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Sent: Tuesday, April 20, 2010 3:49 PM

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Subject: Docket No. 090538-TP - Qwest Communications Company, LLC's Notice of filing Supplemental Authority

Attachments: 0909_001.pdf

Docket No. and Name:
Docket No. 090538-TP, Complaint of Qwest Communications Company, LLC, Against MCImetro Access Transmission Services, LLC (D/B/A Verizon Access Transmission Services), XO Communications Services, Inc., tw Telecom of Florida, L.P., Granite Telecommunications, LLC, Cox Florida Telecom, L.P., Broadwing Communications, LLC, And John Does 1 Through 50, For Unlawful Discrimination.

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Total number of pages:
Thirty-one (31)

Description:
Notice of filing Supplemental Authority

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BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (D/B/A VERIZON ACCESS TRANSMISSION SERVICES), XO COMMUNICATIONS SERVICES, INC., TW TELECOM OF FLORIDA, L.P., GRANITE TELECOMMUNICATIONS, LLC, COX FLORIDA TELECOM, L.P., BROADWING COMMUNICATIONS, LLC, AND JOHN DOES 1 THROUGH 50, For unlawful discrimination. /	Docket No. 090538-TP Filed: April 20, 2010

QWEST COMMUNICATIONS COMPANY, LLC'S
NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Qwest Communications Company, LLC ("QCC"), by and through its undersigned counsel, hereby respectfully files the following decision as supplemental authority to its "Response to Joint CLECs' Motion to Dismiss and to MCI's Motion for Summary Final Order":

A copy of Decision No. R10-0364-I, issued in the matter of *Qwest Communications Company, LLC vs. MCImetro Access Transmission Services, LLC, et al., Docket No. 08F-259T*, where the Administrative Law Judge issued an interim order denying the CLECs' Summary Judgment Motions, holding, among other things, that the Public Utilities Commission of the State of Colorado may award reparations to the extent rates paid by QCC were discriminatory and that claims are not barred by the filed rate doctrine. This Decision, which was issued April 19, 2010, is provided in further support of QCC's positions set forth in these proceedings.

RM:7344528:3

DOCUMENT NUMBER-DATE
03080 APR 20 ≌
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Respectfully submitted this 20th day of April

QWEST COMMUNICATIONS COMPANY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail, and that an electronic copy has also been provided to the persons listed below on April 20, 2010:

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RM:7344528:3

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RM:7344528:3

Decision No. R10-0364-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08F-259T

QWEST COMMUNICATIONS COMPANY, LLC,

COMPLAINANT,

V.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, XO COMMUNICATIONS SERVICES, INC., TIME WARNER TELECOM OF COLORADO, L.L.C., GRANITE TELECOMMUNICATIONS, INC., ESCHELON TELECOM, INC., ARIZONA DIALTONE, INC., ACN COMMUNICATIONS SERVICES, BULLSEYE TELECOM, INC., COMTEL TELECOM ASSETS, LP, ERNEST COMMUNICATIONS, INC., LEVEL 3 COMMUNICATIONS, LLC AND LIBERTY BELL TELECOM, LLC, AND JOHN DOES 1-50 (CLECS WHOSE TRUE NAMES ARE UNKNOWN),

RESPONDENTS.

INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
DENYING SUMMARY JUDGMENT MOTIONS

Mailed Date: April 19, 2010

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I. STATEMENT

1. On November 24, 2009, motions for summary judgment were filed by XO Communications Services, Inc., Granite Telecommunications, Inc., tw telecom of colorado, llc, ACN Communications Services, Inc., Bullseye Telecom, Inc., and Eschelon Telecom, Inc. (collectively Joint CLECs); Comtel Telecom Assets LP (Comtel); and MCImetro Access Transmission Services, LLC (MCImetro), requesting relief as to several claims on several grounds.

2. On December 21, 2009, Qwest Communications Company, LLC (QCC) filed its responses to the motions filed on November 24, 2009.

3. On December 21, 2009, QCC filed its Motion Requesting Waiver of 4 *Code of Colorado Regulations* (CCR) 723-1202(c) Regarding Page Limitations. No responses were filed. Based upon good cause shown, the unopposed motion will be granted.

A. Standard of Review

4. Rule 1400 of the Commission's Rules of Practice and Procedure permits summary judgment motions filed in accordance with Colorado Rule of Civil Procedure (C.R.C.P.) 56.

5. The Supreme Court summarized the often stated principles applicable to summary judgment:

> Summary judgment is a drastic remedy and should only be granted if there is a clear showing that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. See *C.R.C.P. 56*; *Greenwood Trust Co. v. Conley, 938 P.2d 1141, 1149 (Colo. 1997)*. The moving party has the initial burden to show that there is no genuine issue of material fact. See *Greenwood Trust, 938 P.2d at 1149*. Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. See id. The nonmoving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party. See *Bayou Land Co. v. Talley, 924 P.2d 136, 151 (Colo. 1996)*.

AviComm, Inc. v. Colorado PUC, 955 P.2d 1023, 1029 (Colo. 1998).

