STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

QWEST COMMUNICATIONS COMPANY, LLC,

Complainant

v. **Case 09-C-0555**

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, XO COMMUNICATIONS SERVICES, INC., GRANITE TELECOMMUNICATIONS, INC., BROADWING COMMUNICATIONS, LLC, AND JOHN DOES 1-50,[1]

Respondents

PETITION FOR REHEARING OF QWEST COMMUNICATIONS COMPANY, LLC

Qwest Communications Company, LLC ("QCC"), by and through its undersigned counsel, hereby petitions for rehearing of portions of the Commission's March 20, 2012 Order Dismissing Complaint in Part, Initiating Further Investigation and Addressing Pending Discovery Requests ("Order"). QCC's petition is made pursuant to Section 22 of the Public Service Law and 16 NYCRR § 3.7. In particular, QCC respectfully requests that the Commission reconsider its dismissal of the claims against MCImetro Access Transmission Services, LLC ("MCI"), and its ruling limiting the retroactive refund period to July 2003.

I. BACKGROUND

This proceeding was commenced on July 3, 2009, by the filing by QCC of a formal complaint against several Competitive Local Exchange Carriers ("CLECs") operating in New York, for their unlawful failure to comply with this Commission's requirements regarding the

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[1] When commenced, this proceeding named tw telecom ny L.P. (tw) as a respondent. By stipulation filed on September 14, 2009, tw was removed as a respondent without prejudice. Accordingly, QCC has revised the caption of this proceeding to reflect that action.

filing of off tariff contracts, and for the respondents' undue and unlawful discrimination against QCC in the provision of intrastate switched access services. At the time the formal complaint was filed, QCC also submitted a request for issuance of three subpoenas duces tecum, directed to AT&T, MCI and Sprint, relating to the unfiled, off-tariff intrastate switched access agreements executed between these IXCs and New York CLECs, the subject of QCC's formal complaint. QCC urged the Commission to issue the subpoenas in order to develop relevant facts, and to identify other CLECs which had engaged in unlawful discrimination against QCC. The process proposed by QCC would have mirrored the process which has been efficiently followed in the parallel Colorado, California and Florida commission proceedings.

On August 28, 2009, MCI filed a motion to dismiss the complaint and QCC's request for issuance of the subpoenas. On or about the same date, Respondents Broadwing Communications, LLC, Granite Telecommunications, LLC and XO Communications Services, Inc. filed answers to QCC's complaint. No action was taken by the Commission on QCC's complaint until the instant Order was issued on March 20, 2012.

In the Order, the Commission appropriately concludes that refunds are potentially owing from New York CLECs.[2] However, the Order incorrectly grants MCI's motion to dismiss, based on findings and conclusions that MCI's and AT&T's "reciprocal" switched access discount arrangement was an "essential component of those agreements"[3]; that such an arrangement was not unreasonable and was in fact was justified;[4] and that QCC "would not have been able to adopt the terms of [the MCI-AT&T] agreement because it lacked a "CLEC affiliate in New York

2 Order, at 11-12.

3 Order, at 9.

4 Order, at 11.

capable of terminating intrastate switched access traffic."[5] The Order also expresses a concern about disturbing the order of the United States Bankruptcy Court, which approved a settlement agreement between Worldcom and AT&T that, in part, led to the subject switched access agreement.[6]

As discussed in greater detail below, the Order errs *as a matter of law* for several reasons. It misapplies and/or ignores the standard by which motions to dismiss are evaluated in New York. It is premised on untrue and unproven facts. And, lastly, it denies QCC a full and fair opportunity to gather information – information in the sole control of MCI – to dispel the unsupportable allegations on which MCI bases (and on which the Order grants) its motion to dismiss.

Turning to the period of the refunds, the Order (at footnote 15) prescribes that any potential refunds owed by New York CLECs to QCC will be limited to the period of July 2, 2003 forward. This ruling, which was reached without the benefit of detailed briefing on the issue, fails to recognize that the failure of the CLECs to disclose their special pricing arrangements – as required by Commission rule – prevented QCC from discovering the violations and acting to protect its rights. Accordingly, QCC urges the Commission to hold that QCC's causes of action did not begin to accrue until it knew or should have known that particular CLECs were engaging in unlawful rate discrimination in New York concerning bottleneck switched access services.

