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

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

**O1 COMMUNICATIONS, INC. (U-6065-C)
APPLICATION FOR REHEARING OF DECISION D.16-09-005
GRANTING AT&T MOBILITY MOTION TO DISMISS**

[PUBLIC VERSION]

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Pursuant to the California Public Utility Commission's ("CPUC" or "Commission") Rules of Practice and Procedure 16.1, O1 Communications Inc. ("O1") respectfully files this Application for Rehearing of the *Commission's Decision Granting Motion to Dismiss Complaint* in this proceeding ("Decision" or "D.16-09-005") issued September 20, 2016. The Commission's Decision to grant New Cingular Wireless, PCS, LLC and AT&T Mobility Wireless Operations Holdings, Inc.'s (collectively "ATT-M") Motion to Dismiss O1's entire complaint on the eve of evidentiary hearings erred legally and procedurally.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Decision suffers from several legal and procedural errors that have resulted not only in an incorrect outcome to the case, but also in the denial of O1's due process rights. First, the Decision fails to apply the appropriate standard for a motion to dismiss since it violated the requirement that the decision maker accept all facts pled in the Complaint as true. Second, the Decision fails to consider *all undisputed material* facts in its evaluation of O1's Complaint, particularly O1's discrimination claim, which the Commission is required to consider under standards governing motions to dismiss and motions for summary judgment. Additionally, the Decision improperly treats O1's first cause of action – that ATT-M improperly refused to maintain direct interconnection with O1 – as a condition precedent to each of O1's additional causes of action rather than considering each of O1's causes of action as standalone claims for relief pled under specific facts and separate legal authority.

Furthermore, the Decision denies O1 its due process right to an opportunity to be heard. Because this is a complaint case that involves a claim of discrimination, Commission precedent requires a factual examination based on all of the evidence, not just portions of the parties' opening testimony. The Scoping Ruling determined that a hearing is required and that ruling has

not been changed, yet the Decision forecloses O1's right to a factual examination of its claims based on the entire record, as would have been done in an evidentiary hearing. The Decision therefore violates the Commission's own precedent and O1's due process rights. O1 is entitled to a full and fair consideration of *all* material facts either through a motion for summary judgment based on all the evidence developed by the parties through discovery or an evidentiary hearing.

As set forth in detail below, the Commission should grant rehearing of its Decision to correct these errors and allow O1 to present its evidence either in the form of its already filed Motion for Summary Judgment¹ or in an evidentiary hearing with the opportunity to cross examine ATT-M's witnesses.

II. STANDARD OF REVIEW

Cal. Pub. Util. Code § 1732 and Rule 16.1 govern the rehearing of Commission decisions. Section 1732 permits rehearing if a Commission decision is unlawful. Rule 16.1(c) similarly permits rehearing when a decision of the Commission is based on legal or factual errors. The Decision in this case should be reheard because it is unlawful and contains both legal and factual errors.

III. DISCUSSION

A. The Decision Errs Procedurally By Failing To Apply The Appropriate Standard To ATT-M's Motion To Dismiss.

ATT-M filed its Motion to Dismiss in February 2016 and the issues were fully briefed in March 2016. Oral argument on the Motion was heard by the Administrative Law Judge on April 18, 2016. ATT-M's Motion and all of the briefings and oral argument preceded the filing of any testimony and accompanying exhibits by the parties months later, in July 2016. The Motion,

¹ For the Commission's convenience, O1 attaches hereto as Attachment A, its Motion for Partial Summary Judgment filed August 17, 2016.

Response and Reply were based only on the Complaint, Answer, O1 Motion for Temporary Restraining Order (“TRO”), ATT-M Response to the Motion for TRO and accompanying exhibits. ATT-M's Motion argued that O1 allegedly failed to state a claim because federal law does not require direct connection between carriers.² ATT-M argued that the entire Complaint could be dismissed as a matter of law because interpretation of a statute or regulation, namely 47 U.S.C. §251(a) governing interconnection between non-ILECs, "is a pure legal issue."³ ATT-M contended that each of O1's claims rested on a false assumption that ATT-M was required to directly interconnect with O1 pursuant to Section 251(a).⁴

The gravamen of the standard for motions to dismiss is whether the complaint as pled fails to present a cognizable claim.⁵ 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.”⁶ 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 the facts asserted in the complaint are true.*"⁷ Moreover, a granting of a motion to dismiss before a hearing is a drastic remedy, and all doubts must be

² ATT-M Motion to Dismiss at pp. 2-4, 6-12.

