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090538-TP

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Sent:	Tuesday, November 16, 2010 2:31 PM
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Subject:	FL PSC Docket No. 090538-TP - Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds
Attachments:	FL PSC Docket No 090538-TP Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds.pdf

Attached for electronic filing in the above-referenced docket, please find the attached Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds. If you have any questions, please do not hesitate to contact us.

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b. Docket No. 090538-TP

c. Filed on behalf of: Access Point, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PAETEC Communications, Inc., and US LEC of Florida

d. Total pages: 59

e. Brief Description: Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (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, 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.	DOCKET NO. 090538-TP Filed: November 16, 2010

ACCESS POINT, INC., LIGHTYEAR NETWORK SOLUTIONS, LLC, NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., AND US LEC OF FLORIDA, LLC'S JOINT MOTION TO DISMISS QWEST'S FIRST AND SECOND CLAIMS FOR RELIEF AND REQUEST FOR REPARATIONS IN THE FORM OF REFUNDS

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Dated: November 16, 2010

DOCUMENT NUMBER-DATE
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Access Point, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; PAETEC Communications, Inc.; and US LEC of Florida, LLC (collectively "Movants"), by and through undersigned counsel, hereby move the Florida Public Service Commission ("Commission") to dismiss the First and Second Claims for Relief in the Amended Complaint ("Complaint") filed by Plaintiff Qwest Communications Company, LLC ("Qwest" or "QCC") and also to dismiss the Complaint to the extent it seeks "reparations" in the form of refunds from Movants.

I. INTRODUCTION AND SUMMARY

Qwest filed its Complaint with the Commission on September 29, 2010. In its First Claim for Relief, Qwest alleges that with respect to rates for intrastate switched access services, the Respondent CLECs engaged in unlawful rate discrimination against Qwest in violation of Florida Statutes § 364.08(1) and § 364.10(1). In its Second Claim for Relief, Qwest alleges that the Respondent CLECs have violated Florida Statute § 364.04(1) and § 364.04(2) by failing to abide by their filed price lists for intrastate switched access services in Florida. In its Third Claim for Relief, Qwest alleges that certain Movants violated Florida law by not providing to Qwest the discounts contained in customer-specific, individual case-basis agreements they entered into with others as called for by their prices lists.

In support of these three Claims for Relief, Qwest generically alleges that: (1) each Movant has on file with the Commission price lists specifying the rates, terms and conditions of service; (2) each Movant bills Qwest at the rates set forth in the filed price lists for intrastate

access service; (3) each Movant had or has off-price list agreements with certain Interexchange Carriers ("IXCs") other than Qwest; (4) these agreements offer intrastate access services at rates different from and lower than the rates set forth in the filed price lists; and (5) the rates, therein, have not been offered to Qwest.

Qwest specifically requests that the Commission grant relief in the form of:

> A. a declaration that the "Respondent CLECs violated Florida law by engaging in unlawful rate discrimination to the detriment of QCC, by extending other IXCs advantages of contract or agreement not extended to QCC to the detriment of QCC, by failing to abide by their price lists and by charging QCC more for switched access than they charged other IXCs under like circumstances for like or substantially similar service."
> B. an order requiring the "Respondent CLECs to pay QCC reparations, with applicable interest, in an amount to be proven at hearing."
> C. an order requiring "the Respondent CLECs to lower their intrastate switched access rates to QCC prospectively consistent with the most favorable rate offered to other IXCs in Florida." E. an order requiring "Respondent CLECs to file with the Commission any contract service agreements Respondent CLECs may have with other IXCs in Florida which agreements charge rates for intrastate switched access services to IXCs that are inconsistent with the rates in their published tariffs or price lists."[1]

Movants seek dismissal with prejudice of Qwest's First and Second Claims for Relief along with Prayer for Relief B seeking reparations.[2] Dismissal of Qwest's First Claim for Relief is proper because Qwest fails to allege a *prima facie* case of unlawful rate discrimination. Specifically, Qwest fails to allege that it suffered a cognizable injury resulting from the alleged unlawful price discrimination. Dismissal of Qwest's Second Claim for Relief is proper because, even if Qwest's factual allegations are accepted as correct, the Movants have not violated § 364.04, Fla. Stat., because the statute does not apply to the switched access service at issue in this case and because the statute does not prohibit carriers from selling at rates below those in

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[1] Complaint at 23.

[2] Movants do not waive and expressly reserve the right to raise other defenses later in the proceeding, including, but not limited to, statute of limitation defenses.

their filed price lists. Moreover, even assuming that the Movants violated § 364.04, the statute does not provide a remedy to Qwest, which admits that it was charged the rates set forth in Movants' filed price lists, and thus Qwest lacks standing to assert this claim.[3]

Finally, dismissal of Qwest's prayer for reparations in the form of refunds is proper because even if all the factual allegations in Qwest's Complaint were found to be true, Qwest would, as a matter of law, not be entitled to the reparations in the form of refunds that it seeks. This is so, even though on May 7, the Commission held that it had "jurisdiction to remedy regulatory overcharges,"[4] because Qwest's admission that it paid the rates in Movants' filed price lists establishes that, as a matter of law, it was not "overcharged." Qwest itself has previously argued this point.[5]

Accordingly, the Commission should not waste valuable resources considering Qwest's first two Claims for Relief or the reparations it seeks for the unlawful discrimination it alleges, and the parties should not waste the considerable time and money necessary to complete discovery, file testimony, conduct a hearing and submit further briefs on these issues.

II. STANDARD OF REVIEW

Under Florida law, the purpose of a motion to dismiss is to challenge the legal sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). To sustain a motion to dismiss, the moving party must demonstrate that,

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[3] Complaint, ¶¶ 10.g.i, 10.n.i, 10.o.i, 10.p.i, & 10.r.i.

[4] Docket No. 09-0538-TP, Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Judgment, Order No. PSC-10-0629-PCO-TP, at 6 (Fla. P.S.C. May 7, 2010).

[5] See, Excerpt of Appellee's Opening Brief at 20-21, Qwest Corp. v. Minn. Public Util. Commis., 427 F.3d 1061 (8th Cir. 2005) (Nos. 04-3408, 04-3368, 04-3510) (attached hereto as Exhibit A) ("Brief of Qwest Corporation"). A full version of the brief is available at 2005 WL 5627773 (8th Cir. 2005).

accepting all allegations in the complaint as facially correct, the complaint still fails to state a cause of action for which relief can be granted. *In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995); *Varnes*, 624 So. 2d at 350.

III. ARGUMENT

A. Qwest's First Claim for Relief Should be Dismissed Because Qwest Fails to State a *Prima Facie* Claim of Unlawful Rate Discrimination

In its First Claim for Relief, Qwest alleges that the Movants "have subjected QCC to unreasonable prejudice and disadvantage and to discriminatory treatment with respect to rates for intrastate switched access services provided to similarly-situated IXCs by not making those off-tariff arrangement rates available to QCC, and by charging QCC more for switched access services than they charged other IXCs that are parties to those off-tariff arrangements."[6] Qwest's claim must be dismissed because Qwest fails to articulate a cognizable claim for unlawful rate discrimination.

For a unlawful rate discrimination claim to be cognizable, it "must be based on proof of an actual injury from discrimination."[7] Qwest does not allege a cognizable unlawful rate discrimination claim because it fails to allege an injury from the asserted unlawful discrimination. As a measure of monetary relief, Qwest has made it clear to the Commission that

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[6] Complaint, ¶ 13.

[7] *Spa Universaire v. Qwest Communications International, Inc.*, 2007 WL 2694918, at *8 (D. Colo. Sep. 10, 2007) (citing *AT & T Co. v. New York City Human Resources Admin.*, 833 F.Supp. 962, 980 (S.D. N.Y. 1993)); *see also, e.g., Reuben H. Donnelley Corp. v. Pacific Bell,* 39 Cal.P.U.C.2d 209, 243 (Cal. P.U.C. 1991) ("Even if discrimination exists, for preference or prejudice to be unlawful under § 453, 'the preference or prejudice must be unjust or undue. To be undue, the preference or prejudice must be shown to be a source of advantage to the parties or traffic allegedly favored and a detriment to the other parties or traffic… The discrimination must also be the proximate cause of the injury which is the source of complaint.'") (quoting *California Portland Cement Co. v. Union Pacific Railroad*, 54 Cal. P.U.C. 539, 542 (Cal. P.U.C. 1955)).

it seeks a "refund based on *the same pricing* that has been offered to other IXCs but not QCC."[8] Stated differently, Qwest requests that the Commission order the Movants to refund to Qwest the difference between the amount Qwest paid them and the amount they would have charged Qwest had they provided intrastate switched access services at the rates charged to allegedly favored IXCs.

The fact that (if true) Movants charged Qwest a different rate than another customer is not in and of itself a cognizable injury, and the difference between the filed and unfiled rates is not, as a matter of law, the measure of damage. As Justice Cardozo held in *I.C.C. v. United States*, 289 U.S. 385, 389-91 (1933), when discrimination alone is the gist of the claim and a party who has paid the reasonable rate sues upon a claim of discrimination because some other party has paid less, "the difference between one rate and another is not the measure of the damages .... He is to recover the damages that he has suffered, which may be more than the preference or less.... The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."[9]

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[8] Qwest Communications Company's Response to Joint CLECs' Motion to Dismiss and to MCI's Motion for Summary Final Order, Docket No. 090538-TP, at 12 (filed Mar. 9, 2010) ("Qwest's 3/9/10 Response to Motions") (emphasis in original).

[9] 289 U.S. 385, 389-91; *see also AT&T Co.*, 833 F. Supp. at 980-81 ("Assuming that the City could demonstrate unlawful discrimination, the City must allege, and provide evidence of, an injury from the discrimination in order to have a cognizable claim under Section 202(a). In other words, the City must show that its pecuniary damages would have been less if AT&T had collected the full tariff rate from the customers with whom AT&T has allegedly settled."); *Spa Universaire*, 2007 WL 2694918, at *8 ("Damages may not be measured simply by showing that [other customers] received the benefit of the discounted rate. A plaintiff must show it was adversely affected by the fact that because these two carriers paid less for like services they were favored or in some other manner that will vary according to time, place, and circumstances just as in Interstate Commerce Act cases."); *In re Exchange Network Facilities for Interstate Access*, 1 FCC Rcd. 618, 1986 LEXIS 2336, ¶ 69 (Nov. 14, 1986) ("[t]he measure of damages is not the difference between the discriminatory rate to customers and a just and reasonable rate, but actual

Allegation of a specific competitive injury resulting from unlawful rate discrimination (for example, that because an allegedly favored IXC paid Movants a lower intrastate access rate, it was able to capture business from Qwest, or Qwest was forced to lower its retail rates, thus reducing profits) is a critical element of a valid unlawful rate discrimination claim. Because Qwest has "failed to show injury from a rate discriminatory rate given to the favored …carriers under the secret contracts," Qwest's claim must be dismissed, as other courts have done at the behest of Qwest, when a plaintiff has failed to make such a showing when alleging unlawful rate discrimination.[10] Moreover, even if Qwest could prove such injury, the Commission has no authority to award damages for unlawful rate discrimination.[11]

B. The Second Claim for Relief Should be Dismissed Because Movants Have Not Violated § 364.04, Fla. Stat., and Even if They Had, Qwest Lacks Standing to Assert a Claim of Violation

In its Second Claim for Relief, Qwest relies on Florida Statute § 364.04(1) and 364.04(2),[12] and alleges that the Movants have failed to "abide by their published price lists" for intrastate switched access services in Florida.[13]

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damage to the complainant by virtue of the unlawful preference, or profits lost because of the ability of the favored customer, or profits lost because of the ability of the favored customer to control the market price of complainant's goods or services"); *In re Illinois Bell Telephone Co.*, 4 F.C.C. Rcd. 5268, 1989 FCC LEXIS 988, ¶ 10 (June 13, 1989) ("[i]n order to recover damages under Section 202(a), a complainant must be capable of showing that it actually was damaged by virtue of the unlawful discrimination or preference proscribed by that Section" and, thus, failure to allege damages warrants dismissal of such a claim); *Ad Visor v. General Telephone Co. of California*, 1976 Cal. PUC Lexis 1085, at *30 (Cal. P.U.C. 1976).

[10] *Cheesman v. Qwest Communications International, Inc.*, 2008 WL 2037675, at *2 (D. Colo. May 12, 2008).

[11] Docket No. 09-0538-TP, Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Judgment, Order No. PSC-10-0629-PCO-TP, at 6 (Fla. P.S.C. May 7, 2010).

[12] Complaint, ¶ 15.

[13] Complaint, ¶ 16. The Second Claim for Relief also alleges discrimination based on Qwest's claim that Movants charged Qwest "more for switched access services than they

Florida Statute § 364.04 provides:

> (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 performed within the state. 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.
>
> (2) 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.

Qwest acknowledges that the Movants "have filed price lists for their intrastate switched access services in Florida,"[14] so any alleged violation of these sections must stem from a failure to adhere to the filed price lists. There is, however, no provision in the sections relied upon by Qwest that requires Movants to charge only the rates set forth in their published price lists, or that provides Qwest, which admits that it was charged the rates provided in the filed price lists, a private right of action to recover on the grounds that Movants charged another carrier rates lower than those set forth in the filed price list.

Furthermore, Qwest has failed to show that it has standing to bring a claim for the alleged failure to abide by price lists. To have standing, Qwest must demonstrate that it "suffered an 'injury in fact'" that was "concrete and particularized," and "actual or imminent, not conjectural

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charged other IXCs in Florida." *Id.* This discrimination claim is identical to and redundant of the discrimination claim contained in Qwest's First Claim for Relief and should be stricken for redundancy or dismissed for the reasons set forth in Section III.A, above.

[14] Complaint, ¶ 15.

or hypothetical," which is likely to be "redressed by a favorable decision."[15] In order to participate in a Florida regulatory proceeding, a party must show that it will suffer an injury in fact "which is of sufficient immediacy" to entitle it to a hearing and that such injury is "of the type or nature which the proceeding is designed to protect."[16] Qwest failed to allege specific facts demonstrating that it was injured or harmed by Movants' alleged failure to charge others the rates listed in its price lists, asserting only the vague claim that it was subject to "unreasonable prejudice and disadvantage" because it was not charged the same rates as similar providers.[17] Such vague claims are insufficient. In *Florida Society of Ophthalmology v. State Board of Optometry*, ophthalmologists sought to challenge an agency's ruling that permitted optometrists to compete with them in certain respects.[18] The ophthalmologists were denied standing because the appellate court found that while the ophthalmologists "may well suffer some degree of loss due to economic competition from optometrists certified to perform services that appellants alone were previously permitted to perform, we fail to see how this potential injury satisfies the 'immediacy' requirement." [19]

Qwest's speculative and vague assertions of economic harm are, thus, "legally insufficient" to demonstrate standing, and Qwest does not show that these alleged injuries are within the "zone of interest" that sections 364.04(1) and 364.04(2), Fla. Stat., were designed to protect. In order to survive a motion to dismiss, Qwest must state a "plausible claim for relief,"

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[15] *Lujan v. Defenders of Wildlife*, 504 U.S. 560-61 (1992); *see also Warth v. Seldin*, 422 U.S. 490, 508 (1975) (holding that plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him.").

[16] *Agrico Chemical Co. v. Department of Regulations*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

[17] Complaint, ¶ 16.

[18] 532 So. 2d 1279 (Fla. 1st DCA 1988).

[19] *Id.* at 1285.

which contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[20] Qwest's vague claims of "prejudice" and "disadvantage" contain no factual content sufficient to survive a motion to dismiss, the alleged injuries are not within the "zone of interest" that sections 364.04(1) and 364.04(2), Fla. Stat., were designed to protect.

At bottom, even if Qwest's factual allegations are accepted as facially correct, *i.e.*, that Movants charged IXC rates that deviated from the Movants' filed price lists, Movants did not violate Section 364.04. In addition, even if they did violate Section 364.04, Fla. Stat, Qwest, which has admitted that it paid the rates in the filed price lists, has not offered allegations sufficient to show that it has standing to complain of such violation. The Commission should, therefore, dismiss Qwest's second claim for relief.

C. Qwest's Request for Reparations in the Form of Refunds Should Be Dismissed Because Qwest Is Not Entitled to Refunds as a Remedy for Any of Its Claims for Relief

All three of Qwest's claims for relief concern the same set of operative factual allegations, couched in different legal terms. All three claims fail to state a claim for which reparations in the form of refunds can be granted as a remedy.

In its First Claim for Relief, Qwest alleges that Movants violated § 364.08(1) and 364.10(1), Fla Stat., because they "have subjected QCC to unreasonable prejudice and disadvantage and to discriminatory treatment with respect to rates for intrastate switched access services provided to similarly situated IXCs by not making those off-tariff arrangement rates available to QCC."[21] In its Second Claim for Relief, Qwest alleges that Movants violated

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[20] *Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)).

[21] Complaint, ¶ 13.

364.04(1) and (2), Fla. Stat., because Respondent CLECs failed to "abide by their published price lists to the detriment of QCC, by subjecting QCC to unreasonable prejudice and disadvantage and to discriminatory treatment with respect to rates for intrastate access services provided to similarly-situated IXCs, and by charging QCC more for switched access services than they charged other IXCs in Florida."[22] In its Third Claim for Relief, Qwest alleges that certain Movants (including Movants Access Point, Lightyear, Navigator, and PAETEC) have not abided by their filed price lists by failing to provide customer-specific contract terms to Qwest because Qwest alleges it is a similarly situated customer.[23]

As explained below, regardless of the way in which the allegedly unlawful discriminatory act is characterized, reparations in the form of refunds are unavailable to Qwest. This is so because Qwest fails to allege that it has been charged more than the filed price list rates, *i.e.*, overcharged for such services. Qwest's prayer for reparations in the form of refunds should be dismissed with prejudice because, as a matter of law, the Commission cannot order refunds for unlawful discrimination that Qwest alleges.[24]

1. Florida Case Law and Public Policy Prohibit Refunds

Even if Qwest's allegations of unlawful discrimination are correct, the Commission cannot order refunds as a form of relief, because doing so would contravene long standing Florida case law and public policy, by granting Qwest a below-price list rate that is more favorable than other purchasers from Movants. Indeed, when interpreting the antidiscrimination statutory provisions that apply to government regulated entities, the Florida court in *Gestion* has

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[22] Complaint, ¶ 16.

[23] Complaint, ¶ 19.

[24] Even if reparations were a remedy available to Qwest for the discrimination it alleges (which they are not), it would not be entitled to reparations because, as shown above, Qwest has not alleged that it has suffered a cognizable injury that resulted from discrimination.

found that "The public policy embodied in this and similar statutory provisions precludes a business whose rates are governmentally regulated from granting a rebate or other preferential treatment to any particular individual."[25] The court explained that "it is universally held that a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence or *even from a specific contractual undertaking to charge a lower amount.*"[26]

As *Gestion* explained, the Florida Supreme Court even held in *Brandon v. Lichty,* 133 Fla. 520, 182 So. 897 (Fla. 1938) that "a carrier could not be estopped or otherwise barred from recovering the full amount of freight charges indicated in the applicable ICC tariff, notwithstanding its express agreement to transport the goods in question for less."[27] This case "reflects the general rule that the equitable doctrine of estoppel cannot be employed to effect results which are unlawful or otherwise contrary to public policy."[28]

Therefore, Florida law requires that if a regulated entity, such as Movants, is found to have unlawfully discriminated (which they have not) - even if it resulted from a specific contractual undertaking - the regulated entity is required to collect the undercharges, not to give refunds to a complaining third-party company, such as Qwest.

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[25] *Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Comp.*, 385 So. 2d 124, 126 (Fla. 3rd DCA 1980).

[26] *Id.* (citing, *e.g., Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915)); *W. S. Dickey Clay Manufacturing Company v. Corder,* 310 F.2d 764 (5th Cir. 1962), *cert. dismissed,* 373 U.S. 906, 83 S. Ct. 1294, 10 L. Ed. 2d 197 (1963); *Butler v. Bell Oil & Refining Co.,* 70 Cal. App. 2d 728, 161 P.2d 559 (1945) (emphasis added).

[27] *Gestion,* 385 So. 2d at 126 (citing and discussing *Brandon v. Lichty,* 133 Fla. 520, 182 So. 897 (1938)).

[28] *Id.* (citing *e.g., Enderby v. City of Sunrise*, 376 So. 2d 444 (Fla. 4th DCA 1979); *United Sanitation Services of Hillsborough, Inc. v. City of Tampa*, 302 So. 2d 435 (Fla. 2nd DCA 1974).

Moreover, it is ironic that the very statute on which Qwest relies, § 364.08, Fla. Stat., precludes the Commission from ordering refunds to Qwest because doing so would, in itself, be unlawfully discriminatory. Section 364.08, Fla. Stat. states,

> 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.

By ordering refunds to Qwest the Commission would require Movants to "extend ...[an] advantage of contract or agreement ...not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service," because other purchasers from Movants paid the price list rate. Thus, such an order would directly contravene § 364.08, Fla. Stat., by creating unlawful discrimination in favor of Qwest. Florida law does not allow a customer to recover on the theory that "two wrongs make a right."

Under traditional regulation codified by Florida statutes, the Commission has previously acknowledged that unlawful discrimination would violate Section 364.08 and 364.14, Florida Statutes.[29] However, under Section 364.14, Fla. Stat. (when applicable), which was repealed on July 1, 2010, the Commission never had the authority to order refunds for unlawful discrimination. In addition, the Commission lacks the authority to award retrospective relief in this context. Section 364.14, Fla. Stat., stated that if the Commission finds that rates charged are "unjustly discriminatory", "unduly preferential", or "in anywise in violation of law", the Commission has the authority to "determine" the rates to "be **thereafter** observed." (emphasis

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[29] *See, e.g., In re: Investigation into NTS Cost Recovery - Phase II*, Docket No. 860984-TP; Order On NTS Cost Recovery-Phase II, Order No. 19677, 1988 Fla. PUC LEXIS 963; 95 P.U.R.4th 162 (Fla. P.S.C. July 15, 1988) (holding that "we find that as long as all similarly situated persons are treated equally, a bulk-rate switched access discount for high-volume end-users is not unlawfully discriminatory in violation of Sections 364.08 and 364.14, Florida Statutes.").

added). Before being repealed on July 1, 2010, Section 364.14 stated,

> (1) Whenever the commission finds, upon its own motion or upon complaint, that:
> (a) The rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telecommunications company for services subject to s. 364.03, or the rules, regulations, or practices of any telecommunications company affecting such rates, charges, tolls, rentals, or service, are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law;
> (b) Such rates, charges, tolls, or rentals are either insufficient to yield reasonable compensation for the service rendered; or
> (c) Such rates, charges, tolls, or rentals yield excessive compensation for the service rendered,
>
> the commission shall determine the just and reasonable rates, charges, tolls, or rentals to *be thereafter observed* and in force and fix the same by order. In prescribing rates, the commission shall allow a fair and reasonable return on the telecommunications company's honest and prudent investment in property used and useful in the public service.[30]

This repealed statute was consistent with the current Florida statute that applies to gas and electric companies.[31] When interpreting these Florida statutes, the Florida Supreme Court

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[30] Section 364.14, Florida Statutes (repealed July 1, 2010) (emphasis supplied).

[31] Section 366.07, Florida Statutes ("Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed **in the future."**) (emphasis added); Section 366.06(2), Florida Statute ("Whenever the commission shall find, upon request made or upon its own motion, that the rates demanded, charged or collected by any public utility company for public utility service, or that the rules, regulations or practices of any public utility company affecting such rates are unjust, unreasonable, unjustly discriminatory, or in any wise in violation of law, * * * or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the utility company, and shall thereafter determine just and reasonable rates **to be thereafter charged** for such service and to promulgate rules and regulations affecting equipment, facilities and service to be thereafter installed, furnished, and used; * * *") (emphasis added).

has held these "statutes preclude such a retroactive order by the Commission."[32] Moreover, because Section 364.14, Fla. Stat. (when applicable), expressly gave the Commission authority to address charges of unlawful discrimination on a prospective basis and because this statute has been entirely repealed effective July 1, 2010, Section 364.14., Fla. Stat., no longer provides the Commission with such authority.[33] Nor does the Commission have the authority under the repealed Section 364.14, Fla. Stat., to order refunds since "[r]epealing statutes apply retrospectively in all situations where a right or remedy has been created wholly by statute."[34]

2. Because Qwest Alleges It Was Charged the Rates in the Movants' Price Lists, It Cannot be Entitled to Refunds.

Qwest does not allege that it was charged more than the rates in the Movants' filed price lists.[35] Nor does Qwest assert that these filed rates are unreasonable. Qwest's claim for reparations in the form of refunds is, therefore, inappropriate and must be dismissed. Moreover, Qwest's own allegations are mutually inconsistent and undermine a claim for such refunds.

Qwest alleges that pursuant to § 364.08(1) and § 364.10(1), Fla. Stat., it is entitled to be offered the rates set forth in the Movants' unfiled off-tariff/price list agreements, because a carrier that offers services via a contract must make the contractual terms and conditions available to similarly situated customers. If, however, such an "off-tariff/price list" agreement violates § 364.08(1) and § 364.10(1), Fla. Stat. — as Qwest claims it does — then the agreement

[32] *City of Miami v. Florida Public Service Commission*, 208 So. 2d 249 (Fla. 1968).

[33] *Bureau of Crimes Compensation, Dept. of Labor and Employment Sec. v. Williams*, 405 So. 2d 747 (Fla. 2nd DCA 1981) (concluding that "Repealing statutes apply retrospectively in all situations where a right or remedy has been created wholly by statute. Thus, when the legislature repeals a statute, the right or remedy created by the statute falls with it. *Yaffee v. International Co.*, 80 So. 2d 910 (Fla. 1955).").

[34] *Id.*

[35] To the contrary, it alleges that it was charged the filed rates. Complaint, ¶¶ 10.g.i, 10.n.i, 10.o.i, 10.p.i, & 10.r.i.

is necessarily unlawful and unenforceable, *i.e.*, void.[36] Given this, *because the off-tariff agreement is unenforceable by the third-party IXC to the agreement, it cannot be enforceable by Qwest.*

Qwest's allegations are mutually inconsistent because Qwest alleges both that (1) the off-tariff agreements are illegal and essentially unenforceable because they were not made available to it,[37] and that (2) it is entitled to benefit from the illegal agreements and should be refunded all charges it has paid in excess of the illegal rates. These two propositions fail to support a claim for reparations because they are "mutually inconsistent legal conclusions."[38] If Qwest is correct that the off-tariff/price list agreements are unlawful because they violated § 364.08(1) and § 364.10(1), Fla. Stat., the agreements were never "in effect" for purposes of these Florida Statutes or otherwise available to other entities. Qwest, according to its own allegations, cannot now be, and never was, entitled to the rates set forth in the off-tariff/price list agreements, which it implicitly contends are illegal and unenforceable.

If the off-tariff/price list agreements are unlawful and Qwest was not entitled to the rates set forth in those agreements, then the only permissible rates are the rates in the Movants' price lists on file with the Commission.[39] Qwest, thus, necessarily alleges that it has been, and continues to be, charged the rates reflected in the Movants' filed price lists. Given this allegation, Qwest is not entitled to reparations in the form of refunds because, having admitted it

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[36] *See, e.g., Brandon,* 133 Fla. at 524, 182 So. at 899; *see also Gestion*, 385 So. 2d at 12; *AT & T v. Central Office Tel.*, 524 U.S. 214, 224 (1998).

[37] Complaint, ¶ 16.

[38] *See* Exhibit A, Excerpt of Appellate Brief of *Qwest Corporation at* 20. ("The Commission's findings that the agreements were illegal, but that their terms should be available to other CLECs, are mutually inconsistent legal conclusions.").

[39] *See, e.g., Central Office Tel.*, 524 U.S. at 223.

paid only the filed rates for the services that are set forth in the Movants' price lists, Qwest has not properly alleged that it was overcharged.

3. Qwest's Complaint Does Not Allege that Qwest Was Overcharged

In its May 7, 2010 Order, in this Docket,[40] the Commission held that it had "jurisdiction to remedy regulatory overcharges," quoting from *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 894 (Fl. App. 2005) ("*Albert Littler*"). But Qwest's Complaint does not allege that Movants "overcharged" it by charging more than the filed rates. Quite to the contrary, Qwest alleges that Movants charged it the filed rates,[41] complaining that others were charged *less than* the filed rates. This is most clearly illustrated by Qwest's Second Claim for Relief, in which Qwest's sole contention is that other carriers were charged rates that are less than the rates set forth in Movants' filed price lists.[42] It is not credible that a claim that in violation of statute, other carriers were charged too little constitutes an "overcharge" of Qwest within the meaning of *Albert Littler*. The Commission should accordingly dismiss Qwest's claim for refund under its Second Claim for Relief.

A careful review of Qwest's First and Third Claims for Relief, each of which alleges a form of unlawful discrimination, shows that they, too, are not for regulatory overcharges. In the *Albert Littler* case quoted by the Commission, the plaintiffs alleged that they were charged more than permitted under the utility's filed tariff because the "meters miscalculated the amount of electricity, resulting in overcharges." *Id.* at 892. The *Albert Littler* case would be on point if plaintiffs there had complained that they paid the correct rate, but others were *undercharged.*

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[40] Docket No. 09-0538-TP, Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Judgment, Order No. PSC-10-0629-PCO-TP (Fla. P.S.C. May 7, 2010).

[41] Complaint, ¶¶ 10.g.i, 10.n.i, 10.o.i, 10.p.i, & 10.r.i.

[42] Complaint, ¶ 16.

That, of course, is not at all what they alleged.

The same is true of the three cases cited in *Albert Littler*. All of them involve claims that the plaintiff was charged an impermissibly high amount, not (as Qwest claims here) that another party paid less than the tariffed rates. In *Charlotte County v. General Development Utilities, Inc.,* Plaintiff alleged that defendant "improperly calculated the amount of water [plaintiff] consumed."[43] In *Florida Power Corp. v. Zenith Industries Co.*, plaintiff alleged that defendant utility "paid artificially inflated prices for fuel oil and passed such increased costs on to its customers in the form of increased rates for electrical power."[44] In *Richter v. Florida Power Corp.*, plaintiffs alleged that they "had been forced to pay unreasonably high electrical rates because of excessive fuel adjustment charges."[45]

Thus, when the Commission has ordered refunds for alleged overcharges, it has done so to remedy a telecommunications carrier's billing errors that resulted in a customer paying more than the applicable filed rates, or the filed rates did not implement a Commission rate-setting order properly, or the amount paid by the Customer was more than what the Customer actually used[46] or refunds were ordered in accordance with Administrative Code Section 25-4.114, which

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[43] 653 So. 2d 1081, 1083 (Fla. 1st DCA 1995).

[44] 377 So. 2d 203, 204 (Fla. 2nd DCA 1979).

[45] 366 So. 2d 798, 798 (Fla. 2nd DCA 1979).

[46] *See, e.g., Florida Power & Light Co. v. Albert Litter Studios,* Inc. 896 So. 2d 891 (Fla. 3rd DCA 2005) (ordering refunds for electricity the plaintiff did not use because the meter was defective); *In re: Investigation and determination of appropriate method for issuing refunds to affected customers for apparent overcharges by Global Crossing Telecommunications Inc., for homesaver 1+ and calling card plans,* Notice of Proposed Agency Action, Order Accepting Global Crossing Inc.'s Refund Proposal, Docket No. 070419-TI, Order No. PSC-07-0849-PAA-TI (Fla. P.S.C. Oct. 22, 2007) (ordering refunds for overcharges associated with tariffed rates that were mistimed and misrated); *In re: Investigation and determination of appropriate method for refunding overcharges and interest on O+ calls made from pay telephones by USLD Communications, Inc.,* Docket No. 010-937-TI, Order NO. PSC-OI-1744-PAA-TI, 2001 Fla. PUC LEXIS 994 (Fla. P.S.C. Aug. 27, 2001) (ordering refunds for overcharges because calls

does not apply to CLECs.[47] In such circumstances, the overcharges were refunded to the ratepayer. That is because a claim of "overcharge" is universally held to refer only to a claim for the recovery of "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission,"[48] not a claim that another party had been undercharged.

In order to prove an overcharge, a complainant need only show that it has been charged a rate in excess of the appropriate rate under the filed tariff. The measure of recovery for an overcharge claim is the difference between the rate charged and the appropriate rate under the filed tariff or price lists or what the rate should have been in the tariff or price list pursuant to a Commission's ratesetting order. An "overcharge" claim seeking reparations, thus, *undoes* the harm caused in these circumstances. By contrast, as discussed in Section III.A., above, the measure of relief, if any in a unlawful discrimination case, such as Qwest, has alleged is the

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were not billed in accordance with the carriers tariffs and due to billing errors); *See In re: Investigation and determination of Method to credit access flow through reductions by MCIWorldCom Communications, Inc. and TTI National Inc.*, as *required by Section 364.163, F.S.*, Notice of Proposed Agency Action Order Approving Settlement Offer and Authorizing Commission Staff To Administratively Approve True Up Refund Adjustment, Docket No. 00141 TI, Order No. PSC-00-2139-PAA-T1, 2000 Fla. PUC LEXIS 1456 (Fla. P.S.C. Nov. 8, 2000) (ordering refunds because carrier did not implement flow through charges ordered by the Commission as required by Statute).

[47] *See* Administrative Code Section 25-24.800 ("The provisions of Chapter 25-4..., F.A.C., shall not apply to Competitive Local Exchange carriers, unless specifically provided by this part" 25-24.800 and nothing in 25-24.800 specifically states that 25.114 applies to CLECs.).

[48] *See, e.g.*, Communications Act of 1934 , 47 U.S.C. § 415(g) ("The term 'overcharges' as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedule of charges lawfully on file with the Commission"); Interstate Commerce Act, 49 U.S.C. § 304a ("Overcharges are defined to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.") (internal citations omitted); Decision No. 94-04-041, Rulemaking No. 93-06-032, 54 CPUC2d 24, 1994 Cal. PUC LEXIS 286 at * 40 (Cal. P.U.C. 1993) ("'Overcharge' means a charge for transportation services, billed and collected by a carrier, in excess of the charge applicable under the terms of the tariffs lawfully on file with the Commission.").

amount by which Qwest is worse off because Movants charged other carriers too little, *I.C.C. v. United States*, 289 U.S. 385, 389-92 (1933). With respect to unlawful discrimination claims, the refunds that Qwest has requested would contravene Florida law as explained in Section III.C.1.

4. The Filed Rate Doctrine Prohibits the Commission from Issuing Refunds

The filed rate doctrine supports dismissal as well. Under the filed rate doctrine, the only rates Qwest can lawfully be charged are the filed rates.[49] Because Qwest has admitted it paid only the filed rates and complains that others may have paid less, the Movants' alleged failure to abide by their own price lists, even if proven, would not entitle Qwest to any form of refunds or monetary recovery. The filed rate doctrine prohibits Qwest's claims for a refund.

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'" [50] because filed price sheets "carry the force and effect of law and are enforceable by the Commission."[51] It has been found that "[a] particular rate thus becomes 'legal' when it is filed with the agency and becomes effective."[52] Simply, the filed rate doctrine precludes a party from

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[49] *Global Access Limited v. AT&T Corp.*, 978 F. Supp. 1068, 1073 (S.D. Fla. 1997); *see also Central Office Tel.*, 524 U.S. at 214; *see also Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 497 U.S. 116, 117 (1990).

[50] *Global Access Limited*, 978 F. Supp. at 1073 (quoting *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 615 (11th Cir. 1995)).

[51] *In re: Complaint against MCI Communications Services, Inc. d/b/a Verizon Business Services for failure to pay intrastate access charges pursuant to Embarq's tariffs, by Embarq Florida, Inc.*, Docket No. 080308-TP; Order No. PSC-08-0752-PCO-TP, 2008 Fla. PUC LEXIS 560, *3 (Fla. P.S.C. Nov. 13, 2008); *see also MCI Telecommunications Corp. v. Obrien Marketing, Inc.*, 913 F. Supp. 1536 (S.D. Fla. 1995) (explaining that "tariffs filed with the F.C.C. pursuant to the Communications Act 'conclusively and exclusively control the rights and liabilities between a carrier and its customer.' Such tariffs 'are not mere contracts, but rather have the force of law.' Therefore, '[t]he duty to pay a certain price for phone service is a federal obligation.'") (citations omitted).

[52] *ACS of Anchorage, Inc. v. F.C.C.*, 290 F.3d 403, 411 (D.C. Cir. 2002).

seeking rates other than the filed rates. Courts have acknowledged that "Application of the filed rate doctrine can at times be harsh, but its justification lies in the principle that carriers should not be able to discriminate against customers in the setting of service rates; one rate - the filed rate - is the applicable rate for all regardless of private agreements to the contrary."[53] To prevent unlawful discrimination, Section 364.08(1), Fla. Stat., states that 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." Nor can the carrier "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."[54]

As previously discussed, the court in *Gestion* recognized this when it held the public policy embodied such "statutory provisions precludes a business whose rates are governmentally regulated from granting a rebate or other preferential treatment to any particular individual."[55] For that reason, it explained that "it is universally held that a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount."[56] The Florida Supreme Court's decision in *Brandon v. Lichty*, 133 Fla. 520, 182 So.

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[53] *Global Access Limited*, 978 F. Supp. at 1073; *see also MCI Telecomm. Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994); *see also Maislin,* 497 U.S. at 117 (explaining that the duty to file rates and obligation to charge only those rates have always been considered essential in preventing price discrimination).

[54] Section 364.08(1), Fla. Stat.

[55] *Gestion*, 385 So. 2d at 126.

[56] *Gestion*, 385 So. 2d at 126 (discussing the holding in *Brandon*, 133 Fla. 520, 182 So. 897).

897 (Fla. 1938) supports *Gestion*. As *Gestion* explained, the Florida Supreme Court held in *Brandon* that "a carrier could not be estopped or otherwise barred from recovering the full amount of freight charges indicated in the applicable ICC tariff, notwithstanding its express agreement to transport the goods in question for less" and that the *Brandon* case "reflects the general rule that the equitable doctrine of estoppel cannot be employed to effect results which are unlawful or otherwise contrary to public policy."[57] Accordingly, Qwest's claims for a refund based on its unlawful rate discrimination claim are prohibited by the filed-rate doctrine and must be dismissed.[58]

5. Qwest has Previously Successfully Argued that Its Own Unfiled Agreements with CLECs Did Not Entitle Non-contracting Carriers to Reparations

Finally, Qwest's successful advocacy in another proceeding demonstrates that it is not entitled to reparations in the form of refunds in this case. In February 2002, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had executed unfiled agreements with various CLECs.[59] The Minnesota Commission found that Qwest's unfiled agreements were unlawful, assessed a penalty against Qwest in excess of $25.9 million, and also ordered a retroactive discount (the same remedy Qwest seeks here) to non-contracting

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[57] *Id.* (supporting citations omitted).

[58] In response to Verizon's previously filed Motion to Dismiss, Qwest asserted that the price list must be approved before the filed rate doctrine can apply. Qwest's 3/9/10 Response to Motions at 14. Contrary to Qwest's claims, "'[t]o render rates definite and certain, and to prevent discrimination and other abuses….", *ACS*, 290 F.3d at 411 (quoting *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 384 (1932), "a particular rate thus becomes 'legal' when it is filed with an agency and becomes filed." *ACS*, 290 F.3d at 411.

[59] *See* Excerpt of Order Assessing Penalties, *In the Matter of the Complaint of the Minnesota Dept. of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* at 1 (Minn. P.U.C., Feb. 28, 2003) (No. P-421/C-02-197) (attached hereto as Exhibit B) ("Qwest Penalty Order"). A full version is available at: https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=eDocketsResult#{76ACCB75-1802-4DC7-BC32-7B9548C1F71B}.

CLECs as reparations.[60] Qwest argued before the Minnesota Commission that reparations were not available to other telephone companies who were not parties to the unfiled agreements, and that the only permissible monetary remedy was a payment to the Minnesota Commission itself.[61]

The Minnesota Commission rejected Qwest's argument, and Qwest appealed the Minnesota Commission's order to a federal district court. That court upheld the penalty against Qwest, but reversed the award of reparations to non-contracting CLECs on statutory authority grounds. Qwest appealed to the Eighth Circuit, which affirmed both of the district court's rulings.[62] Thus, both courts agreed with Qwest that the only remedy available for a claim that a carrier has entered into unfiled agreements was the monetary penalty ordered by the Minnesota Commission against that carrier—not reparations to the complainant.[63]

In successfully presenting its position to the Eighth Circuit, Qwest argued that unfiled agreements were void and unenforceable *ab initio*, because they violate the filed rate doctrine.[64] In Qwest's own words:

> Like a tariff, any attempt to enforce rates contained in an unfiled agreement that conflicts with the rates contained in a filed ... agreement would violate the filed rate doctrine. The filed rate doctrine prohibits the Commission from using agreements that the

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[60] Exhibit B, Qwest Penalty Order at 20-21.

[61] *See* Excerpt of Qwest Corp. Proposed Procedure for Penalty Phase, Exceptions to ALJ Findings of Fact, Conclusions of Law, and Recommendation and request for Oral Argument at 115-116, in *In the Matter of the Complaint of the Minnesota Dept. of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* No. P-421/C-02-197 (filed with Minn. P.U.C. on Sep. 30, 2002) (attached hereto as Exhibit C). A full version of this document is available at: https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=eDocketsResult#{76ACCB75-1802-4DC7-BC32-7B9548C1F71B}.

[62] *See Qwest Corp. v. Minnesota Pub. Utils. Comm'n,* 427 F.3d 1061, 1063 & n.1 (8th Cir. 2005).

[63] *Id.* at 1063, 1065-66.

[64] Exhibit A, Brief of Qwest Corporation, at 20-21.

> Commission itself concluded were improper to award other CLECs discounts.[65]

While the law in Minnesota is not identical to Florida law, the applicable principles are analogous. When the shoe was on the other foot, Qwest correctly understood that the only remedy available for a situation, in which a utility has entered into an unfiled contract with rates contrary to the filed rate, is the voiding of that contract, and that non-parties to the non-filed agreement — such as Qwest here — are not entitled to reparations simply because other customers are unlawfully undercharged. "At best," Qwest argued in 2005, "the proper equitable remedy—assuming for the purposes of discussion that the Commission had equitable powers—would have been to require [the contracting parties] to disgorge the benefit that they received from the void agreements."[66] Stated differently, as discussed, the remedy in Florida would be for the Movants to collect the undercharges.

IV. CONCLUSION

For the reasons set forth above, the Commission should dismiss, with prejudice, Plaintiff Qwest's First and Second Claims for Relief and Qwest's Second Prayer for Relief seeking reparations in the form of refunds.

Respectfully submitted,

/s/ Philip J. Macres

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[65] *Id.* at 20-21 (citations omitted).

[66] *Id.*

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(*) Request for being named a qualified representative has been separately filed in Docket No. 100008-OT.

Dated: November 16, 2010

EXHIBIT A

DOCUMENT NUMBER-DATE
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For Opinion See 427 F.3d 1061

United States Court of Appeals, Eighth Circuit.
QWEST CORPORATION, a Colorado corporation, Plaintiff Below-Appellee/Cross-Appellant,
v.
THE MINNESOTA PUBLIC UTILITIES COMMISSION; R. Marshall Johnson, in his official capacity as a member of the Minnesota Public Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Public Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission, Defendants Below-Appellants/Cross-Appellees,
Clec Coalition; AT&T Communications of the Midwest, Inc., Intervenors Below-Appellants.
Nos. 04-3408, 04-3368, 04-3510.
January 21, 2005.

On Appeal from the United States District Court for the District of Minnesota

Appellee/Cross-Appellant Qwest Corporation's Opening Brief and Addendum

Peter S. Spivack (DCB #453731), Hogan & Hartson L.L.P., 555 13th Street NW, Washington, DC 20004, (202) 637-5600.Robert E. Cattanach (#0153734), Dorsey & Whitney L.L.P., Suite 1500, 50 South Sixth Street, Minneapolis, MN 55402, (612) 340-2600, Attorneys for Plaintiff Below-Appellee/Cross-Appellant.

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

The Minnesota Public Utilities Commission found that Qwest failed to file twelve interconnection agreements that should have been filed under the provisions of the Telecommunications Act of 1996. The Federal Communications Commission subsequently clarified the filing requirement's scope, and Qwest has acknowledged that these agreements should have been filed. In selecting and imposing what it called "restitutional remedies," however, the Commission exceeded its authority under state and federal law, and explicitly refused to consider the requirements of Federal law.

As the district court held, the Commission has no authority under state law to impose equitable remedies such as the "restitution" ordered here, especially since that remedy would put third parties in a better position than they would have been in absent a violation. The Commission's fine likewise should be overturned because it was calculated not according to the requirements of state or federal law, but with the impermissible motive of "incentivizing" Qwest to accept remedies that the district court held were unlawful.

This appeal raises important questions about the interplay between the Telecommunications Act of 1996 and state law in the regulations of local telephone services. Qwest believes these issues can be addressed in 20 minutes of oral argument for each side.

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The ordered restitutional remedies contain no volume commitments from the CLECs. The CLECs were, thus, given an economic windfall by getting rates they may not otherwise have been eligible for, and on better terms than contained in the original agreements.

Restitutional remedies that grant victims an economic windfall are invalid. *See, e.g., Admiral Fin. Corp. v. United States,* 378 F.3d 1336, 1345 (Fed. Cir. 2004) (holding that restitution cannot give the victim a windfall); *State v. Caldwell,* 84 P.3d 636, 276 (Kan. Ct. App. 2004) (same); *In re Ryan A.,* 39 P.3d 543, 549 (Ariz. Ct. App. 2002) (same); *Taylor v. State,* 45 P.3d 103, 106 (Okla. Ct. Crim. App. 2002) (same); *State v. Martin,* 747 N.E.2d 318, 326-27 (Ohio App. Ct. 2000) (same). No reported Minnesota cases directly address this issue, but courts routinely deny or invalidate restitution that actually puts the victim in a better position. For example, even where the government had breached a contract with a claimant, the Federal Circuit has held the claimant was not entitled to restitution when its financial condition was not made any worse by the legal violation than it would otherwise have been. *Admiral Fin. Corp.,* 378 F.3d at 1345.

3. There Was No Evidence That Nonparty CLECs Could Fulfill the Related Terms.

Had the Commission required that the CLECs establish their ability to fulfill related terms, there was no evidence in the record that any nonparty CLECs could have accepted the volume and term commitments in the Eschelon and McLeod agreements. In fact, the Commission sought to justify its restitutional remedies solely on the basis that the agreements were not filed - without any evidence of actual discrimination arising from a CLEC's ability to fulfill the related terms.[FN13] As a result, there is no basis in the record sufficient to justify restitutional remedies.[FN14] Qwest repeatedly reminded the Commission that it should consider whether the nonparty CLECs would have been entitled to opt into under 252(i). JAA 209-11, 295. But the Commission refused to consider the issue at all. JAA 211, 295. The absence of a sufficient factual basis to support the amount of remedies "with specificity" is alone enough to invalidate the remedies.[FN15]

FN13. Indeed, the Commission found that Qwest "unquestionably" discriminated against other CLECs by failing to make the preferential terms available to them, without regard to their eligibility. JAA 211.

FN14. *T.S.H.,* 2004 WL 1444957, at *2, attached at APP 15 ("The district court has wide discretion in ordering reasonable restitution, but there must be a factual basis for establishing the victim's loss."); *Livingston,* 2004 WL 26600, at *1, attached at APP 17.

FN15. *T.S.H.,* 2004 WL 1444957, at *2, attached at APP 15 (invalidating the restitution amount awarded for a vandalized amplifier because there was no evidence in the record the vandalism decreased its value).

4. The Appropriate Equitable Remedy Was Disgorgement of the Unlawful Benefit by Eschelon and McLeod.

The Commission's findings that the agreements were illegal, but that their terms should be available to other CLECs, are mutually inconsistent legal conclusions. Once the Commission concluded that monetary provisions of the agreements at issue in this case impermissibly varied from the rates contained in the filed interconnection agreements, those agreements by definition violated the filed rate doctrine, and were void and unenforceable *ab initio.*[FN16] Under the Commission's view, Eschelon and McLeod thus had no valid, enforceable contract rights. An interconnection agreement "is functionally no different from a federal tariff." *Verizon Md., Inc. v. RCN Telecom Serv., Inc.,* 232 F. Supp. 2d 539, 552 n.5 (D. Md. 2002), *aff'd in part and dismissed in part,* 377 F.3d 355 (4th Cir. 2004). Like a tariff, any attempt to enforce rates contained in an unfiled agreement that conflicts with the rates contained in a filed interconnection agreement would violate the filed rate doctrine.[FN17] The filed rate doctrine prohibits the Commission from using agreements that the Commission itself concluded were improper to award other

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CLECs discounts.[FN18] At best, the proper equitable remedy - assuming for the purposes of discussion that the Commission had equitable powers - would have been to require Eschelon and McLeod to disgorge the benefit that they received from the void agreements - *i.e.*, the difference between the rates in the filed and approved interconnection agreements and the rates paid pursuant to the discount.

FN16. An interconnection agreement, unlike an ordinary private contract, is not valid and enforceable until it has been filed with and approved by a state commission. As the court held in *GTE Northwest Inc. v. Hamilton,* "[a] binding final agreement will not exist until after the Commission reviews and approves the agreement signed and submitted" by the ILEC and the CLEC. 971 F. Supp. 1350, 1354 (D. Or. 1997).

FN17. *See Goldwasser v. Ameritech Corp.,* 222 F.3d 390, 402 (7th Cir. 2000) (holding that the filed rate doctrine barred a claim for damages where the filed rates in question were those in filed interconnection agreements approved under Section 252). *See also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990).

FN18. Under long-standing Supreme Court precedent, the filed rate must be strictly enforced, notwithstanding other legal theories or equitable defenses. *Louisville & Nashville R.R. v. Maxwell,* 237 U.S. 94, 97 (1915) ("This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.").

C. Any Attempt to Extend the Terms of an Interconnection Agreement to Third-Party CLECs Without Including Related Terms is Preempted by Section 252(i) of the Act.

The Commission's action suffers from an even more basic defect. While it attempted to justify the penalties and remedies by claiming to base them on state law, such remedies would be preempted by the Act itself. Even assuming state law provided general authority in this area, it cannot grant only the beneficial terms of interconnection agreements to third-party CLECs without requiring them to accept related terms as required under federal law. *See AT&T Communications of Ill., Inc. v. Illinois Bell Tel. Co.,* 349 F.3d 402, 411 (7th Cir. 2003) (holding that a state statute that established rates in a manner inconsistent with the federal TELRIC methodology was preempted); *Pacific Bell v. Pac-West Telecomm., Inc.,* 325 F.3d 1114, 1125-28 (9th Cir. 2003) (holding that state commission general rulemaking that purported to apply to all interconnection agreements was precluded by Section 252 because it exceeded Section 252's grant of authority to arbitrate, approve and enforce interconnection agreements). *See also Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n,* 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (holding that Commission attempt to regulate "information services" was preempted because federal law expressed an intent to leave such services unregulated and subject to competition).

Under the Supremacy Clause of the United States Constitution, the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 427 (1819). As the Supreme Court has clarified, "[s]tate action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or *by implication because of a conflict with a congressional enactment.*" *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001) (emphasis added).

The Commission and Intervenors argue that restitution does not conflict with federal law because it is not a physical impossibility to comply with state and federal law. App. Br. at 47. But the Supreme Court held in *Fidelity Fed. Sav. and Loan Ass'n v. Cuesta,* 458 U.S. 141 (1982) that even where complying with both state and federal law is not a

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physical impossibility, if state law precludes acts that federal law explicitly allows, the state law is preempted. *Id.* at 54. For example, in Cuesta the Supreme Court invalidated a state law that prohibited lenders from including certain clauses in their contracts that federal law explicitly allowed. *Id.* at 154-57. Section 252(i) allows an ILEC, upon receiving a request by a CLEC to opt into interconnection provisions, to compel that CLEC to accept all provisions related to the desired provision.[FN19] The Commission order is preempted by the Act because it undermines this framework of the Act.

FN19. Under the FCC regulations implementing Section 252(i), the burden was on the ILEC to establish that certain provisions are related to the CLEC's desired provision. *See* 47 C.F.R. § 51.809 (2003). Such considerations are irrelevant at this stage because the Commission refused to consider Section 252(i) requirements at all.

The Seventh Circuit has held a state law was preempted because that law undermined the framework of the Act, despite the fact that it was not impossible to comply with both state and federal law. The Wisconsin Public Service Commission enacted a rule creating an alternative framework for CLECs to acquire interconnection rights by requiring that an ILEC file tariffs setting forth the price and related terms for interconnection to its network. *See Wisconsin Bell, Inc. v. Bie,* 340 F.3d 441 (7th Cir. 2003), *cert. denied,* 540 U.S. 1142 (2004). When challenged in court, the Wisconsin Commission defended the tariff rule on the basis that it did not preclude the negotiation and arbitration provided for in the Telecommunications Act, and that it was in line with the pro-competitive policy underlying the act. *Id.* at 443. The Seventh Circuit held that the Wisconsin Commission's tariff rule impermissibly interfered with the Telecommunications Act by altering the negotiation landscape in the Act, and creating parallel state procedures for achieving interconnection (tariff and state court appeal) to those provided in the Act (arbitration or negotiation with ultimate appeal to federal court). *Id.* at 444-45.

As the Seventh Circuit noted, "the negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could ... enable would-be entrants to bypass the federally ordained procedure." *Id.* at 445. In the present situation, not only "could" the Commission order enable would-be entrants to bypass the federally ordained procedure contained in Section 252(i), it has already done so.

III. THE FINE IMPOSED BY THE COMMISSION, AND LEFT INTACT BY THE DISTRICT COURT, IS ILLEGAL AND MUST BE VACATED.

A. The Commission's Fine Fails for Purely Legal Reasons That This Court Reviews *De Novo*

The Commission's decision to impose a $25.9 million fine and the district court's decision not to vacate it both suffer from fundamental errors of federal law that this Court reviews *de novo. MCIMetro Access Trans. Serv., Inc., v. BellSouth Telecomm. Inc.,* 352 F.3d 872, 876 (4th Cir. 2003); *Coserv, LLC v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 486 (5th Cir. 2003); *Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.,* 339 F.3d 428, 433 (6th Cir. 2003). The Commission agrees that the Court reviews the excessiveness of the fine *de novo* as well. *United States v. Bajakajian,* 524 U.S. 321, 336-37, n.10 (1998), (citing *Ornelas v. United States,* 517 U.S. 690, 697 (1996)).

