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

QWEST COMMUNICATIONS COMPANY, LLC (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 TELCOM (fdba ESCHELON TELCOM, INC.) (U-6083-C), LEVEL 3 COMMUNICATIONS (U-5941-C), COX CALIFORNIA TELCOM 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 TELCOM, 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
(Filed August 1, 2008)

JOINT RESPONSE OF MCIMETRO ACCESS TRANSMISSION SERVICES, L.L.C., ADVANCED TELCOM, INC., ARRIVAL COMMUNICATIONS, INC., BLUE CASA COMMUNICATIONS, INC., BROADWING COMMUNICATIONS, LLC, BUDGET PREPAY, INC., BULLSEYE TELCOM, INC., COX CALIFORNIA TELCOM, LLC, GRANITE TELECOMMUNICATIONS, LLC, MPOWER COMMUNICATIONS CORP., NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., TELScape COMMUNICATIONS, INC., TW TELECOM OF CALIFORNIA, L.P., U.S. TELEPACIFIC CORP., UTILITY TELEPHONE, INC., AND XO COMMUNICATIONS SERVICES, INC. TO QWEST COMMUNICATIONS COMPANY LLC'S APPLICATION FOR REHEARING OF DECISION 10-07-030

September 16, 2010

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Pursuant to Rule 16.1(d) of the Commission’s Rules of Practice and Procedure, Joint Carriers¹ submit this Joint Response to Qwest Communications Company, LLC’s (“QCC”) September 1, 2010 Application for Rehearing of Decision 10-07-030 (the “Application”).

I. INTRODUCTION

QCC uses its Application as an opportunity to reassert what QCC believes the policy and law should be regarding CLEC switched access contracts, while plainly ignoring the Commission’s reasonable interpretation of its own policies and applicable law on the subject. Indeed, QCC makes the same arguments in its Application that it previously made—and the Commission rejected—both in D.10-07-030 and in the Commission’s 2007 *Access Charge Decision*.² On this basis alone, the Application fails in that the purpose of an application for rehearing under Rule 16.1(c) “is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”³ QCC fails to demonstrate legal error in D.10-07-030; therefore, the Commission should deny the Application,⁴ as well as QCC’s request for oral argument, as set forth below.⁵

¹ Joint Carriers collectively include the following Defendants: MCImetro Access Transmission Services L.L.C. d/b/a Verizon Access Transmission Services (U-5253-C) (“MCImetro” or “Verizon Business”), Advanced Telcom, Inc. (U-6083-C), Arrival Communications, Inc. (U-5248-C), Blue Casa Communication, Inc. (U-6764-C), Broadwing Communications, LLC (U-5525-C), Budget PrePay, Inc. (U-6654-C), BullsEye Telecom, Inc. (U-6695-C), Cox California Telcom, LLC (U-5684-C), Granite Telecommunications, LLC (U-6842-C), Mpower Communications Corp. (U-5859-C), Navigator Telecommunications, LLC (U-6167-C), PAETEC Communications, Inc. (U-6097-C), Telscape Communications, Inc. (U-6589-C), tw telecom of california, lp. (U-5358-C), U.S. TelePacific Corp. (U-5721-C), Utility Telephone, Inc. (U-5807-C), and XO Communications Services, Inc. (U-5553-C). Joint Carriers do not include Level 3 Communications, LLC (U-5941-C) because QCC dismissed Level 3 from this matter by its Notice of Dismissal Without Prejudice, filed November 6, 2009. Despite this dismissal, QCC has erroneously included Level 3 in its Confidential Attachment A which it filed under seal in this matter.

² D.07-12-020, 2007 Cal. PUC LEXIS 609, *rehearing denied in* D.08-02-037, 2008 Cal. PUC LEXIS 110.

³ Rule 16.1(c). Unless otherwise noted, references to “Rules” are to the Commission’s Rules of Practice and Procedure, and references to “sections” are to the Cal. Pub. Util. Code.

⁴ The Application includes numerous factual errors and omissions, which is consistent with other QCC pleadings in this proceeding. Joint Carriers do not attempt to identify and detail all of QCC’s factual errors in the Application, but rather reserve the right to later do so, if necessary. Joint Carriers caution the Commission to rely only on the undisputed facts in the record in reviewing the Application.

⁵ Contrary to Rule 16.3(a), QCC fails to demonstrate how its request for oral argument “will materially assist the Commission in resolving the application.” QCC merely asserts broad, conclusory statements regarding the importance of “prevent[ing] rate discrimination” and the need to address the “due process implications” of the underlying decision. Application at 26–27. Such broad generalizations are decidedly insufficient to warrant oral

QCC erroneously asserts that the Commission dismissed QCC's Complaint in D.10-07-030 on the basis of a "single sentence"⁶ from the *Access Charge Decision* authorizing CLECs to voluntarily establish off-tariff intrastate access charges by contract. QCC misstates the Commission's holding in D.10-07-030. In unanimously voting to dismiss QCC's Complaint, the Commission held that QCC's "allegations of voluntary contracts for intrastate access services at rates different from tariffed rates do not constitute a violation of California law or Commission regulation"⁷; accordingly, the Commission determined that QCC failed to state a cause of action for unlawful discrimination. D.10-07-030 is correct, and the Commission should affirm it as legally sound and well supported by the extensive record in this two-year proceeding.

QCC alleges unlawful discrimination under section 453 based *solely* on the fact that Defendants charged QCC their respective tariffed rates for intrastate switched access and not the (lower) rates that each Defendant charged certain third-party customers pursuant to individual contracts.⁸ QCC believes that this fact alone gives it valid cause to complain because—in QCC's view—any deviation from "equivalent ... rate treatment for switched access"⁹ presumptively violates the anti-discrimination provisions of section 453, *i.e.*, it is discriminatory "*per se*."¹⁰

But the Commission correctly determined in D.10-07-030 that QCC's "*per se*" discrimination theory violates the pricing policy for CLEC switched access service that the Commission adopted in its 2007 *Access Charge Decision*. In that decision, the Commission established a tariffed rate cap for CLEC-provided intrastate switched access *and* authorized

argument. Accordingly, the Commission should deny QCC's request pursuant to the Commission's "complete discretion" under Rule 16.3(a) "to determine the appropriateness of oral argument in any particular matter."

