State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 28, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Tan)
Office of Telecommunications (Curry, Long)

RE: Docket No. 090538-TP – Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; BullsEye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.

AGENDA: 04/09/13 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Brisé, Edgar, Balbis

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\090538.RCM.DOC

Case Background

On December 11, 2009, Qwest Communications Company, LLC (QCC) filed a complaint against Florida competitive local exchange carriers (CLECs), which QCC amended twice.[1] QCC provides long distance service in Florida as an interexchange carrier (IXC). Over time a number of CLECs were dismissed from this proceeding.[2]

The CLECs remaining in this proceeding are BullsEye Telecom, Inc. (BullsEye), tw telecom of florida, l.p. (TWTC), Ernest Communications, Inc. (Ernest), Flatel, Inc. (Flatel), and Navigator Telecommunications, LLC (Navigator) (Respondents). Although named in the Amended Complaint, both Ernest and Flatel failed to participate in the hearing process. Navigator ceased participation prior to the hearing. Ernest, Flatel and Navigator did not file a prehearing statement or appear at the hearing. Ernest, Flatel and Navigator remain respondents and are subject to the decision in this case.

The CLECs filed multiple Motions to Dismiss and a Motion for Reconsideration in which the Commission determined that it retains jurisdiction for this matter and has the authority to investigate the allegations of this Complaint but cannot grant monetary damages or injunctive relief.[3]

Based on the record, Qwest, as an IXC, purchases intrastate switched access service from CLECs, through CLEC published price lists, which the CLECs must publish and may file with the Commission.[4] Switched access service is necessary for IXCs to provide long distance service. QCC became aware that the Respondent CLECs entered into alleged secret agreements that included discounts on price list intrastate switched access rates. QCC believed that the discounts were not reflected on the price lists, and were not offered or furnished to QCC, even upon request. The CLECs state that the agreements with different switched access rates were offered as a result of a settlement agreement with AT&T. QCC believes it is entitled to the cost differential between the published schedule rates and the secret agreement rates. QCC's Complaint is comprised of three claims for relief.

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[1] QCC alleges rate discrimination in connection with the provision of intrastate switched access services.

[2] Parties voluntarily dismissed without prejudice are Cox Florida Telecom l.p., by administrative memo on April 7, 2011, and XO Communication Services, Inc. by Order No. PSC-12-0305-PCO-TP issued June 14, 2012. Parties voluntarily dismissed with prejudice are Lightyear Network Solutions, LLC; by Order No. PSC-12-0210-FOF-TP, issued April 23, 2012; Access Point, Inc.; STS Telecom; by Order No. PSC-12-0305-PCO-TP; Birch Communications, Inc; by Order No. PSC-12-0395-PCO-TP, issued August 1, 2012; Budget Prepay, Inc.; DeltaCom, Inc. d/b/a/ EarthLink Business; Saturn Telecommunications Services d/b/a EarthLink Business; Order No. PSC-12-0305-PCO-TP, PaeTec Communications, Inc.; US LEC of Florida LLC d/b/a PAETEC Business Services; Windstream Nuvox, Inc.; by Order No. PSC-12-0553-PHO-TP, issued October 17, 2012; and Granite Telecommunications, LLC; by Order No. PSC-12-0536-PCO-TP, issued October 9, 2012; Broadwing Communications, LLC; and, MCImetro Access Transmission Service LLC d/b/a Verizon Access Transmission Services, by Order No. PSC-12-0546-PCO-TP, issued October 16, 2012.

[3] Order No. PSC-10-0296-PCO-TP, issued May 7, 2010; Order No. PSC-11-0145-FOF-TP, issued March 2, 2011; Order No. PSC-11-0222-FOF-TP, issued May 16, 2011; Order No. PSC-11-0420-PCO-TP, issued September 28, 2011.

[4] Price lists are now referred to as schedules, pursuant to amended Section 364.04, F.S.

- Violation of Sections 364.08(1) and 364.10(1), F.S. (2010), by BullsEye, TWTC, Ernest, Navigator and Flatel. (First Claim for Relief)

- Violations of Sections 364.04(1) and (2), F.S. (2010), by BullsEye, TWTC, Ernest, Navigator and Flatel. (Second Claim for Relief)

- Violations of Sections 364.04(1) and (2), F.S. (2010), by BullsEye and Navigator only. (Third Claim for Relief)

Revisions to Chapter 364, F.S.

On July 1, 2011, Chapter 2011-36, Laws of Florida, (Regulatory Reform Act) became effective, repealing and amending language in Chapter 364, F.S. These changes include sections that pertain to the instant case. The following subsections were repealed in their entirety.

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

Also relevant is Section 364.04, F.S., which addresses schedules and publishing of rates. This section was amended as follows:

> (1) Every telecommunications company shall publish through electronic or physical media schedules showing the rates, tolls, rentals, and charges of that company for service to be offered ~~performed~~ within the state. The commission shall have no jurisdiction over the content or form or format of such published schedules. A telecommunications company may, as an option, file the published schedules with the commission or publish its schedules through other reasonably publicly accessible means, including on a website. A telecommunications company that does not file its schedules with the commission shall inform its customers where a customer may view the telecommunications company's schedules.
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> (2) This chapter does not prohibit a telecommunications company from:

(a) Entering into contracts establishing rates, tolls, rentals, and charges that differ from its published schedules or offering services that are not included in its published schedules; or
(b) Meeting competitive offerings in a specific geographic market or to a specific customer.

(3) This section does not apply to the rates, terms, and conditions established pursuant to 47 U.S.C. ss. 251 and 252. ~~The schedules shall plainly state the places telecommunications service will be rendered and shall also state separately all charges and all privileges or facilities granted or allowed and any rules or regulations or forms of contract which may in anywise change, affect, or determine any of the aggregate of the rates, tolls, rentals, or charges for the service rendered.~~

The Regulatory Reform Act also amended Section 364.16, F.S., which governs access and interconnection between telecommunication companies, and added new subsections (1) and (2) as follows:

(1) The Legislature finds that the competitive provision of local exchange service requires appropriate continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition.
(2) It is the intent of the Legislature that in resolving disputes, the commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior, including, but not limited to, predatory pricing.

The impact of these statutory changes will be further discussed in Issue 1.

The Commission has jurisdiction pursuant to Chapters 364 and 120, Florida Statutes.

Discussion of Issues

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

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

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

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

Recommendation: No. Staff recommends that the Commission no longer retains jurisdiction to make a finding of specific violations of Sections 364.08(1) or 364.10(1), F.S., however, QCC's claims for relief are grounded in allegations of anticompetitive behavior by the Respondent CLECs, over which the Commission has continuously maintained jurisdiction pursuant to Chapter 364, F.S. (Tan)

Position of the Parties

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

TWTC: The Regulatory Reform Act removed Commission authority over the cited provisions; therefore, all pending cases fall with the law. QCC had no property interest in its claims, and current, not repealed, law applies.

BullsEye: No. The Regulatory Reform Act repealed Sections 364.01(1) and 364.10(1), and modified Section 364.04 to confirm that service contracts are lawful. The Act included no saving 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."

Staff Analysis:

QCC's Argument: QCC asserts that the Commission has already determined in this proceeding that it has jurisdiction over QCC's claims. QCC contends that the jurisdiction was not modified by the 2011 Regulatory Reform Act. QCC rejects the CLEC's claim that without the protection of a savings clause, the act of legislation repealing a statute conferring jurisdiction presumptively and automatically strips an administrative agency such as the Commission of all jurisdiction, including pending cases. (BR 10)

QCC argues that although Sections 364.08 and 364.10(1), F.S., are now repealed, the jurisdiction over this proceeding resides in Sections 364.01(1) and (2), F.S., and in newly amended Sections 364.16(1) and (2). (BR 11) QCC contends that in Sections 364.01(1) and (2), F.S., the Legislature has given the Commission exclusive jurisdiction to handle all matters set forth in Chapter 364 in regulating telecommunications companies. QCC further contends that

Section 364.16(1), F.S., expressly provides continued regulatory oversight of carrier-to-carrier relationships (such as the relationship at issue between QCC and the CLECs pursuant to Section 364.16(2), F.S.) and protection against anticompetitive behavior. *Id.*

QCC argues that the Regulatory Reform Act does not contain an express statement for retroactive applicability and therefore should be presumed to apply prospectively. QCC agrees with the Commission's decision in Order No. PSC-11-0420-PCO-TP, wherein the Commission found that the Legislative intent was not sufficiently clear with respect to whether the Commission was to apply the Regulatory Reform Act retroactively. (BR 13) QCC contends that the Commission's decision should stand and that any attempt to alter the Commission's conclusion is an untimely request for reconsideration by the Respondent CLECs. *Id.*

TWTC's Argument: TWTC argues that the Commission does not have the jurisdiction to enforce repealed laws because it lacks authority once the Legislature repeals or alters the applicable statutory provisions and all pending cases fall with the law. (BR 5) TWTC further argues that application of the Regulatory Reform Act is not a retroactive change of law and QCC did not establish a property right. (BR 6)

TWTC maintains that this issue is limited to Section 364.08(1), 364.10(1) and 364.04(1), F.S., as the statutes existed prior to July 1, 2011 and amendments made to these statutes by the Regulatory Reform Act. *Id.* TWTC argues that no other sections can be considered because they are not included in the wording of the First, Second and Third Claims for relief. TWTC contends that this issue is based on evidence in the record and addresses whether the Commission has jurisdiction to enforce the referenced statutory sections. TWTC argues that QCC did not have a vested property right to a cause of action. (BR 7)

TWTC asserts that as a "creature of statute" the Commission has only those powers conferred expressly or implicitly by statute and the Legislature.[5] (BR 9) TWTC further argues that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."[6] TWTC argues that there is no language that exempts pending proceedings from the operation of the statute. (BR 11)

TWTC argues that notwithstanding the Commission's lack of jurisdictional authority, QCC has no vested private property right based on a claim of unreasonable discrimination.

BullsEye's Argument: BullsEye asserts that the Commission is a creature of statute with only the powers delegated to it by the Legislature. (BR 8) BullsEye argues that if jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. (BR 9) BullsEye further argues that absent a savings clause, the Legislature has eliminated the jurisdiction over the alleged violations of the repealed provisions. *Id.*

BullsEye contends that, by the newly amended Section 364.04, F.S., the Legislature explicitly permits the entry into a contract with rates that are different from the default rates available in the price lists. BullsEye further contends that this change shows the Legislature's

[5] *See e.g.* State Dept of Transportation v. Mayo, 354 So. 2d 359, 361 (Fla. 1977)
[6] Bruner v. United States, 343 U.S. 112

intent to remove jurisdiction from the Commission regarding Section 364.01, F.S. BullsEye argues that, because the amended law expressly permits the actions that QCC alleges is anticompetitive, the Commission must find that it has no jurisdiction in this matter. (BR 11) BullsEye maintains that a contrary finding would violate basic principles of statutory construction. *Id.*

Analysis

The Commission, as a creature of statute, holds only those powers delegated to it by the Legislature.[7] Stated differently, "the Commission's powers, duties, and authority are those and only those that are conferred expressly or impliedly by statute of the state."[8] At issue is whether the Commission has jurisdiction to render a decision in this proceeding. The Respondent CLECs take the position that the repeal and amendment of certain statutes named in QCC's claims for relief have eliminated the Commission's ability to assert jurisdiction. QCC takes the position that Order No. PSC-11-0420-PCO-TP, issued earlier in this proceeding, already established the Commission's authority. As discussed below, staff believes that the Commission's jurisdiction to prevent anticompetitive practices and ensure a fair and effective marketplace remains intact.

