

Decision _____

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)

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**MODIFIED PRESIDING OFFICER'S DECISION DENYING
COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC**

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**MODIFIED PRESIDING OFFICER'S DECISION DENYING
COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC**

Summary

In this complaint case, Qwest Communications Company, LLC, (Complainant or Qwest) asserts that certain named competitive local exchange carriers (CLECs or Defendants) unlawfully discriminated against it by secretly providing discounted switched access rates to AT&T (contracting carrier)¹ through unfiled, off-tariff agreements. Qwest argues that, in doing so, the CLECs improperly overcharged Qwest for the identical switched access that they provided to the contracting carriers. This, says Qwest, violated Public Utilities Code Sections 453,² 489,³ and 532.⁴ Qwest seeks varied amounts of reparations from each CLEC, totaling approximately \$22 million.

In support of its position, Qwest also cites the Commission's long held belief in public disclosure of off-tariff agreements which, Qwest contends, are intended to prevent the type of unlawful discriminatory behavior that Qwest puts at issue here.

¹ Some defendants offered discounted switched access to AT&T and Sprint, therefore, any reference to AT&T or "contracting carrier(s)" includes Sprint.

² Unless otherwise specified, subsequent section references are to the Public Utilities Code. Section 453(c) prohibits a public utility from establishing or maintaining "any unreasonable difference as to rates, charges, service, facilities" between localities or between classes of service.

³ Section 489(a) requires every public utility to file with the commission, and keep open to public inspection, schedules showing all rates and contracts which in any manner affect or relate to service.

⁴ Section 532 generally prohibits a public utility from charging a different rate or receiving a different compensation than those specified in its schedules on file. A utility also may not extend to any corporation or person any form of contract or agreement "except such as are regularly and uniformly extended to all corporations and persons."

We conclude that, although the CLECs provided different rates to Qwest than they provided to certain contracting carriers, there was a rational basis for doing so. Accordingly, the CLECs did not engage in unreasonable rate discrimination under the circumstances present in this case. The relief requested by Qwest is denied.

1. Procedural Background

In Decision (D.) 10-07-030, the Commission dismissed an earlier complaint filed by Qwest Communications Company, LLC (Qwest) against 21 California competitive local exchange carriers (CLECs or Defendants). Qwest's earlier complaint alleged that, by voluntarily contracting for intrastate access service at rates different from the tariffed rates, the Defendants had violated Public Utilities Code Sections 453 and 532, and had subjected Qwest to unjust and unreasonable rate discrimination. The Commission initially decided that Qwest had failed to state a cause of action upon which relief could be granted, because D.07-12-020 authorizes carriers to offer intrastate access services in voluntary contracts at rates different from their tariffed rates without further ratemaking review.⁵ In dismissing the case for failure to state a cause of action, the Commission noted that Ordering Paragraph 5 of D.07-12-020, authorized carriers to "voluntarily contract with each other to pay intrastate access charges different from those adopted in today's decision."

However, this proceeding is again before the Commission because Qwest filed a timely application for rehearing of our August 2, 2010, D.10-07-030. In D.11-07-058, dated July 11, 2011, the Commission concluded that Qwest's

⁵ D.07-12-020, Re Review Policies Concerning Intrastate Carrier Access Charges (2007) - Final Opinion Modifying Intrastate Access Charges (2007 Access Charge Decision).

complaint should not have been dismissed for failing to state a cause of action, and granted rehearing, citing D.94-09-065, in which the Commission noted that Courts reviewing this issue under statutes similar to § 453 have concluded that such contracts may be permissible if the rates under the contract are made available to any similarly situated customer willing to meet the contract's terms.

A prehearing conference (PHC) was initially held on August 28, 2012 before Administrative Law Judge (ALJ) Robert Barnett. A scoping memorandum setting forth the issues and schedule for the proceeding issued October 31, 2012. Thereafter, the parties exchanged discovery, including testimony. Qwest achieved informal resolution with several CLECs and filed motions for dismissal of several parties. The matter was reassigned upon ALJ Barnett's retirement, and in June 2013, the assigned ALJ granted dismissal of several parties, revised the caption to reflect this and set hearing. A further PHC was held on September 13, followed by evidentiary hearings held September 24-27, October 2-3 and October 18, 2013. The parties filed opening briefing on November 22 and reply briefing on December 20, 2013. The parties submitted an agreed list of exhibits for submission in the case in April 2014.

