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**Subject:** Docket No. 090538-TP - Post-Hearing Brief of BullsEye Telecom, Inc.
**Attachments:** 2012-12-10 BullsEye Post Hearing Brief - Final.pdf

Attached for electronic filing in the above-referenced docket, please find the *Post-Hearing Brief of BullsEye Telecom, Inc.* If you have any questions, please do not hesitate to contact us.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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|---|---|
| Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (D/B/A VERIZON ACCESS TRANSMISSION SERVICES), TW TELECOM OF FLORIDA, L.P., GRANITE TELECOMMUNICATIONS, LLC, BROADWING COMMUNICATIONS, LLC, BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INC., FLATEL, INC., NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., SATURN TELECOMMUNICATIONS SERVICES, INC. (D/B/A EARTHLINK BUSINESS), US LEC OF FLORIDA, LLC, WINDSTREAM NUVOX, INC., AND JOHN DOES 1 THROUGH 50. | Docket No. 090538-TP<br><br>Dated: December 10, 2012 |

**POST-HEARING BRIEF OF BULLSEYE TELECOM, INC.**

Pursuant to the Order Establishing Procedure issued in this proceeding (Order No. PSC-12-0048-PCO-TP), BullsEye Telecom, Inc. ("BullsEye") hereby files its Post-Hearing Brief with the Florida Public Service Commission ("Commission"). For the reasons that follow, the Commission should find that BullsEye has not violated any provision of Florida law and find that Qwest Communications Company, LLC d/b/a CenturyLink QCC ("Qwest") is not entitled to any relief and certainly no retroactive damages.

## STATEMENT OF THE CASE

*Overview*

This case is less about an asserted dispute than it is about the scope of regulation, jurisdictional limits and, most of all, fundamental fairness. The true questions concern whether the claim being asserted relates to any matter that the Commission has truly regulated, whether the Commission is vested with jurisdiction to weigh the claim or grant any relief, and the inappropriateness of retroactive regulation that would punish the competitive carrier that was coerced into an agreement in the first instance and reward a party who has asserted the very illegality of that agreement and actually had – under the very same deregulatory regime – its own specific agreements with other carriers. In answering these questions, it is clear that Qwest's claims fail for many different reasons.

Qwest has no lawful claim, and has presented no facts to support the claim it attempts to assert. Critically, the Commission as of last year no longer has jurisdiction to even entertain Qwest's unfounded claim. Of the three statutes that Qwest claims were violated, two no longer exist and the third was modified to clarify that the conduct at issue is lawful. The Act that confirmed the invalidity of the claims (the Regulatory Reform Act, Laws 2011, c. 2011-36 (the "Act"), effective July 1, 2011), contains no provision to preserve any pending claims.

More significantly, there should never have been a pending claim, as the now-repealed laws were never applied to competitive carriers like BullsEye in the first instance. BullsEye thus could not have violated Florida law by entering a settlement agreement. The former (now repealed) Sections 364.08(1) and 364.10(1), Florida Statutes (2010), upon which Qwest's discrimination claims are based, have ***never*** been applied to CLECs. That indisputable legal fact is now reinforced by the record of this proceeding.[1] CLEC switched access service has always been treated as an unregulated service, and the Commission has thus never regulated CLEC switched access rates, never required CLEC switched access to be priced according to cost, never required CLECs to publish any switched access settlements or contracts, and never even required CLECs to file a Price List for such services.[2] Moreover, the Commission has always ***encouraged*** settlement of disputes between carriers, like the BullsEye settlement at issue here.[3]

Qwest actually acknowledges that CLEC services have not been subject to any rate regulation,[4] yet still lobbies for the Commission to now create and retroactively impose – over many prior years – a never-before-announced switched access-specific regulation under which CLECs would suddenly become rate-regulated based on cost.[5] Such a proposal is outrageous, as there has never been the hint of any such regulation in Florida and thus no way a competitive carrier like BullsEye could ever have anticipated (much less presumed) such regulation. Indeed, such regulation would be entirely contrary to the way CLEC switched access – and CLEC services more generally – have been treated in Florida, and would violate Florida law. The suggestion that such regulation be created and retroactively applied is irrational, as it would

[1] Hearing Transcript at 610-612 (Deason).
[2] *Id.*; see also Hearing Transcript at 437-440 (Wood) and 653 (LaRose).
[3] Hearing Transcript at 611 (Deason).
[4] Hearing Transcript at 174 (Easton) (agreeing that CLECs are not required to file price lists for switched access services and that CLECs are permitted to use individual contracts to deviate from a voluntarily filed switched access price list).
[5] Hearing Transcript at 351-352 (Weisman) (claiming that in the absence of a cost-based justification, there should be a "default uniform price" for switched access service).

constitute unlawful retroactive regulation and rate-setting, and must be rejected.[6] Such retroactive regulation would impose irreparable financial harm on BullsEye by changing the rules of the game already played. BullsEye, or any company for that matter, can only operate when the rules are known and those rules cannot later be changed, or else companies will exit the Florida market or cease to exist.

Now that a hearing has been held, we know facts that further demonstrate the baselessness of Qwest's claims. We know, for example, that Qwest has had agreements with various competitive local exchange carriers ("CLECs") going back many years, under which Qwest avoided certain access charges altogether. According to Qwest, these agreements reflect the give-and-take of negotiations. Qwest clearly believed that such "CPLA" agreements were proper under Florida law, and likewise thought it appropriate to declare those agreements to be secret and highly confidential. It is incompatible for Qwest to have had its own agreements and then assert that other carriers who had similar agreements somehow violated the law. It is likewise unreasonable for Qwest to try to benefit from agreements it did not negotiate or attempt to negotiate even when Qwest became aware of their existence.

We also now know that Qwest used other stratagems to avoid payment of access charges, such as so-called "alternate routing arrangements." Qwest used these third-party arrangements to pay reduced access charges to CLECs like BullsEye, or apparently to pay no charges at all.

It was also confirmed that Qwest is dissimilar to AT&T. They differ in a variety of ways, including volume of traffic, the nature and regulatory classification of traffic, payment and dispute stature, negotiation status, and settlement posture. Thus, even if Qwest could assert a claim under Florida law, that applied to BullsEye, that the Commission could entertain, and that was not defeated by Qwest's own actions, Qwest could not – and has not – made the requisite

[6] Hearing Transcript at 597-598 (Deason) and 654 (LaRose).

showing of being "under like circumstances." And the Commission could not grant the relief that Qwest seeks, even if Qwest could and did prove the facts that it did not.

Finally, it is worth noting – as Qwest did when it sued AT&T – that AT&T forced BullsEye (Qwest says illegally) into a one-sided settlement. Qwest, on the other hand, has always paid to BullsEye, without dispute or request for an alternate arrangement, the rate that BullsEye has had on file with the Commission. Qwest is on record as saying that such facts prevent this Commission from awarding it any relief.

**The dismissal of the Qwest Complaint must therefore occur without further delay.**

*The Regulatory Reform Act*

The Florida Legislature and Governor, in enacting the Regulatory Reform Act, further deregulated telecom services and thus removed any possible doubt as to the meritless nature of Qwest's claims. Critically, the Act:

(1) ***repealed entirely*** the "discrimination" provisions within former Sections 364.08(1) and 364.10(1) upon which Qwest's First and Second Claims are completely reliant, and

(2) modified former Section 364.04 – upon which Qwest's Third Claim for Relief is completely reliant – to explicitly clarify that individual contracts are ***entirely permissible and lawful.***[7]

As a result, there is indisputably no statutory support whatsoever for the Qwest request for new regulation under Florida law. In the Act, the Legislature fully eliminated even the alleged basis for Qwest's claims, as well as the Commission's jurisdiction to entertain such claims.

*Switched Access Agreements in Florida*

Both Qwest and BullsEye have had settlements and/or individual-case basis agreements for switched services in Florida. Qwest, in fact, entered several times as many agreements,

[7] Fla. Stat. 364.04(1) (2012).

which *pre-date* BullsEye's settlement agreement with AT&T.[8] In entering such agreements, Qwest clearly believed they were lawful under Florida law and regulation. The existence of such agreements also demonstrates that Qwest knew, long ago, that it could request and obtain off-Price List agreement – before BullsEye was even active in Florida – on better terms than AT&T had itself obtained.

Remarkably, Qwest refused to disclose its switched access agreements and demanded highly confidential treatment once it was ultimately compelled by the Commission to produce them (flatly contradicting Qwest's position that BullsEye and others were required to disclose their settlements). While Qwest will no doubt attempt to distinguish its agreements as somehow different or unique, Qwest's own witness conceded that Qwest's agreements are just like any other – reflecting the trade-offs inherent in negotiations between two parties.[9]

These facts and evidence eviscerate Qwest's case. As with Qwest's own agreements, the BullsEye settlement agreement reflects trade-offs between two parties.[10] BullsEye obviously had no desire to collect lower revenues, or to somehow advantage its competitor (AT&T). The truth is that BullsEye would not have survived had it not reached a settlement since AT&T was disputing and withholding millions of dollars in switched access charges.[11]

Qwest concurs: "AT&T used the financial leverage gained through its size, and the volume of its intrastate calls originated or terminated with CLECs, to refuse to pay CLECs for access services at lawful tariffed rates and to induce, coerce, or persuade the CLECs to enter into

[8] Hearing Exhibit No. 84 (Qwest Response to BullsEye Interrogatory No. 10 and Document Request No. 17, Bates No. QCC POD 3041-3163); Hearing Transcript at 156-157 (Easton) (admitting that Qwest was not being charged for switched access under its "CPLA" agreements).
[9] Hearing Transcript at 184 (Easton).
[10] Hearing Transcript at 656-657 (LaRose).
[11] Hearing Transcript at 656-657, 675-677 (LaRose) (discussing BullsEye's critical need to collect charges from AT&T).

agreements for the purpose of avoiding lawful tariffed access charges."[12] Qwest witness Dr. Dennis Weisman reinforced this view at the Hearing, adding that there is "no doubt that the CLECs made what they perceived to be a rational (economic) business decision to grant these discounts rather than run the risk of not being paid for their services or incurring the cost of litigating the matter."[13] BullsEye, in other words, cannot be faulted for entering the settlement agreement and did not "unreasonably discriminate" against Qwest.

The settlement terms demanded by AT&T prevent any effective termination of the settlement agreement, as it provides that "[i]n the event of termination of this Agreement and the continued use of switched access services by AT&T, then the pricing set forth [in the settlement] would continue in effect.[14] Thus, while Qwest may attempt to claim that BullsEye has chosen to (irrationally) keep the agreement in effect, such claim is simply untrue since the settlement agreement itself gives BullsEye no option to terminate the pricing demanded by AT&T.