⁶ Application at 1.

⁷ D.10-07-030 at Conclusion of Law ¶ 4.

⁸ See First Amended Complaint of Qwest Communications Corporation (Apr. 15, 2009) (hereafter "*First Amended Complaint*") at ¶¶ 11–13.

⁹ Application at 1. See also QCC Response to MCI Metro Motion to Dismiss (Feb. 12, 2009) at 9 ("As Professor Weisman explains in greater length in his Declaration, MCI has not demonstrated, or even suggested, any rational and credible basis for departing from uniform pricing for bottleneck switched access services. Typically, a departure from uniform pricing for non-competitive, regulated services could only be justified if the provider established that the relevant cost of providing the service varies between customers.").

¹⁰ QCC Response to MCI Metro Motion to Dismiss (Feb. 12, 2009) at 13, 14, 16.

CLECs to voluntarily contract with other carriers to establish off-tariff switched access prices by commercial negotiation.¹¹ The Commission imposed no obligation upon CLECs to affirmatively offer such contract prices to all purchasers of switched access service, nor would such a rule have made sense since each carrier's circumstances necessarily vary. The Commission was well within its authority to establish such a policy as section 453(c) prohibits only "unreasonable difference[s]" in rates between customers; and the Commission has previously held that discrimination, even among arguably similarly situated customers, "is lawful if there is a rational basis for the different treatment in the Commission's economic regulation."¹² Establishing a tariffed rate cap while simultaneously permitting carriers to negotiate off-tariff rates by contract provides a reasonable solution to any concerns relating to "excessive" CLEC access charges, and is thus consistent with the "rational basis" test. QCC has no valid cause to complain for (admittedly) being charged the tariffed rate approved in a duly noticed rulemaking proceeding (in which QCC participated) since QCC was free to negotiate a lower rate. QCC's failure to do so does not give rise to a valid cause of action.

Nor does QCC have a valid cause to complain based solely on the fact that Defendants did not file the contracts with the Commission since, as the Commission held in D.10-07-030, such contracts are not subject to ratemaking approval, and contrary to QCC's assertions, the Commission was well within its authority under sections 490, 495 and 532 to decline to require such contracts to be filed.¹³ Consequently, the Commission correctly dismissed QCC's Complaint for failing to state a cause of action for unlawful discrimination. Joint Carriers address these and other issues in greater detail below.

¹¹ *Access Charge Decision*, at Conclusions of Law ¶¶ 7, 10, Ord. Paras. 4, 5.

¹² D.02-12-027, 2002 Cal. PUC LEXIS 897, *48.

¹³ *See infra* at n. 55.

II. DISCUSSION

A. QCC FAILED TO STATE A CLAIM FOR UNLAWFUL DISCRIMINATION UNDER PUBLIC UTILITIES CODE SECTION 453.

As the Commission correctly held in D.10-07-030, QCC cannot state a valid claim for unlawful discrimination under section 453 based *solely* on the fact that Defendants did not extend to QCC the same rates, terms, and conditions for intrastate switched access contained in the subject contracts. Importantly, section 453(c) does not prohibit “any difference” in rates; on the contrary, the statute prohibits only “unreasonable” price differences. As the Commission has explained on numerous occasions,¹⁴ this key statutory distinction requires the complaining party to prove that it has “suffered prejudice or disadvantage in relation to a comparable situation.”¹⁵ The Commission commonly refers to this as the “similarly situated” element of unlawful discrimination; and the Commission has found that in an increasingly competitive market such as telecommunications “it will be difficult for a protesting customer to demonstrate that it is sufficiently similarly situated to invoke § 453’s nondiscrimination provisions,” as “[n]umerous characteristics of a particular customer ... could be sufficient to distinguish one customer from another.”¹⁶

During the course of this two-year proceeding, QCC failed to assert any specific, objective facts showing why it believes it is a “similarly situated” customer entitled to the same rates, terms and conditions contained in each of the subject contracts. On the contrary, the only

¹⁴ See, e.g., D.04-05-061, 2004 Cal. PUC LEXIS 249, *11–*12 (2004) (“Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those *in like circumstances* ...”), quoting *International Cable T.V. Corporation vs. All Metal Fabricators, Inc.*, 66 Cal. P.U.C. 366, 382–83 (1966) (emphasis added); D.05-10-046, 2005 Cal. PUC LEXIS 486, *10 (2005), citing *Sunland Refining Corp. v. Southern Tank Lines, Inc.* 80 Cal. P.U.C. 806, 817 (1976); D.92-07-044, 1992 Cal. PUC LEXIS 685, *6 (1992) (“Similarly, a ‘disadvantage’ which is unlawful under Section 453(a) can only be established when a comparison is made between situations which are comparable. In this case, Bates would need to demonstrate that similarly situated customers were treated differently in similar circumstances. For example, it would be unlawful for GTEC to provide walk-in customer facilities to Bates but to refuse the same service to a similarly situated customer.”)

¹⁵ *Sunland Refining Corp.*, 80 Cal. P.U.C. 806, 817.

¹⁶ *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters* (hereafter, “*IRD*”), D.94-09-065, 1994 Cal. PUC LEXIS 681 (Part 3 of 9), *53 (1994).

