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Subject: Electronic Filing - Docket No. 090538-TP
Attachments: 090538-TP twt Brief and Final Statement of Issues and Positions.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact Matt Feil. Thank you.

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Docket Name and Number: Docket No. 090538-TP – Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.

Filed on Behalf of: tw telecom of florida, l.p.

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Thank you.

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December 10, 2012

ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 090538-TP - Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.

Dear Ms. Cole:

Enclosed is tw telecom of florida, l.p.'s Brief and Final Statement of Issues and Positions, submitted by electronic mail in the above-referenced docket.

If you have any questions, please call me at 850-521-1708.

Sincerely,

Matthew J. Feil

Enclosures

DOCUMENT NUMBER-DATE
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.	DOCKET NO. 090538-TP FILED: December 10, 2012

BRIEF AND

FINAL STATEMENT OF ISSUES & POSITIONS OF

TW TELECOM OF FLORIDA, L.P.

Matthew Feil
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On behalf of tw telecom of florida, l.p.

DOCUMENT NUMBER-DATE
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INTRODUCTION & SUMMARY

Between 2001 and 2008, through a corporate parent, tw telecom of florida, l.p. ("TWTC") had an agreement with AT&T in which AT&T made a multi-million dollar take-or-pay revenue commitment to TWTC for several unregulated services purchased on a nation-wide basis, including Florida intrastate switched access ("SWA"). In this case, Qwest claims, under certain repealed provisions of Florida law, that this TWTC-AT&T agreement was unduly or unreasonably discriminatory. However, during this same period, 2001 to 2008, and continuing to the present day, Qwest also has had an agreement with TWTC for unregulated services. The Qwest agreement contains no revenue commitment, nor did Qwest negotiate SWA prices. Though Qwest could have sought its own agreement with TWTC for SWA, it did not. And, significantly, Qwest will not agree to a revenue commitment similar to that of AT&T. Even if the Commission had jurisdiction over Qwest's claims after The Regulatory Reform Act of 2011, those claims must be rejected because Qwest was not in "like circumstances" to AT&T nor was Qwest the victim of "undue or unreasonable" treatment vis-à-vis AT&T. AT&T agreed to a multi-million dollar take-or-pay obligation: Qwest wanted no part of that or any other commitment. Rather than equal treatment with AT&T, Qwest asks the Commission for preferential treatment: i.e. retroactively granting Qwest an SWA rate that would not have existed but for the totality of the negotiated AT&T-TWTC agreement and its associated revenue commitment.

CLECs in Florida are and have always been subject to a "lesser level" of regulation to encourage CLEC entry and investment in the state. Imputing a new regulatory regime for

CLEC SWA rates after the fact, as Qwest urges the Commission to do here, will only penalize CLECs like TWTC who already invested in Florida and will discourage future investment in Florida.

Qwest's case cannot withstand critical scrutiny. Qwest sidesteps the repeal of the discrimination laws upon which its entire complaint is based in several specious ways. Although the statutes upon which Qwest relies have been repealed, Qwest argues that the repeal was only intended to effect retail consumer practices. This argument is self-contradictory because Qwest acknowledges that **the only** non-discrimination provisions in the statute protected consumers and not carriers. Qwest also insists that it had a private property right (a cause of action) which outlives the laws' repeal. This position flies in the face of precedent regarding such rights and agency jurisdiction, and is completely inconsistent with Qwest's argument that the statute of limitations does not apply because this case is an agency enforcement action. Qwest can't have it both ways.

Further, although Qwest claims in Count II of its Amended Complaint (Issue No. 6) that a CLEC must charge all IXCs the SWA standard offer rate from the CLEC's price list, Qwest witness Easton could not square this claim with his own testimony that CLECs should extend SWA contract rates by notice/letter. Qwest witness Hensley-Eckert would have the Commission believe Qwest conducted a "diligent" investigation of CLEC SWA contract rates by writing letters which asked CLECs for the type of confidential/proprietary contracts Qwest itself would not surrender to any third party who asked; and, remarkably, the "diligence" did not include a Google search for publically available information regarding CLEC agreements, let alone for agreements involving large or publicly-traded CLECs like TWTC.

Qwest also asks the Commission to unlawfully rely on presumptions and unpromulgated rules to establish the bases for both undue or unreasonable discrimination and harm. Without these proposed presumptions and rules, Qwest's case falls. Qwest did not present any actual evidence that TWTC's allegedly discriminatory pricing was in fact undue or unreasonable or had any impact on Qwest's prices, profits or market share in Florida or any impact on Florida consumers. And, in the converse situation where Qwest was the beneficiary of a contract rate for SWA, Qwest offered inadequate explanation of why the same evidentiary presumptions and rules would not apply. Finally, Qwest may make a last-ditch effort to distract the Commission from these flaws and the claims as pled by suggesting that the AT&T-TWTC agreement may somehow be independently actionable as anticompetitive behavior. This claim is not in Qwest's complaint or in the Prehearing Order issues. The obvious procedural defects to this phantom claim notwithstanding, there is absolutely no competent substantial evidence in the record that the AT&T-TWTC agreement was anti-competitive or had or any impact to any Florida market.

Despite Qwest's claims to the contrary, this case is not a parallel proceeding to the one that was litigated in Colorado: the statutes and regulatory rules in Colorado are materially different than the statutes and rules in Florida. Qwest's advocacy espouses not what the law in Florida is -- where the Legislature has sought to promote a more free market for telecommunications services –, but what Qwest feels the law should have been for the past ten-plus years. In Florida, CLEC SWA rates are not regulated, there is no cost basis mandate for SWA pricing, there is no requirement to file SWA price lists or contracts, and SWA has never been deemed a bottleneck service. Any Qwest argument to the contrary must be rejected.

With the hearing completed and the evidentiary record closed, the Commission should now see Qwest's case for what it really is: an over-lawyered contrivance to retroactively impute

new regulation into repealed law. Qwest has made an unprecedented and unreasonable request for a windfall or penalty, to the detriment of economic investment in Florida. For these and all the reasons stated in this Brief, the Commission must reject all of Qwest's claims against TWTC.

ISSUES, POSITIONS AND ARGUMENT

ISSUE 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)?

TWTC: ***The Regulatory Reform Act removed Commission authority over the cited provisions; therefore, all pending cases "fall with the law." Qwest had no property interest in its claims, and current, not repealed, law applies.***

The commission does not have jurisdiction to enforce repealed prior law in the context of this case because: (a) even if the cited statutory provisions applied to CLECs, the Commission only has the authority granted it by the Legislature; since the Legislature repealed or altered those statutory provisions, the Commission has no jurisdiction over this matter and all pending cases fall with the law; and (b) application of The Regulatory Reform Act to this matter does not constitute a retroactive change of law, and Qwest did not establish a property right (i.e. vested right) in a cause of action.[1]

[1] If the Commission finds in Issues Nos. 5, 6 and 7 that Qwest failed to prove TWTC violated any of the statutory provisions – which the Commission should decide – the Commission may evaluate whether all or parts of Issues No. 1, 3, 4, 8 and 9 need to be ruled upon at all. TWTC does not state a position regarding such an evaluation,

To properly address this issue, the Commission must affirm several points respecting the issue's scope. First, this issue **ONLY** involves §§ 364.08(1), 364.10(1) and 364.04(1)[2] as those sections existed prior to July 1, 2011, and changes made to those sections by The Regulatory Reform Act.[3] No other statutory provisions are cited in the wording of the issue, so none should be addressed as part of the issue. Second, this issue posits that Qwest's First, Second and Third Claims for Relief **ONLY** allege violations of those referenced sections and nothing else.[4] Therefore, to the extent that any other party addresses jurisdictional matters outside these four corners of the issue, such arguments are outside the scope of the issue and improper.[5]

With the issue's scope thus defined, the Commission must also affirm that the posture, and hence the analysis, of this issue is entirely different from that of a motion to dismiss. In a motion to dismiss, the Commission accepts as true the allegations made in the petition and affords the petitioner the benefit of inferences from allegations.[6] The determination now required by this issue, however, leaves that framework and the pleadings behind. Instead, this

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which, as applied, could have multiple and significant variations. Rather, TWTC reserves its rights should the Commission's actions affect TWTC's interests.

[2] TWTC does not concede that the cited sections even apply to carrier transactions. That topic is addressed in Issue No. 5.

[3] Chapter 2011-36, Laws of Florida. This law made the following changes. Sections 364.08(1) and 364.10(1) were repealed and not replaced. Section 364.04 was rewritten to clarify that the Commission did not have jurisdiction over the content of published schedules of telecommunications companies and permit service contracts with rates, terms and conditions different from those published schedules. For the sake of convenience, throughout this brief, TWTC refers to all of foregoing changes as a "repeal" unless otherwise noted and does not always include the "(2010)" designation in referring to statutory sections as they existed prior to July 1, 2011.

[4] This issue's wording should not now be revised to ask an entirely different question. Qwest may assert this issue includes the question of the Commission's jurisdiction over a claim sounding in anticompetitive conduct. On its face, the issue does not. Besides, an agency may not take jurisdiction over one provision of the law and then bootstrap it onto another that was repealed.

[5] For instance, the Commission's jurisdictional authority, if any, to order the remedies Qwest seeks are addressed in Issue No. 9(a).

[6] Docket File Document No. 04705-11.

issue addresses whether the Commission has jurisdiction to enforce the referenced statutory sections **based on evidence in the record**. Thus, jurisdiction is viewed not in the context of allegations once assumed to be true but in the context of claims proven to be true, if any. The Commission's ruling on the Joint CLECs' earlier motion to dismiss for lack of jurisdiction,[7] therefore, is little more than a historical reference.[8] It is not dispositive at this stage of the game.

Further, as alluded to above, TWTC submits that a predicate question for this analysis is the following: whether Qwest had a vested property right in a cause of action which could not be altered by The Regulatory Reform Act. As discussed in further detail below, TWTC submits that Qwest did not have a vested property right to a cause of action, and, even if Qwest did, the Commission does not have jurisdiction to address same. This aside, if this predicate question is not decided in the context of this issue – and depending on the Commission's reasoning, it may not need to be -- TWTC notes the question also comes up in the context of Issue No. 7(a) (statute of limitations).[9]

Below is a summary of what was and what was not proven in the record germane to a Commission determination on jurisdiction[10]:

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[7] Order No. PSC-11-0420-PCO-TP, issued September 28, 2011, in this docket.

[8] At the Agenda Conference where the earlier Motion to Dismiss was addressed, the Commission indicated its intent to revisit the issue of jurisdiction when the case was decided on the merits. Docket File Document No. 06694-11, page 24.

[9] In its discussion of Issue No. 8(a), TWTC points out the inconsistency in the Qwest arguments that, on the one hand, Qwest has a vested right in a cause of action for purposes of the jurisdictional analysis, but, on the other hand, this case is an agency enforcement matter for purposes of the statute of limitations analysis. TWTC maintains that the theoretical foundation for Issue No. 1 and Issue No. 8(a) must be consistent, i.e. must be one or the other.

[10] Most of these findings are discussed in greater detail in Issues Nos, 5 – 8 later in this Brief, with record citations there.

(1) TWTC charged Qwest a standard offer SWA rate from TWTC's Florida Price List, a rate which Qwest paid without dispute. Qwest did not make any attempt to negotiate a contract rate with TWTC, though Qwest knew that it could so negotiate.

(2) TWTC charged AT&T a negotiated contract rate for SWA, as allowed by TWTC's Florida Price List. An integral part of that TWTC-AT&T contract required AT&T to make a take-or-pay revenue commitment applicable to the entire package of services under contract.

(3) Qwest would not and will not agree to a revenue commitment as was agreed to by AT&T. Rather, Qwest seeks just one rate for one service, SWA, from the TWTC-AT&T agreement and would abjure **all** other AT&T duties under that contract.

