



FILED

07-17-12

04:59 PM

BEFORE THE PUBLIC UTILITIES

COMMISSION OF THE STATE OF CALIFORNIA

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

Complainant,

v.

Case No. C.08-08-006

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (U-5253-C), XO COMMUNICATIONS SERVICES, INC. (U-5553-C), TW TELECOM OF CALIFORNIA, L.P. (U-5358-C), GRANITE TELECOMMUNICATIONS, INC. (U-6842-C), ADVANCED TELCOM, INC. dba INTEGRA TELECOM (fdba ESCHELON TELECOM, INC.) (U-6083-C), LEVEL 3 COMMUNICATIONS (U-5941-C), COX CALIFORNIA TELECOM II, LLC (U-5684-C), ACCESS ONE, INC. (U-6104-C), ACN COMMUNICATIONS SERVICES, INC. (U-6342-C), ARRIVAL COMMUNICATIONS, INC. (U-5248-C), BLUE CASA COMMUNICATIONS, INC. (U-6764-C), BROADWING COMMUNICATIONS, LLC (U-5525-C), BUDGET PREPAY, INC. (U-6654-C), BULLSEYE TELECOM, INC. (U-6695-C), ERNEST COMMUNICATIONS, INC. (U-6077-C), MPOWER COMMUNICATIONS CORP. (U-5859-C), NAVIGATOR TELECOMMUNICATIONS, LLC (U-6167-C), NII COMMUNICATIONS, LTD. (U-6453-C), PACIFIC CENTREX SERVICES, INC. (U-5998-C), PAETEC COMMUNICATIONS, INC. (U-6097-C), TELEKENEX, INC. (U-6647-C), TELSCAPE COMMUNICATIONS, INC. (U-6589-C), U.S. TELEPACIFIC CORP. (U-5721-C), AND UTILITY TELEPHONE, INC. (U-5807-C)

Defendants.

QWEST COMMUNICATIONS COMPANY LLC'S
REQUEST FOR OFFICIAL NOTICE

Adam L. Sherr
Associate General Counsel
Qwest
1600 7th Avenue, Room 1506
Seattle, WA 98101
Tel: 206-398-2507
Fax: 206-343-4040
Email: adam.sherr@centurylink.com

Leon M. Bloomfield, Bar No. 129291
Law Offices of Leon M. Bloomfield
1901 Harrison St., Suite 1620
Oakland, CA 94612
Tel: 510-625-8250
Email: lmb@wblaw.net

Attorneys for Qwest Communications
Company, LLC fka Qwest Communications
Corporation

July 17, 2012

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

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

Complainant,

v.

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

Defendants.

Case No. C.08-08-006

**QWEST COMMUNICATIONS COMPANY LLC'S
REQUEST FOR OFFICIAL NOTICE**

Pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure, Complainant Qwest Communications Company, LLC ("QCC") respectfully requests that the Commission take official notice of the following:

1. Colorado Public Utilities Commission – Recommended Decision of Administrative Law Judge G. Harris Adams on Remand. On June 21, 2011, the Public Utilities Commission of the State of Colorado ("Colorado Commission") issued the Recommended Decision of Administrative Law Judge G. Harris Adams on Remand in the parallel action brought by QCC against various competitive local exchange carriers ("CLECs") before the Colorado Commission (the "RD on Remand"), a copy of which is attached hereto as Exhibit A.¹

¹ Many of the CLEC Defendants in the Colorado proceeding are the same as those in the action pending before this Commission. For example, MCI metro, XO Communications Services, Inc., Ernest Communications, Inc., Granite Telecommunications, Inc., tw telecom, and BullsEye Telecom are Defendants/Respondents in both proceedings. Also, affiliated CLECs ATI (California) and Eschelon (Colorado) are Defendants/Respondents in the respective proceedings.

2. As noted in QCC's pending Request for Judicial Notice dated August 2, 2011, the Colorado Commission previously issued the Recommended Decision of Administrative Law Judge G. Harris Adams Partially Dismissing and Partially Granting Complaint in which the ALJ recommended that the QCC complaint against MCI in Colorado be dismissed with prejudice on statute of limitations grounds unique to MCI.

3. The Colorado Commission subsequently issued an Order in which it, among other things, granted QCC's Exceptions to the ALJ's recommendation with respect to MCI and determined that QCC's claims against MCI were timely. See QCC's pending Request for Judicial Notice dated November 18, 2011.

