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

Qwest Communications Company, LLC (U5335C),

Complainant,

vs.

tw telecom of california, l.p. (U5358C), Cox California Telecom II, LLC (U5684C), Access One, Inc. (U6104C), Arrival Communications, Inc.(U5248C), Blue Casa Communications, Inc. (U6764C), BullsEye Telecom, Inc. (U6695C), Ernest Communications, Inc. (U6077C), Mpower Communications Corp. (U5859C), Navigator Telecommunications, LLC (U6167C), nii Communications, Ltd. (U6453C), Pacific Centrex Services, Inc. (U5998C), Telekenex, Inc. (U6647C), Telscape Communications, Inc. (U6589C), U.S. TelePacific Corp. (U5271C), and Utility Telephone, Inc. (U5807C).

Defendants.

Case 08-08-006  
(Filed August 1, 2008)

**RESPONSE OF ACCESS ONE, INC. (U6104C), ARRIVAL COMMUNICATIONS, INC. (U5248C), BULLSEYE TELECOM, INC. (U6695C), COX CALIFORNIA TELCOM, LLC (U5684C), MPOWER COMMUNICATIONS CORP. (U5859C), TELSCAPE COMMUNICATIONS, INC. (U6589C), TW TELECOM OF CALIFORNIA, L.P. (U5358C), U.S. TELEPACIFIC CORP. (U5271C) AND UTILITY TELEPHONE, INC. (U5807C) TO APPLICATION FOR REHEARING OF D.16-02-020 FILED BY QWEST COMMUNICATIONS COMPANY, LLC**

Dated: April 14, 2016

Pursuant to the California Public Utilities Commission’s Rule of Practice and Procedure (“Rules”) Rule 16.1(d), competitive carriers Access One, Inc. (“Access One”), Arrival Communications, Inc. (“Arrival”), BullsEye Telecom, Inc. (“BullsEye”), Cox California Telcom, LLC (“Cox”), Mpower Communications Corp. (“Mpower”), Telscape Communications, Inc. (“Telscape”), tw telecom of california, l.p., U.S. TelePacific Corp. (“TelePacific”), and Utility Telephone, Inc. (“Utility”) (“Competitive Carriers” or “defendants”) hereby timely submit this response to Qwest Communications Company, LLC’s (“QCC” or “Complainant”) Application for Rehearing of Decision 16-02-020.

### **INTRODUCTION**

Decision 16-02-020 (the “Decision”) unequivocally rejected QCC’s Complaint by finding that QCC failed to meet the burden to prove *any* of the elements of its asserted “unlawful discrimination” claim. In a prior order issued in this case (D.11-07-058), the Commission set forth each of the specific elements QCC was required to prove at hearing to meet its burden of proof. Yet, as the Decision resoundingly concludes, QCC did not prove a single element. The Commission has thus properly concluded that QCC brought and – for *eight years* sought to prosecute – claims lacking the requisite evidentiary support. The Competitive Carriers have already been forced to expend significant resources defending against QCC’s meritless claims; it is clearly time for this matter finally to be put to rest.

The QCC Application for Rehearing (“QCC Application”) repeats a familiar pattern. The QCC Application does not – and cannot – argue that the Commission made an error of law by applying its long-standing test for evaluating a claim of unlawful discrimination.<sup>1</sup> Rather, QCC

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<sup>1</sup> As noted, the Commission’s test for evaluating a claim of unlawful discrimination was specifically defined for QCC prior to the hearing held in this case. *See* Decision 11-07-058, at 4-5.

once again attempts to take issue with the Commission's test itself and argues that the Commission should instead apply a QCC-created test under which the burden of proof on key elements would be unlawfully shifted away from the Complainant and placed instead on the Defendant Competitive Carriers. QCC's Application would have the Commission believe that the regulatory sky is falling and California regulation is doomed, unless the Commission steps in and relieves QCC of its burden of proof.

### STANDARD OF REVIEW

Commission Rule 16.1(c) provides that "[t]he purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." As the Commission has held, an application for rehearing that asks the Commission "to reweigh the evidence" must be denied, because "the purpose of a rehearing application is to specify legal error, not to be a vehicle for relitigation."<sup>2</sup> Accordingly, an application for rehearing that merely disagrees with the Commission's conclusions and reargues the case must be denied.<sup>3</sup>

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<sup>2</sup> *Application of Pacific Gas and Electric Company for 2013 Rate Design Window Proceeding (U39E)*, A. 12-12-003, D.15-06-037, at 2 (issued Jun. 11, 2015); *see also Alfred Labrada, Complainant, vs. Southern California Edison Company (U338E), Defendant*, C.12-07-022, D.13-07-047, at 3-4 (issued Jul. 25, 2013) (denying rehearing where the application sought to relitigate issues rather than identifying a specific law that was broken); *Application of SOUTHERN CALIFORNIA WATER COMPANY (U 133 W) for an order authorizing it to increase rates for water service by \$ 18,972,300 or 24.17% in 2006; by \$ 1,534,500 or 1.57% in 2007; and by \$ 1,493,900 or 1.50% in 2008 in its Region III Service Area*, A. 06-02-004, D.06-11-020, at 24 (issued Nov. 9, 2006) (stating that "merely asking [the Commission] to reweigh the evidence does not constitute a proper allegation of legal error for purposes of an application for rehearing").

<sup>3</sup> *Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans*, R.12-03014, D.14-10-051, at 9-10 (issued Oct. 16, 2014) (denying a "rehearing application [that] merely disagrees with [the Commission's] findings, without acknowledging that the Decision is based on the record," because "[s]uch claims do not demonstrate error.").

## **I. THE QCC APPLICATION FAILS TO MEET THE STANDARD FOR REHEARING, BECAUSE QCC IDENTIFIES NO LEGAL ERROR**

The QCC Application does not come close to meeting the requisite standard, because it fails to identify any legal error. Indeed, each of the so-called “flaws” that QCC lists are merely complaints about how the record evidence was weighed under the Decision.<sup>4</sup> As such, the QCC Application fails to meet the applicable standard under Rule 16.1(c) and thus cannot be duly considered as an application for rehearing; the QCC Application must therefore be summarily denied.<sup>5</sup>

The Decision finds, for example, that QCC failed to carry its burden to prove that QCC was similarly situated to the contracting carriers.<sup>6</sup> While the QCC Application attempts to take issue with this finding, QCC does not identify any specific legal error allegedly committed by the Commission.<sup>7</sup> Instead, QCC claims merely that the Commission should have weighed the evidence differently,<sup>8</sup> and QCC is thus attempting to relitigate issues already fully considered and decided.

Similarly, upon due consideration of the record facts, the Decision concludes that the Competitive Carriers “had a rational basis for offering the contracting carrier rates different from their tariffed rates,”<sup>9</sup> and thus found that QCC also failed to prove this element of its claim.<sup>10</sup>

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<sup>4</sup> See, e.g., Application at 5-6.

<sup>5</sup> See, e.g., *Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans*, R.12-03014, D.14-10-051, at 9-10 (issued Oct. 16, 2014) (denying a “rehearing application [that] merely disagrees with [the Commission’s] findings, without acknowledging that the Decision is based on the record,” because “[s]uch claims do not demonstrate error.”).

<sup>6</sup> Decision at 10-11, 26. Indeed, the Commission found that QCC was not similarly situated to the contracting carriers in a variety of ways, including the respective call volumes and costs of negotiation.

<sup>7</sup> See Application at 25-31.

<sup>8</sup> See *id.* at 28 (arguing that the Commission should have given more weight to the theory of QCC’s expert – which contradicted Commission precedent).

<sup>9</sup> Decision at 21; see also *id.* at 16-18 (discussing the record facts).

Again, the QCC Application fails to identify any specific error or misstatement of law, and improperly attempts to take issue with the way in which the Commission weighed the evidence.<sup>11</sup> This likewise illustrates QCC’s failure to meet the applicable standard of review.

In short, the Commission fully (and indeed repeatedly) weighed the record evidence and concluded that QCC failed to meet the burden of proof to establish the elements of its claim. The QCC Application does not specify any error of law and thus does not meet the Commission’s standard for rehearing. Accordingly, the QCC Application should be summarily denied.

**II. THE QCC APPLICATION ALSO FAILS TO SATISFY THE STANDARD FOR REHEARING BECAUSE IT SEEKS TO RELITIGATE THE SAME ARGUMENTS THE COMMISSION ALREADY CONSIDERED AND REJECTED**

The arguments raised in the QCC Application have all been raised by QCC before, and soundly rejected by the Commission and the ALJ. Indeed, in many cases, QCC submits entire paragraphs that are identical or virtually identical to those it previously submitted on appeal, and thus clearly fails to meet the applicable standard of review.

QCC even brazenly concedes that it is re-asserting its previous arguments. For example, in seeking to relitigate the Decision’s determination that Competitive Carriers had a rational basis for their challenged conduct, QCC asserts that its earlier “appeal of the POD highlighted” the same argument.<sup>12</sup> Moreover, QCC unabashedly cites a large part of its own Post-hearing Brief, admitting that its current argument re-hashes what QCC “recounted at length” in its Post-

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<sup>10</sup> *Id.* at 26

<sup>11</sup> *See, e.g.*, Application at 21, 23 (arguing that more weight should be given to the theory of QCC’s expert witness – which theory is itself incompatible with California law – and less weight to the specific testimony of Competitive Carrier company and expert witnesses concerning the nature of the agreements).

<sup>12</sup> Application at 16.

hearing Brief.<sup>13</sup> QCC simply misunderstands the purpose of an Application for rehearing, apparently thinking it appropriate to resubmit the same arguments that it has raised previously, in the hope that the same Commission that rejected its arguments the first time will change its mind on the second try. Notably, QCC fails to cite to any Commission decision that suggests, let alone demonstrates, that QCC's approach is consistent with the Commission's rules or is a basis for granting its request.

With one exception, each of the arguments QCC advances in the Application were also raised in its appeal of the Presiding Officer's Decision ("POD"). Indeed, the following list demonstrates that each QCC argument raised in the Application was already raised in QCC's appeal of the POD and thus each argument was fully considered and rejected by the Commission:

- The Commission used the wrong analytical standard for the rational basis test<sup>14</sup>
- The desire to preserve revenue cannot immunize discriminatory conduct<sup>15</sup>
- Denial of Complaint conflicts with Commission precedent<sup>16</sup>
- Difference in cost of service is a critical component of establishing a rational basis<sup>17</sup>
- Refusal to consider relative cost of service is erroneous<sup>18</sup>
- QCC never asserted that discounted rates had to be provided on a standalone basis<sup>19</sup>
- Withholding payment for services cannot be a required service-related term of the agreements<sup>20</sup>

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<sup>13</sup> Application at 36-37.

<sup>14</sup> Application at 15-16; Qwest Communications Company, LLC's Appeal of Presiding Officer's Decision Issued August 26, 3015 at 12-13 (filed Sep. 25, 2015) ("Appeal").

<sup>15</sup> Application at 17-18; Appeal at 14-15.

<sup>16</sup> Application at 19; Appeal at 15-16.

<sup>17</sup> Application at 20-22; Appeal at 16-17.

<sup>18</sup> Application at 22-25; Appeal at 16-17, 30-34.

<sup>19</sup> Application at 32-33; Appeal at 18-19.

<sup>20</sup> Application at 33-35; Appeal at 19-21.

- QCC was willing to accept all “service-related” rates, terms and conditions of the agreements<sup>21</sup>
- Requirement to file untariffed agreements is critical<sup>22</sup>
- D.07-12-020 did not eliminate requirement to file untariffed agreements<sup>23</sup>
- Filing requirements are unambiguous<sup>24</sup>

The one QCC argument that is not simply a rehash of an argument QCC raised in its appeal of the POD relates to the Decision’s finding that QCC was not “similarly situated” to the contracting carriers<sup>25</sup> – which is due to the fact that the Decision diverged from the POD on this point. Notably, however, the arguments that QCC raises in the Application concerning this issue were previously raised by QCC in its opposition to Competitive Carriers’ appeal of the POD,<sup>26</sup> and thus already considered and rejected by the Commission.

Moreover, even if the QCC Application was to be substantively considered the Commission would again conclude that QCC is simply wrong on the law and wrong on the facts. Competitive Carriers respectfully refer the Commission to their briefs on appeal, which unequivocally refute QCC’s arguments:

- Commission used the wrong analytical standard for the rational basis test;<sup>27</sup>
- The desire to preserve revenue cannot immunize discriminatory conduct;<sup>28</sup>
- Denial of Complaint conflicts with Commission precedent;<sup>29</sup>

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<sup>21</sup> Application at 35-37; Appeal at 21-23.

