



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

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O1 Communications, Inc. (U-6065-C),

*Complainant*

vs.

New Cingular Wireless Pcs, LLC (U-3060-C) and  
AT&T Mobility Wireless Operations Holdings, Inc.  
(U-3021-C)

*Defendants*

C.15-12-020

**COMMENTS OF O1 COMMUNICATIONS, INC. (U-6065-C)  
ON DECISION GRANTING MOTION TO DISMISS**

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Pursuant to Commission Rule of Practice and Procedure 14.3, O1 Communications, Inc. (“O1”) hereby submits comments on the Proposed Decision (“PD”) granting the Motion to Dismiss filed by New Cingular Wireless PCS, LLC (U-3060-C) and AT&T Mobility Wireless Operations Holdings, Inc. (U-3021-C) (“ATT-M”). Granting ATT-M’s motion to dismiss O1’s entire complaint on the eve of evidentiary hearings errs procedurally and legally.

**I. Procedural and Legal Errors**

**A. ATT-M Sought Only a Motion to Dismiss for Failure to State a Claim**

The PD errs procedurally by converting ATT-M’s motion to dismiss to a motion for summary judgment even though ATT-M only sought, and only alleged grounds for, a motion to dismiss. The basis for ATT-M’s motion to dismiss was that O1 allegedly failed to state a claim because federal law doesn’t require direct connection between carriers.<sup>1</sup> The gravamen of the standard for motions to dismiss is whether the complainant has pled sufficiently to present a cognizable claim.<sup>2</sup>

At the motion to dismiss stage of the proceeding, the Complainant does not have to show probability of success, it “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence to support the allegations”<sup>3</sup>. The same standard applies under state law. "A motion to dismiss in federal court is functionally equivalent to a demurrer filed in California. A demurrer in this state is sustained when the facts asserted in the complaint fail to state a cause of action; the order is not based on the production of evidence, as it is assumed that

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<sup>1</sup> Proposed Decision Granting Motion to Dismiss Complaint, at p. 2, 7, 11-12.

<sup>2</sup> Fed. Rule Civ. Proc. 12(b)(6); *Garza v. Alvara*, 2016 U.S. Dist. LEXIS 88923, \*7-8 (E.D. Cal. July 8, 2016).

<sup>3</sup> *Garza*, at \*14-15.

the facts asserted in the complaint are true."<sup>4</sup>

In its Complaint, O1 pled sufficient facts to sustain independent causes of action for (1) violation of state and federal laws that prohibit blocking or delaying traffic and (2) that ATT-M is discriminating against O1 by failing to offer a direct connection agreement. In support of these claims, O1 pled facts showing that ATT-M's disconnection of the direct connect trunk would cause service delays and dropped calls in violation of state and federal law that prohibits delaying or blocking calls.<sup>5</sup> O1 pled facts that ATT-M offered direct connection agreements to other carriers but had failed to do so for O1.<sup>6</sup>

The Commission was required to accept these facts as true, under the standard for motions to dismiss. The PD, however, failed to accept that the facts as pled and deny the motion to dismiss. Instead, the PD converted the motion to dismiss to a motion for summary judgment and then concluded there were no disputed facts based on only portion of the record. The PD erred legally by improperly converting the motion to dismiss as pled by ATT-M.

#### **B. The PD Errs By Failing to Recognize Independent Claims Pled by O1**

The PD errs legally by treating one issue as a condition precedent for all claims in O1's complaint rather than treating each claim as an independent cause of action. Specifically, the PD concludes erroneously that the whole premise of this Complaint revolves around the first cause of action;"<sup>7</sup> that cause of action being whether federal law requires a carrier to offer direct connection. The PD fails to recognize that O1 clearly stated a cognizable claim regarding other

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<sup>4</sup> *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1170 (Cal. App. 6th Dist. 2008) (internal citations omitted).

<sup>5</sup> O1 Complaint, at ¶¶64; Mertz Declaration in Support of Motion for Temporary Restraining Order, ¶¶29-30.

<sup>6</sup> O1 Complaint, at ¶¶77-78.

<sup>7</sup> PD at p.18.

grounds, including discrimination and unjust and unreasonable conduct. Those grounds have independent validity and should not have been dismissed even if it were correct that O1 failed to state a claim regarding direct connection requirements. If the PD had taken account of the entire record, it would have found that O1 stated a cognizable claim for discrimination and unjust and unreasonable conduct because the undisputed evidence developed by O1 demonstrated that ATT-M was offering direct connect agreements to other carriers, while it denied an agreement on the same terms and conditions to O1.

