Eric Fryson

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Subject: Docket No. 090538-TP - Prehearing Statement of BullsEye Telecom, Inc.
Attachments: Docket 090538-TP - BullsEye Prehearing Statement.pdf

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

a. Persons responsible for filing:

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b. Docket No.: 090538-TP – Amended Complaint of Qwest Communications Company, LLC against MCImetro Access, et al.

c. Filed on behalf of: BullsEye Telecom, Inc.

d. Total pages: 15

e. Brief Description: Prehearing Statement of BullsEye Telecom, Inc.

Respectfully submitted,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (D/B/A VERIZON ACCESS TRANSMISSION SERVICES), TW TELECOM OF FLORIDA, L.P., GRANITE TELECOMMUNICATIONS, LLC, BROADWING COMMUNICATIONS, LLC, BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INC., FLATEL, INC., NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., SATURN TELECOMMUNICATIONS SERVICES, INC. (D/B/A EARTHLINK BUSINESS), US LEC OF FLORIDA, LLC, WINDSTREAM NUVOX, INC., AND JOHN DOES 1 THROUGH 50.	Docket No. 090538-TP Dated: September 14, 2012

PREHEARING STATEMENT OF BULLSEYE TELECOM, INC.

Pursuant to Order No. PSC-12-0048-PCO-TP ("Order Establishing Procedure"), BullsEye Telecom, Inc. ("BullsEye") hereby files with the Florida Public Service Commission ("Commission") its Prehearing Statement. As and for its Prehearing Statement, BullsEye and states as follows:

I. WITNESSES

Witness	Subject Matter
Peter K. LaRose Finance Consultant BullsEye Telecom, Inc.	Provides background facts on BullsEye's nationwide settlement agreement with AT&T, and explains that BullsEye was compelled to enter the settlement due to AT&T's withholding of access charge payments in all jurisdictions nationwide; Explains that Qwest was put on notice of AT&T's settlements as early as 2001, but waited many years to raise any claim with BullsEye regarding such agreements; Explains why BullsEye was not required to extend the terms of the AT&T settlement agreement to Qwest; Explains that, unlike AT&T, Qwest never disputed BullsEye's invoices, refused to pay BullsEye's access charges or requested an agreement;

Witness	Subject Matter
	Describes objective distinctions between AT&T and Qwest that render them dissimilar with respect to carrier-to-carrier settlements for switched access; Identifies Qwest's prior positions that AT&T's withholding of payments to secure settlement was coercive and anticompetitive; Explains the detrimental impacts to competition and unfairness to competitors that would result if the Commission were to retroactively impose Qwest's uniform-rate theory for switched access, which has never been the law in Florida; Explains that even if parity in switched access rates were somehow to be required, the only fair result would be to require AT&T – as the outlier that obtained an agreement through coercion – to pay the price list rate, rather than permitting Qwest to benefit from the agreement that Qwest itself believes constitutes an "unreasonable advantage," and claimed was the result of coercive self-help and thus should be void.

II. EXHIBITS

BullsEye has submitted the following pre-filed exhibits, which were filed with the Rebuttal Testimony of Peter K. LaRose on August 9, 2012.

Exhibit	Description	Sponsoring Witness
PKL-1	Qwest Complaint Against AT&T (1-29-07)	Peter K. LaRose
PKL-2	FCC Statistics of Carriers (2004/2005)	Peter K. LaRose
PKL-3	Qwest Announcement to BullsEye (2-25-08)	Peter K. LaRose
PKL-4	Minnesota DOC Comments (3-13-06)	Peter K. LaRose
PKL-5	AT&T Public Comments (8-19-04)	Peter K. LaRose

In addition to the above pre-filed exhibits, BullsEye reserves the right to utilize any exhibit introduced by any other party or for which administrative notice may be taken. BullsEye additionally reserves the right to introduce any additional exhibits necessary for cross-examination or impeachment at the final hearing.

III. STATEMENT OF BASIC POSITION

BullsEye's position is that the Commission is without jurisdiction to entertain Qwest's claims and, even if it had such jurisdiction, Qwest would not be entitled to any relief given that the conduct complained of does not violate Florida law and, in any event, the relief Qwest seeks is barred as a matter of law and policy.

This proceeding concerns Qwest's unfounded claim that BullsEye somehow violated Florida law by entering a settlement agreement with another interexchange carrier ("IXC") and not with Qwest. Qwest failed to truly consider the law in Florida when Qwest filed its boilerplate Complaint here. The agreement at issue – a nationwide settlement agreement with AT&T – is an agreement that BullsEye was compelled to enter in 2004 to collect payments from AT&T, which had been withholding all switched access payments on a nationwide basis from BullsEye for multiple years. Qwest knew of the existence of AT&T's agreements for several years and even sued AT&T in 2007 for harm allegedly resulting from AT&T's agreements. In its complaint against AT&T, Qwest represented that AT&T "coerced" nascent CLECs to enter the agreements through unlawful self-help and that the agreements themselves should be void and unenforceable. After settling its claims against AT&T, Qwest now seeks in this proceeding to retroactively opt-in to and benefit from that same AT&T agreement. Qwest's claims and requests for relief against BullsEye are without merit, and should not be granted, for a host of independent legal, factual and policy reasons described in the specific position statements discussed in Section IV below.

IV. SPECIFIC ISSUES AND POSITIONS

BullsEye incorporates the CLEC Group Statement of Issues and Positions attached hereto as Appendix A. In addition to the positions taken in the CLEC Group Statement, BullsEye takes the following positions:

Issue No. 6: *Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?*

BullsEye Position: In addition to the positions stated in Appendix A, BullsEye's Price List provides that agreements for switched access are available on a customer-specific basis. Thus, BullsEye did abide by its Price List in executing a customer-specific settlement agreement.

Issue No. 9(b): *If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:*

> ***(i)*** *If applicable, how should the amount of any relief be calculated and when and how should it be paid?*

BullsEye Position: In addition to the positions stated in Appendix A, even if the Commission could somehow find that BullsEye's settlement agreement with AT&T violated repealed sections 364.08(1) or 364.10(1), F.S. (2010), the fair and reasonable method the Commission and courts have employed for eliminating alleged undue or unreasonable advantage is to reverse that advantage specifically for the customer to whom it was given (*i.e.*, AT&T), rather than retroactively perpetuate that advantage to other customers, or to just one customer like Qwest.

Further, given that BullsEye was compelled to enter the AT&T settlement agreement due to AT&T's withholding of access charge payments on a nationwide basis, it would be wholly unfair

to permit Qwest to benefit from that agreement, rather than reversing the gains improperly obtained by AT&T.

V. STIPULATED ISSUES

There are no stipulated issues at this time.

VI. PENDING MOTIONS

There are no pending motions at this time. BullsEye reserves the right to file any motion that may later become necessary, including without limitation any motion to compel discovery from Qwest.

VII. PENDING REQUESTS FOR CONFIDENTIAL CLASSIFICATION

BullsEye filed one claim for confidential treatment that applies to certain portions of the pre-filed Rebuttal Testimony of Peter K. LaRose. BullsEye intends to file a request for confidential treatment for such information prior to the October 3, 2012 Prehearing Conference. BullsEye reserves the right to seek similar confidential treatment of any further discovery responses it serves prior to the close of discovery on October 1, 2012.

VIII. OBJECTIONS TO QUALFICATIONS OF EXPERT WITNESSES

BullsEye has no objections to qualifications of any expert witness at this time.

IX. COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE

At this time, BullsEye is not aware of any requirements in the Order Establishing Procedure with which it cannot comply.

Dated: September 14, 2012

/s Andrew M. Klein

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CLEC Group List of Issues and Positions

Issue No. 1: For conduct occurring prior to July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

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

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

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

CLEC Group Position: No, as to all subparts. Even if sections 364.08(1), 364.10(1) and 364.04, F.S. (2010) did apply as Qwest alleges (which CLECs dispute), Chapter 2011-36, Laws of Florida ("the Regulatory Reform Act"), repealed and did not replace 364.08(1) and 364.10(1), which are the basis for Qwest's First Claim. The Regulatory Reform Act also modified 364.04 to clarify the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by contract) is entirely permissible. The Regulatory Reform Act did not include a savings clause to preserve Commission jurisdiction over pending cases, as had been done for prior legislative changes to chapter 364. The Commission only has the powers granted to it by the Legislature. Thus, Florida courts have long held for administrative cases that "[w]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." Reliance on a "vested right" theory cannot be used to avoid this rule. Regulatory statutes do not create absolute obligations or rights, and a litigant to an administrative proceeding has no constitutionally protected right in pursuing a non-final (pending) administrative hearing claim. Therefore, the Commission has no jurisdiction to hear Qwest's claims made for conduct prior to July 1, 2011 under statutes repealed by the Regulatory Reform Act.

Issue No. 2: For conduct occurring on or after July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

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

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

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

CLEC Group Position: No, as to all subparts. The Regulatory Reform Act repealed and did not replace 364.08(1) and 364.10(1), on which the First Claim is based, and modified 364.04 to clarify that the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by

contract) is entirely permissible. Therefore, the Commission has no jurisdiction to address any portion of Qwest's Claims for conduct occurring on or after July 1, 2011.

There are no other Claims for Relief in the Qwest Amended Complaint, and no other provisions of the statute are encompassed within this issue or properly before the Commission for adjudication. Qwest has not alleged a violation of any other statute, either before or after July 2011, and has never attempted to amend its Complaint to allege any such violation.

Issue No. 3: Which party has (a) the burden to establish the Commission's subject matter jurisdiction, if any, over Qwest's First, Second, and Third Claims for Relief, as pled in Qwest's Amended Complaint, and (b) the burden to establish the factual and legal basis for each of these three claims?

CLEC Group Position: The burden of proof to demonstrate subject matter jurisdiction is placed on the party asserting jurisdiction, and remains on that party throughout the entire proceeding. Qwest thus bears the burden of proof on this issue because it is the party invoking the Commission's jurisdiction by the filing of its complaint. This burden requires Qwest to demonstrate the existence of jurisdiction "beyond a reasonable doubt." As the Florida Supreme Court has held, "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested."

Further, in the absence of statutory authority to the contrary, the party asserting the affirmative of an issue before an administrative tribunal bears the burden of proving both the factual and legal basis for its claims. The burden remains with that party in the absence of a burden-shifting legal presumption. The Legislature has not created any such presumption that applies here, and administrative agencies have no authority to create or apply legal presumptions in the absence of specific statutory or constitutional authority. Accordingly, the burden of establishing the factual and legal basis for its claims remains with Qwest throughout the proceeding.

Issue No. 4: Does Qwest have standing to bring a complaint based on the claims made and remedies sought in (a) Qwest's First Claim for Relief; (b) Qwest's Second Claim for Relief; (c) Qwest's Third Claim for relief?

CLEC Group Position: No. In order to have standing, Qwest must demonstrate that it suffered an injury in fact of a type which the proceeding is designed to protect. Qwest has not shown, and cannot show, that its alleged injuries were within the "zone of interest" that the now-repealed statutes upon which it relies (sections 364.08(1), 364.10 (1) and 364.04(1) and (2), F.S. (2010)) were designed to protect. Further, even if Qwest, in the past, would have had standing to bring a complaint based on the claims in its First, Second and Third Claims for Relief under §§ 364.08(1), 364.10(1) and 364.04(1) and (2), F.S. (2010), which CLECs dispute, it certainly lacks standing to raise or maintain such claims after the Legislature enacted The Regulatory Reform Act, which repealed and did not replace 364.08(1) and 364.10(1), on which the First Claim is based, and modified 364.04 to clarify that the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by contract) is entirely permissible. Qwest has not alleged a

violation of any current statute, and has never attempted to amend its Complaint to allege any such violation.