Sections 364.08(1) and 364.10(1), F.S., were repealed by the Legislature. The Respondents, citing Bruner at 116-117 take the position that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." The Commission must determine whether the review of actions, which occurred before the Regulatory Reform Act, remains within its jurisdiction. Consistent with Bruner, in Jennings v. Fla. Elections Comm'n, 932 So. 2d 609, 613 (Fla. 2d DCA 2006), the Second District Court of Appeal stated the following:

> It makes no difference that the Commission had completed the investigatory stage of its proceeding against Jennings before the 2004 law took effect. The statute does not distinguish violations unearthed by the Commission before its effective date from violations discovered thereafter. If the legislature had intended its restriction on the Commission's power to apply only to the latter, it easily could have said so. Just as easily, the legislature could have exempted pending proceedings from the operation of the statute. It did neither.

Moreover, other Florida courts have dismissed properly-filed actions when the jurisdictional statutes have been repealed.[9] In accordance with the foregoing, the Commission cannot apply Sections 364.08(1) and 364.10(1), F.S., to determine if violations have occurred before July 21, 2011; however, as discussed below, staff believes that the Commission still retains jurisdiction to oversee fair and effective competition.

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[7] *See*, Southern States Util. v. Public Service Commiss'n, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998); *See also*, Ocampo v. Dept of Health, 806 So. 2d 633, 634 (Fla. 1st DCA 2002); State Dept. of Env. Reg. v. Falls Chase Special Taxing Dist., 425 So. 2d 787, 793 (Fla. 1st DCA 1982); *See* United Telephone Co. of Florida Public Service Commission, 496 So. 2d 116 (Fla. 1986); and Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973).
[8] City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 496 (Fla. 1973).
[9] Hallowell v. Commons, 239 U.S. 506, 508-509, 36 S. Ct. 202, 203-204, 60 L. Ed. 409 (1916).

Consistent with the Commission's decision in Order No. PSC-11-0420-PCO-TP, issued September 28, 2011, in the instant docket, staff believes that the Commission retains subject matter jurisdiction in this proceeding to determine whether alleged anticompetitive behaviors occurred.

Prior to July 21, 2011, by Section 364.10(1), F.S. (2010), the Legislature conferred to the Commission the ability to prevent prejudice and anticompetitive conduct:

> (1)A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Pursuant to the foregoing, the Legislature clearly granted the Commission jurisdiction to oversee and prevent anticompetitive behavior. Even though Section 364.10(1) has been repealed, in Section 364.16(1) and (2), F.S., (2011) the Legislature maintained the Commission's ability to oversee and prevent anticompetitive behavior by adding the following language:

> (1) The Legislature finds that the competitive provision of local exchange service requires appropriate continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition.
>
> (2) It is the intent of the Legislature that in resolving disputes, the commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior, including, but not limited to, predatory pricing.

Staff recommends that if the Legislature had intended to eliminate regulatory oversight of competition and anticompetitive behavior, it would not have added statutory language to continue the Commission's exercise of such authority. As set forth above, pursuant to Section 364.16(2), F.S., the Commission retains jurisdiction over anti-competitive behavior, including predatory pricing practices, and fair and effective competition. In addition, staff believes that the Legislature has not modified the Commission's exclusive jurisdiction over wholesale carrier-to-carrier disputes, and the obligation to ensure fair and effective competition among telecommunications service providers.

In conclusion, staff recommends that although the Commission no longer retains jurisdiction to make a finding of specific violations of Sections 364.08(1) or 364.10(1), F.S., QCC's claims for relief are grounded in allegations of anticompetitive behavior by the Respondent CLECs, over which the Commission has continuously maintained jurisdiction pursuant to Chapter 364, F.S.

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

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

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

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

Recommendation: No. Staff recommends that the Commission no longer retains jurisdiction to make a finding of specific violations of Sections 364.08(1) or 364.10(1), F.S., however, QCC's claims for relief are grounded in allegations of anticompetitive behavior by the Respondent CLECs, over which the Commission has continuously maintained jurisdiction pursuant to Chapter 364, F.S. (Tan)

Position of the Parties

QCC: Yes. While sections 364.08(1) and 364(1) were repealed effective July 1, 2011, the Florida Commission continues to have jurisdiction under 364.16(1) and (2) to resolve carrier-to-carrier disputes and, in doing so, to ensure fair treatment of all telecommunications providers and to prevent anticompetitive behavior.

TWTC: At the hearing, QCC stipulated that this issue does not involve or impact TWTC.

BullsEye: No. The Regulatory Reform Act repealed Sections 364.08(1) and 364.10(1), F.S. and modified Section 364.04, F.S. to confirm that service contracts are lawful. QCC's claims rely solely on these sections, and do not allege a violation for conduct occurring after the effective date of the Act.

Staff Analysis:

QCC's Argument: QCC asserts that only BullsEye, Ernest, and Navigator are affected by this issue because TWTC and Flatel, prior to July 21, 2011, had ended their "secret agreements" with AT&T. (BR 13) QCC contends that the Regulatory Reform Act language and legislative history does not support the assertion that the Commission lacks jurisdiction. QCC argues that the amendments to Chapter 364 and the repeal of Sections 364.08 and 364.10(1) do not change the Commission's authority to protect against anti-competitive, carrier-to-carrier conduct. (BR 13)

QCC argues that switched access is a wholesale service over which the Commission retains jurisdiction in the newly-amended Section 364.16(1) F.S. QCC contends that the statute continues regulatory oversight of carrier-to-carrier relations. (BR 14) QCC further argues that by the newly-amended Section 364.16(2), F.S., the Legislature intends that the Commission must "prevent anticompetitive behavior, including but not limited to predatory pricing." QCC

contends that the legislature intended for the Commission to continue to prevent abusive wholesale practices such as the "secret discounts provided by the Respondent CLECs to select IXCs." (BR 14) QCC asserts that the Respondent CLECs' ongoing practice of providing discriminatory switched access charges to QCC is the type of conduct the legislature expects the Commission to prevent and correct. (BR 14)

TWTC's Argument: TWTC states that its switched access contract rate with AT&T expired in November 2008. TWTC avers QCC stipulated that this issue does not involve TWTC. (BR 17)

BullsEye's Argument: BullsEye argues that the Regulatory Reform Act removed any Commission jurisdiction relating to QCC's claims. (BR 12) BullsEye further argues that the legislature repealed in its entirety all of the sections QCC's claims allege to be violated. BullsEye maintains that a statute cannot be violated if it does not exist.

BullsEye asserts that QCC's Second and Third Claims rest on establishing that Section 364.04, F.S., is violated. BullsEye contends QCC's Second and Third Claims are negated by the legislature's explicit modification of the statute to reflect that a telecommunications company is not prohibited from entering into contracts which establish rates and charges that differ from its published schedules. BullsEye further argues the Commission cannot assert jurisdiction since the conduct authorized by a statute cannot also be a violation. *Id.*

Analysis

Staff notes that during the evidentiary hearing QCC stipulated to TWTC's exclusion from this issue. (TR 692) Due to the time frame of this issue, Flatel is also not affected by this issue. Therefore only BullsEye, Navigator and Ernest are subject to a decision in this issue.

Pursuant to applicable case law, the Commission's powers, duties, and authority must be "express or implied" by the Florida Statutes.[10] Based on the plain meaning of Sections 364.16(1) and (2), F.S., the Commission has been granted jurisdiction to oversee fair and effective competition for carrier-to-carrier relationships and is tasked with the prevention of anticompetitive behaviors. The Legislature acknowledged the Commission's previously existing and continuing authority in Sections 364.16(1) and (2), F.S., by stating that the Commission has "continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition" and "in resolving disputes, the commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior." Therefore, the changes of the Regulatory Reform Act did not alter the Commission's ability to look at anticompetitive behavior.

In conclusion, staff recommends that although the Commission no longer retains jurisdiction to make a finding of specific violations of Sections 364.08(1) or 364.10(1), F.S., QCC's claims for relief are grounded in allegations of anticompetitive behavior by the Respondent CLECs, over which the Commission has continuously maintained jurisdiction pursuant to Chapter 364, F.S.

[10] City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 496 (Fla. 1973).

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

Recommendation: Staff recommends that the issues before the Commission must be proven by a preponderance of the evidence provided. QCC has the burden to prove subject matter jurisdiction and to establish the factual and legal basis to provide the relief sought by a preponderance of the evidence. (Tan)

Position of the Parties

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

TWTC: (a) The burden to demonstrate jurisdiction remains on the party asserting jurisdiction, i.e. QCC. (b) Absent a statutory burden-shifting presumption, QCC also bears the burden of proving both the factual and legal basis for its claims. The Legislature has not created a presumption to shift that burden to the CLECs.

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

Staff Analysis:

QCC's Argument: QCC asserts that it has the burden to establish subject matter jurisdiction over the subject matter of its Complaint under a preponderance of the evidence standard. QCC argues that it has fully met its burden to establish the facts and argue the law related to the Commission's jurisdiction. QCC maintains that the Commission has already determined jurisdiction in its decisions regarding the Motions to Dismiss.[11] (BR 15)

QCC maintains that it has the burden of proof but argues that the Respondents hold the burden to establish the factual and legal bases for each affirmative defense utilized. (BR 16) QCC contends that in a rate discrimination case in which a *prima facie* case has been established by the complainant, the burden shifts to the CLECs to establish a lawful basis for its price differentiation. *Id.* QCC asserts that it has established the necessary *prima facie* case of unlawful rate discrimination. (BR 17) QCC contends that the CLECs have failed to provide credible evidence that the services provided to the preferred IXCs differed either functionally or as to the costs from the services provided to QCC. *Id.*

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

TWTC's Argument: TWTC asserts that the burden of proof is on the party asserting the affirmative of an issue in an administrative proceeding.[12] (BR 18) TWTC argues that since a motion to dismiss for lack of jurisdiction may be made at any time under Rule 1.140(h)(2), Florida Rules of Civil Procedure, than the party asserting the Commission's authority must establish that authority at any time. *Id.*

TWTC argues that in an administrative case, the standard of proof is a preponderance of evidence, except to the extent that this proceeding is a disciplinary case, upon which the standard of proof is clear and convincing evidence. *Id.* TWTC contends that there is not a burden shifting presumption even with the allegation there is a difference in switched access rates not related to costs. TWTC argues that the Commission cannot shift the burden to the CLECs unless authorized by statute. (BR 19) TWTC maintains that the burden to establish subject matter jurisdiction as well as the factual and legal basis for its claims remains on QCC. *Id.*

BullsEye's Argument: BullsEye argues that the burden of proof is placed on the party asserting jurisdiction and remains on that party throughout the entire proceeding. (BR 12) BullsEye maintains that it is QCC who has the burden to demonstrate the existence of jurisdiction "beyond a reasonable doubt." BullsEye disagrees with the previous Commission decision in which the Commission determined that the CLECs had a high burden to prove lack of jurisdiction. BullsEye further argues that the Commission should now determine that it is QCC who holds the high burden of proof and that erring on the side of caution would result in dismissal. (BR 13)

BullsEye contends that the burden before an administrative tribunal belongs to the party asserting the affirmative of an issue absent any presumption to shift the burden. BullsEye asserts that the Legislature has created no presumption that would place the burden on the CLECs. *Id.* BullsEye further asserts that administrative agencies such as the Commission have no authority to create or apply legal presumptions in the absence of specific statutory or constitutional authority.[13] BullsEye argues that Florida has no statutory authority that allows for such a burden-shifting presumption, which requires that the Commission determine that QCC has the burden of proof. (BR 14)

Analysis

All the parties assert that QCC has the burden to establish subject matter jurisdiction over the subject matter of its Complaint. However, the Respondent CLECs argue that QCC, as the party asserting jurisdiction, has the burden of proof to establish the legal and factual elements of the complaint. QCC takes the position that the burden is an initial one, and that the burden then shifts to the Respondent CLECs to establish a lawful basis for their price differentiation.