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5 Order, at 11.

6 Order, at 10.

II. STANDARD OF REVIEW

Rehearing should be granted when the Commission commits an error of law, an error of fact or when new circumstances warrant a different determination.[7] As set forth in sections III and IV below, QCC identifies errors of both fact and law which should result in grant of rehearing, and upon such rehearing, (a) reinstatement of all claims against MCI and (b) adjustment of the period for which refunds should be available.

A motion to dismiss, based upon allegations that a complainant has failed to state a cause of action, must be denied unless there would be no basis for finding for the complainant, even if all facts alleged in the complaint were proved true.[8] As the Appellate Division held in a case cited by the Commission in the Order, it "is axiomatic that on a motion to dismiss pursuant to CPLR 3211(a)(7), the court 'must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable influence, and determine only whether the facts as alleged fit within any cognizable legal theory.'"[9] The question to be decided on a motion to dismiss for failure to state a cause of action is whether any valid cause of action can fairly be gathered from the allegations of the complaint. The *sole criterion* is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest *any* cause of action cognizable at law, a motion for dismissal will fail."[10]

While these governing standards are beyond clear, and in fact are cited in the Order, the Order seemingly ignores them in granting MCI's motion to dismiss. The Order looks well beyond the "four corners" of the complaint, and not only considers extrinsic factual allegations

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7 16 NYCRR § 3.7(b).

8 Arbitration of Manhattan Tel., Case 04-C-1176, 2006 NY PUC LEXIS 419 (2006).

9 Collins v. Telcoa Int'l Corp., 283 A.D.2d 128 (2001).

10 Johnson v. Jam. Hosp., 62 N.Y.2d 523 (1984) (emphasis added).

made by MCI, but evaluates their sufficiency and judges them to be reasonable and MCI's conduct to be justified. Unfortunately, the Order prematurely makes findings and conclusions without the benefit of an evidentiary record, and without having permitted QCC to conduct the discovery which would permit it to rebut MCI's assertions. As such, the Order manifests errors of both law and fact.

III. IDENTIFICATION OF ERRORS

Rehearing is sought to correct the following errors of law and fact. Each of these errors is discussed in greater detail below.

* The Order errs in granting MCI's motion to dismiss in an arbitrary and capricious manner, and despite the existence of genuine issues of material fact.

* The Order errs in evaluating MCI's motion to dismiss, by considering and relying upon facts outside of the four corners of the Complaint.

* The Order errs in evaluating MCI's motion to dismiss, by failing to accept all facts and inferences in QCC's favor.

* The Order errs to the extent it implicitly treats MCI's motion to dismiss as a motion for summary judgment, by failing to properly notify the parties thereof and by failing to provide QCC a sufficient opportunity to engage in discovery relevant to MCI's allegations.

* The Order is premised upon incorrect facts.

* The Order errs in its interpretation and application of bankruptcy law principles, and its apparent misunderstanding of QCC's claims as they relate to the Bankruptcy Court's orders.

* The Order errs in its limitation of the refund period.

IV. DISCUSSION

A. The Order Improperly Grants MCI's Motion to Dismiss.

As discussed above, New York courts, and the Commission itself, have made clear that a motion to dismiss must be denied unless, even accepting all facts and inferences in the complainant's favor, it is beyond dispute that a cognizable cause of action cannot exist. MCI did not come close to meeting this critical standard.

1. <u>The Order Improperly Looks Beyond the Complaint</u>.

As it pertains to MCI, QCC's complaint is relatively simple. QCC alleges that MCI has on file with the Commission a tariff specifying rates, terms and conditions for its provision of intrastate switched access services, and that MCI bills QCC the rates set forth therein for intrastate switched access.[11] QCC further alleges that MCI had or has off-tariff, unfiled agreements for intrastate switched access with select interexchange carriers ("IXCs"), not including QCC, and that such agreements provide the other IXCs switched access at rates different from and lower than the rates set forth in MCI's effective tariff. QCC also alleges that, despite the requirements of this Commission's orders, MCI never submitted its off-tariff switched access agreements to the Commission, or appended them or a summary of them to its tariff.[12] The Complaint sets forth no allegations concerning whether MCI's secret, off-tariff agreement were part of a "reciprocal" arrangement with AT&T, or whether such "reciprocity" was meaningful, or whether it justified MCI's failure to provide equivalent rate treatment to QCC.

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11 Complaint of Qwest Communications Company, LLC ("Complaint"), at 6.

12 Complaint, at 6-7.

In fact, the allegations concerning MCI are essentially the *identical* allegations made by QCC in the Complaint as to each other CLEC Respondent. Given the Order's conclusion that there is a potential basis for refunds as to the other CLEC Respondents, including those not yet known or named, its dismissal of MCI is difficult to understand.

Furthermore, the Complaint's allegations regarding MCI – which the Commission must accept as true for purposes of considering MCI's motion to dismiss – are not even denied by MCI. Instead of denying that which it cannot deny – that it ignored the Public Service Law and its own tariff obligations by secretly preferring one IXC over others – MCI seeks dismissal based on its claim that QCC could not "reciprocate," as it alleges AT&T did. This claim, besides being legally irrelevant in the context of a motion to dismiss, is factually unsupportable. Contrary to the impression MCI may have presented, the Order is based on a false understanding of the facts when it concludes that QCC lacked a CLEC affiliate in New York capable of terminating intrastate switched access traffic.[13] This is simply untrue, as can be determined by a review of the Commission's own public records. QCC obtained certification to provide facilities-based local exchange service (and thus switched access services) in February 1999, long before MCI entered its secret switched access agreement with AT&T.[14] Thus, QCC was fully authorized to provide switched access service and, had MCI made its "reciprocal" arrangement available to QCC, could have modified its tariff to include such offerings. It is manifestly untrue that QCC was operationally or legally incapable of providing switched access in New York.[15]

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13 Order, at 9-10, 11.

14 *See* Case No. 99-C-0008.

15 MCI never argued QCC was not legally or technically able to provide switched access, but only that QCC "does not and never has" provided switched access service in New York" (MCI Motion to Dismiss, at 1, 7). That is a far cry from saying QCC could never have been in the same position as AT&T in terms of <u>offering</u> to provide switched access service. Indeed, had QCC been made aware of the special pricing arrangement, it could simply have filed a tariff for switched access service and been fully able to offer that service.

Returning to the fundamental flaw underlying the Order's evaluation of MCI's motion to dismiss, the Order errs as a matter of law by ignoring the operative standard of review, and by considering facts beyond those set forth in the Complaint.[16] The Order's evaluation of MCI's defense is particularly disturbing given that the Commission did so without permitting QCC to gather from MCI even the barest facts relevant to disproving MCI's theory. Had it allowed such discovery – or alternatively denied MCI's motion until discovery was sufficiently complete – the Commission would have become aware of facts (disclosed in other states under seal) that undermine MCI's reciprocity theory.

Instead of focusing on the allegations of the Complaint, as New York law requires, the Order improperly considers MCI's extrinsic allegations, and incorrectly reaches findings of fact and conclusions of law. For example, at page 9, the Order concludes (based on the advice of Staff) that "reciprocity" was an essential component of the MCI-AT&T arrangements. QCC steadfastly denies that to be the case, and could support such denial, if permitted to conduct the identical discovery that it has already conducted (and MCI has already responded to) in the parallel Colorado, California and Florida proceedings.

At page 10, the Order concludes that "Qwest fails to demonstrate that the practice of providing a lower intrastate access rate, provided there is a local exchange affiliate capable of offering the same rate, is without a rational basis." Yet, QCC was not given an opportunity to

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16 QCC acknowledges that under some circumstances a motion to dismiss can, in order to permit the consideration of facts beyond the four corners of the Complaint, be converted into a motion for summary judgment. However, per CPLR 3211(c), that can only be done with notice from the court or Commission. No such notice was given in this case. Nor does the Order even purport to have done so. Even if the reader can contort the Order enough to infer that MCI's motion to dismiss is being considered a motion for summary judgment, summary judgment is clearly inappropriate at this early juncture. Per CPLR 3212(g), when it appears that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. In other words, until QCC is permitted sufficient opportunity to engage in discovery and to bring to light facts that would be important to the Commission's evaluation of whether genuine issues of material fact exist, a motion for summary judgment should be denied.

make such a demonstration, and (as mentioned above) this conclusion disregards the Commission's own public records, which plainly evidence that QCC has had facilities-based LEC authority since 1999.

