Decision 10-07-030 July 29, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Qwest Communications Company, LLC (U5335C), Complainant, vs. 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), 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)

FINAL DECISION DISMISSING COMPLAINT

Summary

This decision finds that the complainant has failed to state a cause of action upon which relief may be granted and that the complaint should be dismissed.

Background

On August 1, 2008, Qwest Communications Corporation (Qwest) filed this Complaint against seven competitive local exchange carriers, contending that these carriers offered intrastate switched access services to other similarly situated competitive local exchange carriers at lower prices than stated in filed tariffs and charged to Qwest. Qwest's complaint details three causes of action based on discrimination and tariff violations. On September 22, 2008, the seven original defendants filed answers.

By ruling dated December 18, 2008, the assigned Administrative Law Judge (ALJ) denied the motion of Cox California Telecom II, LLC, dba Cox Communications (Cox), and Level 3 Communications, LLC (Level 3) to quash a subpoena issued to AT&T Corporation (AT&T) by Qwest for information on intrastate switched access services provided by AT&T to any interexchange carrier since January 1, 1998. That ruling also set a prehearing conference for January 13, 2009, which was subsequently continued at the request of the complainant to allow for filing the amended complaint.

Cox and Level 3 also filed motions to dismiss the original complaint on November 12, 2008, and September 23, 2008, respectively. These motions have not been resolved and motions to place portions of them, and ensuing responses, under seal remain outstanding.

On April 15, 2009, the complainant filed its First Amended Complaint against the 24 competitive local exchange carriers listed in the caption to this

decision as well as the referenced unnamed carriers ("John Does 1-50"). In the First Amended Complaint, Qwest renewed its claims that the defendants had charged other similarly situated competitive local exchange carriers lower intrastate access charge rates than offered to Qwest, failed to file their agreements with the other interexchange carriers with the Commission, and otherwise illegally kept the agreements from the public eye.

As demonstrated by the procedural history set forth above, it was not possible to resolve this case by August 1, 2009. Because of these circumstances, the Decision (D.) 09-07-045 extended the deadline to August 1, 2010 to allow adequate time for the Commission to resolve this matter.

Eighteen answers to the initial Complaint and First Amended Complaint were filed. On October 26, 2009, Qwest filed a motion for entry of default against Ernest Communications. Of the now 24 defendants, 23 have filed at least one answer to the Complaint or First Amended Complaint or both.

On July 29, 2009, the assigned ALJ convened a prehearing conference and adopted a schedule for filing dispositive motions.

Parties filed motions to dismiss the First Amended Complaint between July 16 and August 31, 2009. Twenty one defendants submitted motions to dismiss, all of which joined together in the Joint CLEC Motion to Dismiss filed August 14, 2009, except for MCIMetro Access Transmission LLC (MCIMetro) which filed its own Motion to Dismiss January 15, 2009, and followed Qwest's First Amended Complaint with a Second and Alternative Motion to Dismiss Complaint and all Causes of Action filed August 14, 2009. Qwest filed its consolidated response to the motions on September 18, 2009.

Many procedural motions remain outstanding as well as motions for default judgment against Ernest Communications and a motion to stay against

Pacific Centrex due to filing for bankruptcy protection in U.S. Bankruptcy Court. On April 28, 2010, the assigned ALJ issued a ruling authorizing the parties to file and serve legal argument addressing the applicability of D.07-12-020 to the issues in this complaint proceeding.

Initial briefs were filed and served by the Joint Carriers[1] and Qwest, with Qwest also submitting a reply brief.