2. Complainant Standard of Proof

In granting rehearing, the Commission cited D.94-09-065, in which the Commission noted that Courts reviewing this issue under statutes similar to § 453 have concluded that such contracts are permissible if the rates under the contract are made available to any similarly situated customer willing to meet the contract's terms.⁶ Therefore, in order to prove that the CLECs engaged in

⁶ D.11-07-058 at 15 citing *Sea-Land Service, Inc. v. ICC* (D.C. Cir. 1984) 738 F.2d 1311, 1317; *MCI Telecommunications Corp. v. FCC* (D.C. Cir. 1990) 917 F.2d 30, 38. GO 96-B,

Footnote continued on next page

unreasonable rate discrimination with regard to the provision of intrastate switched access, Qwest must first demonstrate that it was similarly situated to the contracting carrier(s), secondly that there was no rational basis for the Defendant CLECs to voluntarily contract for intrastate access service with the contracting carrier at rates different from their tariffed rates, and thirdly, that Qwest was willing to meet the contract terms agreed to by the contracting carrier.⁷

This Commission previously has held that merely showing that rates lack uniformity is, by itself, insufficient to establish that rates are unreasonable or unlawful,⁸ and that numerous characteristics of a particular customer, such as volume, calling patterns, cost of negotiation, etc., could be sufficient to distinguish one customer from another.⁹

2.1. Qwest and Contracting Carrier Are Not Similarly Situated

Qwest contends that it was similarly situated to the contracting carrier, because the intrastate switched access service provided in California by the Defendants to Qwest and to the contracting carrier was identical in terms of

Telecommunications Industry Rule 8.2.2 -Availability of Contract Rates, stating: "The rate or charge under a contract then in effect must be made available to any similarly situated customer that is willing to enter into a contract with the same terms and conditions of service."

⁷ See D.11-07-058 at 4.

⁸ D.11-07-058 at 4 citing D.07-01-020, Order Denying Rehearing of D.06-07-030 relying on *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172,1180.

⁹ D.11-07-058 at 4 citing D.94-09-065 *Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1994) 56 Cal.P.U.C.2d 117,243.

function, with respect to facilities used to route the service, and with respect to cost to provide the service.¹⁰

Qwest's witness Mr. Easton explained that, intrastate switched access refers to the elements provided by a local exchange company carrier which allows a customer's long distance call to be delivered to, or received from, his or her long distance carrier. The local exchange company carries the call from the user to the originating switched access (the interexchange carrier [IXC]) which then carries the call over its long distance network to the called party's local exchange company in another part of the state for termination.¹¹ Qwest posits that the Defendants routed calls originating from Qwest and from the contracting carrier through the same switched access facilities, which were within the exclusive control of Defendants.¹² Thus, says Qwest, the Defendants incurred the identical cost to route the switched access service to each of its end user customers, whether the service was being provided by Qwest or by the contracting carrier.¹³ Furthermore, Qwest contends that the Defendants provided discounted rates for switched access to the contracting carrier under off-tariff

¹⁰ Qwest 11-22-13 Post Hearing Brief, Section VIII-A at 76-78.

¹¹ Qwest 11-22-13 Opening Brief at 6 and Easton testimony, Exh. 1 at 8-18.

¹² In its Opening Brief, Qwest explains its theory of why CLECs have exclusive control over intrastate switched access rates, how switched access is routed and who carries the call. It recaps the testimony of its witnesses Easton and Weisman who contend that CLEC-provided switched access is a monopoly, bottleneck service. See Qwest 11-22-13 Opening Brief at 6-15, citing testimony of Weisman and Easton.

¹³ Testimony of Weisman, Exh. 10 at 4 cited in footnote 20 at 12 of Defendants 11-22-13 Post Hearing Brief: "two interexchange carriers (IXCs) that are different in certain respects are presumptively similarly situated if there is no difference in the cost of supplying switched access to them"; also citing Qwest Prehearing brief at 10 - price differentiation can be justified "to the extent the cost of providing this service to one customer varies from the cost of providing the service to another customer."

agreements which it failed to file with Commission, and which they never publicly disclosed or offered to Qwest.

The CLECs contend that Qwest was not similarly situated to the contracting carriers to whom discounts (off the tariffed rates) were granted. For instance, the Defendant CLECs argue that the contracting carriers had a much greater access call volume. They say that this directly impacts the methods and points of interconnection for traffic exchange, and requires less network elements to be used, which in turn has a direct impact on the cost effectiveness of routing options available to each CLEC who services them.¹⁴ They characterize as “misguided,” Qwest’s theory that the underlying cost to provide switched access service to the contracting carrier is the relevant factor when deciding whether Qwest and the contracting carrier were similarly situated.¹⁵ Moreover, they argue that because Qwest’s economic expert (Easton) did not conduct a cost study for intrastate switched access services for this proceeding, Qwest could not prove that the actual cost for each CLEC to provide the identical service to the contracting carriers was the same as the cost to provide service to Qwest.¹⁶

It is true that there was no evidence provided at hearing by either party which revealed the actual cost that the CLECs incurred to route intrastate

¹⁴ Post Hearing Reply Brief of Access One and Bullseye at 2.

¹⁵ Defendant’s Opening Post Hearing Brief dated 11-22-13 at 21.