The burden of proof in a Section 120.57, F.S., proceeding is upon the petitioner to go forward with evidence to prove the truth of the facts asserted in his petition.[14] In Florida Dep't of Transportation v. J.W.C. Co., Inc., the Court explains that:

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[12] *See e.g.* Department of Transportation v. J. W. C. Co., Inc., 396 So .2d 778, 788 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977).
[13] Little v. Dep't of Labor and Employment Security, 652 So.2d 927 (Fla. 1st DCA 995).
[14] Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981)

> [t]he term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

Id. at 787

Indeed, absent a statutory provision to the contrary, the party asserting the affirmative of an issue before an administrative tribunal bears the burden of proving both factual and legal basis for its claims.[15] QCC is asserting the affirmative of its issues and therefore has the burden of going forward. Therefore, staff does not agree that the burden for jurisdiction would shift to the Respondent CLECs.

For standard of proof, administrative agencies, such as the Commission, apply the preponderance of evidence standard.[16] Furthermore, Section 120.57(1)(j), F.S., establishes that administrative hearings involving disputed issues of material fact shall be based upon a preponderance of evidence which shall be based exclusively on the evidence of the record and on matters officially recognized. The statute provides for exceptions applying to penal and licensure disciplinary proceedings or as provided by separate statute, which do not apply here.

Staff recommends that the issues before the Commission must be proven by a preponderance of the evidence provided. Therefore, staff recommends that as the party seeking affirmative relief in this docket, QCC has the burden to prove subject matter jurisdiction and to establish the factual and legal basis to provide the relief sought by a preponderance of the evidence.

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[15] Young v. Dep't of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993), South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988) (finding that the utility must show its case by a preponderance of evidence); Order No. PSC-99-2444-AS-SU, Docket No. 981781-SU, In re: Application for amendment of Certificate No. 247-S to extend service area by the transfer of Buccaneer Estates in Lee County to North Fort Myers Utility, Inc., issued December 14, 1999 (finding technical ability and capacity to provide wastewater service by a preponderance of evidence); Order No. PSC-98-1556-FOF-TI, Docket No. 951232-TI, In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc., and Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission's jurisdiction, November 23, 1998; Order No. PSC-92-0002-FOF-EI, Docket No. 910883-EI, In re: Petition for determination of need for a proposed electrical power plant and related facilities in Polk County by Tampa Electric Company., issued March, 2, 1992 (the petitioner in the case has the burden to prove to the Commission by a preponderance of the evidence)

[16] Fitzpatrick v. City of Miami Beach, 328 So. 2d 578 (Fla 3d DCA 1976).

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

Recommendation: Yes. Staff believes QCC has standing because its substantial interests fall within the zone of interests to be protected under Sections 364.16(1) and (2), F.S. Accordingly, staff recommends that QCC has standing to seek a determination from the Commission to determine if anticompetitive behavior has occurred. (Tan)

Position of the Parties

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

TWTC: No. To have standing, QCC must demonstrate injury in fact of a type which the proceeding is designed to protect. QCC cannot show standing on these facts, under repealed law. TWTC argues that QCC has not alleged a violation of any current statute, nor attempted to amend its Complaint to allege such.

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

Staff Analysis:

QCC's Argument: QCC argues there is no factual or legal basis that would prevent QCC from having standing in this case. (BR 17) QCC contends that it has suffered an injury in fact which is of sufficient immediacy; and that the substantial injury is of the type or nature that the proceeding was designed to protect.[17] (BR 18) QCC asserts that as a captive customer of critical switched access services, it continues to be subjected to unreasonable rate discrimination by the CLECs by charging other IXCs rates not found in their price lists and is therefore an ongoing injury in fact. QCC further asserts that the CLECs' actions violate former sections 364.04, 364.08 and 364.10, F.S., which QCC maintains the Commission is and was required to enforce. QCC contends that these statutes are designed to protect QCC from unreasonable disadvantage and prejudice. *Id.*

QCC argues that in Order No. PSC-11-0145-FOF-TP, the Commission has already determined QCC has standing in this proceeding by meeting the requirements in Agrico. QCC contends that the Commission should affirm its prior ruling that QCC has standing to pursue its claims. (BR 19)

[17] *See*, Florida Society of Ophthalmology v. State Board, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988), *rev. denied*, 542 So. 2d 1333 (Fla. 1989); Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982).

TWTC's Argument: TWTC argues that QCC fails to have standing when the law has been repealed as it has in this proceeding due to lack of subject matter jurisdiction. TWTC also argues that QCC did not properly make a separate claim to address its claim of anti-competitive conduct. (BR 20) TWTC contends that QCC also failed to properly name TWTC as a respondent to its Third Claim. *Id.*

BullsEye's Argument: BullsEye argues that the Regulatory Reform Act repealed the statutes upon which QCC relies upon for establishing standing in this proceeding. (BR 14) BullsEye contends that since there is no longer a statute that could protect the injury that QCC alleges to have suffered, QCC fails to establish standing. BullsEye further argues that the issue of altering the price list in regards to an agreement with AT&T would be between BullsEye and AT&T and not QCC. BullsEye asserts that it abided by its Price List with respect to QCC and therefore QCC has no standing under its Second Claim for Relief.

Analysis

To meet the standard for standing under Rule 28-106.201(2), Florida Administrative Code, a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Agrico, 406 So. 2d at 482.

In Order No. PSC-11-0145-FOF-TP, the Commission determined that QCC had standing in this proceeding. The Respondent CLECs take the position the Regulatory Reform Act removed QCC's standing in this proceeding. Staff does not agree with the Respondent CLECs argument. Rather, staff believes that QCC continues to meet the two-prong standing test in Agrico.

As discussed earlier, pursuant to Section 364.16(1) and (2), F.S., the Commission has the authority to investigate anticompetitive behavior and unlawful discrimination amongst telecommunication providers, such as those alleged by QCC in this proceeding. Staff believes that although QCC no longer retains standing pursuant to Sections 364.08(1), and 364.10(1), F.S., pursuant to Agrico, QCC retains standing to petition the Commission for a determination of anticompetitive behavior pursuant to the Commission's general authority over anticompetitive behaviors and unlawful discrimination provided in Sections 364.16(1) and (2), F.S. Therefore, staff believes QCC has standing because its substantial interests fall within the zone of interest to be protected under Sections 364.16(1) and (2), F.S. Accordingly, staff recommends that QCC has standing to seek a determination from the Commission to determine if anticompetitive behavior has occurred.

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

Recommendation: No. The CLECs have not engaged in unreasonable rate discrimination, as alleged in QCC's First Claim for Relief. (Curry, Tan)

Position of the Parties

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

TWTC: No. Repealed Sections 364.08(1) and 364.10(1) should not be applied as QCC argues. Further, QCC is neither in "like circumstances" to AT&T nor the victim of "undue or unreasonable" treatment vis-à-vis AT&T because AT&T made a multi-million dollar take-or-pay commitment QCC would not and could not make.

BullsEye: No. QCC failed to show any unreasonable discrimination. The Commission has never applied former Sections 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.

Staff Analysis:

QCC's Argument: QCC states that the core of this litigation is whether the Respondent CLECs violated former Sections 364.08 and 364.10, F.S., by engaging in unreasonable rate discrimination with regards to the provision of intrastate switched access services in Florida. (BR 19) QCC contends that the Respondent CLECs each entered into one or more secret, off-price list agreements whereby they provided discounted intrastate switched access rates to AT&T. (BR 1) QCC's position is not that the CLECs violated the law by entering into an agreement with AT&T. Instead, the CLECs violated the law by not extending the same discounts given to AT&T to other similarly situated IXCs such as QCC. (BR 23)

In addition to not extending the discounted switch access rates in their AT&T agreements to other similarly situated IXCs, the CLECs also failed to disclose their agreements or to even advise QCC or other IXCs that alternative switched access rates were available. As a result, QCC continued to pay the CLECs' higher price list rates and was substantially over charged. (BR 1) QCC argues that the CLECs have failed to demonstrate any reasonable basis for their admitted price discrimination. Further, the CLECs' failure to disclose the discounts, make the discounts available to other customers, or publish the discounted rates demonstrates that they were aware that the discounts were not reasonable. (BR 23)

QCC contends that the CLECs' argument (specifically BullsEye) that they were coerced into an agreement with AT&T as a result of AT&T's refusal to pay the CLECs' switched access rates is insufficient. QCC does not doubt that AT&T refused to pay BullsEye the switched access rates listed in BullsEye's price list. However, QCC contends that AT&T's refusal to pay

does not justify the unreasonable price discrimination to which BullsEye subjected QCC. Further, QCC's willingness to pay its bills (as compared to AT&T's apparent refusal) does not create a meaningful distinction rendering (as BullsEye asserts) QCC dissimilarly situated from AT&T. (BR 29-30)

QCC argues that it is similarly situated to AT&T, in regards to the provision of intrastate switched access service for numerous reasons. First, QCC is similarly situated to AT&T because the switched access service that the CLECs provide to both AT&T and QCC, including the functionality, service elements, and the facilities they were provided over, are all identical. (BR 24-25) Second, the bottleneck nature of the service is also identical whether the CLEC originates the call on behalf of QCC or AT&T. QCC asserts that the FCC and several state commissions have confirmed that CLECs have a bottleneck monopoly control over the switched access services that they provide.[18] (BR 25) As such, QCC and AT&T are similarly situated in regards to their inability to seek other alternatives for a monopoly service. *Id.*

Finally, the CLECs' costs of providing switched access services to QCC and AT&T are the same. QCC asserts price differentiation is permitted when the cost of providing a service varies between customers. However, traffic volume should not be used to justify rate discrimination because there is no evidence that the volume of switched access services purchased alters the CLECs' cost to provide the service. (BR 35) Since the CLECs' cost to provide switched access services to AT&T and QCC does not vary, QCC is similarly situated to AT&T in regards to cost. According to QCC, neither BullsEye nor TWTC ever established a variance in cost to provide switched access services to AT&T and QCC. (BR 26) Therefore, the same discounts that the CLECs gave AT&T for switched access services should have been extended to QCC. (BR 25-26)

TWTC's Argument: TWTC argues that the use of QCC's proposed strict liability rule of discrimination is not the proper method to evaluate QCC's claims of discrimination because these elements were constructed by QCC after-the-fact, for purposes of this case. These elements were also not a part of a fairly noticed and previously implemented regulatory system which set expectations for the carrier community.[19] Instead, the Commission should look to a "rule of reason" test to determine what constitutes "undue" or "unreasonable" discrimination and who may or may not be "similarly" situated. Under the rule of reason approach, the TWTC-AT&T agreement was appropriate, justified, and not discriminatory, as QCC claims, because AT&T was uniquely situated. (BR 8 and 21)

Under TWTC's "rule of reason" test, TWTC argues that it did not violate Sections 364.08(1) and 364.10(1), F.S., by entering into a unique, multi-state, multi-service agreement with AT&T. TWTC's agreement with AT&T included a substantial take-or-pay revenue commitment from AT&T.[20] The agreement was a bi-lateral business arrangement that was profitable to TWTC and guaranteed a substantial amount of revenue for the company. Switched access services were a small but integral part of the agreement.[21] (BR 23-24)

[18] TR 342-346, Weisman Direct Testimony.
[19] BR 8 (5) lists the elements of Qwest's strict liability claim.
[20] Jones, TR 000623-000624; Confidential EXH 81.
[21] A redacted version of TWTC-AT&T agreement was posted on the SEC's EDGAR website in 2005.

TWTC argues that QCC was not in "like circumstances" or "similarly situated" to AT&T because AT&T is uniquely situated. After analyzing AT&T's and QCC's total spend with TWTC, it was concluded that QCC was not similarly situated to AT&T because QCC's spend total was substantially less than AT&T's.[22] TWTC argues that since QCC was not in "like circumstances" or "similarly situated" to AT&T it did not engage in unreasonable rate discrimination against QCC. (BR 24)

TWTC further argues that QCC has failed to prove that TWTC discriminated against the company by entering into an agreement with AT&T. Sections 364.08(1) and 364.10(1), F.S., did not require service specific pricing or ban bundling services in service agreements. In addition, QCC's failure to attempt to negotiate a contract for switched access services does not constitute discrimination. QCC and TWTC have had an agreement for unregulated services since 1995 and the agreement has been amended twenty-three times. Several of the amendments occurred after QCC became aware of the TWTC-AT&T agreement. However, QCC never attempted to negotiate an agreement for switched access services with TWTC. TWTC argues that QCC's failure to attempt to negotiate lower switched access rates does not constitute unreasonable rate discrimination. (BR 24-25, 36)

BullsEye's Argument: BullsEye states that QCC is seeking to obtain the benefit of the AT&T settlement, which "QCC previously claimed was coercive and anticompetitive, without ever being in a remotely comparable position to AT&T." BullsEye contends that it entered into a settlement agreement with AT&T after AT&T began withholding payments for both intrastate and interstate switched access services and asserted that it would continue to withhold payments unless BullsEye entered into a settlement on the terms demanded by AT&T.[23] Since BullsEye's ongoing operations rely heavily on the timely collection of access charge revenues, and AT&T was BullsEye's largest customer, BullsEye was compelled to enter into the settlement. (BR 24)

BullsEye argues that QCC has not demonstrated 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" or by giving "undue or unreasonable preference or advantage" to any person for the following reasons:

- The Commission never applied these repealed statutes to CLECs and CLEC agreements – in particular settlement agreements have always been considered reasonable and lawful,
- QCC relies on a non-existent rule under which any variation in switched access prices would have to based on cost differences, and
- QCC failed to prove that QCC is "under like circumstances" with AT&T or that BullsEye's conduct in entering the AT&T settlement was "unreasonable." (BR 15-16)

[22] The term "total spend" was used by TWTC. This term refers to the total amount of revenue that the company received from AT&T for services defined in their agreement. (TR 623-628) TWTC's witness Jones analyzed QCC's total spend with TWTC over a four year period. (Confidential EXH 81)
[23] Witness LaRose (TR 656-657)

BullsEye contends that CLECs have always been subject to a lesser level of regulation than ILECs. Therefore, the Commission has never applied Sections 364.08 and 364.10, F.S., to CLEC switched access services. (BR 15-17) Further, the Commission has never regulated switched access rates or required CLECs to file Price Lists for switched access services. The Commission has also allowed CLECs to enter into individual contracts for switched access services and never required CLECs to publish their contracts or settlement agreements. (BR 16-17)

BullsEye argues that while QCC has acknowledged that CLECs are permitted to enter into service agreements that vary from the terms of their price lists, QCC attempts to create and then retroactively apply an exception to the rule. This exception is based on QCC's theory that switched access should be considered a monopoly service and that any variations in pricing negotiated with customers may only be based on cost differences. (BR 18-19) BullsEye argues that Florida laws do not support this theory because the Commission has never determined switched access to be a monopoly service. The Commission has also never required CLECs to charge cost-based switched access rates or required CLECs to justify price differences based on cost. In addition, BullsEye's price list, which QCC acknowledges it has had notice of since 2003, specifically states that BullsEye may enter into individual contracts for switched access services for reasons other than costs. (BR 19)

BullsEye argues that QCC has also failed to prove that it is "under like circumstances" with AT&T or that BullsEye's conduct was unreasonable. BullsEye contends that there are several factors in addition to cost, such as, traffic volumes and traffic types that determine if a company is in "like circumstances."[24] During the years leading up to AT&T and BullsEye's settlement, AT&T's nationwide call volume was as much as 21 times greater than QCC's. This factor significantly distinguished AT&T from QCC and was a major consideration for BullsEye when deciding to enter into a settlement with AT&T.

In addition, QCC failed to show that its mixture of traffic types was similar to AT&T's. Traffic types, such as wireless-originating and VOIP-originating, are important factors because they affect compensation rates. Unlike QCC, AT&T has a wireless affiliate. Since QCC does not have a wireless affiliate it is unlikely that QCC has the same mixture of traffic as AT&T. (BR 22-23) Further, QCC is not "under like circumstances" to AT&T because QCC never competed with BullsEye for end-user customers in Florida, never disputed BullsEye's invoice (as required under BullsEye's Price List), and never sought to enter into carrier-to-carrier negotiations with BullsEye.[25] (BR 23-24) Therefore, QCC does not have a claim for "unreasonable rate discrimination" against BullsEye and the Commission should reject QCC's arguments.

Analysis

As discussed in Issue 1, staff's analysis of this case centers around the Commission's responsibility under Section 364.16(2), F.S., to prevent anticompetitive behavior. However, the

[24] TR 54, 56-57, 169-170.
[25] Qwest acknowledged that it was not providing dial tone service in Florida during the effective term of the AT&T settlement. (BR 23)

majority of QCC's claims and arguments are based on Sections 364.08(1) and 364.10(1), F.S. While these sections have been repealed, they relate to alleged unreasonable rate discrimination that would be considered anticompetitive behavior. As such, staff believes the parties' arguments are still relevant to the resolution of this issue. Staff believes that the determining factor in this issue revolves around whether QCC was similarly situated to AT&T and thus eligible for its contract terms.

Based upon the parties' testimonies and the facts on record, staff has determined that the parties agree on the following issues:

- CLECs are subject to diminished regulation. (TR 437-49, 595, 599, BR 22)
- The Commission does not set, regulate, or require CLECs to file their switched access rates. *Id.*
- CLECs are permitted to negotiate contracts with rates that deviate from their price lists rates. (TR 59, 437-439, 610-611)
- Each CLEC had a negotiated agreement with AT&T for at least a portion of the contested period, and that the switched access rates in those contracts deviated from the CLECs' standard price lists. (TR 24, TR 60, TR 623, TR 34)
- QCC was charged the standard price list rates by each of the CLECs during the contested period. (TR 22, TR 65, TR 72-73, TR 189-190, TR 429, TR 476, TR 655)
- Both BullsEye and TWTC have provisions in their Price Lists that allow for separate negotiated rates. (EXH 44, EXH 57)[26]

Staff believes that QCC has failed to demonstrate that it was similarly situated to AT&T and thus eligible for its contract terms. Staff agrees with the CLECs' argument that QCC's claim that all IXCs are similarly situated with respect to access services unless there is a cost-based reason for differential rate treatment is inconsistent with Florida Law. Staff also agrees with the CLECs' argument that there are no laws in Florida that have ever declared switched access to be a monopoly service. (TR 659)

QCC's witnesses Weisman and Easton both testified that rate differences are only justified when there is a difference in cost. (TR 141-142, 659) However, despite Weisman's cost-based theory, he later testified that there was no cost-based standard in Florida for setting switched access rates.[27] (TR 394-395) Further, TWTC's witness Deason testified that CLECs have never been cost regulated by the Commission. In fact, CLECs were specifically exempt from cost standards. (TR 604) Witness Deason also stated that the Commission has never considered CLEC switched access to be a monopoly service. (TR 603)

The CLECs' also contend that in addition to costs, there are several other factors that determine if a company is in like circumstances or similarly situated such as traffic types, traffic

[26] The relevant language in BullsEye's Price List is listed in Section 5.1 entitled "Special Contract Arrangements." The relevant language in TWTC's Price List is listed in Section 8.1 entitled "Customer Specific Contracts."
[27] Weisman also testified that he has never reviewed any data regarding the CLEC's cost to provide switched access services and that cost studies were never done. (TR 409)

volumes, and the company's ability to meet revenue commitments.[28] As stated above, the CLECs assert that QCC has failed to demonstrate that it is similarly situated or in like circumstances with AT&T based on these additional factors as well. For instance, AT&T's traffic type included wireless and VOIP originating traffic.[29] Since QCC does not have a wireless affiliate like AT&T it is implausible that QCC's mixture of traffic types is similar to AT&T's.

In addition, both BullsEye and TWTC contend that two major factors which significantly distinguished AT&T from QCC were AT&T's call volume and total spend. These factors were also a major consideration for both CLECs when deciding to enter into an agreement with AT&T. According to the CLECs, QCC's call volume and total spend were considerably less than AT&T's. (BR 22-23, BR 24, respectively EXH 81)

Further, TWTC asserts that because QCC's total spend was significantly less than AT&T's, QCC was not capable of meeting the same total revenue commitment of the TWTC-AT&T agreement. (TR 623-628) In fact, TWTC's witness Jones testified that "AT&T was the only TWTC customer whose spend was great enough to make it feasible to commit to the 'Total Cumulative Revenue Commitment'." (TR 624) Despite this fact, however, according to QCC's witness Easton, QCC was not interested in the whole TWTC-AT&T agreement, but instead was only interested in obtaining the AT&T switched access rate. (TR 153)

BullsEye further argues that a company's ability to compete for end-users can also be used to determine if a company is in like circumstances or similarly situated. QCC acknowledged that during the effective term of the BullsEye-AT&T agreement that it did not provide dial tone service in Florida.[30] (TR 662) BullsEye contends that QCC's inability to compete with BullsEye for end-users significantly differentiated QCC from AT&T and increased AT&T's bargaining power with respect to the settlement agreement for switched access rates. (BR 23) Further, since AT&T did compete with BullsEye for end-user customers, BullsEye argues that without the reduced access prices the incentive for AT&T to acquire BullsEye's end-user customers would have increased. (TR 662)

Another factor that differentiated QCC from AT&T was QCC's failure to even attempt to negotiate switched access rates with the CLECs. (TR 629-630, 661) TWTC's witness Jones testified that QCC and TWTC have had an agreement for unregulated services since 1995 and has been amended twenty-three times. Several of the QCC-TWTC agreement amendments occurred after QCC became aware of the TWTC-AT&T agreement. However, QCC never once attempted to negotiate an agreement for switched access. (TWTC BR 24-25) Therefore, the CLECs argue that QCC's failure to attempt to negotiate its own contract for switched access services does not constitute discrimination.

[28] Witness Weisman testified that he has never reviewed any data reflecting the type of traffic that QCC or AT&T sent to BullsEye. (TR 410)
[29] As previously noted, traffic types are an important factor because they affect compensation rates.
[30] QCC's witness Easton also testified that QCC currently does not offer switched access in Florida, but it does act as a local exchange carrier. (TR 158)

Further, TWTC's witness Deason testified that in Order No. PSC-01-1588-PAA-TL, the Commission essentially determined that "the mere existence of a rate negotiated by a local exchange carrier does not mean there has been any undue discrimination. To find undue discrimination, there has to be a determination that different entities are 'similarly situated,'... and that actual discrimination occurred and was not simply the result of a failure or inability of one customer to successfully negotiate." (TR 594-595)

Staff believes that the CLECs' arguments are persuasive. Based on the testimony of the witnesses and on the fact that there are no statutes, Commission regulations, or Commission orders that ever required CLEC switched access rates to be based on cost or declared CLEC switched access a monopoly service, staff agrees with the CLECs' contention that QCC has failed to demonstrate that it is similarly situated to AT&T. (TR 394-395, 603-604, 659) In terms of call volume, traffic, and total spend, staff also believes that the CLECs showed that QCC was not similar to AT&T.

