

Marguerite McLean

090538-TP

From: Scobie, Teresa A (Terry) [terry.scobie@verizon.com]
Sent: Tuesday, November 16, 2010 11:13 AM
To: Filings@psc.state.fl.us
Subject: RE: Docket No. 090538-TP - Verizon Access' Answer to Amended Complaint
Attachments: 090538 VZ Access Answer to Amended Complaint 11-16-10.pdf

Per the below email, please find attached Verizon Access Transmission Services' corrected document for filing in Docket No. 090538-TP. Please advise if anything further is needed.

Terry Scobie
Legal Secretary II
Verizon Legal Department
P. O. Box 110 - MC FLTC0007
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From: Filings@psc.state.fl.us [mailto:Filings@psc.state.fl.us]
Sent: Tuesday, November 16, 2010 10:53 AM
To: Scobie, Teresa A (Terry)
Subject: FW: Docket No. 090538-TP - Verizon Access' Answer to Amended Complaint

Ms. Scobie:

We are in receipt of your attached e-filing. Please note that, per the Commission's e-filing requirements, documents are to include an official signature. Your document will need to be revised and resubmitted to be considered an official filing.

Manner of Electronic Transmission:

- Documents shall be signed by typing "s/" followed by the signatory:

s/ First M. Last
- The acknowledgment indicates the document has been received, but does not confirm the document meets the requirements for electronic filing.

A link to the Commission's e-filing requirements is included for your convenience:

<http://www.psc.state.fl.us/dockets/e-filings/>

Please call our office if you have any questions.

Marguerite H. McLean
Commission Deputy Clerk II

DOCUMENT NUMBER DATE
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FPSC-COMMISSION CLERK

11/16/2010

Florida Public Service Commission
Office of Commission Clerk
850-413-6770

From: Scobie, Teresa A (Terry) [mailto:terry.scobie@verizon.com]

Sent: Tuesday, November 16, 2010 10:06 AM

To: Filings@psc.state.fl.us

Cc: Adam Sherr; Alex Duarte; Andrew Klein; Beth Keating; Carolyn Ridley; David Christian; O'Roark, Dulaney L; Clark, Demetria Germaine; App, Frank (Frank); Greg Diamond; Howard Adams; Jason Topp; Jeff Wirtzfeld; John Ivanuska; Ken Culpepper; Marsha Rule; Mary Smallwood; Matthew Feil; R. Currier; Severy, Richard; Steven Denman; Lee Eng Tan

Subject: Docket No. 090538-TP - Verizon Access' Answer to Amended Complaint



The attached is submitted for filing on behalf of Verizon Access Transmission Services by

Dulaney L. O'Roark III
P. O. Box 110, MC FLTC0007
Tampa, Florida 33601-0110
(678) 259-1657
de.oroark@verizon.com

The attached document consists of a total of 23 pages - cover letter (1 page), Answer (19 pages), and Certificate of Service (3 pages).

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November 16, 2010 – VIA ELECTRONIC MAIL

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090538-TP
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; Cox Florida Telcom, L.P.; Broadwing
Communications, LLC; and John Does 1 through 50 (CLEC's whose true names
are currently unknown) for rate discrimination in connection with the provision of
intrastate switched access services in alleged violation of Sections 364.08 and
364.10, F.S.

Dear Ms. Cole:

Enclosed for filing in the above matter is MCImetro Access Transmission Services d/b/a
Verizon Access Transmission Services' Answer to Amended Complaint. Service has
been made as indicated on the Certificate of Service. If there are any questions
regarding this filing, please contact me at (678) 259-1657.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosures

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest) Docket No. 090538-TP
Communications Company, LLC, Against)
MCImetro Transmission Services LLC (d/b/a) Filed: November 16, 2010
Verizon Access Transmission Services); XO)
Communications Services, Inc.; tw telecom)
of florida, l.p.; Granite Telecommunications,)
LLC; Cox Florida Telcom, L.P.; Broadwing)
Communications, LLC; Access Point, Inc.;)
Birch Communications, Inc.; Budget Prepay,)
Inc.; Bullseye Telecom, Inc.; Deltacom, Inc.;)
Ernest Communications, Inc.; Flatel, Inc.;)
Lightyear Network Solutions, LLC; 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)
_____)

ANSWER OF VERIZON ACCESS TO AMENDED COMPLAINT

Pursuant to Rule 28-106.203 of the Florida Administrative Code, defendant MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("Verizon Access" or "MCImetro") respectfully submits this answer to the Amended Complaint ("Amended Complaint") of Qwest Communications Company, LLC (f/k/a Qwest Communications Corporation) ("QCC"), as corrected on October 11, 2010.

