STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 15, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca

CASE 09-C-0555 - Complaint of Qwest Communications Company, LLC against MCI Metro Access Transmission Services, LLC; XO Communications Services, Inc., et al. Regarding Unreasonable Rate Discrimination in Connection with the Provision of Intrastate Switched Access Services.

ORDER DISMISSING COMPLAINT IN PART, INITIATING FURTHER INVESTIGATION AND ADDRESSING PENDING DISCOVERY REQUESTS

(Issued and Effective March 20, 2012)

BY THE COMMISSION:

INTRODUCTION

In its July 2, 2009 complaint, Qwest Communications Company, LLC (Qwest), a provider of long distance telecommunications services (interexchange carrier (IXC)) in New York, alleges that several Competitive Local Exchange Carriers (CLECs) engaged in rate discrimination in connection with off-tariff agreements that they failed to file in compliance with the Public Service Law's (PSL) tariff filing requirements (PSL §§92(1) and 92(2)(d)). The named respondents subject to the complaint are MCI Metro Access Transmission Services (MCI) d/b/a Verizon Access Transmission Services (Verizon Business), XO Communications Services, Inc. (XO), Granite Telecommunications,

Inc. (Granite) and Broadwing Communications, LLC (Broadwing) and other unnamed CLECs.[1] Qwest requests that the Commission initiate a formal evidentiary proceeding to investigate its complaint, determine in the proceeding that the CLECs violated the PSL, order them to pay compensation, and require them to file their off-tariff agreements and lower the rates charged Qwest during the pendency of the formal proceeding and prospectively. Qwest requests that the Commission issue subpoenas directing Verizon Business, AT&T and Sprint to produce agreements relating to switched access service with any New York CLEC to Qwest. In this Order, we deny Qwest's complaint relating to Verizon Business, grant Verizon Business' Motion to Dismiss and direct further investigation of the Qwest complaint against XO, Granite, Broadwing and other unnamed CLECs.

QWEST'S COMPLAINT

Qwest claims that the CLECs originate and terminate intrastate switched access traffic on behalf of Qwest at New York switched access tariff rates, but provide the same services to other IXCs in accordance with off-tariff agreements that contain lower rates.[2] Qwest asserts that these companies must abide by their tariffs, or summarize and file any off-tariff agreements with the Commission.[3] Qwest states that failure to do

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[1] Qwest included tw telecom of NY L.P, (tw) among the CLECs subject to its complaint. After the complaint was filed, Qwest and tw stipulated that the complaint against tw is withdrawn without prejudice (Stipulation Withdrawing Complaint against tw telecom of NY, L.P., dated August 27, 2009).

[2] In order to deliver long distance calls, Qwest pays switched access charges to local telephone companies including CLECs. The charges cover the costs for originating and terminating the long distance calls.

[3] See MCI v. PSC, 169 A.D.2d 143 (3rd Dept. 1991).

so violates PSL §§92(1) and 92(2)(d). Qwest states that, while it made good faith attempts to obtain copies of the off-tariff agreements, it has been unsuccessful to date. In its original complaint and again by subsequent letters, Qwest requests that the Commission issue subpoenas duces tecum directing Verizon Business, AT&T and Sprint, to produce copies of any agreements with any CLEC executed after January 1, 1998 relating to rates, terms and conditions for switched access service provided to each IXC.

VERIZON BUSINESS MOTION TO DISMISS

Verizon Business[4] filed a Motion to Dismiss Qwest's complaint. Verizon Business states that Qwest cannot meet its burden of proving unlawful rate discrimination with respect to the switched access agreements between Verizon Business and AT&T. While Verizon Business does not deny the existence of off-tariff agreements, it states that Qwest is not entitled to the rates established in the agreements because they are reciprocal in nature. Specifically, Verizon Business argues that the parties agreed that each company's CLEC affiliate would charge the other company's IXC a single uniform rate for the exchange of switched access service anywhere in the country where such CLEC affiliate provided local exchange service. Qwest, according to Verizon Business, does not have a CLEC affiliate in New York and, therefore, could not be considered a similarly-situated customer to take advantage of this lower switched access rate.

