Ruth Nettles 090538-TP

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Subject: Docket No. 090538-TP - Qwest Communications Company's Response to Joint CLECS' Motion to Dismiss and MCI's Motion for Summary Final Order

Attachments: Qwest3-9-10.pdf

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01603 MAR-9 ≘
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BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (D/B/A VERIZON ACCESS TRANSMISSION SERVICES), XO COMMUNICATIONS SERVICES, INC., TW TELECOM OF FLORIDA, L.P., GRANITE TELECOMMUNICATIONS, LLC, COX FLORIDA TELCOM, L.P., BROADWING COMMUNICATIONS, LLC, AND JOHN DOES 1 THROUGH 50, For unlawful discrimination.	Docket No. 090538-TP Filed: March 9, 2010

QWEST COMMUNICATIONS COMPANY'S RESPONSE TO JOINT CLECS' MOTION TO DISMISS AND TO MCI'S MOTION FOR SUMMARY FINAL ORDER

Qwest Communications Company LLC ("QCC") submits this response to the Joint CLEC Partial Motion to Dismiss, filed January 29, 2010,[1] and MCImetro Access Transmission Services d/b/a Verizon Access Transmission's ("MCI") Motion to Dismiss Reparations Claim and Motion for Final Summary Order Dismissing All Other Claims Against Verizon Access, filed January 29, 2010. The motions are without merit, and should be denied.

The CLEC Respondents – as well as numerous other yet-unidentified CLECs[2] – blatantly violated Florida law by engaging in unlawful rate discrimination as to their pricing

[1] The Joint CLECs include Broadwing Communications, LLC; XO Communications Services, Inc.; Florida Telecom, L.P., and Granite Telecommunications, LLC.

[2] At QCC's request, the Commission has issued three subpoenas directed to IXCs AT&T, Sprint and MCI. QCC expects that, in response to these subpoenas, the IXCs will produce scores of switched access agreements that are or were recently effective in Florida between the IXCs and Florida CLECs. Once that process is complete and QCC has reviewed and analyzed the agreements, QCC will amend its complaint (as it has in the parallel Colorado and California proceedings) to name additional Respondents.

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for switched access. Switched access is a critical, costly and bottleneck service required to allow interexchange carriers ("IXCs"), including QCC, to provide long distance service to Florida customers. The CLECs accomplished their discrimination by means of secret, unfiled discount agreements favoring a select few IXCs. The preferred IXCs were given steep discounts below the CLECs' price list rates. Contrary to law, the CLECs failed to modify their price lists, notify the Commission of the off-price list arrangements, advise other IXCs (QCC included) of the discounts or offer the same discounts to other IXCs.

The CLECs' motions do not deny any of these allegations, and in fact admit that all such allegations must be accepted as true for purposes of the instant motions. Yet, the CLECs seek dismissal of QCC's complaint by contorting Florida law in a manner that, if accepted, essentially divests the Commission of any authority to enforce the statutory prohibition against rate discrimination. The CLECs effectively ask the Commission to write Sections 364.01, F.S., 364.08, F.S., 364.10, F.S., and 364.337(5), F.S. out of the law.

As discussed in greater length below, this Commission has, and has often exercised, the authority to order reparatory refunds as a remedy for various forms of utility misconduct. In the hopes of confusing the Commission, the CLECs unpersuasively mischaracterize the reparations QCC seeks as "damages." QCC, well aware that this Commission lacks the authority to award civil damages, does not seek any such civil remedy. Instead, QCC asks this Commission to exercise its statutory authority to enforce and remedy the CLECs' blatant, and uncontroverted, rate discrimination. QCC's request is consistent with Florida law and Commission precedent. The motions should be denied.

I. Switched Access is a Critical, Bottleneck Service.

Switched access is a key input (both in terms of functionality and cost) required for the provision of long distance service by IXCs.[3] Functionally, switched access consists of various service elements provided by LECs (whether ILECs, CLECs or rural LECs) to permit the origination and termination of long distance calls by IXCs. When an end user dials a 1+ long distance call, the LEC routes the call from the end user to the IXC point of presence. The IXC pays originating switched access for performance of this function. To complete the call, the IXC then hands the call off to a LEC who delivers it to the end user being called. IXCs pay terminating switched access to the LEC that terminates the call.

As the FCC has firmly established, switched access – whether it is provided by the largest ILEC or the smallest CLEC – is a service that the IXC *must utilize* and over which the IXC has little, if any, competitive alternative. The FCC addressed these realities, in the context of CLEC-provided switched access, in its 2001 Seventh Report and Order:

> Sprint and AT&T persuasively characterize both the terminating and the originating [switched] access markets as consisting of a series of bottleneck monopolies over access to each individual end user. Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, the end user. (footnote omitted)[4]

[3] Switched access is a very costly input, and these costs directly drive the cost of providing long distance service. QCC would estimate that CLECs alone bill QCC over $5 million per year in Florida for intrastate switched access. Because of the sharp price differentiation at issue here, in Florida QCC likely paid well over a million dollars more than its competitors for the identical bottleneck service. As this case proceeds, QCC's witnesses will specifically establish the amount of the overcharge that has occurred in Florida.

