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090538-TP

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Subject: PSC Docket No. 090538TP

Attachments: Qwest Joint Motion to Dismiss.pdf

Please find attached for filing:
Qwest Communications Company LLC's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request Reparations in the Form of Refunds.

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BEFORE THE PUBLIC UTILITIES

COMMISSION OF THE STATE OF FLORIDA

Amended 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, ACCESS POINT, INC., BIRCH COMMUNICATIONS, INC., BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INC., FLATEL, INC., LIGHTYEAR NETWORK SOLUTIONS, LLC, NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., STS TELECOM, LLC, US LEC OF FLORIDA, LLC, WINDSTREAM NUVOX, INC., AND JOHN DOES 1 THROUGH 50, For unlawful discrimination.	Docket No. 090538-TP Filed: December 8, 2010

QWEST COMMUNICATIONS COMPANY, LLC's RESPONSE TO JOINT MOTION TO DISMISS QWEST'S FIRST AND SECOND CLAIMS FOR RELIEF AND REQUEST FOR REPARATIONS IN THE FORM OF REFUNDS

TABLE OF CONTENTS

QWEST COMMUNICATIONS COMPANY, LLC's RESPONSE TO MOTION TO DISMISS

Qwest Communications Company, LLC ("QCC"), through undersigned counsel, hereby responds to the Joint Motion to Dismiss with Prejudice Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds ("Bingham Joint Motion") filed by Respondents Access Point, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PAETEC Communications, Inc., and US LEC of Florida, LLC. (the "Movants") filed in this proceeding.[1]

I. INTRODUCTION

The issues in this proceeding are straightforward and go to the very heart of this Commission's authority and obligation to address unlawful rate discrimination. At issue is the discriminatory pricing the Respondent competitive local exchange carriers ("CLECs") charge for intrastate switched access, which 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 interexchange carriers ("IXCs") such as QCC.[2] Functionally, switched access consists of various service elements provided by local exchange carriers ("LECs") (whether they are incumbent LECs, 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

[1] On November 17, 2010, Respondent Windstream Nuvox, Inc. filed a single sentence Notice whereby it joined in the Bingham Joint Motion.

[2] 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.

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 incumbent LEC 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)[3]

In brief, it is undisputed in this case (and assumed for purposes of the Bingham Joint Motion) that the Movant CLECs entered into secret, off-price list agreements through which they provided select IXCs with lower rates for intrastate switched access services than the rates they charge QCC. Indeed, most of those secret agreements, and the detriment suffered by QCC in Florida, did not come to light until third party IXCs AT&T, Sprint and MCI responded to subpoenas issued by the Commission in this docket. As a result, QCC was – without its knowledge – subjected to unlawful rate discrimination. Through this complaint, QCC seeks to simply recover the overcharges it paid for those services, and to ensure that the competitive playing field is level going forward.[4]

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[3] 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.*

[4] The Bingham Joint Motion does not attack QCC's right to pursue prospective relief. Instead, it focuses on QCC's request for retroactive (reparatory) relief. As such, there should be little question that QCC's forward looking claims remain at issue.

As to QCC's backwards looking claims, the Movants – flatly ignoring that the Commission has already determined *in this proceeding* that it has jurisdiction to award reparatory refunds to remedy unlawful rate discrimination – seek to immunize themselves from their blatant and admitted failure make the lower rates available to QCC and other disfavored IXCs. The Movants raise a host of legal and hyper-technical theories, urging dismissal with prejudice of specific claims and/or the requests for relief. These theories essentially fall into the following categories:

- QCC's First Claim for Relief should be dismissed because QCC failed to properly plead cause of action (see Section III.A, infra);
- QCC's Second Claim for Relief should be dismissed because the movants did not violate section 364.04, F.S., and because QCC lacks standing in any event (see Section III.B., infra); and
- QCC is not entitled to refunds as a remedy (see Sections III.C., infra).

As discussed fully below, the Movants essentially ask the Commission to whitewash their actions and otherwise render meaningless the prohibition of unlawful discrimination that is contained in Chapter 364, F.S. The Movants further seek the Commission to disavow Order No. PSC-10-0296-FPF-TP (the "MTD Order"), issued earlier in this proceeding.[5] The Movants' theories, however, are without merit. As a result, the Bingham Joint Motion should be denied and this case should proceed with full discovery and the setting of a comprehensive procedural schedule which will fairly permit the parties to gather, analyze, and present the necessary information to prosecute and defend the claims arising from QCC's Amended Complaint.

II. STANDARD OF REVIEW

In considering whether QCC's Amended Complaint states a cause of action upon which relief may be granted, the Commission must take all factual allegations in the Complaint as true and

[5] *Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Final Summary Order,* Docket No. 090538-TP, Order No. PSC-10-0296-FOF-TP (issued May 7, 2010).

all reasonable inferences are allowed in favor of QCC's case.[6] In determining the sufficiency of the Amended Complaint, the Commission should confine itself to the Amended Complaint and documents incorporated therein, and the grounds asserted in the motion to dismiss.[7] 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 complainant has stated the necessary allegations.[8] Thus, for purposes of the Bingham Joint Motion, the Commission must accept as true that the Movants entered into secret, off-price list 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.

III. DISCUSSION

A. QCC Has Presented a Prima Facie Case of Rate Discrimination.

1. QCC Has Alleged All Necessary Elements of an Unlawful Rate Discrimination Case.

The Movants cherry pick limited sections of the Amended Complaint and argue that QCC has failed to – and cannot as a matter of law – allege "injury" as a result of the Movants' unlawful discrimination. The detriment resulting from the unlawful discrimination exposed in this case could not be more clear – *QCC was overcharged for intrastate switched access services by the Movants who otherwise kept the lower rates to QCC's competitors hidden away in secret, off-price list agreements*. In the context of rate discrimination cases, a *prima facie* case is established once QCC establishes that the Movants entered into off-price list switched access agreements and failed to

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[6] See *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla.1st DCA 1993); *Orlando Sports Stadium, Inc. v. State ex rel Powell*, 262 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).

[7] 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.

[8] *Matthews v. Matthews*, 122 So.2d 571 (Fla. 2nd DCA 1960).

provide equivalent rate treatment to QCC for the same or similar service.[9] Once QCC has established these basic facts through testimony and at hearing, the burden of going forward will then shift to each Respondent to establish that the price differentiation was reasonable and lawful. This is the same analytical framework employed by the FCC when considering Section 202 discrimination claims. Citing a long line of precedent, the FCC succinctly summarized the burden shifting in *Offshore Telephone Company v. South Central Bell*:

> Offshore, as complainant herein, bears the burden of proving that it was discriminated against in the first instance. * * * In the event of making such a threshold showing, defendants would then have to show that the discrimination was justified. * * * In order to establish a violation of Section 202(a), Offshore must show that it has been treated differently from similarly situated carriers in connection with the provision of "like" communications services or facilities or that the carrier has given an undue or unreasonable preference or advantage. Such a finding is made on a case-by-case basis and is dependent on the unique facts associated with each proceeding. * * *[10]

QCC's Amended Complaint easily meets the burden of stating a *prima facie* case. QCC alleges the existence of differential rate treatment for "like" (actually, identical) services.[11] As such, and given that all factual allegations stated in the Amended Complaint are deemed true for purposes of the Bingham Joint Motion, QCC has stated a cognizable and sufficient *prima facie* case.

In the parallel Colorado PUC proceeding, a host of CLECs similarly argued (in a dispositive motion) that QCC had failed to state a *prima facie* case because it had not alleged actual injury in

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[9] *See,* Order No. 19677, in Docket 860984-TP, issued July 15, 1988, *In re: Investigation into NTS Cost Recovery Phase II* (switched access discounts that provide undue preferences violate section 364.08, F.S.).

[10] *In the Matter of the Offshore Telephone Company v. South Central Bell Telephone Company and AT&T, MEMORANDUM OPINION AND ORDER, 2 FCC Rcd 4546 (Aug. 7, 1987), ¶ 32.* Federal courts employ the identical 3-step analysis to resolve Section 202(a) discrimination claims. *Nat'l Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 129 (2d Cir. 2001).

[11] As to each of the Movants, QCC has alleged that the CLEC "had or has off-price list, unfiled agreements for intrastate switched access services at rates different from and lower than the rates set forth in the Respondent's effective state price list." QCC also alleged that the CLEC "has not provided QCC the rates, terms and conditions received by the IXCs that are parties to the off-price list arrangements." *See e.g.,* Amended Complaint, p.17, ¶ 10.n.ii (Lightyear allegations).

the form of quantifiable competitive injury. The CLECs' motion was rejected in Colorado, and the presiding Administrative Law Judge held that QCC had alleged a *prima facie* case.

> QCC was charged tariff rates [by the Respondent CLECs] when others were charged lower rates. The [Colorado] Commission made no finding as to [the CLECs' switched access] tariff rates. Further, rates actually charged by Respondents have been shown not to be lawful rates. Joint CLECs failed to meet their burden of proof that QCC failed to state a prima facie case of price discrimination in this proceeding as a matter of law.[12]

This Commission should be no more persuaded by the Movants' ploy than was the Colorado Commission just a few months ago. QCC's Amended Complaint states a *prima facie* case, and the Bingham Joint Motion should be denied.

2. QCC Has Suffered Cognizable Detriment Under Florida Law and is Entitled to Recover Refunds in the Amount of the Overcharges.

The Movants acknowledge that QCC seeks to recover the amount it was overcharged. In the MTD Order, this Commission already concluded that it has the authority to award reparatory refunds if QCC establishes that it was discriminatorily overcharged. Specifically, after hearing arguments similar to those now being rehashed by the Movants, the Commission held:

> Pursuant to Section 364.01, F.S., we have the authority to order refunds as a remedy for overcharges in order to promote fair treatment for all providers of telecommunications services. * * * Consistent with prior decisions, we do not have the authority to award damages. To the extent that Qwest is requesting money damages, we find it appropriate that the Partial Motion to Dismiss and Motion to Dismiss Claims for Reparations be granted. We have the authority to investigate the allegations in the Complaint, to prevent anticompetitive and unlawful discrimination amongst telecommunications service providers, and to determine the amount of any refunds and applicable interest, if any, Qwest is due.[13]

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[12] *Interim Order of Administrative Law Judge G. Harris Adams Denying Summary Judgment Motions,* Docket No. 08F-259T, Decision R.10-0364-I ("Colorado SJ Order"), 2010 Colo. PUC LEXIS 411 (Apr. 19, 2010), ¶ 58.

[13] MTD Order, at p. 6.

In essence, the Movants now seek the Commission to disavow the MTD Order. Notwithstanding the MTD Order, the Movants contend that the overcharge is not "a cognizable injury, and the difference between the . . . rates is not, as a matter of law, the measure of damage."[14] Although the appropriateness of reparations is discussed more thoroughly below in Section III.C, the Movants' assertions are clearly unfounded.

In an effort to divert this Commission from its authority and responsibility under Chapter 364, F.S., the Movants cite only to cases interpreting Interstate Commerce Act provisions and cases interpreting provisions of other federal and state programs.[15] QCC, however, has alleged violations of Chapter 364 as the basis of its claims, not violations of the Interstate Commerce Act, the Federal Communications Act, or any other state's telecommunications law. Specifically, QCC has alleged that Movants have violated sections 364.01, 364.08, and 364.10, F.S. Pursuant to section 364.01, F.S., the Florida Legislature has expressly given the Commission exclusive jurisdiction over the telecommunications rates and services in question and has directed the Commission to "[e]nsure

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[14] Bingham Joint Motion at p. 5.