³ ATT-M Motion to Dismiss at p. 4.

⁴ *Id.* at pp. 2-4, 6-13 (see e.g., at p. 2: "The entirety of O1's Complaint is based on the erroneous premise that the law compels ATT-M to interconnect with O1 directly. Because that premise is contrary to federal law, ATT-M respectfully requests that the Commission dismiss the Complaint.")

⁵ Fed. Rule Civ. Proc. 12(b)(6); *Garza v. Alvara*, 2016 U.S. Dist. LEXIS 88923, *7-8 (E.D. Cal. July 8, 2016).

⁶ *Garza*, at *14-15.

⁷ *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1170 (Cal. App. 6th Dist. 2008) (emphasis added; internal citations omitted).

resolved against the moving party.⁸

In its Complaint, in addition to arguing that ATT-M violated federal and state law by failing to allow O1 to continue to maintain direct connection with ATT-M, O1 cited to applicable law and pled sufficient facts to sustain an independent cause of action against ATT-M for discriminating against O1 by failing to offer O1 interconnection on the same rates, terms and conditions as those offered to other similarly situated carriers.⁹ O1 cites to CPUC Code Sections 453(a) and 728 which prohibit public utilities from engaging in discriminatory and preferential behavior. O1 pled facts stating that ATT-M entered into interconnection agreements with other carriers on more favorable terms and conditions than ATT-M was willing to offer to O1, including agreeing to direct interconnection at bill and keep – zero rates.¹⁰

Under the standard for motions to dismiss, the Commission was required to accept these facts as true and to resolve all doubts *against* granting ATT-M's Motion. In dismissing O1's discrimination claim, however, the Decision improperly failed to accept the facts O1 presented demonstrating that ATT-M offers more favorable rates, terms and conditions for interconnection to similarly situated carriers. ATT-M disputed these facts. The Decision cites to ATT-M's testimony claiming that, "The rates, terms and conditions offered to O1 during the negotiations from the onset of negotiations through December 2015 were substantively similar to rates, terms and conditions offered to other transit carriers like O1"¹¹ but resolved the factual dispute against O. The Decision based its dismissal of O1's discrimination claim at least in part on its resolution

⁸ *MCI Telecommunications Corporation v. Pacific Bell*, D. 97-09-113, 75 CPUC 2nd 695 at 23 (1997) (refusing to dismiss complaint alleging that Pacific Bell violated state and federal law and orders of this Commission by willfully or negligently failing to provide the means for prompt and efficient resale of local exchange service); *see also, Pettis v. General Tel. Co* (1967) 66 Cal. 2d 503.

⁹ O1 Complaint at ¶¶74-79.

¹⁰ *Id.*

¹¹ Decision at p. 15.

of the factual dispute in favor of ATT-M. Not only did the Decision improperly fail to accept the facts pled as true in its dismissal of the discrimination claim, it also relied on evidence that was not available to the parties at the time of the briefing and oral argument on the Motion to Dismiss and improperly resolved a factual dispute in the context of a Motion to Dismiss. The plain language of the rules governing both motions to dismiss and motions for summary judgment clearly prohibits the decision maker from dismissing claims without an evidentiary hearing when material factual disputes exist.¹²

The Decision errs legally for several reasons: it fails to accept the facts pled in the Complaint as true; it resolved doubts in favor of, rather than against, the moving party (ATT-M) and it converted ATT-M's Motion to Dismiss to a Motion for Summary Judgment and then applied the wrong legal standard. Therefore, the Commission should grant rehearing with regard to its dismissal of O1's discrimination claim.

B. The Commission Failed to Consider All Material Undisputed Facts in the Record in Dismissing O1's Discrimination Claim.