“proof” QCC could muster was the discredited “*per se*”¹⁷ discrimination theory of its hired economist, Dr. Dennis L. Weisman. Under that theory, which even QCC now attempts to disavow,¹⁸ no access price differentiation is permissible, because, in Dr. Weisman’s view, “all IXCs are similarly situated with regard to switched access.”¹⁹ Relying solely on this “*per se*” discrimination theory, QCC contends that any contractual deviation from “equivalent ... rate treatment for switched access”²⁰ *presumptively violates* the anti-discrimination requirements of section 453. Accordingly, in QCC’s view, the contract rate must be offered to all IXC customers upon demand, with no “similarly situated” analysis required.²¹ In the words of Dr. Weisman: “Typically, a departure from *uniform pricing* for non-competitive, regulated services could only be justified if the provider established that the relevant cost of providing the service varies

¹⁷ QCC Response to MCImetro Motion to Dismiss (Feb. 12, 2009) at 13, 14, 16.

¹⁸ See generally Application at III.A (“QCC has Never Relied on a *Per Se* Discrimination Theory.”)

¹⁹ QCC Response to MCImetro Motion to Dismiss (Feb. 12, 2009) at 10; QCC Consolidated Response to Motions to Dismiss and Motions for Summary Judgment, at 53–55 (Sep. 21, 2009).

²⁰ Application at 1. See also QCC Response to MCImetro Motion to Dismiss (Feb. 12, 2009) at 9 (“As Professor Weisman explains in greater length in his Declaration, MCI has not demonstrated, or even suggested, any rational and credible basis for departing from *uniform pricing* for bottleneck switched access services.”) (Emphasis added.)

²¹ Indeed, the express goal of QCC’s Complaint is an order that Defendant CLECs “Prospectively lower their intrastate switched access rates to QCC consistent with the most favorable [contract] rate offered to other IXCs in California” and “[r]efund to QCC the difference between the amount QCC paid the Defendant CLECs and the amount they would have charged QCC had they provided intrastate switched access services at the [contract] rates charged to other IXCs.” *First Amended Complaint* at 37, Prayer for Relief (D); *id.* at ¶ 21(e).

Even if QCC’s claims had some validity (which they do not), the relief that QCC seeks does not. QCC’s argument that it does not allege that the off-tariff agreements are unlawful (see Application at 1, 13) is untenable. See Defendants ACN Communication Services, Inc. (U-6342-C), Arrival Communications, Inc. (U-5248-C), Mpower Communications Corp. (U-5859-C), NII Communications, Ltd. (U-6453-C), PAETEC Communications, Inc. (U-6097-C), and U.S. TelePacific Corp.’s (U-5721-C) Joint Reply in Support of Joint Motion To Dismiss With Prejudice Qwest’s First Claim For Relief And Prayer For Reparations, at n.25 (Oct. 9, 2009) (“*Joint Movants’ 10/9/09 Reply*”) (explaining that “Qwest’s allegations that the off-tariff agreements violated General Orders 96-A and 96-B are in fact allegations that the off-tariff agreements are unlawful and unenforceable.”) In its Application, QCC asserts that the off-tariff agreements at issue violated California law and are discriminatory. Despite these claims, by seeking reparations, QCC asserts that it is entitled to benefit from the same agreements that it asserts were not filed in accordance with California law. While QCC’s claims should be rejected for the reasons provided in D.10-07-030, QCC claims should also be rejected because QCC asserts and seeks relief based on “mutually inconsistent legal conclusions.” See Defendants ACN Communication Services, Inc. (U-6342-C), Arrival Communications, Inc. (U-5248-C), Mpower Communications Corp. (U-5859-C), NII Communications, Ltd. (U-6453-C), PAETEC Communications, Inc. (U-6097-C), and U.S. TelePacific Corp.’s (U-5721-C) Joint Motion To Dismiss With Prejudice Qwest’s First Claim For Relief And Prayer For Reparations, Case No. C.08-08-006, at 12 and n.31 (July 16, 2009) (“*Joint Movants’ 7/16/09 Motion*”) (citing and quoting excerpt of certain Appellate Brief of Qwest Corporation at 20 (“The Commission’s finding that the agreements were illegal, but that their terms should be available to other CLECs, are mutually inconsistent legal conclusions.”); see also *Joint Movants’ 10/9/09 Reply* at 9–11.

between customers.”²²

Dr. Weisman’s “*per se*” discrimination theory, however, violates California law and Commission precedent as it purports to relieve Complainant QCC of its burden of proving unlawful discrimination²³ by showing that it was a “similarly situated customer willing to meet the contract’s terms.”²⁴ Contrary to Dr. Weisman’s opinion that all access purchasers are necessarily similarly situated, the Commission has observed that “numerous characteristics” may distinguish one customer from another, so as to justify different pricing.²⁵ QCC can point to no California legal authority that waives the “similarly situated” element of unlawful discrimination or shifts the burden of proof onto Defendants to prove (with facts not within their determination) that each of the contracts was nondiscriminatory. QCC’s failure (even to try) to state a valid cause of action with particularity as to each Defendant and each subject contract is a fatal flaw of its Complaint that cannot be cured.

²² QCC Response to MCImetro Motion to Dismiss (Feb. 12, 2009) at 9 (emphasis added). *See also* QCC’s Opening Brief Regarding the Applicability of D.07-12-020 to this Complaint Proceeding (May 20, 2010) at 6, n.18, *citing* Declaration of Dennis L. Weisman at ¶ 7. Notably, Dr. Weisman’s assertion that the prices in Defendants’ various switched access contracts must meet an economic-cost standard to avoid unlawful discrimination, a standard that Dr. Weisman contends would almost never “justify” non-uniform pricing, is in direct conflict with the Commission’s ruling in the *Access Charge Decision*. In that decision, the Commission required “a detailed cost-of-service study” to evaluate proposed price increases “higher than the caps” (presumably to guard against unreasonably high rates), but the Commission adopted no such requirement for the lower prices it expressly authorized carriers to negotiate by contract. *Compare Access Charge Decision* at Conclusion of Law ¶ 9 *with id.* at Conclusion of Law ¶ 10. Since QCC cannot purport to substitute Dr. Weisman’s views for the actual rules adopted by the Commission in a duly noticed rulemaking decision, the Commission was correct to dismiss QCC’s Complaint.