Indeed, to the extent the Commission seeks to entertain a regulatory solution or explore anticompetitive activity clearly not present in BullsEye's rational business decision making, the focus would have to be on ***AT&T***. The Commission would in all fairness hold AT&T accountable for its tortious actions in withholding payments to force BullsEye to enter a settlement agreement.

The FCC has previously recognized the anticompetitive nature of AT&T's actions, and Qwest once again concurs, stating that AT&T used anti-competitive self-help to obtain settlement agreements:

- "AT&T decided in 1998 to adopt a national policy under which it would refuse to pay for CLEC access services in exchanges where the ILEC access charges were lower than those of the CLEC. AT&T pursued its national policy without regard to the

[12] Hearing Exhibit No. 76 (PKL-1) (Qwest Complaint Against AT&T, at ¶ 35).
[13] Hearing Transcript at 353 (Weisman).
[14] Hearing Exhibit 42 (BullsEye-AT&T Settlement, at § B(1)) (non-confidential portions).

unlawful results of its policy in Filed-Rate States [which, according to the complaint, includes Florida]."[15]

- "AT&T...coerced nascent competitive local exchange telephone companies ("CLECs) to provide off-tariff rates with various threats and incentives, including withholding compensation from the CLECS [*sic*] for services provided to AT&T until the CLECs agreed to accept contracts[.]"[16]

This is precisely what transpired in BullsEye's situation, as it had no choice but to comply with AT&T's demands.[17] On the record here, Qwest's witnesses recognize yet again the impropriety of ***AT&T's*** actions.[18]

Yet, in what may be the height of hypocrisy, upon settlement of its claims against the acknowledged perpetrator, AT&T, Qwest now attempts to somehow fault *BullsEye* and obtain for itself a financial windfall attributable solely to the settlement agreement that Qwest asserts to have been ***unlawfully obtained by AT&T***. The Commission must reject Qwest's attempt to benefit from AT&T's improper conduct.

[15] Hearing Exhibit No. 76 (PKL-1) (Qwest Complaint Against AT&T, at ¶ 31).
[16] Hearing Exhibit No. 76 (PKL-1) (Qwest Complaint Against AT&T, at ¶ 3).
[17] Hearing Transcript at 656-657 (LaRose).
[18] Hearing Transcript at 242 (Eckert) (stating that AT&T's self-help mechanism was "inappropriate").

## DISCUSSION OF ISSUES AND POSITIONS

**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)?**

****No. The Regulatory Reform Act repealed §§364.08(1) and 364.10(1), and modified §364.04 to confirm that service contracts are lawful. The Act included no savings clause. For administrative cases, "[w]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."****

The Commission is a creature of statute with only those powers delegated to it by the Legislature.[19] The Legislature confirmed in 2011 that the Commission has no jurisdiction over Qwest's first, second or third claims for relief, as it eliminated or modified in a dispositive manner the laws upon which those claims are solely based. This fully resolves Issue 1.

It is fundamental that "an agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction."[20] The Florida Supreme Court requires that "***[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof***...and the further exercise of the power should be arrested."[21]

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[19] *Southern States Util. v. Public Serv. Comm'n*, 714 So.2d 1046, 1051 (Fla. 1st DCA 1998) (*en banc*) ("Inasmuch as the PSC, like other administrative agencies, is a creature of statute, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State"). *See also, Ocampo v. Dept. of Health*, 806 So.2d 633, 634 (Fla. 1st DCA 2002) ("An agency can only do what it is authorized to do by the Legislature."); *State Dept. of Env. Reg. v. Falls Chase Special Taxing Dist.*, 425 So.2d 787, 793 (Fla. 1st DCA 1982) ("An agency has only such power as expressly or by necessary implication is granted by legislative enactment.").

[20] *State Dept. of Env. Reg. v. Falls Chase Special Taxing Dist.*, 425 So.2d at 793.

[21] *City of Cape Coral v. GAC Utils., Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973) (emphasis added).

It is black-letter law that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."[22] Where, for example, the violation of a certain statute is alleged, and the Legislature repeals the statute without including a savings clause, repeal will "eliminate the jurisdiction of the...Commission over this particular violation" and "put an end to the authority of the [Commission] to punish for such violations."[23] In short, unless the Legislature specifically provides otherwise, a change in law restricts an agency's jurisdiction both retrospectively and prospectively.[24]

Application of such well-established law is dispositive here. Qwest's First Claim for relief alleges a violation of former Sections 364.08(1) and 364.10(1), F.S. (2010), which the Regulatory Reform Act ***completely repealed without a savings clause.***[25] The Legislature thus eliminated the jurisdiction of the Commission over any violations of those repealed provisions and put an end to any authority the Commission had to punish for such violations.

Similarly, Qwest's Second and Third Claims allege a violation of former Section 364.04, F.S. (2010), which the Act revised to clarify that "[t]his chapter does not prohibit a telecommunications company from...[e]ntering into contracts establishing rates...and charges that differ from its published schedules or offering services that are not included in its published schedules."[26] The Legislature thus clarified that Florida law ***explicitly permits*** the very conduct that Qwest (incorrectly) claims to have violated the former statute: entry into a contract with

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[22] *Jennings v. Florida Elections Commission*, 932 So.2d 609 (Fla. 2d DCA 2006); *see also Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (same).
[23] *Gewant v. Florida Real Estate Commission*, 166 So.2d 230, 233 (Fla. 4th DCA 1964).
[24] *Id.* at 231-233; *see also Jennings*, 932 So.2d at 613 (holding that a new law likewise restricts an agency's jurisdiction both prospectively and retrospectively).
[25] *See generally* Laws 2011, c. 2011-36 (effective July 1, 2011).
[26] Fla. Stat. § 364.04(2)(a) (2012).

rates differing from the default rates in the price list.[27] The Legislature did not include a savings clause to preserve any Commission jurisdiction over alleged violations of the former version of the statute, completely removing any Commission jurisdiction over Qwest's claims going backward.[28] The Commission must adhere to the Legislature's intent as expressed in the Statute.

Qwest's arguments here are contrary to the law. Qwest's suggestion that the "majority of the conduct complained of" occurred prior to the Act[29] is irrelevant. Florida law provides that when a statute is repealed, the Commission's jurisdiction to determine a violation of that statute is abolished – both prospectively ***and*** retrospectively.

Qwest's "vested right" argument is also a red herring as Commission jurisdiction is not determined based on any rights of Qwest, but rather whether the Legislature provides the Commission with statutory authority to address a particular violation.[30] It is well-settled that a party's pending claim before an administrative agency cannot be saved under a "vested rights" theory when, as here, the governing law is repealed or revised.[31] Since issues of "vested rights" arise only in cases before courts of law – which unlike agencies are not merely creatures of statute[32] - the Commission could not have lawfully relied on a "vested rights" claim to avoid dismissal of Qwest's claims, and may not do so now.

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[27] In any event, BullsEye did not violate the former version of this statute, since BullsEye's price list explicitly permitted BullsEye to enter into individual contracts for switched access services based on a variety of considerations and factors other than cost. *See* Discussion of Issue 7, *infra*.

[28] This intent is made even more clear by the fact that the Legislature has included savings clauses for previous statutory revisions, but did not do so when enacting the Regulatory Reform Act. *See, e.g.*, Fla. Stat. § 364.385.

[29] Qwest Communications Company, LLC's Prehearing Statement, at 8 (dated Sept. 14, 2012).

[30] *Ocampo v. Dept. of Health*, 806 So.2d 633, 634 (Fla. 1st DCA 2002) ("An agency can only do what it is authorized to do by the Legislature.").

[31] *BellSouth Telecommunications v. Southeast Telephone*, 462 F.3d 650 (6th Cir. 2006) (finding that a CLEC did not have a vested right in a petition before a state public service commission when the FCC changed the governing law during the pendency of the case).

[32] For example, unlike agencies, courts of law have general jurisdiction to resolve controversies and to interpret and apply the constitution. *State Dept. of Env. Reg. v. Falls Chase Special Taxing Dist.*, 425 So.2d 787, 793 (Fla. 1st DCA 1982). Indeed, whether a party has a "vested right" under a statute is a constitutional question that the Commission is also without jurisdiction to decide. *In re Fuel and Purchased Power Cost* Recovery, Docket No. 11001-E1, Order No. PSC-11-0579-FOF-EI (issued Dec. 16, 2011) ("Administrative agencies lack the power to

Qwest's suggestion that Section 364.01(4), F.S., provides any basis for Commission jurisdiction over its claims is plainly meritless as Qwest's Amended Complaint alleges only three claims – none of which sets forth a claim based on "anticompetitive behavior" or "predatory pricing."[33] As a result, there is no issue on the Issues List concerning any such claim.[34] Moreover, it would be impossible for Qwest to even allege anticompetitive conduct under Section 364.01(4), as BullsEye's entry into a contract that is ***expressly permitted*** under Florida law cannot *ipso facto* be "anticompetitive." A finding otherwise would violate basic principles of statutory construction.[35] Thus, the Commission's authority under Section 364.01(4) is simply not implicated – and could not be implicated – by Qwest's claims in this proceeding.

In sum, the Regulatory Reform Act removed Commission jurisdiction over Qwest's claims in this case, such that the Commission is without authority to decide them. A reviewing court would quickly recognize the unlawfulness of reliance on a "vested rights" theory and statutes that are not at issue in this case. Qwest's claims must be dismissed.

**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)?**

**** No. The Regulatory Reform Act repealed §§364.08(1) and 364.10(1), and modified §364.04 to confirm that service contracts are lawful. Qwest's claims rely solely on these sections, and do not allege a violation of any other statute. There is absolutely no basis for jurisdiction over Qwest claims for conduct occurring after the effective date of the Act.****

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consider or determine constitutional issues."). Thus, in addition to deciding the issue incorrectly, the Commission exceeded its authority in even considering it.

[33] Amended Complaint, at 11-18.

[34] Order No. PSC-12-0048-PCO-TP at 13-14.

[35] *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So.2d 14, 16 (Fla. 1997) ("Where possible, it is the duty of courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act.").

The Regulatory Reform Act undoubtedly removed any Commission jurisdiction over Qwest's claims relating to periods following enactment of the Act. As to Qwest's First Claim for Relief, the Legislature repealed entirely the precise Sections of the Florida Statutes that Qwest claims to be violated. Since it is impossible to violate a statute that does not exist, there is clearly no Commission jurisdiction to entertain Qwest's claim.

As to Qwest's Second and Third Claims, the Legislature explicitly modified the statute Qwest alleges to be violated (Section 364.04) to specifically authorize the conduct complained of. Florida law "does not prohibit a telecommunications company from...[e]ntering into contracts establishing rates...and charges that differ from its published schedules[.]." Since it is manifestly permissible for BullsEye and other carriers to enter contracts for service, it is likewise impossible for BullsEye to violate this statute by entering such a contract. Since it is impossible for conduct authorized by a statute to at the same time violate that statute, the Commission cannot have jurisdiction to consider stating otherwise.

**Issue No. 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?**

****Qwest is invoking the Commission's jurisdiction, and has the burden of proof to demonstrate that subject matter jurisdiction. Since the statutes upon which Qwest's claims are brought do not create any burden-shifting presumption, Qwest has the burden of establishing the factual and legal basis for its claims.****

A. Commission Jurisdiction

The burden of proof to demonstrate Commission jurisdiction is placed on the party asserting jurisdiction, and remains on that party throughout the entire proceeding.[36] Qwest

[36] *See, e.g., Beemer v. Holder*, 2012 WL 4842037 (5th Cir. 2012) (holding that "a party opposing a motion to dismiss for lack of subject matter jurisdiction still bears the burden of proof that jurisdiction does in fact exist"); *Hanna v. CFL Pizza, LLC*, 2012 WL 515875 (M.D. Fla. 2012) (same).

invoked Commission jurisdiction by filing its complaint and must therefore demonstrate the existence of jurisdiction "beyond a reasonable doubt." Indeed, The Florida Supreme Court holds that "***[a]ny reasonable doubt*** as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested."[37] As Qwest's Prehearing Statement is silent on this issue, Qwest concedes that it bears this burden.[38]

Unfortunately, the Commission applied the exact opposite of the actual legal standard when considering this issue previously, stating after oral argument its belief that the *CLECs* had a high burden to prove a lack of jurisdiction and that the Commission should err on the side of caution by proceeding to hearing. Now, after the hearing, the Commission has the opportunity to correctly determine (1) *Qwest* – as the proponent of the Commission's jurisdiction – has a high burden (*i.e.*, proof beyond a reasonable doubt) to affirmatively establish jurisdiction and (2) erring on the side of caution requires *dismissal*, since any reasonable doubt militates ***against*** the exercise of power. As discussed under Issues 1 and 2 above, Qwest cannot meet its burden and dismissal at this time is required.

B. Factual and Legal Basis of Claims

The party asserting the affirmative of an issue before an administrative tribunal bears the burden of proving both the factual and legal basis for its claims, in the absence of a statutory provision to the contrary.[39] The burden remains with that party, absent any burden-shifting legal presumption.[40] The Legislature has created no such presumption here, and administrative agencies have no authority to create or apply legal presumptions in the absence of specific

[37] *City of Cape Coral v. GAC Utils., Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973) (*emphasis added*).
[38] Qwest Communications Company, LLC's Prehearing Statement, at 9 (dated Sept. 14, 2012).
[39] *Young v. Dep't of Community Affairs*, 625 So.2d 831, 833 (Fla. 1993).
[40] *See Universal Ins. Co. of N.A. v. Warfel*, 82 So.3d 47 (Fla. 2012).

statutory or constitutional authority.[41] Accordingly, the burden of establishing the factual and legal basis for its claims remains with Qwest throughout the proceeding.

Qwest's argument that there is a specific burden-shifting rule in rate discrimination cases is incorrect under Florida law. Qwest can point to no Florida statutory authority that would create such a burden-shifting presumption, because none exists.[42] Qwest's argument is therefore easily rejected, such that Qwest – even if the Commission did have jurisdiction to address its claims – has the burden to affirmatively prove, among other things, that BullsEye's settlement was "unreasonable" and that Qwest was "under like circumstances" with AT&T.[43]

**Issue No. 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?**

****No. Qwest has not shown it suffered an injury that former §§364.08(1), 364.10(1) and §364.04 are designed to protect. Further, with respect to the Second Claim Qwest clearly has no standing, because – as between BullsEye and Qwest – there is no dispute that BullsEye abided by its price list.****

In order to have standing, a complainant must be able to allege and show that it suffered an injury within the "zone of interest" that a particular law is designed to protect.[44] In large part, this issue is equivalent to Issue 8(b), as the Regulatory Reform Act repealed entirely the (former) statutes that Qwest alleges were violated or modified them to explicitly state that the conduct at

[41] *Little v. Dep't of Labor and Employment Security*, 652 So.2d 927 (Fla. 1st DCA 1995) ("A state executive branch agency lacks implied or inherent power to fashion, adopt, or apply a legal presumption for application in an administrative proceeding in the absence of specific authority in a statute or the constitution.").

[42] In fact, Qwest admittedly has no statutory basis for its burden-shifting argument. Instead, it attempts to argue that the burden should somehow shift as a matter of *policy* since – according to Qwest – BullsEye and other CLECs are somehow in a "better position" than Qwest to conduct a cost-study. This claim is patently false. Indeed, BullsEye – as a CLEC – has never been required to conduct a cost-study, since CLECs have never been subject to rate-of-return regulation. Indeed, it has always sought to *not* impose such requirements on CLECs. Qwest, on the other hand, is part of multi-billion dollar enterprise, many segments of which *are* rate-of-return regulated ILECs that have decades of experience conducting cost-studies. Thus, even if Qwest's burden-shifting argument could even be considered, Qwest is obviously in a much better position to perform a cost-study than BullsEye.

[43] *See* Sections 364.08(1) and 364.10(1), Florida Statutes (2010).

[44] *North Ridge General Hospital, Inc. v. NME Hospital, Inc.*, 478 So.2d 1138, 1139 (Fla. 1st DCA 1985).

issue is lawful. As such, Qwest certainly has no standing because there no longer exists any statute that could protect the "injury" that Qwest alleges it suffered.

Moreover, even if one were to assume for the sake of argument that Qwest could still maintain a claim under statutes that no longer exist, Qwest would still have no standing under its Second Claim for Relief. As this claim alleges that BullsEye somehow did not "abide by" its Price List with respect to AT&T, this could only be an issue between BullsEye and AT&T (*see* Issue 6, below). *Qwest* has no standing to raise such a claim, as Qwest openly admits that BullsEye abided by its Price List with respect to Qwest since BullsEye at all times charged Qwest in accordance with BullsEye's Price List.[45] Qwest thus has no standing under its Second Claim for Relief.

**Issue No. 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?**

****No. Qwest failed to show any unreasonable discrimination. The Commission has never applied former §§ 364.08(1) and 364.10(1) to CLECs, has never required CLECs to charge uniform or cost-based switched access rates, and has encouraged settlements of disputes. BullsEye's conduct in entering a settlement with AT&T was reasonable and permissible.****

Qwest has not demonstrated – and cannot demonstrate – that BullsEye violated the repealed statutes by "not extend[ing] to any person any advantage of contract or agreement...to persons ***under like circumstances*** for like or substantially similar service"[46] or by giving "***undue or unreasonable*** preference or advantage"[47] to any person, as Qwest would be required to prove for there to be a violation of such statutes, for three independent reasons:

(1) The Commission never applied these repealed statutes to CLECs, and CLEC agreements – particularly settlement agreements – have always been considered reasonable and lawful,

[45] Hearing Transcript at 265-266 (Canfield).
[46] Fla. Stat. § 364.08 (2010) (emphasis added).
[47] Fla. Stat. § 364.10 (2010) (emphasis added).

(2) Qwest relies on a non-existent rule under which any variation in switched access prices would have to be based on cost differences, and

(3) Qwest failed to prove that Qwest is "under like circumstances" with AT&T or that BullsEye's conduct in entering the AT&T settlement was "unreasonable."

Moreover, each of these reasons – fully explained below – are supported by Qwest's own actions, as Qwest has entered its own agreements for switched access service.

A. Qwest's unreasonable discrimination claim must be rejected because the Commission never applied the repealed "anti-discrimination" statutes to CLECs and has always considered CLEC agreements to be reasonable and lawful.

CLECs came into existence in the mid-1990s when the U.S. Congress and Florida Legislature enacted laws that opened local telecommunications markets to competition. Prior to that time, local markets were controlled by incumbent, monopoly telephone companies (ILECs), which were heavily regulated under rate-of-return regulation. Anti-discrimination statutes were intended to restrict the rate-of-return regulated monopolies, because any unjustified reduction in revenues as to certain customers could lead to rate increases for all other customers.[48] By opening markets to competition, Congress and the Florida Legislature sought to create new companies (CLECs) that would operate in a deregulated environment and thereby provide competitive checks that would ultimately replace the heavy regulation imposed on ILECs.

Given the intention for CLECs to operate in a deregulatory environment, CLECs have always been subject to a lesser level of regulation than ILECs and have always been allowed to enter individual contracts for services – including CLEC switched access services. Indeed, the Commission has never applied the repealed statutes to CLEC switched access, never regulated CLEC switched access rates, never required CLECs to publish their settlements or contracts, and

[48] Hearing Transcript at 607 (Deason).

never even required CLECs to file Price Lists for switched access services.[49] Instead, the Commission has ***encouraged*** carriers to negotiate and settle their disputes.[50] Former Chairman Terry Deason, who served on the Commission for many years, confirmed this to be the case:

> ***The Commission never considered switched access service provided by CLECs to be a regulated service that necessitated regulatory requirements in order to protect end use customers.*** Nor did the Commission consider switched access service provided by CLECs to be a service for which information needed to be filed at the Commission. For example, unlike in the prior era of rate of return regulation, CLECs were not required to provide cost information or otherwise justify the prices they charged for switched access.[51]

Moreover, in moving towards a competitive marketplace, the Commission recognized that there was no concern that CLECs could somehow engage in unreasonable rate discrimination by entering individual-case basis arrangements, finding "[c]ircumstances that would have amounted to undue discrimination in rate setting under monopoly regulation ***do not amount to undue discrimination under deregulation***."[52]

In other words, a claim grounded in "discrimination," such as Qwest's here, is really just a façade for that party's failure to negotiate. Indeed, even in circumstances where ILECs are permitted to negotiate individual rates, the Commission has expressed doubt that alleged "discrimination" constitutes something other than a failure on the part of one entity to successfully negotiate.[53]

Significantly, the record clearly shows that this is exactly the case with Qwest here, as Qwest failed to even attempt to negotiate an agreement with BullsEye. While Qwest has negotiated individual-case basis agreements with many Florida CLECs (some of which pre-date