4. On March 13, 2012, the Colorado Commission remanded the matter for determination of three issues. As regards MCI, the ALJ was directed to make "[f]indings regarding whether MCImetro unlawfully discriminated against QCC by subjecting it to any prejudice or competitive disadvantage for providing access to the local exchange network, in violation of § 40-15-105(1), C.R.S." If the ALJ found that MCI had violated Colorado law, he was directed to make findings about "appropriate reparations." RD on Remand at ¶ 2.

5. In remanding the matter to the ALJ, the Colorado Commission stressed that "MCImetro raised arguments to rebut QCC's complaint that are very different from arguments raised by all other respondent CLECs," i.e., "The 2004 contracts between MCImetro and AT&T were reciprocal and bilateral. MCI contends that QCC was not similarly situated to AT&T because it was unable to enter into such a reciprocal arrangement and undertake the same reciprocal obligations to which MCImetro and AT&T had agreed. This is because, *inter alia*, QCC does not (and is not legally able to) provide switched access service in Colorado." RD on Remand at ¶ 12.

6. On Remand, ALJ Adams determined, among other things, that MCI unlawfully discriminated against QCC by “granting an unreasonable preferential and advantageous access service to an IXC other than QCC by departing from tariff rates while denying such preference and advantage to QCC.” See RD on Remand at ¶ 40.

7. The RD on Remand rejected MCI’s assertions with respect to its AT&T agreements and found:

Without regard to implementation, the thrust of MCImetro's second theory is that QCC was not similarly situated to AT&T because QCC could not undertake the reciprocal arrangement. Aside from failing to file with the Commission, the attempt to distinguish customers by a combination of access with other tariff and off-tariff contract provisions was previously rejected. *The substance of access agreements must prevail over form and access services cannot be obscured or obviated by inclusion with other terms.* Creativity of those contracting for access, as segregated consistent with Section 40-15-105, CRS, cannot change the access service provided nor the unlawful pricing thereof. RD on Remand at ¶ 27 (emphasis added).

8. ALJ Adams further found that QCC was entitled to reparations for the “excess billed to QCC” See RD on Remand at ¶ 40.²

9. MCI has filed Exceptions to the RD on Remand with the Colorado Commission. QCC’s Response to the Exception is due on July 25, 2012.³

10. In California, MCI has asserted essentially identical defenses to QCC’s claims in the instant proceeding. See e.g., MCI Motion to Dismiss (January 15, 2009); see also MCI’s Response to QCC’s Post Pre-Hearing Statement (March 12, 2012).

² ALJ Adams further noted that MCI had charged QCC higher switched access tariffed rates in effect than that charged to AT&T for identical intrastate switched access services and failed to provide statutory notice of the agreement with AT&T. He also noted that MCI never filed the 2004 contracts with the Colorado Commission. See RD on Remand at ¶ 20.

³ QCC will provide notice to the Commission when the Colorado Commission rules on the MCI Exceptions.

Exhibit A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08F-259T

QWEST COMMUNICATIONS COMPANY, LLC,

COMPLAINANT,

V.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, XO COMMUNICATIONS SERVICES, INC., TIME WARNER TELECOM OF COLORADO, L.L.C., GRANITE TELECOMMUNICATIONS, INC., ESCHELON TELECOM, INC., ARIZONA DIALTONE, INC., ACN COMMUNICATIONS SERVICES, BULLSEYE TELECOM, INC., COMTEL TELECOM ASSETS, LP, ERNEST COMMUNICATIONS, INC., LEVEL 3 COMMUNICATIONS, LLC AND LIBERTY BELL TELECOM, LLC, AND JOHN DOES 1-50 (CLECS WHOSE TRUE NAMES ARE UNKNOWN),

RESPONDENTS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
ON REMAND**

Mailed Date: June 25, 2012

TABLE OF CONTENTS

I. STATEMENT.....	2
II. FINDINGS.....	7
A. MCImetro Access Transmission Services.....	7
B. Time Warner Telecom.....	15
C. Eschelon Telecom	16
III. ORDER.....	19
A. The Commission Orders That:	19

I. STATEMENT

1. On June 20, 2008, Qwest Communications Corporation (QCC or Qwest) filed a Formal Complaint against MCImetro Access Transmission Services, LLC (MCI or MCImetro); XO Communications Services, Inc.; Time Warner Telecom of Colorado, LLC (TWT); Granite Telecommunications, Inc.; Eschelon Telecom, Inc. (Eschelon); Arizona Dialtone, Inc.; and John Does 1-50 (CLECs whose true names are unknown).

2. By Decision No. C12-0276, issued March 13, 2012, the Commission remanded the matter for determination of three issues:

- a) Findings regarding whether MCImetro unlawfully discriminated against QCC by subjecting it to any prejudice or competitive disadvantage for providing access to the local exchange network, in violation of § 40-15-105(1), C.R.S. If so, then appropriate reparations.
- b) The correct amount of reparations owed by TWT to QCC for the period of May 1, 2002 through October 1, 2008.
- c) The correct amount of reparations owed by Eschelon to QCC for the period of November 1, 2002 through December 5, 2007.

3. As to Eschelon, “the ALJ may adopt the calculation presented by either Ms. Copley or Dr. Ankum, as these calculations are premised on the correct time period. In the alternative, the ALJ may adopt the calculation presented by Mr. Canfield, if there is evidence in the record to support an adjustment of his total amount to the correct time period.” Decision No. C12-0276, at ¶ 90.

4. In light of the limited scope of remand, the Commission sought further findings and conclusions, to the extent possible, based upon the evidence already in the record. The ALJ finds that further findings and conclusions may be based on the evidence of record. Thus, the evidentiary record need not be reopened.

5. On March 26, 2012, the MCImetro Access Transmission Services LLC's Request for Administrative Notice and Consideration of New York Public Service Commission Decision was filed. MCImetro requests that the Commission take administrative notice of the New York decision because the findings and conclusions are pertinent to the findings and conclusions to be determined upon remand.

6. On April 9, 2012, Qwest Communications Company, LLC's Response to MCImetro Access Transmission Services LLC's Request for Administrative Notice and Consideration of New York Public Service Commission Decision was filed. While QCC does not specifically oppose the Commission taking administrative notice, it responds that the decision is not final and will be appealed.

7. The New York decision is based upon Public Service Law's (PSL) tariff filing requirements (PSL §§ 92(1) and 92(2) (d)). Section 92 provides:

§ 92. Rate schedules

1. Every telegraph corporation and every telephone corporation shall print and file with the commission schedules showing all rates, rentals and charges for service of each and every kind by or over its line between points in this state and between each point upon its line and all points upon every line leased or operated by it and between each point upon its line or upon any line leased or operated by it and all points upon the line of any other telegraph or telephone corporation whenever a through service or joint rate shall have been established between any two points. If no joint rate over a through line has been established the several corporations in such through line shall file with the commission the separately established rates and charges applicable where through service is afforded. Such schedule shall plainly state the places between which telephone or telegraph service, or both, will be rendered and shall also state separately all charges and all privileges or facilities granted or allowed and any rules or regulations or forms of contract which may in any wise change, affect or determine any or the aggregate of the rates, rentals or charges for the service rendered. Such schedule shall be plainly printed and kept open to public inspection. The commission shall have the power to prescribe the form of every such schedule and may from time to time prescribe, by order, changes in the form thereof. The commission shall also have power

to establish rules and regulations for keeping such schedules open to public inspection and may from time to time modify the same. Every telegraph corporation and telephone corporation shall file with the commission as and when required by it a copy of any contract, agreement or arrangement in writing with any other telegraph corporation or telephone corporation or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telegraph line or telephone line or service by or rates and charges over or upon any such telegraph line or telephone line.

2. (a) No change shall be made in any rate, charge or rental, or joint rate, charge or rental applicable to regulated basic services, switched carrier access services, charges for interconnection between local exchange carriers, and toll services within a local access and transport area which shall have been filed by a telegraph corporation or telephone corporation hereinafter in this subdivision called a utility in compliance with this chapter, except after thirty days' notice to the commission and to each county, city, town and village served by such utility which had filed with such utility within the prior twelve months a request for such notice and shall be affected by such change and publication of a notice to the public of such proposed change once in each week for four successive weeks in a newspaper having general circulation in each county containing territory affected by the proposed change. No other change shall be made in any rate, charge or rental, or joint rate, charge or rental filed by a utility, except after ten business days' notice to the commission and publication of one notice at least ten business days prior to the effective date of the change in a newspaper of general circulation in each county affected by the proposed change. Such notices shall plainly state the changes proposed and the time when they go into effect. For the purpose of this paragraph, "regulated basic services" are defined as: residential, individual business, and public access line network access, connection charges for such network access, local usage, local coin usage rates, tone dialing, access to emergency services, statewide relay services, operator assistance services, director[directory] 1 listings, and provisions that affect privacy protections.
- (b) All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon the schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may, except in the case of major changes, allow changes in rates, charges or rentals to take effect prior to the end of such thirty-day period or such ten-day period and without publication of notice to the public under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such utility. The commission may delegate to the secretary of the commission its authority to approve a change to a schedule postponing the effective date of such schedule previously filed with the commission and for good cause shown to allow the postponement

to take effect prior to the end of such thirty-day period or ten-day period and without publication of notice to the public.

- (c) For the purpose of this subdivision, "major changes" shall mean an increase in rates, charges and rentals which would increase the aggregate revenues of the applicant more than the greater of three hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals allowed to go into effect by the commission or made by the utility pursuant to an order of the commission after hearings held upon notice to the public.
- (d) No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service.
- (e) Whenever there shall be filed with the commission by any utility, any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission may at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative, and, if it so orders, without answer or other formal pleading by the utility, but upon reasonable notice, hold a hearing concerning the propriety of a change proposed by the filing. If such change is a major change the commission shall hold such a hearing. Pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the utility, a statement in writing of its reasons therefor, may suspend the operation of such schedule, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect. After full hearing, whether completed before or after it goes into effect, the commission may make such order in reference thereto as would be proper in a proceeding begun after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility has become effective.[.] 2 If such hearing cannot be concluded within the period of suspension as above stated, the commission may extend the suspension for a further period, not exceeding six months. The commission may, as authorized by section ninety-seven of this article, establish temporary rates, charges or rentals, for any period of suspension under this section.
- (f) At any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed

by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it.

- (g) During the suspension by the commission as above provided, the schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the suspended schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force unless the commission shall establish a temporary rate.

NY CLS Pub Ser § 92.

8. Particularly in light of the limited scope of remand, that the New York order is not yet final, and that the evidentiary record does not otherwise require reopening, administrative notice of the decision will not be taken. These concerns are compounded based upon the lack of showing that New York law has the same statutory requirements and limitations found in § 40-15-105, C.R.S., or that the agreement considered was subject to the same standards found in Colorado law. To the extent MCImetro seeks to use the decision for legal argument, it may do so without taking of administrative notice. To the extent it seeks to reopen the evidentiary record, insufficient cause has been demonstrated, as required by Rule 1504(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1. The request to take administrative notice of the decision will be denied.

9. Decision No. R11-0175 issued February 23, 2011, recommended that the Commission partially grant and partially deny QCC's Complaint. Except to the extent altered or modified by the Commission, Decision No. R11-0175 is incorporated herein by reference and will not be set forth fully herein.

10. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS

A. MCImetro Access Transmission Services

11. The Commission recognized that QCC claims of unlawful discrimination against MCImetro were not addressed in Decision No. R11-0175 because the decision recommended dismissal of claims on the statute of limitations grounds. The mere fact that MCImetro charged QCC more than AT&T Communications of the Mountain States, Inc. (AT&T) for intrastate switched access during the same time does not necessarily constitute undue or unreasonable preference in violation of § 40-15-105(1), C.R.S. Further, in the event unlawful discrimination was established, reparations should account for the fact that traffic between MCImetro and AT&T went in both directions.

12. The Commission provided additional matters for consideration on remand regarding MCImetro:

On remand, the ALJ shall determine whether MCImetro unlawfully discriminated against QCC by subjecting it to any prejudice or competitive disadvantage for providing access to the local exchange network, in violation of § 40-15-105(1), C.R.S. It is important to note that MCImetro raised arguments to rebut QCC's complaint that are very different from arguments raised by all other respondent CLECs. In essence, these arguments are that the 2004 contracts between MCImetro and AT&T were reciprocal and bilateral. MCImetro contends that QCC was not similarly situated to AT&T because it was unable to enter into such a reciprocal arrangement and undertake the same reciprocal obligations to which MCImetro and AT&T had agreed. This is because, *inter alia*, QCC does not (and is not legally able to) provide switched access service in Colorado. MCImetro concludes QCC was not entitled to the benefits of the 2004 contracts in the form of lower rates because it was not able to meet the corresponding obligations of these contracts. We direct the ALJ to consider the above arguments in determining whether or not MCImetro unlawfully discriminated against QCC.

Decision No. C12-0276 at ¶ 28.

13. If "MCImetro unlawfully discriminated against QCC, the ALJ should also determine the proper measure of damages. This could be the total amount by which MCImetro charged QCC more than AT&T when the unfiled agreement between MCImetro and AT&T was

in effect. It could also be the lower amount which accounts for the fact that traffic between MCImetro and AT&T went in both directions, which was not the case with the traffic between MCImetro and QCC, or another amount.” Decision No. C12-0276 at ¶ 29.

14. On March 2, 2004, the bankruptcy court approved the settlement. *See* Hearing Exhibit 13 at 9 and Exhibit PHR-5 to Hearing Exhibit 13. The bankruptcy court authorized MCI and AT&T "to implement the Settlement Agreement," "take any and all actions reasonably necessary or appropriate to consummate" the agreement, and "perform any and all obligations contemplated therein." The Debtors entered into two bi-lateral switched access service agreements with AT&T, *i.e.*, the "2004 Contracts." The terms of the two 2004 Contracts were identical except for the names of the purchaser and seller. Decision No. R11-0175 at ¶103

15. As has been argued, the negotiated form of agreement between AT&T and MCI is broader in scope than the sale of switched access service by MCI to AT&T. *See* Confidential Exhibit LBB-1 to Hearing Exhibit 7(C) (and Hearing Exhibits 80(C) through 83(C)). The provision of intrastate switched access was included in the 2004 Contracts.

16. The 2004 Contracts were in effect from January 27, 2004 through January 27, 2007. Subsequent to bankruptcy court approval of the original two-year term, the parties extended those agreements for an additional year.

17. Because QCC was not able to provide reciprocal service at the time, MCI maintains that QCC could not have entered into a reciprocal switched access agreement with MCI. Based upon such showing, MCI concludes that QCC was not similarly-situated to AT&T for the applicable time period. In turn, it is argued that MCI's agreement with AT&T did not unreasonably discriminate against QCC.

18. MCI heavily relies upon the reciprocal scope and terms of the negotiated 2004 Contracts and the fact that QCC could not undertake those reciprocal obligations because QCC did not (and was not legally able to) provide switched access service in Colorado. However, the fact that QCC could not enter into an identical agreement does not determine unlawful discrimination of services provided within the scope of agreement, particularly in light of other applicable statutory requirements.

19. Section 40-15-105, C.R.S., prohibits any preference or advantage as to pricing or provision of intrastate access service. Pricing for such services shall be “cost based, as determined by the commission,” and not more than the average price “by rate element and by type of access” in effect on July 1, 1987. § 40-15-105(1), C.R.S.

20. MCI charged QCC higher switched access tariffed rates in effect than that charged to AT&T for identical intrastate switched access services and failed to provide statutory notice of the agreement with AT&T. MCI never filed the 2004 Contracts with the Colorado Commission. Hearing Exhibit 13 at 16.

21. Mr. Brotherson summarized applicable switched access rate provisions of the 2004 Contracts:

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

Hearing Exhibit 7(C) at 6.

22. MCI's rates were not shown to be the result of anything other than a negotiated rate as one component of a comprehensive settlement between AT&T and MCI after consideration of such matters as scope of included services, reciprocal traffic volumes, and pending bankruptcy claims. No basis whatsoever was shown for extension of the agreement for an additional year.

23. The argument that QCC could not have achieved the same intrastate access rates that AT&T paid because it could not reciprocate the scope of contracted service must fall because whether QCC is similarly situated is based upon the intrastate access service rather than the contractual scope. This is particularly the case in light of the statutory limitations and obligations imposed.

24. The findings and conclusions at paragraphs 271 through 281 of Decision No. R11-0175 are equally applicable to MCI. QCC made a

prima facie showing that the functionality and service elements used to provide access services are identical, as were the facilities they were provided over. All IXCs must utilize such access service to reach a given end use customer. The facilities to accommodate one IXC serve all IXCs. LECs enjoy bottleneck, monopoly control over switched access services provided to their end-use customers without regard to the identity of the IXC or the volume of calls completed. Identical service was provided over identical facilities to IXCs completing calls to CLEC customers. QCC was charged tariff rates when others were charged lower rates. There is no showing that any IXC other than QCC was charged at the tariff rate. QCC made a *prima facie* showing that the relative size of any given purchaser of access services is not relevant to specific access services since each call is separate and distinct and carried in identical fashion (assuming no dedicated facilities to a particular local switch or end user). Thus, on a call-by-call basis, every IXC is similarly situated. While roles have changed, this is the very purpose for which § 40-15-105, C.R.S., was adopted.

Decision No. R11-0175, at ¶ 278.

25. As previously recognized, "unlawful discriminatory access service occurs when functionally equivalent services are sold to similarly situated classes of customers at differing rates without reasonable cost justification." Decision No. R11-0175, at ¶ 271. QCC demonstrated that MCImetro entered into off-tariff switched access agreements to provide

intrastate switched access services to other interexchange carriers (IXCs) but did not provide equivalent treatment to QCC for the same services.

26. In addition to non-prevailing arguments of other respondents, MCI attempts to overcome the *prima facie* showing of discrimination as if two independent lawful rates exist and the issue is QCC's eligibility for each of those rates. Such circumstances have not been shown applicable to the case at bar. Respondents contend that the class of customer and service at issue are determined by the scope of the contractual agreements entered into with some IXCs, but not others, and that the relevant customer classes must be determined in light of the contractual scope. However, no disclosure was made and neither the Commission nor any other IXC ever had an opportunity to consider those agreements.