²³ D.04-05-061, 2004 Cal. PUC LEXIS 249, *11 (2004), *citing Sunland Refining Corp.*, 80 Cal. P.U.C. 806, 816–817 (“The burden of proof is on the complaining party to establish prejudice or disadvantage in relationship to a comparable situation.”)

²⁴ *IRD*, D.94-09-065, 1994 Cal. PUC LEXIS 681 (Part 3 of 9), *52 (1994), *citing Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990). *See also* COMPLAINT OF QWEST COMMUNICATIONS CORPORATION at ¶ 12 (admitting the “similarly situated” element of unlawful price discrimination).

²⁵ *IRD*, D.94-09-065, 1994 Cal. PUC LEXIS 681 (Part 3 of 9), *53.

B. QCC’S “PER SE” DISCRIMINATION THEORY VIOLATES THE COMMISSION’S DULY ESTABLISHED SWITCHED ACCESS PRICING POLICY.

In addition to failing to state a valid cause of action, QCC’s Complaint fails because its “*per se*” discrimination theory violates the Commission’s switched access pricing policy adopted in the *Access Charge Decision*. In that decision, the Commission declined to require uniform pricing of switched access service and declined to impose any restrictions on carriers’ ability to establish off-tariff rates by contract. Specifically, in the *Access Charge Decision*, the Commission:

- (1) *Established* a tariffed price cap for CLEC-provided intrastate switched access;²⁶
- (2) *Required* “a detailed cost-of-service study” to evaluate proposed switched access rate increases “higher than the caps.”²⁷
- (3) *Authorized* carriers to “voluntarily contract with each other to pay intrastate access charges different from those adopted” in the decision,²⁸
- (4) *Declined* to adopt a cost-study requirement for prices set by contract;²⁹
- (5) *Acknowledged and grandfathered* then-existing CLEC switched access contracts;³⁰ and
- (6) *Declined* QCC’s requests that the Commission adopt a filing requirement for CLEC switched access contracts,³¹ notwithstanding QCC’s repeated assertions at

²⁶ See *Access Charge Decision* at Conclusion of Law ¶ 7 (“The competitive local exchange carriers should charge no more than the higher of AT&T’s or Verizon’s intrastate access charges, plus 10%, effective January 1, 2009, and each rate element provided should also be limited to the higher of AT&T’s or Verizon’s comparable rate element, plus 10%. Advice letters implementing this rate cap should be filed and served no later than November 3, 2008.”) Notably, when the FCC adopted a cap for interstate switched access rates, it also let stand existing agreements as it “continue[d] our [the FCC’s] move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit.” *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001), ¶ 5. In permitting CLECs to negotiate contracts, the FCC left preexisting contracts in place: “Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to *charge even more favorable access rates to particular IXCs*. Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide.” *Id.*, ¶ 57. (Footnotes omitted. Emphasis added.)

²⁷ *Access Charge Decision* at Conclusion of Law ¶ 9.

²⁸ *Id.* at Conclusion of Law ¶ 10.

²⁹ Compare *id.* at Conclusion of Law ¶ 9 with *id.* at Conclusion of Law ¶ 10.

³⁰ See *id.* at Conclusion of Law ¶ 10 (“Existing contracts between carriers that specify intrastate access charges are not affected by this decision.”)

the time that it was “aware of widespread, off-tariff pricing arrangements between certain CLECs and IXCs for switched access” that “have not been made universally available to all IXCs and have not been filed for approval”³²

This comprehensive pricing policy provides QCC and all other access purchasers with the benefit of a tariffed rate *cap* for switched access provided by CLECs, *i.e.*, a ceiling on the amount a CLEC may charge, *not* a uniform rate that all carriers must charge. In addition, it permits carriers to “voluntarily contract with each other to pay intrastate access charges different from those adopted” in the decision; and it holds that “existing contracts between carriers that specify intrastate access charges are not affected by this decision.”³³ QCC has no legitimate basis to complain about being charged the tariffed rate explicitly authorized by the Commission. If QCC wanted a lower rate, then it could have negotiated with individual CLECs—as expressly permitted by the decision—particularly since QCC by its own admission knew that “widespread, off-tariff pricing arrangements”³⁴ existed at the time of the decision. The *Access Charge Decision* imposed no obligation upon the CLECs to affirmatively offer such contract rates to all access purchasers upon demand, nor would such a rule have made sense since each carrier’s circumstances necessarily vary. QCC’s failure to negotiate lower access rates is no one’s fault but QCC’s.³⁵

³¹ *Compare Access Charge Decision* at Conclusion of Law ¶ 7, Ord. Para. 4 (requiring advice letters implementing the adopted rate cap to be filed) *with id.* at Conclusion of Law ¶ 10, Ord. Para. 5 (adopting no such filing requirement for contracts).

³² Reply Comments of Qwest Communications Corporation in Response to Joint Assigned Commissioner and Administrative Law Judge Ruling Setting Further Proceedings, R.03-08-018 (July 30, 2007) at 6; Reply Comments of Qwest Communications Corporation in Response to Proposed Decision of Administrative Law Judge, R.03-08-018 (Nov. 13, 2007) at 2 (repeating same). *See also Access Charge Decision*, 2007 Cal. PUC LEXIS 609, *30–*31 (“Qwest opposed Cox’s request that the PD be modified to allow competitive carriers to negotiate voluntarily lower access charges. Qwest argued that §§ 532 and 453 require these carriers to charge tariffed rates and not to discriminate. Qwest explained that it was aware of ‘off-tariff pricing arrangements’ between certain carriers ... which have not been made available [to] all competitive carriers.”); Qwest Communications Corporation’s Application for Rehearing of D.07-12-020 (Jan. 9, 2008) at 4.

³³ *Access Charge Decision* at Conclusion of Law ¶ 10.

³⁴ *See supra* at n. 32.

