



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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**QWEST COMMUNICATIONS CORPORATION)
(U-5335-C)**

CASE NO. C08-08-006

Complainant,

v.

**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), and 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.

**ADVANCED TELCOM, INC.'S (U-6083-C) REPLY TO
QWEST COMMUNICATIONS CORPORATION'S RESPONSE**

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Defendant Advanced TelCom, Inc. d/b/a Integra Telecom (U-6083-C) (“ATI”), by and through its undersigned counsel, hereby submits its Reply to Qwest Communications Company, LLC’s (QCC) (U-5335-C) Consolidated Response to Motions to Dismiss and Motions For Summary Judgment (“Response”). ATI renews its motion to dismiss with prejudice Plaintiff Qwest Communications Company, LLC’s (QCC) Complaint in this proceeding (“Complaint”), pursuant to the Commission Rules of Practice and Procedure (“Rules”) 11.1 and 11.2.

I. INTRODUCTION

QCC’s Response repeats the allegation that it was “overcharged” for switched access services, despite its admission that it paid the lawfully tariffed rate. The fact is that it was never overcharged by ATI. It was charged the lawfully tariffed rate. QCC also continues to imply that it is currently paying discriminatory rates for switched access. That is simply not the case with ATI, which has no ongoing agreements regarding switched access with any IXC in California.¹

QCC also includes a number of technical arguments as to why the statute of limitations and the filed rate doctrine should not apply to its Amended Complaint. These arguments rely upon mistaken interpretations of the law and the facts. QCC’s response does not refute, and indeed confirms, that it is asking this Commission to retroactively change ATI’s tariffed switched access rates in contravention of the filed rate doctrine.

The facts show that, even accepting QCC’s arguments, all claims against ATI for, at the very least, the periods prior to April of 2005, are barred by the statute of limitations. Furthermore, QCC’s proposed remedy is barred by the filed rate doctrine.

¹ See Declaration of Catherine A. Murray, attached to ATI’s Motion to Dismiss.

In this Reply, ATI will respond to a few of the arguments raised by QCC in its Response. Silence on any issue should not be construed as agreement but rather as an indication that ATI stands on its Motion and the motions of the other CLECs on that issue.

II. ALL CLAIMS AGAINST ATI PRIOR TO 2005 ARE TIME BARRED.

A. QCC's Claim Based on an Agreement that was Terminated in 2002 is Barred by the Statute of Limitations.

The facts and the law make it clear, and QCC's Response confirms, that to the extent QCC has any valid claims against ATI, they are limited to, at the most, the period after April of 2005. QCC admits that its claim for unlawful rate discrimination is subject to the two-year statute of limitations in Public Utility Code Section 735 (hereinafter "Section"). It also admits that its claim under Count II is subject to a three-year statute of limitations.² Since the only pre-2005 agreement that ATI was a party to was terminated in 2002, prior to its bankruptcy and sale to Eschelon Telecom, Inc., and long prior to 2005, even with the application of the "discovery rule" both Count I and Count II of QCC's complaint against ATI are barred by the statute of limitations, as to that agreement.³

QCC admits that ATI's agreement with AT&T was terminated in 2002 and was not a party to any subsequent agreement involving ATI until some settlement agreements, first entered into in May of 2005,⁴ that QCC now, for the first time, claims are relevant to this matter. QCC acknowledges in its Response that the statute of limitation may accrue as early as

² QCC Response, at 23.

³ QCC claims that the Count II claims were tolled as of February-March 2008 when it sent written claims. However, even if Qwest did submit such a claim it was a year after the statute of limitations for Count I, and also beyond the three year statute of limitations for Count II. In its Complaint, QCC identifies four agreements that it alleges that ATI was a party to—in fact it was not a party to any of them but in any event all were terminated by the beginning of 2005. These were the only four agreements identified in either the initial or Amended Complaint. The one pre-2005 agreement with AT&T that ATI was a party to was terminated in 2002, and was not identified in the Amended Complaint.

⁴ QCC incorrectly claims that an agreement involving ATI was entered into in March of 2004. The first such agreement was entered into in May of 2005.

April of 2005 for some CLEC agreements, including ATI.⁵ Since the only pre-2005 agreement that ATI was a party to was terminated in 2002, even upon application of the “discovery rule” both Count I and Count II of QCC’s complaint against ATI are barred by the statute of limitations, as to that agreement. While, it is ATI’s position, as addressed below, that the statute of limitations accrued as early as April of 2004, accepting, for the sake of argument the April of 2005 date, the statute of limitations on any claims prior to April of 2005 have expired. Thus, any claims that QCC may have against ATI are limited to the period after April of 2005.