[4] Seventh Report and Order, *at ¶ 30. See also ¶¶, 28-29, 31-34.* Based on these findings, the FCC imposed price constraints on (interstate) CLEC switched access, ultimately requiring CLECs in most cases to charge no more than the ILEC in the relevant service territory. *Id., at ¶¶ 35-81.*

As the FCC suggested, the IXC must pay the switched access charges of both the originating and terminating LECs, and has virtually no opportunity to circumvent those charges. Rate discrimination in the context of this critical service (especially one that has such a large financial impact on the customers required to purchase it) warrants particular scrutiny by this Commission.

II. This Commission Has Authority to Award QCC's Requested Relief.

Through its Complaint, QCC seeks both retrospective relief (in the form of refunds for past overcharges) and prospective relief. The Joint CLECs urge the Commission to dismiss QCC's retrospective claims for relief which the Joint CLECs characterize as claims for "damages" and "injunctive"[5] relief, arguing that the Commission lacks authority to award such relief. See, Joint CLECs' Motion to Dismiss at ¶¶ 7-10. Similarly, MCI asks the Commission to dismiss one of QCC's requests for relief which MCI also characterizes as a claim for "damages." See MCI's Motion to Dismiss Reparations Claim and Motion for Final Summary Order, at p.4. Both Motions should be denied, as this Commission has authority to provide the type of relief QCC requests.

A. Standard of Review for Motions to Dismiss

In considering whether QCC's petition states a cause of action upon which relief may be granted, the Commission must take all factual allegations of the Complaint as true and all reasonable inferences are allowed in favor of QCC's case. See *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla.1st DCA 1993); *Orlando Sports Stadium, Inc. v. State ex rel Powell*, 262

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[5] *QCC is not seeking injunctive relief from this Commission.* Rather, QCC is asking this Commission to conduct a hearing, determine whether Respondents' practices adhere to Florida law, and then to issue appropriate relief based upon those factual findings and legal conclusions.

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So.2d 881 (Fla. 1972); *In re: Complaint to enforce interconnection agreement with NuVox Communications Inc. by Bell South Telecommunications, Inc.*, Order No. PSC.-04-0998-FOF-TP, Docket No. 040527-TP (October 12, 2004). In determining the sufficiency of the petition, the Commission should confine itself to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. See *Flye v. Jeffords*, 106 So.2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So.2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So.2d 571 (Fla. 2nd DCA 1960). Thus, for purposes of the instant motions, the Commission must accept as true that the CLECs entered into secret, unfiled switched access discount agreements with a select few favored IXCs, and that QCC was charged and paid a higher rate for the identical, bottleneck service.

B. The Commission has the Authority to Require "Reparations"

The motions to dismiss essentially attack one of QCC's prayers for relief, not its underlying causes of actions. Through its Complaint, QCC requests the Commission to conduct an evidentiary hearing to determine whether Respondents have, contrary to various provisions of Florida law: engaged (and in some cases continue to engage in) unlawful rate discrimination; failed to adhere to prices offered in price lists filed with the Commission's staff (by providing some customers, but not others, with favorable off-price lists terms); and, in certain cases, failed to adhere to the express terms of published price lists. See, QCC's Complaint, First, Second, and Third Claims, ¶¶11-19.

Both the Joint CLECs and MCI seek dismissal by mischaracterizing QCC's claim for Reparations (item B in QCC's Prayer for Relief) as one for "damages," a remedy they then assert that this Commission lacks any authority to award. Despite Respondents' efforts to reframe QCC's request as one for civil damages, QCC simply is not pursuing a tort or contract claim and is not seeking relief for personal injury, lost profits, consequential damages, or any other such type of remedy, and Respondents' reliance on cases addressing such types of claims is misguided.[6] Instead, QCC is seeking to remedy the fact that, as a result of the CLECs' violation of several Florida statutes over which the Commission has jurisdiction, QCC has been dramatically overcharged for switched access.

