

BEFORE THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA



FILED

10-26-09
04:59 PM

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

Defendants.

Case No. C.08-08-006
Filed August 1, 2008

**MOTION OF QWEST COMMUNICATIONS COMPANY, LLC (U-5335-C) FOR
ENTRY OF DEFAULT AGAINST ERNEST COMMUNICATIONS, INC. (U-6077-C)**

[PUBLIC VERSION]

MOTION OF QWEST COMMUNICATIONS COMPANY, LLC (U-5335-C) FOR ENTRY OF DEFAULT AGAINST ERNEST COMMUNICATIONS (U-6077-C)

Pursuant to Rule 11.1 of this Commission’s Rules of Practice and Procedure, Qwest Communications Company, LLC (U-5335-C) (“QCC”) respectfully submits this Motion for Entry of Default against Defendant Ernest Communications (U-6077-C) (“Ernest”). As discussed below, Ernest has failed to file an answer to QCC’s First Amended Complaint – or otherwise participate in this proceeding – despite being provided repeated opportunities to do so. Thus, entry of default, and the corresponding award of prospective relief and reparations plus interest, is appropriate in this case.

I. BACKGROUND

On April 15, 2009, QCC filed its First Amended Complaint in which it named 17 new defendants including, among others, Ernest. The First Amended Complaint, like the initial Complaint filed in August 2008, is based on the Defendant CLECs’ respective decisions to enter into secret, off-tariff agreements in which they provided select IXCs with lower rates for intrastate switched access services than the rates they provided to QCC. Indeed, most of those secret agreements, as well as the identity of the CLECs that entered into those agreements, did not come to light until earlier this year when third party IXCs responded to subpoenas issued by the Commission in this case.¹

On May 19, 2009, the Commission’s Docket Office served the Complaint and the Instructions to Answer on the Defendants, directing them to, among other things, file and serve

¹ See e.g., QCC’s Consolidated Response to Motions to Dismiss (filed September 18, 2009) at p. 35. While a few CLECs’ agreements were produced to QCC in late 2008 in response to similar subpoenas issued in the parallel Colorado proceeding, those agreements were produced under seal and could not be identified or used outside the Colorado proceeding.

their respective Answers by June 18, 2009.² Those Instructions to Answer were served on Mr. Masters, President of Ernest Communications and the listed contact person on the Commission website.³ Ernest did not file or serve an Answer on June 18, 2009.⁴

On July 1, 2009, QCC sent Mr. Masters a letter (electronically and by U.S. mail) reminding him of Ernest's obligation to file an Answer. QCC attached a copy of the First Amended Complaint and the Commission's Instructions to Answer to that July 1 letter.⁵ To date, Ernest has not responded to the letter or filed an Answer or any other pleading with the Commission.⁶

On September 22, 2009, QCC sent Mr. Masters another email reminding him of Ernest's failure to file an Answer and informing him that QCC would be "forced to bring this matter to the Commission's attention and seek appropriate relief including, but not limited to, requesting that a default judgment be entered against Ernest" if no Answer was forthcoming.⁷ No response has been received to date and Ernest has not yet filed an Answer.⁸

² See Declaration of Leon M. Bloomfield ("Bloomfield Decl.") at ¶ 4, attached hereto as Attachment A.

³ Id. at ¶¶ 4-5.

⁴ Id. at ¶ 6.

⁵ Id. at ¶ 6. Also, on July 14, 2009, QCC counsel Adam Sherr emailed Ernest's Colorado counsel (Mr. Craig Joyce), informing Mr. Joyce that QCC had not yet received Ernest's answer in California. Mr. Sherr indicated that, if Ernest did not answer, QCC would move for default, as it had in Colorado. Mr. Sherr also informed Mr. Joyce of the July 29, 2009 California prehearing conference. Id. at ¶ 8.

⁶ Id. at ¶¶ 7, 10.

⁷ Id. at ¶ 9.

⁸ Id. at ¶ 10.

II. QCC IS ENTITLED TO AN ORDER OF DEFAULT AND AN AWARD OF THE RELIEF IT REQUESTED

As provided by the Code of Civil Procedure, judgment may be had if the defendant fails to answer the complaint, as follows:

In other actions [i.e., actions not arising upon contract or judgment for the recovery of money or damages], if the defendant has been served, other than by publication, and no answer ...has been filed with the clerk of the court within the time specified in the summons, or within further time as may be allowed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint. The court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief...as appears by the evidence to be just.⁹

Although the Commission is not strictly bound by the Code of Civil Procedure, it often looks to the Code for guidance on matters where it has no formulated law and it has done so in the context of default judgments.¹⁰ In this instance, the entry of default – as well as an award of reparations and prospective relief – is appropriate.

