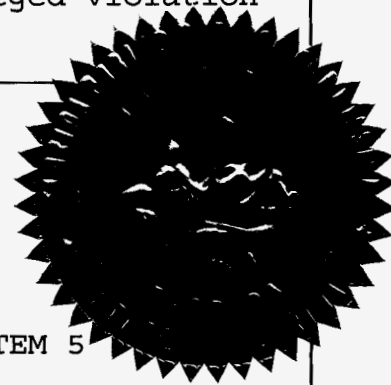


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of: DOCKET NO. 090538-TP

Complaint of Qwest Communications Company, LLC against
MCI metro Access Transmission Services (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 (CLECs whose true names are currently unknown) for
rate discrimination in connection with the provision of
intrastate switched access services in alleged violation
of Sections 364.08 and 364.10, F.S.



PROCEEDINGS: AGENDA CONFERENCE - ITEM 5

COMMISSIONERS
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER NATHAN A. SKOP
COMMISSIONER DAVID E. KLEMENT
COMMISSIONER BEN A. "STEVE" STEVENS II

DATE: Tuesday, May 4, 2010

TIME: Commenced at 9:49 a.m.
Concluded at 10:36 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL, RPR, FPR

DOCUMENT NUMBER - DATE

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FPSC - COMMUNICATIONS DIVISION

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APPEARANCES:

ADAM L. SHERR, ESQUIRE, 1600 7th Avenue, Room 1506, Seattle, Washington, 98191, appearing on behalf of Qwest Communications Company.

BETH KEATING, ESQUIRE, Akerman Law Firm, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301; appearing on behalf of the Joint CLECs.

DULANEY L. O'ROARK III, ESQUIRE, Verizon Florida LLC, Six Concourse Parkway, NE, Suite 800, Atlanta, Georgia, 30328, appearing on behalf of Verizon Access.

CURT KISER, ESQUIRE, General Counsel; MARY ANNE HELTON, ESQUIRE, Advisor to the Commissioners; and LEE ENG TAN, Commission Staff, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850

P R O C E E D I N G S

1
2 CHAIRMAN AGENZIANO: We will have -- we have
3 an interpreter here especially for Item 3. We
4 thank her for being here. And we're going to move
5 to Item 5.

6 You're recognized, Lee Eng.

7 MS. TAN: Good morning, Commissioners.

8 Lee Eng Tan on behalf of Commission staff.

9 Item Number 5 is a complaint by Qwest that
10 other CLECs have benefited from non-tariffed
11 private contracts that offered favorable access
12 rates unavailable to Qwest. Staff's recommendation
13 addresses the Joint CLECs' Partial Motion to
14 Dismiss, Verizon Access's Motion to Dismiss
15 Reparations Claim and Motion for Summary Final
16 Order.

17 Staff recommends that the Commission grant the
18 Joint CLECs' Partial Motion to Dismiss and Verizon
19 Access's Motion to Dismiss Reparations Claim to the
20 extent that Qwest seeks monetary damages or
21 injunctive relief. Staff recommends that Verizon
22 Access's Motion for Summary Final Order be denied
23 without prejudice.

24 Staff further recommends denying the request
25 for oral argument. However, should the Commission

1 in its discretion grant oral argument, staff
2 recommends that each side be allowed ten minutes.

3 Representatives from Qwest, Verizon Access,
4 and the Joint CLECs are available should the
5 Commission grant oral argument. Staff is also
6 available for any questions.

7 CHAIRMAN ARGENZIANO: Thank you. Members, or
8 Commissioners. I'm sorry. What is the
9 Commission's opinion, or what would the Commission
10 like to do as far as the oral arguments, granting
11 oral arguments?

12 Commissioner Skop and then Commissioner
13 Klement.

14 COMMISSIONER SKOP: Thank you. Just a point
15 of information to staff on Issue 1 for the request
16 to grant oral argument. Staff recommended no.
17 Could staff briefly elaborate as to why?

18 MS. TAN: Why we believe that oral argument is
19 not necessary?

20 COMMISSIONER SKOP: Yes.

21 MS. TAN: We believe that the filings from the
22 parties were comprehensive and were sufficient in
23 order to respond to the motions to dismiss and the
24 motions for summary final order.

25 COMMISSIONER SKOP: So in staff's opinion,

1 oral argument would be duplicative to what's
2 contained in the pleadings?

3 MS. TAN: That is correct.

4 COMMISSIONER SKOP: Thank you.

5 CHAIRMAN AGENZIANO: Commissioner Klement.

6 COMMISSIONER KLEMENT: Just a question. When
7 will we be seeing the hearing schedule on the
8 disputed issues of fact?

9 MS. TAN: At this time, an issue ID has not
10 been made. This docket is still in the beginning
11 stages, and that has yet to be determined.

12 COMMISSIONER KLEMENT: Thank you.

13 CHAIRMAN ARGENZIANO: Commissioner Edgar.

14 COMMISSIONER EDGAR: Thank you, Madam Chair.
15 Commissioners, I could truly go either way on this,
16 but recognizing that we do have the parties here,
17 and just from their facial expressions, it looks
18 like they are interested in speaking to us. I am
19 glad to hear them.

20 COMMISSIONER KLEMENT: I would too.

21 CHAIRMAN AGENZIANO: Then let's do that. And
22 each party has ten minutes.

23 MS. KEATING: Good morning, Madam Chair. Beth
24 Keating with Akerman Senterfitt here today on
25 behalf of Cox Communications. I have a number of

1 other colleagues here today with me. To my left is
2 Ms. Marsha Rule with Rutledge Ecenia, and Mr. Matt
3 Fiel is behind me with Akerman Senterfitt. And, of
4 course, you know De O'Roark with Verizon Access.

