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10-21-09  
04:59 PM

**BEFORE THE PUBLIC UTILITIES**

**COMMISSION OF THE STATE OF CALIFORNIA**

QWEST COMMUNICATIONS COMPANY, LLC  
(U-5335-C)

Complainant,

v.

Case No. C.08-08-006

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.

**QWEST COMMUNICATIONS COMPANY, LLC's (U-5335-C) MOTION TO COMPEL  
MPOWER COMMUNICATIONS CORP. (U-5859-C) TO PROVIDE FURTHER RESPONSES  
TO FIRST SET OF DATA REQUESTS**

**[PUBLIC VERSION]**

**QWEST COMMUNICATIONS COMPANY, LLC’s (U-5335-C) MOTION TO COMPEL  
MPOWER COMMUNICATIONS CORP. (U-5859-C) TO PROVIDE FURTHER  
RESPONSES TO FIRST SET OF DATA REQUESTS**

Qwest Communications Company, LLC (U-5335-C) (“QCC”), through undersigned counsel, moves for an order compelling Defendant Mpower Communications Corp. (U-5859-C) (“Mpower”) to provide further responses to QCC’s First Set of Data Requests. In particular, Mpower should be required to immediately provide QCC with unredacted copies of its off-tariff agreement with an unnamed IXC referred to by Mpower as “IXC B” as well as to identify another unnamed IXC referred to by Mpower as “IXC A.” This motion is made pursuant to Rule 11.3 of the Commission’s Rules of Practice and Procedure and Resolution ALJ-164<sup>1</sup> and follows on multiple good faith communications between QCC and Mpower to informally resolve the dispute.

**I. INTRODUCTION**

As the Assigned ALJ is aware, this case is focused on QCC’s allegations that the Defendants, including Mpower, violated the Public Utilities Code, Commission General Orders and in some cases the CLECs’ own tariffs by entering into secret, off-tariff agreements with select IXCs for intrastate switched access without applying those off-tariff agreements to all IXCs and without filing the agreements as required by state law. Central to the Commission’s evaluation of QCC’s claims – and of course central to QCC’s ability to prosecute and develop its claims – are the contracts themselves and the identity of the IXCs who were provided the preferred rates. QCC obtained copies of many agreements (between the Defendant CLECs and other IXCs) via subpoenas issued by the Commission at QCC’s request. Still others were produced in response to QCC’s data requests.

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<sup>1</sup> QCC is aware that Resolution ALJ-164 provides the Assigned ALJ with the authority to remove a discovery motion from the law and motion calendar and address the issues directly. See Resolution ALJ-164 at ¶ 2(e). Given the Assigned ALJ’s clear directions with respect to the production of the off-tariff agreements at issue in this case, this motion may of particular interest to the Assigned ALJ.

## II. DISCUSSION

### 1. QCC's Data Requests to Mpower

On April 15, 2009, QCC amended its complaint to add Mpower (among many others) as a Defendant to this proceeding.<sup>2</sup> Following receipt of Mpower's Answer in June,<sup>3</sup> QCC served its First Set of Data Requests on Mpower on July 9, 2009.<sup>4</sup> On July 21, 2009, Mpower and several other Defendants filed a motion to stay discovery pending resolution of their pending motion to dismiss.<sup>5</sup> At the July 29, 2009 prehearing conference, however, the ALJ directed the Defendants to respond to limited discovery and made very clear that the Defendants were to provide to QCC copies of switched access agreements.<sup>6</sup>

### 2. Mpower's Response to the QCC Data Requests.

On August 13, 2009, Mpower served its objections and responses to QCC's data requests. In the text of its response to QCC Data Request No. 2, Mpower identified that it had entered into ten (10) agreements with IXCs "that had governed the going-forward rates, terms or conditions (as of the date of the agreement) of Mpower's provision of intrastate switched access services in California." More specifically, Mpower identified agreements with Sprint, MCI, Cox, Global

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<sup>2</sup> *First Amended Complaint of Qwest Communications Company, LLC (fka Qwest Communications Corporation).*

<sup>3</sup> *Mpower Communications Corp.'s Verified Answer to First Amended Complaint of Qwest Communications Company, LLC (fka Qwest Communications Corporation).*

<sup>4</sup> See Declaration of Adam L. Sherr, attached hereto as Attachment A, at ¶ 3, Exhibit 1.

<sup>5</sup> *Defendants ACN Communication Services, Inc. (U-6342-C), Mpower Communications Corp. (U-5859-C), nii Communications, Ltd. (U-6453-C), and U.S. Telepacific Corp.'s (U-5271-C) Joint Motion for Partial Stay of Discovery.*

<sup>6</sup> *Hearing Transcript at 64: 24-28 - 65:1* ("With regard to the 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.") (emphasis added).

Crossing, BTI and three unidentified IXCs labeled IXCs A, B and C.<sup>7</sup> This motion concerns the production of the agreements with IXCs A and B.

In response to Data Request No. 3.a., which directed Mpower to produce an unredacted copy of the agreements identified in response to No. 2, Mpower *did not produce IXC B's agreement* and produced a copy of IXC A's agreement, *but redacted any information identifying IXC A.*<sup>8</sup>

**3. QCC and Mpower Satisfied the Commission's Meet and Confer Requirement.**

Following receipt of Mpower's response, QCC and Mpower met and conferred regarding the IXC A and B agreements. Mpower indicated that it could not obtain the permission of IXC B to produce a copy of the agreement (apparently, even on a confidential basis) and could only obtain permission from IXC A to produce a copy of the agreement if the IXC's name and identifying information was redacted.<sup>9</sup>

**4. Mpower Should be Compelled to Produce the Off-Tariff Agreement with IXC B.**

Rule of Practice and Procedure 10.1 permits any party "to obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence, unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." The information sought here is, as discussed below, clearly relevant to the subject matter of this proceeding and there is no burden to Mpower to produce an unredacted copy of its agreement with IXC B, as it is already in hand and *Mpower is*

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<sup>7</sup> See Attachment A, Sherr Declaration at ¶ 4, Exhibit 2.

<sup>8</sup> Id. at ¶ 5, Exhibit 3.

<sup>9</sup> Id. at ¶ 6, Exhibit 4.

*already a party to a joint non-disclosure agreement in this case which allows materials to be designated, subject to challenge, as confidential.*

Moreover, as the Assigned ALJ has already recognized,<sup>10</sup> copies of the agreements themselves are the most basic evidence required for the Commission to resolve this case. The case simply cannot proceed without those agreements. The fact that one or more parties' (or non-party's, as the case may be) desire to stay hidden from Commission view does not provide persuasive, let alone compelling, justification for non-disclosure.

In addition, the agreements themselves go the heart of several critical issues in this case. For example, without information on the below-tariff rates being offered by Mpower per those agreements, QCC is unable to determine the amount of the overcharge at stake. The agreements are also relevant to the issue of whether QCC was similarly situated to the other parties with whom Mpower entered into these secret arrangements.<sup>11</sup> Without the ability to review the actual agreements at issue, QCC simply has no ability to address/investigate those matters or to otherwise fully prosecute its case against Mpower.

In defending its limited production, Mpower did not allege that QCC's request for the document was somehow unreasonable, intrusive, burdensome or contrary to law. In fact, Mpower produced numerous agreements (regarding other IXCs) in response to the same data request. Instead, Mpower points solely to the refusal of its counterparty to give consent to the disclosure. That is simply an inadequate ground for refusing to comply with legitimate discovery demands.

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<sup>10</sup> See n. 6, *supra*.

<sup>11</sup> QCC notes that Mpower's pending motion to dismiss already alleges that QCC is not similarly situated to certain of the ten IXCs with whom Mpower provided secret switched access discounts. Mpower Motion for Partial Summary Judgment at p. 3.

**5. Mpower Should be Compelled to Identify IXC A by Producing an Unredacted Copy of the Agreement.**

Although the Commission has recognized the limited ability of carriers to withhold the names of the contracting party from *public disclosure* when filing off-tariff contracts,<sup>12</sup> Mpower's attempt to withhold the identity of IXC A should be rejected. As an initial matter, the exception is limited to "public disclosure" and had no bearing on a complaint proceeding, especially in light of the serious discriminatory pricing allegations at stake here.<sup>13</sup> Had Mpower bothered to file the agreement in the required time frame – or at all for that matter - it could have possibly withheld the IXC's name, at least in the public version. That flexibility has no relevance to Mpower's response to QCC's data requests in this case.

Moreover, the identity of the IXC is critical to the extent Mpower intends to assert – as it has in the context of other IXCs – that QCC is not "similarly situated" to IXC A.

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<sup>12</sup> *In the Matter of the Application of XO California, Inc. and ICG Telecom Group, Inc. for Modification of Decision 94-09-065 so that Competitive Local Carriers and Nondominant Interexchange Carriers May Withhold Customer Names from Filings of General Order No. 96-A Contracts and May Also Make Such Contracts Effective on 14 Days' Notice, Decision No. 01-11-059, 2001 Cal. PUC LEXIS 1037 \*5 (Nov. 29, 2001)*("...we recognize that some contract customers may not want their names to be made publicly available in connection with specific contract terms.")(quoting *D.94-09-065* where the Commission initially set forth this provision in the context of NDIECs' obligations to file off-tariff contracts)(emphasis added in *D. 01-11-059*).

<sup>13</sup> As noted above, Mpower has the ability to designate information as "confidential" under the terms of the Joint NDA which – subject to challenge by QCC – mitigates any potential public disclosure issue even if that was a legitimate concern (which it is not in this case for the reasons noted above).



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Complainant,

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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  
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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.

**ATTACHMENT A**

**DECLARATION OF ADAM L. SHERR IN SUPPORT OF QWEST COMMUNICATIONS  
COMPANY, LLC's (U-5335-C) MOTION TO COMPEL MPOWER COMMUNICATIONS  
CORP. (U-5859-C) TO PROVIDE FURTHER RESPONSES TO FIRST SET OF DATA  
REQUESTS**

I, Adam L. Sherr, hereby state and declare as follows:

1. I am employed by Qwest Corporation, affiliate of Qwest Communications Company, LLC (“QCC”), the complainant herein, as Corporate Counsel. My business address is 1600 7<sup>th</sup> Avenue, Room 1506, Seattle WA 98191.

2. The statements contained in this Declaration are true of my own knowledge and, if called as a witness, I could competently testify to them.

3. Attached as Exhibit 1 is a true and correct copy of QCC’s First Set of Data Requests on Mpower served on July 9, 2009.

4. Attached as Exhibit 2 is a true and correct copy of Mpower’s response to QCC Data Request No. 1-2 which Mpower provided to QCC on August 13, 2009.

5. Attached as Joint NDA Attorneys Only Confidential Exhibit 3 is a true and copy of the agreement between Mpower and “IXC A,” in the redacted form produced by Mpower to QCC in response to QCC Data Request 1-3. In further response to that Data Request, Mpower indicated that “despite reasonable efforts, it has been unable to obtain consent from CLEC/IXC B to provide” the Mpower-IXC B agreement.

6. On August 24 and 25, 2009, I had a series of telephonic and email communications with Mpower’s counsel regarding its responses to QCC’s data requests. In brief, Mpower indicated it was not able to obtain consent from IXC A to disclose its name in the redacted agreement it produced on August 13. In addition, Mpower indicated it was unable to obtain consent from IXC B to produce the Mpower-IXC B agreement in any form. The email chain memorializing the parties’ meet and confer efforts is attached hereto as Joint NDA Attorneys Only Confidential Exhibit 4.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of October, 2009, at Seattle, WA.



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Adam L. Sherr, Corporate Counsel  
Qwest Corporation

# **EXHIBIT 1**

**BEFORE THE PUBLIC UTILITIES**

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QWEST COMMUNICATIONS COMPANY, LLC  
(U-5335)

Complainant,

v.

MCIMETRO ACCESS TRANSMISSION  
SERVICES, LLC (U-5253-C), et al.

Defendants.

Case No. C. 08-08-006

**QWEST COMMUNICATIONS COMPANY LLC'S FIRST DATA REQUESTS TO  
MPOWER COMMUNICATIONS CORP.**

Adam L. Sherr  
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Attorneys for Qwest Communications  
Company, LLC

July 9, 2009

Qwest Communications Company, LLC ("QCC") hereby serves this First Set of Data Requests on Mpower Communications Corp. ("Mpower").

### **DEFINITIONS**

As used herein, the following terms have the meaning as set forth below:

1. "List," "describe," "detail," "explain," "specify" or "state" shall mean to set forth fully, in detail, and unambiguously each and every fact of which you, your company or your agents or representatives have knowledge which is relevant to the answer called for by the request.

2. The terms "document," "documents," or "documentation" as used herein shall include, without limitation, any writings and documentary material of any kind whatsoever, both originals and copies (regardless of origin and whether or not including additional writing thereon or attached thereto), and any and all drafts, preliminary versions, alterations, modifications, revisions, changes and written comments of and concerning such material, including, but not limited to: correspondence, letters, memoranda, internal communications, notes, reports, studies, surveys, books, manuals, work papers, and other written records or recordings, in whatever form, stored or contained in or on whatever medium including computerized or digital memory or magnetic media that:

- (a) Are now or were formerly in your possession, custody or control; or
- (b) Are known or believed to be responsive to these requests.

3. The terms "identify" and "identity" when used with respect to any entity means to state the entity's full name and the address of its principal place of business.

4. The term "identify" with respect to a document means to state the name or title of the document, the type of document (e.g., letter, memorandum, telegram, computer input or output, chart, etc.), its date, the person(s) who authored it, the person(s) who signed it, the person(s) to

whom it was addressed, the person(s) to whom it was sent, its general subject matter, its present location, and its present custodian.

5. The terms “relates to” or “relating to” mean referring to, concerning, responding to, containing, regarding, discussing, describing, reflecting, analyzing, constituting, disclosing, embodying, defining, stating, explaining, summarizing, or in any way pertaining to.

6. The term “including” means “including, but not limited to.”

7. “You” or “Your” means Mpower, including its affiliates and subsidiaries or a predecessor in interest of Mpower, including its affiliates or subsidiaries.

8. “IXC” means interexchange carrier.

9. “Commission” means California Public Utilities Commission.

10. “CLEC” means competitive local exchange carrier.

### **INSTRUCTIONS**

1. Please provide the responses to this First Set of Data Requests by July 30, 2009.

2. The data requests are deemed to be continuing in nature and, if further information with respect thereto comes to the attention of Advanced, its officers, employees, agents, representatives, or attorneys between the date of service hereof and the date of final Commission decision on the complaint herein, the answers and responses must be amended accordingly.

3. The Response to each data request provided should first restate the question asked and also identify the person(s) supplying the information.

4. In answering these data requests, furnish all information that is available to you or may be reasonably ascertained by you, including information in the possession of any of your agents or attorneys, or otherwise subject to your knowledge, possession, custody or control.

5. Whenever you are instructed to state a date, amount, number or quantification, or percent of any kind, if such date, amount, number or quantification, or percent is unknown to you, state your best estimate of such date, amount, number or quantification, or percent or indicate that it is an estimate.

6. If it is claimed that the attorney-client privilege or any other privilege is applicable to any document, the substance of that document need not be disclosed at this time, but with respect to that document:

- a. State the date, nature and subject matter of the document;
- b. Identify each and every other author or preparer of the document, and each and every person represented by each and every author or preparer of the document;
- c. Identify each and every person who received, read, or reviewed the document, and each and every person represented by each and every person who received, read, or reviewed the document;
- d. State the present location of the document and all copies thereof, and
- e. Provide all further information concerning the document and the circumstances under which it was created upon which the claim of privilege is asserted.

### **DATA REQUESTS**

1. Please produce copies of all responses to data requests propounded by other parties in this proceeding.

2. Identify each and every agreement, whether or not still in effect, entered into since January 1, 1998 between you and any IXC relating to going-forward rates, terms or conditions (as of the date of the agreement) for the provision (by you) of intrastate switched access services to the IXC. These agreements include, but are not limited to, settlement agreements and so-called “switched access service agreements.”

3. For each agreement identified in response to No. 2:
  - a. Produce an unredacted copy of the agreement.

- b. Identify which rates, terms or conditions set by the agreement differ (or at any time differed) from the rates, terms or conditions stated in your filed California switched access tariff effective at the time of such difference.
- c. Fully describe all reasons explaining and supporting your decision to offer the IXC rates, terms and conditions for intrastate switched access different from the rates, terms and conditions set forth in your then-effective tariff.
- d. Identify the precise date on which the agreement became effective.
- e. Identify the precise date on which the agreement terminated. To clarify, QCC seeks the date you stopped providing the IXC the rates, terms and conditions under the agreement, not the date on which the original term of the agreement may have expired.
- f. If the agreement has terminated, produce all documents relating to the termination of the agreement.
- g. Identify, by year, how many dollars, and for how many minutes of use, you billed the IXC for intrastate switched access services in California while the agreement was effective.
- h. Did you file the agreement with the Commission as an off-tariff, individual-case-basis agreement or for any other reason?
- i. If your answer to the immediately preceding subpart h. is in the affirmative, produce a copy of the transmittal document(s), including pleadings if applicable, you used when filing the agreement with the Commission.
- j. Did you otherwise (i.e., apart from the filing of the agreement with the Commission) make the agreement, or the terms of the agreement, publicly known?
- k. If your answer to the immediately preceding subpart j. is in the affirmative, produce a copy of any documents supporting your contention that you made the agreement, or the terms of the agreement, publicly known.
- l. Identify whether you offered equivalent rates, terms and conditions for switched access services to any other IXC, including but not limited to, QCC.
- m. If your answer to the immediately preceding subpart l. was in the affirmative, produce a copy of all documents supporting your contention that you offered equivalent rates, terms and conditions to other IXCs.
- n. If you contend that QCC was not (at the time of the agreement became effective) similarly situated to the IXC party to the agreement, identify and fully explain all ways in which QCC and said IXC were not similarly situated.

o. With regard to your answer to subpart n., did you evaluate, at the time the agreement became effective, whether QCC and the IXC party to the agreement were similarly situated? If yes, please produce all documents reflecting that you performed such an evaluation.

p. Does/did the rate or rates set forth in the agreement apply only to a set, minimum or maximum number of intrastate switched access minutes of use, or does/did the rate(s) apply to as many switched access minutes as the IXC would use while the agreement was effective? Please explain any such limitations/requirements, and produce any documents establishing the limitations/requirements.

q. Did you produce or rely on a cost study to establish the intrastate switched access rate set forth in the agreement? If so, produce a copy of the cost study, as well as all workpapers and documents pertaining to the cost study.

r. Did you produce or rely on a demand study or an elasticity study to establish the intrastate switched access rate set forth in the agreement? If so, produce a copy of all such demand studies, as well as all workpapers and documents pertaining to the studies produced.

s. Identify (by name, job title and address) all employees or agents who participated in negotiating the agreement with the IXC.

t. Please produce invoices or billing statements issued by you (whether issued by you or indirectly through any other billing agent) to the IXC which include charges for intrastate switched access services provided in California for the following billing periods: January 2007; January 2008; October 2008; and March 2009.

4. For the time period during which the agreements identified in response No. 2 above, were in effect, produce copies of all versions, even if since replaced, of your Commission tariff(s) relating to your provision of intrastate switched access services. To clarify, the time period QCC is referring is the period that you provided the IXC the rates, terms and conditions under the agreements produced.

5. Do you contend that an IXC has the ability to choose which local exchange carrier will provide it originating switched access in connection with an intrastate, long distance call?

6. If your response to No. 5 above, is other than an unqualified no, fully explain all ways in which an IXC can choose which local exchange carrier will provide it originating intrastate switched access.

7. Do you contend that an IXC has the ability to choose which local exchange carrier will provide it terminating switched access in connection with an intrastate, long distance call?

8. If your response to No. 7 above, is other than an unqualified no, fully explain all ways in which an IXC can choose which local exchange carrier will provide it terminating intrastate switched access.

9. In the past five years, has your company received any publication or other form of advice (not protected by attorney-client privilege) regarding the lawfulness or propriety of off-tariff agreements for switched access services? If so, please produce a copy of all documents bearing that advice. What actions, if any, did you take based on this advice?

10. Aside from the agreements identified in response to the foregoing data requests, since 2005, have you entered into any written or unwritten settlement agreements or arrangements (however titled) with Verizon Business or any MCI affiliate (as IXC) which have resolved backwards-looking billing disputes regarding your provision of intrastate switched access?

11. If your answer to QCC Data Request 10 is other than an unqualified “no,” for each such agreement:

- a. Identify the agreement by title, parties and date.
- b. Produce a copy of the agreement.
- c. Identify the billing time period covered by the agreement.
- d. For the time period covered by the agreement, identify the amount billed by you, the amount disputed by Verizon Business/MCI and the amount you and Verizon Business/MCI agreed Verizon Business/MCI would pay for intrastate switched access services.
- e. Was or is there any written or unwritten understanding between Verizon Business/MCI and you establishing or suggesting a mechanism or plan by which Verizon Business/MCI disputes your intrastate switched access billings and you then provide Verizon Business/MCI credits or retroactive discounts?
- f. If your answer to subpart e. is other than an unqualified “no,” fully describe the terms and details of the understanding and produce any documents codifying, summarizing or explaining the understanding.

12. Aside from the agreements identified in response to the foregoing data requests, since 2005, have you entered into any written or unwritten settlement agreements or arrangements (however titled) with AT&T (as IXC) which have resolved backwards-looking billing disputes with AT&T regarding your provision of intrastate switched access agreements?

13. If your answer to QCC Data Request 12 is other than an unqualified “no,” for each such agreement:

- a. Identify the agreement by title, parties and date.
- b. Produce a copy of the agreement.

- c. Identify the billing time period covered by the agreement.
- d. For the time period covered by the agreement, identify the amount billed by you, the amount disputed by AT&T and the amount you and AT&T agreed AT&T would pay for intrastate switched access services.
- e. Was or is there any written or unwritten understanding between you and AT&T establishing or suggesting a mechanism or plan by which AT&T disputes your intrastate switched access billings and you then provide AT&T credits or retroactive discounts?
- f. If your answer to subpart e. is other than an unqualified “no,” fully describe the terms and details of the understanding and produce any documents codifying, summarizing or explaining the understanding.

14. In paragraph 10 of your answer, you indicate that “Mpower admits that it was a party to certain confidential settlement agreements that resolved bona fide disputes concerning previously billed amounts with certain IXCs.” For each agreement being referenced and with regard to the dispute with the IXC that led to the agreement (“settlement agreement”):

- a. Specifically describe the nature of each of the IXC’s objections, if any, to your billing for switched access services prior to execution of the settlement agreement. As part of your response, please identify whether the IXC alleged that your intrastate switched access rates were unreasonably high. Please also identify whether the IXC alleged that you had billed the IXC for services not provided or otherwise made billing errors not solely related to the reasonableness of your switched access rates.
- b. Produce all documents in your possession that memorialize the IXC’s position, prior to execution of the settlement agreement, with regard to your switched access billing.
- c. Produce all documents that memorialize your position, prior to execution of the settlement agreement, with regard to the IXC’s disputes regarding your switched access billing.
- d. Identify, for the pre-settlement agreement period of time covered by the settlement agreement:
  - (1) the amount you billed the IXC for intrastate switched access (in total dollars);
  - (2) the amount the IXC disputed; and
  - (3) the amount that the parties ultimately agreed would be paid by the IXC for said period of time.

15. With regard to the disputes with the IXC's referenced in paragraph 10 of your answer, did you ever seek to involve state or federal regulatory commissions to assist you in resolving your disputes with the IXC's, including by filing a complaint?

16. If your answer to No. 15 is in the affirmative, fully explain your attempts and produce all documents relating to your attempts to solicit the assistance of regulatory commissions.

17. With references to Affirmative Defense No. 10, please describe all ways in which QCC has made any claims against affiliates, subsidiaries, predecessors or any other separately certified entity associated with Mpower not named in the First Amended Complaint.

Dated this 9th day of July, 2009.

WILSON & BLOOMFIELD LLP

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Attorneys for Qwest Communications  
Company, LLC

## **EXHIBIT 2**

Mpower Communications Corp.

State of California

Case No. C. 08-08-006

Respondent: Dan Simone, Controller,  
Mpower Communications Corp.

Objections Prepared By  
Mpower's Undersigned Outside  
Counsel

REQUEST: Qwest, Set #1

DATED: July 9, 2009

ITEM: Identify each and every agreement, whether or not still in effect,  
Qwest CA - Mpower entered into since January 1, 1998 between you and any IXC relating to  
1-2 going-forward rates, terms or conditions (as of the date of the  
agreement) for the provision (by you) of intrastate switched access  
services to the IXC. These agreements include, but are not limited to,  
settlement agreements and so-called "switched access service  
agreements."

MPOWER In addition to the General Objections, Mpower objects to this Data  
RESPONSE: Request to the extent that it seeks information concerning agreements  
that were terminated or expired prior to August 2005. Based upon the  
order issued in the pre-hearing conference with the ALJ on July 29,  
2009, such information is *Not Relevant* at this time. Subject to and  
without waiving the foregoing objections, based on Mpower's  
understanding, AT&T has already provided to Qwest in response to the  
subpoena issued in this docket its agreement with Mpower that had  
governed the going-forward rates, terms or conditions of Mpower's  
provision of intrastate switched access services in California.

