

Decision 11-07-058

July 28, 2011

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)

**ORDER GRANTING REHEARING OF DECISION (D.) 10-07-030,
AND VACATING THE DECISION**

I. INTRODUCTION

In Decision (D.) 10-07-030 (or “Decision”), we dismissed the complaint filed by Qwest Communications Company, LLC (“Qwest”) against twenty-one California competitive local exchange carriers (“CLECs” or “Defendants”).¹ The Decision found that Qwest had failed to state a cause of action upon which relief could be granted.

Qwest’s complaint had alleged that the Defendants had subjected Qwest to unjust and unreasonable rate discrimination in connection with the provision of intrastate switched access service. Specifically, Qwest’s complaint raised three claims for relief.

- (1) Rate Discrimination - Defendants have subjected Qwest to discriminatory treatment with respect to rates for intrastate switched access service provided to similarly situated interexchange carriers (“IXCs”) by not making off-tariff rates available to Qwest (citing Public Utilities Code Sections 453, 532, and 734, and General Order 96-B).² (First Amended Complaint, p. 33, ¶ 12.)
- (2) Failure to Abide by Tariffs or File ICBs - Defendants entered individual-case-basis (“ICB”) agreements with some IXCs, but not Qwest, with terms and conditions that deviated from their tariffed rates for intrastate switched access services and did not file the ICB agreements with the Commission (citing Section 453 and 532 and General Orders 96-A, 96-B, General Rule 8.5.6 and Telecommunications Industry Rules 4, 7.1(8), and 8.2.) (First Amended Complaint, p. 33, ¶ 15.)

¹ Qwest’s August 1, 2008 complaint named seven defendants: MCI Metro Access Transmission Services, L.L.C.; XO Communications Services, Inc.; tw telecom of California, lp.; Granite Telecommunications, LLC; Advanced Telecom, Inc.; Level 3 Communications; and Cox California Telecom, LLC. On April 15, 2009, Qwest filed its First Amended Complaint and added seventeen additional defendants: Access One, Inc.; ACN Communications Services, Inc.; Arrival Communications, Inc.; Blue Casa Communications, Inc.; Broadwing Communications, LLC; Budget PrePay, Inc.; BullsEye Telecom, Inc.; Ernest Communications, Inc.; Mpower Communications Corp.; Navigator Telecommunications, LLC; nii Communications, Ltd.; Pacific Centrex Services, Inc.; PAETEC Communications, Inc.; Telekenex; Telescape Communications, Inc.; U.S. TelePacific Corp.; and Utility Telephone, Inc. Qwest is no longer pursuing claims against three of the twenty-four named defendants, Pacific Centrex Services, Inc., Level 3 Communications and ACN Communications Services, Inc.

² Unless otherwise specified, subsequent section references are to the Public Utilities Code.

- (3) Failure to Provide Customer-Specific Contract Terms to Similarly-Situated Customers in Violation with Tariffs - Some defendants violated terms in their tariff that stated that if they entered into ICB agreements they would (1) make the same terms available to other customers on a non-discriminatory basis, and/or (2) attach a summary of the agreement to their tariff, and/or (3) file the agreement and seek Commission approval (citing Section 532, General Orders 96-A, 96-B, General Rule 8.2.1.) (First Amended Complaint, pp. 34-35, ¶ 19.)

In dismissing Qwest's complaint, the Decision found that Qwest alleges that the Defendants' voluntarily contracts for intrastate access service at rates different from the tariffed rates violated sections 532 and 453. (D.10-07-030, p. 12, [Finding of Fact 3].) The Decision concluded that in D.07-12-020³ the Commission had authorized carriers to offer intrastate access services in voluntary contracts at rates different from the valid tariffed rates without further ratemaking review. (D.10-07-030, p. 12 [Conclusion of Law 2].) The Decision further concluded that the Commission had imposed no restriction on the voluntary contractual rates, and concluded Qwest's allegation of contracts for intrastate service at rates different from tariffed rates did not constitute a violation of California law or Commission regulation. (D.10-07-030, p. 12 [Conclusion of Law 4].)

Qwest filed a timely application for rehearing of D.10-07-030.⁴ Qwest alleges that the Commission: (1) misconstrued Qwest's complaint regarding its discrimination argument; (2) unlawfully disregarded the mandates of the Public Utilities Code (in particular section 453); (3) violated basic principles of due process; (4) incorrectly dismissed claims that predate *2007 Access Charge Decision*; and (5) issued a decision incompatible with sound public policy. Qwest also requests oral argument under Rule 16.3 of the Commission's Rules of Practice and Procedure.