[15] Movants rely, for example, on *Interstate Commerce Commission v. United States*, 289 U.S. 385 (1933), which does not bear on Chapter 364 and is inapposite. The complainant lumber company in that case was being charged certain rates by the railroads for what were termed "short line connections" up to particular locations and certain group rates for transport beyond those locations. The complainant did not challenge the reasonableness of any of the rates, or – as in this case - allege it had been overcharged, but instead asserted it was competitively prejudiced by the absence of group rates over the short line connections. In it opinion, the Court noted the ICC's decision that the absence of group rates over the short line connections provided an "undue preference" and upheld its determination that no damages were warranted on the record in this case. The *ICC* case, however, simply has no application to the instant case which involves a clear case of discriminatory rates for the same service.

The other cases cited by the Movants to support this argument are equally inapposite. For example, see *Spa Universaire et al. v. Qwest Communications International, 2007 U.S.Dist. LEXIS 66665 (U.S.D.C. Colo.) (Sept. 10, 2007 (* plaintiff's allegations that they paid higher prices for like services than their competitors does not constitute *anti-trust injury* under the Sherman Act). QCC, however, is not raising Sherman Act allegations in this complaint. See also, *General Telephone Co. of California ordered to amend its tariff on directory advertising, D.85334, 1976 Cal. PUC LEXIS 1085 (Jan. 13, 1976)("Ad Visor" case).* Unlike the instant case, *Ad Visor* did not involve rate discrimination claims based on the secret provision of lower rates to select customers for the identical service. Moreover, the Movants ignore more recent California Commission precedent which held that requiring similarly situated customers to pay different rates for the same service was not only harmful, but entitled the aggrieved party to the difference between the higher rate it was charged and the lower rate that was made available to other customers. 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) ("Qwest v. SBC").*

that all providers of telecommunications service are treated fairly, by preventing anticompetitive behavior."[16]

3. QCC is Not Required to Allege Consequential Damages and is Precluded from Recovering Such Damages from the Commission.

The Bingham Joint Motion relies on circular, self-fulfilling and ultimately unpersuasive logic. Although the Movants are aware that the Commission does not have the authority to award economic or consequential damages (e.g., loss of profits or market share), they nevertheless argue that QCC's failure to allege such damages is a fatal flaw in pursuing this case.[17] In other words, the Movants seek to maneuver QCC into a position where it would be required to seek relief which the Commission cannot provide.[18] QCC appropriately seeks, among other things, to recover the overcharges it paid to the respective CLECs for intrastate switched access and is neither required nor allowed to pursue economic damages (as it might in the state courts) in this forum.[19] In essence, the Movants argue that the Commission cannot provide any remedy to victims of unlawful rate discrimination because either QCC must allege damages which are outside the Commission's jurisdiction or (as discussed below) the CLECs get blanket immunity as long as they charge the victims their "tariffed" rates. Their argument, if accepted, essentially writes sections 364.01. 364.08, and 364.10, F.S., out of existence. Neither the law, nor common sense, would support such a result.[20]

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16 Section 364.01(4)(g), F.S.

17 See Bingham Joint Motion at p. 6. Moreover, the cases cited by the Movants to support this proposition do not support their theory that QCC is somehow required to plead consequential damages or lost profits.

18 Bingham Joint Motion at p. 6. ("[T]he Commission has no authority to award damages for unlawful rate discrimination.").

19 *See, e.g., Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. 2nd DCA 1979) (PSC has exclusive jurisdiction to investigate alleged statutory violations and determine applicable refunds).

20 *Id.*

B. The Movants Violated Florida Law by Failing to Abide by their Filed Price Lists.

1. The Movants are Required to Abide by their Filed Price Lists.

The Movants contend that, as a matter of law, QCC's second claim is improper because there is nothing in section 364.04, F.S., that requires CLECs to charge only the rates that are set forth in their published price lists.[21] Aside from rendering section 364.04 meaningless,[22] this argument misstates QCC's claims, however, and ignores other applicable sections such as 364.01, 364.08, and 364.10, F.S., which prohibit rate discrimination and expressly prohibit telecommunications companies from deviating from their filed rate schedules.[23] As discussed above, the essence of QCC's claim is that it has been *overcharged* by the CLECs for the identical service provided to other IXCs at discounted, below-price list rates. QCC does not allege that the CLECs were categorically precluded from entering into off tariff agreements with other IXCs for those switched access services. Rather, the gravamen of QCC's claim is that if the CLECs entered into such agreements, they were obligated to make those rates, terms and conditions available to QCC on a non-discriminatory basis. It was the CLECs' decision to keep those agreements secret – and not make the rates available to similarly situated IXCs like QCC – that gave rise to this complaint proceeding. In other words, QCC has been effectively overcharged for intrastate switched access services and is now entitled to a refund in the amount of that overcharge (plus interest) in the same way it would be entitled to a refund if it had been billed an amount higher than

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[21] See Bingham Joint Motion at p. 7. Of course, in arguing this, Movants blatantly omit any reference to section 364.08, F.S. (a telecommunications company may not charge any compensation other than the charge as specified in its schedule on file and in effect at the time).

[22] If companies are free to disregard their price lists, section 364.04, F.S., serves no purpose, making Movants' reading of that section contrary to basic principles of statutory construction. *See State v. Goode*, 830 So.2d 817, 824 (the Legislature does not intend to enact useless provisions).

[23] See, e.g., Order No. 19677, in Docket No. 860984-TP, issued July 15, 1988, *In re: Investigation into NTS Cost Recovery--Phase II* (switched access discount violates section 364.08, F.S., if all similarly situated are not treated equally).

the price list rate. Indeed, in the context of a discrimination claim, that is exactly what 364.01, 364.08, and 364.10, F.S., are designed to provide.[24] In addition to violating these sections, the Movants' conduct clearly violates section 364.04. This conduct, especially when viewed in conjunction with the Movants' secret discounts to a select few other IXCs, violates the plain language, meaning and purpose of section 364.04, F.S.[25]

2. QCC Has Standing as a Party Complainant.

Lacking any substantive grounds for dismissal of QCC's Amended Complaint, the Movants resort to an assertion that QCC lacks standing to be a party complainant. There is no factual or legal basis for this contention.