Subject to the General Objections or any other objections Mpower may  
later make, Mpower also had agreements with Sprint, MCI, Cox,  
CLEC/IXC A, XO, Global Crossing, CLEC/IXC B, CLEC/IXC C and  
BTI that had governed the going-forward rates, terms or conditions (as  
of the date of the agreement) of Mpower's provision of intrastate  
switched access services in California.

**Exhibit 3 has been designated as Attorneys Only Confidential pursuant to the Joint NDA and is not included in this version of Attachment A.**

## **EXHIBIT 4**

---

**From:** Macres, Philip J. [Philip.Macres@bingham.com]  
**Sent:** Tuesday, August 25, 2009 2:26 PM  
**To:** 'Sherr, Adam'  
**Cc:** 'Leon M. Bloomfield'; Branfman, Eric J.; Beshka, Katie B.  
**Subject:** RE: C.08-08-006 -- Meet and Confer (Mpower)  
Adam,

In response to your email below, despite diligent efforts, Mpower has been unable to obtain consent from IXC A or IXC B to disclose any of the information you have requested. We therefore have no update to our data request responses already provided with respect to these two carriers.

# REDACTED

---

**From:** Sherr, Adam [mailto:Adam.Sherr@qwest.com]  
**Sent:** Friday, August 21, 2009 1:53 PM  
**To:** Macres, Philip J.  
**Cc:** 'Leon M. Bloomfield'  
**Subject:** C.08-08-006 -- Meet and Confer (Mpower)

Phil:

Thanks for taking the time to meet and confer with me regarding Mpower's response to QCC's 1st data requests. This will confirm our discussion. Please let me know if I have misstated or misconstrued our discussion.

The disagreement concerns Mpower's response to DRs 2 and 3, which require Mpower to identify and produce going-forward switched access agreements Mpower has entered as a provider of switched access. Mpower identifies agreements with AT&T, Sprint, MCI, Global Crossing, XO, Cox and then three unidentified IXCs labeled "IXC A," "IXC B" and "IXC C." The disagreement concerns A, B and C. Regarding IXC A, Mpower produced (under seal) a redacted copy of the agreement, but redacted the name of the IXC (at the IXC's request). Regarding IXC B, Mpower did not produce a copy of the agreement, as Mpower was unable to obtain consent from IXC B.

# REDACTED

As to IXCs A and B, QCC believes Mpower should unredact the name of IXC A and should produce a copy of IXC B's agreement. Rule 10.1 of the Commission's Rules of Practice and Procedure permits discovery and thus requires Mpower to cooperate in responding. While QCC disagrees, I understand Mpower's position that it can not disclose the name/agreement without the IXCs' consent given the confidentiality provisions of the agreement(s). I understand, however, that you will circle back with IXCs A and B to seek their consent.

You promised to give me an update as to IXCs A, B and C by Tuesday of next week. Thereafter, if the matter is not resolved, QCC intends to file a motion to compel. While I'd prefer not to tax the ALJ with

such a motion, that may be the only way to obtain the agreements/information.

Again, I appreciate your time, and will look forward to speaking with you on or by Tuesday the 25th.

**Adam L. Sherr**  
Corporate Counsel, Qwest  
1600 7th Avenue, Room 1506  
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---

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**CERTIFICATE OF SERVICE**

I, Richard M. Marshall, the undersigned, hereby declare that on October 21, 2009, I caused a copy of the foregoing:

**QWEST COMMUNICATIONS COMPANY, LLC's (U-5335-C) MOTION TO COMPEL  
MPOWER COMMUNICATIONS CORP. (U-5859-C) TO PROVIDE FURTHER  
RESPONSES TO FIRST SET OF DATA REQUESTS**

**[PUBLIC VERSION]**

in the above-captioned proceeding, to be served as follows:

- Via Messenger and email to the Assigned Commissioner
- Via Messenger and email to the Administrative Law Judge
- Via Email or U.S. Mail Service to the parties on the attached service list for C.08-08-006

This declaration was executed on October 21, 2009 at Oakland, California.

/s/

---

Richard M. Marshall



California Public  
Utilities Commission

CPUC Home

## CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

**PROCEEDING: C0808006 - QWEST COMMUNICATIONS**  
**FILER: QWEST COMMUNICATIONS CORPORATION (U5335C)**  
**LIST NAME: LIST**  
**LAST CHANGED: JULY 30, 2009**

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