

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; BullsEye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.

DOCKET NO. 090538-TP
ORDER NO. PSC-12-0560-PCO-TP
ISSUED: October 19, 2012

ORDER GRANTING IN PART BULLSEYE TELECOM, INC.'S EMERGENCY MOTION TO COMPEL DISCOVERY FROM QWEST COMMUNICATIONS COMPANY

On Friday, October 12, 2012, BullsEye Telecom, Inc. ("BullsEye") filed an Emergency Motion to Compel Discovery from Quest Communications, LLC D/B/A Centurylink QCC ("QCC") ("Motion"). In the Motion, BullsEye states that on Monday, October 1, 2012, QCC filed responses and objections to BullsEye's Second Set of Interrogatories Nos. 5-22 and Third Set of Document Requests Nos. 13-24. BullsEye maintains that QCC failed to fully respond to the majority of the Interrogatories and Requests for Production, and after counsel conferred on October 2nd and 4th, the majority of discovery requests remained unanswered. Therefore, in the Motion, BullsEye asks the Commission to compel QCC to respond to BullsEye's Second Set of Interrogatories Nos. 6-12 and 17-21, and Third Request for Production of Documents Nos. 13, 15, 17, 21, and 22. BullsEye states that the evidentiary hearing is scheduled to begin on October 23, 2012, and it requires the information sought prior to the commencement of the hearing. As alternative relief, BullsEye requests that if QCC does not provide the information prior to the scheduled hearing start date, then the hearing should be postponed or QCC should be precluded from introducing testimony or evidence on the subjects the discovery relates to.

In its Motion, BullsEye asserts that the documents and information it seeks "fall squarely within the scope of this proceeding and are directly relevant to the claims asserted by QCC and defenses interposed by BullsEye." BullsEye maintains that QCC has refused to produce the discovery sought, without any valid basis, even after a "lengthy meet-and-confer" where counsel for BullsEye and QCC discussed this issue. BullsEye avers that the discovery it seeks relates directly to QCC's pre-filed Direct and Rebuttal testimony, and the discovery goes towards issues that QCC has placed into contention, including QCC's use of third party CLECs to route traffic,

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QCC's use of off-price list agreements, and QCC changing its position in this docket from a prior litigation position.

On October 17, 2012, QCC filed its Response in Opposition ("Response"). In the Response, QCC asserts that the Commission should immediately deny the Motion, since "it is an exercise in harassment and gamesmanship." QCC asserts that the purpose of the Motion is to prevent QCC from preparing for the hearing, and to delay the hearing. QCC avers that BullsEye waited until the last day allowed to propound the discovery, and waited until 7 business days before the hearing to file the Motion to Compel. QCC goes on to allege that BullsEye "should not be permitted to engage in an untethered fishing expedition," and "BullsEye seeks information that goes well beyond the scope of this case."

QCC asserts that discovery at the Commission, as incorporated by Rule 28-106.206, Florida Administrative Code (F.A.C.), follows Florida Rules of Civil Procedure 1.280 - 1.400. QCC maintains that the discovery sought must be relevant to the subject matter of the proceeding, and must be reasonably calculated to lead to the discovery of admissible evidence. QCC avers that the Commission has denied discovery requests which are overly broad and unduly burdensome, and that "discovery promulgated primarily for an improper purpose, such as harassment or delay, is prohibited." QCC concludes that the Commission should deny BullsEye's "eleventh hour motion to compel" because the discovery requests are objectionable "and its intention seems clearly focused on delaying the evidentiary hearing and/or hindering QCC's ability to prepare."

In its Motion, BullsEye consolidated its arguments into four groups, which QCC utilizes in its Response. For convenience, I have set forth BullsEye's and QCC's arguments and my rulings utilizing these same groupings.

Interrogatories Nos. 6-9 and Request for Production No. 15

Interrogatory No. 6: Identify all agreements, contracts, arrangements, or understandings between QCC and an underlying third-party carrier to terminate intrastate interexchange traffic in Florida, entered into or operated under since 2002.

Interrogatory No. 7: For each agreement, contract, arrangement, or understanding identified in response to Interrogatory No. 6, identify the following:

- a. The underlying third-party carrier;
- b. The period during which the agreement, contract, arrangement, or understanding was in effect;
- c. The rates, terms and conditions under which QCC purchased or the third-party provided termination services for intrastate interexchange traffic in Florida;
- d. All CLECs to which traffic was terminated in Florida under such agreement, contract, arrangement or understanding, and
- e. The volume of traffic handled.

Interrogatory No. 8: For each calendar year from 2002 to present, identify the quantity of Florida intrastate access traffic that QCC sent to an underlying third-party carrier for termination in terms of minutes and as a percentage of QCC's overall volume of Florida intrastate access traffic. Set forth in detail all calculations and underlying data reviewed by QCC to provide its response to this Interrogatory.

Interrogatory No. 9: For each calendar year from 2002 to present, identify the amount of Florida intrastate access traffic that QCC sent to an underlying third-party carrier for termination to each CLEC that has been named as a Respondent to this proceeding (including all CLECs that are no longer in the proceeding).

Request for Production No. 15: Produce a copy of any contract, agreement, arrangement or understanding identified in response to Interrogatory No. 6.

In its Motion, BullsEye alleges that "QCC concedes that it uses third party carriers to terminate access traffic in Florida" and that the discovery sought seeks information about the use of such carriers to reduce QCC's costs. BullsEye avers that QCC refuses to provide details about such arrangements, including identification of the third party carriers, the number of minutes sent for termination, the rates QCC pays, and the terms of the agreements. BullsEye alleges that QCC's claims that such requests are "unduly burdensome" or "not relevant" are "plainly unsustainable" because the information sought is relevant to QCC's position on Issue No. 5 in this proceeding.

BullsEye goes on to explain that QCC's use of third party carriers for switched access contradicts QCC's claims that CLEC switched access is a "bottleneck service" as it "demonstrates that QCC has alternatives to switched access services offered under CLEC price lists." BullsEye avers that "while QCC certainly has an interest in suppressing discovery regarding QCC's use of third-party alternate routers, as that will further reveal a fundamental flaw in QCC's essential theory of this case, the Commission must reject that attempted suppression."

BullsEye claims that "[t]he details of QCC's alternate routing arrangements are also likely to further explain why QCC chose not to dispute BullsEye's price list charges or seek contract-based pricing," and "information about the rates and volumes of traffic associated with these underlying carriers is of obvious relevance to QCC's claim for damages." BullsEye concludes that "the information sought is necessary to fully test and evaluate QCC's position in this case, such that QCC must be ordered to produce responsive information."

In its Response, QCC asserts that "BullsEye demands that QCC identify and compile extraordinary levels of detail about each underlying carrier agreement" and the "questions are patently overbroad and seek information that bears no relevance to the switched access traffic at issue in this proceeding." QCC goes on to describe the role of underlying carriers in handling telecommunications traffic, and asserts that BullsEye seeks "information entirely irrelevant to the instant proceeding" and its questions are "outside the scope of this case." QCC further asserts

that the burden of production on QCC would outweigh any probative value, the requests are “extremely burdensome and logistically difficult,” and that in any event, “QCC has provided a response to BullsEye’s Interrogatory No. 5, which should suffice.”

QCC denies that the “extreme detail” BullsEye seeks concerning QCC’s agreements is relevant or could lead to any relevant and admissible evidence. Instead, QCC maintains that BullsEye requests each agreement since 2002, the terms of each agreement, including all rates, the time periods each agreement has been effective, and year-by-year volume and usage information, including year-by-year accountings broken out by agreement, minutes of use, percentage of overall Florida usage, and then by minutes and percentages terminated to each of the 18 CLECs who were once parties to this proceeding. QCC alleges “[t]his is an incredible amount of data – which is not presently compiled or immediately available to QCC – and it serves no logical purpose to this docket.”

QCC maintains that responding could require more than 30 days of effort, to compile more than 40 agreements, with over 1,000 rate sheets, most of which exceed 100 pages. QCC also avers that the agreements are confidential, “and disclosure would require notice to each third party, many or all of which likely would object given the commercial sensitivity of this information. Because the burden on QCC clearly and vastly outweighs any probative value from these requests, QCC respectfully requests that the Motion be denied.”

Upon review, it does not appear that QCC denies that it has entered into agreements of the type for which BullsEye seeks detailed information. Given that the existence of such agreements does not seem to be at issue, BullsEye has not persuasively argued why the level of detail sought by BullsEye in its Interrogatories Nos. 6-9 and Request for Production No. 15 is directly related to issues in contention in this docket, or to a claim or defense of BullsEye. Furthermore, as argued by QCC, production of the information sought would place an extreme burden on QCC, especially given the short time remaining until the hearing. After full consideration, I find that granting the Motion to Compel would be an undue hardship on QCC and is unlikely to result in relevant, admissible evidence which would be probative to BullsEye’s defense. Accordingly, BullsEye’s Motion to Compel Responses to Interrogatories Nos. 6-9 and Request for Production No. 15 is DENIED.

Interrogatories Nos. 10-12 and Request for Production No. 17

Interrogatory No. 10: On page 17 of the QCC Rebuttal Testimony of William R. Easton, Mr. Easton refers to agreements between QCC and CLECs. As to each such agreement, or similar such arrangements or understandings, identify:

- a. Each CLEC and any other LEC with whom QCC had such an agreement, arrangement, or understanding;
- b. The period during which the agreement, arrangement, or understanding was in effect;
- c. The rates, terms and conditions relating to payment, non-payment and/or waiver of access charges, and
- d. The total value of such waivers, agreements, arrangements, or understandings.

Interrogatory No. 11: In any instance where QCC had an agreement, arrangement or understanding with a LEC under which QCC obtained waivers of or was otherwise not assessed switched access charges, identify on a monthly basis the actual net rate (a) charged to, and (b) paid by, QCC for originating access and terminating access.

Interrogatory No. 12: In any instance where QCC claims that QCC was charged for switched access by a CLEC despite the existence between QCC and the CLEC containing a waiver of switched access charges, did QCC pay such charges to the CLEC? If so, identify all such amounts.

Request for Production No. 17: On page 17 of the Rebuttal Testimony of William R. Easton, Mr. Easton refers to agreements between QCC and CLECs. Produce all documents relating to or reflecting the agreements referred to by Mr. Easton.

In its Motion to Compel, BullsEye asserts that QCC has entered into the same “‘secret agreements’ for switched access service” that form the basis of QCC’s complaint in this docket, and that this discovery is intended to require QCC to produce information regarding these agreements. BullsEye maintains that these agreements are relevant to this proceeding, since they call into question QCC’s assertions that it did not know of the existence or availability of such agreements. BullsEye further states that this discovery relates directly to Issue 8 in this proceeding.

In its Response, QCC asserts that these requests seek “copies of agreements, as well as significant data that has not been compiled, related to agreements” between QCC and CLECs. QCC maintains that these requests “do not seek information that is relevant or reasonably calculated to lead to the discovery of admissible evidence” in that they have nothing to do with “BullsEye’s conduct vis-à-vis QCC.” QCC states that it has not compiled the information sought by BullsEye, and is not sure how long such a compilation would take. QCC states that “these data requests are designed to do little more than distract the Commission from the issues before it and otherwise force QCC to expend resources on a fruitless exercise.”

Upon review, it appears that these four discovery requests are germane to the subject matter of this docket, and relate directly to QCC’s prefiled testimony. Despite Interrogatory No. 10 being somewhat vague, a review of Lines 6 – 8 of Mr. Easton’s testimony reveals he refers to one particular type of agreement with specificity. Given the specificity of QCC’s testimony, and the wording of the Interrogatory, QCC shall be required to respond only as to that specific type of agreement. As I am limiting the scope of QCC’s response to Interrogatory No. 10, it follows that the same limitation should be applied to Request for Production No. 17. Accordingly, as QCC’s responses will be directly related to its claims or BullsEye’s defenses, QCC shall respond to BullsEye’s Interrogatories Nos. 10-12 and Request for Production No. 17, subject to the limitation on the scope of the response.

Interrogatories Nos. 17 and 18 and Request for Production No. 13

Interrogatory No. 17: State whether QCC contends or believes that AT&T's off-tariff agreements for switched access service were void, illegal, and/or unenforceable in Florida prior to July 1, 2011.

Interrogatory No. 18: To the extent QCC does not currently contend or believe that AT&T's off-tariff agreements for switched access service were void, illegal, and/or unenforceable in Florida prior to July 1, 2011, specify the date on which QCC ceased to believe in the accuracy of that assertion and identify the facts upon which QCC currently relies.

Request for Production No. 13. Produce all documents that were reviewed or relied upon in providing QCC's response to Interrogatory Nos. 5-22, with the exception of number 13.

In its Motion, BullsEye argues that the information it seeks relates to its allegation that QCC changed its position regarding the switched access agreements at issue in this docket after entering a settlement with AT&T. Specifically, BullsEye asserts that in 2007, QCC filed a civil complaint contending that certain switched access agreements were illegal and unenforceable in Florida. After settling that complaint with AT&T, alleges BullsEye, QCC then filed the instant proceeding alleging the exact opposite of its 2007 complaint; that is, that such switched access agreements were legal, enforceable, and that QCC is "now somehow entitled to benefit from their terms." Therefore, states BullsEye, it is asking QCC "to clarify its position in this case, to identify a date, and to produce any documents that reflect such date or change in position. As the Commission has previously determined that such questions do not call for a conclusion of law, QCC must be directed to fully respond to the requests."

In its Response, QCC maintains that BullsEye seeks QCC's legal opinion, "a party answering discovery is not required to interpret, speculate, or opine on the law," and cites a recent decision by the Commission denying a motion to compel discovery requests that sought legal opinions. QCC goes on to aver that "QCC's opinion on the enforceability of BullsEye's contract is wholly irrelevant to the Commission's determination of the lawfulness of BullsEye's subsequent behavior."

After review, as stated by BullsEye in its Motion, Interrogatories Nos. 17 and 18 do not call for a legal conclusion. As worded, both Interrogatories merely ask for QCC's position, and when QCC formed that position. There is no reason why QCC cannot or should not answer such a question by providing its position, which may be devoid of any legal analysis or detail. Therefore, QCC shall respond to Interrogatories Nos. 17 and 18.

Request for Production No. 13 is on its face overly broad, and given the short time until hearing, would clearly constitute an undue burden on QCC. Accordingly, BullsEye's Motion to Compel QCC to provide responsive documents to Request for Production No. 13 is DENIED.

Requests for Production Nos. 21 and 22

Request for Production No. 21: Produce all documents and correspondence of Mr. Patrick Welch relating to this proceeding.

Request for Production No. 22. Produce all documents and correspondence of Ms. Lisa Hensley Eckert relating to this proceeding.

In its Motion, BullsEye asserts that Mr. Patrick Welch is a director of QCC, and Ms. Hensley Eckert filed direct testimony in this case, relating to switched access. With regard to Request for Production No. 21, relating to QCC director Patrick Welch, BullsEye alleges Mr. Welch “appears to be the person behind QCC’s unjustified claims against BullsEye. Mr. Welch’s documents are expected to contain material related to Issues 8(a), (d), (g) and (h), at a minimum.” BullsEye asserts that QCC has refused to produce the documents under a claim of attorney client privilege, but demonstrates no basis for such claims. BullsEye avers that not all of Mr. Welch’s communications could be privileged and confidential.

According to BullsEye, Request for Production No. 22 seeks documents relating to Ms. Hensley Eckert’s knowledge of facts that QCC has placed into contention, and that parties opposing such contentions have the right to review a witness’ documentation. Further, avers BullsEye, QCC should not be able to object to the request being burdensome when the material is relevant and is in fact raised by QCC’s prefiled testimony. BullsEye maintains that in order to comply with the request, QCC would only need “to review one person’s emails and files and produce the responsive documents.”

In its Response, QCC maintains that the BullsEye’s request “on its face is overwhelmingly broad and clearly constitutes a speculative fishing expedition designed to harass QCC.” QCC further maintains that “BullsEye’s requests demand that QCC pour through countless documents many, if not most, of which are plainly protected by attorney client privilege and the work product doctrine.” QCC states that the requests would require the two employees to “review, chronicle and disclose every email between themselves and counsel, every email between themselves and other QCC employees and contractors ... and every handwritten note taken in conjunction with the litigation,” and that such documents are either in the public domain, are privileged, or are confidential and protected by non-disclosure agreements. QCC alleges that “BullsEye’s intent in pressing for these documents is made clear by its repeated request that the Commission postpone the hearing if QCC fails to produce the material BullsEye now seeks” and concludes that “[s]eeking ‘all documents...relating to the proceeding’ is simply too broad and the Commission should not compel QCC to perform an extensive review of these employees’ files without any more basis than BullsEye’s unsupported speculation that there may be relevant information in their files.”

In Request for Production No. 21, BullsEye states that “Mr. Welch’s documents are expected to contain material related to issues.” I note that Mr. Welch is not a witness to this proceeding, and BullsEye has made no showing that this request is anything other than a “fishing expedition.” Given the short time frame remaining until the hearing, and the failure of BullsEye

to identify with specificity what relevant evidence this Request is reasonably calculated to lead to, BullsEye's Motion to Compel a response to Request for Production No. 21 is DENIED.

With respect to Request for Production No. 22, Ms. Hensley Eckert is indeed a fact witness in this proceeding, and has prefiled testimony. BullsEye is entitled to investigate the basis of Ms. Hensley Eckert's knowledge of the facts she asserts. The Request as worded, however, is overly broad and goes beyond any documents Ms. Hensley Eckert relied upon for the preparation of her testimony. Therefore, QCC shall be required to respond to BullsEye's Request for Production only as to documents relied upon by Ms. Hensley Eckert in preparing for and filing her prefiled testimony. I am aware, however, that there has been significant discovery and exhibits already produced in this proceeding. Accordingly, QCC's response to this Request for Production is limited to materials not already produced to any party in this proceeding, including discovery responses or prefiled hearing exhibits.

Interrogatories Nos. 19-21.

Interrogatory No. 19: QCC has responded to prior discovery with the following statement: In the course of its business, QCC creates countless documents that are not subject to record retention requirements of the Commission or the Federal Communications Commission. The information and documents are kept in numerous locations and may be moved from site to site as employees change jobs or as the business is reorganized.

Please identify:

- a. The record retention requirements of the Commission or the Federal Communications Commission to which QCC makes reference,
- b. QCC's record retention policy in effect for the period of QCC's claim, and
- c. Information and documents that are no longer available for production in this proceeding due to record retention policies, employee moves, reorganizations, or any other reason.

Interrogatory No. 20: QCC has responded to prior discovery with the following statement: QCC objects to the discovery requests to the extent they seek to impose an obligation on QCC to respond on behalf of subsidiaries, affiliates or other persons that are not parties to this case on the grounds that such requests are irrelevant, overly broad, and unduly burdensome.

Please identify:

- a. Each subsidiary, affiliate or persons that QCC knows or reasonably believes to have information relating to the subject matter of this proceeding, and which of such information has been produced, and
- b. Whether QCC includes TEOCO, QCC consultants, and expert witnesses within the categories that QCC excludes from the scope of discovery.

Interrogatory No. 21: Identify the role and responsibilities of TEOCO relative to QCC's receipt of, charges incurred for, contracts relating to, and disputes concerning intrastate switched access in Florida.

In its Motion on Page 4, BullsEye includes Interrogatories Nos. 19-21 in the list of items QCC has not responded to, and to which it requests responses. However, in the body of the Motion, BullsEye provides no argument nor specific grounds why I should compel QCC to respond to these three Interrogatories. QCC points out this fact in its Response.

Furthermore, a review of QCC's October 1, 2012 response to these three Interrogatories indicates that QCC responded to each of these Interrogatories, at least in part. Accordingly, since QCC has responded to each of these Interrogatories, and BullsEye has not provided any argument why such response is legally insufficient, BullsEye's Motion to Compel Responses to these three items is DENIED.

Based on the foregoing, it is

ORDERED by Commissioner LISA POLAK EDGAR, as Prehearing Officer, that BullsEye's Telecom, Inc.'s Emergency Motion to Compel Discovery from QCC Communications, LLC is granted in part, as set forth in the body of this Order. It is further

ORDERED that Quest Communications LLC shall have until Monday, October 22, 2012, at 12:00 Noon, Eastern Standard Time, to provide its responses.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 19th day of October, 2012.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

LDH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.