[4] MCI, formerly a subsidiary of Worldcom, Inc. (Worldcom), is now owned by Verizon New York Inc. (herein referred to as Verizon Business). As it emerged from the WorldCom bankruptcy, MCI merged with Verizon Communications, Inc.

Notwithstanding the foregoing, Verizon Business states that the Commission has no authority to make retroactive rate adjustments or to award damages. Verizon Business maintains that Qwest's complaint is time barred by the applicable statute of limitations under bankruptcy law. It reasons that Qwest was given notice and an opportunity to be heard on the final approval of these agreements as part of a comprehensive settlement of all claims between Worldcom and AT&T in Bankruptcy Court and did not object or raise any concerns at that time.[5] Verizon Business states that the proper time for Qwest to complain or object occurred in February or March 2004 when the matter was pending for approval before the Bankruptcy Court. In any event, Verizon Business states that the agreements with AT&T expired in 2007. As to the issuance of subpoenas, Verizon Business submits such issuance is usually reserved for formal evidentiary proceedings.

XO RESPONSE

XO denies that it has any currently effective agreements for intrastate switched access service with any IXCs that include rates that are different from, or lower than, the rates set forth in XO's New York tariffs. However, XO acknowledges that it had, pursuant to a settlement with one IXC, contracts that provided lower rates based upon factors specific to that carrier. Since these were settlement agreements, XO says that the terms were not available to other carriers. XO admits that it did not file the off-tariff arrangement or attach addendum to its New York tariffs summarizing the settlement agreements.

[5] Verizon Business claims that Qwest's complaint is also time barred under the three year statute of limitations set forth in Civil Practice Law and Rules (CPLR) §214.

GRANITE AND BROADWING RESPONSES

Granite states that Qwest's demand for reparations must be denied because it fails to allege any claim upon which reparations may be granted. Granite believes that, under the filed rate doctrine, a claim that is inconsistent with the rates and terms of a Commission-approved filed tariff is barred. Granite asserts that Qwest's claims for relief are based on mutually inconsistent legal conclusions, in that Qwest claims that the alleged off-tariff, unfiled agreements are unlawful and, at the same time, argues that it is entitled to the rates set forth in the agreements. Broadwing denies the allegations in the complaint, does not support the opening of a proceeding and states that Qwest's complaint is barred on several legal and jurisdictional grounds.

QWEST RESPONSE

Qwest states that the various defenses set forth in the above replies are without merit and the issuance of subpoenas should go forward. Qwest points out that the respondents do not dispute their conduct and that Granite, XO and Verizon Business even admit to entering into off-tariff intrastate switched access agreements with Qwest's competitors. Regarding respondents' claim that the Commission cannot order reparations, Qwest disagrees, citing PSL §118. Qwest adds, however, that reparations are only one form of relief. The other forms of relief are a determination that the respondents violated the PSL, should file any current off-tariff agreements and lower their rates to Qwest to be consistent with the most

favorable rate offered to any other long distance carrier in New York.[6]

As to Verizon Business' claim that Qwest would not have been able to obtain the same rate because it was not in a similar situation as AT&T (i.e., offering local exchange service in New York), Qwest states that Verizon Business has not provided sufficient justification for this conclusion because the rates and conditions in the agreements remain secret[7] and the secrecy of the agreements undermines the basic integrity of the regulatory regime requiring rate schedules to be filed with the Commission and made public. Qwest further states that the Commission must determine whether or not the distinction of offering switched access service in New York justifies the special pricing treatment offered to AT&T. Qwest argues that reciprocity alone is not a reasonable basis for price differentiation because switched access service is a bottleneck service consisting of three facilities – the loop, switching and transport. Accordingly, Qwest believes that, unless the CLECs seeking to justify their price differentiation can identify and support a cost-basis for their preferential rates to select IXCs, switched access service should be priced uniformly.

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[6] Specifically, Qwest states that PSL §91 prohibits a telephone corporation from imposing any charges which are unjust or unreasonable or more than allowed by law or order of the Commission, and that §91(2) prohibits a telephone corporation from offering special rates or from collecting or receiving compensation from any person or corporation that is greater or less than it collects from another for like services "under the same or substantially the same circumstances and conditions." In summary, §91(3) prohibits undue or unreasonable preference and §92(d) prohibits charging or demanding rates other than those specified in filed tariffs.

[7] It is our understanding that Qwest has since had the opportunity to review the Verizon Business agreement (Letter from Keith Roland dated February 17, 2012).

In any event, Qwest argues that these off-tariff agreements are not truly reciprocal. According to Qwest, they were simply a means of financing payment to AT&T pursuant to the bankruptcy proceeding. In other words, Verizon Business would not receive an equal financial benefit from the agreements. Were the dollars between the companies balanced, AT&T, according to Qwest, would effectively receive no greater financial benefit than it was receiving prior to the agreements and that would be contrary to the negotiated outcome of the Bankruptcy Court.

Upon receipt of Verizon Business' confidential switched access agreements on February 17, 2012, Qwest submitted a redacted and unredacted letter response. Qwest states that "in isolation" those agreements do not provide complete information as to whether Verizon Business' agreements were truly reciprocal in nature and, in the absence of certain baseline information surrounding those agreements, the Commission cannot conclude they were "reciprocal." Qwest claims that its participation in the WorldCom bankruptcy does not impute knowledge of these agreements to Qwest. In fact, Qwest claims that these documents were not disclosed to it in the bankruptcy proceeding. Finally, Qwest argues that the Bankruptcy Court's approval of these switched access agreements does not divest the Commission of its jurisdiction over intrastate rates and tariff filing requirements.

DISCUSSION

The Public Service Law requires telephone corporations to file rates for intrastate switched access services and obtain Commission approval (PSL §92). While individual case base (ICB) pricing arrangements are allowed, the law is well settled that telephone corporations are required to file those rates as addenda to the tariffs to insure against rate discrimination

and/or preferential treatment. Verizon Business, Granite, Broadwing and XO admit that they previously entered into off-tariff agreements and failed to file the necessary tariff addenda. Accordingly, there is no dispute that these carriers violated the tariff filing requirements of the PSL.

However, there is an issue as to whether Qwest alleges a basis for which relief, particularly refunds, can be granted. Public Service Law §118(3), does provide for "power to require a public utility . . . to provide a refund or credit to a customer when a payment has been made in excess of the correct charge for actual service rendered to the customer." Nevertheless, we find that Qwest has no basis for refunds or other monetary relief as against Verizon Business and grant Verizon Business' Motion to Dismiss. Verizon Business established that Qwest could not have qualified for the special pricing arrangement. For the remaining named respondent CLECs, a question of fact as to whether refunds are possible remains. This question warrants further investigation by Department of Public Service Staff (Staff), as discussed in more detail below.

Verizon Business' Motion to Dismiss

A Motion to Dismiss 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 a dismissal as a matter of law.[8] Qwest is entitled to all favorable inferences that may be drawn from the undisputed facts.[9] Verizon Business bears the burden of establishing the validity of its rates, whether filed under the PSL or not (see PSL §92(2)(f)).

[8] See generally, Collins v. Telcoa Intern. Corp., 283 A.D.2d 128 (2nd Dept. 2001).

[9] Id.

The PSL requires telephone corporations to file rates under individually negotiated agreements, so that customers and competitors are aware of prices charged in such special arrangements. Addenda to tariffs authorizing special pricing arrangements satisfy both requirements (PSL §92(1)). It is not required that telephone corporations offer the same contract to all customers, because such special agreements are tailored to specific circumstances. However, any similarly-situated customer should be able to obtain special pricing arrangements, if the terms of those ICBs likewise apply to the similarly-situated customer.

Staff reviewed the switched access service agreements at issue between Verizon Business and AT&T. Staff advises that an essential component of those agreements, which are now expired, is that the company receiving the reduced intrastate switched access rate had the ability to offer the same intrastate switched access rate to the other's IXC through a local exchange affiliate.

As an initial matter, we agree with Qwest that Verizon Business did not file its agreement or an addendum as it should have under the PSL.[10] We also agree that, if Verizon Business' agreement was still in effect it should be filed immediately. However, since that agreement is no longer in effect, there is nothing to file. Accordingly, the question we now turn to is whether Qwest would have qualified for the reduced rate even if the contract had been filed properly when it was in effect.

Qwest does not dispute that it did not, at the time, have a local CLEC affiliate in New York capable of terminating

[10] By our action today, this proceeding is continued and, at this point, there is no need to institute a formal evidentiary proceeding.

another IXC's intrastate switched access traffic. Instead, Qwest argues that CLECs seeking to justify price differentiation must identify and support the rate differences through cost-based analysis and obtain Commission approval. Neither, according to Qwest, occurred here.

Qwest fails to demonstrate that the practice of providing a lower intrastate access rate, provided there is a local exchange affiliate capable of offering the same rate, is without a rational basis, despite Verizon Business' admitted failure to file its agreement pursuant to the PSL.[11] Indeed, despite this failure, we note the agreement was a product of the bankruptcy settlement involving WorldCom, where several competing financial interests were ultimately brought to bear. After considerable due process, the Bankruptcy Court determined that the settlement agreement was based upon good faith negotiations and decided to approve it. We do not believe it would be appropriate here to upset the balance of the Bankruptcy Court's settlement,[12] especially where Qwest was a party.

Moreover, AT&T's local affiliate in New York offered a uniform off-setting rate to terminate intrastate switched access traffic to Verizon Business. While AT&T potentially stood to

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[11] It appears that Verizon Business' access tariff allows for this practice of discounted rates through an authorization of ICBs. Under the PSL, these arrangements would have to be filed, but failure to file does not support a claim for relief if, as here, Verizon Business can show Qwest would not be eligible for the rate in the unfiled arrangement.

[12] In 2002, WorldCom filed for bankruptcy. As result of that proceeding, WorldCom entered into a settlement agreement that resolved numerous claims and disputes between itself and its creditors. The off-tariff switched access agreements between MCI (Verizon Business) and AT&T and their respective CLEC affiliates constituted one such component of that settlement. The switched access agreements specified a single, uniform rate regardless of jurisdiction.

benefit from this arrangement based on the alleged imbalances of traffic being exchanged, that benefit in and of itself is also not a reason to find the arrangement unreasonable. Given the unique circumstances surrounding the WorldCom settlement agreement, we believe it was justified. Qwest fails to demonstrate that had Verizon Business appropriately filed its off-tariff agreement with AT&T, it would have qualified for that lower rate. The fact remains that without a CLEC affiliate in New York capable of terminating intrastate switched access traffic for the other's IXC, Qwest would not have been able to obtain the benefit of the lower switched access rate in the Verizon Business/AT&T agreement.[13]

Based on the foregoing, we agree with Qwest that Verizon Business violated the PSL and should have filed its agreement. However, because Qwest would not have been able to adopt the terms of that agreement, we find no basis for requiring Verizon Business to pay refunds to Qwest.[14]

CLEC Respondents

Turning to the remaining respondent CLECs (XO, Granite and Broadwing), there is a potential basis for refunds. Qwest could be entitled to refunds because the respondent CLECs were not, as we understand, at the time affiliated with any IXCs. In addition, Staff preliminarily reviewed the respondent CLECs' off-tariff agreements, filed under protective cover, and advises that they are not a product of the Bankruptcy Court's settlement, nor do they involve a reciprocal exchange of traffic

[13] We further note that access rates are not cost-based in New York, but have historically been set to yield a contribution to maintain lower local rates.

[14] Any other agreements that Staff uncovers will be reviewed on a case-by-case basis to determine if Qwest could adopt the terms.

between IXCs and local exchange affiliates. Qwest was apparently charged the tariff rate, while certain other IXCs were charged lower off-tariffed rates through separate agreements. We direct Staff to report to us its future recommendations relating to the respondent CLECS' off-tariff agreements. Further, PSL §92 requires telephone corporations to file ICB pricing arrangements as addenda to tariffs. Therefore, we require XO, Granite and Broadwing to file with the Secretary to the Commission a description of any rates established in off-tariff agreements with any IXC currently in effect, or a letter stating that no such agreements exist, within 15 business days of the date of this Order.

To determine whether any potential basis for refunds exists with respect to agreements between other unnamed CLECs and IXCs, additional discovery is warranted. Staff is directed to determine whether additional off-tariff agreements, which formed the basis for intrastate switched access billed by other unnamed CLECs after July 2, 2003[15] exist, to obtain copies of such agreements and to report its findings and recommendations when available.[16]

[15] Quest filed its complaint on July 2, 2009, and under our established practice we only provide refunds for a period of six years prior to a complaint. This limitation period is patterned after the six year statute of limitations under CPLR §213. Specifically, only off-tariffed agreements that formed the basis for intrastate switched access billed at lower intrastate switched access rates after July 2, 2003 would be subject to Qwest's claims for refunds here.

[16] Because the Commission has statutory authority to require the production of these contracts (PSL §94(3)), and a Protective Order was issued in this case on December 22, 2011 to facilitate the exchange of information, there is no need to grant Qwest's request for subpoenas here.

Related Discovery Matters

By letter dated June 29, 2011, Verizon Business declined to provide responses to certain discovery requests submitted by Qwest. In response, Qwest, in a letter dated July 8, 2011, urged us to direct Staff to issue the same requests for information to Verizon Business. In light of our discussion above, this request is moot.

In its original petition and again by subsequent letters, Qwest requested that we issue subpoenas directing Verizon Business, AT&T and Sprint to produce copies of any agreements they have entered into with any CLEC since January 1, 1998, relating to rates, terms and conditions for switched access service provided to each IXC. Because we are, by this Order, directing Staff to take all necessary steps to identify and evaluate all such agreements, we will deny Qwest's request for now, without prejudice to renewing its request in the future should circumstances warrant a different outcome.

CONCLUSION

Based on the foregoing, Qwest's complaint as it relates to Verizon Business is denied and Verizon Business' Motion to Dismiss is granted. XO, Granite and Broadwing shall file a description of any currently available off-tariff agreements with any IXC, in accordance with the PSL, within 15 business days of the date this Order or a letter stating that no such agreements exist. Staff is directed to report to the Commission the status of the XO, Granite and Broadwing off-tariff agreements and any off-tariff agreements involving other unnamed CLECs when available.

The Commission orders:

1. Qwest Communications Company, LLC's complaint is denied in part, in accordance with the discussion in the body of this Order.

2. MCI Metro Access Transmission Services d/b/a Verizon Access Transmission Services' Motion to Dismiss is granted, in accordance with the discussion in the body of this Order.

3. The request of Qwest Communications Company, LLC for issuance of discovery requests to MCI Metro Access Transmission Services d/b/a Verizon Access Transmission Services is denied.

4. The request of Qwest Communications Company, LLC for the issuance of subpoenas duces tecum is denied without prejudice.

5. XO Communications Services, Inc., Granite Telecommunications, Inc. and Broadwing Communications, LLC shall file copies of a description of any rates established in off-tariff agreements with interexchange carriers currently in effect, or a letter stating that no such agreements exist, with the Secretary to the Commission within 15 business days of the issuance of this Order.

6. The Secretary is authorized to extend the deadlines set forth in this order.

7. This proceeding is continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

(SIGNED) JACLYN A. BRILLING
Secretary