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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
MOTION TO STRIKE SPECIFIC SECTIONS OF MPOWER'S RESPONSE TO
MCIMETRO'S MOTION FOR OFFICIAL NOTICE**

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April 19, 2012

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QWEST COMMUNICATIONS COMPANY, LLC
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LLC (U-5253-C), et al.

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**QWEST COMMUNICATIONS COMPANY LLC'S
MOTION TO STRIKE SPECIFIC SECTIONS OF MPOWER'S RESPONSE TO
MCIMETRO'S MOTION FOR OFFICIAL NOTICE**

On April 9, 2012, Defendant Mpower filed a "Response" to MCIMetro's ("MCI") Motion for Official Notice of the March 20, 2012 ruling by the New York Public Service Commission ("NY PSC") in which it granted MCI's Motion to Dismiss QCC's complaint in NY PSC Case No. 09-C-055. QCC does not dispute that Mpower may file a response in support of, or opposition to, the MCI Motion. However, Mpower cannot - and should not be allowed to - manipulate the Commission's processes by transforming that response into a supplemental pleading in support of its pending Motion for Partial Summary Judgment. Accordingly, QCC respectfully requests that the following text of Mpower's Response, as well as the attached Exhibits A and B, be stricken:

"In taking notice of the NY PSC Order, the Commission should also take notice that the NY PSC's grounds for dismissing Verizon Business from the New York complaint proceeding also support granting Mpower's August 14, 2009 Motion for Partial Summary Judgment and dismissing any other agreements that are similarly

reciprocal in this case. [Mpower's footnote 7 omitted.¹] As Mpower explained in this August 14, 2009 Motion,

Mpower, like MCI Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("MCI") entered into certain agreements with interexchange carriers ("IXCs") that were reciprocal in nature (the "Reciprocal Agreements"), providing that both parties to each of the Reciprocal Agreements would provide intrastate switched access services *to the other* at agreed upon rates, terms and conditions. The Reciprocal Agreements could not be offered to Qwest under the same rates, terms and conditions because Qwest, by its own admission, does not provide switched access services in California, nor is it authorized by the Commission to do so. Based upon these undisputed facts, Qwest cannot state a cause of action for discriminatory treatment with respect to rates for intrastate switched access services, as Qwest was never similarly situated to the IXCs with which Mpower had the Reciprocal Agreements, in that it could not have provided Mpower with reciprocal switched access services."

Mpower's Response is particularly inappropriate in this case. First, there is no dispute that the NY PSC Order is a matter of public record and is thus subject to judicial notice.² In addition, the NY PSC Order comprises the current decisional authority/official act of the NY

¹ Mpower's footnote 7 refers to two agreements produced by Mpower during the course of discovery – but not referenced in its Motion for Partial Summary Judgment – that also contain allegedly reciprocal provisions. As noted in the Mpower footnote, both of those agreements were identified and discussed in QCC's Post-Prehearing Conference Statement. QCC does not object to those agreements being included as part of the public record as evidenced by its pending Motion to Redesignate the Secret Agreements as Non-Confidential. However, it is inappropriate to include such documents in a response to a motion for official notice.

² Order Instituting Investigation Whether Pacific Gas and Electric Company, et al. have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems. Decision 02-07-043, 2002 Cal. PUC LEXIS 440 (July 17, 2002) ("Courts may take judicial notice of the records and files of state agencies, including those of the Commission... Thus, a court and, therefore, the Commission may take judicial/official notice of the existence of each document in a court or agency file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact, conclusions of law, and judgments.")

PSC.³ As such, it is subject to judicial/official notice under the Commission’s Rules and California law.⁴

Moreover, QCC filed a Response and Statement of Non-Opposition to the MCI Motion on April 6, 2012 – three days *before* the Mpower filing. Thus, the MCI motion was, for all intents and purposes, unopposed and no further responses were required.

Finally, and perhaps most strikingly, Mpower reasserts that the “reciprocal” nature of several of its agreements warrants dismissal of QCC’s claims. However, as noted in previous submissions by QCC, Mpower’s agreements seem to be reciprocal in name only.⁵ To date, the only evidence on the record indicates that Mpower provided switched access under these “reciprocal” agreements but either no switched access was provided to Mpower in return⁶ or the arrangement was simply a discount for the party with the lower tariff rate.⁷ Thus, in reality, there does not appear to be anything reciprocal about the Mpower agreements. At best, there are facts still to be developed on that issue with respect to most of the Mpower agreements once full

³ As it indicated it would in its April 6, 2012 Response and Statement of Non-Opposition, QCC filed a Petition for Rehearing of the NY PSC Order on April 17, 2012. See QCC Response and Statement of Opposition at p. 2.

⁴ See Rule of Practice and Procedure 13.9 which states that the Commission may take official notice of “such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.” Section 452, subds. (a) and (c), of the Evidence Code provides that judicial notice may be taken of “[t]he decisional, constitutional, and statutory law of any state of the United States. . .” and “[o]fficial acts of the legislative, executive, and judicial departments of the United States or any state of the United States.”

⁵ See QCC’s Consolidated Response to the Defendants’ Motions for Summary Judgment at pp. 55-56, Appendix F (Sherr Declaration), Exhibit 1.

⁶ See e.g., QCC’s Post Prehearing Conference Statements at pp. 16 – 17. (For example, Mpower received no benefit from AT&T’s “promise” to provide Mpower reciprocal discounts because AT&T provided Mpower *no switched access* between 2002 and 2008.)

⁷ See *id.* at 17 (“reciprocal” agreements between CLECs in which they agreed to use the lower tariff rate of the parties amounted to nothing more than a discount for the CLEC with the lower tariff rate).

