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April 24, 2012

Via Electronic Mail

Hon. Jaclyn A. Brilling
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case No. 09-C-0555
Petition of Granite Telecommunications, LLC for Rehearing

Secretary Brilling:

Pursuant to New York Public Service Law § 22 and 16 N.Y.C.R.R. § 3.7, enclosed please find the Petition of Granite Telecommunications, LLC for Rehearing of the Commission's March 20, 2012, Order in the above-referenced case.

Respectfully submitted,

Andrew M. Klein

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Andrew M. Klein

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint of Qwest Communications Company, LLC Against MCIMetro Access Transmission Services, LLC, XO Communications Services, Inc., TW Telecom of NY L.P., Granite Telecommunications, LLC., Broadwing Communications, LLC, and John Does 1-50.	)	**Case 09-C-0555**

PETITION OF GRANITE TELECOMMUNICATIONS, LLC FOR REHEARING OF MARCH 20, 2012 ORDER

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April 24, 2012

Pursuant to New York Public Service Law § 22 and 16 N.Y.C.R.R. § 3.7, Granite Telecommunications, LLC ("Granite") hereby respectfully requests the Commission to grant rehearing of the *Order Dismissing Complaint in Part, Initiating Further Investigation and Addressing Pending Discovery Requests* issued on March 20, 2012 in the above-captioned proceeding ("Order").

Section 3.7(b) of the Commission's regulations (16 N.Y.C.R.R. § 3.7(b)) authorizes the Commission to grant rehearing of a prior order "on the grounds that the Commission's Order committed an error of law or fact[.]" In this instance, rehearing is warranted for each of the following independent errors of law and fact:

(1) The Commission Order's finding that "there is no dispute that [Granite] violated the tariff filing requirements of the PSL" constitutes an error of law and fact, because Granite does dispute that assertion and there is no factual record in this proceeding upon which any such finding could be made.

(2) The Commission's Order contains an error of law in its finding that Qwest's Complaint is not barred as a matter of law under Public Service Law § 92(2)(d), as Qwest's attempt to obtain an unfiled rate is plainly barred by §92(2)(d).

(3) The Commission's Order commits an error of law by finding that refunds may possibly be awarded to Qwest in this proceeding, because (a) no refunds are permissible under Public Service Law § 118(3) given that Qwest paid the lawful, correct rate for Granite's access services, and (b) refunds would not be the lawful measure of relief for discrimination in any event.

(4) The Commission's Order commits an error of law by finding that a six-year statute of limitations applies to a claim for refunds.

As fully explained below, the Commission respectfully should grant rehearing under each and every one of these grounds, issue a corrective Order, and dismiss the Complaint in this proceeding.

ARGUMENT

I. THE FINDING IN THE ORDER THAT GRANITE VIOLATED THE FILING REQUIREMENTS OF THE PUBLIC SERVICE LAW CONSTITUTES AN ERROR OF LAW AND FACT.

The Order's finding that "there is no dispute that [Granite and the other Respondents] violated the tariff filing requirements of the PSL"[1] constitutes and error of law and fact, because Granite does indeed dispute that assertion and there is no factual record in this proceeding upon which such a finding could be made.

Granite's Response to Qwest's Complaint specifically raised the affirmative defense that "Granite has complied with all obligations imposed under New York statutes and the Commission's Orders and regulations in all material respects."[2] Thus, under the pleadings filed in this case, Granite did dispute whether it has violated any tariff filing requirements of the PSL. Granite has not modified or waived that defense. Moreover, there is no factual record in this proceeding that would permit a finding of any violation. Thus, the Order's conclusion of an "undisputed violation" is both legally and factually incorrect, and rehearing is therefore warranted to correct this finding. Finally, were this proceeding to continue and a sufficient factual record be established, that record would confirm that no violation has occurred.