As discussed above, rather than base its Decision only on the pleadings that were discussed in the briefings and oral argument presented with regard to ATT-M's Motion to Dismiss, the Commission also cites to portions of the parties' opening testimony – filed months after the briefing was closed on the Motion to Dismiss - to support its dismissal of O1's Complaint, particularly the discrimination claim.¹³ In order to decide a case on a motion to dismiss or motion for summary judgment, it is mandatory for the Commission to take account of the entire record in order to determine *whether based on all of the material undisputed facts in*

¹² Cal. Code of Civ. Proc. §437c; *In re Western Gas Resources-California, Inc.* (1999) D. 99-11-023.

¹³ Decision at pp. 13-17.

*the record, the moving party is entitled to judgment as a matter of law.*¹⁴ In order to be able to determine whether there exists a genuine dispute of material fact, the decision maker must review the entire factual record. Even more plainly stated under California law, the decision maker must determine whether there exists a “triable issue of material fact,” and “shall consider all of the evidence...”¹⁵ 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 Procedure¹⁶ 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.”

Here the Decision improperly omits consideration of substantial portions of the record, and bases the dismissal solely on its own selection of a few statements taken from the parties’ opening testimony, which created outside the context of the Motion to Dismiss and unavailable for O1 to respond to at the time briefing was closed on the Motion to Dismiss.¹⁷ O1 submitted substantial 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.¹⁸ O1 was unable to present such detailed evidence in its Opening Testimony – which is the only testimony the Commission considered in its evaluation of the motion to dismiss – because it had to engage in a protracted discovery dispute, including a

¹⁴ Cal. Code of Civ. Proc. §437c; *In re Western Gas Resources-California, Inc.* (1999), D. 99-11-023.

¹⁵ Cal. Code Civ. Proc. § 437c(c).

¹⁶ “The Commission shall render its decision based on the evidence of record.”

¹⁷ Decision at pp. 13-16.

¹⁸ See e.g. attached hereto exhibits Attached to O1's Reply and Rebuttal Testimony, Confidential Exhibits JM DD, U, TT, UU, VV and summary chart, JM WW.

motion to compel, in order to obtain the evidence from ATT-M. Once it obtained the evidence, O1 included the evidence in its Reply and Rebuttal Testimony, which clearly demonstrates what O1 alleged in its Complaint and its Opening Testimony that ATT-M discriminated against O1 in violation of state and federal law by offering and agreeing to rates, terms and conditions for interconnection with several third party similarly situated carriers which ATT-M refused to offer and agree to with O1.¹⁹

The Decision, however, cites only to the parties' Opening Testimony. ATT-M argued in its comments that the Proposed Decision was not required to cite to everything it took into account and there was no reason to believe that the Proposed Decision omitted O1's Reply and Rebuttal testimony. But the timing of the Proposed Decision demonstrates unequivocally that it could not have taken into account at least the Rebuttal Testimony, which was filed and served shortly before 5pm on Friday July 22, 2016 and the Proposed Decision was issued before 10 a.m. on the following Monday, July 25, 2016. The only way the Rebuttal Testimony could have been reviewed and reflected in the Proposed Decision was if Commission staff worked over the weekend, which would be highly unusual for a non-emergency matter. Given the processing time required by the STAR unit, which is typically several days to a week, it is also unclear whether the Proposed Decision could have taken into account the Reply Testimony, which was filed on July 15, 2015, only five business days before the Proposed Decision was issued.

The Commission should grant rehearing to correct this serious procedural and legal error and consider all material facts relating to O1's discrimination claim.

¹⁹ *Id.*

C. O1's Claim of Discrimination Stands Regardless of Whether the Law Allows ATT-M to Choose Direct or Indirect Interconnection.

The Decision also errs legally by treating one issue as a condition precedent to all claims in O1's Complaint rather than treating each claim as an independent cause of action. Specifically, the Decision concludes erroneously that the whole premise of O1's Complaint revolves around the first cause of action²⁰ that is, whether federal law requires a carrier to offer direct connection.²¹ The Decision fails to recognize that O1 clearly stated cognizable claims based on additional facts and law, including discrimination. O1's discrimination claim has independent validity and should not have been dismissed even if it were correct that ATT-M did not, as a matter of law, have an obligation to offer and to agree to provide O1 direct interconnection. Rather, the law provides that once ATT-M chose to interconnect directly with other carriers, ATT-M's own conduct triggered its non-discrimination obligations under state and federal law to offer the same terms and conditions for interconnection to other carriers similarly situated.²²

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.²³ 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

²⁰ Decision at p.18.