³⁵ QCC erroneously asserts in its Application that the issue of “ICB” [individual case basis] contracts for switched access was not within the scope of the access charge proceeding, R.03-08-018. QCC is wrong as its own pleadings in the access charge proceeding show. *See supra* at n. 32. In a ruling dated May 4, 2007, the Commission

QCC attempts to obscure its own failure of negotiation by attacking the Commission for permitting off-tariff contracts in the first place, calling such decision an attempt to “nullify the Legislature’s express prohibition of rate discrimination as found in Section 453.”³⁶ But as the Commission held in D.02-12-027, the Commission is well within its authority under section 453 to permit discrimination even between “arguably similarly situated [customers] ... if there is a rational basis for the different treatment in the Commission’s economic regulation.”³⁷ Such a “rational basis” exists here. In setting the pricing rules for switched access in the *Access Charge Decision*, the Commission sought to address what it referred to as the problem of “excessive intrastate access charges.”³⁸ Establishing a cap on tariffed rates, while simultaneously permitting carriers to negotiate off-tariff rates by contract, reasonably addressed this issue, and is thus consistent with the “rational basis” test set forth in D.02-12-027. Indeed, commercially negotiated agreements for intercarrier compensation are typically the best way to accommodate carriers’ particular circumstances and technological developments, without having to seek Commission resolution of the often-thorny regulatory issues that arise with respect to such compensation.

In light of the discussion above, the Commission should view QCC’s criticism of D.10-07-030 as an unlawful collateral attack on the Commission’s *Access Charge Decision* since

explicitly sought comments on “the Federal Communications Commission’s (FCC) methodology for capping competitive local carriers’ interstate access charge rates.” Joint Assigned Commissioner and Administrative Law Judge Ruling Setting Further Proceedings (May 4, 2007) at 1. In response, Cox and tw telecom stated that “The FCC also expressly granted CLECs permission to negotiate access rates with interstate interexchange carriers and the Commission should do the same.” Opening Comments of Cox California Telcom, L.L.C., dba Cox Communications, and Time Warner Telecom of California, LP To Assigned Commissioner And Administrative Law Judge Ruling Setting Further Proceedings (June 29, 2007) at 9. In response to this Cox and tw telecom recommendation, QCC filed reply comments stating that QCC “does not oppose the concept that CLECs and IXC’s should be permitted to negotiate below-tariff access rates” but that such rates should be made “universally available to all IXC’s” and the contracts themselves should be “filed for approval” with the Commission. Reply Comments of Qwest Communications Corporation in Response to Joint Assigned Commissioner and Administrative Law Judge Ruling Setting Further Proceedings, R.03-08-018 (July 30, 2007) at 6. The ability of carriers to negotiate off-tariff contract rates was thus clearly within the scope of the proceeding even though the term “ICB” was not included in the Commission’s May 4, 2007 Joint Ruling.

³⁶ Application at 20.

³⁷ D.02-12-027, 2002 Cal. PUC LEXIS 897, *48.

³⁸ *Access Charge Decision*, 2007 Cal. PUC LEXIS 609, *23.

D.10-07-030 merely applies the Commission’s established pricing policy for CLEC switched access service to the undisputed facts of this case. QCC’s erroneous characterization of D.10-07-030 as “a ruling which would explicitly and directly condone secretive and unlawfully discriminatory behavior by public utilities”³⁹ should be disregarded as nothing more than hyperbole.⁴⁰

C. QCC HAD AMPLE OPPORTUNITY TO PROVE ITS CASE BUT FAILED TO DO SO.

QCC’s failure to state a cognizable legal claim for relief renders any discovery issues a red herring. Nonetheless, even if such issues were somehow relevant, the Commission should disregard QCC’s misleading attempt to justify its *own* failure to prove its case⁴¹ by blaming the ALJ for her reasonable ruling in July 2009—*nearly a full year after QCC filed its Complaint*—to focus the scope and timing of discovery pending the outcome of dispositive motions.⁴² On the contrary, as is routine in pre-hearing conferences, the judge balanced QCC’s assertions of an unlimited right to discovery⁴³ with certain Defendants’ complaints about QCC’s overbroad

³⁹ Application at 26.

⁴⁰ Likewise, the Commission should disregard QCC’s repeated assertions regarding the supposed “secrecy” of the subject agreements as Joint Carriers—and Verizon Business in particular—previously demonstrated that such assertions are false and misleading, and the Commission acknowledged the same in dismissing QCC’s Complaint. See D.10-07-030, mimeo at 11, *citing* Reply Comments of MCImetro Access Transmission Services L.L.C. on the June 29, 2010 Proposed Decision of Administrative Law Judge Maribeth A. Bushey (July 26, 2010). Joint Carriers joined in MCImetro’s July 26, 2010 comments regarding QCC’s false “secrecy” allegations. See Joint Reply Comments of Advanced Telcom, Inc., Arrival Communications, Inc., Blue Casa Communication, Inc., Broadwing Communications, LLC, Budget PrePay, Inc., BullsEye Telecom, Inc., Cox California Telcom, LLC, Granite Telecommunications, LLC, Mpower Communications Corp., Navigator Telecommunications, LLC, PAETEC Communications, Inc., Telscape Communications, Inc., tw telecom of california, lp., U.S. TelePacific Corp., Utility Telephone, Inc., and XO Communications Services, Inc. in Response to Qwest Communications Company LLC’s July 19, 2010 Opening Comments on the Administrative Law Judge’s Proposed Decision to Dismiss the Complaint (July 26, 2010) at 4, n. 18. QCC appears to confuse the confidentiality of the agreements with their supposed “secrecy.” In fact, the nature and existence of the Verizon Business–AT&T contracts in particular, and many of the other subject contracts, were disclosed to QCC in various forums since as early as 2004, as the Commission acknowledged in Decision 10-07-030 at 11. Indeed, QCC’s complaint, based “on information and belief,” expressly acknowledges that the Verizon Business–AT&T contract at issue was “identified” in a Minnesota PUC proceeding that was conducted between 2004 and 2005. See *First Amended Complaint* at 11 ¶ 10a.ii.

⁴¹ See Application at 11–12, 14.

⁴² See Pre-hearing conference transcript, C.08-08-006 (July 29, 2009) at 64–65.

⁴³ See *id.* at 21–26 (Mr. Sherr, counsel for QCC opposing any limits on discovery).

fishing expedition⁴⁴ and resolved these competing concerns by ruling that “discovery will continue,” albeit focused on the key documents and facts at issue:

ALJ BUSHEY: While these motions are and responses are being filed, discovery will continue. The discovery will be focused on the facts, particular facts, that have occurred after August 1, 2005. ¶ With regard to contracts, the discovery will be focused on the existence of the contracts, copies of the contracts, whether those contracts were filed at this Commission, particularly including the prices and terms, and whether these contracts and some of the prices and terms were offered to Qwest.⁴⁵

QCC thus had ample opportunity to develop its case through discovery, both before *and after* the ALJ’s discovery ruling in July 2009. And QCC seized that opportunity. During the entire course of this proceeding, QCC propounded *over two dozen* sets of detailed data requests on Defendants, including multiple, follow-up data requests. (For ease of reference, Joint Carriers attach a Table of Discovery Propounded by QCC — see *Appendix A* to this response — showing the extent of QCC’s discovery on Joint Carriers.) In addition, QCC issued subpoenas to third-party IXC’s such as AT&T, Sprint, and MCI Communications.⁴⁶ Assuming for the sake of argument that any single Defendant or third-party respondent failed to respond to QCC’s legitimate discovery, then the proper recourse would have been for QCC to file a motion to compel responses, as the ALJ expressly instructed QCC at the pre-hearing conference.⁴⁷ Accordingly, QCC cannot now credibly claim that it was “precluded from conducting adequate discovery” in this case.⁴⁸

In addition to the discovery in this proceeding, QCC had the benefit of an extensive

⁴⁴ See Pre-hearing conference transcript (July 29, 2009) at 15–16 (Mr. Branfman for six Defendants arguing that discovery should be limited to key documents and facts, many of which are in the public domain).

⁴⁵ *Id.* (July 29, 2009) at 64–65.

⁴⁶ *See id.* at 27.

⁴⁷ *See id.* at 62. Indeed, QCC took advantage of this option and filed a motion to compel in October 2009. *See* Qwest Communications Company, LLC (U-5335-C) Motion to Compel Mpower Communications Corpo. (U-5859-C) To Provide Further Responses to First Set of Data Request (October 21, 2009).

⁴⁸ Application at 14.

public record developed since as early as 2004 in related litigation in Minnesota,⁴⁹ Colorado⁵⁰ and other states,⁵¹ and in the WorldCom bankruptcy proceeding in which QCC was provided notice and an opportunity to be heard regarding whether the Court should approve a comprehensive bankruptcy settlement involving the very same Verizon Business switched access contract that QCC complains about here.⁵² QCC has thus had ample opportunity to substantiate its allegations but failed. Accordingly, the Commission was correct to dismiss QCC's Complaint.

D. THERE IS NO FILING REQUIREMENT FOR COMMERCIALY NEGOTIATED SWITCHED ACCESS CONTRACTS.

QCC devotes much discussion to an (at best) marginally relevant issue that the Commission need not resolve in order to dispose of QCC's Application: whether carriers were required to file switched access contracts with the Commission under generic contract-filing requirements in G.O. 96B and section 489. Notably, the Commission declined in the *Access Charge Decision* to impose a filing requirement on switched access contracts, while at the same time it directed CLECs to file tariffs to comply with the rate cap.⁵³ These two, respective

⁴⁹ See First Supplemental Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken at § VII, filed in support of Second and Alternative Motion to Dismiss Complaint and all Causes of Action Against MCImetro (Aug. 14, 2009) (detailing QCC's record comments and actions in the Minnesota PUC proceedings in 2005–2006 regarding many of the same agreements involving Verizon Business and other carriers that QCC complains about here).

⁵⁰ See *QCC v. MCImetro, et al.*, Colorado PUC Docket No. 08F-259T.

⁵¹ QCC makes reference (at Application, n.91) to other ongoing state commission actions concerning switched access agreements. Those cases are neither relevant nor binding on this Commission, as QCC acknowledges, because of the unique nature of the commissions' regulatory schemes. Furthermore, QCC incorrectly states that the Nebraska and Arizona Commissions are "investigating CLEC off-tariff switched access agreements." In fact, despite being aware of the agreements, neither state is proceeding with such an investigation. Nebraska recently closed its investigation without any action (*Order Closing Investigation*, Nebraska Public Service Commission, Application No. C-4238/PI-157, August 31, 2010); while the Arizona proceeding explicitly only addresses future policy regarding such contracts. *Procedural Order*, Arizona Corporation Commission, Docket No. T-00000D-00-0672, Sept. 29, 2009.

⁵² See Sworn Statement of Richard B. Severy Setting Forth Undisputed Facts and Matters of which Judicial Notice May Be Taken, filed in support of Motion to Dismiss Complaint and all Causes of Action Against MCImetro (Jan. 15, 2009) at ¶¶ 3, 6–7.