6. Even if "it is extremely doubtful that a genuine issue of fact exists[,] … summary judgment is not appropriate in cases of doubt." *Abrahamsen v. Mountain States Telephone and Telegraph Company*, 494 P.2d 1287, 1290 (Colo. 1972). A fact is "material," for purposes of a motion for summary judgment, if it will affect the outcome of the case. *Gadlin v. Metrex Research Corporation*, 76 P.3d 928 (Colo. App. 2003).

B. MCImetro Access Transmission Services, LLC

7. On July 21, 2002 and November 8, 2002, WorldCom, Inc. (WorldCom) and certain of its direct and indirect subsidiaries, including MCImetro, commenced cases under chapter 11 of title 11 of the United States Code. By Orders dated July 22, 2002 and November 12, 2002, the chapter 11 cases were consolidated for procedural purposes and jointly administered under case no. 02-13533. MCImetro continued to operate its businesses and manage its properties as debtor in possession. During its bankruptcy proceeding, WorldCom attempted to resolve the claims of thousands of creditors, three of which were AT&T Corp., on behalf of itself and its affiliates (collectively AT&T), Qwest Corporation, and QCC.

8. During its bankruptcy proceeding, on August 14, 2003, the Bankruptcy Court approved a separate Settlement Agreement that WorldCom entered into with Qwest Corporation and QCC to resolve numerous financial claims and contractual and billing disputes between the three companies totaling hundreds of millions of dollars. The parties successfully reconciled and resolved their prepetition claims, debts, and other disputes pursuant to the terms of the agreement.

9. During WorldCom's bankruptcy process, the company entered into two bi-lateral switched access service agreements with AT&T, *i.e.*, the "2004 Contracts." The terms of the two 2004 Contracts were identical except for the names of the purchaser and seller.

10. WorldCom and AT&T each had subsidiaries and affiliates that operate as competitive local exchange carriers (CLECs) and interexchange carriers (IXCs), and both entered into the agreements on behalf of their respective subsidiaries and affiliates, as applicable. Each company's CLEC agreed to provide switched access service to the other company's IXC pursuant to the terms of the agreements. The 2004 Contracts were nationwide in scope. Each company's CLEC offered to provide switched access service to the other company's IXC "within each geographic area" in which the CLEC directly or through an affiliate provided local exchange services. There was no geographical limitation on where service would be offered. Each company's CLEC and its affiliates agreed to charge the other company's IXC the same rate for switched access service wherever the CLEC and its affiliates provided local exchange service. The switched access charges contained in the 2004 Contracts applied to all types of switched access traffic, including specifically that which the CLEC provided using the Unbundled Network Element - Platform or "UNE-P" service delivery method. The switched access charges contained in the 2004 Contracts applied to all types of interexchange calls that

originated from or terminated to the CLEC's local customers, both residential and business customers. The 2004 Contracts specified a single, uniform rate for all switched access traffic regardless of the jurisdiction. The 2004 Contracts expired and are no longer in effect. The 2004 Contracts do not require the traffic exchanged by the parties to be in balance.

11. MCImetro is, and at all times relevant herein was, a CLEC in Colorado. MCImetro's affiliate, MCI Communications Services, Inc., doing business as Verizon Business Services, provides, and at all times relevant herein provided, IXC services in Colorado. MCImetro provides, and at all times relevant herein provided, switched access service in Colorado. MCImetro provides, and at all times relevant herein provided, local exchange services to residential and business customers. During the time the 2004 Contracts were in effect, MCImetro provided local exchange service through its own facilities or by using the Unbundled Network Element Platform, or "UNE-P," and its commercial replacement.

12. AT&T Communications of the Mountain States, Inc. (AT&T-Mountain States) and several of its affiliates are, and at all times relevant herein were, CLECs and IXC carriers in Colorado. AT&T-Mountain States provides, and at all times relevant herein provided, switched access service in Colorado. During the time the 2004 Contracts were in effect, AT&T-Mountain States provided local exchange services to residential and business customers in Colorado.

13. During the time the 2004 Contracts were in effect, AT&T-Mountain States provided local exchange service through its own facilities or by using the Unbundled Network Element Platform, or "UNE-P," and its commercial replacement.

14. The Commission granted QCC a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange telecommunications services as a CLEC in Colorado on April 2, 2004. Before QCC could commence operations under that CPCN and before it could

provide local exchange telecommunications services in Colorado, QCC was required by the Commission's 2004 order to file an Advice Letter containing local exchange maps, local calling areas, and a proposed tariff. QCC filed its initial local exchange services tariff on March 2, 2007, with an effective date of April 2, 2007.

15. During the period January 27, 2004 through January 27, 2007, QCC could not lawfully provide local exchange services or switched access services in Colorado because it did not obtain a CPCN until April 2, 2004, and because it did not have an effective local exchange services tariff in effect until April 2, 2007.

16. QCC is a CLEC but does not provide switched access service in Colorado. QCC has not previously provided switched access service in Colorado. QCC does not have a tariff authorizing it to provide switched access service in Colorado, and QCC has not had such a tariff since at least September 1, 2002.

17. QCC does not provide facilities-based switched local exchange service in Colorado. QCC has not previously provided facilities-based switched local exchange service in Colorado. QCC does not provide local exchange service using its own end-office switches in Colorado. QCC does not currently provide competitive local exchange service in Colorado using unbundled network elements. QCC has not previously provided competitive local exchange service using unbundled network elements in Colorado.

C. Additional Findings of Fact and Conclusions of Law Applicable to all *Motions*

18. QCC is organized under the laws or the State of Delaware with its principal place of business at 1801 California Avenue, Denver, Colorado. QCC is qualified to do business in Colorado, and is a telecommunications carrier certified to provide telecommunications services

in Colorado. QCC provides, as relevant to this Complaint, interexchange (long-distance) telecommunications services throughout the State of Colorado.

19. QCC is an IXC. QCC uses and is billed for intrastate switched access services by local exchange carriers (LECs). All respondents are CLECs in the State of Colorado.

20. In summary, QCC's claims rest upon the following common facts: respondents are CLECs authorized to do business in the State of Colorado. Respondents all have switched access tariffs on file with the Commission. Such tariffs were permitted to go into effect by operation of law and no findings were made by the Commission with regard thereto. Respondents, themselves or with affiliates, subsidiaries, or predecessors, charged lower rates to QCC's competitors pursuant to switched access service agreements than those rates stated in tariffs on file with the Commission. Such switched access agreements were not filed with the Commission. QCC purchased and paid for access services provided by Respondents pursuant to tariffs on file with the Commission. QCC demanded that each CLEC provide QCC intrastate switched access services at the most favorable rates, terms, and conditions provided to other IXCs, but each refused to do so.

21. Based upon the foregoing, QCC states three claims for relief in the Amended Complaint. First, QCC claims that it was precluded from obtaining non-discriminatory, equal rates for identical intrastate switched access services, despite being similarly situated to the IXCs that received preferential treatment from Respondents. As a result QCC paid higher rates than others for identical, regulated services. Second, QCC claims that Respondents failed to file notice of agreements entered into with terms and conditions that deviated from their tariffed rates for intrastate switched access services. Third, QCC claims that Respondents failed to comply with the terms and conditions of tariffs on file with the Commission. Summary Judgment is not

based upon facts specific to the third claim. QCC claims that Respondents entered into unfiled, off-tariff agreements with other IXCs, but have not made the discounts set forth in those agreements available to QCC.

22. The Commission has jurisdiction over this Complaint pursuant § 40-6-108, C.R.S.

23. Each respondent has an intrastate switched access tariff rate on file with the Commission in Colorado.

24. The obligations imposed upon local exchange providers entering into access contracts pursuant to § 40-15-105(1), C.R.S., are unequivocal and define the statutorily-mandated notice with regard thereto.

25. "Section 40-15-102(28) defines 'switched access' as 'the services or facilities furnished by a local exchange company to interexchange providers which allow them to use the basic exchange network for origination or termination of interexchange telecommunications services.'" *AviComm, Inc. v. Colorado PUC*, 955 P.2d 1023 (Colo. 1998).

26. Colorado law requires access charges be non-discriminatory: "No local exchange provider shall, as to its pricing and provision of access, make or grant any preference or advantage to any person providing telecommunications service between exchanges nor subject any such person to, nor itself take advantage of, any prejudice or competitive disadvantage for providing access to the local exchange network." § 40-15-105(1), C.R.S. In furtherance thereof, contracts for such access "shall be filed with the commission and open to review by other purchasers of such access to assure compliance with the provisions of this section." § 40-15-105(1), C.R.S.

27. Section 40-15-105, C.R.S., was reacted in 1987 to require the filing of access contracts entered into by local exchange providers. By Decision No. C08-0800, the Commission opened and designated Docket No. 08M-335T as a single repository for all such agreements.

28. Section 40-3-106(1)(a), C.R.S., provides:

> (1)(a) Except when operating under paragraph (b) of this subsection (1) or pursuant to article 3.4 of this title, no public utility, as to rates, charges, service, or facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The commission has the power to determine any question of fact arising under this section."

AviComm, Inc. v. Colorado PUC, 955 P.2d 1023, 1033 (Colo. 1998).

29. Rule 4 CCR 723-2-2203(c) requires each of the Respondents to maintain a tariff on file with the Commission containing the rates, terms, and conditions governing its Part II and Part III services and products, including intrastate switched access.

30. "Tariffs are the means by which utilities record and publish their rates along with all policies relating to the rates. See 40-3-103, 17 C.R.S. (1993); U.S. West Communications, Inc. v. City of Longmont, 948 P.2d 509, 516 (Colo. 1997). Tariffs are legally binding, see Longmont, 948 P.2d at 517, and the proper application of rates and tariffs is within the regulatory authority of the PUC. See 40-3-102, 17 C.R.S. (1993); Silverado, 893 P.2d at 1320." *AviComm, Inc. v. Colorado PUC*, 955 P.2d 1023, 1031 (Colo. 1998) (footnote omitted).

31. In absence of the statutorily mandated filing and requirements in § 40-15-105, C.R.S., CLEC rates must be in accordance with the tariff or price list on file with the Commission.

D. Statute of Limitations

32. Section 40-6-119(2), C.R.S., provides in relevant part: "All complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues" § 40-6-119(2), C.R.S. The Supreme Court of Colorado has held that "[o]nly if a rate payer files a complaint within the period prescribed by statute concerning complaints made to the Public Utilities Commission can that complainant be assured of an investigation of the matter by the PUC."[1] The Commission has recognized that a cause of action under Section 40-6-119(2), C.R.S. accrues pursuant to Section 13-80-108(4), C.R.S., which states "A cause of action for debt, obligation, money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed or performance becomes due." Home Builders Ass'n of Metropolitan Denver v. Public Service Co. of Colo., 2003 WL 21221189 (Colo. PUC 2003) (Docket No. 01F-071G, Decision No. R03-0519) (Home Builders Ass'n I).

33. A cause of action accrues when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence. Section 13-80-108(8), C.R.S., which clarifies the meaning of "accrues," codifies into statute the common law discovery rule.

34. "Statutes of limitation are enacted to promote justice, discourage unnecessary delay, and forestall prosecution of stale claims. Rosane v. Senger, 112 Colo. 363, 369, 149 P.2d 372, 375 (1944). At times, however, equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice. See Garrett v. Arrowhead Improvement

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[1] *Peoples Natural gas Div. of Northern Natural Gas Co. v. Public Utilities Com'n of State of Colo.*, 698 P.2d 255,263 (Colo. 1985).

Ass'n, 826 P.2d 850, 853 (Colo. 1992), and cases cited therein." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo. 1996).

35. In the absence of any provision indicating that that "accrual" in § 40-6-119(2), C.R.S., is different than that codified in § 13-80-108, C.R.S., the Commission must construe the two provisions in harmony, so as to give effect to both. *Huff v. Tipton*, 810 P.2d 236,238 (Colo. App. 1991).

36. The Supreme Court recognized holdings that "a party will not be heard to plead the statute of limitations if he himself is not in compliance with his statutory duty." *Strader v. Beneficial Finance Co.*, 551 P.2d 720, 724 (Colo. 1976) *citing Alfred v. Esser*, 91 Colo. 466, 15 P.2d 714 (1932); *Berkey v. County Commissioners*, 48 Colo. 104, 110 P. 197 (1910).

37. Arguments that *Home Builders Ass 'n*, 2003 WL 21221189 supports a claim that the applicable statutory period has expired miss the mark. In *Home Builders*, the Commission found that Complainant's claim was time barred because all information upon which the claim accrues was publicly available in tariff. Decision No. C03-1093. Such circumstances preventing tolling of the statute of limitations are not present at bar.

38. Thus, for CLECs to prevail in the claim that QCC's claims are time barred by the applicable statute of limitations, they must show the passage of time specified between when the claim was known or should have been known by the exercise of reasonable diligence prior to the filing of the complaint.

39. In absence of showing knowledge of the accrual of the claim, the exercise of reasonable diligence by purchasers of access charges in Colorado regarding CLEC departure from tariff rates would only require review of statutorily mandated filings with the Commission. The fact that terms might be discovered through alternative means (with or without cost or legal

process) is meaningless in light of the mandated statutory disclosure and the filed rate doctrine. Because the agreements at issue herein were not filed with the Commission, the filed rate doctrine applies and those failing to file agreements to provide regulated services upon terms varying from their filed tariff will not be heard to claim that others might have discovered the unfiled agreement through other means. Such an interpretation ensures compliance with mandatory disclosure to competitors, the Office of Consumer Counsel, and the Commission. All Colorado local exchange providers will remain on equal footing.

40. No party having demonstrated filing with the Commission or QCC's knowledge of the claims, or upon reasonable inquiry, more than two years prior to the filing of the within Complaint, QCC's claims are not time barred and all motions for summary judgment based thereupon will be denied. In any event, Respondents cannot be heard to complain when they have varied from the terms of their tariffs on file without complying with § 40-15-105(3), C.R.S.

E. QCC's First Claim and Prayer

41. QCC contends the same LEC facilities are used by all IXCs to reach the same end user customers. The relative size of any given purchaser of access services is not relevant since each call is separate and distinct and carried in identical fashion (assuming no dedicated facilities to a particular local switch or end user). Thus, on a call-by-call basis, every IXC is similarly situated.

42. QCC seeks reparations for amounts it overpaid the Respondent CLECs relative to the discounted amounts it would have paid had the CLECs extended the same discount to QCC as they did to AT&T and Sprint Communications Company, LP. Prospectively, QCC requests the Commission find that QCC is prospectively entitled to the same discounted rates still in effect

for the IXCs benefiting from various agreements not on file with the Commission by requiring carriers to modify tariffs to include such rates.

43. QCC shows the financial impact of the difference between the rate QCC was charged and the rate charged to its competitors. *See* Canfield Direct Testimony. For consideration of this motion, the methodology will be considered, rather than the precise calculation. Disputed issues of material fact remain as to Mr. Canfield's calculations.

44. Dr. Weisman presents several policy based arguments that the Commission should not permit a departure from uniform rates for a bottleneck monopoly service that is not competitively supplied, in absence of demonstrated variation in the economic cost to provision the service. In the case at bar, he opines that that magnitude of the variation observed between rates charged to QCC and its competitors cannot be the result of cost variations because the service provided is essentially identical across carriers.

45. QCC claims that Respondents precluded it from obtaining non-discriminatory, equal rates for identical intrastate switched access services. In this regard, QCC claims it is similarly situated to IXCs that received preferential treatment from the Respondents pursuant to terms of contractual agreements. As a result, QCC was charged, and paid, higher rates than it should have for identical, regulated services.

46. CLECs argue that QCC claims are barred by the filed rate doctrine. QCC alleges that certain Respondent CLECs violated their tariffs on file by failing to offer QCC the same contractual terms set forth in the unfiled agreements. CLECs argue that the filed rate doctrine requires the Commission to apply only the filed rate. Even if QCC successfully demonstrates that Respondent CLECs' failure to abide by tariffs on file, QCC would not be entitled to any form of monetary recovery.

47. The Commission is charged to govern and regulate all rates, charges, and tariffs of every public utility of this state to prevent unjust discriminations in the rates, charges, and tariffs of public utilities. § 40-3-102, C.R.S.

48. In order to prevail on its discrimination claims, the movants contend that QCC must show more than the fact that different rates were charged by Respondents. They contend QCC must further show that QCC was similarly situated to other customers of Respondents purchasing the same service, and that an undue or unjust advantage was given to those other customers.

49. Joint CLECs contend to be unlawful, discrimination must: (1) result in an undue or unjust advantage to the preferred party; and (2) involve similarly situated customers or parties. Failing to make these allegations, movants contend the claim must be dismissed.

50. Joint CLECs contend that QCC only alleges "detriment" from discrimination without any specification or quantification. However, it is acknowledged that QCC alleged payment of Respondents' tariff rates for switched access that were higher than those allegedly charged to other IXCs pursuant to contractual agreements. Arguing that the Colorado Legislature contemplated that LECs may negotiate contracts for switched access service on an individual case basis, Joint CLECs contend that differences in rates for switched access service are contemplated as being lawful. Accordingly, Joint CLECs contend that QCC failed to make a *prima facie* case of discrimination based upon a showing that different rates were charged and QCC was charged the tariff rate.

51. Joint CLECs contend that QCC cannot demonstrate a specific competitive injury in the retail long-distance marketplace resulting from the alleged rate discrimination because of

the relatively small portion of the market represented. No advantage that any single respondent might have conferred upon any other IXC could have caused a competitive injury.

52. As to the second mandatory element argued, Joint CLECs contend QCC's allegations that it is similarly situated to the IXCs who received preferential treatment from the Respondents are insufficient. Without demonstrated support, it is argued that QCC cannot meet its burden of proof.

1. Discussion

53. Joint CLECs argue that QCC is not similarly situated to other contract counterparties such that no discrimination may be found. However, the argument is built upon the false premise.

54. "The 'filed tariff doctrine' prohibits a regulated entity ... from charging rates for its services different from the rates filed with the regulatory authority. See Rene Sacas, The Filed Tariff Doctrine: Casualty or Survivor of Deregulation? 29 Duq. L. Rev. 1, 5 (1990); Kiplyn R. Farmer, Note, FERC Waiver of the Filed Rate Doctrine: Some Suggested Principles, 9 Energy L.J. 497, 498 (1988)." *U S West Communs. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997).

55. The Commission summarized the filed rate doctrine in Decision No. C02-0687:

> cc. ...The filed rate doctrine is a nearly century old tenet interpreted and analyzed in a long history of case law. Essentially, the doctrine holds that a rate duly filed is the only lawful charge and deviation from it is not permitted upon any pretext unless it is found to be unreasonable. Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1951) (that referred to carrier rates approved under the Interstate Commerce Act by the ICC). "The filed rate doctrine, which originated in the U.S. Supreme Court's cases interpreting the Interstate Commerce Act, 'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" Phillips Pipe Line Company v. Diamond Shamrock Refining and Marketing Company, 50 F.3d 864, 867 (10th Cir.1995) citing Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981) (citation omitted). The filed rate doctrine serves to "assure effective Commission [ICC] oversight of

the rates at which power is sold. 'The considerations underlying the [filed rate] doctrine...are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" Id. citing City of Girard, Kan. v. FERC, 790 F.2d 919, 922 (D.C.Cir.1986) (quoting City of Cleveland v. FPC, 525 F.2d 845, 854 (D.C. Cir.1976). The doctrine, "based both on historical antipathy to rate setting by courts, deemed a task they are inherently unsuited to perform competently, and on a policy of forbidding price discrimination by public utilities and common carriers, forbids a court to revise a public utility's...filed tariff..." Arsberry v. Illinois, 244 F.3d 558, 561 (7th Cir.2001) citing AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990); Arkansas Louisiana Gas Co., supra at 577-78; Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th Cir.1998); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir.1994).

dd. Although strict in its application, the filed rate doctrine, despite PSCo's argument to the contrary, is not a monolithic and absolute barrier to filed rate challenges. Rather, it may preempt suits that "seek to alter the terms and conditions provided for in the tariff. This is how the doctrine has been applied in the past." American Telephone & Telegraph Co., supra, at 1966 (Rehnquist, C.J. concurring). "The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law." Id. at 1966-67.

Decision No. C02-0687 at 16-18.

Further, the Commission reconciled complaint jurisdiction in the context of a filed tariff. While not fully restated here, the analysis is applicable to the case at bar. It has been specifically held that the filed rate doctrine does not prohibit a claim that a tariff was unreasonable where no findings were made with regard thereto but charges were collected in accordance therewith. *Bonfils v. Public Utilities Com.*, 67 Colo. 563, 576-577 (Colo. 1920).

56. Much of the Joint CLEC arguments address discrimination claims among two independent lawful rates and a complainant's eligibility for one of those rates. Such circumstances have not been shown applicable to the case at bar.

57. There is no lawful basis demonstrated for any respondent to charge for access services pursuant to agreements not filed with the Commission as required by § 40-15-105(3), C.R.S. By charging rates in accordance with such agreements rather than rates on file with the Commission, it has been shown that respondents varied charges from lawful rates. *See also U S West Communs. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997).

58. QCC was charged tariff rates when others were charged lower rates. The Commission made no finding as to those tariff rates. Further, rates actually charged by Respondents have been shown not to be lawful rates. Joint CLECs failed to meet their burden of proof that QCC failed to state a *prima facie* case of price discrimination in this proceeding as a matter of law.

F. Remedy of Reparations

59. Turning to the requested relief, QCC seeks an order for reparations, with applicable interest, in an amount to be proven at hearing. If Respondents "charged an excessive or discriminatory amount for such product, commodity, or service…[the Commission can order]…due reparation therefor, with interest from the date of collection, provided no discrimination will result from such reparation." § 40-6-119(1), C.R.S.

60. The Commission has broad authority to rectify unlawful utility action, including an order of reparations. Thus, the Commission exercises remedial as well as regulatory power. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1081 (Colo. Ct. App. 2006).

61. MCImetro argues that QCC is not entitled to reparations as a remedy for any claimed relief because QCC paid tariff rates. Any alleged discriminatory conduct does not allow for reparations because QCC fails to allege that it has been charged an unlawfully discriminatory or excessive rate for service under the tariffs. Citing § 40-6-119(1), C.R.S., it is argued that a

finding must be made that a public utility charged an excessive or discriminatory amount for a product, commodity, or service before reparations can be made. The two necessary elements not being able to be shown, reparations are inapplicable. Furthermore, reparations may only be awarded pursuant to § 40-6-119(1), C.R.S., if no discrimination will result from such reparations.

62. The Joint CLECs contend that QCC has not shown it is entitled to reparations as a matter of law. They contend QCC fails to allege that it has been charged an unlawfully discriminatory or excessive rate for service under tariff.

63. MCImetro also argues that the failure to comply with filing requirements does not entitle QCC to any relief because it has not shown that it paid excessive or discriminatory charges and that reparations will not result in discrimination. MCImetro argues that QCC seeks reparations solely based upon the failure to file the 2004 Contracts with the Commission. MCImetro contends that QCC fails to show any legal basis for recovery solely based upon the failure to file.

64. QCC alleges that pursuant to § 40-15-105(3), C.R.S., and Rule 2203(c)(IV), 4 CCR 723-2, it is entitled to be offered the rates set forth in the Respondents' unfiled off-tariff agreements, because a carrier that offers services via a contract must make the contractual terms and conditions available to similarly situated customers by filing such contracts with the Commission. Is argued that it follows from QCC's allegations that: (1) the off-tariff agreements are illegal and unenforceable; and (2) that it is entitled to benefit from the unenforceable agreements, and should be refunded all charges it has paid in excess of the illegal rates. Movants argue the two propositions are mutually inconsistent and fail to support a claim for reparations. If the tariff provides the only lawful rate, then QCC is not entitled to reparations for a

discrimination claim based upon unenforceable agreements. QCC is then left having paid the only lawful rate.

1. Discussion

65. QCC contends that Respondents unreasonably discriminated against QCC by offering competitors lower switched access rates pursuant to agreements not filed with the Commission and failing to make those rates available to QCC. Thus, it is QCC's contention that charging competitors a different rate than that charged QCC is unlawfully discriminatory and reparations should be awarded for the excess.

66. Pursuant to various agreements not filed with the Commission, each respondent charged rates different from those appearing on file in tariffs with the Commission. Those same respondents billed QCC tariff rates for switched access services.

67. While § 40-15-105, C.R.S., clearly contemplates negotiated access contracts, the statute also explicitly requires cost-based pricing up to a ceiling: "Access charges by a local exchange provider shall be cost-based, as determined by the commission, but shall not exceed its average price by rate element and by type of access in effect in the state of Colorado on July 1, 1987." § 40-15-105(1), C.R.S.

68. In accordance with the filed rate doctrine, a utility's filed rate is the lawful rate. In the case at bar, the only lawful rate shown for CLEC services in dispute is that appearing in the tariff. QCC was charged tariff rates by Respondents. For various causes stated, CLECs charged other rates without any demonstrated basis or authority under Colorado law or Commission rule.

69. The Colorado Legislature clearly intended that the Commission consider complaints for discriminatory charges. § 40-6-119(2), C.R.S. Further, reparations to the

complainant are explicitly authorized for discriminatory charges without regard to whether the same charge is excessive. § 40-6-119(1), C.R.S.

70. No party has provided, and the undersigned has not found, any prior case where the Commission applied its authority to order reparations based only upon rates found to be discriminatory.

71. In Decision No. C96-0011, the Commission addressed potential violations based upon a service provider operating in contravention of the terms of its tariff. Qwest Corporation, formerly known as U S WEST Communications, Inc. (U S WEST) offered a functionally equivalent service in two effective tariffs. However, a customer was violating the terms and conditions of service in the tariff from which the service was being purchased. By permitting that customer to purchase the functionally-equivalent service in violation of the tariff, the Commission stated that the provider permitted the purchasers to discriminate against other companies purchasing the functionally equivalent service through a different tariff, citing § 40-15-105(1), C.R.S.

72. It was found that U S WEST was not treating all purchasers alike if it permits some to purchase services from one tariff as opposed to the other, concluding that U S WEST "is probably in violation of § 40-15-105(1), C.R.S." The Commission went on to consider whether the same conduct potentially amounted to a preference in violation of § 40-3-106(1)(a), C.R.S. In conclusion, the Commission did not condone the potential violations found. Decision No. C96-0011 at 11-13.

73. In the case at bar, the Commission has not considered or made any findings regarding the tariff rates at issue. As addressed above, a claim for an overcharge can be maintained based upon charges collected at tariff rates where such tariff was unreasonable.

Bonfils v. Public Utilities Com., 67 Colo. 563, 576-577 (Colo. 1920). In such event, reparations might be awarded to the extent rates paid were discriminatory.

74. Analogous to the substantial body of law as to the reasonableness of lawful rates in effect by operation of law, the filed rate doctrine would not prohibit the Commission from considering whether rates charged pursuant to a lawful tariff violate § 40-15-105, C.R.S.

75. Applicability of authorities outside of Colorado is suspect based upon differing governing statutes. Absent specific authority, the Commission cannot assess damages. *Haney v. Public Utilities Commission,* 194 Colo. 481, 574 p.2d 863 (1978). On the other hand, others may not be so bound. Precedents for the calculation of damages required of other statutory schemes have not been shown to control the outcome of this proceeding.

76. In Decision No. C00-0034, the Commission reviewed the scope of the Commission's jurisdiction to award remedies:

> 1. The remedies that the Commission itself may order are constrained by applicable law. The Commission cannot order remedies for the violations found in this case to the extent such remedies would be equivalent to damages or penalties. By damages, we interpret Colorado law to mean that the Commission cannot order a return of consequential or expectation damages to harmed consumers. Thus, for instance, the Commission does not have the power to order USWC to compensate a business customer lost profits because of service violations, or a residential customer for lost job opportunities because of a held order....Many of the specific monetary remedies proposed by Staff and the OCC are the equivalent of damages or penalties because they are unrelated to the rates paid (or might be paid) by customers for regulated services, or are not specifically designed to adjust rates prospectively to reflect the quality of service actually provided by USWC in the future....
>
> 3. As for the first assertion, the court in Peoples Natural Gas v. Public Utilities Commission, 698 P.2d 255, at 263 (Colo. 1985), expressly found that the Commission has the authority to investigate excessive utility charges and award reparations pursuant to the Commission's general powers stated in § 40-3-102, C.R.S. (Commission may do all things, whether specifically designated in articles 1 to 7 of title 40 or in addition thereto, which are necessary or convenient in the exercise of such power). The court expressly rejected the suggestion that the

> Commission's power to award reparations to ratepayers is limited to that authority found in § 40-6-119.
>
> 4. As for the suggestion that we cannot order reparations in this case because the record does not identify specific customers who paid excessive charges (in light of the inadequate service provided by USWC), we conclude: Most of the rule requirements at issue here...do not lend themselves to identifying the specific customers who were harmed by a violation of the rules. The nature of the interconnected public switched telephone network derives substantial value from being able to communicate with others. To some extent, as other customers have problems with service quality or connectivity, other customers are adversely impacted and the value paid-for is not received. Nevertheless, the method we adopt for awarding reparations here is reasonably designed to refund excessive charges to those groups of ratepayers (e.g. customers of specific wire centers) who were affected by the rule violations found here. No authority holds that the Commission is unable to order customer reparations in the absence of the ability to precisely identify those customers who paid excessive charges and the precise amounts overpaid by each customer.

77. To the extent movants argue that QCC must effectively demonstrate damages from others being charged a lower rate before any reparation may be ordered, such arguments must fail. The Commission can fashion reparations within its authority to achieve remedies such as refunding charges or adjusting rates to reflect the service received.

78. Illustratively, in In re Exchange Network Facilities for Interstate Access, 1 FCCRcd. 618, 1986 LEXIS 2336, at 69 (November 14, 1986), it was stated: "[t]he competitive injury resulting from rate discrimination, such as a loss of profits or market share as the result of the competitive advantage afforded to the preferred party, is a critical component of a valid unlawful rate discrimination claim for which reparations can be awarded." While competitive advantage afforded could be relevant to discrimination claim under Colorado law, damages for competitive injury do not control the amount of appropriate reparations. Reparations may be due pursuant to Colorado law without regard to the demonstration of consequential or expectation damages.

79. QCC contends it was overcharged and that it should have been charged the same, and even the best, rate Respondents charged for the identical tariff service that QCC purchased from Respondents. Thus, QCC requests that reparations be ordered to the extent that it paid a higher rate than its competitors.

80. Movants failed to meet their burden of proof to show that QCC cannot prevail as a matter of law on a claim for reparations.

G. Applying Facts Regarding Reparations

81. QCC alleges there is sufficient information in the record from which to infer the nature and basis of a discrimination claim upon which reparations might be ordered.

82. The Administrative Law Judge (ALJ) finds that issues of material fact remain as to the extent, if any, that reparations should be ordered. Thus, summary judgment is precluded. For example, whether QCC was similarly situated to other purchasers of access service. If the Commission should determine that monies paid by QCC must be repaid, how much money should be repaid and whether accrued interest should be paid. How and when should any repayment be accomplished, and the implications of any ordered reparations. Fundamentally, whether access charges that are required to be cost based are those tariff services, as QCC argues, or based upon the entirety of the relationship pertaining to the provision of such services (*i.e.*, including other costs associated with providing access service, such as billing processing efficiencies). Other disputes remain as to the appropriate basis and calculation of reparations, including the impact upon QCC of CLECs having filed the agreements including rates differing from tariff rates upon which its claims are based.

83. Movants failed to meet their burden of proof to show that QCC cannot be awarded reparations as a matter of law.

H. Comtel Telecom Assets LP

84. Comtel requests summary judgment on all claims because QCC failed to "establish the fundamental basis for its claims against Comtel – i.e., the existence of an off-tariff agreement between Comtel and an IXC." Comtel's motion at 1. There being no genuine issues of material fact, judgment is requested as a matter of law.

85. Comtel contends it did not assume the contracts alleged by QCC, it has no off-tariff agreement with any IXC, it is charging pursuant to its tariff on file, and it is in the process of "correcting all billing errors" to ensure compliance with its tariff.

86. In response, QCC demonstrates that material questions of fact are in dispute as to Comtel's conduct in furtherance of an Asset Purchase Agreement between Comtel Investments and the VarTec and Excel entities.

87. It being found that QCC has demonstrated remaining disputed issues of material fact remain, Comtel has failed to meet its burden and the Motion for Summary Judgment will be denied.

I. Conclusion

88. Any claims not explicitly addressed herein were considered and rejected. Due to the similarity of multiple party claims, accreditation of positions may not be comprehensive as to all parties.

89. Remaining genuine issues of material fact identified above are not intended to present a comprehensive identification of disputes. Rather, having found some to exist, summary judgment is not appropriate.

90. Based upon applicable principles, the ALJ finds and concludes that the motions for summary judgment should be denied because movants failed to meet their burden of proof to

show that relief should be granted as a matter of law and because genuine issues of material fact remain in this proceeding.

II. ORDER

A. It Is Ordered That:

1. The Motion Requesting Waiver of 4 CCR 723-1202(c) Regarding Page Limitations filed by Qwest Communications Company, LLC is granted.

2. Motion of Respondent Comtel Telecom Assets LP for Summary Judgment on All Claims filed November 23, 2009 is denied.

3. Combined Motion and Brief for Summary Judgment on All Claims for Relief in Favor of MCIMetro Access Transmission Services, LLC filed November 23, 2009 is denied.

4. Respondents XO Communications Services, Inc.; Granite Telecommunications, LLC.; tw telecom of colorado llc; ACN Communications Services, Inc.; Bullseye Telecom, Inc.; and Eschelon Telecom, Inc.'s Motion for Summary Judgment on Qwest's First Claim for Relief and Prayer for Reparations filed November 23, 2009 is denied.

5. Respondents XO Communications Services, Inc.; Granite Telecommunications, LLC.; tw telecom of colorado llc; ACN Communications Services, Inc.; Bullseye Telecom, Inc.; and Eschelon Telecom, Inc.'s Motion for Summary Judgment on Statute of Limitations Grounds filed November 23, 2009 is denied.

6. This Order is effective immediately.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

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