II. THE COMMISSION'S ORDER COMMITTED AN ERROR OF LAW BY NOT FINDING THAT QWEST'S COMPLAINT IS BARRED BY PUBLIC SERVICE LAW § 92(2)(d).

Qwest's Complaint fails to set forth a claim upon which relief may be granted, and should therefore have been dismissed. The Qwest Complaint states that Granite has at all times

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[1] Order at 8.

[2] Case 09-C-0555, Response of Granite Telecommunications, LLC to Petition of Qwest Communications Company, LLC, at 7, ¶ 21 (dated Aug. 28, 2009) [hereinafter "Granite Response to Complaint"].

charged Qwest the rate in Granite's filed tariff.[3] As such, the relief sought by Qwest is unequivocally prohibited by PSL § 92(2)(d), which bars Qwest from claiming entitlement to any unfiled rate or refunds of rates duly paid.[4] Given that Qwest's Complaint is barred as a matter of law, the decision to proceed to further consider the claims set forth therein constitutes legal error, which respectfully should be corrected on rehearing.

Despite such clear legal prohibitions, the Qwest Complaint ostensibly seeks refunds of – in effect discounts off of – the filed rate.[5] The Complaint thus seeks monetary damages by claiming entitlement to rates that Qwest itself states were *never filed*. However, since filing the Complaint, Qwest has acknowledged that "***[t]o be valid***, a special pricing arrangement must comply with the procedural requirements, . .including the filing of summaries of such arrangements as ICB Addenda to relevant tariffs."[6] But the particular agreement between Granite and AT&T here at issue cannot be valid since, according to Qwest, the agreement is "**void, illegal and unenforceable**" under New York law and the laws of other "Filed-Rate States."[7]

While Qwest attempts to avoid the mandatory dismissal under the guise of claim of discrimination, the correct application of PSL §92(2)(d) properly prevents discrimination by

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[3] Qwest Complaint, at 10, ¶ 8.d.i. (dated July 2, 2009).

[4] Section 92(2)(d) of the Public Service Law ("PSL") codifies the long-standing common law rule known as the Filed Rate Doctrine. Indeed, Qwest's own Complaint recognizes that "[u]nder §92(2), telephone corporations are allowed to charge only the rates set forth in their tariffs[.]" Qwest Complaint at 4, ¶ 4. While the Order (at page 6, fn. 6) duly recognizes some of the prohibitions imposed by §92(2)(d), the Order does not proceed to apply those prohibitions to bar the Qwest claims that are plainly inconsistent with the law.

[5] *See, e.g.*, Qwest Complaint at 15-16, claiming entitlement to alleged "unfiled" rates.

[6] Correspondence from Keith Roland, counsel for Qwest, to Jaclyn Brilling, Secretary, Public Service Commission, at page 4 (dated Dec. 6, 2011) (*emphasis added*).

[7] Complaint of Qwest Communications against AT&T (dated January 29, 2007), at pages 25-29, 37 and 42-43 (*emphasis added*) (hereinafter "Qwest Complaint Against AT&T"). A copy of this Complaint was attached as Exhibit C to Granite's Response to Staff's Interrogatories, dated Nov. 14, 2011.

requiring all customers to pay the duly filed rate. As a result, in the hypothetical situation where a customer may have paid a below-tariff rate, the only lawful remedy would be an order requiring that customer to pay the filed rate. Indeed, Qwest's own ILEC affiliate successfully relied on the Filed Rate Doctrine and analogous State law to overturn a State Commission order that had required Qwest to pay refunds based on its own unfiled agreements.[8] Extensive case law confirms that this is exactly how §92(2)(d) and the Filed Rate Doctrine must be applied in New York.[9]

The straightforward application of the law to the allegations of Qwest in this case bars any such relief as a matter of law. The Complaint thus does not set forth any lawful claim and all proceedings thereon will needlessly waste the Commission's resources and the resources of all parties involved. The Commission should therefore grant rehearing and order that Qwest's Complaint be dismissed.

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[8] *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 427 F.3d 1061 (8th Cir. 2005) (Nos. 04-3408, 04-3368, 04-3510), *cited* in Response of Granite Telecommunications, LLC to Petition of Qwest Communications Company, LLC, Case 09-C-0555, at 3 (Aug. 28, 2009).

> Like a tariff, any attempt to enforce rates contained in an unfiled agreement that conflicts with the rates contained in a filed...agreement would violate the filed rate doctrine. The filed rate doctrine prohibits the Commission from using agreements that the Commission itself concluded were improper to award other CLECs discounts. At best, the proper equitable remedy - assuming for the purposes of discussion that the Commission had equitable powers - would have been to require [the contracting parties] to disgorge the benefit that they received from the void agreements.

Brief of Qwest Corp. at 20-1 (filed Jan. 21, 2005).

[9] *See, e.g., Porr v. NYNEX Corp.*, 230 A.D.2d 564, 565 (2d Dep't 1997), *lv. denied* 91 N.Y.2d 807 (1998) (holding that "[a]ny remedy that requires a refund of a portion of the filed rate…is barred"); *American Tel. and Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (stating that under the century-old filed rate doctrine "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff"); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1170 (2d Cir. 1998) (finding that "any subscriber who has paid the filed rate has suffered no legally cognizable injury"); *AT&T v. JMC Telecom, LLC*, 470 F.3d 525, 532 (3d Cir. 2006) ("The classic example of the preemptive power of the [Filed Rate Doctrine] occurs when a customer makes a claim for a rate that was not filed by the carrier - such claims are barred.").

III. THE SUGGESTION IN THE ORDER THAT QWEST MAY POSSIBLY BE ENTITLED TO REFUNDS CONSTITUTES AN ERROR OF LAW.

The Commission's Order contains an error of law in suggesting that PSL § 118(3) may potentially authorize an award of refunds to Qwest in this case. This conclusion constitutes legal error for two independent reasons: (1) as a corollary to the requirements of PSL § 92(2)(d), PSL § 118(3) does not authorize the Commission to award refunds where a customer complaint asserts – as Qwest does here – that it has paid the filed rate, and (2) as a matter of law, refunds are only permissible to address overcharges (*e.g.*, instances in which a customer is charged a rate *in excess of* the filed rate, or where a customer is charged for inadequate or deficient services) – not rate discrimination. As fully explained below, for each of these reasons the Commission's Order should have found that refunds are not available to Qwest in this case, and the Commission must grant rehearing to correct this legal error.

A. Public Service Law § 118(3) Does Not Permit Refunds under the Undisputed Facts of this Case.

The Commission's authority to order refunds is circumscribed by PSL § 118(3), which provides in relevant part:

> Credit or refund of overpayments. (a) The commission shall have the power to require a public utility company or municipality 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.

Under this statute, the Commission only has authority to award refunds where payment is made "in excess of the correct charge." Commission precedent clarifies that refunds under this provision are limited to instances where a utility's bills are *inconsistent* with the utility's filed

rates, such as "miscalculations of a customer's service application, the application of incorrect rates or charges and the failure to reflect tariff provisions for which the customer qualifies."[10]

The statute does not, however, authorize refunds where the customer alleges it was charged the filed rate, as Qwest does here. Indeed, as established in Section II above, PSL § 92(2)(d) bars claims of the type Qwest attempts to here assert. Indeed, PSL § 92(2)(d) *explicitly prohibits* a carrier from refunding a customer any portion of the filed rate.

The analytical error of the Order – and the position that Qwest takes – is that it assumes the correct charge may potentially be a rate set forth in an alleged agreement that was never filed or approved by the Commission. As noted above, such a conclusion is unequivocally prohibited by the PSL - which Qwest has acknowledged in this very case.[11]

Given the assertion in the Complaint that Qwest has at all times paid the tariffed rate for Granite's switched access services, the Commission is simply not authorized to award any refunds and the Order's finding that refunds may possibly be awarded to Qwest constitutes an error of law. The Commission should therefore grant rehearing and dismiss Qwest's claim for refunds.

B. Refunds Are Not the Measure of Relief for a Discrimination Claim.

Even if the Commission did not lack authority to award refunds under the facts of this case (which, as explained above, it does), the Commission's Order should still have found that refunds are not available to Qwest because refunds are not the legal measure of relief under a claim of discrimination. It is black-letter law that, to obtain relief under a discrimination claim, a

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[10] Case No. 00-E-1534, *Strategic Power Management, Inc. v. Orange and Rockland Utilities, Inc.*, Order Denying Petition for Rehearing, at 4 (issued July 2, 2001).

[11] *See* Qwest Complaint at 4, ¶ 4, and correspondence from counsel for Qwest to Secretary Brilling, dated Dec. 6, 2011, at page 4.

complainant must show damages resulting from the discriminatory treatment alleged, not simply a difference in rates.

This fundamental rule was explained nearly a century ago in Justice Cardozo's seminal opinion in *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1993), where the Supreme Court explained the critical distinction between a claim for overcharges and a claim for discrimination:

> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a [carrier] is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *But a different measure of recovery is applicable where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less.* Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less, but which, whether more or less, is something to be proved and not presumed. Recovery cannot be had unless it is shown, that as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. ***The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less***.[12]

Again, Qwest's ILEC affiliate has successfully relied on this argument multiple times when faced with discrimination claims identical to the one Qwest now attempts to assert here.[13]

Thus, to pursue a claim grounded in discrimination, Qwest must have asserted, and would have to prove, that it suffered *quantifiable damages* – such as lost market share or other

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[12] 289 U.S. at 390 (*emphasis added*). It should be noted again that Qwest has no claim for overcharges, because it paid the correct rate.

[13] *See Cheesman v. Qwest Communication Int'l, Inc.*, 2008 WL 2037675, at *2 (D. Colo. 2008) *citing Interstate Commerce Comm'n v. United States ex rel. Campbell*, 289 U.S. 385, 390 (1933); *Spa Universaire v. Qwest Communications International, Inc.*, 2007 WL 2694918 at *8. ("Damages may not be measured simply by showing that [other customers] received the benefit of the discounted rate. A plaintiff must show it was adversely affected by the fact that because these two carriers paid less for like services they were favored or in some other manner that will vary according to time, place, and circumstances just as in Interstate Commerce Act cases").

competitive harm – as a result of another customer paying a lower rate. However, Qwest's Complaint and filings contain no such assertions and describe no such damages.

As a result, the Commission's Order commits an error of law by finding that Qwest may potentially be entitled to refunds in this case. The Commission's Order should instead have lawfully concluded that refunds based on a claimed difference in rates are not available to Qwest under a claim of discrimination. The Commission should therefore grant rehearing and dismiss Qwest's claim for refunds for this additional reason.

IV. THE COMMISSION'S ORDER COMMITS AN ERROR OF LAW BY FINDING THAT A SIX-YEAR STATUTE OF LIMITATIONS APPLIES TO A CLAIM FOR REFUNDS.

Lastly, the Commission's Order also commits an error of law by finding, *sua sponte*, that a six-year Statute of Limitations may apply to a claim for refunds. Although Qwest cannot even seek refunds in this case (as discussed above in Section III), even if it could the Commission is required to apply (a) the 90-day notice provision of Granite's tariff, which requires a customer – such as Qwest – to file a notice of dispute within 90 days of an invoice to preserve any dispute and (b) the two-year statute of limitations found in 47 U.S.C. § 415, which acts here to preempt State statutes of limitations on claims for refunds against telecommunications carriers.

First, the six year statute of limitations is contrary to Granite's filed tariff, which provides:

> All bills are presumed accurate, and shall be binding on the Customer unless notice of the disputed charge(s) is received by the Company within 90 days (commencing 5 days after such bills have been mailed or otherwise rendered per the Company's normal course of business). For the purposes of this section, "notice" is defined as written notice to the Company, containing sufficient documentation to investigate the dispute, including the account number under

> which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed.[14]

The filed tariff terms, which "carry the force of law,"[15] put Qwest on clear notice that any claims are deemed waived if notice of dispute is not provided within the timeframes and in the manner specified. Qwest, however, does not allege that it ever provided Granite with any notice of dispute, and – in fact – did not do so. There can be no dispute as to whether Qwest had notice of its claims, because Granite's agreement with AT&T was made public in a proceeding before the Minnesota Public Utilities Commission, in which Qwest was an active party, in June of 2006. As such, even if refunds were available (which they are not), they would be limited under this provision.

Second, the Order also errs, because – even if Qwest's claim could somehow be construed as one for overcharges – the applicable statute of limitations on claims for overcharges is found in 47 U.S.C. § 415(c), which imposes a two-year statute of limitations.[16]

This Federal statute of limitations provides the applicable statute of limitations here, under the doctrine of conflict preemption. Under a conflict-preemption analysis, state law is deemed preempted "where compliance with both federal and state [law] is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of

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[14] Granite Telecommunications, LLC P.S.C. Tariff No. 3 – Telephone, Original Sheet 33, § 2.6.3(A) (effective Aug. 2, 2002).

[15] *See, e.g.*, Case No. 02-E-1244, In re Burnham, Commission Determination at 4 (issued July 30, 2004) ("A filed, effective tariff has the force of law."); *see also ICOM Holding, Inc. v. MCI Worldcom, Inc.*, 238 F.3d 219, 221 (2d Cir. 2001) (holding that a filed tariff binds "both customers and carriers with the force of law").

[16] "For recovery of overcharges action at law shall be begun…against carriers within two years from the time the cause of action accrues, and not after…except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

the full purposes and objectives of Congress."[17] In fact, as far back as 1974, the Federal Court of Appeals for the Sixth Circuit found that the Federal statute of limitations preempts state law under this analysis because "[u]sing such a state statute would defeat the national uniformity Congress intended in enacting the one-year [now two-year] statute of limitations."[18] New York courts considering this issue have followed the Sixth Circuit's decision, holding that application of a different limitations period "conflicts with the congressional objective in a uniform two-year (previously one-year) limitations period for carriers' recovery of charges from customers."[19]

As such, the Commission's Order erred by finding that a six-year statute of limitations may apply to Qwest's claims. The Commission should therefore grant rehearing and impose the correct limitation.

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[17] *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Mother Zion Tenant Ass'n v. Donovan*, 55 A.D.3d 333, 335, 865 N.Y.S.2d 64 (1st Dep't 2008).

[18] *Swarthout v. Michigan Bell Tel. Co.*, 504 F.2d 748, 749 (6th Cir. 1974).

[19] *World-Link, Inc. v. Mezun.com, Inc.*, 14 Misc.3d 745, 758, 827 N.Y.S.2d 642 (N.Y. County 2006); *see also Palisades Collection LLC v. Larose*, No., 10/9/2009 N.Y.L.J. 25, (col. 3) (N.Y. Civ. Ct. Sept. 23, 2009) (finding that even though 47 U.S.C. § 415 "[does] not contain express language preempting New York's six-year statute of limitations, CPLR 213(2) [is] implicitly preempted as it conflict[s] with 'the congressional objective in a uniform two year limitations period for carriers' recovery of charges from customers'").

CONCLUSION

WHEREFORE, Granite respectfully requests the Commission to grant rehearing for each of the foregoing reasons and issue a corrective order dismissing the Complaint.

Dated: April 24, 2012

Andrew M. Klein

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