Issue No. 5: Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

CLEC Group Position: No. Qwest's First Claim alleges that each Respondent CLEC independently violated former Sections 364.08(1) and 364.10(1), Florida Statutes (2010). Even if the Commission were to apply these repealed statutes to the CLECs, Qwest cannot demonstrate that any Respondent CLEC violated the repealed statutes by failing to "extend to any person any advantage of contract or agreement . . . to persons **under like circumstances** for like or substantially similar service" or by giving "**undue or unreasonable** preference or advantage" to any person for the following independent reasons:

1. The Commission never applied the repealed statutes to CLECs. CLECs have always been subject to a lesser level of regulation and have been allowed to operate as other businesses in a free market that negotiate prices with their customers. As with any business negotiation, rates may vary based on the particular circumstances of the provider and the customer. Such deals are reasonable and permitted under Florida law and Commission rules.
2. Qwest mistakenly asserts that variations in switched access prices negotiated with customers must be based on cost differences. No Florida statute or Commission rule imposes such a requirement. To the contrary, the Commission has never (1) required CLECs to charge cost-based switched access rates or (2) required CLECs to justify price differences based on cost. The circumstances of each transaction may vary for any number of reasons, such as the volume and type of services being provided, the expected volume of switched access traffic, the term length, pending disputes between the parties, and the parties' respective bargaining skills. Because Qwest ignores such factors, it fails to demonstrate any "unreasonable discrimination."
3. The Commission has never required CLECs to charge only a uniform switched access rate to all IXCs and has never required CLECs to disclose, file and offer any non-uniform contract prices for switched access to all IXCs.

Issue No. 6: Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

CLEC Group Position: Each CLEC ***did*** abide by its Price List in connection with its pricing of intrastate switched access service to Qwest, because each CLEC charged Qwest the switched access rates in their respective Price Lists.

Moreover, a CLEC's entry into an agreement for switched access service with one IXC, but not another, does not constitute a violation of law or a failure to abide by a Price List. In fact, Qwest's complaint admits that Florida law permits – and has always permitted – CLECs to enter customer-specific agreements for switched access service.

Issue No. 7: Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

CLEC Group Position: This claim only applies to Budget, BullsEye and Saturn. Each of these CLECs ***did*** abide by its Price List. While Qwest's Third Claim alleges that certain CLECs did not abide by Price List provisions specifying that agreements will be made available to "similarly situated customers in substantially similar circumstances," this claim obviously hinges on a demonstration by Qwest that Qwest is in fact an IXC "similarly situated and in substantially similar circumstances" to each IXC that has an agreement for switched access.

Qwest has failed to make the requisite demonstration. Instead, Qwest relies solely on an assertion that all IXCs are presumptively "similarly situated" unless there is a cost-based reason as to why they are not. However, such assertion is untenable under Florida law, because the Commission has never (1) required CLECs to charge cost-based switched access rates, (2) required CLECs to justify price differences based on cost, (3) required CLECs to charge only a uniform switched access rate to all IXCs or (4) required CLECs to disclose, file and offer any non-uniform contract prices for switched access to all IXCs contemporaneous to the effective date of such contracts. Qwest's case thus fails to account for the variety of legitimate reasons reflecting why Qwest is not "similarly situated and in substantially similar circumstances" to the contracting IXCs, and consequently fails to demonstrate that the Price List provisions somehow obligated any CLEC to extend an IXC's customer-specific agreement to Qwest.

Issue No. 8: Are Qwest's claims barred or limited, in whole or in part, by:

(a) the statute of limitations;

CLEC Group Position: Yes. The Florida Statute of Limitations, in Chapter 95, Florida Statutes, applies because Qwest has filed and pursued, and the Commission has processed, this case as a private right of action in the manner of a civil lawsuit. Specifically, either §§ 95.11(3)(f) or (3)(p) serve as an absolute bar to any portion of Qwest claims against a given CLEC that pre-dates by more than four years Qwest's naming that CLEC as a respondent. Specifically, the statute of limitations bars claims before December 11, 2005 for Respondents named in Qwest's original complaint; October 22, 2006 for Respondents first named in Qwest's Amended Complaint; and June 14, 2008 for the Respondent named in Qwest's Second Amended Complaint. In addition, under Florida law the delayed discovery doctrine does not apply, no conditions exist which would toll the limitation period, and filing a "John Doe" complaint does not toll the limitations period. Even if, contrary to Florida law, the delayed discovery doctrine were considered, Qwest has failed to meet its burden to prove any fact that would support its application here. In fact, Qwest knew of the alleged violation of its legal rights no later than June 2005, more than 4 years before Qwest chose to file its original complaint in Florida in late December 2009. Qwest inexcusably took more than 4 years to file a complaint and has neither pled nor proven any other basis for the Statute of Limitations to not apply.

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

CLEC Group Position: Yes. Qwest's claims are completely barred by the Regulatory Reform Act. See CLEC Group positions on Issues Nos. 1 and 2 (jurisdiction) and 4 (standing).

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

CLEC Group Position: Yes. Qwest's claims are barred for two reasons:

(i) The CLECs' price lists require that any disputes be submitted within a set time period. For years prior to filing its complaint in this case, Qwest knew it had a dispute with CLECs, but failed to submit disputes based on its claims in this case and continued to pay the price list rates.

(ii) The price lists of Budget, BullsEye, DeltaCom, Saturn and TWTC also provide that contract rates are available to all IXCs. While Qwest acknowledges both the right of CLECs to provide services by contract and its own right to negotiate such contacts with the CLECs and has in fact exercised that right with some CLECs, Qwest simply failed to

negotiate a contract pursuant to the price lists, but claims entitlement to benefits of negotiations it consciously chose not to pursue. Qwest is not entitled to any benefit of what amounts to an imputed contract, and, in particular, is not entitled to imputation, on a retroactive basis, of one finite aspect (rates) of a contract between a CLEC and another IXC.

(d) waiver, laches, or estoppel;

CLEC Group Position: Yes, Qwest's claims should be barred in whole. Qwest knowingly waived its rights and should not otherwise be allowed to assert those rights because Qwest: (i) knew of the alleged violation of its legal rights, yet inexcusably took more than 4 years to assert them; and (ii) knew that it had the duty to submit billing disputes to, and seek contract negotiations with, the CLECs but refused to do so, even though, all the while, Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Therefore, Qwest cannot be heard to complain now when Qwest failed to timely pursue rights it knew it had.

(e) the filed rate doctrine;

CLEC Group Position: Yes. The CLECs in this case filed price lists with the Commission that were approved by the staff pursuant to authority delegated to the staff by the Commission in accordance with section 2.07 C.5.a(16) of the Administrative Procedures Manual. Those price lists provide a rate or rates that apply in the absence of a negotiated rate, require that billing disputes be timely submitted, and in some cases prescribe negotiation for contract rates. Unless an IXC negotiates a different rate, it is obligated to pay the rates in the CLEC's switched access price list when it originates or terminates interexchange traffic from or to the CLEC. Qwest may not "cherry pick" parts of the filed price lists that CLECs are required to honor and at the same time ignore other portions of the price list that impose obligations on Qwest, as a customer that obtained service pursuant to the price list. Qwest has asserted in other venues that the filed rate doctrine applies to CLEC switched access service in Florida. Qwest therefore should not be heard to take a conflicting position in this case.

(f) the prohibition against retroactive ratemaking;

CLEC Group Position: Yes. Qwest's claims for monetary relief should be barred entirely. Qwest seeks to have the Commission establish a rate different than that in a CLEC's price list and different than the rate Qwest paid, and to apply that rate retroactively to the date when Qwest alleges its claim began. More specifically, Qwest asks the Commission to permit it to retroactively dispute CLEC bills (going back many years) and pay a different amount based on a contract rate that Qwest never negotiated. Because Qwest did not negotiate switched access rates with any of the CLECs, it was obligated to pay the "default" rates in the CLECs' price lists. Establishing a new rate and

applying it to Qwest's bills in this proceeding would violate the well-established principle against retroactive ratemaking. Qwest's complaint is also designed to have the Commission assert cost-based ratemaking authority over CLEC switched access charges on a retroactive basis when the Commission does not have rate-setting authority over any CLEC services. This, too, would constitute prohibited retroactive ratemaking.