In today's decision, we address the applicability of D.07-12-020 to the conduct alleged by Qwest to have violated California law or Commission regulation. We find that Qwest has failed to state a claim upon which relief can be granted because the Commission authorized these competitive local exchange carriers to voluntarily contract for different intrastate access service rates, so long as a tariffed rate subject to the adopted cap was also in place. Qwest has not alleged any violations of the tariff requirements but only that competitive local exchange carriers have entered into voluntary contractual rates for intrastate access services at rates below the tariffed rates, and have not offered these lower rates to Qwest. As analyzed below, we find that D.07-12-020 authorized such voluntary contracts, so long as a valid tariff with an adopted cap was in place. Therefore, we conclude that Qwest's allegation of contracts between carriers for lower intrastate access rates than in the carriers' tariffs does not constitute a violation of California law or Commission regulations.

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[1] MCIMetro; Advanced Telcom Inc.; Arrival Communications, Inc.; Blue Casa Communications, Inc.; Broadwing Communications, LLC; Budget Prepay, Inc.; Bullseye Telecom, Inc.; Cox; Granite Telecommunications LLC; Mpower Communications Corp.; Navigator Telecommunications, LLC; Telscape Communications, Inc.; TW Telecom of California, L.P.; U.S. Telepacific, Corp.; Utility Telephone, Inc.; and XO Communications Services, Inc.

Positions of the Parties

The Joint Carriers stated that D.07-12-020 was "fatal" to Qwest's claim that all interexchange carriers are similarly situated and that all defendants must prospectively lower their intrastate switched access rates to Qwest to the lowest rate offered to any other California carrier, and retrospectively refund the difference to Qwest. The Joint Carriers explained that in the 2007 decision, the Commission expressly authorized competitive local carriers to negotiate off-tariff rates with other carriers, and left unsettled whether such contracts had to be filed. The Joint Carriers contended that Qwest's attempts to eliminate the voluntary contract provision of the 2007 decision was an unlawful collateral attack on that decision.

In its opening brief, Qwest explained that the Commission's 2007 decision reinforces the bottleneck nature of access services, and supports Qwest's allegations that offering lower rates to certain carriers is unlawful and discriminatory. Qwest also stated that the "mere existence" of off-tariff contracts did not necessarily violate California law or Commission regulation, but that offering different rates "could only be justified where the provider . . . establishes that the relevant economic cost . . . varies between customers."[2]

In reply to the Joint Carriers, Qwest argued that off-tariff contracts for access services are not per se discriminatory, but that the carriers' failure to offer the lower rates reflected in those contracts to Qwest was discriminatory. Qwest also contended that the Commission requires all individual case basis service contracts to be filed with the Commission.

[2] Qwest Opening Brief at 6.

Discussion

Pursuant to Pub. Util. Code § 1702,[3] this Commission may entertain any complaint that sets "forth 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." The complaint fails to meet this standard and we therefore dismiss it. (*See* AC Farms Sherwood vs. Southern California Edison Company, D.02-11-003.)

In Ordering Paragraph 5 of D.07-12-020, the Commission authorized carriers to "voluntarily contract with each other to pay intrastate access charges different from those adopted in today's decision." The Commission also explicitly required all California-certificated competitive local exchange carriers to limit their intrastate access charges to the higher of AT&T's or Verizon's intrastate access charges, plus 10%, over the objection of numerous competitive carriers that the incumbent carrier's rates were an unreasonably low proxy for the competitive carriers' actual costs.

Qwest does not allege that any defendant has failed to offer tariffed intrastate access services in compliance with D.07-12-020.

The essence of Qwest's complaint is that the defendants have discriminated against Qwest by offering lower intrastate access rates to certain contractual customers, and not offering these lower rates to Qwest. This theory underlies Qwest's three claims for relief in its amended complaint. Qwest, however, presented this theory to the Commission in its comments on D.07-12-020 and, as set forth below, the Commission rejected the theory and gave

[3] All statutory citations are to the Public Utilities Code unless otherwise indicated.

blanket approval for carriers to voluntarily contract for intrastate access services at rates different from the tariff.