¹⁶ *Id.* at 22. “The only evidence that Qwest attempted to provide ...i.e., to show that the [CLECs] actually incurred ‘identical costs’ to provide the ‘identical services’ to [Qwest] and the [contracting carriers] was that of Mr. William Easton. However, Mr. Easton’s testimony does not contain any actual demonstration of facts in this regard. He merely makes bare assertions that a [CLEC’s] costs were ‘identical’ or that services were ‘identical.’” [citing in footnote 48 Exh. 1 at 6, 19, 21, 38. Also Weisman testimony Exh. 9 at 8, 27; Exh. 10 at 29, 41.] “Likewise, Professor Weisman simply presumes, without any foundation, that the costs and services are identical regardless of the customer.”

switched access service within California.¹⁷ Accordingly, the underlying cost to provide switched access service to Qwest versus to the contracting carriers cannot be considered here for purposes of deciding whether Qwest and the contracting carrier were similarly situated. It would be purely speculative for the Commission to place consideration upon this factor in making its determination.¹⁸ We reach this conclusion, despite the fact that the Defendants provided an excerpt from FCC Statistics of Common Carriers¹⁹ which they say demonstrates that the contracting carriers had a volume of calls between 7 to 21 times greater than Qwest's. Absent cost data, it would still be speculative to surmise the effect of the greater call volume on overall costs.

Accordingly, the Presiding Officer's Decision concluded that, because the CLECs provided the same services to Qwest that they provided to the contracting carriers, and used the same or similar facilities to route these services to Qwest and the contracting carriers, the Commission would consider Qwest and the contracting carriers to be similarly situated for purposes of its analysis.²⁰ The outcome reached on this issue is somewhat moot since, as will be discussed

¹⁷ Qwest 11-22-13 Post Hearing Brief, Section VIII-B at 79-80.

¹⁸ Defendants also argued that Qwest could not prove that the cost for each CLEC to provide switched access service to the contracting carriers was exactly the same as the cost to provide service to Qwest, because Qwest's economic expert did not conduct a cost study for intrastate switched access services for this proceeding.

¹⁹ See Exh. 18, Testimony of Peter LaRose at 26.

²⁰ The Presiding Officer's Decision noted that Qwest and the Defendants offered testimony by witnesses and exhibits to describe, in great detail, the fine points of how switched access is routed, various distinctions between types of facilities that CLECs may use to route traffic and ways in which carriers may avoid certain routing and benefit from other routing. For these reasons, the Presiding Officer's Decision concluded that the pertinent point is that switched access is within the exclusive control of the Defendants -- whether traffic originates or ends with Qwest or with the contracted carrier.

below, Qwest ultimately fails to satisfy its burden of proof that there is unlawful discrimination regardless of whether Qwest prevails or fails to show similarity between itself and the contracting carriers. As a result, it is arguably somewhat unnecessary to revisit the issue of whether Qwest is similarly situated to support the Presiding Officer's correct conclusion that the relief requested by Qwest should be denied.

However, we are persuaded by the points made by the Defendant CLECs in their appeal that, although the Presiding Officer's Decision correctly concludes that Qwest failed to meet its burden to demonstrate unlawful or unreasonable discrimination, it is still important to address whether Qwest was similarly situated, simply because Qwest carries this burden as well.

We completely understand, and do not disagree with the conclusion of the Presiding Officer's Decision that "the underlying cost to provide switched access service to Qwest versus to the contracting carrier(s) cannot be considered...for purposes of deciding whether Qwest and the contracting carrier were similarly situated."²¹ Nor do we second guess the Presiding Officer's opinion that "there was no evidence provided at hearing by either party which revealed the actual cost that the CLECs incurred to route intrastate switched access service within California..." and that "absent cost data, it would still be speculative to surmise the effect of the greater call volume on overall costs."²² 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 Qwest was dissimilar to the

²¹ See Presiding Officer's Decision at 9.

²² *Id.* at 8-9.

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 Qwest. Also, the “cost of negotiation” clearly is another significant distinction between Qwest and the contracting carriers.²⁴

In summary, while it is correct that, Qwest would not prevail even if it were similarly situated to the contracting carriers (e.g., because Qwest fails to satisfy its burden of proof that there is unlawful discrimination), the facts that convince us that there was a rational basis for disparate treatment of the contracting carriers leads to the inevitable conclusion that Qwest also is not similarly situated to them. Accordingly, we agree to modify the finding of facts in the Presiding Officer’s Decision to reflect this.

²³ On page 4 of D.11-07-058, we expressly set “guiding principles” for the carrier seeking to prove discrimination. We indicated that the carrier must show that they are similarly situated and that there was no rational basis for different treatment. We noted that simply showing that rates lack uniformity is insufficient to establish unreasonableness or unlawfulness. And we expressly stated that: “Numerous characteristics of a particular customer -- volume, calling patterns, cost of negotiation, etc. -- could be sufficient to distinguish one customer from another” (citing Re: Alternative Regulatory Frameworks for Local Exchange Carriers [D.94-09-065] (1994) 56 Cal.P.U.C.2d 117, 243).

²⁴ The Defendant CLECs demonstrated the detriment that would accrue had they not negotiated with the contracting carriers. Indeed, the superior negotiation positions of AT&T and Sprint are what made them able (whether fairly or unfairly) to impose their will upon the CLECs by withholding payment to acquire lower rates. This is why, concluding that “there was a rational basis to negotiate a favorable, discounted rate with the contracting carriers” as the Presiding Officer’s Decision does in Section 2.3, essentially demonstrates the point that the contracting carriers were anything but “similar” to Qwest.