⁵³ Compare *Access Charge Decision* at Conclusion of Law ¶ 7, Ord. Para. 4 (requiring advice letters implementing the adopted rate cap to be filed) *with id.* at Conclusion of Law ¶ 10, Ord. Para. 5 (adopting no such filing requirement for contracts).

ordering paragraphs⁵⁴ plainly reflect the Commission's decision to require CLECs to file tariffs but not file contracts, a decision clearly within the proper exercise of its discretion under sections 490, 495 and 532.⁵⁵

The Commission's decision not to require the filing of contracts for switched access service containing rates lower than the approved cap is fully consistent with California law and the Commission's policy and practice with respect to the filing of intercarrier agreements. Section 766, the earliest version of which was adopted in 1915,⁵⁶ generally addresses interconnection and related compensation arrangements between telephone corporations. This section provides that when carriers fail to successfully negotiate interconnection or intercarrier arrangements, they may bring a dispute to the Commission for resolution. In 1966, the Commission explained the purpose of Section 766 as follows:

The basic purpose of Section 766 of the Public Utilities Code is to establish the manner in which the public may obtain the benefits of being able to communicate, without duplication of plant and expense, between areas service by the systems of two or more different public utility telephone or telegraph corporations, one or more of which may be reluctant to provide the service. Having thus given the Commission the authority to establish interchanged traffic, the section then provides that, if the parties cannot agree, the Commission may specify the manner in which the cost of the interchanged traffic or revenues therefor are to be divided between the parties.⁵⁷

Notably, the Legislature did not compel the filing or publication of tariffs or contracts for such arrangements. Instead, any such requirements were left entirely to the Commission's discretion.

⁵⁴ See *supra* at n.53.

⁵⁵ Pub. Util. Code § 490, subd. (a) states, in pertinent part: "The commission may from time to time determine and prescribe by order changes in the form of the schedules referred to in this article as it finds expedient, and may modify the requirements of any of its orders or rules in respect to any matter referred to in this article." Pub. Util. Code § 495 expressly references exemption from the filing requirements of § 489(a). And the last sentence of Pub. Util. Code § 532 states: "The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

⁵⁶ Formerly section 40 of the Public Utilities Act, Stats.1915, c. 91, p.136, § 40.

⁵⁷ D.71575, 66 Cal. P.U.C 419, 435 (1966).

The Commission has acted pursuant to such discretion in a variety of ways over these many decades. The Commission did not directly exercise any authority over negotiated agreements until 1953, when it sent a letter directing Pacific Telephone and Telegraph Company to begin filing its agreements, not for approval but merely for “informational purposes.”⁵⁸ After seven decades of no formal tariff or contract filing requirements for intercarrier arrangements, the Commission elected, in 1983, to adopt a tariffed access charge regime for interconnection between “monopoly” local exchange carriers (now known as incumbent local exchange carriers or “ILECs”) and interexchange or toll carriers (“IXCs”).⁵⁹

Similarly, when the Commission opened the local exchange market to competition in approximately 1995, the Commission adopted rules pertaining to interconnection agreements between ILECs and CLECs and directed the carriers to file such agreements with the Commission.⁶⁰ The Commission adopted these rules and filing requirement in part because “interconnection agreements may be difficult to establish and [] the negotiating power of the parties to the contract may not be even.”⁶¹ A few months later, the Commission issued another decision addressing interconnection-related issues concerning ILECs and CLECs in which the Commission addressed switched carrier access, among numerous other issues. In D.96-02-072, the Commission directed CLECs and ILECs to establish meet-point billing arrangements by mutual agreement and instructed CLECs to “maintain provisions in their respective State access tariff or concur in another LEC’s or CL[E]C’s existing State access tariff sufficient to reflect this

⁵⁸ See D.92-01-016, 1992 Cal. PUC LEXIS 17, *34, *citing* D.50837, 53 CPUC 662, 665 (1954), stating that the contract filing requirements of General Order No. 96 do “not apply to intercompany traffic agreements.”

⁵⁹ See *generally* D.83-12-024, 1983 Cal. PUC LEXIS 1162 (1983).

⁶⁰ This requirement has been effectively superseded by the federal Telecommunications Act of 1996 which established rules governing interconnection agreements between CLECs and ILECs and directs the filing of such agreements with the Commission. See 47 U.S.C. § 252(e).

⁶¹ D.95-12-056, 1995 Cal. PUC LEXIS 966, * 3.

meet-point billing arrangement and meet-point billing percentages.”⁶² However, in these decisions, the Commission did not directly address intercarrier-compensation arrangements between CLECs and IXC. Importantly, there was no order specifically directing CLECs to file tariffs or contracts with respect to rates for switched access services.

Section 766 and the Commission’s decisions governing interconnection and intercarrier relationships between telephone corporations establish a reasonable regulatory framework. While Section 766 does not contain a specific contract-filing requirement, the Commission has the authority to require carriers to file contracts where it finds that the circumstances so warrant. When it does so, the Commission makes its intentions clear by imposing a specific filing requirement.

Accordingly, the Commission acted appropriately by dismissing QCC’s Complaint and, in so doing, effectively confirming that CLECs were authorized, both before and after the issuance of the 2007 *Access Charge Decision*, to establish intercarrier arrangements with IXCs pursuant to access contracts that need not be filed with the Commission.

Even assuming solely for the sake of argument that a filing requirement were to apply to CLEC-provided switched access contracts under section 489, the fact that Defendants did not file their switched access contracts with the Commission does not grant QCC any cause of action or the relief it seeks since, as the Commission held in D.10-07-030, the contracts are not subject to ratemaking approval under the *Access Charge Decision*, and carriers are not obligated to offer such contract rates to third parties upon demand, as if they were tariffed rates. The Commission has the authority under sections 490, 495 and 532 *both* to allow carriers to contract for switched access rates that are lower than the rates included in the carriers’ tariffs *and* not to require

⁶² D.96-02-072, 1996 Cal. PUC LEXIS 123, *135 (1996). A meet-point billing arrangement between CLECs and ILECs is an interconnection arrangement that is separate and distinct from switched access service and the corresponding switched access charges that CLECs charge to IXCs for traffic that is delivered over meet-point billing arrangements. Such arrangements are not within the subject of QCC’s Complaint.

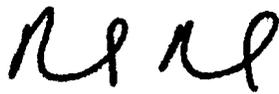
carriers to file such contracts with the Commission, as previously discussed.⁶³ Consequently, the Commission need not address the filing issue in order to dismiss QCC's Complaint.