In D.07-12-020, the Commission's primary goal was to bring to an end "excessive intrastate access charges" with "purchasing carriers unable to seek alternatives to terminating the call traffic." In that decision, the Commission accomplished its goal by requiring competitive local exchange carriers to offer intrastate access services at a tariffed rate, subject to a cap based on the incumbent local exchange carriers' cost-based intrastate access services rates. The competitive local exchange carriers opposed using the incumbents' tariffs rates as a cost proxy because the competitive carriers claimed that their costs were higher than the incumbents' costs.

In the 2007 decision, the Commission also recognized that the carriers had existing contracts that specified intrastate access services rates and the Commission declined to require that these contracts conform to the new rate cap limitation and stated that these contacts "are not affected by" the 2007 decision. Similarly, the Commission authorized carriers prospectively to enter into voluntary contracts for intrastate access services at rates "different" from the rates adopted in the decision.

Qwest alleges that defendant carriers have offered other competitive local exchange carriers "different" rates that are lower than the intrastate access rates offered to Qwest. Qwest contends that this violates the statutory prohibition against discrimination found in Pub. Util. Code § 453.[4] Qwest also points to Pub.

[4] Section 453 provides: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to a prejudice or disadvantage."

Util. Code § 532 as requiring all public utilities to offer services only as specified in compliance with their filed tariffs.[5]

In authorizing carriers to voluntarily contract for different rates, the Commission noted but rejected Qwest's contention that "§§ 532 and 453 require these carriers to charge tariffed rates and not to discriminate." Over Qwest's objection, the Commission authorized voluntary contacts at rates to be determined by the parties, without regard to the tariff rate. The Commission also declined to extend to existing contracts the limitations set forth in the 2007 decision, again over Qwest's objection that "off tariff pricing arrangements" had been made between certain carriers and not made available to all. We find, therefore, that the Commission expressly authorized intrastate access rates to be set in voluntary agreements between carriers.

Qwest next argues that any such contracts were required to be filed and approved by the Commission, as well as made available to all similarly situated carriers. Finding no explicit filing requirement in the 2007 decision, Qwest points to General Order (GO) 96-B, Telecommunications Industry Rule 8.2, as requiring that all contracts for tariffed services be submitted to the Commission for its approval and that the terms of such offerings be available to all similarly situated carriers.

In D.07-12-020, however, the Commission gave carriers blanket authorization to "voluntarily contract with each other to pay intrastate access

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[5] Section 532 also grants the Commission explicit authority to exempt public utilities from the tariff requirement: "The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility." Thus, the Commission has the authority to exempt public

Footnote continued on next page

charges different from those adopted in today's decision." The Commission did not place specific limitations on the contract rates, as it did with the tariff intrastate access charge rates, and no additional ratemaking approval is required because the Commission had previously authorized all "different" rates. This outcome is also consistent the Commission's determination to exempt from the decision's limitations all then-existing intrastate access charge contracts

The complaint fails to show a violation of California law because the Commission was aware of alleged off-tariff pricing for intrastate access services and the Commission let those arrangements stand, and authorized future such arrangements.[6] Qwest's instant complaint is based on the theory that such arrangements violate Pub. Util. Code §§ 532 and 453, a theory that the Commission rejected.

Therefore, we find that Qwest has not alleged that any defendant has failed to offer intrastate access services in conformity with the tariff filing and rate limitations found in D.07-12-020 or that any different intrastate access rates were reached by involuntary means. We hold that Qwest's allegations of lower contract rates for intrastate access services made available to certain carriers but not to Qwest do not allege a violation of California law or Commission regulation and, consequently, fail to state a claim upon which relief can be granted. Accordingly, Qwest's complaint should be dismissed.

Need for Hearing

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utilities from the requirement to offer service only pursuant to filed tariffs, upon a showing that such exemption is just and reasonable.

[6] The Commission did require all carriers to file tariffs subject to a rate cap, but violations of those requirements are not part of Qwest's complaint.

There are no disputed issues of material fact and no evidentiary hearings are necessary.