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[49] Hearing Transcript at 610-612 (Deason).
[50] Transcript at 599-600, 611 (Deason); *see also In re AT&T Communications of the Southern States, Inc.*, Docket No. 960833-TP, Order No. PSC-96-1238-PHO-TP (issued Oct. 7, 1996) (noting the "spirit and intent of the [federal Telecommunications] Act and this Commission's policy to encourage negotiated settlements").
[51] Transcript at 595 (Deason) (*emphasis added*).
[52] Order No. PSC-97-0488-FOF-TL (emphasis added); Transcript at 595-96 (Deason).
[53] Order No. PSC-01-1588-PAA-TL; Transcript at 594 (Deason).

the BullsEye-AT&T settlement) and was on notice that AT&T was entering settlements with CLECs as far back as 2004/2005, Qwest never sought to negotiate an agreement with BullsEye[54] and has always paid BullsEye the switched access rates set forth in BullsEye's Price List without dispute.[55] The only contact that BullsEye ever received from Qwest relating to switched access was a generic 2008 letter demanding that BullsEye (a) disclose its confidential agreements to Qwest and (b) allow Qwest to automatically opt-in to the "most favorable" rate in any such agreements without negotiation.[56] Although BullsEye would have been willing to negotiate with Qwest (and remains willing),[57] Qwest – without ever making any serious attempt to negotiate – filed several administrative complaints against BullsEye, forcing BullsEye to incur significant legal costs to defend itself against unfounded claims. It is clear that Qwest's discrimination claims are really just a cover for Qwest's own failure to successfully negotiate an agreement.

In short, as CLEC switched access has never been regulated and CLECs have always been free (and encouraged) to enter settlements. Qwest has no argument that BullsEye violated Florida law by entering a settlement with AT&T, possessing only a gripe that it did not successfully negotiate its own agreement. The Commission must deny Qwest's "unreasonable discrimination" claim against BullsEye as inconsistent with Florida law.

B. Qwest's unreasonable discrimination argument must be rejected, because it relies solely on a non-existent exception to the general rule.

Even if it were somehow possible for CLECs to violate the repealed discrimination statutes, Qwest's theory would remain completely unfounded. Qwest acknowledges the general rule that CLECs are free to enter into service agreements that vary from the terms of a price

[54] Hearing Transcript at 660-661 (LaRose) and 239-241 (Eckert).
[55] Transcript at 661 (LaRose).
[56] Hearing Transcript at 658-659, 673 (LaRose) and Hearing Exhibit No. 78 (PKL-3).
[57] Hearing Transcript at 661 (LaRose).

list.[58] Qwest, however, attempts to create and then retroactively apply an exception to this rule, based solely on the theory of Qwest expert witness Dr. Dennis Weisman – who theorizes that CLEC switched access should be considered a monopoly service and that any variations in pricing negotiated with customers may only be based on cost differences.

This theory, however, finds no support in any Florida law or regulation. The Commission has never found CLEC switched access to be a monopoly service, never required CLECs to charge cost-based switched access rates, and never required CLECs to justify price differences based on cost. Former Chairman Terry Deason confirmed that "the Commission has not ever considered CLEC switched access to be a monopoly service."[59] Moreover, BullsEye's filed Price List, of which Qwest admittedly has been on notice since its 2003 effective date,[60] specifically states that BullsEye may enter individual contracts for switched access on reasons other than costs, including "term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features."[61] As such, the premise of Qwest's theory – that CLEC switched access is a monopoly service – is simply not true under Florida law, and Qwest's theory must be rejected as an attempt to retroactively change the way switched access services have been regulated.

Indeed, any retroactive change in regulation would be completely unfair, disruptive to business, and would harm the public interest. As a CLEC formed in 1999, BullsEye has relied on Florida law that always treated CLEC switched access as a deregulated service.[62] BullsEye witness Mr. LaRose explained why a retroactive change would be completely unfair:

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[58] Hearing Transcript at 137-138 (Easton).
[59] Hearing Transcript at 597-98 (Deason).
[60] Hearing Transcript at 177-178 (Easton).
[61] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 66, § 5.1. BullsEye appropriately requested official notice of its filed Price List.
[62] Hearing Transcript at 651 (LaRose).

BullsEye, like all businesses, must be permitted to rely on existing laws and regulations to operated its business and manage its finances.

If the Commission were to set a precedent under which it retroactively imposes a new rule or policy, it would be extremely difficult for BullsEye and other Florida carriers to accurately predict their ongoing costs since there would exist an ongoing potential for the imposition of unknown, unexpected, retroactive costs. Such retroactive costs – particularly costs of the size and scope sought by Qwest in this proceeding – would place tremendous financial hardship on small carriers like BullsEye, because BullsEye would be unable to retroactively recover such costs from its customers. As a small competitor, BullsEye does not have the financial resources and flexibility to account for such unknown costs like its larger competitors may. Thus, the imposition of retroactive rules would unfairly cause financial hardship on BullsEye and harm its ability to compete against its larger competitors.

These impacts would be detrimental to the public interest as increased uncertainty and decreased competition would lead to higher rates, less innovation and poorer service quality. My understanding is that it is for this very reason that regulatory agencies abhor and in many instances are prohibited from retroactive ratemaking and regulation.[63]

Former Chairman Deason likewise cautions that:

It would be bad regulatory policy to redefine the fundamental nature of a service in order to provide one company a financial benefit now based on retroactive application of that re-definition.[64]

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It would be bad regulatory policy and perhaps even disingenuous to have encouraged new entrants to enter the Florida market with the promise of lesser regulation in 1995, and then impose new regulatory requirements (such as the duty to file contract rates and to provide cost justification) in 2012 retroactively to 1995.[65]

Qwest's attempt to rely on a non-existent rule to obtain for itself retroactive damages simply cannot be countenanced.

Moreover, even if the Commission were to somehow consider whether Qwest's theory could be adopted prospectively (an impossibility under current law after the Regulatory Reform

[63] Hearing Transcript at 654 (LaRose).
[64] Hearing Transcript at 597-98 (Deason).
[65] Hearing Transcript at 600 (Deason).

Act[66]), the factual record belies Qwest's claim that CLEC switched access is a monopoly service. In fact, Qwest itself admitted to having "40 to 50 agreements" with third-party carriers, under which Qwest hands off its switched access traffic to third parties for delivery to BullsEye and other CLECs. Although Qwest will likely attempt to characterize these arrangements as indirect methods of purchasing the same service, Qwest's own witnesses admit that this is not the case. Qwest witness William Easton, for example, specifically acknowledged that Qwest may pay less to terminate calls through third-parties than it would pay to BullsEye directly.[67] He further admits that some third-party carriers used by Qwest likely use schemes to avoid switched access charges altogether.[68] As Qwest admits that it has options to avoid BullsEye's switched access and the BullsEye price list, such switched access simply cannot be considered a monopoly service. Qwest's attempt to re-define CLEC switched access must be rejected on both a prospective and retroactive basis.

C. Qwest has not met – and cannot meet – its burden to prove that it is "under like circumstances" with AT&T or that BullsEye's conduct was unreasonable.

In addition to relying on an invalid theory, Qwest also fails to meet its burden to prove facts that might establish its case. For example, even though Qwest seeks to rely solely on its theory that any variances in switched access pricing may only be based on cost differences, Qwest made no attempt whatsoever to ***actually show*** that BullsEye incurs the same costs when providing switched access service to AT&T and Qwest. Qwest's expert witness Dr. Weisman openly admitted that he never looked at the underlying costs of BullsEye, AT&T or Qwest and

[66] *See* Discussion of Issues 1 and 2, supra. As an example, in order for the Commission to adopt Qwest's rule prospectively, it would need to change the terms of BullsEye's Price List, which it does not have authority to do under the Regulatory Reform Act. Fla. Stat. § 364.04 (2012).
[67] *Id.* (testifying that there are several reasons – including call volumes and location of carrier points of presence – why a third-party may be able to offer termination services at rates lower than the rates for CLEC switched access).
[68] Transcript at 172 (Easton) (stating that Qwest has used some carriers that "most likely did not deliver the traffic over Feature Group D").

that he had no idea whether Qwest was a "least-cost provider" as he insinuated in his hypothetical examples.[69] Indeed, despite serving multiple rounds of discovery, Qwest never asked BullsEye for information concerning its underlying costs to provide switched access.[70] Instead, Qwest simply asked whether BullsEye had ever conducted a cost-study, which of course BullsEye has not since BullsEye is a CLEC that is not required to perform any cost-study.[71] As such, the record contains no facts concerning BullsEye's costs, such that Qwest failed to prove its case even under its own invalid theory of what constitutes "unreasonable discrimination."

The record further shows that there are many objective factors other than cost that may distinguish customers of switched access that Qwest likewise failed to consider or demonstrate. For example, Qwest's own witness admitted that traffic volumes can distinguish customers of switched access.[72] However, Qwest tellingly submitted no facts or analysis of Qwest's or AT&T's traffic volumes.[73] BullsEye, however, did show that "AT&T has had a much larger volume of traffic than Qwest," that during the years leading up to BullsEye's settlement agreement "AT&T's nationwide toll service revenues were as much as 21 times greater than Qwest's,"[74] and that "AT&T's call volumes were a major consideration for BullsEye in entering into the settlement agreement."[75]

As another example, Qwest did not show that its mixture of traffic types was similar to AT&T's. This is an important factor, since different types of traffic – such as wireless-originating and VoIP-originating traffic – are subject to different compensation regimes under federal law, such that a particular customer's traffic types may affect the applicable rates or

[69] Hearing Transcript at 405 (Weisman).
[70] *See generally* Hearing Exhibits 13 and 14.
[71] Hearing Exhibit 13 (Qwest Interrogatory Nos. 2(l) and 2(m)).
[72] Hearing Transcript at 54, 56-57, 169-170 (Easton).
[73] Hearing Transcript at 329 (Canfield) and 410-411 (Weisman).
[74] Hearing Transcript at 662 (LaRose) and Hearing Exhibit No. 77 (PKL-2).
[75] Hearing Transcript at 662 (LaRose).

whether intrastate switched access rates even apply.[76] Qwest's witness Mr. Easton even acknowledged that this is the case, but Qwest made no attempt to submit facts as to Qwest's or AT&T's traffic types.[77] In fact, Qwest's expert Dr. Weisman attempted to hide behind a presumption that "the issue in this proceeding involves discrimination across carriers that provide the same type of traffic,"[78] but conceded on cross examination to having no factual basis on which to make such a presumption.[79] Moreover, BullsEye showed that Dr. Weisman's claim is highly doubtful, because Qwest does not have a large wireless affiliate like AT&T and therefore is Qwest is extremely unlikely to have a similar mixture of traffic types to AT&T.[80]

Furthermore, the record also shows that Qwest is also distinguishable from AT&T as a customer of switched access, since Qwest does not compete with BullsEye for end-user customers in Florida. As BullsEye witness Mr. LaRose explained:

> [U]nlike AT&T, Qwest acknowledges that it was not providing dial tone service in Florida during the effective term of the AT&T settlement. Thus, unlike AT&T, Qwest does not compete with BullsEye for end-user customers. As such, AT&T had more bargaining power with respect to a settlement for switched access charges in Florida, for absent reduced access prices from BullsEye, AT&T had a greater incentive to target for acquisition BullsEye's end-user customers.[81]

This demonstrates yet another reason why Qwest is not "under like circumstances" to AT&T.

As a last and perhaps most important example, Qwest was never "under like circumstances" to AT&T, because – unlike AT&T – Qwest never disputed BullsEye's invoices (as required under BullsEye's Price List[82]) or ever sought to enter carrier-to-carrier negotiations with BullsEye. As Mr. LaRose explained:

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[76] *See, e.g.*, 47 C.F.R. § 20.11 (setting forth the FCC's compensation governing CLEC charges to wireless traffic).
[77] Hearing Transcript at 169 (Easton) and 329 (Canfield).
[78] Hearing Transcript at 369 (Weisman).
[79] Hearing Transcript at 410-411 (Weisman).
[80] Hearing Transcript at 330 (Canfield) and 410 (Weisman).
[81] Hearing Transcript at 662 (LaRose) (citations omitted).
[82] *See* Discussion of Section 8(c), *infra*.

> Qwest never disputed BullsEye's switched access invoices and never withheld payment, such that the primary considerations underlying the settlement agreement with AT&T never existed with Qwest. Moreover, Qwest never even sought to engage BullsEye in the good faith negotiation of a switched access agreement. In fact, Qwest to this day continues to remit payment to BullsEye in accordance with the BullsEye switched access invoices, without dispute. Instead of seeking its own negotiation with BullsEye, Qwest attempts to benefit from the coercive AT&T settlement without even entering negotiations on a carrier-to-carrier basis.[83]

Qwest thus seeks to obtain the benefit of the AT&T settlement (which – as discussed further below[84] – Qwest previously claimed to be coercive and anticompetitive), without ever being in a remotely comparable position to AT&T.

Finally, Qwest has not – and cannot – demonstrate that BullsEye's conduct in entering the settlement agreement with AT&T was somehow unreasonable. Indeed, despite not having the burden of proof, BullsEye showed that it would not have survived financially if it did not enter the AT&T settlement.[85] As the record shows, beginning in October 2001, AT&T withheld payment under BullsEye's invoices and refused to pay BullsEye for both interstate and intrastate access charges in all jurisdictions nationwide.[86] AT&T asserted that it would continue to withhold payment unless BullsEye entered into a settlement on terms demanded by AT&T.[87] As Mr. LaRose testified, BullsEye's ongoing operations rely on the timely collection of access charge revenues, especially from its largest customer, AT&T.[88] Thus, by the end of 2004, when AT&T's withholdings had amounted to multiple millions of dollars, BullsEye was compelled to enter the settlement "[g]iven the critical need for these access payments from AT&T and the significant delay and expense that jurisdiction-by-jurisdiction litigation would entail, as well as

[83] Hearing Transcript at 661 (LaRose).
[84] *See* Discussion of Section 8(h), *infra*.
[85] Hearing Transcript at 656-657, 675-677 (LaRose).
[86] Hearing Transcript at 656 (LaRose).
[87] *Id.*
[88] *Id.*

the financial hardship an effort such as this would have imposed."[89] Thus, there can be no doubt that BullsEye was simply acting reasonably and objectively in light of the circumstances, with no intent to somehow "advantage" AT&T.

In fact, Qwest has repeatedly admitted that these were the circumstances under which BullsEye entered the settlement. In 2007, Qwest filed a complaint against AT&T, claiming that ***AT&T's conduct*** in obtaining the settlement that was unreasonable.[90] In that complaint, Qwest represented that:

- "AT&T decided in 1998 to adopt a national policy under which it would refuse to pay for CLEC access services in exchanges where the ILEC access charges were lower than those of the CLEC. AT&T pursued its national policy without regard to the unlawful results of its policy in Filed-Rate States [which, according to the complaint, includes Florida]."

- "AT&T...coerced nascent competitive local exchange telephone companies ("CLECs) to provide off-tariff rates with various threats and incentives, including withholding compensation from the CLECS [*sic*] for services provided to AT&T until the CLECs agreed to accept contracts[.]"

- "AT&T obtained enormous financial leverage over the CLECs through its unilateral decision to withhold payment of the tariffed access charges. This created a financial squeeze on CLECs that effectively eliminated meaningful opportunities for negotiation.

- "AT&T used the financial leverage gained through its size, and the volume of its intrastate calls originated or terminated with CLECs, to refuse to pay CLECs for access services at lawful tariffed rates and to induce, coerce, or persuade the CLECs to enter into agreements for the purpose of avoiding lawful tariffed access charges."

- The financial squeeze caused by AT&T "put the CLECs at the mercy of AT&T's demands."[91]

Qwest thus admits that it was not BullsEye that acted unreasonably, ***it was AT&T***. In fact, Qwest settled its claims against AT&T, thereby obtaining relief from AT&T for its conduct.[92]

[89] Hearing Transcript at 657 (LaRose).
[90] Hearing Exhibit No. 76 (PKL-1).
[91] *Id.*; *see also* Hearing Transcript at 664 (LaRose).
[92] Hearing Exhibit No. 16 (Qwest Response to Document Request No. 5, Bates No. QCC POD 1940-1960).

Yet, Qwest now somehow attempts to turn the facts on their head, seeking in this case to obtain a financial benefit from a settlement that it claimed was obtained through anticompetitive conduct.

Thus, in the final analysis, there is no dispute that BullsEye's conduct was entirely reasonable and based on a number of objective factors and business-driven reasons. Qwest's expert Dr. Weisman even admitted that he had "no doubt that the CLECs made what they perceived to be a rational (economic) business decision" in entering their agreements.[93] Instead, the only unreasonable conduct that has been identified is ***AT&T's conduct*** in using anticompetitive self-help to obtain agreements from small CLECs like BullsEye, which issue Qwest has already settled with AT&T. Thus, Qwest has absolutely no claim for "unreasonable discrimination" against BullsEye, and the Commission must reject Qwest's argument. To the extent the Commission should take any action on the facts presented in this case, it should investigate AT&T's anticompetitive, coercive tactics in obtaining the settlement with BullsEye and other CLECs.

**Issue No. 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?**

****BullsEye indisputably abided by its Price List, as Qwest admits that BullsEye charged Qwest the switched access rates set forth in BullsEye's Price List. Further, BullsEye's entry into a settlement with another carrier was likewise compliant with the explicit terms of BullsEye's Price List.****

Qwest's Second Claim is easily resolved in BullsEye's favor as Qwest has admitted that BullsEye abided by its Price List with respect to Qwest. Indeed, Qwest admits that BullsEye at all times charged Qwest, and Qwest paid, the rates for switched access set forth in BullsEye's

[93] Hearing Transcript at 353 (Weisman).

Price List.[94] Thus, as between BullsEye and Qwest, there can be no issue as to whether BullsEye "abided by" its Price List in pricing switched access service; Qwest admits that BullsEye did.

Furthermore, even if Qwest has any standing to allege that BullsEye did not "abide by" its Price List as regards the BullsEye/AT&T agreement, Qwest would still be wrong as BullsEye's Price List explicitly states, at Section 5.1, that BullsEye may enter individual contracts for switched access:

> At the option of the Company, services may be offered on a contract basis to meet specialized pricing requirements of the Customer not contemplated by this price list. The terms of each contract shall be mutually agreed upon between the Customer and Company and may include discounts off of rates contained herein and waiver of recurring, nonrecurring, or usage charges. The terms of the contract may be based partially or completely on the term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features.[95]

BullsEye thus indisputably abided by its Price List, of which Qwest was on notice, by entering a customer-specific settlement agreement.

**Issue No. 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?**

****Qwest's Third Claim for Relief hinges on a demonstration by Qwest that Qwest is "similarly situated and in substantially similar circumstances" to AT&T. Qwest failed to meet its burden to prove this and, in any event, is not similarly situated to AT&T.****

Qwest's Third Claim for Relief requires Qwest to demonstrate that it is "similarly situated" to AT&T. This standard is equivalent to that in Qwest's First Claim, which requires Qwest to demonstrate that Qwest is "under like circumstances" to AT&T.[96] As such, Qwest's Third Claim fails for the same reason as its First Claim: Qwest failed to make the requisite demonstration.

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[94] Hearing Transcript at 265-266 (Canfield).
[95] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 66, § 5.1 (*emphasis added*).
[96] Qwest itself has used the term "similarly situated" instead of "under like circumstances." Hearing Transcript at 359, 391 (Weisman).

As fully explained under Issue 5 above, Qwest's case relies solely on its expert witness's ***theory*** that all IXCs are presumptively "similarly situated" unless there is a cost-based reason as to why they are not. Such theory, however, is untenable under Florida law, because the Commission has never (1) required CLECs to charge cost-based switched access rates, (2) required CLECs to justify price differences based on cost, or (3) required CLECs to charge only a uniform switched access rate to all IXCs.[97] Moreover, the theory is also directly contradicted by the sentence of BullsEye's Price List ***immediately preceding*** the sentence on which Qwest's claim relies, which states that "[t]he terms of the contract may be based partially or completely on the ***term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features***."[98] Thus, the Price List itself provides that individual contracts may be entered into for non-cost-based reasons. As such, Qwest cannot rely on its theory to show that BullsEye somehow "failed to abide" by its Price List, since the Price List itself ***explicitly permits*** the conduct that Qwest has alleged it does not.