In addition, all parties have acknowledged that QCC never even attempted to initiate negotiations with the CLECs for switched access service despite already having a contract for unregulated services with at least one of the CLECs. Based upon the aforementioned, staff believes that QCC was not similarly situated or in like circumstances with AT&T. Therefore, QCC was not eligible to receive the rates in the AT&T contracts. Further, staff saw no evidence in this case of anticompetitive behavior by the CLECs towards QCC. Therefore, staff recommends that the CLECs have not engaged in unreasonable rate discrimination, as alleged in QCC's First Claim for Relief.

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

Recommendation: Yes. The CLECs abided by their price lists in connection with the pricing of intrastate switched access service. (Long, Tan)

Position of the Parties

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

TWTC: TWTC followed its Price List. No statute, rule, or order required TWTC to charge only a uniform standard offer rate. QCC paid TWTC's standard rate without dispute, rather than negotiate a rate as the Price List allowed. QCC witness Easton admitted CLEC rates need not be in a Price List.

BullsEye: BullsEye indisputably abided by its Price List, as QCC admits that BullsEye charged QCC 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.

Staff Analysis:

QCC's Argument: QCC concurs with the other parties that the CLECs were not required to file price lists and also that it was charged the rate listed in the CLECs' published price lists. (BR 37) QCC argues that once the CLECs chose to file price lists, they were bound by Chapter 364.04, F.S., to charge the rates listed therein. (BR 37) The point of contention rests on the carriers' "secret deviation" from the relevant rates to other "similarly situated" IXCs, which QCC claims resulted in discrimination. (BR 37)

TWTC's Argument: TWTC's Price List on file with the commission contains language that provides for both a standard rate and the option for negotiating separate contract rates. (BR 38) QCC was charged (and did not dispute) the standard rate, and did not elect to negotiate its own agreement nor did it accept all of the rates, terms, and conditions of the TWTC-AT&T agreement. (BR 38-39) TWTC further argues that the assertion by QCC that all IXCs must be charged a standard rate or that all contract rates should be made publicly available is not supported by law, and would render portions of TWTC's filed Price List meaningless. (BR 39) Finally, TWTC argues that it was never required by any rule, law, or statute to publish or disclose any of its rates for switched access service. (BR 38-40)

BullsEye's Argument: BullsEye argues that QCC admitted it was at all times charged the rate published in BullsEye's price list. (BR 26) BullsEye further states that if QCC is asserting that

BullsEye did not "abide by" its Price List regarding the BullsEye/AT&T agreement, the Price List also explicitly allows for individual contracts with carriers for switched access rates. (BR 26) BullsEye also argues that its Price List describes situations that may justify a variance from standard pricing, such as "term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features." (BR 27)

Analysis

As discussed in Issue 5, the parties agree that QCC was charged the standard price list rates by each of the CLECs during the contested period and that individual contracts were permitted in the CLEC's price lists. As discussed in Issue 1, staff believes the Commission's authority falls under Section 364.16(2), F. S., and not the repealed statutes that form the basis for most of QCC's assertions.

Based on staff's analysis of Issue 5, staff believes that the companies were not similarly situated. Also, the CLECs are not required to file price lists with the Commission and only do so voluntarily. Because the CLECs properly charged QCC the price list rates for switched access, followed the terms of their price lists regarding individual contracts, and did not engage in anticompetitive behavior regarding the contracts' availability, staff recommends that the CLECs abided by their price lists in connection with the pricing of intrastate switched access service.

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

Recommendation: Yes. QCC is not a similarly situated customer. Therefore, the CLECs did not fail to abide by their Price Lists. (Long)

Position of the Parties

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

TWTC: QCC's Complaint did not name TWTC as a respondent on its Third Claim and did not seek to amend. Even if QCC had, QCC was not similarly situated to AT&T because AT&T made a multi-million dollar take-or-pay commitment QCC would not and could not make.

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

Staff Analysis:

QCC's Argument: QCC cites Sections 364.08 and 364.10, F.S., as being violated along with Section 5.1 of BullsEye's Price List due to the failure on BullsEye's part to contact QCC and offer QCC discounted rates after negotiating lower rates for switched access with AT&T. (BR 37-38). QCC also argues that they are and were similarly situated to AT&T. (BR 38)

TWTC's Argument: TWTC was not named as a respondent for QCC's Third Claim for Relief.

BullsEye's Argument: BullsEye argues that QCC's theory that all IXCs are "similarly situated," absent a cost-based reason as to why they are not, is not supported by Florida law. (BR 28) The text QCC cites from BullsEye's Price List is directly preceded by language describing valid reasons other than cost that BullsEye may choose to deviate from published rates. (BR 28) Apart from the specific qualities in BullsEye's Price List that differentiate the two IXCs, BullsEye maintains that an additional rationale for explaining the divergence from published rates is the dissimilar behavior exhibited by AT&T. BullsEye further states that AT&T chose to abide by the dispute resolution process detailed in the Price List by contesting what they were being charged, and then negotiating lower rates, whereas QCC did not. (BR 28)

BullsEye contends that QCC's argument that it was unaware of its ability to contest billed amounts and negotiate preferable rates is untenable, as this course of action was clearly outlined in BullsEye's Price List. (BR 28) Additionally, QCC was aware of contracts between AT&T and various CLECs and had previously negotiated its own long-standing contract rates for switched access with a number of CLECs. BullsEye also notes that the FPSC has previously acknowledged that each individual contract reflects unique circumstances, and as such, it is

nearly impossible to prove that two companies are "similarly situated" in this context. (BR 28-29)

Analysis

QCC did not include TWTC, Ernest, or Flatel as respondents in its Third Claim for Relief. Navigator is no longer participating in this proceeding. QCC admitted that it inadvertently omitted TWTC. (BR 38) Therefore, staff believes that TWTC, Ernest, and Flatel are not bound by any decisions made in this issue, and the decisions should apply only to BullsEye and Navigator.

This issue addresses what obligations, if any, the CLECs had to disclose or "make available" any off-Price List agreements to other similarly-situated customers, namely QCC. As discussed in Issue 5, Staff does not believe that QCC was similarly situated to AT&T. Thus, staff believes that there was no obligation on the CLECs' part to make such agreements available to QCC at all. Therefore, staff believes that Bullseye and Navigator abided by their Price Lists with respect to the question raised in this Issue.

Issue 8: Are QCC's claims barred or limited, in whole or in part, by:

a) the statute of limitations;

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

c) terms of a CLEC's price list;

d) waiver, laches, or estoppel;

e) the filed rate doctrine;

f) the prohibition against retroactive ratemaking;

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

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

8(a) Recommendation: No. Staff believes this proceeding is an administrative proceeding that is before the Commission and for which the Commission is the appropriate court of jurisdiction, and therefore recommends that the statute of limitations does not bar or limit, in whole or in part, QCC's claims for relief in this proceeding. (Tan)

8(b) Recommendation: No. The Commission continues to have exclusive jurisdiction over wholesale carrier-to-carrier disputes and maintains its obligation to ensure fair and effective competition among telecommunications service providers. Staff recommends that QCC's claims are not barred or limited as it pertains to the issue of anticompetitive behavior. (Tan)

8(c) Recommendation: No. QCC's claims are not barred or limited, in whole or in part, by terms of the CLECs' price lists. (Long)

8(d) Recommendation: No. Staff believes that it is not appropriate for the Commission to make a finding that the adoption is barred by the doctrines of equitable relief. (Tan)

8(e) Recommendation: No. Staff recommends that the filed rate doctrine does not apply to this proceeding and therefore QCC's claims are not barred or limited, in whole or in part. (Tan)

8(f) Recommendation: No. In order for retroactive ratemaking to be at issue in this case, the Commission would have to set new rates for past service or change the price list schedule. (Tan)

8(g) Recommendation: No. QCC's claims are not barred or limited, in whole or in part, by the intent, pricing, terms or circumstances of separate agreements between QCC and any CLEC. (Long)

8(h) Recommendation: No. Staff believes that there are no other affirmative defenses pled or any other reason that bar or limit, in whole or in part, QCC's claims. (Tan)

a) the statute of limitations

Position of the Parties

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

TWTC: If the Commission finds that QCC had or has a "cause of action," the statute of limitations, Section 95.11, F.S. applies. Under Florida law, there is no delayed discovery doctrine; and no conditions exist in this case which would toll or overcome the limitations period. Therefore, QCC's claims are barred.

BullsEye: Yes. While QCC 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 QCC's claims against BullsEye.

Staff Analysis:

QCC's Argument: QCC argues the Respondents have erred in reliance on the statute of limitations considering Commission precedent holds that statutes of limitations in Ch. 95 do not apply to the Commission's actions unless related to arbitrations or enforcement of interconnection agreements. (BR 38) QCC contends that the statute of limitations does not apply to the Commission's ability to order refunds, such as the refunds of discriminatory overcharges requested in this proceeding. (BR 39)

QCC argues that should the Commission find that the statutory limitations apply to this proceeding; the delaying actions of the CLECs should prevent the application of any limits. (BR 40) QCC maintains that the CLECs failure to respond to requests for information, and keeping preferential agreements secret prevented and delayed QCC from filing its Complaint and must be taken into consideration. (BR 41)

TWTC's Argument: TWTC contends the Commission must determine if the statute of limitations applies and if the timing of the filing of the complaint affects QCC's claims. (BR 41) TWTC rejects any argument from QCC regarding when the claims were discovered and argues that there is no delayed discovery doctrine applicable in Florida. TWTC asserts that pursuant to Section 95.11(3)(f), F.S., the statute of limitations bars a litigant from filing claims after a set period of time expires. (BR 42) TWTC contends that the statute of limitations applies in instances of administrative disciplinary proceedings. Hames v. City of Miami Firefighters, 980 So.2d 1112, 1116 (Fla. 3d DCA 2008) (BR 43)

TWTC argues that QCC cannot argue that this case is both a private right of action and a disciplinary/enforcement proceeding and therefore the Commission should look at when QCC's claims occurred and apply the statute of limitations. TWTC argues that should the Commission find jurisdiction to handle this claim, the Commission must take into account that QCC's claims information was readily available to be calculated and the four year limitation should be applied. TWTC asserts that since QCC filed action against TWTC in December 2009, all of QCC's claims are outside the four year limit. TWTC further asserts that the delayed discovery rule does not apply to the case at issue and that any delay was caused by QCC.