III. CONCLUSION

For the forgoing reasons, the Commission should affirm D.10-07-030.

Dated: September 16, 2010

Respectfully submitted,

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⁶³ See *supra* at n. 55.

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APPENDIX A

Appendix A: Table of Discovery Propounded by QCC¹

Discovery Propounded by QCC	Date Issued By QCC	Date Answered by Defendant
First Set Data Requests to Advanced Telcom	November 12, 2008	December 14, 2008
Second Set Data Requests to Advanced Telcom	July 16, 2009	August 7, 2009 (objections)
Third Set Data Requests to Advanced Telcom	August 26, 2009	September 28, 2009
First Set Data Requests to Arrival	July 6, 2009	August 10, 2009 (objections and responses)
First Set Data Requests to Broadwing	July 6, 2009	August 12, 2009 (responses and objections)
First Set Data Requests to BullsEye Telecom	July 6, 2009	July 30, 2009
First Set Data Requests to Cox	November 3, 2008	December 4, 2008 (objections) September 2, 2009 (objections and responses)
Second Set Data Requests to Cox	July 16, 2009	August 7, 2009 (objections)
Third Set Data Requests to Cox	October 26, 2009	November 13, 2009 (objections)
First Set Data Requests to Granite	November 3, 2008	March 13, 2009
Second Set Data Requests to Granite	July 16, 2009	August 5, 2009 (objections)
First Set Data Requests to Level 3	November 17, 2008	December 8, 2008 (responses and objections)

¹ This table includes only the discovery that QCC propounded on Joint Carriers (*see* n. 1 to Joint Response for list of Joint Carriers) and in the case of Verizon Business, its non-party IXC affiliate, MCI Communications Services, Inc. This table does not include all discovery that QCC propounded in this proceeding, *e.g.*, the subpoenas QCC issued to non-party IXCs AT&T and Sprint, as that information is not necessarily within the possession of Joint Carriers.

Discovery Propounded by QCC	Date Issued By QCC	Date Answered by Defendant
Second Set Data Requests to Level 3	July 16, 2009	August 12, 2009 (responses and objections)
First Set Data Requests to Verizon Business	November 3, 2008	November 17, 2008
Second Set Data Requests to Verizon Business	July 16, 2009	August 5, 2009
Third Set Data Requests to Verizon Business	August 26, 2009	September 4, 2009
Fourth Set Data Requests to Verizon Business	October 2, 2009	October 5, 2009
First Subpoena to MCI Communications Services, Inc.	January 23, 2009	February 20, 2009 February 26, 2009
Second Subpoena to MCI Communications Services, Inc.	September 8, 2009	Superseded per agreement of the parties by Data Request #4 to Verizon Business
First Set Data Requests to Mpower	July 9, 2009	August 13, 2009 (objections and responses) November 20, 2009 (objections and supplemental responses)
Second Set Data Requests to Mpower	August 26, 2009	September 4, 2009 (objections and responses) September 9, 2009 (objections and supplemental responses) October 9, 2009 (objections and 2nd supplemental responses)

Discovery Propounded by QCC	Date Issued By QCC	Date Answered by Defendant
First Set Data Requests Navigator	July 9, 2009	July 28, 2009 (initial) August 13, 2009 (supplemental)
First Set Data Requests to U.S. TelePacific	July 9, 2009	August 13, 2009 (objections and responses)
First Set Data Requests to PAETEC	July 9, 2009	August 13, 2009 (objections and responses)
Second Set Data Requests to PAETEC (Revised)	August 28, 2009	September 4, 2009 (objections and responses)
Third Set Data Requests to PAETEC	September 4, 2009	September 10, 2009 (objections and responses)
First Set Data Requests to Telscape	July 9, 2009	September 14, 2009 (objections and responses)
First Set Data Requests to tw telecom	November 17, 2008	December 1, 2008 (initial objections and responses) June 10, 2009 (supplemental)
First Set Data Requests to Utility Telephone, Inc.	July 9, 2009	September 14, 2009 (objections and responses)
First Set Data Requests to XO Communications Services, Inc.	November 17, 2008	December 5, 2008 (objections and responses)

CERTIFICATE OF SERVICE

I, Christine M. Becerra, certify that on this 16th day of September, 2010, I caused a copy of the foregoing:

**JOINT RESPONSE OF MCIMETRO ACCESS TRANSMISSION SERVICES, L.L.C.,
ADVANCED TELCOM, INC., ARRIVAL COMMUNICATIONS, INC., BLUE CASA
COMMUNICATIONS, INC. , BROADWING COMMUNICATIONS, LLC, BUDGET
PREPAY, INC., BULLSEYE TELCOM, INC., COX CALIFORNIA TELCOM, LLC,
GRANITE TELECOMMUNICATIONS, LLC, MPOWER COMMUNICATIONS CORP.,
NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC.
TELSCAPE COMMUNICATIONS, INC., TW TELCOM OF CALIFORNIA, L.P., U.S.
TELEPACIFIC CORP., UTILITY TELEPHONE, INC., AND XO COMMUNICATIONS
SERVICES, INC. TO QWEST COMMUNICATIONS COMPANY LLC'S
APPLICATION FOR REHEARING OF DECISION 10-07-030**

to be served by electronic mail on all known parties to Case No. 08-08-006 on the most recently updated service list available on the California Public Utilities Commission's website, shown below, and by U.S. First Class mail to all individuals on the service list without e-mail addresses.

I also caused a courtesy copy to be hand delivered to:

Hon. Maribeth A. Bushey, Administrative Law Judge
California Public Utilities Commission
State Building, Room 5018
505 Van Ness Avenue
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of September, 2010 in San Francisco, California.

/s/ Christine M. Becerra
Christine M. Becerra

Service List:

C.08-08-006



California Public
Utilities Commission

CPUC Home

CALIFORNIA PUBLIC UTILITIES COMMISSION

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LIST NAME: LIST
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