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

CLEC Group Position: Yes. Qwest's claims should be barred in whole. Throughout the alleged damages period, Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Qwest cannot have it both ways: Qwest cannot be both a beneficiary of contract rates and an opponent of contract rates. Additionally, Qwest's Complaint in this case asks the Commission to reverse Qwest's own choice not to pursue contract rates with Respondent CLECs. This the Commission cannot and should not do.

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

CLEC Group Position: Yes. Qwest's claims should be barred in whole. Contrary to the Legislature's direction and the Commission's own history of minimal regulation for CLECs, Qwest asks the Commission, for the first time in this case, to comprehensively regulate CLEC access rates, and to do so in a manner inconsistent with and more restrictive than utility rates the Commission actually does have authority to regulate and set. Further, most if not all of the positions Qwest asks the Commission to adopt would constitute agency rules. For the Commission to adopt such positions in this case outside a proper rulemaking proceeding and then to apply such rules retroactively would be unlawful under Chapter 120 and violate the CLECs' rights.

Additionally, any relief to Qwest should be barred as a matter of policy given that (a) Qwest filed a civil complaint in 2007 against AT&T, claiming that AT&T's agreements with CLECs were "illegal" and should be canceled in several States (including Florida) and seeking damages for harm allegedly resulting from such agreements; (b) Qwest obtained a settlement from AT&T under those claims; and (c) Qwest now seeks to benefit from the very agreements Qwest previously claimed were void and unenforceable. The Commission should thus deny any relief to Qwest to prevent Qwest from obtaining double recovery by asserting diametrically opposite positions in different forums.

Issue No. 9 (a): If the Commission finds in favor of Qwest on (a) Qwest's first Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) Qwest's Second Claim for Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010), what remedies, if any, does the Commission have the authority to award Qwest'?

CLEC Group Position: The Commission has no current authority to award a remedy for violation of statutes that have been repealed. Qwest has not alleged a violation of any other statute, either before or after July 2011, and has never attempted to amend its Complaint to allege any such violation.

Qwest's claim for "reparations" is, in fact, a request for compensation due to alleged discrimination. In other words, this claim is for damages, which are beyond the Commission's authority to award. Further, the Commission lacks specific statutory authority to award or calculate prejudgment interest.

In addition to monetary damages, Qwest asks the Commission to order Respondents to lower their intrastate switched access rates to Qwest prospectively to reflect any contract rate offered to any IXC and to file their contract service agreements with the Commission. Even if the Commission had such authority before July 1, 2012, it clearly lacks authority to do so thereafter.

Issue No. 9(b): If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:

(i) If applicable, how should the amount of any relief be calculated and when and how should it be paid?

CLEC Group Position: Qwest is not entitled to any relief, even if the Commission were to find a violation of law within the four-year statute of limitations period (beginning December 11, 2005 for Respondents named in Qwest's original complaint; October 22, 2006 for Respondents first named in Qwest's Amended Complaint; and June 14, 2008 for the Respondent named in Qwest's Second Amended Complaint), and even if Respondents' Affirmative Defenses are denied.

According to Qwest's witness, Dr. Weisman, the only arguable harm occurred, if at all, in the "downstream" retail market, but Qwest provided no evidence that any such harm actually occurred, nor has it attempted to quantify any such harm. Qwest provided no evidence that it was unable to recover intrastate switched access charges from its customers or that it lost customers or market share. Instead, Qwest claims as the measure of its damages the estimated difference between Respondents' price list rates and the amounts Respondents charged certain other IXCs. The monetary relief Qwest seeks is therefore entirely improper.

(ii) Should the Commission award any other remedies?

CLEC Group Position: No. See CLEC Group position on Issue No. 9(a). No other remedies are appropriate.

CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 14 day of September, 2012, to the following:

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