Therefore, all claims against ATI, for the agreement that was terminated in 2002, must be dismissed due to the statute of limitations. Any claims against ATI for any other alleged agreements must be limited to the period after April of 2005 at the earliest.

B. The Discovery Rule Does Not Absolve QCC From Acting on What it Knew or Should Have Suspected.

QCC argues that application of the discovery rule delayed accrual of its claims to at least April of 2005 for a few CLECs, including ATI and much later for other CLECs. QCC rejects the argument that its claims accrued in 2004, asserting that it had no reason to pay attention to the July 22, 2004 Minnesota Public Utilities Commission Telecommunications (MPUC) Agenda, with which it was served and which identified and gave notice of a switched access agreement investigation concerning some of these very agreements by the Minnesota Public Utilities Commission (MPUC).⁶ QCC cavalierly dismisses the Commission Agenda notice, claiming that the CLECs involved were not identified, and that Qwest instead focused its efforts on “proceedings which potentially affect their interests.”⁷ However, a look at that Agenda belies that argument. The switched access investigation agenda item is listed right

⁵ QCC Response at 45.

⁶ A copy of the Agenda was included as Exhibit 2 to ATI’s Motion to Dismiss.

⁷ QCC Response at 37.

below a Qwest item and does, contrary to QCC's assertion, identify ten CLECs. Furthermore, the caption of the Docket states: "In the Matter of the DOC Investigation into Many Companies' Negotiated Contracts for Switched Access Services." Certainly this would be expected to raise a suspicion that Qwest's interests might be implicated given QCC's Assertion that switched access is a matter of intense interest and importance to it. Furthermore, the service list for that Agenda shows that this supposed oversight by Qwest occurred despite the fact that it was served on three Qwest employees, Jason Topp, Joan Peterson, and JoAnn Hanson, and two outside counsel for Qwest, Eric Swanson and Larry Espel.⁸

QCC also argues that the discovery rule is not triggered by the Notice from the MPUC or subsequent occurrences because the discovery rule tolls the statute "until a plaintiff discovers or should have discovered the facts essential to its cause of action."⁹ It then goes on to ignore the words "should have discovered," and argues that only once it was aware of all of the facts essential to its cause of action could the claim accrue. However, the Court in *Norgart* made it clear that "should have discovered" is a key part of the rule, stating that "[T]he limitations period begins when the plaintiff suspects, or should suspect, that [he] has been wronged," even if he does "not know *whom* to sue."¹⁰ The court goes on to say, in reference to a decision that implied that more than just a suspicion of a factual basis for a claim was necessary to start the clock running on the statute of limitations: "To the extent that *Bristol-Myers Squibb* reads *Jolly* to require that a plaintiff must do more than suspect a factual basis for the elements of a cause of action in order to discover the cause of action...--it reads it

⁸QCC declarant Lisa Hensley Eckert (QCC Response, at Appendix C) argues that this notice only concerned a protective agreement and thus did not invite its interest. Ironically, QCC also complains that it had no way to access the agreements until much later because they were not public. Had it intervened and signed the protective agreement in 2004, it presumably could have had access to them.

⁹*Norgart v. The UpJohn Company*, 21 Cal. 4th 383, 397 (1999)

¹⁰*Norgart* at 397, emphasis added. This also counters QCC's argument that the clock could not start running because they did not know every CLEC that might have such an agreement.

wrong. To that extent, it is disapproved.” Therefore, QCC’s claims accrued as of July 22, 2004 and any claims for periods prior to August of 2006 are beyond the statute of limitations for Count I and any claims prior to August of 2005 are beyond the statute of limitations for Count II.

C. Failure to Plead the Discovery Rule Bars Claims for Periods Prior to 2005.

Finally, as was pointed out by the CLECs, QCC’s Amended Complaint made no mention of its application of the discovery rule and thus it can not now rely upon it. QCC brushes off this inconvenient oversight as mere “form over substance.”¹¹ However, the courts do not agree that this is a minor matter. In fact, the courts have dismissed lawsuits on this very basis.

The California Appeal court has ruled that a party whose complaint shows on its fact that his or her claim would be barred by the applicable orthodox statute of limitations, and who intends to rely on the discovery rule to toll the orthodox limitation period, “must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence”..... “Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer.”¹²

QCC’s contentions to the contrary, its claims for any period prior to August of 2005, are, on the face of the Complaint, barred by the statute of limitations. It is only through the application of the discovery rule that it avoids that conclusion. Yet, it failed to plead the discovery rule in its Complaint.

¹¹ QCC Response at 31.

¹² CAMSI IV v. Hunter Technology Corp., 230 Cal. App. 3d 1525, 1536-37 (1991), rehearing denied at 1541, E-Fab, Inc. v. Accountants, Inc. Services, 153 Cal. App. 4th 1308 (2007)..