2.2. Requirement to File Tariff

Qwest contends that Section 489(a)²⁵ requires CLECs to file off-tariff contracts with the Commission although deviations from tariffs are permitted²⁶ under Sections 489 and 532. Qwest argues that public disclosure of such deviations is critical.²⁷ Qwest further reasons that the present case is within the Commission's longstanding General Order (GO) 96-A adopted in 1962, which Qwest says has always required that off-tariff contracts, or individual case basis (ICB) contracts, be filed with, and authorized by, the Commission. Citing a 1913 railroad case, Qwest argues that the Commission has required off-tariff contract filing requirements as a means to prevent discrimination for over 100 years.²⁸ It argues that when initially adopted, GO-96-A mandated that:

... no utility of a class specified herein shall hereafter make effective any contract arrangement or deviation for the furnishing of any public utility service at rates or under conditions other than the rates and conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of the Commission to carry out the terms of such contract, arrangement or deviation. Request for such authorization should

²⁵ Section 489(a) provides that: The commission shall, by rule or order, require every public utility other than a common carrier to file with the commission within the time and in the form as the commission designates, and to print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rental, classifications, or service.

²⁶ Qwest 11-22-13 Post Hearing Brief, Section V-C at 57 footnote 256: "See Section 489(a) which provides in part 'Nothing in this section shall prevent the commission from approving or fixing rates, tolls, rentals, or charges, from time to time, in excess of or less than those shown by the schedules.'"

²⁷ Qwest 11-22-13 Post Hearing brief at 55-58.

²⁸ *Id.* at 55 footnote 252 citing California Western RR & Nav. Co., 2 CRC 584 (1913), in which the Commission rejected an application to provide a discounted contract rate for tariffed service on a retroactive and prospective basis.

be made by application in accordance with the commission's Rules of Procedure, except that, where the service is of minor importance or temporary in nature, the Commission may accept an application and showing of necessity by Advice Letter....²⁹

Furthermore, Qwest says that the Commission has made it clear that its off-tariff contract filing requirement is applicable within the context of both wholesale and retail services. In this regard, it cites the 1993 D.93-06-103 involving AT&T Communications of California, Inc., in which a request to provide private line service under a customer-specific contract to Contel Service Corporation was at issue.³⁰ In the AT&T/Contel case, the Commission granted prior approval of AT&T's advice letter filing regarding its off tariff agreement per GO-96-A.

Qwest says that several recent cases make it clear that the Commission intends that CLECs are subject to the provisions of GO 96-A and that dominant or non-dominant interexchange carriers must seek approval of individual contracts which are entered at other than existing tariff rates.³¹ Qwest contends that, not only has the Commission been clear that no carrier is exempted from following GO 96-A with respect to off tariff agreements, the Commission has

²⁹ *Id.* With reference to footnote 252 in which Qwest indicates that it is referring to GO 96-A, Subsection X, which is no longer available on the Commission's website but was modified with adoption of GO 96-B in 2007.

³⁰ Qwest 11-22-13 Post Hearing Brief at 57 footnote 257 also cites D.99-09-027 In the Matter of the Application of Pacific Gas and Electric Company (U39E) for Modification of Resolution E-3423 to Bring Ratemaking Treatment for the Exxon Agreement into Conformance with Public Utilities Code Section 372(b)(3), 1999 Cal. PUC LEXIS 634 at *2 (Commission modified the termination date of the PG&E/Exxon agreement submitted under GO 96-A, Section X).

³¹ *Id.* at 59, citing Sections X.A and X.B of GO 96-A and In re Rulemaking on Modifying Tariff Filing Rules for Telecommunications Utilities other than AT&T, D.90-02-019, 1990 Cal. PUC LEXIS 94 at 15-16.

clearly stated that CLECs have no “blanket authority for ICB arrangements” and that any such contracts “must be approved by Advice Letter.”³²

The Defendants acknowledge that D.07-12-020 and subsequent decisions implementing the FCC’s intercarrier compensation order, require Qwest – which itself in some cases, operates as a CLEC providing intrastate switched access services within California - to file an advice letter adopting or modifying its intrastate switched access charges.³³ However, the CLECs contend that wholesale contracts, by which they provide direct or indirect interconnection to the switched access of their networks for transport and completion of interexchange calls (and occasionally, local calls), are not subject to contract filing requirements and other provisions of state law and Commission rules, which they contend are generally only applicable to retail services.³⁴ They contend that interconnection agreements between themselves and incumbent local exchange carriers (ILECs) must be filed with the Commission pursuant to GO 96-B and GO 171;³⁵ however, interconnection and related compensation arrangements

³² *Id.* citing Local Competition Docket case D.97-09-110, 1997 Cal.PUC LEXIS 875 at 23 (“ICB arrangements are subject to GO 96-A rules. There is no blanket authority for ICB arrangements.”); The Matter of the Application of Citizens Telecommunications Company dba Citizens Long Distance Company (U-5429-C) for Expansion of its Current Authority to Provide Competitive Local Exchange Services, D.97-05-082, 1997 Cal.PUC LEXIS 262 at 23.

