Eric Fryson

From: Cooper, Roberta G [Roberta.G.Cooper@centurylink.com]
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To: Filings@psc.state.fl.us
Cc: Masterton, Susan S; Sherr, Adam
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Filed on Behalf of: Susan S. Masterton
Senior Corporate Counsel
CenturyLink QCC
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301
Telephone: 850/599-1560
Email: susan.masterton@centurylink.com

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Roberta Cooper
Legal Assistant III- Susan Masterton and Kevin Zarling
Voice: 850-599-1563| Fax: 850-224-0794
Email: Roberta.G.Cooper@centurylink.com
315 S. Calhoun Street, Suite 500 |Tallahassee, FL 32301
Mailstop: FLTLHZ0501-5001

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); tw telecom of florida, l.p.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; and John Does 1 through 50, for unlawful discrimination.	DOCKET NO. 090538-TP DATED: October 17, 2012

RESPONSE OF QWEST COMMUNICATION COMPANY, LLC IN OPPOSITION TO EMERGENCY MOTION OF BULLSEYE TELECOM, INC. TO COMPEL DISCOVERY

Qwest Communications Company, LLC d/b/a CenturyLink QCC ("QCC"), hereby files this expedited response to the Emergency Motion of BullsEye Telecom, Inc. to Compel Discovery ("Motion") filed on October 12, 2012.

The Commission should immediately deny the Motion. The Motion is an exercise in harassment and gamesmanship, and its purpose is clear on its face. Through this Motion, BullsEye seeks to distract and prevent QCC from preparing for hearing and ultimately seeks to delay the hearing. BullsEye waited until the very last day to issue discovery requests which could have been asked far earlier in the proceeding, and waited until seven business days before the evidentiary hearing to file its "emergency" motion. BullsEye even implies that the Motion should be granted immediately, without QCC having an opportunity to respond.

On the merits, BullsEye's discovery is overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. At this very late stage, BullsEye has decided to go fishing by asking extremely broad questions about subjects that bear little, if any, connection to the issue before the Commission – that is, whether BullsEye violated

Florida law by charging QCC significantly higher rates for intrastate switched access than it charged AT&T. QCC's objections to the BullsEye discovery are appropriate, and BullsEye's motion should be denied. BullsEye should not be permitted to engage in an untethered fishing expedition, the goal of which is to expend QCC's resources and delay a hearing which has been scheduled since February 2012.

One central theme of the Motion is BullsEye's contrivance that QCC refuses to answer any discovery that is not supportive of QCC's theory of the case.[1] This is simply false. While the permissible scope of discovery in Commission proceedings is broad, there are limits, and BullsEye's discovery well exceeds these limits. Discovery is only appropriate if it is relevant to the subject matter of the proceeding and reasonably calculated to lead to the discovery of admissible evidence. Yet, BullsEye seeks information that goes well beyond the scope of this case. It contains overly broad questions about subject matters that do not bear in any way on determining *whether BullsEye violated Florida law* by charging QCC higher rates for switched access. And, it requests information that by its very character BullsEye knows to be privileged. QCC directly addresses each of the discovery requests that is the subject of BullsEye's Motion below. In considering BullsEye's requests and QCC's objections and responses it is imperative for the Commission keep in mind that discovery is not unlimited and should not be used merely as a tool for the purposes of harassment and delay.

I. Legal Standard for Discovery

In accordance with Rule 28-106.206, Florida Administrative Code, the discovery rules set forth in Florida Rules of Civil Procedure (Rule 1.280-1.400) are generally applicable in Commission proceedings. While the scope of discovery as set forth in the rules is broad, it is not

[1] Motion, at 4.

unlimited. As a threshold matter, the discovery must be relevant to the subject matter of the proceeding and, while the information sought need not itself be admissible, it must be reasonably calculated to lead to the discovery of admissible evidence.[2] Further, even if information sought could be demonstrated to have some relevance to the subject matter of a case, discovery may be denied where the burden of providing a response outweighs the value of the information sought.[3]

In addition, the Commission has denied motions to compel discovery which is overbroad and unduly burdensome,[4] calls for a legal conclusion[5] and which seeks information protected by the attorney client privilege or the work product privilege.[6] Further, it is clear that discovery promulgated primarily for an improper purpose, such as harassment or delay, is prohibited.[7] As more fully set forth below, the bases of QCC's objections to the discovery requests that are the subject of BullsEye's Motion are entirely consistent with the types of information that the Commission has protected from discovery in its prior decisions.

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[2] See, *Krypton Broad of Jacksonville, Inc. v. MGM-Pathe Commc'ns Co.*, 629 So. 2d 852, 855 (Fla. 1st DCA 1993), disapproved on other grounds by *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995).

[3] See, *Krypton* at 855. See also, *In re: Complaint of XO Florida, Inc. against BellSouth Telecommunications, Inc. for alleged refusal to convert circuits to UNEs and request for expedited processing*, Order Granting in Part and Denying in Part XO Florida, Inc.'s Emergency Motion to Compel, Order No. PSC-05-0546-PCO-TP issued May 17, 2005, at 2.

[4] See, e.g., *In re: Complaint and Petition for Relief against Halo Wireless, Inc. for breaching the terms of the wireless interconnection agreement by BellSouth Telecommunications,LLC d/b/a AT&T Florida*, Order Granting in Part and Denying in Part Halo Wireless Inc.'s Motion to Compel Discovery, Order No. PSC-12-0349-PCO-TP, issued July 5, 2012 at 2; *In re: Complaint of BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services*, Order Denying AT&T Florida's May 7, 2008 Motion to Compel, Order No. PSC-08-0340-PCO-TP, issued May 28, 2008 at 3.

[5] See, e.g., *In re: Application for rate increase by Southern States Utilities, et.al.*, Order Denying in Part and Granting in Part Utilities' Amended Motion for Protective Order, Order No. PSC-92-0819-PCO-WS, issued August 14, 1992, at 5.

[6] Id. at page 6. See also, *In re: Application for rate increase by City Gas Company of Florida*, Order Denying Discovery, Order No. PSC-96-1340-PCO-GU issued November 7, 1996 at 2.

[7] See, e.g., *Tennant v. Charlton*, 377 So. 2d 1169, 1170 (Fla. 1979) (...the court also correctly recognized that the trial court should always be sensitive to the protection of a party from harassment and from an overly burdensome inquiry. *Florida Rule of Civil Procedure* 1.280(c) provides that for good cause shown, the trial court may make an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires.").

II. Response Regarding Specific Discovery Requests

QCC objected to the BullsEye discovery requests at issue in the Motion because the requests are burdensome and, generally speaking, broadly explore subject matters that are entirely irrelevant to the question facing this Commission in the complaint – whether BullsEye violated Florida law by charging QCC higher rates than BullsEye charged AT&T for the identical switched access service. Contrary to BullsEye's rhetoric, QCC does not seek to "suppress" information that "goes to the heart of issues that QCC has placed in contention."[8] BullsEye's inquiries are also overly broad, unduly burdensome and are not reasonably calculated to lead to the discovery of admissible evidence, and for all of these reasons the Motion should be denied.

A. Interrogatories 6-9, Document Request 15

Through these extremely broad discovery requests, BullsEye demands that QCC identify and compile extraordinary levels of detail about each underlying carrier ("ULC") agreement QCC has ever operated under with any underlying carrier in Florida since 2002. These questions are patently overbroad and seek information that bears no relevance to the switched access traffic at issue in this proceeding.

ULCs are interexchange carriers ("IXCs") which sell capacity to other IXCs. ULCs provide long distance transport and then hand calls to local exchange carriers ("LECs") to terminate. ULCs are commonly used by most (if not all) IXCs to provide these services. For example, an IXC operating in Miami may hand off some of its long distance traffic to a ULC to carry across the state and hand (for termination) to the called party's LEC. ULCs are responsible for paying any charges incurred (including but not limited to transport and terminating switched access) in providing that service. The IXCs, in turn, pay the ULC for the services it provides

[8] Motion, at 5.

based on per-minute of use rate schedule, not based on a pass through of the actual charges the ULC may incur.

Notwithstanding the irrelevance of this line of questions, QCC responded to BullsEye's Interrogatory No. 5 and acknowledged that QCC uses ULCs to handle certain portions of its intrastate traffic.[9] BullsEye, however, is not satisfied with this acknowledgement, and instead has asked for a detailed accounting of QCC's operations under each ULC agreement that has been in effect since 2002. BullsEye's requests are objectionable for a number of reasons.

Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

BullsEye's deep probing into QCC's use of ULCs seeks information entirely irrelevant to the instant proceeding. QCC's complaint seeks a finding that BullsEye violated Florida law by charging QCC more than it charged AT&T for the identical switched access services. In the context of ULC services, the ULC directly hands the traffic to the terminating LEC, and is billed for switched access by that LEC. The LEC (here, BullsEye) does not bill the ULC's customer (here, QCC) for those services. QCC's overcharge calculations in this case concern only calls handed directly from QCC to BullsEye (in the context of terminating switched access) or from BullsEye to QCC (in the context of originating switched access). Traffic handed (by QCC) to a ULC, which later terminated that call via BullsEye switched access, *is not at issue in this case or claimed as part of QCC's overcharge calculation.* This was explained to BullsEye (both in QCC's written objections and during counsel's meet and confer), yet BullsEye persists in seeking excruciating detail about services and minutes of use outside the scope of this case.[10]

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[9] Motion, Exhibit B (QCC response to BullsEye Interrogatory 5).

[10] The detail BullsEye seeks is further irrelevant given that it concerns time periods plainly outside the scope of this case. BullsEye's off-price list arrangement with AT&T became effective in late 2004 (Rebuttal Testimony of Peter K. LaRose, p.7, line 23), yet BullsEye demands contracts and usage data dating back to 2002.

Finally, in an attempt to shoehorn in these questions as "indisputably relevant," BullsEye intentionally mischaracterizes QCC's position in this case. At page 7 of the Motion, BullsEye states that "QCC's entire position on [Issue No. 5] is based on its expert witness's theory that any difference in rates for a 'bottleneck' service constitutes 'unreasonable discrimination.'" This characterization is knowingly false. Nowhere does QCC advance the *per se* theory that any price difference is automatically unlawful that BullsEye wishes to assign to QCC. Instead, QCC merely states that "[b]y charging QCC the higher rates for switched access, while charging other IXCs lower contract rates *without reasonable justification for the differential rate treatment*, the CLECs engaged in unreasonable rate discrimination in violation of Florida law."[11] BullsEye's characterization of QCC's theory is contrived, and should not be used to define the reasonable scope of this proceeding.

Burden of production data outweighs any probative value.

For the reasons stated above, QCC rejects the notion that the extreme detail BullsEye seeks concerning QCC's ULC agreements has any relevance (or could lead to any relevant and admissible evidence) in this proceeding. The objectionable nature of the inquiry is made even clearer considering the extreme burden BullsEye wishes to impose on QCC, just days before the case goes to hearing.

BullsEye demands – for each ULC agreement that has existed since 2002 – the identification of the ULC, the contract terms (including all rates that have been in effect), the time periods each agreement has been effective, and year-by-year volume and usage information. BullsEye wants the year-by-year accountings broken out by ULC, by minutes of use, by percentage of overall Florida usage, and then by minutes and percentages terminated to each of

[11] Qwest Communications Company, LLC's Prehearing Statement, p. 10 (emphasis added).

the 18 CLECs who were once parties to this proceeding. This is an incredible amount of data – which is not presently compiled or immediately available to QCC[12] – and it serves no logical purpose to this docket.

Again, the traffic that would be captured in the data BullsEye seeks is outside the scope of this proceeding and of QCC's overcharge calculations. QCC's calculations cover only switched access charges directly assessed by BullsEye to QCC, and thus no minutes of use delivered to BullsEye by ULCs would be included.

To the extent BullsEye wishes to argue that QCC uses ULCs, that switched access is thus not a bottleneck service (a conclusion QCC contests) and/or that QCC could have avoided BullsEye's rate discrimination by entering third party contracts,[13] QCC's answer to Interrogatory No. 5 suffices. BullsEye requires none of the detail it seeks to establish its points. For example,

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[12] BullsEye's ULC discovery, insofar as it demands that QCC compile data and make computations not already compiled and computed, is objectionable on that basis as well. In its response to BullsEye's discovery, QCC renewed its earlier general objections. Motion, at Exhibit B, p. 1 ("All general objections made in previous response to information requests are incorporated by reference."). In its responses to BullsEye's first set of discovery, QCC interposed a general objection to "the discovery requests to the extent they purport to impose obligations that go beyond the obligations imposed [by] the Florida Rules of Civil Procedure or the Rules of the Commission.

Neither Florida civil rules nor Commission practice requires a party answering discovery to conduct special studies or make compilations not already compiled. See, *In re: Halo Wireless*, Order No. PSC-12-0349-PCO-TP, at 10 ("As argued by AT&T, the purpose of discovery is to ensure all parties to a dispute have access to all existing information, not otherwise privileged. Discovery cannot be used to compel a party to create information.") See also, *In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Order Denying Emergency Request for Oral Argument and Motion to Compel and Granting Motion for Protective Order, Order No. PSC-07-0032-PCO-EU issued January 9, 2007 at 4 and 5.

Ironically, BullsEye objected to "each and every discovery request.....to the extent QCC seeks to require BullsEye to create documents not already in existence." Response of BullsEye Telecom, Inc. to First Set of Interrogatories (1-8) and Document Requests (1-5) from Qwest Communications Company, LLC (General Objection 8). BullsEye similarly objects to each and every discovery request to the extent it is "excessive, oppressive or harassing" and to the extent it would be "unduly expensive or time consuming to provide a response." Id. (General Objections 14, 15). BullsEye should not be heard to demand that QCC make vast compilations and computations not already in existence in the form requested by BullsEye.

[13] BullsEye suggests that ULC usage data is relevant because it "will show the extent to which QCC avoided or could have avoided CLEC price list rates through such arrangements." Motion, at 8. BullsEye's demand for data admittedly irrelevant to the minutes of switched access at issue in this proceeding is illogical. Further, to the extent BullsEye asserts that QCC was required to enter third party agreements in order to avoid BullsEye's admitted price discrimination, that argument should fall on deaf ears. QCC should not be required to generate large volumes of data to buttress BullsEye's argument that switched access customers are required to enter third party workarounds to avoid unlawful conduct.

computation and disclosure of the precise volume of Florida traffic routed by ULCs (for QCC) to Deltacom in 2005 is wholly irrelevant to determining if BullsEye violated Florida law in its provision of switched access to QCC.

These requests are extremely burdensome and logistically difficult. QCC estimates that, to respond to BullsEye's requests by compiling data that is not presently compiled (or potentially still archived in any usable form), it would require approximately 30 hours of full time effort. To produce all the contracts and rate sheets would likely take at least *30 days* of full time effort. QCC estimates that there are between 40 and 50 "responsive" agreements and *over one thousand* corresponding rate sheets (as rate sheets are very commonly updated by the ULCs). Most rate sheets exceed a hundred pages. Many of the rate sheets are hundreds of pages long, and QCC would need to redact all non-Florida rates from each rate sheet.

Furthermore, as BullsEye well knows, ULC contracts are confidential and disclosure would require notice to each third party, many or all of which likely would object given the commercial sensitivity of this information. Because the burden on QCC clearly and vastly outweighs any probative value from these requests, QCC respectfully requests that the Motion be denied.

B. Interrogatories 10-12, Document Request 17.

Through Interrogatories 10-12 and Document Request 17, BullsEye seeks copies of agreements, as well as significant data that has not been compiled, related to agreements between QCC (as an IXC) and other CLECs. These questions do not focus on any agreement between QCC and BullsEye and how any such agreements would affect QCC's claim against BullsEye. The Motion should be denied as to these requests for several reasons.

Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

These requests do not seek information that is relevant or reasonably calculated to lead to the discovery of admissible evidence. Whether *BullsEye's conduct* violates or violated Florida law does not depend in any way on what QCC may or may not have done in the context of its business arrangements with other entities. Whether BullsEye's conduct was unlawfully discriminatory is a fact specific inquiry based on BullsEye's behavior. It is not informed in any way by the unrelated conduct of QCC or any other entity, especially in such different circumstances.[14] Pursuing this information is merely an attempt to distract the Commission from the issues at hand and from scrutinizing BullsEye's conduct. These requests are not reasonably calculated to lead to the discovery of admissible evidence concerning BullsEye's conduct vis-à-vis QCC. In the parallel complaint proceeding in Colorado, the assigned ALJ reached this exact conclusion when another CLEC pressed for disclosure of QCC agreements. He reasoned as follows.

> 7. Request 15 seeks information regarding whether QCC has ever reached a compromise whereby it paid less than billed for interstate or intrastate switched access services. Such inquiry is not reasonably calculated to lead to the discovery of admissible evidence.
>
> 8. Because there has been no showing that information sought in Requests 6, 9, and 15 has any relation whatsoever to what Qwest paid Eschelon for services, the rates therefor, or the defenses plead, they are not reasonably calculated to lead to the discovery of admissible evidence.[15]

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[14] As Mr. Easton explains in great detail at pages 17-20 of his Rebuttal Testimony, the agreements that BullsEye is pressing for now are entirely different than the type of agreement BullsEye entered into with AT&T. These agreements related to QCC's provision of unregulated wholesale long distance service and, unlike the BullsEye's agreement, were not intended to result in advantaging one customer over another. Instead, the intention of the contract provisions was to accommodate a CLEC's supposed inability to bill for switched access. The QCC agreements were intended to have neutral economic effect on the contracting parties, as QCC agreed to lower unregulated wholesale long distance services in exchange for waiver of switched access charges that the CLEC was entitled but unable to assess.

[15] Interim Order of Administrative Law Judge G. Harris Adams Denying Motion to Compel Discovery, Decision No, R09-0403-I, Docket No. 08F-259T (Colo. PUC 2009), p 3.

Furthermore, BullsEye's requests go well beyond the information BullsEye needs to argue any of its affirmative defenses asserted in BullsEye's Motion to Compel (at paragraph 17) as the reason it needs this information. BullsEye ignores that QCC has provided BullsEye sufficient information for these purposes and that BullsEye's position is not enhanced (except to the extent distracting QCC from preparation for hearing is valuable to BullsEye) by requiring QCC to identify every CLEC with whom QCC entered into such an agreement and by requiring QCC to compile rate, usage and expenditure data relating to each such arrangement. QCC has not compiled any of this information, and is unsure how long such a compilation would take given the breadth and age of the data.

While it believes these agreements are irrelevant to the proceeding, QCC did provide (in response to Mr. Wood's direct testimony) sample language and a thorough explanation of the program.[16] BullsEye has what it needs and requiring QCC to compile significant additional data – relating to switched access obtained from CLECs other than BullsEye – serves no logical or reasonable purpose to determining the lawfulness of *BullsEye's* switched access practices.

In brief, these data requests are designed to do little more than distract the Commission from the issues before it and otherwise force QCC to expend resources on a fruitless exercise that would at best provide information which is of no credible relevance to this proceeding or any legitimate defense that BullsEye may care to raise.[17] Accordingly, the Motion should be denied.

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[16] See Mr. Easton's Rebuttal Testimony, at pages 17-20. That Mr. Easton discusses these agreements in his testimony does not necessarily open the door to unlimited discovery on the issue. Mr. Easton raised the issue only in response to the direct testimony of Don Wood.