In conclusion, any claims against ATI for period prior to April of 2005 are barred by the statute of limitations.

III. THE FILED RATE DOCTRINE PREVENTS QCC'S PROPOSED REMEDY.

QCC argues that the filed rate doctrine does not apply because Section 489 gives the Commission the power to order rates that vary from those in the tariffs. No one denies that the Commission has the authority to order a different rate than is in the tariff. In fact, when it approves a contract it does just that. But that does not mean that it can retroactively impose a rate other than the tariff rate for past periods, which is what QCC is asking it to do.

QCC claims that Section 489(a) means that the filed rate doctrine does not apply to the Commission, citing to *Pacific Bell Telephone Company, d/b/a AT&T California v. Fones4All Corporation*.¹³ But that was not a case in which a party was seeking to retroactively charge a rate different than the tariffed rate by substituting a rate from a contract to which it was not a party. In that case, Fones4All was arguing that its tariffed rate applied despite the fact that it had contracted with that same party for that service at a different rate. The Commission ruled that the contract rate was legal and enforceable despite the fact that it differed from the tariffed rate, because Fones4All had agreed to it and it had been approved by the Commission. In effect, the Commission ruled that where both a contract rate and tariffed rate were legal, the party that entered into a contract and purchased the service under that contract, could not challenge its own contract on the basis that it varied from the tariffed rate. As the Commission said, that case challenged "...the Commission's ability to approve an agreement between two

¹³ QCC Response at 20.

telecommunications carrier when the terms of that agreement deviate from the terms of one carrier's tariff. That question does not involve the filed rate doctrine."¹⁴

That is not the case here. In this case it is a party that is subject to a tariffed rate and has purchased the service under that tariff and has no contract that is asking to change the tariffed rate retroactively to a rate in someone else's contract. This directly contravenes the filed rate doctrine which the Commission in *Pacific Bell* said provides that one "cannot use principles of tort or contract to vary the requirements of a tariff." That is exactly what QCC is asking the commission to do here—to vary the requirements of a tariff by application of a contract. The filed rate doctrine comes into play, where, as here, a carrier's tariff has been on file and validly charged. The issue is whether a carrier who purchased under that tariff has the right to some other rate. The filed rate doctrine clearly provides that they do not. Where, as is alleged here, a carrier has been charged something other than the tariffed rate, the remedy is to charge that carrier, in this case AT&T the tariffed rate. That is exactly what the U.S Supreme Court did in the *Maislin* case.¹⁵ This remedy would also avoid a potential problem under Section 734.¹⁶ without retroactively changing the filed rates. Yet, QCC choose not to bring AT&T into this matter.

IV. CONCLUSION

In conclusion, ATI's Motion to Dismiss should be granted as to any claims in QCC's Complaint that occurred prior to April of 2005.

¹⁴ *Pacific Bell Telephone Company, d/b/a AT&T California v. Fones4All Corporation.*, Decision 08-04-043, 2008 Cal. PUC LEXIS 132, *76 (April 10, 2008).

¹⁵ *Maislin Indus., U.S. v. Primary Steel*, 110 S. Ct. 2759, 2768 (1990). QCC argues that the "federal filed rate doctrine" applied in *Maislin* does not apply in this case. While ATI acknowledges that the Commission is not subject to the statutes applied in *Maislin*, the same filed rate principles apply.

¹⁶ In its Response, QCC does not deny that Section 734 precludes a remedy that results in discrimination. Rather it argues that ATI is suggesting that the Commission simply accept and endorse "the current level of unlawful discrimination." (QCC Response at 15). ATI has made no such suggestion. ATI has no ongoing agreements and thus there is no current unlawful discrimination taking place involving ATI.

QCC's Complaint should be dismissed for any claims prior to 2005 because of its failure to state a claim because it did not assert the discovery rule in its Complaint.

ATI's Motion to Dismiss should be granted on all claims because QCC's proposed remedy would violate the Filed Rate Doctrine.

Respectfully submitted,

/s/ Dennis D. Ahlers

Dated: October 9, 2009

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CERTIFICATE OF SERVICE

I, Dennis D. Ahlers, certify that on this 9th day of October, 2009, I caused a copy of the foregoing:

**ADVANCED TELCOM, INC.'s (U-6083-C) REPLY TO
QWEST COMMUNICATIONS CORPORATION'S RESPONSE**

in the above-captioned proceeding, to be re-served as follows:

- Via overnight mail and email to the Assigned Commissioner
- Via overnight mail and email to the Administrative Law Judge
- Via email service to the parties on the attached service list for C08-08-006

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of October, 2009.

/s/ Dennis D. Ahlers
Dennis D. Ahlers

cc: C08-08-006 Service List



CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

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