(4) CLEC SWA rates have never been based on cost in Florida; the Commission does not have jurisdictional authority to set SWA rates, based on cost or any other basis; and the Commission has never exercised jurisdictional authority, even if it had any, over contracts for SWA rates/services.

(5) No statute, Commission rule or order establishes **even one** of the elements to Qwest's strict liability[11] brand of discrimination claim, those elements being: (a) SWA is a monopoly service, (b) a CLEC's SWA standard offer rates and contract rates must be uniform unless supported by a cost study, (c) any such non-uniform SWA rates are presumptively discriminatory and harmful to one or more undefined market(s), (d) contract SWA rates had to be filed with or approved by the Commission or disclosed/offered to all carriers, (e) though not regulated by the Commission, SWA rates are subject to retroactive adjustment.[12]

(6) These aforesaid elements have all been constructed by Qwest after-the-fact, for purposes of this case, and were not part of a fairly noticed and previously implemented regulatory system which set expectations for the carrier community.[13]

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[11] "Strict liability" means "Liability without fault. A case is one of 'strict liability' when neither care, nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save the defendant" Black's Law Dictionary, Revised Fourth Edition.

[12] As discussed in Issue No. 3, many of the foregoing are based on impermissible evidentiary presumptions or, as discussed in Issue No. 5, unpromulgated rules.

[13] In fact, as discussed later in Issue No. 5, the Commission cultured an environment of regulatory restraint as to CLECs, as Mr. Deason testified. In addition, if there is any concern at all in this proceeding about a retroactive application of law, that concern pertains to the Commission's applying these newly-forged elements to prior CLEC conduct.

With these findings, the Commission may proceed to the analysis of: (1) whether the commission, as an agency with powers limited by the Legislature, has jurisdictional authority to enforce repealed law as Qwest has argued in this case and, (2) whether applying The Regulatory Reform Act to this case is a retroactive application of law and whether Qwest had a vested property right to the relief Qwest seeks. As TWTC notes throughout, under any analytical approach, Qwest is wrong, and the Commission simply lacks jurisdiction, under any circumstances, to enforce repealed sections of Florida Statutes.

The record must be reconciled with years of precedent defining the limited scope of agency and Commission authority, including, in particular, the holdings of *Jennings v. Florida Elections Com'n*, 932 So.2d 609 (Fla. 2nd DCA 2006), and *Gewant v. Florida Real Estate Com'n*, 166 So.2d 230 (Fla. 3rd DCA 1964). In those cases, the courts found an agency could not enforce repealed law for acts committed prior to repeal. Therefore, from a critical point of view, the Commission must at least acknowledge this much: if the Commission on its own initiative sought to enforce repealed law, the Commission lacks jurisdictional authority to do so.

The Commission is, of course, a creature of statute with only such powers as delegated to it by the Legislature.[14] "Inasmuch as the PSC, like other administrative agencies, is a creature of statute, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *Southern States Util. v. Public Serv. Comm'n*, 714 So.2d 1046, 1051 (Fla. 1st DCA 1998) (*en banc*) (internal quotations and citations omitted). Indeed, it is a bedrock principle of administrative law that:

[14] *See, e.g., State Dept of Transportation v. Mayo*, 354 So.2d 359, 361 (Fla. 1977).

> An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency **may not** increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.

State Dept. of Env. Reg. v Falls Chase Special Taxing Dist., 425 So.2d 787, 793 (Fla. 1st DCA 1982) *review den'd* 436 So.2d 98 (Fla. 1983) (emphasis added); *see also Ocampo v. Dept. of Health*, 806 So.2d 633, 634 (Fla. 1st DCA 2002) ("An agency can only do what it is authorized to do by the Legislature"). An agency may not enlarge, modify, or contravene the authority the Legislature delegated to the Commission. *See, e.g., City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973) ("Any 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."); *see also State Dept. of Transportation v. Mayo*, 354 So.2d at 361. If the Commission attempted to expand its authority, intentionally or not, the Commission's actions would be an unlawful attempt to wrest power away from the Legislature, rather than acting as an agent of the Legislature. Moreover, as the Florida Supreme Court has stated, "[t]o say that the jurisdiction of the Public Service Commission cannot be altered by the State Legislature is to admit that the government is beyond the control of the people – that an administrative Frankenstein, once created, is beyond the control of its Legislative creator."[15]

In *Jennings*, the Second DCA addressed whether the Florida Elections Commission ("FEC") had the authority on its own initiative to proceed with investigating certain charges against a city councilmen when, after a DOAH hearing but before final adjudication of those charges, the Legislature changed the law and limited FEC's ability to investigate only charges

[15] *City of Cape Coral* at 496.

brought by a third party complaint. 932 So.2d 609, 610-611. After relating the relevant facts, the court began to address principles of retroactivity as to procedural, remedial and substantive changes of law, but stopped short, and found instead:

> We conclude that general principles to be applied in determining whether a statute should be applied retroactively are not useful in resolving this case given the nature of the law at issue here. The amendment effectively restricted the jurisdiction of the [FEC].
>
> . . . .
>
> We conclude that the issue in this case must be resolved by using the general principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."

Id. at 612, 613 (Citations omitted.) Then, as to the inference of legislative intent to be drawn from the lack of a savings clause accompanying the statutory change, the court commented,

> The statute does not distinguish violations unearthed by the [FEC] before its effective date from violations discovered thereafter. If the legislature had intended its restriction on the [FEC's] power to apply only to the latter, it easily could have said so. Just as easily, the legislature could have exempted pending proceedings from the operation of the statue. It did neither.

Id. at 613.

In another change of law case affecting agency jurisdiction, *Gewant* concerned Florida Real Estate Commission ("FREC") charges against a registered broker for violating a statute which declared it unlawful for anyone to advertize land sales to out-of-state prospects prior to filing certain information with the FREC. 166 So.2d 230, 231. While proceedings were pending at FREC, but before a final decision on the charges was rendered, the statutory mandate was repealed. *Id.*, 231 – 232. "No savings clause was included in the new statute." *Id.* at 232. The court held that the effect of the repeal "was to eliminate the jurisdiction of the [FREC] over this particular violation." *Id.* at 233. Even if the Legislature intended to continue to regulate the activity, the court continued, "it cannot be said that it was their intent to perpetuate (beyond the

[effective date of repeal]) the power of the [FREC] to punish for violations of the repealed section." *Id.*

Jennings and *Gewant* illustrate several key points. First, an agency has no jurisdiction to proceed in pending cases where the authority which the agency did have is repealed prior to the agency's final determination. Second, a savings clause would be required to preserve authority over pending cases.[16] In other words, the proper legislative intent to be drawn from the lack of a savings clause is that a repeal/replacement of laws governing agency authority applies on the effective date of the repeal. If the opposite conclusion regarding legislative intent from the lack of a savings clause were made, both *Jennings* and *Gewant* would have different holdings altogether.

In consideration of the above authority, there can be little question in this case that (a) the repeal or replacement of §§ 364.04, 364.08(1), and 364.10(1), F.S. (2010), by The Regulatory Reform Act applies to all pending cases and the Commission has lost jurisdiction over all pending cases to enforce repealed law and (b) the lack of a savings clause means that there was NO legislative intent to preserve Commission jurisdiction over pending cases. Accordingly, the question becomes what difference, if any, should Qwest's presence in this case make, particularly in light of the record here.

TWTC has found no Florida authority supporting the proposition that a third party's mere allegations for standing to commence an administrative adjudication on a repealed regulatory requirement, either: (a) over-rides the Legislatively created jurisdictional bounds of that agency or (b) can or does create a vested property right or a "cause of action" in a prior

[16] *See also Florida Interexchange Carriers Association, Inc., v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996) ("The very nature of a savings clause imparts retroactivity upon the statutes within its ambit.")

regulation. The Commission does not have the same authority as Florida's courts. This case is an administrative, quasi-judicial proceeding.[17] And, although very sparse as to telecommunications services, the legislative prescriptions in Chapter 364 were a limited exercise of the state's police power.[18] The Regulatory Reform Act constitutes a change to or pull back of the state's police power. When the Legislature, in its sound judgment, limits its exercise of police power, and an agency finds that a third party has a vested property right in prior regulation, the agency effectively divests the Legislature of control over its police power. Thus, Qwest asks the Commission to do what the Commission cannot do: wrest control of regulation from the Legislature. In addition, no agency has inherent jurisdictional authority to find or preserve a vested property right,[19] let alone tamper with the police power in defiance of its Legislative master. And even if Qwest had a vested right in any prior regulations -- which Qwest does not – the Commission may not grant itself additional jurisdictional authority to adjudicate repealed law under the guise of "interpreting" The Regulatory Reform Act. *See, e.g,. Falls Chase Special Taxing Dist., supra; Ocampo, supra; GAC Utilities, Inc. of Florida, supra.*

Based on the record in this case, TWTC disputes the contentions that applying The Regulatory Reform Act to this case would be retroactive and that Qwest has a vested property right any prior regulations. As a general rule, "courts should apply the law in effect at the time that they decide a case *unless* that law would have an impermissible retroactive effect as that

[17] All of the cases heretofore cited by Qwest, and likely to be cited again, are cases involving civil actions in the courts, not cases involving agency regulation or jurisdiction. Qwest's cited cases are, therefore, are inapposite. Further, although TWTC characterizes Qwest's prayer for monetary relief as a damages remedy, that assertion does not change the jurisdictional analysis.

[18] See § 364.01(4), F.S. (2010). The state's police power generally encompasses regulations designed to promote the public, health, safety, welfare or general prosperity. *E.g. State v. Saiez*, 489 So.2d 1125, 1127 (Fla. 1986).

[19] For an agency to do so would unlawfully cast the agency in the role of a court, holding the Legislatures' change to law unconstitutional as applied.

concept is defined by the Supreme Court." *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 652 F.3d 650 (6th Cir. 2006) (no retroactive application of law impeding a vested right for PSC to apply new regulation regarding interconnection agreements to case filed prior to rule change). The U.S. Supreme Court established the framework for retroactivity analyses in *Landgraf v. Usi Products, et al.* 511 U.S. 244 (1994), where the Court explained:

> While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task.
> . . . .
>
> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.
>
> . . . .
>
> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf at 268- 270 (internal quotations and citations omitted). In this case, The Regulatory Reform Act did not specify its "temporal reach," though, as stated earlier, *Jennings* and *Gewant* both dictate that changes to a regulatory statute apply to pending cases where the new law

contains no savings clause. Accordingly, even if one were to look to the next part of the *Landgraf* test, nothing about "the nature and extent of the change in the law" or "the degree of connection between the operation of the new rule and a relevant past event" offends "familiar considerations of fair notice, reasonable reliance, and settled expectations." TWTC maintains this is so because, at a minimum: (a) The public understands that particular expressions of the state's police power, such as the statutory sections repealed and replaced here, are always subject to change by the Legislature.[20] (b) It cannot be fairly or persuasively argued that any Florida telecommunications carrier had notice of, relied on or expected that, under prior law, even if anti-discrimination statutory provisions applied to SWA: (i) the standard for a claim of discrimination was strict liability **and** (ii) such a claim triggered the sort of retroactive monetary liability reserved for instances where the Commission had plenary authority to set and regulate rates.[21]

Dove-tailing into these concepts of notice, reliance and expectation in a retroactivity analysis is the definition of "vested right." To be vested, "a right must be **more than** a mere expectation based on anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enjoyment of a demand." *In re: Will of Martel*, 457 So.2d 1064, 1067 (Fla 2nd DCA 1984) (emphasis added), *citing Division of Workers Compensation v Brevda,* 420 So.2d 887 (Fla 1st DCA 1982). A right cannot be uncertain or a mere possibility. *Id.* Nor can such rights be said to be contingent, i.e., "when they only come into existence on an event or condition which may not happen or be performed until some other

[20] Indeed, the Florida Legislature has altered the Commission's jurisdictional authority over telecommunications matters multiple times over the last ten years.

[21] The benefit of going-forward relief based on the repealed statutory sections does not raise retroactivity concerns and would not constitute a vested right. *Landgraf* at 273. Therefore, there is no question that any Qwest claims for prospective relief based on repealed law is improper.

event may prevent their vesting." *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004) (quotations and citations omitted).

Any expectation Qwest had relative to its claims were purely unilateral expectations, and by no means shared or mutual. Further, any such Qwest expectations **were entirely contingent** on the Commission's accepting, for the first time in this case, the new elements to Qwest's unique brand of strict liability discrimination claim, including: (a) SWA is a monopoly service, (b) a CLEC's SWA standard offer rates and contract rates must be uniform unless supported by a cost study, (c) any such non-uniform SWA rates are presumptively discriminatory and harmful to one or more undefined market(s), (d) contract SWA rates had to be filed with or approved by the Commission or disclosed/offered to all carriers, (e) though not regulated by the Commission, SWA rates are subject to retroactive adjustment. Therefore, it cannot be said Qwest had a vested right.

In summary, notwithstanding the Commission's lack of jurisdictional authority on a statutory basis, even if it were correct to say that Qwest's initial pleading constituted more than just a claim for standing in agency enforcement of a delegated police power, or stated more specifically, even if prior regulations vested Qwest with a private property right in a "cause of action" for undue or unreasonable discrimination, that is a far cry from what is at issue now. In the record Qwest posits an entirely new "cause of action," one based on strict liability and retroactive adjustment to rates which the Commission does not regulate. Accordingly, on this record, the application of The Regulatory Reform Act to this case is not retroactive and Qwest had no vested right.

In consideration of the foregoing, TWTC maintains that the Commission does not have jurisdiction based on the evidence in the record to enforce §§ 364.08(1), 364.10(1) and 364.04(1), F.S. (2010).

ISSUE 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)?

TWTC: ***At the hearing, Qwest stipulated that this issue does not involve or impact TWTC.***

TWTC's SWA contract rate with AT&T expired in November 2008. As Qwest stipulated at the conclusion of the hearing, this issue, therefore, does not involve TWTC.

ISSUE 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?**

TWTC: ***(a) The burden to demonstrate jurisdiction remains on the party asserting jurisdiction, i.e. Qwest. (b) Absent a statutory burden-shifting presumption, Qwest also bears the burden of proving both the factual and legal basis for its claims. The Legislature has not created a presumption to shift that burden to CLECs. ***

It is doubtful that there is any genuine dispute in this case regarding who has the ultimate burden of proof. Rather, the more specific contentions involve what that burden of

proof entails and how is it met in the context of this case. Qwest errs in several respects regarding the burden, and the Commission cannot and should not rely on these flaws.

As a general rule, the burden of proof is on the party asserting the affirmative in an administrative proceeding. *See e.g. Florida Department of Transportation v J.W.C. Co., Inc.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349, 350 (Fla. 1st DCA 1977). Since a motion to dismiss for lack of jurisdiction may be made at any time under Rule 1.140(h)(2) of the Florida Rules of Civil Procedure, it logically follows that if jurisdiction is questioned at any time, the party asserting the affirmative of a tribunals' authority must also establish the jurisdiction of the tribunal at any time.

The standard of proof in most administrative cases is a preponderance of evidence. Section 120.57(1)(j), F.S. *Fitzpatrick v City of Miami Beach*, 328 So2d 578 (Fla. 3d DCA 1976). However, the clear and convincing evidentiary standard applies in penal proceedings, such as a disciplinary cases or cases imposing an administrative fine, as these are penal in nature and implicate property rights. *E.g., Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). Therefore, to the extent this matter is a disciplinary case, the standard of proof is clear and convincing evidence.

On the face of its argument regarding burden of proof, Qwest posits a burden shifting presumption whereby, as Qwest would have the Commission believe, the burden of coming forward with evidence shifts from Qwest to TWTC once Qwest makes the mere allegation that a difference in SWA rates is not based on cost. To support this proposition, Qwest has cited authority from other jurisdictions or in applicable authority. However, these do not establish the

law in Florida administrative proceedings. The more serious flaws to Qwest's position regarding how the burden of proof is to be applied are: (a) Florida administrative agencies have no authority to adopt or apply a legal presumption in the absence of specific authorization from the Legislature, (b) Qwest misrepresents its presumption as one which shifts the burden of coming forward, and (c) in reality, Qwest posits an irrebutable presumption for both liability and harm. Qwest cannot evade its burden of proof in the case by these improper devices.

The law on this point is clear. "[T]here is no authority under Florida law for an agency to adopt and apply a legal presumption in the absence of specific authorization by the legislature." *McDonald v. Dept. of Professional Reg., Bd. of Pilot Comm'n*, 582 So.2d 660, 664 (Fla. 1st DCA 1991.[22] At a minimum, this means that an agency may not declare through a rule or order that the existence of a one fact establishes the existence of a presumed fact.[23] It does not mean the Commission may not draw reasonable inferences from the evidence. But, clearly, a mere inference is not what Qwest suggests here. Qwest asks the Commission to use presumptions to establish liability and harm. Qwest's witnesses makes Qwest's intentions obvious: they testify that there is no justification for different rates other than cost. (Weisman, TR 000355, 000363) (Easton TR. 000141 – 000142.) Qwest's use of cost in this way is a noteworthy flaw in and of itself, since SWA rates are not and never have been based on cost or regulated. In any event, the Commission may not employ presumptions, rebuttable or not, unless authorized by statute. The burden to establish subject matter jurisdiction as well as the factual and legal basis for its claims remains squarely on Qwest. The Commission must reject

[22] Any reliance on *Clay Utility Co. v. City of Jacksonville*, 227 So.2d 516 (Fla. 1st DCA 1969) is misplaced. That case was a circuit court action for a determination of rights under former chapter 86, F.S, which set limitations on municipal electric provider cost recovery; it was not a quasi-judicial proceeding under chapters 120 and 364.

[23] See the definition of a "presumption" in section 90.301, Florida Statutes.

Qwest's efforts to excuse its failure to meet these burdens by relying on legal presumptions that were never authorized by the Legislature.

ISSUE 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?**

TWTC: ***No. To have standing, Qwest must demonstrate injury in fact of a type which the proceeding is designed to protect. Qwest cannot show standing on these facts, under repealed law. Qwest has not alleged a violation of any current statute, nor attempted to amend its Complaint to allege such.***

The two-pronged test for standing in administrative proceedings is well-settled under *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981). The question presented here, more precisely, is whether a party has standing under *Agrico* to request enforcement of repealed law. A third party does not have standing to seek agency enforcement of repealed law; for it logically follows that standing would fail when subject matter jurisdiction fails, as it should per TWTC's position on Issue No. 1.

Qwest did not properly place before the Commission any other claims for adjudication. Specifically, Qwest did not properly place at issue a separate claim of anti-competitive conduct.[24] For that matter, Qwest did not properly name TWTC as a respondent to its Third

[24] TWTC does not take the position that a carrier lacks standing to petition the Commission to address matters within the Commission's jurisdiction, which could include anticompetitive conduct, if those matters are **properly** put before the Commission. Qwest's complaint did not state a claim for anti-competitive conduct and only makes two passing references to § 364.01. Qwest's testimony only posits the presumption that alleged rate discrimination causes anticompetitive results in downstream markets. Its testimony does not meet any established elements for a claim of anticompetitive conduct. Qwest made no attempt to amend its complaint to include such a claim before or after the law changed, and did not seek to add an issue or amend existing issues to include such a claim, even if for no purpose other than clarification and fair notice to the parties.

Claim. And the Commission should not allow Qwest to play fast and loose with the procedural requirements of the Commission and Chapter 120.

ISSUE 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?**

TWTC: ***No. Repealed sections 364.08(1) and 364.10(1) should not be applied as Qwest argues. Further, Qwest is not in "like circumstances" to AT&T nor the victim of "undue or unreasonable" treatment vis-à-vis AT&T because AT&T made a multi-million dollar take-or-pay commitment Qwest would not and could not make.***

Notwithstanding the repeal of §§ 364.08(1) and 364.10(1) (2010), TWTC questions whether these statutory sections were applicable, or should have been applicable, to all or some services sold by carriers to other carriers or just some services sold to consumers. Further, TWTC maintains that if these sections were applicable to inter-carrier service, Qwest's proposed strict liability approach is improper on a number of grounds and the Commission must therefore look to a "rule of reason" test for what might constitute "undue" or "unreasonable" discrimination and who may or may not be "similarly situated." Under the rule of reason approach, the TWTC-AT&T agreement was appropriate, justified, and not discriminatory, as AT&T is uniquely situated. Qwest has not provided adequate bases to claim otherwise.

TWTC's disagreement with the application of §§ 364.08(1) and 364.10(1) (2010) to all carrier transactions stems from legislative statements, Commission precedent, sound policy and Qwest's own admissions. Beginning with the latter, Qwest fervently argued the repeal of these sections was only intended to effect retail consumer transactions.[25] But there were not separate

[25] See Qwest's response to Joint CLEC Motion to Dismiss, Docket File Document No. 05392-11, page 15-

non-discrimination provisions in the law, one for consumer transactions and one for carrier transactions. Thus, Qwest acknowledges that **the only** non-discrimination provisions in the statute protected consumers and not carriers. Notably, the preamble of The Regulatory Reform Act supports this rationale wherein it describes the act as "repealing . . . 364.08, F.S., relating to . . . unlawful charges against **consumers** . . . ."[26] In addition, the rules of statutory construction require that all provisions of Chapter 364 be read together in harmony to achieve a consistent legislative purpose. [27] While §§ 364.08(1) and 364.10(1) were in effect, chapter 364 also provided that CLECs were subject to a lesser level of regulation,[28] and the Commission's rules for CLECs took, and still take, a "hands-off" approach to CLECs. The Commission never applied §§ 364.08(1) and 364.10(1) to CLECs (for customer or carrier transactions), and implemented no rules on the subject. Moreover, from a policy point of view, there was no need to apply §§ 364.08(1) and 364.10(1) to CLECs. As former Chairman Deason testified, it would have served no purpose to apply these legacy sections to CLECs; instead he opined those provisions remained in the statute to protect ILEC consumers during the transition to competition (Deason, TR. 000607-000608), because carriers can fend for themselves.[29]

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[26] Chapter 2011-36, Laws of Florida, Preamble (emphasis added).

[27] *E.g., Woodgate Dev. Corp. v. Hamilton Investment Trust*, 351 So.2d 14 (Fla. 1979).

[28] Section 364.01(4)(e), F.S (2010).

[29] Qwest has argued that in order for §§ 364.08(1) and 364.10(1) to not apply to a CLEC, § 364.337 required that a CLEC seek a waiver from the Commission. TWTC disagrees that a waiver was necessary or that § 364.337 required that the Commission apply §§ 364.08(1) and 364.10(1) . The Commission implemented comprehensive rules for CLECs after the 1996 act and specifically rejected **any** rules on CLEC SWA. CLECs reasonable relied on the Commission's choices in that rulemaking, both approving and rejecting various proposals, to cover all CLEC operations, not just a few select parts. Although § 367.377 has changed significantly over time, during the TWTC-AT&T agreement on SWA rates, it provided in part, "Rules adopted by the commission governing the provision of competitive local exchange telecommunications service shall be consistent with s. 364.01." (Section 364.01 provides for a lesser level of regulation for CLECs.) Section 364.337 further provided, "A certificated competitive local exchange telecommunications company may petition the commission for a waiver of some or all of the

Assuming §§ 364.08(1) and 364.10(1) (2010) did apply to CLECs and, specifically to CLEC services sold to other carriers, the Commission must address the standard(s) by which it should evaluate application of those sections in the context of the evidence in this case. As noted above, Qwest proposes a novel and improper strict liability approach; TWTC proposes a "rule of reason" test. The facts on the record, sound policy and the law support TWTC's rule of reason approach and a finding that TWTC did not violate the law.

As TWTC witness Jones testified, the agreement between TWTC and AT&T[30] was a unique, multi-state, multi-service agreement with a **substantial** take-or-pay revenue commitment. (Jones, TR. 000623-000624; CONFIDENTIAL Exhibit No. 81).[31] SWA was a small but integral part of the agreement. (Jones, TR. 000623-000624.) AT&T was uniquely situated as the only TWTC customer whose footprint and revenue spend were large enough nationally to meet the substantial revenue commitment of the agreement. (Jones, 000623-000626.) The agreement, she averred, was bi-lateral business arrangement and involved no impropriety. (Jones, TR. 000626-000627.) Moreover, Ms. Jones testified the agreement was supported by a sound, rational economic justification: TWTC verified that the overall deal was profitable to TWTC, TWTC was guaranteed a substantial revenue stream for multiple years, AT&T sought high-quality special access, direct transport and SWA services from TWTC on a national basis and TWTC was willing and able to sell same. (Jones, TR. 000624-000626.) The

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requirements of this chapter . . . ." (Emphasis added.) Typically a "requirement" means an affirmative obligation, such as a filing or reporting requirement, rather than a purported prohibition, such as those in §§ 364.08(1) and 364.10(1). And as the Commission found in its comprehensive CLEC rulemaking, there were no filing requirements for SWA.

[30] The contract rates for SWA were effective for invoices to AT&T from January 2001 through November 2008.

[31] The amount of that commitment is confidential and subject to a pending request for confidential classification. For convenience the confidential figure is not repeated here but may be found on the transcript page and/or exhibit cited above.

agreement was a mutually beneficial and comprehensive business deal based on a total revenue commitment, and it was appropriate to include all purchased services in the total AT&T spend under the agreement. (Jones, TR. 000623-000626.) Thus, Ms. Jones emphasized, the reasons for TWTC's distinguishing AT&T through this agreement were absolutely reasonable. (Jones, TR. 000623-000626.) Qwest was not in "like circumstances" or "similarly situated" to AT&T, and Qwest only would be so if Qwest were ready, willing and able to adopt the TWTC-AT&T agreement **in its entirety**. (Jones, TR. 000627-000628.) To test whether Qwest was similar to AT&T, Ms. Jones compared Qwest's total spend with TWTC to AT&T's total spend with TWTC for the last four years of the TWTC-AT&T agreement. (Jones, TR. 000628; CONFIDENTIAL Exhibit No.81.) Qwest's spend didn't even come close to AT&T's; therefore, Qwest was not in "like circumstances" or "similarly situated" to AT&T. (Jones, TR. 000627-000628; CONFIDENTIAL Exhibit No. 81.)[32] Ms. Jones then refuted the notion that the TWTC-AT&T agreement was not disclosed, as a redacted version was filed with and posted on the SEC's EDGAR website in 2005[33] and the terms of the agreement was the subject of a conversation between Qwest counsel and TWTC counsel, who pointed out Qwest was not similarly situated to AT&T. (Jones, TR. 000630-000632.) Ms. Jones also pointed out that Qwest and TWTC have had an agreement for unregulated services since 1995. (Jones, TR. 000629-000630.) That agreement had been renegotiated and amended twenty-three times since 1995, with several amendments effective after Qwest knew about the TWTC-AT&T agreement

[32] TWTC and AT&T were negotiating a new agreement when the revenue commitment obligation expired. (Jones, TR 000640-000641).

[33] During her testimony summary, Ms. Jones mistakenly stated the agreement was filed with the SEC in 2001. (Jones, TR. 000634).

rates; yet Qwest has still not negotiated a contract SWA rate with TWTC. (Jones, TR. 000629-000630.)

TWTC witness Deason provided a historic viewpoint of telecommunications regulation from the time leading up to the 1995 Florida legislation introducing greater competition in the industry to the more recent years. He served on the Commission from 1991 to 2006 (Deason, TR. 000589, 000591), so his vantage point is particularly useful. Mr. Deason described the transition from regulated to competitive services and the views of the Commission regarding competitive service arrangements made through contract service agreements ("CSAs"). (Deason, TR. 000592-000594.) A carrier's CSA reports filed with the Commission were treated as confidential (when requested); and the Commission ruled that CSA reports were not needed to protect against discrimination among customers. (Deason, TR. 000593-000594.) Mr. Deason opined that the situation in this case is similar what the Commission found relative to CSA reporting: a finding of discrimination requires more than just a rate difference: there has to be a fact-specific determination of whether entities are similarly situated and not simply a the failure or inability of the complaining customer to successfully negotiate. (Deason, TR. 000595.)

Mr. Deason verified that the Commission never considered SWA to be a regulated service, nor was it a service for which cost or other information was required to be filed. (Deason, TR. 000595.) And he argued the Commission has already found that, with regard to more competitively priced services, "circumstances that would have amounted to undue discrimination in rate setting under monopoly regulation do not amount to discrimination under deregulation." (Deason, TR. 000595-000596.) Mr. Deason also reminded the Commission that when it enacted rules governing CLEC, the Commission approved staff's recommendation that

CLEC-provided SWA would not be a monopoly service and therefore filing information should not be required of CLECs. (Deason, TR. 000596-000597.) Mr. Deason opined that since the Commission never before required filing information from CLECs for SWA and never considered SWA to be a monopoly service, it would be bad regulatory policy for the Commission to do so in this case on a retroactive basis. (Deason, TR. 000597-000598.) The Commission's decisions limiting CLEC regulation were driven by the statute urging a "lesser level" of regulation, which was a tool for encouraging investment in the Florida market. (Deason, TR. 000598-000600.) Again, Mr. Deason stressed that it would be bad regulatory policy for the Commission to do what Qwest urges here, i.e. having encouraged entry into "the Florida market with the promise of lesser regulation in 1995, and then impose new regulatory requirements . . . in 2012 retroactively to 1995." (Deason, TR. 000600.) Furthermore, Mr. Deason said, requiring negotiated terms to be published so other companies could request those terms may result in fewer or no negotiated agreements. (Deason, TR. 000602.) Finally, Mr. Deason opined that none of the non-discrimination provisions that lingered in chapter 364 after the 1995 Act were intended to apply to CLECs and none ever were so applied by the Commission. (Deason, TR. 000606-000608.) Qwest, Mr. Deason concludes, is asking the Commission to intercede, based on historic regulation that no longer exists and was not meant for Qwest's benefit, because other carriers successfully negotiated where Qwest did not. (Deason, TR. 000605, 000608-000609.)

TWTC witness Wood emphasized that the Commission must look at the Qwest complaint within the confines of Florida's regulatory regime at the time. He affirmed that SWA rates were not required to be filed, let alone "tariffed," and were not set by the Commission or required to be based on cost. (Wood, TR 00437-440.) Qwest asks the Commission to impose a

strict liability regime for, and regulation of, SWA though none of the sections of statute Qwest cites refer to or regulate SWA and one, §364.03 specifically excluded CLECs from having cost-based rates. (Wood, TR. 000440-000442.) Mr. Wood opined service contracts for a variety of telecommunications services and differentiating price on a host of factors is the norm. (Wood, TR. 000446-000448.) Here, Qwest is seeking preferential, not equal, treatment under the statutes because Qwest wants to ignore provisions in CLEC contracts Qwest does not like. (Wood, TR. 000448-000449.) Further, Qwest asks to reverse the unregulated regime for SWA and create a regulated regime, while evading traditional enforcement principles of a regulated regime. (Wood, TR. 000451-000452.) Mr. Wood opined that Qwest's views are thus not consistent with sound economic and public policy. (Wood, TR. 000446, 000450, 000453.) He insisted that a proper analysis under the anti-discrimination statutes, if they applied, must include multiple factors, including the purchase of additional services. (Wood, TR. 000457-000459, 000461).

He opined that Qwest's remedies effectively ask the Commission to authorize another violation of the very sections of the statute Qwest claims were violated in the first place. (Wood, TR. 000467, 000484.) Further, a "refund," he stated, refers to when a party is charged a rate different from a Commission-approved rate, and that is not the case here. (Wood, TR. 000467-000468, 000485.) Instead, Qwest asks the Commission to regulate and authorize a new SWA rate OR award what would have to be described as damages, since it is Qwest's fumbled attempt to restore Qwest to the position it would have occupied but for the alleged wrongdoing while ignoring all the other component parts of the TWTC-AT&T agreement (Wood, TR. 000468-000470, 000484-000485.)

Mr. Wood debunked Qwest's suggestion that the Colorado PUC's views on Qwest's claims were relevant here because Colorado law: (1) required tariff filing for SWA, (2) required SWA rates to be cost-based, (3) required the filing of SWA rate contracts, and, consistent with these, (4) regulated discrimination for SWA specifically. (Wood, TR. 000495-000502.) Mr. Wood also criticized Qwest witness Weisman's reliance on the FCC's CLEC Access Reform Order because Dr. Weisman completely ignores that the FCC specifically allowed contract rates for SWA and did not: (1) set SWA rates, (2) require cost-based pricing of SWA, (2) require uniform pricing of SWA, (3) require regulation of SWA or that negotiated rates be cost-justified, (4) require disclosure and offering of contract rates to all IXC, (5) require retroactive adjustment to any SWA rates. (Wood, TR. 000520-000527.) Mr. Wood disagreed with Dr. Weisman in principle that a cost difference must be demonstrated under Florida law and, even if a cost difference needs to be shown, Mr. Wood testified that TWTC's cost for providing SWA services to AT&T were indeed different (000528-000533, 000578-000582.) Further, Mr. Wood testified that under the plain terms of the TWTC-AT&T agreement, there was no question that contract rate for SWA would not apply unless AT&T met all of its other obligations under the agreement. (Wood, TR. 000578.)

Qwest witness Easton advocated a rule whereby CLECs must "disclose and offer" any contract rate for SWA to all other carriers immediately upon the contract rate becoming effective (Easton, TR 000136) but he also acknowledged in Florida CLECs had no obligation to even file or publish any SWA rates (Easton TR. 000143). He said his idea of required disclosure could be fulfilled by any means and that CLECs did not have to follow their filed price lists, but he could not reconcile his opinion with Qwest's Second Claim that CLECs may only charge their price list rate. (Easton TR. 000137 – 000138.) Mr. Easton opined that only an

SWA rate in a contract, whether the rate is up or down, must be disclosed to all carriers, but no other rates, terms and conditions of the contract need be, as they do not matter. (Easton TR. 000139 – 000141.) He then affirmed Qwest's position that a cost basis is **the only** justification for having any differences in SWA rates. (Easton TR. 000141 – 000142.) Significantly, Mr. Eason admitted that Qwest had NO interest in accepting the TWTC-AT&T agreement as a whole (Easton TR. 000151-000152.) He knew of no real proof that the SWA rate from that contract would have even existed outside the confines of the broader agreement, arguing instead Qwest's self-serving relevance delusion. (Easton, TR 000153.) Though acknowledging TWTC's Price List allowed contract rates by negotiation (Easton, TR, 000150-000151), he had no idea what if anything Qwest did to negotiate its own contract for SWA with TWTC (Easton, TR 000151 -000152).

Mr. Easton admitted instances where Qwest was the beneficiary of contract SWA rates and, though claiming the CPLA type were "neutral," he acknowledged the broad scope of some CPLA agreements, could not testify that any verification or follow up on the cost or status of the CLECs involved was done, and he knew of no quantitative data to support his claim that Qwest's agreements had no impact on markets. (Easton TR. 000148 – 000150.) Further, he effectively admitted that these Qwest agreements were "secret," because the contracts would not be disclosed to third parties on request. (Easton TR. 000149 – 000150.) And, though he supported Qwest's discrimination claims, Mr. Easton could not explain what factors, cost or otherwise, actually went into Qwest's evaluation of which CLECs allegedly discriminated against Qwest. (Easton, TR. 000154.)

Qwest witness Weisman's testimony stands out for several reasons. First, Dr. Weisman maintains that any SWA rate differences not based on cost are not and can never be

economically justified and are per se discriminatory (Weisman, TR 000355, 000363.) In other words, Qwest/Dr. Weisman would impose an irrebutable presumption, or strict liability rule of discrimination, in all cases where there is an SWA rate difference not based on cost, even though this cost trapdoor is not authorized by any statute, legislative finding or even a prior Commission finding.[34] Rather, it is a presumption/rule which Dr. Weisman proposes for the first time in this case and would apply retroactively. Further, Dr. Weisman's cost condition would put the Commission in the posture of reviewing and approving SWA cost studies. Although Dr. Weisman denies advocating SWA rate regulation, that is the practical effect of his testimony. And if not rate regulation, then Dr. Weisman certainly advocates rate structure regulation. Per Qwest, SWA rates must be strictly uniform, unless a different rate class is approved by the Commission based on cost. And if a contract rate differs from a standard offer rate, the contract rate serves as a rate cap, if it is lower than the standard rate. That certainly bears the hallmarks of rate structure regulation. Second, to support his belief that SWA is a bottleneck service Dr. Weisman relies on an FCC finding in an order addressing CLEC interstate switched access (Weisman, TR 000342-000343), but Dr. Weisman never reconciles his reliance on that finding with the fact that the FCC specifically allowed contract rates for interstate switched access, did not require uniform rates, and did not ban rate differences which were not based on cost. In sum, Dr. Weisman does a brazen job of cherry picking the FCC's views. Third, Dr. Weisman's testimony regarding "downstream market impacts" (Weisman, TR 000342-000343) is neither quantitative nor anecdotal proof of those alleged harms. It is, at best, only a theoretical construct, with just one dial and one input; it's not even a model. Bit it

[34] The definition of a "presumption" and the law regarding same are discussed in Issue No. 2 above. The definition of an agency "rule" and the law regarding same are discussed in this Issue No. 5, in the paragraphs below.

explains why Dr. Weisman uses qualifying words such as "could" and "may" throughout his testimony when complaining of potential harm. In any event, Qwest once again proposes a new presumption/rule with retroactive effect.

Qwest witness Canfield's testimony and exhibits were more relevant for what they did not cover than what they did. Mr. Canfield provided no analysis to prove that any of the following were caused directly or indirectly by the TWTC-AT&T agreement on SWA rates: (a) Dr. Weisman's so-called downstream market impacts; (b) changes, if any, to Qwest's market share or profitability; (c) changes, if any, to Qwest or any IXC's toll rates. (Canfield, TR. 000320-000322.) In addition, Mr. Canfield acknowledged that the monthly access traffic exchanged between TWTC and Qwest for the period covering the TWTC-AT&T contact rate showed no discernible trend, up or down . (Canfield, , TR. 000323-000324.) Mr. Canfield did not examine traffic patterns between TWTC and AT&T for the period covering the TWTC-AT&T contact rate. (Canfield, TR 000323-000324.) Nor did he examine changes, if any, to Florida market prices or volumes for the other services AT&T was committed to purchase from TWTC under the TWTC-AT&T agreement. (Canfield, , TR. 000320-000322.) In short, Mr. Canfield performed a purely mechanical estimate of the difference in Qwest's bills using, on the one hand, the SWA rate Qwest paid pursuant to the TWTC Price List, without dispute, and, on the other hand, the SWA rate TWTC charged to AT&T only as an integral part of a broader agreement as described by TWTC witness Jones. The remarkable thing here is that Qwest presented absolutely NO quantitative proof -- and not even anecdotal proof -- that the very reason it wants contract rates disallowed were even present in the Florida market. Instead, Qwest's case is built on the Weisman presumptions/rules and nothing else.

The first question the Commission must answer if it concludes that repealed §§ 364.08(1) and 364.10(1) apply to carrier transactions by CLECs is the standard by which those sections will be applied in this case. Qwest's case is built around a strict liability standard. For the reasons that follow, TWTC maintains this is the wrong standard.

As TWTC's witnesses stressed, SWA rates in Florida are not based on cost, have never been based on cost (for ILECs or CLECs), have never been found to be a monopoly service, and the Commission has never exercised authority over SWA rate levels or rate structure. This is one of the main reasons why a strict liability theory is misplaced, particularly on a retroactive basis. Further, it should not be overlooked that while Qwest bemoans (wrongly) the retroactive application of The Regulatory Reform Act to this proceeding, the actual retroactive application of law at play here is Qwest's strict liability argument, which neither the Legislature nor Commission have ever approved.[35] In addition, whether Qwest's case is characterized as rate level or rate structure regulation, the Commission not only lacks specific statutory authority to act as Qwest urges, but the sections of the statute Qwest relies on for Commission authority would become a regulatory black hole – a regulation whose reach can grow exponentially to re-regulate everything from rate levels, to rate structures, and potentially to service levels. This too speaks firmly against a strict liability approach.

TWTC also maintains that several Qwest's positions constitute unadopted agency rules and may not be relied on in this proceeding; Qwest's position that all SWA rates must be uniform unless based on cost, i.e. strict liability, is chief among these. Section 120.52(16), F.S. defines a "rule" as "each agency statement of general applicability that implements, interprets,

[35] Consistent with the principles of *Landgraf* addressed in Issue No. 1, the Commission cannot and should not permit unquestionably new rules, such as that imposing strict liability, to a transaction already completed, i.e. to the now-expired TWTC-AT&T contract rates for SWA.

or prescribes law or policy . . . " The definition of "rule" does not exclude agency statements made through quasi-judicial proceedings. The phrase "general applicability" has been interpreted by the courts to mean statements that are "intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law," affording agency personnel no discretion to apply the agency statement. *McDonald v. Dept. of Banking & Finance*, 346 So.2d 569, 581 (Fla. 1st DCA 1977). Section 120.57(1)(e)1, F.S., provides that an agency may not base agency action on an unadopted rule. There can be little doubt that Qwest intended its strict liability standard as a rule pronouncement by the Commission that would apply to all CLECs in this and all future cases regarding SWA.[36] The standard is iron-clad and affords no flexibility to the Commission or to litigants to argue for a different standard.

Precedent also counsels against the strict liability standard Qwest proposes. Discrimination cases decided by this Commission are few and far between, even as to regulated utilities.[37] TWTC found no precedent applying Qwest's strict liability theory to unregulated rates, and Qwest has heretofore not cited any. However, at least one prior Commission decision provides some additional insight relevant to the standard, and it does not support Qwest's strict liability theory. As discussed by TWTC Witness Deason, the first is Order No. PSC-97-0488-FOF-TL, issued April 28, 1997, in Docket No. 951354-TL. There, the Commission found that price differences implemented by ILECs pursuant to the flexibility of the price cap statute do not constitute undue discrimination under §§ 364.08, 364.09 or 364.10. "Circumstances that

[36] The prospective remedies Qwest seeks for imposing future regulation also support this contention.

[37] Generally speaking, where the Commission does have plenary authority over the rates of a public utility pursuant to statute, the Commission makes changes to rate classes and rate structure on a prospective, not retroactive, basis.

would have amounted to undue discrimination in rate setting under monopoly regulation do not amount to undue discrimination under deregulation."[38] Thus, the Commission found that another standard, not strict liability, would apply. Consistent with that decision, the Commission should not apply strict liability for the fist time here, since neither CLECs nor SWA have been subject to any monopoly regulation in Florida.

In addition, while §§ 364.08(1) and 364.10(1) were in effect, neither said that every individual service a telecommunications company offers must be priced separately and provided to all takers at that same price. Section 364.08(1) referred to "persons under like circumstances for like or substantially similar service," so the Commission would look at both the circumstances of the person and the services. Section 364.10(1) also involves a judgment call in that it referred to "undue or unreasonable" advantage. Surely, if the Legislature intended to say that one service or certain types of service required uniform prices, it would have said just that. But it did not. The Legislature also declared in § 364.01(4)(e) that new entrants, i.e. CLECs, be subject to a lesser level of regulation to encourage entry and investment. In sum, these statutory provisions do not support a strict liability approach.

TWTC therefore maintains that a flexible "rule of reason" rather than a strict liability approach is proper in this case. There is no precedent for strict liability and the manner in which Qwest asks that to be carried out does not comport with Florida law regarding presumptions and unadopted rules. TWTC's recommended approach is also consistent with the historic fact that SWA has not been regulated, the lack of a legislative grant of authority to the

[38] Order No. PSC-97-0488-FOF-TL, at p. 7; (Deason, TR. 000595 – 000596.) As pointed out elsewhere in this brief, the chief flaw to Qwest's argument that SWA should be subject to monopoly regulation is that the Legislature has not heretofore found that SWA should be and did not give the Commission the authority to make such a finding.

Commission over SWA, the expert policy opinions of witnesses Wood and Deason, and the words and intent of the statute.

Applying the rule of reason standard to the facts on the record, TWTC maintains that the Commission should find that: (a) the TWTC-AT&T agreement was a unique situation, with the contracted SWA rates being an integral part of a much broader services agreement that included a substantial take-or-pay revenue commitment; (b) the TWTC-AT&T agreement was economically justified under the circumstances; (c) there is no credible evidence in the record that the TWTC-AT&T agreement was formed with ill intent or had a deleterious impact in any market for any services; (c) Qwest could not and would not accept **all** of the rates, terms and conditions of the TWTC-AT&T agreement nor negotiate terms of its own; (e) Qwest was therefore not similarly situated to AT&T; (f) Qwest was not the subject of any undue or unreasonable rate discrimination by TWTC, and (g) TWTC is not liable to Qwest for any claims under this issue.

Significantly, Qwest's reliance on strict liability was virtually absolute; it presented no evidence to support a finding of liability using a rule of reason approach. In its brief, Qwest may instead posit other arguments, including that TWTC's combining unregulated SWA with other unregulated services in a revenue commitment agreement should be improper notwithstanding its cost rule/presumption. Again, looking to the language of repealed §§ 364.08(1) and 364.10(1), neither required service specific pricing and neither banned bundling. Surely, if the Legislature intended to ban bundling of a specific service or services, it could have easily said so; it did not. Further, Qwest presented no evidence that there was any impropriety or coercion by TWTC in bundling services or the formation of the TWTC-AT&T agreement. For that matter, Qwest presented no evidence of impropriety or coercion by TWTC with respect

to any services in any market, let alone SWA. Nor did Qwest present evidence that there was any impact, one way or another, from the TWTC-AT&T agreement in any market. Selling different products together under one agreement is not per se illegal even if one is alleged to be a bottleneck. Therefore, this Qwest argument too must fail.

The bottom line is that Qwest cannot face up to the plain and simple truths that AT&T was uniquely situated and that there was ample economic justification for the TWTC-AT&T agreement. And rather than attempt to negotiate a contract rate of its own with TWTC, Qwest would rather sue its way to preferential, not equal, treatment so that it does not have to fulfill the substantial financial commitments that were integral to AT&T's negotiated arrangement. Besides, if Qwest thought that it was in some way wronged in one or more markets by the TWTC-AT&T agreement, nothing stopped Qwest from seeking a remedy in court to address it.[39] But in this case, Qwest has presented absolutely no proof that it was wronged.