As an initial matter, Ernest has had adequate (and numerous) opportunities to respond to QCC's First Amended Complaint. The individual identified as the company's contact person on the Commission's website, who is also identified as the "co-founder and president" of Ernest on the company's website, was provided with Instructions to Answer from the Commission in May,

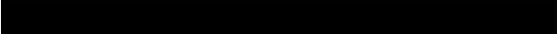
⁹ *Code of Civil Procedure § 585(b).*

¹⁰ *See Pac-West Telecomm, Inc. v. Pacific Centrex, D. 08-01-031, 2008 Cal. PUC LEXIS 24 (Jan. 31, 2008)*(default judgment entered against Pacific Centrex for failure to file an answer or any other responsive pleading), stayed by *D. 08-04-044, 2008 Cal. PUC LEXIS 155 * 9 (April 10, 2008)* (Commission provides Pacific Centrex with an opportunity to file an answer based on representations that the Instructions to Answer were sent to a service technician and not an authorized officer/agent, the defendant was a small company unfamiliar with Commission proceedings and other individuals from the company generally were designated as agents for service of process).

Unlike Pacific Centrex, Ernest is not "unfamiliar with Commission proceedings." In the parallel Colorado proceeding, Ernest answered QCC's virtually-identical complaint, although only after QCC first filed a motion for default. Ernest's absence appears to be a matter of choice, and not a matter of unfamiliarity.

2009.¹¹ In addition, he was provided with at least two written reminders from QCC regarding its failure to file an Answer.¹² No Answer, or response of any sort, has been filed or served.¹³

Ernest also failed to appear at the July 29, 2009 Prehearing Conference¹⁴ and has not filed any motions or joined any of the multitude of motions to dismiss that have been filed by the other Defendants. Finally, Ernest is certainly aware of this proceeding as it is also a named defendant in the parallel Colorado proceeding where it ultimately filed an Answer.¹⁵ In brief, Ernest has been provided with adequate opportunity to participate in this proceeding and has steadfastly failed to do so in any way whatsoever. In this situation, the entry of default is appropriate and does not implicate any due process concerns.¹⁶

In addition to entry of default, QCC is entitled to reparations for the overcharges it paid to Ernest for switched access services, as well as prospective rate relief.¹⁷ As alleged in the complaint, **[BEGIN AT&T CONFIDENTIAL]** 


¹¹ See Bloomfield Decl. at ¶¶ 4-5. As a general matter, the Commission's Docket Office usually calls the defendant prior to serving a complaint to verify a proper agent for service of process. See *Pac West, supra*, 2008 Cal. PUC LEXIS 155 at *10. QCC does not have any independent confirmation that Ernest was contacted in this particular case but has no reason to believe otherwise.

¹² See Bloomfield Decl. at ¶¶ 6, 9. As noted above, Ernest's Colorado counsel was also put on notice of his client's failure to file an answer in California. Id. at ¶8.

¹³ Bloomfield Decl. at ¶¶ 7, 10.

¹⁴ Id. at ¶ 8; Tr. 5.

¹⁵ Bloomfield Declaration, at ¶ 11.

¹⁶ See e.g., *Pac-West, supra*, 2008 Cal. PUC LEXIS 155 *10 ("At the outset we wish to clarify that the Commission's due process obligation is satisfied upon properly sending the notice and instructions to answer. There is no legal duty to subsequently contact a defendant who has failed to respond.")

¹⁷ The Code of Civil Procedure generally provides for a bifurcated approach where judgment is first entered and then the plaintiff applies for the relief sought. See *Code of Civil Proc. § 585(b)*. However, QCC believes that it is more efficient for the Commission to consider both matters simultaneously and does not see how any party could be prejudiced from this approach.

[REDACTED]

[REDACTED]

[REDACTED]¹⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹ [END AT&T

CONFIDENTIAL]

During that same time period, however, Ernest continued to bill QCC at what QCC understood to be its published “tariffed” rate. Ernest’s actions not only violated the terms of its own tariff,²⁰ as well as the Commission’s requirement to file off-tariff agreements and make them publicly available,²¹ it also subjected QCC to unlawful rate discrimination. In fact, Ernest charged QCC [BEGIN QCCCONFIDENTIAL] [REDACTED]

[REDACTED]

¹⁸ See Declaration of Derek Canfield attached hereto as Attachment B, at ¶¶ 3-4, 6-7, Exhibit DAC-1; see also QCC’s Motion to Redesignate Off-Tariff Agreements as Non-Confidential, Sherr Declaration, Exhibits Nos. 13 and 50 for copies of the subject agreements.

¹⁹ Id. at ¶ 17.

²⁰ See First Amended Complaint at ¶¶ 10(o), 17-19.

²¹ See General Order 96-A, §§ XA; see also GO 96-B, Telecommunications Industry Rules 8.2.1 and 8.2.2.; see also Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service, Decision No. 99-03-050, 1999 Cal. PUC LEXIS 414 (Mar. 18, 1999)(Ernest, and other CLECs, granted CPCN and required to abide by NDIEC rules for filing contracts).

QCCCONFIDENTIAL].²² As discussed in QCC’s Consolidated Response to the Motions to Dismiss, requiring similarly situated customers to pay different rates for the same service is not only harmful, but also entitles the aggrieved party – in this case QCC – to the difference between the higher rate it was charged and the lower rate that was made available to other customers.²³

In this case, the principle is particularly applicable as there is no reasonable basis for discriminating between QCC and AT&T; both were IXCs operating in California that were essentially forced to utilize Ernest’s switched access services in order to provide long distance services to Ernest end users. Moreover, switched access is a service that the IXCs must utilize and over which the IXC has little, if any, competitive alternative.²⁴ Indeed, absent some cost-of-service based rationale to justify price discrimination – which there is none given the nature of switched access services – it is difficult to even imagine a lawful basis for charging different rates to different IXCs.²⁵ In other words, switched access is a “series of bottleneck monopolies over access to each individual end user” and Ernest’s decision to secretly offer discounted rates to a select IXC constitutes unlawful rate discrimination.

Finally, the amount of the overcharge is readily ascertainable. As discussed more thoroughly in the attached Declaration of Derek Canfield, QCC has calculated what it paid

²² See Canfield Declaration at ¶¶ 3-4, Exhibit DAC-1.

²³ See *Qwest Communications Corporation and Qwest Interprise America, Inc. v. Pacific Bell Telephone Company, dba SBC California*, D. 06-08-006, 2006 Cal. PUC LEXIS 302 (Aug. 24, 2006) (“*Qwest v. SBC*”); see also *Pub. Util. Code § 734* (after finding that a public utility has charged an unreasonable, excessive, or discriminatory amount, Commission may “order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation.”)

²⁴ See *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking* (Apr. 27, 2001), at ¶ 30 (In other words, switched access is a “series of bottleneck monopolies over access to each individual end user.”).

²⁵ See e.g., Weisman Declaration attached as Appendix E to QCC Consolidated Response.

Ernest and compared it to what it would have paid Ernest had it been provided with the discounted rates in the [BEGIN AT&T CONFIDENTIAL] [REDACTED] [END AT&T CONFIDENTIAL] That amount, without interest, comes to [BEGIN QCC CONFIDENTIAL] [REDACTED] [END QCC CONFIDENTIAL]²⁶

Furthermore, QCC is entitled to the prospective relief it requested in its complaint. Specifically, QCC requested that the Commission “order the Defendant CLECs to prospectively lower their intrastate switched access rates to QCC consistent with the most favorable rate offered to other IXC’s in California.” [BEGIN AT&T CONFIDENTIAL] [REDACTED]

[REDACTED] [END AT&T CONFIDENTIAL]

III. CONCLUSION

For the reasons discussed above, QCC respectfully requests that the Commission enter judgment on all three causes of action alleged in the First Amended Complaint as against Ernest

²⁶ See Canfield Declaration at Exhibit DAC-1; see also Canfield Declaration at ¶¶ 3-19 for a more detailed explanation of the reparations analysis.

ATTACHMENT A

**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.

**DECLARATION OF LEON M. BLOOMFIELD IN SUPPORT OF MOTION OF QWEST
COMMUNICATIONS COMPANY, LLC's (U-5335-C) FOR ENTRY OF DEFAULT
AGAINST ERNEST COMMUNICATIONS, INC. (U-6077-C)**

I, Leon M. Bloomfield, declare and state as follows:

1. I am a partner at the law firm of Wilson & Bloomfield LLP and have been retained as outside counsel by Qwest Communications Company, LLC (“QCC”) in this proceeding.

2. This Declaration is made in support of QCC’s Motion for Entry of Default Against Ernest Communications.

3. On or about April 15, 2009, QCC’s First Amended Complaint was filed in this proceeding. Ernest Communications, Inc. (“Ernest”) was identified as one of the defendants in the First Amended Complaint.