Furthermore, Qwest has not demonstrated – and cannot demonstrate – that it was somehow "similarly situated" to AT&T. As fully explained above, Qwest fails to account for the variety of legitimate reasons reflecting why Qwest is not "similarly situated" to AT&T, including their respective traffic volumes, traffic types, and bargaining power.[99] Further, Qwest failed to account for the fact that – unlike AT&T – Qwest never disputed BullsEye's invoices for switched access and never sought to enter negotiations with BullsEye. Although Qwest has tried to excuse its failure by claiming it did not know it could, this is belied by (a) the terms of BullsEye's Price List, of which Qwest has always been on notice, (b) the fact that Qwest knew that AT&T had agreements with "hundreds of CLECs" as far back as 2005, and (c) the fact that

[97] *See* Discussion of Issue 5, *supra.*
[98] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 66, § 5.1.
[99] *See* Discussion of Issue 5, *supra.*

***Qwest itself has many agreements with CLECs for switched access, some of which pre-date BullsEye's settlement with AT&T.*** Thus, it is clear that Qwest is simply using its unfounded claims as a cover for its failure to negotiate, as the Commission has previously warned about.[100]

Given these many different distinguishing factors, there is simply no basis in the record to conclude that Qwest is "similarly situated" to AT&T. Indeed, as the Commission has previously recognized, it is virtually impossible to make a demonstration that meets the "similarly situated" standard with respect to individual contracts, because each individual contract reflects a unique set of trade-offs and compromises between the contracting parties.[101] This is particularly true for settlement agreements like BullsEye's, which are often entered into due to many different considerations. As that is exactly the case here, Qwest has not – and cannot – meet its burden to show that it is somehow "similarly situated" to AT&T.

**Issue No. 8: Are Qwest's claims barred or limited, in whole or in part, by:**
**(a) the statute of limitations;**

****Yes. While Qwest is not entitled to retroactive relief for a number of different reasons noted elsewhere, even if one were to assume for the sake of argument that it were, the four-year statute of limitations applicable to claims for statutory violations partially bars Qwest's claims against BullsEye.****

As explained in the discussion of Issues 1, 5 and 8(f), any retroactive relief to Qwest is barred as a matter of law since (1) the Commission's jurisdiction over the alleged violations has been removed and (2) even if it was not, any such relief would be contrary to the way in which the Commission has regulated switched access. Even with those aside, retroactive relief would *additionally* be partially barred under the applicable statute of limitations.

[100] Hearing Transcript at 594-596 (Deason).
[101] *Id.*

Section 95.11(3)(f), Florida Statutes, imposes a four-year statute of limitations on "[a]n action founded on a statutory liability."[102] This statute of limitations clearly applies, since Qwest has filed and pursued, and the Commission has processed, this case as a complaint proceeding and in the manner of a civil claim. However, while Qwest claims that the conduct that gave rise to its claims occurred on October 21, 2004 (the date when BullsEye entered a settlement with AT&T), Qwest did not file a complaint against BullsEye in this proceeding until six years later - on October 22, 2010.[103] As such, Qwest failed to timely file its complaint and its claims are therefore barred by the statute of limitations.

To the extent Qwest responds that the statute of limitations is tolled under a delayed discovery rule, such an argument is without merit. A delayed discovery rule cannot apply to actions founded on a statutory claim, since the Legislature does not provide for any such rule as a basis for tolling.[104] As courts have held, "[w]hen construing statutes of limitations, generally courts will not write in exceptions when the legislature has refused to do so."[105] Thus, since the Legislature does not provide for delayed discovery as a basis for tolling a statutory claim, Qwest has no basis to rely on such a rule.

Furthermore, even if this were a situation where a discovery tolling rule is statutorily permitted, Qwest has not – and cannot – meet its burden to prove any fact that would support its application here. Indeed, as the proponent of a tolling rule, it is black letter law that Qwest bears

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[102] *See also* Fla. Stat. § 95.11(3)(p) (providing a catch-all four-year statute of limitations for "[a]ny action not specifically provided for in these statutes").
[103] *See* Order No. PSC-10-0629-PCO-TP (issued Oct. 22, 2010) (granting Qwest leave to file amended complaint). Under Florida law, a John Doe complaint does not toll the limitations period.
[104] *See* Fla. Stat. § 95.051 (enumerating specific grounds for tolling); *see also Major League Baseball v. Morsani*, 790 So.2d 1071, 1075 (Fla. 2001) (holding that Section 95.051 "delineates an *exclusive* list of conditions that can "toll" the running of the statute of limitations") (emphasis added).
[105] *Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532, 534 (Fla. 4th DCA 1999); *see also Carey v. Beyer*, 75 So.2d 217 (Fla. 1954) (same).

the burden to establish the elements of such a rule.[106] To meet this burden, Qwest would have to prove that it (1) did not know of the existence of its claim prior to the limitations period and (2) could not reasonably have discovered the conduct prior to the limitations period.[107] In other words, Qwest was required to prove that it did not know the factual basis for its complaint until after October 22, 2006 ***and*** that it could not reasonably have discovered the factual basis until after October 22, 2006. Qwest, however, failed to demonstrate either element.

First, the record shows that Qwest ***did know*** of the existence of its claim prior to October 22, 2006. In fact, Qwest's own Amended Complaint outwardly admits that its complaint was brought upon facts it learned during the proceedings before the Minnesota PUC that occurred in 2004 and 2005. Indeed, at paragraphs 8-9 of its Amended Complaint, Qwest summarizes the Minnesota PUC proceeding and admits that AT&T on August 19, 2004 stated that "AT&T has entered into ***hundreds*** of agreements based on the same form with CLEC providers of switched access services ***throughout the United States.***"[108] Further, Qwest's witness admitted to becoming an active party to the Minnesota PUC proceeding and learning of AT&T's comments in April 2005, and Qwest even filed comments in the Minnesota PUC proceeding on August 24, 2005 that specifically stated Qwest believed AT&T's contracts affected Qwest's rights.[109] Thus, there is no dispute that Qwest knew the facts that formed the basis for its claims in this case well-before the four-year limitations period.

Second, the record also belies any claim that Qwest could somehow not have reasonably discovered the existence of its claims. To the extent Qwest claims it needed to subpoena for

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[106] *Palmer v. McKesson Corp.*, 7 So.3d 561, 563-64 (Fla. 1st DCA 2009) (holding that where a plaintiff seeks to avoid the statute of limitations under a tolling rule, he or she bears the burden of establishing the exception).
[107] *Black Diamond Properties, Inc. v. Haines*, 69 So.3d 1090, 1094 (Fla. 5th DCA 2011).
[108] Amended Complaint at ¶ 9; see also Hearing Exhibit No. 80 (PKL-5) (containing a copy of AT&T's comments filed with the Minnesota PUC on August 19, 2004).
[109] Hearing Exhibit No. 35 (Qwest Comments at 4-5).

CLEC agreements to discover the basis for its claims, this is simply a red herring. Indeed, knowing the basis of its complaint in April 2005 at the latest, there is nothing that would have reasonably prohibited Qwest from initiating this proceeding at that time. Instead, Qwest waited several years to even raise the issue with CLECs,[110] and spent most of the intervening time suing AT&T on allegations directly opposite to the allegations of its complaint here.[111] As such, it is clear that Qwest inexcusably took more than four years to file a complaint, and its claims are therefore barred by the statute of limitations. Again, even though Qwest was aware of the AT&T arrangement in 2005, it did not dispute BullsEye's access charges at that time or at any time since. According to BullsEye's clearly articulated price list, a disputing party has 60 days to dispute any charges – and Qwest has never filed any dispute with BullsEye.

**(b) Ch. 2011-36, Laws of Florida;**

******Yes. Qwest's claims are completely barred by the Regulatory Reform Act. Under the Regulatory Reform Act, the former statutes that Qwest claims were violated were either repealed entirely, or revised in such a way that no such violation is possible.******

While the Regulatory Reform Act removed the Commission's jurisdiction over Qwest's claims (as discussed under Issues 1 and 2),[112] even if one were to assume otherwise for the sake of argument the Commission would have to conclude that Qwest's claims are barred under existing law. As fully discussed above, it is not possible for the conduct alleged by Qwest to violate the Regulatory Reform Act, because (1) the former, so-called "anti-discrimination" provisions have been completely repealed and (2) the existing statutes have been revised to clarify that entering individual service contracts with customers are entirely permissible.

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[110] Hearing Transcript at 658-659 (LaRose).
[111] Hearing Exhibit No. 76.
[112] It should be noted that the jurisdictional raised in Issues 1 and 2 do not constitute an affirmative defense, since Qwest – as the proponent of the Commission's jurisdiction – has the burden of proof to establish the existence of jurisdiction. *See* Discussion of Issue 3, *supra.*

Moreover, even if the Commission somehow had jurisdiction to consider whether the alleged conduct is otherwise unlawful under Section 364.01(4) (which it does not, since no such violation has been alleged), it would violate basic principles of statutory construction to interpret the Regulatory Reform Act in such a way as to find a violation. Indeed, when statutes governing specific conduct are repealed (such as the so-called "unreasonable discrimination" statutes under former Sections 364.08(1) and 364.10(1)), the rules of statutory construction bar any interpretation that a more general statute (such as Section 364.01) still somehow prohibits the specific conduct that was formerly governed by the repealed statute.[113] In other words, it would defy the rules of statutory construction to somehow find that alleged discrimination could be unlawful under the Regulatory Reform Act, because the Legislature intentionally repealed all of the specific statutory provisions that previously governed any such allegations. It is therefore impossible for the conduct alleged by Qwest to violate the Regulatory Reform Act, such that Qwest's claims are completely barred under existing law.

**(c) terms of a CLEC's price list;**

****Yes, Qwest claims are barred for two reasons: (1) BullsEye's Price List expressly permits BullsEye to engage in the conduct that Qwest somehow alleges is unlawful and (2) Qwest failed to file a notice of dispute within sixty days of an invoice, as required under BullsEye's Price List.****

BullsEye filed a Price List for intrastate switched access charges on November 6, 2003, with an effective date of November 7, 2003.[114] This Price List was approved in accordance with Section 2.07(C)(5)(a)(16) of the Commission's Administrative Procedure Manual (APM), which provides Commission staff with authority to administratively process CLEC price list and allows

[113] *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So.2d 14, 16 (Fla. 1997) ("Where possible, it is the duty of courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act.").
[114] BullsEye Telecom, Inc. Florida PSC Tariff No. 2.

such price lists to go into effect on one day's notice.[115] Qwest admits – as it must – that it has at all relevant times been on notice of BullsEye's Price List and the terms therein.[116] As a result, Qwest cannot reasonable dispute that its claims are barred under the terms of BullsEye's Price List for at least two reasons.

First, as fully discussed above under Issue 7, Section 5.1 of BullsEye's Price List explicitly permits BullsEye to enter individual contracts for switched access service. Although Qwest alleges that it is eligible for the terms of AT&T's settlement under its expert witness's theory that all IXCs are presumptively "similarly situated" unless there is a cost-based reason as to why they are not, such theory is not only untenable under Florida law, as explained above, but is also directly contradicted by plain terms of BullsEye's Price List. Indeed, Section 5.1 of the Price List expressly states that individual contracts may be based on reasons other than cost, including "***the term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features.***"[117] As such, Qwest's claims and the theory on which those claims rely are barred by BullsEye's Price List.

Second, Qwest's claims are also barred under Section 2.10.4, because Qwest failed to object to any BullsEye invoice as required under that provision. Section 2.10.4(A) provides:

> Any objections to billed charges must be reported to the Company or its billing agent within sixty (60) days of the invoice of the bill issued to the Customer. Adjustments to Customers' bills shall be made to the extent that circumstances exist which reasonably indicate that such changes are appropriate.[118]

[115] A copy of the relevant portions of the Commission's APM was attached to tw telecom of florida, l.p.'s Request for Official Notice, filed Oct. 18, 2012.
[116] Hearing Transcript at 177-178 (Easton).
[117] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 66, § 5.1.
[118] *Id.*

Qwest, however, failed to comply with this provision, as it has always paid BullsEye's switched access charges in full without dispute.[119] Moreover, as fully explained under Issue 8(a) above, Qwest admittedly knew since at least 2005 that other IXCs had switched access agreements with CLECs and in fact sued AT&T in 2007 based on the existence of AT&T's agreements with CLECs. Furthermore, Qwest even has its own switched access agreements with CLECs, many of which pre-date BullsEye's settlement with AT&T.[120] Qwest even sued AT&T in 2007 based on the existence of AT&T's agreements with CLECs. Thus, Qwest knew of the existence of the dispute raised in this proceeding for many years, but never raised any objection.[121]

**(d) waiver, laches, or estoppel;**

****Yes. Qwest knowingly waived its rights by inexcusably waiting several years to assert its claims, and by failing to submit billing disputes or seek contract negotiations with BullsEye. Qwest cannot be heard to complain now when it failed to timely pursue its rights.****

The doctrines of laches and waiver are equitable doctrines that bar a claim where a plaintiff's unreasonable delay in pursuing such claim has prejudiced the opposing party such that it would be unfair to grant the late-filed claims.[122] As fully established under Issues 8(a) and 8(c), Qwest unreasonably waited several years to file its complaint in this case despite knowing for many years that AT&T had entered nationwide agreements with hundreds of CLECs. Qwest even spent much of the intervening time pursuing civil claims against AT&T based on those agreements, in which Qwest took the exact opposite position that it takes in this case,[123] and had

[119] Hearing Transcript at 265-266 (Canfield).
[120] Hearing Exhibit No. 84 (Qwest Response to BullsEye Interrogatory No. 10 and Document Request No. 17, Bates No. QCC POD 3041-3163); Hearing Transcript at 156-157 (Easton) (admitting that Qwest was not being charged for switched access under its "CPLA" agreements).
[121] Indeed, at best, Qwest admits that the earliest it sent any notice to BullsEye was February 25, 2008, when it sent a generic "announcement" to BullsEye, baselessly demanding disclosure of BullsEye's confidential settlement agreements. Hearing Exhibit No. 78 (PKL-3). Therefore, even if Qwest's claims had any merit (which they do not), BullsEye's Price List would bar such claims as to any charges billed prior to December 27, 2007 (*i.e.*, sixty days prior to February 25, 2008).
[122] *McCray v. State*, 699 So.2d 1366, 1368 (Fla. 1997).
[123] Hearing Exhibit. No. 76 (PKL-1).

been entering its own switched access agreements the whole time.[124] Qwest, however, failed to seek negotiations or file notices of dispute with BullsEye during this same time, and only notified BullsEye of its claim in this case after it settled with AT&T in 2008.[125] Qwest now seeks to retroactively impose a non-existent rule regulating switched access that BullsEye had no reason to ever know, which would be wholly unfair and prejudicial to BullsEye. Indeed, as former Chairman Deason noted, "[t]he time for the debate and Dr. Weisman's arguments was 1995, not 2012."[126] Thus, in addition to being without merit on the substance, Qwest's claims should therefore be denied in equity as well.

**(e) the filed rate doctrine;**

****Yes. BullsEye Price List provides a default rate for switched access service that applies in the absence of a contract. As a customer that obtained service under BullsEye's Price List, Qwest cannot attempt to rely on certain parts of the Price List while ignoring other parts.****

The filed rate doctrine embodies the principle that carrier customers are charged with notice of the carrier's tariff or price list and accept the rates and terms therein when they use the carrier's service.[127] BullsEye Price List, which was approved by staff under the Commission's Administrative Procedures Manual, provides default rates for switched access and states that such rates shall apply in the absence of an agreement.[128] Qwest acknowledges it was on notice of BullsEye's Price List, always paid BullsEye in accordance with BullsEye's Price List without dispute, and never sought to negotiate an agreement. The Price List terms, however, explicitly require an objection to be made within sixty days of an invoice or any dispute is waived.[129] Qwest now attempts to ignore that Price List term, while at the same time claiming that BullsEye

[124] *See* fn. 118, supra.
[125] Hearing Exhibit No. 78 (PKL-3).
[126] Transcript at 598 (Deason).
[127] *See, e.g., Global Access Limited v. AT&T Corp.*, 978 F.Supp. 1068 (S.D. Fla. 1997).
[128] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 62, § 3.9
[129] BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 27, § 2.10.4(A).

somehow failed to "abide by" other terms of the Price List.[130] Qwest cannot try to have it both ways – ignoring some terms, while affirmatively relying on others. Indeed, Qwest has asserted in other forums that the Filed Rate Doctrine applies to CLEC switched access in Florida – and prevents Qwest from obtaining any relief from this Commission.[131] Qwest should therefore not be heard to take conflicting positions in this case, and the Price List must instead be enforced in accordance with its terms.

**(f) the prohibition against retroactive ratemaking;**

****Yes. The prohibition of retroactive ratemaking prevents the Commission from revising a carrier's applicable rates on a retroactive basis. Since Qwest's claims seek to have the Commission retroactively impose a different rate for Qwest, such claims are barred under the prohibition against retroactive ratemaking.****

The prohibition against retroactive ratemaking precludes the Commission from modifying the rate for a particular service on a retroactive basis.[132] Here, Qwest asks the Commission to permit it to retroactively dispute BullsEye's bills (going back many years) and pay a different amount based on a contract that Qwest never negotiated. Since Qwest did not negotiate its own contract, it was obligated under BullsEye's Price List to pay the default rates for switched access established thereunder. Permitting Qwest to obtain retroactive entitlement to a different rate (as it seeks here) would violate the prohibition against retroactive ratemaking.

**(g) the intent, pricing, terms or circumstances of any separate service agreements between Qwest and any CLEC;**

****Yes. Qwest's claims should be barred in whole, because Qwest has itself sought and received contract rates for switched access with many CLECs in Florida. Qwest's claims are therefore merely an improper attempt to have the Commission excuse Qwest's own choice to not pursue its own contract with BullsEye.****

[130] *See* Amended Complaint at ¶¶ 14-19.
[131] Hearing Exhibit No. 76 (PKL-1) (Qwest representing that Florida is a "Filed-Rate State").
[132] *In re Citizens of State*, Docket No. 060658-EI, Order No. PSC-07-0266-PHO-EI (issued Mar. 29, 2007) (recognizing the prohibition of retroactive ratemaking and unfairness that would result if it were not followed).

As noted several times above, Qwest has entered many agreements with CLECs for switched access rates that vary from the CLECs' price lists.[133] Some of these agreements pre-date BullsEye's settlement with AT&T, and many of them provide Qwest with a rate that is far more preferential than the rates set forth in BullsEye's settlement with AT&T.[134] Furthermore, Qwest has adamantly claimed that these agreements are confidential to the parties that entered them.[135] Qwest has therefore understood all along that it was and is permitted to negotiate agreements with CLECs, and has taken advantage of that opportunity with certain CLECs, but not BullsEye. Qwest's claims are therefore merely an attempt to disguise its failure to negotiate as alleged "discrimination." Indeed, the Commission has previously expressed skepticism that any alleged discrimination could constitute anything else. Qwest claims should not be permitted to benefit from a settlement that it did not negotiate, as it attempts to do here.

**(h) any other affirmative defenses pled or any other reasons?**

****Yes. Qwest claims should be barred as a matter of policy, since (a) Qwest seeks to have the Commission retroactively change the way in which CLEC switched access has been regulated and (b) Qwest itself has already obtained a settlement from AT&T related to AT&T's switched access agreements with CLECs.****

Sound principles of public policy also mandate rejection of Qwest's claims. First, as repeatedly noted above, Qwest asks the Commission – for the first time – to comprehensively regulated CLEC switched access rates and to do so in a manner inconsistent with and more restrictive than the way that the Commission has always treated such rates. If the Commission were to somehow adopt Qwest's position, it would constitute the unlawful creation of a new rule and would constitute bad public policy. BullsEye witness LaRose and former Chairman Deason

[133] Hearing Exhibit No. 84 (Qwest Response to BullsEye Interrogatory No. 10 and Document Request No. 17, Bates No. QCC POD 3041-3163); Hearing Transcript at 156-157 (Easton) (admitting that Qwest was not being charged for switched access under its "CPLA" agreements).
[134] *Id.*
[135] *Id.*; *see also* Hearing Transcript at 149 (Easton).

testified extensively as to the unfairness of such action and the harmful effects it would have on competition, the ability of a business to continue to operate and survive financially, and the public interest, such that Qwest's position must be rejected.

Second, as also noted above, Qwest has already sued AT&T based on allegations that it was ***AT&T*** that engaged in anticompetitive conduct by forcing nascent CLECs like BullsEye into settlement agreements through financial duress by withholding payments for access services on a nationwide basis.[136] Qwest settled those claims with AT&T, thereby obtaining relief for any harm that Qwest alleged it suffered as a result of AT&T's settlements.[137] Yet, in this case Qwest actually seeks to retroactively obtain the benefit of the very settlement that Qwest previously described as coercive and "unenforceable."[138] ***This is, by definition, duplicitous conduct.*** If Qwest were to recover again from CLECs for the same alleged harm over which it already settled with AT&T, Qwest would improperly obtain double recovery and would consequently be placed in an even better position than AT&T with respect to BullsEye's switched access services. As such a result is directly contrary to the purported objective of Qwest's own flawed theory (*i.e.*, to create uniformity in rates), Qwest's claims must also be rejected as a matter of policy for this reason.