By mischaracterizing reparatory refunds as civil damages, the CLECs patently ignore the authority of this Commission to address and resolve, through refunds and other appropriate mechanisms, the underlying issues stemming from the CLECs' discriminatory and anticompetitive behavior. These statutory authorities of the Commission[7] include:

- The power to resolve complaints against CLECs for unreasonably prejudicial, anti-competitive or discriminatory conduct. §§ 364.01 and 364.337(5), F.S.;
- The power to prevent unreasonable, preferential, discriminatory or anticompetitive conduct. §§ 364.01(4)(g), 364.08 and 364.10(1), F.S.;
- The power to require telecommunications Companies, including CLECs, that file tariffs or price lists for their intrastate switched access services to provide

[6] The Joint CLECs, for example, rely heavily on cases such as *Southern Bell Tel. & Tel. Co. v. Mobile America Corp.*, 291 So.2d 199 (Fla. 1974); *In re: complaint and petition of John Charles Heekin against Florida Power &Light Co.*, Order No. PSC-99-1054-FOF-EI, Docket No. 981923, May 24, 1999; *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3rd DCA 1996). The *Mobile America Corp.* and case involved a claim of negligence where the plaintiff attempted to recover consequential damages. The *Heekin* case involved claims of alleged trespass and other torts and sought damages arising out of those allegations. The *Glazer* case involved a claim for personal injury due to alleged exposure to electromagnetic fields from powerlines.

[7] Arguably, in fact, the power to resolve issues involving these statutory provisions is within the exclusive jurisdiction of the Commission. See §364.01(2), F.S.; *Florida Power & Light Co. v. Albert Litter Studios*, 896 So.2d 891 (Fla. 3rd DCA 2005); *Florida Power Corp. v. Zenith Indus.*, 377 So.2d 203 (Fla. 2nd DCA 1979); and see discussion below.

those services in a nondiscriminatory manner §§ 364.08(1) and 364.10(1), F.S.; and

- Oversight over the provision of basic local exchange service by CLECs for the purpose of "ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace. § 364.337(5), F.S.

Disputes involving these statutory provisions are regulatory matters requiring regulatory remedies that include the Commission's authority to impose monetary resolutions—whether labeled reparations, refunds, credits, restitution, or any other name. As the District Court of Appeals determined, a litigant's strategic and repeated use of the phrases "money damages" and "damages" is insufficient to render a claim for a refund of overcharges outside the Commission's jurisdiction. See *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 894. In that case, the plaintiff filed a complaint in circuit court seeking a refund of overcharges by FP&L occasioned by FPL's alleged placement of inaccurate meters. The court, finding that the Commission has exclusive jurisdiction to remedy regulatory overcharges (in connection with its exclusive authority to regulate the rates and service provided by public utilities), held that the case properly resided before this Commission, and not a civil court. *Florida Power & Light Co.*, at 895. Specifically, the District Court of Appeals concluded:

> The Florida Public Utilities Commission [sic] is a creature of the state legislature. Accordingly, its authority including its jurisdiction, duties, and powers is derived solely from the legislature. * * * Section 366.04 of the Florida Statutes states: "The commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service . . . [and] the jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards . . . ." Accordingly, the Florida Supreme Court has held that this statute grants the Commission "exclusive jurisdiction over matters respecting the rates and service of public utilities." * * * *Thus, the remaining issue for this court is whether a consumer of FP&L electricity seeking a*

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refund of overcharges is a matter respecting the rates and service of FP&L. We so conclude. (citations omitted; emphasis added)

Indeed, Florida courts repeatedly have recognized the power of the Commission to provide a monetary remedy for regulatory enforcement matters that fall within the PSC's jurisdiction. *See, e.g., Charlotte County v. General Dev. Util., Inc.,* 653, So.2d 1081, 1085 (Fla. 1st DCA 1995) (holding that "the PSC has jurisdiction to resolve the question of the alleged overcharges...."); *Florida Power Corp. v. Zenith Indus.,* 377 So.2d 203 (Fla. 2nd DCA 1979) (holding that "jurisdiction to determine and award refunds of the alleged overcharges does not lie in the court but in the [Commission]"); *Richter v. Florida Power Corp.,* 366 So.2d 798, 801 (Fla. 2nd DCA 1979) (holding that the Commission has exclusive jurisdiction to issue a refund when the plaintiff alleges an unreasonably high electric rate).

The *Richter* case is a very good example of the Commission's authority to impose a monetary remedy in a regulatory context where there has been unlawful conduct. In the *Richter* case, the District Court of Appeal was asked to determine whether the Commission or the circuit court had jurisdiction over a claim that was "in the nature of money damages against a utility . . . for alleged illegal rates." *Richter* at 798. The case involved a class action that had been filed in circuit court against Florida Power Corporation ("FPC") by consumers who claimed they had been forced to pay "unreasonably high electrical rates" as a result of alleged unlawful behavior by FPC in connection with fuel prices charged to customers. FPC moved to dismiss the complaint in circuit court, arguing that the Commission had exclusive jurisdiction to determine the reasonableness of rates that had been charged in the past. The circuit court agreed and dismissed the claim. The District Court of

Appeal affirmed, concluding that the PSC had exclusive jurisdiction to determine the matter and to establish a mechanism whereby refunds could be made, if necessary. *Id.* at 799, 801.

In the present case, , however, the CLECs attempt to diminish the Commission's authority[8] to address unlawful rate discrimination by implying that the Commission's authority is limited to prospective application and cannot address past, discriminatory overcharges. The CLECs' interpretation would effectively neuter this Commission's authority when, as here, a CLEC blatantly flouts Florida law by entering into a secret agreement that unreasonably favors one switched access customer over another, fails to follow Florida requirements for providing fair notice of those agreements through price list filings. If the Commission lacks effective enforcement authority, public utilities will feel free to violate Florida law with impunity, knowing there is little jeopardy for such misconduct.

The CLECs' attempt to restrict this Commission's authority to prospective relief also ignores significant past decisions of this Commission in other telecommunications cases that have explicitly ordered refunds when a customer has been overcharged:

- This Commission has investigated and approved a proposal of an IXC to refund overcharges associated with long distance calls that were mis-timed and mis-rated. *In re: Investigation and determination of appropriate method for issuing refunds to affected customers for apparent overcharges by Global Crossing Telecommunications Inc., for homesaver 1+ and calling card plans*, Notice of Proposed Agency Action, Order Accepting Global Crossing Inc.'s Refund Proposal, Docket No. 070419-TI, Order No. PSC-07-0849-PAA-TI (Oct. 22, 2007).

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[8] See *Florida Public Service Commission v. Bryson*, 569 So.2d 1253, 1254-1255 (Fla. 1990) in which the Florida Supreme Court noted that: "the PSC has authority to interpret the statutes that empower it, including jurisdictional statutes...and to issue orders accordingly.... It follows that the PSC *must be allowed to act* when it has *at least a colorable claim* that the matter under consideration falls within its exclusive jurisdiction as defined by statute." (Emphasis added).

- The Commission has ordered refunds in connection with 0 plus dialing charges. *In re: Investigation and determination of appropriate method for refunding overcharges and interest on 0+ calls made from pay telephones by USLD Communications, Inc.*, Docket No. 010-937-TI, Order No. PSC-01-1744-PAA-TI (August 27, 2001).

- This Commission has specifically ordered a refund of access charge reductions obtained by long distance carriers that were not flowed through to customers as required by Section 364.163(6), F.S. *See In re: Investigation and determination of Method to credit access flow through reductions by MCI WorldCom Communications, Inc. and TTI National Inc., as required by Section 364.163, F.S.,* Notice of Proposed Agency Action Order Approving Settlement Offer and Authorizing Commission Staff To Administratively Approve True Up Refund Adjustment, Docket No. PSC-00-2139-PAA-TI, Order No. 001411-TI (Nov. 8, 2000).

In each of these instances, the Commission ordered refunds for past unlawful actions. QCC merely seeks the same relief.

QCC's claims fall squarely in line with these precedents, which properly recognize that this Commission has the authority to order refunds. QCC's claims fall precisely within the expertise of this agency and therefore are easily distinguished from the litany of cases cited by the CLECs that stand for the unremarkable proposition that the Commission does not have the authority to award civil or tort damages.[9]

Indeed, the interpretation and enforcement of regulatory mandates (including Florida's prohibition against rate discrimination) are central to this Commission's purpose and authority. Section 364.01, F.S., grants the Commission exclusive jurisdiction to enforce

[9] All of the following cases, for example, cited by the Respondents' as prohibiting the Commission from awarding monetary damages are cases involving tort or contract claims: *Southern Bell Tel. & Tel. Co. v. Mobile America Corp.*, 291 So.2d 199 (Fla. 1974); *In re: complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-1054-FOF-EI, Docket No. 981923, May 24, 1999; *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3rd DCA 1996); *Florida Power Corp. v. Zenith Indus.*, 377 So.2d 203 (Fla. 2nd DCA 1979); *In re: Complaint of Sallijo Freeman against Florida Power & Light Co.* for violation of Rule 25-6.105, F.A.C., Order No. PSC-08-0380-PCO-EI, Docket No. 080039-EI, June 9, 2008; *In re: Complaint of Donald Chapman against Florida Digital Network regarding interruption of service and request for compensation*, Order No. PSC-03-0127-FOF-TX, Docket No. 021122-TX, Jan. 22, 2003.

Chapter 364 and *directs* the Commission to exercise its exclusive jurisdiction in order to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Section 364.01(2), (4)(g), F.S.