B. The Commission Grounded Its Fine Not In The Statutory Factors, But On The Specific Intent That A Record Fine Would "Incentivize" Qwest To Agree To Illegal Restitution

The Act provides a carefully balanced structure for regulating the respective interconnection rights and responsibilities of ILECs and CLECs. Any penalties for violating the Act must be crafted to comply with that structure. State law plays a role, of course - properly adjudicated violations of federal law are punishable in Minnesota via subdivi-

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sion 2(b) of Minn. Stat. § 237.462, which defines the nine factors that the Commission must consider and weigh when establishing penalties in enforcement actions.[FN20] But the administrative record in this case reveals that the Commission calculated the $25.9 million fine in complete disregard of the statutory criteria. Instead, according to the Commissioners themselves, this fine was designed specifically to function as the stick that would coerce Qwest to agree to an illegal carrot, *i.e.*, a resolution of this case in which Qwest would pay illegal "restitution" to CLECs and the Commission would suspend the fine. When Qwest failed to play along, the Commission imposed the restitution anyway *and* left the fine in place as further punishment for not bowing to the Commission's illegal demands.

FN20. *See* Minn. Rev. Stat. § 237.462, subd. 2 ("In determining the amount of a penalty, the commission shall consider: (1) the willfulness or intent of the violation; (2) the gravity of the violation, including the harm to customers or competitors; (3) the history of past violations, including the gravity of past violations, similarity of previous violations to the current violation to be penalized, number of previous violations, the response of the person to the most recent previous violation identified, and the time lapsed since the last violation; (4) the number of violations; (5) the economic benefit gained by the person committing the violation; (6) any corrective action taken or planned by the person committing the violation; (7) the annual revenue and assets of the company committing the violation, including the assets and revenue of any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company; (8) the financial ability of the company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, to pay the penalty; and (9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.").

The Court need not accept Qwest's characterization of the Commission's motives - the transcript of the Commission's public deliberations reveal them directly. The Commission deliberated the package of penalties at a hearing on February 4, 2003, and the Commissioners made clear their preference that it feature payments to CLECs. JAA 278-314. The Commission's discussion of the fine component centered not on the severity of the violations, harm, economic benefit or any of the other statutory factors, but on the likelihood that the fine (or, more precisely, the possibility of avoiding the fine) would "incentivize" Qwest to agree to pay restitution. The transcript could hardly be more clear:

COMMISSIONER SCOTT: But then we're saying that the fine needs to be high enough to incentivize -

COMMISSIONER REHA: That's right.

COMMISSIONER SCOTT: -- the behavior that we want, which is -

COMMISSIONER JOHNSON: That's right.

COMMISSIONER REHA: That's right.

COMMISSIONER SCOTT: - the going forward. So what is that number then? It's not 12 million then.

COMMISSIONER REHA: No.

COMMISSIONER SCOTT: It's bigger than that. [JAA 239-240.]

In the course of the back-and-forth, Commissioner Scott acknowledged that the Commission's authority to order restitution was questionable and, more to the point, that this fine was not grounded in "what [has] happened." JAA 229-30.

Instead, the Commissioners speculated on how high the penalty would have to be set in order for Qwest to accept the "remedial" measures as an alternative:

COMMISSIONER REHA: Well, I - I guess I'm convinced that the value of the 24 months [of future discounts to all CLECs] prospectively is a heck of a lot more than 12.2 million -

[P]erhaps we either do what Commissioner Scott suggests and not set a penalty and just set that as an option; and if we're - we're told we can't do it on appeal, then we come back and set a penalty. The other option would be to set a

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FN28. *See United States ex rel Smith v. Gilbert Realty Co., Inc.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (holding that where the defendant landlord faced a civil penalty of $290,000 for violations that resulted in actual damages of $1,630 the fine was constitutionally excessive, and would be reduced to $35,000). The Supreme Court also has held that punitive damages bearing no rational relationship to the actual harm suffered by a plaintiff *(e.g.*, compensatory damages) violate due process. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 429 (2003) (holding that an imposition of $145 million in punitive damages against an insurance company for bad faith failure to settle, where full compensatory damages amounted to $1 million, violated due process).

Qwest anticipates that the Commission will try to distinguish *Bajakajian* as it attempted below, by arguing that the violations in this case arose from more serious offenses. But this argument depends on the invalid assumption debunked above, *i.e.*, that the failure to file agreements caused millions of dollars of damages to CLECs *per se.* For the reasons discussed above, that assumption is inconsistent with federal law as well as an administrative record completely devoid of any evidence of actual discrimination or harm. Thus, the only claim against Qwest with any support in the record is its the failure to file the agreements at issue under Section 252. But without belittling the importance of the filing requirement, neither the record nor the law afford a basis on which the Commission could have reasonably assumed (or on which this Court can assume) that this failure in any way produced consequences of millions of dollars regardless whether other CLECs could have opted into these agreements. *See First Report and Order,* 11 FCC Rcd at 16139, ¶ 1315. Even if it were significant that this case involved multiple reporting violations, rather than the single violation in *Bajakajian,* the fine still is grossly disproportionate because there were no allegations below, let alone proof, that any CLEC could have or would have opted into the agreements. And even if the actual "discounts" to Eschelon and McLeod totaled $22.5 million, as the Commission argues, these "discounts" represent lost opportunities only to CLECs that could have qualified for them in the first place. There is no evidence of harm, discrimination, or severity of Qwest's conduct that can support a fine anywhere near $26 million, and this vacuum renders the Commission's ill-conceived fining order disproportionate and excessive.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that the Commission does not have statutory authority to order restitution or other equitable remedies. This Court should also find that the restitutional remedies ordered by the district court conflict with state and federal law. Finally, this Court should reverse the district court and rule that the amount of the fine was invalid as inconsistent with state law, the 1996 Telecommunications Act, and the excessive fines clause of the United States Constitution.

QWEST CORPORATION, a Colorado corporation, Plaintiff Below-Appellee/Cross-Appellant, v. THE MINNESOTA PUBLIC UTILITIES COMMISSION; R. Marshall Johnson, in his official capacity as a member of the Minnesota Public Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Public Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; Gregory Scott, in his official
2005 WL 5627773 (C.A.8) (Appellate Brief)

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EXHIBIT B

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ellen Gavin	Commissioner
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: February 28, 2003

DOCKET NO. P-421/C-02-197

ORDER ASSESSING PENALTIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest Corporation (Qwest) filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange carriers (CLECs), has acted in a discriminatory and anti-competitive manner. The complaint was ultimately amended to include a twelfth agreement.

On March 12, 2002, the Commission in its NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for a contested case proceeding.

On September 20, 2002, Administrative Law Judge (ALJ) Allan W. Klein submitted his Findings of Fact, Conclusions, Recommendation and Memorandum (ALJ Report) to the Commission.

On November 1, 2002, the Commission issued its ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES. The Commission found that Qwest knowingly and intentionally violated federal and state law and established a comment period to address possible remedies.

On November 19, 2002, the Commission met to consider possible remedies.

On December 18, 2002, the Commission issued its ORDER REQUIRING PLAN AND AUTHORIZING COMMENTS wherein the Commission ordered Qwest to file proposed plans with respect to remedies which would further competition in Minnesota.

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There are two exceptions to the second and third requirements. Two CLECs, Eschelon and McLeod, were the beneficiaries of the two most favorable unfiled agreements. They participated in and benefitted from Qwest's illegal activity and were prepared to do so for the full length of their agreement. Moreover, when the Department brought these agreements to light and Qwest terminated their agreements, they received substantial buy-out payments from Qwest.

In these circumstances, these two CLECs have already received the discount benefits applicable to their purchases between November 15, 2000 and November 15, 2002 and should not be allowed to experience discounts on future purchases (during the 2-year period available to other CLECs under this Order) until they (McLeod and Eschelon) purchase services from Qwest for which the discount amounts (not available to them but computed in a tracker account) equal the amount of the contract termination payments received from Qwest.

V. OPPORTUNITY TO STAY PENALTY

Finally, the Commission's authority to order the foregoing three-steps to remedy Qwest's discriminatory action is clear. In addition, the monetary penalty assessed is appropriate based on the factors discussed in this Order. Nevertheless, practical public policy considerations incline the Commission to believe that the significant and warranted fine assessed in this Order should be coupled with the possibility of avoiding it if Qwest agrees to take and does take the appropriate three-step corrective (market-remediative) actions previously identified. This opportunity is provided to Qwest based on the Commission's preference for an outcome to this matter that restores the local competitive market in Minnesota most directly and efficiently.

VI. RIGHT TO REVIEW

A penalty imposed under Minn. Stat. § 237.462 shall not be payable sooner than 31 days after the Commission issues its final order assessing the penalty. The person subject to the penalty may appeal the Commission's penalty order under sections Minn. Stat. §§ 14.63 to 14.68. If the person does appeal the Commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal. Minn. Stat. § 237.462, subd. 5.

ORDER

1. Qwest shall pay a penalty of $25,955,000, calculated at the rate of $10,000 per penalty day for the Eschelon IV and McLeod III unfiled agreements, and at the rate of $2,500 per penalty day for the 10 other unfiled agreements.

2. Qwest shall make all 26 provisions of the unfiled agreements at issue in this matter available to the CLECs for the length of time they were offered to the CLEC signatory to the unfiled provision in question. That is, each CLEC will be able to determine which of the 26 provisions it wants to be part of its interconnection agreement with Qwest. Provided, however that Eschelon and McLeod's adoption of the discount provisions is subject to Order Paragraph 6 below.

3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services that the CLEC purchased from Qwest between November 15, 2000 and November 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs , tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a 24 month period starting on November 15, the day the Eschelon IV agreement became effective.

3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, $2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.

3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a $13 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.

3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a $16 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.

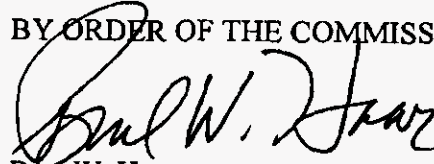
4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.

5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.

6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary

(S E A L)

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EXHIBIT C

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Jason D. Topp
Attorney

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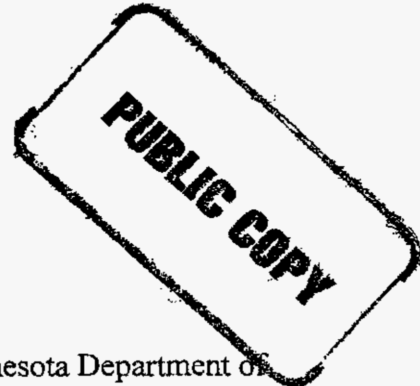
ride the light
Qwest.

September 30, 2002



Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Re: In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation regarding Unfiled Agreements
MPUC Docket No. P-421/C-02-197

Dear Dr. Haar:

Enclosed for filing are the original and fifteen (15) copies of Qwest Corporation's Proposed Procedure for Penalty Phase, Exceptions to Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation, and Request for Oral Argument regarding the above-referenced matter.

Very truly yours,

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List

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FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
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Gregory Scott	**Chair**
Edward A. Garvey	**Commissioner**
R. Marshall Johnson	**Commissioner**
LeRoy Koppendrayer	**Commissioner**
Phyllis Reha	**Commissioner**

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation	**MPUC Docket No. P-421/C-02-197** **OAH Docket No. 6-2500-14782-2**

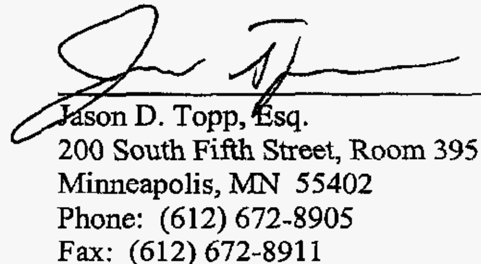
QWEST CORPORATION'S PROPOSED PROCEDURE FOR PENALTY PHASE, EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION, AND REQUEST FOR ORAL ARGUMENT

Qwest Corporation ("Qwest") hereby files its proposed procedure for the penalty phase in this case, exceptions to the Administrative Law Judge's findings of fact, conclusions of law, and recommendation in this matter, and request for oral argument.

Dated this 30th day of September 2002.

Respectfully submitted,

QWEST CORPORATION



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Department's burden to prove by a preponderance of the evidence that penalties are justified. 289/

Fourth, there is no evidence in the record regarding the extent, if any of the benefit Qwest might have received from not making these "discounts" generally available -- and again, the Report's statement that Qwest saved "several millions of dollars in Minnesota alone" 290/ suggests that it incorrectly considered Qwest's out-of-state conduct, and the potential out-of-state impact of that conduct. It is not enough simply to say that other CLECs would have taken advantage of an opportunity to obtain a ten percent discount -- each such CLEC would first have to purchase UNE Star and make a purchase commitment and, to opt into Eschelon's agreement, provide consulting services. The Department has offered no evidence on which this Commission could base a finding that any other CLEC could have met the conditions precedent to these "discounts" and, therefore, that Qwest could have reaped a benefit by not making these "discounts" available to other CLECs.

C. There Is No Credible Evidence that CLECs Sustained Any Harm from the Inability to Opt Into Any of the Provisions at Issue. 291/

The Department claimed, and the Report agrees despite no support in the law that an erroneous failure to file an agreement is discrimination *per se*. To the contrary, the Department was obliged to prove that other CLECs were harmed by Qwest's decision not to file these agreements, and the Report erred in finding discrimination without proof of actual discrimination. The Department's CLEC witnesses could testify only that they might have been

289/ *See* Minn. Stat. § 237.462, subd. 3.

290/ Report, Findings of Fact, ¶ 372.

291/ Through this discussion, Qwest respectfully takes exception to the findings in paragraphs 373, 374, 375 and 376 of the Report.

interested in "*possibly* adopting" one or more of the unfiled agreements' terms, not that they actually would have opted into them. 292/ For example, Mr. McMillin testified only that "New Edge would definitely have been interested in carefully reviewing, and *possibly* opting into, the terms of the Covad Agreement." 293/ Similarly, Mr. Bullard could not be any more definitive than to say that the provisions regarding a dedicated on-site provisioning team "should have been available for my company to consider and *possibly* adopt." 294/ That was the best they could do. It is not enough just to want a dedicated provisioning team -- a CLEC opting into that provision of Eschelon Agreement II also would have to pay the cost of that service (which amounted to more than $9,000 per month for Eschelon), and small CLECs might well not be able to afford it. But a CLEC that could not afford an on-site manager cannot suffer discrimination from not knowing about the service in the first place, and the Report's assumption that the mere lack of knowledge constitutes discrimination flies in the face of the law and common sense.

These speculations and ruminations about possibilities cannot satisfy the Department's burden to prove discrimination by a preponderance of the evidence. As set forth above, there literally is no evidence in the record to support the Report's findings that (a) CLECs were actually harmed, (b) Qwest harmed CLECs intentionally, (c) "it is certain that damages [to CLECs] would amount to several million dollars for Minnesota alone," (d) the alleged harms continue, and (e) "Qwest's conduct generally harms competition and the growth of CLECs in Minnesota." The Commission should reject these findings and decline the invitation to impose penalties on these grounds.

292/ Dept. Br. at 56.

293/ Direct Testimony of Robert Y. McMillin, at 9:1-3 (emphasis added).

294/ Direct Testimony of Greg Bullard, at 3:4-5 (emphasis added).

D. There Are No Relevant Past Violations. 295/

As set forth above, the Report errs in finding that two prior Commission orders, *MCImetro Access Transmission Services v. U S WEST Communications, Inc.*,P-421/C-97-1348, and the *Order Approving Settlement in the DTI matter*, Docket No. P-421/C-00-373 (July 25, 2001), established the governing filing standard. 296/ The Report compounds those errors by finding that these orders and the UNE-P testing order 297/ constitute past violations for purposes of the penalty statute. 298/ The Commission should reject this finding and should not consider these orders as a basis for imposing penalties here. Whatever the Commission may decide now with regard to the filing standard, the fact remains that the Commission entered the *MCImetro* and *DTI* orders after Qwest entered into most of the agreements at issue here. The *MCImetro* order, to the extent it can even be read as relevant precedent regarding service level agreements, was entered five months after Qwest entered into the Covad Agreement (the only service level agreement at issue). The *DTI* order, to the extent it now provides relevant guidance, came even later, on July 25, 2001, after literally every agreement at issue in this case except Eschelon Agreement VI. And although Qwest respectfully disputes that either order raises issues similar to the issues here for purposes of the penalty statute, they cannot be considered "past violations" with respect to Qwest's failure to file these agreements -- the alleged violations occurred before Qwest could possibly have been on notice of the Commission's rulings in those cases.

295/ Through this discussion, Qwest respectfully takes exception to the findings in paragraph 377 of the Report.

296/ *See* Part II.A. *supra*.

297/ *In the Matter of the Complaint of AT&T Communications of the Midwest Against Qwest Corporation*, Docket No. P-421/C-01-391.

298/ *See* Minn. Stat. § 237.432 subd. 2(b)(3).

The UNE-P testing case, which was decided later still, has even less significance to this case. AT&T never raised in that case, and the Commission never addressed, whether Qwest is required by Section 252 to file agreements other than formal interconnection agreements -- it complained only about Qwest's failure, in its view, to agree to and perform a testing regimen that satisfied AT&T. 299/ And unlike this case, in which Qwest is alleged to have harmed CLECs generally, the UNE-P testing case was a dispute between two parties that had no broader market implications.

It seems easy, with the benefit of hindsight, to look back at the transactions underlying agreements, the state of the Commission's orders now, and stitch together a "pattern" -- at the end of the day, that was the role the Department commissioned Mr. Deanhardt to play. But if the purpose of the "past violations" provision of the penalty statute is to penalize a violator's failure to learn from *earlier* transgressions, as it surely must be, the Commission cannot label and penalize Qwest a "recidivist" in a historical vacuum. The past transgressions considered by the Report in its penalty analysis did not exist at the time Qwest entered into and opted not to file these agreements, and as such it erred in finding that these orders supported the imposition of penalties in this case.

299/ Moreover, despite being a forward-looking agreement that imposed binding obligations on the parties, neither the Department nor AT&T ever suggested that the UNE-P Testing Agreement itself should be filed. *See* Testimony of Michael Hydock at 5:4-7:8 (describing UNE-P testing dispute but failing to argue that the agreement should be filed).

E. The Report Errs in Finding that Qwest Committed 25 Individual Violations. 300/

The Department's complaint alleged that Qwest violated the law in one respect, *i.e.*, by (mis)interpreting and (mis)applying Section 252 when it decided not to file the agreements at issue. Had Qwest filed the agreements as the Department and the Report claim it should, Qwest would have filed twelve agreements, it surely would not have made a separate filing for each provision contained in those agreements. Aside from the fact that Section 252 speaks in terms of "interconnection agreements," 301/ no principle limits the number of violations if the unit of measure is any smaller than the agreement. Why measure by paragraphs or sections -- the Report's analysis could, if the Department chose to plead the case as such, treat Qwest's single act of failing to file one agreement as a separate violation with respect to each sentence that had some independent substantive meaning.

The Report's unit of measurement is contrary to law, in Minnesota and elsewhere. A single act cannot beget multiple punishments, even if that act might theoretically constitute multiple offenses. 302/ And here, the act is the failure to file each of the twelve agreements -- a

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300/ Through this discussion, Qwest respectfully takes exception to the findings in paragraph 378 of the Report.

301/ *See* 47 U.S.C. § 252(a) (emphasis added).

302/ *See* Minn. Stat. § 609.035 ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . ."); *State v. Lingwall*, 637 N.W.2d 311, 314-15 (Minn. App. 2001) (single series of statements cannot constitute separate acts of contempt); *see also United States v. Salameh*, 261 F.3d 271, 278 (2d Cir. 2001) (refusing to impose separate punishments for single act in the absence of express legislative intent to do so); *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140 (11th Cir. 1990) (same discharge of pollutant could not result in violation of both daily and monthly discharge limitations); *State v. Schmitt*, 429 N.W. 2d 518, 524 (Wisc. App. 1988) (failure to renew license could not simultaneously violate provisions for operating a landfill without a license and filling outside an approved area).

failure that could, at most, have occurred only twelve times. Accordingly, at most, Qwest could only have committed twelve failures to file and, therefore, twelve violations of Section 252.

F. The Report Errs in Finding that Qwest Did Not Take Meaningful Corrective Action. 303/

Aside from contradicting the findings in the "Public Interest Implications" section of 304/ the Report's finding that "Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint" ignores entirely Qwest's immediate, sweeping, and region-wide remedial actions and penalizes Qwest for defending this case. The record demonstrates that after questions were raised as to whether some of Qwest's agreements with CLECs should have been filed, Qwest acted promptly to respond to those concerns. This action included (1) submitting the agreements at issue to the Commission and to other state commissions; (2) implementing a broad standard that draws no lines between minor implementation matters that Qwest views as outside the scope of Section 252's mandatory filing requirement, and other 251-related provisions; (3) expanding the scope of that broad filing standard beyond future agreements to reach certain ongoing obligations; and (4) enacting a new review procedure to ensure future compliance with Section 252.

The Report proceeds from the belief, contrary to common sense, that Qwest should have filed the agreements alleged in the Department's complaint for approval despite its good faith belief that those agreements need not be filed, apparently including the oral agreement that Qwest believes does not exist. Because, however, the Department decided to handle this matter as an enforcement action by filing a complaint and seeking significant penalties, and given the

303/ Through this discussion, Qwest respectfully takes exception to the findings in paragraph 380 of the Report.

304/ *See* Report, Findings of Fact, ¶¶ 358-60.

Department's view that subsequent remedial measures constitute admissions against interest (despite Minnesota Rule of Evidence 407's clear language to the contrary), filing the agreements at issue for approval in Minnesota would have the same effect as admitting the allegations of the complaint. Qwest cannot be penalized, or have its penalties enhanced, for defending this case, even if it turns out that the Commission disagrees with Qwest's decisions. At the end of the day, Qwest acted in good faith in making its filing decisions and in deciding to litigate this case, and it took significant corrective measures across a fourteen-state territory in response to these allegations. Under the circumstances, it is difficult to understand what more the Commission could fairly require Qwest to do.

G. Qwest Did Not Intentionally Structure or Terminate Agreements to Avoid Disclosure. 305/

In addition to the many reasons, articulated at length above, why the Report errs in finding that Qwest knowingly and intentionally violated Sections 251 and 252, it errs further in finding that Qwest structured and terminated agreements to avoid filing those agreements and making them available to CLECs. As set forth in detail above, and as Qwest demonstrated throughout this case, Qwest worked directly with CLECs to address their specific business needs, negotiating and structuring its agreements with CLECs accordingly. The terms and structure of each such agreement reflects these negotiations, just as the 1996 Act contemplated. Qwest determined that some of these agreements were interconnection agreements within the meaning of Section 252 and, in those cases, filed them with state authorities pursuant to Section 252(e)(2). Other contractual arrangements with CLECs did not, and Qwest believes do not, fall within the prior filing and approval requirements of Section 252.

305/ Through this discussion, Qwest respectfully takes exception to the findings in paragraphs 373 and 381 of the Report.

Two undeniable facts provide the context that the Report lacks: (1) at the time of these agreements, no court or commission had defined the term "interconnection agreement" for purposes of Section 252's filing standard; and (2) to this day, there still is no consensus among regulators and industry regarding that standard. The lack of clarity in the filing standard precludes a finding that Qwest knowingly and intentionally violated the law, and similarly precludes a finding that Qwest configured its agreements to dodge its disclosure obligations. The record demonstrated, and the Department's expert conceded, that Qwest is not required to file all agreements with CLECs -- the only question is where the filing line should be drawn, and Qwest's line was a reasonable one, in hindsight not everyone agrees. And there is no evidence in the record, save the speculative and inadmissible opinions of the Department's expert, supporting the findings that Qwest knowingly and intentionally avoided disclosing these agreements.

The Report's conclusion that Qwest cancelled agreements in order to avoid making them publicly available 306/ puts Qwest in the position to be penalized regardless of how it acts. After the Department filed its initial complaint, Qwest reviewed the agreements at issue, assessed for each the possibility that the Commission might find violations, and terminated agreements that, in Qwest's view, might lead to an adverse finding. By terminating, Qwest stopped the alleged violation, and stopped the potential penalty from accumulating further, while it defended the case -- a simple and legitimate business decision. Had Qwest not done so, the Department no doubt would have claimed that Qwest was unrepentantly continuing to violate the law in blatant disregard of the Department's concerns. And there is no evidence in the record supporting the Report's finding that Qwest terminated those agreements to avoid disclosure -- indeed, Qwest

306/ Report, Findings of Fact, ¶ 381.

revealed the terminations in its Answer and openly litigated those agreements throughout the course of this docket.

H. Qwest's Revenue, Assets and Ability to Pay Do Not Support Penalties.

Qwest respectfully objects to the Report's failure even to consider Qwest's arguments regarding its financial status, as well as its misinterpretation of the testimony of Qwest's witness, Ms. McKenney, in finding that "Qwest has the financial ability to pay any fine assessed by the Commission." As the Commission no doubt is aware, the entire telecommunications industry is facing financial difficulties, and Qwest is no exception. Thus, to the extent Qwest's overall financial condition, however measured, is relevant to the Commission's analysis, it cuts directly against the imposition of penalties in this case.

Ms. McKenney's testimony, when read in context, does not suggest otherwise. The $40-50 million figure on which the Report seizes first arose in connection with questions about Qwest's Purchase Agreement with McLeod, and specifically the scope of Qwest's obligation to purchase services from McLeod. In response to questions about whether it made business sense to enter into that agreement, Ms. McKenney testified that in the overall scope of Qwest's company-wide purchases of network services, a $50 million commitment over a three-year period would not be material from an accounting perspective, although it would be material from a business perspective.

> Q Thank you. You've indicated that it was very important for Qwest to take a look at these numbers because a take or pay is a very serious matter, is that correct?
>
> A That's correct.
>
> Q Because a company could go into bankruptcy and Qwest might still be obligated to be responsible for paying those numbers; correct?

A That's correct.

Q And 40, $50 million is an awful lot of money, isn't it?

A Well, to you and I as the average person. Yes. But you have to understand, and this is one of those differences that the merger brought to U S WEST, classic Qwest was spending about two and a half billion dollar to $3 billion a year with other carriers purchasing services. Those other carriers include AT&T, WorldCom, Covad, SBC, Verizon, BellSouth. So when you look at two -- $50 million over a three year period compared to if I can do my math right, of, you know, you're looking at somewhere compared to seven and a half to nine billion dollar for that same period of time, it's not a material amount.

Q So Qwest paying 40 to $50 million for anything given its overall expenditures is not very much to this company?

A Well, please keep in perspective the number you're quoting is over a three year perspective – three year period. When you look at it in terms of our total spend with other carriers of $9 billion, again, to me, yeah, individually it's a big number, but this terms of how much money the corporation spends, you know, it's not a material amount.

Q So if Qwest had three years to pay 40 to $50 million it's not a large amount given their overall expenditures?

A From a materiality level, no it's not. 307/

On redirect, Ms. McKenney then explained what she meant by "materiality," an accounting term 308/ that the Report ignored in describing her testimony as characterizing $40-50 million as "insignificant" 309/:

307/ Aug. 6 Tr. at 107:5-108:17.

308/ "Materiality is defined by the [Financial Accounting Standards Board] as the magnitude of an omission or misstatement in the financial statements that makes it probable that a reasonable person relying on those statements would have been influenced by the information or made a different judgment if the correct information had been known." Patrick R. Delaney, *et al.*, *Wiley GAAP 2002, Interpretation and Application of Generally Accepted Accounting Principles*, at 10. Although the materiality of a particular item or transaction varies depending on the circumstances, *id.* at 10-11, the FASB defines a material segment or customer for

> Q Ms. McKenney, you testified in response to a question on cross examination or perhaps a series of questions that relative to the total amount of take or pay purchase service that Qwest makes from other companies that 40 to $50 million was not a material amount. Could you explain what you meant by that?
>
> A Sure. Under generally accepted accounting principles a material amount is generally 3 percent or 5 percent of any material line items. So when I was referring to it's more from an accounting practice as opposed to is it a material amount, you know, from a business perspective.
>
> Q Is it a material amount from a cash point of view?
>
> A Sure. It's not material from an accounting standpoint, but it is a material amount from a business perspective. 310/

The Report errs, then, in characterizing a $40-50 million penalty as "insignificant," or anything other than devastating, in Qwest's view.

Ultimately, should the Commission find any violation here, the public interest lies in determining what agreements should be filed, approved, and made available for CLECs under Section 252(i). To the extent the Commission determines that Qwest interpreted and applied the law incorrectly, Qwest already has remedied that concern by filing, in advance of any ruling, all agreements that fall within the Department's conception of the filing requirement. Qwest also will comply with any order of the Commission going forward. Given the confusion surrounding the intended scope of the filing requirement and Qwest's good faith both in interpreting the law and in responding to the Department's concerns in this docket, additional penalties would be gratuitously retributive and would serve no useful regulatory purpose. The Commission should

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reporting purposes as ten percent or more of revenues, profits or combined assets. Statement of Financial Accounting Standards 131, June 1997, at ¶ 18.

309/ Report, Findings of Fact, ¶ 383.

310/ Tr., Vol V, Testimony of Audrey McKenney, at 143:9-25.

follow the lead of the Iowa Public Utilities Board and the Staff of the Arizona Public Utilities Commission in finding that significant retroactive penalties are not warranted or appropriate here and that the important relief, should there be any violations, should come through a prospective order outlining the scope of the filing requirement at a level of detail all affected companies can understand and follow.

I. The Commission Is Authorized Only to Impose Monetary Penalties. 311/

Finally, should the Commission deem penalties appropriate at all -- which it should not -- the only legally authorized penalties that it may unilaterally order take the form of monetary sanctions. The governing statute authorizes the Commission to "issue an order administratively assessing monetary penalties for knowing and intentional violations" of enumerated statutes. 312/ Although, as the Report notes, the statute says that "[t]he payment of a penalty does not preclude the use of other enforcement provisions, under which penalties are not assessed, in connection with the violation or violations for which the penalty was assessed," 313/ no other statute authorizes penalties in any other form for the violations alleged here. 314/ Moreover, in the absence of a specific provision authorizing non-monetary penalties, the

311/ Through this discussion, Qwest respectfully takes exception to the findings in paragraph 368 of the Report and Memorandum.

312/ Minn. Stat. § 237.462, subd. 1 (emphasis added).

313/ *Id.*, subd. 9.

314/ In its Initial Post-Hearing Brief, the Department argued that Minn. Stat. § 237.011 authorizes the Commission to order Qwest to make any "unfiled agreements" available to CLECs for "pick-and-choose." But § 237.011 does nothing of the sort: it simply lists a series of policy goals "that should be considered as the commission executes its regulatory duties with respect to telecommunications services." *Id.* It does not authorize the Commission to take action in any fashion, let alone impose penalties.

Commission should construe the existing provision strictly. 315/ The Department has not cited any penalty authority other than Section 237.462 and it cannot. If the Commission decides to impose penalties, then, the only proper inquiry lies in determining the amount of money Qwest should be penalized.

VIII. PROPOSED PROCEDURE FOR PENALTY PHASE

As reflected in the Report, the Commission referred this case to the Office of Administrative Hearings for a recommendation on whether disciplinary action and/or penalties are appropriate in this case. The Commission did not refer the issue of how much of a monetary penalty it should impose on Qwest, nor whether it had the authority to or would impose other disciplinary measures on Qwest. 316/ In addition, the Commission did not set forth a proposed procedure for addressing the issue of penalties.

Qwest respectfully requests that it be afforded the opportunity to submit evidence and argument relevant to the issues of the appropriateness and severity of penalties. Because Minn. Rev. Stat. § 237.462 ostensibly enables the Commission to impose up to $10,000 per day per violation, the potential maximum amount of penalties at issue in this case is enormous, especially since the Report assigns twenty-five violations from Qwest's failure to file only twelve agreements. There are important legal and factual questions to address, such as the whether terminated or superseded agreements act to cut off liability, whether penalties may be imposed by provision or only by agreement, whether any harm or discrimination in fact occurred to any CLEC operating in Minnesota, whether any penalties that are assessed can consider only

315/ *See First Nat'l Bank of Gordon v. Department of Treasury*, 911 F.2d 57, 65 (8th Cir. 1990).

316/ As set forth in Part VII, the Commission does not have the authority to impose non-monetary penalties.

Minnesota-specific harm or Minnesota-specific benefits, the financial value of the benefit, if any, to Qwest from the unfiled agreements, and the financial harm, if any, to CLECs. In order to provide a complete record for the Commission to consider the issue of penalties, Qwest suggests the following procedure for the penalty phase of this case:

Parties to submit opening briefs and supporting affidavits, if any, by November 8, 2002.

Parties to submit reply briefs and supporting affidavits, if any, by November 15, 2002.

Hearing on proposed penalties on November 19, 2002.

Commission to issue penalty Order by November 25, 2002.

IX. CONCLUSION

At the beginning of these proceedings in February 2002, Qwest pointed out that conducting a penalty proceeding where all parties agreed that there was no legal standard would work an injustice. In the seven months that have passed since, that conclusion has only become more of a self-evident truth: All parties now agree that there is no prevailing standard. The Department has been unable to sustain its burden of proving knowing and intentional conduct, actual discrimination, or intentional discrimination. The Report's lack of evidentiary support and failure to discuss Qwest's evidence are its most significant features. With this factual record, and in this legal context, the Commission should decline to impose any penalties.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by email or by U.S. Mail to the following on this 16th day of November, 2010.

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