**Issue No. 9 (a): 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'?**

****The Commission has no current authority to award a remedy for violation of statutes that have been repealed. Further, the relief Qwest seeks to recover does not constitute a "refund" but instead constitutes damages that the Commission is without authority to award.****

[136] Hearing Exhibit No. 76 (PKL-1).
[137] Hearing Exhibit No. 16 (Qwest Response to Document Request No. 5, Bates No. QCC POD 1940-1960).
[138] Hearing Exhibit No. 76 (PKL-1).

As fully explained under Issues 1 and 2 above, the Commission has no authority under the Regulatory Reform Act to award any relief for the violations of former statutes alleged in Qwest's complaint. As such, the Commission should find that no remedies can be awarded.

Furthermore, the Commission also has no authority to award the relief Qwest seeks, since such relief would constitute damages that the Commission is without authority to award. As previously determined, the Commission only has authority to award "refunds," not damages.[139] Indeed, this rule has long been established and the Commission has repeatedly recognized this limitation.[140] However, there is no refund issue at stake in this case – Qwest admits it was at all times charged and at all times paid the applicable rates set forth in BullsEye's Price List. In other words, there is no amount that could possibly be refunded because BullsEye billed Qwest the applicable rate and Qwest did not overpay that rate.[141]

Instead, Qwest complains that BullsEye violated the law by committing "unreasonable discrimination," and seeks to collect compensation for that alleged wrong. Such compensation – however calculated – therefore constitutes "damages," which is defined as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury."[142] In fact, the U.S. Supreme Court has held that discrimination claims brought under analogous federal statutes *require* a demonstration of damages and that refunds cannot possibly available as a remedy

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[139] Order No. PSC-10-0296-FOF-TP at 6.

[140] *Southern Bell Telephone and Telegraph Co. v. Mobile America Corporation, Inc.*, 291 So.2d 199, 202 (Fla. 1974) ("Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const."); *In re: Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003) ("This Commission lacks any legal authority to award the type of money damages sought by AT&T."); *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) ("The Commission may not award monetary damages in resolving utility related disputes.").

[141] *See, e.g.*, Black's Law Dictionary (8th ed. 2009) (defining "refund" as "[t]he return of money to a person who ***overpaid***, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings").

[142] Black's Law Dictionary (8th ed. 2009).

under such claims.[143]

Realizing this problem, Qwest attempts to disguise its calculation as a refund by claiming that it "overpaid" *in relation to AT&T.* This is calculation cannot constitute a refund, however, because the AT&T settlement agreement rates ***never applied*** to Qwest. In other words, Qwest is not arguing it paid too much, but instead is arguing AT&T paid too little. Qwest attempt to be put in AT&T's position retroactively is therefore not a refund. In fact, Qwest initially admitted as much, describing the relief it seeks as "reparations,"[144] which are defined as "[c]ompensation for an injury or wrong."[145] As the Commission has previously determined, "[r]etroactive remedies, which are in the nature of reparations...are peculiarly judicial in character" and beyond the Commission's jurisdiction.[146] Thus, since the relief Qwest seeks does not constitute refunds but instead seeks compensation for an alleged violation, such relief constitutes damages that the Commission lacks authority to award.

**Issue No. 9(b): 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?**

****No relief is warranted. BullsEye charged Qwest according to the Price List, such that Qwest cannot recover refunds. Qwest did not show it suffered harm that would necessitate another form of relief. The only proper relief under Qwest's theory would be to reverse the advantage AT&T obtained through anticompetitive withholding.****

Absolutely no relief to Qwest is warranted in this case. Although Qwest's case rests on an untenable theory that Qwest was somehow harmed in the "downstream market" by the fact

[143] *See ICC v. United States*, 289 U.S. 385, 389-92 (1933) (Cardozo, J.) (holding that where a party who has paid the [filed] rate sues upon a discrimination claim because some other party has paid less, "the difference between one rate and another is not the measure of the damages").
[144] Complaint at 19 (filed Dec. 11, 2009) (Qwest Prayer for Relief, Part B).
[145] Black's Law Dictionary (8th ed. 2009).
[146] *In re: Application of Tampa Electric Company for Authority to Increase its Rates and Charges,* Docket No. 800011-EU, Order No. 9810 (February 23, 1981) (emphasis in original).

that AT&T obtained a settlement, Qwest has provided no evidence of any *actual* harm ever occurred. Qwest did not submit any evidence whatsoever to show that it was unable to recover the switched access charges it paid from its customers or that it lost customers or market share due to the alleged violations. In fact, since Qwest actually obtained favorable switched access rates for itself under its own agreements, the record overwhelmingly demonstrates that Qwest was not harmed – but has instead *benefitted* – from the deregulated environment in which CLEC switched access services have been provided. The Hearing testimony of Qwest witness Derek Canfield showed that Qwest had no real data upon which it based its alleged calculations.

Moreover, even if the Commission were to somehow conclude that uniform switched access rates should be required, the appropriate remedy would not be to extend the benefit of the settlement that AT&T received to Qwest. Instead, the only fair and reasonable remedy would be to reverse the alleged "unreasonable advantage" for the customer to whom it was given rather than retroactively perpetuate that advantage to another customer. Indeed, allowing Qwest to obtain the benefit of the AT&T agreement would – under Qwest's theory – simply give Qwest an "unreasonable advantage" over the dozens of other IXCs in that – like Qwest – pay BullsEye's Price List rate.

Furthermore, given Qwest admits that BullsEye was compelled to enter the AT&T settlement due to AT&T's anticompetitive withholding of access charge payments on a nationwide basis, it would be wholly unfair to permit Qwest to benefit from that agreement, rather than reversing the advantage unfairly obtained by AT&T. In fact, that was the result reached by the Minnesota Public Utilities Commission when it investigated AT&T's settlement

contracts in Minnesota.[147] The FCC and other state commissions have recognized the propriety of this result as well.[148]

Finally, it should be noted that the Colorado PUC's decision upon which Qwest may attempt to rely has no persuasive value under Florida law. Colorado – unlike Florida – has specific statutes that regulate switched access service according to cost, and requires the filing of off-tariff agreements. For these and many other reasons, the Colorado proceeding does not represent a "parallel proceeding" as Qwest has attempted to suggest.[149] In any event, the Colorado PUC's determinations are unlawful for many reasons, which are currently under review in Colorado State Court.

Thus, to the extent the Commission should take any action on the facts presented in this case, it should investigate AT&T's anticompetitive, coercive tactics in obtaining the settlement with BullsEye and other CLECs. In any event, however, Qwest's claim for relief must be rejected in its entirety.

## CONCLUSION

**It is now abundantly clear that Qwest's Amended Complaint should have been dismissed long ago, for a variety of independent reasons:**

1. Qwest has no claim under Florida law, as two of the three statutes that Qwest claims were violated no longer exist and the third was modified to clarify that the conduct at issue is lawful;
2. The now-repealed laws were never applied by the Commission to competitive carriers like BullsEye in the first instance, such that Qwest's discrimination

[147] Hearing Transcript at 132, 195 (Easton); Hearing Transcript at 669 (LaRose) and Exhibit No. 79 (PKL-4).
[148] Hearing Transcript at 668 (LaRose).
[149] *See* Hearing Transcript at 494-502 (Wood).

claims are based on statutes that have ***never*** applied to BullsEye in the manner suggested by Qwest;

   a. CLEC switched access has always been treated as an unregulated service;

   b. The Commission has never regulated CLEC switched access rates, required CLEC switched access to be priced according to cost, required CLECs to publish any switched access settlements or contracts, or required CLECs to file a Price List for such services;

   c. Qwest's radical suggestion to now create and retroactively impose new switched access regulation is entirely contrary to the way CLEC services have been treated in Florida, would violate Florida law, and would force companies to exit the Florida market or cease to exist altogether.

3. The Commission, as of the July 1, 2011 effective date of the Regulatory Reform Act, no longer has jurisdiction to even entertain Qwest's unfounded claims;

   a. The Act not only confirms the invalidity of the claims going forward, but also contains no provision to preserve any pending claims;

   b. Qwest has failed to make any demonstration of jurisdiction;

4. Qwest has presented no facts to support the claims it attempts to assert;

   a. Qwest failed to show that it is "under like circumstances" to AT&T;

   b. To the contrary, the record shows Qwest and AT&T to be dissimilar in a variety of ways, including volume of traffic, the nature and regulatory classification of traffic, payment and dispute stature, negotiation status, and settlement – and the fact that AT&T is a competitor to BullsEye nationally and specifically in Florida, while Qwest is not.

5. Qwest's own actions demonstrate the invalidity of its claims:

    a. Qwest had agreements with competitive carriers going back many years, under which Qwest avoided certain access charges altogether, which Qwest clearly believed were proper under Florida law;

    b. Qwest used various stratagems to avoid payment of access charges, such as so-called alternate routing arrangements, to pay reduced access charges or apparently pay no access charges at all;

    c. Qwest has always paid to BullsEye, without dispute or request for an alternate arrangement, the rate that BullsEye has had on file with the Commission; Qwest is on record as saying that such facts prevent this Commission from awarding it any relief.

6. AT&T withheld the payment of access charges and threatened financial harm to coerce the settlement agreement with BullsEye, which Qwest says was illegal;

    a. BullsEye had no reasonable option but to enter the settlement with AT&T, and has no ability under its terms to effectively terminate the going-forward rates demanded by AT&T;

    b. Qwest cannot benefit from an agreement it says was illegal and unenforceable;

    c. Qwest may not attempt to claim an agreement for itself that it did not negotiate or attempt to negotiate, even when Qwest became aware of its existence;

    d. Should the Commission wish to take any action, it would in all fairness pursue relief from AT&T due to its prior actions.

Finally, it is also clear that Qwest is not only seeking to benefit from an Agreement it characterized as "illegal," but to do so by imposing financial harm on BullsEye by:

1. Soliciting the Commission to change its rules retroactively to cover for Qwest's failure to dispute the charges or seek its own agreement;
2. Forcing BullsEye to incur huge amounts of legal fees to defend against Qwest's frivolous claims, which the Commission should demand Qwest reimburse, and
3. Attempting to replicate and benefit from AT&T's tortuous conduct, retroactively, by demanding the rates AT&T extorted from BullsEye, which effort the Commission must not only reject but should attempt to remedy by concluding that AT&T should pay the same price list rates that all other carriers pay.

Dated: December 10, 2012

*/s Andrew M. Klein*

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**CERTIFICATE OF SERVICE**
**DOCKET NO. 090538-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 10th day of December, 2012, to the following:

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