³³ 11-22-13 Post hearing Brief of Defendants at 125. The CLECs argue that because Qwest has not demonstrated that it has complied with this requirement, Qwest has unclean hands and should be barred from making a claim for relief as a result of their failure to comply with filing requirements.

³⁴ 11-22-13 Post hearing Brief of Defendants at 58.

³⁵ Defendants explain that these GOs implement Section 252 of the Federal Communications Act, which prescribes specific requirements and procedures to facilitate establishment of interconnection agreements for local exchange traffic between an ILECs and CLECs, and require filing with relevant state commissions for approval.

between ILECs and IXCs are governed by switched access tariffs.³⁶ They say that agreements subject to Section 252 of the Federal Communications Act may establish interconnection and related compensation arrangements at variance from tariffs when one of the parties is operating as an IXC (providing intrastate toll service) and that, in such cases, it is permissible for provisions in such an agreement to supersede conflicting tariff provisions.³⁷ For these reasons, they assert that there is no state filing requirement in the case of interconnection agreements and compensation arrangements between carriers other than ILECs. In support of their contention, the Defendants offered several exhibits establishing below-tariff rates (by ILECs operating as IXCs) for intraLATA toll calls which vary from tariff.³⁸

The CLECs contend that the Commission's existing rules as enunciated in D.07-12-020, expressly permit CLECs to enter into individual contracts for switched access service.³⁹ Furthermore, they contend that the Commission only requires CLECs to cost-justify a tariff rate when that rate is above the Commission-set rate cap for CLEC switched access. They point out that, when the Commission has reviewed individually-negotiated agreements providing for rates below tariff switched access charges, the Commission has found such contracts nondiscriminatory.

³⁶ *Id.* at 60-61.

³⁷ *Id.* at 61 footnote 202 citing Exhs. 437, 438, 518, 657, 700, 800 and 904.

³⁸ *Id.*

³⁹ D.07-12-020 at 16-17 "Carriers may voluntarily contract with each other to pay intrastate charges different from those adopted in today's decision."

2.2.1. Relevance of Qwest's Alleged Failure to File Off-Tariff Contracts

The Defendant CLECs assert that Qwest has itself had contracts with customers in which it has agreed to charge below tariff switched access charges, and that those contracts were not filed with this Commission. Therefore, they argue that, Qwest should be estopped from demanding public disclosure of CLEC deviations from tariffs on the theory that it has "unclean hands."⁴⁰ We do not agree.

The Defendants contend that a competitive service offering on Qwest's website mirrors elements of switched access that are at issue in this case,⁴¹ and that Qwest had not filed the required advice letters with the Commission for its own service offering (as of the date of the evidentiary hearing). However, this is not necessarily the case. The volume of filings that the Commission receives may result in delays before filed items are posted. In addition, because Qwest posted information on its website, this may be sufficient to provide public notice under D.98-08-031.⁴² On the other hand, even if it is true that Qwest has not yet filed the required advice letters,⁴³ the very fact that the Defendants are aware that Qwest has made a competitive service offering, presumptively demonstrates that Qwest has disclosed aspects of its intended arrangements to the public. This contrasts with Qwest's allegation that Defendants had secret arrangements with the contracting carriers that were not publicly disclosed. As a result, an "unclean

⁴⁰ *Id.* at 124.

⁴¹ *Id.* at 125.

⁴² D.98-08-031.

⁴³ The volume of filings that the Commission receives sometimes results in lengthy delays before filed items are posted.

hands” analysis does not bar Qwest from demanding public disclosure of CLEC deviations from tariffs, if those disclosures are required.

2.3. Rational Basis for Disparate Treatment

Qwest contends that in order to determine whether there is a rational basis upon which the CLECs can justify charging contracting carriers a discounted rate that was not offered to Qwest, the Commission should be guided by D.10-04-054 and D.07-01-020, which rely upon *Hansen v. City of Buenaventura*.⁴⁴ Qwest reasons that Hansen requires the Commission to evaluate whether a public utility reasonably or unreasonably discriminates between customers. In that case, a municipal water company charged nonresidents higher rates for water than it charged residents. The California Supreme Court held that making nonresident users subject to a higher rate than residents did not necessarily prove the rate unreasonable or invalid, and that, to prove discrimination, nonresidents must demonstrate that there is not a “cost of service” or other reasonable basis for the higher price.

Relying on *Hansen*, Qwest argues that giving a discounted rate to a contracted carrier who had engaged in “self help” by withholding payment, was not a rational basis for charging that customer a lower rate than charged to Qwest, who had diligently paid its bills on time.⁴⁵ Qwest argues that doing so essentially served the CLECs own self interests, because the primary objective was to preserve the CLEC’s revenue from the contracting carrier.

However, the CLECs argue that there were many reasons why there was a rational basis to negotiate a favorable, discounted rate with the contracting

⁴⁴ Qwest 11-22-13 Opening Brief at 98-99 citing 42 Cal.3d 1172, 1986 Cal.LEXIS 306.

⁴⁵ *Id.* at 98.

carriers. Some CLECs saw potential that the contracting carriers would compete with them for customers. Others were able to negotiate long term contracts which, in exchange for pricing concessions, guaranteed long term future revenue streams. In summary, the CLECs contended that they were required to make a rational, economics-based business decision to grant discounts to the contracting carriers rather than run the risk of not being paid.⁴⁶ The CLECs offered witness testimony explaining reasons that they found it necessary to negotiate with the contracting carriers. One expressed need to address immediate cash flow issues, another cited investor concerns,⁴⁷ and another expressed fear that it would be “crushed like a grape”⁴⁸ by the larger contracting carriers. They insist that, in doing so, they were not motivated by any intent to impart a disadvantage to Qwest, but rather to ensure that they themselves could remain viable. Furthermore, by reaching settlement with the contracting carriers, the CLECs avoided the risk and expense of entering litigation with the contracting carriers about withheld payment.⁴⁹

2.4. Qwest Willingness to Meet the Substantive Rates, Terms and Conditions of Contracting Carriers

Qwest claims that, had it been offered the substantive rates, terms and conditions offered to the contracting carriers, it would have been willing and able to comply with them. However, Qwest undermines this argument in its own

⁴⁶ 11-22-13 Post Hearing brief of Defendants at 37.

⁴⁷ See Exh. 27 Testimony of Heyman at 4-7, and Hearing Testimony 10/18/13 at 1092-1093.

⁴⁸ See Exh. 15 Testimony of Miller, and Hearing Testimony 10/2/13 at 913.

⁴⁹ *Id.* at 38. Footnote 118 citing Exhs. 15 at 3-4; 18, at 4-6; 21 at 10; 23 at 5; 24, at 43-53 and 84-108; 25 at 47-49; 27 at 8-20; 28 at 4-6 and Exh. 33 at 7-17.

briefing. Qwest specifically 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.⁵⁰

Qwest cites the Commission's 1994 decision in the Alternative Regulatory Framework proceeding:⁵¹

[C]ontracting with individual customers at rates that deviate from those available under the tariffs raises the issue of whether such contracts violate the nondiscrimination provisions of § 453(a). Courts reviewing this issue under statutes similar to § 453 have concluded that such contracts are permissible if the rates under the contract are made available to any similarly situated customer willing to meet the contract's terms.

The language is straight forward; however, Qwest reasons that "requiring another customer to accept literally every term of an off-tariff agreement, regardless of any nexus to the regulated service at issue, simply makes no sense."⁵² This, Qwest says, would permit contracting carriers to poison any other customer's right to non-discriminatory treatment and otherwise undermine the Public Utilities Code's prohibition of unreasonable rate discrimination.⁵³ Qwest then delineates the aspects of each CLEC's off tariff agreement that it would be willing to meet.⁵⁴

⁵⁰ Qwest 11-22-13 Opening Brief at 99.

⁵¹ *Id.* at 100, footnote 375 citing 2011 Cal.PUC LEXIS 397 at 6-7 (In re ARF Proceeding, (Part 1 of 9) D.94-09-065, 1994 Cal, PUC LEXIS 681 (Sept. 15, 1994).

⁵² *Id.* at 100-101.

⁵³ *Id.* at 101.

⁵⁴ *Id.* at 101-109. For example, Qwest indicates that it would be willing to pay Utility Telephone, Inc. the same above tariff rate for interstate switched access and below tariff rate for intrastate switched access that AT&T pays. However, Qwest contends that it should not be required to purchase certain quantities of unrelated, non-jurisdiction, dedicated services under

Footnote continued on next page

The CLECs respond that the requirement that a complainant demonstrate that it is willing and able to meet all (as opposed to only a subset) of a given contract's terms is absolute.⁵⁵ They cite *Sea-land Service, Inc. v. ICC*, in which a federal appellate court upheld an Interstate Commerce Commission decision recognizing the importance of economic efficiencies accruing from private contracting, and concluded that individual contracts with negotiated rates did not violate nondiscrimination requirements – provided that the “rates” are made available to other customers “willing and able” to satisfy the “contract’s terms.”⁵⁶

The Commission agrees with the Defendants’ argument that neither Sea-Land nor later issued decisions provide any support for the position that a public utility offering lower rates via a contractual agreement must make the negotiated rates available on a stand-alone basis, as Qwest contends here.

On the other hand, we do not necessarily agree, as the CLECs urge, that each and every agreement between a CLEC and an IXC is unique.⁵⁷ There is merit to Qwest’s observation that, under such a theory, no two agreements or relationships would ever be alike. We agree with Qwest that, viewing every agreement between a CLEC and IXC as so unique that no two customers would ever be similarly situated, would serve to undermine every analysis of

the Cox California Telecom II, LLC and TW Telecom of California, L.p. agreements that AT&T purchases, as this requirement is simply not a condition of switched access service relevant to the Commission’s rate discrimination analysis.

⁵⁵ 11-22-13 Post Hearing Brief of Defendants at 40.

⁵⁶ *Id.* citing *Sea-Land*, 738 F.2d at 1317.