In addition to the Commission decisions cited above, it also should be noted that, in fact, this Commission has promulgated a rule (Administrative Code Section 25-4.114) describing the manner in which Commission-ordered refunds will be issued by public utilities. This rule (which is specifically authorized by Section 364.08, F.S. among other statutes) would make no sense were the CLECs correct that this Commission lacks the authority to order refunds in cases such as this.

The CLECs' motions also rely extensively on a Commission decision involving a different set of circumstances. *In re: Petition of AT&T Communications of the Southern States LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No.FL2002-01 Filed by Bellsouth Telecommunications, Inc.*, Docket 020738-TP, Order No. PSC-03-0031-FOD-TP (January 6, 2003). In that proceeding, AT&T challenged a BellSouth Access Tariff that provided discounts to long distance carriers that demonstrated increasing levels of access traffic.. AT&T alleged that the tariff was unreasonably discriminatory because it alleged the tariff was a "growth tariff" in violation of federal law. Nowhere in that proceeding did a party argue that a separate unfiled agreement existed to charge prices that were inconsistent with filed tariffs or price lists. This distinction is crucial. AT&T was not seeking a refund. AT&T was attempting to change the provisions of a filed tariff and to compute the remedy based upon what the as yet unrevised tariff prices *might* be versus

application of the existing tariff. See Order No. PSC-03-0031-FOF-TP at page 3. The Commission concluded it could not order this "type" of monetary damage because the result was too speculative and there was "no objective way in which the subject damages could be calculated." Order No. PSC-03-0031-FOF-TP at pages 4-5. The Commission also rejected AT&Ts request because it sought a unique result for AT&T and, as such, would be "discriminatory." *Id.* at page 5. QCC is not seeking to rewrite an existing tariff. QCC is not seeking a unique benefit. On the contrary, QCC is seeking a refund based on *the same pricing* that has been offered to other IXCs but not to QCC. Further, QCC would support the extension of the remedy to all similarly-affected IXCs. Thus, QCC is simply not seeking a unique benefit that would in any way exacerbate the CLECs' continuing discrimination. It seeks (for itself and for all other similarly-disadvantaged IXCs) to level the playing field, both retroactively and prospectively.[10]

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[10] The approach QCC suggests is similar to one followed by other state commissions. For example, the California Commission recently approved a similar approach to resolve a discrimination complaint filed by QCC against ILEC SBC. See *Qwest Communications Corporation and Qwest Interprise America, Inc. v. Pacific Bell Telephone Company, dba SBC California,* D. 06-08-006, 2006 Cal. PUC LEXIS 302 (Aug. 24, 2006). In that case, QCC and an affiliate brought a complaint against SBC to recover overcharges for discriminatory cageless collocation rates. QCC was being charged one rate for cageless collocation based on what was referred to as SBC "Accessibility Letter CLECC 99-200." Other carriers who procured cageless collocation at a later date, were being charged *lower rates for the same services* based on subsequent SBC Accessibility Letters. In that case, the Commission found that:

> "[f]or complainants to have to pay higher interim rates for the same collocation services during the same periods, as compared to the interim rates paid by carriers ordering those services later than complainant, puts the complainant at a substantial and unfair competitive disadvantage. Apart from the anti-competitive impact, depriving any business of $10 million imposes harms. Cash flow is impaired; opportunities are foregone."

Id., at 2006 Cal. PUC LEXIS 302 *8-9.

In addition to requiring SBC to refund to QCC the difference between the discriminatory rates charged to QCC and the lower rates charged to others for the identical service, the California Commission *sua sponte* ordered SBC to provide notice to all other CLECs subject to the higher rates imposed on QCC so that they could request refunds. *Id.*, at 2006 Cal. PUC LEXIS 302 *15. A similar approach could be followed in this case, if the Commission so chooses.

In short, QCC's request that the Commission order refunds as a consequence for the CLECs' (uncontroverted) rate discrimination lies at the heart of this Commission's jurisdiction. QCC does not seek unspecified damages for "lost profits" or other economic harm as Respondents suggest. The motions should be rejected.

III. The Filed Tariff Doctrine Is Not Applicable In This Case.

MCI also argues that QCC's claim for "reparations" is barred by the "filed-rate doctrine." See, MCI Motion to Dismiss at 4. To support this conclusion, MCI relies on two federal judicial decisions and one Commission order, all of which deal with the issue of retroactive ratemaking. None of these cases discusses the elements or the details of applying the Filed Tariff Doctrine.[11] Moreover, as discussed further below, in the case of the rates charged by Florida CLECs for switched access, the Commission has not performed *any* ratemaking functions in the first instance, so the issue of retroactive ratemaking is not applicable. Hence, the cases cited by MCI are inapposite.