BullsEye's Argument: BullsEye argues that any relief to QCC is retroactive and barred as a matter of law due to lack of Commission jurisdiction over the alleged violations, and believes it would result in a outcome that is different than previous Commission treatment of switched access. (BR 29) BullsEye goes on to state that QCC would be barred by the statute of limitations, pursuant to Section 95.11(3)(f), F.S. BullsEye contends that QCC's filing of a complaint against BullsEye for conduct that began on October 21, 2004 is untimely. (BR 30)

BullsEye rejects any claim that the statute is tolled under a delayed discovery rule because the Legislature does not provide for any such rule. *Id.* BullsEye argues that QCC must prove that it was "unaware of the existence of the claim prior to the limitation period" and "could not reasonably have discovered the conduct prior to the limitation period." (BR 31) BullsEye further argues that QCC was aware of the existence of the claim and discovered the conduct well before the four-year limitation. *Id.* BullsEye contends that QCC's failure to dispute the access charges within 60 days bars QCC's claims by the statute of limitations. *Id.*

Analysis:

Both QCC and TWTC cite to Hames, which both believe addresses the issue of whether the statute of limitations applies in this proceeding. QCC argues that the Florida statute of limitations does not apply in this proceeding because limitations in Chapter 95 have typically been held to apply only to claims that were filed as a direct administrative substitute for a civil action.[31] TWTC believes that the statute of limitations should apply, because this is an administrative case that is direct administrative substitute for a civil action.[32] QCC also argues that a civil action refers to a lawsuit or other action filed in court, which is unlike the current proceeding.[33]

The Commission is specifically charged with investigating and adjudicating claims of anticompetitive behavior. Staff notes that QCC has not opened a civil case or proceeding against the Respondent CLECs, and this proceeding is before the Commission, an administrative agency.

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[31] Hames.

[32] The court in Hames cited to Farzad v. Dep't of Prof'l Regulation, 443 So. 2d 373, 375 (Fla. 1st DCA 1983) (which the court determined that the administrative claim involved an action that was an administrative substitute for a common law breach of contract suit.) Bishop v. State, Div. of Ret., 413 So. 2d 776, 777 (Fla. 1st DCA 1982)

[33] *See*, Sarasota County v. National Bank of Cleveland, 902 So. 2d 233, 234 (Fla. 2d DCA 2005) (where the court found that nothing suggests that the legislature intended Chapter 95 to apply to quasi-judicial proceedings initiated pursuant to any administrative law.)

In a docket involving Commission-ordered refunds, the Commission held that limitations in Chapter 95 do not apply to the Commission's actions.[34] Although the Commission has considered statutory limitations, the proceedings were related to arbitrations or enforcement of interconnection agreements.[35] Therefore, because this proceeding is an administrative proceeding that is before the Commission and for which the Commission is the appropriate court of jurisdiction, staff recommends that the statute of limitations does not bar or limit, in whole or in part, QCC's claims for relief in this proceeding.

b) Ch. 2011-36, Laws of Florida

Position of the Parties

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

TWTC: QCC's claims are completely barred by the Regulatory Reform Act, Ch. 2011-36, Laws of Florida. See TWTC positions on Issue No.1 (jurisdiction) and 4 (standing).

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

Staff Analysis:

QCC's Argument: QCC argues the Regulatory Reform Act (Ch. 2011-36, Laws of Florida) was not retroactive and is not applicable to this case. (BR 41) QCC maintains that its previous arguments made in Issue 1, 2 and 4 apply and indicate that the Commission continues to have exclusive jurisdiction over wholesale carrier-to-carrier disputes.

TWTC's Argument: TWTC contends that its previous arguments regarding jurisdiction and standing are sufficient to find that QCC's claims should be barred. (BR 49)

BullsEye's Argument: BullsEye argues that the Regulatory Reform Act removed the Commission's jurisdiction and repealed the statutes under which QCC bases its complaint. (BR

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

[35] *See*, In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida, Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company, Order No. PSC-03-1139-FOF-TP, issued October 13, 2003 in Docket No. 020960; In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated, Order No. PSC-05-1234-FOF-TP, issued December 19, 2005, in Docket No. 041144-TP.

32) BullsEye further argues that the existing statutes now reflect that entering individual service contracts with customers are permitted. *Id.*

BullsEye contents that even with jurisdiction to consider the alleged conduct is unlawful under 364.01(4), it would not be allowed under the rules of statutory construction. (BR 33) BullsEye maintains that the rules of statutory construction "bar any interpretation that a more general statutes could prohibit specific conduct formerly governed by a repealed statute." *Id.*

Analysis:

As staff has recommended in Issues 1 and 2, the issue of anticompetitive concerns is not affected by the Regulatory Reform Act due to the Commission's existing and ongoing jurisdiction intended by the Legislature pursuant to the revisions to Section 364.16, F.S. Accordingly, staff believes the Legislature intended that the Commission continue to have exclusive jurisdiction over wholesale carrier-to-carrier disputes to ensure fair and effective competition among telecommunications service providers. Staff recommends that QCC's claims are not barred or limited as it pertains to the issue of anticompetitive behavior.

c) terms of a CLEC's price list

Position of the Parties

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

TWTC: QCC's claims should be barred because (1) QCC knew it had a dispute but failed to submit a dispute as required by the TWTC Price List and (ii) the TWTC Price List makes contract rates available to all IXCs and QCC elected not to negotiate.

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

Staff Analysis:

QCC's Argument: QCC argues that its claim is not based on the CLECs' price lists or their failure to assess the price list rate. (BR 42) It is based on the subsequent failure of CLECs to offer the same discounted rates to QCC that were offered to other IXCs, resulting in discriminatory overcharges. (BR 42-43) The CLECs' assertion that QCC is responsible for negotiating its own contract rates with other carriers to ensure it is not discriminated against is incorrect. (BR 43) There are over 700 CLECs nationwide that provide switched access to QCC; it is the CLECs' responsibility to ensure IXCs are not treated in a discriminatory fashion and QCC cannot reasonably be expected to bear the burden of negotiating rates. (BR 43)

Furthermore, there is no reason for QCC to believe that had it approached all 700 plus CLECs that they would have been able to obtain rates as favorable as the rates given to other IXCs. (BR 43-44) QCC was unaware that there were lower rates being charged to other IXCs and attempted to collect information from 90 CLECs in 2008 and was largely ignored. Therefore, any delay in the timing of QCC's complaint is a result of the CLEC's noncompliance with information gathering efforts. (BR 44)

TWTC's Argument: TWTC argues that QCC should not be allowed to "cherry pick" which parts of TWTC's Price List it will follow and which ones it will not. QCC never disputed what it was charged by TWTC, and never made any effort to negotiate a more preferable rate. (BR 50)

BullsEye's Argument: BullsEye maintains that its Price List went into effect on November 7, 2003, and that QCC admits that is has been on notice of this Price List since that time. (BR 33-34) BullsEye states that its Price List explicitly permits BullsEye to enter into individual contracts for switched access service, including an explanation of what types of scenarios may allow for a deviation from the published standard rate. (BR 34) BullsEye also argues that QCC additionally failed to abide by the terms of BullsEye's Price List by not utilizing the dispute process outlined in section 2.10.4 of said Price List. BullsEye also counters QCC's claim that QCC was unaware of the disparities in pricing between carriers, as QCC filed a law suit against AT&T in 2005 and also had contracts with CLECs with variant pricing prior to that time. (BR 33-35)

Analysis

This issue addresses whether the terms of each of the CLEC's price lists individually bar or limit QCC's claims or its ability to make them. Specifically, the CLECs argue that the CLECs' provisions for individual contracts and dispute resolution and QCC's failure to either negotiate an individual contract or dispute any bills affect QCC's ability to seek relief before the Commission. (TWTC BR 50, BullsEye BR 33-35, TR 177-178, 265-266, 632)

As previously discussed in Issue 1, staff believes that the Commission's responsibility in this matter is to prevent anticompetitive behavior in carrier-to-carrier relationships pursuant to Section 364.16, F.S. While the terms of a given price list are strongly considered in carrier-to-carrier disputes, staff believes that such terms should not override the Commission's responsibilities under Section 364.16, F.S. If the Commission determined that anticompetitive behavior was present, staff believes the existence of contrary terms in a price list would not preclude a carrier's right to pursue a claim nor would it impede the Commission's ability to properly address it. Staff recommends that, as a result, QCC's claims are not barred or limited, in whole or in part, by terms of a CLEC's price list.

d) waiver, laches, or estoppel

Position of the Parties

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

TWTC: QCC claims should be barred because it took more than 4 years to assert rights allegedly violated and ignored its duty to submit billing disputes to, and seek contract negotiations with, TWTC.

BullsEye: Yes. QCC 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. QCC cannot be heard to complain now when it failed to timely pursue its rights.

Staff Analysis:

QCC's Argument: QCC argues that laches is an equitable defense which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." (BR 45) QCC further argues that the CLECs have failed to demonstrate that QCC's claims should be barred and maintains that considerable diligence was exercised to gather the necessary information. *Id.* QCC asserts that it experienced considerable difficulties gathering information because of delays and lack of cooperation from the CLECs. (BR 46)

QCC contends that the CLECs cannot establish that they were prejudiced by the alleged delays and maintains that QCC was prejudiced by CLECs and their alleged refusal to extend non-discriminatory rate treatment to all similarly situated IXCs. *Id.*

TWTC's Argument: TWTC argues that QCC is barred because of the delay in asserting its rights and has failed to file any disputes of its switched access bills and failure to negotiate a contract rate.

BullsEye's Argument: BullsEye asserts that the doctrine of laches and waiver are equitable doctrines that bar a claim where the plaintiff's unreasonable delay in pursuing a claim results in prejudice of the opposing party. (BR 35) BullsEye further asserts that QCC unreasonably waited several years to file its complaint and failed to seek negotiations or file notices of dispute. (BR 36) BullsEye contends that QCC's failure to take action in a timely manner is unfair and prejudicial to BullsEye. *Id.*

Analysis

Equitable relief, such as the doctrines of estoppel, laches, waiver and unclean hands, are concepts which the Commission has commented on in previous proceedings, but which has not been the basis for a Commission decision. The Commission only has those "powers granted by statute expressly or by necessary implication."[36] Section 364.162, F.S., only authorizes the Commission to seek equitable relief in an appropriate circuit court, not to order equitable relief. The Commission's authority, while "broad enough to inquire into competitive conduct, does not clearly authorize the Commission to impose equitable relief."[37] Rather, the resolution of

[36] Deltona Corp. v. Mayo, 342 So. 2d 510, 512 (Fla. 1977)
[37] Order No. PSC-01-2178-FOF-TP, Docket No, 010345-TP, In re: Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries, issued November 6, 2001, concurring opinion of Chairman Jacobs.

equitable relief is "reserved for agencies with specific statutory authority."[38] As the Commission is a statutory creature, the Commission has no common law jurisdiction or inherent power as do the courts.[39]

The Commission has only those powers granted by statute expressly or by necessary implication and does not have authority to order equitable relief.[40] Accordingly, staff believes that it is not appropriate for the Commission to make a finding that QCC's claims are barred by the doctrines of equitable relief.

e) the filed rate doctrine

Position of the Parties

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

TWTC: TWTC does not take a position on the filed rate doctrine question, but QCC's position on the subject has been and continues to be inconsistent.

BullsEye: Yes. BullsEye's 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, QCC cannot attempt to rely on certain parts of the Price List while ignoring other parts.

Staff Analysis:

QCC's Argument: QCC argues that the filed rate doctrine does not create immunity for the CLECs in this docket. QCC contends that the filed rate doctrine applies only to rates subject to regulation by the state, including the authority to review the rates and approve or reject them. (BR 47) QCC asserts that the Commission does not approve CLEC price lists before they become effective, nor does the Commission require switched access price lists to be filed. (BR 48)

QCC rejects the CLECs' argument that price lists filed with the Commission meet the requirement of approval as it is contemplated by the filed rate doctrine. QCC maintains that having the price lists become effective only after one day's notice pursuant to the Administrative Procedure Manual is merely an authority to administratively process the price lists. (BR 48)

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[38] *Id.*

[39] Order No. PSC-02-1705-FOF-TP, Docket No. 021006-TP, In re: Petition for expedited enforcement of interconnection agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida., issued December 6, 2002, citing East Central Regional Wastewater Facilities Bd. v. City of West Palm Beach, 659 So. 2d 402, 404 (Fla. DCA 1995); Order No. PSC-96-0007-FOF-TP, Docket No. 911214-TP, In re: Initiation of show cause proceedings against TELECO COMMUNICATIONS COMPANY for violation of Rule 25-4.004, F.A.C., Certificate of Public Convenience and Necessity Required, issued January 2, 1996.

[40] *See*, Order No. PSC-12-0390-FOF-TP, Docket 110087-TP, In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc., issued July 30, 2012.

Therefore, QCC argues that CLEC price lists are not approved by the Commission or the staff, rendering the filed rate doctrine inapplicable. *Id.*

TWTC's Argument: TWTC maintains that for purposes of this proceeding, it does not take a position for or against the filed rate doctrine as a matter of law. However, TWTC asserts that QCC has maintained that the filed rate doctrine applied in other state proceedings concerning switched access charges. (BR 50) TWTC contends that QCC's position in other state proceedings is inconsistent with its current position that the filed rate doctrine does not apply. *Id.*

BullsEye's Argument: BullsEye asserts that the filed rate doctrine applies when carrier customers are imputed notice of a tariff or price list, and accept the rates and terms therein when they use that carrier's service. (BR 36) BullsEye avers that its Price List was approved by staff as set forth in the Administrative Procedure Manual. BullsEye further maintains that its Price List provides default rates for switched access which apply in the absence of an agreement. *Id.* Pursuant to its Price List, BullsEye maintains that QCC was required to make an objection within sixty days of an invoice or the dispute is waived. *Id.* BullsEye argues that the Price List must be followed completely and QCC cannot ignore some terms in favor of other terms. *Id.* BullsEye contends that QCC is inconsistent with its current position that the filed rate doctrine does not apply. *Id.*

Analysis

The filed rate doctrine prohibits a regulated entity from charging a rate other than the one on file with the appropriate regulatory authority.[41] Staff notes that the purpose of the filed rate doctrine is to "prevent carriers from engaging in rate discrimination."[42] Staff further notes that the "filed rate doctrine holds that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged."[43]

There are two elements necessary for the application of the filed rate doctrine. First, the tariff must be filed with the regulatory authority. Second, the tariff must be approved by the regulatory authority.

BullsEye takes the position that filing its price list is sufficient to satisfy the approval aspect of the filed rate doctrine. BullsEye argues that price lists are approved when processed as set forth in the Administrative Practice Manual, and that customers accept the rates and terms of those price lists when they use the carrier's service.[44] Staff does not agree that the filing of unregulated rates establishes or creates approval of the price list.[45]

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[41] Black's Law Dictionary, 8th Edition, 2004.
[42] Fax Telecommunications, Inc. v. AT&T, 138 F. 3d 479, 489 (2d Cir. 1998)
[43] Global Access Limited v. AT&T Corp., 978 F. Supp. 1068 (S.D. Fla. 1997); citing Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 615 (11th Cir. 1995).
[44] Section 2.07 C.5.a(16) of the Commission's Administrative Procedures Manual states that CLECs may file price lists with the Commission, and that they become effective one day after filing. The Administrative Procedures Manual has no process for the Commission to consider or approve the price list, but rather, as the title suggests, price list filings are an administrative matter not requiring Commission decisions.
[45] CLECs are not required to file switched access price lists.

QCC's position is that the filed rate doctrine applies only to rates subject to regulation by the state. In order for the filed rate doctrine to be triggered, argues QCC, a regulatory scheme must exist which requires telecommunication carriers to file and charge their filed rate, which must be approved by a Commission with the authority to review and reject those rates.[46] QCC takes the position that the filed rate doctrine does not apply in this proceeding simply because a price list is merely filed with the Commission. Indeed, QCC's issue is not with the filed rates filed by the CLECs but the availability of the "secret agreements" that the Respondent CLECs had with other IXCs.

Upon review, staff believes that the filed rate doctrine is not applicable, in whole or in part, for two reasons. First, staff believes that this proceeding is not about the effectiveness or appropriateness of rates previously approved by the Commission, but rather whether QCC was appropriately denied the opportunity to enter into a contract on non-price list switched access charge rates. Second, staff believes that the switched access rates set forth in filed CLEC price lists have not received the type of Commission approval which triggers application of the filed rate doctrine. Accordingly, staff recommends that the filed rate doctrine does not apply to this proceeding and that QCC's claims are not barred or limited in whole or in part by that doctrine.

f) the prohibition against retroactive ratemaking

Position of the Parties

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

TWTC: The Commission's establishing a new rate and applying it to prior QCC bills would constitute prohibited retroactive ratemaking.

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

Staff Analysis:

QCC's Argument: QCC argues that retroactive ratemaking is not applicable to this case. (BR 49) QCC acknowledges that the Commission lacks authority to issue retroactive ratemaking orders[47] but maintains that QCC is not asking the Commission to change rates retroactively. *Id.* QCC argues that in order to differentiate between customers there presumptively must be a cost

[46] See, Florida Munipal Power Agency v. Florida Power & Light Co., 64 F.3d 614, citing Keogh v. Chicago & Northern Rwy., 260 U.S. 156 (1922) (11th Cir. 1999) (doctrine attaches after a carrier's rates have "been submitted to and approved" by responsible agency), Hill v. Bellsouth Telecommunications, Inc., 364 F.3d 1308, 1315 (11th Cir. 2004) ("As it applies in the telecommunications industry, the doctrine dictates that rates become the law once filed and approved" by the FCC); Brown v. MCI WorldCom Network Services, Inc., 277 F3.d 1166 (9th Cir. 2002)("once a tariff is approved" it binds carriers and shippers); Pfeil v. Sprint Nextel Corp., 284 Fed. Appx. 640, 2008 U.S. App. LEXIS 13965 (11th Cir. 2008)(per curium)(doctrine applies once filed with and approved).

[47] *See. e.g.* City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 259-260 (Fla. 1968).

based justification. *Id.* QCC further argues that it is asking the Commission to enforce unreasonable rate discrimination because the CLECs failed to make available discounted switched access rates extended to AT&T. *Id.* QCC contends that the CLECs are statutorily required to extend the same rates to QCC unless QCC was not under like circumstances. *Id.*

TWTC's Argument: TWTC maintains that the Commission does not have jurisdiction or authority to order retroactive rates.[48] (BR 51) TWTC goes on to assert that because the Commission did not set the rates or rate structure of the switched access service, the Commission cannot assert authority over TWTC rates or rate structure or adjust QCC's prior bills.

BullsEye's Argument: BullsEye asserts that the prohibition against retroactive ratemaking precludes the Commission from modifying the rate for a particular service on a retroactive basis.[49] (BR 37) BullsEye maintains that QCC did not negotiate its own contract and was obligated to pay the default rates established by BullsEye's Price List. *Id.* BullsEye goes on to state that permitting QCC to receive a different rate would be retroactive ratemaking. *Id.*

Analysis

The Commission does not have jurisdictional authority to order retroactive ratemaking.[50] Indeed, the prohibition on retroactive ratemaking prohibits new rates for past service, or going back in the past and changing an approved rate. TWTC and BullsEye argue that the Commission did not and does not have the authority to set the rates or the rate structure of the switched access service. Further, TWTC and BullsEye argue that that to assert authority over the rates or rate structures and to adjust QCC's rates would essentially be an application of new rates to prior usage or retroactive ratemaking.

QCC argues that this case does not involve ratemaking in any format. QCC clarifies that it is not asking for a retroactive rate change but is asking the Commission to enforce equal treatment and prevent unreasonable rate discrimination by offering the same rates voluntarily offered to other IXCs.

It is undisputed that the Commission cannot set retroactive rates. However, this does not preclude the Commission from making a determination of whether the Respondent CLECs engaged in anticompetitive behavior. In order for retroactive ratemaking to be at issue in this case, the Commission would have to set new rates for past service or change the price list schedule.

[48] *Id.*
[49] See. e.g. Order No. PSC-07-0266-PHO-EI, Docket No. 060658-EI, In re Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million, issued March 29, 2007.
[50] *See e.g.*, City of Miami.

g) the intent, pricing, terms or circumstances of any

separate service agreements between QCC and any CLEC

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

TWTC: QCC's claims belie its own conduct and should be barred. QCC sought and received contract rates for switched access from CLECs with whom QCC has other dealings. QCC cannot be both a beneficiary of and an opponent to contract rates.

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

Staff Analysis:

QCC's Argument: QCC's other agreements have no bearing on this complaint, as the question is whether BullsEye violated Florida law in its provision of switched access service to QCC. The CPLA agreements QCC had with CLECs were "entirely distinct" from the discount agreements in this proceeding, wherein the Respondent CLECs granted large, secret discounts to other IXCs designed to benefit certain carriers to the detriment of others. The QCC CPLA agreements were designed to have neutral economic effect. (BR-50-51)

TWTC's Argument: QCC's witness, Mr. Easton, admitted QCC was the beneficiary of contract switched access rates, and though these agreements were allegedly "neutral" some of them were broad in scope, and no verification or market testing was ever done to prove that they were in fact, economically neutral. These agreements were also confidential. (BR-29)

BullsEye's Argument: QCC has entered many agreements with CLECs for switched access rates that vary from published price list rates. Some of these agreements pre-date the AT&T agreement with BullsEye, and many of them provide QCC with a rate that is far more preferential than the rate in the AT&T rate. (BR-37-38)

Analysis

This issue addresses whether the intent, pricing, terms or circumstances of any separate agreements between QCC and any CLEC bar or limit QCC's claims or its ability to make them. Specifically at issue are QCC's agreements for CPLA with other CLECs. (TR 150) As discussed in Issue 7, staff believes that the existence of CPLA agreements between QCC and other CLECs is one of several factors to consider in determining whether any anticompetitive behavior occurred under Section 364.16, F.S. However, neither the existence of these agreements nor the terms of the agreements individually bar or limit QCC's claims in this matter. Staff recommends that, as a result, QCC's claims are not barred or limited, in whole or in part,

by the intent, pricing, terms or circumstances of any separate agreements between QCC and any CLEC.

h) any other affirmative defenses pled or any other reasons

Position of the Parties

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

TWTC: QCC's claims should be barred as (i) inconsistent with "light touch" regulatory approach applied to Florida CLECs to encourage entry and investment and (ii) a request for the Commission to apply unadopted rules retroactively, inconsistent with Chapter 120.

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

Staff Analysis:

QCC's Argument: QCC argues that the CLECs final arguments simply misdirect the Commission's attention from the undisputed conduct underlying QCC's complaint. (BR 51)

TWTC's Argument: TWTC contends that its previous arguments of "light touch" regulation and unadopted agency rules are sufficient to find that QCC's claims should be barred. (BR 52)

BullsEye's Argument: BullsEye maintains that if the Commission were to now comprehensively regulate CLEC switched access rates, it would be for the first time and in a manner inconsistent with previous treatment. BullsEye argues that if the Commission were to adopt QCC's position, the Commission would be unlawfully creating a new rule that would constitute bad public policy. (BR 38) Witnesses LaRose and Deason contend that there would be harmful effects on competition, the ability of a business to continue to operate and survive financially, if the Commission were to regulate CLEC switched access rates. *Id.*

BullsEye alleges improper double recovery and argues that QCC's settlement of claims with AT&T regarding anticompetitive behavior offered relief from any harm that alleged by QCC. (BR 39) BullsEye further argues that allowing recovery to QCC would improperly benefit QCC and be left in a better position that AT&T with respect to BullsEye's switched access service and therefore must be rejected for reasons of policy. *Id.*

Analysis

BullsEye raises a concern that there will be inconsistent regulation of switched access rates if the Commission were to restrict the ability of CLECs to enter into contracts for switched access service. TWTC takes the position that a finding in favor of QCC would upset the light regulation over switched access. BullsEye takes the position that any Commission action on

switched access service would be unfair and would have a harmful effect on competition and for the survival of a business. BullsEye holds the position that because QCC already sued AT&T for anticompetitive conduct which resulted in a settlement agreement with AT&T, allowing QCC to further recover from the CLECs on the same basis of facts would be double recovery. BullsEye believes that QCC's claims should be rejected as a matter of policy.

