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

QWEST COMMUNICATIONS COMPANY, LLC (U-5335-C)

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), 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

Case No. 08-08-006

JOINT REPLY COMMENTS OF ADVANCED TELCOM, INC., ARRIVAL COMMUNICATIONS, INC., BLUE CASA COMMUNICATIONS, INC., BROADWING COMMUNICATIONS, LLC, BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., COX CALIFORNIA TELCOM, LLC, GRANITE TELECOMMUNICATIONS, LLC, 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. IN RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S OPENING COMMENTS ON THE ASSIGNED ADMINISTRATIVE LAW JUDGE'S PROPOSED DECISION TO DISMISS THE COMPLAINT

July 26, 2010

Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, Joint Carriers¹ submit this Joint Reply to Qwest Communications Company LLC's ("QCC") July 19, 2010 Opening Comments on the ALJ's Proposed Decision to Dismiss the Complaint ("QCC Comments").

I. INTRODUCTION

Joint Carriers appreciate the careful consideration ALJ Bushey has given to this case and fully support her June 29, 2010 Proposed Decision to Dismiss QCC's First Amended Complaint ("PD"). Resorting to unnecessarily alarmist language, QCC wrongly asserts that the PD would "eviscerate ... the prohibition of rate discrimination by public utilities."² The PD does no such thing. Rather, it applies to QCC's Complaint the sound principles regarding agreements between CLECs and IXCs for switched access charges that the Commission adopted—over QCC's objection—in its December 7, 2007 decision in D.07-12-020 (the "*Access Charge Decision*"). Contrary to QCC's rhetoric, the Commission's ability "to maintain a fair and non-discriminatory telecommunications market in California"³ will not abruptly end upon the PD's adoption. The Commission should adopt the PD.

II. DISCUSSION

A. The Commission Previously Considered and Rejected QCC's Arguments in the Access Charge Proceeding, R.03-08-018

QCC's Comments challenging the PD resurrect the same arguments that QCC raised in the Access Charge Proceeding, R.03-08-018, and that the Commission declined to adopt in the *Access Charge Decision*. That Commission ruling, which for the first time established a regulatory framework for CLEC intrastate switched access service, requires dismissal of QCC's Complaint. The Commission should reject QCC's improper collateral attack on the *Access Charge Decision* and adopt the PD.

¹ Joint Carriers collectively include the following defendants: Advanced Telecom, Inc. (U-6083-C), Arrival Communications, Inc. (U-5248-C), Blue Casa Communication, Inc. (U-6764-C), Broadwing Communications, LLC (U-5525-C), Budget PrePay, Inc. (U-6654-C), BullsEye Telecom, Inc. (U-6695-C), Cox California Telecom, LLC (U-5684-C), Granite Telecommunications, LLC (U-6842-C), Mpower Communications Corp. (U-5859-C), Navigator Telecommunications, LLC (U-6167-C), PAETEC Communications, Inc. (U-6097-C), Telscape Communications, Inc. (U-6589-C), tw telecom of california, lp. (U-5358-C), U.S. TelePacific Corp. (U-5721-C), Utility Telephone, Inc. (U-5807-C), and XO Communications Services, Inc. (U-5553-C).

² QCC Comments at 1.

³ *Id.* at 15.

In the *Access Charge Decision*, the Commission: (1) established a tariffed price cap for CLEC intrastate switched access rates;⁴ (2) authorized CLECs and IXC's to "voluntarily contract with each other to pay intrastate access charges different from those adopted" in the decision;⁵ (3) grandfathered then-existing CLEC switched access contracts;⁶ and (4) declined QCC's requests that it adopt a filing requirement for CLEC switched access contracts,⁷ despite QCC's repeated assertions that QCC was "aware of widespread, off-tariff pricing arrangements between certain CLECs and IXC's for switched access" that had not been made available to all IXC's.⁸ The Commission has the authority under the last sentence of Pub. Util. Code § 532 to decline to adopt or to waive tariffing and filing requirements. It did just that in the *Access Charge Decision* and should not revisit previously rejected QCC arguments in a collateral proceeding.

B. QCC Misinterprets and Mischaracterizes the Law and Commission Precedent

In its Comments, QCC makes a number of erroneous assertions that mischaracterize the Commission's *Access Charge Decision* and its holdings.

First, QCC wrongly claims that the PD "dispose[d] of QCC's complaint on the basis of a single sentence ... found in the *Access Charge Decision*."⁹ On the contrary, the PD comprehensively analyzes the *Access Charge Decision* as it applies to defendants, repeatedly references additional statements in the decision, such as the determination that the pre-existing unfiled contracts that QCC pointed to then and that form the basis of QCC's complaint now would be allowed to stand, explains why defendants have

⁴ *Access Charge Decision*, at Conclusions of Law, ¶¶ 6-7.