Comments of Proposed Decision

The proposed decision of the ALJ Maribeth A. Bushey in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Qwest filed comments on the Proposed Decision on July 19, 2010, and urged the Commission to reject the Proposed Decision in its entirety because, if adopted, the Proposed Decision would "write out of existence the non-discrimination provisions of the Public Utilities Code." Specifically, Qwest argued that switched access is a critical and non-competitive input service and that this Commission as well as the Federal Communications Commission has recognized the potential anti-competitive impact of excessive rates for these "bottleneck" services. In light of this, the Commission in 2007 removed non-cost-based rate elements and imposed a price cap on Competitive Local Exchange Carriers' intrastate access rates. Qwest explained that although the Commission authorized carriers to continue voluntarily to contract with each other for different access charges, the Commission did not exempt those contracts from from Pub. Util. Code § 453, with prohibits discrimination among customers. Qwest concluded that sound public policy against "secretive and unlawfully discriminatory behavior by public utilities" required that the Commission reject the Proposed Decision.

In reply, joint defendants[7] stated that the Commission considered and rejected Qwest's discrimination arguments in the 2007 decision and that Qwest's attempts to "resurrect" these same arguments in this complaint proceeding amount to "an improper collateral attack" on the 2007 decision. Defendants explained that in the 2007 the Commission adopted a "plain and specific waiver of the general requirement in Pub. Util. Code § 532 that carriers may not depart from tariffed rates" and that the Commission properly relied on the "backstop" of the tariff price cap as a "rational basis" for the "different rates."

MCIMetro Access Transmission Services, LLC, joined in the joint reply comments but also filed its separate reply comments to challenge Qwest's assertions that the intrastate access agreements at issue in this complaint were kept "secret." MCIMetro described the various means by which Qwest has received copies of these agreements since 2004.

Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. There are no allegations or evidence that any defendant has not historically offered and is not currently offering carriers intrastate access services through a

[7] Advanced Telecom, 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.

validly filed tariff with rates that do not exceed the rate cap adopted in D.07-12-020.

2. In D.07-12-020, the Commission authorized voluntary contracts for intrastate access services at rates different from the tariff rate over Qwest's objection that such contracts violate Pub. Util. Code §§ 532 and 453.

3. In the instant complaint, Qwest alleges that the defendants' voluntary contracts for intrastate access services at rates different from the tariffed rate violate Pub. Util. Code §§ 532 and 453.

4. Numerous motions, including several to file documents under seal, remain outstanding.

Conclusions of Law

1. The Commission has the authority pursuant to Pub. Util. Code § 532 to exempt public utilities from the obligation to offer public utility services only in accord with their filed tariffs.

2. In D.07-12-020, the Commission authorized carriers to offer intrastate access services in voluntary contracts at rates different from the valid tariffed rate, without further Commission ratemaking review.

3. In D.07-12-020, the Commission required that tariffed intrastate access service be offered to all carriers subject to a cost cap but imposed no restrictions on the voluntary contractual rates for intrastate access services.

4. Qwest's allegations of voluntary contracts for intrastate access services at rates different from tariffed rates do not constitute a violation of California law or Commission regulation.

5. Qwest's complaint should be dismissed.

6. Numerous motions to file documents under seal remain outstanding and should be granted; all other motions should be denied as moot.

FINAL ORDER

IT IS ORDERED that:

1. All outstanding motions to file documents under seal in this proceeding are granted. The documents attached to the motions shall be held under seal for two years from the date of this decision, and during that period the material so protected shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If any party believes that further protection of this information is needed after the two-year period, they may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall explain with specificity why the designated material still needs protection in light of the passage of time involved. This motion shall be filed at least 30 days before the expiration of this protective order.
2. All outstanding motions other than motions to place documents under seal are denied.
3. The amended complaint is dismissed.
4. Case 08-08-006 is closed.

This order is effective today.

Dated July 29, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH

JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners