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August 8, 2012

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By Overnight Mail
Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 090538-TP – Complaint of Qwest Communications Company, LLC

Dear Ms. Cole:

Enclosed for filing on behalf of BullsEye Telecom, Inc. please find the following documents:

1. An original and fifteen (15) copies of the redacted pre-filed Rebuttal Testimony and Exhibits of Peter K. LaRose; and

2. Confidential Attachment A: A sealed envelope marked "CONFIDENTIAL," containing page 8 of Mr. LaRose's testimony, with confidential portions marked with yellow highlighter.

Please note that BullsEye claims that the contents of Attachment A are confidential and proprietary business information pursuant to § 364.183(1), Florida Statutes, that should be kept confidential and exempt from public disclosure.

A copy of this letter and Mr. LaRose's redacted testimony and exhibits are being provided to parties in accordance with the attached certificate of service. Copies of confidential material are being provided to Qwest subject to a mutual non-disclosure agreement.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance with this filing and please do not hesitate to contact me if you have any questions.

Respectfully submitted,

Andrew M. Klein
Allen C. Zoracki
Counsel for BullsEye Telecom, Inc.

COM 5 (testimony only)
AFD ____
APA ____
ECO ____
ENG ____
GCL 17
IDM ____
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CLK 1-mm + 1-Ct Rep (testimony only)

Enclosures

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CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing and enclosures noted are being served by electronic mail or U.S. Mail by the 9th day of August, 2012, to the following:

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(*) – Confidential pages served by U.S. Mail pursuant to NDA

Andrew M. Klein

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, 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.	**Docket No. 090538-TP**

REDACTED

REBUTTAL TESTIMONY OF

PETER K. LAROSE

ON BEHALF OF

BULLSEYE TELECOM, INC.

August 8, 2012

DOCUMENT NUMBER-DATE
05421 AUG-9 ≌
FPSC-COMMISSION CLERK

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1 **I. INTRODUCTION OF WITNESS**

2

3 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

4 **A.** My name is Peter K. LaRose. My business address is 25925 Telegraph Road,

5 Suite 210, Southfield, Michigan 48033.

6

7 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

8 **A.** I am employed by BullsEye Telecom, Inc. ("BullsEye") as a Finance

9 Consultant.

10

11 **Q. PLEASE DESCRIBE YOUR EMPLOYMENT AND EDUCATIONAL**

12 **BACKGROUND.**

13 **A.** I have been with BullsEye for over 13 years. Immediately prior to serving as

14 Finance Consultant for BullsEye, I was employed as Vice President of Finance

15 of BullsEye since June 1, 1999. During my tenure at BullsEye, I have been

16 directly involved in the events that led to the settlement agreement between

17 BullsEye and AT&T, which is at issue in this proceeding.

18 Prior to joining BullsEye I started my career with Price Waterhouse,

19 after which I joined MCI and served as Vice President & Controller for 10

20 years. After leaving MCI and before joining BullsEye, I served in executive

21 capacities with other telecommunications companies.

22

23 **Q. PLEASE BRIEFLY DESCRIBE BULLSEYE.**

24 **A.** BullsEye is a small competitive local exchange carrier ("CLEC") based in

25 Southfield, Michigan. As a CLEC, BullsEye provides local telephone service

26 to customers in all of the 48 contiguous states, including Florida. BullsEye

1 was granted certification to provide competitive local exchange service in
2 Florida by the Florida Public Service Commission ("Commission") in Docket
3 No. 020631-TX and began providing service to Florida customers thereafter.
4 To provide its services to Florida customers, BullsEye leases
5 telecommunications facilities, including switching, from ILECs under
6 interconnection agreements and related commercial agreements.
7
8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**
9 **A.** The purpose of my testimony is to respond to and rebut the direct testimony of
10 each of the four witnesses sponsored by Qwest Communications Company,
11 LLC d/b/a CenturyLink QCC ("Qwest"). In responding to their testimony, I
12 will show the following:
13 (1) While I am not a lawyer and expect the attorneys will address this
14 further in briefing, it is my understanding that Qwest's theory of the case is
15 inconsistent with the regulatory regime in Florida for CLEC switched access,
16 which is that rates are not subject to rate regulation and contracts are
17 permissible. As such, Qwest's proposed "uniform rate" model of CLEC
18 switched access is inconsistent with existing law.
19 (2) As a result of its reliance on an incorrect "uniform rate" model,
20 Qwest attempts – but even then fails – to show that it was or is "similarly
21 situated"[1] to AT&T with respect to the BullsEye/AT&T settlement. Further,
22 though it is not BullsEye's burden to do so, I will show that Qwest has never
23 been in a similar position to AT&T with respect to any disputes, settlement of

[1] While Qwest witnesses use the term "similarly situated," the former – now repealed – version of §364.08, Florida Statutes, uses the term "under like circumstances." As such, this testimony will use the correct term.

1 disputes, or requests for negotiations, and that there are objective differences
2 between AT&T and Qwest that render them dissimilar as customers of
3 switched access.

4 (3) Even if the Commission were to somehow consider the baseless
5 Qwest request to retroactively impose a "uniform rate" model for CLEC
6 switched access, it must take into account the circumstances under which the
7 BullsEye/AT&T settlement agreement was formed. That is, AT&T used its
8 market power to compel BullsEye to enter that agreement by withholding all
9 access charge payments from BullsEye on a nationwide basis, leaving
10 BullsEye – at the time a nascent company – with no alternative but to accede to
11 the AT&T-demanded terms. Qwest is well aware of these facts, and has
12 indeed characterized AT&T's actions as anticompetitive and illegal.[2] Quite
13 remarkably, Qwest now actually seeks to benefit from those same AT&T
14 actions, and asks the Commission to be complicit in that request.
15 Unfortunately for Qwest, under its "uniform rate" model, the far more
16 appropriate policy would be to require AT&T, as the wrongdoer and outlier, to
17 pay the rate in BullsEye's price list – as opposed to the suggestion that Qwest
18 retroactively obtain the rate that AT&T extracted through coercion and duress.[3]

19
20 **II. RESPONSE TO DIRECT TESTIMONY OF DENNIS WEISMAN**

21

22 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF DENNIS**
23 **WEISMAN FILED ON BEHALF OF QWEST IN THIS PROCEEDING?**

[2] Qwest made these representations in a complaint it filed against AT&T in court, which sought damages from AT&T based on the contracts it entered with CLECs in Florida and dozens of other states. A copy of Qwest's Complaint against AT&T is attached hereto as Exhibit PKL-1.
[3] *Id.*

1 **A.** Yes, I have.

2

3 **Q. DO YOU HAVE ANY GENERAL COMMENTS ABOUT DR.**
4 **WEISMAN'S TESTIMONY?**

5 **A.** Yes. As I understand his testimony, Dr. Weisman is advocating for the
6 creation and retroactive application of a rule that would require each CLEC to
7 charge a single rate for switched access to all customers. While I am not a
8 lawyer, I can say that BullsEye has never been aware of any rule under Florida
9 law imposing such a requirement. BullsEye's understanding has always been
10 that the Commission does not regulate rates for CLEC switched access, does
11 not require CLECs to file a price list for switched access, and does not require
12 contracts for switched access to be filed. Given this existing framework, I was
13 surprised to learn that Dr. Weisman is arguing that the Commission should
14 now adopt and retroactively impose a different model, given the negative
15 policy implications and fundamental unfairness that would result from such
16 drastic action.

17

18 **Q. DID YOU NOTICE WHETHER DR. WEISMAN CITES ANY**
19 **EXISTING FLORIDA LAWS OR REGULATIONS IN HIS**
20 **TESTIMONY?**

21 **A.** Dr. Weisman does not cite any existing Florida laws or rules in support of his
22 theory.

23

24 **Q. WHAT PROBLEMS WOULD A CLEC LIKE BULLSEYE FACE IF**
25 **THE COMMISSION WERE TO RETROACTIVELY APPLY A RULE**

1 **THAT WAS NEVER PREVIOUSLY ANNOUNCED?**

2 A. It is worth noting that Dr. Weisman is an academic and theoretician. The
3 suggestion that the Commission should suddenly adopt and retroactively apply
4 a rule, as to which there has been no notice, is a proposal for significant
5 uncertainty and hardship for companies such as BullsEye. BullsEye, like all
6 businesses, must be permitted to rely on existing laws and regulations to
7 operate its business and manage its finances.

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

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

25

1 **III. RESPONSE TO DIRECT TESTIMONY OF WILLIAM R. EASTON**

2

3 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF WILLIAM**
4 **R. EASTON FILED ON BEHALF OF QWEST IN THIS PROCEEDING?**
5 **A.** Yes, I have.
6
7 **Q. WHAT DOES MR. EASTON'S TESTIMONY STATE ABOUT**
8 **BULLSEYE?**
9 **A.** Mr. Easton's testimony says very little about BullsEye in particular. The only
10 statements specifically relating to BullsEye are found on pages 24-25 of Mr.
11 Easton's testimony. Mr. Easton states that BullsEye has "an agreement for
12 intrastate switched access services with AT&T which contains rates different
13 than the rates contained in its intrastate access price list" and that BullsEye
14 charged Qwest the rates for switched access in BullsEye's price list. The rest
15 of Mr. Easton's testimony consists of vague, generalized claims that attempt to
16 characterize all CLECs uniformly across-the-board.
17
18 **Q. IS MR. EASTON CORRECT THAT BULLSEYE AT ALL TIMES**
19 **CHARGED QWEST THE RATES IN ITS FILED PRICE LIST?**
20 **A.** Yes. To my knowledge, BullsEye has at all times charged Qwest the rates in
21 BullsEye's price list on file with the Commission.
22
23 **Q. IS MR. EASTON CORRECT THAT BULLSEYE HAS AN**
24 **AGREEMENT WITH AT&T THAT RELATES TO SWITCHED**
25 **ACCESS SERVICES?**
26 **A.** Yes, BullsEye was compelled to enter a nationwide settlement agreement with

1 AT&T that relates to switched access services. The settlement agreement was
2 drafted and proposed by AT&T, and has an effective date of October 21, 2004.
3 The settlement agreement applies on a nationwide basis, covering AT&T's
4 purchase of both interstate and intrastate switched access services.
5
6 **Q. WHY DO YOU SAY BULLSEYE WAS COMPELLED TO ENTER THE**
7 **SETTLEMENT AGREEMENT WITH AT&T?**
8 **A.** Prior to the settlement agreement, BullsEye had billed AT&T for switched
9 access services in accordance with BullsEye's duly filed tariffs and price list in
10 each of the States where BullsEye provide service. Beginning in October
11 2001, AT&T withheld payment under BullsEye's invoices and refused to pay
12 BullsEye for both interstate and intrastate access charges in *all* jurisdictions –
13 that is, under all of BullsEye's state and federal tariffs and price lists. AT&T
14 asserted that it would continue to withhold payment unless AT&T's demands
15 were met.
16 As a small competitive carrier, BullsEye's ongoing operations rely on
17 the timely collection of access charge revenues. This is especially the case
18 with AT&T, which had by far the most long distance traffic of any other
19 interexchange carrier ("IXC"). For example, between 2000 and 2003 – the
20 years leading up to the settlement – AT&T's total nationwide toll service
21 revenues were approximately 8 to 21 times greater than Qwest's, and nearly
22 twice the amount of any other IXC.[4]
23 By the end of 2004, when the settlement agreement was entered into,
24 AT&T was withholding approximately **[***BEGIN CONFIDENTIAL***]**

[4] FCC, *Statistics of Communications Carriers* (2004/2005 edition), Table 1.4. A copy of the relevant pages of the FCC's report is attached hereto as Exhibit PKL-2.

1 **[***END CONFIDENTIAL***]** from BullsEye in access
2 charges billed to AT&T under BullsEye's filed tariffs and price lists. Given
3 AT&T's refusal to pay, BullsEye had two choices: (a) enter a settlement
4 agreement on the terms demanded by AT&T or (b) seek jurisdiction-by-
5 jurisdiction litigation of the dispute in each and every state where BullsEye
6 operates. Given the critical need for these access payments from AT&T and
7 the significant delay and expense that jurisdiction-by-jurisdiction litigation
8 would entail, as well as the financial hardship an effort such as this would have
9 imposed, BullsEye was left with no alternative but to enter the settlement
10 agreement.
11
12 **Q. DID THE SETTLEMENT AGREEMENT WITH AT&T RESOLVE THE**
13 **AT&T ACCESS PAYMENT ISSUE?**
14 **A.** Yes. Pursuant to the settlement agreement, **[***BEGIN**
15 **CONFIDENTIAL***]**
16
17
18
19
20
21 **[***END**
22 **CONFIDENTIAL***]**
23
24 **Q. MR. EASTON'S TESTIMONY CLAIMS THAT BULLSEYE SHOULD**
25 **HAVE EXTENDED THE AT&T AGREEMENT RATES TO ALL**

1 **OTHER IXCS. WHY DIDN'T BULLSEYE EXTEND THE TERMS OF**
2 **THE AT&T AGREEMENT TO OTHER IXCs IN FLORIDA?**
3 **A.** It is illogical for one to assert that the terms of a bilateral settlement agreement
4 should somehow automatically become multilateral. I do not believe that
5 Qwest or CenturyLink publish the terms of each settlement agreement entered
6 into. In fact, in this proceeding alone, Qwest has entered into intrastate access
7 rate settlement agreements and has asserted confidentiality over the terms of
8 such agreements. Forcing a CLEC to extend a rate that is part of a settlement
9 agreement to all other IXCs would make it difficult, if not impossible, for any
10 CLEC to settle a dispute on a carrier-to-carrier basis.
11 With specific regard to the BullsEye/AT&T settlement agreement, there
12 was no requirement for BullsEye to publicize or offer up such terms under
13 Florida law. As I discussed above, my understanding is that CLEC switched
14 access rates have never been regulated in Florida. In fact, Mr. Easton even
15 admits on page 10 of his testimony that there is no requirement under Florida
16 law that CLECs file their rates for switched access. Given Mr. Easton's
17 admission that CLEC switched access is not subject to rate regulation, it is
18 entirely unclear how he can then assert that BullsEye was somehow required to
19 extend the terms of a bilateral settlement agreement to all other IXCs.
20 Moreover, unlike AT&T, Qwest never disputed BullsEye's switched
21 access invoices, withheld payment, requested negotiation of a switched access
22 agreement, or made any demonstration to BullsEye that it was entitled to
23 receive the terms of AT&T agreement. The only contact that BullsEye
24 received from Qwest concerning a switched access agreement was a Qwest
25 "announcement," dated February 25, 2008, demanding that BullsEye provide

1 Qwest with the "most favorable" rate found in any agreement with AT&T or
2 another IXC. The letter provided no demonstration as to why Qwest was
3 similarly situated to AT&T or any other IXC, and instead broadly claimed that
4 switched access agreements "are required to be filed with governing state
5 commissions and made available to other carriers."[5] Of course, Mr. Easton
6 now admits that this was not the case in Florida.[6]
7
8 **Q. MR. EASTON NOW ATTEMPTS TO CLAIM IN THIS PROCEEDING**
9 **THAT QWEST AND AT&T ARE SIMILARLY SITUATED. HOW**
10 **DOES BULLSEYE RESPOND TO THAT CLAIM?**
11 A. Mr. Easton's claim is inconsistent with Florida law and does not appear to be
12 based on any specific facts about BullsEye or AT&T.
13 Mr. Easton's claim relies on the theory espoused by Dr. Weisman that
14 all IXCs are similarly situated with respect to access services unless there is a
15 cost-based reason for differential rate treatment. However, as I discussed
16 above, my understanding is that CLEC switched access rates have never been
17 regulated under Florida law, have not been required to be cost-based, and have
18 not been subject to any filing requirement.
19 Further, even if one were to entertain Dr. Weisman's theory, Mr.
20 Easton does not present facts to support the application of Dr. Weisman's
21 theory in this case. For example, Dr. Weisman admits that two customers of
22 switched access are not under like circumstances if there is a difference in the
23 cost of providing service to each customer. While Mr. Easton attempts to rely
24 on this theory, he does not provide any evidence concerning BullsEye's costs

---

[5] A copy of the Qwest "announcement" is attached hereto as Exhibit PKL-3.
[6] Testimony of William Easton at 10.

1 to provide service to Qwest versus AT&T. He instead seems to suggest that it
2 is somehow BullsEye's responsibility to produce a cost study, despite no
3 requirement in Florida that BullsEye do so.
4
5 **Q. DESPITE QWEST'S FAILURE TO PRESENT FACTS**
6 **DEMONSTRATING THAT QWEST IS SOMEHOW "UNDER LIKE**
7 **CIRCUMSTANCES" WITH AT&T, ARE YOU AWARE OF ANY**
8 **REASONS WHY QWEST AND AT&T ARE NOT "UNDER LIKE**
9 **CIRCUMSTANCES" WITH RESPECT TO BULLSEYE'S**
10 **SETTLEMENT AGREEMENT WITH AT&T?**
11 **A.** Yes. I am aware of several reasons that Qwest is not under like circumstances
12 with AT&T with respect to the settlement agreement. First and foremost,
13 Qwest has never been in a similar position to AT&T with respect to any
14 settlement of disputes. Second, there are objective differences between AT&T
15 and Qwest that render them dissimilar as customers of switched access.
16
17 **Q. PLEASE EXPLAIN WHY QWEST HAS NOT BEEN A POSITION**
18 **SIMILAR TO AT&T FOR PURPOSES OF SETTLEMENT OF**
19 **DISPUTES.**
20 **A.** BullsEye entered the settlement agreement with AT&T based on a dispute
21 unique to BullsEye and AT&T. As I discussed earlier, AT&T had disputed
22 BullsEye's invoices and withheld all access charge payments from BullsEye on
23 a nationwide basis for over two years. BullsEye was compelled to enter the
24 agreement to collect from AT&T the significant amounts outstanding, ensure
25 certainty in the collection of payments from AT&T going forward, avoid costly

1 litigation against a dominant carrier like AT&T, and avoid souring the
2 relationship between BullsEye and AT&T, which serves as BullsEye's primary
3 supplier of underlying network services.
4 Qwest, on the other hand, was never in a comparable situation or
5 "under like circumstances." Qwest never disputed BullsEye's switched access
6 invoices and never withheld payment, such that the primary considerations
7 underlying the settlement agreement with AT&T never existed with Qwest.
8 Moreover, Qwest never even sought to engage BullsEye in the good faith
9 negotiation of a switched access agreement. In fact, Qwest to this day
10 continues to remit payment to BullsEye in accordance with the BullsEye
11 switched access invoices, without dispute. Instead of seeking its own
12 negotiation with BullsEye, Qwest attempts to benefit from the coercive AT&T
13 settlement without even entering negotiations on a carrier-to-carrier basis.
14
15 **Q. PLEASE EXPLAIN THE OBJECTIVE DISTINCTIONS BETWEEN**
16 **AT&T AND QWEST THAT DIFFERENTIATE THEM AS**
17 **CUSTOMERS OF SWITCHED ACCESS IN FLORIDA.**
18 **A.** I am aware of several significant objective distinctions between AT&T and
19 Qwest.
20 First, AT&T has had a much larger volume of traffic than Qwest. As
21 noted above, during the years leading up to the settlement agreement (2000-
22 2003), AT&T's nationwide total toll service revenues were approximately 8 to
23 21 times greater than Qwest's.[7] While initially noting that volumes may play
24 an important role in how switched access services are ordered and provided,[8]

[7] Exhibit PKL-2.
[8] Direct Testimony of William R. Easton at 6.

1 Mr. Easton attempts to downplay the difference in AT&T's and Qwest's traffic
2 volumes by vaguely (and baselessly) claiming on page 14 of his testimony that
3 "[i]n most cases, the discounted rates were not apparently tied to term or
4 volume commitments." However, simply because an agreement does not
5 explicitly state a volume term does not *ipso facto* mean that call volumes are
6 somehow irrelevant or were not a considerable factor in the settlement. In fact,
7 AT&T's call volumes were a major consideration for BullsEye in entering into
8 the settlement agreement. As AT&T had a significant call volume, BullsEye
9 was forced to enter the settlement agreement to ensure receipt of that
10 corresponding huge revenue stream from AT&T.

11 Second, unlike AT&T, Qwest acknowledges that it was not providing
12 dial tone service in Florida during the effective term of the AT&T settlement.[9]
13 Thus, unlike AT&T, Qwest does not compete with BullsEye for end-user
14 customers. As such, AT&T had more bargaining power with respect to a
15 settlement for switched access charges in Florida, for absent reduced access
16 prices from BullsEye, AT&T had a greater incentive to target for acquisition
17 BullsEye's end-user customers. These objective distinctions likewise
18 distinguish Qwest from AT&T.

19

20 **Q. MR. EASTON SUGGESTS IN HIS TESTIMONY THAT PRINCIPLES**
21 **OF FAIRNESS SHOULD DICTATE THAT CLECs PROVIDE QWEST**
22 **WITH THE "MOST FAVORABLE" RATE FOR SWITCHED ACCESS**
23 **SERVICES ON A RETROACTIVE BASIS. DO YOU AGREE OR**
24 **DISAGREE WITH HIS CLAIM?**

[9] Testimony of William R. Easton at 4; Qwest Response to Granite Request to Admit No. 1 (dated Feb. 13, 2012).

1 **A.** I strongly disagree with that claim.

2 As I discussed earlier, it would be unfair for the Commission to
3 retroactively change the rules governing CLEC switched access in Florida.
4 Principles of fairness dictate that competitive providers like BullsEye be
5 permitted to rely on the existing regulatory regime in the planning and
6 operation of their businesses. Given that CLEC switched access rates have not
7 been subject to rate regulation in Florida, it would be utterly unfair to suddenly
8 impose on a retroactive basis a uniform rate requirement on CLECs.

9 Further, even if one were to assume for the sake of argument that there
10 could be a "uniform pricing" requirement imposed under Florida law,
11 principles of fairness would dictate that AT&T be required to join Qwest in
12 paying the rate in BullsEye's price list rather than Qwest being allowed to
13 slither into the terms of the coercive AT&T settlement agreement. As Qwest is
14 well-aware, AT&T extorted the settlement agreement by withholding all access
15 charge payments from BullsEye on a nationwide basis.[10] To permit Qwest to
16 retroactively "opt in" to the AT&T terms instead of requiring AT&T to "opt
17 up" would condone AT&T's improper behavior and create perverse incentives
18 for dominant carriers to withhold payments from small competitors to
19 improperly extort lower rates. As such, Mr. Easton's suggestion is not
20 grounded in any objective analysis of overall fairness, but merely reflects
21 Qwest's self-interested attempt to benefit from AT&T's improper actions.

22

23 **Q. HAS QWEST PREVIOUSLY ACKNOWLEDGED THAT AT&T**
24 **EXTRACTED SETTLEMENT AGREEMENTS WITH CLECs**

[10] Exhibit PKL-1.

1 **THROUGH COERCIVE AND ANTI-COMPETITIVE ACTIONS?**

2 A. Absolutely. That is what makes Qwest's actions here even more appalling.
3 Qwest knows that the AT&T agreement was obtained through coercion, yet in
4 the height of duplicity now seeks to become a third-party beneficiary to that
5 very agreement. Qwest's complaint should never have been entertained by the
6 Commission, and should at this point be dismissed with costs.

7 The indisputable facts bear this out very clearly. Prior to filing regulatory
8 complaints against the CLECs, Qwest brought suit against AT&T seeking
9 damages from AT&T for forcing CLECs to enter the agreements through
10 coercion and duress. A copy of Qwest's court complaint against AT&T is
11 attached as Exhibit PKL-1 to my testimony. Qwest's complaint in that action
12 made the following assertions and claims:

13 • "AT&T decided in 1998 to adopt a national policy under which it
14 would refuse to pay for CLEC access services in exchanges where the
15 ILEC access charges were lower than those of the CLEC. AT&T
16 pursued its national policy without regard to the unlawful results of its
17 policy in Filed-Rate States [which, according to the complaint, includes
18 Florida]."[11]

19 • "AT&T...coerced nascent competitive local exchange telephone
20 companies ("CLECs") to provide off-tariff rates with various threats
21 and incentives, including withholding compensation from the CLECS
22 [*sic*] for services provided to AT&T until the CLECs agreed to accept
23 contracts[.]"[12]

24 • "AT&T obtained enormous financial leverage over the CLECs through

[11] Id. at ¶ 31.
[12] Id. at ¶ 3.

1 its unilateral decision to withhold payment of the tariffed access
2 charges. This created a financial squeeze on CLECs that effectively
3 eliminated meaningful opportunities for negotiation."[13]

4 • "AT&T used the financial leverage gained through its size, and the
5 volume of its intrastate calls originated or terminated with CLECs, to
6 refuse to pay CLECs for access services at lawful tariffed rates and to
7 induce, coerce, or persuade the CLECs to enter into agreements for the
8 purpose of avoiding lawful tariffed access charges."[14]

9 • The financial squeeze caused by AT&T "put the CLECs at the mercy of
10 AT&T's demands."[15]

11 Significantly, Qwest then argued that the agreements were "void, illegal and
12 unenforceable"[16] and that AT&T has "no legitimate justification to use,
13 enforce, or threaten to enforce their illegal off-tariff intrastate switched-access
14 pricing contracts in Filed-Rate States [including Florida]".[17] Qwest even
15 sought damages from AT&T, recognizing that "Qwest brings this action to
16 obtain relief for harm that cannot be remedied in any other forum."[18]

17

18 **Q. DESPITE QWEST'S STATED POSITION, MR. EASTON NOW**
19 **ARGUES ON PAGES 13-14 OF HIS TESTIMONY THAT THE CLECs**
20 **SHOULD NOT BE ABLE TO RELY ON AT&T'S WITHHOLDING OF**
21 **PAYMENTS AS AN "EXCUSE" FOR ENTERING THE**
22 **AGREEMENTS. HOW DOES BULLSEYE RESPOND TO THIS?**

[13] Id. at ¶ 32 (*emphasis added*).
[14] Id. at ¶ 35 (*emphasis added*).
[15] Id. at ¶ 3 (*emphasis added*).
[16] Id. at ¶ ¶ 119.
[17] Id. at ¶ 71 (*emphasis added*).
[18] Id. at ¶ 73.

1 **A.** Mr. Easton's position indicates that Qwest was for the coercion argument
2 before Qwest was against it. Qwest was either making misrepresentations to
3 the court, or is committing that sin here.
4 Mr. Easton is also evading the true issue. It is important for the
5 Commission to be aware of the actions that led to the formation of the
6 settlement agreement, so that all relevant facts are considered. That AT&T
7 extracted the agreement through anti-competitive withholding is critical for the
8 Commission to consider, because Qwest is now attempting to confer upon
9 itself the "illegal" benefit that AT&T extracted through what Qwest previously
10 described as a financial squeeze that – in Qwest's own words – "put the
11 CLECs at the mercy of AT&T's demands."
12 However, even if one were to accept Qwest's uniform rate theory, the
13 Commission must still decide which action sets the correct policy: (a) allowing
14 Qwest to benefit from the agreement that Qwest itself said was obtained
15 through anticompetitive conduct or (b) redressing the wrongs reflected in the
16 coercive settlement agreement by canceling the agreement and requiring
17 AT&T to pay BullsEye's price list rate, just like Qwest and other Florida IXCs.
18 Mr. Easton's preference that the Commission pretend this issue does not exist
19 is not among the viable options.
20
21 **Q. MR. EASTON ALSO SUGGESTS THAT THE CLECs HAD**
22 **REASONABLE ALTERNATIVES TO ENTERING THE SETTLEMENT**
23 **AGREEMENTS WITH AT&T. HOW DOES BULLSEYE RESPOND**
24 **TO THAT CLAIM?**
25 **A.** In addition to my understanding that it is inconsistent with existing law, Mr.

1 Easton's claim that each of the CLECs could have undertaken an effort to
2 litigate this issue prior to entry of the agreement is purely speculative and
3 unsupported by fact. Indeed, Mr. Easton has no knowledge whatsoever of
4 BullsEye's finances or operations. The fact is that incurring legal expenses to
5 litigate against AT&T in dozens of jurisdictions while simultaneously being
6 deprived of the millions of dollars in access charge revenue that AT&T was
7 withholding was in no way a reasonable option for BullsEye. Not only did
8 BullsEye not have the financial resources to undertake such an effort against
9 the AT&T behemoth, but such action would have threatened to jeopardize
10 BullsEye's relationship with AT&T – whose ILEC affiliates make up
11 BullsEye's largest underlying supplier of network services. Thus, Mr. Easton's
12 argument is purely academic, speculative and not grounded in reality.
13 Interestingly, however, Mr. Easton's testimony defeats his own
14 argument. As Mr. Easton acknowledges, other state commissions considering
15 this issue found that AT&T's withholding of payments was unlawful and
16 anticompetitive[19] - just as Qwest had previously claimed in its complaint
17 against AT&T. But upon citing to those decisions, Mr. Easton fails to consider
18 or explain why a similar conclusion should not be reached in this case if its
19 proposed "uniform rate" model were considered for application in Florida.
20 Instead, now that Qwest is seeking to obtain a windfall based on the AT&T
21 settlement, Mr. Easton is opportunely fond of the AT&T settlement agreement
22 and would have the Commission ignore the underlying maladies about which
23 Qwest itself so fervently argued.
24

[19] Testimony of William R. Easton at 13.

1 **Q. HAVE OTHER REGULATORY AGENCIES RECOGNIZED THAT**
2 **AT&T'S WITHHOLDING OF ACCESS CHARGE PAYMENTS TO**
3 **SECURE AN AGREEMENT WERE ANTI-COMPETITIVE OR**
4 **OTHERWISE PROBLEMATIC?**

5 **A.** Yes. Other regulatory agencies have likewise noted the very problematic and
6 anti-competitive nature of AT&T's actions.

7 As far back as 2001, in an Order to which Mr. Easton himself cites, the
8 FCC recognized the problematic nature of AT&T's effort to force reductions in
9 CLEC rates through the withholding of filed-rate payments. The FCC
10 specifically noted that AT&T "has frequently declined altogether to pay CLEC
11 access invoices that it views as unreasonable," and found that such actions
12 were problematic:

13 > [T]he IXCs' attempt to bring pressure to bear on CLECs has resulted in
14 > litigation both before the Commission and in the courts. And…the
15 > uncertainty of litigation has created substantial financial uncertainty for
16 > parties on both sides of the dispute. This uncertainty, in turn, poses a
17 > significant threat to the continued development of local-service
18 > competition, and it may dampen CLEC innovation and the development
19 > of new product offerings.[20]

20 Based in part on this finding, the FCC decided to cap CLEC tariffed switched
21 access rates going forward, but did not prohibit CLECs from entering
22 agreements with IXCs at off-tariff rates. More importantly, the FCC resolved
23 the issue on a prospective-only basis, and did not require any retroactive

[20] *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking (adopted April 26, 2001) ["FCC CLEC Access Reform Order"] at ¶ 23.

1 payments between carriers for agreements that existed prior to the change in
2 regulation.[21]
3 The Minnesota Department of Commerce ("Minnesota DOC") likewise
4 determined that the agreements were the result of AT&T's refusal to pay the
5 lawfully tariffed rates and AT&T's threat of waging litigation against the
6 CLECs. Specifically, the Minnesota DOC concluded that "Commission
7 enforcement of state tariffs is needed so there is no incentive for interexchange
8 carriers to withhold payment of access charges and demand similar illegal
9 preferential contract rates in the future."[22] Thus, in a fashion similar to the
10 FCC, the Minnesota Commission ultimately resolved the issue by canceling the
11 AT&T agreements as they related to Minnesota and reduced tariffed access
12 rates going-forward. No IXCs received any retroactive payments, and all IXCs
13 were required to pay the CLECs' tariffed rates.
14
15 **Q. WHAT DO YOU THINK THE COMMISSION SHOULD TAKE AWAY**
16 **FROM THOSE DECISIONS?**
17 **A.** The Commission should consider that, even in jurisdictions where CLEC
18 switched access rates are required to be tariffed and are thus subject to some
19 level of rate regulation, regulators found that it was better policy to address the
20 problems inherent in AT&T's improper actions rather than exacerbate those
21 problems by allowing Qwest to benefit from those same AT&T actions –
22 which Qwest believes were coercive and illegal. Significantly, none of those
23 proceedings resulted in retroactive relief to Qwest or another IXC. Instead, the
24 regulators determined it was better policy to address these issues on a

[21] Id. at ¶ 44.
[22] A copy of the Minnesota DOC comments is attached hereto as Exhibit PKL-4.

1 prospective-only basis.[23] To the extent any relief is ultimately considered, an
2 approach that brings other carriers up to the level of Qwest and all other IXCs
3 is resoundingly more fair than the unsound alternative Qwest proposes,
4 particularly in consideration of the fact that CLEC switched access has not
5 previously been subject to any rate regulation in Florida.
6
7 **IV. RESPONSE TO DIRECT TESTIMIONY OF LISA HENSLEY ECKERT**
8
9 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF LISA**
10 **HENSLEY ECKERT FILED ON BEHALF OF QWEST IN THIS**
11 **PROCEEDING?**
12 **A.** Yes, I have.
13
14 **Q. WHAT DOES MS. ECKERT'S TESTIMONY STATE ABOUT**
15 **BULLSEYE?**
16 **A.** Ms. Eckert's testimony does not state any specific fact about BullsEye.
17 Instead, Ms. Eckert generally, but vaguely, attempts to portray Qwest's generic
18 knowledge of CLEC settlement agreements with other IXCs and attempts to
19 avoid the rather obvious conclusion that Qwest could certainly have many
20 years ago negotiated agreements for lower access rates.
21
22 **Q. DO YOU HAVE ANY GENERAL COMMENTS ABOUT MS.**
23 **ECKERT'S TESTIMONY?**
24 **A.** Yes. The goal of Ms. Eckert's testimony appears to downplay the knowledge

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[23] Given the overwhelming weight of these decisions, the holdings of the Colorado commission on which Qwest heavily relies are clearly anomalous and do not reflect sound policy.

1 that Qwest had about CLEC agreements with other IXCs. Although she says
2 many things, Ms. Eckert never explicitly states the specific point in time when
3 Qwest obtained knowledge of the facts that underlie its complaint in this case.
4 She seems to conveniently conclude that Qwest did not have enough
5 knowledge to bring its complaint until *after* it actually filed the complaint this
6 case, which is self-contradictory.
7
8 **Q. WAS IT PUBLIC KNOWLEDGE THAT CLECs, LIKE BULLSEYE,**
9 **WERE ENTERING SETTLEMENT AGREEMENTS WITH CERTAIN**
10 **IXCs AT THE TIME WHEN BULLSEYE ENTERED ITS**
11 **AGREEMENTS?**
12 **A.** Yes. The existence of such agreements was public knowledge as far back as
13 2001, when the FCC issued its 2001 access charge reform order.[24] As I
14 discussed above, that Order specifically mentioned that AT&T and other IXCs
15 were engaged in strategies to compel CLECs to enter settlement agreements for
16 switched access. Qwest's predecessor entity, U.S. West, was an active party in
17 that proceeding.[25]
18 In 2004, the Minnesota Public Utilities Commission initiated
19 proceedings to investigate AT&T's settlement agreements with various CLECs
20 that related to intrastate switched access charges. Minnesota is one of States
21 within Qwest's ILEC region, it is incredible to suggest that Qwest was unaware
22 of this proceeding upon the filing of the Complaint against AT&T and fifteen
23 other CLECs. AT&T filed public comments in that proceeding on August 19,
24 2004, stating that "[i]n the past four years or so, AT&T has entered into

[24] *Supra* at n. 21.
[25] FCC CLEC Access Reform Order, at Appendix A.

1 hundreds of agreements based on the same form with CLEC providers of
2 switched access services throughout the United States."[26] Significantly,
3 Qwest's complaint in this proceeding explicitly states that its complaint was
4 brought based on that AT&T statement.
5
6 Q. **MS. ECKERT'S TESTIMONY STATES ON PAGE 2 THAT QWEST**
7 **UNDERTOOK "DILIGENT EFFORTS" TO UNCOVER FACTS**
8 **RELATING TO AT&T'S SWITCHED ACCESS CONTRACT AFTER**
9 **BECOMING AWARE OF AT&T'S AGREEMENTS DURING THE**
10 **PROCEEDING BEFORE THE MINNESOTA COMMISSION. WHEN**
11 **DID QWEST FIRST ASK BULLSEYE FOR ANY INFORMATION**
12 **CONCERNING BULLSEYE'S SETTLEMENT WITH AT&T?**
13 A. Although Ms. Eckert admits that Qwest became aware of the existence of
14 AT&T's agreements as early as April of 2005, Qwest made no effort to
15 negotiate an agreement with BullsEye. In fact, Qwest made no inquiry of
16 BullsEye until February of 2008, when it sent BullsEye a form
17 "announcement" demanding disclosure of BullsEye's agreements. However,
18 given the AT&T-mandated terms of the settlement agreement that declared the
19 agreement confidential, BullsEye was unable to disclose the AT&T settlement
20 agreement.
21
22 Q. **DID THIS PREVENT QWEST FROM FILING ITS COMPLAINT IN**
23 **THIS AND THE OTHER STATE PROCEEDINGS?**
24 A. No. Qwest filed its complaint with the Colorado Public Utilities Commission

[26] A copy of AT&T's comments is attached hereto as Exhibit PKL-5.

1 in July of 2008, shortly after it sent the form letter to BullsEye. Qwest then
2 waited another seventeen (17) months to file its complaint in this case.
3
4 **V. RESPONSE TO DIRECT TESTIMONY OF DEREK CANFIELD**
5
6 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF DEREK**
7 **CANFIELD FILED ON BEHALF OF QWEST IN THIS PROCEEDING?**
8 **A.** Yes, I have.
9
10 **Q. DOES BULLSEYE AGREE OR DISAGREE WITH MR. CANFIELD'S**
11 **FINANCIAL ANALYSIS?**
12 **A.** BullsEye disagrees with the financial analyses presented by Qwest. However,
13 given that Qwest has no valid claim, and retroactive relief would be
14 unavailable to Qwest in any event, it would be wasteful to devote resources to
15 this issue and undoubtedly premature at this time.
16
17 **Q. DO YOU HAVE ANY OTHER COMMENTS ABOUT MR.**
18 **CANFIELD'S ANALYSIS?**
19 **A.** Aside from the many insurmountable hurdles set forth above that prevent any
20 of the relief sought by Qwest and warrant dismissal of the complaint, it is my
21 understanding is that there are multiple legal problems with Mr. Canfield's
22 analysis. These include the fact that his calculations constitute damages which
23 the Commission does not have authority to award and that his reliance on the
24 difference in rates would not even be the correct measure of relief for a
25 discrimination claim. These, however, are legal issues that will be addressed
26 by BullsEye counsel.

1
2 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**
3 **A.** Yes.
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Docket No. 09538-TP

Qwest Complaint Against AT&T (2007)

Exhibit PKL-1

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HENN CO DISTRICT COURT ADMINISTRATOR

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

Qwest Communications Corporation, a Delaware corporation,

Plaintiff,

v.

AT&T Inc., a Delaware corporation; AT&T Communications of the Midwest, Inc., an Iowa corporation; and TCG Minnesota, Inc., a Delaware corporation,

Defendants.

Case No.

COMPLAINT

Exhibit # 107
Docket #
Witness
Date 7/22/10

For its complaint against Defendants, Plaintiff Qwest Communications Corporation ("Qwest") states the following:

Introduction and Overview

1. AT&T is a telecommunications carrier that has, since at least 1998, engaged in a broad-scale national effort to evade the legally-mandated intrastate switched-access tariffs filed in numerous states and thereby gain a significant illegal and unfair competitive advantage at the expense of Qwest, one of AT&T's competitors, among others.

2. Many states, including Minnesota, require telephone companies and telecommunications carriers to file and honor tariffs for intrastate access charges. A purpose of such legal requirements is to protect against price discrimination and unfair competition.

3. AT&T flouted state tariff requirements and coerced nascent competitive local exchange telephone companies ("CLECs") to provide off-tariff rates with various threats and

Submitted to Colorado PUC E-Filings System

incentives, including withholding compensation from the CLECS for services provided to AT&T until the CLECs agreed to accept contracts for illegal and discriminatory intrastate switched-access rates and charges. AT&T used a non-negotiable form for these contracts that required the CLECs to keep the agreements confidential. With the exception of a small subset in Minnesota for which disclosure was forced by agency action, none of these agreements have been filed. Nor has the discrimination in favor of AT&T been justified.

4. The Minnesota Department of Commerce uncovered AT&T's conduct and initiated administrative proceedings against AT&T. The Minnesota Public Utilities Commission determined that AT&T had a duty as a long-distance telephone company (also known as an inter-exchange carrier or "IXC") to pay tariffed amounts for intrastate switched access. Those proceedings have caused AT&T to enter into a "Minnesota exception," under which AT&T has begun to pay tariff rates in Minnesota. However, AT&T's actions have not been fully remedied in Minnesota and its conduct continues unabated in other states. AT&T's scheme involves hundreds of agreements, many of which have multi-state applications and effects.

5. AT&T has violated state requirements directly; it has committed and participated in frauds and misrepresentations; it has conspired with other companies to procure and exploit violations; and it has aided and abetted the violations of other companies. AT&T continues to enforce and exploit these agreements in a large number of states in which they were and are unlawful.

6. AT&T's actions have caused and are causing harm to Qwest, one of AT&T's competitors, in the form of lost market share, lost profits and other consequential harm.

7. Qwest brings this action to seek declaratory relief, injunctive relief, damages, and other relief warranted by AT&T's illegal actions.

Parties

8. Qwest is a Delaware corporation with its principal place of business in Denver, Colorado. Qwest has participated and currently participates in the long distance market or markets at issue in this case and owns the claims at issue, either by virtue of its own dealings or as a result of mergers, assignments and other consolidations from predecessor or affiliate organizations. Qwest is authorized to do business in the State of Minnesota.

9. Defendant AT&T Inc. is a Delaware corporation with its headquarters in San Antonio, Texas. At the time that most of the contracts described herein were formed, AT&T Corp. was a New York corporation with headquarters in New Jersey, but on November 18, 2005, SBC Communications, Inc. merged with AT&T Corp. and changed its name to AT&T Inc. AT&T Inc. is the successor in interest, parent, or affiliate of all AT&T entities described herein. (The term "AT&T" in this Complaint will be used to refer to AT&T Inc. and its predecessors and affiliates and will be used to refer to AT&T's predecessors and affiliates, including the co-defendants, in their roles as CLECs or IXCs, as applicable.)

10. Defendant AT&T Communications of the Midwest, Inc. ("AT&T Midwest") is an Iowa corporation headquartered at One AT&T Way, Bedminster, NJ 07921. It is a wholly-owned subsidiary of AT&T.

11. Defendant TCG Minnesota, Inc. is a Delaware corporation with its principal place of business in New Jersey. It too is a wholly-owned subsidiary of AT&T.

Jurisdiction and Venue

12. Jurisdiction in this Court is proper pursuant to Minn. Stat. § 484.01.

13. Venue in this District is proper pursuant to Minn. Stat. § 542.09.

Factual Background

Role of Regulation and Competition in the Relevant Markets in the Telecommunications Industry

14. This lawsuit pertains to an important aspect of the telecommunications industry that may be virtually unnoticed by most consumers of long-distance phone calls but that has enormous economic implications for the CLECs and IXCs that connect and transport those calls.