Thus, regardless of whether ATT-M was obligated to offer direct connections, it chose to do so for at least three other carriers, and therefore triggered an obligation under state and federal law to offer direct connect agreements to other carriers similarly situated. As a matter of law, the record shows that ATT-M is discriminating against O1 by offering direct connection agreements at bill and keep to at least three other similarly situated carriers while denying the same agreement to O1.<sup>8</sup> Commission precedent has recognized that when a utility makes an offer available to any carrier, such offer triggers non-discrimination provisions of federal law.<sup>9</sup> The PD cites to no authority that excuses ATT-M from its obligations to behave in a just, reasonable and non-discriminatory matter, and thus errs by dismissing these claims. O1 has viable and well pled claims independent of the direct connection issue that should not have been dismissed.

**C. The PD Fails to Consider the Entire Record as Required by the Standard for Summary Judgment and State Law**

Because the PD converted ATT-M's motion to dismiss into a motion for summary

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<sup>8</sup> J. Mertz Rebuttal Testimony, p. 18, and Confidential Exhibit JM WW.

<sup>9</sup> *Qwest Communications Co. v. MCImetro Access Transmission Services, LLC*, Order Granting Rehearing of Decision (D.) 10-07-030, and Vacating the Decision, D. 11-07-058, Case No. 08-08-006 (2011) ("Qwest Order Granting Rehearing") at pp. 4-5.

judgment, it was mandatory for the PD to take account of the entire record in order to determine whether there are any disputed factual issues – the essence of a motion for summary judgment. Under the federal rules of civil procedure, a summary judgment motion may be granted only if the court determines “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>10</sup> In order to be able to determine whether or not there exists a genuine dispute of material fact, the Court must review the factual record. Even more plainly stated under California law, the Court must determine whether there exists a “triable issue of material fact,” and the court “shall consider all of the evidence...”<sup>11</sup>. Because a motion for summary judgment may dispense with the case, the Commission is independently required to base its decision on the entire record of the case by Rule 8.3(k) of the Commission’s Rules of Practice and Procedure<sup>12</sup> and Section 1706, which requires that “[a] complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney.”

The PD, however, omits substantial portions of the record, and bases the dismissal solely on the parties’ opening testimony. O1 set forth evidence, largely in its reply and rebuttal testimony, that ATT-M is offering direct connect agreements to at least three other carriers on the exact rates, terms and conditions O1 sought but was denied. O1 was unable to present the evidence earlier because it had to engage in a protracted discovery dispute, including a motion to compel, in order to obtain the evidence from ATT-M.

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<sup>10</sup> Fed. R. Civ. Proc. 56.

<sup>11</sup> Cal. Code Civ. Proc. § 437c(c).

<sup>12</sup> “The Commission shall render its decision based on the evidence of record.”

#### **D. The PD Denies O1 Its Right to a Hearing**

Because this is a complaint case, O1 is entitled to full and fair consideration of all of the evidence, not just its opening testimony. The Scoping Ruling determined that a hearing is required in this case, and it has not been changed. Despite ATT-M filing a Motion to Dismiss, the parties proceeded with discovery and prepared and submitted testimony to the Commission for six months. Suddenly, five days before the hearing was scheduled to begin, after O1 had expended substantial resources (including a motion to compel ATT-M to produce direct connection agreements it has in place with other carriers in California), the PD dismissing the case was issued. The PD, if approved, will foreclose O1 its rights to prove its claims through evidence already submitted and in the possession of the Commission.

O1 submits that an evidentiary hearing was required given that this is a complaint case<sup>13</sup> and involved a discrimination claim, which requires a factual analysis and may not be dispensed with on a motion to dismiss.<sup>14</sup> Nonetheless, because the PD does a partial motion for summary judgment analysis, in order to protect its rights, O1 is willing to forego an evidentiary hearing with cross examination, and instead rely either on briefing or a complete summary judgment process. Therefore, O1 will file a motion for summary judgment that incorporates an examination of the entire record, as required by due process and state law.

#### **II. Specific Errors in the Proposed Decision**

The basis for ATT-M's motion to dismiss was that federal law purportedly preempted the Commission from requiring ATT-M to re-install a direct connect trunk with O1. Thus ATT-M's motion was limited to a legal issue – whether the Commission has jurisdiction to hear O1's

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<sup>13</sup> *California Trucking Ass'n v. PUC*, 19 Cal.3d 240, 245 (1977) (confirming that complaint cases before the Commission require evidentiary hearings, with the opportunity to be heard and present evidence).

