New York, reflecting that Notice of the Motion of the Debtors Pursuant to Bankruptcy Rule 9019 Seeking Approval of a Settlement and Compromise of Certain Matters with AT&T Corporation ("*Debtors' Settlement Motion*") filed February 23, 2004, was electronically mailed to David J. Mark of Katten Muchin Zavis Rosenman, QCC's counsel of record.

¹¹ See *First Supplemental Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Aug. 14, 2009), **Attachment A** at ¶ 45 and **Public Exhibit 10** attached thereto, QCC August 12, 2009 Amended Response to MCImetro Requests for Admissions 01-003 ("...QCC admits, without admitting that it had the opportunity to do so, that it did not object to the Motion of the Debtors....").

¹² See *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), at **Public Exhibit 5**, p. 2.

¹³ *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), at **Confidential Exhibit 2**, ¶ 10 ("AT&T and MCI shall treat this Settlement Agreement as confidential and shall not disclose its terms (other than those terms included in the Settlement Approval Motion) to third parties in the absence of the written consent of all parties hereto.")

¹⁴ See *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), at ¶ 4 and **Confidential Exhibit 2** thereto at p. 7.

“ORDERED that the Motion is granted in all respects; and it is further ORDERED that the terms and conditions of the settlement and the Settlement Agreement are hereby authorized and approved, and the Debtors are authorized to implement the Settlement Agreement; ...”¹⁵ Consequently, the Bankruptcy Court’s Order also protects the 2004 MCImetro–AT&T switched access agreement from public disclosure, as both the Minnesota¹⁶ and Colorado PUCs also held.¹⁷

QCC fails to provide any legal basis authorizing this Commission to countermand the Bankruptcy Court’s Order. On the contrary, pursuant to Bankruptcy Code, Article XII of the Plan of Reorganization and the Order, the Bankruptcy Court retains exclusive jurisdiction over “any and all disputes under or otherwise relating to the construction, performance, and enforcement of the terms of this Order and the terms and conditions of the Settlement Agreement.”¹⁸ Therefore, any party requesting disclosure of the Settlement Agreement, including the MCImetro–AT&T switched access agreement, must make that request before the Bankruptcy Court.

The Colorado PUC reached the same result, maintaining the confidentiality of the MCImetro–AT&T switched access agreement in its entirety, consistent with the Bankruptcy Court’s

¹⁵ See n. 12, *supra*.

¹⁶ The Minnesota PUC expressly maintained “trade secret protections” for the MCI–AT&T bankruptcy Settlement Agreement despite requests that it make the document public. *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched Access Services*, Minnesota PUC Docket No. P-442, *et al*, 2007 Minn. PUC LEXIS, at 5-6 and 18. (Page references are to the version of the order provided by QCC in Attachment C to its Motion). QCC also continues to ignore the facts that MCImetro was not a party to that proceeding, that the Minnesota Commission expressly declined to comment on MCImetro’s prior conduct in its decision, and took no action with respect to the MCImetro–AT&T switched access agreement. *Id.* at 1, 19. In fact, MCImetro had previously settled an earlier complaint by entering into a stipulation with the Minnesota Department of Commerce and other parties. The stipulation did not imply or contain any admission by any party of any violation of Minnesota law, rule or Commission Order. The Minnesota PUC approved the stipulation, found the settlement was in the public interest, and dismissed all allegations relating to MCImetro. See *In the Matter of Negotiated Contracts for Switched Access Services, Order Approving Stipulations, Dismissing Various Complaints, and Providing for Response to Additional Complaint*, Minnesota PUC Docket No. P-442 (July 7, 2005).

¹⁷ See Interim Order of Administrative Law Judge G. Harris Adams Addressing Confidentiality of Documents, Decision No. R09-0815-1 (July 30, 2009) at ¶¶ 72, 73 (“... it is undeniable that the 2004 agreement was an exhibit to the Settlement Agreement, and therefore part thereof. [¶] QCC failed to demonstrate that an exhibit to WorldCom’s settlement with AT&T made confidential by the bankruptcy court is outside the scope of the bankruptcy court’s order. MCI has also demonstrated that the Minnesota Public Utilities Commission has preserved confidentiality protections for WorldCom’s 2004 settlement agreement as well. Confidentiality protections herein for the settlement agreement, including the Switched Access Service Agreement between MCImetro Access Transmission Services, LLC and AT&T Corp, effective date January 27, 2004, will remain subject to confidentiality protections.”)

¹⁸ *Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken* (Jan. 15, 2009), at **Public Exhibit 5**, p. 3

Order.¹⁹ Although the Colorado PUC declined to maintain confidentiality of the subsequent amendments to the *2004 Contracts* in their entirety, the ALJ ordered specified provisions of the amendments to remain confidential, including the negotiated intrastate switched access rates, holding them to be trade secrets.²⁰ QCC provides no good reason why this Commission should arrive at a result different than that reached in Colorado. On the contrary, in related cases pending before other courts or agencies, the Commission has repeatedly stated its preference for “a spirit of cooperation and comity,”²¹ in order to avoid inconsistent results and unnecessary inter-governmental disputes. As the Commission held in D.04-05-018, “it is desirable for all concerned that there not be conflicting sets of rules that serve different regulatory purposes but that may address closely related subjects.”²² Such is the case here.

¹⁹ See n. 17, *supra*, Interim Order of Administrative Law Judge G. Harris Adams Addressing Confidentiality of Documents, Decision No. R09-0815-1 (July 30, 2009) at Ord. Para. ¶ 21 (“The Switched Access Service Agreement between MCImetro Access Transmission Services, LLC and AT&T Corp, effective date January 27, 2004, filed March 27, 2009, shall remain subject to confidentiality protections.”)

²⁰ See *id.* at ¶¶ 75–78, Ord. Paras. ¶¶ 22, 23 (citing analysis of other agreements involving AT&T, *e.g.*, *id.* at ¶¶ 14–36).

²¹ D.04-05-018, 2004 Cal. PUC LEXIS 227, *32. See also D.02-06-039, 2002 Cal. PUC LEXIS 371, *4 (dismissing complaint in favor of judicial comity where duplicative matters were pending before the Superior Court); D.00-04-031, 2000 Cal. PUC LEXIS 153, *24 (approving settlement involving sale of power plant, among other reasons, “as a matter of comity with respect to the decisions of the other state commissions.”)

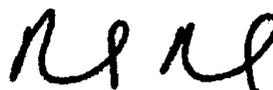
²² D.04-05-018, 2004 Cal. PUC LEXIS 227, *32.

CONCLUSION

For the reasons discussed above, the Commission should deny QCC's motion as premature, unnecessary, and inconsistent with the holdings of the Bankruptcy Court as well as those of the Colorado and Minnesota PUCs. Alternatively, the Commission should defer any ruling on QCC's motion pending a ruling on Verizon Business and other Defendants' various dispositive motions.

Dated: November 2, 2009

Respectfully submitted,



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California Public Utilities Commission

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