15. "Local exchange carriers" ("LECs") provide local telephone service to customers ("subscribers"). LECs own and control most of the plant and facilities used to provide local telephone service in their geographic areas. By way of general illustration, in local telephone networks, the subscribers' wired telephones are connected to the network in the subscribers' local service areas by cable strung on telephone poles or buried underground. The cable connects each telephone subscriber to a local "central office" switch in the LEC's service area. A switch is a machine that receives telephone calls and "switches" (that is, connects) the calls to the next step along the path to the destination that the subscriber dialed. If the call is for a subscriber on another switch, the central office sends the call to another switch that routes the call on its way. Thus, the telephone network is in essence a series of switches connected to one another. (While technologies such as internet protocol networks are beginning to change the structure of local telephone systems, this description remains a generally accurate explanation of the network structure involved in this case.)

16. Local telephone networks: (1) complete local calls; and (2) originate and terminate long-distance calls. When a subscriber places a call to someone whom the subscriber's LEC also services, then that LEC originates and terminates the call. In some cases involving "local toll" traffic, if the call is outside the free local service area but not necessarily outside the territory of the LEC that originates the call (known as "local toll service"), the subscriber dials

"1" plus the phone number and the call goes to the subscriber's preselected IXC to carry the call from the originating LEC exchange to the terminating LEC exchange. When a subscriber dials a number outside the LEC's service area with "1+" dialing, the caller's LEC originates the call, but then routes it outside the local service area. If the call is long-distance, the LEC sends the call to the subscriber's preselected IXC.

17. Generally, IXCs may not maintain their own networks to the end user's location and in many cases it is economical for IXCs to rely, therefore, on access to the networks maintained by LECs when bringing long distance calls from the calling party (originating) or to the receiving party (terminating). When a subscriber places a long-distance call (or when the subscriber has chosen a company other than its LEC to provide its local toll service), the customer's IXC generally must access both the calling party's local network and the receiving party's local network to complete the call. LECs charge IXCs a fee for using their local networks to complete customers' long-distance or local toll calls. In other words, IXCs must pay the LECs' "access charges" to use the local networks on each end of the call. Local access on the calling party's end of the call is called "originating access," while access on the receiving party's end is "terminating access."

18. This lawsuit pertains specifically to the subset of long-distance phone calls that are handled on an intrastate basis—that is, phone calls that originate in one local telephone exchange, are carried by one or more IXCs, and are terminated in another local telephone exchange within the same state.

19. LECs may be incumbent local exchange carriers ("ILECs"), including the successors to the Bell Telephone Company, or they may be CLECs, which are companies that have come into existence after the enactment of the Telecommunications Act of 1996. This

lawsuit pertains to the intrastate switched-access charges for origination or termination with CLECs.

20. The larger IXCs during the period from approximately 1998 through the present have included AT&T, MCI, Sprint, and Qwest. Some IXCs, such as AT&T, have also acted as CLECs in some states or nationally.

21. Since a merger in 2000, Qwest has been affiliated with an ILEC known as Qwest Corporation ("QC"), that has provided local exchange services in 14 states, including Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. These 14 states are referred to herein as Qwest's "In-Region States." Qwest has provided retail and wholesale long-distance inter-exchange telephone service in states other than its In-Region States at all pertinent times since 1998. Qwest has provided retail long-distance inter-exchange service in its In-Region States prior to the merger in 2000, and, thereafter, only after receiving certain approvals from various state and federal agencies, the dates of which range from about December 2002 through December 2003.

22. The switched-access charges for calls made within the same state are intrastate switched-access charges and are subject to regulation, to the extent exercised, by the given state and its administrative agencies charged with regulation of intrastate telephone service. The switched-access charges for calls that cross state lines are interstate switched-access charges and are subject to regulation by the Federal Government and, specifically, by the Federal Communications Commission ("FCC"). This lawsuit pertains to intrastate calls and not to interstate calls.

23. Nearly all states, including Minnesota, subscribe to the filed rate doctrine as reflected in statutes, regulations, and case law. The filed rate doctrine, sometimes referred to as the filed tariff doctrine, generally requires that the specific filed rate, toll, charge or price for a service be published in a tariff and charged to customers until the rate, toll, charge, or price for the service is changed through a new tariff filing or through an order of the appropriate regulatory agency requiring a going-forward change to the tariff. Under the filed rate doctrine, parties providing or receiving a tariffed service, including many telephone or telecommunications services, are governed by the tariffed rate or price, and are not free to negotiate an off-tariff rate. Many states, including Minnesota, also have had or have policies requiring CLECs and other telephone companies or telecommunications carriers to provide services and prices without discrimination between or among customers.

24. Many states have required or currently require CLECs to keep on file with the appropriate public agency the specific rate, toll, charge, or price for intrastate switched-access services provided by CLECs and or mandate non-discrimination with respect to such charges. This lawsuit pertains to states that have required or require such filings for intrastate switched-access services provided by CLECs or that mandate non-discrimination with respect to such matters. For purposes of this Complaint, the states at issue, referred to herein as "Filed-Rate States," include the following:

- Alabama;
- Arizona;
- Arkansas;
- California;
- Colorado;

- Connecticut;
- Delaware;
- Florida;
- Georgia;
- Iowa;
- Kansas;
- Kentucky;
- Louisiana;
- Maryland;
- Massachusetts;
- Mississippi;
- Missouri;
- Minnesota;
- Nebraska;
- Nevada;
- New Jersey;
- New Mexico;
- New York;
- North Carolina;
- North Dakota;
- Oklahoma;
- Pennsylvania;
- Rhode Island;
- South Dakota;

- Tennessee;
- Texas;
- Vermont;
- Virginia;
- West Virginia; and
- Wyoming.

Qwest reserves the right to amend and supplement this listing of Filed-Rate States to bring into play other states that currently have similar requirements or that have had similar requirements at material times.

25. In Filed-Rate States, LECs charge tariff rates to the IXCs for use of their networks for the origination and termination of long-distance calls. Minutes of Use (MOU) provide a common measurement for the traffic that is routed through the LEC switches and a basis for common intrastate switched-access charges.

26. Since interstate switched-access charges are regulated by the FCC and intrastate switched-access charges are regulated, if at all, by the many Filed-Rate States, intrastate switched-access charges for CLECs can vary from state to state and can (and generally do) vary from the interstate rates. Moreover, intrastate switched-access charges for CLECs can (and generally do) vary from those charged by ILECs. Intrastate switched-access charges are often higher than interstate switched-access charges.

27. There has been and remains fierce competition among IXCs for inter-exchange telephone traffic both for intrastate and interstate calls at both retail and wholesale levels. IXCs want to control and minimize variable costs, and switched-access charges represent a large share of those costs. In Filed-Rate States, however, intrastate switched-access charges are governed by

tariffed prices. Accordingly, fair competition as between and among IXCs for intrastate long-distance telephone calls is to be pursued in relation to prices of other service inputs, quality of service, and other factors besides the intrastate switched-access charges.

28. The long distance market includes the retail market, in which services are sold directly to end-user customers, and the wholesale market, which involves resale or transport and termination services for another IXC's traffic. Both the retail long distance market and the wholesale long distance market are and have been competitive markets during the times relevant to this lawsuit. At the same time, IXCs have also routinely entered into transactions with other IXCs in the wholesale market for resale and transport and termination services. The expectation and express or implied representation and obligation for such wholesale services is that the terminating IXC will terminate the call lawfully and will assume and satisfy all associated obligations to pay the tariffed charges in Filed-Rate States for intrastate switched-access.

29. Access charges are one of the largest costs of doing business for Qwest, AT&T, MCI, and Sprint, as well as other long-distance companies.

30. Revenues from IXCs for intrastate switched-access charges and interstate switched-access charges represent a large share of the income expected by CLECs for their local exchange services.

AT&T's Self-Help and Off-Tariff Deals

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

32. AT&T obtained enormous financial leverage over the CLECs through its unilateral decision to withhold payment of the tariffed access charges. This created a financial squeeze on CLECs that effectively eliminated meaningful opportunities for negotiation, and put the CLECs at the mercy of AT&T's demands.

33. AT&T has publicly admitted its self-help measures and has attempted to justify those measures by complaining that the public policy-makers have failed to mandate reforms, failed to do so with sufficient speed, or failed to mandate adequate reforms. Rather than abide by decisions of the regulators of Filed-Rate States, AT&T instead elected to engage in self-help to pay less than state law required it to pay, and carried out its wishes in a deceptive, intentional and knowing manner.

34. AT&T conceived, undertook, and implemented its self-help measures without regard for the law as it existed and currently exists. As set forth below, AT&T reached a bilateral deal with MCI for untariffed prices between their respective IXC and CLEC operations as early as 1998, imposed its self-help deals on other CLECs as early as 2000, and the deals have continued apace since then.

35. Over the years, AT&T used the financial leverage gained through its size, and the volume of its intrastate calls originated or terminated with CLECs, to refuse to pay CLECs for access services at lawful tariffed rates and to induce, coerce, or persuade the CLECs to enter into agreements for the purpose of avoiding lawful tariffed access charges. In the words of one of the CLECs pressured by AT&T's self-help measures:

> AT&T asserts that CLECs "voluntarily" agreed to these contracts. This is the equivalent of Stalin saying that Poland voluntarily agreed to occupation by the Soviet Union. The fact is that AT&T refused to pay <u>any</u> access charges unless and until an agreement was signed. AT&T not only refused to pay the tariffed rate, it refused to pay anything, even the rate that it claimed was reasonable, until the CLEC signed the agreement. This denied the CLECs millions of dollars at a

> time that they were struggling to merely survive. Thus the agreements were hardly "voluntary" on the part of the CLECs.

Eschelon's Reply to AT&T's Response to Department Exhibit, p. 3, *In the Matter of Negotiated Contracts for the Provision of Switched-access Services*, Minnesota Public Utilities Commission ("PUC"), Docket No. P442, etc./C-04-235, May 23, 2005. In the words of another group of CLECs:

> AT&T misleadingly suggests that the CLECs "voluntarily" agreed to these contracts in exchange for not having to defend their excessive tariff rates in complaint proceedings. More accurately, the CLECs entered into these contracts because AT&T was refusing to pay any of the multiple millions of dollars in access charges that the CLECs had properly billed at tariffed rates for services already received. The CLECs had to enter into these contracts to receive even a portion of these very large past due payments.

Reply of Focal Communications, Inc., Integra Telecom of Minnesota, Inc., KMC Telecom, Inc. McLeodUSA, Inc., and XO Communications, Inc. to AT&T's Comments on Department's Exhibit, PUC Docket No. P442, etc./C-04-235, May 23, 2005. In the same vein, the CLEC McLeodUSA provided the proper characterization of the conduct of AT&T and MCI in *Reply Comments of McLeodUSA, Inc.*, PUC Docket No. P442, etc./C-04-235, September 9, 2004:

> AT&T was usurping the Minnesota Public Utilities Commission's authority to determine the reasonableness of switched-access rates. Rather than address the reasonableness of CLEC access rates in proper proceedings, AT&T flexed its considerable market power in a policy of "self help" and extracted from CLECs the access rates it wanted. . . . MCI did the same. . . . The market power disparity between the IXCs and CLECs is apparent in the striking similarity between all of the agreements in which all the key terms were dictated by the IXCs.

36. For the Filed-Rate States, AT&T unilaterally decided to engage in self-help through confidential, coerced deals that afforded discriminatory pricing in its favor rather than to obtain lawful revisions to tariffs in compliance with applicable law.

37. AT&T's conduct caused disadvantage and harm not only to the CLECs, but also to AT&T's competitors and to the public. One of the affected CLECs explained the public harm:

> IXCs had already billed their customers for the long distance services that the IXCs were able to provide by virtue of the access services provided by McLeodUSA and other CLECs. Yet, when an IXC used its market power (in the form of withholding very large sums of money that CLECs desperately needed to fund their day-to-day operations) to extract reduced access rates, IXCs did not pass the benefits they reaped to their customers in the form of refunds. Instead, this money simply went to improve the bottom line profits of the IXCs [who had thereby avoided the tariffed access rates].

Reply Comments of McLeodUSA, September 9, 2004, in *In the Matter of Negotiated Contracts for the Provision of Switched-access Services,* C-04-235.

38. In a document dated August 18, 2004, AT&T admitted to the PUC that its agreements all follow the same basic form, stating:

> In the past four years or so, AT&T has entered into hundreds of agreements based on the same form with CLEC providers of switched-access services throughout the United States.

AT&T Comments, Motion to Dismiss and Motion for Summary Judgment, August 18, 2004, in *In the Matter of Negotiated Contracts for the Provision of Switched-access Services,* C-04-235. On information and belief, AT&T has continued to enter into additional and similar agreements since August 2004, continues to rely upon those agreements at the present time, and plans to continue to do so for the foreseeable future, barring specific rulings to the contrary.

39. Illustrative Settlement and Switched-Access Service Agreements, which have become known to Qwest by virtue of disclosures obtained by the Minnesota Department of Commerce ("DOC"), include:

a. Agreement with MCI on July 23, 1998;

b. Agreement with Eschelon Telecom, Inc. on May 1, 2000;

c. Agreement with Time Warner on January 1, 2001;

d. Agreement with Integra on July 1, 2001;

e. Agreement with McLeod on July 1, 2001;

f. Agreement with XO Communications on July 1, 2001;

g. Agreement with Focal Communications Corporation of Minnesota on December 25, 2001;

h. Agreement with NorthStar on September 11, 2002;

i. Agreement with Granite on April 1, 2003;

j. Agreement with New Access, Stonebridge, Choicetel, Emergent on May 1, 2003;

k. Agreement with Digital on July 31, 2003;

l. Agreement with Desktop Media on August 15, 2003;

m. Agreement with Mainstreet on September 4, 2003;

n. Agreement with OrbitCom, Inc. on January 1, 2004;

o. Agreement with VAL-ED on February 16, 2004;

p. Agreement with Time Warner on February 20, 2004, superseding prior Agreement; and

q. Agreement with Tekstar on April 5, 2004.

40. The following provisions are generally found in all or the vast majority of these "Settlement and Switched-Access Service Agreements":

a. The agreements were entered into by and between AT&T Corp. on behalf of itself and each of its subsidiaries, all collectively referred to as "AT&T," and any given CLEC.

b. Part A of the agreements documented a payment by AT&T of a "Settlement Amount," representing, on information and belief, a substantially discounted payment for switched-access services provided to AT&T by the CLEC prior to the date of the agreement.

c. The agreements provided for a resolution of the so-called "Dispute," which AT&T had created by withholding the payments unlawfully withheld from CLECs in need of cash, providing a release in favor of AT&T (to protect the discount it had extracted) as of the "Effective Date," for all claims in any court or agency.

d. The agreements provided for a contract period in Part B.1 governing prices relating to "Switched-access Services," although the contract periods varied from CLEC to CLEC.

e. The agreements pertained to Switched-access Services throughout the nation or at least the entire area served by any particular CLEC.

f. The agreements provided for "Pricing Principles" in Part B.6, which usually referred to a Schedule A, to govern the charges for intrastate switched-access service as between AT&T and the given CLEC. The agreements did not provide for or authorize the CLEC to make filings of the agreements or otherwise comply with filing requirements for the Filed-Rate States.

g. Schedule A provided for the same charges to be used in all states served by the CLEC, and only in a few instances did Schedule A include exceptions for particular states.

h. The agreements contained provisions that made the agreements and the terms of the agreements, both in their literal wording and their practical effect, confidential.

i. The agreements used by AT&T have remained essentially the same over the several years that AT&T has been employing self-help measures, without changes

prompted by various decisions that were adverse to AT&T's practices and that put AT&T on notice of its violations of the laws in the Filed-Rate States.

41. The settlement amounts AT&T paid to any particular CLEC for intrastate switched-access charges constituted only partial payments for the tariffed rates for those services that had been used for long-distance calls prior to the dates of the settlements.

42. Not only did AT&T achieve significant savings through its off-tariff prices for services predating the agreements, AT&T also achieved significant savings with the prospective, unique, off-tariff rates it achieved through each deal.

43. Since off-tariff savings were and are not lawful in the Filed-Rate States, AT&T's gains are unlawful. The specific amounts of these unlawful gains are not yet known to Qwest.

44. As explained below, AT&T eventually agreed to abide by tariffed rates for intrastate switched access in Minnesota. However, AT&T continues to enjoy the benefits of its untariffed rate agreements for Filed-Rate States other than Minnesota, and continues to threaten CLECs with economic hardship, sanctions, claims for breach of contract, and other disincentives against complying with their tariffed rates for AT&T's use of their intrastate switched-access services in any state other than Minnesota.

45. Even in Minnesota, and except for a repayment to MCI, AT&T has not repaid to CLECs the amount of illegal rate relief it achieved through its deals with any CLEC for any services received prior to the date on which the DOC filed a complaint against AT&T and various CLECs. Rather, AT&T has agreed merely to honor specific tariffs in Minnesota on a going-forward basis.

Bi-Lateral Off-Tariff Deals Between AT&T and MCI

46. AT&T and MCI entered into a National Services Agreement (as amended) between Metro Access Transmission Services, Inc. and AT&T Communications, Inc., dated November 1, 1996, and a Switched-Access Services Agreement (as amended) between AT&T Corp. and MCI WorldCom Network Services, Inc., dated July 23, 1998. One or both of these agreements served as private contractual arrangements between these two competitors governing the respective amounts which AT&T's CLEC charged to MCI's IXC and which MCI's CLEC charged to AT&T's IXC.

47. On or about February 25, 2004, AT&T and MCI entered into a settlement to resolve, among other things, a complaint that AT&T had filed against MCI in the United States District Court, Eastern District of Virginia, in September, 2003. In addition to the settlement of the lawsuit, the parties also resolved a dispute about access charges, confirming that the access charges would be paid at contract rates, rather than tariff rates, for the period in question prior to the settlement. In addition, AT&T and MCI entered into reciprocal switched-access service agreements with two-year terms in a format consistent with the same format AT&T used with other CLEC deals. Under these reciprocal agreements, AT&T's CLEC agreed to charge MCI's IXC an off-tariff rate for all calls, including intrastate switched-access calls. And, MCI's CLEC agreed to charge AT&T's IXC the same off-tariff rate for the same classes of calls. During this time, AT&T maintained a filed tariff for its own switched-access for services for terminating calls at a rate that is higher than the rate it granted solely to MCI in the reciprocal deal.

48. The rates charged by AT&T's CLEC and MCI's CLEC deviated below their tariffed rates for intrastate switched-access service in Filed-Rate States.

49. Neither AT&T nor MCI complied with applicable filing and non-discrimination requirements for tariffed rates with respect to any of their reciprocal agreements as required under laws and regulations in the Filed-Rate States.

50. In reference to the reciprocal agreements between AT&T and MCI, Gregory J. Doyle, a Manager for the DOC, stated: "AT&T . . . engaged in self-help which resulted in discrimination and a thumbing of its nose at legal requirements." Doyle Rebuttal Testimony filed in *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched-access Contracts,* October 6, 2006 ("Doyle Rebuttal"), p. 18.

AT&T's Deceptions Concerning Tariffed Rates

51. Beginning in about 2001 and from time to time thereafter, AT&T filed its own tariffs in various states, including, without limitation, Arkansas, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey and New York, for the purpose of collecting a monthly "In-State Connection Fee" ("ISCF") from residential customers of approximately $1.95.

52. AT&T specifically or implicitly represented to regulators, the public and other parties in each of these states that it needed the ISCF in order to cover the difference between the rates for tariffed access charges for intrastate long-distance calls as compared with the rates for tariffed access charges for interstate long-distance calls.

53. AT&T concealed or failed to reveal to regulators, the public and other parties that AT&T was at that same time refusing to pay the tariffed intrastate switched-access rates to CLECs and demanding and obtaining off-tariff intrastate switched-access rates from CLECs far lower than the tariffed intrastate switched-access charges.

54. AT&T profited by collecting the ISCF from its residential customers at the same time as it was refusing to pay and avoiding payment of the tariffed intrastate switched-access charges upon which the ISCF was ostensibly predicated.

Tolling of Claims

55. The existence, terms, and conditions of the off-tariff agreements were not known to Qwest until recently and even now Qwest has only limited information about these off-tariff agreements.

56. AT&T required pre-negotiation confidentiality agreements as a condition of negotiations with a large number of CLECs.

57. Nearly all of the agreements AT&T imposed upon CLECs contained provisions that made the agreements confidential.

58. The DOC obtained information about a small number of off-tariff agreements, which led the DOC to file an administrative complaint with the PUC on June 15, 2004, against AT&T, MCI, and a number of other CLECs and IXCs. However, at that time, while the DOC's complaint described some information about the unfiled, off-tariff agreements between AT&T and the other parties, the agreements and their material terms were described and provided with most of the pertinent information redacted and unavailable to Qwest or the public. As explained by Mr. Doyle: "[T]his case was initiated in early 2004, and for two years, AT&T and the other parties to the agreements continued to abide by the veil of secrecy. Doyle Rebuttal, p. 3. Eventually, all of the CLECs and IXCs agreed to abide by tariffed rates in Minnesota going forward, and the DOC's complaint was dismissed against all parties, except against AT&T for its conduct as a CLEC with respect to the bi-lateral deal with MCI. The majority of AT&T's off-tariff intrastate switched-access pricing agreements, except for a small subset of those

agreements that formed the basis of certain administrative proceedings in Minnesota, have not yet been made public.

59. On December 30, 2005, the DOC filed an additional complaint with the PUC against AT&T and a number of other CLECs. The DOC had only recently become aware of those additional agreements between AT&T and those CLECs. Again, while the DOC's complaint described some information about the unfiled agreements between AT&T and the other parties, the agreements and their material terms were described and provided with most of the pertinent information redacted and unavailable to Qwest or the public.

60. As a result of AT&T's representation to the PUC in April 2006, Qwest has finally been permitted to receive and review a handful of AT&T's secret agreements with CLECs, including the discriminatory pricing rates that AT&T was able to extract from CLECs through its predatory practices. Qwest had no access to these agreements until after April 2006.

61. Even now, the only subset of agreements that has been made available to Qwest is the handful of agreements that have been revealed in Minnesota. The other similar agreements and pricing arrangements AT&T extracted from other CLECs, including a large number of those entered into applicable to Minnesota and including all of those affecting only other states, still have not been filed or made available to Qwest. Accordingly, while the veil of secrecy has been lifted enough to glimpse a small fraction of AT&T's conduct, AT&T continues to profit by its illegal actions in Filed-Rate States across the nation.

Regulators Reject AT&T's Assertions of Right to Evade Tariffed Rates

62. The Iowa Supreme Court confirmed that AT&T was obligated to comply with tariffed switched-access rates in *AT&T Commc'ns of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554 (Iowa 2004). The court affirmed an Iowa Utilities Board ruling that AT&T was

obligated to pay the tariffed rates for past intrastate switched-access services. The court relied upon the filed-rate doctrine, observing that this doctrine "provides that the legal rights of the utility in the customer are measured exclusively by the published tariff." *Id.* at 562. The court concluded that the tariff rate on file was applicable and enforceable until it was found to be unlawful. (The Iowa case commenced when five CLECs filed an administrative complaint filed against AT&T Midwest with the Utilities Board for the State of Iowa Department of Commerce on August 16, 2000, objecting that AT&T had refused to provide payment for billed originating and terminating access services. Other CLECs intervened. Each of the CLECs had adopted and filed an intrastate switched-access tariff. AT&T argued that it should not be required to purchase and pay for access services from the CLECs at rates AT&T deemed to be non-competitive.) The Iowa Utilities Board ruling against AT&T, affirmed by the Iowa Supreme Court, had been reflected in a Decision and Order issued October 25, 2001. The Board ruled that:

> Any interexchange calls originating outside the called user's exchange using AT&T's services must be completed to the called user's telephone number and AT&T must pay the tariffed terminating access charges, even if the user's chosen LEC has terminating access charges that are higher than AT&T might like. Similarly, calls originating from customers of the complainant CLECs must be carried by AT&T, so long as AT&T serves any LEC in the exchange, and AT&T must pay the tariffed originating access charges.
>
> This does not put AT&T at the mercy of an "unconstrained monopoly," as AT&T argues. If AT&T (or any other interexchange carrier) believes at any time that a particular CLEC's access charges are unreasonable, the interexchange carrier may file a written complaint with the Board ..., asking the Board to determine the just and reasonable terms and procedures for exchange of toll traffic with the CLEC ....

The Board ordered that AT&T was obligated to pay for the access services at the CLEC's tariffed rates in effect at the time the services were used.

63. The Minnesota PUC has also ruled against AT&T on the off-tariff conduct. For example, the PUC issued its Order Finding Failure to Pay Tariffed Rate, Requiring Filing, and

Notice and Order for Hearing on February 8, 2006, in *In the Matter of the Complaint of PrairieWave Telecommunications, Inc. Against AT&T Communications of the Midwest,* PUC Docket No. P-442/C-05-1842. In that Order, the PUC explicitly ruled:

> The Commission finds that AT&T is obligated to pay PrairieWave's tariffed access rates and that it has failed to do so. The Commission rejects AT&T's contention that it was authorized to withhold payment on the basis of its belief that the tariffed rates were excessive, unjust, unreasonable, and therefore illegal.

Order, at p. 2. The matter had come before the PUC on the complaint of PrairieWave that AT&T Midwest was refusing to pay PrairieWave's tariffed rates for intrastate switched-access services. AT&T Midwest admitted that it had not paid monthly invoices submitted by PrairieWave, but asserted in a counterclaim that the tariffed rates were unjust, unreasonable, discriminatory, anti-competitive, and therefore illegal. The DOC urged the PUC to resolve PrairieWave's complaint on legal and policy issues and to refer the counterclaim for an evidentiary hearing. At a hearing before the PUC on January 12, 2006, the PUC rejected AT&T's contention that it was allowed to withhold payment on the grounds that AT&T deemed the rates excessive. The PUC provided a detailed explanation in support of its decision that "AT&T was and is obligated to pay tariffed access rates," Order, at p. 2, starting with the invocation of the filed rate doctrine, embracing the following definition:

> **Filed rate doctrine.** Doctrine which forbids a regulated entity from charging for its services other than those properly filed with the appropriate federal regulatory authority.

Order, at p. 2. The PUC went on to explain:

> Although state and federal policy initiatives promoting competition in the local telecommunications market now give carriers unprecedented flexibility in pricing their services, the filed rate doctrine remains intact. No matter how flexible pricing decisions may become, prices and rates must be filed with the Commission and charged uniformly throughout carriers' service areas, including prices and rates subject to adjustment in response to unique cost, geographic, or market factors or unique customer characteristics.

> PrairieWave therefore lacked the right to accede to AT&T's request to retroactively adjust its access rates, and AT&T lacked the right to pay any rate other than the tariffed rate.
>
> Further, AT&T had a duty to promptly pay all access charges incurred. Both the seamless telecommunications network on which the public depends and the competitive telecommunications marketplace that state and federal policymakers seek, require the prompt satisfaction of inter-carrier financial obligations.

Order, at p. 3 (citations omitted).

64. As noted above, in another proceeding, the Minnesota DOC initiated a complaint against AT&T and others in June 2004. That administrative proceeding was given the Docket Number P-442 et seq./C-04-235. Eventually, the parties to that proceeding agreed to abide by filed tariffs on a prospective basis, except that AT&T did not reach an agreement with the DOC concerning its conduct as a CLEC with respect to the bi-lateral deals with MCI. The Minnesota PUC referred that complaint to the Office of Administrative Hearings ("OAH") for an evidentiary proceeding.

65. In the ensuing contested case proceeding concerning AT&T's conduct as a CLEC, on June 26, 2006, in a Recommendation on Motion for Summary Disposition, Administrative Law Judge Steve M. Mihalchick recommended that the Commission should find, among other violations, that "AT&T knowingly and intentionally violated applicable provisions of Minn. Stat. Ch. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237," and

> That AT&T engaged in discrimination by knowingly or willfully charging, demanding, collecting, and receiving the untariffed rates for intrastate-switched-access service under the terms of its unfiled Agreement with MCI, while offering, charging, demanding, collecting, or receiving tariffed rates for intrastate-switched-access service with regard to other IXCs under similar circumstances, in violation of Minn. Stat. § 237.09, subd. 1.

Recommendation, pp. 1-2. In explaining these recommendations, Judge Mihalchick explained that AT&T is required to file its tariff or price list for each service and noted that AT&T entered into two unfiled Agreements with MCI but did not file the terms as a unique price list or tariff term. "Instead, AT&T filed and maintained a separate tariff under which AT&T provided less favorable terms to other carriers that did not reach a unique agreement with AT&T." Recommendation, p. 9. The Administrative Law Judge continued:

> [B]y offering unique pricing to MCI that it did not file as a tariff, AT&T engaged in unreasonable discrimination .... CLECs, like AT&T [are permitted] to offer telecommunications service within the State only if the rates are uniform and the terms and rates are not "unreasonably discriminatory." ... [A] CLEC's abililty to reasonably discriminate with respect to its rates and terms is limited to ... specific exceptions; anything else, is unreasonable discrimination. Moreover, ... a CLEC may only qualify for one of these exceptions if it first files its unique price offering with the Commission ....

Recommendation, pp. 12-13. The Administrative Law Judge concluded that AT&T's purposeful election to enter into an agreement with MCI—in which AT&T charged MCI less for intrastate switched-access than it charged other carriers and provided intrastate switched-access service to MCI on a unique separate basis, not pursuant to tariff under which the service was offered to all similarly situated carriers—was "illegal conduct" in which "AT&T purposefully engaged . . . [and] its actions were knowing and intentional." Recommendation, p. 14.

66. As noted earlier, the DOC initiated another complaint against AT&T and other parties in Docket No. P442/C-05-1282, filed December 30, 2005. This matter was resolved by stipulations confirming that the parties would honor filed tariffs on a prospective basis in April 2006.

67. Also, the DOC initiated another complaint against AT&T's subsidiary TCG in Docket No. P442/C-05-1282, filed June 7, 2006. On October 12, 2006, the PUC referred this complaint to the OAH for contested case proceedings.

Defendants' Ongoing Off-Tariff Deals in Filed-Rate States outside Minnesota

68. Although AT&T has agreed to abide by tariffed rates for intrastate switched-access service in Minnesota for agreements discovered and specifically challenged by the DOC, AT&T has not agreed to abide by tariffed rates for intrastate switched-access service for any other Filed-Rate States, and AT&T continues to enjoy the illegal fruits of off-tariff intrastate switched-access pricing agreements in all or at least most other Filed-Rate States.

69. AT&T continues to pursue tactics based upon the leverage afforded by the volume of its interexchange traffic rather than lawful compliance with filed tariffs. For example, on information and belief, while AT&T has begun to pay PrairieWave for its intrastate switched-access services at tariffed rates, AT&T has simultaneously determined to withhold other payments for which it is legally obligated. Thus, AT&T is honoring only the form of compliance with the PUC order while effectively flaunting requirements by transferring its withholding to other categories so that PrairieWave is given no net benefit by AT&T's ostensible compliance.

70. On information and belief, Defendants continue to pursue and enforce even the agreements with specific CLECs that operate in Minnesota, after those agreements have plainly been exposed as illegal contracts in Minnesota, so that even though it may be paying tariffed rates in Minnesota, it continues to pay the agreement rates for those same CLECs in all other jurisdictions, including other Filed-Rate States.

71. Defendants have no legitimate justification to use, enforce, or threaten to enforce their illegal off-tariff intrastate switched-access pricing contracts in Filed-Rate States.

72. Defendants' activities, and the activities of those with whom Defendants are in privity, violate statutes or cause violations of statutes in the Filed-Rate States, including but not limited to the following:

a. Alabama: The laws that those activities violated include Ala. Code § 37-2-10.

b. Arizona: The laws that those activities violated include Ariz. Rev. Stat. Ann. § 40-365, Ariz. Admin. Code §§ R14-2-1115 and R14-2-510, and Ariz. Rev. Stat. Ann. § 40-334.

c. Arkansas: The laws that those activities violated include Ark. Code Ann. §§ 23-4-88-107, 23-4-105, 23-4-106, and 23-3-114(a).

d. California: The laws that those activities violated include Cal. Pub. Util. Code §§ 489 (and General Order 96A adopted pursuant thereto), 556, and 558.

e. Colorado: The laws that those activities violated include Colo. Rev. Stat. §§ 40-15-105 and 40-3-101.

f. Connecticut: The laws that those activities violated include Conn. Stat. Ann §§ 42-110b, 16-247f, and16-247b.

g. Delaware: The laws that those activities violated include Del. Code Ann. tit. 26, § 304, Del. Code Regs §§ 10-800-020-3.5, 10-800-050-48.1, 10-800-050-5.2.1, and Del. Code Regs § 10-800-050-6 and Del. Code Ann. tit. 26, § 303.

h. Florida: The laws that those activities violated include, but are not limited to, Fla. Stat. §§ 501.204, 364.04, 364.08, and 364.09.

i. Georgia: The laws that those activities violated include Ga. Code Ann. §§ 46-2-25, 46-5-164, and 46-5-166.

j. Iowa: The laws that those activities violated include Iowa Code §§ 476.4 and 476.101.

k. Kansas: The laws that those activities violated include Kan. Stat. Ann. §§ 66-109, 66-1,190, 66-1,189, and 66-154a.

l. Kentucky: The laws that those activities violated include Ky. Rev. Stat. Ann. § 278.160.

m. Louisiana: The laws that those activities violated include La. Competition Reg. § 401(A).

n. Maryland: The laws that those activities violated include Md. Code Ann., Pub. Util. Cos. § 4-202.

o. Massachusetts: The laws that those activities violated include Mass. Gen. Laws 93A § 2, 159 § 19 and 116 § 14, and orders entered pursuant thereto.

p. Minnesota: The laws that those activities violated include Minn. Stat. §§ 325F.67, 325F.69, 237.07, 237.035, 237.74, 237.09, 237.60, and Minn. R. 7811.2210.

q. Mississippi: The laws that those activities violated include Miss. Code Ann. § 77-3-35.

r. Missouri: The laws that those activities violated include Mo. Stat. §§ 392.220, Mo. Code Regs tit. 4 § 240- 3.545, and Mo. Stat. § 392.200.

s. Nebraska: The laws that those activities violated include Neb. Rev. Stat. Ann. § 86-143.

t. Nevada: The laws that those activities violated include Nev. Rev. Stat. Ann. §§ 598.969, 598.0923, and 704.061 through 704.0130.

u. New Jersey: The laws that those activities violated include N.J. Stat. Ann. § 56:8-2, N.J. Admin. Code §§ 14:1-4, 14:10-5.3 through 14:10 10-5.11, and 48:3-1.

v. New Mexico: The laws that those activities violated include N.M. Stat. §§ 57-12-2, 57-12-3, and 63-9A-8.1.

w. New York: The laws that those activities violated include N.Y. Pub. Serv. L. §§ 92, N.Y. Comp. Codes R & Regs tit. 16 § 720-1.3, and N.Y. Pub. Serv. Law § 91.

x. North Carolina: The laws that those activities violated include N.C. Gen. Stat. §§ 62-133.5 and 62-134.

y. North Dakota: The laws that those activities violated include N.D. Cent. Code §§ 51.15-02, 49-05-05, 49-21-04, 49-04-07, 49-21-07, and 49-21-10.

z. Oklahoma: The laws that those activities violated include Okla. Stat. §§ 165:55-5-1 and 165:55-5-2.

aa. Pennsylvania: The laws that those activities violated include 66 Pa. Cons. Stat. Ann. §§ 1302, 1303 and 1304.

bb. Rhode Island: The laws that those activities violated include R.I. Gen. Laws §§ 39-3-10, 39-3-11, 39-2-2, 39-2-3, and 39-2-4.

cc. South Dakota: The laws that those activities violated include S.D. Stat. §§ 37-24-6, 49-31-12.2 49-31-19, 49-31-4, 49-31-4.2, and 49-31-11, and S.D. Admin. R. 20:10:27:06 and 20:10:27:17.

dd. Tennessee: The laws that those activities violated include Tenn. Code Ann. § 65-5-102 and Tenn. Comp. R. & Regs. 1220-4-1-.03 to .04.

ee. Texas: The laws that those activities violated include Tex. Util. Code § 52.251 and Tex. PUC Subst. R. 26.89(a)(3).

ff. Vermont: The laws that those activities violated include Vt. Stat. Ann. § 225.

gg. Virginia: The laws that those activities violated include Va. Code Ann. §§ 56-479.2(b), 56-236, 56-237, and 56-234.

hh. West Virginia: The laws that those activities violated include W. Va. Code §§ 24-3-1, 24-3-2, and 24-3-5, W. Va. Code R. §§ 150-2-2, 150-2-7, 150-2-16, 150-2-28, 150-6-9, and 150-6-15.

ii. Wyoming: The laws that those activities violated include Wyo. Stat. Ann. §§ 37-15-204, 37-15-404, and 37-15-404.

Effects of Defendants' Off-Tariff Deals

73. Qwest brings this action to obtain relief for harm that cannot be remedied in any other forum. Qwest has incurred loss of market share in the wholesale market for intrastate inter-exchange telephone service as a direct result of AT&T's practices since 1998. There is no adequate remedy for such damages to be had in the administrative agencies in the Filed-Rate States.

74. AT&T gained competitive advantages by exploiting evasion and secrecy in states that depended upon the filed rates for uniformity and even-handed, non-discriminatory treatment of competitors. In other words, IXCs like Qwest, which complied with the lawful requirements to pay the tariffed rates for intrastate switched access, were put at a disadvantage in the face of AT&T's conspiracy to deceive regulators, CLECs, the public, and competitors.

75. Defendants have no right to create wealth for themselves by exploiting a regulatory regime with illegal practices inuring to the exclusive benefit of Defendants. In the words of Mr. Doyle:

> AT&T, like other businesses, has an incentive to maximize shareholder wealth. This is generally healthy for the marketplace. However, that does not mean that a company can choose to create wealth by violating the law if it is unlikely that it will be caught, and even if caught, any penalty is unlikely to be as great as the benefit received.

Doyle Rebuttal, p. 4.

76. Defendants have no right to profit by their illegal conduct in Minnesota or in any other state that employs a comparable tariff filing requirement for switched-access services offered by CLECs. In the words of Mr. Doyle:

> There is value to regulatory certainty in the marketplace and regulatory certainty is created when all competitors are confident that, if they operate in compliance with the law, they will be operating on a level playing field and will not be disadvantaged by their honesty. AT&T's discriminatory tactics, if anything, created financial hardship on those companies that did not have the economic advantage of an illegal contract, and would create a disincentive for such companies to invest.

Doyle Rebuttal, p. 19.

77. Defendants' conduct has enabled them to gain unfair and illegal advantage at the expense of their competitors. In the words of Mr. Doyle:

> [N]ot all IXCs engaged in such contracts. Thus, only the very few IXCs that also obtained contracts with the same beneficial terms could compete effectively with each other. IXCs without contracts are clearly harmed. IXCs with fewer contracts are also harmed. If competition suffers, consumer benefits achieved through competition will also suffer. Only through non-discrimination by application of the tariffed rates for access services are IXCs effectively competing with one another.

Doyle Rebuttal, p. 20.

78. Defendants have harmed consumers by achieving their desired rate reductions through their illegal self-help measures rather than through appropriate regulatory channels. The IXC market is highly competitive and, as costs decline, prices for consumers tend to decline as well. However, because the Defendants secured secret cost reductions, market forces operated differently for those IXCs like Qwest whose costs were kept higher as they complied with filed rates. Mr. Doyle provided an additional perspective:

> In the P421/C-90-1184 and P999/C-93-90 dockets, AT&T was required to pass through the access charge savings to consumers through lower toll rates. Interexchange carriers would prefer that there be no regulatory requirement to reduce their toll rates if access rates are reduced. However, a pass-through was agreed to in the course of negotiations to reach a settlement in these previous cases. Thus, access charge reductions reached through the regulatory process, if a pass through of cost savings is required, does not have the same financial benefit to AT&T as access charge reductions achieved, as AT&T has done, through the unfiled agreements.

Doyle Testimony, *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched-Access Services,* July 28, 2006. In fact, AT&T's actions actually compounded the illegal consequences insofar as AT&T obtained authority to impose the ISCF upon its customers by representing that it was paying tariffed rates that it was in fact not paying.

79. AT&T was able to exploit the benefits of their bilateral off-tariff agreements. They were in a position to hoard the gains made possible by their mutual deception, because competitors in the marketplace, including Qwest, were driven to higher prices by incurring the full costs required by following the filed tariffs. Thus, since AT&T engaged in a conspiracy of self-help, it deprived the public consumers of the true benefit of open and fair competition.

80. Not only was the public harmed by the bilateral off-tariff agreements of AT&T, but so also were competitors such as Qwest that paid tariffed rates to AT&T and to other CLECs with whom AT&T had secret deals. In the words of Mr. Doyle:

> [T]here are a significant number of competitors in the interexchange market. In a competitive market, price moves toward cost and no individual company has the ability to establish the market price. . . . If a competitor is able to achieve a cost advantage that is not achievable by others, profit margins (if any) will be squeezed .... Obtaining a cost advantage from a self-help scheme can significantly harm competitors and reduce the benefits that legitimate competition brings to consumers.

Doyle Testimony, p. 21. Mr. Doyle also explained:

> [C]ompanies can compete on non-price factors, such as quality of service. The issue of discrimination resulting from the contract should legitimately consider cost and non-cost factors. Even though AT&T and MCI may not have changed prices during the term of the contract[s], to the extent the margin between price and cost increased, the contract created a competitive advantage. To the extent the company [such as AT&T and MCI] could afford to improve service quality since access costs were reduced, the contract created a competitive advantage.

Doyle Rebuttal, p. 21. Further,

> If one company has a sweetheart deal that no other company has, that company may use that cost advantage to directly improve the company's net income. The prices charged by competitors cannot squeeze out excessive profits if the underlying costs, over which a carrier has no control, are not the same. Over the long term, companies must keep their service prices above costs to stay in business. If a company is able to obtain a cost advantage, that company may simply flow that advantage to its bottom line.

Doyle Rebuttal, pp. 23-24. Defendants have exploited their series of sweetheart off-tariff deals in Filed-Rate States to impose illegal harm upon Qwest.

81. There is no legitimate competitive benefit in Defendants' practices of breaking the law to secure gains, nor is there any competitive benefit in Defendants' practices to discriminate against other IXCs (apart from the co-conspiring IXC with which they conspired).

82. Defendants' practices have caused direct and indirect harm to Qwest through an unfair competitive advantage, price manipulations, exploiting unlawful and hidden cost savings, causing a loss of market share, and other direct and consequential harm.

Claims

Count One
Statutory Claims for Violation of Tariffing and Related State Law Requirements

83. The allegations of paragraphs 1 through 82 are incorporated herein as if fully restated.

84. Defendants have engaged in violations of law in Filed-Rate States with respect to their off-tariff intrastate switched-access pricing agreements.

85. Defendants have engaged in, procured, assisted, aided, abetted, encouraged or conspired in the violations of law knowing that their conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

86. Defendants' conduct constitutes anti-competitive acts or practices in connection with Defendants' provision of telecommunications services.

87. Qwest has suffered substantial harm as a result of Defendants' violations of law in Filed-Rate States in an amount yet to be determined.

88. Qwest is entitled to recover damages and other relief, including attorneys' fees, for the violations of law of the Filed-Rate States with respect to Defendants' unfiled, off-tariff agreements for special pricing for intrastate switched-access service pursuant to applicable statutes, including but not limited to the following:

a. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Arizona pursuant to the law of Arizona, including without limitation, Ariz. Rev. Stat. Ann. § 40-423, and, by way of supplementation

or in the alternative, under remedial or procedural provisions in the forum state.

b. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Arkansas pursuant to the law of Arkansas, including without limitation, Ark. Code Ann. § 4-88-113, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

c. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of California pursuant to the law of California, including without limitation, Cal. Pub. Util. Code § 2106 and California Public Utilities Commission Decision No. 77406, 71 Cal. P.U.C. 229, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

d. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Colorado pursuant to the law of Colorado, including without limitation, Colo. Rev. Stat § 40-7-102, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

e. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Connecticut pursuant to the law of Connecticut, including without limitation, Conn. Stat. Ann § 42-110g, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

f. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Delaware pursuant to the law of Delaware, including without limitation, Del. Code Ann. tit. 6, §§ 2513, 2525 and 2533, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

g. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Florida pursuant to the law of Florida, including without limitation, Fla. Stat. §§ 501.204 and 501.211, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

h. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Georgia pursuant to the law of Georgia, including without limitation, Ga. Code Ann. § 46-2-90, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

i. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Kansas pursuant to the law of Kansas, including without limitation, Kan. Stat. Ann. §§ 66-176 and 66-178, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

j. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Massachusetts pursuant to the law of Massachusetts, including without limitation, Mass. Gen. Laws ch. 93A, §§ 2 and 11, and,

by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

k. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Minnesota pursuant to the law of Minnesota, including without limitation, Minn. Stat. §§ 325F.67, 325F.69, 325D.13, and 8.31, subd. 3a.

l. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Missouri pursuant to the law of Missouri, including without limitation, Mo. Stat. § 392.350, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

m. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Nevada pursuant to the law of Nevada, including without limitation, Nev. Rev. Stat. Ann. §§ 41.600(e), 598.0923, 598.9694, and 598.969, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

n. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New Jersey pursuant to the law of New Jersey, including without limitation, N.J. Stat. Ann. § 56:8-2.12 and 56.8-19, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

o. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New Mexico pursuant to the law of New Mexico, including without limitation, N.M. Stat. § 57-12-10, and, by way of supplementation

or in the alternative, under remedial or procedural provisions in the forum state.

p. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New York pursuant to the law of New York, including without limitation, N.Y. Pub. Serv. Law § 93 and 349, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

q. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of North Dakota pursuant to the law of North Dakota, including without limitation, N.D. Cent Code § 49-05-10, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

r. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Pennsylvania pursuant to the law of Pennsylvania, including without limitation, 66 Pa. Cons. Stat. Ann. § 3309, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

s. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Rhode Island pursuant to the law of Rhode Island, including without limitation, R.I. Gen. Laws §§ 39-2-7, 39-2-8, and 39-1-22, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

t. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of South Dakota pursuant to the law of South Dakota, including without limitation, S.D. Stat. § 37-24-31, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

u. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Virginia pursuant to the law of Virginia, including without limitation, Va. Code Ann. § 56-479.2(b), and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

v. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of West Virginia pursuant to the law of West Virginia, including without limitation, W. Va. Code §§ 24-4-7 and 24-4-3, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

w. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Wyoming pursuant to the law of Wyoming, including without limitation, Wyo. Stat. Ann. § 37-12-208, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

89. Qwest is entitled to judgment for damages caused by Defendants' violations in an amount to be determined by the trier of fact.

Count Two
Misrepresentation, Omission or Fraud

90. The allegations of paragraphs 1 through 89 are incorporated herein as if fully restated.

91. AT&T has made express or implied statements of material fact to Qwest, regulators, the public and other parties to the effect that it was paying tariffed rates for intrastate switched-access service in Filed-Rate States. And, AT&T has procured actions by, assisted, encouraged, or acted in concert in a common design with CLECs with the result that CLECs have made express or implied statements of material fact to Qwest, regulators, the public and other parties to the effect that they were charging tariffed rates for intrastate switched-access service in Filed-Rate States.

92. AT&T has made indirect representations of material fact to the effect that it was paying tariffed rates for intrastate switched-access service in Filed-Rate States. And, AT&T has procured actions by, assisted, encouraged, or acted in concert in a common design with CLECs with the result that CLECs have made indirect representations of material fact to Qwest, regulators, the public and other parties to the effect that they were charging tariffed rates for intrastate switched-access service in Filed-Rate States.

93. AT&T has endorsed or confirmed representations of material fact made by others to the effect that AT&T was paying tariffed rates for intrastate switched-access service in Filed-Rate States.

94. The statements made directly or indirectly, implied, endorsed or confirmed, to the effect that AT&T was paying tariffed rates for intrastate switched-access service in Filed-Rate States were false or omitted facts necessary to make them not misleading. And, the statements to

the effect that CLECs were charging tariffed rates for intrastate switched-access service in Filed-Rate States were false or omitted facts necessary to make them not misleading.

95. AT&T knew or should have known that its statements of material fact and those procured, assisted, encouraged and in common with CLECs were false or misleading.

96. AT&T made misstatements of material fact, and procured, assisted, encouraged, and acted in common with CLECs and others with whom it was in privity in misstatements of material fact, in order to induce reliance upon those misstatements by others including, but not limited to, Qwest.

97. Qwest actually and justifiably relied upon the misstatements of fact by AT&T and those with whom AT&T was in privity.

98. Qwest has suffered damages in an amount yet to be determined through its reliance upon the direct and indirect misstatements of fact by AT&T and those with whom AT&T was in privity.

99. Qwest is entitled to judgment for damages caused by the violations of law frauds and misrepresentations engaged in, procured by, assisted, encouraged, and made in concert with, for, and by AT&T in an amount to be determined by the trier of fact.

Count Three
Conspiracy to Violate Tariffing Requirements

100. The allegations of paragraphs 1 through 99 are incorporated herein as if fully restated.

101. CLECs, including AT&T and MCI, which have entered into off-tariff agreements with Defendants for special pricing for intrastate switched-access service, have violated applicable statutes, regulations, orders and other laws in the Filed-Rate States.

102. Defendants have combined, conspired and agreed with MCI and CLECs and other parties to procure the violations of law by the CLECs in the Filed-Rate States in their exercise of economic leverage, refusal to pay tariffed rates, negotiations, demands, and agreements with the CLECs for special pricing for intrastate switched-access service.

103. The conspiracy or conspiracies have involved unlawful purposes or lawful purposes to be achieved by unlawful means.

104. Defendants have engaged in overt acts in furtherance of the conspiracy or conspiracies.

105. Defendants have engaged in the violations of law and the conspiracy or conspiracies for such violations, knowing that their conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

106. Qwest suffered substantial harm as a result of Defendants' conspiracy or conspiracies with CLECs in an amount yet to be determined.

107. Qwest is entitled to judgment for damages caused by the violations of law Defendants' conspiracy or conspiracies with MCI and CLECs and other parties in an amount to be determined by the trier of fact.

Count Four
Aiding and Abetting the Violations of Tariffing Requirements

108. The allegations of paragraphs 1 through 107 are incorporated herein as if fully restated.

109. Defendants have aided and abetted MCI and CLECs and other parties to procure the violations of law by the CLECs in the Filed-Rate States in their exercise of economic leverage, refusal to pay tariffed rates, negotiations, demands, and agreements with the CLECs for special pricing for intrastate switched-access service.

110. Defendants acted under a common design to violate the law or to encourage and assist violations of law by the CLECs.

111. Defendants have purposefully engaged in the violations of law and the aiding and abetting of such violations knowing that their unlawful conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

112. Qwest suffered substantial harm as a result of MCI's, CLECs' and other parties' violations of law and the Defendants' aiding and abetting of such violations in an amount yet to be determined.

113. Qwest is entitled to judgment for damages caused by the violations of law by MCI, CLECs and other parties and the aiding and abetting of such violations.

114. Qwest is entitled to judgment for damages caused by the violations of law by Defendants with MCI, CLECs and other parties in an amount to be determined by the trier of fact.

Count Five
Declaratory Judgment and Injunctive Relief

115. The allegations of paragraphs 1 through 114 are incorporated herein as if fully restated.

116. Defendants have violated applicable statutes, regulations, orders, and other laws in the Filed-Rate States directly or indirectly with respect to their agreements for off-tariff special pricing for intrastate switched-access service.

117. Qwest is entitled to a declaration that Defendants have violated applicable law in the Filed-Rate States with respect to off-tariff intrastate switched-access charges and rates.

118. Qwest is entitled to a declaration that Defendants are obligated to comply with filed tariffs for intrastate switched-access service.

119. Qwest is entitled to a declaration that Defendants' off-tariff agreements for special pricing for intrastate switched-access service have been and are void, illegal and unenforceable in the Filed-Rate States.

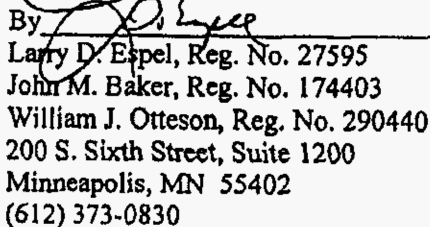
120. Qwest is entitled to an injunction requiring Defendants to abide by filed tariffs with respect to intrastate switched-access service in the Filed-Rate States without evasion or offset.

WHEREFORE, Qwest demands judgment against Defendants:

1. For declaratory and injunctive relief against Defendants;
2. For damages in an amount yet to be determined greater than $50,000;
3. For attorneys' fees, costs and other relief as is allowed by applicable laws; and
4. For such other and further relief as the Court may deem just and proper.

Dated: January 29, 2007

GREENE ESPEL, P.L.L.P.



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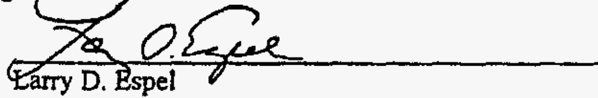
ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.



Larry D. Espel

#290772v12

Docket No. 09538-TP

FCC Statistics of Carriers (2004-2005)

Exhibit PKL-2

NEWS

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
November 7, 2005

NEWS MEDIA CONTACT:
Mark Wigfield at (202) 418-0253
Email: mark.wigfield@fcc.gov

FEDERAL COMMUNICATIONS COMMISSION RELEASES
STATISTICS OF COMMUNICATIONS COMMON CARRIERS

Washington, D.C. – Each year since 1939, the FCC has published the *Statistics of Communications Common Carriers*, a reference work widely used by academics, consultants, and other researchers in the field of telecommunications. This report includes a wealth of data on telecommunications costs, revenues, prices, and usage.

In order to expedite release of the information, the FCC is making all of the data available electronically at this time, before the report's formal publication in December 2005. A second notice will be issued when printed versions can be purchased from the U.S. Government Printing Office.

The electronic version of the publication is available to the public free of charge. The 160-page volume is divided into the following five sections:

- Part 1 contains general information on industry structure.
- Part 2 contains financial and operating data relating to telephone carriers.
- Part 3 contains data on international communications.
- Part 4 contains historical financial and operating statistics.
- Part 5 contains data on industry trends.

The full report is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY-A257, Washington, DC 20554. This report may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW, Room CY-B402, Washington, DC 20554, telephone 800-378-3160 or via their website at www.bcpiweb.com. The publication also may be downloaded from the Wireline Competition Bureau's Internet site at www.fcc.gov/wcb/stats.

- FCC -

Wireline Competition Bureau contact: Katie Rangos, Industry Analysis and Technology Division at (202) 418-0940; TTY (202) 418- 0484.

Statistics of Communications Common Carriers

2004/2005 Edition

Federal Communications Commission
Washington, DC 20554

Statistics of Communications Common Carriers

Introduction and Overview

The *Statistics of Communications Common Carriers (SOCC)*, which has been published annually since 1939, is one of the most widely used reference works in the field of telecommunications. It is the only permanent record of common carrier activity published by the Government Printing Office and sent to repository libraries. The most recent edition may be purchased by mail from the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954, or by calling GPO's Order and Inquiry Desk at (866) 512-1800.

Sources of Information

Much of the material contained in this volume is available well before the *SOCC* is published by the Government Printing Office.

Internet

The Wireline Competition Bureau has a home page on the World Wide Web. This home page can be accessed directly at www.fcc.gov/wcb/ through a link from the main FCC home page at www.fcc.gov. The materials available include orders, notices of proposed rulemaking, statistical reports, public notices, news releases, fact sheets, and answers to frequently asked questions (FAQs). The Wireline Competition Bureau Statistical Reports web pages include all of the files contained in the *SOCC* and a variety of other reports that are used in the preparation of the *SOCC*. It can be reached directly at www.fcc.gov/wcb/stats/. The annual carrier submissions that are used in developing many of the tables in this publication can also be found at www.fcc.gov/wcb/armis/.

Duplicating Contractors and Reference Information Center

Several private firms specialize in locating, duplicating, and distributing FCC documents. The Commission's current duplicating contractor is Best Copy and Printing, Inc. Documents may be purchased by calling Best Copy and Printing, Inc., 1-800-378-3160, or via e-mail at FCC@bcpiweb.com. Reports and the summaries used in the preparation of the *SOCC* are also available in the FCC's Reference Information Center, located on the Courtyard Level, 445 12th Street S.W., Washington, D.C.

Coverage

Local Telephone Companies

There are approximately 1,300 companies that have historically provided local telephone service in the United States. These companies, often referred to as incumbent local exchange carriers (ILECs), range in size from rural cooperatives serving fewer than 100 customers to large holding companies serving millions of telephone lines. In most cases, only larger companies (those with more than $125 million in annual revenues in 2004) are required to file information with the FCC, and only telephone companies affiliated with the four largest holding companies are required to file the most extensive information. New telephone service providers, referred to as competitive local exchange carriers (CLECs), and providers of wireless telephone service are not required to file detailed statistical data with the Commission.

In 2004, as shown in the detailed statistics in Table 2.8, there were 28 reporting large ILECs required to file the ARMIS USOA Report 43-02. In addition to these large carriers, 28 mid-sized ILECs report less detailed data in

the ARMIS Annual Summary Report 43-01, and statistical tabulations based on this report are shown in Tables 2.9 through 2.17. While these 56 companies account for more than 90% of the local telephone lines served by ILECs, they do not reflect a complete census of the industry.

Long Distance Companies

Over 900 firms buy access from local telephone companies in order to provide long distance service, and a limited amount of information on the larger long distance companies is contained in various tables throughout the *SOCC*. Among long distance carriers, only AT&T and Alascom, which once were regarded as dominant carriers possessing market power, were ever required to file detailed reports. These data are contained in earlier editions of this publication. The reporting requirements, however, were eliminated when the FCC determined that AT&T was no longer a dominant carrier.

Accounting Standards

A new Uniform System of Accounts (USOA) for the telephone industry became effective at the beginning of 1988. The detailed tables in this report are based on that system. Full Class A reporting requirements are imposed only where the aggregate revenues of an ILEC and its affiliates exceed $7.403 billion. In 2004, only BellSouth, Qwest, SBC, and Verizon remained subject to full Class A reporting requirements. The results for the 28 carriers affiliated with these firms appear in Table 2.8. The amount of state-by-state information varies from company to company. Ameritech, now a subsidiary of SBC, has historically maintained a separate operating company in each state served and consequently files information for each one. In contrast, Qwest, formerly U S WEST, has consolidated its operations into a single company servicing 14 states, for which it files aggregated information.

Where a company's revenues from all its affiliated ILECs total less than $7.403 billion, each of the affiliated ILECs earning revenues over the reporting threshold is eligible for Class B (streamlined) reporting treatment. Summary tabulations for these mid-sized companies are included in Tables 2.9 through 2.17.

The USOA applies to telephone operating companies. It is not designed to capture the activities of parent holding companies or subsidiaries. Where activities have been transferred from telephone companies to holding companies or subsidiaries, the revenues from those activities cease to be reported by the operating companies. For this reason, along with several other differences between financial and regulatory accounting systems, the results contained in reports to the FCC may differ markedly from reports to the Securities and Exchange Commission (SEC).

Timing of the *SOCC*

Most companies report information for the prior calendar year to stockholders and to the SEC by April 1. At the same time, they provide annual reports on their domestic operations to the FCC. The basic raw data are made available to the public as soon as received. This statistical summary is produced after the data have been checked, inquiries on suspect items sent to the carriers, corrected submissions received, and the industry tables compiled. Unlike data for domestic operations, corrected data for international services are typically not received until at least ten months after the end of the year being reported. Summaries of the international data are usually prepared and released by the end of the year.

We have shortened the production cycle in order to reduce the delay in publication and we now complete the production within a six-month timeframe. This has been done by lagging the publication of international data

by one year. Thus, this edition of the *SOCC* contains the international statistics *only through 2003*. International data for 2004 will be available via the Internet, from duplicating contractors, and in the FCC's public reference center, but it will not be published in the *SOCC* until next year.

Other Information Sources

The United States Telecom Association represents most local telephone companies. Like many trade associations, it collects information from each of its members. Annually, it prepares, publishes and sells statistical publications such as *Phone Facts*.

The Cellular Telecommunications & Internet Association (CTIA) represents the wireless industry. Since January 1985, it has conducted a semi-annual wireless survey, which consists of data on the wireless industry including the number of subscribers, revenues, employees, and average local monthly bill.

The Telecommunications Industry Association's (TIA) members consist of manufacturers and suppliers of the products and services used in telecommunications. TIA publishes annually the *Telecommunications Market Review and Forecast*, which provides an overview of the telecommunications industry.

* * * * * * * * * * * *

The 2004/2005 volume of the *Statistics of Communications Common Carriers*, was prepared by John Adesalu and Katie Rangos under the supervision and direction of Alan Feldman. All have worked long and hard to expand and improve the publication.

We invite comments and suggestions for further improvements. For your convenience, the survey form on the following page may be used for your response.

Rodger A. Woock, Chief
Industry Analysis and Technology Division
(202) 418-0940

November 2005

Part 1

General Tables

Statistics of Communications Common Carriers

Table 1.4 – Total Toll Service Revenues by Provider [#]
(Dollar Amounts Shown in Millions)

Company	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
AT&T Companies [1]											
AT&T Communications, Inc.	$37,166	$38,069	$39,264	$39,470	$40,551	$39,680	$37,646	$33,310	$27,094	$22,418	$22,243
Alascom, Inc.	329	325									
Teleport Communications Group, Inc.						284	464	632	437	396	1,376
ACC Long Distance Corp.			118	122	123						
MCI Companies [2]											
MCI - L.D. Operations					22,192	23,431	22,554	21,259	17,659	16,062	11,602
MCI Telecomunications Corp.	11,715	14,617	16,372	17,150							
WorldCom, Inc.	2,221	3,640	4,485	5,897							
Wiltel, Inc.	917										
MFS Intelenet, Inc.		118	122								
Intermedia Communications, Inc.					380	516	444				
Sprint Corporation - Long Distance Division	6,805	7,277	7,944	8,595	7,994	9,708	9,038	8,424	7,077	6,326	5,900
SBC Companies											
SBC Communications, Inc. [ILEC] [3]							2,748	2,420	2,182	2,083	1,692
SBC Long Distance, Inc.*								449	729	1,572	2,892
SNET America, Inc.*				142	162	186	189	177	158	154	143
Verizon Companies											
Bell Atlantic Comm, Inc. d/b/a Verizon Long Dist.*							130	864	1,433	1,802	2,041
Verizon Communications, Inc. [ILEC] [3]							2,278	1,988	1,668	1,629	1,555
Verizon Select Services, Inc.				340	607	834	1,004	509		223	441
NYNEX LD Co. d/b/a Verizon Enter. Solutions *										316	316
Qwest Companies [4]											
Qwest Communications Corp.*					320	517	1,773	2,309	3,202	2,824	3,307
Qwest Communications, Inc. [ILEC] [3]							374	264	175	124	78
Qwest LD Corp.											366
Qwest Interprise America, Inc.											339
LCI Int'l Telecom Corp. d/b/a Qwest Comm. Svcs. *	453	671	1,103	1,001	1,664	1,394	1,271	871			
USLD Communications, Inc.*	136	155	188	241	279	216					
IDT Corporation					376	850	945	1,303	1,532	1,835	2,217
Global Crossing Companies											
Global Crossing Bandwidth, Inc.	144	127		324	539	692	1,555	1,225	1,312	1,565	1,317
Global Crossing Telecommunications, Inc.	568	827	1,119	775	874	874	801	817	786	615	625
Global Crossing North American Networks, Inc.	306	309	323	223			196				
International Exchange Ntwks, Ltd. (IXnet, Inc.)							131				
BellSouth Companies											
BellSouth Long Distance, Inc. *								294	486	928	1,483
BellSouth Telecommunications, Inc. [ILEC] [3]							466	412	341	341	268
WilTel Communications, LLC [5]				227	126	184	413	593	737	1,112	1,302
VarTec Companies											
VarTec Telecom, Inc.	107	125	470	820	836	819	923	947	793	404	c
Excel Telecommunications, Inc.	156	363	1,091	1,179	1,219	942	703	611	427	665	c
eMeritus Communications, Inc.	215	429	379	264	260	169					
Long Distance Wholesale Club			176	121	131						
Broadwing Communications, LLC										310	658
Teleglobe America Inc.					275	557	282	208	269	409	508
ITC^DeltaCom Cos. [6]											
ITC^DeltaCom Communications, Inc					122	172	270	259	311	308	324
Business Telecom, Inc.		115	149	195	212	260	271	286	251	228	177
Citizens Communications Cos. [7]											
Frontier Communications of America, Inc.	133	121									193
Electric Lightwave, Inc.							145	227	180	176	169
General Communication, Inc. [8]	106	120	143	158	175	184	211	238	227	263	283
McLeodUSA Telecommunications Services, Inc.						232	448	463	358	274	225
Evercom Systems, Inc.						205	206	245	239	184	206
Level 3 Communications, LLC								160	131	134	190
ALLTEL Communications, Inc. (ACI)						120	175	174	160	175	188
Primus Telecommunications, Inc.										219	183
Talk America Inc.		180	232	305	426	398	428	249	160	158	176
Americatel Corporation						129	188	269	246	193	139
Norlight Telecommunications, Inc.							119	142	140	141	136
Sum of Above Companies [#]											65,258
Toll Service Revenues of Above Companies											58,537
Incumbent Local Exchange Carriers [8]	13,375	11,332	11,248	10,215	9,429	8,046					
Other Toll Service Providers [9]	9,626	10,709	14,765	13,029	15,783	16,647	20,827	16,702	12,797	12,034	11,561
Total Toll Service Revenues [10]	$84,478	$89,629	$99,691	$100,793	$105,055	$108,246	$109,616	$99,300	$83,697	$78,600	$70,098 p

Note: Total toll service revenues include intrastate, interstate and international toll revenues. Also, some numbers for previous years have been revised for consistency with other reports.