Florida courts have long concluded that the availability of a hearing under Chapter 120 is not to be construed restrictively, and the 1975 amendments to Chapter 120 were intended to expand this remedy beyond technical arguments.[26] The Movants' argument reflects a misunderstanding or misapplication of the law of standing under Florida's Administrative Procedure Act ("APA") and should be denied.

a. Factual Allegations that Support QCC's Standing.

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[24] See, e.g., section 364.01(4)(c), F.S. (protect the public welfare by ensuring monopoly services continue to be subject to effective regulation); section 364.01(4)(a), F.S. (ensure that basic service is available to all consumers at reasonable and affordable prices); section 364.01(4)(i), F.S. (continue the Commission's historical role as surrogate for competition for monopoly services); section 364.08(1), F.S. (telecommunications companies may not extend any advantage of contract or agreement unless uniformly extended to all); section 364.10(1), F.S. (telecommunications company may not make or give any undue preference or advantage).

[25] The Amended Complaint clearly identifies the facts and legal theory underlying QCC's second and third causes of action. It also clearly puts the Movants on notice of the nature of the claims against them. That said, QCC could have also referenced section 364.08(1) as additional support for its second and third causes of action, just as it did in support of its first cause of action. To the extent the Commission finds that the Amended Complaint would be clearer if QCC repeats its reference to section 364.08 in conjunction with the latter two claims, QCC is willing to do so. Because all parties are clearly on notice as to the nature and basis of all three causes of action, further amendment is probably unnecessary. It would certainly exalt form over substance to dismiss QCC's second cause of action on this basis given the clarity of QCC's allegations.

[26] *E.g., Hasper v. Department of Labor& Employment Security*, 459 So.2d 400, 402 (Fla. 1st DCA 1984) (section 120.57(1) intended to create a broad avenue of redress for many persons variously situated; "substantial interests" contemplates rights not more restrictive but more expansive than predecessor statute).

In its Amended Complaint, QCC makes sufficient factual allegations to establish its standing. There, QCC alleges:

- QCC is a telecommunications company authorized by the commission to provide telecommunications services in Florida, and provides interexchange (long-distance) telecommunications throughout Florida;
- CLECs have subjected QCC to unjust and unreasonable rate discrimination in the provision of intrastate switched access services in Florida; and
- CLECs entered into undisclosed contract service agreements, outside of tariffs or price lists, with select interexchange carriers and failed to make those same rates, terms and conditions available to QCC.[27]

Elsewhere and throughout the Amended Complaint are more specific, detailed allegations identifying and describing the unlawful conduct by each Respondent CLEC.[28] The essence of these allegations is that each of the Respondent CLECs had or has agreements with select IXCs which offer those IXCs intrastate switched access rates different from and lower than the rates set forth in each CLEC's Florida price list and different from and lower than the rates charged to QCC. The Respondents failed to make the discounted rates available to QCC, in violation of Florida statute.

The statutes the CLECs are alleged to violate could not be clearer. For example, section 364.08(1), F.S., provides:

> **364.08 Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.**
>
> (1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file or otherwise published and in effect at that time. A telecommunications company may not extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

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27 Amended Complaint, p. 2.

28 Amended Complaint, pp. 3-20.

Section 364.10(1), F.S., provides:

> **364.10 Undue advantage to person or locality prohibited**
> (1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Through its three causes of action, QCC alleges that the CLECs' violations of these statutes subject QCC to unreasonable and discriminatory prejudice and disadvantage. The nature and type of prejudice and disadvantage incurred by QCC is not complex. CLEC-provided intrastate access service is a key and costly component for the provision of long distance services. QCC is being charged higher (often *substantially higher*) rates by the CLECs than QCC's competitor IXCs are charged for identical services. The CLECs' rate discrimination causes unreasonable disadvantage and an unreasonable prejudice and results in unjustified overpayment by QCC.

b. QCC Clearly Meets the Legal Test for Establishing Standing.

To withstand a motion to dismiss for lack of standing, QCC must allege that it will (1) suffer injury in fact which is of sufficient immediacy; and (2) that the substantial injury is of the type or nature that the proceeding was designed to protect.[29]

QCC's Amended Complaint alleges that QCC is now incurring and will continue to incur detriment because, as a captive customer of critical switched access services, it is being subjected to unreasonable rate discrimination by the Movants, who persist in charging other IXCs rates not found in the Movants' price lists. There is no basis for the contention that the detriment QCC is suffering is remote, speculative, or not sufficiently immediate to confer standing. The detriment from the conduct of the CLECs began years ago, continues today and will certainly continue

[29] *Florida Society of Ophthalmology v. State Board of Ophthalmology*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1333 (Fla.1989); *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982).

indefinitely in the future unless the Commission intervenes. The first prong for standing (injury in fact of sufficient immediacy) is thus more than satisfied.

The second requirement for standing is that the detriment be of the type and nature that the proceeding was designed to protect. Rule 25-22.036(2), F.A.C., describes what circumstances are appropriate for the filing of a complaint, and provides:

> (2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

Here, the Amended Complaint details specific acts and omissions of the Movants that affect QCC's substantial interests. The Movants are subject to the jurisdiction of the Commission. Their actions violate sections 364.04, 364.08 and 364.10, F.S., which the Commission is required to enforce.[30] Further, as specifically alleged by QCC, those statutes have been and continue to be violated by the CLECs causing consequences that sections 364.04, 364.08(1) and 364.10(1), F.S., are designed to prohibit. The relevant statutes thus protect persons, including QCC, from unreasonable disadvantage and unreasonable prejudice. Indeed, the statute's protection is drafted to be broad and sweeping, protecting persons from "disadvantage in any respect whatsoever" by conduct like that alleged in the complaint.[31]

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[30] Section 364.01(1), F.S. ("The Florida Public Service Commission *shall exercise* over and in relation to telecommunications companies *the powers conferred in this chapter.*") (emphasis added).