⁵ *Id.*, ¶ 10.

⁶ *Id.*

⁷ See Qwest Communications Corporation's Application for Rehearing of D.07-12-020 (Jan. 9, 2008) at 4; see also Reply Comments of Qwest Communications Corporation in Response to Proposed Decision of Administrative Law Judge, R.03-08-018 (Nov. 13, 2007) ("QCC R.03-08-018 Reply Comments") at 2-3.

⁸ QCC R.03-08-018 Reply Comments at 2 (quoting Reply Comments of Qwest Communications Corporation in Response to Joint Assigned Commissioner and Administrative Law Judge Ruling Setting Further Proceedings, R.03-08-018 (July 30, 2007) at 6).

⁹ QCC Comments at 6.

not violated California law, and properly concludes that QCC “fail[ed] to state a claim upon which relief can be granted.”¹⁰

Second, QCC erroneously claims the *Access Charge Decision* has no retroactive effect because, QCC argues, the Commission did not eliminate any filing requirement for access contracts entered into prior to that decision.¹¹ Contrary to QCC’s claims, as the PD explains, the Commission “was aware of alleged off-tariff pricing for intrastate access services and the Commission let those arrangements stand,” as they were fully consistent with the Commission’s stated objective to reduce “excessive” access rates, and thus it “authorized future such arrangements.”¹² As noted above, in the Access Charge Proceeding, QCC expressly asked the Commission to require that such contracts be filed with the Commission, but the Commission declined to do so.

Third, QCC wrongly asserts that PU Code §§ 453 and 532 do not condone offering rates to IXCs under negotiated agreements that differ from the tariffed rate, and that the PD was based on an “unspoken waiver” in the *Access Charge Decision* of the requirements of these Code sections.¹³ Contrary to QCC’s claims, the PD relied on the Commission’s explicit (not “unspoken”) holding in the *Access Charge Decision* that “Carriers may voluntarily contract with each other to pay intrastate access charges different from those adopted in this decision.”¹⁴ This holding is a plain and specific waiver of the general requirement in § 532 that carriers may not depart from the tariffed rates.

Moreover, § 453(c) prohibits only “unreasonable difference[s]” in rates between customers; it

¹⁰ PD at 10. The PD recognizes that the pre-existing unfiled contracts of which QCC complains were “not affected by” the *Access Charge Decision*. *Id.* at 7, *see id.* at 8-9. The PD acknowledges the Commission’s “primary goal” in the *Access Charge Decision* was “to bring an end to ‘excessive intrastate charges’” (*id.* at 7) and the Commission’s approach to accomplish this goal was capping CLEC intrastate switched access rates and sanctioning contracts that CLECs have entered into with IXCs to provide intrastate access services at rates that are “different” from the rates adopted in the *Access Charge Decision*. *Id.* at 7 & 9. The PD further explains that “[b]ecause the Commission did not place specific limitations on the contract rates, as it did with the tariff intrastate access charge rates, there would be no purpose in filing the contract because the Commission had previously authorized all ‘different’ rates and no additional ratemaking approval is required.” *Id.* at 9. The PD explains that the Commission in the *Access Charge Decision* rejected the “essence” of the discrimination theory underlying QCC’s complaint (PD at 6-7) and, therefore, Commission precedent requires that the PD reject it again.

¹¹ QCC Comments at 14.

¹² PD at 9.

¹³ QCC Comments at 7-8.

¹⁴ *Access Charge Decision*, at Conclusion of Law, ¶ 10. *See* PD at 8.

does not prohibit any difference in rates. As the Commission held in D.02-12-027, discrimination among similarly situated customers “is lawful if there is a rational basis for the different treatment in the Commission's economic regulation.”¹⁵ The Commission was well within its authority to determine in the *Access Charge Decision* that different rates established through voluntary negotiation are reasonable so long as all IXC purchasers have access to the tariffed price cap as a backstop. This provides a “rational basis” for a given switched access provider to treat customers differently. If QCC believed that this holding was unlawful, then it could have appealed the *Access Charge Decision* in a timely manner, not wait several years and then launch an impermissible collateral attack here. As the PD explains, the *Access Charge Decision* “authorized voluntary contracts at rates to be determined by the parties, without regard to the tariff rate” and declined to adopt a contract-filing requirement despite QCC’s objection that “‘off-tariff pricing arrangements’ had been made between certain carriers and not made available to all.”¹⁶ QCC is wrong to assert that these holdings violate § 532¹⁷ because, as the PD acknowledged and as noted above, the Commission has express authority under that section to exempt public utilities from tariffing requirements, which is precisely what the Commission did in the *Access Charge Decision*.¹⁸

Fourth, QCC also errs in stating that “the recommendation to add ... language” in the *Access Charge Decision* authorizing CLECs and IXCs to “voluntarily contract with each other to pay intrastate access charges different from those adopted” was “not opposed by any party.”¹⁹ In fact, QCC opposed this Cox- and tw telecom-proposed language and expressly asked the Commission to “reject” it.²⁰

Fifth, QCC further errs in representing that “the question of whether the subject off-tariff

¹⁵ D.02-12-027 at 26.