[#] Some of the companies included non toll-related revenues in their annual submissions filed pursuant to section 43.21(c) of the Commission's rules.

* Regional Bell Operating Company's long distance subsidiaries.

c - Confidential

p - preliminary

Statistics of Communications Common Carriers

Notes for Table 1.4.

The revenue information for the larger long distance telephone companies, shown in Table 1.4, is reported annually to the FCC pursuant to 47 CFR 43.21(c) filings. The revenue information for large local exchange telephone companies is based on the annual filings of ARMIS (Automated Reporting Management Information System) Reports 43-02. The Commission also collects revenue information on FCC Form 499-A (Telecommunications Reporting Worksheet) and, in previous years, on FCC Forms 431 (Telecommunications Relay Service Worksheet) and 457 (Universal Service Worksheet). Revenues for carriers that are not subject to the filing requirements under § 43.21(c), or ARMIS Reports, are estimated by the FCC staff based on carriers' filings of the FCC Forms 431, 457, and 499-A.

Company Notes

[1] ACC Long Distance Corp. and Teleport Communications Group merged in April of 1998, and the combined company, Teleport Communications Group, merged with AT&T Communications, Inc., in July of that year. AT&T Communications acquired Alascom, Inc., August 7, 1995 and began filing a consolidated revenue statement in 1996.

[2] On July 21, 2002, WorldCom and substantially all of its U.S. subsidiaries filed voluntary petitions for relief in the U.S. Bankruptcy Court for the Southern District of New York under Chapter 11 of Title 11 of the U.S. Bankruptcy Code. On April 20, 2004, WorldCom emerged from bankruptcy and merged with and into MCI whereby the separate existence of WorldCom ceased and MCI became the surviving company.

[3] For the years 1994 - 1999, the RBOC ILEC toll service revenues are included in total ILEC toll revenues.

[4] Qwest Interprise America, Inc. is a subsidiary for out-of-region DSL (digital subscriber line); and Qwest LD Corp. is a subsidiary for in-region long distance.

[5] In November 2003, WilTel Communications, LLC became a wholly-owned, indirect subsidiary of Leucadia National Corporation. Thus, it no longer files with the SEC (Securities & Exchange Commission) on a stand-alone basis.

[6] In October 2004, ITC^DeltaCom completed its acquisition (begun in July 2003) of BTI Telecom Corp. outstanding common stock.

[7] Frontier was acquired by Citizens Communications Company in June of 2001 and Electric Lightwave on June 20, 2002.

[8] ILECs' totals are shown separately through 1999 because they primarily carried intraLATA calls due, in part, to the restrictions imposed on the RBOCs by the 1984 Divestiture agreement. By 2000 most local exchange customers could presubscribe to any carrier for intraLATA toll service and some RBOCs began to receive section 271 approval to provide interLATA toll services.

[9] Includes wireless toll service revenues reported by wireless carriers, toll service revenues reported by CLECs, and toll service revenues reported by non-RBOC ILECs.

[10] Estimated by the FCC staff.

Docket No. 09538-TP

Qwest Announcement 2-25-08

Exhibit PKL-3

February 25, 2008

Julie Knight
BULLSEYE TELECOM
25900 Greenfield Rd-Suite 330
OAK PARK, MI 48237
USA

To: Julie Knight

Announcement Date:	**February 25, 2008**
Effective Date:	**N/A**
Document Number:	**GNRL.02.25.08.B.003019.QCC_Inter_Switch_Acc_Svc**
Notification Category:	**General Notification**
Subject:	**QCC Intrastate Switched Access Services**

Qwest is requesting your assistance in confirming that the switched access services purchased by Qwest are priced at the most favorable and non-discriminatory rates made available by your company.

As a result of information made available to Qwest Communications Corporation ("QCC") in a recent state commission investigation, we have reason to believe that Bullseye Telecom may have been and may continue to provide intrastate switched access services to AT&T Corp. and its subsidiaries and affiliates ("AT&T"), and perhaps other interexchange carriers, at rates that are lower than those provided under tariffs to QCC for the same services. We are also concerned that you may have granted AT&T and other interexchange carriers and CLECs preferential treatment regarding 800/8YY database queries and reciprocal compensation. We understand that these lower rates have been made available in all states in which you do business pursuant to agreements (rather than tariffs) that have not been filed with the applicable state commissions and/or made available to QCC.

QCC requests that you agree to provide to QCC intrastate switched access services at the lowest rates upon which you provide the same services to AT&T or any other interexchange carrier. The provision of switched access services to QCC at rates, terms and conditions other than as stated in your filed tariffs will require, of course, compliance with all applicable regulatory filing obligations. QCC also requests reimbursement for all past charges that exceeded the lowest, off-tariff rates offered to AT&T or to other interexchange carriers.[2] We would prefer to resolve this issue through business discussions rather than through litigation. Please note that this letter does not relate to or waive other disputes between our companies, and does not resolve whether QCC is required to pay your company for switched access services that are not properly tariffed.

To these ends, QCC requests that you provide copies of any and all agreements you have with AT&T or other interexchange carriers relating to the provisioning of intrastate switched access at off-tariffed rates. To the extent any of your agreements with AT&T contain confidentiality or non-disclosure clauses, AT&T has waived any objections to disclosure of these agreements to Qwest. AT&T's waiver of confidential treatment was specific to the switched access agreements described above, and does not waive any objections it may have to disclosures to persons or entities other than Qwest. AT&T has not waived any objections it may have to

[2] Qwest is not attempting to collect on any debt discharged in bankruptcy or otherwise released.

disclosure of any documentation that is not part of the consideration of the rates, terms and conditions for the provisioning by you of switched access services to AT&T. As agreements that are required to be filed with governing state commissions and made available to other carriers, they are public documents for which there are no grounds for non-disclosure.

We would be happy to discuss this to address any questions you may have. Please contact Ms. Candace Mowers within 14 days of the date of this letter. We ask that your response to Ms. Mowers address the following questions:

INTRASTATE SWITCHED ACCESS

Are you charging, or have you ever charged, AT&T or other IXC intrastate switched access rates at a different or lesser amount than your tariffed rates? If so, please identify the state commission with which the agreement is filed. If it is not filed, please identify the IXCs, date of the agreement, and whether the agreement is currently in effect, or date of termination. Please also provide copies of all such off-tariff agreements.

800/8YY DATABASE QUERIES

Are you charging, or have you ever charged, AT&T or other IXC 800/8YY database query rates different or lesser amounts than your tariffed rates, which were offered to QCC? If so, please identify the commission with which the agreement is filed. If it is not filed, please identify the IXCs, date of the agreement, and whether the agreement is currently in effect, or date of termination. Please also provide copies of all such off-tariff agreements.

RECIPROCAL COMPENSATION

Have you agreed to provide reciprocal compensation to other CLECs in Qwest Corporation's 14-state ILEC region at terms, rates or conditions different than those offered to Qwest Corporation? If so, please identify the state commission with which the agreement is filed, and provide copies of such agreements and an explanation of the rates, terms and conditions.

Ms. Mowers can be reached as follows:

Candace A. Mowers
Qwest Communications Corporations
1801 California St., Suite 4720
Denver, CO 80202-2658
Telephone: (303) 896-9577
Email: candace.mowers@qwest.com

Absent a response from you to Ms. Mowers within 14 days, please be on notice that QCC will proceed to file administrative and judicial actions asserting all remedies as available under governing law. Our strong preference, however, is to reach a business solution to this immediately.

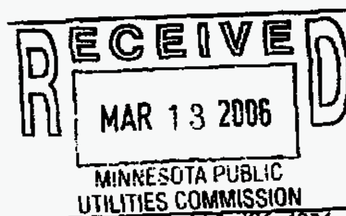
Sincerely,

Charlie Galvin Jr.
Qwest Communications

Docket No. 09538-TP

Minnesota DOC Comments

Exhibit PKL-4



85 7th Place East. Suite 500
St. Paul. Minnesota 55101-2198
651.296.4026 FAX 651.297.1959 TTY 651.297.3067

March 13. 2006

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: Department Reply to Comments Submitted by Other Parties in the Complaint and Request for Commission Action
Docket No. P442,5243,5934,5681,6287,5656,5936,6144.5542,5981,5720/C-05-1282

Dear Dr. Haar:

Enclosed is the Department's reply to the comments submitted by other parties on February 21. 2006 in response to the Department Complaint and Request for Commission Action filed with the Commission on December 30, 2005.

Respectfully submitted,

GREGORY J. DOYLE
Manager. Telecommunications

GJD/DD/sm
Attachment

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. P442,5243,5934,5681,6287,5656,5936,6144,5542,5981,
5720/C-05-1282

I. BACKGROUND

On December 30, 2005, the Minnesota Department of Commerce (Department) filed a Complaint and Request for Commission Action with the Minnesota Public Utilities Commission (Commission) describing several agreements for the provision of switched access services at rates that were different than the tariffed rates of the CLECs offering the service. These agreements involved the following carriers: Desktop Media, Inc., Granite Telecommunications, LLC, OrbitCom, Inc., New Access Communications, LLC, Choicetel Communications, LLC, Digital Telecommunications, Inc., Mainstreet Communications, LLC, Tekstar Communications, Inc., VAL-ED Joint Venture, LLP d/b/a 702 Communications, and Time Warner Telecom of Minnesota, LLC (the Affected CLECs), and AT&T Communications of the Midwest, Inc. (AT&T).

On January 24, 2006, the Department filed Additional Comments recommending dismissal of the complaint against Mainstreet Communications, LLC and VAL-ED Joint Venture, LLP d/b/a 702 Communications.

On February 21, 2006, Reply Comments were filed by AT&T and Granite Telecommunications, LLC.

II. DEPARTMENT REPLY COMMENTS

The Department stands by its December 30, 2005 and January 24, 2006 complaint and comments, but addresses some of the issues raised by the other parties in comments filed on February 21, 2006. The Department does not attempt to address each of the issues raised by other parties unless further clarification of the Department's position is helpful or a new issue was raised.

A. THE AFFECTED CARRIERS HAVE NOT OPERATED IN ACCORDANCE WITH THEIR EXISTING TARIFFS

Minnesota law requires all regulated telephone and telecommunications carriers, including competitive local exchange carriers (CLECs) and interexchange carriers, to operate in accordance with their tariffs and in accordance with the Commission rules and orders. At pages 3 through 6 of its February 21, 2006 comments, Granite recognizes that CLECs must file tariffs pursuant to Minn. Rules pt. 7812.2210, subp. 2 and must operate in accordance with the applicable tariffs, rules and orders.

Minn. Stat. Section 237.09, subd. 1 is an anti-discrimination statute that states that a telephone company may not "***collect, or receive***" from any purchaser, any greater or less compensation for an intrastate service than it "***collects, or receives***" from any other purchaser of the service. Under this section of the law, CLECs have a duty to supply intrastate switched access service at a non-discriminatory rate, and interexchange carriers (IXCs) must pay for switched access service at that rate.[1] Any IXC who disputes the terms of service as provided pursuant to the rules, orders, and tariffs, may seek resolution of the dispute by filing a complaint with the Commission. While IXCs may have no statutory directive to ensure that CLECs make appropriate tariff filings, the Affected CLECs did in fact bill their tariffed rates to AT&T prior to AT&T withholding payment in order to obtain a lower rate from the Affected CLECs.

Granite's comments of February 21, 2006 provide a description of the impact of AT&T's refusal to pay tariffed access rates. AT&T has not denied that it refused to pay (and continues to refuse to pay) the Affected CLECs' tariffed access rates. This refusal to pay lawful tariffed access rates set the stage for AT&T eventually forming the unfiled agreements that are described in the Department's comments of December 30, 2005.

Granite notes at page 4 of its February 21, 2006 comments: "...By design, AT&T leveraged its considerable market power in the long-distance market to coerce Granite and many other CLECs into signing an unfiled switched access agreement. To accomplish its scheme, AT&T withheld from Granite switched access payments pursuant to Granite's lawfully filed tariffs. In addition, AT&T threatened costly litigation if Granite did not agree to enter into the unfiled agreement. AT&T's conduct left Granite in the untenable position of accepting the terms of the unfiled agreement or losing the considerable switched access charges that AT&T owed Granite under its lawful tariffs that AT&T refused to pay." Commission enforcement of state tariffs is needed so there is no incentive for interexchange carriers to withhold payment of access charges and demand similar illegal preferential contract rates in the future.

---

[1] Pursuant to Minn. Stat. **§237.035(e)** a telecommunications carrier's local service is subject to chapter 237 except that: (1) a telecommunications carrier is not subject to rate-of-return or earnings investigations under §§237.075 or 237.081; and (2) a telecommunications carrier is not subject to §237.22.

B. INDIVIDUAL CASE BASED PRICING IS ONLY PERMITTED IF FILED AND APPROVED BY THE COMMISSION

CLECs have a number of legal duties set forth in Minn. Rules pt. 7812.2210. Among those duties, is the duty to maintain a comprehensive tariff of regulated local services: "For each local service offering, a CLEC shall file with the commission a tariff that contains the rules, rates, and classifications used by the CLEC in the conduct of its local service business, including limitations on liability. The tariff must be consistent with any terms and conditions in the CLEC's certificate of authority."

AT&T hypothesizes at page 2 of its February 21, 2006 comments that the contracts could have been permitted by law because "under the Commission's rules, individualized contracts may contain volume discounts — among other things — that justify differing treatment. AT&T's contracts with the Affected CLECs are in the nature of such contracts." First, the Department respectfully submits that one very large carrier's refusal to pay the lawful rate in duly filed tariffs of dozens of small CLECs and the threat of waging litigation against them does not constitute adequate justification, under Minn. Rules pt. 7812.2210, to obtain unique prices.

Second, AT&T has offered no explanation showing that a so-called "volume" discount to a large carrier could be reasonable, even if it were tariffed. To the contrary, AT&T is well known for its arguments that access services are priced too high in relationship to cost. If AT&T is correct, there is no reason for AT&T to receive a preferential rate, creating an uneven playing field in both the IXC and CLEC markets, and causing its CLEC and IXC competitors to attempt to survive with lower margins. Further, AT&T is among the largest interexchange carriers in Minnesota and other companies are forced to follow AT&T's prices if they wish to remain competitive. If AT&T has lower costs through the preferential contract rates, over time AT&T would be able to reduce prices and squeeze its CLEC and IXC competitors out of the marketplace.

Third, for a "volume discount" rate to be available, it must first be duly filed under 7812.2210, subp. 2., which includes filing the tariff with the Department of Commerce and the Office of the Attorney General. AT&T's special deals in this case, like the dozen or so special pricing deals demanded by AT&T in the Commission's P442 et al/C-04-235 docket were not filed, but were instead concealed from all state regulators and from AT&T's IXC and LEC competitors.

Fourth, the Commission recently found in its February 8, 2006 Order in Docket No. P442/C-05-1842, pages 2 and 3, that AT&T was and is obligated to pay the duly tariffed access rates of LECs.[2]

C. THE TERMS OF THE AGREEMENT HINDERED DISCLOSURE OF THE AGREEMENTS TO THE PERTINENT REGULATORY AGENCIES

The circumstances that lead to the formation of the agreements and the confidentiality provisions in the agreements, protected the agreements from regulatory review until several years after the agreements went into effect. The Complaint of December 30, 2005 suggests that the terms of the agreements provided for disclosure if a regulatory agency specifically requested a given agreement. However, none of the agreements provided for voluntary disclosure of the actual agreement or even disclosure of the mere existence of the agreement unless the regulatory agency made a pointed request for a given agreement.

At page 2 of AT&T's February 21, 2006 Answer, AT&T states:

> the contracts between AT&T and the Affected CLECs do not contain provisions that require secrecy or in any way interfere with the Affected CLECs ability to comply with any legal obligation that may have existed under state law or Commission rules. The contracts expressly obligate the Affected CLECs to take whatever steps necessary to obtain any required regulatory authorizations to offer the service in accordance with the contracts. The confidentiality provisions in the contracts merely required the Affected CLECs to give AT&T prior notice of disclosure so that AT&T could seek confidential protection of the information if it deemed it necessary.

While AT&T is down playing the secrecy that it required of the CLECs, to this day, to the best of the Department's knowledge, none of the agreements have been disclosed by AT&T to a single other carrier. Thus, IXCs remain unaware of the unique rates and terms that AT&T was and is paying for access services from the Affected CLECs. CLECs that entered into these agreements

[2] In issuing its February 8, 2006 Order Finding Failure to Pay Tariffed Rate, Requiring Filing, and Notice and Order for Hearing, the Commission made the following statement: The filed rate doctrine is the longstanding regulatory principle that common carriers are bound by the terms of their tariffs; they cannot make side agreements with individual customers, and any side agreements they do make will be stricken. . . Although state and federal policy initiatives promoting competition in the local telecommunications market now give carriers unprecedented flexibility in pricing their services, the filed rate doctrine remains intact. No matter how flexible pricing decisions may become, prices and rates must be filed with the Commission and charged uniformly throughout carriers' service area, including prices and rates subject to adjustment in response to unique cost, geographic, or market factors or unique customer characteristics. . . Further, AT&T had a duty to promptly pay all access charges incurred. Both the seamless telecommunications marketplace that state and federal policymakers seek, require the prompt satisfaction of inter-carrier financial obligations. Failing to promptly satisfy these obligations threatens the integrity of the network by creating grounds for disconnection and jeopardizes competition by depriving unpaid carriers of the funds they need to stay in business. For these reasons, the Commission has long viewed prompt payment of access charges as an integral part of providing adequate service."

with AT&T remain unaware of the rates and terms of other CLEC/AT&T agreements. CLECs and LECs that have remained in compliance with the law and have not entered into secret agreements remain unaware of the rates and terms of the agreements. If in fact the Department is incorrect about the shroud of secrecy that AT&T attempted to maintain surrounding each and every agreement, then it is time for AT&T to step forward and agree that the agreements can be made open for inspection by the public.

Through these comments the Department wishes to place AT&T on notice that it should be prepared to declare the agreements public in the presence of the Commission, if it has not done so prior to the hearing.

III. DEPARTMENT RECOMMENDATION

The Department continues to recommend that the Commission grant the relief requested by the Department in its December 30, 2005, Complaint and Request for Commission Action. It should be noted that the Department is attempting to negotiate a settlement agreement with the parties, which will be filed in the near future if negotiations are successful. The Department requests that the Commission proceed as it normally would to schedule the hearing in this matter, and that there should be no delay due to the possibility of a settlement.

/sm

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, **Linda Chavez,** on the **13th** day of **March, 2006**, served the attached **Minnesota Department of Commerce – REPLY**

Docket Number(s): **P442,5243,5934,5681,6287,5656,5936,6144,5542,5981/C-05-1282**

X by depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid.

X by personal service

by express mail

by delivery service

to all persons at the addresses indicated below &/or on the attached list:

P999/C-05-1282

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Minneapolis MN 55401

Docket No. 09538-TP

AT&T Public Comments (2004)

Exhibit PKL-5

RECEIVED

AUG 1 9 2004

MN PUBLIC UTILITIES COMMISSION

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Senior Attorney
Law & Government Affairs

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August 18, 2004

Via Overnight Mail

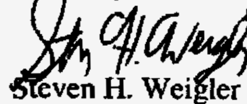
Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Re: In the Matter of Negotiated Contracts for the Provision of Switched Access Services, Docket No. P-422,5798,5340,5826,437,5643,443,5323,5668, 466/C-04-235.

Dear Dr. Haar:

Enclosed for filing are the original and fifteen copies of AT&T's Comments, Motion to Dismiss and Motion for Summary Judgment in this matter.

Sincerely,



Steven H. Weigler

cc: Service List

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STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts	)	Docket No. P-442,5798, 5340,5826
for Switched Access Services	)	5025,5643,443,5323,5668,466/
	)	C-04-235

AT&T'S COMMENTS, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits Comments regarding the Minnesota Department of Commerce's "Complaint and Request for Commission Action" (hereinafter "Complaint") in the above styled action. AT&T submits these comments to demonstrate that the Minnesota Department of Commerce ("MDOC" or "Department") is incorrect on many of the factual and legal assertions it makes in its Complaint. Accordingly, when the facts and relevant law are examined in proper context, it is clear that AT&T should be dismissed from this Complaint as a party. However, as further articulated below, AT&T would seek non-party participant status in order to protect its legal interests essentially because AT&T has determined that it will not be protected by the other parties in this proceeding.

I. INTRODUCTION

In the fall of 2003, the Department made a formal request of AT&T to supply agreements that AT&T has with competitive local exchange carriers ("CLEC(s)") that provide AT&T with access services within the state of Minnesota at other than tariffed

rates[1]. In AT&T's annual report to the Department for 2002, AT&T had stated that it had such agreements and had provided a list of the CLEC providers from which it was purchasing access services in Minnesota pursuant to those agreements. AT&T fully complied with the MDOC Information Requests to produce the agreements. AT&T also provided the CLEC providers with which AT&T had entered into the agreements the pre-disclosure notice that the agreements required.

In its Complaint, the Department refers to agreements that AT&T has with six CLEC providers of switched access services: Arizona Dialtone ("AZD"), Eschelon Telecom ("Eschelon"), Focal Communications Corp. ("Focal"), Integra Telecom ("Integra"), McLeod USA Inc. ("McLeod"), and NorthStar Access ("NorthStar").[2] The agreements all follow the same basic form, with modifications specific to the business relationship between AT&T and the individual CLEC providers. In the past four years or so, AT&T has entered into hundreds of agreements based on the same form with CLEC providers of switched access services throughout the United States. AT&T undertook this substantial contracting effort because CLECs were charging interexchange carriers ("IXC(s)"), including AT&T, exorbitant rates for switched access services.[3] Often, both

[1] *State of Minnesota Department of Commerce Utility Information Request 7 Response* (dated October 17, 2003); Docket Number: Telecommunications Carrier Annual Report 2002 (hereinafter referred to as "Information Requests").
[2]Most of the agreements have been in effect for years. The Effective Dates of the agreements are as follows: AZD agreement: January 21, 2003; Eschelon agreement: May 1, 2000; Focal agreement: December 25, 2001; Integra agreement: July 1, 2001; McLeod agreement: July 1, 2001; and NorthStar agreement: September 11, 2002. In fact, AT&T had difficulty finding employees with knowledge of the agreements, given the considerable passage of time since their negotiation.
[3] On this point, AT&T is in agreement with the Department which states, at page 2 of its Complaint, that "Since [IXCs] are captive customers of the local service providers for switched access services, and the rate levels of CLECs receive little regulatory oversight, the switched access rates of CLECs are often higher than the switched access rates of the incumbent local exchange carrier ["ILEC"]".

the CLEC providers' interstate *and* intrastate rates (in states that did not have mandated access rates) were exorbitant.[4]

In the agreements with the six CLEC providers specified above, AT&T is solely and exclusively a customer purchasing switched access services and not a provider.

Each agreement has a section entitled "[CLEC Provider] Regulatory Approvals and Tariffs" in which the CLEC provider warranted "that it has and will maintain, at its own expense, all regulatory certifications, authorizations, and permits needed to offer the Switched Access Service described in this Agreement." All but one of the agreements also include language explicitly anticipating the CLEC provider's filing of tariffs; for example, " [CLEC provider] will not file any tariff or tariff revisions that alter the terms and conditions, or pricing of switched access as specified in this Agreement," unless required to do so.

As discussed in detail in Section II below, the Regulatory Approvals and Tariffs section in each of the agreements effectively memorialized an obligation that both parties knew belonged and continues to belong only to the CLEC providers; that is, the filing of terms of the CLEC provider's service pursuant to applicable law. Although the agreements also contain broad mutual protection for each party's confidential and proprietary information, the CLEC providers would not have been prohibited from adhering to applicable regulatory obligations, if any.

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[4] It was not until the middle of 2001 that the Federal Communications Commission ("FCC") imposed a benchmark rate above which most CLECs were not permitted to tariff interstate switched access rates. *FCC's Seventh Report and Order and Further Notice of Proposed Rulemaking re Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Docket 96-262, Released April 27, 2001. The benchmark rate established in that Order is a rate that declined over the past 3 years until now, when the rate most CLECs may charge IXCs may be no greater than the rate the competing ILEC would charge the IXC.

The AZD and Focal agreements included the settlement of formal actions and the Eschelon, Integra. McLeod and NorthStar agreements included the settlement of informal disputes. Thus, AT&T agreed to pay each CLEC no less than a six- or seven-figure settlement amount before any of the individual agreements went into effect. The agreements also include comprehensive mutual releases generally of all issues arising or that could have arisen as of an agreement's effective date[5].

Finally, as discussed in greater detail in Section III, NorthStar's position (as articulated by the Department in its Complaint) is correct, at least as it applies to AT&T: NorthStar does not have agreements with IXCs to charge untariffed rates for the provision of intrastate access services.[6] Among other reasons, because the NorthStar agreement does not contain intrastate access rates, this Commission does not have jurisdiction over that agreement. AT&T provides a few key facts to put the NorthStar agreement in context in order to allay any regulatory concerns. *See* Exhibit A, Affidavit of Debbie H. Joyce.

With these facts in mind, AT&T's legal analysis will establish that the Department's Complaint, as related to AT&T, is meritless as a matter of law and should be dismissed as a matter of law.

[5] The Eschelon agreement, the oldest agreement of the six by more than a year, is the sole exception.
[6] *See* Complaint at page 12.

II. THE DEPARTMENT FAILS TO ESTABLISH VALID CLAIMS AGAINST AT&T AS A MATTER OF LAW

As a threshold matter, AT&T submits that the Commission's seven year-old comprehensive access proceeding would be the appropriate forum to address the Department's policy position on access rather than the instant matter.[7] Furthermore, in this docket, AT&T is simply the customer in the above-referenced agreements with the CLEC providers. Finally, the Department's summation of why these settlements occurred and its perspective on the parties positions,[8] besides being extremely oversimplified and factually suspect, has no relevance under Minnesota law as there is an actual contract that spells out, in unambiguous terms the intent, terms and conditions of the parties' agreements. We develop these points more fully below.

In all events, the settlement agreements at issue were the "result of a compromise" between the parties and constitute "full and final satisfaction of the dispute."[9] Minnesota law is clear that compromise and settlement of a lawsuit is contractual in nature. *Ryan v. Ryan*, 292 Minn. 52, 55, 193, 295, 297, 193 N.W.2d 295 (1971).[10] The only reasons to invalidate a settlement agreement/contract is because of "**mutual** mistake, fraud or misrepresentation," *Ryan v. Ryan*, 292 Minn. 52, 55, 193, 295, 297, 193 N.W.2d 295 (1971)(emphasis added), *Sorenson v. Coast-to-Coast Stores, Inc.*, 353 666, 669-70 (Minn. App. 1984), or if the contracts are illegal. *Barna, Guzy, & Steffen, Ltd. v. Beans*, 541 N.W.2d 354, 356 (MN. App. 1995). No such reasons exist in the instant circumstance.

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[7] *In the Matter of a Commission Investigation of Intrastate Access Charge Reform*, Docket No. P999/CI-98-674.
[8] *See* Department's Complaint at p.12-14.
[9] *See* e.g. McLeod Agreement, Department's Exhibit ML-1 at A.2 and 3.
[10] Although the Eschelon agreement does not contain these terms. the result is the same under law.

Because the issues the Department is pursuing relate to the existence and interpretation of a contract, this matter must be decided as a matter of law, ***Knudsen v.*** *Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (MN App. 2004), looking exclusively at the four corners of the instrument(s) in question. *Id.* Accordingly, the unsubstantiated assertions in the Department's Complaint such as:

1) "The switched access agreements appear to have been formed as a means for the CLECs to obtain some payment from the interexchange carrier, which, in some cases, refused to pay the tariffed rates of the CLECs.[11]
2) "CLECs felt that resolving their billing dispute by engaging in contracts to charge lower access rates was the best way to avoid litigation and resume some cash flow."[12]
3) "Interexchange Carriers believed the CLECs were taking advantage of their captive status with high access rates"[13]
4) "...large interexchange carriers are able to exert market power to receive lower switched access rates."[14]

are irrelevant in the instant dispute (even though AT&T may agree with some of the characterizations)[15] because none of these facts are found in the four corners of the settlement agreement. *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (MN App. 2004).

Furthermore, as a practical matter, there is extreme peril if this Commission decided to look outside the four corners of the settlement agreement/contract, essentially reviewing the parties' positions *de novo*. For example, as Exhibit B attached demonstrates, Eschelon would dispense with the exchange the parties bargained for -- a commercial bargain that has lasted and worked for both parties ***for more than four years***

[11] Complaint at p.12.
[12] *Id.* at p.14.
[13] *Id.* at p.13.
[14] *Id.*
[15] AT&T notes that this Commission is looking at these issues in the generic access reform docket which has been pending in front of this Commission for seven years. *See* Docket No. P999/CI-98-674.

-- in an attempt to gain more revenue from AT&T in terms of increased retroactive access rates where AT&T is wholly without fault.

A real question exists, furthermore, as to whether this Commission would have the power to, or would want to engage in precedent where, it sought to collect past due amounts from AT&T, which is the customer under the Eschelon and the other five agreements with the CLEC providers. When the FCC was presented with similar facts, it found that it did not have the power to collect past amounts due from a customer. See *Tel-Central v. United Tel.Co.*, File No. E-87-59, Memorandum Opinion and Order, 4 FCC Rcd 8338 (1988) which states: "the complaint procedures make a carrier liable to a customer for damages that result from the carrier's unlawful actions or omissions...However, this statutory scheme does not constitute the Commission as a collection agent for carriers with respect to unpaid tariff charges. In the normal situation if the carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action **in contract** to compel payment." (Emphasis added.)

As expressed above, this Commission should summarily dispose of this Complaint as a matter of law because the Department cannot establish that the contract terms are void or voidable. No party, including the Department, has raised that there has been mutual mistake, fraud or misrepresentation that would invalidate a contract thus permitting the Department or any other party to restructure, reinterpret or suppose the intent behind a settlement agreement. *See e.g., TNT Properties, LTD v. Tri-Star Developers LCC*, 677 N.W.2d 94, 98-102 Minn. App. 2004). As such the terms of the agreements remain.

More importantly, in looking at the four corners of the settlement agreements at issue, no terms make those settlement agreements illegal or suggest in any way that AT&T violated its Certificate of Authority or any relevant law. In order to establish this point, AT&T will compare the specific allegations made by the Department with the actual terms of the contract.

A. AT&T as an IXC Customer Had No Obligation Under Minnesota Law or Rule to File Tariffs or Assure that Tariffs were Filed

AT&T, as the customer of access service, had no obligation to submit tariffs to the Commission for services that it bought. That obligation, if it indeed exists, falls exclusively on the provider in question. *See e.g., Minn. Stat. § 237.07.* The Department fails to acknowledge that AT&T, as the purchaser of access services, is completely distinguishable under law from the CLEC provider of service. Without specific citation, the Department claims that "Minnesota law requires all regulated telephone and telecommunication carriers, including CLECs and interexchange carriers, to operate in accordance with their tariffs and accordance with Commission rules and Orders."[16] The Department then cites MN Stat. §237.121(a)(3) which states "(a) telephone company or telecommunications carrier may not…fail to **provide** a service, product or facility to a telephone company or telecommunications carrier in accordance with the applicable tariffs, price lists, **or** contracts and with the Commissions rules and orders." (Emphasis added). As the Commission can see, the statutory responsibility under law falls exclusively to the *provider* of services. The Department further cites *Minn. Rule* 7810.8400 which states "(a) telephone company shall keep on file with the department its tariffs and price lists showing or referencing specific rates, tolls, rentals, and other

[16] Complaint at p.9.

charges **for the services offered by it** either alone or jointly and concurrently with other telephone companies." (Emphasis added). Again, the rule applies to the *provider* of services. As the very rules that the Department relies on are inapplicable to AT&T as a customer, AT&T cannot be found to have violated any law or Commission rules in this matter.

Furthermore, the four corners of the settlement agreements in question alone (entirely apart from the Department's extrinsic innuendo), mirror Minnesota Statute and Rule requirements by assigning the obligation to file such tariffs and otherwise adhere to legal requirements to the CLECs and not AT&T. The relevant sections of the settlement agreements all include the following statement:

> [CLEC provider] warrants that it has and will maintain, at its own expense, all regulatory certifications, authorizations, and permits needed to offer the Switched Access Service described in this Agreement.

Furthermore, all but one of the agreements include language explicitly anticipating the CLEC provider's filing of tariffs; for example, (the CLEC) "will not file any tariff or tariff revisions that alter the terms and conditions or pricing of switched access as specified in this Agreement". In summary, the settlement agreements each specifically acknowledge what is clear under Minnesota law: that the obligation is on the provider of service to comply with the provisions of Minnesota laws and rules in providing its services not the purchaser. Accordingly, AT&T as the purchaser of these services should be dismissed from this proceeding as a matter of law.

B. AT&T Has Not Violated "Conditions Associated With" Its Certificate of Authority

Unable to establish that AT&T violated any specific Minnesota rule or statute, the Department recommends that this Commission find that AT&T (and other IXCs) violated conditions associated with its certificate of authority.[17]

The Department cites no legal authority for its position that AT&T would have to assure that it was purchasing only tariffed services to be in compliance with its certificate of authority.[18] A review of AT&T's certificate of authority conclusively shows that it contains no conditions that prohibit it from a negotiating an access rate. AT&T has attached its certificate of authority, which contains no terms about purchasing access services as an interexchange provider at set tariffed rates.[19]

To the extent that the Department claims that the violations were not in the *actual* certificates of authority, but in the conditions associated with the Commission's October 15, 1985 Order in Docket No. P442, 443, 444, 421, 433/NA-84-212 [20] such claims are factually incorrect. Neither of the Orders cited in the Department's Complaint contain such a condition, nor does the original Order granting AT&T Interexchange authority contain any condition related to assuring that AT&T was buying tariffed services.

- Pages 27-28 of the October 15, 1985 Findings of Fact, Conclusions of Law and Order listed the ten conditions for expanding AT&T's certificate to include intraLATA toll services. While some conditions concern the rates AT&T may charge as a provider, none of the conditions concern "payment of switched access services at tariffed rates." Thus, Item 2 states "AT&T/MW is hereby granted an extension of its existing certificate of public convenience and necessity in such a manner as to authorize it to provide intraLATA telecommunications services to

[17] *See* Complaint at pp. 18-19.
[18] Instead, as discussed above, the Department cites Minn. Stat. §237.121(a)(3) and Minn. Rule 7810.8400. The Department's proposition of law is related to the *provider* of service, and not AT&T, which is the *purchaser* of services in these agreements.
[19] *See* Exhibit C.
[20] Department's Complaint at p.14.

customers within Minnesota in addition to its present authority to provide interLATA telecommunications subject to all requirements of this order including a requirement to submit an annual report of its Minnesota intrastate operations and financial results in accordance with the Uniform System of Accounts and as specified by the DPS." Item 5 states "Changes in intrastate toll rates sought by any interexchange carrier, including AT&T/MW and NWB, shall be evaluated and considered in accordance with the provisions of this Order." Item 6 states "No interexchange carrier, including AT&T/MW and NWB, shall implement rates or tariffs that deaverage toll rates based on the basis of geographic location or that discriminate in the terms and conditions under which services will be made available on the basis of geographic location without the express approval of the Commission."

- The November 2, 1987 85-582 docket is void of the condition that requires AT&T as the purchaser of services to assure that rates that are paid are tariffed. See Ordering paragraphs 1 through 28 on pages 58 through 63.
- Finally the Order Granting Certificate of Public Convenience and Necessity in Docket P-442/M-83-640 issued on December 23, 1983 which grants AT&T's certificate of Public Convenience and Necessity to provide the intrastate, interLATA toll service contains no condition on paying tariffed rates. See Order at page 3 for the six ordering paragraphs.

Furthermore, even if AT&T's certificate of authority contained terms requiring AT&T to tariff terms as a purchaser of access services, as discussed in Section II, A. above. there are specific terms in each of the agreements that addressed each CLEC provider's responsibility to obtain "all regulatory certifications, authorizations, and permits needed to offer these switched access services." Accordingly, the four corners of the settlement agreements acknowledged the responsibility to comply with regulatory requirements, and just as Minnesota Statutes and Rules do, place that responsibility on the CLEC provider of services to comply with any tariffing requirements, not the IXC purchaser.

Finally even if the statute, rules, certificates of authority, and relevant settlement agreements were not unanimous that customers of services have no responsibility to file tariffs, as a policy matter, it would be inappropriate to impose on customers any obligation to assure that the bargained-for rate of services that they were buying were

properly tariffed by the provider of those services.[21] Quite simply, it would turn the customers' simple purchase decision into a decision about the regulatory compliance of the provider.

In sum, AT&T did not violate any conditions associated with its certificate of authority.

C. The Settlement Agreements in Question Did Not Contain Discriminatory Non-Disclosure Terms

The Department claims that "(t)he confidentiality clauses in [the] agreements [in question] prevented regulatory agencies such as the Department and the Commission from reviewing the agreements for compliance with Minnesota law and the Commission's rules and Orders." Such a position is not supported by the only relevant evidence: the four corners of the settlement agreements themselves.

Confidentiality provisions are commonplace in settlement agreements and adjudicative bodies should take proper steps to safeguard the confidential nature of settlement terms. *See e.g., In re: L-Tryptophan Cases*, 518 N.W.2d 616, 622 (MN App. 1994). As such, there is nothing wrong with the parties making the settlement terms confidential as long as there were provisions that would allow the parties to meet the various regulatory and legal requirements, if applicable. The relevant provisions of the AZD, Focal, Integra, and NorthStar agreements contain the following language:

> For purposes of this agreement, "Proprietary Information" means information that is marked or otherwise specifically identified in writing as proprietary, confidential or trade secret. Proprietary Information includes, but is not limited to, this Agreement, the payments to [CLEC Provider] by

[21] AT&T notes that the Department did not take this position in the Qwest Secret Deals case where the responsibility to file agreements pursuant to 42 U.S.C. 252 was far more straightforward. The Department filed a complaint against the seller of such services, Qwest, and not against the purchasers including Eschelon and McLeod.

> AT&T and volume of traffic between the parties. Notwithstanding the forgoing, either party may advise a state or federal regulatory body, including without limitation the FCC, that it has reached a resolution of the Dispute, although neither party may disclose the terms of the Agreement except as expressly provided for elsewhere in this Agreement.
>
> Each party will hold in confidence Proprietary Information disclosed by the other party except if it (1) was previously known by the receiving party free from any obligation to keep it confidential, (2) is independently developed by the receiving party, (3) becomes publicly available, or (4) is disclosed to the receiving party by a third party without breach of any confidentiality obligation.
>
> If either party is compelled to disclose Proprietary Information in judicial or administrative proceedings, such party will give the other party the opportunity, in advance of such disclosure, to seek protective arrangements and will cooperate with the other party in that regard.[22]

The Eschelon and McLeod agreements contain the foregoing language (except for a sentence from the first paragraph)[23], as follows: "Notwithstanding the forgoing, either party may advise a state or federal regulatory body, including without limitation the FCC, that it has reached a resolution of the Dispute, although neither party may disclose the terms of the Agreement except as expressly provided for elsewhere in this Agreement."

As discussed above, the Regulatory Approvals and Tariffs Section in each of the agreements – in which the CLEC providers warranted that they have "and will maintain…all regulatory certifications, authorizations, and permits necessary to offer the Switched Access Service" described in each agreement[24] -- effectively memorialized an obligation belonging to the CLEC providers: the filing of terms of each CLEC provider's

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[22] Department's Exhibit AD-3 at B11.

[23] The Eschelon agreement also contains some terms in the section on confidentiality and proprietary information relating to the treatment of such information in the event that Eschelon becomes a publicly-held company or undergoes a "private placement or other financial arrangement", which are not relevant here.

[24] *See e.g., id.*, at B3.

service pursuant to applicable law. Accordingly, AT&T would have no reason to assume that the CLEC providers would not have either tariffed the rates or more likely sought special pricing consideration. The provisions in the agreements regarding the treatment of confidential and proprietary information would not have stood in the way of the CLEC providers' compliance with those obligations. AT&T's responses to the Department's Information Requests demonstrate how the provision related to the treatment of confidential and proprietary information operate (*See* Statement of Facts). Quite simply, AT&T merely first notified the CLEC providers that AT&T intended to produce the agreements in response to the Information Requests, and then AT&T produced the agreements[25]. Furthermore, four of the agreements contain the statement that each party "may disclose the terms of this Agreement . . . as expressly provided for elsewhere in this Agreement". To the extent, then, that the CLEC providers have or had obligations to file terms of their agreements with state regulatory bodies, the Regulatory Approvals and Tariffs section of each agreement provides a permitted exception to the general prohibition against disclosure of confidential and proprietary information. Thus, if the CLECs believed the access rates needed to be tariffed or otherwise reviewed, they simply needed to "give [AT&T] the opportunity in the advance of such disclosure, to seek protective agreements"[26] and then tariff the terms. That notification process was precisely what AT&T engaged in, without objection of the CLECs, in an extremely

[25] We note that all of the agreements contain the language stating that "If either party is compelled to disclose Proprietary Information in judicial or administrative proceedings, such party will give the other party the opportunity, in advance of such disclosure, to seek protective arrangements and will cooperate with the other party in that regard."
[26] *See* e.g., Department's Exhibit AD-3 at B11(c).

straightforward manner.[27]

The Department also argues that the AT&T/CLEC negotiated agreements "foreclosed the possibility that other interexchange carriers would receive the rates or terms available to AT&T, MCI WorldCom, Sprint and Global Crossing [and that the] impact on the marketplace is that the interexchange carrier with an agreement has an unfair competitive advantage over other interexchange carriers."[28] The Department offers no facts to support these vague, conclusory allegations, and the Commission should wholly disregard them.

Furthermore, if the Department seeks to rely on language in certain agreements stating that (the CLEC) "will not file any tariff or tariff revisions that alter the terms and conditions or pricing of this agreement,"[29] such language merely requires the CLEC not to alter the terms of the agreement *through* a tariff. It does not preclude other IXCs from receiving the same terms and conditions that AT&T received; rather it simply ensures that the CLEC will not undermine the mutual agreement through unilateral use of the tariffing process.

Again, in looking at the four corners of the documents in question, there is no language that suggests discriminatory non-disclosure terms. Accordingly, the Department's claim that "(t)he confidentiality clauses in these agreements prevented regulatory agencies such as the Department and the Commission from reviewing the agreements for compliance with Minnesota law and the Commission's rules and Orders,

[27] Furthermore, in reviewing the terms of the agreements in question, it is debatable if the access rates that AT&T was paying to the CLECs were even confidential as the terms regarding confidentiality did not specifically include the pricing. *See e.g., Exhibit AD-3* at B11(A) indicating proprietary information includes, but is not limited to, this Agreement, the payments to (the CLEC) by AT&T and the volume of traffic between the parties.
[28] Complaint at p.12.
[29] *See* Department's Exhibit AD-3 at 3.

and foreclosed the possibility that other interexchange carriers would receive the rates or terms available to AT&T...."[30] is groundless.

In summary, there were no terms in any of the agreements that violated Minnesota law and this Commission should dismiss AT&T from this proceeding as a matter of law.

III. THE COMMISSION SHOULD DISMISS THE NORTHSTAR PIU CLAIM OR GRANT AT&T SUMMARY JUDGMENT

Without any discussion or legal analysis, the Department seeks to have this Commission "(f)ind that the percentage interstate use in the agreement between NorthStar Access and AT&T should be the percentage used prior to entry into the contract, since the intent of the change is to evade interstate access charges."[31] As established below, the issue of what percentage of interstate usage ("PIU") factor is appropriate is determined by application of the federal tariff; thus, this question is not properly before this Commission. In all events, even if this matter were properly before this Commission, as established below, the Department brings forward no evidence for the claim that the parties' "intent" in using a 100% PIU was to "evade interstate access charges". In fact, all evidence is contrary to that proposition. For those reasons, summary judgment would be appropriate.

Summary judgment is appropriate when the pleadings, affidavits, and other documents before the court show that there is no genuine issue of material fact and judgment is appropriate as a matter of law. *Jorgensen v. Knudson*, 662 N.W.2d 893, 897 (Minn. 2003); *Mon-Ray v. Granite Re, Inc.* 677 N.W.2d 434, 439 (MN App. 2004). As discussed in greater detail below, based on the sworn affidavits of both NorthStar and

[30] Department's Complaint at p.12.
[31] Department's Complaint at p.15.

AT&T witnesses, the Department cannot bring forward any *genuine* issue of material fact, and based on FCC rules and case law, summary judgment is appropriate as a matter of law.

As discussed in the affidavit of Debbie H. Joyce, as corroborated by NorthStar witnesses, the parties believed that the majority of the traffic exchanged was interstate but could not determine the exact amount of traffic being transported. Accordingly, the parties applied a factor of 100% PIU.[32] Because the Department was not part of the negotiations, it would not be able to provide contradictory material facts. Accordingly, because the Department cannot establish that there is a *de minimis* amount of interstate traffic traveling over the trunks at issue, the traffic is interstate in nature, affording jurisdiction exclusively to the Federal Communications Commission, and requiring judgment in favor of the parties' agreement to be entered as a matter of law.

This Commission is well aware of the U.S. District Court's decision in *Qwest v. Scott*, 2003 WL 79054 (D.Minn.) (attached) which addresses the FCC's 10% Rule of dual jurisdiction. The Court accurately articulates the FCC's 10% Rule as follows:

> The FCC had.... assigned all lines with even a de minimums amount of interstate traffic "to interstate jurisdiction," such that parties could avoid the state tariff by including even a tiny proportion of interstate communications on these circuits. *In the Matter of GTE Operating Cos.*, 13 F.C.C.R. 22,466 ¶25 (1998) ("10% Order"); *In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 F.C.C.R. 1352 ¶¶ 1,30 (1989) *adopted by 10% Order ¶8,9.* The FCC adopted the 10% allocation rule to allow states to retain control over intrastate lines carrying small amounts of interstate transmissions. *See 10% Order* ¶2. The FCC concluded that permitting intrastate circuits with 10% or less interstate traffic to be tariffed at the state level would accord "proper recognition (to) state regulatory interests. *Id.* ¶7. Thus, the FCC concluded "that the (10% Rule) separations

[32] *See* Exhibit A: Affidavit of Debbie H. Joyce. *See also*, Initial Comments of NorthStar.

> procedure properly reflect the dual jurisdictional regulatory structure of the Act. *Id.*

Qwest Corporation v. Scott, 2003 WL 79054 (D.Minn.) at p.2.

As the affidavits disclose, the parties reasonably believed that 92% of the traffic was interstate in nature, thus making interstate rates applicable to all switched access traffic under the agreement. Accordingly, because the Department cannot establish that there was 10% or less interstate traffic being routed, judgment must be afforded to AT&T as a matter of law on the Department's claim.

IV. EQUITABLE AND POLICY CONSIDERATIONS

Even if there were not a compelling legal basis to dismiss AT&T from this matter, there are numerous equitable and policy considerations that this Commission should take into consideration while determining how to address this matter.

A. Fairness and Consistency

As AT&T expressed to the Department,[33] it is puzzled by the inconsistencies of the Department's position in different fora: it did not complain about the consumer of services in one docket (specifically the Minnesota Qwest Secret Deals Complaint (Docket No. P-421/C-02-197) in which the Department filed a Complaint against the provider of services, Qwest, but here it is seeking remedies against both the seller and purchaser of services. This is especially true when in this docket, the agreements contain an express warranty from the seller of those services to the buyer that the seller would comply with any regulatory requirements. Such regulatory warranties were certainly not

[33] AT&T notes, that as expressed in Section I above, its discussion with the Minnesota Department of Commerce was perfunctory with no discussion about the actual terms of the agreements.

included in the Secret Deals Complaint. Regardless, taking enforcement action against the purchaser of services, especially when there is an express warranty from the seller of regulatory compliance, would have serious chilling effect on the purchase of telecommunications services in Minnesota and is unprecedented under law.

B. Ramifications of Action

The Department suggests that this Commission redefine and invalidate legal agreements that were entered into by two willing parties. For example, the Department wishes that this Commission "(f)ind that the percentage interstate usage in the agreement between NorthStar Access and AT&T should be the percentage used prior to entry into the contract."[34]

AT&T respectfully suggests that this Commission will commit regulatory overkill if it begins to second guess PIU factor declarations and other mutually agreed to terms in a contract.

More importantly, by reformulating contracts, this Commission would actually be rewarding the *non-compliant party*: the provider of services to which any tariff-obligation belongs. For example, as shown by Exhibit B, Eschelon Telecom, Inc. has notified AT&T that "it may be required to begin charging AT&T the standard tariffed rates for switched access services in Minnesota as of June 16, 2004, the date the Complaint was filed. Furthermore, Eschelon may seek to adjust previous bills so as to charge AT&T the standard Minnesota tariffed access rate for all previous applicable billing periods." [35] As one can see, Eschelon has every reason to seek such an inequitable windfall in response to the allegation of failing to file tariffs for services. It is for that

[34] Complaint at p.15.
[35] *See* Exhibit B.

reason that AT&T would seek to continue participating in this case as a participant to protect its interests against parties like Eschelon, unless this Commission dismisses AT&T from this matter and orders that there be no recourse against AT&T.

C. Need for Complete Investigation

If the Commission decides to go forward in this matter, AT&T notes that the Department investigation was far from complete. As the Department indicated, its investigation began when AT&T was the only party who voluntarily disclosed and provided the existence of agreements.[36] The Department complains that some parties have been evasive in their answers, while others have failed to respond.[37] Because the Department only relied upon the agreements and other information that were voluntarily provided by AT&T and some of the CLEC providers and IXCs before filing its complaint, this Commission has an extremely incomplete picture of the issue, because neither the Department nor the Commission have reviewed the plethora of agreements that exist in Minnesota which contain access terms.

If the Commission is interested in proceeding, AT&T would suggest a complete investigation of industry practices including Department investigation and disclosure of how many access agreements with similar terms exist, the terms of such agreements, if other access agreements not yet disclosed contain material differences, PIU factors contained in every agreement filed in Minnesota, and ILEC access agreement differences.

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[36] Complaint at p.2.

[37] Complaint at p.2-3. AT&T notes that that the Department did not name the parties who failed to answer the Department's information requests. Accordingly, the Department only pursued violations on those who voluntarily provided information. Again, questions of equity are presented with respect to AT&T, which not only did not have an obligation to file, or assure that the CLEC providers filed, information about the terms of the agreements, but also fully complied with the Department's requests and its contractual obligations towards the CLEC providers.

Otherwise, the Commission would be acting on this matter without complete disclosure of industry practices and the effect on any purchaser of services.

V. LEGAL RESERVATION OF RIGHTS

AT&T notes that this Commission sought comments on this matter and accordingly, provides the facts and law necessary to demonstrate to the Commission that all claims against AT&T should either be dismissed as a matter of law, or AT&T should be granted summary judgment. AT&T reserves its rights to present additional evidence or pursue additional legal remedies afforded to it by law if it is not dismissed from this Complaint. For example, AT&T believes that there are additional reasons why this Commission does not have jurisdiction over this matter: all six of the agreements contain a choice of law provision, with only one agreement -- Eschelon's -- providing for the application of Minnesota law to "all substantive matters pertaining to the interpretation and enforcement of the terms of th[e] Agreement"[38] AT&T will address this and other legal issues in due course, if required.

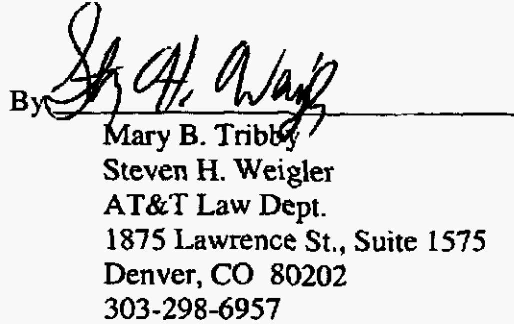
VI. CONCLUSION

For the foregoing reasons, AT&T requests that this Commission dismiss it from the Complaint as to the Department's allegation that it failed to adhere to conditions associated with its certificate of authority and grant summary judgment to it regarding the Department's allegation that the PIU factor should be changed in the NorthStar agreement. AT&T also notes that there are numerous equitable considerations in play that would weigh against moving forward on this Complaint. Finally, AT&T reserves the right to pursue all remedies available to it against any party as allowed by law.

[38]The AZD agreement provides for Arizona law to apply, while the other four agreements provide for New York law to apply.

Respectfully submitted on August 19, 2004.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.



By ____________________

Mary B. Tribby
Steven H. Weigler
AT&T Law Dept.
1875 Lawrence St., Suite 1575
Denver, CO 80202
303-298-6957

Exhibit A

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts	)	Docket No. P-442,5798, 5340,5826
for Switched Access Services	)	5025,5643,443,5323,5668,466/
	)	C-04-235

AFFIDAVIT OF DEBBIE H. JOYCE

I, Debbie H. Joyce, being first duly sworn, depose and state as follows:

1. I am currently employed by AT&T Corp. ("AT&T") as a Business Developer. I have been in this position since 1999.

2. I negotiated the Settlement and Switched Access Agreement between AT&T and NorthStar Access, LLC ("NorthStar"), effective date September 11, 2002 ("Agreement"), on behalf of AT&T.

3. I submit this Affidavit in support of AT&T's Comments in the above-captioned proceeding, which I understand involves the Agreement.

4. AT&T has direct trunks in Minnesota with a NorthStar affiliate and decided to use those trunks for the switched access traffic that it would be sending to NorthStar for termination in Minnesota.

5. At the time the parties entered into the Agreement, like many telecommunications companies trying to achieve efficiencies, the NorthStar affiliate did not break out actual percentages of usage over such trunks, but instead applied a set percentage to all traffic: 92% interstate usage ("PIU"); 8% intrastate usage.

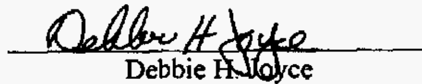
6. NorthStar was thus unable to determine the jurisdiction of the traffic that AT&T sent to NorthStar over those trunks, although NorthStar believed that the majority of the traffic was interstate.

7. Because of the difficulties in determining jurisdiction, and the likelihood that the traffic was mostly interstate, NorthStar informed AT&T that it preferred to apply a factor of 100% PIU.

8. In addition to the reasons listed above, NorthStar stated that a 100% PIU would simplify its billing process, therefore the parties did not pursue discussions regarding intrastate rates at the time the Agreement was negotiated.

9. In the Spring of this year, the parties have had discussions in which NorthStar has informed AT&T that it may soon be able to determine the jurisdiction of traffic and, if so, AT&T has indicated its willingness to revisit the PIU factor and, consequently, reasonable intrastate switched access rates.

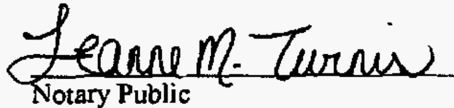
Dated August 17, 2004.



Debbie H. Joyce

STATE OF GEORGIA)
)ss.
COUNTY OF COBB)

Subscribed and sworn to before me
this 17th day of August, 2004.



Notary Public

My Commission Expires: Jan. 12, 2008

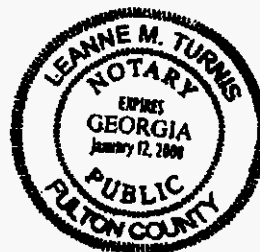


Exhibit B

RECEIVED
AT&T Corp. Legal - Denver
JUL

July 1, 2004

Via Airborne Express Mail

Robert P. Handal, Jr.
AT&T Corp.
900 Route 202/206 North--Room 2A109
Bedminster, NJ 07921-0752

Re: Switched Access Service Agreement - Minnesota

This is to notify AT&T that the Minnesota Department of Commerce has filed a complaint with the Minnesota Public Utilities Commission in Docket No. P442,5798, 5340,5826,437,5643,443,5323,5668,466/C-04-235, in which it alleges that several carriers, including Eschelon Telecom of Minnesota, Inc. have violated state law by not charging AT&T Communications of the Midwest, Inc. the filed tariffed rate for switched access services in Minnesota. The Department also alleges that AT&T and others violated conditions of their certificates of authority by failing to pay switched access services at tariffed rates.

While Eschelon disagrees with the allegations of the Department of Commerce as to Eschelon and intends to dispute them, Eschelon is giving AT&T notice pursuant to Section 8 of the Switched Access Service Agreement that it may be required to begin charging AT&T the standard tariffed rates for switched access services in Minnesota as of June 16, 2004, the date the complaint was filed. Futhermore, Eschelon may also be required to adjust previous bills so as to charge AT&T the standard Minnesota tariffed rate for all previous applicable billing periods under the Agreement.

Eschelon is not implementing these changes at this time since it does not appear that the Department has ordered Eschelon to take any action at this time.
However, we wanted to give AT&T notice of the possibility of a regulatory order that would require such actions.

Please contact me if you have any questions about Eschelon's position in this matter.

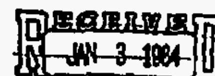
Sincerely,

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
612.436.6249 (direct)
612.436.6349 (fax)
ddahlers@eschelon.com

cc: Steve Weigler

Exhibit C

12-29-83



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Terry Hoffman	Chairman
Leo G. Adams	Commissioner
Roger L. Hanson	Commissioner
Cynthia A. Kitlinski	Commissioner
Lillian Warren-Lazenberry	Commissioner

In the Matter of the Application of AT&T Communications of the Midwest, Inc. for Authority to Engage in the Construction, Operation, or Extension of Telecommunications Systems and Services within the State of Minnessota.

DOCKET NO. P-442/M-83-640

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Procedural History

On October 25, 1983, AT&T Communications of the Midwest, Inc. (AT&T/MW or the Company) filed a request with the Minnesota Public Utilties Commission (the Commission) for a Certificate of Public Convenience and Necessity (Certificate) to engage in the construction, operation or extension of telecommunications systems and services, within Minnesota, pursuant to Minn. Stat. § 237.16, subd. 4 (1982). AT&T/MW is an Iowa corporation and is currently a wholly-owned subsidiary of Northwestern Bell Telephone Company (NWB). It is managed by its own officers and directors.

This matter arises out of the Modified Final Judgment (MFJ) Order in United States of America v. Western Electric Corporation, Inc. and American Telephone and Telegraph Company, Civil Action No. 83-0192 (D.C. Cir., August 24, 1982). The MFJ requires that American Telephone and Telegraph Company (AT&T) divest NWB and leave to NWB sufficient facilities, personnel, systems and technical information to permit NWB to perform exchange telecommunications and exchange access functions. Under the MFJ, beginning on January 1, 1984, AT&T/MW will separately conduct interexchange switching and transmission service, using certain facilities, equipment, etc., presently owned in the name of NWB. The Company will provide intrastate, interLATA long distance (toll) telephone service in Minnesota, Iowa, North Dakota, South Dakota and Nebraska. It will have its headquarters in Omaha, Nebraska as well as offices and staff in the five jurisdictions where it operates.

Ownership of AT&T/MW is to be transferred to AT&T on January 1, 1984; its financial strength will reflect the resources of its parent organization. In this request for a Certificate, the Company is asking for authority to provide the intrastate, interLATA toll service for telephone users within Minnesota to be divested by NWB on January 1, 1984, and authority to "[respond] where appropriate in the future to the demands and opportunities of increased competition in the telecommunications marketplace which it faces from other interexchange carriers, resellers and common carriers."

The names and addresses of the Company's Board of Directors are:

M. Tanenbaum	295 North Maple Avenue Basking Ridge, N.J. 07920
B. H. Gaynor	Rt. 202/206 Bedminster, N.J. 07921
A. A. Green	295 North Maple Avenue Basking Ridge, N.J. 07920
J. E. Harrington	295 North Maple Avenue Basking Ridge, N.J. 07920
R. W. Kleinert	Rt. 202/206 Bedminster, N.J. 07921
A. C. Partoll	295 North Maple Avenue Basking Ridge, N.J. 07920
S. P. Willcoxon	295 North Maple Avenue Basking Ridge, N.J. 07920

The names, addresses and phone numbers of the Company's present officers are:

J. A. Blancuard, III
President
811 Main, P.O.Box 1418
Room 1200
Kansas City, Missouri 64141
816-391-3131

K. E. McClintock
Vice President & General Counsel
AT&T
1 S. Wacker, 11th Floor
Chicago, Illinois 60606
312-592-5102

W. A. Garrett
Vice President, Marketing
AT&T Long Lines
10 S. Canal St., 26th Floor
Chicago, Illinois 60606
312-855-3000

T. O. Davis
Secretary
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New York, New York 10007
212-393-5161

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Assistant Secretary
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201-234-6324

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Regulatory Relations
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Omaha, Nebraska 68154
402-691-2001

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Assistant Secretary
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212-393-3021

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Treasurer
AT&T Long Lines
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201-326-3760

C. J. Gustafson
Assistant Secretary
340 Mt. Kemble Avenue
Morristown, New Jersey 07690
201-326-2610

D. L. Steinmeyer
Comptroller
1314 Douglas-on-the-Mall
13th Floor
Omaha, Nebraska 68102
402-633-7776

On December 14, 1983, the Minnesota Department of Public Service (DPS) filed comments to the Company's request for a Certificate. The DPS alleged that if the Company desired a Certificate prior to January 1, 1984, it must file a joint petition with NWB for Commission approval of the purchase/transfer of NWB property to AT&T/MW pursuant to Minn. Stat. § 237.23 (1982). Furthermore the DPS argued that if AT&T/MW's request for a Certificate were denied, the intrastate, interLATA toll services would be transferred to the Company on January 1, 1984 by operation of law pursuant to the MFJ. The DPS further claimed that the Certificate being requested was overly broad.

The Company's Reply dated December 9, 1983 denied the allegations contained in the DPS comments.

On December 20, 1983, the Commission met to consider AT&T/MW's :plication for a Certificate. Based upon the information contained in the application, supporting documents, map and files, the Commission made the following findings:

FINDINGS

1. That the MFJ requires NWB to discontinue performing intrastate, interLATA toll services beginning January 1, 1984.

2. That public convenience and necessity requires that telephone users within Minnesota continue to have intrastate, interLATA toll services available to them.

3. That AT&T/MW has agreed to file a joint petition with NWB for Commission approval of the transfer of assets necessary for performing intrastate, interLATA toll services. As a successor company to Northwestern Bell, AT&T/MW will perform intrastate, interLATA toll services. The Company will provide telephone services of the same quality and, initially at the same rate levels that have been authorized for NWB.

4. That the standards for authorizing a Certificate set forth in Minn. Stat. § 237.16, subd. 4 (1982) have been met.

5. That the Commission finds that the broader authority requested in the Company's petition will be better addressed at a later date.

IT IS THEREFORE ORDERED:

ORDER

1. AT&T/MW is granted a Certificate of Public Convenience and Necessity to provide the intrastate, interLATA toll service for telephone users within Minnesota as a successor company to Northwestern Bell on January 1, 1984. The Company shall provide telephone services of the same quality and, initially at the same rate levels that have been authorized for NWB.

2. The granting of this Certificate is contingent upon the filing by NWB and AT&T/MW of a joint petition pursuant to Minn. Stat. § 237.23 (1982) for the Commission's approval of the transfer of assets from NWB to AT&T/MW pursuant to the federally mandated divestiture.

3. AT&T/MW shall operate in conformance with Minn. Stat. Ch. 237 (1982) and all other applicable Minnesota Statutes.

4. AT&T/MW shall operate in conformance with all applicable Rules of the Public Utilities Commission, including Minn. Reg. PSC 170 - 219.

5. Other authority requested in the Company's petition will be addressed at a later date.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Randall D. Young
Executive Secretary

SERVICE DATE: DEC 29 1983

(S E A L)

RDY:RC:sj

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts for the Provision of Switched Access Services	Docket No. P-422,5798,5340,5826,437, 5643,443,5323,5668,466/C-04-235

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
)ss.
COUNTY OF DENVER)

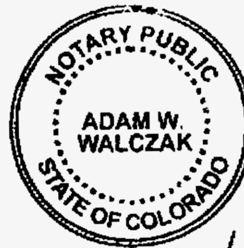
Janet Keller, being first duly sworn, deposes and says that on the 18th day of August, 2004, she served AT&T's Comments, Motion to Dismiss and Motion for Summary Judgment to the attached service list by U.S. Mail and/or overnight delivery service.

Janet Keller

Subscribed and sworn to before me
this 18th day of August, 2004.

Adam W Walczak
Notary Public

My Commission Expires: 1/22/06



My Commission Expires 1/22/06

SERVICE LIST
Docket No. P-422,5798,5340,5826,437,5643,443,5323,5668,466/C-04-235.

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Executive Secretary
Minnesota Public Utilities Commission
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St. Paul, MN 55101-2147

Linda Chavez (4)
Telephone Docketing Coordinator
MN Department of Commerce
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St. Paul, MN 55101-2198

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Attorney General's Office
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