4. On May 19, 2009, I received an email from Mr. Nakahara at the Commission’s Docket Office informing me that the First Amended Complaint, as well as Instructions to Answer, were served on the defendants earlier that day. Per Mr. Nakahara’s email and the attached Instructions to Answer, Defendants were to file Verified Answers by June 18, 2009. Mr. Nakahara’s email also contained the email he had apparently sent to the defendants and it included, among other email addresses, pmasters@ernestgroup.com which I am informed and believe is the email address from Mr. Paul Masters. A true and correct copy of that email (w/o attachments) is attached hereto as Exhibit 1.

5. Mr. Masters is identified as the “co-founder and president” of Ernest on the company’s website at http://www.ernesttelecom.com/about_mgmt.html and pmasters@ernestgroup.com is listed on the Commission’s website as the contact email address for Ernest. A true and correct copy of the Commission website contact printout is attached hereto as Exhibit 2.

6. On July 1, 2009, having not received any Answer or any communications from Ernest, I sent Mr. Masters a letter by email and by U.S. Mail (to the addresses noted on the

Commission's website) in which I reminded Mr. Masters of Ernest's obligation to file an answer. I attached an electronic copy of the First Amended Complaint as well as the Docket Office's Instructions to Answer to the email. A true and correct copy of the email cover as well as the July 1, 2009 letter (w/o enclosures) is attached hereto as Exhibit 3.

7. I have never received any response from Ernest to the July 1, 2009 communications.

8. I am informed and believe and on that basis declare that on July 14, 2009, QCC counsel Adam Sherr emailed Ernest's Colorado counsel (Mr. Craig Joyce), informing Mr. Joyce that QCC had not yet received Ernest's answer in California. Mr. Sherr indicated that, if Ernest did not answer, QCC would move for default, as it had in Colorado. Mr. Sherr also informed Mr. Joyce of the July 29, 2009 California prehearing conference. Mr. Joyce did not respond to Mr. Sherr's email with respect to the California proceeding and no one appeared at the prehearing conference on Ernest's behalf.

9. On September 22, 2009, I sent another email to Mr. Masters at the email address identified on the Commission's website in which I indicated that I had not yet received any response to my July 1, 2009 communications or an Answer to QCC's First Amended Complaint. Among other things, I informed Mr. Masters that in the absence of an Answer, QCC would be "forced to bring this matter to the Commission's attention and seek appropriate relief, including but not limited to, requesting that a default judgment be entered against Ernest." A true and correct copy of the September 22, 2009 email is attached hereto as Exhibit 4.

10. As of the date of this Declaration, I have not had any response from Mr. Masters or Ernest to my September 22, 2009 email. In addition, the Commission's website for this proceeding does not have any entry indicating an Answer has been filed by Ernest nor have I received a copy of any Answer from Ernest.

11. I am informed and believe, and on that basis declare, that (a) Ernest is also a named defendant in the parallel Colorado proceeding brought by QCC with respect to secret off-tariff agreements in that state and (b) that Ernest filed an Answer in that proceeding but has not otherwise submitted any testimony or otherwise participated in that matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 23rd day of October, 2009, in Oakland California.



Leon M. Bloomfield

EXHIBIT 1

Leon Bloomfield

From: Nakahara, Martin M. [MMN@cpuc.ca.gov]
Sent: Tuesday, May 19, 2009 1:05 PM
To: lmb@wblaw.net
Cc: Bushey, Maribeth A.; Cooke, Michelle; ALJ Docket Office
Subject: FW: C.08-08-006 Email Service of Instructions To Answer First Amended Complaint letter filed 5/19/09 and related legal documents.

Importance: High

Dear Leon M. Bloomfield, Esq.

Below is a copy of the Email Service of the First Amended Complaint ("FAC") and related legal documents I effected late this morning in proceeding C.08-08-006. I could not include you bec my Email was so massive I barely got it out the door. I apologize if this has created any inconvenience.

Please call if you have any questions, but the Verified Answers are due 6/18/09.

FYI - I was unable to compare the text/claims of the FAC with the original complaint filed 8/1/08. As you know. the original seven (7) defendants all timely filed Answers thereto, and it may well be that if the text/claims of the FAC are identical, that those defendants may chose to stand on that Answer pursuant to Rule 1.12(b) without filing a new Answer.

Unless noted otherwise, all references to "RULES" or "RULES OF PRACTICE AND PROCEDURE" are to the CPUC RULES OF PRACTICE AND PROCEDURE (http://docs.cpuc.ca.gov/published/RULES_PRACT_PROC/70731.htm)

Regards,

Martin Nakahara

Legal Analyst
 Docket Office - Room 2001
 California Public Utilities Commission
 505 Van Ness Avenue
 San Francisco CA 94102-3298
 Telephone (415) 703-2291 (Direct)
 Telephone (415) 703-1929/1927 (Office)
 E-Mail: mmn@cpuc.ca.gov
 Website: www.cpuc.ca.gov

From: Nakahara, Martin M.
Sent: Tuesday, May 19, 2009 11:40 AM
To: 'Elaine.duncan@verizon.com'; 'gregkopta@dwt.com'; 'Toller, Suzanne'; 'JClark'; 'AKlein@KleinLawPLLC.com'; 'AZoracki@KleinLawPLLC.com'; 'ddahlers@integratelecom.com'; 'Greg.rogers@level3.com'; 'rl@comrl.com'; 'esther.northrup@cox.com'; 'Joelm@accessoneinc.com'; 'nlubamersky@telepacific.com'; 'Philip.macres@bingham.com'; 'eric.branfman@bingham.com'; 'thomas.hixson@bingham.com'; 'rsanchez@bluecasa.com'; 'mollyv@budgetprepay.com'; 'pmasters@ernestgroup.com'; 'mike@navtel.com'; 'jvillanueva@cleartel.com'; 'regulatory@cleartel.com'; 'devins@pcs1.net'; 'Messenger, John'; 'gstover@telekenex.com'
Cc: Bushey, Maribeth A.; Cooke, Michelle; ALJ Docket Office; ALJ Process
Subject: C.08-08-006 Email Service of Instructions To Answer First Amended Complaint letter filed 5/19/09 and related legal documents.

[Note Well - If the document is "split" or small when you open it, go to your

Toolbar at top and click "View," then, click "Print Layout." That should straighten out the document to one complete page]

Ladies & Gentlemen. This Email message constitutes electronic mail service of the following referenced documents (or electronic links thereto) pursuant to Rules 4.3 and 1.9/1.10, Rules of Practice and Procedure. Only one Law firm or one representative need execute & return the enclosed Notice and Acknowledgement of Receipt form even though more than one representative may be receiving a copy hereof on behalf of each named defendant.

- Link to Instructions to Answer First Amended Complaint letter filed electronically on April 19, 2009, which includes a copy of the Commission's Rules of Practice and Procedure, Rules 4.3, 4.4 and 1.12(b):

[101224.pdf - Instruction to Answer filed by CALJ/CLOPTON/CPUC on 05/19/2009](#)

[101225.pdf - Instruction to Answer filed by CALJ/CLOPTON/CPUC on 05/19/2009](#)

and,

- Link to First Amended Complaint, filed electronically on 4/15/09:

[100039.pdf - Amended Complaint filed by Qwest Communications Company, LLC fka Qwest Communications Corporation on 04/15/2009](#)

and,

- Link (See, Attachment Line, above) to Notice and Acknowledgement of Receipt form for Instructions to Answer First Amended Complaint letter (Word Version only).

Please call if you have any questions.

Unless noted otherwise, all references to "RULES" or "RULES OF PRACTICE AND PROCEDURE" are to the CPUC RULES OF PRACTICE AND PROCEDURE (http://docs.cpuc.ca.gov/published/RULES_PRAC_PROC/70731.htm)

Regards,

Martin Nakahara

Legal Analyst

Docket Office - Room 2001

California Public Utilities Commission

505 Van Ness Avenue

San Francisco CA 94102-3298

Telephone (415) 703-2291 (Direct)

Telephone (415) 703-1929/1927 (Office)

E-Mail: mmn@cpuc.ca.gov

Website: www.cpuc.ca.gov

EXHIBIT 2



Utility Contact System Search

The Utility Contact System (UCS) is the Communications Division's database for the primary regulatory contact for each telephone corporation operating in California. The Communications Division sends important regulatory notices to the regulatory contact for each telephone corporation via e-mail, so it is important for primary regulatory contacts to update their UCS record if their e-mail address changes. Telephone corporations: update UCS contact information by the form on the following page.

Carrier Reporting Requirements

Search Utility Name		Search Utility Number					Search	Clear			
Utility Name	Alias (DBA Name)	Utility Number	Street Address	City	State	Zip	Phone Number	Email	Utility Type	CPCN Approval I	
ERNEST COMMUNICATIONS, INC		6077	5275 TRIANGLE PKWY, SUITE 150	NORCROSS	GA	30092	(770) 242-9069	pmasters@ernestgroup.com	IER	11-09-1998	
ERNEST COMMUNICATIONS, INC		6077	5275 TRIANGLE PARKWAY, STE, 150	NORCROSS	GA	30071	(770) 242-9069		IER	11-09-1998	
ERNEST COMMUNICATIONS, INC		6077	5275 TRIANGLE PARKWAY, STE, 150	NORCROSS	GA	30092	(770) 242-9069	PMASER@ERNESTGROUP.COM	CLR	11-19-1998	
ERNEST COMMUNICATIONS, INC		6077	6475 JIMMY CARTER BLVD	NORCROSS	GA	30071	(770) 448-7788		CLR	11-19-1998	
ERNEST COMMUNICATIONS, INC		6077	5275 TRIANGLE PKWY, STE 150	NORCROSS	GA	30092	(770) 242-9069	pmasters@ernestgroup.com	CLR	11-19-1998	

Save Search Results as CSV Spreadsheet

Comments & Feedback

EXHIBIT 3

Leon Bloomfield

From: Leon Bloomfield [lmb@wblaw.net]
Sent: Wednesday, July 01, 2009 1:12 PM
To: 'pmasters@ernestgroup.com'
Cc: 'Sherr, Adam'
Subject: California Public Utilities Commission, Docket No. C-08-08-006; Qwest Communications Company LLC v. MCIMetro et al.

Mr. Masters,

Please see attached correspondence (and attachments) regarding Ernest's failure to file an Answer in the above-referenced matter and let me know if you have any questions or if you would like to discuss.

Thank you.

Leon M. Bloomfield
Wilson & Bloomfield LLP
1901 Harrison St., Suite 1620
Oakland, CA 94612
Direct: 510.625.1164
Telephone: 510.625.8250
Mobile: 510.282.6240
Fax: 510.625.8253

NOTICE: This e-mail message and all attachments transmitted with it may contain legally privileged and confidential information intended solely for the use of the addressee. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately by telephone (510.625.8250) or by replying to this email, and delete this message and all copies and backups thereof. Thank you.

WILSON & BLOOMFIELD LLP

ATTORNEYS AT LAW

1001 HARRISON STREET, SUITE 1020

OAKLAND, CALIFORNIA 94612

TELEPHONE: 510.625.8250

FACSIMILE: 510.625.8253

July 1, 2009

VIA EMAIL & U.S. MAIL

Paul Masters, President
Ernest Communications, Inc.
5275 Triangle Parkway, Suite 150
Norcross, GA 30092

Re: California Public Utilities Commission Docket No. C-08-08-006
Qwest Communication Company LLC v. MCI Metro et al.

Dear Mr. Masters:

As I believe you are aware, Ernest Communications, Inc. ("Ernest") has been named as a defendant by Qwest Communications Company, LLC ("QCC") in its First Amended Complaint filed on April 15, 2009 in the above-referenced proceeding before the California Public Utilities Commission. Per the Instructions to Answer which were served by the Commission on May 19, 2009, defendants were to, among other things, file and serve Answers to the First Amended Complaint by June 18, 2009.

However, as of today, QCC has not received a copy of Ernest's Answer nor does the Commission website indicate that one has been filed. In addition, I am not aware of any communications between Ernest and QCC regarding a possible extension of time to respond. Please let me know immediately if you believe that your Answer has indeed been filed. However, if I do not hear from you by the end of this week, or I do not otherwise receive a copy of Ernest's Answer by next Wednesday, July 8, 2009, we will be forced to bring this matter to the Commission's attention and seek appropriate relief.

For your reference, I am attaching electronic copies of the First Amended Complaint and the Instructions to Answer to this letter.

Thank you for your anticipated cooperation.

Leon M. Bloomfield



Attorneys for Qwest
Communications Company LLC

cc: Adam Sherr (via email)
Craig D. Joyce (via mail)

EXHIBIT 4

Leon Bloomfield

From: Leon Bloomfield [lmb@wblaw.net]
Sent: Tuesday, September 22, 2009 11:58 AM
To: 'pmasters@ernestgroup.com'
Cc: 'Sherr, Adam'
Subject: California Public Utilities Commission, Docket No. C-08-08-006; Qwest Communications Company LLC v. MCIMetro et al.

Mr. Masters,

I do not believe I have received any response to my July 1, 2009 communications (see email below) regarding Ernest Communication's failure to file an Answer to the Qwest Communications Company complaint in the above-referenced proceeding. In addition, at least as of this morning, the Commission's docket does not indicate that any Answer has been filed on behalf of your company.

If you believe that is incorrect, please let me know immediately. Please note that in the absence of an Answer, we will be forced to bring this matter to the Commission's attention and seek appropriate relief including, but not limited to, requesting that a default judgment be entered against Ernest.

Thank you.

Leon M. Bloomfield
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Oakland, CA 94612
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Mobile: 510.282.6240
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From: Leon Bloomfield [mailto:lmb@wblaw.net]
Sent: Wednesday, July 01, 2009 1:12 PM
To: 'pmasters@ernestgroup.com'
Cc: 'Sherr, Adam'
Subject: California Public Utilities Commission, Docket No. C-08-08-006; Qwest Communications Company LLC v. MCIMetro et al.

Mr. Masters,

Please see attached correspondence (and attachments) regarding Ernest's failure to file an Answer in the above-referenced matter and let me know if you have any questions or if you would like to discuss.

Thank you.

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ATTACHMENT B

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

Qwest Communications Company, LLC (U5335C),

Complainant,

vs.

MCImetro Access Transmission Services, LLC (U5253C), XO Communications Services, Inc. (U5553C), TW Telecom of California, Ip (U5358C), Granite Telecommunications, Inc. (U6842C), Advanced Telecom, Inc. dba Integra Telecom (fdba Eschelon Telecom, Inc.) (U6083C), Level 3 Communications (U5941C), and Cox California Telecom II, LLC (U5684C), Access One, Inc. (U6104C), ACN Communications Services, Inc. (U6342C), Arrival Communications, Inc. (U5248C), Broadwing Communications, LLC (U5525C), Budget Prepay, Inc. (U6654C), Bullseye Telecom, Inc. (U6695C), Ernest Communications, Inc. (U6077C), MPower Communications Corp. (U5859C), Navigator Telecommunications, LLC (U6167C), nii Communications, Ltd. (U6453C), Pacific Centrex Services, Inc. (U5998C), Paetec Communications, Inc. (U6097C), Telekenex, Inc. (U6647C), Telscape Communications, Inc. (U6589C), U.S. TelePacific Corp. (U5721C), and Utility Telephone, Inc. (U5807C)

C.08-08-006

Defendants.

DECLARATION OF DEREK CANFIELD

I, Derek Canfield, hereby declare:

1. I am employed by TEOCO Corporation, where I am presently Executive Director of Usage Audit and Analysis. I have been employed by TEOCO Corporation since 2005. Within my role, I manage a team of highly trained usage auditors who are responsible for the audit and analysis of switched access and wholesale usage invoices for many of the

leading local, wireless, and long distance carriers in North America, including Qwest Communications Company, LLC (“QCC”).

2. The purpose of this declaration is to describe the financial impact upon QCC of the rate discrimination at issue in this complaint as it relates to Ernest Communications, Inc.’s off-tariff agreements with [BEGIN AT&T CONFIDENTIAL] [REDACTED] [END

AT&T CONFIDENTIAL] In particular, my declaration will describe the difference between the charges actually incurred by QCC for intrastate switched access services and the charges it would have incurred had it been charged for those service pursuant to the terms of those agreements.

Overview

3. [BEGIN QCC CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END QCC CONFIDENTIAL] A summary of my calculations can be found in Confidential Exhibit DAC-1.

5. Although I will discuss in greater detail below how I performed my analysis, I essentially calculated what Ernest actually billed QCC for intrastate switched access services and compared it to what Ernest would have been billed QCC had it been charged according to the terms of the secret off-tariff Ernest agreements at issue in this case. I performed this calculation for originating switched access, terminating switched access and 800 query charges.

[BEGIN AT&T CONFIDENTIAL] [REDACTED]

6. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

7. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

8. [REDACTED]

[REDACTED]

[END AT&T CONFIDENTIAL]

9. I created separate blended composite rates for what I understand to be the four types of intrastate switched access services provided by Ernest to QCC, i.e., originating direct, originating indirect; terminating direct and terminating indirect. A summary of those composite rates – as well as a comparison to the rates being charged to QCC during the same time period for those same services – is included in Confidential Exhibit DAC-1 to this declaration.

10. [BEGIN AT&T CONFIDENTIAL] [REDACTED]

[REDACTED] [END

AT&T CONFIDENTIAL] Those rates – and a comparison of those rates - are also noted on Exhibit DAC-1.

Electronic Invoices

11. For essentially all of the minutes and dollars included in my analysis (over 99% of both), QCC had the electronic bill detail from Ernest needed to complete the

calculation. Thus, I was able to extract the minutes of intrastate use from the switched access invoices. I then multiplied those minutes by the corresponding [BEGIN AT&T

CONFIDENTIAL] [REDACTED]

[END AT&T CONFIDENTIAL] The financial impact, therefore, was calculated by subtracting the amount QCC would have been billed at the contract rate from the amount it was actually billed.

12. The electronic invoices also provided me with information as to what percentage of Ernest's total monthly invoices was comprised of intrastate switched access charges (including intrastate 800 query charges). [BEGIN QCC CONFIDENTIAL] [REDACTED]

[REDACTED] [END QCC CONFIDENTIAL] See

Confidential Exhibit DAC - 1.