Finally, at page 11, the Order somehow concludes (without the benefit of any evidentiary record) that the imbalance of the MCI-AT&T arrangement (which imbalance, if exposed in greater detail, would raise considerable doubt as to the "reciprocal" nature of the arrangement) "was justified." As a matter of law, at this very preliminary stage, the Commission is in no position to draw such ultimate conclusions. It is manifestly unjust for the Commission to dismiss QCC's complaint against MCI on this basis without offering QCC the opportunity to develop and present its case (or any case). The Commission should grant rehearing of the Order, and permit QCC's Complaint to proceed against all CLECs, including MCI.

2. <u>Alleged Reciprocity Does Not Justify MCI's Behavior</u>.

MCI premised its motion to dismiss on its argument that, because its secret switched access agreement with AT&T was part of a nationwide "reciprocal" arrangement, and because QCC did not provide switched access services in New York during the effective period of the MCI-AT&T agreement, QCC was not similarly situated to AT&T. As such, MCI argued that it could not have unreasonably discriminated against QCC in violation of the Public Service Law.

As QCC explained in response to MCI's motion, the Commission should have rejected MCI's "reciprocity" argument at this early stage. First, MCI's argument and the Order falsely assume that QCC was unable to provide switched access in New York. Second, genuine issues of material fact remain as to whether the MCI-AT&T arrangement was truly "reciprocal," and without permitting discovery on this point the Commission cannot lawfully grant dismissal of MCI. Finally, even if reciprocity were indisputably present (which it was not), principles of economics and public policy – as well as the need to preclude subterfuge designed to avoid compliance with the Commission's requirements – weigh heavily against accepting reciprocity as a justification for wanton rate discrimination, especially as to a bottleneck service.

a. QCC Could Have Offered Switched Access in New York.

The Order seems to conclude – without the issue having been raised by MCI nor rebutted by QCC – that QCC lacked a local exchange carrier affiliate capable of providing switched access services. This is false. In 1999, this Commission granted QCC facilities-based local exchange authority. As such, it was (in 2004) and remains authorized to provide switched access services. Had MCI bothered to inform QCC or the Commission (as it is required by law to do) that it had entered into an off-tariff arrangement for intrastate switched access services, QCC certainly could have amended its tariff to include switched access services. That QCC, unaware of MCI's off-tariff pricing to AT&T, did not do so is not dispositive of anything.

b. Genuine Issues of Material Fact Remain Regarding the "Reciprocal" Nature of MCI's Arrangement with AT&T.

As the Order recognizes, a motion to dismiss can only be granted if there is a clear showing that no genuine issues of material fact exist, and that the moving party is entitled to a dismissal as a matter of law.[17] In addition to the fact that the Order errs by looking beyond the four corners of the Complaint, the Order also errs by ignoring the genuine issues of material fact that exist concerning whether the MCI-AT&T arrangement was truly reciprocal. As detailed by QCC in its response to the motion to dismiss, MCI's own statements in other states make clear that the MCI-AT&T arrangement was not balanced in any economic sense. As MCI has publicly admitted, AT&T derived a net benefit from the arrangement.[18] QCC pursued this inconsistency

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[17] Order, at 8.

[18] *See* Response of QCC to Motion to Dismiss and Answer of Parties ("QCC Response"), at 14-16.

in discovery. MCI's proprietary discovery responses were quite telling, but have not been produced to QCC or the Commission in the instant proceeding.[19] In light of the obvious existence of genuine issues of material fact, the Commission should have denied MCI's motion to dismiss.

c. *Reciprocity Alone Does Not Justify Rate Discrimination.*

A bare allegation that two persons are not similarly situated cannot, by itself, justify preferential treatment. Instead, the Commission must scrutinize both the characteristics of the service (is the service being provided to different customers the same, similar or meaningfully different?) and the characteristics of the customers being served (are the customers sufficiently and meaningfully distinct?). Here, the service provided by MCI to AT&T and QCC is identical, and the characteristics of the two IXCs are likewise identical.

MCI's claim that mere reciprocity justifies, without further consideration, MCI's preferential treatment of AT&T is incorrect. As a matter of public policy, common sense and economics, the Commission should not find that reciprocity – AT&T's and MCI's agreement to favor each other with secret, off-tariff agreements – is a reasonable or permissible basis for validating MCI's unlawful conduct.[20] Only a thorough review of all facts and circumstances surrounding the bona fides of the alleged reciprocity can resolve its legitimacy.

As a matter of public policy and common sense, the Commission should not approve MCI and AT&T, then the two largest CLECs and IXCs, entering into secret, arguably-

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[19] On June 21, 2011, QCC issued data requests to MCI which closely tracked its requests to MCI (which MCI has already answered) in other states. On June 29, 2011, MCI served a letter refusing to respond to the discovery. QCC responded on July 8, 2011(explaining that the information sought was of a baseline nature and had already large been produced by MCI in other states). Yet, the Commission never required MCI to produce responses to QCC's discovery. The subject discovery would have proven illuminating as to the reciprocity defense. By dismissing MCI without requiring MCI to disclose highly pertinent facts and documents already gathered by MCI for other proceedings, the Order rewards MCI for its secretive and uncooperative behavior.

[20] *See* QCC Response, at 11-14.

duopolistic agreements whereby each agreed to grant the other a favorable, and key, input in the provision of long distance service. Put in far simpler terms, two wrongs do not make a right. To dismiss QCC's claims against MCI would be to legitimize MCI's conduct in deliberately ignoring its statutory obligations to abide by tariff pricing, to file off-tariff contracts, and to avoid price discrimination. Clearly, the fact that the two largest CLECs agreed to simultaneously ignore the Public Service Law is not an exculpatory factor; if anything, it is an aggravating factor, which should cause the Commission even greater concern about MCI's conduct.

As a matter of economics, "reciprocity" alone (even if it were an accurate description of the dual MCI-AT&T agreements) is not a reasonable basis for price differentiation as to bottleneck switched access services. All the traffic of all IXCs (be they QCC, AT&T, Sprint or another) travels over the very same loop and switching vehicles for origination or termination to a particular end user. This reality presumptively mandates uniform pricing, whether the switched access customer for any particular call is AT&T, QCC or another IXC. Unless the CLEC seeking to justify its price differentiation can identify and support a cost basis for its preferential rates to select IXCs, switched access service should be uniformly priced. MCI points to no such cost difference (and offers no evidence to support any such difference), and thus its significant divergence from uniform pricing was unlawful.

MCI's attempt to distinguish among IXC customers is nothing more than a *post hoc* rationalization, rather than a legitimate explanation for the price differentiation. Especially in the absence of contemporaneous (to the execution of the off-tariff agreement) analysis, MCI's *post hoc* justification should be given no weight whatsoever. Ultimately, the uncontested fact that MCI entered into a secret, off-tariff agreement with one favored IXC, and did not file that agreement with the Commission or modify its tariff to apply the lower pricing to all IXCs, should be fatal to MCI's protestations of innocence.

3. QCC Does Not Seek to Have This Commission Disturb the Bankruptcy Decision.

The Order's dismissal of MCI also appears to be premised on a concern that, to grant QCC's complaint, would potentially disturb the Worldcom Bankruptcy Court decision approving the settlement of disputes between Worldcom and AT&T. This is absolutely not the case. QCC's complaint is not that MCI entered into an off-tariff switched access agreement with AT&T, or that the Bankruptcy Court approved that arrangement. It may have well been a prudent business decision and reasonable under the circumstances. QCC's Complaint does not seek, and would not require, that the MCI-AT&T agreement be unwound in any way. Rather, QCC's complaint is that MCI's *subsequent conduct* violates New York law.