A. The Filed Rate Doctrine is Inapplicable.

There is much confusion about whether the filed rate doctrine continues to apply,[12] to what extent it applies in various states,[13] and if it applies, whether there are any exceptions.[14]

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[11] In the *Sea Robin Pipeline v. FERC* opinion cited by MCI, the court reviewed, in part, the authority of FERC to provide retroactive relief in a case where FERC had reviewed proposed rate changes but allowed them to go into effect subject to a further hearing. *Sea Robin Pipeline v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986). This triggered the potential for retroactive ratemaking by the agency. This case also dealt with the federal Natural Gas Act which, unlike the case before this Commission, requires carriers to file all of their rates and which imposes notice requirements and opportunity for the agency to review and approve the files rates. See 15 U.S.C. §§717c and 717d (2010).

[12] See, e.g., "Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era," *Vanderbilt Law Review*, Vol. 56, Nov. 2003

[13] See, e.g., "Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the "Self" Interest," Federal Communications Bar Journal, Vol. 54, pages 302 et seq., March 1, 2002.

A review of cases addressing application of the doctrine in Florida and elsewhere, however, reveals that one thing is certain: to act as a bar against challenging the lawfulness of rates, the doctrine requires that rates be filed *and approved.* See *Florida Municipal Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, citing *Keogh v. Chicago & Northern Rwy.*, 260 U.S. 156 (1922) (11th Cir. 1999) (doctrine attaches after a carrier's rate has "been submitted to *and approved*" by responsible agency) (emphasis added); *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (As it applies in the telecommunications industry, the doctrine dictates that rates become the law once filed "*and approved*" by the FCC); *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002) ("once a tariff is approved" it binds carriers and shippers); *Pfeil v. Sprint Nextel Corp.*, 284 Fed. Appx. 640; 2008 U.S. App. Lexis 13965 (11th Cir. 2008) (per curium) (doctrine applies once filed with *and approved*). None of the price lists submitted to the Commission staff by CLECs pursuant to 24-25.825, F.A.C., is approved by the Commission. They are not brought to the Commission for review and they are not acted upon by the Commission, absent some form of question being raised about them (such as in this case).

MCI, however, implies that the approval requirement of the filed rate doctrine is optional. In fact, MCI assumes that simply filing a price list with Commission staff is sufficient to protect all of its actions from challenge. This is not true. The Commission has an ongoing statutory duty to ensure that rates charged by the entities it regulates are

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[14] See generally, for example, *Day v. AT&T Corp*, 74 Cal. Rptr.2d 55 (Cal. Ct. App. 1998) (action to enjoin phone card deceptive advertising practice is not barred by Filed Tariff Doctrine); see also *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004) (in which the Court considered, but ultimately rejected as unfounded, an antitrust claim despite the traditional view that antitrust claims are precluded by the Filed Tariff Doctrine).

nondiscriminatory,[15] that the public welfare is protected by ensuring that telecommunications companies "continue to be subject to effective price . . . [and] rate . . . regulation,"[16] and that *all* providers of telecommunications services are treated "fairly" by preventing "anticompetitive behavior."[17]

MCI relies on Rule 25-24.285, F.A.C., as support for its argument that the filed rate doctrine has been triggered in this case. It is difficult to conclude, however, that the filed rate doctrine applies to price lists filed pursuant to that rule. As MCI concedes, pursuant to Rule 25-24.285, F.A.C., CLECs in Florida are required to file a price list *if* they offer basic local telecommunications service. See 25-24.825(1), F.A.C. CLECs are not required to file price lists for non-basic local telecommunications services. 25-24.825(2), F.A.C. The rule does not require the Commission to act upon or even consent to the prices included in the lists filed by CLECs before they go into effect.[18] In fact, price information included in price lists that are filed can be revised by CLEC's on *one day's notice*. 25-24.825(3), F.A.C.

The price list rule for CLECs[19] in Florida does not even meet the essential elements of the Filed Tariff Doctrine. It does not require filing of all of the companies' rates or

[15] See, e.g. § 364.01(4)(h) and 364.08-10, F.S.

[16] 364.01 (4)(c), F.S.

[17] 364.01 (4)(g), F.S.

[18] See Commission's 2009 "Report on Status of Competition in the Telecommunications Industry, as of December 31, 2008," at page 6, explaining that CLECs are regulated differently than ILECs, that CLECs are subject to "minimal Commission oversight," and that CLECS "are not required to file tariffs for Commission "acknowledgement."

