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**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.

**RESPONSE OF BULLSEYE AND GRANITE TO QWEST MOTION
CONCERNING CONFIDENTIALITY DESIGNATIONS**

Pursuant to Rule 11 of the Commission’s Rules of Practice and Procedure, Defendants BullsEye Telecom, Inc. (U-6695-C) and Granite Telecommunications, LLC (U-6842-C) (collectively, “BullsEye and Granite”) hereby respond to the Qwest Communications Company, LLC (“Qwest”) motion to re-designate certain documents as non-confidential in the above-captioned proceeding (“Redesignation Motion”). For the reasons set forth below, the Redesignation Motion should be struck or denied.

I. INTRODUCTION

Qwest’s Complaint in this case seeks a refund of amounts paid for intrastate access services, in spite of the fact that – at all times – BullsEye and Granite charged and Qwest paid the lawful rates for such services: the access rates set forth in BullsEye’s and Granite’s applicable tariffs. Qwest’s claims are fundamentally flawed in multiple respects, and are subject to dismissal pursuant to motions filed by Defendants in this case, including the Motion filed by BullsEye and Granite.¹ Although a procedural schedule was established to preliminarily address and resolve those dispositive motions, Qwest now prematurely raises issues not relevant to those motions, burdening the Commission and parties with a further motion that will likely be rendered moot by the motions already pending.

While the Qwest Redesignation Motion may as a result be denied or struck as premature, it must be noted that Qwest’s request is premised upon an issue not yet resolved: whether the alleged “off-tariff agreements” are indeed invalid and unenforceable, as BullsEye and Granite believe them to be. BullsEye and Granite have identified and presented this issue to the

¹ See Motion of BullsEye Telecom, Inc. and Granite Telecommunications, LLC to Dismiss First Amended Complaint (filed Aug. 14, 2009).

Commission in this case.² BullsEye and Granite were forced to enter the so-called “off-tariff agreements” in order to collect significant sums unlawfully withheld by certain IXCs on a nationwide basis,³ and such involuntary agreements are not valid or enforceable and are not subject to Commission filing requirements.

Thus, in the final analysis, the lawful rate for BullsEye’s and Granite’s access services has at all times remained the rate set forth in their applicable tariffs. The IXCs that failed to remit payment in accordance with the BullsEye and Granite tariffs must be required to pay such lawful rates (just like Qwest and every other IXC). Further, Qwest should not be permitted to benefit from the terms forced upon BullsEye and Granite by other IXCs, as such a result would create perverse incentives for IXCs with market power to engage in such behavior – and permit others to improperly benefit from such actions, increasing the damages to the affected party. Indeed, as regulators in other states found, the very purpose of a tariffed-based system is to forestall such abuses of market power.⁴

Given this background, BullsEye and Granite should not be placed in the position of having to validate or defend the terms of settlement agreements they were forced to enter when IXCs wrongly withheld payment of tariffed charges. BullsEye and Granite nonetheless discuss

² Answer of BullsEye Telecom, Inc. to First Amended Complaint of Qwest Communications Company, LLC at ¶ 38 (filed Jun. 18, 2009); Answer of Granite Telecommunications, LLC to First Amended Complaint of Qwest Communications Company, LLC at ¶ 36 (filed Jun. 18, 2009).

³ Answer of BullsEye Telecom, Inc. to First Amended Complaint of Qwest Communications Company, LLC at ¶ 12, 18 (filed Jun. 18, 2009); Answer of Granite Telecommunications, LLC to First Amended Complaint of Qwest Communications Company, LLC at ¶ 12, 18 (filed Jun. 18, 2009).

⁴ See, e.g., Minnesota PUC Docket No. C-05-1282, Comments of the Minnesota Dep’t of Commerce at 2. The Minnesota DOC concluded that the settlement agreements at issue there, which included the settlement agreement between Granite and AT&T, were the result of AT&T’s refusal to pay the lawfully tariffed rates and threat of waging litigation against the CLECs. The Minnesota DOC therefore found that “Commission enforcement of state tariffs is needed so there is no incentive for interexchange carriers to withhold payment of access charges and demand similar illegal preferential contract rates in the future.” *Id.*

herein that the relief sought in the Qwest Redesignation Motion is premature and unnecessary to the proper resolution of this proceeding. Moreover, the Redesignation Motion is also an improper attempt to re-litigate an issue already decided in the parties' analogous proceeding before the Colorado Public Utilities Commission. BullsEye and Granite therefore respectfully request that the Commission deny or strike the Qwest Redesignation Motion, as more fully discussed below.

II. DISCUSSION

A. Qwest's Motion is Premature.

At the July 29, 2009 Pretrial Conference held in this proceeding, a preliminary procedural schedule was established to allow for the Commission's consideration of various dispositive motions. Pursuant to that schedule, BullsEye, Granite, and many other Defendants filed motions on August 14, 2009, seeking dismissal of some or all of Qwest's claims.⁵ Those motions did not rely on or require the Commission's consideration of any confidential information. Briefing on those motions was completed on October 9, 2009. As resolution of those motions may resolve or at least significantly narrow the issues in this proceeding, Your Honor indicated that a schedule to address any remaining issues is to be established after the Defendants' dispositive motions are decided.