⁵⁷ Defendant’s witness Mr. Wood testified that “carriers negotiate contracts with one another based on a wide range of factors that reflect the unique way in which those carriers interact and do business.” *See* Exh. 24 at 13.

discriminatory conduct because, by definition, no two customers would ever be similarly situated.

However, Qwest itself admits that, the circumstances in this proceeding involve agreements that arose [between the contracting carriers and the CLECs] as the direct result of the withholding of payments by contracting carriers and due to the Defendants' motivation to obtain some amount of payment for services rendered from the contracting carriers.⁵⁸ Qwest points out that each of the agreements between the CLECs and the contracting carriers contained "most favored nations clauses" that guaranteed AT&T the lowest rate offered by the CLECs regardless of any other term or condition of the agreement.⁵⁹

We find that the circumstances in this proceeding, in which the off tariff discount arose between the contracting carriers and the CLECs as the direct result of the withholding of payments, which arguably placed each CLEC in a position to acquiesce to terms that they would not necessarily have otherwise voluntarily or willingly negotiated with the contracting carriers, vitiate Qwest's argument that it should be entitled to those same rates. It also follows that Qwest cannot prevail in its argument that it is a similarly situated carrier, entitled to the same off-tariff rate(s) that the CLECs begrudgingly tendered to the contracting carriers, unless Qwest in turn acquiesces to all of the substantive rates, terms and conditions that the contracting carriers are subject to with the respective CLECs.

⁵⁸ Qwest 11-22-13 Opening Brief at 109.

⁵⁹ *Id.* at 109 citing Hearing Exh. 1 at 114-115 (Arrival agreement), 403-404 (Ernest agreement); 431 (Mpower agreement); 629 (Telscape agreement); and 856 (U.S. TelePacific agreement).

3. Conclusion

In conclusion, the Commission finds that Qwest has not demonstrated that the Defendant CLECs engaged in unreasonable rate discrimination with regard to the provision of intrastate switched access services.

In order to demonstrate that the Defendant CLECs engaged in unreasonable rate discrimination with regard to the provision of intrastate switched access, Qwest must demonstrate: 1) that it was similarly situated to the contracting carriers, 2) that there was no rational basis for the Defendant CLECs to voluntarily contract for intrastate access service with the contracting carriers at rates different from their tariffed rates, and 3) that Qwest was willing to meet the contract terms agreed to by the contracting carriers.

The Commission concludes that Qwest is similarly situated to the contracting carriers for purposes of the analysis here. However, we also conclude that the Defendant CLECs had a rational basis for offering the contracting carriers rates different from their tariffed rates. In addition, in our view, Qwest did not demonstrate willingness to meet all of the agreed contract terms between the contracting carriers and the respective CLECs.

Therefore, the CLECs did not engage in unreasonable rate discrimination under the circumstances present in this case. The relief requested by Qwest is denied and its complaint should be dismissed with prejudice.

4. Appeal of Presiding Officer's Decision

The Presiding Officer's Decision Denying the Complaint of Qwest Communications Company, LLC prepared by ALJ Patricia Miles (Presiding Officer's Decision), was mailed to the parties on August 26, 2015. The Presiding Officer's Decision was appealed by each of the parties on September 25, 2015. Responses to each of the appeals were filed on October 12, 2015.

In its appeal, Qwest argues that the Presiding Officer's Decision: 1) erroneously interprets and misapplies the rational basis standard; 2) ignores that Qwest was willing to accept service related terms and conditions offered to the contracting carriers; 3) disregards the failure of Defendant CLECs to file their agreements with the contracting carriers; 4) did not address Qwest's claims against the Defendant CLECs for violation of their tariffs; 5) fails to consider evidence that there was no cost justification for the rates that the Defendant CLECs charged Qwest and the contracting carriers, and 6) does not address Qwest claims against Cox and TW Telecom.

The joint appeal by the Defendant CLECs supports the Presiding Officer's Decision concluding that there was no unlawful discrimination against Qwest and that Qwest's complaint should be dismissed. However, the Defendant CLECs argue that Qwest also failed to meet its burden to demonstrate that it was similarly situated to the contracting carriers. In support of their appeal, the Defendants cite the contracting carriers' higher volume of traffic, mixture of traffic types, and the types and volumes of other services that the contracting carriers purchased from the CLECs.

We agree with the Defendant CLECs that Qwest's appeal is not persuasive. In the introductory comments within its appeal, Qwest claims that "the POD ignores Commission precedent and evaluates whether the Defendants had a "rational basis" for deviating from their tariffs and not whether they had a rational basis for failing to make those same rates available to similarly situated customers like QCC."⁶⁰ Qwest claims that this critical distinction is "entirely

⁶⁰ See Qwest Appeal, Summary at 3.

missed in the POD.”⁶¹ This is not the case. The issue is clearly acknowledged within the opening summary of the Presiding Officer’s Decision and on page 7 within Section 2.1. (“Furthermore, Qwest contends that the Defendants provided discounted rates for switched access to the contracting carrier under off tariff agreements which they failed to file with the Commission and which they never publicly disclosed or offered to Qwest.”)⁶² The Presiding Officer’s Decision clearly recognizes and accurately states the Commission’s determination in D.94-09-065, that off-tariff contracts may be permissible only if the rates under the contract are made available to any similarly situated customer willing to meet the contract’s terms.

The gist of Qwest’s appeal is that the Presiding Officer is compelled to agree that the Qwest was discriminated against simply because it was not “offered” the rate that Defendant CLECs offered the contracting carriers. But, this is illogical for two reasons. First, failure to offer Qwest the negotiated rate offered to the contracting carriers is simply the undisputed, threshold fact that gives rise to Qwest’s complaint. Second, there is no requirement that the CLECs offer the negotiated rate unless Qwest proves that it is “similarly situated” to the contracting carriers. However, even if Qwest were able to prove that it is similarly situated and should have been offered the negotiated rate, the ultimate issue presented here -- as framed by Qwest’s own complaint -- is whether Qwest was improperly overcharged. That is, was Qwest “unlawfully or unreasonably” discriminated against from a rate standpoint, as a result of the failure to have the rate offered to it?

⁶¹ See Qwest Appeal at 13.

⁶² Presiding Officer’s Decision at 7-8.

This is Qwest's burden to prove. And of course, by necessity, any meaningful analysis and evaluation of the "unlawful or unreasonable discrimination" issue must ask two questions: 1) whether there was a rational basis for failure to offer the rate, and 2) whether Qwest would have been willing to meet the contract terms underlying the rate, had the rate been offered? The affirmative answer to the first question and the negative answer to the second question, provide the lynchpin undermining Qwest's claim and its appeal.

For, contrary to Qwest's argument in its appeal that the Presiding Officer's Decision "ignores" that Qwest was willing to accept service related terms and conditions offered to the contracting carriers, it is clear that the Presiding Officer's Decision expressly finds that being willing to accept only the "switched access service related terms and conditions of each of the agreements between the CLECs and the contracting carriers" was insufficient for Qwest to meet its burden of proof.⁶³

Qwest likewise incorrectly states that the Presiding Officer's Decision disregards the failure of Defendant CLECs to file the agreements with the contracting carriers.⁶⁴ The Decision addresses this issue, and we modify the findings of fact to reflect this. We also find inaccurate Qwest's contention that the Presiding Officer's Decision fails to consider evidence that there was no cost justification for the rates that the Defendant CLECs charged Qwest and the contracting carriers.⁶⁵ The Presiding Officer's Decision expressly stated that it

⁶³ See Presiding Officer's Decision, Section 2.4.

⁶⁴ See Presiding Officer's Decision, Section 2.2.

⁶⁵ See Presiding Officer's Decision at 8, Findings of Fact 4; Conclusion of Law 2.

would not consider the costs to provide service when determining whether Qwest and the contracting carriers were similarly situated.

We deny Qwest's appeal and agree with the conclusion of the Presiding Officer's Decision that the CLECs did not engage in unreasonable or unlawful rate discrimination under the circumstances in this case. We grant the limited appeal of the Defendant CLECs and find that Qwest did not meet its burden of proving that it was similarly situated to the contracting carriers.

For the foregoing reasons, we concur with the Presiding Officer's Decision that Qwest's complaint should be dismissed with prejudice.

5. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and Patricia B. Miles is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. To preserve revenue from certain contracting carriers who withheld payment, Defendants negotiated discounted off-tariff rates with certain contracting carriers.
2. Defendants did not offer the discounted off-tariff rates that they negotiated with the contracting carriers to Qwest.
3. D.07-12-020 expressly permits carriers to voluntarily contract with each other to pay intrastate access charges different from those adopted in D.07-12-020 without further ratemaking review. In rehearing D.07-12-020, the Commission did not adopt a rule requiring the filing of such agreements.
4. Qwest did not provide adequate cost evidence to evaluate the cost to provide service to Qwest compared to the cost to provide service to the contracting carriers.

5. Defendants asserted and Qwest conceded dissimilarities between the contracting carriers and Qwest. For instance, Qwest did not have the same call volume with the Defendants as the contracting carriers.

6. Qwest was willing to meet only the switched access service related terms and conditions of the negotiated agreements between the contracting carriers and the Defendants.

Conclusions of Law

1. The Defendant CLECs had a rational basis for negotiating a favorable, off-tariff discounted rate with the contracting carriers.

2. Qwest did not meet its burden to demonstrate that it has characteristics that would make Qwest “similarly situated” to the contracting carriers as described in D.11-07-058.

3. Qwest did not demonstrate that it was willing to accept all of the contract terms between the Defendant CLECs and the contracting carriers.

4. Qwest did not meet its burden of proving that the Defendant CLECs engaged in unlawful or unreasonable rate discrimination.

5. Qwest’s prayer for relief should be denied.

O R D E R

IT IS ORDERED that:

1. The relief requested by Qwest Communications Company, LLC in Case 08-08-006 is denied, and the complaint is dismissed with prejudice.

2. Case 08-08-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.