This brings us to the question of whether the TWTC-AT&T agreement was independently actionable as anticompetitive conduct. Putting aside for the moment TWTC's objection to the Commission's considering this question on due process and procedural grounds, the claim is absolutely without foundation. Apparently, Qwest believes it establishes this claim simply by saying the magic word. But platitudes are not proof. As emphasized above, there is no evidence in the record of any impropriety or coercion by TWTC in any market. Further, as the record establishes, and Qwest witness Canfield admitted, there is no proof whatsoever, empirical or anecdotal, that any market was at all impacted, let alone

[39] Section 364.01, F.S., provides, in part: "Communications activities that are not regulated by the Florida Public Service Commission are subject to this state's generally applicable business regulation and deceptive trade practices and consumer protection laws, as enforced by the appropriate state authority or through actions in the judicial system. This chapter does not limit the availability to any party of any remedy or defense under state or federal antitrust laws."

negatively impacted, by the TWTC-AT&T agreement. Therefore, any argument from Qwest on this phantam claim must also fail.

Qwest has used a rule of reason to support its own conduct as a beneficiary of SWA contract rates. Qwest attempted, and failed, to adequately justify its SWA contract rates, both CPLA and others, on bases other than cost.[40] Qwest's own SWA contracts support the finding that carriers can and should fend for themselves and that differential pricing is not per se unreasonable. In addition, Qwest witness Easton, the company's chief advocate in this case, had no idea what went into the evaluation of who Qwest should sue and not sue. Considering the content of CONFIDENTIAL Exhibit No. 24, the Commission is free to infer that Qwest considered factors other than cost in its evaluation of which CLECs may or may not have discriminated against Qwest.

Finally, some effort has been devoted by other parties, Qwest in particular, for the Commission to take notice of various decisions made in other jurisdictions addressing one or more aspects of this case. Every jurisdiction is different. For instance, some state PUCs have statutory authority to regulate and/or reform SWA or award "reparations," others states, like Florida, do not. Rather than engage in prolonged analysis of these decisions,[41] TWTC emphasizes that this case must be decided based on the law in Florida and the evidence on the record.

In conclusion, Qwest's position advocates an over-reach of Commission authority and bad regulatory policy built on a foundation of nonexistent evidence. Accordingly, Qwest's

[40] See summary of Qwest witness Easton's testimony earlier in the discussion of this Issue.

[41] See TWTC witness Wood's commentary on the Colorado decision and the FCC's orders, as discussed above.

claims under §§ 364.08(1) and 364.10(1) (2010) and any others claims the Commission may consider under this issue must be rejected.

ISSUE 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?**

TWTC: ***TWTC followed its Price List. No statute, rule or order required TWTC to charge only a uniform standard offer rate. Qwest paid TWTC's standard rate without dispute, rather than negotiate a rate as the Price List allowed. Qwest witness Easton admitted CLEC rates need not be in a Price List.***

Of all the baseless arguments Qwest makes in this proceeding, none may be more confounding that Qwest's Second Claim. Qwest's Second Claim, according to the complaint, is that any CLEC who does not charge all carriers the standard offer rate from the CLEC's price list violates the price list and, therefore, violates §364.04 (2010). Not only is Qwest's Second Claim without foundation as to TWTC, but it contradicts the testimony of Qwest's own witness, Mr. Easton.

Qwest cannot dispute that for the period of time in which TWTC charged AT&T a contract rate for SWA, TWTC's Price List on file with the Commission contained both a standard offer rate and contract rate option.[42] Nowhere does the Price List require or even imply that all carriers must be charged the standard offer rate. Qwest was charged (and did not dispute) the standard offer rate, and the TWTC Price List allowed TWTC to have a contract

[42] The Commission took official notice of TWTC's filed Price Lists. Further, TWTC's price list is contained in Exhibit No.4 The contract rate option appears in Original Page 58 of the Pride List. The "Customer Specific Contract" provision of the Price List does not require TWTC to disclose contract rates to anyone; rather, it states only that "contract offerings will be made available to similarly situated customers in substantially similar circumstances." As discussed in Issues Nos 5 and 7 and in the testimony of TWTC witnesses Jones and Wood, Qwest did not and does not meet the criteria to trigger the subject TWTC-AT&T contract offering to be made available to Qwest.

with AT&T. If looked at in a broader context, Qwest had opportunity to invoke the contract rate option either by (a) negotiating its own agreement with TWTC as allowed by the Price List or (b) accepting all of the rates, terms and conditions of the TWTC-AT&T agreement. Qwest elected not pursue the former and wanted no part of, and could not otherwise qualify for, the latter. (Jones, TR. 000629-000630, 000627-000626.) (Easton, TR 000151-000152.)

The analysis for this issue should come to a dead stop at the point it is agreed the TWTC Price List did not require that the standard offer rate be charged to all carriers. Why Qwest may think the analysis does not end there is a mystery, one which Qwest witness Easton did nothing to clear up on the record. In fact, Mr. Easton effectively impeached any argument Qwest might make that a CLEC may only assess a filed SWA rate (standard offer or otherwise) because he testified that a CLEC should disclose rates by letter or notice. (Easton, TR 000143.) Furthermore, if Qwest's argument here is that all IXCs must be charged a filed standard offer rate because all IXCs are similarly situated, that argument must be rejected. Aside from amounting to an unauthorized over-reach of authority on SWA rates and/or rate structure, this approach would render the contract rate option in the Price List meaningless and retroactively re-write TWTC's Price List.

TWTC also notes that during the entire life of the TWTC-AT&T SWA contract rate (which commenced in January 2001 expired November 2008), TWTC was not required by law to file or publish standard offer SWA rates or SWA contract rates or to even disclose contract rates in Florida. Prior to July 1, 2009, §364.04 stated, "Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges of that company for service to be performed within the state." There was not "file ***or*** publish"

language in the statute until July 1, 2009. Similarly, prior to The Regulatory Reform Act, §364.07 stated that only "as and when required by" the Commission were telecommunications carriers supposed to file rate contracts.[43] In any event, no rule or order of the Commission in effect during the life of the TWTC-AT&T contract rate required TWTC to file, publish or disclose SWA standard offer rates or contract rates in Florida.

Because TWTC complied with its Price List, there is no need for the Commission to address the question of whether or not it has jurisdictional authority to order prospective or retroactive compliance with the contents of a voluntary price list filing or only the authority to order compliance with a required act of filing or publication, where applicable.

ISSUE 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?**

TWTC: ***Qwest's Complaint did not name TWTC as a respondent on its Third Claim and did not seek to amend. Even if Qwest had, Qwest was not similarly situated to AT&T because AT&T made a multi-million dollar take-or-pay commitment Qwest would not and could not make.***

TWTC was not named as a respondent for Qwest's Third Claim. Qwest provided no excuse or explanation for this failure (Easton, TR 000155), and the Commission should not allow Qwest to engage in such procedural games. However, if the Commission does consider the Qwest claim that TWTC somehow violated its Price List because Qwest was "similarly

[43] Qwest has conveniently ignored § 364.07 throughout this entire proceeding. Though now repealed, it provided: "**Joint contracts; intrastate interexchange service contracts.**-- (1) Every telecommunications company shall file with the commission, as and when required by it, a copy of any contract, agreement, or arrangement in writing with any other telecommunications company, or with any other corporation, association, or person relating in any way to the construction, maintenance, or use of a telecommunications facility or service by, or rates and charges over and upon, any such telecommunications facility."

situated" to AT&T, the Commission must rule in TWTC's favor. As discussed in greater detail in Issue No. 5 above, Qwest was not and is not "similarly situated" to AT&T as that term under the provisions of the repealed laws in question or as that term is meant under the TWTC Price List. (Jones, TR 000631; CONFIDENTIAL Exhibit No. 81). Accepting Qwest's argument would render the Price List's contract rate option meaningless and have the Commission re-write the Price List and regulate SWA rates and/or rate structure., which the Commission is not authorized to do. Therefore, Qwest's Third Claim is without merit and must be rejected.

ISSUE 8: **Are Qwest's claims barred or limited, in whole or in part, by:**

a) the statute of limitations;
b) Ch. 2011-36, Laws of Florida;
c) terms of a CLEC's price list;
d) waiver, laches, or estoppel;
e) the filed rate doctrine;
f) the prohibition against retroactive ratemaking;
g) the intent, pricing, terms or circumstances of any separate service agreements between Qwest and any CLEC;
h) any other affirmative defenses pled or any other reasons?

TWTC: **a) * If the Commission finds that Qwest had or has a "cause of action," the statute of limitations, section 95.11, F.S., applies. Under Florida law, there is no delayed discovery doctrine; and no conditions exist in this case which would toll or overcome the limitations period. Therefore, Qwest's claims are barred.***

The statute of limitations ("SOL") affirmative defense[44] requires the Commission to make several determinations: (a) whether the SOL applies to this case, (b) when Qwest's claims accrued for purposes of the SOL, (c) whether there is any recognized basis in law for

[44] Affirmative defenses serve to defeat an otherwise valid claim. As explained above, TWTC maintains that Qwest does not have a valid claim. The following defenses are presented in the event the Commission finds it has jurisdiction and one or more of Qwest's claims are valid.

tolling or bypassing the SOL. In summary, the SOL does apply here if the Commission asserts jurisdiction over the case, and the SOL bars all or at least part of Qwest's claim.

Since this case has in all respects been treated as an administrative substitute for a civil action, the SOL applies and there is a four-year filing limit from the date the Qwest claims accrued. Qwest's claims accrued when the TWTC-AT&T agreement became effective in January 2001 or, alternatively, they accrued on a rolling basis monthly after that date. Qwest's arguments regarding when it supposedly discovered its claims are irrelevant. Florida courts have been clear: there is **no** delayed discovery doctrine applicable in Florida. There is therefore no Commission decision to be made regarding the alleged date of discovery. And if there were, Qwest's so called "diligence" in discovering the facts regarding its claim was no diligence at all. The SOL can only be tolled pursuant to conditions established by statute, and none of those conditions are present here. And, finally, the SOL may only be over-ridden in cases of misleading conduct sufficient to establish equitable estoppel. Qwest conceded that such conduct is not present here.

Generally stated, the SOL bars a litigant from filing claims at any point after a set period of time expires after the claim "accrues." A claim accrues when the last element constituting the claim occurs. In Florida, the SOL is contained in chapter 95, Florida Statutes, and applies to any "civil action or proceeding."[45] The Florida SOL provides in pertinent part:

[45] Section 95.011, provides: "**Applicability.**—A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere."

> **95.031 Computation of time.**—Except as provided in subsection (2)[46] and in s. 95.051[47] and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.
> (1) A cause of action accrues when the last element constituting the cause of action occurs.
> . . . .
>
> **95.11 Limitations other than for the recovery of real property.**—Actions other than for recovery of real property shall be commenced as follows:
> . . . .
> (3) WITHIN FOUR YEARS.—
> . . . .
> (f) An action founded on a statutory liability.
> . . . .
> (p) Any action not specifically provided for in these statutes.

The first determination the Commission must make is whether the SOL applies to this case. "Florida courts . . . have consistently refused to apply the limitations periods contained in [the SOL] to administrative disciplinary proceedings." *Hames v City of Miami Firefighters*, 980 So.2d 1112, 1116 (Fla. 3rd DCA 2008) (emphasis removed). However, where the SOL has been applied to administrative cases, "each claim was filed as a direct administrative substitute for a civil action." *Hames* at 1115. "Thus, an administrative substitute for a civil action is a 'civil action or proceeding' for the purposes of [the SOL] . . . ." *Hames* at 1116. [48]

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[46] Subsection (2) addresses specific types of claims for which accrual may be deferred. The Qwest claim is not one of those types of actions.

[47] Section 95.051 establishes conditions under which tolling of the SOL occurs. (i.e. a suspension of the clock). Qwest's case does not fit or establish any of the statutorily recognized bases for tolling.

[48] The *Hames* court futher explained, "[S]tatutory limitations periods contained in chapter 95 of the Florida Statutes, are sometimes applicable to administrative proceedings, including those held pursuant to chapter 120. *See Associated Coca Cola v. Special Disability Trust Fund,* 508 So.2d 1305, 1306 (Fla. 1st DCA 1987) (applying chapter 95 four-year statute of limitations to bar administrative proceeding contesting denial of workers' compensation reimbursement); *Rebich v. Burdine's,* 417 So.2d 284, 285 (Fla. 1st DCA 1982) (applying chapter 95 limitations period to physician's claims for services provided to workers' compensation claimant); *Bishop v. State, Div. of Ret.,* 413 So.2d 776, 777 (Fla. 1st DCA 1982) (applying chapter 95 statute of limitations to bar administrative petition for relief conducted pursuant to chapter 120). However, the above-captioned cases have one critical element in common; each claim was filed as a direct administrative substitute for a civil action. *See, e.g., Farzad v. Dep't of Prof'l Regulation,* 443 So.2d 373, 375 (Fla. 1st DCA 1983) (explaining that in *Bishop,* the

In the instant case, Qwest has restated its position on the SOL during discovery, taking a different position than what it took in the Prehearing Order.[49] Qwest's last-stated position is that the SOL does not apply at all because this proceeding is "an administrative action based on statutory violations." This Qwest position is inconsistent with its stance that the Commission has jurisdiction in this case because Qwest has a vested property right in a "cause of action." This case was not initiated by the Commission as a show cause proceeding, nor has it been processed as such. Qwest initiated this proceeding in pursuit of its own interests, seeking its own reward, and every step of the way Qwest accepted the role of the plaintiff with a burden of proof. The Commission has not disavowed that course. Moreover, Qwest repeatedly referred to its "cause of action" in defending itself against a prior Joint CLEC motion to dismiss for lack of jurisdiction. Qwest cannot have it both ways. This case has to be one or another – a private right of action or a disciplinary/enforcement proceeding – it cannot be both or a little of both. If a third party could, without any time limit, file with an agency a self-serving claim for an alleged statutory violation, the agency would improperly delegate to that third party the timing of the government's decision making power regarding enforcement and there would be no end to an entity's liability exposure to third parties. This is gainsay to delegation principles of administrative law and the purpose of the SOL. Therefore, if for any reason the Commission decides that it has jurisdiction over Qwest's claims, the SOL should be applied.

The Commission must then look to the question of when Qwest's claims accrued. To do this, the Commission must identify when the last element of the claim occurred. Qwest initially

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administrative claim involved an action that was an administrative substitute for a common law breach of contract suit)." 980 So.2d 1115 – 1116.

[49] See Hearing Exhibit No. 9, Qwest's original and supplemental responses to Broadwing Interrogatory No. 18.

argued that the act of a CLEC entering into a contract did not trigger Qwest's claim but the CLEC's conduct afterwards (not to "disclose and offer" the contract rate) did. However, the Commission should conclude from Qwest witness Easton's testimony that the supposed two acts – contract start date and "conduct after" – are in fact contemporaneous. (Easton, TR 000136.) This then leads the Commission to the next part of the accrual analysis: determining whether Qwest has one claim which accrued at one distinct point in time or has claims that accrue each month when a contract rate was in effect. The test for this determination may be summed up as follows:

> [I]f the injury is permanent, or if the causative structure or condition is of such a character that injury will inevitably result and the amount of the damages can be determined or estimated, a single action may and should be brought for the entire damages, both past and prospective. . . . . [I]f the situation involves other elements of uncertainty, such as the possibility or likelihood of the alteration or abatement of the causative condition . . . so as to prevent a reasonably accurate estimate of future damages, it is generally held that each repetition . . . gives rise to a new cause of action for which successive actions may be brought.

Kulpinski v. Tarpon Springs, 473 So.2d 813, 814 (Fla. 2d DCA 1985) (quotes, citations and emphasis omitted). TWTC maintains that this case fits in more with the former situation than the latter. There was only one TWTC-AT&T agreement, and that agreement's impact on Qwest's prospective usage (Qwest's measure of damages) could have been readily calculated. The TWTC-AT&T agreement became effective in January 2001; therefore, that is when Qwest's claims accrued. Since Qwest filed this action against TWTC in December 2009, all of Qwest's claims fall outside the four year limit of § 95.11(3)(f) and (p), F.S. If, alternatively, the Commission finds Qwest's claims accrued monthly, i.e. they were "rolling" claims as Qwest was billed, then the last Qwest bill that would fall within the four year limit was on December 2005, and monthly claims as to all prior months are barred.

Whether the Commission decides the Qwest claims accrued at one time – as the Commission should find – or accrued on a rolling basis, one thing is certain under Florida law: the claims accrued as these events occurred, whether Qwest had actual knowledge of the exact amount of the AT&T contract rate or not. The applicable doctrine of delayed discovery does not apply and does not push back the accrual date of Qwest's claims.

Under the "delayed discovery doctrine," a cause of action does not accrue until the plaintiff either knows or reasonably should have known by the exercise of reasonable diligence of an invasion of his/her legal rights which gave rise to a cause of action. The delayed discovery doctrine delays accrual of a cause of action, i.e. when the SOL first begins to run; it does not stop or "toll" the SOL once the clock is already ticking. *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000). In *Hearndon*, the Supreme Court considered whether the SOL barred tort claims by a victim of child abuse where the abuse triggered traumatic amnesia. After first distinguishing 'accrual' from 'tolling,' the Court acknowledged that the Legislature explicitly limited tolling of the SOL to the enumerated bases in § 95.05(1). The Court then observed the Legislature "did not likewise limit the circumstances under which accrual may have been delayed." *Id.* at 1185. Considering the modern trend in a majority of other states' rulings on abuse cases, the Court applied the delayed discovery doctrine to the case at bar, to benefit "victims of a uniquely sinister form of abuse." *Id.* at 1185-6.

Two years later, however, in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002), the Court was asked to apply the delayed discovery doctrine to a broad array of other tort claims, such as breach of fiduciary duty, civil theft, conversion and unjust enrichment. In that case, the guardian of a woman with senile dementia filed numerous tort claims in April 1998 stemming from pre-1994 misappropriations of assets, not discovered until October 1995. The Court held

that the Legislature explicitly found that a cause accrues when the last element occurs and delayed accrual is only available under specific statutory exceptions. "Aside from [specific statutory provisions] for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, **there is no other statutory basis for the delayed discovery rule.**" *Davis v. Monahan* at 710 (emphasis added.) The Court stated its agreement with the rationale of a Fifth DCA opinion[50] that to permit application of the delayed discovery doctrine to all claims "would require the court to write into the statute a delayed discovery rule even though the Legislature had not done so." *Id.* at 711. Accordingly, the Court refused to apply the delayed discovery doctrine to all cases, as "[t]o hold otherwise would result in this Court rewriting the statute, and, in fact, **obliterating the statute.**" *Id.* (emphasis added). The Court thus ruled that the delayed discovery doctrine did **not** apply to every state law claim and that *Hearndon* is limited to its facts.

The Fifth DCA case which the *Davis v. Monahan* Court endorsed, *Yusef*, 793 So.2d 1127, involved a plaintiff who filed suit for claims of tortious interference and for unfair and deceptive trade practices under §§ 501.201 – 501.203, F.S., the Florida Deceptive and Unfair Trade Practices Act (or "FDUTPA"). The *Yusef* Court, noting several cases which rejected application of the delayed discovery to breach of contract cases (even for latent undiscovered defects), reasoned that *Hearndon* was limited to its facts; and since there was no statutory basis for applying the delayed discovery doctrine to the claims at issue, the court would not write one into the law. *Yusef* at 1128 The FDUTPA claim, the court held, was "an action founded on a statutory liability" and thus subject to the four-year SOL of section 95.11(3)(f). *Id.*

[50] *Yusef Mohamad Excavation, Inc. v. Ringhaver Equipment Co*, 793 So.2d 1127 (Fla. 5th DCA 2001). See discussion of Yusef in the paragraph following.

In summary, there is no delayed discovery doctrine applicable to this case. Qwest's claims are, by its own admission, founded on a statutory liability, and are thus subject to the ruling in *Davis v. Monahann* and, more specifically, *Yusef.* Qwest has not presented any argument or facts supporting a statutory basis for either delayed accrual or tolling. Qwest's claims accrued when the TWTC-AT&T agreement became effective in January 2001 regardless of when Qwest alleges it may have discovered its claim. Accordingly, Qwest's claims are cut-off by the SOL, as TWTC stated above. To the extent proffered to establish delayed discovery, Qwest witness Hensley-Eckert's testimony is irrelevant. Even if considered, her testimony should be rejected for several patent flaws.

Qwest had every reason to know that contract rates for SWA were common when AT&T acknowledged in August 2004 written comments to the Minnesota PUC that AT&T had hundreds of agreements with CLECs for contract rates. (Wood, TR 000547.) Qwest lawyers had to have seen this AT&T statement because they filed responsive comments in that same docket on in mid 2005. (Hensley Eckert, TR 000226-000231.) Qwest knew that TWTC was one of the largest CLECs in the country. (Hensley Eckert, TR 000226-000231.) Yet, rather than promptly conducting research for additional information on the Internet for agreements between AT&T and the largest CLECs in the country, Qwest took **three years** to write TWTC a letter inquiring about contract rates as though that act reflected either reasonable diligence or an efficient approach to obtaining information.[51] Ironically, Qwest witness Easton acknowledged that Qwest itself would not surrender a copy of a confidential agreement for contract rates in

[51] Qwest witness Hensley Eckert acknowledged that she uses Google as a research tool to perform her duties. ((Hensley Eckert, TR 000226-000231.) As Exhibit No. 87 shows, all Qwest had to do was perform a Google search for "Time Warner Telecom agreement with AT&T," and it would have found that there was a TWTC-AT&T agreement.

response to a third-party's letter (Hensley Eckert, TR 000226-000231) and Ms. Hensley Eckert knew that Qwest had its own such confidential agreements. (Hensley Eckert, TR 000226-000231.) Then, to top it all off, Qwest asserts that it would have to physically see the Florida-specific contract rates for its claim to accrue, even though Qwest filed its claim against TWTC in Florida without seeing that information. Qwest could have filed claims at any time against any CLEC or no CLEC in particular – a claim based "upon information and belief" -- just as it did here. (Wood, TR 000546 – 000548.) AT&T's acknowledgement in Minnesota should have served as notice to any reasonable person to use reasonable methods to find additional information. Qwest used methods it should have known would be ineffectual or just stuck its head in the sand. The Commission, even if it considers Qwest's evidence on delayed discovery, should reject it.

Lastly, Qwest witness Hensley Eckert testified that TWTC did nothing to mislead or lie to Qwest regarding the existence of the TWTC-AT&T agreement. (Hensley Eckert, TR 000226-000231.) And, as discussed earlier, there was no legal requirement to file, publish or disclose this agreement. Therefore, Qwest can make no argument that equitable estoppel or like doctrine could be invoked to bypass a claim already barred by the SOL.[52]

In consideration of the above, the Commission should find that the SOL applies in this case and that Qwest's claims accrued in January 2001 and are therefore barred in their entirety or, alternatively, that Qwest's claims accrued monthly from January 2001 until November 2008 and therefore any portion of Qwest's claims predating December 2005 are barred.