5 First off, thank you for allowing this
6 opportunity to address you on our motion to
7 dismiss.

8 Let me just start off by saying that for the
9 most part, we agree with your staff's
10 recommendation. We really only have one specific
11 concern, and that's the fact that your staff
12 indicates that there's still some confusion as to
13 whether Qwest has asked for a refund or damages.
14 And in leaving that door open, they also leave open
15 the door as to whether this Commission has the
16 authority to grant the specific monetary relief
17 that Qwest has asked for.

18 The fact of the matter is, though,
19 Commissioners, that the monetary relief Qwest is
20 seeking can only be characterized as damages.
21 Damages is defined as a monetary award to redress
22 an injury or a wrong.

23 In this case, Qwest is saying that they were
24 wronged by being discriminated against, and the
25 relief that they're asking for to address that

1 wrong is the difference between the rate that they
2 paid under the tariff and a rate that somebody else
3 supposedly paid.

4 And it's interesting to note that Qwest can't
5 point to a single case, not one single case in the
6 97 years since section 364.08 and 364.10 were
7 enacted where a court has said the Commission is
8 authorized to award a payment from one party to
9 another party for discrimination, not one case.

10 Now, clearly, this Commission has the
11 authority to resolve a dispute arising under a
12 tariff, and certainly you can award a refund for
13 misapplication of a tariffed rate, but that's not
14 what Qwest is asking for here. We would even agree
15 that you can impose a penalty for failure to comply
16 with a statute or rule, but again, that's not what
17 Qwest is asking for here. To the contrary, Qwest
18 is saying they were discriminated against, it was
19 illegal, and they are asking you to compensate them
20 for the competitive damage that was done to them
21 because they paid a different rate.

22 Now, let's look at the cases that Qwest has
23 referenced and is relying upon. If you look at the
24 facts in each of those cases, they simply don't
25 match up with the facts in this case. Every single

1 case that they have referenced, the complainant was
2 either complaining that they were charged more than
3 a tariffed rate, they were complaining that they
4 were misbilled, or they were attacking the tariff
5 itself. In this case, Qwest is not arguing about
6 any of those.

7 For instance, if you look at the Richter case
8 that they've relied upon heavily, that was a docket
9 or a case that involved fuel adjustment charges.
10 In that case, the complainant was arguing that the
11 rates that were approved by the Commission were
12 inordinately high because they were based on
13 misinformation. The court took a look at that and
14 said in that extraordinary circumstance, the
15 Commission did have the authority to go back and
16 review the rates that it had approved, and if it
17 found that the rates that it had approved were too
18 high based on misinformation, the Commission could
19 award a refund of the difference in the rates that
20 were based on misinformation and a more accurate
21 rate.

22 In that case, the complainant was attacking
23 the rate. Here, Qwest isn't attacking the rate.
24 They're attacking the behavior. They're saying
25 that they were discriminated against, and they are

1 asking for compensation for that alleged
2 discrimination. That can only be characterized as
3 damages.

4 Let me just go to one other point, and that is
5 the standard for addressing a motion to dismiss.
6 Your staff has included it in their recommendation.
7 And admittedly, it's a high standard. But there's
8 one component of the standard for a motion to
9 dismiss that is easily overlooked, and that's
10 included in your staff's recommendation, and it's
11 the reference to the bar bio case. And that
12 addresses what you should look at when you consider
13 a motion to dismiss and whether you should grant or
14 deny it. And that case says you should look at the
15 four corners of the petition and the bases in the
16 motion.

17 Now, certainly Qwest is allowed to respond to
18 our motion to dismiss, and in doing so, they can
19 attack the legal basis for our motion, and they can
20 even clarify some of the arguments in their
21 original complaint. What they can't do is
22 recharacterize and finagle the facts in their
23 request for relief in order to -- in their response
24 to our motion in order to avoid dismissal.

25 To the point, I ran a quick word search on

1 their initial complaint in this proceeding for the
2 word "refund." The word "refund" shows up in their
3 complaint a grand total of zero times, not once. I
4 ran that same word search on their response to our
5 motion to dismiss, and the word "refund" shows up
6 an astounding 25 times in their response to our
7 motion.

8 Commissioners, the fact of the matter is that
9 Qwest is asking for damages, not a refund for
10 overcharges. They're asking for compensation for
11 discriminatory treatment, and that's a request for
12 damages. Applying the standard for a motion to
13 dismiss, they shouldn't be allowed to revisit their
14 initial request and revise it, using their response
15 to our motion as a vehicle in order to avoid
16 dismissal.

17 As such, we just ask that in making your
18 ruling today, you clarify that Qwest, when asking
19 that you remedy the alleged discriminatory
20 treatment by providing them a monetary award, that
21 Qwest is actually asking for damages, and that that
22 is simply not a request for relief that this
23 Commission is authorized to award. Thank you.

24 MR. O'ROARK: Good morning, Madam Chairman and
25 Commissioners. I'm De O'Roark with Verizon Access.

1 I'll be brief this morning, because Ms. Keating has
2 really said a lot of what I would have said.

3 Verizon Access filed a motion to dismiss with
4 respect to the retroactive relief requested by
5 Qwest and a motion for summary final order with
6 respect to the prospective relief. I'll deal with
7 each of them very briefly.