While there is no dispute that switched access service is a lightly regulated area of telecommunications, staff does not believe that a resolution regarding anticompetitive behavior would constitute inconsistent regulation. Therefore, staff believes that there are no other affirmative defenses pled or any other reason that bar or limit, in whole or in part, QCC's claims.

Issue 9:

a) If the Commission finds in favor of QCC on (a) QCC's First Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) QCC's Second Claim for Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (c) QCC'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 QCC?

9 b) If the Commission finds a violation or violations of law as alleged by QCC and has authority to award remedies to QCC 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?

9(a) Recommendation If the Commission finds in favor of Qwest on any of its Claims for Relief, the Commission has the authority to order the CLECs to cure any and all anticompetitive behavior pursuant to Section 364.16(2), F.S. (Curry, Tan)

9(b) Recommendation: If the Commission finds a violation or violations of law as alleged by QCC and has authority to award remedies to QCC per the preceding issue, the CLECs should be ordered to cure any anticompetitive behavior and negotiate a mutually-acceptable agreement with QCC in good faith. (Curry, Tan)

9(a) If the Commission finds in favor of QCC on (a) QCC's First Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) QCC's Second Claim for Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (c) QCC'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 QCC?

Position of the Parties

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

TWTC: The Commission has no authority to award any relief QCC requests. The retrospective monetary relief sought constitutes damages stemming from unregulated rates and a windfall.

The prospective relief sought (imposing new rates, a uniform rate structure and contract filing requirements) are not authorized by statute.

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

Staff Analysis:

QCC's Argument: QCC argues that despite the CLECs' claims, QCC is not seeking damages as a remedy for the CLECs' anticompetitive and discriminatory conduct. Per Order No. PSC-10-0296-FOF-TP, the Commission declared that it does not have the authority to award damages, but it does have the authority to issue refunds, plus any applicable interest. If the Commission finds that the CLECs have violated the statutes QCC is seeking a refund of the overcharges, plus interest, that it paid to the CLECs for switched access services. (BR 54-56)

In terms of prospective relief, QCC contends that the Commission maintains the authority to mandate and prevent anticompetitive practices regarding wholesale services. Therefore, if the Commission finds that the CLECs' continued conduct violates Florida statutes, and/or hinders fair competition, the Commission retains the authority to prohibit such conduct. QCC argues that to prevent the CLECs from continually violating the statutes the Commission should direct the CLECs with ongoing switched access agreements (principally BullsEye and Ernest) to extend the same rate treatment to all Florida IXCs as long as those CLECs continue to offer AT&T preferential rate treatment under the agreements in dispute. (BR 56)

TWTC's Argument: TWTC states that it acknowledges that the Commission has the power to order refunds. However, the Commission may only do so when it has lawful authority to control the rates collected by a public utility. Since the Commission does not regulate or set rates for switched access, TWTC contends that the Commission does not have the authority to issue refunds. Further, TWTC argues that because the Commission does not have regulatory authority over switched access services, the relief that QCC seeks in this matter constitutes damages, or a penalty, not a refund. Therefore, since the Commission does not have the authority to award damages QCC's claim for relief should be denied. (BR 52)

BullsEye's Argument: BullsEye argues that the Commission does not have the authority to award the relief Qwest seeks, since such relief would constitute damages or reparations that the Commission is without authority to award. While the Commission does have the authority to award refunds, BullsEye argues that the issue of refunds is not applicable in this matter. QCC was admittedly charged, and paid, BullsEye's price list rates for switched access services. Therefore, QCC is not entitled to a refund because it did not overpay for switched access services. (BR 40-41)

BullsEye also argues that QCC is attempting to disguise its calculations as refunds by claiming that it overpaid the CLECs, in relation to AT&T, for switched access. However, QCC's calculations cannot constitute a refund because the AT&T settlement agreement never applied to QCC. Further, QCC is seeking relief that would retroactively put it in AT&T's

position and the Commission does not have the jurisdiction to award retroactive remedies since they would constitute reparations instead of a refund.[51] (BR 41)

Analysis

If the Commission finds that anticompetitive behavior has occurred and is still occurring, staff believes it has the clear statutory authority under Section 364.16(2), F.S., to order the companies to cure such actions on a prospective basis. Examples of possible cures could be negotiating a mutually acceptable agreement, disclosing off-price list contracts if appropriate, formally disputing charges under the terms of an existing agreement, etc. While the Commission lacks injunctive power, if any carrier refused to stop its anticompetitive behavior, the Commission could initiate a show cause proceeding that could result in penalties.

However, the Commission does not have the authority to award damages. QCC acknowledges that the Commission cannot award damages, and contends that it is not seeking damages, but a refund of unlawful charges for switched access. (BR 55, TR 95, 188, 314) The CLECs argue that QCC is not seeking a refund, but restoration for discriminatory pricing. (TR 468)

QCC partially bases its argument on a previous Commission Order issued in this case.[52] In its Order, the Commission states:

> Consistent with prior decisions, we do not have the authority to award damages. To the extent QCC is requesting monetary damages, we find it appropriate that the Partial Motion to Dismiss and Motion to Dismiss Claims for Reparations be granted. We have the authority to investigate the allegations in the Complaint, to prevent anticompetitive and unlawful discrimination among telecommunications service providers, and to determine the amount of any refunds and applicable interest, if any, QCC is due.[53]

This order was based on the parties' arguments applying Sections 364.01, 364.337(5), 364.01(4)(g), 364.08 and 364.10(1), F.S. These statutes have since been largely repealed.[54] Consistent with staff's analysis of Issue 1, staff believes that its authority to issue refunds based on QCC's reliance on the above statutes was eliminated by their repeal. However, the Commission's responsibility to prevent anticompetitive behavior remains under Section 364.16(2), F.S., and under this section the Commission could specifically order refunds or other measures between carriers if it deemed them appropriate.

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[51] Order No. 9810, Docket No. 800011-EU, In re: Application of Tampa Electric Company for Authority to Increase its Rates and Charges, (February 23, 1981), the Commission determined, "retroactive remedies, which are in the nature or reparations...are peculiarly judicial in charter" and beyond the Commission's jurisdiction. (emphasis added)

[52] Order No. PSC-IO-0296-FOF-TP, issued May 7, 2010.

[53] Id., at p. 6.

[54] Section 364.01 was amended, and the language referenced in the Order was moved to Section 364.16(2), F.S.

Staff agrees with the CLECs that the relief QCC seeks here is not a refund. Staff believes these claims are more appropriately damages. As discussed in previous issues, all the parties agreed that the CLECs charged QCC the rates in their price lists and that they were permitted to enter into contracts with other carriers at different rates. Also, the Commission has never rate-regulated CLECs in any way, and now lacks the authority to rate regulate any telecommunications company.

Staff believes that these factors indicate that, if the Commission were to grant any of QCC's claims, the rates paid by QCC would not be refundable overcharges but financial damages.[55] Staff believes that the Commission does not have the authority to award financial damages, so it could make no monetary award to QCC for damages found in this proceeding.

Staff believes the Commission, if it finds in favor of QCC on any of its claims, has the authority under Chapter 364.16(2), F.S., to require the CLECs to cure any and all anticompetitive behavior on a prospective basis. Staff further believes that QCC could subsequently seek damages in an appropriate civil court.

9 b) If the Commission finds a violation or violations of law as alleged by QCC and has authority to award remedies to QCC 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?

Position of the Parties

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

TWTC: The Commission should exercise its discretion and not order any remedies from TWTC.

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

Staff Analysis:

QCC's Argument: QCC states that it is seeking a refund for the amount that it overpaid each CLEC for intrastate switched access relative to the amount it would have paid had the CLEC

[55] Order No. PSC-10-0296-FOF-TP, issued May 10, 2010.

abided by Florida statutes and provided QCC non-discriminatory rate treatment. QCC argues that the refund amount ordered should be the principal amounts calculated by Mr. Canfield, as further updated through the date of the final order, plus interest.[56] (BR 57) QCC contests that Mr. Canfield's refund calculation method is the most reliable method because the principal amount of the overcharges have been separately and precisely calculated relative to each CLEC. Further, the CLECs have not provided any alternative methods for calculating refund amounts. QCC believes that either 30 or 60 days is a reasonable timeframe for the CLECs to render payment. (BR 57 and 59)

TWTC's Argument: TWTC argues that if the Commission finds that TWTC has violated the statutes that QCC is alleging the Commission should not order any remedies from TWTC. TWTC argues that it is bad regulatory policy to lure entrants into the Florida market on the promise of lesser regulation and then to retrospectively change the rules.[57] If the Commission does order TWTC to make payments to QCC, TWTC contends that it will have to carefully consider the regulatory climate in Florida before making future investments within the state. Given the languid state of the economy, the Commission cannot afford to discourage investment in Florida. Further, since TWTC does not have any current switched access contracts rates and nothing on record establishes its intent to sign another, QCC's other remedies (imposing uniform rates and requiring contract filing) are unnecessary as they pertain to TWTC. (BR56-57)

BullsEye's Argument: BullsEye argues that given that QCC has admitted that BullsEye was compelled to enter the AT&T settlement due to AT&T's anticompetitive withholding of access charge payments, it would be unfair to award QCC a refund. Awarding QCC a refund of the switched access charges that it paid would permit QCC to benefit from the BullsEye-AT&T agreement rather than reversing the advantage unfairly obtained by AT&T. Moreover, allowing QCC to obtain the benefit of the of the AT&T agreement would, under QCC's own theory, give QCC the same "unreasonable advantage" over other IXCs, like QCC, who pay BullsEye's price list rates for switched access. (BR 42) To the extend that the Commission should take any actions, BullsEye argues that based on the facts presented in this case the Commission should investigate AT&T's anticompetitive, coercive tactics in obtaining settlements with BullsEye and other CLECs. (BR 43)

Analysis

As discussed in previous issues, staff believes that the relief QCC seeks in this case is appropriately classified as damages and not refunds. Also, the Commission does not have the authority to award damages, and even if it did, there is insufficient evidence that any anticompetitive behavior occurred in this case. However, if the Commission finds a violation or violations of law as alleged by QCC and has authority to award remedies to QCC per the preceding issue, the CLECs should be ordered to cure any anticompetitive behavior and negotiate a mutually-acceptable agreement with QCC in good faith.

[56]Mr. Canfield thoroughly explains analysis and calculations in his direct testimony. (TR 265-267 and 297-299)
[57]TWTC's argument is based on the testimony of its witness Deason. (TR 597-598 and 600)

Issue 10: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendations in Issues 1-9, this docket should be closed after the Order becomes final and the time for filing an appeal has passed. (Tan)

Staff Analysis: If the Commission approves staff's recommendations in Issues 1-9, this docket should be closed after the Order becomes final and the time for filing an appeal has passed.