

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

11-02-09
04:59 PM

QWEST COMMUNICATIONS COMPANY, LLC (U53350C),

Complainant,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (U5253C), XO COMMUNICATIONS SERVICES, INC. (U5553C), TW TELECOM OF CALIFORNIA, L.P. (U5358C), GRANITE TELECOMMUNICATIONS, INC. (U6842C), ADVANCED TELCOM, INC. dba INTEGRA TELECOM (fdba ESCHELON TELECOM, INC.) (U6083C), LEVEL 3 COMMUNICATIONS (U5941C), COX CALIFORNIA TELECOM II, LLC (U5684C), ACCESS ONE, INC. (U6104C), ACN COMMUNICATIONS SERVICES, INC. (U6342C), ARRIVAL COMMUNICATIONS, INC. (U5248C), BLUE CASA COMMUNICATIONS, INC. (U6764C), BROADWING COMMUNICATIONS, LLC (U5525C), BUDGET PREPAY, INC. (U6654C), 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), PAETEC COMMUNICATIONS, INC. (U6097C), TELEKENEX, INC. (U6647C), TELSCAPE COMMUNICATIONS, INC. (U6589C), U.S. TELEPACIFIC CORP. (U5721C), AND UTILITY TELEPHONE, INC. (U5807C),

Defendants.

Case 08-08-006

**XO RESPONSE TO QWEST MOTION TO REDESIGNATE
AGREEMENTS AS NON-CONFIDENTIAL**

XO COMMUNICATIONS SERVICES, INC.

Gregory J. Kopta
Suzanne Toller
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Tel.: (415) 276-6500
Fax: (415) 276-6599
E-mail: gregkopta@dwt.com
E-mail: suzannetoller@dwt.com

Counsel for XO Communications Services, Inc.

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

QWEST COMMUNICATIONS COMPANY, LLC (U53350C),

Complainant,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (U5253C), XO COMMUNICATIONS SERVICES, INC. (U5553C), TW TELECOM OF CALIFORNIA, L.P. (U5358C), GRANITE TELECOMMUNICATIONS, INC. (U6842C), ADVANCED TELCOM, INC. dba INTEGRA TELECOM (fdba ESCHELON TELECOM, INC.) (U6083C), LEVEL 3 COMMUNICATIONS (U5941C), COX CALIFORNIA TELECOM II, LLC (U5684C), ACCESS ONE, INC. (U6104C), ACN COMMUNICATIONS SERVICES, INC. (U6342C), ARRIVAL COMMUNICATIONS, INC. (U5248C), BLUE CASA COMMUNICATIONS, INC. (U6764C), BROADWING COMMUNICATIONS, LLC (U5525C), BUDGET PREPAY, INC. (U6654C), 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), PAETEC COMMUNICATIONS, INC. (U6097C), TELEKENEX, INC. (U6647C), TELSCAPE COMMUNICATIONS, INC. (U6589C), U.S. TELEPACIFIC CORP. (U5721C), AND UTILITY TELEPHONE, INC. (U5807C),

Defendants.

Case 08-08-006

**XO RESPONSE TO QWEST MOTION TO REDESIGNATE
AGREEMENTS AS NON-CONFIDENTIAL**

Pursuant to Commission Rule 11, XO Communications Services, Inc. (U5553C) (“XO”) provides the following response to the motion of Qwest Communications Company, LLC (“Qwest”) to redesignate agreements between XO and other carriers as non-confidential (“Qwest Redesignation Motion”). For the reasons discussed below, the Commission should deny the motion.

I. DISCUSSION

A. Qwest's Motion Is Premature.

The timing of Qwest's Redesignation Motion is curious, to say the least. XO and other defendants filed motions on August 14, 2009, seeking to dismiss some or all of the claims in Qwest's complaint. Qwest filed its Redesignation Motion on October 9, 2009, the very same day that the parties filed the last round of briefing on the motions to dismiss the complaint.

Obviously, Qwest's Redesignation Motion may well be moot, in whole or in part, once the Commission rules on the defendants' dispositive motions to dismiss the complaint. Qwest thus requests that the Commission rule on an issue that will have no practical impact on this case.

The Commission should decline that invitation. The motion that XO and other CLECs jointly filed did not include confidential information, and the Commission need not review or consider any such information in order to rule on that motion. The Commission, therefore, should deny Qwest's Redesignation Motion as premature. Alternatively, the Commission should hold that motion in abeyance pending the resolution of the motions to dismiss.

B. Qwest's Motion Is Unnecessary.

Qwest observes that the administrative law judge ("ALJ") in Qwest's Colorado complaint addressed the same issues that Qwest raises here and that some of the agreements that are the subject of its motion have already been made public. Qwest Redesignation Motion at 4 & n.7. Qwest, however, fails to explain the impact of those observations. Specifically with respect to the agreements to which XO is a party, the 2001 agreement with AT&T was made public in Minnesota, and the Colorado ALJ made public all other agreements between XO and AT&T or Sprint as they were provided to Qwest¹ except for the dollar amounts on which the parties agreed

¹ The agreements that AT&T and Sprint provided to Qwest were redacted to remove terms and conditions that were not related to switched access services or that governed federal services or services provided in states other than Colorado. The agreements provided to Qwest in California were similarly redacted, and Qwest has not challenged or otherwise sought disclosure of those redactions, either in Colorado or in its Redesignation Motion here.

to settle their disputes and the charges they agreed would apply on a going-forward basis.²

Accordingly, the only XO confidential information that Qwest seeks to make public is settlement dollars and charges.

Qwest already can use the vast majority of the XO agreements at issue as public documents. Qwest, moreover, possesses the limited financial information that the Colorado ALJ and XO agree is, and should remain, confidential. Qwest offers no reason why it needs to make this small amount of information public to be able to prosecute its complaint. Nor can Qwest plausibly make that claim when Qwest has not appealed the Colorado ALJ's decision, the parties have filed testimony consistent with the protections in that decision, and the Colorado Commission will be conducting evidentiary hearings in December. Qwest's Redesignation Motion, therefore, is simply unnecessary.

C. The Commission Should Follow the Colorado ALJ Decision as a Matter of Comity and to Discourage Forum Shopping.

In March 2009, Qwest filed virtually the same motion in Colorado as the Designation Motion. The Colorado ALJ ruled on that motion in July, finding the agreements at issue should be made public except for specified financial data. Qwest has provided the Commission with a copy of the Colorado decision but represents that while Qwest will comply with it, Qwest urges the Commission to disregard that decision and make public in California even the limited amount of information protected in Colorado. Qwest Redesignation Motion at 4, n.7. The Commission should refuse to do so.

The XO agreements that the ALJ considered in Colorado are the same agreements at issue in California, as well as in New York where Qwest has also filed a complaint. Indeed,

² The only other XO agreement at issue in the Qwest Redesignation Motion is an agreement between XO and Mpower, which was not at issue in Colorado. For purposes of this proceeding, XO is willing to make that agreement public on the same terms as those outlined in the Colorado ALJ's order, *i.e.*, the redacted agreement provided to Qwest would be considered non-confidential except for any settlement amount and charges, which would remain confidential.

those agreements are national in scope, and Qwest may file additional complaints in other states challenging those same agreements. Based on the Colorado ALJ's decision, XO (and other carriers involved in that proceeding) have a settled and reasonable expectation of the information in its settlement agreements that can be protected as confidential. A Balkanized approach to confidentiality, in which the same information in the same agreements is treated differently in different states, would result only in unwarranted uncertainty that would undermine the efficiency of multi-state settlements and chill parties' willingness to resolve their disputes through negotiated agreements. At least under the circumstances presented here, the Commission should respect and honor the confidentiality determination of another state commission and should protect the same information from public disclosure.

The Commission, moreover, should not encourage Qwest to repeatedly bring the same motion before different state commissions in hopes of finding one that will rule in Qwest's favor. Such tactics needlessly expend party and state commission resources on an issue, as discussed above, that has no practical value or significance, other than perhaps Qwest's convenience. Both as an issue of state comity and to provide a disincentive to engage in wasteful litigation, the Commission should provide the XO agreements the same level of confidentiality as the Colorado Commission.

II. CONCLUSION

For the foregoing reasons, the Commission should deny Qwest's Motion.

Dated this 2nd day of November, 2009.

XO COMMUNICATIONS SERVICES, INC

By: /s/
Gregory J. Kopta
Suzanne Toller
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Tel.: (415) 276-6500
Fax: (415) 276-6599
E-mail: gregkopta@dwt.com
E-mail: suzannetoller@dwt.com
Counsels for XO Communications Services,
Inc.

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

On November 2, 2009, I caused the following to be served:

**XO RESPONSE TO QWEST MOTION TO REDESIGNATE
AGREEMENTS AS NON-CONFIDENTIAL**

via electronic mail to all parties on the service list Case 08-08-006 who have provided the Commission with an electronic mail address and by First class mail on the parties listed as “Parties” and “State Service” on the attached service list who have not provided an electronic mail address.

/s/ _____
Judy Pau

VIA EMAIL AND US MAIL

Commissioner Timothy Alan Simon
ALJ Maribeth A. Bushey

VIA FIRST CLASS MAIL

Randall P. Muench
Cleartel Communications
1960 N. Congress Avenue
Delray Beach, FL 33445

Peter Larose
Bullseye Telecom, Inc.
15900 Greenfield Road, Suite 330
Oak Park, MI 48237

VIA E-MAIL

gcookman@granitenet.com; John.messenger@paetec.com; AZoracki@KleinLawPLLC.com; aklein@kleinlawpllc.com; AKlein@KleinLawPLLC.com; Eric.branfman@bingham.com; eric.branfman@bingham.com; eric.branfman@bingham.com; eric.branfman@bingham.com; Eric.branfman@bingham.com; eric.branfman@bingham.com; philip.macres@bingham.com; philip.macres@bingham; Philip.macres@bingham.com; Philip.macres@bingham.com; philip.macres@bingham.com; philip.macres@bingham.com; JMuller@acninc.com; KKuder@acninc.com; pmasters@ernestgroup.com; jvillanueva@cleartel.com; ddahlers@integratelecom.com; Joelm@accessoneinc.com; mollyv@budgetprepay.com; mike@navtel.com; Greg.rogers@level3.com; Greg.rogers@level3.com; eeverbach@telepacific.com; eeverbach@telepacific.com; eeverbach@telepacific.com;

devins@pcs1.net; esther.northrup@cox.com; rsanchez@bluecasa.com;
nlubamersky@telepacific.com; Rudy.reyes@verizon.com; nlubamersky@telepacific.com;
nlubamersky@telepacific.com; nlubamersky@telepacific.com; jclark@goodinmacbride.com;
jclark@goodinmacbride.com; jclark@goodinmacbride.com; Thomas.hixson@bingham.com;
Thomas.hixson@bingham.com; thomas.hixson@bingham.com; thomas.hixson@bingham.com;
thomas.hixson@bingham.com; thomas.hixson@bingham.com; Kopta, Greg; Toller, Suzanne;
gstover@telekenex.com; lmb@wblaw.net; rl@comrl.com; rl@comrl.com; victoria.goeman-
page@att.com; rex.knowles@xo.com; DavidJMiller@att.com; fassil.t.fenikile@att.com;
thomas.selhorst@att.com; marg@tobiaslo.com; Nelson, Katie; StoverLaw@gmail.com;
anitataffrice@earthlink.net; douglas.garrett@cox.com; Adam.Sherr@Qwest.com;
mab@cpuc.ca.gov