27. Without regard to implementation, the thrust of MCImetro's second theory is that QCC was not similarly situated to AT&T because QCC could not undertake the reciprocal arrangement. Aside from failing to filing with the Commission, the attempt to distinguish customers by a combination of access with other tariff and off-tariff contract provisions was previously rejected. The substance of access agreements must prevail over form and access services cannot be obscured or obviated by inclusion with other terms. Creativity of those contracting for access, as segregated consistent with § 40-15-105, C.R.S., cannot change the access service provided nor the unlawful pricing thereof.

28. Illustratively, the agreement between MCI and AT&T applies switched access service regardless of delivery method. However, if the parties had negotiated a commercial agreement to limit charges to a unique negotiated methodology using traditional means plus delivery of a peppercorn, or perhaps a unique billing requirement (*e.g.*, use of controlled proprietary applications),

they would forever prohibit any competitor from being similarly situated, obviating requirements of Colorado law.

29. It seems there are two approaches to interpretation of the intrastate access provisions in the 2004 Contracts. Either consideration was exchanged for provisions other than intrastate access that affected intrastate pricing, or not. If AT&T and MCI independently negotiated pricing for intrastate switched access, then there is no reason to assume that QCC could not have potentially achieved the same negotiated result within the context of § 40-15-105(1), C.R.S. On the other hand, they could be interpreted that MCI modified its intrastate switched access rates in reliance upon the negotiated scope and extent of other services.

30. In absence of filing of the agreement and Commission determination of a permitted cost-based rate, MCI was not permitted to deviate from its tariff rates in Colorado.

31. Switched access is uniquely defined apart from other services. *See e.g.*, Decision No. R11-0175 at 61. While contracting for access is clearly intended, negotiated agreements must comply with the limitations of § 40-15-105(1), C.R.S.

32. Contract interpretation subject to incorporated law has been summarized:

The parties contract with knowledge of the law. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, 92 L. Ed. 10, 68 S. Ct. 1 (1947). "The parties are presumed to be aware of applicable statutes and to intend to incorporate them." 24 Corbin on Contracts § 24.26, at 273 (1998). In this regard, the law becomes a part of the contemporaneous circumstances of the contract's execution and is incorporated, without reference, into the agreement itself. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130, 113 L. Ed. 2d 95, 111 S. Ct. 1156 (1991) ("Laws which subsist at the time and place of the making of a contract ... enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."); *see also* 24 Corbin on Contracts § 24.26, at 271 (noting that rules and regulations are always considered as contemporaneous circumstances). As a result, the parties are presumed to have intended to create a valid, binding contract and the court should resolve alternative interpretations of contract language so as not to void the contract. *See Torncello v. United States*, 231 Ct. Cl. 20, 27, 681 F.2d 756, 761 (1982) (citing *Arizona v. United States*, 216 Ct. Cl. at 235-36, 575 F.2d at 863); *Truong Xuan*

Truc v. United States, 212 Ct. Cl. 51, 64 n.11 (1976) (noting that a court should construe contract provisions, "if possible, to be lawful rather than unlawful" and citing *Hobbs v. McLean*, 117 U.S. 567, 576, 29 L. Ed. 940, 6 S. Ct. 870 (1886)).

Dart Advantage Warehousing, Inc. v. United States, 52 Fed. Cl. 694, 700 (Fed. Cl. 2002).

33. For MCI to condition pricing or availability of intrastate access service upon reciprocation of service alone would directly contravene the limitations of § 40-15-105(1), C.R.S. An IXC requiring intrastate access service to terminate a call is totally independent of the reciprocal provision of access service. Such an IXC requiring access need not have any ability to provide access services. For MCI to lower the rate for access service only for those able to provide reciprocal service directly contravenes Colorado law.

34. MCI unlawfully discriminated in failing to show that QCC was a relevant dissimilar customer class purchasing identical access service. MCI failed to overcome QCC's *prima facie* showing of unjust discrimination and no lawful basis for price differentiation has been shown.

35. Importantly, the conclusions herein should not be read to question legality of the 2004 Contracts. Rather, it is the failure of MCI to implement those contracts in accordance with the terms of their approval and Colorado law that results in undue discrimination.

36. MCI was required to file the agreements in Colorado. They did not. Once filed, the agreements could have properly affected parties' negotiations and the Commission could have considered whether terms were applicable to other parties if those parties sought those MCI-AT&T rates, terms, and conditions. Further, based upon a review of the entire scope of the contract, it has not been shown that QCC could not have negotiated similar access rates consistent with Colorado law. Unjust discrimination resulted to the extent of variation from tariff rates charged to QCC for identical access service.