Manual Invoices

13. For the remaining less than 1 percent of the minutes and dollars included in my analysis, QCC did not receive, or at least have access to, the electronic detail and thus, I had access only to the total dollars billed on a particular invoice. For this very small subset of invoices, I applied the percentage of intrastate switched access from the electronic invoice discussed above [BEGIN QCC CONFIDENTIAL] [REDACTED] [END

QCC CONFIDENTIAL] to the total amount of the manual bills to derive a reasonable

estimate of the intrastate switched access charges on those manual invoices. I then

applied the [BEGIN AT&T CONFIDENTIAL] [REDACTED] [END

AT&T CONFIDENTIAL] discount [BEGIN QCC CONFIDENTIAL] [REDACTED]

[END QCC CONFIDENTIAL] to determine the financial impact of this remaining 1 percent. A summary of that calculation is contained in Confidential Exhibit DAC-1.

Composite Rates

14. Because Ernest billed QCC using single composite rates, but – at least as of June 2003 - billed [BEGIN AT&T CONFIDENTIAL] [REDACTED] [END AT&T CONFIDENTIAL] using rates for the individual elements covered under the Pacific Bell and Verizon California intrastate tariffs, I created composite rates for Pacific Bell and Verizon to utilize within my analysis. Specifically, I created a composite end office rate which included both End Office Local Switching and Call Set-up charges. Because Pacific Bell and Verizon’s Call Set Up charge is billed on a per call basis, and Ernest bills a composite per-minute-of-use rate, I divided the Call Set Up rate by the average call duration for each ILEC respectively to convert this element to rate a per minute of use.

15. I also created a composite transport rate which included the Pacific Bell and Verizon tariff elements of Tandem Switched Transport Facility, Tandem Switched Transport Termination, Tandem Switching and Interconnection charge. Because Tandem Switched Transport Termination is a per-minute-per-mile rate, I multiplied the rate by the average mileage between the Ernest end office and the appropriate tandem to convert the rate to a per minute rate.

16. Lastly, I weighted the ILEC cost per minute by the quantity of minutes originating from or terminating to Ernest in the appropriate ILEC territory. The composite rates, average mileage, average call durations, percentage direct v. tandem routed traffic and weighting of traffic by ILEC are all incorporated into my analysis. See Confidential Exhibit DAC- 1.

17. Based on the [BEGIN AT&T CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END AT&T
CONFIDENTIAL]

800 Query Charges

18. Ernest also charged QCC more for intrastate 800 query charges than it would have under the [BEGIN AT&T CONFIDENTIAL] [REDACTED] [END AT&T CONFIDENTIAL] 800 query charges, unlike most switched access charges, are assessed on a per call (not per minute) basis. They are not, however, assessed on all intrastate calls but only those that are delivered to 8XX (toll free) numbers. I am informed and believe that 8XX numbers are unique in that as a general matter, in order to deliver a toll-free call, the traffic must generally be (a) “dipped” into a nationwide toll-free database which identifies the carrier that is associated with the toll-free number, (b) switched and (c) transported to the IXC (or other carrier that is associated with the 8XX number). Those services are often provided by tandem providers (like Ernest). The “dip” is generally referred to as the 800 Query charge. If the 8XX call begins and ends in different states, it is categorized as an *interstate* call, and the 800 query charge is assessed at interstate rates. If both ends of the 8XX call are within a

state, the call is categorized as *intrastate*, and the LECs' intrastate 800 query charge applies. My analysis focuses exclusively on such intrastate 8XX calls.

19. [BEGIN AT&T CONFIDENTIAL] [REDACTED]

[END AT&T CONFIDENTIAL] Ernest, however, charged QCC based on what I believe were its tariff rates which were on average [BEGIN QCC CONFIDENTIAL] [REDACTED] [END QCC CONFIDENTIAL]

I declare under penalty of perjury under the laws of the State of Kansas that the foregoing is true and correct.

/s/

Dated: October 26, 2009

Derek A. Canfield

Exhibit DAC-1 has been designated as Confidential by QCC pursuant to GO 66-C and Public Utility Code section 583 and is not included in this version of Attachment B.

CERTIFICATE OF SERVICE

I, Richard M. Marshall, the undersigned, hereby declare that on October 26, 2009, I caused a copy of the foregoing:

MOTION OF QWEST COMMUNICATIONS COMPANY, LLC's (U-5335-C) FOR ENTRY OF DEFAULT AGAINST ERNEST COMMUNICATIONS (U-6077-C)

[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 26, 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: OCTOBER 23, 2009

[Download the Comma-delimited File](#)
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[TOP OF PAGE](#)

[BACK TO INDEX OF SERVICE LISTS](#)