³ *Final Opinion Modifying Intrastate Access Charges* ("2007 Access Charge Decision") [D.07-12-020] (2007) ____ Cal.P.U.C.3d ____.

⁴ Qwest's rehearing application was filed with a motion for leave to file confidential materials under seal.

MCI Metro Access Transmission Services, L.L.C., Advanced Telecom, Inc., Arrival Communications, Inc., Blue Casa Communications, Inc., Broadwing Communications, LLC, Budget PrePay, Inc., BullsEye Telecom, Inc., Cox California Telecom, LLC, Granite Telecommunications, LLC, Mpower Communications Corp., Navigator Telecommunications, LLC, PAETEC Communications, Inc., Telescape Communications Inc., tw telecom of california, lp., U.S. TelePacific Corp., Utility Telephone, Inc., and XO Communications Services, Inc filed a Joint Response to Qwest's rehearing application.

II. DISCUSSION

We have reviewed Qwest's application for rehearing, and have concluded that Qwest's complaint should not have been dismissed on the ground for failing to state a cause of action. Therefore, we grant rehearing to consider the allegations of discrimination asserted in Qwest's complaint.

We note a few guiding principles: To prove discrimination, a carrier will have to show that it was similarly situated and that there was no rational basis for such different treatment. (*Order Denying Rehearing of Decision (D.) 09-12-018* [D.10-04-054] (2004) ____ Cal.P.U.C.3d ____ at p. 7 (slip op.)) "A showing that rates lack uniformity is by itself insufficient to establish that they are unreasonable and hence unlawful. . . ." (*Order Denying Rehearing of Decision (D.) 06-07-030*) [D.07-01-020] (2007) ____ Cal.P.U.C.3d ____ at p. 7 (slip op.) relying on *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1180. "Numerous characteristics of a particular customer -- volume, calling patterns, cost of negotiation, etc. -- could be sufficient to distinguish one customer from another." (*Re Alternative Regulatory Frameworks for Local Exchange Carriers* [D.94-09-065] (1994) 56 Cal.P.U.C.2d 117, 243. As the Commission recognized:

[C]ontracting with individual customers at rates that deviate from those available under the tariffs raises the issue of whether such contracts violate the nondiscrimination provisions of § 453(a). Courts reviewing this issue under statutes similar to § 453 have concluded that such contracts

are permissible if the rates under the contract are made available to any similarly situated customer willing to meet the contract's terms. [Citations omitted.] (*Id.*, relying on *Sea-Land Service, Inc. v. ICC* (D.C. Cir. 1984) 738 F.2d 1311, 1317; *MCI Telecommunications Corp. v. FCC* (D.C. Cir. 1990) 917 F.2d 30, 38; see also, General Order 96-B, Telecommunications Industry Rule 8.2.2 -Availability of Contract Rates, stating: “The rate or charge under a contract then in effect must be made available to any similarly situated customer that is willing to enter into a contract with the same terms and conditions of service.”

We note that Defendants in this proceeding have filed numerous motions to dismiss and motions for summary judgment. These motions had been denied as moot in D.10-07-030. Because we are granting rehearing and vacating D.10-07-030, these motions are once again pending. Disposition of these motions shall be made during the rehearing. We grant Qwest’s motion for leave to file the unredacted version of its Application for Rehearing under seal.

III. REQUEST FOR ORAL ARGUMENT

Qwest requests oral argument pursuant to Rule 16.3 on the grounds that D.10-07-030 creates unprecedented and unlawful exceptions to the non-discrimination provisions contained in the Public Utilities Code and the Commission’s General Orders, and that the Decision’s attempt to bar Qwest from pursuing its claims based on statement made in a separate rulemaking represents a matter of first impression and has due process implications. (Rehrg. App., pp. 26-27 [Public Version].) We do not address the merits of this request because we are granting rehearing. Thus, the request is denied.

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IV. CONCLUSION

For the reasons stated above, we grant rehearing of D.10-07-030, and vacate the Decision.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.10-07-030 is granted.
2. The request for oral argument is denied.
3. Qwest's motion to file the unredacted version of its Application for Rehearing of D.10-07-030 under seal is granted.
4. D.10-07-030 is vacated.

This order is effective today.

Dated July 28, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners