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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Qwest Communications Company, LLC (U5335C),

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 Telecom, Inc. dba Integra Telecom (fdba Eschelon Telecom, Inc.) (U6083C), Level 3 Communications (U5941C), and 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. (U5271C), and Utility Telephone, Inc. (U5807C),

Defendants.

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

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION TO FILE UNDER SEAL AND REQUIRING FILING OF MODIFIED POST PREHEARING CONFERENCE STATEMENT

Motion to File Under Seal

On December 30, 2011, Qwest Communications Corporation (Qwest) filed and served a redacted form of its Post Prehearing Conference Statement as well as the unredacted version of the Statement with a motion requesting that the Commission hold that version under seal. The unredacted version included a list of the switched access contracts that Qwest has evaluated to meet the Commission's two requirements for a discrimination claim, namely, that the complainant is willing to meet the terms of the contract and that the complainant is similarly situated to the contract participants. The list, found at Attachment A, names the parties to the contract, the effective date, and the status. Also shown in Attachment A are four substantive elements of the contracts: (1) switched access volume commitment, (2) minimum or maximum usage requirement, (3) switched access term commitment, and (4) other interexchange carrier commitments. The list shows no pricing terms of any contract. Qwest asks the Commission to hold the unredacted form of its Statement under seal.

Qwest's motion is denied. The information presented in Attachment A does not appear to meet the Commission's standards to be excluded from the public record. Any party disputing this conclusion may file and serve a verified statement presenting clear evidence showing the commercial value of specific information within 10 days of the date of this ruling. Otherwise, after that date, all information included in Qwest's filing shall be deemed suitable for the public record.

Requirements for Modified Post Prehearing Statement

On January 6, 2012, the Joint Carriers¹ moved to strike Qwest's post prehearing conference statement from the record or, in the alternative, to declare the Statement an admission by Qwest that it is not willing to meet the terms of entire contracts and that it is not similarly situated to the contracting parties. The Joint Carriers contended that contrary to the direction at the prehearing conference, Qwest had not identified entire contracts it was willing to meet the terms of but rather had identified only certain terms of contracts it was willing to meet. The Joint Carriers similarly objected to Qwest's blanket assertion that it was similarly situated to each contracting interexchange carrier, and that the competitive local exchange carriers should have provided equal rate treatment to Qwest.

The Joint Carriers asked that Qwest's statement be stricken from record and Qwest directed to file a revised statement complying with the directions at the prehearing conference. In the alternative, the Joint Carriers requested that the statement be deemed admissions that Qwest is not willing to meet the terms of the contracts and is not similarly situated to the contracting parties. Based on those admissions, the Joint Parties moved to dismiss the complaint.

On January 18, 2012, Qwest responded in opposition to the Joint Carriers' motion. Qwest stated that it had carefully reviewed the contracts and indicated

¹ MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, Advanced Telcom, Inc., Arrival Communications, Inc., Blue Casa Communications, Inc., Broadwing Communications, LLC, Budget PrePay, Inc., BullsEye Telecom, Inc., Cox California Telcom II, LLC, Granite Telecommunications, Inc., IXC Holdings, Inc. d/b/a Telekenex, Inc., Mpower Communications Corp., Navigator Telecommunications, LLC, PaeTec Communications, Inc., Telscape Communications, Inc., TW Telecom of California, L.P., U.S. TelePacific Corp., Utility Telephone, Inc., and XO Communications Services, Inc.

its willingness to “accept the switched access service related terms of each of the agreements.”²

Qwest contends that “the vast majority of contracts at issue provides discounted rates for switched access services on a forward-looking basis but require the contracting [interexchange carrier] to pay a certain amount in settlement to the [competitive local exchange carrier] for unpaid past charges for switched access.”³ Qwest states that it never withheld such payments, and that making payments as prescribed in the contracts would be defy “common sense.”⁴ Qwest concludes that to prove discrimination a carrier must show that it was similarly situated and that there was no rational basis for the different treatment, and “whether payment of a particular sum, purchase of unrelated non-tariff services, calling patterns, alleged reciprocity, etc. provide that lawful basis is an issue to be resolved after consideration of the appropriate record.”⁵

Qwest goes on to state that much of this case is “indisputable.”⁶ Each item alleged to be indisputable is listed below:

1. Defendants provided, and in some cases still provide, discounted rates for switched access to particular interexchange carriers;
2. Defendants offered those rates pursuant to off-tariff agreements that were not filed with the Commission or otherwise made public;
3. In almost every instance, Qwest finally obtained copies of the off-tariff agreements by issuing subpoenas; and

² Qwest Response to Motion to Strike at 2.

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.* at 6.

⁶ *Id.* at 8.

4. Qwest paid the Defendants non-discounted rates for the same switched access services provided to these interexchange carriers.

Qwest concludes that “the issue before the Commission is not really whether there was discrimination, but whether the discriminatory conduct of the Defendants was unlawful,” which it succinctly summarizes as: “did any of the Defendants have a lawful basis for treating [Qwest] differently?”⁷

Notwithstanding this succinct summary, Qwest then recommends that it be allowed to pursue full discovery so that it can establish an appropriate record, following the “normal course with discovery, the preparation of testimony and ultimately hearings.”⁸

Ruling

I agree with Qwest’s assessment that the factual issues in this proceeding appear to be largely indisputable, and that the actual issues are legal, or perhaps policy-based, in nature and can be succinctly stated to enable efficient resolution by the Commission. The purpose of this ruling is to provide a procedural path forward that will allow prompt and economical resolution of the actual disputed issues in this proceeding. Although denying the Joint Carriers’ motion to strike, this ruling directs Qwest to prepare a modified post prehearing conference statement that sets out clear statements of the issues to be resolved in this proceeding, and to identify disputed issues of material fact underlying those issues.

As Qwest correctly sets out above, few, if any, disputed issues of material fact are evident in the record to date. The dispute between the parties appears to be the legal consequences of those indisputable facts. The existence of disputed

⁷ *Id.* at 9.

⁸ *Id.* at 10.

issues of material fact is a precursor to the need for hearings. Where no party is disputing the facts, there is no reason to engage in expensive and time-consuming discovery and litigation.

Qwest contends that the vast majority of the contracts at issue extend lower rates for future switched access services based on a financial settlement of unpaid past charges for switched access services. Qwest elaborates on this issue in its post prehearing conference statement at pages 18 and 19. Qwest identifies no disputed issue of material fact regarding these contracts, but raises numerous policy and legal issues.

Qwest's statement however, shows that rigorously applying the Commission's two-factor approach to discrimination claims such as this may be unworkable. Here, the fact that Qwest does not have unpaid charges for switched access services renders nonsensical the Commission's requirement that Qwest be willing to meet this term of the contract. Turning to the Commission's second requirement, that it be similarly situated to the customer, Qwest then argues that a customer's "refusal to pay is not – and simply cannot be – a legitimate basis for permitting Defendants to discriminate against [Qwest]."⁹ Thus, Qwest does not dispute that it is different from the other customer in that Qwest *did pay* its charges for switched access services, but Qwest argues that this difference does not mean that the two customers are not similarly situated. Putting Qwest's description of this fact pattern into its "succinct summary" form results in the following issue statement: Is settlement of past unpaid charges for switched access a lawful basis for offering carriers with such unpaid charges a lower future rate for switched access services, and not offering the lower rate to

⁹ *Id.* at 19.

carriers without such unpaid charges, such as Qwest? Such a statement is more useful for quickly identifying the issues that must be resolved in this proceeding than rigidly adhering to the two-factor approach in the Commission's decision.

Therefore, in its modified post prehearing conference statement Qwest must evaluate each of the 50 contracts¹⁰ at issue in this proceeding using one of the following two approaches:

- (1) indicate that Qwest is willing to meet **each and every substantive term of the contract**, and provide Qwest's factual analysis supporting its conclusion that it is similarly situated to the contract participants, or
- (2) formulate a succinct statement of the conduct the Commission must evaluate for lawfulness with regard to the contract.

Qwest must also identify for each contract or group of contracts any disputed issues of material fact necessary for resolving the issues before the Commission.

Qwest must file and serve its modified post prehearing conference statement no later than February 15, 2012. Defendants may file and serve replies to the statement no later than March 2, 2012.

A scoping memo and procedural schedule will be issued based on these filings. Other pending motions may be resolved in the interim.

IT IS RULED that:

1. Qwest's December 30, 2011, motion to file its unredacted post prehearing conference statement under seal is denied. The material shall be provisionally held under seal for 20 days after the date of this ruling. Absent further ruling, the unredacted post prehearing conference statement shall be moved to the public record at the expiration of the 20 days.

¹⁰ Contracts with similar issues should be analyzed as a group.

2. The January 6, 2012, Joint Carriers' motion to strike is denied.
3. No later than February 15, 2012, Qwest must file and serve a modified post prehearing conference statement addressing each contract using one of the two approaches set forth above, and identifying disputed issues of material fact.
4. No later than March 2, 2012, Defendants may file and serve replies to Qwest's modified post prehearing conference statement.

Dated, January 24, 2012, at San Francisco, California.

/s/ MARIBETH A. BUSHEY

Maribeth A. Bushey
Administrative Law Judge