[19] It is instructive to compare the regulation of CLECs in Florida to the basic service tariff requirements for price capped companies in Florida. See generally §§364.04 and 364.05, F.S. Price capped companies in Florida must publish all, not just some, of the rates they charge in Florida. See 364.04, F.S. Absent a waiver approved by the Commission, price capped companies must give sixty days' notice to the Commission before making any changes in their published tariff rates. 364.05(1), F.S. Moreover, rate changes may not go into effect without "[the Commission's] consent." 364.05(3), F.S.

agreements with the Commission. It does not require notice of the available rates to the public at large. And it does not require any consent by the Commission to any of the rates imposed by the CLEC, whether published or not. This is hardly a regulatory program that lends itself to application of a judicially-developed doctrine based on federal statutes that require tariffs to be filed with agencies and made available to the public for a reasonable period of time before becoming effective, and that require approval of the filed tariffs by those agencies before they are deemed lawful.[20] The Commission never has approved any of the rates in question and QCC's claims are not barred by the filed rate doctrine.

B. MCI Seeks To Turn the Filed Rate Doctrine on its Head.

The primary purpose of the filed rate doctrine is to "prevent carriers from engaging in price discrimination."[21] In the present case, MCI attempts to turn the doctrine on its head and use it to justify and immunize discrimination, not prevent it. The doctrine simply does not operate in the way MCI suggests.[22]

A primary justification for the filed rate doctrine is to keep courts "which are far less competent to perform this function, out of the ratemaking process."[23] To the contrary, the Commission is precisely qualified to make such decisions.

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[20] See, e.g., the FCC tariffs filing and review requirements for interstate carriers. 47 U.S.C. §§203 and 204 (2010)

[21] *Fax Telecommunications Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir. 1998).

[22] *Maislin Indus. U.S., Inc. v. Primary Steel*, 497 U.S. 116, 128 (1990) (explaining that the purpose of the doctrine is to prevent shipping clerks and other agents of carriers from giving preferential treatment to certain carriers). *See also In The Matter of Halprin, Temple, Goodman & Sugrue v. MCI Telecomm'n. Corp.*, 14 FCC Rcd 21092 (1999) (holding that the filed rate doctrine does not bar a claim when the terms of the tariff do not clearly set forth when the tariff is superseded by an individual agreement); *MCI Telecomm'n. Corp. v. FCC*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1999) (rejecting the filed rate doctrine as a defense against a claim for the difference between the maximum rates under a rate of return order and the rates contained in a tariff).

[23] *Verizon Delaware Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1086 (9th Cir. 2004).

In short, even setting aside the inapplicability of the filed rate doctrine as discussed above, MCI's reliance on the filed rate doctrine is misplaced. Through its complaint, QCC merely seeks non-discriminatory application (retroactively and prospectively) of rates the CLECs apparently deem reasonable. Given that many of the agreements remain in effect and given that many of the Respondents have given no indication that they have sought to void or terminate the agreements, any argument that QCC must continue to pay higher tariffed rates for the identical service is absurd and undermines any basis, legal or equitable, for a filed rate doctrine defense.

MCI's theory converts the filed rate doctrine into a shield insulating rate discrimination, rather than a shield to protect against it. MCI essentially is arguing that it is free to enter secret, discriminatory rate agreements with whomever it wants, but its price list rates are not subject to challenge. This is entirely at odds with the intent of the doctrine. As the United States Supreme Court determined, "if rates are subject to secret alterations by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart…." *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). MCI's reliance on the filed rate doctrine is misplaced, and its motion should be denied.

IV. MCI Motion for Summary Dismissal of all other claims

MCI seeks summary dismissal of all of QCC's claims. As grounds for this request, MCI asserts that wholly past claims by Qwest must be dismissed because, as a matter of law, QCC may not recover monetary "damages" and are barred by the Filed Tariff Doctrine. These issues have been addressed above and do not apply. In addition, MCI asserts that

QCC's prospective claims must be dismissed because MCI no longer has any ICBs in existence in Florida.

A. Standard of Review for Motion for Final Summary Order

Pursuant to Section 120.57(1)(h) Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, *depositions, answers to interrogatories, and admissions* on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. (Emphasis added.) Rule 28-106.204(4), F.A.C., states that "any party may move for Summary Final Order whenever there is no genuine issue as to material fact . . . . Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgement is sought." *Green v. CSX Transportation, Inc.*, 626 So. 2d 974 (Fla. 1st DCA 1993) (citing *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.1977). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So.2d 666 (Fla. 1985). If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. *Albelo v. Southern Bell*, 682 So.2d 1126 (Fla. 4th DCA 1996).

B. MCI's Motion is Premature and Must Be Denied.

Florida case law clearly holds that the entry of final summary judgment, which is the equivalent of a final summary order issued in a Chapter 120 proceeding, is not appropriate absent the opportunity to conduct discovery. *Brandauer v. Publix Super Markets, Inc.*, 657 So.2d 932 (Fla. 2d DCA (1995) (grant of summary judgment reversed where plaintiff had not yet deposed any representative of the corporate defendant); *Singer v. Star*, 510 So.2d 637,639 (summary judgment should not be granted until facts have been developed sufficiently for court to be reasonably certain no issue of material fact exists); *Colby v. Ellis*, 562 So.2d 356 (Fla. 2d DCA 1990) (as a general rule, court should not enter summary judgment where opposing party has not completed discovery).