[17] As an aside, BullsEye once again opts to mischaracterize QCC's position in order to buttress its Motion. At pages 9-10 of the Motion, BullsEye declares that "QCC has made clear in its objections and representations that its refusal to produce discovery is based in large part on the assertion that such information is not consistent with, nor relevant to QCC's theory of the case." That is false. QCC's objections are premised on the fact that the area of inquiry is not reasonably calculated to lead to the discovery of admissible evidence as it in no way informs whether BullsEye violated Florida law *as to its* provision of switched access service. QCC does not believe that a party can refuse to answer discovery because it will harm its theory of the case. But, parties need not respond to discovery that bears no reasonable connection to the allegations and causes of action placed before the Commission.

C. Interrogatories 17-18, Document Request 13.

Through these requests, BullsEye plainly seeks QCC's legal opinion as to whether the BullsEye-AT&T agreement at issue in this case is "void, illegal, and/or unenforceable in Florida" and, if QCC changed its contention in this regard, when it did so.[18] A party answering discovery is not required to interpret, speculate or opine on the law in answer to interrogatories that plainly seek legal opinions. In the recent decision granting in part and denying in part Halo Wireless's motion to compel discovery responses from AT&T, the Commission repeatedly denied Halo's motion to the extent its requests for admission and interrogatories sought legal interpretations rather than facts.[19]

BullsEye believes it can cleverly evade this limitation on discovery by using the verbs "contends or believes." In support of this proposition, BullsEye cites to an order granting AT&T's motion to compel in a complaint case against Thrifty Call, Inc.[20] Yet the Commission's order in the *Thrifty Call* case does not stand for the proposition that BullsEye contends.

That order, citing Rule 1.370(a), rejects Thrifty Call's refusal to answer AT&T requests for admission. The order does not expound upon the denial except to say that "Thrifty Call's objection that the requests call for a legal conclusion has no real merit." While the order goes on (at page 3) to cite Rule 1.370(a), that rule governs requests for admission, not interrogatories (which are governed by Rule 1.340). As the *Halo Wireless* order illustrates, Florida law is plain that interrogatories cannot be used as a guise to force opposing parties to give legal opinions.

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[18] BullsEye is preoccupied with the fact that Qwest, in a Minnesota civil court complaint *which was dismissed,* made allegations regarding the nature of the AT&T agreements. No court ever ruled on these allegations and QCC is free to pursue relief against the CLECs (including BullsEye) which violated Florida law, not by entering the agreements, but by refusing to provide QCC equivalent rate treatment thereafter. BullsEye is free to raise estoppel or other legal defenses in post-hearing brief, but BullsEye seeming obsession with the allegations of the dismissed civil complaint does not oblige QCC to respond to BullsEye's calls for legal opinions.

[19] *In re: Halo Wireless*, Order No. PSC-12-0349-PCO-TP at 13, 15, 16, 17.

[20] Motion, at 11.

Furthermore, AT&T's requests for admission at issue in the *Thrifty Call* case clearly sought admissions on factual matters – i.e., whether Thrifty Call had correctly identified whether the disputed traffic was interstate or intrastate. To the contrary, BullsEye seeks QCC's legal opinion on the enforceability of BullsEye's agreement with AT&T.

In addition, whether or not BullsEye's agreement is "void, illegal or unenforceable" is an issue relevant only to the contracting parties (BullsEye and AT&T) in the context of the parties' compliance with the terms of the contract. QCC's complaint is not that BullsEye entered into a contract with AT&T, but instead focuses on BullsEye's subsequent conduct when it chose to charge QCC higher rates for the same service. QCC's opinion on the enforceability of BullsEye's contract is wholly irrelevant to the Commission's determination of the lawfulness of BullsEye's subsequent behavior. It appears uncontested that BullsEye has abided and continues to abide by the terms of its contract with AT&T. The question of whether a court would have held BullsEye to the terms of the contract (had BullsEye bothered to pursue such relief) aside, BullsEye has consistently charged QCC higher rates for Florida switched access since 2004. These interrogatories, seeking QCC's legal opinion, are inappropriate and irrelevant.

D. Document Requests 21 and 22.

Through these extremely broad document requests, BullsEye seeks "all documents and correspondence" of Qwest employees Patrick Welch and Lisa Hensley Eckert "relating to" this proceeding. Rather than identify any specific subject matter for which it seeks communications, BullsEye demands at this late date <u>all</u> documents and correspondence "relating to the proceeding." This request on its face is overwhelmingly broad and clearly constitutes a speculative fishing expedition designed to harass QCC (including its witness, Ms. Hensley Eckert) just before the evidentiary hearing. In the *Halo Wireless* complaint discussed above, the

Commission recently denied a motion to compel regarding a similarly-untethered interrogatory requesting that AT&T identify "all Documents which [AT&T] reviewed prior to filing the Complaint." The Presiding Officer found the request overbroad on its face and not "narrowly tailored" to AT&T's claims in the proceeding.[21] The Commission should similarly deny BullsEye's motion to compel regarding these untailored requests.

In addition to being unquestionably overbroad, BullsEye's requests demand that QCC pour through countless documents many, if not most, of which are plainly protected by attorney client privilege and the work product doctrine.[22] To the extent Mr. Welch and Ms. Hensley Eckert communicated regarding this case with counsel, those communications are clearly privileged. To the extent they communicated with others within Qwest or with other fact or expert witnesses (including TEOCO) in conjunction with this proceeding, those materials are protected by the work product doctrine.[23] To the extent BullsEye is fishing for correspondence between Mr. Welch and other CLECs in conjunction with settlements, that information is also protected.[24] These two document requests on their face require these two Qwest employees to

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[21] *In re: Halo Wireless,* Order No. PSC-12-0349-PCO-TP at 1-5.

[22] QCC recognizes that the rules require that discovery objections based on the claims of privilege typically should be accompanied by a privilege log. However, Florida courts uniformly have held that this requirement applies only if the information is otherwise discoverable. See, e.g., *W. Fla. Regl Med Ctr v. See,* 18 So. 3d 676, 683 (Fla. 1st DCA 2009) ("Petitioners obligation to file a privilege log did not attach until the trial court decided these threshold issues."); *Gosman v. Luzinski,* 937 So. 2d 293, 296 (Fla. 4th DCA 2006) ("If the party is correct in her assertion that the documents requested are burdensome to produce, why should she still go through all the requested documents to determine which are privileged, even though none of them may be required to be produced because the request is burdensome?").

[23] While the work product privilege is not absolute, BullsEye has made no attempt to make the showing required by Rule 1.280(b)(3) that BullsEye needs the materials to prepare its case and that it cannot, without undue hardship obtain the equivalent of the materials by other means

[24] Section 90.408, F.S. In paragraph 33 of its Motion, BullsEye implies that QCC has entered into settlement agreements with respondents (including XO) in this case that QCC has kept secret. That implication is patently untrue as QCC has filed every settlement agreement entered into with a respondent to this proceeding with the Commission and has provided a copy of each agreement to parties who have signed a nondisclosure agreement, including BullsEye. QCC and XO did not enter a secret, Florida-specific settlement agreement (as BullsEye bizarrely implies), and XO remains a defendant in QCC's Colorado, California and New York complaints, as BullsEye knows.

review, chronicle and disclose every email between themselves and counsel, every email between themselves and other QCC employees and contractors (including TEOCO) sent in conjunction with the litigation, every email sent concerning confidential settlement discussions, every handwritten note taken in conjunction with the litigation, copies of all pleadings and discovery filed and served by all parties, drafts of testimony, drafts and work papers related to all discovery requests, public pleadings from other state proceedings and confidential pleadings (protected by non-disclosure obligations) from other state proceedings. Almost all, if not all, of these materials are either already available in the public domain (in the case of the pleadings and discovery in this case and the public pleadings from other state proceedings), are subject to other states' non-disclosure obligations or are privileged.