ANSWER TO MATERIAL ALLEGATIONS IN THE AMENDED COMPLAINT

In response to the material allegations of the Amended Complaint, Verizon Access states as follows:

1. In response to the first unnumbered paragraph on page 2 of the Amended Complaint, Verizon Access states that no response is necessary to the statement that

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QCC is bringing a complaint against the named respondent competitive local exchange carriers ("CLECs").

2. In response to the second unnumbered paragraph on page 2 of the Amended Complaint, Verizon Access denies that it has subjected QCC to unjust and unreasonable rate discrimination in connection with the provision of intrastate switched access services. The paragraph sets forth legal conclusions to which no response is necessary. To the extent these legal conclusions can be deemed factual allegations, Verizon Access answers those allegations in paragraphs 14–16 below. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations regarding other respondent CLECs and therefore denies those allegations. Verizon Access denies the remaining allegations of the second unnumbered paragraph on page 2 of the Amended Complaint.

3. In response to Paragraph 1 of the Amended Complaint, Verizon Access admits, upon information and belief, that QCC is a Delaware corporation with its principal place of business in Denver, and is a telecommunications company authorized to provide certain telecommunications services, including interexchange (long distance) services, in Florida. No response is necessary to the statement about QCC's contact information in Paragraph 1a. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations contained in Paragraph 1b, and therefore denies those allegations.

4. In response to Paragraph 2a of the Amended Complaint, Verizon Access admits the allegations in the first sentence about Verizon Access's legal status. For purposes of this proceeding, Verizon Access's regulatory contact and legal counsel is:

Dulaney L. O'Roark III
P. O. Box 110, MC FLTC0007
Tampa, Florida 33601-0110
678-259-1657 (phone)
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de.oroark@verizon.com

5. In response to Paragraphs 2b through 2t of the Amended Complaint, Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.

6. In response to Paragraph 3 of the Amended Complaint, Verizon Access admits that the Commission has jurisdiction over certain complaints, but denies that it has jurisdiction over all of the claims asserted by QCC in the Complaint.

7. In response to Paragraph 4 of the Amended Complaint, Verizon Access states that sections of the Florida statutes identified in this paragraph speak for themselves, and denies all allegations inconsistent with those requirements. To the extent Paragraph 4 includes legal conclusions, no response is necessary.

8. In response to Paragraph 5 of the Amended Complaint, Verizon Access states that the provisions of the Florida statutes identified in this paragraph speak for themselves, and denies all allegations inconsistent with those requirements. To the extent Paragraph 5 includes legal conclusions, no response is necessary.

9. In response to Paragraph 6 of the Amended Complaint, Verizon Access admits that it has on file with the Commission a price list specifying rates, terms and conditions for the provision of intrastate switched access services.¹ Verizon Access has

¹ MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, F.P.S.C. Price List No. 1.

no knowledge or sufficient information to form a belief as to the truth of allegations, statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.

10. In response to Paragraph 7 of the Amended Complaint, Verizon Access is without knowledge or sufficient information to form a belief as to the truth of statements regarding QCC or other respondent CLECs, and therefore denies those allegations. Verizon Access admits that it has billed QCC for intrastate switched access services in Florida.

11. In response to Paragraph 8 of the Amended Complaint, Verizon Access states that on June 16, 2004, the Minnesota Department of Commerce ("MN DOC") filed a Complaint and Request for Commission Action "In the Matter of Negotiated Contracts for the Provision of Switched Access Services," that the Minnesota Public Utilities Commission ("MN PUC") conducted a proceeding in response thereto in Docket C-04-235, that MCImetro was a party in Docket C-04-235, and that on July 7, 2005, the MN PUC approved a stipulation dismissing the complaint against MCImetro without making any finding that MCImetro had violated any law, rule or Commission order. Verizon Access was not a party to any other MN PUC investigation involving the allegations raised by QCC in Paragraph 8, and thus does not have sufficient knowledge or information to form a belief as to the truth of the allegations relating to such other investigations and therefore denies those allegations. Verizon Access further states that the proceedings before the MN PUC speak for themselves, so no response is necessary.