¹⁶ PD at 8.

¹⁷ See QCC Comments at 7-8, 10, n.38, & 11. QCC’s citation to a Cox filing for the proposition that off-tariff contracts are authorized “provided the carrier files those agreements” is flatly wrong. See QCC Comments at 11 & n.42 (emphasis supplied by QCC). No filing requirement is mentioned in the Cox filing cited by QCC in n.42.

¹⁸ The undersigned have reviewed and join in the reply comments of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (U5253C) regarding QCC’s incorrect and repeated assertions that the agreements were “secret” and otherwise “hidden” from QCC. See QCC Comments at 1, 4, 8, 10, 12, 15).

¹⁹ QCC Comments at 9 & n.35.

²⁰ QCC R.03-08-018 Reply Comments at 3. See Defendants’ May 20, 2010 Joint Brief in this matter at pp. 3-6, demonstrating that the Commission adopted this language over this QCC request that it “reject” it.

agreements are lawful has yet to be decided or even considered.”²¹ The *Access Charge Decision* expressly authorized CLECs and IXCs to “voluntarily contract with each other to pay intrastate access charges different from those adopted.”²²

Sixth, QCC incorrectly asserts the “scope” of Phase III of the Access Charge Proceeding did not include filing requirements for off-tariff agreements, and that it would violate due process to preclude QCC from pursuing its claim on the basis that the issues were raised in the Access Charge Proceeding.²³ But QCC never objected to having the filing issue addressed in the Access Charge Proceeding. Indeed, QCC proposed that the Commission adopt a filing requirement for off-tariff contracts in that proceeding, and the Commission declined to do so. It is QCC which seeks to violate due process by launching an unlawful collateral attack on the *Access Charge Decision* and requiring the parties to defend a complaint with no basis in California law.²⁴

III. CONCLUSION

For the forgoing reasons, the Commission should reject QCC’s criticisms and adopt the PD.²⁵

Dated: July 26, 2010

Respectfully submitted,

/s/Eric J. Branfman
Eric J. Branfman
Philip J. Macres

²¹ QCC Comments at 11.

²² *Access Charge Decision*, Conclusions of Law, ¶ 10.

²³ *QCC Comments* at n.14 and n.35.

²⁴ While QCC apparently disagrees with the *Access Charge Decision*, Joint Carriers cannot be faulted for acting consistently with the regulatory framework adopted in this decision. See PU Code section 1702 (permitting complaints to be brought only upon “any act or thing done or omitted to be done by any public utility ... in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.”). Since Joint Carriers acted in accordance with the order adopted by the Commission in the *Access Charge Decision*, QCC’s complaint lacks foundation under section 1702 and must be dismissed, as the PD concluded.

²⁵ If, however, the Commission rejects the basis for dismissal set forth in the PD, it should not accept QCC’s suggestion (QCC Comments at 15) that the proceeding “move forward with discovery, testimony and hearings.” Rather, the ALJ should address the merits of the other CLEC motions, which were treated as moot given the PD dismissing the Complaint for failure to state a claim.

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CERTIFICATE OF SERVICE

I, Kimberly A. Lacey, certify that on this 26th day of July, 2010, I caused a copy of the foregoing:

JOINT REPLY COMMENTS OF ADVANCED TELCOM, INC., ARRIVAL COMMUNICATIONS, INC., BLUE CASA COMMUNICATIONS, INC. , BROADWING COMMUNICATIONS, LLC, BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., COX CALIFORNIA TELCOM, LLC, GRANITE TELECOMMUNICATIONS, LLC, 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. IN RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S OPENING COMMENTS ON THE ASSIGNED ADMINISTRATIVE LAW JUDGE'S PROPOSED DECISION TO DISMISS THE COMPLAINT

to be served by electronic mail on all known parties to Case No. 08-08-006 on the most recently updated service list available on the California Public Utilities Commission's website, shown below, and by U.S. First Class mail to all individuals on the service list without e-mail addresses.

I also caused a courtesy copy to be delivered via Federal Express to the following:

Hon. Maribeth A. Bushey,
Administrative Law Judge
California Public Utilities
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State Building, Room 5018
505 Van Ness Avenue
San Francisco, CA 94102

Commissioner Timothy Alan Simon
Assigned Commissioner
California Public Utilities
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In addition, I emailed a copy of the foregoing to Commissioner Simon at tas@cpuc.ca.gov.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of July, 2010 in Washington, D.C.

/s/ Kimberly A Lacey
Kimberly A. Lacey

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