BullsEye's intent in pressing for these documents is made clear by its repeated request that the Commission postpone the hearing if QCC fails to produce the material BullsEye now seeks. [25] If BullsEye had sought documents pertaining to specific matters, such as matters raised in Ms. Hensley Eckert's testimony, its request might be more reasonable, although many of those documents still would likely be privileged or protected by the work product doctrine. More specificity regarding the scope of the request as it relates to Mr. Welch might have been reasonable, but BullsEye opted to propound an incredibly broad request to which QCC cannot reasonably be required to respond. Seeking "all documents...relating to the proceeding" is simply too broad and the Commission should not compel QCC to perform an extensive review of these employees' files without any more basis than BullsEye's unsupported speculation that there may be relevant information in their files. Given the nature and timing of the request, QCC requests that the Commission deny the Motion.

[25] Motion at 2, 17.

terrogatories Nos. 19 and 20

On page four of its Motion, BullsEye identifies twelve Interrogatories for which it seeks to compel responses, including Interrogatories Nos. 19 and 20. However, BullsEye fails to address these Interrogatories in the body of its Motion. QCC provided information that QCC believes is fully responsive to these request (See, Exhibit B to BullsEye's Motion at pages 19 and 20.) and BullsEye has failed to explain why the information provided may not have been sufficient. Therefore, to the extent that BullsEye's Motion is intended to request that the Commission compel any further responses to these Interrogatories, the Motion should be denied.

IV. Conclusion

Based on the foregoing, QCC respectfully requests that the Commission deny BullsEye eleventh hour motion to compel. BullsEye's requests are objectionable for all the reasons stated above and its intention seems clearly focused on delaying the evidentiary hearing and/or hindering QCC's ability to prepare.

RESPECTFULLY SUBMITTED on this 17th day of October, 2012.

/s/ Susan S. Masterton
Susan S. Masterton
CenturyLink QCC
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301
850-599-1560
850-224-0794 (fax)
Susan.Masterton@centurylink.com

Adam L. Sherr
CenturyLink QCC
1600 7th Avenue, Room 1506
Seattle, Washington 98191
206-398-2507
206-343-4040 (fax)
Adam.Sherr@centurylink.com

ATTORNEYS FOR QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC

CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP

I hereby certify that a true and correct copy of the foregoing has been served upon the following by electronic mail delivery and/or U.S. Mail this 17th day of October, 2012.

Florida Public Service Commission Theresa Tan Office of General Counsel 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 ltan@psc.state.fl.us	Division of Regulatory Analysis Jessica Miller Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399 JEMiller@psc.state.fl.us
Ernest Communications, Inc. 5275 Triangle Parkway, Suite 150 Norcross, GA 30092-6511 lhaag@ernestgroup.com	Flatel, Inc. c/o Adriana Solar Executive Center, Suite 100 2300 Palm Beach Lakes Blvd. West Palm Beach, FL 33409-3307 asolar@flatel.net
BullsEye Telecom, Inc. David Bailey 25925 Telegraph Road, Suite 210 Southfield, MI 48033-2527 dbailey@bullseyetelecom.com	Gunster, Yoakley & Stewart, P.A. Matthew J. Feil 215 South Monroe Street, Suite 601 Tallahassee, FL 32301 mfeil@gunster.com † ***Confidential Documents provided in accordance with signed Protective Agreement***
Navigator Telecommunications, LLC David Stotelmyer 8525 Riverwood Park Drive North Little Rock, AR 72113	Klein Law Group Andrew M. Klein/Allen C. Zoracki 1250 Connecticut Ave. NW, Suite 200 Washington, DC 20036 AKlein@kleinlawPLLC.com azoracki@kleinlawpllc.com † ***Confidential Documents provided in accordance with signed Protective Agreement***
	TW Telecom of Florida L.P. Carolyn Ridley 2078 Quail Run Drive Bowling Green, KY 42104 Carolyn.Ridley@twtelecom.com

/s/ Susan S. Masterton
Susan S. Masterton