37. There is no absolute certainty that QCC would have been able to achieve identical pricing based upon the totality of facts and circumstances. There will never be a way to know. Reparations are not an attempt to calculate contract damages. Rather, reparations approximate a remedy of past unjust discrimination and, consistent with prior Commission policy, avoids a windfall to the utility from discriminatory conduct violating its own tariff obligations.

38. Based upon MCI's analysis of switched access under the settlement, Mr. Canfield calculated that AT&T would benefit from an [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] from tariff rates. Hearing Exhibit 6D at 14. MCI billed QCC [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] for intrastate switched access in Colorado. Hearing Exhibit 5C at 8. Applying an equivalent [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] to QCC billings between January 2004 and January 2007, QCC would have been charged [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] less than it was actually charged. Highly Confidential Exhibit DAC-21 to Hearing Exhibit 6D.

39. MCImetro has an intrastate switched access tariff rate on file with the Commission in Colorado. MCImetro charged an IXC other than QCC a lower rate for intrastate switched access than provided for in the providers' tariff on file with the Commission. Respondents unjustly discriminated first in unlawfully departing from tariff rates, as addressed above, without first giving notice of the agreement. Further, as to QCC, the same access services were sold to other IXCs needing to complete intrastate interLATA telephone calls at a rate unjustly less than that charged to QCC. Qwest made a *prima facie* case that the Respondents' cost to provide service was the same as to all comers requiring access services and no Respondent demonstrated reasonable justification related to the variation in pricing.

40. In the case at bar, QCC has proven that MCImetro unjustly discriminated by granting an unreasonable preferential and advantageous access service to an IXC other than QCC by departing from tariff rates while denying such preference and advantage to QCC. Reparations will be awarded as ordered below for the excess billed to QCC, described above, for identical services.

B. Time Warner Telecom

41. The Recommended Decision awarded QCC reparations in the amount of [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]. The Commission agreed with TWT that the amount was incorrect, as it was based on an incorrect time period. The time period should have ended on October 1, 2008.

42. The issue was remanded for determination of the correct amount of reparations owed by TWT to QCC.

43. The record does not reflect monthly billing detail. Rather, reparations were calculated in Confidential Exhibit DAC-19 to Hearing Exhibit 6C. Each line item of the calculation including a time period after October 1, 2008 will be allocated *pro rata* based upon the number of days within the calculated period. Reparations awarded will be adjusted by the appropriate number of days, as calculated in the Confidential Appendix A. In light of the materiality of the adjustment, the burden to reopen the record for additional evidence, and the likelihood that better evidence might not exist, a *pro rata* allocation is found as a reasonable basis upon which to calculate adjusted reparations.

C. Eschelon Telecom

44. The Recommended Decision awarded QCC reparations in the amount of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] from Eschelon based upon the time period from [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. The Commission determined that time period for calculation of reparations due from Eschelon should end on December 5, 2007.

45. The Commission remanded selection of reparations owed by Eschelon to QCC among three alternatives:

- a) Mr. Canfield's calculation if there is evidence in the record to support an adjustment of his total amount to the correct time period.
- b) Ms. Copley's calculation; or
- c) Dr. Ankum's calculation.

46. Availability of only manual invoices, as opposed to electronic invoices, does not permit a precise determination of intrastate versus interstate minutes of use. As found in the recommended decision, Mr. Canfield made reasonable assumptions to make a *prima facie* showing of appropriate reparations.

47. Mr. Canfield generally attempted to calculate "overcharges" by multiplying the difference between competitive local exchange carrier (CLEC) rates on bills to Qwest and the CLEC rates under the agreements with other IXCs by Qwest's volumes (minutes of use on CLECs' access bills to Qwest).

48. In Hearing Exhibit 14 at pp. 3-4, Ms. Copley testifies regarding her approach to calculating reparations:

- a) Eschelon agreements with Sprint and AT&T ended 3/6/05. Ex 14 at 1.
- b) QCC was billed and paid Eschelon \$404,000 for Intrastate Switched Access in Colorado from December 2002 through December 2008.

- c) Her calculations do not include time period between December 2007 and December 2008.
- d) Using actual billing records, she compiled Confidential Exhibit EC 4, and references Dr. Ankum's analysis.

49. As a result of her computations, if Eschelon had billed QCC at the same rates that AT&T paid from December 2002 through December 2007, QCC would have been billed approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. In turn, QCC would have paid Eschelon approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] less for the period. *See* Confidential Exhibit EC 4.

50. Citing Confidential Exhibit EC-4 to Hearing Exhibit 14C, Ms. Copley contends that QCC was billed and paid [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] for the applicable period. Hearing Exhibit 14C at 3.

51. Ms. Copley disputes Mr. Canfield's reparations based upon the difference in amounts billed and paid; inclusion of December 2007 through December 2008; and that he used the incorrect composite rate upon which Eschelon bills were based. For the final aspect, she refers to Dr. Ankum's testimony for explanation of the flaw.

52. Dr. Ankum addressed Mr. Canfield's calculations. *See* Hearing Exhibit 11 at pp. 45-52. Dr. Ankum initially summarizes that Mr. Canfield applies the difference between intrastate switched access rates billed to Qwest by CLECs and rates Qwest would have been billed under CLEC agreements with other IXC's to Qwest volumes.

53. Dr. Ankum criticizes the approach because he contends that Qwest's internal records are incomplete because the manual invoices only permit one to access the combined interstate and intrastate amounts. This aspect does not contradict Mr. Canfield's approach and forms the basis for assumptions adopted.

54. Dr. Ankum attempts to challenge the reasonableness of assumptions by analyzing the billing data available. Without adequate foundation, Dr. Ankum disregards large invoices affecting calculations. Because the manner of invoice has not been shown to affect the billing accounts, or the nature or amount of billed traffic, it is found more reasonable to include the entire period for which reparations are due, rather than disregarding material amounts affecting the calculation without sufficient basis. Hearing Exhibit 11C at 45–46.

55. Ms. Copley calculates that Eschelon's monthly billings to QCC would have been [BEGIN CONFIDENTIAL] [BEGIN CONFIDENTIAL] less had the rates AT&T paid been used for billing. Dr. Ankum's restatement of Mr. Canfield's analysis produces a very similar result of \$32,776.96.

56. Dr. Ankum states other criticisms unique from Ms. Copley. Hearing Exhibit 11C at 48-50. Mr. Canfield refutes these criticisms such that Eschelon fails to overcome the *prima facie* showing by QCC. Hearing Exhibit 6 at 8-9.

57. In rebuttal, Mr. Canfield also identifies billing accounts used in his calculations that were improperly omitted from Ms. Copley's calculations. Thus, it is not surprising that she found lower billings. He also raises substantial questions regarding variations in data used for her calculations. Hearing Exhibit 6 at 10-11.

58. Neither Dr. Ankum nor Ms. Copley convinces the undersigned ALJ that Mr. Canfield's approach should not be adopted. Thus, like TWT addressed above, reparations will be adjusted to eliminate the time period after December 5, 2007. Because daily billing detail is not available in the record, reparations calculated in Confidential Exhibit DAC-5 to Hearing Exhibit 5C will be adjusted. Each line item of the calculation including a time period after December 5, 2007 will be allocated *pro rata* based upon the number of days within the

calculated period. Reparations awarded will be adjusted by the appropriate number of days, as calculated in the Confidential Appendix A.

59. In light of the burden to reopen the record for additional evidence, and the likelihood that better evidence might not exist, a *pro rata* allocation is found to be a reasonable basis upon which to calculate adjusted reparations.

III. ORDER

A. The Commission Orders That:

1. The Request for Administrative Notice and Consideration of New York Public Service Commission Decision filed by MCImetro Access Transmission Services LLC (MCImetro) on March 26, 2012, is denied.

2. The Complaint filed by Qwest Communications Corporation (QCC) is granted in part as to MCImetro; Time Warner Telecom of Colorado, LLC (TWT);, and Eschelon Telecom, Inc. (Eschelon):

- a. Each Respondent violated § 40-15-105(3), C.R.S., by failing to file access agreements.
- b. Each Respondent unlawfully discriminated against QCC by permitting similar customer classes to purchase functionally equivalent tariff intrastate switched access services at a lesser rate without reasonable cost justification.
- c. QCC is awarded reparations from each respondent from the time contracted discounts varying from tariff rates commenced to the earlier of cessation of contracted discount rates varying from tariffs, the date this Decision becomes a final decision of the Commission, or appropriate

filing of the respective Competitive Local Exchange Carriers' (CLECs) agreement in Docket No. 08M-335T, as applicable. Initial ordered reparations are as follows:

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

Respondents shall pay QCC ordered initial reparations within 30 days of a final Commission decision approving such reparations.

- a. Interest shall accrue on unpaid reparation amounts from the date of accrual of each overcharge through the date of payment and should be calculated using the customer deposit rate(s) in effect during the relevant time periods from the accrual of overcharge to the date of the final Order in this matter.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge