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Subject: 090538 QCC Post-Hearing Statement and Brief
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Filed on behalf of: CenturyLink QCC

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*******A Word Version of the Redacted Post-Hearing Statement and Brief will be provided on CD/diskette to the clerk under separate cover in accordance with Rule 25-22.028******

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CenturyLink™

December 10, 2012

VIA ELECTRONIC FILING
Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090538-TP - Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against TW TELECOM OF FLORIDA, L.P., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INC., FLATEL, INC., NAVIGATOR TELECOMMUNICATIONS, LLC, AND JOHN DOES 1 THROUGH 50, for unlawful discrimination

Dear Ms. Cole:

Enclosed please find Qwest Communications Company, LLC, d/b/a CenturyLink QCC's Redacted Post-Hearing Statement and Brief, which we ask that you file in the above captioned docket. A Word Version of the Redacted Post-Hearing Statement and Brief will be provided on CD/diskette to the clerk under separate cover in accordance with Rule 25-22.028.

Copies are being served upon the parties in this docket pursuant to the attached certificate of service.

Sincerely,

/s/ Susan S. Masterton
Susan S. Masterton

Enclosures

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CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP

I hereby certify that a true and correct copy of the foregoing has been served upon the following by electronic mail delivery and/or U.S. Mail this 10th day of December, 2012.

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/s/ Susan S. Masterton
Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against tw telecom of florida, l.p.; BullsEye Telecom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; and John Does 1 through 50, for unlawful discrimination.	**DOCKET NO. 090538-TP** **Filed: December 10, 2012**

POST-HEARING STATEMENT AND BRIEF OF QWEST COMMUNICATIONS COMPANY, LLC

TABLE OF CONTENTS

INTRODUCTION

The record evidence is overwhelming and largely uncontested. QCC has established that each of the Respondents entered into one or more secret, off-price list agreements whereby it provided discounts on intrastate switched access service to preferred interexchange carriers ("IXCs"). Switched access is a critical, bottleneck service and a key input (both in terms of functionality and cost) required for the provision of long distance service by interexchange carriers ("IXCs") such as QCC.[1]

Those discounts were not extended (nor even offered) to QCC, and QCC was substantially overcharged as a result. Notably, the Respondent CLECs do not dispute these key facts. They essentially admit that they deviated from their price lists (for the benefit of select IXCs, but not QCC). They admit that they did not disclose the agreements to the Commission or to QCC. And, they effectively admit that QCC paid more than its IXC rivals for switched access. Instead of mounting a defense based on facts establishing a lawful justification for the admitted discrimination, the Respondents' case falls largely on blaming the victim. Their position seems to be that, had QCC simply tried a little bit harder to discover the agreements and/or obtain its own discount, it could have overcome the CLECs' unlawful conduct.

In response to QCC's Complaint, BullsEye has disclaimed any responsibility for its misconduct. BullsEye blames AT&T for forcing it into a discount agreement and for preventing BullsEye from disclosing it. While assailing AT&T for its refusal to pay BullsEye's switched access rates, BullsEye punishes QCC for not doing the same, arguing that QCC's willingness to pay its bills distinguishes QCC from AT&T and justifies its preferential treatment of AT&T.

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[1] In his Direct Testimony, Qwest witness Bill Easton thoroughly describes the function and importance of switched access to the operations of an IXC. TR 53-60, Easton Direct. Derek Canfield specifies how costly an input switched access is. TR 254-255, Canfield Direct. And finally, Dr. Dennis Weisman explains the importance and bottleneck nature of switched access, as well as the potential harms of unreasonable input rate discrimination. TR 342-351, Weisman Direct.

Mounting a very different defense, TWT claims that QCC is dissimilar to AT&T because QCC did not (and could not, according to TWT) agree to purchase large volumes of unrelated, unregulated and competitively-supplied services in addition to TWT's intrastate switched access. But there is no reasonable or rational connection between an IXC's purchase of unrelated services and its purchase of intrastate switched access. TWT was bound by Florida law to provide non-discriminatory rate treatment to QCC in connection with the provision of switched access, and TWT cannot credibly point to AT&T's purchase of entirely unrelated services as an excuse for denying QCC such rate treatment.

By a preponderance of the evidence, it is abundantly clear that the remaining Respondent CLECs violated Florida law in their provision of critical switched access services to QCC. As a result, QCC overpaid the CLECs by very large sums of money, and for some of the remaining Respondents this overpayment continues today. After considering the totality of the record evidence and the applicable law, QCC believes the Commission should and will enter an order granting QCC's complaint and ordering each of the Respondent CLECs to pay QCC refunds in the amounts set forth in QCC's prefiled testimony, plus interest. Granting QCC's complaint would be consistent with the Commission's obligation to enforce Florida law to ensure fair competition and prevent anticompetitive behavior.

STATEMENT OF FACTS

While the large number of Respondent CLECs has made this case logistically complicated, the underlying facts are straightforward and largely undisputed. Each of the five remaining Respondents provides intrastate switched access services and has price list rates on file with this Commission. Each of the remaining Respondents entered into one or more secret agreements whereby the Respondent CLEC furnished the IXC counterparty discounts off of

price list intrastate switched access rates. The discounts are not reflected in the price lists filed by the Respondent CLECs, and were not offered or furnished to QCC, which (as to some of the Respondents) continues to pay rates higher than provided to other IXCs. The facts specific to each of the Respondents are discussed in turn.

A. BullsEye Telecom

BullsEye offers intrastate switched access service via a price list filed with the Commission.[2] BullsEye's price list rate is $.041 for switched access in Florida. It also charges a flat rate of $.0055 for each 8XX database query.[3] It is undisputed that BullsEye charged its price list rates to QCC.[4] Section 5.1 of BullsEye's price list states that BullsEye may enter into ICB ("special contract arrangements") agreements, but the price list promises that such "[s]ervice shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract."[5]

BullsEye entered into a secret switched access agreement with AT&T effective October 21, 2004.[6] Pursuant to the agreement, *which remains in effect by BullsEye's own choice*,[7] AT&T receives a heavy discount off of BullsEye's price list rates. AT&T pays BullsEye only [redacted]

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2 Hearing Exhibit 44 (BullsEye Price List).

3 TR 72, Easton Direct.

4 TR 72, Easton Direct; TR 265-266, Canfield Direct; Hearing Exhibit 60 (BullsEye Overcharge Analysis Detail); TR 655, LaRose Rebuttal.

5 Hearing Exhibit 44 (BullsEye Price List). Section 5.1 of the BullsEye price list also specifies that the "terms of the [ICB] contract may be based partially or completely on the term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features." The BullsEye agreement at issue in this case is premised on none of these "distinguishing" criteria.

6 TR 72, Easton Direct; Hearing Exhibit 37 CLEC Agreement Rates); Hearing Exhibit 42 (BullsEye-AT&T agreement); TR 655-656, LaRose Rebuttal.

7 TR 685-687, LaRose Cross. The BullsEye-AT&T agreement had an initial term of [redacted] Hearing Exhibit 42, p.2 (BullsEye-AT&T Agreement, Sec. B.1.). Contrary to its mantra that the agreement is void and unenforceable (TR 663-666, LaRose Rebuttal; TR 685, LaRose Cross), [redacted] BullsEye continues to this day to operate under the agreement. Despite its vehement disdain for AT&T's practices, BullsEye voluntarily continues (six years after it was contractually bound to do so) to provide AT&T preferential rate treatment. BullsEye's conduct does not match its rhetoric.

[redacted] for Florida switched access. AT&T only pays BullsEye [redacted] for each 8XX database query.[8] Had BullsEye provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [redacted] less than it was actually charged, through March 2012.[9] QCC was charged [redacted] more than AT&T would have been charged for the same volume of services. In rebuttal testimony, BullsEye witness Peter LaRose generally stated disagreement with "the financial analyses presented by Qwest," but offered no specific computational or methodological critiques of QCC's analysis.[10] QCC asked for specific criticisms through discovery, but BullsEye offered no specifics and stated that the existence of computational errors is "entirely irrelevant."[11]

QCC became aware of the BullsEye-AT&T agreement when a redacted copy was provided under seal in August 2008 pursuant to a Colorado Commission subpoena. QCC did not become aware of the Florida-specific terms of the agreement until AT&T responded to this Commission's subpoena in May 2010. QCC is not aware and no evidence was presented to show that BullsEye filed the agreement with this Commission, appended the agreement to its price list, modified its price list to reflect the discounts provided to AT&T, advised QCC of the existence of the agreement or offered QCC equivalent rate treatment. There is no evidence that BullsEye ever even sought permission from AT&T to share a copy with QCC.[12]

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[8] Hearing Exhibit 42, p. 6 (BullsEye-AT&T Agreement, Schedule A.); Hearing Exhibit 37 (CLEC Agreement Rates).

[9] TR 266, Canfield Direct; Hearing Exhibits 59 (BullsEye Overcharge Analysis Summary) and 60 (BullsEye Overcharge Analysis Detail). As Mr. Canfield explained in his Direct Testimony, his calculations were compiled through March 2012, and need to be updated to reflect the full amount of the overcharge.

[10] In rebuttal testimony, BullsEye witness Peter LaRose generally stated disagreement with "the financial analyses presented by Qwest," but offered no specific computational or methodological critiques of QCC's analysis.TR 673, LaRose Rebuttal.

[11] Hearing Exhibit 14, at Bates No. 348.

[12] Despite making significant and burdensome demands on QCC in discovery in this matter (culminating in a motion to compel filed on the eve of the evidentiary hearing), BullsEye refused to respond to even these most basic questions. Instead, BullsEye obfuscated, and refused to answer. Hearing Exhibit 13, at Bates Nos. 321-322, 324-325. There is no record evidence demonstrating (or even suggesting) that BullsEye gave any notice of the existence of its agreement with AT&T.

B. Ernest Communications, Inc.

Ernest offers intrastate switched access service via a price list filed with the Commission.[13] Ernest's price list rate is $.0200 for originating switched access and $.0280 for terminating switched access. It also charges a flat rate of $.0055 for each 8XX database query.[14] It is undisputed that Ernest charged QCC its price list rates.[15]

Ernest entered into two secret switched access agreements with [redacted] effective [redacted].[16] Pursuant to the agreements, the latter of which is [redacted],[17] [redacted] receives a significant discount off of Ernest's price list rates. [redacted][18] Had Ernest provided equivalent rate treatment to QCC since entering into the [redacted] agreements, QCC would have been charged [redacted] less than it was actually charged, through March 2012.[19] QCC was charged [redacted] more than [redacted] would have been charged for the same volume of services. Ernest offered no testimony responding in any way to QCC's calculations, and chose not to respond to discovery or participate in the evidentiary hearing. Thus, QCC's overcharge calculation is unrebutted.

QCC became aware of the Ernest-[redacted] agreements when redacted copies were provided under seal in August 2008 pursuant to a Colorado Commission subpoena. QCC did not become aware of the applicability of the agreements to Florida until [redacted] responded to this Commission's subpoena in May 2010. QCC is not aware and there is no evidence to show that Ernest filed the agreements with this Commission, appended the agreements to its price list,

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13 Hearing Exhibit 48 (Ernest Price List).
14 Id. (secs. 3.9.3, 3.9.4.); TR 75-76, Easton Direct.
15 TR 75, Easton Direct; TR 273, Canfield Direct; Hearing Exhibit 62 (Ernest Overcharge Analysis Detail).
16 TR 75, Easton Direct; Hearing Exhibits 45-46 (Ernest [redacted] Agreements).
17 Hearing Exhibit 37 (CLEC Agreement Rates), p. 3.
18 TR 75, Easton Direct; Hearing Exhibits 45-46 (Ernest [redacted] Agreements); Hearing Exhibit 37 (CLEC Agreement Rates), p. 3.
19 TR 273, Canfield Direct; Hearing Exhibits 61 (Ernest Overcharge Analysis Summary) and 62 (Ernest Overcharge Analysis Detail). Mr. Canfield's calculations require updating through the date of the final order herein, and do not include interest.

modified its price list to reflect the discounts provided to [redacted], advised QCC of the existence of the agreements or offered QCC equivalent rate treatment. There is no evidence that Ernest ever even sought permission from [redacted] to share copies with QCC.[20]

C. Flatel, Inc.

Flatel offers or offered intrastate switched access service via a price list filed with the Commission.[21] Flatel billed a variety of switched access elements to QCC including Carrier Common Line, End Office Local Switching and 8XX database queries. During the relevant time period, Flatel billed QCC $.0225 per minute for originating switched access, $.0250 per minute for terminating switched access and $.005 per each 8XX database query.[22]

Flatel entered into a secret switched access agreement with [redacted] effective [redacted] Pursuant to the agreements, [redacted] receives a significant discount off of Flatel's price list rates. [redacted][24] Had Flatel provided equivalent rate treatment to QCC since entering into the [redacted] agreement, QCC would have been charged [redacted] less than it was actually charged. QCC was charged [redacted] more than [redacted] would have been charged for the same volume of services.[25] Flatel offered no testimony responding in any way to QCC's calculations, and chose not to respond to discovery or participate in the evidentiary hearing. Thus, QCC's overcharge calculation is unrebutted.

QCC became aware of the Flatel-[redacted] agreement when [redacted] responded to this Commission's subpoena in April 2010. QCC is not aware and there is no evidence to show that Flatel filed the agreements with this Commission, appended the agreements to its price list,

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[20] Ernest ignored QCC's discovery in this proceeding. TR 75, Easton Direct; Hearing Exhibit 47 (QCC's discovery to Ernest).

[21] TR 276, Easton Direct. QCC could not locate a copy of Flatel's price list.

[22] Hearing Exhibit 64 (Flatel Overcharge Analysis Detail).

[23] TR 276, Easton Direct; Hearing Exhibit 49 (Flatel-[redacted] agreement).

[24] Hearing Exhibit 49 (Flatel-[redacted] agreement); Hearing Exhibit 37 (CLEC Agreement Rates), p. 3.

[25] TR 277, Canfield Direct; Hearing Exhibits 63 (Flatel Overcharge Analysis Summary) and 64 (Flatel Overcharge Analysis Detail). Mr. Canfield's calculations do not include interest.

modified its price list to reflect the discounts provided to [redacted], advised QCC of the existence of the agreements or offered QCC equivalent rate treatment. There is no evidence that Flatel ever even sought permission from [redacted] to share copies with QCC.[26]

D. Navigator Telecommunications, LLC

Navigator offers or offered intrastate switched access service via a price list filed with the Commission.[27] Navigator's price list rates changed over time, and Mr. Easton summarizes those rates in his Direct Testimony.[28] It is undisputed that Navigator charged QCC its price list rates.[29]

Navigator entered into a secret switched access agreement with AT&T effective July 1, 2001.[30] Pursuant to the agreement, AT&T receives a heavy discount off of Navigator's price list rates. AT&T pays [redacted][31] Had Navigator provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [redacted] less than it was actually charged. QCC was charged [redacted] more than AT&T would have been charged for the same volume of services.[32] Navigator offered no testimony responding in any way to QCC's calculations, and chose not to participate in the evidentiary hearing. Thus, QCC's overcharge calculation is unrebutted.

QCC became aware of the Navigator-AT&T agreement when AT&T responded to this Commission's subpoena in June 2010. QCC is not aware and there is no evidence to show that Navigator filed the agreement with this Commission, appended the agreement to its price list,

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[26] Flatel ignored QCC's discovery in this proceeding. TR 76, Easton Direct; Hearing Exhibit 50 (QCC's discovery to Flatel).

[27] Hearing Exhibit 54 (Navigator Price List).

[28] TR 83-84, Easton Direct.

[29] TR 83, Easton Direct; TR 288-289, Canfield Direct; Hearing Exhibit 66 (Navigator Overcharge Analysis Detail).

[30] TR 82, Easton Direct; Hearing Exhibit 52 (Navigator-AT&T Agreement).

[31] TR 82-83, Easton Direct; Hearing Exhibit 52 (Navigator-AT&T Agreement); Hearing Exhibit 37 (CLEC Agreement Rates), p. 4.

[32] TR 289, Canfield Direct; Hearing Exhibits 65 (Navigator Overcharge Analysis Summary) and 66 (Navigator Overcharge Analysis Detail). Mr. Canfield's calculations do not include interest.

modified its price list to reflect the discounts provided to AT&T, advised QCC of the existence of the agreements or offered QCC equivalent rate treatment. There is no evidence that Navigator ever even sought permission from AT&T to share copies with QCC.[33]

E. tw telecom of florida, l.p.

tw telecom of florida, l.p ("TWT") offers intrastate switched access service via a price list filed with the Commission.[34] Mr. Easton summarizes TWT's price list rates in his Testimony.[35] It is undisputed that TWT charged its price list rates to QCC.[36]

TWT entered into a switched access agreement with AT&T effective January 1, 2001.[37] Pursuant to the agreement, AT&T received a substantial discount off of TWT's price list rates. AT&T paid specified rates that changed every few months. While the TWT-AT&T agreement remains in effect, the parties amended it in November 2008 (following, *and in part because of*, QCC's complaint filing) to remove the below-tariff discount for intrastate switched access.[38]

Unlike the agreements at issue involving the other remaining Respondents, the TWT-AT&T agreement contained provisions concerning other services and commitments. For instance, the agreement obliged AT&T to purchase specified amounts of other services (principally, non-jurisdictional and/or unregulated special access and data services). TWT has presented no evidence that its cost of providing AT&T switched access was reduced or affected in any way by AT&T's purchase of these unrelated, unregulated services.[39]

Had TWT provided equivalent switched access rate treatment to QCC since entering into

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33 Hearing Exhibit 53 (Navigator Discovery Responses), pp. 5, 7-8. There is no record evidence demonstrating (or even suggesting) that Navigator gave any notice of the existence of its agreement with AT&T.

34 TR 87-88, Easton Direct; Hearing Ex. 53 (TWT price list).

35 TR 87-88, Easton Direct.

36 TR 87, Easton Direct; TR 297-298, Canfield Direct.

37 Hearing Exhibit 55 (TWT-AT&T agreement).

38 Id., pp. 83-99 (16th Amendment to TWT-AT&T agreement). TR 640-644, Jones Cross.

39 TR 335-356, Weisman Direct; TR 646, Jones Cross; Hearing Exhibit 19 (TWT response to QCC's First Discovery), Bates No. 440; TR 578-579, Wood Cross.

the AT&T agreement, QCC would have been charged [redacted] less than it was actually charged.[40] QCC was charged [redacted] more than AT&T would have been charged for the same volume of services.[41] Like BullsEye, TWT offered only generalized disagreement with QCC's calculations, but no specific computational critiques. While it presented legal arguments as to why QCC is not entitled to the relief it seeks, TWT did not assert that Mr. Canfield inaccurately compared TWT's billings to QCC with its billings to AT&T.[42]

QCC first became aware of the Florida-specific rate provisions of the TWT-AT&T agreement when AT&T responded to this Commission's subpoena in December 2011. While TWT claims that QCC became aware of the agreement when TWT filed a redacted copy of the agreement with the SEC in 2005, TWT acknowledges that the rate provisions (found in Appendix E) were redacted and not made public in that SEC filing.[43]

QCC is not aware and there is no evidence that TWT filed the agreement with this Commission, appended the agreement to its price list, modified its price list to reflect the discounts provided to AT&T, advised QCC of the existence of the agreements or offered QCC equivalent rate treatment. There is no evidence that TWT ever even sought permission from AT&T to share copies with QCC.[44]

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[40] TR 298, Canfield Direct; Hearing Exhibits 67 (TW Telecom Overcharge Analysis Summary) and 68 (TW Telecom Overcharge Analysis Detail).

[41] Id.

[42] Hearing Exhibit 22 (TWT's responses to QCC's Second Set of Discovery), at Bates Nos. 476-77.

[43] TR 638-639, 641, 645-646, Jones Cross.

[44] Hearing Exhibit 19 (TWT response to QCC's First Set of Discovery), Bates Nos. 438-439, 441-442; Hearing Exhibit 21 (TWT supplemental response to QCC's First Set of Discovery), Bates No. 461. In answer to QCC's inquiries as to whether TWT advised QCC of the agreement, TWT responds with generalities about public notice and its SEC filing. TWT does not allege that the Florida-specific rates it charged AT&T under its secret agreement were publicly known or disclosed.

ISSUES AND ARGUMENT

ISSUE 1: For conduct occurring prior to July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), Florida Statutes (F.S.) (2010);

(b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);

(c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010)?

QCC's Position: ** Yes. The Regulatory Reform Act was not retroactive on its face. As the Commission already determined in Order No. PSC-11-0420-PCO-TP, the legislation did not modify the Commission's exclusive jurisdiction over carrier-to-carrier disputes or its obligation to ensure fair and effective competition among telecommunications service providers. **

Argument

The Commission has already clearly determined in this proceeding that it has jurisdiction over QCC's claims, and that such jurisdiction was not modified by the 2011 Regulatory Reform Act. The Commission's ruling was correct, and should not be disturbed.

A. Legislation is Presumptively Prospective under Florida Law.

Florida law is clear that legislation presumptively does not have retroactive effect.[45] Earlier in this proceeding, TWT and BullsEye (along with other respondents) moved to dismiss QCC's complaint on the basis that the Regulatory Reform Act lacked a "savings clause," and therefore divested the Commission of jurisdiction, even over QCC's claims relating to conduct occurring prior to July 1, 2011. The CLEC argument misunderstands and misapplies Florida law, as the Commission already determined in Order No. PSC-11-0420-PCO-TP.

The CLECs claim that, absent a "savings clause," an act of legislation repealing a statute conferring jurisdiction presumptively and automatically strips the relevant body of all

[45] If a statute attaches new legal consequences to events completed before its enactment, Florida courts impose a presumption *against* retroactive application of the statute to pending cases absent clear legislative intent to the contrary. *Metropolitan Dade Co. v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999). The policy rationale behind this rule is that retroactive application of statutes can be harsh and implicate due process concerns. *Id.* Requiring clear legislative intent assures that the Legislature has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable result in light of countervailing benefits. *Arrow Air, Inc. v. Walsh,* 645 So.2d 422, 425 (Fla. 1994).

jurisdiction, even over pending cases. For two reasons, the CLEC argument fails.

First, while now-repealed Sections 364.08 and 364.10(1) created substantive protections against rate discrimination, they were not the only sources of the Commission's jurisdiction over QCC's claims, as the Commission acknowledged earlier in this proceeding.[46] Rather, the Commission's jurisdiction over QCC's claims is founded in Sections 364.01(1) and (2),[47] neither of which were repealed by the Regulatory Reform Act, and in newly-amended Sections 364.16(1) and (2).[48] As such, the CLECs' central premise (that the repeal of a statute *conferring jurisdiction* to the Commission eliminates the Commission's jurisdiction over pending claims) is inapposite.[49]

Second, the CLECs ignore the well-established test under Florida law for evaluating whether legislation acts retroactively. Florida opinions have established a two-pronged inquiry for addressing whether a statute is to be applied retroactively to conduct that predates enactment.[50] The first inquiry is whether there is *clear evidence* of legislative intent to apply the statute retrospectively.[51] If the answer to the first inquiry is in the negative, the legislation has only prospective effect. If the first inquiry is answered in the affirmative, legislation is still only

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[46] In its March 2, 2011 order denying the Bingham CLECs' motion to dismiss, the Commission held that it has "jurisdiction over this matter pursuant to Sections 364.01, 364.04, 364.08, 364.10, 364.337, and Section 120.57, Florida Statutes (F.S.)." Order No. PSC-11-0145-FOF-TP, Issued March 2, 2011, at p. 2.

[47] Section 364.01(1) states that the Commission "shall exercise over and in relation to telecommunications companies the powers conferred by [Chapter 364, F.S.]. Section 364.01(2) states the legislature's intent to give exclusive jurisdiction in all matters set forth in [Chapter 364, F.S.] to the Commission in regulating telecommunications companies.

[48] Newly-amended Section 364.16(1) expresses the legislative finding "that the competitive provision of local exchange service requires appropriate continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition." Newly-amended Section 364.16(2) states the legislature's intent "that in resolving disputes, the commission treat all providers of telecommunications services fairly *by preventing anticompetitive behavior*, including, but not limited to, predatory pricing."

[49] See, e.g., *In re Investigation into Development of OSS,* Docket No. 000121A-TP, Order No. PSC-10-0664-FOF-TP (issued Nov. 2, 2010), at pp. 4-5 ("The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. To that end, Section 340.01(4)(g), Florida Statutes, provides, in part, that the Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications services are treated fairly by preventing anticompetitive behavior."). The substantive language of Section 364.01(4)(g) was moved to amended Section 364.16 as part of the Legislation.

[50] See, *Metro Dade at* 499.

[51] *Id.*

deemed to operate retroactively if to do so would be constitutionally permissible. [52]

Because the Regulatory Reform Act does not contain an express statement that the Legislature intends the statute to be applied retroactively to pending matters, it must be presumed to apply prospectively only. Under Florida law, the legislature must be *unequivocal* that it intends retroactive application.[53] Here, the legislature was silent, and the Regulatory Reform Act contains no explicit provision indicating that carriers which have violated now-repealed provisions of Chapter 364 bear no responsibility or liability for their past conduct. Absent such language, there is no basis for the Commission to conclude that the legislature intended the Regulatory Reform Act to operate retroactively.

This is exactly the conclusion reached by the Commission in denying the CLECs' motion to dismiss filed shortly after the Regulatory Reform Act took effect.[54] The Commission considered the CLECs' argument, and concluded that "we clearly maintain jurisdiction over wholesale, carrier-to-carrier disputes. The legislation has not modified our exclusive jurisdiction over wholesale carrier-to-carrier disputes, and our obligation to ensure fair and effective competition among telecommunications service providers; therefore, we still retain jurisdiction to oversee fair and effective competition."[55] Focusing on whether there was sufficiently clear intent to apply the Regulatory Reform Act retroactively, the Commission found there was not.

> Without an actual savings clause addressing the repealed and amended statute, we cannot speculate what the Legislature's intent would be regarding Chapter 364. A savings clause is unique to each

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[52] All parties have already thoroughly briefed this issue for the Commission. Rather than repeating its entire analysis, QCC respectfully refers the Commission to that earlier discussion, which QCC incorporates herein by this reference. Response to Joint Motion to Dismiss (filed Aug. 1, 2011), at pp. 4-12.

[53] See *Larson v. Independent Life and Accident Insurance Co.*, 29 So.2d 448 (1947)(implication supporting interpretation that a statute be applied retroactively must be unequivocal and leave no room for doubt as to legislative intent); see also, *Promontary Enterprises, Inc. v. Southern Engr'g & Contracting, Inc.*, 864 So. 2d 479, 484 (5th DCA)(2004) (repeal of licensing cure provision did not include express statement of retroactivity and, therefore, applied prospectively only).

[54] Order No. PSC-11-0420-PCO-TP, Issued September 28, 2011.

[55] Id., at p.8.

> statute to which it applies; therefore, without specifics, it would be impossible to determine how a savings clause might affect the repealed statutes. The absence of a savings clause is not an express statement of legislative intent that a change in law be retroactively applied to carrier actions prior to July 1, 2011. Without an express statement of legislative intent, there is a presumption against retroactivity.[56]

Given that neither the facts nor the law has changed since 2011, when the parties fully briefed this issue for the Commission's consideration, there is no basis to disturb the Commission's conclusion now. In essence, the CLECs' argument amounts to an untimely motion for reconsideration of Order No. PSC-11-420-PCO-TP. Therefore, the Commission should affirm its prior ruling and find that it continues to have jurisdiction over QCC's Complaint for conduct occurring before July 1, 2011.

ISSUE 2: For conduct occurring on or after July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), F.S. (2010);

(b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);

(c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010)?

QCC's Position: ** Yes. While sections 364.08(1) and 364.10(1) were repealed effective July 1, 2011, the Florida Commission continues to have jurisdiction under 364.16(1) and (2) to resolve carrier-to-carrier disputes and, in doing so, to ensure fair treatment of all telecommunications providers and to prevent anticompetitive behavior. **

Argument

The CLECs[57] falsely assume that, because of the amendments to Chapter 364 and the repeal of Sections 364.08 and 364.10(1), the Commission unequivocally lacks jurisdiction over QCC's claims, as they would pertain to conduct on or after July 1, 2011. Neither the language nor the legislative history of the Regulatory Reform Act supports such a view. The legislature very clearly intended the Commission to retain authority to protect against anti-competitive,

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[56] Id. (citations omitted).

[57] QCC notes that this issue relates only to Respondents BullsEye, Ernest and Navigator. As Mr. Canfield's Direct Testimony details, QCC's claims against Respondents TWT and Flatel do not extend beyond June 30, 2011.

carrier-to-carrier conduct such as the discriminatory rate treatment imposed by the Respondents on QCC's purchase of intrastate switched access service. Switched access is a wholesale (carrier-to-carrier) service, and is not a retail service purchased by consumer end-users.

Newly-amended Section 364.16(1) expresses the legislative finding "that the competitive provision of local exchange service requires appropriate *continued* regulatory *oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition.*" Newly-amended Section 364.16(2) states the legislature's intent "that in resolving disputes, the commission treat all providers of telecommunications services fairly *by preventing anticompetitive behavior*, including, but not limited to, predatory pricing." The legislature intended for this Commission to continue to prevent abusive wholesale practices such as the secret discounts provided by the Respondent CLECs to select IXCs for many years.[58] At hearing, TWT witness Don Wood acknowledged that, as a matter of public policy, the Commission *should* have jurisdiction over inter-carrier relationships.[59]

The Respondent CLECs' continued practice of imposing anticompetitive and discriminatorily high switched access rates on QCC (as compared to the lower, secret rates they charge other IXCs for the identical wholesale service) constitutes just the type of conduct the legislature expects the Commission to prevent and correct, even today.

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[58] As previously discussed in QCC's Response to CLECs July 2011 Motion to Dismiss, the available legislative history makes it very clear that the legislature's singular focus was to deregulate *retail* services, and to preserve Commission jurisdiction over wholesale practices. For instance, the March 29, 2011 Senate bill analysis summarizes that the effect of the Legislation is to "[c]omplete *retail* deregulation of wireline telecommunication services" and "*[m]aintain the role of the Public Service Commission in resolving wholesale disputes between service providers.*" It further explains that the "statute also provides the commission with continuing regulatory oversight of nonbasic services for purposes of preventing cross-subsidization of nonbasic services with revenues from basic services, *and ensuring that all providers are treated fairly in the telecommunications market.* Florida Senate, Bill Analysis and Fiscal Impact Statement, Bill SB 1524 (March 29, 2011), at pp.1-2.

[59] TR 572-575, Wood Cross.

ISSUE 3: **Which party has (a) the burden to establish the Commission's subject matter jurisdiction, if any, over Qwest's First, Second, and Third Claims for Relief, as pled in Qwest's Amended Complaint, and (b) the burden to establish the factual and legal basis for each of these three claims?**

QCC's Position: ** QCC has the burden to establish subject matter jurisdiction through its pleadings and has the initial burden to establish the legal and factual elements of its complaint. However, the burden of going forward shifts to each Respondent to establish that the price differentiation was reasonable and lawful. **

Argument

A. Burden to Establish Subject Matter Jurisdiction

QCC has the burden to establish through its pleadings that the Commission has jurisdiction over the subject matter of its Complaint. Subsequently, QCC has the evidentiary burden to establish by a preponderance of the evidence any facts necessary to support the allegations in its Complaint. To the extent there are questions of law regarding the extent and scope of the Commission's jurisdiction, no evidentiary "burden" applies. Rather each party supports its position through legal argument, which the Commission may consider and weigh in making its determination as the proper meaning and application of the relevant law.

QCC has fully met its burden to establish the facts and argue the law related to the Commission's jurisdiction, as set forth in QCC's positions and arguments on Issues 1 and 2. In this case, the subject matter of QCC's Complaint is that the Respondent CLECs violated statutes within the exclusive regulatory jurisdiction of the Commission under ch. 364. The Commission has already found that the subject of QCC's complaint is clearly within in its jurisdiction in its rulings on the Motions to Dismiss previously filed in this proceeding.[60]

B. Burden of Proof and of Going Forward (Factual and Legal Basis of Claims)

As the complainant, QCC has the burden of proof in this proceeding. The Respondents

[60] See, Order No. PSC-10-0296-FOF-TP, Issued May 7, 2010; Order No. PSC-11-0145-FOF-TP, Issued March 2, 2011; Order No. PSC-11-0222-FOF-TP, Issued May 16, 2011.

likewise hold the burden to establish the factual and legal bases for each affirmative defense on which they rely in this proceeding.[61]

QCC's burden requires proof of QCC's claims by a preponderance of the evidence, meaning that, on the whole, the evidence tips at least slightly in favor of the complainant.[62] However, in the context of rate discrimination cases, once the complainant has established a *prima facie* case, the burden of going forward shifts to the utility (here, the CLECs) to establish a lawful basis for its price differentiation.

In this context, a *prima facie* case is established once QCC establishes as to each CLEC that the CLEC charged QCC a higher rate for the same or similar service.[63] Once QCC establishes these basic facts (as it did in testimony, at hearing and in the discussion above), the burden of going forward shifts to each Respondent CLEC to establish that the price differentiation was reasonable and lawful. This is the same analytical framework employed by the FCC when considering Section 202 discrimination claims.[64] The FCC succinctly summarized the burden shifting in *Offshore Telephone Company v. South Central Bell*:

> Offshore, as complainant herein, bears the burden of proving that it was

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61 *Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA, 1981).*

62 *In Re: Complaint of Mr. Thomas L. Fuller Against Florida Power Corporation Regarding High Electric Bills in Orange County,* Order No. PSC-96-0483-FOF-EI, Conclusion of Law 9.

63 *In the Matter of the Offshore Telephone Company v. South Central Bell Telephone Company and AT&T, MEMORANDUM OPINION AND ORDER, 2 FCC Rcd 4546 (Aug. 7, 1987), ¶ 32; See,* Order No. 19677, in Docket 860984-TP, issued July 15, 1988, *In re: Investigation into NTS Cost Recovery Phase II* (switched access discounts that provide undue preferences violate section 364.08, F.S., which is substantially similar to Section 202 of the federal Telecommunications Act). Contrary to the CLECs' implication (see TR 320-322, Canfield Cross; TR 400-401, 306-407, Weisman Cross), QCC is aware of no Commission authority requiring quantitative proof of downstream impacts (e.g., lost profits or market share) in order to prove unlawful rate discrimination. This is further discussed regarding Issue 9b, below.

64 This also tracks the manner in which the Colorado Public Utilities Commission analyzed QCC's parallel complaint case. After hearing and briefing, the presiding Administrative Law Judge concluded that QCC established a *prima facie* showing and held that the "Respondents failed to overcome QCC's *prima facie* showing of unjust discrimination." Recommended Decision of Administrative Law Judge G. Harris Adams Partially Dismissing and Partially Granting Complaint, Decision No. R11-0175 (Colo. PUC Feb. 23, 2011) ("Colorado ALJ Order"), at paras. 279-282. On review, the full Commission affirmed the ALJ, agreeing that "QCC has established a *prima facie* showing of discrimination" and that "the record evidence does not establish a lawful basis for price discrimination in this case." Order Addressing Exceptions and Motion to Reopen the Record, Decision No. C11-1216 (Colo. PUC Nov. 15, 2011) ("Colorado Order on Exceptions"), at paras 72, 74.

> discriminated against in the first instance. * * * In the event of making such a threshold showing, defendants would then have to show that the discrimination was justified. * * * In order to establish a violation of Section 202(a), Offshore must show that it has been treated differently from similarly situated carriers in connection with the provision of "like" communications services or facilities or that the carrier has given an undue or unreasonable preference or advantage. Such a finding is made on a case-by-case basis and is dependent on the unique facts associated with each proceeding. * * *[65]

Beyond any doubt, QCC has established a *prima facie* case of unlawful rate discrimination as to each of the remaining Respondents. It is undisputed that each Respondent charged QCC higher rates for the identical switched access services than the rates charged to the IXCs with which each Respondent had a secret agreement for these same services. Further, QCC has demonstrated that the functionality and costs of switched access service is the same for every IXC. While the Respondents wish to hide behind their belief that QCC holds the burden to establish each fact or issue in dispute, the burden of going forward has shifted to the Respondents to establish a lawful basis for the admitted discrimination. However, the Respondents presented no credible evidence that the services provided to the preferred IXCs differed either functionally or as to costs from the services provided to QCC.

ISSUE 4: Does Qwest have standing to bring a complaint based on the claims made and remedies sought in (a) Qwest's First Claim for Relief; (b) Qwest's Second Claim for Relief; (c) Qwest's Third Claim for relief?

QCC's Position: ** Yes. As determined in Order No. PSC-11-0145-FOF-TP, QCC meets the two-prong standing test set forth in *Agrico*. QCC has suffered injury in fact which is of sufficient immediacy, and the substantial injury is of the type or nature that the proceeding was designed to protect. **

Argument

As this Commission has already concluded in this case, there is no factual or legal basis for the CLECs' contention that QCC lacks standing as a Complainant in this docket. Under

[65] *Offshore Telephone Company, ¶ 32.* Federal courts employ the identical 3-step analysis to resolve Section 202(a) discrimination claims. *Nat'l Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 129 (2d Cir. 2001).

Florida law, to withstand a challenge to its standing to pursue its causes of action, QCC must allege that it will (1) suffer injury in fact which is of sufficient immediacy; and (2) that the substantial injury is of the type or nature that the proceeding was designed to protect.[66]

QCC's Amended Complaint and the record evidence allege and establish that QCC is now incurring and will continue to incur detriment because, as a captive customer of critical switched access services, it is being subjected to unreasonable rate discrimination by the CLECs, some of which persist in charging other IXCs rates not found in their price lists. The detriment from the CLEC conduct began years ago, continues today and will certainly continue indefinitely unless the Commission intervenes. The first prong for standing (injury in fact of sufficient immediacy) is easily satisfied.

The second requirement for standing is that the detriment be of the type and nature that the proceeding was designed to protect. Here, the Amended Complaint and record evidence detail specific acts and omissions of the CLECs affecting QCC's substantial interests. The CLECs are subject to Commission jurisdiction. Their actions violate former sections 364.04, .08 and .10, which the Commission is and was required to enforce.[67] The relevant statutes thus protect persons, including QCC, from unreasonable disadvantage and unreasonable prejudice. Indeed, the statute's protection is drafted to be broad and sweeping, protecting persons from "disadvantage in any respect whatsoever" by conduct like that alleged in the complaint.

In Order No. PSC-11-0145-FOF-TP, which denied a Joint CLEC motion to dismiss QCC's complaint, the Commission held unambiguously that QCC has standing. Specifically, the Commission found that:

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[66] *Florida Society of Ophthalmology v. State Board of Ophthalmology*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1333 (Fla.1989); *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982).

[67] Section 364.01(1), F.S. ("The Florida Public Service Commission *shall exercise* over and in relation to telecommunications companies *the powers conferred in this chapter.*") (emphasis added).

> It appears that Qwest meets the two-prong standing test in Agrico. Qwest has shown that being subjected to unreasonable rate discrimination, resulting in paying an amount higher for switched. access service than was provided to other similarly situated companies causes Qwest to suffer an immediate and ongoing injury in fact which is quantifiable and actual. As discussed earlier, we have the authority to investigate anticompetitive behavior and unlawful discrimination amongst telecommunication providers, such as those alleged by Qwest in this proceeding. Therefore, we find that Qwest has standing to raise the issue of anticompetitive activity and unlawful discrimination pursuant to Agrico.[68]

The Respondent CLECs argued in their July 2011 Motion to Dismiss that as a result of the Regulatory Reform Act, QCC no longer has standing to bring this Complaint. However, the Commission already rejected that argument in its ruling denying the Motion to Dismiss. Neither the factual nor legal basis underlying the Commission's ruling has changed. The Commission should affirm its prior ruling and affirm that QCC has standing to pursue its claims herein.

ISSUE 5: Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

QCC's Position: ** Yes. By charging QCC the higher price list rates for switched access, while charging other IXCs lower contract rates for the identical service without reasonable justification for the differential rate treatment, the CLECs engaged in unreasonable rate discrimination in violation of Florida law. **

Argument

At the heart of this litigation is whether the Respondent CLECs violated former Sections 364.08 and .10 with regard to their provision of intrastate switched access in Florida. While the Respondents pay considerable attention to the fact that the 2011 Regulatory Reform Act repealed those two provisions, the fact remains that those statutes governed the Respondents' behavior during the vast majority of the time relevant to this case. In fact, the relevant conduct of TWT, Flatel and Navigator occurred entirely while 364.08 and .10 were in effect. As to BullsEye and Ernest, the vast majority of the discriminatory conduct occurred prior to July 1, 2011, as Mr.

[68] Order No. PSC-11-0145-FOF-TP, Issued March 2, 2011, at p. 6.

Canfield's prefiled testimony and exhibits make clear.

Thus, while the CLECs would have the Commission believe that the Regulatory Reform Act rendered the legislature's prohibition of unreasonable rate discrimination a nullity – prospectively and retrospectively – that is simply not the case. And the record evidence makes abundantly clear that the CLECs lacked any justification – let alone a reasonable one – for providing preferential rate treatment to other IXCs. As such, QCC's complaint should be granted as to each remaining Respondent, and QCC should be awarded refunds in the principal amount described by Mr. Canfield, plus any additional principal sums that have accrued since March 2012 (as to BullsEye and Ernest) and plus interest (as to all the Respondents).

A. Florida Law Plainly Prohibited Unreasonable Rate Discrimination By CLECs.

The statutes central to this case plainly prohibit discriminatory behavior.

> **364.08 Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.**
> (1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file or otherwise published and in effect at that time. A telecommunications company may not extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.
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> **364.10 Undue advantage to person or locality prohibited**
> (1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

In addition to proscribing unreasonably discriminatory conduct, the legislature also mandated that the Commission enforce the prohibitions. Former section 364.01(4)(g) stated that the "commission *shall* exercise its exclusive jurisdiction in order to...[e]nsure that all providers

of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

The legislature further made clear that these prohibitions applied to CLECs, unless and until a CLEC sought and obtained Commission exemption. Section 364.337(2) states that a "certificated competitive local exchange telecommunications company may petition for a waiver of some or all of the requirements of this chapter, except ss. 364.16, 364.336, and subsections (1) and (5)." It also lists sections from which CLECs are automatically exempt. The list conspicuously omits 364.08 and .10.

Despite the Respondents' insistence that sections 364.08 and .10 did not apply (or were not intended to apply) to CLEC behavior, the statutory language does not exempt CLECs[69] and the CLECs never tested that theory and never sought a waiver (which by their own logic would have been granted). Commissioner Deason's view of what the Commission may have believed belies the simple and undeniable fact that the Commission never entered an order exempting all, some or even one CLEC from sections 364.08 and .10.[70] As such, fundamental rules of statutory construction require that statutes be given their plain meaning and that exemptions not be inferred when the legislature has not provided them. Given the legislature's specific guidance in 364.337 (exempting CLECs from particular statutory requirements and inviting CLECs to seek exemptions of virtually all other provisions of chapter 364), the Respondents' argument that they were immune from sections 364.08 and .10 (via some phantom, unarticulated "understanding") lacks any merit.

TWT witness Don Wood also dedicates inordinate effort to arguing that the CLECs were

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[69] TR 566-569, Wood Cross.

[70] Given that there is no Commission order confirming or supporting Commissioner Deason's reasoning, Commissioner Deason can only be testifying as to his own opinion, as opposed to the opinion of all Commissioners who served during or since his tenure at the Commission.

exempt from 364.08 and .10 because CLECs are subject to diminished regulatory oversight in Florida.[71] In this regard, Mr. Wood conflates two very different concepts in an attempt to mischaracterize QCC's position in this case. There is no doubt that CLECs are subject to diminished oversight. There is also no doubt that CLEC rates are not set or regulated by the Commission. However, those facts do not equate to an implied exemption from statutes that the legislature very clearly declined to exempt CLECs from. Contrary to Mr. Wood's obfuscation, QCC is not asking the Commission to turn back the clock and retroactively set or regulate CLEC access rates. The Commission has no such authority, and needs no such authority for purposes of this case. Because Florida law did clearly require CLECs to provide non-discriminatory rate treatment, the Commission's concern should be focused not on absolute rate levels (be the rate $.02 or $.20 per minute), but on relative rate levels. If a CLEC believed it was reasonable to charge AT&T $.02 per minute for switched access, it was required to likewise charge QCC that same rate if QCC was under "like circumstances."

B. The Respondents Have Admitted Differential Treatment.

As detailed in the Facts section above, each CLEC Respondent has on file with this Commission a price list establishing its rates for intrastate switched access services. It is beyond dispute that the Respondents charged QCC their price list rates. It is further beyond dispute that each Respondent charged one or more other IXCs lower rates for the identical bottleneck switched access service. While the magnitude of the discount varies from Respondent to Respondent and agreement to agreement, the Respondents overcharged QCC by between [redacted] relative to the preferred IXCs. As discussed above, the CLECs' price differentiation was not trivial whether expressed as a percentage or in dollars. Applying the preferential

[71] *See e.g.*, TR 488 ("Throughout their testimony, the Qwest witnesses assume that a regime of cost-based, highly regulated CLEC switched access rates exists in Florida – a regime that in reality does not exist and never has existed in Florida").

discounted rates enjoyed by the preferred IXCs to QCC's usage, QCC was overcharged – for Florida intrastate switched access services alone – by over [redacted] just by the remaining five Respondent CLECs. Through its complaint, QCC seeks refunds of those overcharged amounts, plus interest, as Florida law permits it to seek.[72]

C. The Respondents Secreted Away the Discounts and Failed to Provide Equivalent Rate Treatment to QCC or other IXCs.

Throughout this proceeding, numerous Respondent CLECs (particularly BullsEye) have placed inordinate focus on their contention that AT&T coerced them into entering the discount agreements by refusing to pay the CLECs' tariff rates.[73] While the insufficiency of that motivation is discussed at greater length below, the argument misses the point. QCC's position is not that the Respondent CLECs violated Florida law by entering the agreements for this or any other reason. Instead, the violations of law stem from the Respondents' *subsequent* conduct.[74]

After entering into the agreements (for whatever reason), the Respondent CLECs were fully capable of abiding by Florida law by (a) providing non-discriminatory rate treatment to similarly-situated IXCs including QCC, or by (b) amending their price lists to offer all IXCs equivalent rate treatment. That is precisely what Level 3 did, as explained by QCC witness Bill Easton.[75] By doing so, Level 3 obviated the need to take further affirmative steps and protected itself from any claim of rate discrimination. Every CLEC in this case could have done exactly the same thing, but chose not to. Instead, the Respondent CLECs held the discounts secret, refusing to disclose the agreements or to advise other IXCs (including QCC) that such

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72 *See* Order No. PSC-10-0296-FOF-TP, Issued May 7, 2010, at p. 6 (discussed at greater length regarding Issue 9a below).

73 *See e.g.*, TR 655-657, LaRose Rebuttal; TR 678-679, LaRose Cross.

74 TR 135-136, Easton Cross.

75 TR 63, Easton Direct. As Mr. Easton recounts, in the parallel Colorado proceeding, Level 3 witness Mack Greene testified that after entering into an off-tariff switched access agreement with AT&T, it modified its state switched access tariffs to reflect the same rate as set forth in the AT&T agreement. Upon learning that Level 3 had modified its tariff to reflect the AT&T agreement rate, QCC voluntarily dismissed Level 3 as a respondent in the Colorado proceeding.

agreements or rates were available.

The Respondent CLECs' failure to disclose the discounts casts considerable doubt on any claim that their preferential rate treatment was reasonable. Had the Respondent CLECs in fact believed the discounts were reasonable, or had they intended to make them available to other customers, they would have published the discounts in their price lists, setting parameters for IXCs to request equivalent treatment. But they did not. Instead, they embargoed the agreements, hiding behind confidentiality provisions they voluntarily agreed to and thereby limited the benefit of the agreements to the preferred IXCs. Confidentiality provisions did and could not lawfully prevent the Respondents from abiding by Florida law.

D. QCC and the Preferred IXCs Are and Were "Under Like Circumstances."

A hallmark of any rate discrimination analysis is the determination of whether two customers, the preferred and the non-preferred, are similarly situated (or "under like circumstances," per section 364.10). In all relevant respects, QCC is similarly situated to AT&T with regard to the Respondents' provision of intrastate switched access service in Florida.[76]

First, the service itself is absolutely identical (let alone being "like"). The functionality and service elements provided to QCC and AT&T were identical, as were the facilities they were provided over.[77] As an example, suppose there are two Miami neighbors, both of whom use BullsEye as their local exchange provider. Neighbor A has chosen AT&T as its IXC, while Neighbor B uses QCC as its IXC. Neighbors A and B each place 20 minute calls to the same friend in Tampa. In this scenario, despite the fact that BullsEye is providing the *identical*

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[76] In the parallel Colorado complaint proceeding, the Commission likewise concluded that the QCC and the preferred IXCs were similarly situated and that the CLECs had failed to establish a reasonable or lawful justification for the differential treatment. The Colorado Commission held that the CLECs (including BullsEye, Ernest and TWT) engaged in unreasonable and unlawful rate discrimination with regard to the identical agreements. Colorado ALJ Order, paras. 272-285; Colorado Order on Exceptions, paras. 72-77; Order: (1) Addressing Applications for Rehearing, Reargument, or Reconsideration; and (2) Remanding the Matter to the Administrative Law Judge with Directions, Decision No. C12-0276 (Colo. PUC Feb. 15, 2012) ("Colorado RRR Order"), paras. 68-77.

[77] TR 53, 56. Easton Direct.

originating access service over the *identical* facilities to AT&T and QCC, QCC is charged a rate [redacted] higher than is AT&T.

Second, the bottleneck nature of the service is identical whether the CLEC originates the call on behalf of QCC or AT&T. As confirmed by the FCC and numerous state commissions, CLECs (which typically lack monopoly power in downstream, retail markets) have bottleneck, monopoly control over switched access services they provide.[78] This is no less true for services provided to IXC AT&T than it is for services provided to IXC QCC. If dissatisfied by BullsEye's rate, whether on an absolute basis (because the rate is excessively high) or a relative basis (because QCC suspects that BullsEye is providing preferential rate treatment to QCC's competitor IXCs), QCC has no viable option to circumvent BullsEye's service because it is the end-user customer rather than the IXC that chooses the local exchange carrier. As such, with respect to seeking alternatives, QCC and AT&T are identical.[79]

Third, and most critically, a CLEC's cost of providing switched access to QCC is identical to its cost of providing the service to AT&T. Price differentiation is permitted when the cost of providing the service varies between customers. This conclusion is supported as a matter of economics and as a matter of law. As a matter of economic theory, Dr. Weisman explains that discriminatory pricing refers to price differences that cannot be explained by cost differences.[80] If, for example, one of the Respondents demonstrated that its relevant economic cost of

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78 TR 342-346, Weisman Direct.

79 The CLECs appear to argue that CLEC-provided switched access is not a bottleneck because, like other IXCs, QCC at times utilizes the services of underlying carriers ("ULCs") to carry long distance traffic and deliver it to terminating LECs. If the suggestion is that these ULCs provide QCC a meaningful alternative to CLEC-provided switched access, the CLECs miss the point. First, none of the traffic at issue in this case was handed to ULCs. QCC has only sought refunds relating to intrastate calls that it directly handed to the Respondent CLECs. Second, while it is true that QCC did not suffer discrimination as to calls handed by the ULCs (which are responsible for paying switched access to the LECs), the ULCs may have as the ULCs similarly had no competitive alternatives. In essence, there is only one gate to the end user, regardless of which IXC hands the call off for termination. TR 170-174, Easton Cross; TR 197, Easton Re-Direct; TR 332. Canfield Cross; TR 414-417, Weisman Cross.

80 TR 351-361, Weisman Direct; TR 389-390, Weisman Summary; TR 408-409, Weisman Cross.

providing switched access varies between customers – costing it less to provide switched access to AT&T than to QCC – its discount to AT&T might be justified. Yet, none of the Respondents endeavored to establish any such variance in cost. Neither BullsEye nor TWT performed cost studies, either before entering the secret discount agreements, or at any time since.[81] Given that the Respondents do not even allege any such cost differentials, there is no basis for the Commission to determine that the Respondents' undisputed rate differentiation is or was justified by differences in the cost of providing switched access.[82] As QCC's testimony is unrebutted on this point, the Commission should find that QCC is and was similarly situated to AT&T relative to the CLECs' provision of intrastate switched access.

As a matter of law, this principle has been upheld many times. Especially in the context of bottleneck, monopoly services, Florida courts and this Commission have likewise tied lawful price differentiation to the proof of cost differences in serving different customers. In *Mohme v. City of Cocoa*, the Florida Supreme Court considered the lawfulness of Section 180.191, which permitted municipalities to assess surcharges to consumers outside municipal boundaries. The Court cited earlier precedent for the proposition that such assessments are not necessarily discriminatory.

> The court made it clear that positive factual allegations are necessary on which to base a charge of discrimination. A different rate may be charged if it is justified because of the difference in cost to furnish service to those without the municipal limits, as compared to the cost to

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[81] In discovery, BullsEye refused to answer whether it had performed a cost study, and it provided no evidence of having performed one in prefiled testimony or at hearing. Hearing Exhibit 13 (BullsEye response to QCC's First Discovery), Bates No. 323. As such, the Commission can safely assume that BullsEye has prepared no such analysis. TWT admits it neither produced nor relied on a cost study. TR 646, Jones Cross; Hearing Exhibit 19 (TWT response to QCC's First Discovery), Bates No. 440. TWT witness Wood, who has apparently conducted multiple cost studies, did not perform one for this case. TR 578-579, Wood Cross.

[82] The CLECs may suggest that QCC held the burden to establish that the CLECs' cost of providing switched access did not vary by customer. TR 405, 408-409, Weisman Cross. Such a demand is unreasonable given that the CLECs are in the far better position to come forward with credible analyses regarding their own costs. QCC asked the CLECs for CLECs in discovery for such information, but the CLECs provided none. TR 352, Weisman Direct; Hearing Exhibit 43 (BullsEye Discovery Responses), p.6; Hearing Exhibit 56 (TWT Discovery Responses), p.6.

furnish it to those within the municipality.[83]

This Commission has likewise focused on cost bases for rate differences. In 1982, the Commission eliminated the City of Tallahassee's 15% surcharge for out-of-city customers on the basis that "the surcharge is not justified on a cost-of-service basis." The Commission reasoned:

> We consider the principle of avoidance of undue discrimination to be of particular relevance to this case. *The general purpose of establishing rate classifications is to have a generally homogeneous group of customers so that rates can be designed to track their cost causation pattern.* Unless a classification is based upon cost factors with a fairly high correlation to membership in the class, a fairly homogeneous group of customers is not obtained and undue discrimination may result.
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> *Changes in city limits appear to bear little, if any, relation to changes in cost.* An area is included within the city limits upon an affirmative vote for annexation. An area will remain outside the city limits in the absence of an affirmative vote. Thus, customers in the City's electric utility service area will have their rate classification determined, not by the cost of service to the area within which they live, but by the ballot. *We cannot reconcile this fact with the need to avoid undue discrimination in establishing rate classifications.* (italics added)[84]

To be clear, requiring proof of cost differentials is not tantamount to requiring that CLEC

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[83] *Mohme v. City of Cocoa, 328 So.2d 422, 424 (Fla. 1976), citing Cooper v. Tampa Electric Co., 154 Fla. 410 (1944)* and *Clay Utility Co. v. City of Jacksonville, 227 So.2d 516 (1st D.C.A.Fla. 1969).* In *Florida East Coast Ry. Co. v. King, 158 So.2d 523 (1963),* the Supreme Court made the following observation in a decision reviewing a Commission order prescribing uniform statewide rates for multiple shipments of crushed stone: "In numerous instances the Interstate Commerce Commission has heard request for multiple car rates. It has accepted the applications on their merits instead of denying them because of any claimed discrimination inherent in this type of rate. In all instances brought to our attention, however, the Commission has always required evidence of cost studies before arriving at a conclusion. * * * In the instant case, as we have emphasized, there is a total lack of cost data evidence to support the respondent Commission in prescribing the joint line rate differential." *Id. at 526.*

[84] *In Re: Rate Schedule Modification of the City of Tallahassee,* Order No. 11221 (1982). In 1988, the Commission disapproved an FPL large power agreement with Union Carbide. In its discussion rejecting the agreement, the Commission noted that "[a] rate based on cost of service is not unduly discriminatory." *In Re: Petition of Florida Power and Light Company for Approval of Large Power Agreement with Union Carbide Corporation.* Order No. 19231 (1988). While the Commission has permitted price differentiation on other factors, including the level of competition in varying wire centers (circumstances not present or relevant in this case), the Commission has noted that the "question of undue or unreasonable discrimination has historically hinged on cost differences inherent in serving customers in the same class or different classes." *In Re: Bell South Telecommunications, Inc.,* Order No. PSC-03-0726-FOF-TP (2003).

access rates be cost-based or Commission-determined, as the CLECs repeatedly claim.[85] Instead, the cost basis required in a discrimination analysis is merely a concrete and objective way of determining whether two customers (one advantaged, and the other disadvantaged) were sufficiently dissimilar – from the perspective of the utility – to justify differential pricing.[86]

E. The Respondents Fail to Demonstrate any Reasonable Basis for Their Admitted Price Differentiation.

Because QCC has established that each Respondent CLEC charged QCC higher rates for an identical service, the burden of going forward shifts to the Respondents to demonstrate a reasonable basis for such price differentiation.[87] The scattershot of *post hoc* rationalizations presented by the Respondents is unpersuasive.[88] None of the excuses offered by the Respondents is grounded in any economic reality or cost basis. None is supported by contemporaneous evidence that the Respondent CLEC agreed to discount its intrastate switched access to AT&T based on an analysis that it was less expensive for the Respondent CLEC to provide the service to the favored IXC. The record reflects that the Respondent CLECs entered these agreements as a matter of expediency. It is obvious from the record that BullsEye, for example, sought to avoid protracted billing disputes or litigation with AT&T over BullsEye's high switched access rates. And, the method chosen (the provision of off-price list discounts) was limited to just the preferred IXCs. The Respondents willfully secreted the discounts – ignoring statutory non-discrimination obligations – in the hopes of preserving their higher revenue streams from the non-preferred IXCs, including QCC.

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85 See e.g., TR 28, BullsEye Opening Statement ("Qwest has failed to recognize that there is no requirement in Florida that carriers price access at cost or some other level.").

86 See TR 390-391, Weisman Cross.

87 *Offshore Telephone Company, supra,* ¶32.

88 Because Ernest, Flatel and Navigator failed to file testimony or participate in the evidentiary hearing, QCC is unaware of what excuses, if any, those Respondents have to justify their discriminatory behavior. As such, this discussion will focus on BullsEye and TWT.

1. QCC's Willingness To Pay Its Bills Does Not Justify BullsEye's Discrimination.

BullsEye's repeated refrain, in explaining why it provided large discounts to AT&T for intrastate switched access service, is that AT&T coerced BullsEye into agreeing to the discount arrangements.[89] BullsEye does not claim that this distinction (QCC's willingness to pay BullsEye's price list rates, as compared to AT&T's unwillingness to pay) implicated a difference in its economic cost of providing the underlying switched access service. As such, the Commission should reject this "justification" out of hand.

Even assuming the Commission looks further at this alleged justification, and accepts it as factually accurate, AT&T's refusal to pay is not a legitimate basis permitting BullsEye to discriminate against QCC. It ignores that BullsEye had at its disposal many other options, all of which it ignored in an attempt to preserve as much access revenue streams as it could. In any event, such an excuse, if endorsed by the Commission is inconsistent with sound public policy.

BullsEye Had Many Other Options at its Disposal. QCC has no basis to doubt that AT&T refused to pay BullsEye's high switched access rates. Without justifying AT&T's handling of the situation,[90] BullsEye had numerous lawful alternatives at its disposal when faced with AT&T's unwillingness to pay. It could have filed civil or regulatory complaints against AT&T in one or more states. If it deemed formal litigation as too costly and slow an approach, BullsEye could have informally sought the assistance of Commissions, Commission staffs or state attorneys general. In addition, as Dr. Weisman explained at hearing, the CLECs could have

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[89] *See e.g.*, TR 655-657, LaRose Rebuttal; TR 678-679, LaRose Cross. In his witness summary, Mr. LaRose made clear that AT&T's refusal to pay, and predatory mentality, distinguishes it from QCC. TR 676 ("They [AT&T] are also a bully. They're a predator. And they can also be very arrogant. So with that reputation, I don't think that Qwest is even in a similar position to AT&T, although they may qualify in some of those aspects.").

[90] As the CLECs repeatedly pointed out at hearing, QCC protested AT&T's conduct to the point that QCC initiated civil litigation against AT&T in the state of Minnesota. *See* Hearing Exhibit 36 (QCC Civil Complaint). However, AT&T's conduct did not immunize the BullsEye from abiding by state non-discrimination requirements, and did not justify the BullsEye's choice to (ironically) engage in wanton *preferential treatment of AT&T* as a reward for its refusal to pay its price list rates.

easily banded together to seek intervention by state or federal departments of justice.[91] Finally, at the very least, BullsEye could have made available to other IXCs the discounts contained in the AT&T agreement or modified its price list upon agreeing to the ICB arrangement.

BullsEye Merely Wished to Preserve Revenue Streams. It requires no stretch of the imagination to understand *why* BullsEye chose to embargo the AT&T agreement rather than disclose it or provide equivalent rate treatment to others. BullsEye clearly wished to grease the squeaky wheel (AT&T), while preserving its revenue stream to the extent possible. This approach, while unlawful, had appeal to BullsEye for two reasons. First, it permitted BullsEye to obtain as much revenue from AT&T as it could without a public fight that may have drawn attention to its excessive access rates. Second, it permitted BullsEye to continue to enjoy the higher revenue streams from IXCs such as QCC that did not withhold payment.

This rationale does not provide a reasonable justification for rate discrimination.[92] Similarly, QCC's willingness to pay its bills (as compared to AT&T's apparent refusal) does not create a meaningful distinction rendering (as BullsEye asserts) QCC dissimilarly situated from AT&T in the context of the CLECs' provision of switched access in Florida. If BullsEye wished to resolve further dispute by dramatically lowering its effective rates, that action was certainly permissible, as long as it likewise lowered its rates to *all IXCs*. It did not do so, and instead hid its discounts to AT&T so as to preserve its revenue stream, at QCC's expense. Arguably, BullsEye used revenues from QCC to subsidize the discount granted to AT&T.

Sound Public Policy Does Not Support the CLECs' Argument. Just as permitting significant rate discrimination against a party based on its "willingness to pay" is unsupportable as a matter of law and economics, it is similarly unsupportable as a matter of public policy. As

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91 TR 411-413, Weisman Cross.

92 In his direct testimony, Dr. Weisman explains that AT&T's "unwillingness to pay" does not constitute a legitimate basis for distinguishing between customers, as a matter of economics. TR 353-355, Weisman Direct.

both QCC and BullsEye seem to agree, IXCs should not be encouraged to engage in self help.[93]

At hearing, Mr. LaRose agreed that the Commission should not encourage customers to simply withhold payment when those customers believe the utility's rates are too high.[94] While he showed disdain for AT&T's "predatory" conduct, BullsEye's advocacy asks the Commission to endorse this very conduct by finding that BullsEye was justified in denying QCC rate treatment equivalent to AT&T because, unlike AT&T, QCC did not engage in such self help. Adopting BullsEye's irreconcilable arguments would be incompatible with sound public policy goals such as ensuring fair treatment by public utilities, promoting competition, and encouraging compliance with statutory obligations.

2. AT&T's Purchase of Unrelated, Unregulated Services Does Not Justify TWT's Discriminatory Rate Treatment.

TWT premises its entire defense of QCC's complaint on the fact that AT&T agreed to purchase (on a "take or pay" basis) large sums of other services under the 2001 AT&T-TWT agreement. The agreement primarily focused on providing discounts on unregulated[95] "special access and direct transport" services in exchange for AT&T's agreement to meet a total revenue commitment. While TWT describes Florida intrastate switched access services as "integral" to the agreement and the revenue commitment, Ms. Jones admits that they accounted for [redacted] of commitment.[96] Because QCC was (according to TWT) not capable of meeting the same total revenue commitment, [redacted] of which related to services other than those at issue in this case, TWT concludes QCC and AT&T were not similarly situated with regard to TWT's provision of intrastate switched access in Florida. TWT's argument fails for numerous reasons.

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93 TR 61-63, Easton Direct.

94 TR 683, LaRose Cross.

95 TR 557, Wood Witness Summary ("The terms and conditions of this contract include a commitment from AT&T to purchase large volumes of unregulated services....").

96 TR 623, Jones Direct.

Premising a Switched Access Discount on Buying Unrelated Services is Unreasonable.

As a matter of economics and common sense, it is unreasonable to condition a discount off of bottleneck switched access services on the purchase of unrelated, competitive services. As Dr. Weisman explains, TWT has not demonstrated a credible economic basis for favoring AT&T in its pricing of intrastate switched access in Florida.[97] TWT has not demonstrated, nor does any economic study of which Dr. Weisman is aware demonstrate, that the cost of providing switched access varies with the amount of unrelated services purchased by an IXC.[98] The absence of such proof is not surprising. The two types of services (switched access and special access) are virtually unrelated, except to the extent that an IXC with large volumes of traffic to a particular calling area or location may find it economically advantageous to purchase special (dedicated) access as an alternative to switched access. The record is devoid of any credible evidence that a LEC's cost of providing tandem-routed switched varies based on which IXC customer is using the service, how many minutes of use that IXC (or any IXC) uses in a particular month or what and how many other unrelated services an IXC happens to purchase from the LEC.[99]

While it may have been expedient and "profitable"[100] for TWT to conjoin these two unrelated services (competitively-supplied dedicated services and bottleneck switched access), TWT has no proof whatsoever that AT&T's purchase of the unrelated service altered TWT's cost of providing AT&T switched access. The Colorado Commission reached the identical conclusion in its orders holding TWT liable to QCC for unreasonable rate discrimination regarding the identical agreement. In a Recommended Decision later affirmed (in relevant part) by the full Commission, the Colorado ALJ held as follows. "In any event, the combination of

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97 TR 355-356, Weisman Direct.

98 Id.

99 Id.

100 TR 625-626, Jones Rebuttal; TR 646, Jones Cross.

access with other tariff and off-tariff provisions in contract cannot change consideration of statutory compliance for access services. The substance of access agreements must prevail over form and access services cannot be obscured or obviated by inclusion with other terms. Focusing upon the access service at issue, as segregated consistent with § 40-15-105, C.R.S., the creativity of those contracting cannot change the access service provided nor the unlawful pricing thereof."[101] Presented with the same agreement, the same circumstances and the same statutory prohibition of rate discrimination, this Commission should reach the same conclusion.

TWT's Arguments Appear to be Pretext. TWT asks the Commission to believe that the AT&T's purchase of unrelated, competitive services and its purchase of intrastate switched access were integrally related. But they were not. While TWT bases its defense on the fact that the switched access discounts were part and parcel of a larger agreement (and critical to the overall take or pay nature of the agreement), the 16th Amendment to the agreement renders that argument highly suspect. Under that Amendment, the parties agreed to remove the switched access discounts (leaving AT&T paying the same price list rate QCC has paid all along) and, nevertheless, agreed to *extend* the agreement.[102] The Amendment proves that the switched access discounts were not critical to the overall agreement and/or that TWT could have accomplished the same "bargain" with AT&T without providing preferential rate treatment for Florida switched access. Thus, the paradigm TWT is trying to portray in this case rings hollow.

Furthermore, TWT's own testimony confirms that the take or pay agreement (as designed by TWT) could apply to only one IXC, AT&T.[103] Given the utter disconnection between

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101 Colorado ALJ Order, at para. 285, affirmed by Colorado Order on Exceptions, at paras. 60, 64, 70, 72-76 and Colorado RRR Order, paras. 80-84.

102 Hearing Exhibit 55 (TWT-AT&T agreement), pp. 83-99 (16th Amendment to TWT-AT&T agreement). TR 640-644, Jones Cross.

103 TR 624, Jones Rebuttal ("AT&T was the only TWTC customer whose spend was great enough to make it feasible to commit to the 'Total Cumulative Revenue Commitment' amount stated above.").

dedicated and special access services on the one hand and switched access on the other hand, the Commission should be wary to accept TWT's explanation. If this agreement could truly only exist for one IXC (AT&T) – and the reason for that is that AT&T is the only IXC to purchase such large levels of the unrelated service that comprises [redacted] of the revenue commitment required under the agreement – it is clearly unreasonable to disadvantage all other Florida IXCs as to the pricing of switched access on that basis. This Commission's purview is to enforce the statutory non-discrimination requirements of Florida statute as they pertain to CLEC-provided switched access. As the Colorado Commission found, TWT should not be able to obscure those statutory mandates on the basis of one customer's willingness to purchase large amounts of unrelated and unregulated services. To do so would be to glorify form over substance. QCC is not, contrary to TWT's argument at hearing, asking the Commission to award QCC a preferential deal which would treat "tw and AT&T unfairly and unreasonably."[104] It is seeking the non-discriminatory rate treatment for intrastate switched access services guaranteed by statute. That TWT chose to dress up its discount to AT&T by combining it with AT&T's purchase of entirely unrelated services does not, as TWT suggests, absolve TWT of its statutory obligations, and does not divest QCC of its entitlement to equivalent rate treatment.

3. The CLECs' Other Justifications Fail as Well.

While BullsEye and TWT primarily focus on the issues of coercion and the purchase of other services, a handful of other *post hoc* rationalizations are also floated. In their Prehearing Statements, the CLECs include the following assertion: "[t]he circumstances of each transaction may vary for any number of reasons, such as the volume and type of services being provided, the expected volume of switched access traffic, the term length, pending disputes between the parties, and the parties' respective bargaining skills. Because Qwest ignores such factors, it fails

104 TR 39, TWT Opening Statement; TR 558-559, Wood Witness Summary.

to demonstrate any 'unreasonable discrimination.'"

Most of these justifications are left entirely unexplained, and seem to make no sense. As to the "type of service provided," it is established and uncontested that the switched access the Respondents provide to QCC is identical in all respects (except as to price) to the switched access it provides to AT&T and other IXCs. The services provided to QCC use the identical facilities and cost the CLEC exactly the same as the services provided to AT&T. Barring any further specificity as to how the "types of services" differ (which specificity cannot be found in the record evidence), the Commission should reject this curious argument.

As to traffic volumes, this argument too lacks any credibility or evidentiary support. There is no evidentiary basis to conclude that the volume of switched access purchased by AT&T alters the CLECs' cost of providing the service to AT&T and/or that such costs were even considered by the contracting parties. Neither BullsEye's nor TWT's agreements tie the discount to be received by AT&T [redacted] Thus, reliance on "volumes" as a distinguishing feature is inapt. The Colorado Commission found the absence of volume commitments to be fatal to the CLECs' argument that "traffic volumes" rendered QCC and the preferred IXCs sufficiently dissimilar to justify the CLECs' discriminatory rate treatment.[106]

In addition, as Dr. Weisman explains, there is no theoretical or quantifiable basis to

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105 Hearing Exhibits 42 (BullsEye-AT&T agreement) and 55 (TWT-AT&T agreement). TR 62, Easton Direct.

106 Colorado Order on Exceptions, para. 75 ("[W]e find most persuasive QCC's argument that none of the unfiled off-tariff agreements ties the discount to the IXC to the purchase of specific volumes of switched access service. To the contrary, all of the unfiled agreements at issue in the instant proceeding grant the discount in unlimited fashion, regardless of how much switched access a favored IXC purchases. This alone is fatal to the claim that differences in size or traffic volumes justify price differentiation in this case.").

conclude that volume discounts are cost justified or otherwise appropriate in the context of switched access. Given that each minute of switched access costs the CLEC providing the access the same, there is no clear economic basis for distinguishing between larger and smaller consumers of this particular service.[107] Finally, if the ICB discounts were in fact granted to AT&T by virtue of its volumes, one could reasonably expect that CLECs would have published the availability of volume discounts in their price lists. Yet, not a single CLEC switched access price list provides for volume discounts. All these factors, taken individually and as a whole, squarely suggest that the CLECs did not grant AT&T volume-based discounts. Instead, this appears to be just one of many *post hoc* rationalizations concocted to deflect the Commission's attention from the CLECs' unambiguous violation of Florida law.[108]

In the final analysis, the Respondent CLECs have not met their burden to come forward with and demonstrate any lawful justification for their admitted price discrimination. They have offered a few theories in support of their actions, but the theories are factually unsupported and legally deficient. QCC's complaint should be granted.

ISSUE 6: Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

QCC's Position: ** By charging QCC the higher price list rates for switched access, while charging other IXCs lower contract rates, the Respondents failed to abide by their price lists. Once the CLECs voluntarily filed price lists, they were bound to apply their price list rates in a nondiscriminatory manner. **

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107 TR 359-361, Weisman Direct.

108 The remaining generalized excuses are similarly unpersuasive. The CLECs have offered no explanation as to how or why the term of the agreement renders QCC and AT&T dissimilar. As QCC was not presented the opportunity to enjoy the benefit (or even be aware of) the CLECs' secret discount agreements, there is no basis to assume that the term of the agreement would have inhibited QCC's agreement to accept a similar discount. The CLECs' references to pending disputes and bargaining skill are veiled references to the "coercion" that BullsEye relies on in defense of its discriminatory conduct. To suggest that QCC deserved or deserves inferior rate treatment because it did not engage in self help or otherwise "coerce" BullsEye into granting QCC discounts is absurd, contrary to public policy and contrary to law.

Argument

Former section 364.04(2) provided that telecommunications rate schedules "shall state separately all charges and all privileges...granted or allowed and any...forms of contract which may in anywise change, affect, or determine any of the aggregate of rates." While CLECs were not required to make price list filings for switched access, they were permitted to by Rule 25-24-825(2), FAC, and each of the remaining Respondents did so. Upon voluntarily filing a price list, the CLEC became bound by section 364.04 and the obligation to abide by its price list.

The record evidence is uncontested that, while the Respondents charged QCC their price list rates, they secretly deviated from those rates for the benefit of one or more other IXCs. By doing so, they violated section 364.04 to the detriment of QCC by subjecting QCC to unreasonable prejudice and disadvantage and to discriminatory treatment with respect to rates for intrastate switched access provided to other similarly-situated IXCs. While the CLECs emphasize (in the Prehearing Statements) that they *did* abide by their price lists in connection with their pricing of switched access to QCC, they conveniently omit that they deviated from their published rates in favor of other IXCs.

ISSUE 7: Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

QCC's Position: ** In addition to violating Sections 364.08 and .10, BullsEye violated its own price list by failing to extend special contract pricing to similarly situated IXCs, including QCC. **

Argument

In addition to violating Sections 364.08 and .10 by denying QCC equivalent rate treatment to that granted to AT&T, BullsEye violated the provisions of its own published price list. As discussed above, Section 5.1 of BullsEye's price list states that BullsEye may enter into

ICB ("special contract arrangements") agreements, but promises that such "[s]ervice shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract."[109]

For all the reasons discussed above regarding Issue 5, BullsEye's conduct violates the terms of its own price list, and thus section 364.04. Because QCC is and was similarly situated to AT&T, BullsEye was required, by its own published rate schedule, to extend equivalent rate treatment to QCC. It did not, and as a result it violated the terms of its price list and Florida law.

ISSUE 8a: Are Qwest's claims barred or limited, in whole or in part, by the statute of limitations?

QCC's Position: ** No. Under Florida case law and prior Commission decisions, the Florida statutes of limitations applicable to civil actions do not apply to an administrative action based on statutory violations. Further, the CLECs' willful conduct precludes any argument that QCC's objection was untimely. **

Argument

Respondent CLECs have asserted that QCC's Complaint is barred, at least in part, by the limitations periods set forth in Section 95.11, specifically the four-year limitation on actions based on statutory violations set forth in subsection (3)(n). Reliance on the limitations in ch. 95 is misplaced. Commission precedent holds that the limitations in ch. 95 do not apply to the Commission's actions, including proceedings involving Commission-ordered refunds, the relief QCC is seeking in this case.[110]

In a case brought by a customer against Florida Power Corporation seeking refunds for electric charges for services never received, the Commission specifically rejected Florida Power Corporation's argument that the refunds were limited by the limitations in ch. 95, holding that

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[109] Hearing Exhibit 44 (BullsEye Price List). TWT's price list contains a similar provision. However, QCC mistakenly overlooked TWT in its Third Claim for Relief.

[110] See, e.g., *In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million*, Order No. PSC-07-0816-FOF-EI in Docket No. 060658-EI, issued October 10, 2007 (In determining how far back it could conduct a prudence review of past expenditures to determine if customers refunds were due, the Commission found that "As of today, there is no statute of limitation or jurisdictional limitation placed on our ability to review past expenditures.").

"Chapter 95, Florida Statutes, did not bar [the customer's] entitlement to reimbursement for a period in excess of four years."[111] It appears that the only decisions where the Commission has considered that the statutory limitations periods may be applicable were decisions relating to arbitrations or enforcement of interconnection agreements.[112]

The Commission's rulings regarding the applicability of the statutory limitations periods to its actions are also consistent with Florida case law relating to the applicability of the limitations periods in administrative actions. Florida case law recognizes that ch. 95 by its terms is applicable to "civil actions or proceedings," which are generally actions brought in court.[113] On this basis, courts have distinguished administrative enforcement actions from administrative actions to enforce private rights as far as the applicability of the limitations periods in chapter 95.[114] In this proceeding by QCC to obtain refunds of discriminatory overcharges, a finding that ch. 95 is inapplicable is supported by the nature of the Commission's authority and its own precedent that the statutes of limitations do not apply to its ability to order refunds in the exercise of this authority.

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[111] *In re: Complaint of Louis Svabek against Florida Power Corporation*, FPSC Order No. 13455 in Docket No. 840037, issued June 25, 1984 at page 1.

[112] See, *In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida, Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company*, Order No. PSC-03-1139-FOF-TP in Docket No. 020960 issued October 13, 2003 at page 15 (in which the Commission applied the statutory 5-year limitation on actions brought under contract as the time frame within which a company could backbill under the interconnection agreement); *In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated*, Order No. PSC-05-1234-FOF-TP in Docket No. 041144-TP, issued December 19, 2005 at page 50 (in complaint to collect unpaid access charges due under the parties' interconnection agreement, the Commission held "Sprint's backbilling is limited, if at all, only by section 95.11(2), Florida Statutes.").

[113] See, *Sarasota County v. National Bank of Cleveland*, 902 So. 2d 233, 234 (Fla. 2d DCA 2005) ("Nothing in section 95.11(3)(c) suggests that the legislature intended it to apply to quasi-judicial proceedings initiated pursuant to any administrative law, and we are inclined to conclude the same as to all of chapter 95.").

[114] See, *Hames v. City of Miami Firefighters' and Police Officers' Trust*, 980 So. 2d 1112 (Fla. 3rd DCA 2008) (noting that the limitations in ch. 95 have typically been held to apply only to claims that were filed as a direct administrative substitute for a civil action).

Even if the Commission finds that the statutory limitations period applied to QCC's action, time periods otherwise outside the limitations period should not be barred because the actions of the Respondent CLECs themselves prevented QCC from filing its Complaint at an earlier time.[115] As detailed in the testimony of QCC witness Lisa Hensley Eckert, these actions included keeping secret their agreements with other IXCs, failing to make the lower rates available to other similarly situated IXCs, and refusing to respond to QCC's request for information concerning the agreements and for similar rate treatment.[116]

Florida courts have recognized that equitable principles may allow actions to be brought outside the otherwise applicable limitations period.[117] These principles recognize exceptions to the strict application of the statutory limitations period when the delay occurs either through ignorance or other excusable neglect of the party bringing a claim or because of actions of the party against whom a claim is brought.[118] Equitable principles bear consideration in this case as well, where QCC was prevented from filing a complaint because of the actions of the Respondent CLECs to keep their preferential agreements secret, as well their refusal to respond to QCC's requests for information concerning the preferential agreements and rates.[119] In fact,

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115 Even if the Commission finds that the 4-year limitations period applies and that the Respondents are not precluded from asserting such a defense, most of the overcharges at issue in this case occurred within 4 years of QCC's commencement of this litigation.

116 TR 213-221, Hensley Eckert Direct.

117 QCC understands that the Florida Supreme Court has generally limited the application of the "delayed discovery rule" as it relates to the timeliness of court actions to the types of actions specifically delineated in s. 95.031. See, *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002). But see, *Butler University v. Bahssin*, 892 So. 2d 1087 (Fla. 2d DCA 2004), a case subsequent to Davis where the DCA applied the delayed discovery rule to an action to recover misappropriated property.

118 For instance, equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant. *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988). "Equitable estoppel" is applicable where "one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001). The two principles differ in that equitable tolling tolls the limitations period as a result of excusable actions by plaintiff, whereas equitable estoppel bars the defendant from asserting the limitations period as a defense because of the defendant's actions.

119 TR 213-221, Hensley Eckert Direct.

QCC did not become fully aware of the existence of Respondent agreements applicable to Florida until it received the responses to the Commission's subpoenas issued after and on the basis of QCC filing this Complaint.[120]

Based on the Commission's precedent and consistent with Florida case law, the Commission should find that there is no limitation on the time frames encompassed by QCC's Complaint. However, even if the Commission determines that the statutory limitations period does apply, the Commission should find that it does not serve as a bar to any portion of QCC's Complaint because of the actions of the Respondent CLECs which prevented and delayed QCC from filing its Complaint.

ISSUE 8b: Are Qwest's claims barred or limited, in whole or in part, by Ch. 2011-36, Laws of Florida?

QCC's Position: ** No. Ch. 2011-36 is not retroactive and does not bar QCC's Complaint for discriminatory pricing prior to the effective date of the law. Further, the Commission continues to have exclusive jurisdiction over wholesale carrier-to-carrier disputes and maintains its obligation to ensure fair and effective competition among telecommunications service providers. **

Argument

As discussed above, the Regulatory Reform Act (Ch. 2011-36, Laws of Florida) was not retroactive, and contains no provision barring or limiting claims based on conduct preceding its effective date. There is no legal or factual support that this affirmative defense (if it is even a cognizable affirmative defense) is applicable to this case. In their Prehearing Statements, the CLECs simply state that "Qwest's claims are completely barred by the Regulatory Reform Act. See CLEC Group positions on Issues Nos. 1 and 2 (jurisdiction) and 4 (standing)." Given that the CLECs do not make any independent argument concerning this alleged affirmative defense,

[120] It is possible that BullsEye or TWT will assert that QCC could have filed this case sooner, even without knowledge of which CLECs entered into agreements relevant to Florida switched access. As the Colorado Commission found when faced with the identical argument, QCC was not required to commence complex litigation in order to uncover whether it was being unlawfully discriminated against. *Colorado Order on Exceptions, para. 54.*

QCC refers the Commission to its discussion of Issues 1, 2 and 4, above.

ISSUE 8c: Are Qwest's claims barred or limited, in whole or in part, by terms of a CLEC's price list?

QCC's Position: ** No. The Respondent CLECs have failed to demonstrate that the terms of their price lists justify their discriminatory treatment of QCC or serve to bar QCC's Complaint or the relief it seeks. **

Argument

The CLECs contend that their price lists preclude QCC's claims for two reasons. Neither the record, nor common sense, supports the CLECs' arguments.

Timeliness. The CLECs claim that QCC's claim is precluded by price list provisions which set time limits on submitting billing disputes. More specifically, the CLECs claim in their Prehearing Statements that "[f]or years prior to filing its complaint in this case, Qwest knew it had a dispute with CLECs, but failed to submit disputes based on its claims in this case and continued to pay the price list rates." The CLECs' ploy of blaming QCC for paying its bills lacks merit. First, QCC's claim is not based on the price list or, more pointedly, the CLECs' failure to assess QCC the price list rate. Instead, QCC's complaint makes clear that QCC seeks refunds for the CLECs' discriminatory overcharges. The CLECs violated *Florida statute*, and QCC's primary claim is entirely independent of the CLECs' price list. Because this is not a price list billing dispute, the price list provisions the CLECs vaguely reference are irrelevant.

Second, the Commission should not lose sight of the fact that any "delay" in initiating this claim was based solely on the CLECs' willful concealment of the facts underlying QCC's claims. In fact, as to each of the remaining Respondents, QCC did not have possession of Florida-specific contract rate information until *after* QCC initiated this complaint and received responses to the Commission's subpoenas. That is because, as discussed above, QCC was denied critical information (i.e., the facts as to which CLECs were providing below-price list rate

treatment to select IXCs in Florida) by the CLECs despite QCC's persistent effort to uncover that information. The CLECs virtually acknowledge this fact by their intentional use of a generalized argument in their Prehearing Statement. BullsEye does not state that QCC knew it had a dispute with BullsEye for years prior to filing the complaint. Instead, the CLECs imprecisely assert that "Qwest knew it had a dispute with CLECs" for years. Lacking the specifics as to which CLECs were providing what discounts in Florida, QCC cannot be said to have waited too long to pursue its claims. See QCC's discussion of Issues 8a and 8d.

Failure to initiate negotiations. In their Prehearing Statements, the CLECs suggest that QCC is claims are barred because QCC failed to initiate negotiations for preferential switched access rates despite the existence of price list language suggesting that TWT and BullsEye permitted individual contracts. It is unclear whether the CLECs argue that QCC is not entitled to relief under its Third Claim of Relief because it did not initiate negotiations or is not entitled to relief under any Claim for Relief on this basis. In either case, the CLECs are incorrect.

As an IXC, QCC is provided switched access by over 700 CLECs nationwide.[121] Those CLECs, and not their IXC customers, hold the statutory burden to avoid discriminatory and anticompetitive practices. This argument – that QCC lost the protections of sections 364.08 and .10 because it did not seek out non-discriminatory treatment – is absurd and unsupported by the language of those statutes or common sense. Furthermore, the argument falsely assumes that QCC was aware that BullsEye, for example, was offering some IXCs off-price list pricing for switched access. Clearly, QCC should not be required to proactively police the practices of 700 different providers in order to assure itself the statutory protections the legislature granted it.[122] It further ignores that, even had QCC approached all 700 CLECs, there is very little basis to

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121 TR 119, 151, Easton Cross.

122 TR 237-238, Hensley Eckert Cross.

assume that the CLECs would have been forthcoming with information about discounts being provided to IXCs or would have simply granted QCC equivalent rate treatment. As Ms. Hensley Eckert describes, QCC did approach approximately 90 CLECs before initiating these complex complaint cases in an attempt to informally gather information and resolve these issues. The CLECs largely ignored QCC's correspondence, and not a single one of them granted QCC equivalent rate treatment as a result of those inquiries.[123] Once again, the CLECs blame the victim, and are attempting to deflect any responsibility for their own conduct.

ISSUE 8d: Are Qwest's claims barred or limited, in whole or in part, by waiver, laches, or estoppel?

QCC's Position: ** No. The Respondent CLECs have failed to demonstrate that QCC's claims are barred by waiver, laches or estoppel. **

Argument

In their Prehearing Statements, the CLECs argue that QCC "knowingly waived its rights and should not otherwise be allowed to assert those rights because Qwest: (i) knew of the alleged violation of its legal rights, yet inexcusably took more than 4 years to assert them; and (ii) knew that it had the duty to submit billing disputes to, and seek contract negotiations with, the CLECs but refused to do so, even though, all the while, Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Therefore, Qwest cannot be heard to complain now when Qwest failed to timely pursue rights it knew it had." The CLECs' arguments about submitting billing disputes, initiating negotiations and entry into other contracts are addressed regarding Issues 8c and 8g.

Laches is an equitable defense which "requires proof of (1) lack of diligence by the party

[123] TR 218-219, Hensley Eckert Direct, 242-243, Hensley Eckert Cross (questions by Commissioner Balbis).

against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[124] If the Commission decides to consider the CLECs' ill-defined laches defense, the facts underlying the defense are similar or identical to the facts underlying a statute of limitations defense.[125] For all the reasons discussed above regarding Issue 8a, the CLECs have failed to demonstrate that QCC's claims should be barred on this basis. QCC exercised considerable diligence over the years of attempting to gather the information necessary to protect its rights, and was frustrated all along the way by the CLECs' uncooperativeness.

As Ms. Hensley Eckert detailed in her prefiled testimony and at hearing, QCC made numerous attempts to gather information necessary to understand which CLECs had entered into the subject agreements, and in what states. Once QCC became aware of the Minnesota Department of Commerce complaints in 2005 (a year after the cases were commenced),[126] QCC served Data Practices Act requests seeking disclosure of the subject agreements. QCC's request was declined.[127] QCC nevertheless continued to pursue copies of the agreements, both on a public and confidential basis, through the Minnesota proceedings. In June 2006, a small handful of the agreements were provided on a public basis.[128] While QCC was provided a highly redacted portion of the TWT-AT&T agreement, that document contained no information suggesting preferential rate treatment *in Florida.*[129] In addition, in 2007 QCC attempted to informally gather relevant information through ordinary business contacts with CLECs. Those

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124 *McCray v. State, 699 So.2d 1366, 1368 (1997), quoting Costello v. United States, 365 U.S. 265, 282 (1961).*

125 In at least one case, the Commission has rejected laches as a defense on the basis that it seeks "equitable relief" which is not within the Commission's jurisdiction to grant. *In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.*, Order No. PSC-12-0390-FOF-TP, issued July 30, 2012.

126 TR 213-214, Hensley Eckert Direct; Hearing Exhibit 9 (QCC response to Broadwing discovery), Bates No. 250.

127 TR 215, Hensley Eckert Direct.

128 TR 215-216, Hensley Eckert Direct.

129 TR 216, Hensley Eckert Direct.

efforts also failed.[130] In early 2008, QCC made one final informal attempt by sending out substantively-identical demand letters to 90 CLECs nationwide. For the most part, QCC's letters were ignored, and certainly none of the remaining CLECs in this case provided Florida-specific information.[131] Having been frustrated at every turn by the CLECs (who now audaciously blame QCC for "waiting too long" to file the Florida complaint), QCC finally relented and filed regulatory complaints in Colorado, California, New York and Florida in 2008 and 2009.[132]

To support laches, the CLECs must also establish that they were prejudiced by the alleged delay. While QCC was prejudiced by the CLECs' concealment and resistance, the CLECs certainly were not. They continued to enjoy excessive revenue streams occasioned by their refusal to extend non-discriminatory rate treatment to all similarly situated IXCs.

ISSUE 8e and f: **Are Qwest's claims barred or limited, in whole or in part, by the filed rate doctrine or the prohibition against retroactive ratemaking?**

QCC's Position: ** No. Neither the filed-rate doctrine nor the prohibition against retroactive ratemaking apply in this case or preclude the Commission from granting QCC the relief it seeks. **

Argument

The CLECs also argue that they are immune from liability under former Sections 364.08 and 364.10 on account of the filed rate doctrine. The CLECs theorize that QCC may not recover refunds (even if unlawful rate discrimination has occurred) because QCC was billed the CLECs' published rates. For several reasons, this argument fails and the Commission should once again reject it here.

A. The Filed Rate Doctrine Does Not Apply.

Although the CLECs assert that simply filing a price list with Commission staff is

130 TR 217-218, Hensley Eckert Direct.
131 TR 218-219, Hensley Eckert Direct.
132 TR 219-224, Hensley Eckert Direct.

sufficient to protect their conduct from challenge, this is not the case.[133] The filed rate doctrine – the purpose of which is to "prevent carriers from engaging in rate discrimination"[134] – recognizes that, where the legislature has established a scheme for ratemaking, "the rights of the rate-payer in regard to the rate he pays *are defined by that scheme.*"[135] Hence, the filed rate doctrine does not automatically apply merely because a rate has been filed.[136] Moreover, a careful review of cases addressing application of the filed rate doctrine in Florida and elsewhere reveals that, to act as a bar against challenging the lawfulness of rates, the doctrine requires that rates be subject to regulation by the state, including the authority to review the rates and approve or reject them.[137] The statutory prohibitions on rate discrimination alone are not a sufficient basis to invoke the

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[133] In their unsuccessful motion to dismiss, the CLECs relied heavily on *Corporation de Gestion Ste-Foy v. FPL*, 385 So.2d 124 (Fla. 3rd DCA 1980) ("*de Gestion*"), a case involving the collection of undercharges due to the misreading of a meter, to support their argument that absolute adherence to their price lists is required by public policy and the filed rate doctrine. *De Gestion*, however, did not involve alleged violations of the underlying statutory scheme. Moreover, subsequent Florida authority held that an electric utility *can* be estopped from collecting such undercharges. *See JEA v. Draper's Egg and Poultry Co., Inc.*, 531 So.2d 373 (Fla. 1st DCA 1988), *rev'd on other grounds*, 557 So.2d 1357 (Fla. 1990). The CLECs also cited *ACS of Anchorage, Inc. v. FCC*, 290 F. 3d 403 (D.C. Cir. 2002) to support their view that simply filing a price list with Commission staff is enough to trigger the filed rate doctrine. *ACS* reviewed issues applicable to a rate of return regulated company under FCC streamlined tariff provisions that are completely dissimilar to Florida's price list requirements. Even so, the court in *ACS* made it very clear that the mere filing of a rate is not enough to trigger the filed rate doctrine and that a rate which has been filed "may be subject to refund liability" if it later is shown to be unlawful. *ACS* at 411.

[134] *Fax Telecommunications, Inc. v. AT&T,* 138 F.3d 479, 489 (2d Cir. 1998). Through their distortion of the filed rate doctrine, the CLECs flip the doctrine on its head and instead seek to use it as a shield insulating discriminatory conduct.

[135] *Taffet v. Southern Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992) (emphasis added).

[136] For example, as held in *In re Managed Care Litigation*, 150 F.Supp. 1330 (S.D.Fla. 2001) ("*Managed Care*"), the filed rate doctrine does not apply where the agency does not conduct extensive administrative oversight of rates. *Managed Care* at 1344. The court in *Managed Care* examined the application of the doctrine to a RICO claim involving health insurance policies filed with oversight agencies by companies operating in Florida and other southern states. The court found that Florida did not conduct oversight in a manner extensive enough to implicate the filed rate doctrine. In particular, the court noted that the applicable regulatory scheme in Florida did not mandate the setting of a flat rate and it did not provide an opportunity for notice and comment prior to acceptance of the rates.

[137] See *Florida Municipal Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, citing *Keogh v. Chicago & Northern Rwy.*, 260 U.S. 156 (1922) (11th Cir. 1999) (doctrine attaches after a carrier's rate has "been submitted to and *approved*" by responsible agency) (emphasis added); *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) ("As it applies in the telecommunications industry, the doctrine dictates that rates become the law once filed *and approved*" by the FCC) (emphasis added); *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002) (*"once a tariff is approved"* it binds carriers and shippers) (emphasis added); *Fax Telecommunications, Inc. v. AT&T,* 138 F.3d 479, 489 (2d Cir. 1998) (the filed rate doctrine applies to a federal regulatory scheme that required telecommunications carriers to file and charge their filed rate and where the FCC had the authority to review the filed rates, and to reject any rates deemed unjust, unfair, or unreasonable); *Pfeil v. Sprint Nextel Corp.*, 284 Fed. Appx. 640; 2008 U.S. App. LEXIS 13965 (11th Cir. 2008) (per curium) (doctrine applies once filed with and approved).

filed rate doctrine.

This Commission's regulatory scheme for overseeing CLEC price lists does not meet any of the essential elements that courts have held are necessary before the filed rate doctrine will be strictly applied. In Florida, the Commission need not approve CLEC price lists before they become effective.[138] During the relevant time period, the Florida CLEC regime did not require public notice and it allowed rate changes to become effective one day after filing the change with staff.[139] The CLECs acknowledge that neither the statutes nor the Commission regulate the levels of their switched access rates and, therefore, the Commission has no power to approve or reject them.[140]

In their Prehearing Statements, the CLECs falsely suggest that they filed price lists with the Commission "that were approved by the staff pursuant to authority delegated to the staff by the Commission in accordance with section 2.07 C.5.a(16) of the Administrative Procedures Manual." The CLECs' argument fails. Under the heading "Matters for Administrative Disposition," Section 2.07 C.5.a(16) merely states that "[p]rice list filings made by an alternative local exchange telecommunications company may be administratively processed and may go into effect after one day's notice." Any argument that this Manual delegated *approval powers* to Commission Staff is hyperbolic and outright misleading. It merely conferred administrative authority to the Staff, and nothing more. Thus, CLEC switched access price lists (which, of course, are not even strictly required) are not approved by the Commission or the Staff. As such, the filed rate doctrine is inapplicable.

B. QCC Does Not Seek "Retroactive Ratemaking."

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138 In fact, the Florida CLEC program does not even require CLECs to file switched access price lists.

139 See Rule 25-24.825(3), F.A.C (2011). Compare this approach, for example, to water and wastewater utility tariff changes where notice of the changes must be mailed to customers before they become effective.

140 See, e.g., TR 556, Wood Summary; TR 585, Wood Cross.

The doctrine of "retroactive ratemaking" has no applicability to this case. In the *City of Miami v. Florida Public Service Commission*, the Florida Supreme Court considered the City's appeal of Commission rulings determining the rates of Bell South and FPL. While the Commission held that both utilities' rates were excessively and unreasonably high, its rate modifications were prospective only. The City appealed, arguing that the Commission should have ordered those rate modifications retroactively. The Supreme Court disagreed with the City, holding that the Commission lacks authority to make retroactive *ratemaking* orders.[141]

While QCC has no quarrel with the prohibition cited by the Supreme Court, it has nothing to do with this case, which does not involve *ratemaking* in any sense. In *City of Miami*, the Commission was concerned with modifications to filed and approved utility rates. In addition to the fact that CLEC switched access rates are not similarly established by the Commission, QCC is not asking the Commission change those rates retrospectively. It is asking the Commission to enforce the legislative prohibition on unreasonable rate discrimination. As mentioned above, it is not the CLECs' absolute rate levels that concern QCC in this complaint, but their relative rate levels.[142] Because the CLECs voluntarily chose to discount their switched access rates to AT&T, they were statutorily required to extend the same rate treatment to QCC absent a demonstration that QCC was not under like circumstances. Were the CLECs to succeed on this theory (a theory they have already raised in their unsuccessful dispositive motions), the prohibition of rate discrimination would have no teeth and no meaning. Such an interpretation would not deter discriminatory conduct given that an offending utility would never face the obligation to remedy its past misconduct.

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141 *City of Miami v. Florida Public Service Commission, 208 So.2d 249, 259-260 (1968).*

142 BullsEye's cross examination of Dr. Weisman suggests that BullsEye may be arguing that QCC is seeking retroactive adoption of a rule requiring CLEC switched access rates to be cost based. TR 394-395, Weisman Cross. As Dr. Weisman made plain, that is simply untrue. QCC does not allege that CLEC rates must be set on the basis of cost. However, in order to *differentiate between customers*, there presumptively must be a cost-based justification.

ISSUE 8g: **Are Qwest's claims barred or limited, in whole or in part, by the intent, pricing, terms or circumstances of any separate agreements between Qwest and any CLEC?**

QCC's Position: ** No. The Respondent CLECs have failed to demonstrate that the terms of other agreements justify their discriminatory treatment of QCC or serve to bar QCC's Complaint or the relief it seeks. **

Argument

Having little or no defense or justification for *their own* discriminatory and anticompetitive conduct, the CLECs dedicate inordinate focus to whether QCC also entered into switched access agreements *as a customer*. CLEC counsel asked in excess of 25 questions on cross examination about the issue of the CPLA agreements disclosed by QCC in the course of discovery. Despite counsel's hyper-vigilant interest, these agreements have no bearing on the central question – whether BullsEye violated Florida law in *its provision* of intrastate switched access to QCC. The Commission should not allow BullsEye to distract the Commission from the core issues in this case.[143]

Even if the Commission was inclined to consider the CPLA agreements, those agreements were entirely distinct from the discount agreements at issue in this proceeding. [redacted] the CLECs granted large, secret discounts on Florida switched access. The agreements were designed to confer a clear benefit to the IXC, and were also designed to guard the secrecy of the switched access discounts.

[143] QCC's entry into agreements with *other* CLECs is wholly irrelevant to determining whether the Respondent CLECs violated Florida law. The record evidence revealing that BullsEye preferred AT&T (vis-à-vis QCC) in its pricing of intrastate access services without reasonable justification is essentially uncontested. The reasonableness and lawfulness of BullsEye's preferential rate treatment is not informed in any way by information concerning QCC's contractual dealings with other LECs. As discussed above, the Commission's discrimination analysis involves determining whether the Respondent provided differential rate treatment to similarly situated customers without reasonable justification. That inquiry focuses entirely on the relationship between that Respondent and QCC, as well as the relationship between the Respondent and the preferred IXC. QCC's relationship with *other providers* is entirely irrelevant.

To the contrary, the CPLA agreements were designed to have neutral economic effect. The program was developed in conjunction with QCC's provision of unregulated wholesale long distance services. At the time (the early 2000s), some of QCC's wholesale long distance customers were also CLECs which provided local service using UNE-P. By virtue of utilizing UNE-P, the CLECs were entitled to charge IXCs for switched access, although many claimed that they were operationally unable to do so. As an accommodation, QCC agreed to reduce its unregulated wholesale long distance rates in exchange for the CLECs waiving switched access charges. Mechanically, switched access charges were "waived," but in reality the swap was designed to have neutral economic effect, with the CLECs realizing the benefit of switched access charges through reduced long distance rates.[144]

Thus, while the CLECs (particularly BullsEye) would prefer to shift the Commission's attention away from the CLECs' own conduct, the Commission should reject the notion that the CLECs were simply immune from abiding by sections 364.08 and .10 because of unrelated agreements entered into between QCC and other providers.

ISSUE 8h: Are Qwest's claims barred or limited, in whole or in part, by any other affirmative defenses pled by any other reasons?

QCC's Position: ** No. The Respondent CLECs present no other facts or principles of law that serve in any respect to bar QCC's Complaint or the relief it seeks. **

In their Prehearing Statements, the CLECs raise two final arguments in a desperate hope to misdirect the Commission's attention away from the undisputed conduct underlying QCC's complaint. Neither is compelling.

A. QCC's Complaint Does Not Amount to a Rulemaking or Other Shift in the Regulatory Paradigm.

In their Prehearing Statements, the CLECs seek to convince the Commission that the

[144] TR 146-149, 157, 160-161, 184-185, Easton Cross; Hearing Exhibit 28 (QCC Supplemental Response to Birch Interrogatory No. 1); TR 417-418, Weisman Redirect.

state's statutory and regulatory framework precludes QCC's complaint. The CLECs argue that QCC is asking the Commission to "comprehensively regulate CLEC access rates" and that such actions "would constitute agency rules."[145]

This argument mischaracterizes QCC's position and wholly ignores that Florida statutes clearly prohibited unreasonable rate discrimination by CLECs. QCC is not asking the Commission to "regulate CLEC access rates." QCC does not ask the Commission to set or cap CLEC access rates, but simply asks the Commission to enforce the statutory prohibition of unreasonable rate discrimination. This critical distinction is ignored by the CLEC rhetoric.

Despite the CLECs' arguments to the contrary, Florida law squarely prohibited the CLECs from engaging in exactly the type of unreasonable rate discrimination at issue in this case. Sections 364.08 and .10 were clear, and none of the Respondent CLECs sought exemption, as section 364.337 clearly invited. The legislature could have automatically exempted CLECs from the discrimination prohibitions when enacting section 364.337, but it did not do so. No rule or order was necessary in order to conclude that a CLEC was not permitted to unreasonably differentiate between switched access customers. The legislature had already so concluded. The CLECs' argument articulated in their Prehearing Statements is a contrivance which asks the Commission to infer exemptions when the Legislature did not enact them and the CLECs failed to seek them despite the clear opportunity to do so.

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[145] Specifically, in their position on Issue 8h CLECs state:

> Qwest's claims should be barred in whole. Contrary to the Legislature's direction and the Commission's own history of minimal regulation for CLECs, Qwest asks the Commission, for the first time in this case, to comprehensively regulate CLEC access rates, and to do so in a manner inconsistent with and more restrictive than utility rates the Commission actually does have authority to regulate and set. Further, most if not all of the positions Qwest asks the Commission to adopt would constitute agency rules. For the Commission to adopt such positions in this case outside a proper rulemaking proceeding and then to apply such rules retroactively would be unlawful under Chapter 120 and violate the CLECs' rights.

B. QCC's Civil Complaint Against AT&T Does Not Preclude This Complaint.

The CLECs ask the Commission to bar any relief to QCC "as a matter of policy" because, in 2007, QCC sought civil relief against AT&T in a Minnesota state court complaint. That complaint was dismissed (as the CLECs know), and QCC was awarded no relief whatsoever against AT&T.[146]

BullsEye in particular is preoccupied with the fact that QCC's unsuccessful civil complaint alleged that the AT&T agreements were void and unenforceable.[147] The Court did not enter findings based on this allegation, and there is no legal or other basis to conclude that QCC is estopped or otherwise precluded from now seeking relief based on the CLECs' violation of Florida law. As noted in QCC's supplemental response to BullsEye's discovery, after the Minnesota state court dismissed QCC's complaint, QCC shifted its focus from AT&T to the CLECs which violated state discrimination laws. Whether or not QCC once believed or alleged that the agreements were unenforceable is entirely irrelevant. If the CLECs wished to have the lawfulness of the agreements tested or scrutinized, they had every right to bring a civil action or to simply stop performing under the agreement, forcing AT&T to bring a breach of contract action. But they did not do so, and instead continued performing under the agreements by providing large discounts, even well after the initial terms of the agreements expired.

Whether or not the agreements were or are "illegal and unenforceable" is a matter for the courts, and a matter of import only to the contracting parties. QCC's concern is the significantly lower rates that the CLECs charged QCC's similarly situated IXC competitors. As a matter of

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[146] As the CLECs note, QCC and AT&T did subsequently reach a settlement of the civil complaint, as well as numerous claims by AT&T against QCC's affiliates. The settlement resulted in QCC [redacted]. See, Hearing Exhibit 18. Entry of the multi-issue settlement certainly does not preclude QCC from pursuing a regulatory remedy against the CLECs for their violation of Florida statute.

[147] *See* TR 665, LaRose Rebuttal. BullsEye even filed a motion to compel QCC to reveal whether it presently contends the CLEC agreements are void and to explain when and why it changed its position. Hearing Exhibit 83 (QCC's Supplemental Response to BullsEye's Discovery).

policy, the Commission – which remains statutorily mandated to prevent anticompetitive conduct in the carrier-to-carrier setting – should reject the CLECs' ploy. Principles of public policy dictate that the Commission should be much more interested in preventing and remedying discriminatory and anticompetitive conduct than it is in whether QCC made an allegation in an unsuccessful civil complaint in Minnesota six years ago that is irrelevant to this Complaint before the Florida Commission.

ISSUE 9a: If the Commission finds in favor of Qwest on (a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) Qwest's Second Claim for Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010), what remedies, if any, does the Commission have the authority to award Qwest?

QCC's Position: ** As already determined in Order No. PSC-10-0296-FOF-TP, the Commission has the authority to order refunds with interest as a remedy for anticompetitive and discriminatory conduct. In this case, QCC seeks refunds for overcharges and does not seek "damages," as the Respondents repeatedly suggest. **

Argument

In one of the failed motions to dismiss, the Respondents angled to have the Commission find that QCC was seeking "damages," relief the Commission clearly cannot award. Heeding its own precedent, the Commission rejected the CLEC argument and made clear that it could award refunds for discriminatory and anticompetitive overcharges such as those at issue in this case.[148]

Consistent with prior decisions, we do not have the authority to award

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[148] Other state commissions have likewise ordered refunds for discriminatory overcharges. In California, SBC was ordered to pay refunds for discriminatory collocation pricing. *Qwest Communications Corporation and Qwest Interprise America, Inc. v. Pacific Bell Telephone Company, dba SBC California*, D.06-08-006, 2006 Cal. PUC LEXIS 302 (Cal.PUC 2006), at *8-9 ("[f]or complainants to have to pay higher interim rates for the same collocation services during the same periods, as compared to the interim rates paid by carriers ordering those services later than complainant, puts the complainant at a substantial and unfair competitive disadvantage. Apart from the anti-competitive impact, depriving any business of $10 million imposes harms. Cash flow is impaired; opportunities are foregone."). In addition to granting QCC refunds in the parallel access discrimination complaint, the Colorado Commission earlier approved a stipulation *awarding credits to CLECs* on account of Qwest Corporation's entry into arrangements deemed to be unfiled interconnection agreements. *In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation,* Docket No. 02I-572T, Order Approving Stipulation and Settlement Agreement with Modifications, Decision No. C05-1483 (Colo.PUC 2005).

> damages. To the extent Qwest is requesting monetary damages, we find it appropriate that the Partial Motion to Dismiss and Motion to Dismiss Claims for Reparations be granted. *We have the authority to investigate the allegations in the Complaint, to prevent anticompetitive and unlawful discrimination among telecommunications service providers, and to determine the amount of any refunds and applicable interest, if any, Qwest is due.*[149]

Notwithstanding the clarity of the Commission's ruling and QCC's repeated assertion that it is not seeking civil "damages" – a remedy QCC acknowledges this Commission has no authority to award – the CLECs persist in characterizing the relief QCC seeks as "damages." In his prefiled testimony, CLEC witness Wood used the term no fewer than 74 times.[150] As the District Court of Appeals concluded in a case cited by the Commission, a litigant's strategic and repeated use of the phrases "money damages" and "damages" is insufficient to render a claim for a refund of overcharges outside the Commission's jurisdiction.[151] The Commission should once again reject the CLECs' ploy.

Despite the Respondents' efforts to reframe QCC's request as one for civil damages, QCC simply is not pursuing a tort or contract claim and is not seeking relief for personal injury, lost profits, consequential damages, or any other such remedy, and Respondents' reliance on cases addressing such types of claims is misguided.[152] Instead, QCC is seeking to remedy the fact that, as a result of the CLECs' violation of several Florida statutes over which the Commission has jurisdiction, QCC has been dramatically overcharged in comparison to other

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149 Order No. PSC-10-0296-FOF-TP, Issued May 7, 2010, at p. 6 (emphasis added).

150 *See, e.g.*, TR 427, Wood Direct ("Qwest seeks a number of retroactive and prospective remedies, including the payment of damages, based on its claims.").

151 Order No. PSC-10-0296-FOF-TP, Issued May 7, 2010 (citing *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So.2d 891, 894).

152 In their failed motion to dismiss, the Joint CLECs, for example, rely heavily on cases such as *Southern Bell Tel. & Tel. Co. v. Mobile America Corp.*, 291 So.2d 199 (Fla. 1974); *In re: complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-1054-FOF-EI, Docket No. 981923, May 24, 1999; *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3rd DCA 1996). The *Mobile America Corp.* and case involved a claim of negligence where the plaintiff attempted to recover consequential damages. The *Heekin* case involved claims of alleged trespass and other torts and sought damages arising out of those allegations. The *Glazer* case involved a claim for personal injury due to alleged exposure to electromagnetic fields from power lines.

IXCs for switched access. By mischaracterizing refunds as civil damages, the CLECs ignore the authority of this Commission to address and resolve, through refunds and other appropriate mechanisms, the underlying issues stemming from the CLECs' discriminatory and anticompetitive behavior.[153] Consistent with their arguments regarding Issues 1 and 2, the CLECs wish the Commission to conclude (despite all the precedent to the contrary) that it never had the authority to enforce Florida statute, and that even if it did, it lost that authority upon the effective date of the Regulatory Reform Act. Neither the language of the Act, nor any other Florida authority, supports the CLECs' contention.[154]

In terms of prospective relief, the Commission retains the authority and mandate to prevent anticompetitive practices regarding wholesale services. If the Commission concludes that the CLECs' continued conduct violates Florida statute, the Commission retains the authority to prohibit such conduct. If it did not have such authority, the provisions of Section 364.16 would be meaningless. While the Commission does not have the authority to set CLEC switched access rates, it can surely prohibit conduct it finds to be anticompetitive and a hindrance to fair competition. The simplest way of achieving an appropriate outcome would be for the Commission to direct the CLECs with ongoing switched access agreements (principally, BullsEye and Ernest) to extend the same rate treatment to all Florida IXCs as long as those CLECs continue to offer AT&T preferential rate treatment under the agreements in dispute. That result would not result in "compulsory" rates, as the CLECs ultimately retain control as to

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[153] Indeed, Florida courts repeatedly have recognized the power of the Commission to provide a monetary remedy for regulatory enforcement matters that fall within the PSC's jurisdiction. *See, e.g., Charlotte County v. General Dev. Util., Inc.,* 653, So.2d 1081, 1085 (Fla. 1st DCA 1995) (holding that "the PSC has jurisdiction to resolve the question of the alleged overcharges...."); *Florida Power Corp. v. Zenith Indus.,* 377 So.2d 203 (Fla. 2nd DCA 1979) (holding that "jurisdiction to determine and award refunds of the alleged overcharges does not lie in the court but in the [Commission]"); *Richter v. Florida Power Corp.,* 366 So.2d 798, 801 (Fla. 2nd DCA 1979) (holding that the Commission has exclusive jurisdiction to issue a refund when the plaintiff alleges an unreasonably high electric rate).

[154] See also, Qwest Communications Company's Response to Joint CLECs' Motion to Dismiss and to MCI's Motion for Summary Final Order, at pp. 5-13. QCC incorporates that discussion herein by this reference.

whether they will continue to operate under agreements that they have the ability to terminate without penalty.

ISSUE 9b: If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:
(i) If applicable, how should the amount of any relief be calculated and when and how should it be paid?
(ii) Should the Commission award any other remedies?

QCC's Position: ** Because the Respondent CLECs engaged in unreasonably discriminatory and anticompetitive conduct, the Commission should award QCC refunds of the difference between the lowest rate a CLEC charged another IXC during the contract period and the rate charged QCC, plus interest through the date of the Commission's final order. **

Argument

Despite the CLECs' relentless attempts to complicate and confuse matters, QCC's request for retroactive relief has been straightforward from the outset. Consistent with Commission precedent (discussed in Issue 9a), QCC merely seeks a refund of the amount it overpaid each CLEC for intrastate switched access relative to the amount it would have paid had the CLEC abided by Florida law and provided QCC non-discriminatory rate treatment.

The principal amount of the overcharge has been separately and precisely calculated relative to each Respondent by QCC witness Derek Canfield. Mr. Canfield compared (on a month-to-month basis) each Respondent's actual billings to QCC for Florida switched access to what QCC would have been billed for the identical set of minutes and services had the CLECs provided the preferred discount. Mr. Canfield offers two different views for each Respondent. First, he offers a month-by-month summary calculation that blends together all rate elements billed in a particular month. Second, he offers a more granular monthly analysis, which breaks apart each CLEC's billings to QCC by rate element and by the form of bill (i.e., whether the bill was transmitted in electronic or manual format). The results of his analyses (as to each Respondent) are specified in the Facts section above.

As noted above, in their testimony the CLECs offered almost no methodological critiques of Mr. Canfield's analysis.[155] Instead, they make broader (legal) arguments focused on whether QCC is entitled to relief at all, includinga general allusion to the statute of limitations discussed in Issue 8a above. They also posit a new and creative red herring trying to drive a wedge between Mr. Canfield's calculations and Dr. Weisman's testimony. According to the CLECs, Dr. Weisman's testimony about harms to downstream retail markets is inconsistent with the refunds Mr. Canfield calculates. This argument is nonsense.

Dr. Weisman's testimony about the potential harm in downstream retail markets is well supported and essentially unrefuted. Yet, it has no bearing on the remedy this Commission should award QCC. Dr. Weisman offers the explanation to guide the Commission in understanding why the CLECs' discriminatory and anticompetitive conduct is not only unlawful, but harmful to the policies this Commission is mandated to implement. Dr. Weisman's testimony is qualitative, and QCC does not attempt to *quantify* the actual downstream market effects that occurred by virtue of the CLECs' misconduct. It does not do so, because such a quantification (in addition to being impractical, given QCC's lack of visibility to data essential to make that calculation) is unnecessary for determining liability or appropriate remedies. In reality, this argument is yet another attempt by the CLECs to corner the Commission into believing that QCC must pursue relief that it cannot be awarded by the Commission. If the CLECs can succeed in convincing the Commission that QCC's only conceivable remedy for rate discrimination is civil damages for lost profits or lost market share, it will box QCC out of any

[155] Past experience suggests that the CLECs *may* attack Mr. Canfield's use of proxies for purposes of analyzing paper (manual) invoices for which QCC lacks electronic detail. Mr. Canfield thoroughly explains this process in his prefiled testimony, and the proxies are reasonable. TR 266-267, 274, 277-278, 289-290, 298-299, Canfield Direct. In the face of an identical challenge in the parallel complaint case, the Colorado Commission concluded that Mr. Canfield's proxy analysis (for a subset of the billings in question) was reasonable and reliable. Colorado Order on Exceptions, paras. 124-125. Assuming the CLECs even raise this issue in their Statements of Position, the Commission should similarly find Mr. Canfield's analytical framework reasonable.

recovery given that this Commission clearly has no authority to award damages. For the reasons discussed above, the Commission (as it did before) should reject this CLEC tactic.

Finally, BullsEye raises the issue of disgorgement in its Prehearing Statement. If this Commission holds (as the Colorado Commission held) that the CLECs violated the prohibition of rate discrimination, BullsEye believes that the appropriate outcome would be to order AT&T to refund its discount to BullsEye. This request is incredibly self serving and contrary to public policy, as it would inexplicably *reward* BullsEye for its malfeasance. Disgorgement would be procedurally improper (as BullsEye never even attempted to add AT&T as a third party defendant) and would similarly provide no relief to QCC. Dr. Weisman summarized the flaws with BullsEye's disgorgement theory as follows.

> [I]ncreasing the rate for the favored IXCs achieves parity on a prospective basis, but it does not retroactively address the competitive impact of the unlawful practice on QCC. To wit, the favored IXCs were conferred an artificial competitive advantage by the CLECs that lowered their cost structure in the provision of long-distance telecommunications vis-à-vis QCC. Hence, it is not sufficient in terms of a remedy to simply (i) require the favored IXCs to disgorge the amount of the undercharges or discounts; and (ii) correct the switched access rate disparity going forward. This is necessarily the case because the expected competitive impact on QCC in the retail long distance market would already have occurred and it is not possible to "un-ring the bell" so to speak."[156]

QCC should be awarded the principal amounts calculated by Mr. Canfield, as further updated through the date of the final order, plus interest.[157] This is identical to the relief ordered by the Colorado Commission in the parallel complaint case. In that order, the Colorado Commission granted the Respondents 60 days to tender payment to QCC. QCC believes that either 30 or 60 days is reasonable.

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[156] TR 380, Weisman Rebuttal; TR 193, Easton Cross.

[157] In Order No. PSC-10-0296-FOF-TP (at page 6), the Commission already concluded that it has the authority to award QCC interest. The Commission has done so on numerous occasions in the past. *See e.g.,* Order No. PSC-03-1320-PAA-EI and PSC-05-0226-FOF-EI (granting refunds for overcharges plus interest for inaccurate power meter readings).

CONCLUSION

Based on the foregoing, the Commission should grant QCC's complaint, and should award QCC refunds plus interest on the basis of the Respondent CLECs' discriminatory and anticompetitive conduct.

Respectfully submitted on this 10th day of December 2012.

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