(b) *Qwest's claims are completely barred by The Regulatory Reform Act, Ch. 2011-36, Laws of Florida. See TWTC positions on Issues No. 1 (jurisdiction) and 4 (standing).*

[52] *See e.g. Major League Baseball v. Morsani*, 790 So.2d 1071 (Fla. 2001).

(c) *Qwest's claims should be barred because (i) Qwest knew it had a dispute but failed to submit a dispute as required by the TWTC Price List and (ii) the TWTC Price List makes contract rates available to all IXCs and Qwest elected not to negotiate.*

Qwest should not be allowed to cherry pick which parts of the TWTC Price List it will follow and which ones it will not. As TWTC witness Jones testified, Qwest has neither filed disputes of its SWA bills nor sought to negotiate a contract rate. If the Commission allows Qwest to by-pass these requirements, Qwest can run roughshod over any rate, term or condition in the Price List rather than follow proper procedures, and the Commission will put Qwest in a preferred position vis-à-vis carriers who do follow the Price List. This the Commission should not allow.

(d) *Qwest claims should be barred because it took more than 4 years to assert rights allegedly violated and ignored its duty to submit billing disputes to, and seek contract negotiations with, TWTC. *

See TWTC's discussion under Issues Nos. 8(a) and 8(c).

(e) TWTC does not take a position on the filed rate doctrine question, but Qwest's position on the subject has been and continues to be inconsistent. *

For purposes of this proceeding, TWTC does not take a position for or against application of the filed rate doctrine as a matter of law. TWTC does however, point out that in Qwest's Minnesota state court law suit against AT&T on various counts related to SWA contracts, Qwest maintained the filed rate doctrine applied in several states including Florida.

Qwest's position in its Second Claim in this case seems to follow this view as well. And Qwest's position regarding its requested relief in this case cannot be reconciled with its current position that the filed rate doctrine does not apply.

(f) *The Commission's establishing a new rate and applying it to prior Qwest bills would constitute prohibited retroactive ratemaking.*

The Commission does not have jurisdictional authority to order retroactive rates. *See, e.g., City of Miami v. Florida Public Service Commission*, 208 So.2d 249 (Fla. 1968). For instance, in *Southern Bell Tel. & Tel. v. Florida Public Service Commission*, 453 So.2d 780 (Fla. 1984), the Commission gained jurisdiction to approve/disapprove an inter-carrier settlement for the division of toll revenues. The Commission did not have statutory authority over the agreement at the time the agreement became effective. The court held that it would be impermissible retroactive ratemaking for the Commission to order a change to that agreement, as of a prior date, and require payment from one party to the other based on that new change. In the instant case, the Commission did not set the rates or rate structure of the SWA service, and the Commission had no authority to do so. If the Commission were to now assert authority over TWTC's rates or rate structure and adjust Qwest's prior bills to apply new rates to prior usage, this would constitute impermissible retroactive ratemaking, a remedy outside this Commission's jurisdiction.

(g) *Qwest's claims belie its own conduct and should be barred. Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Qwest cannot be both a beneficiary of and an opponent to contract rates.*

See TWTC discussion under Issue No. 5 regarding Qwest as a beneficiary of contract rates for SWA .

(h) *Qwest's claims should be barred as (i) inconsistent with "light touch" regulatory approach applied to Florida CLECs to encourage entry and investment and (ii) a request for the Commission to apply unadopted rules retroactively, inconsistent with Chapter 120.*

See TWTC discussion under Issue No. 5 regarding "light touch" regulation and unadopted agency rules.

ISSUE 9a: **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?**

TWTC: ***The Commission has no authority to award any relief Qwest requests. The retrospective monetary relief sought constitutes damages stemming from unregulated rates and a windfall. The prospective relief sought (imposing new rates, a uniform rate structure and contract filing requirements) are not authorized by statute.***

TWTC does not dispute that this Commission has the power, in specific types of cases, to order refunds to customers **when the Commission has lawful authority to control the rates collected by a public utility.** But that is NOT the situation here. Because the Commission lacks regulatory jurisdiction over and rate setting authority for SWA, the retrospective monetary relief Qwest seeks here constitutes damages or a penalty, not a refund, and therefor the Commission is without authority to order same.

There is no dispute in this case that the Commission did not set or regulate the SWA rates, did not regulate the CLECs as a public utility, and that it does not have the jurisdictional authority to do either. As addressed at length under Issue No. 1, the Commission is a creature of statute and only has such jurisdiction as specifically granted it by statute. The difference between a regulated public utility and a certificated CLEC under Chapter 367 should be obvious. Briefly stated, the chief reasons for regulation of the public utility's rates and services are these: to prevent uneconomic duplication, assure minimum service standards, restrain monopoly prices, and provide the utility's investors an opportunity to earn a fair rate of return. By now, these are axiomatic. However, the certificated CLEC's characteristics do not align with these justifications. Further, if just one CLEC-provided service, such as SWA, was in fact a monopoly service, surely the Florida Legislature, being well acquainted with public utilities, would have recognized it or the potential for it and granted the Commission any necessary authority respecting SWA. However, the Legislature did not do this. Instead, all CLEC rates, including SWA rates in particular, are not subject to Commission rate-setting authority.

The distinction between regulated rates and unregulated rates is a dispositive one as it concerns this Commission's authority to order a remedy. As TWTC witness Deason explained, because a public utility's Commission-set revenue requirement is implicated by any unauthorized or erroneous rate differences to any one customer, all of the public utility's customers rates are affected thereby. (Deason, TR p. 000607.) This rationale, and a specific Legislative grant of rate-making power to the Commission, support corrective action (such as refunds and surcharges) for unauthorized or erroneous differences from Commission-established rates for a public utility. The Commission's power over the regulated rate is plenary

and has the force and effect of law.[53] However, these principles do not apply to, and there is no legislative grant of authority for, an unregulated rate such as SWA.[54]

Qwest has cited no authority for the proposition that the Commission may order a "refund" of a rate the Commission does not set or regulate.[55] TWTC maintains that no such authority exists. Since the SWA rates at issue are not Commission set, the rate difference Qwest seeks does not represent a refund, but rather constitutes damages and/or a penalty, which the Commission has no authority to order.

In Docket No. 020738-TP, AT&T sought for the Commission to order BellSouth to pay what AT&T labeled as "damages," consisting of what AT&T stated was the difference between a lawful SWA rate and an unlawfully discriminatory SWA rate. In its Order, the Commission noted that AT&T's complaint was based on the statute's price regulation provisions for non-basic services which required that "similarly situated" customers be treated fairly.[56] Citing *Southern Bell Tel. & Tel. Co. v. Mobile America Corp.*,[57] the Commission ruled that non-discrimination requirement for price cap rates (i.e. rates not set but under a cap) did not

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[53] *See Landrum v. Florida Power and Light Company*, 505 So.2d 552 (Fla. 3rd DCA 1987), *rev den* 513 So.2d 1061.

[54] If the Commission finds that the filed rate doctrine does apply to a CLEC SWA price list, then TWTC's analysis of this issue might differ. For purposes of this proceeding, TWTC does not take a position for or against application of the filed rate doctrine as a matter of law. TWTC nonetheless points out that, Qwest's position regarding the Commission's refund authority, which Qwest argues is dependent on rate approval/regulation, is inconsistent with Qwest's position that the filed rate doctrine does not apply.

[55] In Order No. PSC-10-0296-FOF-TP, issued May 10, 2011, in this docket, the Commission held that it did not have authority to award damages but reserved judgment on the question of its authority over the relief Qwest seeks in this case as a possible refund. The Commission did not find that the relief Qwest sought in this matter was a refund.

[56] Order No. PSC-03-0031-FOF-TP, issued January 6, 2003, page 5.

[57] 291 So.2d 199 (Fla. 1974) (the Commission does not have authority to enter an award of money damages, as this is a judicial function within the jurisdiction of the court).

authorize it to act on the requested relief: "We do not, however, believe this provision authorizes the Commission to award damages. This Commission, as a matter of law, may not grant the relief by AT&T in its Amended Petition." [58] The only real distinction between that case and this case, TWTC maintains, is a distinction without a difference: AT&T called what it sought "damages," but here Qwest calls what it seeks a "refund" or "reparations" in an effort to conceal its nature. Regardless of the labels used by AT&T or Qwest, in both cases the money at stake represents a difference between desired rates and allegedly discriminatory rates – when the Commission had no authority to set or regulate those rates in the first place. [59]

As the Commission has already stated, it is not dispositive how the relief is labeled, for it is the nature of the relief requested that matters.[60] Thus, Qwest's alternatively labeling its requested relief as "reparations," serves it no better.[61] In addition, the fact that Qwest (and Mr. Canfield in particular) turned a blind eye to the factors that would normally be part of a proper damages calculation (Wood, TR 000536-000543) does not make Qwest's requested relief any less a claim for damages. If anything, this failure renders Qwest's request for relief more of a

[58] Order No. PSC-03-0031-FOF-TP, page 5 (citation omitted).

[59] A case with a similar result, arrived at in a different way, is *Winter Springs Development Corp. v. Florida Power Corp.*, 402 So.2d 1225 (Fla. 5th DCA 1981). There, the court found that where there was no regulatory limitation placed on a public electric utility's ability to contract for undergrounding service until the point in time when the Commission approved a rate and tariff for the service, the difference between the contract rate and the Commission-approved rate constituted damages, and the Commission lacked jurisdiction over the dispute. 402 So.2d at 1228. In other words, unless and until a regulated rate is actually established by the Commission, the rate is not within the control of the Commission for regulatory purposes and therefore any retroactive recovery thereof would not constitute a refund.

[60] Order No. PSC-10-0296-FOF-TP, issued May 10, 2011, in this docket.

[61] The Commission has already determined that "[r]etroactive remedies, which are in the nature of reparations . . . are particularly judicial in character" and beyond the Commission's jurisdiction." Order No. 9810, issued February 23, 1981 in Docket No. 800011-EU (citation omitted) (emphasis in original).

penalty (Jones, TR. 000633) or a flat-out windfall. The Commission does not have authority to award either.[62]

Qwest also asks the Commission to require lower SWA rates so as to impose a uniform rate structure and to require SWA contract filings. For the reasons explained above, TWTC does not believe the Commission has the authority to regulate SWA rates or rate structure retroactively OR prospectively. And Commission authority to require filing for SWA contracts, under current law, is questionable at best.

ISSUE 9b: **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?
(ii) Should the Commission award any other remedies?

TWTC: ***The Commission should exercise its discretion and not order any remedies from TWTC.***

If the Commission finds TWTC liable for alleged violations of the statute and that is has the jurisdiction to address those alleged violations and to order one or more remedies, the Commission should exercise its discretion and not order any remedies from TWTC. As TWTC witness Deason testified, it is bad regulatory policy to lure entrants into the Florida market on the promise of lesser regulation in 1995 and then change the rules on them in 2012 retroactive to 1995. (Deason, TR 000597-000598, 000600.) TWTC witness Jones also testified that if the Commission ordered TWTC to make payments to Qwest, TWTC would have to carefully consider the regulatory climate in Florida before making any future investment in the State.

[62] TWTC also questions the Commission authority to award interest, particularly since it has no authority to award the monetary relief Qwest seeks and has no express statutory authority on the subject of interest.

(Jones, TR. 000633.) Given the languid state of the economy, the Commission can ill afford to discourage investment in Florida. Therefore, the Commission should not order monetary relief from TWTC. Since TWTC has no current SWA contract rates and nothing on the record establishes its intent to sign another, Qwest's other remedies (imposing uniform rates and requiring contract filing) are unnecessary as to TWTC. Moreover, both, if undertaken at all, are ill suited for this case against two CLECs.

RESPECTFULLY SUBMITTED this 10th day of December, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 10th day of December, 2012.

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