8 With respect to the motion to dismiss,
9 Ms. Keating has really covered all the main points.
10 The thing I would emphasize here is that there is
11 no factual dispute about what relief Qwest is
12 asking for. The only dispute concerns the purely
13 legal question of whether the Commission could
14 grant the relief that Qwest is requesting. But as
15 to what that relief is, that appears on the face of
16 the complaint and is not the subject of dispute
17 between the parties. We would respectfully submit
18 that the time to resolve the question of whether
19 the Commission should -- would be able to grant the
20 relief is now, not after a year of litigation. By
21 addressing the question now, you can save everyone
22 involved a lot of time and a lot of resources.

23 On the motion for summary final order, we
24 really make just a discrete point. I realize it is
25 early in the proceedings for a motion for summary

1 final order. The reason that we did, we submitted
2 an affidavit, and we explained that the only ICB,
3 individual case basis contract, at issue with
4 respect to Verizon Access is one that terminated as
5 of January 2007. Qwest is well aware of this.

6 This is a case, by the way, that isn't unique
7 to Florida. Qwest is bringing these cases around
8 the country. And so our point is simply that with
9 respect to the prospective relief, since the last
10 ICB we had that was even at issue is now three
11 years -- has been expired for three years, there's
12 really nothing to be dealt with with Verizon Access
13 going forward.

14 I realize that Qwest has said that it wants
15 discovery. If that is what you conclude, what we
16 respectfully request is that with respect to
17 Verizon Access, you suspend consideration of the
18 motion for summary final order, let Qwest ask us
19 questions to satisfy itself that that truly is the
20 only ICB that we had in Florida, and then once
21 they've had a chance to look at that, come back and
22 revisit our motion. Thank you.

23 CHAIRMAN AGENZIANO: Mr. Sherr.

24 MR. SHERR: Yes. Good morning. My name is
25 Adam Sherr. I'm associate general counsel for

1 Qwest Communications Company. I appreciate the
2 opportunity to address you today.

3 Ms. Keating and I have one thing definitely in
4 common, and that is that we think that staff got it
5 right for the most part. Qwest is in agreement
6 with the vast majority of staff's recommendation. I
7 would like to provide some introductory remarks and
8 then respond to a couple the comments made by
9 opposing counsel and, of course, answer your
10 questions at any point.

11 I would like to take a step back just to make
12 sure it's clear to the Commission what's at stake
13 here, that this case is about the provision of
14 switched access service by certain identified CLECs
15 in the State of Florida, and also many CLECs that
16 have not yet been identified. We know that there
17 are many CLECs that have engaged in the practice
18 that's at issue in this case. At our request, you
19 issued subpoenas to the largest interexchange
20 carriers in the state, and they are in the process
21 of producing documents to us showing us scores and
22 scores of these agreements.

23 And so just so procedurally it's clear what's
24 going to happen -- and I have had the pleasure of
25 prosecuting this case in other states -- we will

1 come to you probably within the next month and
2 amend our complaint to add other defendants, other
3 CLECs who have engaged in this practice.

4 But as to the issue of switched access,
5 switched access is a vital, critical bottleneck
6 service that an interexchange carrier, a long
7 distance carrier like Qwest has to purchase in
8 order for its calls to originate to and terminate
9 from the long distance pipe that carries the call.
10 In order for that call to get from the end user who
11 starts the call, who originates the call, to the
12 end user to whom the call is terminated, that
13 service has to be provided to get it from the long
14 distance company's network to the local provider.
15 That service is provided by local exchange
16 carriers, be they large RBOCs like AT&T or the
17 smallest CLEC.

18 That service is a bottleneck monopoly service.
19 There's really no competitive alternative that the
20 interexchange carrier has to have that service
21 originated or terminated to it.

22 And what's novel here is that it's even a
23 monopoly bottleneck service when provided by CLECs,
24 which is unusual, because generally you think of
25 CLECs as competitive carriers who don't have market

1 power over any type of service. But in this case
2 they do, because there's really no way -- there's
3 no way for Qwest as a long distance provider to
4 circumvent the particular local company. That
5 decision is made by the end user who chooses its
6 local exchange company, and Qwest is required to
7 pay the rates of the LEC, be they a CLEC or an
8 ILEC, who provides that service.

9 The FCC has found it to be a bottleneck
10 service even when provided by CLECs and has
11 restrained interstate switched access rates. They
12 did that almost ten years ago. And to my
13 knowledge, every state commission that has
14 considered the issue has reached the same
15 conclusion and has applied some form of rate cap
16 generally mirroring the rates of the ILECs, but
17 some sort of rate CAP.

18 It's a very costly service. This is not
19 trivial. I think we identified in our response to
20 the motions that Qwest was billed just by CLECs and
21 just for intrastate switched access over \$5 million
22 over a few-year period in Florida alone. So this a
23 very, very costly service and one that really
24 drives our cost of providing long distance service.

25 What Qwest alleges in its complaint hopefully

1 is pretty clear, and that is that while we have
2 been paying the price listed rates that the CLECs
3 have stated and have published -- and those rates
4 are relatively high -- the same CLECs have been
5 offering the identical service to other very
6 similar long distance carriers at much, much lower
7 rates by means of secret agreements. There were
8 contracts that were entered into between the CLECs
9 and these long distance companies. They were held
10 secret. They were not filed with the Commission.
11 They were not provided to Qwest. They were not
12 offered to Qwest. So Qwest has been paying rate X,
13 and these other carriers with who Qwest is
14 competing have been paying rate Y, which in some
15 cases is dramatically, dramatically lower. That is
16 the textbook definition of rate discrimination.

17 And interestingly, none of the CLECs deny
18 having engaged in this behavior. In fact, MCI, as
19 you just heard, admits that they did. As I think
20 you'll see as the case proceeds, there's no dispute
21 of fact as to whether these agreements exist or
22 not.

23 Notwithstanding that admission, the CLECs ask
24 you to find that you have no enforcement authority
25 whatsoever for this type of discrimination. They

1 ask you to find this despite the existence of
2 Section 364.01 that gives you the exclusive
3 authority to enforce the obligations and
4 requirements of Chapter 364. They take this
5 position despite the fact that you have a duty to
6 ensure the treatment, the fair treatment of telecom
7 providers like Qwest and to prevent anticompetitive
8 behavior. That's also found in 364.01. They take
9 this position despite the fact that 364.08
10 obligates carriers like CLECs to abide by their
11 filed schedules and price lists. And they take
12 this position -- and this is the most important
13 statute, I think, for this case -- despite 364.10,
14 which explicitly prohibits undue and unreasonable
15 rate discrimination.

16 There's a long line of cases, both cases that
17 were ordered by this Commission and ones that were
18 ordered by courts, where this Commission has
19 specifically authorized, and in fact, has exclusive
20 jurisdiction to award refunds for overcharges.

21 In fact, there's even a rule that this
22 Commission has implemented in order to implement
23 refunds. It talks about the timing of refunds, the
24 interest that has to be paid, reporting about
25 refunds. So there's really no question at all that

1 this Commission has the authority to issue refunds.

2 In order to skew this issue and to muddy it --
3 and this is something that staff, I think, grasped
4 very clearly in its recommendation. What the CLECs
5 are asking you to do is to consider the relief that
6 we have asked for, which is a refund of the
7 difference between X and Y plus interest, and it
8 asks you to consider that to be damages. They then
9 cite a litany of completely irrelevant cases that
10 stand for the unremarkable proposition that this
11 Commission can't award tort or contract damages.

12 If we were here before you today saying the
13 CLECs engaged in this contact, and as a result, we
14 lost 50,000 customers and \$200 million in profit,
15 that our property was somehow damaged, if we were
16 asking for that type of relief, you could show us
17 the door, because this Commission isn't the
18 appropriate place for that. That sits within the
19 discretion of the judiciary. This Commission isn't
20 authorized to award tort or contract damages.

21 All of the cases that are cited by the CLECs
22 for this proposition that the Commission doesn't
23 award damages are tort cases or contract cases. We
24 can talk about any of them that you wish, but they
25 are all exactly the same.

1 This Commission has repeatedly ordered refunds
2 for overcharges, and that's what Qwest is seeking.

3 Just to respond to a point made by
4 Ms. Keating, she indicates that our complaint never
5 once asks for refunds, but instead, asks for
6 reparations. Well, those two words are synonymous.
7 That is what we are seeking. We are seeking very
8 clearly the difference between what we paid and
9 what we would have paid had we not been
10 discriminated against. You'll notice that our
11 complaint never uses the word "damages" either, a
12 point that Ms. Keating did not make.

13 If we were here asking for damages in the
14 civil sense, tort damages, contract damages, we
15 would absolutely be out of place and in the wrong
16 forum, but that's not what we're seeking. I don't
17 know how to make that any clearer.

18 As staff noted, the Court of Appeals of this
19 state has indicated the strategic use of the term
20 and repeated use of the word "damages" does not
21 make it so. It doesn't convert what we're asking
22 for, which is a refund for the overcharge that we
23 paid, it does not convert that into a claim for
24 damages, and that was made very clear in the FPL
25 and Albert Litter case.

1 Moving on briefly, there was a request for --
2 there is an issue about injunctive relief that
3 staff dispenses with. That's specifically tied to
4 Prayer for Relief D that is found in Qwest's
5 complaint. Qwest's complaint sought various forms
6 of prospective relief in addition to the
7 retrospective refunds that we are seeking, the
8 reparations we're seeking. Prayer for Relief D,
9 which was asking for a cease and desist order, was
10 just one of those prospective forms of relief.

11 After reflecting upon the positions of the
12 parties and staff's analysis, Qwest has no problem
13 or objection to removing Prayer for Relief D from
14 its complaint. And when we amend our complaint in
15 the next month or so once we have all the
16 agreements in hand, we're happy to remove it. It's
17 not really central to our request for prospective
18 relief. And frankly, I'll admit that it was a
19 little inartful. So I don't think that's really an
20 issue.

21 The last point I wanted to address was MCI's
22 request for a motion for a final summary order. As
23 staff indicated, it is simply premature for MCI to
24 bring that issue before you. It's also
25 unnecessary. This Commission has repeatedly found

1 that a motion for summary in order, often referred
2 to in other jurisdictions as a motion for summary
3 judgment, is simply too early if brought before
4 testimony is filed and discovery has been
5 completed. In this case, as I believe was made
6 clear in the exchange prior to oral argument
7 starting, the matter hasn't even been set for
8 hearing. No testimony has been filed, and apart
9 from the subpoenas that are going out to third
10 parties, discovery hasn't been started in this
11 case. So it's simply too early for that to be
12 resolved.

13 And further, it's completely unnecessary to
14 dismiss that claim vis-a-vis all those claims or
15 all those prayers for relief as to MCI at this
16 point. Ultimately, if MCI proves its point, which
17 is that it has no going-forward agreements, then
18 the Commission is free to simply deny relief to
19 Qwest. Once we get to the stage of having
20 submitted our testimony, having a hearing
21 conducted, having submitted briefs, if they don't
22 believe that that relief is appropriate, you're
23 free to deny it. It's not necessary to resolve
24 that matter now. You may decide that
25 notwithstanding the lack of a going-forward

1 agreement that prospective relief is still
2 appropriate as to MCI in order to ensure that this
3 practice does not recur in the state. That's your
4 call ultimately, and there's simply no reason to
5 resolve it now.

6 CHAIRMAN AGENZIANO: Sir, you're on your last
7 20 seconds.

8 MR. SHERR: Well, that times nicely, because
9 all I wanted to say now is that I appreciate the
10 opportunity to address you and am happy to answer
11 any of your questions.

12 CHAIRMAN AGENZIANO: Thank you.

13 MR. SHERR: Thank you.

14 CHAIRMAN AGENZIANO: Commissioner Klement.

15 COMMISSIONER KLEMENT: A question to staff. I
16 see in your recommendation that you believe the
17 Commission lacks the authority to issue injunctions
18 or award damages. We're doing some semantics here
19 with the parties' arguments, whether it's a refund,
20 a fine, or reparations. Qwest is using
21 reparations. Do we have the authority to deal with
22 those?

23 MS. TAN: The Commission hasn't really defined
24 the word "reparation." In terms of whether or not
25 -- staff does not necessarily disagree with the

1 movants. The recommendation only notes that if
2 applicable in this case, the Commission does have
3 the authority to issue refunds. So we are looking
4 at this request as a request for refunds.

5 COMMISSIONER KLEMENT: And we do have that
6 authority?

7 MS. TAN: We do have the authority to issue
8 refunds for overcharges.

9 COMMISSIONER KLEMENT: Okay. Thank you.

10 MS. KEATING: Madam Chair.

11 CHAIRMAN AGENZIANO: Yes, Ms. Keating.

12 MS. KEATING: Would it be possible for me to
13 address just a few quick points in response to
14 Mr. Sherr's argument and one of staff's comments?
15 I promise to be brief.

16 CHAIRMAN ARGENZIANO: If you can be brief,
17 sure.

18 MS. KEATING: First off, just let me be clear.
19 We're not asking at this time for Qwest's entire
20 complaint to be dismissed. We're only asking that
21 their request for damages be dismissed, so let me
22 be clear on that.

23 And also, it's not true that we're saying the
24 Commission has no ability to remedy the allegations
25 in Qwest's complaint. We're simply saying that

1 this Commission doesn't have the authority to award
2 damages, and that happens to be the specific
3 monetary request that Qwest has made here.

4 The other point I want to say is that with
5 regard to your questions, Commissioner, about
6 reparations, we actually cited a case in our motion
7 to dismiss -- and it's an old PSC case. It's
8 Docket 800011, where the Commission concluded that
9 retroactive remedies which are in the nature of
10 reparations are peculiarly judicial in character.
11 That sounds an awful lot like an assessment of
12 damages.

13 And the last thing I'll say is, Commissioners,
14 we're not saying that you don't have authority to
15 award a refund for overcharges. But what Qwest is
16 asking for is not a refund of overcharges. Thank
17 you.

18 CHAIRMAN AGENZIANO: Mr. Sherr, would you like
19 to respond?

20 MR. SHERR: I would. Thank you very much.

21 Obviously, Ms. Keating and I just
22 fundamentally disagree on this issue, which I think
23 offers another opportunity to remind you that it is
24 unnecessary to resolve this issue now. I can tell
25 you what Qwest is seeking. And I told you in the

1 complaint, and I told you in our response to the
2 pleadings, and I told you today we are seeking a
3 refund. We believe that word is synonymous with
4 reparations. Staff recognizes that. That's how
5 staff interprets it as well.

6 Ultimately, the proof will be in the pudding.
7 We will file testimony. It will explain the nature
8 of the relief we are requesting and how we
9 calculated it, and you can assess for yourself
10 whether those are contract or tort damages that are
11 prohibited from resolution at this Commission or
12 whether they are refunds for overcharges. That is
13 your ultimate call in this case, and there is no
14 reason you need to make that determination now as
15 to what Qwest is actually seeking. I'm telling you
16 what Qwest is actually seeking, but if you need to
17 see the case developed, then it's appropriate to
18 wait until you have. Thank you.

19 CHAIRMAN ARGENZIANO: Commissioners.
20 Commissioner Skop.

21 COMMISSIONER SKOP: Thank you, Madam Chair.
22 This is to Ms. Keating with respect to Verizon's
23 position on Issue 2. Am I correct to understand
24 that you and the CLECs agree with the staff
25 recommendation on Issue 2 as it's currently

1 written, or what needs to be changed, in your mind?

2 MS. KEATING: With regard to the issue of
3 damages versus refunds?

4 COMMISSIONER SKOP: Yes.

5 MS. KEATING: We agree that staff has reached
6 the correct conclusion that the Commission doesn't
7 have authority to award damages. Where we differ
8 is, staff has left the issue open by saying it's
9 not clear whether Qwest is asking for a refund or
10 damages. In saying that, they keep the issue open
11 for the duration of the case, because what they're
12 saying is the Commission has authority to award
13 refunds, which, frankly, we don't contest. But
14 what we're saying is, Qwest's specific request for
15 monetary relief in this case is damages, and that
16 specific request for relief should be dismissed now
17 at the beginning of the case. It's a legal
18 question. Continuing to carry this issue through
19 the duration of the case would just add additional
20 cost and time to the case, when you can resolve it
21 here and now, because they have specifically asked
22 for damages. Whether they call it reparations or
23 try to call it a refund, the nature of the relief
24 requested is damages. It is what it is.

25 COMMISSIONER SKOP: Thank you. Mr. Sherr, a

1 brief response, and then to staff.

2 MR. SHERR: I appreciate the opportunity. I
3 don't want to repeat myself too many times, but
4 again, I think it's just a fundamental disagreement
5 as to whether we are seeking damages, contract or
6 tort damages, which we are not, or whether we're
7 seeking refunds.

8 I assume that staff characterized their
9 recommendation the way that they did because they
10 haven't seen the testimony in this case. They've
11 seen the complaint. They've seen the motions and
12 the responses to dismiss, but they haven't seen the
13 way Qwest will ultimately characterize what it is
14 seeking. And I don't want to put words in staff's
15 mouth, but it may seem premature to them to decide
16 what's really at stake in this case.

17 Ultimately, you have the authority to issue
18 refunds. Everyone at this very long table seems to
19 agree with that. It's ultimately your decision as
20 to whether Qwest is seeking refunds or whether
21 we're seeking some sort of consequential economic
22 damages, which, of course, we are not. Thank you.

23 COMMISSIONER SKOP: Thank you. Staff?

24 COMMISSIONER KLEMENT: May I ask --

25 CHAIRMAN AGENZIANO: Go ahead.

1 COMMISSIONER KLEMENT: Can you give us a
2 ballpark that we're playing in regarding the amount
3 of refunds?

4 MR. SHERR: Regarding the amount?

5 COMMISSIONER KLEMENT: Yes.

6 MR. SHERR: I can't give you a very educated
7 one, Your Honor. There are a very small set of the
8 CLECs that are -- of the Florida CLECs that have
9 these agreements are parties to this case already.
10 As I said, we had subpoenas issued so that we could
11 gather all of the agreements, and there will be
12 scores of them.

13 We then have to analyze those agreements to
14 see whether they affect Qwest in any way, because
15 it may be that we never bought services from the
16 same company. We're not going to haul a company in
17 here when we didn't buy its service. There's no
18 issue there. So ultimately, it will depend upon an
19 analysis that hasn't yet been conducted.

20 I would guess -- it's very, very hard to
21 ballpark it. We purchased in a certain period of
22 time about \$5 million. I wouldn't at all be
23 surprised if the total amount of reparations we're
24 talking about is in the seven digits, is above a
25 million dollars. It could be.

1 It really depends upon -- and I'm trying to be
2 frank with you. I don't know. I don't want to
3 inflate numbers or deflate them. But it ultimately
4 depends upon a comparison of what the rates were in
5 the contracts we haven't seen yet and the rate we
6 were charged in the state.

7 CHAIRMAN AGENZIANO: The answer, I think, to
8 that is he doesn't know. But before we do that, I
9 cut off Commissioner Skop. Commissioner Skop was
10 asking staff a question.

11 COMMISSIONER KLEMENT: Oh, I'm sorry.

12 CHAIRMAN AGENZIANO: That's okay. We can come
13 back to you in a moment. Commissioner Skop.

14 COMMISSIONER SKOP: Thank you. And just to
15 staff with respect to addressing the concerns
16 raised by Ms. Keating and the response by
17 Mr. Sherr, it seems as if on the staff
18 recommendation, it properly grants the motion to
19 dismiss for monetary damages and injunctive relief,
20 but if staff could elaborate on that a little bit
21 more briefly, because the tension here seems to be
22 that this issue of damages -- you know, obviously,
23 the Commission does not have jurisdiction to award
24 damages, nor injunctive relief. But how do we
25 reconcile this debate of semantics, if you will?

1 MS. TAN: That is correct. We believe that
2 the Commission does not have the -- lacks the
3 authority to grant damages or injunctive relief.
4 And we do believe that it is early in this
5 proceeding, and as a result, whether refunds are
6 appropriate is yet to be determined.

7 CHAIRMAN AGENZIANO: And if that's the case,
8 how do we -- we move forward. We would, as
9 Ms. Keating is saying, dismiss the motion or the
10 damages and move forward. How would that then
11 affect if the company -- if Qwest is then due
12 refunds down the line, or would it?

13 MS. TAN: Staff does not consider refunds or
14 overcharges to be damages, and since we have
15 authority over those, should the Commission
16 determine that refunds are appropriate --

17 CHAIRMAN ARGENZIANO: I guess what I'm trying
18 to get at is, for legal purposes, if we're
19 considering this or, as Commissioner Skop says, the
20 semantics of it, I'm not sure -- I guess what I'm
21 trying to ask is, is it damages or is it refunds
22 today that we're looking at? And if it's refunds,
23 then we do have the authority to give refunds back?
24 And if Qwest is asking or somehow staff believes
25 it's damages, if we were to deny damages because we

1 don't have the authority to do that, then how do
2 they move forward for refunds if they are due
3 refunds?

4 MS. TAN: Are you asking whether or not staff
5 believes that reparations are --

6 CHAIRMAN AGENZIANO: No. I guess what I'm
7 trying to figure out is, if they are due refunds,
8 how do we get to that conclusion? The question I'm
9 trying to ask myself today is, am I voting on
10 damages, or am I voting on refunds? And it doesn't
11 -- I hear Qwest saying it's not damages, and I hear
12 Verizon saying it is damages.

13 So I guess, Staff, it's up to you. Is it
14 damages or refunds that we're voting on today? And
15 then once we make that decision, if we say that
16 they are damages and we kick that to the curb and
17 say, "No, we can't do that, we don't have the
18 authority to do that," then address the refunds if
19 they are due the refunds. As you just indicated,
20 we have to go down the line, I guess, to see if
21 they are due refunds.

22 How does that play out today, and what is your
23 recommendation on what they are asking today? Is
24 it damages or refunds?

25 MS. TAN: We believe that they're asking -- we

1 believe that the motion to dismiss is asking for
2 damages, that they have narrowed to it damages.
3 But we do not necessarily believe that reparations
4 are damages, that they can be --

5 CHAIRMAN AGENZIANO: The lawyer world is very
6 confusing, isn't it?

7 MS. TAN: So it's our recommendation that
8 we're looking at this today just in terms of
9 damages. I'm trying to think.

10 CHAIRMAN ARGENZIANO: If we were to consider
11 those damages today, that we don't have
12 authority --

13 MS. HELTON: Madam Chairman, listening here --
14 and frankly, I don't know the case as well as the
15 staff do, but listening here, it sounds like
16 there's actually a lot of common agreement between
17 everyone sitting at the table. Everyone is saying
18 you do not have the authority to award damages, you
19 do not have the authority to grant injunctive
20 relief, but you do have the authority to award
21 refunds if that is appropriate, or to -- I
22 shouldn't say award refunds; to grant refunds if
23 that is appropriate.

24 It sounds to me also that we don't have really
25 enough information yet, because this is the

1 beginning stages. We have not conducted discovery.
2 We have not filed testimony to know whether what
3 Qwest is asking is refunds or is damages.

4 I would make -- staff has recommended to you
5 that you do have the authority to grant refunds and
6 you don't have the authority to award damages or to
7 issue some kind of injunctive relief, so my
8 recommendation is to follow what staff has
9 recommended and move staff's recommendation.

10 CHAIRMAN AGENZIANO: I understand that, and
11 that's very clear. I mean, that has been said over
12 and over again. I don't hear Qwest saying that
13 they're damages. I hear Qwest saying it's refunds,
14 so I'm trying to figure out is it refunds or
15 damages.

16 And if we determine that it's damages,
17 obviously, we don't have the authority to do that,
18 and we say, "Sorry. We don't have authority to do
19 that." And then where do we move from there? Then
20 does that inhibit or prohibit moving forward on
21 refunds if that's what Qwest -- what will they have
22 to do if we today say it's not damages? Because
23 I'm not hearing them say it's damages.

24 MS. KEATING: Madam Chair.

25 CHAIRMAN ARGENZIANO: Hang on a second. A

1 question for staff, and then I'll come to you.

2 MS. KEATING: Thank you.

3 MS. HELTON: Well, I think if you move staff's
4 recommendation today, Qwest would file testimony
5 and the parties would conduct discovery. If later
6 down the road we determine that what they really
7 are seeking is damages, then I think the parties
8 would be able to file another motion to dismiss.
9 But at this point in time, I'm hearing we don't
10 have enough information to say which it is. We're
11 still in the beginning stages where discovery is
12 being conducted.

13 CHAIRMAN AGENZIANO: Well, that's what I was,
14 I think, asking for.

15 Commissioner Skop, can I go to Ms. Keating,
16 and then you can jump in.

17 MS. KEATING: Thank you, Madam Chair. I think
18 we would respectfully disagree with your staff. We
19 think there's plenty of information as it's
20 outlined in Qwest's complaint. I mean, they've
21 specifically stated how they think the monetary
22 award should be calculated.

23 And this sort of goes back to a response that
24 Mr. Sherr provided to Commissioner Klement. They
25 don't know the answer of how much damages are at

1 stake, because here's what they would have to do:
2 You're looking at the tariffed rate that they paid
3 all over, various tariffs, whether it's Verizon
4 Access, whether it's Cox, whether it's Broadwing,
5 whether it's XO, whether it's Granite. You would
6 have to calculate the difference between that
7 tariffed rate and any number of different contract
8 rates that may be out there.

9 But before you decide whether or not it's
10 appropriate to provide any monetary award there,
11 you would have to decide first that that off-tariff
12 contract was in fact unduly discriminatory. You
13 have to make an assessment that the contract was
14 illegal before you can make an award of the type
15 that Qwest is asking for. That is damages. It's
16 not a refund.

17 They're not saying there was a charge of a
18 certain amount over a tariffed rate. They're
19 asking that you decide these contracts were
20 discriminatory and give them the difference in what
21 they paid and what somebody else paid.

22 MR. SHERR: Madam Chair, may I respond?

23 CHAIRMAN ARGENZIANO: Commissioner Skop.

24 COMMISSIONER SKOP: I'll let Mr. Sherr respond
25 briefly, if I may, and then I've got questions for

1 both of them.

2 CHAIRMAN AGENZIANO: Mr. Sherr.

3 MR. SHERR: Thank you. I'll fight my genetics
4 and try to be brief.

5 Ms. Keating and I continue to have the same
6 fundamental disagreement. And maybe a practical --
7 in answer to your question, maybe a practical way
8 to resolve this, if you look at Qwest's complaint
9 -- I'm not sure if you have a copy of it, but
10 Prayer for Relief B asks that the Commission order
11 the respondent CLECs to pay QCC reparations with
12 applicable interest in an amount to be proven at
13 hearing. If the word "reparations" is -- and I
14 don't think it is, but if it is ambiguous, if it's
15 unclear to you what we mean by that, you can simply
16 direct us to amend our complaint to replace the
17 word "reparations" with the word "refunds." Then
18 it will be very clear that we're not seeking
19 damages and that we don't have the entitlement
20 within the ambit of our complaint to do that. I
21 don't think it's necessary, because as staff
22 recognizes, reparations and refunds are synonymous.

23 With regard to Ms. Keating's last point, I
24 agree with her that ultimately you have to conclude
25 that these agreements were unduly discriminatory,

1 and that's what happens at the end of an
2 adjudicative process after you see the agreements,
3 you see the testimony, you see the argument, and
4 you see the briefs. They're asking to cut this
5 argument off now before we get that far.

6 And the last point it I would make is that an
7 overcharge can either be that Qwest was charged
8 more than a tariffed rate. It can also be that
9 Qwest was charged a tariffed rate while others
10 sitting in exactly its same position were charged
11 less. Either of those contexts is an overcharge.

12 So just to clarify that, an overcharge is not
13 simply limited to a context where we were charged
14 more than a tariffed rate. Either of those could
15 be an overcharge, as staff recognizes. Thank you.

16 CHAIRMAN AGENZIANO: Commissioner Skop.

17 COMMISSIONER SKOP: Thank you, Madam Chair.
18 I'll try and get to, I guess, the bottom of this
19 here.

20 Ms. Keating, I think in this proceeding, if I
21 understood your argument correctly, Verizon and the
22 CLECs are seeking to preclude consideration of
23 damages in this docket based upon the pleadings.
24 Is that generally correct?

25 MS. KEATING: That's correct.

1 COMMISSIONER SKOP: And by amending the
2 pleadings in the manner as suggested or by the
3 Commission ordering the pleadings to be amended or
4 changed in the manner suggested by Mr. Sherr, would
5 that be prejudicial to Verizon and the other CLECs,
6 in your opinion?

7 MS. KEATING: Yes, Commissioner. We think
8 that the way they characterized their request for
9 relief in their initial complaint is clearly a
10 request for damages. They may have used the word
11 "reparations," but frankly, it's a request for
12 damages. They've come back now in their response
13 to our motion to dismiss, and suddenly it's a
14 refund. That's simply not what they asked for.

15 COMMISSIONER SKOP: Madam Chair, just a
16 question to our general counsel, Mr. Kiser.

17 With respect to resolving this, clearly, the
18 Commission does not have authority or jurisdiction
19 to award damages or injunctive relief. But
20 listening to the two parties, what's the point of
21 entry for addressing Qwest's concern?

22 For instance, if the Commission granted
23 dismissal in part on the damages, then obviously,
24 that would be definitive towards damages, but how
25 would Qwest come back into the proceeding? Would

1 it have to be in another docket? Because I think
2 Ms. Keating is suggesting that we put the kabash on
3 damages here.

4 MR. KISER: First of all, let me back up. I
5 still think that what staff recommended on their
6 recommendation number 2, I think that is clear.
7 It's succinct. It's right to the point. And it
8 simply lays out that you're going to grant the
9 motion in part and not grant the request for
10 summary judgment.

11 I think you're drawing a line in the sand by
12 taking that up and saying we agree to what the law
13 is, that we can only do refunds, we can't go into
14 the other forms of damages that parties might want
15 to seek. And to me, that's still -- that's right
16 on point. That's the recommendation that staff
17 started out with, and I think that's right where we
18 need to end up, Commissioner Skop.

19 If you deny the motion for summary judgment so
20 that the processes can continue, then all the other
21 discovery and things that need to take place to
22 help flesh out more of the case are going to
23 develop those other issues. So they're already
24 still in the case, and at that point, you'll see
25 what comes out when they finish with discovery.

1 But I still think that's the recommendation that
2 the Commission ought to follow.

3 COMMISSIONER SKOP: And as a follow-up to
4 that, I think Ms. Keating's concern is that the
5 pleadings have been styled as damages, yet I keep
6 hearing that in the course of this docket and
7 discovery and such, we're going to look at refunds.
8 So I think that's where the disconnect is, and
9 that's what I'm trying to gain a better
10 understanding of, because again, the pleadings
11 typically control the conduct of the case.

12 MR. KISER: Right. And I would agree that if
13 they go back and change the pleadings, they're
14 going to be stuck to staying on whatever that
15 amended pleading is going to say, and then going to
16 be stuck with that course of action.

17 COMMISSIONER SKOP: Okay. Thank you.

18 CHAIRMAN AGENZIANO: Any other questions?

19 COMMISSIONER STEVENS: Madam Chair.

20 CHAIRMAN AGENZIANO: Commissioner Stevens.

21 COMMISSIONER STEVENS: I've read through this
22 several times and listened to the arguments, but
23 I'm still with staff's recommendation.

24 COMMISSIONER EDGAR: Is that a motion?

25 COMMISSIONER STEVENS: I'll move staff's

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recommendation.

COMMISSIONER EDGAR: Second.

CHAIRMAN AGENZIANO: All those in favor?

(Affirmative responses.)

CHAIRMAN ARGENZIANO: All those opposed?

Show it adopted. Thank you.

(Proceedings concluded at 10:36 a.m.)

CERTIFICATE OF REPORTER

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STATE OF FLORIDA:

COUNTY OF LEON:

I, MARY ALLEN NEEL, Registered Professional Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages numbered 1 through 41 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 7th day of May, 2010.


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