The Commission consistently applies this standard to motions for final summary orders. In a prior proceeding based upon a Complaint by the Florida Competitive Carriers Association ("FCCA") against BellSouth Telecommunications, Inc., for example, FCCA filed a motion (before Bell South had filed an answer to the FCCA Complaint) seeking a final summary order. Bell South argued that the motion was premature because discovery had not begun. *See, "BellSouth Telecommunications, Inc.'s Opposition to the Florida Competitive Carriers Associations' Motion for Summary Final Order,"* July 16, 2002, at pages 4-5, Docket No. 020507-TL. The Commission denied FCCA's motion stating that "the suitable time to seek final summary order, if otherwise appropriate, is after testimony has been filed and discovery has ceased." *In re: Complaint of Florida Competitive Carriers Association v. against BellSouth Telecommunications, Inc. regarding BellSouth's practice of*

refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider, and request for expedited relief, Order No. 020507-TL, Docket No. PSC-02-1464-FOF-TL (October 23, 2002). See also, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, Order No. 991437-WU, Docket No. PSC-00-2388-AS-WU (December 13, 2000) (denying motion for summary final order until discovery completed and testimony filed.)

QCC has not had any opportunity to conduct discovery in this proceeding. There have not been any depositions conducted in this case, including, for example, any deposition of the MCI representative who submitted the affidavit upon which MCI bases its motion for summary deposition. There have been no interrogatories submitted or answered in this case. There have been no requests for documents submitted. Summary disposition is appropriate only *after* there has been adequate time for discovery. See, e.g., *Bell So. Telecommunications Co. v. Kerrigan*, 55 F.Supp.2d 1314, (N.D. Fla.)(1999) (the plain language of Rule 56(c), Fed. R. C. V. P., mandates entry of summary judgment *after adequate time for discovery*). While MCI asserts that no ICBs remain in Florida, QCC has had no opportunity – let alone a reasonable opportunity – to test MCI's factual assertion. Therefore, MCI's motion is premature and the Commission must deny the motion in its entirety. If the properly-developed record ultimately reflects that MCI currently has no below-price list switched access agreements, the Commission is free to deny certain forms of relief QCC requests, if the Commission believes that would be the appropriate result.

C. MCI's Admission That Past Such Agreement Was Entered Precludes Summary Disposition.

Moreover, MCI admits that it did have at least one such agreement in the past. *See, MCI's "Motion to Dismiss Reparations Claim and Motion for Summary Final Order Dismissing All Other Claims Against Verizon Access, Affidavit of Peter H. Reynolds"* January 29, 2010, at pages 2-3. Based on that admission alone, summary dismissal of QCC's claims is inappropriate. QCC seeks a determination that MCI has violated Florida law through past and (possibly) on-going agreements. Prayer for Relief, A. QCC asks the Commission to order future rate adjustments consistent with the most favorable rate offered to other IXCs in Florida. *Id.*, ¶ C. QCC asks for an order requiring MCI to cease and desist the behavior it admits it has engaged in in the past. *Id.*, ¶ D. QCC asks that the Commission order MCI to file with the Commission any contract service agreements it may have with other IXCs which charge rates inconsistent with their published tariffs and price lists. *Id.*, ¶ E. Each of these forms of relief is appropriate regardless of whether MCI has an existing business arrangement in place. MCI's conduct makes prevention of similar harm in the future an appropriate concern that should be addressed in the final order of this case.

Conclusion

The Respondent CLECs, as well as numerous other Florida CLECs, have violated and are violating multiple provisions of Florida law by granting preferential discounts to a select few IXCs through secret, unfiled agreements. Without denying these facts, and with no remorse whatsoever, the CLECs stridently posit that this Commission is powerless to enforce Florida law by ordering reparatory refunds and prospective relief. Contrary to law and

public policy, the CLECs offer interpretations and theories that, if accepted, would render this Commission unable to enforce non-discrimination protections and public filing requirements. Rather than accepting the CLECs' factual mischaracterizations and strained legal reasoning, the Commission should deny the motions forthwith, allowing the case to proceed towards the filing of testimony and, ultimately, an evidentiary hearing.

Dated this 9th day of March, 2010.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by regular U.S. Mail and electronic mail on this 9th day of March, 2010, to the following:

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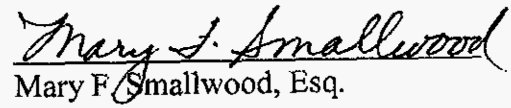
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