[31] The empty claim that QCC's allegations are vague and conclusory requires little response. The Amended Complaint presents, in reasonable detail, the facts upon which QCC relies and complies in all respects with the content requirements for complaints in Rule 25-22.036, F.A.C. Furthermore, under Florida law, a complainant is not required to state (in its complaint) every fact supporting its causes of action. Notice pleading is sufficient. *See Brown v. Gardens by the Sea S. Condo. Ass'n,* 424 So.2d 181, 183 (Fla. 4th DCA 1983) ("Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to apprise the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient.").

The Movants seriously misread *Florida Society of Ophthalmology, supra.* In that case, the petitioner physicians were found to lack standing to be parties to licensing proceedings of optometrists, because they satisfied neither of the two requirements for standing. First, the physicians' allegations of "potential" economic loss due to competing optometrists failed to satisfy the "immediacy" requirement for standing. Second, the physicians' asserted injuries were not within the "zone of interest" intended to be protected by the applicable statutes.[32] The instant case is entirely different. Here, QCC's detriment is present and continuing; and QCC's interest in being free from rate discrimination is *exactly* the type interest that the cited statutes are designed to protect. *Florida Society of Ophthalmology* is of no assistance to the CLECs.

Nor does *Warth v. Seldin*[33] support dismissal for lack of standing. First, *Warth* evaluated the standing of several plaintiffs in federal district court, applying standards involving the "case or controversy" requirement of Article III of the United States Constitution and, alternatively, "prudential limitations" on the role of federal courts in resolving disputes. Although *Warth* may provide broad guidance in certain contexts, it offers little assistance in evaluating party status under Florida's APA. First, Article III "case or controversy" requirements are not applicable here. Second, the "prudential limitations" identified by Justice Powell involved the reluctance of federal courts to exercise jurisdiction when the alleged harm is a generalized grievance "shared in substantially equal measure by all or a large class of citizens;" or where the plaintiff is not asserting his own legal rights but is rather claiming relief based on the rights of others.[34] Neither *Warth*, nor Article III or any of the "prudential limitations" identified in *Warth*, are very useful to the

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32 *Florida Society of Ophthalmology, supra, at 1285.*

33 *Warth v. Seldin,* 95 S. Ct. 2197 (1975).

34 95 S. Ct. at 499.

Commission's evaluation of the standing of parties coming before it, especially in this case.[35] The Movants' reliance on *Warth* is misplaced. QCC clearly has standing in this matter.

C. The Commission is Not Prohibited from Ordering Refunds in this Case.

In a variety of ways, the Movants attempt to relitigate an issue already decided by the Commission in this proceeding—whether the Commission has authority to issue refunds where unlawful discrimination has occurred. The Commission has already held in this proceeding that it holds such authority.[36] The moving parties then, as the Movants do now, argued that the Commission lacked authority to issue refunds for discriminatory behavior and that QCC's claims were precluded by the filed rate doctrine.[37] In its response, QCC noted that Florida case law clearly has recognized the Commission's authority to award refunds where there has been *unlawful conduct*, and that the filed rate doctrine and arguments of retroactive ratemaking do not preclude the Commission's authority to do so.[38] Following extensive briefing, analysis from Commission Staff and oral argument, the Commission issued the MTD Order, rejecting the Respondent CLECs' dispositive motions and agreeing with QCC and Commission Staff that the Commission has authority to order refunds in this case. The Commission was correct, and should not now disavow the MTD Order based on the Movants' recycled arguments.

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35 No plaintiff in *Warth* alleged the kind of specific, ongoing harm, based on conduct expressly prohibited by a statute, such as that alleged by QCC here. If the Warth plaintiffs had, surely *Warth* would have been decided differently.

36 See MTD Order at p. 6.

37 *See, e.g.*, Joint CLECs Partial Motion to Dismiss, at p. 5, filed January 29, 2010 (arguing that QCC could not "create jurisdiction" by labeling its claim as one for reparations and that it was seeking retroactive ratemaking); *see also*, MCImetro Access Transmission Services LLC d/b/s Verizon Access Transmission Services' Motion to Dismiss Reparations Claim and Motion for Final Summary Order Dismissing all Other Claims Against Verizon Access, at pp. 4-6, filed January 29, 2010 (arguing that the Commission is not authorized to award reparations and that the filed rate doctrine precludes any recovery by QCC).

38 *Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. 2nd DCA 1979). *See also* Qwest Communications Company's Response to Joint CLECs' Motion to Dismiss and to MCI's Motion for Summary Final Order, filed March 9, 2010.

1. The Commission has Authority to Order Refunds.

The Movants assert that QCC is not entitled to reparations because to do so would "violate long standing Florida case law and policy" by resulting in a discriminatory outcome which is otherwise precluded by section 364.08, F.S.[39] The argument seems to be that if QCC is awarded reparations, it would simply add one more IXC to the list of those who received the preferred rates. In the meantime, there might be other IXCs who still did not get the preferred rates and they would then be subject to unlawful discrimination.[40] For the Movants, who knowingly and intentionally favored certain IXCs with discounts in violation of state law, to now hide behind the price list rate as the only legitimate rate is unconscionable and entirely unpersuasive.

Leaving aside the fact that this argument boils down to the untenable suggestion that the Commission simply accept and endorse the current level of unlawful discrimination, it completely ignores the Commission's ability and authority to fashion a remedy that would assure that any eligible IXC would be entitled to reparations for the CLECs' discriminatory conduct. The Commission could simply order the Respondents to pay reparations to *all* IXCs who overpaid, relative to the preferred IXCs. In a similar case in California, the California Commission *sua sponte* established a claims process whereby every similarly affected customer would be awarded the same refund.[41]

In that case, QCC and an affiliate brought a complaint against Pacific Bell Telephone Company ("SBC") to recover overcharges for discriminatory cageless collocation rates. QCC was

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[39] See Bingham Joint Motion at p. 12 (stating that ordering refunds in this case would, in itself, be unlawful discrimination under section 364.08). The Movants also argue that the Commission does not have authority under section 364.14, F.S., to order retroactive relief and that, in any event, section 364.14, F.S., has been repealed. Bingham Joint Motion at 12 to 14. QCC's Amended Complaint explicitly relies on sections 364.01, 364.08, and 364.10, F.S. It does not reference or rely on section 364.14, F.S. The Movants' argument is a red herring.

[40] *Id.*

[41] See *Qwest v. SBC, supra*, at *15.

being charged one rate for cageless collocation based on what was referred to as "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 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.[42]

In addition to ordering SBC to immediately issue a refund to QCC, the Commission ordered relief to all similarly-affected carrier customers.

> SBC shall serve a copy of this order on all competitive local carriers that are subject to the 1999 cageless collocation rates. No later than 30 days after service of this order, each such carrier may seek similar treatment for its cageless collocation arrangements by filing and serving a request in this docket. SBC shall have 30 days to respond to any requests. The Commission will then evaluate the requests and responses, and issue an order resolving the requests.[43]

The California Commission's approach is sensible and it, or some similar process, should ultimately be adopted by the Commission in this case. The fact that QCC can only pursue the claims on its behalf, and that others might have similar claims, does not undercut the merits or the viability of the current action, nor of the appropriateness of reparations as a remedy. Nor would it promote sound public policy the Respondents' rate discrimination to continue on the basis that QCC can only pursue its own claims.

2. Qwest Does Not Allege that all Off-Tariff Agreements are *Per Se* Unlawful.

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[42] *Id.*, at *8-9. The California PUC correctly perceived that what really matters in a competitive marketplace is relative positioning. Hence, with respect to this case, QCC suffered unlawful discrimination in paying the Respondents' price list rates given that QCC's IXC rivals were assessed sharply discounted rates for the same service.

[43] *Id.*, at *15.

The Movants also attempt to muddle the issues in this case by asserting that QCC is making "mutually inconsistent" arguments by alleging that (1) the off-tariff agreements are illegal and unenforceable and (2) that it is entitled to benefit from the unenforceable agreements and should be refunded all charges it has paid in excess of the illegal rates."[44]

The Movants' argument blatantly mischaracterizes QCC's claims. QCC does not allege that the off-tariff agreements are *per se* unlawful, but that the failure to make the lower rates provided for in those agreements available to QCC was unlawful given that QCC and the preferred IXCs are similarly situated. The Movants (and/or other CLECs represented by the Movants' counsel) have likewise offered this blatant mischaracterization in the parallel Colorado and California complaint cases, and each time QCC has refuted the allegation and has clarified that it does not take the position that individual case basis ("ICB") agreements are inherently unlawful or void. In fact, QCC's Amended Complaint herein states that explicitly. At paragraph 5 of the Amended Complaint, QCC states that a carrier "may, in appropriate circumstances, enter into separate contracts with switched access customers which deviate from its tariffs or price lists." Nevertheless, the Movants persist in distorting QCC's claims.

Furthermore, the Movants' conduct belies their argument that the contracts are unenforceable. If they earnestly believed the contracts are and were void (and thus cannot be the basis for reparations to QCC), they would have presumably pursued this belief through third party disgorgement claims against AT&T and the other preferred IXCs. The Movants have not done so, and should not be permitted to shift the focus of this case by mischaracterizing QCC's claims against them. In the end, the Movants cannot have it both ways. They cannot seek immunity for their own voluntary and discriminatory deviation from their price lists while simultaneously urging

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[44] Bingham Joint Motion at p. 15.

the Commission to hold (as a matter of law) that their price list rates are sacrosanct. The Movants' willingness to secretly deviate to the benefit of certain IXCs and their unwillingness to pursue recovery of those IXCs' "underpayment" – even in the face of QCC's complaint and the potential award of reparations – forecloses their argument that their price list rates are untouchable.

3. QCC Seeks to Recover Overcharges for Discriminatory Switched Access Services.

The Movants contend that, as a matter of law, QCC's request for reparations is improper because reparations are only available as a remedy for overcharges and there were no "overcharges" since QCC paid the CLECs' price list rates.[45] This argument, besides being circular, essentially urges the Commission to find that it has no authority to remedy rate discrimination despite the clear authority expressed in sections 364.08, 364.10, and 364.01, F.S.[46]

The Movants' assertion that QCC could not have been overcharged because it paid the rates included in price lists is clever, but duplicitous, and it simply restates Movants' filed rate doctrine and retroactive ratemaking arguments. Movants incorrectly assert that overcharges in Florida only occur, and have only been remedied by refunds, where billing or metering errors have occurred or where the filed rates did not "properly" implement a Commission rate-setting order. The Movants attempt to limit the term "overcharge" to mean only circumstances where more than the listed rate has been paid. This argument flies in the face of the *Richter* case noted above.[47] The plaintiffs in *Richter* clearly *paid* the tariffed rates that had been established through Commission proceedings,

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45 See Bingham Joint Motion at pp. 16-18.

46 See footnote 24, *supra*.

47 *Richter v. Florida Power Corp.*, 366 So. 2d 798 (Fla. 2nd DCA 1979).

but they successfully challenged those established rates by showing in a later proceeding that the rates were unlawful because they violated the statutory requirement to have reasonable rates.[48]

4. The Filed Rate Doctrine Does Not Insulate the Defendants from Liability as a Matter of Law.

Respondents rely on the filed rate doctrine, theorizing that QCC may not recover reparations (even if unlawful rate discrimination has occurred) because QCC was billed the CLECs' tariffed rates. For several reasons, this argument fails and should be rejected.

a. The Movants' argument ignores Florida law.

As noted above, this argument was previously raised in this proceeding by MCI and was rejected by the Commission.[49] It similarly has been rejected by the Commission in other cases where petitioners sought refunds.[50] Based on these prior orders alone, the Movants' filed rate argument should be denied.

b. The filed rate doctrine does not strictly apply absent Commission *approval* of a regulated company's rates.

Although the Respondents assert that simply filing a price list with Commission staff is sufficient to protect their conduct from challenge, this is not the case.[51] The filed rate doctrine

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[48] *Id.*; *see also*, Order No. PSC-07-0816-FOF-EI, in Docket 060658-EI, issued October 10, 2007, *In re: Petition on behalf Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund to customers $143 million.*

[49] See MTD Order, at p. 6.

[50] See Order Denying Motion to Dismiss, *In re: Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariff for pay telephone access services (PTAS) rule with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association,* Docket No. 030300-TP, Order No. PSC-030828-FOF-TP, issued July 16, 2003 where the Commission rejected a motion to dismiss based on the filed rate doctrine in a proceeding where the petitioner sought refunds.

[51] The Movants rely heavily on *Corporation de Gestion Ste-Foy v. FPL*, 385 So.2d 124 (Fla. 3rd DCA 1980) ("*de Gestion*"), a case involving the collection of undercharges due to the misreading of a meter, to support their argument that absolute adherence to their price lists is required by public policy and the filed rate doctrine. *De Gestion*, however, did not involve alleged violations of the underlying statutory scheme. Moreover, subsequent Florida authority held that an electric utility *can* be estopped from collecting such undercharges. *See JEA v. Draper's Egg and Poultry Co., Inc.*, 531 So.2d 373 (Fla. 1st DCA 1988), *rev'd on other grounds*, 557 So.2d 1357 (Fla. 1990). Movants cite *ACS of Anchorage, Inc. v. FCC*, 290 F. 3d 403 (D.C. Cir. 2002) to support their view that simply filing a price list with Commission staff is enough to trigger the filed rate doctrine. *ACS* reviewed issues applicable to a rate of return regulated company under FCC streamlined tariff provisions that are completely dissimilar to Florida's price list

recognizes that, where the legislature has established a scheme for ratemaking, "the rights of the rate-payer in regard to the rate he pays *are defined by that scheme.*" *Taffet v. Southern Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992) (emphasis added). Hence, the filed rate doctrine does not automatically apply under all regulatory regimes.[52]

Moreover, a careful review of other cases addressing application of the filed doctrine in Florida and elsewhere clearly reveals that, to act as a bar against challenging the lawfulness of rates, the doctrine requires that rates be filed *and approved* by the Commission.[53] Absent such approval, the rates cannot be considered Commission-set rates, and the filed rate doctrine has no logical application.

This Commission's regulatory scheme for overseeing CLEC price lists[54] does not meet any of the essential elements that courts have held are necessary before the filed rate doctrine will be strictly applied. In Florida, the Commission need not approve CLEC price lists before they become

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requirements. Even so, the court in *ACS* made it very clear that the mere filing of a rate is not enough to trigger the filed rate doctrine and that a rate which has been filed "may be subject to refund liability" if it later is shown to be unlawful. *ACS* at 411.

[52] For example, as held in *In re Managed Care Litigation*, 150 F.Supp. 1330 (S.D.Fla. 2001) ("*Managed Care*"), the filed rate doctrine does not apply where the agency does not conduct extensive administrative oversight of rates. *Managed Care* at 1344. The court in *Managed Care* examined the application of the doctrine to a RICO claim involving health insurance policies filed with oversight agencies by companies operating in Florida and other southern states. The court found that Florida did not conduct oversight in a manner extensive enough to implicate the filed rate doctrine. In particular, the court noted that the applicable regulatory scheme in Florida did not mandate the setting of a flat rate and it did not provide an opportunity for notice and comment prior to acceptance of the rates.

[53] 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) (emphasis added); *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002) (*"once a tariff is approved"* it binds carriers and shippers) (emphasis added); *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).

[54] It is instructive to compare the regulation of CLECs in Florida to the basic service tariff requirements that applied to price capped companies in Florida. See generally section 364.05, F.S. Absent a waiver approved by the Commission, price capped companies were required to give sixty days notice to the Commission before making any changes in their published tariff rates. Section 364.05(1), F.S. Moreover, rate changes could not go into effect without "[the Commission's] consent." Section 364.05(3), F.S.

effective.[55] The Florida CLEC program does not require public notice; it allows rate changes to become effective one day after filing the change with staff.[56] These relaxed filing standards do not, however, diminish a CLEC's obligation to ensure non-discriminatory rate treatment.

c. The Movants' argument flips the filed rate doctrine on its head.

The primary purpose of the filed rate doctrine is to "prevent carriers from engaging in price discrimination."[57] In the present case, the Movants attempt to turn the filed rate doctrine on its head and use it to justify and immunize discrimination, not prevent it. The Movants essentially argue that they are free to enter secret, discriminatory rate agreements with whomever they want, and that the Commission cannot exercise its statutory obligations to prevent such discrimination. This is entirely at odds with the intent of the doctrine. The Commission has an ongoing statutory duty to ensure that rates charged by the entities it regulates are nondiscriminatory,[58] that the public welfare is protected by ensuring that telecommunications companies "continue to be subject to effective price . . . [and] rate . . . regulation,"[59] that all providers of telecommunications services are treated "fairly" by preventing "anticompetitive behavior"[60] and that it is fulfilling its historical role of acting as a surrogate for competition where local exchange companies provide monopoly services, such as switched access.[61] The doctrine simply does not operate in the way the Movants suggest.[62]

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55 In fact, the Florida CLEC program does not even require CLECs to file switched access price lists.

56 See Rule 25-24.825(3), F.A.C. Compare this approach, for example, to water and wastewater utility tariff changes where notice of the changes must be mailed to customers before they become effective.

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

58 See section 364.01(1), (4), 364.08(1), 364.10(1), F.S.

59 Section 364.01(4)(c), F.S.

60 Section 364.01(4)(g), F.S.

61 Section 364.01(4)(i), F.S.

62 *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).

In short, even setting aside the inapplicability of the filed rate doctrine given that CLEC switched access rates are not affirmatively approved by the Commission, the Movants' 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. QCC does not seek to obtain rates more favorable than other IXCs.[63] 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 pay higher (price list) rates for the identical service is absurd and undermines any basis, legal or equitable, for a filed rate doctrine defense. The Movants' theory would convert the filed rate doctrine into a shield insulating rate discrimination, rather than one protecting against it. As did the Colorado Administrative Law Judge,[64] this Commission previously rejected MCI's reliance on the filed rate doctrine, and Bingham Joint Motion likewise should be denied.

5. The Joint CLECs' Reliance on QCC's Affiliate's Position in the Minnesota Proceeding is Misplaced.

The Movants next argue that advocacy and decisions in *Minnesota* litigation related to unfiled ILEC interconnection agreements support their position that *the Florida Commission* does

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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).

63 QCC has no objection to other IXCs obtaining the same rates QCC seeks here. See Section III.B.4, supra.

64 In the parallel Colorado proceeding, the Administrative Law Judge similarly rejected the CLECs' filed rate doctrine defense. Colorado MSJ Order, ¶¶ 53-58, 65-74 ("In the case at bar, the Commission has not considered or made any findings regarding the [CLEC switched access] tariff rates at issue. As addressed above, a claim for an overcharge can be maintained based on upon charges collected at tariff rates where such tariff was unreasonable. * * * Analogous to the substantive body of law as to the reasonableness of lawful rates in effect by operation of law, the filed rate doctrine would not prohibit the Commission from considering whether rates charged pursuant to a lawful tariff violate [the Colorado statute prohibiting rate discrimination].").

not have the authority to issue the relief sought in this proceeding.[65] This argument ignores the language of the Minnesota decisions themselves, which are based entirely on *Minnesota state law*:

> MPUC argues that it has express authority to order restitutional relief [pursuant to several Minnesota statutes].[66]
>
> While we agree that these statutes give MPUC broad statutory authority to regulate the telecommunications market in Minnesota, none of them vest MPUC with the express authority to order remedial relief. We therefore agree with the district court that because none of these statutes expressly refer to remedial/restitutional relief, the relevant inquiry is whether MPUC has the implied authority to order restitution. We conclude that no such authority exists.[67]

In short, the decisions of the Eighth Circuit (and the District Court) addressed the application of unique Minnesota state law provisions and found that the Minnesota Commission simply lacked the authority to award compensation to the CLECs in that case. That decision, however, bears no relevance to the availability of relief in Florida. In Florida, the Commission clearly has authority to award reparations to remedy rate discrimination.[68] Perhaps recognizing that the court decisions in the Minnesota case do not help their cause, the Movants attempt to argue that QCC's affiliate's advocacy in that proceeding supports the Movants' position that the filed rate doctrine precludes the relief QCC seeks in this proceeding. The argument is without merit.

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65 Bingham Joint Motion, at pp. 21-23.

66 In particular, the Court stated, "Minn. Stat. § 237.081, which authorizes MPUC to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and reasonable" and to "establish just and reasonable rates and prices." Minn. Stat. § 237.081, subd. 4. MPUC also claims the authority to order restitution is encompassed within Minn. Stat. §§ 237.461 and 237.462. Section 237.461 is a competitive enforcement statute that permits MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." Minn. Stat. § 237.461, subd. 1. Section 237.462 is also an enforcement statute which states that "the imposition of administrative penalties in accordance with this section is in addition to all other remedies available under statutory or common law. The payment of a penalty does not preclude the use of other enforcement provisions . . . ." Minn. Stat. § 237.462, subd. 9." *Qwest Corp. v. Minnesota Public Utilities Comm'n, 427 F.3d 1061, 1067 (8th Cir. 2005) ("Qwest v. MPUC").*

67 *Id., supra, 427 F.3d at 1067* (emphasis added).

68 MTD Order, at p. 6; see Section III.C., *supra.*

As a general matter, the contexts of the Minnesota proceeding and this case are vastly different. Most importantly, the proceedings are guided by different laws (Minnesota state law and the Federal Telecommunications Act, as opposed to Florida statute). As discussed above, the Minnesota Commission did not have the authority to award reparations. Indeed, the Minnesota courts did not even address Qwest Corporation's assertions in that case with respect to the filed rate doctrine and instead based their ruling on the statutory limitations noted above.[69] Moreover, the CLEC parties to the Qwest Corporation case and related cases (not surprisingly) took the position that refunds were available for the discriminatory conduct alleged in those cases. For the Movants to complain about QCC's "inconsistency" is beyond hypocritical. In either case, it does not support their argument in this proceeding.[70]

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[69] The Minnesota Case involved filing obligations under provisions of the Federal Telecommunications Act of 1996. The Court found that the Commission did not have state law authority to award reparations for failure to adhere to such requirements and declined to reach the filed rate doctrine. *Qwest v. MPUC, supra, 427 F.3d at 1067 n. 6* ("Because we affirm the district court on this issue, we decline to address Qwest's other arguments in opposition to the order for restitution").

[70] Although the Minnesota Commission did not have authority to award reparations to the CLECs, Qwest Corporation ultimately entered into a settlement agreement – which was approved by the Commission – in which it agreed to compensate "any CLEC who was purchasing wholesale services from Qwest while the unfiled agreements were in effect...based on the most favorable discount terms in the unfiled agreements..." *See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No.P-421/C-02-197, Order Accepting Settlement and Assessing Penalties, 2007 WL 4976248 *3 (Dec. 26, 2007).* In other words, Qwest Corporation paid reparations to the CLECs even where there was no legal obligation to do so. If the Movants would like to rest on Qwest Corporation's advocacy to support their position, then Qwest Corporation's settlement should presumably be included as well.

IV. CONCLUSION

Based on the foregoing, the Bingham Joint Motion should be denied. The Movants' scattershot of legal arguments does not withstand scrutiny, especially in the context of this case. QCC has standing and has clearly stated a *prima facie* case through its Amended Complaint. The Commission should refuse the Movants' suggestion that it disavow the MTD Order, and should permit this case to proceed in due course.

Dated this 8th of December, 2010.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 8th day of December, 2010, to the following:

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