As explained in QCC's response to MCI's motion to dismiss, bankruptcy law is crystal clear that an order of the bankruptcy court does not immunize a debtor from its state law obligations. Thus, after the Bankruptcy Court approved the MCI special arrangement, MCI continued to have an obligation under New York law to file the special deal with the Commission, and to offer the same rate to other carriers on a non-discriminatory basis. To suggest that the Bankruptcy Court's approval somehow preempted the applicability of the Public Service Law, and this Commission's Orders, is erroneous as a matter of well-established law.

In addition to the fact that MCI expressly agreed to state commission jurisdiction over its operations,[21] MCI was also required by federal law to comply with applicable New York state

[21] In the bankruptcy proceeding, MCI expressly recognized state commission jurisdiction over its operations. In a stipulation between the Debtors and certain state public utility commissions, the Debtors agreed as follows: "The Debtors agree to and recognize the jurisdiction of the state regulatory enforcement authorities, including, but not limited to, the PUCs, over the Debtors' operations . . . to the extent provided under state law . . . ." *See*

law and regulations. Section 959(b) of title 28, United States Code, provides in relevant part that:

> a debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated . . . .

Section 959(b) "makes explicit the uncontroversial idea that a debtor in possession must continue its operations in conformity with state law."[22] As the U.S. Supreme Court has instructed, "Section 959(b) commands the trustee to 'manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.'"[23] Simply put, Section 959(b) "'offers the estate representative no relief or exemption from state regulatory law.'"[24] Indeed, as the U.S. District Court recognized:

Stipulation [and Order] among the Objecting Parties and the Debtors Concerning the Amended Plan and the Supplement dated September 26, 2003 ("Stipulation and Order"), QCC Response, Attachment E, at 3, ¶ 1.

Paragraph 1 of the Stipulation and Order also contained the following proviso: "...to the extent not pre-empted by operation of the United States Bankruptcy Code." Id. The preemption issue related solely to the Debtors' argument that the Bankruptcy Code impliedly preempted state laws regarding PUC approval of the mergers or consolidations of the Debtors under their Chapter 11 plan. *See id.*, at 4 and 5, ¶¶ 3 and 7.

22 *Hillis Motors, Inc. v. Hawaii Automobile Dealers Ass'n, 997 F.2d 581, 593 (9th Cir. 1993).* In addition, the Ninth Circuit has held that a state utility commission's laws are not impliedly preempted by the Bankruptcy Code. *See In re Baker & Drake, Inc., 35 F.3d 1348, 1353-55 (9th Cir. 1994); see also Midlantic Nat'l Bank v. New Jersey DER, 474 U.S. 494, 505 (1986) (Section 959(b) "provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws"); see generally In re Cajun Electric Power Coop., Inc., 185 F.3d 446, 454 n.11 (5th Cir. 1999) (declaring that debtor's argument that public utility commission could not regulate its rates post-bankruptcy "'ignores the reasons which mandate [public utility commission] regulation in the first instance. The [commission] is entrusted to safeguard the compelling public interest in the availability of electric service at reasonable rates. That public interest is no less compelling during the pendency of a bankruptcy than at other times.'") (alteration by court).* Other Bankruptcy Code sections also evidence that a state's regulatory powers are *not* preempted by the Bankruptcy Code. *See generally 11 U.S.C. §§ 362(b)(4) (automatic stay does not apply to "the commencement or continuation of any action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . regulatory power") and 1129(a)(6) ("Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.").*

23 *Midlantic Nat'l Bank v. New Jersey DER, 474 U.S. 494, 505 (1986) (quoting 28 U.S.C. § 959(b).*

24 *In re PSA, Inc., 335 B.R. 580, 586-87 (Bankr. D.Del. 2005) (quoting 1 Collier on Bankruptcy ¶ 10.03 (15th ed. rev. 2005)).*

> To decide otherwise would lead to irrational results. The trustee of a bankrupt insurance company would be allowed to avoid the state insurance commission and raise the rates as he wished. The trustee of a liquor store could ignore the local licensing and operating laws. The statute necessitates careful investigation of local laws affecting the operation of a particular business before a trustee begins to operate *8 Colliers § 1.21.* It's not the province of the bankruptcy court to undertake the role of local agencies. **The bankruptcy court is only empowered to preserve the assets of a bankrupt estate and cannot authorize non-compliance with local law.**[25] (bold added)

Any assertion by MCI that the Bankruptcy Court's approval of the MCI-AT&T switched access contracts (and the undisclosed special rates contained therein) somehow obviated MCI's obligations under the Public Service Law – or in any way divests this Commission of jurisdiction to investigate, review, or remedy violations of state regulatory requirements – is simply wrong.[26]

B. The Limitations Period Established by the Commission Should Be Six Years Prior to QCC's Discovery of Each CLEC's Unlawful Conduct.