By filing the Redesignation Motion prior to resolution of those threshold issues, Qwest fails to comply with the established schedule and, instead, seeks to prematurely burden the Commission and Defendants with issues irrelevant to Defendants' motions. As noted, the Defendants' dispositive motions do not require consideration of any confidential material. There

⁵ These motions demonstrate that Qwest has failed to state a valid claim for damages for discrimination and that Qwest has failed to state any claim for which reparations may be granted. *See* Motion of BullsEye Telecom, Inc. and Granite Telecommunications, LLC to Dismiss First Amended Complaint (filed Aug. 14, 2009).

is therefore no need for the Commission to consider the Redesignation Motion at this stage. Indeed, given that the resolution of Defendants' motions will likely result in dismissal of Qwest's complaint (or portions thereof), the Redesignation Motion may soon be moot.⁶ The Commission should therefore deny or strike Qwest's Redesignation motion as premature. Alternatively, the Commission should hold the Redesignation Motion in abeyance pending the Commission's resolution of the dispositive motions.

B. The Commission Should Follow the Colorado ALJ's Decision on the Same Subject Involving the Same Parties.

In March 2009, Qwest filed substantively the same motion in the parties' analogous proceeding before the Colorado Public Utilities Commission. The ALJ presiding over the Colorado proceeding found that the settlement agreements would be deemed public, except for specific financial information that had been treated as confidential. Specifically, the Colorado ALJ held that backwards-looking settlement amounts and forward-looking rates are to remain confidential.⁷ While Qwest "is willing to redact...backwards-looking settlement amounts" from the various settlement agreements,⁸ Qwest asks the Commission to effectively overturn the Colorado ALJ's decision with respect to forward-looking rates. The Commission should deny that request.

⁶ Indeed, since all of Qwest's claims for reparations will likely be dismissed, Qwest will likely withdraw its Complaint upon resolution of those motions.

⁷ *Qwest v. MCIMetro Access Transmission Services, LLC, et al.*, Colorado PUC Docket No. 08-259T, Decision No. R09-0815-I (dated Jul. 30, 2009); *see also* Qwest Redesignation Motion at 4 n. 7. The settlement agreement between AT&T and Granite, however, has been a public document for several years and is therefore not subject to Qwest's Redesignation Motion.

⁸ Qwest Redesignation Motion at 9 n. 17.

The settlement agreements considered by the Colorado ALJ are the same settlement agreements that Qwest now asks the Commission to redesignate as non-confidential.⁹ As noted, those settlement agreements were involuntarily entered into in order to collect lawfully billed amounts, after the IXCs had withheld payment of access charges on a nationwide basis for several years. The agreements therefore contain rates and terms that presume to apply to services provided in different jurisdictions. As a result, a decision by this Commission to make such terms public would, in some cases, effectively overrule the Colorado ALJ's decision that such terms remain confidential. Thus, as a matter of comity, the Commission should deny Qwest's motion to prevent inconsistent rulings in different jurisdictions.

It should further be noted that, to the extent Qwest seeks to make public rates that presume to apply in multiple jurisdictions, Qwest would have the Commission rule on issues beyond the Commission's jurisdiction. For example, where a rate presumes to apply on a nationwide basis, Qwest's motion effectively seeks the Commission to make a nation-wide ruling as to the confidentiality of such terms. Since the Commission's jurisdiction – and this proceeding – is limited to the provision of intrastate services in California, any Commission decision should be limited accordingly.¹⁰ A decision limited in this fashion would serve the interests of this case as well as the public policy purposes underlying the presumption of comity. The Commission should therefore deny Qwest's motion to the extent necessary to ensure against an overly broad, extra-jurisdictional ruling.

⁹ Where possible, rates that presume to apply to services other than intrastate California services have been redacted in the versions produced to Qwest, and Qwest does not seek disclosure of such redactions in its Redesignation Motion.

¹⁰ For example, the Commission could to the extent necessary simply have parties stipulate to any rates relating to California intrastate services, so as to make information relevant to this proceeding available without affecting any issues subject to the jurisdiction of other states.

III. CONCLUSION

For the foregoing reasons, BullsEye and Granite respectfully request that the Commission strike or deny the Qwest Redesignation Motion.

Dated: November 2, 2008

/s/ Andrew M. Klein
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CERTIFICATE OF SERVICE

I, Allen C. Zoracki certify that on this 2nd day of November, 2009 I caused a copy of the foregoing

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to be served via email on all known parties to Case No. 08-08-006 listed on the most recently updated service list available on the California Public Utilities Commission's website.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of November, 2009.

/s/ Allen C. Zoracki _____

Allen C. Zoracki

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Case No. 08-08-006

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