12. In response to Paragraph 9 of the Amended Complaint, Verizon Access admits that the MN DOC filed a complaint that initiated Docket C-04-235, and that Verizon Access was a party to that proceeding. Verizon Access was not a party to MN PUC Dockets C-05-1282 and C-06-498, and thus does not have sufficient knowledge or information to form a belief as to the truth of allegations raised by QCC with respect to those proceedings and therefore denies those allegations. Verizon Access states that the complaints filed by the MN DOC in the three MN PUC dockets listed above and the comments filed by AT&T speak for themselves, so no response is necessary concerning the allegations relating to them.

13. In response to Paragraph 10a.i of the Amended Complaint, Verizon Access admits that it has on file with the Commission a price list specifying rates, terms and conditions for its provision of intrastate switched access services.² Verizon Access admits that it bills QCC the rates set forth in its price list for intrastate switched access services in Florida.

14. In response to Paragraph 10a.ii of the Amended Complaint, Verizon Access denies that it has any off-tariff, unfiled agreement to provide intrastate switched access services to any interexchange carrier ("IXC") in Florida. Verizon Access states that it previously entered into an agreement to provide switched access services to AT&T, effective January 27, 2004. That agreement had a term of two years, was later extended in all material respects for one additional year, and expired on January 26, 2007. It is no longer in effect. Verizon Access asserts that the January 2004 agreement was part of a comprehensive Settlement Agreement that was entered into to

² See *supra*, footnote 1.

resolve numerous contractual, commercial, and legal disputes between WorldCom and AT&T during the bankruptcy proceeding of Verizon Access's former corporate parent, WorldCom, and its domestic subsidiaries.³ The Settlement Agreement, including the existence of the January 2004 switched access agreement, was publicly disclosed in a "Motion of the Debtors," filed with the Bankruptcy Court on February 23, 2004.⁴ On the same day, the Bankruptcy Court provided electronic notice of the filing of the Motion of the Debtors on parties to WorldCom's bankruptcy proceeding, including counsel for Qwest Corporation, QCC, and their affiliates.⁵ Verizon Access states that the January 2004 switched access agreement was also identified and described in pleadings that were filed in MN PUC Docket C-04-235 on April 25, 2005, and October 27, 2005, and made available to and reviewed by QCC. Based on information and belief, Verizon Access asserts that QCC and its affiliates obtained copies of the reciprocal agreements between AT&T and Verizon Access's affiliates during the pendency of the MN PUC investigations, and on that basis Verizon Access denies that the material rates, terms and conditions of the January 2004 agreement have not been disclosed to QCC.

15. In further response to Paragraph 10a.ii of the Amended Complaint, based upon information and belief, Verizon Access denies that QCC made a good faith demand on Verizon Access to disclose copies of any off-tariff arrangements and to

³ The "Motion of the Debtors" described below referred to an earlier switched access agreement that MCI and AT&T had entered into in 1998, explained that numerous disputes had arisen under that agreement, and stated that one of the means for reconciling and resolving those disputes was to establish the January 2004 switched access agreement and a companion bilateral agreement between AT&T's CLECs and MCI.

⁴ Motion of the Debtors Pursuant to Bankruptcy Rule 9019 Seeking Approval of a Settlement and Compromise of Certain Matters with AT&T Corporation, filed in *In re WorldCom, Inc., et al*, Chapter 11 Case No. 02-13533 (AJG) (U.S. Bankruptcy Court, Southern District of New York).

⁵ Following notice to Qwest, QCC and all other parties, and after conducting a public hearing, the U.S. Bankruptcy Court approved the 2004 Settlement Agreement on March 2, 2004.

provide QCC intrastate switched access services at the most favorable rates, terms and conditions provided to other IXCs. The only communication known to Verizon Access was a generic form letter announcement titled "General Notification" that was mailed by QCC on February 25, 2008, after the January 2004 switched access agreements had already expired. That letter did not reflect a good faith, business-oriented request on behalf of QCC, but instead asked "Company" to provide information about reciprocal compensation, 800/8YY database queries and intrastate switched access, including copies of agreements to provide switched access service at off-tariff rates, to Candace A. Mowers, an individual QCC later acknowledged is in its Public Policy organization. Based on information and belief, individuals in QCC's Public Policy organization typically do not negotiate and enter into intercarrier business arrangements on behalf of QCC.

16. In further response to Paragraph 10a.ii of the Amended Complaint, Verizon Access denies that it did not honor the limited request made by QCC described in paragraph 15 above. At the time QCC mailed the request, Verizon Access did not have an agreement in effect to provide intrastate switched access service in Florida at rates lower than those in its price list, so there was nothing for it to provide in response. Verizon Access denies all remaining allegations in Paragraph 10a.ii.

17. In response to Paragraphs 10b–t of the Amended Complaint, Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding QCC and other respondent CLECs, and therefore denies those allegations.⁶

⁶ In response to footnote 7, wherein QCC refers to "parallel proceedings pending before ... the California Public Utilities Commission (Case C.08-08-006)," Verizon Access states that, on August 2, 2010, the

18. In response to Paragraph 11 of the Amended Complaint, Verizon Access restates and incorporates its responses in paragraphs 1 through 17 of its Answer above.

19. In response to Paragraph 12 of the Amended Complaint, Verizon Access states that sections 364.08(1) and 364.10(1) of the Florida statutes speak for themselves, and denies all allegations inconsistent with those requirements. To the extent Paragraph 12 includes legal conclusions, no response is necessary.

20. In response to Paragraph 13 of the Amended Complaint, Verizon Access denies that QCC was similarly situated to the IXC (AT&T) with which Verizon Access had a reciprocal switched access agreement and denies that it subjected QCC to unreasonable prejudice and disadvantage and discriminatory treatment with respect to rates for intrastate switched access services. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations, statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.

21. In response to Paragraph 14 of the Amended Complaint, Verizon Access restates and incorporates its responses in paragraphs 1 through 20 of its Answer above.

22. In response to Paragraph 15 of the Amended Complaint, Verizon Access states that the sections of the Florida statutes and the administrative rule identified in this paragraph speak for themselves, and denies all allegations inconsistent with those requirements. To the extent Paragraph 15 includes legal conclusions, no response is necessary. In further response to Paragraph 15, Verizon Access admits that it has filed

California Public Utilities Commission dismissed QCC's identical complaint against several CLECs in its entirety. *Qwest Communications Company, LLC vs. MCImetro Access Transmission Services, LLC et al*, Final Decision Dismissing Complaint, Decision 10-07-030 (application for rehearing pending).

a price list for its intrastate switched access services in Florida. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.

23. In response to Paragraph 16 of the Amended Complaint, Verizon Access states that it previously entered into an agreement with AT&T that has since expired, and states that the agreement constituted one aspect of the consideration intended to resolve the parties' numerous fact-specific financial claims, disputes and obligations during WorldCom's bankruptcy. Verizon Access further states that it did not enter into a contract with QCC for the provision of intrastate switched access services in Florida, but instead has provided intrastate switched access services to QCC and billed for such services pursuant to its price list in Florida. Verizon Access denies that the terms of its now-expired agreement with AT&T have not been disclosed to QCC. Verizon Access states that, under Florida law, CLECs may enter into contracts to provide switched access service to interexchange carriers and that such contracts are not required to be filed with the Commission. Verizon Access therefore denies allegations that it violated Florida law by failing to abide by its published price list or by subjecting QCC to *unreasonable prejudice, disadvantage and discriminatory treatment*. Verizon Access states that it has no knowledge or information sufficient to form a belief as to the truth of allegations, statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations. Verizon Access denies the remaining allegations of Paragraph 16 of the Amended Complaint.

24. In response to Paragraph 17 of the Amended Complaint, Verizon Access restates and incorporates its responses in paragraphs 1 through 23 of its Answer above.

25. In response to Paragraph 18 of the Amended Complaint, Verizon Access states that the sections of the Florida statutes and the administrative rule identified in this paragraph speak for themselves, and denies all allegations inconsistent with those requirements. To the extent Paragraph 18 includes legal conclusions, no response is necessary.

26. In response to Paragraph 19 of the Amended Complaint, no response is necessary as this claim does not involve Verizon Access.

27. In response to the unnumbered paragraph on page 19 under "Prayer for Relief," Verizon Access denies that the Commission should initiate proceedings to adjudicate the issues set forth in QCC's Amended Complaint and rule in its favor, and denies that QCC is entitled to any relief.

28. In response to Prayer for Relief A, Verizon Access denies that it has violated Florida law as alleged by QCC. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact *regarding other respondent CLECs, and therefore denies those allegations.*

29. In response to Prayer for Relief B, Verizon Access denies that Qwest is entitled to reparations or interest. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact *regarding other respondent CLECs, and therefore denies those allegations.*

30. In response to Prayer for Relief C, Verizon Access denies there is any basis for the relief QCC seeks with respect to Verizon Access because Verizon Access charges all IXCs in Florida the switched access rates in its intrastate price list. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.

31. In response to Prayer for Relief E, Verizon Access denies there is any basis for the relief QCC seeks with respect to Verizon Access because Verizon Access does not have any contract service agreements with any interexchange carriers in Florida. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.

32. In response to Prayer for Relief F, Verizon Access denies that QCC is entitled to any other relief with respect to Verizon Access and asserts that no other relief would be appropriate. Verizon Access has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.

AFFIRMATIVE DEFENSES

First Affirmative Defense **(Failure To State Claim Warranting Relief)**

33. QCC's Amended Complaint fails to state a claim with respect to Verizon Access upon which relief can be granted.

Second Affirmative Defense **(CLECs are Permitted to Enter into Contracts for Switched Access Service)**

34. QCC's complaint that Verizon Access entered into an "undisclosed" contract to provide switched access service (Amended Complaint at ¶ 16) fails to state a cause of action under Florida law. CLECs in Florida are required to file price lists only for "basic local telecommunications services." PSC Rule 25-24.825(1), Florida Administrative Code. CLECs have the "option," but are not required to file tariffs or price lists for any other service, including switched access service. PSC Rule 25-24.825(2). CLECs are permitted to enter into contracts with other telecommunications companies, a fact that QCC admits (Amended Complaint at ¶ 12). There is no requirement that a CLEC file any such contracts with the Commission, although Commission staff may request information about a carrier's service offering pursuant to PSC Rule 25.24.825(5). Because CLECs may enter into contracts with interexchange carriers for switched access service, QCC's complaint that Verizon Access entered into an "undisclosed" contract with AT&T does not raise a cognizable issue under Florida law.

Third Affirmative Defense **(QCC is Not Entitled to Any Prospective Relief)**

35. Verizon Access currently charges all IXCs in Florida the intrastate switched access rates contained in its published price list, and it has not provided

intrastate switched access service to any IXC in Florida pursuant to the terms of a contract since January 2007, more than three years ago. See paragraph 14, *supra*.

36. Thus, there is no basis on which the Commission could grant QCC's request that Verizon Access be ordered to "lower" its intrastate switched access rates to QCC prospectively "consistent with the most favorable rate offered to other IXCs in Florida." Amended Complaint at Prayer for Relief ¶ C. And because Verizon Access does not have any switched access service agreements in Florida, there are none that it could file with the Commission. Amended Complaint at Prayer for Relief ¶ E. QCC has failed to allege sufficient facts demonstrating that such prospective relief is warranted or appropriate as it relates to Verizon Access. Accordingly, QCC's complaint should be dismissed or denied as to these two requests for relief.

Fourth Affirmative Defense
(Failure To Allege Facts Warranting Reparations)

37. QCC couches its prayer for relief as a request that the defendant CLECs pay it "reparations," together with applicable interest.

38. But reparations generally are intended to compensate a customer for any payment that it made in excess of the amount that it should have been charged.⁷ At all times relevant to this complaint, QCC was charged the rates for intrastate switched access service contained in Verizon Access's effective price list. QCC has not alleged that Verizon Access did not bill it in accordance with its intrastate price list. The rates in Verizon Access's intrastate switched access price list are reasonable, and QCC has not

⁷ QCC filed its Amended Complaint, *inter alia*, pursuant to Rule 25-4.114 Fla. Admin. Code (Amended Complaint at 1). That rule addresses "refunds," including specifically refunds of deposits or those that are the result of a rate change or overearnings. None of those circumstances pertain to the allegations in QCC's Amended Complaint.

alleged otherwise. Thus, QCC is not seeking repayment of amounts that it was improperly billed in excess of the rates contained in Verizon Access's price list. Accordingly, there is no basis for an award of "reparations." QCC, instead, is seeking damages for an alleged injury to its business.⁸

Fifth Affirmative Defense
(Filed-Rate Doctrine)

39. QCC is not entitled to relief under the filed-rate doctrine because Verizon Access's price list on file with the Commission is presumed to be just and reasonable.