The Commission's Order notes that its general policy for refunds is six years, patterned after the six year statute of limitations under CPLR Section 213. Accordingly, it permitted QCC to pursue refunds from the other CLEC respondents back to July 2, 2003 – six years prior to the filing of QCC's Complaint on July 2, 2009. However, because it was the CLECs' unlawful conduct which precluded QCC from having any knowledge of the statutory violations creating the cause of action, the Commission should modify its Order to apply the refund period from the point when QCC knew or should have known about the CLECs' unlawful conduct.

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25 *In re The Briarcliff, 15 B.R. 864, 867 (D.N.J. 1981).*

26 Section 959(b) requires a debtor to comply with applicable state laws and regulations regardless of whether such compliance may have an adverse effect on the debtor's business. "Implicit in Section 959(b) is the notion that the goals of the federal bankruptcy laws, including rehabilitation of the debtor, do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws." *In re Quanta Resources Corp., 739 F.2d 912, 919 (3d Cir. 1984); PSA, 335 B.R. at 587 ("The purpose of bankruptcy is not to permit debtors or nondebtors to wrest competitive advantage by exempting themselves from the myriad of laws that regulate business.").* MCI's suggestion otherwise should be given no weight.

When it awards refunds, the Commission is not limited to the six year statute of limitations set forth in the CPLR.[27] This Commission itself has not limited refunds to six years when equitable considerations argued for a longer refund period. Thus, in the complaint of Westledge Nursing Home, et al., the Commission stated it was "exercising our broad authority to fashion a fair remedy" by requiring the electric utility – Con Ed – to provide refunds for a period of more than six years, determining that the refund period should be measured from the time of the earliest complaint filed by anyone else against the improper billing practice.[28]

In other refund cases, the customer can generally be put on notice of the utility's improper billing because the customer actually receives and has an opportunity (even if it did not exercise that opportunity) to review the bill. However, in the instant case, QCC never had an opportunity to be aware that the CLECs were engaged in unlawful discrimination against it.

It was thus the CLECs' unlawful conduct in failing to file the off-tariff arrangements which prevented QCC from gaining any knowledge that it was being discriminated against. Had the CLECs filed the mandated disclosure, as required by statute and the Commission's Orders, QCC would have had the opportunity to request the same special pricing arrangements, and to take any steps necessary to qualify for that special pricing arrangement. The Commission should not allow the CLECs to use their failure to comply with their statutory duty as a shield to protect themselves from liability. It was the CLECs' own willful failure to comply with the regulatory

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27 See In the Matter of the Complaint of Queens Jewish Center against The Brooklyn Union Gas Company (G659073), Case 26358, Order issued October 17, 1988. See also Ronald Chernow Associates v. PSC, 230 AD2d 476: "The PSC's coincidental policy decision to implement a six-year look-back-period establishes no rights under the CPLR. In fact, by the express provision of CPLR 101, that chapter is limited in application to civil judicial proceedings in courts and before judges", citing Matter of Owner's Committee on Electric Rates v. PSC, 150 AD2d 45.

28 Case 26358, Complaints of Westledge Nursing Home, et al. against Consolidated Edison Company of New York, Inc., Opinion 89-19, "Opinion and Order Resolving Billing Complaints", June 14, 1989, at pp. 16-17.

mandate which prevented QCC from gaining knowledge of its rights to a refund, and the CLECs should not be rewarded for their unlawful conduct.[29]

The situation is similar to a court's application of Doctrine of Equitable Estoppel. As the New York Court of Appeals has stated:

> "The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense.
>
> "Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing...which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding". (*General Stencils v. Chiappa* , 18 NY2d 125, 128 [1966]".
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> "Thus, this Court has held that equitable estoppel will apply 'where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action' (*Simcuski v. Saeli*, 44 NY2d 442, 449 [1978]). Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations (see *Simcuski*, 44 NY2d at 449)."[30]

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29 By analogy, while normally a utility cannot backbill a consumer for more than two years, that limit is extended where the culpable conduct of the customer caused the underbilling. See Case 98-E-0803, Appeal of Joseph McGuinness against Long Island Lighting Co., Commission Determination, December 23, 1998. Here, it was the CLECs' culpable conduct in not filing the special arrangements which should allow an extension of the refund period.

30 Zumpano v. Quinn, 6 NY3d 666 at 673. That principle was reaffirmed in Putter v. North Shore Univ. Hospital, 7 NY3d 548 at 552-553:

> "We have recently reaffirmed that equitable estoppel will preclude a defendant from using the statute of limitations as a defense 'where it is the defendant's affirmative wrongdoing...which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding' (Zumpano v. Quinn, 6 NY3d 666, 673 [2006], quoting General Stencils v. Chiappa, 18 NY2d 125, 128 [1966]). A plaintiff seeking to apply the doctrine of equitable estoppel must 'establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit' (Zumpano, 6 NY3d at 674). Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant."

Here, it was the CLECs' affirmative wrongdoing – the failure to file the terms of the special arrangements – which precluded QCC from having knowledge of the unlawful discrimination, and thus produced the delay in filing the complaint. That failure to file can and should be viewed as a fraud, misrepresentation, or deception in that it deceived QCC and others into believing the only pricing available from each of the CLECs was the tariff rate.

Accordingly, principles of equity, which may and should be applied by this Commission, fully support a determination that the refund period should run from QCC's discovery of each CLEC's unlawful conduct.

As will be fully explored and explained when this matter proceeds to the development of an evidentiary record and hearing, QCC (despite its best efforts) did not know, nor could reasonably be expected to know, the identities of the offending CLECs, nor the specific terms of their preferential secret agreements as they applied in New York. Indeed, as to most New York CLECs, QCC's claim has not yet begun to accrue.[31]

Because the Commission possesses the authority to craft a remedy under the particular facts and circumstances of this proceeding – particularly the unlawful failure of the CLECs to file their special pricing arrangements – it should exercise the broad discretion in fashioning remedies by determining that the refund period should extend to cover any period of time where the CLECs' unlawful practices directly prevented QCC from knowledge of the CLECs' unlawful discrimination.

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[31] In the parallel Colorado Commission proceeding, the Commission considered very similar statute of limitations arguments from MCI and the other respondent CLECs. As is the case in New York, Colorado statute imposes upon carriers (including CLECs) a requirement to file off-tariff switched access agreements. The purpose of the filing requirement, as explicitly recognized by the Colorado Commission, is to assist the Commission other customers in preventing the very type of rate discrimination experienced in these circumstances. As a result of the CLECs' failure to abide by their statutory filing obligation, the Colorado Commission rejected the CLECs' various theories based on the statute of limitations. *See* Order Addressing Exceptions and Motion to Reopen the Record, Decision No. C11-1216 (Colo.PUC 2011), at 21-23 *aff'd* Decision No. C12-0276 (Colo.PUC 2012), at 18-24 Similarly, this Commission should not reward the CLECs for hiding their off-tariff dealings. To do so would only encourage rate discrimination and violation of the state's filing requirement.

V. CONCLUSION

Based on the foregoing, QCC respectfully urges the Commission to grant rehearing, to permit QCC's complaint to proceed against MCI, and to clarify that the potential refund period is not limited to the period beginning July 2003.

QWEST COMMUNICATIONS COMPANY, LLC

By: ______________________

Keith J. Roland
Herzog Law Firm P.C.
Corporate Woods
7 Southwoods Blvd
Albany, NY 12111
Tel: 518-465-7581
Fax: 518-462-2743
Email: kroland@herzoglaw.com

and

Adam L. Sherr
Associate General Counsel
Qwest Communications
1600 7th Avenue, Room 1506
Seattle, WA 98191
Tel: 206-398-2507
Fax: 206-343-4040
Email: adam.sherr@qwest.com

Attorneys for Qwest Communications Company, LLC

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