<sup>14</sup> Qwest Order Granting Rehearing at pp. 4-5.

complaint. The PD errs by granting the motion to dismiss O1's entire case even though O1 alleged other causes of action, including violation of state and federal law barring discriminatory conduct by utilities. Thus, even if the PD were correct in concluding that federal law does not require direct connections and thus the Commission may not order ATT-M to re-install O1's direct connection, such conclusion does not dispense with O1's entire case.

O1 presented undisputed evidence in its reply and rebuttal testimony that ATT-M decided to offer direct connect agreements (perhaps voluntarily with no legal requirement) and once it decided to do so, it was obligated to offer the same agreement to similarly situated carriers. Thus, the discrimination claim survives any determination regarding whether ATT-M was ever required to offer direct connections to any carrier.

Yet rather than proceed with an evidentiary hearing on the three rounds of testimony submitted in this proceeding, the Commission issued a PD that errs legally by converting ATT-M's Motion to Dismiss to a Motion for Summary Judgment, but considers only a portion of the evidence in the record – the parties' opening testimony. Excluding the two most recent rounds of testimony, which contain the important information O1 learned in a lengthy discovery battle with ATT-M, is prejudicial to O1, and is procedurally and substantively improper. California law requires the Commission to decide issues based on the entire record,<sup>15</sup> not an artificial subset. Even the portion of the evidence taken into account in the PD, however, does not support a holding that O1's complaint should be dismissed.

O1 will describe below the specific errors in the PD by issue. In addition, O1 will file a Motion for Summary Judgment to ensure that the Commission considers the entire record before determining how to proceed with the case.

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<sup>15</sup> Cal. Pub. Util. Code Section 1706; Rule 8.3(k).

**A. Direct Connection**

The PD concludes that ATT-M has no obligation under federal law to directly connect with O1, and therefore determines to dismiss O1's entire complaint. The PD interprets the federal law cited by O1 to mean that there is no set of circumstances under which ATT-M could be obligated to directly connect with O1. Such narrow view ignores the evidence in the record that ATT-M had already agreed to directly connect with O1 and then disconnected the facility. It further ignores evidence that disconnecting the direct connect caused delays and in some cases disruption of service to O1's customers. The PD ignores evidence in O1's reply and rebuttal testimony that ATT-M offers direct connect agreements to other carriers at the same rates, terms and conditions sought by, but denied to, O1. All of these facts matter to the correct resolution of a motion for summary judgment, but the PD takes account none of them. Even if the PD were correct that federal law does not require ATT-M to offer direct connects in a legal vacuum, it fails to recognize that once ATT-M did offer direct connects, it was obligated to do so in a non-discriminatory manner. Thus, O1 has an independent cause of action for discrimination based on the manner in which ATT-M has chosen to offer direct connections, regardless of whether ATT-M might be required to offer direct connections otherwise.

**B. The PD Fails To Analyze Evidence of Discrimination In Violation of Section 453**

To determine whether a carrier's disparate treatment of customers violates Section 453, the Commission is required to determine whether the customers stand in comparable situations.<sup>16</sup> Further, to be unjust or undue discrimination, the preference or prejudice must be shown to be a source of advantage to the parties or traffic allegedly favored and a detriment to the other parties

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<sup>16</sup> *Sunland Refining Corp.*, 80 Cal PUC at 806, 816.(1976).

or traffic.<sup>17</sup> Further, discrimination must also be the proximate cause of the injury which is the source of complaint.<sup>18</sup> Discrimination forbidden by the statute "must be undue, taking into consideration all of the surrounding facts and circumstances."<sup>19</sup> Thus, analysis of discrimination necessarily must involve an analysis of the facts. The PD fails to analyze the facts related to ATT-M's discrimination.

Rather, the PD concludes that ATT-M has not discriminated against O1 by offering other carriers direct connection agreements because O1 was unable to reach an agreement with ATT-M.<sup>20</sup> But the PD fails to consider any of the factual circumstances as to why O1 was unable to reach an agreement with ATT-M, or whether the rates, terms and conditions of other carriers' direct connection agreements differ from the terms O1 sought. Regardless of whether ATT-M is required to offer any carrier direct connection, once it decided to do so, it is obligated to offer direct connection on a non-discriminatory basis by Section 453.<sup>21</sup>

The evidence presented by O1 clearly shows that at least three other carriers are receiving precisely the rates, terms and conditions O1 sought. Indeed, O1 stated that it would be willing to adopt any one of those three agreements.<sup>22</sup> The PD, however, failed even to acknowledge O1's evidence of other similarly situated carriers with direct connection agreements, and thus if failed to examine whether the other carriers with direct connect agreements are similarly situated to

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<sup>17</sup> *California Portland Cement Company vs. Union Pacific Railroad Company*, 54 Cal PUC 539, 542 (1955). See also, *In re Western Airlines, Inc.*, 62 Cal PUC 553, 562 (1964).

<sup>18</sup> *Ad Visor, Inc.*, 82 Cal PUC 685, 698 (1977).

<sup>19</sup> *In re Atchison, Topeka and Santa Fe Railway Company*, 43 CRC 25, 34 (1940).

<sup>20</sup> PD, at p. 14.

<sup>21</sup> Qwest Order Granting Rehearing at pp. 4-5; see also, *Qwest Communications Corp. v. Pacific Bell Telephone Co.*, 2006 Cal. PUC LEXIS 302 (2006) ("Qwest PacBell Case") at pp. 11-13.

<sup>22</sup> J. Mertz Rebuttal Testimony, p. 6, and Exhibits U, TT and UU.

O1. If so, then ATT-M's refusal to offer the same agreement to O1 is clearly discrimination under state law. This, of course, required a factual analysis which the PD did not do.

The PD appears to completely misapprehend the basis of O1's discrimination claim. O1 is not asking the Commission to require ATT-M to directly connect with O1 without an agreement. O1 is asking the Commission to require ATT-M to offer O1 the same agreement it has offered to at least three other similarly situated carriers. Because the unrebutted evidence in the record demonstrates that ATT-M offers direct connection agreements to other similarly situated carriers but not O1, it is discriminating against O1 as a matter of law. Therefore, O1 will file a motion for summary judgment based on these undisputed facts.

**C. The PD Fails to Analyze Evidence of ATT-M's Unjust and Unreasonable Conduct**

As with the discrimination claim, the PD concludes that ATT-M has not violated state law requiring carriers to act in a just and reasonable manner because it is not required under federal law to directly connect with O1.<sup>23</sup> O1 has demonstrated above, however, that ATT-M is discriminating against O1 by refusing to allow it to adopt the same direct connect agreement offered to other similarly situated carriers. It is well established that discrimination is *per se* unjust and unreasonable conduct.<sup>24</sup> As discussed above, regardless of whether ATT-M is required to offer direct connect agreements, once it did so, it was obligated to offer the same rates, terms and conditions to all similarly situated carriers. ATT-M failed to do so.

The PD errs by failing to treat O1's claims that ATT-M violated Pub. Util. Code § 453 and 766 as independent claims. The PD further errs by characterizing this claim as a

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<sup>23</sup> PD, at p.13.

<sup>24</sup> Qwest PacBell Case at pp. 11-13.

constitutional issue. The PD states, “[t]he courts have concluded that pursuant to standard rules of statutory interpretation code sections should be read to avoid constitutional questions, such as federal preemption.<sup>25</sup> The PD does not explain how it believes O1’s claim that ATT-M violated state law barring unjust and unreasonable conduct raises a constitution question or federal preemption.

**D. Delay or Discrimination in Handling of Traffic (Section 558 and 766)**

The PD erroneously concludes that ATT-M is not violating Sections 558 and 766 because it is not outright refusing to complete O1’s calls.<sup>26</sup> The PD is factually and legally incorrect. O1 provided evidence that ATT-M’s disconnection of the direct connect with O1 caused a percentage of O1’s calls to be dropped due to capacity constraints and to suffer delays even when calls were eventually completed.<sup>27</sup> Whether ATT-M intended for calls to be dropped, or caused calls to be dropped due to its arbitrary and reckless behavior, ATT-M’s conduct is still the proximate cause of O1’s call completion failures. The PD disregards this evidence.

P.U. Code §§558 and 766 require telephone corporations to transmit and deliver other carriers' traffic "without discrimination or delay" and for the physical connection between two networks which the connection "can reasonably be made and serves the public convenience and necessity."<sup>28</sup> The PD misinterprets the requirements of Sections 558 and 766 far too narrowly, by concluding that only a total blockage of all calls violates these codes. The plain language of

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<sup>25</sup> PD, at p.13.

<sup>26</sup> PD, at p. 9.

<sup>27</sup> J. Mertz Reply Testimony, pp. 8-10.

<sup>28</sup> In addition, in D. 97-11-024, the Commission held that "all carriers are entitled to have their calls *routed* and completed by other carriers in the manner they have requested." O1 Verified Confidential Complaint at ¶¶59-70 (emphasis added).

the statutes bars a carrier from discriminating or causing delay to another carriers' traffic.

In this case, O1 provided evidence that its calls were being delayed or even dropped as a direct result of ATT-M's disconnection of the direct connect trunk. Further, O1 provided evidence in its three rounds of testimony that ATT-M was discriminating by allowing approximately 20 carriers to have direct connections while it denied the same to O1. At least three carriers have direct connect agreements with the exact rates, terms and conditions sought by O1; thus, ATT-M discriminates in favor of these carriers by making it technically and economically feasible for them to serve customers that O1 cannot. The PD errs by ignoring O1's evidence in testimony that some customers refuse to have traffic terminated via indirect connections and therefore it has lost customers and revenue.<sup>29</sup>

#### **E. Barriers to Competition**

Section §709(f) and 709(g) declare California state policies in telecommunications to promote lower prices, broader consumer choice, avoidance of anti-competitive conduct, remove barriers to open and competitive markets, fair product and price competition and encourage greater efficiency, lower prices and more consumer choice. The PD concludes that O1 failed to provide evidence that ATT-M's conduct harms competition. The PD, however, limits its analysis to opening testimony of the two parties and ignores ample evidence in O1's reply and rebuttal testimony that ATT-M's conduct has harmed O1's ability to offer customers competitive rates through least cost routing. The PD ignores evidence that O1 has lost customers due to its inability to offer direct connection for termination of traffic to customers that refuse any indirect

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<sup>29</sup> J. Mertz Reply Testimony, p. 8, and Confidential Exhibit JM-M and Confidential Exhibit JM-EE showing minutes of use lost on a per customer basis, and Confidential Exhibit JM ZZ. J. Mertz Rebuttal Testimony, pp. 13, 15.

routing of traffic.<sup>30</sup> The PD ignores evidence submitted by O1 that it has lost revenues and is less able to compete in the marketplace due to its lack of direct connections while other similarly situated carriers have such connections.<sup>31</sup> At a minimum, these are issues of disputed material fact, which cannot be resolved on a motion to dismiss and instead require an evidentiary hearing. Thus, as with other causes of action, the PD errs legally by failing to consider the entire record and rendering erroneous conclusions as a result.

**F. Precedential Value of Ruling in This Proceeding**

An additional basis for dismissing O1's complaint set forth in the PD, is the purported precedential value of this case. The PD states:

If the Commission were to compel direct interconnection in this complaint proceeding, it would potentially be setting precedent that could compel other telecommunication providers to directly interconnect. This could potentially result in a violation of the due process rights of the other telecommunication providers who are not parties to this proceeding.<sup>32</sup>

This conclusion is legal error. The issues raised in O1's complaint relate to the specific conduct of ATT-M and its failure to a direct connection agreement to O1 despite doing so for other carriers. To the extent that any precedent will be set, such precedent would be limited to the specific facts of this case. It would not result in a finding of legal violations for any other carrier. At most, the result of this proceeding might establish a general principle that carriers must offer all similarly situated carriers services at the same rates, terms and conditions, which is already the law of this State and the law of the United States pursuant to the Communications Act. In

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<sup>30</sup> J. Mertz Opening Testimony, p. 23.

<sup>31</sup> *Id.*

<sup>32</sup> PD, at p. 19-20.

any event, it is unreasonable and a violation of O1's due process for the Commission to refuse to allow it to present evidence of discrimination against ATT-M in order to protect the due process rights of hypothetical carriers that might one day be required to follow a general principle set forth in an order.

### **III. CONCLUSION**

For all of the reasons set forth above, the PD should be withdrawn because it is deeply flawed from a procedural, factual and legal standpoint. The Commission should instead stay any further consideration of the PD until it reviews and rules on O1's Motion for Summary Judgment, which sets forth the entire evidence in the record on the issue of discrimination and ATT-M's unjust and unreasonable conduct. If the Commission is not inclined to withdraw the PD, it should be revised as indicated in Appendix A attached hereto.

Signed and dated: August 15, 2016 in Walnut Creek, CA.

Respectfully submitted,

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