<sup>22</sup> Application at 38-41; Appeal at 26-29.

<sup>23</sup> Application at 41-42; Appeal at 23-24

<sup>24</sup> Application at 42-44; Appeal at 24-26.

<sup>25</sup> Application at 26-31.

<sup>26</sup> Qwest Communications Company LLC’s Response to Competitive Carriers’ Appeal of Presiding Officer’s Decision (filed October 12, 2015).

<sup>27</sup> Response of tw telecom *et al.* to Qwest Communications Company, LLC’s Appeal of Presiding Officer’s Decision Issued August 26, 2015 at 5-7 (filed Oct. 12, 2015) (“Competitive Carriers’ Response”).

<sup>28</sup> Competitive Carriers’ Response at 7-11.

- Difference in cost of service is a critical component of establishing a rational basis;<sup>30</sup>
- Refusal to consider relative cost of service is erroneous;<sup>31</sup>
- QCC never asserted that discounted rates had to be provided on a standalone basis;<sup>32</sup>
- Withholding payment for services cannot be a required service-related term of the agreements;<sup>33</sup>
- QCC was willing to accept all substantive rates, terms and conditions of the agreements;<sup>34</sup>
- Requirement to file untariffed agreements is critical;<sup>35</sup>
- D.07-12-020 did not eliminate requirement to file untariffed agreements;<sup>36</sup>
- Filing requirements are unambiguous;<sup>37</sup> and
- QCC was “similarly situated” to the contracting carriers.<sup>38</sup>

In addition to demonstrating QCC failed to carry the burden of proving the elements of its allegations, Competitive Carriers also raised numerous affirmative defenses which the Decision did not address. While there is no basis for granting rehearing of the Decision, Competitive Carriers’ note for the record that to the extent the complaint is not dismissed entirely it would be necessary for the Administrative Law Judge to consider a host of highly meritorious defenses.<sup>39</sup>

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<sup>29</sup> Competitive Carriers’ Response 5-7, 9-10, 19.

<sup>30</sup> Competitive Carriers’ Response at 6-7.

<sup>31</sup> Competitive Carriers’ Response at 6-7, 9-10, 18-19.

<sup>32</sup> Competitive Carriers’ Response at 12-16.

<sup>33</sup> Competitive Carriers’ Response at 12-15.

<sup>34</sup> Competitive Carriers’ Response at 12-17.

<sup>35</sup> Competitive Carriers’ Response at 21-30.

<sup>36</sup> Competitive Carriers’ Response at 21-23.

<sup>37</sup> Competitive Carriers’ Response at 21-28.

<sup>38</sup> Competitive Carriers’ Response at 17-20; Appeal of Presiding Officer’s Decision by Cox California Telecom, LLC *et al.*, filed Sept. 25, 2015.

<sup>39</sup> Competitive Carriers’ Response at 33-34.

In sum, the issues raised by the QCC Application have already been fully considered and resolved under the Decision, and for that reason the Competitive Carriers simply refer to their prior filings rather than re-briefing the case here. Since there is no need for the Commission to consider any of QCC's warmed-over arguments again under the Commission's standard of review for rehearing, the Commission should reject QCC's Application.

### **III. QCC'S ALLEGATIONS THAT THE DECISION DOES NOT ADDRESS COX AND TW TELECOM ARE LIKEWISE REPETITIVE OF QCC'S PRIOR ARGUMENTS**

While the QCC Application claims that the Decision did not address QCC's claims against Cox and tw telecom, this is simply not the case. As with its other arguments addressed above, QCC *repeats* the same allegations included in its appeal of the POD on this issue. In fact, except for formatting changes, the text on this point included in QCC's appeal of the POD is verbatim the language included in its Application for Rehearing.

Moreover, QCC's argument is wrong. Competitive Carriers have already refuted QCC's argument and showed its allegations are based on QCC's unnecessarily narrow reading of the Commission's findings. Since QCC has not revised its prior argument or added any new arguments, there is no legal error, as the findings and conclusions in the Decision clearly apply to all of the Competitive Carriers. Moreover, text in the Decision also generally addresses all defendants. For example, in discussing whether QCC was similarly situated to the contracting carriers, the Decision correctly finds:

This said, we agree with the position taken by Defendant CLECs in their appeal that, even if cost is disregarded, the record is replete with evidence that QCC was dissimilar to the contracting carriers in several ways that we cited in D.11-07-058.23 For instance, there can be no doubt that the contracting carriers -- AT&T and Sprint -- had significantly higher volume of traffic than QCC.<sup>40</sup>

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<sup>40</sup> Decision at 10-11 (emphasis in original).

This finding is just one example of the Decision referring to *all* Competitive Carriers, and it notably does *not* refer to “some” of the Competitive Carriers or refer “all of the Competitive Carriers except Cox and tw telecom.”<sup>41</sup>

Similarly, in addressing whether QCC was willing and able to enter into the contracts at issue, the Decision, Section 2.4, correctly rejects QCC’s claim that it would have entered into the substantive terms and conditions of the contracting carrier and been willing and able to comply with such terms. The Decision expressly reflects that QCC “qualifies its claim by stating that it would have been willing to meet only the switched access service-related terms and conditions of each of the agreements between the CLECs and the contracting carriers.”<sup>42</sup> The Decision need not identify every contract, since *QCC* clearly failed to demonstrate its compliance with this requirement.<sup>43</sup>

QCC elected to bring a complaint against numerous carriers which resulted in the development of an overwhelming amount of evidence, including extensive testimony, discovery

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<sup>41</sup> Moreover, the record evidence plainly shows AT&T’s volume of traffic and the volume of services it purchased exceeded what QCC purchased from Cox. *See* Competitive Carriers Post-Hearing Opening Brief, pp.; Competitive Carriers Post-Hearing Reply Brief, pp. 7-8 and Appendix B, pp. 4-5.

<sup>42</sup> Decision at 18 (citing QCC’s Opening Brief at 99). The Decision reflects that “the CLECs” rely on *Sea-Land Service, Inc. v. ICC*, and notably does not say “some of the CLECs” or “all of the CLECs other than Cox and tw telecom.” While the Decision does not address the specific agreements at issue for Cox and tw telecom, respectively, the record plainly shows that QCC would not adopt those types of agreements.

<sup>43</sup> While the Decision does not address the specific agreements at issue for Cox and tw telecom, respectively, the record plainly shows that QCC would not adopt those types of agreements. *See* Competitive Carrier’s Opening Post-Hearing Brief, Appendix B, pp. 9-10 (quoting QCC’s testimony at the evidentiary hearing:

“Q: . . . So with regard to whether Qwest, QCC would be obligated to take the terms of the Cox/AT&T agreement, this is a yes or no question: Is QCC willing to take all of the rates and terms of the Cox/AT&T agreement that is at issue in this proceeding?

A. No, we [QCC] are not willing to take the nonswitch access related terms and conditions, specifically the purchase of the special access volumes.”

Tr. at 302:5-17. Emphasis added. *See* also, Ex. 21 at 9:21-22:5; 10:17-11:2; Ex. 23 at 17:17-18:2.

responses, and other materials. The Commission plainly rejected - as to all defendants without exception - QCC's novel and unfounded theory that cost should be the only factor the Commission should consider.<sup>44</sup> The Decision applies to all defendants and therefore QCC fails to demonstrate legal error on this issue.<sup>45</sup>

#### IV. CONCLUSION

In this litigation, which has spanned eight years and concerns events that began 16 years ago, QCC persists in trying to rehash the same arguments over and over. All of QCC's arguments have been soundly rejected, and QCC has no new arguments. QCC's Application does not meet the Commission's standard for rehearing and should be denied accordingly.

Respectfully submitted April 14, 2016, at San Francisco, California.

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<sup>44</sup> See Decision at 10.

<sup>45</sup> The record evidence unequivocally demonstrates and the Decision correctly finds that QCC failed to carry its burden with respect to all Competitive Carriers. Decision, Finding of Fact No. 4, Conclusion of Law No. 2. However, to eliminate any possible confusion and future appeals by QCC, Competitive Carriers would not be opposed a modification of the Decision to include the following revised Finding of Fact No. 1:

1. To preserve revenue from certain contracting carriers who withheld payment, some Defendants negotiated discounted off-tariff rates with certain contracting carriers. Other Defendants negotiated agreements under which special access, switched access and other services were provided and switched access was provided at a discounted rate.

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Respectfully submitted pursuant to Rule 1.8(d),

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