²¹ Complaint at ¶¶58-67.

²² *Qwest Communications Co. v. MCI Metro 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; Complaint at ¶¶74-79.

²³ *Sunland Refining Corp.*, 80 Cal PUC at 806, 816.(1976).

or traffic.²⁴ Further, discrimination must also be the proximate cause of the injury which is the source of complaint.²⁵ Discrimination forbidden by the statute "must be undue, taking into consideration all of the surrounding facts and circumstances."²⁶ Thus, analysis of discrimination necessarily must involve an analysis of the facts. The Decision fails to analyze these facts related to ATT-M's discrimination against O1 as demonstrated by Confidential Exhibits JM DD, U, UU, TT, VV and WW.

Rather, the Decision 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.²⁷ But the Decision 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 was obligated to offer direct connection to O1 on a non-discriminatory basis by Section 453.²⁸

The Decision misapprehends 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. If permitted to brief the issue on summary judgment, O1 will demonstrate that the unrebutted evidence in the record demonstrates that ATT-M offers direct connection agreements to other similarly situated carriers but not O1 and therefore, it is

²⁴ *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).

²⁵ *Ad Visor, Inc.*, 82 Cal PUC 685, 698 (1977).

²⁶ *In re Atchison, Topeka and Santa Fe Railway Company*, 43 CRC 25, 34 (1940).

²⁷ Decision at p. 14.

²⁸ 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.

discriminating against O1 as a matter of law.²⁹ If the Commission were to determine that factual issues exist on the claim of discrimination, it must allow the parties to proceed to hearing to allow the Commission to resolve the material factual disputes.

In the Commission's *Order Granting Rehearing* of a Qwest Complaint alleging discrimination by several local exchange carriers against Qwest with regard to inter-carrier compensation agreements with other carriers for long distance charges, the Commission stated:

We have reviewed Qwest's application for rehearing, and have concluded that Qwest's complaint should not have been dismissed on the ground for failing to state a cause of action. Therefore, we grant rehearing to consider the allegations of discrimination asserted in Qwest's complaint. We note a few guiding principles: To prove discrimination, a carrier will have to show that it was similarly situated and that there was no rational basis for such different treatment. (*Order Denying Rehearing of Decision* (D.) 09-12-018 [D. 10-04-054] (2004) ___ Cal. P.U.C.3d___ at p. 7 (slip op.)) "A showing that rates lack uniformity is by itself insufficient to establish that they are unreasonable and hence unlawful...." (*Order Denying Rehearing of Decision* (D.) 06-07-030) [D.07.01.020] (2007) ___ Cal.P.U.C.3d___ at p. 7 (slip op.) relying on *Hansen v. City of San Buenaventura* (1986) 42 Cal. 3d 1172, 1180. "Numerous characteristics of a particular customer – volume, calling patterns, cost of negotiation, etc. –could be sufficient to distinguish one customer from another." (*Re Alternative Regulatory Frameworks for Local Exchange Carriers* [D.94-09-065] (1994) 56 Cal. P.U.C.2d 117, 243.³⁰

Just as the Commission did in the *Qwest* discrimination case, the Commission here should grant rehearing in order for it properly to evaluate O1's discrimination claim under Section 453(a) considering all material facts in the record relating to the rates, terms and conditions offered to other similarly situated carriers compared to the rates, terms and conditions offered to O1. To the extent those facts are undisputed, the issue may be resolved on summary judgment evaluating *all* relevant evidence. To the extent material facts are in dispute, O1 is entitled to a hearing.

²⁹ See Attachment A, O1's Motion for Partial Summary Judgment filed August 17, 2016 at pp. 8-13.

³⁰ Qwest Order Granting Rehearing at pp. 4-5.

D. The Decision Denies O1 Its Procedural Due Process Rights to Present All of its Evidence for Consideration to the Commission.

Because this is a complaint case, which is a quasi-judicial proceeding, O1 is entitled to the Commission's engagement of a full and fair consideration of all of the evidence, not just select portions of its opening testimony.