40. QCC acknowledges that the Commission's rules permit CLECs to establish switched access rates by filing price lists with the Commission.⁹ QCC admits that Verizon Access has established its switched access rates in this manner and that QCC has been charged those rates for the switched access services it received. Amended Complaint ¶ 10 a. i. The filed-rate doctrine prohibits QCC from arguing that it should be allowed to pay a rate different than that in the effective price list or obtain a refund based on filed rates that it concedes are lawful.¹⁰ The Commission has rejected such claims under the principle that if filed rates are ordered to be changed, they can only be changed prospectively, not retroactively.¹¹ QCC's request for compensation

⁸ QCC has merely alleged that the respondent CLECs' business practices have operated "to the detriment of QCC" (Amended Complaint at ¶ 13), but it has not alleged or made any specific showing that Verizon's conduct has resulted in actual damage to QCC.

⁹ Section 25-24.825, Florida Administrative Code.

¹⁰ See, e.g., *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) ("FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription").

¹¹ See *In re: Petition for Expedited Review of BellSouth Telecommunications, Inc.'s Intrastate Tariffs for Pay Telephone Access Services (PTAS) Rate with Respect to Rates for Payphone Line Access, Usage, and Features*, by Florida Public Telecommunications Association, Docket No. 030300-TP, Order No. PSC-04-0974-FOF-TP (2004). See also *Southern Bell Tel. & Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780 (Fla. 1984) (Commission orders violated principle against retroactive ratemaking to the extent they required retroactive adjustment under parties' revenue distribution arrangement).

based on rates other than those on file with the Commission therefore must be dismissed or denied.

Sixth Affirmative Defense
(Failure To State a Claim For Undue or Unreasonable Preference or Advantage)

41. Verizon Access has not engaged in any undue or unreasonable preference or advantage, and has not subjected QCC to any undue or unreasonable prejudice or disadvantage that is prohibited by §§ 364.08(1) or 364.10(1), Florida Statutes, as alleged in Paragraph 12 of the Amended Complaint.

42. In order to state a claim for unlawful advantage or privilege under § 364.08(1) Fla. Stat., QCC must show that it was “under like circumstances.” QCC acknowledges that the test of whether contractual terms are made available on a non-discriminatory basis under § 364.10(1) Fla. Stat. also requires a showing that the firms are “similarly-situated telecommunications companies.” Amended Complaint at ¶ 5. As another regulatory commission has found, “[n]umerous characteristics of a particular customer ... could be sufficient to distinguish one customer from another.”¹²

43. QCC, however, fails to allege any facts showing that it was “under like circumstances,” or similarly situated to meet the terms of Verizon Access’s January 2004 switched access agreement with AT&T. Nor could it plausibly make such a claim. As explained above, Verizon Access entered into the January 2004 switched access agreement as one component of a comprehensive settlement of numerous fact-specific

¹² *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters*, D.94-09-065, at 239, 1994 Cal. PUC LEXIS 681 (1994), citing *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) and *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); see also *Re Generic Hearings Concerning Electric Rate Structure*, Colorado PUC Decision No. C79-111, Case No. 5593 at § II A[3], 36 P.U.R.4th 6, 19 (1979) (Commission considers several factors, including costs, the types of service, and the characteristics of such service); *Integrated Network Services, Inc. v. Public Utilities Commission*, 875 P.2d 1373, 1383 (1994) (holding that cost-of-service is not the only factor to be considered, and citing cases in which Commission distinguished customers based on income and where they lived).

and complex commercial, contractual and legal disputes with AT&T during WorldCom's bankruptcy proceeding. During the same bankruptcy process, WorldCom and Qwest Corporation (including QCC and its other affiliates) addressed a different set of substantial financial and commercial disputes, the companies' respective monetary claims were different, and the companies resolved them in a different, albeit mutually acceptable manner. In both instances, WorldCom's settlement agreements with AT&T and Qwest were approved by the federal bankruptcy court that oversaw WorldCom's corporate reorganization.

44. Not only did the companies agree to different financial arrangements, but with respect to the January 2004 switched access agreement, there were other material differences between the companies, as well. Most significant, WorldCom and AT&T resolved their disputes and claims by agreeing that each company's CLEC affiliates would charge the other company's IXC affiliates a single, uniform rate for switched access service provided anywhere in the country where the CLEC and its affiliates provided local exchange service. The parties accomplished this by entering into two separate *reciprocal* agreements. The rates, terms and conditions of the two contracts were identical in every respect, except as to the names of the purchaser and seller. The critical element of the two agreements was their reciprocal nature -- the fact that each party's CLEC affiliates undertook reciprocal obligations to provide switched access service to the other party's IXC affiliates at the same rates, terms and conditions.¹³

¹³ In approving the settlement agreement, the Bankruptcy Court found it to be "the product of good-faith, arm's length negotiations between the parties," "fair and within the range of reasonableness," "an exercise of the Debtors' sound business judgment," and "in the best interests of the Debtors, their estates, and their creditors." *Order Pursuant to Bankruptcy Rule 9019 Approving Debtors' Settlement and Compromise of Certain Matters with AT&T Corporation*, Chapter 11 Case No. 02-13533 (AJG)(U.S. Bankruptcy Court, S.D.N.Y.) (March 2, 2004).

45. QCC was neither operationally nor legally able to provide Verizon Access's IXC affiliates the same benefits of WorldCom's negotiated settlement with AT&T. Based on information and belief, at all relevant times, QCC did not provide switched access service in Florida (or any other state) and did not have a tariff authorizing it to provide switched access service in Florida. Nor did QCC provide facilities-based switched local exchange service in Florida using its own end-office switches or using unbundled network elements, including UNE-P. These facts disqualified QCC from being able to meet the reciprocal terms of the January 2004 switched access agreements.¹⁴

46. Because QCC was in no position to offer Verizon Access's IXC affiliates the same benefits under the reciprocal arrangement that Verizon Access had with AT&T, it was not similarly situated to AT&T, or under "like circumstances." Through its complaint, QCC seeks to obtain the benefit of the reciprocal agreements without incurring any of the mutual obligations that were an express condition of the contracts. Common and prudent business sense suggest that WorldCom would have been unlikely to enter into a "settlement" resulting in a unilateral switched access rate reduction for a single creditor, QCC, without obtaining in exchange a reciprocal access rate reduction on all of its own affiliates' interexchange traffic.

47. QCC cannot prove that it was a similarly situated customer to AT&T and able to meet the terms of the bilateral reciprocal agreements. Accordingly, QCC cannot demonstrate that Verizon Access violated § 364.08 Fl. Stat., which only requires that a carrier "uniformly extend[]" an advantage of contract "to all persons under like

¹⁴ Unlike QCC, Verizon Access and AT&T both provided switched access service throughout their service territories nationwide.

circumstances.” Because QCC was not “under like circumstances” when the January 2004 switched access agreements were in effect, there is no basis on which the Commission could find that Verizon Access subject QCC to any undue or unreasonable prejudice or disadvantage.¹⁵

48. In addition, QCC’s claim for relief would result in discriminatory treatment because, if its request for reparations is granted, QCC alone would obtain lower rates than other IXCs and without making a showing that it is entitled to such rates as a similarly situated customer.

Seventh Affirmative Defense
(Statute of Limitations)

49. QCC’s claims against Verizon Access are barred by the applicable statute of limitations.

Eighth Affirmative Defense
(Claims Barred By Equity)

50. QCC’s claims are barred in whole or in part by laches, waiver, estoppel, and/or unclean hands.

WHEREFORE, Verizon Access respectfully requests that the Commission deny QCC’s complaint as it pertains to Verizon Access.

¹⁵ See *Qwest Communications Company, LLC vs. MCI/metro Access Transmission Services, LLC et al*, *supra* note 6 (California PUC dismissed QCC’s identical complaint alleging that CLECs’ provision of intrastate access services under contracts containing off-tariff rates because such practices “do not constitute a violation of California law or Commission regulation.”)

Respectfully submitted on November 16, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on November 16, 2010 to the following:

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