Section 1701.1(a) provides that the Commission, "consistent with due process, public policy and statutory requirements, shall determine whether a proceeding requires a hearing."³¹

In Re Competition for Local Exchange Service, the Commission stated:

Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.³²

Quasi-judicial proceedings require the opportunity for a hearing.³³ Section 1705 of the Public Utilities Code provides that a party aggrieved by discrimination has a right to a hearing and otherwise the right to participate in all proceedings.³⁴ The Scoping Ruling classified this case as quasi-judicial and determined that a hearing is required. That determination has not been changed. By dismissing O1's Complaint through a motion to dismiss without consideration of all material facts in the record, the Commission deprived O1 of its right to be heard with regard to whether ATT-M discriminated against it relating to interconnection.

On February 26, 2016, ATT-M filed its Motion to Dismiss based only on the Complaint, Answer, Motion for TRO and Response to the Motion for TRO. Briefing closed in March 2016

³¹ *In the Matter of the Joint Application of Verizon Communications, Inc. and MCI, Inc. to Transfer Control of MCI's California Utility Subsidiaries to Verizon*, D. 05-11-029, 2005 Cal. PUC LEXIS 517, 46-47 (emphasis added).

³² D. 95-09-121, 2005 Cal. PUC LEXIS 517 at 13-14.

³³ Cal. Pub. Util. Code §1705.

³⁴ *California Portland Cement Co. v. Public Utilities Com.* (1957) 49 Cal. 2d 171.

and oral argument was held April 18, 2016. After the briefing and oral argument were closed, the parties engaged in extensive discovery (including O1 filing a Motion to Compel ATT-M to produce agreements between it and other carriers) and prepared and submitted three rounds of testimony and voluminous exhibits. The day after the rebuttal testimony was submitted (at the close of business), the Administrative Law Judge issued his 24-page Proposed Decision, which was ultimately adopted by the Commission. Reply testimony and exhibits had also been submitted only a week before that. The lack of any discussion of the relevant sections of the reply or rebuttal testimony or the accompanying exhibits in the Decision as well as the timing of issuance of the 24-page Proposed Decision, both indicate that the Administrative Law Judge failed to consider a substantial portion of material evidence in its ruling. The Administrative Law Judge could have cured this procedural error by requesting that the parties update their briefing on the Motion to Dismiss to incorporate analysis of the evidence presented in the testimony and accompanying exhibits. But, he chose not to.

Given that this is a complaint case, an evidentiary hearing was appropriate to examine factual issues which could not be dispensed with on a motion to dismiss or a motion for summary judgment.³⁵ At a minimum, O1 should have been allowed to present all evidence to the Commission in the form of a summary judgment motion in order to permit O1 to discuss *all* relevant and material evidence relating to its claims, particularly the discrimination claim, which as shown above, requires fact intensive analyses.

The Decision, if allowed to stand, will illegally deny O1 its due process rights to have the opportunity to be heard and in the case of disputed facts, the opportunity to cross examine ATT-

³⁵ *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). Qwest Order Granting Rehearing at pp. 4-5.

M's witnesses with regard to O1's discrimination claim. Thus, the Commission must grant this request for rehearing.

E. Precedential Value of Ruling in This Proceeding

An additional basis for dismissing O1's Complaint set forth in the Decision is the purported precedential value of this case. The Decision 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.³⁶

This conclusion is legal error. The issues raised in O1's Complaint relate to the specific conduct of ATT-M and its failure to enter into a direct connection agreement at bill and keep with O1, despite its choice to do so with 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 any event, it is unreasonable and a violation of O1's due process rights 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.

IV. CONCLUSION

For all of the reasons set forth above, the Decision should be reheard because it is deeply flawed from a procedural, factual and legal standpoint. The Commission should grant rehearing

³⁶ Decision at p. 19-20.

of the Decision and permit O1 to present its evidence either through a Motion for Summary Judgment, which sets forth the entire evidence in the record on the issue of discrimination or permit the parties to proceed to trial and provide O1 with the opportunity to exercise its due process rights of cross examination.

Signed and dated October 20, 2016 at Walnut Creek, CA.

Respectfully submitted,

/s/ Anita Taff-Rice

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