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August 8, 2012 – **VIA OVERNIGHT MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

REDACTED

Re: Docket No. 090538-TP
Amended Complaint of Qwest Communications Company, LLC, Against MCImetro 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

Dear Ms. Cole:

Please find enclosed the original and 15 copies of the Rebuttal Testimony of Peter H. Reynolds on behalf of Verizon Access Transmission Services for filing in the above matter. Also enclosed are an original and 15 copies of a Request for Confidential Classification in connection with Mr. Reynolds' testimony.

Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please call me at 678-259-1657.

Sincerely,

Dulaney L. O'Roark III

Enclosures

COM 5 (testimony only)
AFD ____
APA ____
ECO ____
ENG ____
GCL 7
IDM ____
TEL 2
CLK 1-Ct Rep (testimony only)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail(*) and/or overnight mail (**) on August 9, 2012 to:

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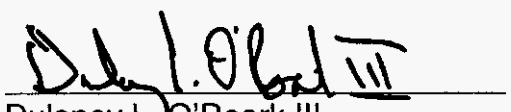
By: 
Dulaney L. O'Roark III

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC, against MCImetro Transmission Services LLC (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; Deltacom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; 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: August 9, 2012

REDACTED

REBUTTAL TESTIMONY OF PETER H. REYNOLDS

ON BEHALF OF

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC
d/b/a VERIZON ACCESS TRANSMISSION SERVICES

PUBLIC VERSION

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME.

A. My name is Peter H. Reynolds.

Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY IN THIS PROCEEDING?

A. Yes. I submitted direct testimony on behalf of MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services ("MCImetro" or "Verizon Access"), one of the respondents in this proceeding.

Q. WHOSE TESTIMONY ARE YOU RESPONDING TO?

A. I have reviewed the direct testimony submitted by all of the witnesses in this proceeding, and am responding specifically to the Direct Testimonies of Lisa Hensley Eckert, William R. Easton, Derek Canfield and Dennis L. Weisman, filed on behalf of Qwest Communications Company, LLC ("QCC"). I agree with much of the detailed analysis and commentary in the Direct Testimony of Don J. Wood on behalf of the "Joint CLECs," but will not focus on his testimony here.

Q. IS ANY OTHER WITNESS SUBMITTING REBUTTAL TESTIMONY ON BEHALF OF MCIMETRO?

A. Yes. Terry Deason is presenting rebuttal testimony on behalf of several CLECs, including MCImetro. He responds to certain arguments made by QCC based on his experience and knowledge of Florida law and telecommunications

regulatory policy.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my testimony is to respond to various arguments presented by QCC in support of its complaint that MCImetro's reciprocal switched access agreements with AT&T[1] unlawfully discriminated against QCC. I present additional facts and arguments to demonstrate that QCC's claims relating to MCImetro are invalid and lack merit. Because QCC has not presented evidence to substantiate the claims in its complaint against MCImetro, I recommend that the Commission dismiss or deny QCC's complaint against MCImetro.

Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

A. QCC attempts to portray itself as the victim of devious, back-room "secret" agreements between CLECs and IXCs, but that picture is false as it relates to MCImetro. QCC was notified of the existence of the *2004 Contracts* at their inception in February 2004, it learned additional details about the agreements over the next two years, and obtained copies of the contracts in the second quarter of 2006. Those agreements were not a "secret" to QCC. QCC had ample opportunity to pursue a similar business arrangement with MCImetro, but never did so, even though its employees were instructed to engage CLECs in discussions about switched access agreements. QCC's reliance on "secrecy" as a foundation for its complaint is also misplaced under Florida's regulatory scheme. CLECs are permitted to negotiate agreements that differ from the terms in their switched access price lists, and they are not required to file or make public the terms of those agreements. Through its complaint, QCC seeks

[1] As I testified previously, the contracts were entered into on January 27, 2004, and expired on January 27, 2007. I refer to them herein as the "*2004 Contracts.*"

to impose new disclosure obligations that did not exist when the *2004 Contracts* were in place. I am not an attorney, but do not believe that that is an appropriate basis for finding liability in this case.

QCC did not present any evidence to demonstrate that it was similarly situated and under like circumstances to MCI and AT&T when they negotiated a comprehensive settlement of numerous disputes and claims during the WorldCom bankruptcy. QCC did not show and, indeed, it could not establish that it would have been able to enter into a similar reciprocal switched access agreement with MCI. QCC did not provide switched access service, it was not operationally capable of providing switched access service at the time and, given the limited scope of its CLEC business in Florida, it is unlikely that it would have made the necessary investments to do so.

QCC attempts to divert attention from the fact that it could not have entered into an agreement with the same terms as in the *2004 Contracts*, by challenging the *bona fides* of the agreements instead. Its claims are contradicted, however, by the actual terms of the agreements and contemporaneous documents demonstrating the contracting parties' clear, unambiguous intent to create identical, reciprocal agreements that established mutual obligations and extended the same benefits to both companies. QCC also tries to avoid dealing with the actual terms of the *2004 Contracts* by suggesting that MCImetro "could have" structured its settlement differently and entered into an alternative agreement that contained different terms. The basis for this argument is QCC's contention that MCImetro intended to provide AT&T a specific "discount" on

access charges nationwide and could have accomplished this by writing the contract differently. Once again, there is no basis for this claim. In fact, the alleged "discount" was calculated by QCC's consultant only during the course of this litigation; there is no evidence that MCImetro calculated any such "discount" back in early 2004. The Commission cannot base its decision on speculation and hypotheticals about how the parties might have proceeded differently and what different agreement they might have written had they chosen to do so. Rather, it must consider the effects of the contract that MCI and AT&T actually entered into and determine whether QCC was similarly situated and could have entered into the same business arrangement.

QCC failed to prove that MCImetro unlawfully discriminated against it, and thus is not entitled to any monetary relief. Nevertheless, I explain that QCC's calculation of the alleged "financial impact" of MCImetro's switched access agreement is flawed in key respects, and would not provide a reliable basis for awarding reparations even if the Commission were to reach that issue – which it should not. QCC's complaint against MCImetro should be dismissed or denied in full.

II. QCC'S RELIANCE ON THE ALLGED "SECRECY" OF THE MCIMETRO-AT&T SWITCHED ACCESS AGREEMENT AS SUPPORT FOR THE RELIEF IT SEEKS IS MISLEADING, EXAGGERATED, AND IRRELEVANT UNDER FLORIDA LAW

Q. IS ALLEGED SECRECY A CENTRAL THEME OF QCC's TESTIMONY?

A. Yes. A constant refrain in the testimonies of Ms. Hensley Eckert and Mr. Easton is the notion that CLECs generally entered into "secret" agreements and offered "secret" rates to carriers other than QCC. In fact, those two witnesses use the term "secret" at least 20 times throughout their two sets of testimonies. While they may feel that repetition lends weight and credibility to their claim, the problem with such general accusations is that they make no sense in the Florida regulatory context and are not accurate with respect to specific carriers, particularly MCImetro. Indeed, it is worth noting that when Mr. Easton and Mr. Canfield discuss the specific MCImetro-AT&T agreement at issue, they are careful *not* to characterize that contract as a "secret" agreement. *See* Easton Direct at 30-34; Canfield Direct at 34-38. Accordingly, the Commission should ignore blanket allegations and characterizations, and only consider facts that relate to each individual party.

Q. ARE COMPETITIVE LOCAL EXCHANGE CARRIERS ("CLECS") REQUIRED TO MAKE THEIR SWITCHED ACCESS AGREEMENTS IN FLORIDA PUBLIC?

A. No. QCC's single-minded focus on "secrecy" is misplaced and an unnecessary distraction, because there is no statute or rule in Florida of which I am aware that requires a CLEC to make public any switched access agreement it enters into. QCC's witness Mr. Easton admits that CLECs are not required to file tariffs or price lists for switched access service in Florida. Easton Direct at 10:20-22. He acknowledges further that CLECs may enter into individual contracts "to deviate from their switched access price lists." *Id.* at 11:2-6. Notably, neither Mr. Easton nor any other QCC witness identifies any state

statute or Commission rule in Florida that requires a CLEC to file such contracts with the Commission and make them public. Mr. Easton suggests that CLECs "could have" appended switched access agreements to their price lists (which are not required to be filed) "or otherwise filed them with the Commission" (*id.* at 15:4-6), but he cites no authority for transforming a hypothetical voluntary act into a finding that any particular CLEC failed to satisfy a specific legal obligation to publicly disclose their individual contracts. While QCC's witnesses refer to contract filing requirements in two other states (Minnesota and Colorado), the absence of any requirement in Florida to file and make public switched access agreements renders those comparisons irrelevant to the issues in this proceeding.

Q. ARE CLECS PERMITTED TO ENTER INTO AGREEMENTS TO PROVIDE INTERSTATE SWITCHED ACCESS SERVICE?

A. Yes. As far back as 2001, the Federal Communications Commission ("FCC") acknowledged that CLECs had been entering into contracts with IXCs to charge rates for interstate switched access service that were "more favorable" than the rates in the CLECs' access tariffs.[2] At that time, the FCC established a "benchmark" or "cap" on the rates that CLECs could charge for interstate switched access service.[3] In doing so, the FCC emphasized that its new rule would "have no effect on negotiated contracts" and that IXCs could continue to obtain the lower access rates provided for in existing contracts. *CLEC Access*

[2] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Reform*") at ¶57.

[3] The FCC did not require CLECs "to mirror the switched access rates" of the local incumbent LEC, as Mr. Easton asserts. Easton Direct at 7, fn. 5. Rather, the FCC's benchmark constituted a "cap" on the amount a CLEC could charge for interstate switched access service. CLECs were free to charge rates lower than the new benchmark. *CLEC Access Charge Reform* at ¶40.

Charge Reform at ¶57. On a going-forward basis, the FCC explained that, "absent some contrary, negotiated agreement," an IXC would pay tariffed rates for switched access. *Id.* at ¶¶42, 28. Thus, under the FCC's rules, CLECs may charge a rate for interstate switched access that is below the level of the benchmark, and they are permitted to enter into contracts to do so. Mr. Wood explains that the FCC's policies provide IXCs with the assurance that they will pay a rate for switched access that either is within the benchmark zone of reasonableness (and tariffed) or one to which they have agreed in negotiations. Wood Direct at 11-12. Qwest (then known as U S West) was a party to and filed comments in the FCC's 2001 rulemaking[4] and, thus, undoubtedly knew that CLECs were entering into switched access contracts and that it was able to negotiate such agreements with individual CLECs.

Q. ARE CLECS REQUIRED TO MAKE INTERSTATE SWITCHED ACCESS AGREEMENTS PUBLIC?

A. No. There is no requirement that a CLEC file with the FCC any of its agreements to provide interstate switched access service. Nor is there any federal statute or FCC rule that requires CLECs to make contracts for interstate access services public. Likewise, the FCC has not required CLECs to provide "cost support" to justify the rates in their switched access agreements.

Q. DID THE FCC'S RULES IMPOSE ANY OBLIGATION ON MCIMETRO TO MAKE ITS SWITCHED ACCESS AGREEMENT PUBLIC IN FLORIDA?

[4] *CLEC Access Charge Reform* at Appendix A.

A. No. The 2004 reciprocal switched access agreements between MCImetro and AT&T provided that each company's CLECs would charge the other company's IXC affiliates a single, uniform rate for switched access service on all calls regardless of jurisdiction (*i.e.*, for both interstate and intrastate interexchange calls) throughout the United States. *See* Reynolds Direct at 12:7-13:4. Mr. Easton acknowledged as much, stating that some of the agreements at issue were "national in scope." Easton Direct at 18:7-8. At the time, well over half of AT&T's interexchange traffic handled by MCImetro was jurisdictionally interstate. There was no requirement that MCImetro publicly disclose the terms of its agreement to provide interstate switched access service to AT&T. And, as I stated earlier, there was no requirement that MCImetro disclose the terms of its agreement to the extent it also included intrastate switched access traffic in Florida.

Q. HAS MS. HENSLEY ECKERT ACCURATELY DESCRIBED THE NATURE AND TIMING OF QCC'S KNOWLEDGE OF THE EXISTENCE AND TERMS OF THE 2004 SWITCHED ACCESS AGREEMENTS BETWEEN MCI AND AT&T?

A. No. Ms. Hensley Eckert purports to describe QCC's "diligent efforts" in attempting to gather facts and information about various switched access agreements. However, she glosses over and omits key milestones in the chronology as it relates to QCC's expanding knowledge of the reciprocal 2004 switched access agreements between MCI and AT&T.

Q. DID QCC ADDRESS THE FACT THAT THE EXISTENCE OF THE *2004 CONTRACTS* WAS PUBLICLY DISCLOSED DURING THE WORLDCOM BANKRUPTCY PROCEEDING?

A. No. Ms. Hensley Eckert ignores the fact that, on February 23, 2004, QCC and Qwest were served with documents during the WorldCom bankruptcy proceeding which explained that MCI and AT&T were "enter[ing] into new 2-year bilateral switched access contracts (the '2004 Contracts') which will become effective as of January 27, 2004."[5] This was not a mere snippet buried in a minor filing, but was disclosed by WorldCom in the context of describing the resolution of "a significant contractual dispute between AT&T and the Debtors arising over the provision of switched access relating to certain 'UNE-P' services" under a prior "National Services Agreement." *Id.* at 3 ¶4, 4 ¶8, and 6-7 ¶ 8(h).

The announcement of a comprehensive Settlement Agreement between Qwest's two largest competitors should have attracted attention and prompted review. As I testified earlier, Qwest and QCC had assigned at least six attorneys (both in-house and retained outside counsel) to represent its interests in the WorldCom bankruptcy proceeding. Reynolds Direct at 14, 31-32. Given this level of resources and Qwest's potential interest, it seems unlikely that none of Qwest's attorneys reviewed the motion describing the Settlement Agreement after they were notified of the filing.[6] The fact that the Settlement Agreement

[5] *See* Reynolds Direct at 10-11, 31-32; Exhibit PHR-1 ("Debtors Settlement Motion") at 7, and Exhibit PHR-4.

[6] I am advised by counsel that while the Bankruptcy Court's docket includes numerous entries, most involve ministerial and routine procedural matters of little significance, and that only about 75 motions relating to proposed settlements and compromises were filed over the two and one-half year duration of the WorldCom bankruptcy proceeding. While the number of docket entries should not preclude

(including the switched access agreements that were attached to it) was treated as confidential did not preclude such review because, as a party to the proceeding, QCC had an opportunity to request additional information to facilitate its review of the motion for relief. *See* Reynolds Direct at 16. Moreover, QCC cannot complain about the Bankruptcy Court's treatment of confidential information, given that its own settlement agreement with WorldCom during the bankruptcy proceeding was considered confidential and handled in the same manner. *Id.* at 17-18.

Regardless of the reasons for QCC's lack of diligence in inquiring further or pursuing any interests it may have had in early 2004, the fact that the Debtors' Settlement Motion that announced the existence of the two new switched access agreements was served on more than 350 parties and creditors, including other telecommunications service providers and government agencies, contradicts QCC's suggestion that MCI was trying to keep the existence of the 2004 Contracts "secret."

Q. WHEN DOES QCC CLAIM THAT IT FIRST BECAME AWARE OF UNFILED SWITCHED ACCESS AGREEMENTS IN THE MINNESOTA PUC PROCEEDINGS?

A. Ms. Hensley Eckert claims that QCC first received "formal notice" that its interests might be affected by various switched access agreements "on April 15, 2005." Hensley Eckert Direct at 4. She asserts that this was "the first notice *in the Docket* that *the MPUC issued* to *all* Telecommunications Carriers in

experienced bankruptcy counsel from separating the "wheat from the chaff," in this instance, QCC's attorneys were provided electronic notice of the relevant Settlement Motion and the upcoming court hearing where it was to be considered.

Minnesota, including Qwest." (Emphasis added.) The multiple qualifications in her statement beg the question of whether QCC had become aware of the investigation sometime earlier through means other than a notice issued in the docket. In fact, as I indicated previously, QCC was notified ten months earlier -- on July 20, 2004 -- that the Minnesota PUC was considering an investigation into "Many Companies' Negotiated Contracts for Switched Access Services." Reynolds Direct at 33 and Exhibit PHR-17. Because Ms. Hensley Eckert, a QCC employee based in Colorado, was not responsible for Qwest's regulatory and legal activities in Minnesota, it does not appear that she is in a position to testify about what Qwest's local legal and regulatory personnel in Minnesota -- including those that were provided notice of, and may have attended, the July 22, 2004 Minnesota PUC meeting where the proceeding involving switched access contracts was discussed -- knew about the investigation into switched access agreements and when they learned of it.

Q. DID QCC LEARN MORE ABOUT THE *2004 CONTRACTS* DURING THE MINNESOTA PUC PROCEEDINGS THAN IS INDICATED BY MS. HENSLEY ECKERT?

A. Yes. Her testimony is very general and, importantly, does not address specific facts relating to MCImetro's agreement with AT&T. I previously explained when QCC learned of the existence and nature of the *2004 Contracts* through its active participation in the Minnesota PUC proceedings and will not repeat that discussion here. *See* Reynolds Direct at 32-36. However, it is important to point out certain errors and omissions in Ms. Hensley Eckert's recitation of the events.

Ms. Hensley Eckert suggests there was no indication that the switched access agreements being reviewed in Minnesota "offered discounts outside of Minnesota." Hensley Eckert Direct at 5:3-5. That is not correct. The Minnesota PUC's July 7, 2005 Order Approving Stipulations and Dismissing Various Complaints specifically referred to "multi-state" contracts that contained "rate[s] applicable in other jurisdictions," but explained that the settlement only addressed Minnesota-specific issues. *See* Exhibit PHR-20 at 4, ¶5. There would not have been any reason for the settlement agreement or the Commission to have made these statements unless the CLECs that were parties to the settlement agreement had entered into "multi-state" contracts. QCC clearly understood this because, when it issued information requests to AT&T in one of the Minnesota proceedings on April 7, 2006, it specifically requested copies of all records and data documenting the usage of switched access "in every jurisdiction affected by" the MCI/AT&T *2004 Contracts*. *See* Exhibit PHR-26 (at Request No. 3).

QCC also attempts to downplay its actual knowledge of the *2004 Contracts* by emphasizing when it obtained "public copies" of other switched access agreements. But, as I testified earlier, QCC explicitly relied on details of the MCI-AT&T switched access agreements contained in comments filed by the Minnesota Department of Commerce on April 25, 2005, when it began complaining about the lawfulness of the agreements between MCI and AT&T in August 2005. Reynolds Direct at 33-35. Ms. Hensley Eckert also glosses over the fact that QCC was provided actual copies of the two reciprocal *2004 Contracts* on May 3, 2006, and July 3, 2006, soon after signing a protective

order.[7] Thus, it is not true, as Mr. Easton claims, that "MCI did not disclose copies" of its switched access agreements to QCC. *See* Easton Direct at 30:17-18.

Q. DID QCC TIMELY PURSUE A SIMILAR SWITCHED ACCESS SERVICE AGREEMENT WITH MCIMETRO?

A. No. QCC states that in 2007 -- two years after becoming aware that its interests might be affected by various CLECs' switched access agreements -- it instructed its Facilities Cost Carrier Management Group to begin contacting CLECs to obtain information about switched access agreements and ask about lower access rates. Hensley Eckert Direct at 8:3-13. Even if QCC's attorneys did not share with the business units the exact details of contracts covered by a Minnesota protective order, QCC's management considered it in the company's business interest to pursue potential switched access agreements with other carriers based on the information that was available. Because MCI and QCC are major customers of each other's services, both companies have created account teams and identified multiple points of contact within our respective organizations. Accordingly, it would have been easy for QCC to initiate the discussions ordered by its management through normal business channels.[8] However, despite the fact that QCC had known of the *2004 Contracts* for a couple of years, and despite the fact that QCC employees were directed to reach out to individual CLECs, there is no evidence that anyone in QCC's business units contacted MCImetro to discuss a similar business arrangement while the

[7] *Id.* at 36; *see also* Exhibit PHR-26. Ms. Hensley Eckert does not explain why QCC waited approximately a year after entering the proceeding before signing the protective order so that it could obtain and review the agreements.

[8] *See* Reynolds Direct at 37-39.

2004 Contracts were in effect.

Q. DID QCC MAKE ANY INQUIRY TO MCIMETRO ABOUT OBTAINING LOWER SWITCHED ACCESS RATES BEFORE THE *2004 CONTRACTS* EXPIRED?

A. No. QCC waited yet another year -- and not until *after* it knew that the *2004 Contracts* had long since expired -- before communicating with MCImetro in writing, and requesting that MCImetro provide QCC intrastate switched access service at the same rates at which "you provide the same services to AT&T." *See* Exhibit PHR-25. In a generic form letter dated February 25, 2008, QCC stated that its inquiry was prompted by information that QCC learned of "in a recent state commission investigation." *Id.* The assertion that QCC had only "recently" obtained such information was misleading or disingenuous, given that the letter was sent nearly three years after QCC had obtained significant details about the nature and terms of MCImetro's agreement with AT&T. Because the *2004 Contracts* had expired more than a year earlier and were no longer in effect, there was no reason for MCImetro to respond to QCC's belated "demand letter."

Q. WAS QCC PRECLUDED FROM PURSUING ITS INTERESTS IN A TIMELY MANNER?

A. No. Ms. Hensley Eckert states that QCC could use the information it obtained from reviewing the reciprocal switched access agreements "only for the purposes of the Minnesota proceedings." Hensley Eckert Direct at 6:8-11. In fact, QCC did not feel so constrained. In January 2007, QCC filed a lawsuit

against AT&T in Minnesota state court, alleging that AT&T had engaged in unlawful practices in at least 35 states, including Florida.[9] QCC's complaint included a number of allegations about the "bi-lateral off-tariff deals between AT&T and MCI." In particular, QCC described the existence and nature of the "reciprocal switched access service agreements entered into by MCI and AT&T in February 2004 as part of a comprehensive settlement agreement. It alleged that the rates charged by MCI's CLEC and AT&T's CLEC "deviated below their tariffed rates for intrastate switched access service" in at least 35 states including, specifically, Florida. It alleged that MCI and AT&T had not "complied with applicable filing and nondiscrimination requirements with respect to any of their reciprocal agreements as required under laws and regulations in numerous states" including, specifically, Florida. QCC alleged further that MCI "violated applicable statutes, regulations, orders and other laws" in numerous states including, specifically, "Fla. Stat. §§ 501.204, 364.04, 364.08, and 364.09"; and claimed that QCC was disadvantaged and harmed by the carriers' "illegal practices." Exhibit PHR-27 at ¶¶ 24, 34, 46-49, 72h, 77-77, 88g, 101, 109, 112-113.

It is clear from QCC's own advocacy that QCC did not feel constrained by the Minnesota PUC's protective order from making public statements about MCImetro's switched access contract with AT&T and alleging that MCImetro's nationwide agreement with AT&T violated numerous state laws and regulations outside of Minnesota.

[9] *See* Exhibit PHR-27. Because QCC had obtained copies of the *2004 Contracts* in mid-2006, Ms. Hensley Eckert's complaint that some CLECs "refused" to produce their switched access agreements during the discovery process in the state court proceeding (Hensley Eckert Direct at 7:6-9), and her comment that "the identity of the CLECs were, for the most part, unknown" (*id.* at 7:14-15) are not true with respect to MCImetro.

Q. DID ANYTHING PREVENT QCC FROM FILING ITS COMPLAINT AGAINST MCIMETRO HERE BEFORE DECEMBER 2009?

A. No. As I just mentioned, a protective order in a Minnesota PUC complaint case did not prevent QCC from including numerous allegations about MCImetro in its lawsuit filed in Minnesota state court in January 2007. That protective order also did not prevent QCC from timely filing a complaint here. This is because QCC's complaint filed in December 2009 was not predicated on any confidential information covered by the protective order. In fact, QCC's Florida complaint was based solely on allegations, made "[o]n information and belief," that MCImetro had an agreement with AT&T to provide intrastate switched access service at rates different than those in its effective Florida price list, and that the agreement had been "identified in the MN DOC's complaint in Docket C-04-235" -- *i.e.*, the proceeding that commenced in 2004 and that QCC formally started participating in in April 2005. Amended Complaint of QCC at 9, ¶10 a. ii. Because QCC was made aware of the *2004 Contracts* during the WorldCom bankruptcy, admits that it learned of the contracts no later than April 2005, and alleged soon thereafter that the agreements violated state law and caused QCC "harm" and "disadvantage," QCC could have brought a complaint in Florida then, and made the *exact same allegation* that it waited until December 2009 to make. Contrary to Ms. Hensley Eckert's testimony (at 10:11-11:2), the existence and nature of the *2004 Contracts* were not a "secret" to QCC, and QCC did not have to issue subpoenas in order to identify MCImetro or its agreement with AT&T before bringing an action here. QCC's complaint contains no more information than was known to QCC in April 2005, and does not allege any additional facts it learned in the ensuing four and one-

half years. Any delay in filing was solely the result of inaction on QCC's part.

III. MCIMETRO DID NOT UNREASONABLY DISCRIMINATE AGAINST QCC IN ITS PROVISION OF INTRASTATE SWITCHED ACCESS

Q. WHAT IS YOUR UNDERSTANDING OF THE NATURE OF QCC'S CLAIM OF UNLAWFUL DISCRIMINATION?

A. I am not an attorney and will not address legal issues such as whether Florida's discrimination statutes apply to CLECs or whether a party claiming discrimination must show that it sought to negotiate terms for the service in question. For purposes of this testimony, my frame of reference is the statements that QCC made in its complaint. QCC acknowledges that, under Florida law, CLECs are permitted to enter into contracts to provide switched access service to other carriers on terms that deviate from the CLECs' price lists. Amended Complaint at ¶¶5, 12; *see also* Easton Direct at 11:2-6. QCC's complaint states that, when a telecommunications company enters into an individual contract, it must make the terms of the contract "available to other *similarly-situated carriers* on a non-discriminatory basis." *Id.* (emphasis added). Finally, QCC states that a carrier is prohibited from "extending to another [entity] any advantage of contract or agreement" that is "not regularly and uniformly extended to all persons *under like circumstances* for like or substantially similar service." *Id.* (emphasis added).

Q. DID QCC PRODUCE EVIDENCE TO DEMONSTRATE THAT IT SATISFIED ALL OF THE ELEMENTS OF A CLAIM FOR

UNREASONABLE DISCRIMINATION?

A. No. As I understand it, under QCC's theory, to prove unreasonable discrimination it must show that a carrier charged similarly situated customers different rates for the same or functionally equivalent service. This involves two separate determinations. First, one must find that the services provided are the same. Next, one must find that the different customers are "under like circumstances" and "similarly situated" to the contracting parties. If the services provided to two different customers are not the same, there is no need to consider the separate question of whether the parties are similarly situated, or to reach the issue of whether there was unreasonable discrimination. On the other hand, if the services provided to two different customers are the same, then it becomes necessary to examine the facts to determine whether the customers are under like circumstances and similarly situated. If the customers are not similarly situated, then charging different rates to two different entities is not unreasonable.

In its testimony, QCC focuses almost entirely on the first, threshold issue, arguing at length that the switched access services that CLECs provide to all IXCs are the same. However, QCC devotes only scant attention to the second, follow-up question of whether QCC was under like circumstances and similarly situated to AT&T and thus capable of entering into a similar agreement with MCI to obtain and provide switched access service on the same terms and conditions. QCC attempts to deflect attention from the fact that it was not similarly situated and could not have entered into an identical agreement, by trying instead to cast doubt on the legitimacy of MCImetro's

bilateral, reciprocal agreement with AT&T. As I will explain, QCC's attacks are ill-founded and without merit.

Q. PLEASE EXPLAIN HOW QCC'S SHOWING WAS INADEQUATE TO DEMONSTRATE THAT IT WAS SIMILARLY SITUATED TO THE CONTRACTING PARTIES.

A. Mr. Easton's testimony provides a lengthy description of switched and special access services. Easton Direct at 5-9. He and Dr. Weisman also spend considerable time arguing that switched access is a "monopoly," "bottleneck service" that is "not competitive" or "competitively provisioned." Weisman Direct at 5-9, 12-14. In short, their testimony is devoted almost entirely to describing the access *services* that CLECs provide to IXCs. But merely stating that the services provided to different carriers are similar is not sufficient to make the showing required under the second part of the two-part analysis I described earlier. In fact, one has to look hard to find any discussion by any of QCC's witnesses of the question of whether and how QCC was under like circumstances and similarly situated to the contracting parties. For example, Mr. Easton's testimony contains the following brief passage:

> As IXC customers of tandem-routed CLEC switched access, AT&T, Sprint and QCC are similarly situated. As I discussed earlier, the same LEC facilities are used to reach the same end user customers. The relative size of any given company is not relevant, since each call is separate and distinct and carried in identical fashion, unless the IXC chooses to avoid certain switched access

rate elements by purchasing dedicated facilities to a particular local switch or to a particular end user.[10]

This overly general statement fails to address my Direct Testimony showing that QCC was not similarly situated and could not have entered into the same type of reciprocal agreement that MCImetro had with AT&T. *See* Reynolds Direct at 20-27. For his part, Dr. Weisman discusses potential anticompetitive outcomes that "may" or "could" result from price discrimination, *assuming* that two hypothetical carriers are similarly situated carriers (Weisman Direct at 9-12)[11], but he does not present any facts to show that QCC was similarly situated to AT&T in 2004 when MCI and AT&T entered into their switched access agreements.

Q. QCC ALLEGES THAT RECIPROCITY WAS BUT A "FAÇADE" AND AN "*EX POST* JUSTIFICATION" FOR THE SWITCHED ACCESS AGREEMENTS ENTERED INTO BY MCIMETRO AND AT&T. (Easton Direct at 31:13-15, 32:8-9; Weisman Direct at 18:1, 20:14-16). IS THAT CLAIM VALID?

A. Absolutely not. QCC's argument ignores the plain language of the twin contracts that MCImetro and AT&T actually entered into. The parties' Settlement Agreement and Bankruptcy Court filings also confirm that reciprocity of the agreements was key to resolving a major dispute over the

[10] Easton Direct at 12:18-24. Mr. Easton addresses some arguments purportedly made by some CLECs regarding the issue of similarly situated (*id.* at 13-15), but that discussion does not address any of the factual circumstances involving MCImetro.

[11] Apart from this general, speculative discussion, QCC does not provide any evidence that it suffered any specific financial harm or economic injury, that it was subject to "undue or unreasonable prejudice," or that its end user customers were adversely impacted, as a direct result of the *2004 Contracts*.

amount each company should charge the other for switched access provided over UNE-P. QCC's claim is also contradicted by many of the "hundreds of pages" of documents and electronic files that QCC admits were produced during the course of this litigation. *See* Canfield Direct at 37:1-3. Those documents included correspondence between MCI and AT&T during the period of time the companies were in settlement discussions and negotiating the *2004 Contracts*. A review of those contemporaneous documents confirms that *both* companies understood and intended that the two companion switched access agreements were identical, imposed mutual obligations, and established mutual, reciprocal benefits.

For example, on February 5, 2004, MCI presented AT&T with a seven-page list of business terms (titled "MCI/AT&T Switched Access *Reciprocal* Contract Terms") that MCI proposed form the basis of new switched access agreements between the two companies. *See* LAWYERS ONLY CONFIDENTIAL Exhibit PHR-28 (emphasis added). The document recommended that AT&T and MCI "enter into identical and reciprocal contract terms for the provision of Switched Access Services to the other." The proposed term sheet used the word "reciprocal" nine times to describe the nature of the proposed business arrangement, and repeatedly stated that the provisions of the contract would apply equally to each company. AT&T's correspondence at the time also referred to the "reciprocal" agreements. *See, e.g.,* Exhibit PHR-29 (e-mail from AT&T's Chief Counsel stating that AT&T would "do the oft-discussed, never yet done 'flip' to put AT&T's name in the boxes for the 'CLEC' in the current draft of the agreement," and substitute MCI's name for AT&T's "throughout

the document," thereby creating a "second and reciprocal" agreement.) MCI's subsequent response to AT&T referred to the "mirror" agreements. *See* Exhibit PHR-30. Several days later, AT&T provided updated versions of what it called "the 2 reciprocal agreements." *See* Exhibit PHR-31. Finally, when MCI's negotiating team requested executive level approval for the proposed switched access agreements, we described the contracts as "identical" "reciprocal buy and sell agreements" with AT&T for the provision of switched access services by each of MCI's and AT&T's respective CLECs" to the other companies' long distance affiliates. *See* LAWYERS ONLY CONFIDENTIAL Exhibit PHR-32.

Given the contemporaneous documents which demonstrated the clear, unambiguous understanding of the contracting parties at the time they negotiated the *2004 Contracts*, QCC's allegation that "reciprocity" was a rationale manufactured by MCImetro many years later to defend itself against a complaint initiated by QCC in late 2009 is completely baseless.

Q. IS MR. EASTON'S CLAIM THAT THE *2004 CONTRACTS* WERE "ONLY NOMINALLY 'RECIPROCAL'' (Easton Direct at 31:15) CORRECT?

A. No. It is obvious from the plain language of the twin agreements that the *2004 Contracts* were identical in all material respects; established identical, mutual obligations; and enabled each company's IXC affiliates to obtain switched access service on the same terms and conditions. The correspondence and communications between the parties are consistent with this understanding, and

reflect the parties' clear intent and agreement that the contracts created reciprocal benefits and obligations. The parties also implemented the contracts as written, and operated under the provisions of the reciprocal agreements over the next three years.

Q. DR. WEISMAN STATES THAT RECIPROCITY IS NOT SUFFICIENT TO SHOW THAT "DISCRIMINATION WAS APPROPRIATE." (Weisman Direct at 20:21-22). HOW DO YOU RESPOND?

A. First, it should be noted that Dr. Weisman does not frame the issue correctly. Even under QCC's theory, the test is not whether discrimination was "appropriate," but whether "unreasonable" discrimination had occurred. Second, it is important to note that Dr. Weisman does not provide any independent evaluation of the *2004 Contracts* or the factual circumstances of the various companies; instead, his discussion relies almost entirely on speculation and allegations contained in Mr. Easton's testimony that reciprocity "may not" have constituted MCI's true rationale for entering into the agreement with AT&T, that reciprocity may only have been "a means to grant a secret net discount to AT&T," and "may have" been invoked to "guarantee collection." Weisman Direct at 20:14-19, and 21:3-5. As I discuss elsewhere in my testimony, all of these contentions are baseless.

Once those statements are stripped away, there is little left of Dr. Weisman's testimony on this issue. In fact, all that remains are his conclusory statements that reciprocity "would not be sufficient" to substantiate MCImetro's position that "discrimination was *appropriate*," and that reciprocity "as a qualifying

condition for the discount *seems* unfounded as a matter of economic theory." *Id.* at 20:21-22, 21:6-7 (emphasis added). As stated above, the first assertion mischaracterizes MCImetro's position, which is that its switched access agreement with AT&T was not "unreasonably" discriminatory *vis-à-vis* QCC. Dr. Weisman did not address the issue at all from the standpoint of reasonableness. Although Dr. Weisman's penultimate conclusion is that reciprocity "seems" unfounded, he does not cite any specific "economic theory" in support of his position.

Q. HAS ANOTHER STATE REGULATORY COMMISSION CONCLUDED THAT THE RECIPROCAL SWITCHED ACCESS AGREEMENT BETWEEN MCIMETRO AND AT&T DID NOT UNREASONABLY DISCRIMINATE AGAINST QCC?

A. Yes. Earlier this year, the New York Public Service Commission issued an order dismissing QCC's identical complaint against MCImetro in that state.[12] In doing so, the New York Commission focused on the reciprocal nature of the dual agreements, specifically the contractual requirement that each party be able to terminate intrastate switched access traffic for the other company's IXC. In its unanimous ruling, the New York PSC made the following findings of fact:

- "Qwest does not dispute that it did not, at the time, have a local CLEC affiliate in New York capable of

[12] *See* Exhibit PHR-33 (*Complaint of Qwest Communications Company, LLC against MCI Metro Access Transmission Services, LLC, et al,* Order Dismissing Complaint in Part, Initiating Further Investigation and Addressing Pending Discovery Requests, Case 09-C-0555, issued and effective March 20, 2012) ("*New York Dismissal Order*"). Although QCC filed a petition for rehearing of that decision, the *New York Dismissal Order* took effect on March 20, it has not been stayed, and will remain in force unless and until set aside by the New York PSC on rehearing or as the result of judicial review.

terminating another IXC's intrastate switched access traffic;" (*New York Dismissal Order* at 9-10)

- "Qwest would not have been able to adopt the terms of" the MCImetro/AT&T reciprocal switched access agreement; (*id.* at 11)
- "Qwest fails to demonstrate that ... it would have qualified for th[e] lower rate" in MCImetro's reciprocal agreement with AT&T, and that "without a CLEC affiliate in New York capable of terminating intrastate switched access traffic for the other's IXC, Qwest would not have been able to obtain the benefit of the lower switched access rate in the MCImetro/AT&T agreement;" (*id.*)
- Qwest "fails to demonstrate that the practice of providing a lower intrastate access rate, provided there is a local exchange affiliate capable of offering the same rate, is without a rational basis;" (*id.* at 10) and
- Because MCImetro established that "Qwest could not have qualified for the special pricing arrangement," "we find that Qwest has no basis for refunds or other monetary relief as against [MCImetro]." (*Id.* at 8).[13]

While Dr. Weisman may not consider the bilateral, reciprocal nature of the

[13] Although the New York PSC's procedural rules did not require the Commission to hold an evidentiary hearing before issuing the *Dismissal Order*, the Commission's staff conducted an investigation, obtained and reviewed the relevant contracts and other documents, and considered at least 10 filings made by QCC over a two-year period.

2004 Contracts to be "a credible basis" for finding that unreasonable discrimination did not occur (Weisman Direct at 20:3-7), the New York Commission obviously concluded otherwise.[14]

Q. MESSRS. CANFIELD AND EASTON ALLEGE THAT THE *2004 CONTRACTS* WERE DELIBERATELY INTENDED TO PROVIDE A SUBSTANTIAL "NET DISCOUNT" TO AT&T. IS THIS TRUE?

A. No, this is a complete fallacy.[15] Mr. Easton alleges that MCI "knew *from the inception*" that the 2004 switched access agreements would afford AT&T "an effective (net) discount of **[BEGIN LAWYERS ONLY CONFIDENTIAL INFORMATION]** XXXXXXXXXXX **[END LAWYERS ONLY CONFIDENTIAL INFORMATION]** and that this amount had been "project[ed] (calculated and shared within MCI in January 2004"). Easton Direct at 31-32. Although QCC's witnesses refer to a few internal MCI documents,[16] neither Mr. Easton nor Mr. Canfield produced a single document that contained the alleged discount figure.

This is hardly surprising, given Mr. Canfield's candid admission that it was he -

[14] Dr. Weisman (at 21-22) refers to a decision in 2007 by the Minnesota PUC, but he fails to point out that the Minnesota Commission expressly declined to make any findings or conclusions regarding MCImetro in its order. *See 2007 Minn. PUC LEXIS 146*, at § VI. Ms. Hensley Eckert also refers to an ongoing proceeding in Colorado where no final order has been issued involving QCC's complaint against MCImetro. Because there are significant differences between the statutes and regulations in Colorado and those in Florida, no meaningful comparisons between the two cases can be made. For example, in preliminary rulings, the Colorado Commission placed substantial weight on a requirement that switched access contracts be filed in Colorado, but no such requirement exists in Florida.

[15] Because I am not an attorney, I will not express an opinion on whether the parties' alleged "intent" in entering into a given agreement is relevant to the issue of whether the agreement was unreasonably discriminatory. I will leave it to the attorneys to address in briefs whether the Commission's evaluation should focus on the objective differences between the customers, rather than, as QCC suggests, the contracting parties' subjective motivations, when deciding if unlawful discrimination took place.

[16] *See* LAWYERS ONLY CONFIDENTIAL Exhibits WRE-28 and DAC-17.

- a QCC consultant -- who "calculate[d] an effective discount (or net) discount to AT&T" several years after the *2004 Contracts* had expired. Canfield Direct at 37:11-12 and 37:20-38:1 (describing how he "subtracted" and "divided" certain amounts when performing his calculations).[17] While Mr. Canfield claims that "*MCI itself projected*" that the contracts would provide for a discount of the amount he specifies, neither he nor Mr. Easton cited a single internal MCI document in which the word "discount" appears or that contained any such "projection." Nor did Mr. Canfield produce any document which demonstrated MCI's "belie[f]," at the time the *2004 Contracts* were executed, that AT&T would receive an effective discount in the amount calculated several years later by Mr. Canfield. In fact, the discount figure calculated by Mr. Canfield appears nowhere in the 500 pages of documents that MCI made available for QCC to review. Accordingly, there is no factual evidence that supports QCC's theory that MCI had conducted the same calculations and reached the same conclusions that Mr. Canfield performed in preparing for this litigation.

Q. HAS AT&T CONTRADICTED QCC'S CLAIM THAT THE *2004 CONTRACTS* WERE DELIBERATELY SKEWED TO BENEFIT AT&T?

A. Yes. Mr. Robert P. Handal, Jr., AT&T's lead business negotiator of the *2004 Contracts*, testified nearly six years ago in a proceeding before the Minnesota

[17] The hypothetical analysis performed by Mr. Canfield is misleading in other respects, as well. For example, according to Mr. Canfield's explanation of the factors that were included in his calculation (Canfield Direct at 37:20-24; *see also* Easton Direct at 32:1-5), his mathematical exercise did not account for the multi-million dollar payment that AT&T made to MCI "in connection with" and as a condition for entering into the *2004 Contracts*. *See* Exhibit PHR-2 (Settlement Agreement at 7-8). His failure to include this amount created a significant upward bias in his calculation of an alleged "discount."

PUC.[18] At that time, Mr. Handal testified that "AT&T and MCI had entered into *bilateral* switched access contracts" "to resolve issues that were in dispute in the [WorldCom] Bankruptcy proceeding." Exhibit PHR-34 at 5:7-9 and 18-21; 8:4-7 (emphasis added). Mr. Handal described the contracts as "a *reciprocal* agreement that sets forth the terms and conditions for each party's provision of switched access service to the other party." *Id.* at 2:19-3:2 (emphasis added). Significantly, Mr. Handal repudiated the same argument advanced by QCC's witnesses here, namely, that the *2004 Contracts* were "lopsided" and designed to provide a substantial financial benefit on AT&T. *See* Easton Direct at 31:18. On the contrary, Mr. Handal testified as follows:

> In fact, both contracts taken together resulted in a financial impact that was revenue neutral to AT&T. In short, in total, the two contracts did not improve AT&T's financial or competitive position. That was simply not the motive for AT&T entering into these contracts.

Id. at 7:15-19. Although QCC and Qwest actively participated in the Minnesota hearings and its attorney cross-examined Mr. Handal, QCC has presented no facts here to undermine AT&T's explanation of the nature, terms and effects of the *2004 Contracts.*

Q. DID QCC ATTEMPT TO FABRICATE AN AGREEMENT DIFFERENT THAN THE ONE MCI AND AT&T ACTUALLY ENTERED INTO

[18] *See* Exhibit PHR-34 (Reply Testimony of Robert P. Handal, Jr. on behalf of AT&T Communications of the Midwest, Inc., filed on September 15, 2006, In the Matter of DOC Complaint and Request for Commission Action in Regard to Negotiated Contracts for Switched Access Services, OAH [Minnesota Office of Administrative Hearings] Docket No.: 12-2500-17084-2 and Minnesota PUC Docket No. P-442, *et al.*)

INSTEAD OF ANALYZING THE TERMS OF THE *2004 CONTRACTS*?

A. Yes. Rather than address the terms of the *2004 Contracts* to show that QCC was similarly situated to MCI and AT&T at the time, QCC contends that MCI and AT&T *could have* entered into a *different* agreement in 2004 to provide AT&T with a discount in the amount calculated years later by Mr. Canfield. Canfield Direct at 37:15-19; Easton Direct at 32:9-11. QCC's suggestion that MCI "could have" written the contract differently, and created only one agreement (rather than two) that did not include reciprocity provisions and contained different language instead is nothing more than an attempt to rewrite history more than eight years after the fact. The witnesses' theory about the kind of alternative agreement MCI "could have" entered into is also naïve, because it ignores the scope and complexity of the lengthy negotiations that ultimately produced the bankruptcy Settlement Agreement, and the various compromises that each company made. For example, a hypothetical contract that merely lowered the access rates that MCImetro charged AT&T, as suggested by QCC, would not have achieved a major goal of the settlement, which was to clarify the proper rate that both companies would charge each other for switched access traffic regardless of the service delivery method. Accordingly, the Commission should disregard any speculation about how the companies might have structured their bankruptcy Settlement Agreement differently and drafted an entirely different contract.

In reviewing claims of unlawful contract discrimination, the Commission should review the agreement that the parties actually entered into, not a hypothetical, alternative contract that has no basis in reality. The pertinent

question is whether QCC was similarly situated and qualified to enter into the same agreement that the contracting parties executed, not whether QCC might have been willing to enter into a different, fictional agreement that never existed.

Q. HAS QCC MISCHARACTERIZED MCI'S BUSINESS RATIONALE FOR ENTERING INTO THE *2004 CONTRACTS*?

A. Yes. Mr. Easton alleges that MCI agreed to an "unbalanced" contractual arrangement "solely to guarantee collectibles," and bases his claim on a single e-mail dated weeks before MCI entered into the *2004 Contracts.*[19] This contention is false and misleading. In fact, the January 28, 2004 e-mail message he refers to described a possible "counter proposal" for a "reciprocal contract, and not the final agreement. *See* LAWYERS ONLY CONFIDENTIAL Exhibit WRE-29B at 1. Mr. Eason also ignores the fact that the preliminary message identified other benefits of the prospective settlement agreement. These included multi-million dollar payments from AT&T, expected savings in MCI's line costs, and elimination of billing disputes based on the jurisdiction of traffic. *Id.* More important, Mr. Easton failed to acknowledge that MCI subsequently developed an "update[d] … settlement model" with additional inputs that superseded the earlier e-mail. *See* LAWYERS ONLY CONFIDENTIAL Exhibit PHR-35. That more comprehensive financial analysis evaluated the impact of the proposed settlement agreement on MCI's business plan (both revenues and costs). The analysis showed that **[BEGIN LAWYERS ONLY CONFIDENTIAL**

[19] Easton at 32:19-33:4. The other two documents referenced by Mr. Easton (at 33:12-21 and in Exhibit WRE 29B) were dated 20 and 23 months *after* the *2004 Contracts* were entered into, and thus have no bearing on the contracting parties' original intent.

INFORMATION] XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX [END LAWYERS ONLY CONFIDENTIAL INFORMATION]. MCI's negotiating team advised the company's management that the updated analysis "tends to support the proposed settlement vs. financial plans as they are known." *Id.* Success of the company's business plan was obviously of utmost importance as the company was seeking to emerge from bankruptcy.

Mr. Easton's myopic reliance on a single factor is also misplaced because he failed to acknowledge the various forms of consideration and other benefits MCI obtained by entering into a comprehensive settlement agreement during the WorldCom bankruptcy proceeding, including resolution of numerous financial disputes and AT&T's dismissal of its federal court lawsuit against the company. Accordingly, the Commission should reject his attempt to discredit the legitimacy of, and MCI's reasons for entering into, a settlement agreement with AT&T.

Q. HAS QCC DEMONSTRATED THAT IT WAS SIMILARLY SITUATED TO AT&T FOR PURPOSES OF ENTERING INTO A SIMILAR RECIPROCAL SWITCHED ACCESS AGREEMENT?

A. No. QCC's position appears to be two-fold. First, Mr. Easton contends that "[a]s IXC customers of tandem-routed CLEC switched access," AT&T and QCC are, essentially by definition, similarly situated. Easton Direct at 12:18-20.[20] Second, he asserts that "no reasonable explanation has been given" as to how and why QCC is not similarly situated "in the context of intrastate

[20] As a factual matter, at the time the *2004 Contracts* were entered into, AT&T had established direct trunks between its network and MCI's in some locations around the country, and MCI had done the same.

switched access in Florida." *Id.* at 15:12-13. Mr. Easton acknowledges there may be a number of factors that could distinguish one customer from another, including "volume, calling patterns, cost of negotiation, *etc.*," but he immediately brushes them aside as "not relevant," (Easton Direct at 15:19-16:1) and rests instead on his primary argument that all IXCs are essentially the same. In essence, QCC tries to interpret the meaning of the term "similarly situated" extremely narrowly, and refuses to address the real world context in which telecommunications service providers interact, negotiate and obtain services from one another. As a result, its testimony does not contain any discussion of the specifics of the MCI-AT&T contract, and does not contain any affirmative showing that QCC had been "under like circumstances" and could have entered into the same type of agreement that MCI and AT&T entered into.

QCC's framing of the issue is also narrow in another sense. The *2004 Contracts* were national in scope and established a rate that applied to interstate and intrastate services that MCI and AT&T provided one another across the United States; the two companies did not separately negotiate a rate for intrastate switched access service in Florida. To be similarly situated, QCC would have had to been able to enter into a comparable, wide-scale agreement. Mr. Easton's argument, however, presupposes that the *2004 Contracts* can be picked apart and viewed in isolation, and examined solely from the perspective of QCC's operations "in Florida." (As I will explain later, QCC did not satisfy even this limited standard, just as the New York PSC found in New York.) QCC's position appears to be that it could have separately negotiated for and received the benefit of the *2004 Contracts* in a single jurisdiction without

agreeing to accept all of the related terms and conditions of the parties' overall agreement. But the suggestion that QCC could "pick and choose" only those contractual provisions to its liking and apply them in only a single state (and refuse to accept other terms and conditions) does not demonstrate that it was in the same circumstances as the contracting parties when they negotiated their service agreement.

Q. MR. EASTON CLAIMS THAT IF MCIMETRO HAD MADE AVAILABLE TO QCC THE SAME TERMS THAT IT OFFERED AT&T, QCC COULD HAVE ENTERED INTO A SIMILAR RECIPROCAL AGREEMENT TO PROVIDE SWITCHED ACCESS SERVICE. (Easton Direct at 34:1-11). WHAT IS YOUR RESPONSE?

A. There are several aspects to his argument which I will address separately. His argument presupposes that QCC was not even aware of the *2004 Contracts* during the relevant time period (or of the more general fact that a number of CLECs had entered into switched access agreements). As I explained earlier, this simply was not the case. Mr. Easton also implies that QCC was helpless or unable to pursue comparable business arrangements on its own. In doing so, he ignores the fact that QCC actually directed its Facilities Cost Carrier Management team a number of years ago to contact individual CLECs and explore switched access agreements. Thus, the suggestion that QCC only had to sit back and wait for offers to come in is unrealistic and inconsistent with the directions QCC management gave to its business units that they should be more proactive in seeking out switched access agreements.

Mr. Easton also implies that MCImetro had some obligation to affirmatively make an offer to provide service to QCC on the same terms that it had agreed to with AT&T. He does not offer any support for this proposition, however. As I discussed earlier, CLECs are permitted to enter into switched access contracts, both for interstate and intrastate services in Florida. Those contracts are not required to be filed with the Commission and there is no requirement to make them public. Nevertheless, Mr. Easton appears to suggest that CLECs have certain obligations that exist outside of the regulatory and statutory sphere to disclose their contracts and unilaterally present them to all other carriers. As I understand it, neither the legislature nor the Commission have considered it necessary to impose such requirements, and Mr. Easton does not explain what the source of such an obligation might be.

Q. DID QCC PROVIDE SWITCHED ACCESS SERVICE DURING THE PERIOD OF TIME THE *2004 CONTRACTS* WERE IN EFFECT?

A. No. Mr. Easton admits that QCC did not provide switched access service in Florida during the years 2004 through 2007. Easton Direct at 34:3-4. He characterizes QCC's CLEC product offerings as "reselling local services" and the sale of "data services, hosting, and large bandwidth facilities." *Id.* at 4:16-17. Significantly, resellers are not permitted to charge IXCs for switched access, and the other services listed do not involve switched access. Presumably it was for those reasons that QCC did not have a tariff or price list authorizing it to provide switched access.

I also tried to determine whether QCC might have provided switched access

service anywhere else in the country. At my direction, Verizon Business conducted a survey of QCC's intrastate tariffs that are accessible through the company's public website. Based on that review, Verizon did not find a single state in which QCC offered switched access service. This was confirmed by Verizon Business's own internal records which contained no indication that QCC ever billed MCI for switched access service anywhere in the country during the period of time that the *2004 Contracts* were in effect.

Thus, as a threshold matter QCC would not have been able to enter into the same type of reciprocal agreement that existed between MCI and AT&T and provided MCI's IXCs with switched access service, either in Florida or anywhere else. It was because of QCC's inability to provide switched access service in New York that the New York PSC concluded that QCC would not have been able to adopt the terms of the MCImetro/AT&T reciprocal switched access agreement. *New York Dismissal Order* at 9-11. This Commission should reach the same conclusion here.

Q. COULD QCC HAVE PROVIDED SWITCHED ACCESS SERVICE ON THE SAME BASIS AND SCALE IN FLORIDA TO HAVE MADE A RECIPROCAL SWITCHED ACCESS AGREEMENT REASONABLE?

A. No. Mr. Easton states that "the availability of discounted switched access rates" from MCImetro would have been "a relevant factor in any decision [by QCC] regarding the offering of switched access service." Easton Direct at 34:5-6. He goes on to suggest that because MCImetro had not made "the AT&T terms available to QCC, QCC was deprived the opportunity to consider

whether to offer switched access." *Id.* at 34:7-9. His testimony on this point is entirely speculative and does not contain any facts regarding QCC's actual situation at the time. In addition, because his comments are tied to the availability of "discounted" switched access rates (presumably based on Mr. Canfield's calculation of the amount of such a discount), there is no explicit commitment that QCC would have been willing to accept all of the terms and obligations contained in the reciprocal *2004 Contracts.*

Mr. Easton does not demonstrate that QCC would have been capable, from an operational and business perspective, of providing switched access service to MCI's IXCs at the time. As a reseller, QCC was not permitted to charge IXCs for switched access. Moreover, QCC did not provide local service in Florida through any serving arrangement that would have enabled it to charge for switched access, such as by operating its own end-office switches or by purchasing unbundled network elements from other carriers. *See* Reynolds Direct at 22; *see also* CONFIDENTIAL Exhibit PHR-11 (2005 CLEC Data Request at §§7 (b) and (c), QCC POD 002074-002075). Mr. Easton offers no cogent evidence that QCC would have been willing to change its business model and make the necessary investments in 2004, so that it could have entered into a reciprocal switched access agreement with MCI. In addition to developing the operational capabilities to provide service in a manner that would have enabled QCC to charge for switched access service, QCC also would have needed to implement means for collecting usage data, and establishing the necessary systems to bill and collect for such traffic. Nothing in Mr. Easton's testimony suggests that QCC was willing or prepared to expand

its CLEC business in Florida to accomplish this.

In fact, it is highly unlikely that QCC would have done so given the size of its CLEC customer base in Florida during the three years the *2004 Contracts* were in effect. According to QCC, **[BEGIN CONFIDENTIAL]** XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX **[END CONFIDENTIAL]** *See* Exhibit PHR-10.

During that same period, QCC reported to the Commission that it **[BEGIN CONFIDENTIAL] XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXX **[END CONFIDENTIAL]** *See* CONFIDENTIAL Exhibit PHR-11 (QCC's "2003 CLEC Data Request" at 2, Response to No. 7, QCC POD 002134; and Response to No. 12, QCC POD 002135). QCC's representations to the Commission a year later were essentially identical. *See* CONFIDENTIAL Exhibit PHR-11 (QCC's "2004 CLEC Data Request" at 1,

Response to Nos. 2-4, QCC POD 002104). QCC provides no evidence, let alone facts that would be convincing, to show that it would have been willing to make the investments necessary to expand its CLEC business solely so that it could have entered into a reciprocal switched access agreement with MCI. Based on the available data and QCC's own assessment of its CLEC business at the time, it is not reasonable to assume that QCC would have done so.

Q. GIVEN THE SCOPE OF QCC'S CLEC BUSINESS DURING THE 2004-2007 TIME FRAME, IS IT LIKELY THAT MCIMETRO WOULD HAVE ENTERED INTO AN IDENTICAL RECIPROCAL SWITCHED ACCESS AGREEMENT WITH QCC?

A. No. As I have just shown, QCC's CLEC customer base would not have been able to generate sufficient switched access traffic to make a reciprocal business arrangement reasonable from MCI's perspective. Even if QCC were to have transformed its business so that it could have provided and billed for switched access on calls to or from its local exchange customers, the amount of access traffic generated by its local service customers would have been too small to have created any material financial benefit for MCI's IXCs. In sharp contrast, when MCImetro entered into the *2004 Contracts*, it had **[BEGIN CONFIDENTIAL]** XXXXXXXXXXX **[END CONFIDENTIAL]** local exchange lines that were used by its residential and small business customers in Florida. Two years later, the number of local lines provided by MCImetro to its mass market customers in Florida still exceeded **[BEGIN CONFIDENTIAL] XXXXX [END CONFIDENTIAL].**[21] To the extent QCC terminated

[21] MCImetro also provided local exchange service to a number of enterprise customers, but it is not easy to quantify the number of lines used by those customers in a particular state.

interexchange calls to MCImetro's substantially larger base of local customers, or MCImetro customers originated long distance or toll-free calls that were transmitted over QCC's long distance network, QCC would have benefited substantially by paying the contract switched access rates, whereas MCI would not have received any corresponding benefit on interexchange calls to or from QCC's group of local exchange customers. As a result, it would not have been rational for MCImetro to have entered into the type of "reciprocal" switched access agreement which QCC now theorizes could have been established, if only QCC had conducted its business differently eight years ago.

Q. DO YOU AGREE WITH MR. EASTON'S CONTENTION THAT BECAUSE THE *2004 CONTRACTS* DID NOT CONTAIN EXPLICIT VOLUME COMMITMENTS, QCC WOULD NOT HAVE BEEN PREVENTED FROM ENTERING INTO THE SAME AGREEMENT? (Easton Direct at 34:14-19).

A. No. Mr. Easton's argument assumes that MCI and AT&T negotiated the terms of their agreement in a vacuum. On the contrary, MCI's settlement model, and the analyses it conducted to determine the financial effects of the proposed settlement agreement were based in part on historic (actual) amounts of traffic that MCI and AT&T had been exchanging with one another and projections about future usage. Thus, MCI's decision to enter into the agreement was based on reasonable expectations about the relative volumes and balance of traffic that the parties would be exchanging. The fact that those expectations were not spelled out in actual contract language does not mean that they were not a consideration that went into the companies' decision to enter into the

agreement. For example, a few days before executing the agreement, MCI projected that, over the next two years **[BEGIN LAWYERS ONLY CONFIDENTIAL]** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXX **[END LAWYERS ONLY CONFIDENTIAL].** *See* Exhibit PHR-32. This reflected the percentage of "total revenue minutes" to the total number of minutes ("revenue" and "cost") that MCI projected would be exchanged between the two companies, as shown in LAWYERS ONLY CONFIDENTIAL Exhibit DAC-17.

The general accuracy of those projections was subsequently borne out by the parties' actual experience in exchanging traffic under the contracts. In the second year of the agreement, MCI conducted an analysis using actual invoice data for five months in mid-2005. That study showed that MCI and AT&T were exchanging **[BEGIN LAWYERS ONLY CONFIDENTIAL]** XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXX **[END LAWYERS ONLY CONFIDENTIAL].** *See* LAWYERS ONLY CONFIDENTIAL Exhibit WRE-29B, page 7 of 9 (Bates No. 000426). Given the enormous traffic volumes involved, MCI's original projections about the relative balance of traffic proved to be reasonably accurate, particularly when normal fluctuations in demand and market conditions are taken into account. This shows that the level and balance of traffic was a reasonable assumption on which MCImetro could base a business decision to enter into the *2004 Contracts* as part of its Settlement

Agreement with AT&T.

Because the agreement between MCI and AT&T was informed by the parties' knowledge of historical traffic volumes and reasonable assumptions about future usage, it does not follow, as Mr. Easton implies, that any other company could have simply opted into an identical agreement regardless of its particular situation or business model. MCImetro certainly would have evaluated another entity's specific circumstances before determining whether it was rational and made good business sense to enter into a similar reciprocal agreement. As I have shown, QCC's CLEC business model was very different from AT&T's, and there was a vast disparity in the number of local customers and lines that MCImetro and QCC served in Florida. Under those circumstances, it would not have been reasonable for MCImetro to have entered into a "reciprocal" agreement with QCC. Such an arrangement would have been highly skewed, rather than closely balanced. Nor would it have provided MCI with any meaningful, mutual benefits that offset the reductions in access rates that would have been made available to QCC.

Q. DR. WEISMAN ARGUES THAT CLECs SHOULD BE REQUIRED TO CHARGE ALL IXCS A UNIFORM PRICE FOR SWITCHED ACCESS SERVICE. (Weisman Direct at 4:5-6). DO YOU AGREE?

A. No, I do not. In fact, his proposal is contrary to and ignores the approach taken in recent years by regulators at both the federal and state levels. These developments in the regulatory arena indicate that uniform pricing is not a presumed requirement, or that non-uniform pricing is, in principle, bad public

policy. For example, since the passage of the federal Telecommunications Act in 1996, incumbent and competitive local exchange carriers are permitted and have been encouraged to negotiate agreements for the provision of local interconnection services. State public utilities commissions are to approve such agreements unless they discriminate against carriers that are not parties to the agreement or are otherwise not in the public interest. 47 U.S.C. § 252(e). Thus, a difference in price from one interconnection agreement to another is not in and of itself a basis for rejecting an agreement or for finding that it violates the Communications Act. By establishing a regime of negotiated agreements, it appears that Congress contemplated that local exchange carriers would actually enter into contracts to provide such services under rates, terms and conditions that are not "uniform."

Similarly, when the FCC established price cap rules for CLECs' switched access services in 2001, it permitted CLECs to enter into contracts with IXCs to provide switched access service at rates different than those tariffed in accordance with the price cap rules. Accordingly, at the federal level, local exchange carriers are permitted to enter into agreements to provide certain services, including some that may be considered to have "bottleneck" or monopoly characteristics, at rates that are not "uniform." This reflects a growing understanding that negotiated arrangements for intercarrier compensation are a preferred and more efficient approach than relying on traditional regulatory mandates. Indeed, as Mr. Wood explains, the FCC's November 2011 intercarrier compensation reform order established a new framework that leaves carriers "free to enter into negotiated agreements that

allow for different terms." Wood Direct at 13.

Likewise, at the state level, while some commissions continue to require CLECs to file tariffs for switched access service, a growing number of states are moving away from strict adherence to "uniform" tariff rates. For example, in some states, such as Georgia, North Carolina, Washington and Oregon, CLECs are not even required to file tariffs or price lists for switched access service. In other states that maintain tariff or price list filing requirements, CLECs are permitted to enter into contracts with IXCs to provide switched access service at rates, terms and conditions that differ from the "uniform" prices otherwise set forth in tariffs. In addition to Florida, other states that take this approach include Kentucky, Tennessee and California. And some states (like Florida) that permit CLECs to enter into contracts for switched access service do not require the carriers to file their agreements with the regulatory agencies. The fact that a number of jurisdictions permit CLECs to enter into contracts to provide switched access service at rates that differ from those in the carriers' tariffs or price lists demonstrates that many policy makers do not share Dr. Weisman's view that a "uniform" pricing standard is required, and contradicts his suggestion that the policy he prefers has been adopted "as a general rule" for CLECs. *See* Weisman Direct at 3:12-14. Indeed, statutes or regulations that permit CLECs to enter into contracts to provide switched access service would be nonsensical if negotiated contractual terms could not differ in some respects from the carriers' standard tariff or price list offerings.

By permitting CLECs to enter into switched access contracts, Florida's policy makers presumably understood that negotiated contracts necessarily will

contain provisions that deviate from the carriers' price lists. If that were not the case, there obviously would be no reason to negotiate any agreement that deviates from one's price list. Thus, Dr. Weisman's recommendation that uniform pricing be required is inconsistent with the established law and policy of this Commission (and that of other state regulatory agencies), permitting CLECs to enter into individually negotiated contracts for switched access service.

IV. QCC IS NOT ENTITLED TO ANY RELIEF

Q. IS QWEST ENTITLED TO ANY RELIEF FROM MCIMETRO?

A. No. MCImetro did not unreasonably discriminate against QCC with respect to the January 2004 switched access agreement that it entered into with AT&T during the WorldCom bankruptcy proceeding. Accordingly, QCC is not entitled to any of the relief that it requests, as to MCImetro, in this proceeding. The *2004 Contracts* expired on January 27, 2007. Since that date, MCImetro has charged AT&T and QCC the rates for intrastate switched access in its Florida price list.

Q. MR. CANFIELD PURPORTS TO QUANTIFY THE FINANCIAL IMPACT ON QCC OF THE JANUARY 2004 SWITCHED ACCESS AGREEMENT BETWEEN MCIMETRO AND AT&T. IS HIS ANALYIS VALID?

A. No, it is not. Mr. Canfield purported to determine the "financial impact" of MCImetro's January 2004 agreement with AT&T in two different ways. Under his first approach, Mr. Canfield states that he multiplied the rate contained in

the January 2004 MCImetro-AT&T agreement by the amount of intrastate switched access minutes that MCImetro billed QCC to determine the amount QCC would have been billed if the contract rate had been applied. He then subtracted that amount from the amount that QCC was actually billed during the contract period to determine the purported "financial impact." Under his second approach, Mr. Canfield applied the "effective (or net) discount" amount that he calculated to the total amount of QCC's intrastate billings during the same period of time.

I will not address whether, as a legal matter, Qwest is entitled to "reparations," "refunds" or some other type of financial relief, such as damages. However, I will discuss several flaws with Mr. Canfield's analysis. Under his first approach, Mr. Canfield assumes that QCC should be entitled to be billed (retroactively) the rate contained in the *2004 Contracts.* As I have already explained, however, it is highly doubtful that MCImetro would have entered into an identical reciprocal contract with QCC -- or that QCC would have been willing or able to enter into an identical reciprocal agreement -- either in January 2004 or at any other time when that contract was in effect. Accordingly, there is no logical or factual justification for assuming that QCC might have been entitled to obtain the same rate, or for concluding that QCC's traffic should now be re-billed at the contract rate, many years after the fact. At all relevant times, QCC was charged the switched access rates in MCImetro's price list, and it never disputed the reasonableness or validity of those charges. There is no basis for retroactively enabling QCC to obtain the benefit of a different rate now.

Mr. Canfield's first calculation also contains two glaring omissions. By his own admission, his calculation of the alleged "financial impact" of the January 2004 agreement is completely one-sided, because it "[l]ook[s] only at the MCI (CLEC) agreement." Canfield Direct at 35:14. In doing so, Mr. Canfield failed to account at all for the reciprocal nature of the 2004 switched access agreements between MCI and AT&T. He ignored the fact that there were two reciprocal agreements, and failed to consider the potential financial implications of the required reciprocity. This is a significant failing because the two agreements were inextricably linked. Had Mr. Canfield conducted a more thorough analysis, he would have been required to consider the impact on QCC and all of its local exchange carrier affiliates if they had charged MCI's IXC affiliates the contract rate in Florida (and nationwide) during the life of the agreement. By failing to take into account the reciprocal nature of the agreements, Mr. Canfield provides an incomplete analysis and produces an inaccurate and biased result.

His second major omission was the failure to factor in the substantial up-front payment that AT&T made to MCI "in connection with" and as a condition for entering into the *2004 Contracts. See* footnote 17 above. That element of consideration was an essential term of the Settlement Agreement and thus must be considered in any assessment of the alleged "financial impact." Not only did Mr. Canfield fail to include the amount of this payment in his calculation, but QCC has not committed that it would be willing to make the identical payment to MCI as a condition for obtaining the benefits of the same agreement.

I have already explained that the alleged "discount" which forms the basis of Mr. Canfield's second, alternative calculation is a fiction manufactured by QCC's consultant for purposes of this litigation. There is no credible basis on which the Commission could utilize that figure as a basis for calculating an award, even in the unlikely event it should find that the *2004 Contracts* unreasonably discriminated against QCC. In addition, Mr. Canfield's calculation of a supposed "discount" fails to take into account the multi-million dollar up-front payment that AT&T made as a condition for entering into the switched access agreements. So, just as with respect to the first approach described above, the resulting calculation is inaccurate and biased upwards.

Accordingly, neither of the alternative methods by which Mr. Canfield calculated the alleged "financial impact" of the *2004 Contracts* is reasonable, complete or reliable, and neither provides a legitimate basis for granting any relief to QCC.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

HOLLAND&HART

Rebecca B. DeCook
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41092.0037

May 3, 2006

VIA ELECTRONIC AND REGULAR MAIL

Joan C. Peterson
Corporate Counsel
Qwest Corporation
200 South 5th Street, Room 2200
Minneapolis, Minnesota 55402

Re: Docket No. P-442/C-04-235

Dear Joan:

Enclosed are AT&T's Objections and Responses to Qwest's First Set of Information Requests in the above-captioned proceeding. As noted in the attached, AT&T is still in the process of identifying whether responsive information exists and compiling the information necessary to provide responses. In addition, several responses require the production of confidential customer information. I have no evidence that Qwest has executed an Exhibit A to the Protective Agreement entered in this case. If you have, please provide me with copies. Also, prior to production, AT&T will need to ensure that MCI consents to the production of their customer-specific information that you have requested.

Very truly yours,

Rebecca B. DeCook

Rebecca B. DeCook
for Holland & Hart LLP

RBD
Enclosures

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QWEST CORPORATION
INFORMATION REQUEST

PUC Docket No. P-et al./C-04-235

Information Requested By:	QWEST CORPORATION Joan C. Peterson (612) 672-8927
Information Requested From:	AT&T
Date Requested:	4-7-2006
Date Due:	4-19-2006

Request No. 1:

Please provide an unredacted copy of the agreement which the Department of Commerce has identified as the Second Unfiled Agreement.

Response:

See Attachment 1.

ATTACHMENT 1

DOCKET NO. 090538-TP

EXHIBIT PHR-26

PAGES 4 OF 11 THRU 10 OF 11

SWITCHED ACCESS SERVICE AGREEMENT BETWEEN

MCI AND AT&T

ENTIRE DOCUMENT IS CONFIDENTIAL

QWEST CORPORATION
INFORMATION REQUEST

PUC Docket No. P-et al./C-04-235

Information Requested By: QWEST CORPORATION
Joan C. Peterson
(612) 672-8927

Information Requested From: AT&T

Date Requested: 4-7-2006

Date Due: 4-19-2006

Request No. 3:

Identify and provide copies of all records and data documenting the usage of switched access affected by the Second Unfiled Agreement in every jurisdiction affected by the Second Unfiled Agreement as it has occurred since the date of the inception of the Second Unfiled Agreement.

Response:

AT&T objects to this request as overly broad and unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence and not relevant to the subject matter of this action. AT&T further objects to this request as vague and ambiguous in so far as it requests records or data "documenting the usage of switched access." AT&T finally objects to this request to the extent it seeks information that is beyond the scope of this Commission's jurisdiction and to the extent it seeks customer proprietary network information. Without waiver of these objections and subject to Qwest executing an Exhibit A to the Protective Agreement and MCI's consent to disclose its requested customer-specific information, AT&T will produce aggregate intrastate minutes of use MCI terminated with AT&T, the CLEC, and aggregate intrastate minutes of use AT&T, the CLEC, originated for MCI during the term of the Second Unfiled Agreement.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

Qwest Communications Corporation, a Delaware corporation,

Plaintiff,

v.

AT&T Inc., a Delaware corporation; AT&T Communications of the Midwest, Inc., an Iowa corporation; and TCG Minnesota, Inc., a Delaware corporation,

Defendants.

Case No.

COMPLAINT

For its complaint against Defendants, Plaintiff Qwest Communications Corporation ("Qwest") states the following:

Introduction and Overview

1. AT&T is a telecommunications carrier that has, since at least 1998, engaged in a broad-scale national effort to evade the legally-mandated intrastate switched-access tariffs filed in numerous states and thereby gain a significant illegal and unfair competitive advantage at the expense of Qwest, one of AT&T's competitors, among others.

2. Many states, including Minnesota, require telephone companies and telecommunications carriers to file and honor tariffs for intrastate access charges. A purpose of such legal requirements is to protect against price discrimination and unfair competition.

3. AT&T flouted state tariff requirements and coerced nascent competitive local exchange telephone companies ("CLECs") to provide off-tariff rates with various threats and

incentives, including withholding compensation from the CLECS for services provided to AT&T until the CLECs agreed to accept contracts for illegal and discriminatory intrastate switched-access rates and charges. AT&T used a non-negotiable form for these contracts that required the CLECs to keep the agreements confidential. With the exception of a small subset in Minnesota for which disclosure was forced by agency action, none of these agreements have been filed. Nor has the discrimination in favor of AT&T been justified.

4. The Minnesota Department of Commerce uncovered AT&T's conduct and initiated administrative proceedings against AT&T. The Minnesota Public Utilities Commission determined that AT&T had a duty as a long-distance telephone company (also known as an inter-exchange carrier or "IXC") to pay tariffed amounts for intrastate switched access. Those proceedings have caused AT&T to enter into a "Minnesota exception," under which AT&T has begun to pay tariff rates in Minnesota. However, AT&T's actions have not been fully remedied in Minnesota and its conduct continues unabated in other states. AT&T's scheme involves hundreds of agreements, many of which have multi-state applications and effects.

5. AT&T has violated state requirements directly; it has committed and participated in frauds and misrepresentations; it has conspired with other companies to procure and exploit violations; and it has aided and abetted the violations of other companies. AT&T continues to enforce and exploit these agreements in a large number of states in which they were and are unlawful.

6. AT&T's actions have caused and are causing harm to Qwest, one of AT&T's competitors, in the form of lost market share, lost profits and other consequential harm.

7. Qwest brings this action to seek declaratory relief, injunctive relief, damages, and other relief warranted by AT&T's illegal actions.

Parties

8. Qwest is a Delaware corporation with its principal place of business in Denver, Colorado. Qwest has participated and currently participates in the long distance market or markets at issue in this case and owns the claims at issue, either by virtue of its own dealings or as a result of mergers, assignments and other consolidations from predecessor or affiliate organizations. Qwest is authorized to do business in the State of Minnesota.

9. Defendant AT&T Inc. is a Delaware corporation with its headquarters in San Antonio, Texas. At the time that most of the contracts described herein were formed, AT&T Corp. was a New York corporation with headquarters in New Jersey, but on November 18, 2005, SBC Communications, Inc. merged with AT&T Corp. and changed its name to AT&T Inc. AT&T Inc. is the successor in interest, parent, or affiliate of all AT&T entities described herein. (The term "AT&T" in this Complaint will be used to refer to AT&T Inc. and its predecessors and affiliates and will be used to refer to AT&T's predecessors and affiliates, including the co-defendants, in their roles as CLECs or IXCs, as applicable.)

10. Defendant AT&T Communications of the Midwest, Inc. ("AT&T Midwest") is an Iowa corporation headquartered at One AT&T Way, Bedminster, NJ 07921. It is a wholly-owned subsidiary of AT&T.

11. Defendant TCG Minnesota, Inc. is a Delaware corporation with its principal place of business in New Jersey. It too is a wholly-owned subsidiary of AT&T.

Jurisdiction and Venue

12. Jurisdiction in this Court is proper pursuant to Minn. Stat. § 484.01.

13. Venue in this District is proper pursuant to Minn. Stat. § 542.09.

Factual Background

Role of Regulation and Competition in the Relevant Markets in the Telecommunications Industry

14. This lawsuit pertains to an important aspect of the telecommunications industry that may be virtually unnoticed by most consumers of long-distance phone calls but that has enormous economic implications for the CLECs and IXCs that connect and transport those calls.

15. "Local exchange carriers" ("LECs") provide local telephone service to customers ("subscribers"). LECs own and control most of the plant and facilities used to provide local telephone service in their geographic areas. By way of general illustration, in local telephone networks, the subscribers' wired telephones are connected to the network in the subscribers' local service areas by cable strung on telephone poles or buried underground. The cable connects each telephone subscriber to a local "central office" switch in the LEC's service area. A switch is a machine that receives telephone calls and "switches" (that is, connects) the calls to the next step along the path to the destination that the subscriber dialed. If the call is for a subscriber on another switch, the central office sends the call to another switch that routes the call on its way. Thus, the telephone network is in essence a series of switches connected to one another. (While technologies such as internet protocol networks are beginning to change the structure of local telephone systems, this description remains a generally accurate explanation of the network structure involved in this case.)

16. Local telephone networks: (1) complete local calls; and (2) originate and terminate long-distance calls. When a subscriber places a call to someone whom the subscriber's LEC also services, then that LEC originates and terminates the call. In some cases involving "local toll" traffic, if the call is outside the free local service area but not necessarily outside the territory of the LEC that originates the call (known as "local toll service"), the subscriber dials

"1" plus the phone number and the call goes to the subscriber's preselected IXC to carry the call from the originating LEC exchange to the terminating LEC exchange. When a subscriber dials a number outside the LEC's service area with "1+" dialing, the caller's LEC originates the call, but then routes it outside the local service area. If the call is long-distance, the LEC sends the call to the subscriber's preselected IXC.

17. Generally, IXCs may not maintain their own networks to the end user's location and in many cases it is economical for IXCs to rely, therefore, on access to the networks maintained by LECs when bringing long distance calls from the calling party (originating) or to the receiving party (terminating). When a subscriber places a long-distance call (or when the subscriber has chosen a company other than its LEC to provide its local toll service), the customer's IXC generally must access both the calling party's local network and the receiving party's local network to complete the call. LECs charge IXCs a fee for using their local networks to complete customers' long-distance or local toll calls. In other words, IXCs must pay the LECs' "access charges" to use the local networks on each end of the call. Local access on the calling party's end of the call is called "originating access," while access on the receiving party's end is "terminating access."

18. This lawsuit pertains specifically to the subset of long-distance phone calls that are handled on an intrastate basis—that is, phone calls that originate in one local telephone exchange, are carried by one or more IXCs, and are terminated in another local telephone exchange within the same state.

19. LECs may be incumbent local exchange carriers ("ILECs"), including the successors to the Bell Telephone Company, or they may be CLECs, which are companies that have come into existence after the enactment of the Telecommunications Act of 1996. This

lawsuit pertains to the intrastate switched-access charges for origination or termination with CLECs.

20. The larger IXCs during the period from approximately 1998 through the present have included AT&T, MCI, Sprint, and Qwest. Some IXCs, such as AT&T, have also acted as CLECs in some states or nationally.

21. Since a merger in 2000, Qwest has been affiliated with an ILEC known as Qwest Corporation ("QC"), that has provided local exchange services in 14 states, including Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. These 14 states are referred to herein as Qwest's "In-Region States." Qwest has provided retail and wholesale long-distance inter-exchange telephone service in states other than its In-Region States at all pertinent times since 1998. Qwest has provided retail long-distance inter-exchange service in its In-Region States prior to the merger in 2000, and, thereafter, only after receiving certain approvals from various state and federal agencies, the dates of which range from about December 2002 through December 2003.

22. The switched-access charges for calls made within the same state are intrastate switched-access charges and are subject to regulation, to the extent exercised, by the given state and its administrative agencies charged with regulation of intrastate telephone service. The switched-access charges for calls that cross state lines are interstate switched-access charges and are subject to regulation by the Federal Government and, specifically, by the Federal Communications Commission ("FCC"). This lawsuit pertains to intrastate calls and not to interstate calls.

23. Nearly all states, including Minnesota, subscribe to the filed rate doctrine as reflected in statutes, regulations, and case law. The filed rate doctrine, sometimes referred to as the filed tariff doctrine, generally requires that the specific filed rate, toll, charge or price for a service be published in a tariff and charged to customers until the rate, toll, charge, or price for the service is changed through a new tariff filing or through an order of the appropriate regulatory agency requiring a going-forward change to the tariff. Under the filed rate doctrine, parties providing or receiving a tariffed service, including many telephone or telecommunications services, are governed by the tariffed rate or price, and are not free to negotiate an off-tariff rate. Many states, including Minnesota, also have had or have policies requiring CLECs and other telephone companies or telecommunications carriers to provide services and prices without discrimination between or among customers.

24. Many states have required or currently require CLECs to keep on file with the appropriate public agency the specific rate, toll, charge, or price for intrastate switched-access services provided by CLECs and or mandate non-discrimination with respect to such charges. This lawsuit pertains to states that have required or require such filings for intrastate switched-access services provided by CLECs or that mandate non-discrimination with respect to such matters. For purposes of this Complaint, the states at issue, referred to herein as "Filed-Rate States," include the following:

- Alabama;
- Arizona;
- Arkansas;
- California;
- Colorado;

- Connecticut;
- Delaware;
- Florida;
- Georgia;
- Iowa;
- Kansas;
- Kentucky;
- Louisiana;
- Maryland;
- Massachusetts;
- Mississippi;
- Missouri;
- Minnesota;
- Nebraska;
- Nevada;
- New Jersey;
- New Mexico;
- New York;
- North Carolina;
- North Dakota;
- Oklahoma;
- Pennsylvania;
- Rhode Island;
- South Dakota;

- Tennessee;
- Texas;
- Vermont;
- Virginia;
- West Virginia; and
- Wyoming.

Qwest reserves the right to amend and supplement this listing of Filed-Rate States to bring into play other states that currently have similar requirements or that have had similar requirements at material times.

25. In Filed-Rate States, LECs charge tariff rates to the IXCs for use of their networks for the origination and termination of long-distance calls. Minutes of Use (MOU) provide a common measurement for the traffic that is routed through the LEC switches and a basis for common intrastate switched-access charges.

26. Since interstate switched-access charges are regulated by the FCC and intrastate switched-access charges are regulated, if at all, by the many Filed-Rate States, intrastate switched-access charges for CLECs can vary from state to state and can (and generally do) vary from the interstate rates. Moreover, intrastate switched-access charges for CLECs can (and generally do) vary from those charged by ILECs. Intrastate switched-access charges are often higher than interstate switched-access charges.

27. There has been and remains fierce competition among IXCs for inter-exchange telephone traffic both for intrastate and interstate calls at both retail and wholesale levels. IXCs want to control and minimize variable costs, and switched-access charges represent a large share of those costs. In Filed-Rate States, however, intrastate switched-access charges are governed by

tariffed prices. Accordingly, fair competition as between and among IXCs for intrastate long-distance telephone calls is to be pursued in relation to prices of other service inputs, quality of service, and other factors besides the intrastate switched-access charges.

28. The long distance market includes the retail market, in which services are sold directly to end-user customers, and the wholesale market, which involves resale or transport and termination services for another IXC's traffic. Both the retail long distance market and the wholesale long distance market are and have been competitive markets during the times relevant to this lawsuit. At the same time, IXCs have also routinely entered into transactions with other IXCs in the wholesale market for resale and transport and termination services. The expectation and express or implied representation and obligation for such wholesale services is that the terminating IXC will terminate the call lawfully and will assume and satisfy all associated obligations to pay the tariffed charges in Filed-Rate States for intrastate switched-access.

29. Access charges are one of the largest costs of doing business for Qwest, AT&T, MCI, and Sprint, as well as other long-distance companies.

30. Revenues from IXCs for intrastate switched-access charges and interstate switched-access charges represent a large share of the income expected by CLECs for their local exchange services.

AT&T's Self-Help and Off-Tariff Deals

31. AT&T decided in 1998 to adopt a national policy under which it would refuse to pay for CLEC access services in exchanges where the ILEC access charges were lower than those of the CLEC. AT&T pursued its national policy without regard to the unlawful results of its policy in Filed-Rate States.

32. AT&T obtained enormous financial leverage over the CLECs through its unilateral decision to withhold payment of the tariffed access charges. This created a financial squeeze on CLECs that effectively eliminated meaningful opportunities for negotiation, and put the CLECs at the mercy of AT&T's demands.

33. AT&T has publicly admitted its self-help measures and has attempted to justify those measures by complaining that the public policy-makers have failed to mandate reforms, failed to do so with sufficient speed, or failed to mandate adequate reforms. Rather than abide by decisions of the regulators of Filed-Rate States, AT&T instead elected to engage in self-help to pay less than state law required it to pay, and carried out its wishes in a deceptive, intentional and knowing manner.

34. AT&T conceived, undertook, and implemented its self-help measures without regard for the law as it existed and currently exists. As set forth below, AT&T reached a bilateral deal with MCI for untariffed prices between their respective IXC and CLEC operations as early as 1998, imposed its self-help deals on other CLECs as early as 2000, and the deals have continued apace since then.

35. Over the years, AT&T used the financial leverage gained through its size, and the volume of its intrastate calls originated or terminated with CLECs, to refuse to pay CLECs for access services at lawful tariffed rates and to induce, coerce, or persuade the CLECs to enter into agreements for the purpose of avoiding lawful tariffed access charges. In the words of one of the CLECs pressured by AT&T's self-help measures:

> AT&T asserts that CLECs "voluntarily" agreed to these contracts. This is the equivalent of Stalin saying that Poland voluntarily agreed to occupation by the Soviet Union. The fact is that AT&T refused to pay <u>any</u> access charges unless and until an agreement was signed. AT&T not only refused to pay the tariffed rate, it refused to pay anything, even the rate that it claimed was reasonable, until the CLEC signed the agreement. This denied the CLECs millions of dollars at a

> time that they were struggling to merely survive. Thus the agreements were hardly "voluntary" on the part of the CLECs.

Eschelon's Reply to AT&T's Response to Department Exhibit, p. 3, *In the Matter of Negotiated Contracts for the Provision of Switched-access Services*, Minnesota Public Utilities Commission ("PUC"), Docket No. P442, etc./C-04-235, May 23, 2005. In the words of another group of CLECs:

> AT&T misleadingly suggests that the CLECs "voluntarily" agreed to these contracts in exchange for not having to defend their excessive tariff rates in complaint proceedings. More accurately, the CLECs entered into these contracts because AT&T was refusing to pay any of the multiple millions of dollars in access charges that the CLECs had properly billed at tariffed rates for services already received. The CLECs had to enter into these contracts to receive even a portion of these very large past due payments.

Reply of Focal Communications, Inc., Integra Telecom of Minnesota, Inc., KMC Telecom, Inc. McLeodUSA, Inc., and XO Communications, Inc. to AT&T's Comments on Department's Exhibit, PUC Docket No. P442, etc./C-04-235, May 23, 2005. In the same vein, the CLEC McLeodUSA provided the proper characterization of the conduct of AT&T and MCI in *Reply Comments of McLeodUSA, Inc.*, PUC Docket No. P442, etc./C-04-235, September 9, 2004:

> AT&T was usurping the Minnesota Public Utilities Commission's authority to determine the reasonableness of switched-access rates. Rather than address the reasonableness of CLEC access rates in proper proceedings, AT&T flexed its considerable market power in a policy of "self help" and extracted from CLECs the access rates it wanted. . . . MCI did the same. . . . The market power disparity between the IXCs and CLECs is apparent in the striking similarity between all of the agreements in which all the key terms were dictated by the IXCs.

36. For the Filed-Rate States, AT&T unilaterally decided to engage in self-help through confidential, coerced deals that afforded discriminatory pricing in its favor rather than to obtain lawful revisions to tariffs in compliance with applicable law.

37. AT&T's conduct caused disadvantage and harm not only to the CLECs, but also to AT&T's competitors and to the public. One of the affected CLECs explained the public harm:

> IXCs had already billed their customers for the long distance services that the IXCs were able to provide by virtue of the access services provided by McLeodUSA and other CLECs. Yet, when an IXC used its market power (in the form of withholding very large sums of money that CLECs desperately needed to fund their day-to-day operations) to extract reduced access rates, IXCs did not pass the benefits they reaped to their customers in the form of refunds. Instead, this money simply went to improve the bottom line profits of the IXCs [who had thereby avoided the tariffed access rates].

Reply Comments of McLeodUSA, September 9, 2004, in *In the Matter of Negotiated Contracts for the Provision of Switched-access Services,* C-04-235.

38. In a document dated August 18, 2004, AT&T admitted to the PUC that its agreements all follow the same basic form, stating:

> In the past four years or so, AT&T has entered into hundreds of agreements based on the same form with CLEC providers of switched-access services throughout the United States.

AT&T Comments, Motion to Dismiss and Motion for Summary Judgment, August 18, 2004, in *In the Matter of Negotiated Contracts for the Provision of Switched-access Services,* C-04-235. On information and belief, AT&T has continued to enter into additional and similar agreements since August 2004, continues to rely upon those agreements at the present time, and plans to continue to do so for the foreseeable future, barring specific rulings to the contrary.

39. Illustrative Settlement and Switched-Access Service Agreements, which have become known to Qwest by virtue of disclosures obtained by the Minnesota Department of Commerce ("DOC"), include:

a. Agreement with MCI on July 23, 1998;

b. Agreement with Eschelon Telecom, Inc. on May 1, 2000;

c. Agreement with Time Warner on January 1, 2001;

d. Agreement with Integra on July 1, 2001;

e. Agreement with McLeod on July 1, 2001;

f. Agreement with XO Communications on July 1, 2001;

g. Agreement with Focal Communications Corporation of Minnesota on December 25, 2001;

h. Agreement with NorthStar on September 11, 2002;

i. Agreement with Granite on April 1, 2003;

j. Agreement with New Access, Stonebridge, Choicetel, Emergent on May 1, 2003;

k. Agreement with Digital on July 31, 2003;

l. Agreement with Desktop Media on August 15, 2003;

m. Agreement with Mainstreet on September 4, 2003;

n. Agreement with OrbitCom, Inc. on January 1, 2004;

o. Agreement with VAL-ED on February 16, 2004;

p. Agreement with Time Warner on February 20, 2004, superseding prior Agreement; and

q. Agreement with Tekstar on April 5, 2004.

40. The following provisions are generally found in all or the vast majority of these "Settlement and Switched-Access Service Agreements":

a. The agreements were entered into by and between AT&T Corp. on behalf of itself and each of its subsidiaries, all collectively referred to as "AT&T," and any given CLEC.

b. Part A of the agreements documented a payment by AT&T of a "Settlement Amount," representing, on information and belief, a substantially discounted payment for switched-access services provided to AT&T by the CLEC prior to the date of the agreement.

c. The agreements provided for a resolution of the so-called "Dispute," which AT&T had created by withholding the payments unlawfully withheld from CLECs in need of cash, providing a release in favor of AT&T (to protect the discount it had extracted) as of the "Effective Date," for all claims in any court or agency.

d. The agreements provided for a contract period in Part B.1 governing prices relating to "Switched-access Services," although the contract periods varied from CLEC to CLEC.

e. The agreements pertained to Switched-access Services throughout the nation or at least the entire area served by any particular CLEC.

f. The agreements provided for "Pricing Principles" in Part B.6, which usually referred to a Schedule A, to govern the charges for intrastate switched-access service as between AT&T and the given CLEC. The agreements did not provide for or authorize the CLEC to make filings of the agreements or otherwise comply with filing requirements for the Filed-Rate States.

g. Schedule A provided for the same charges to be used in all states served by the CLEC, and only in a few instances did Schedule A include exceptions for particular states.

h. The agreements contained provisions that made the agreements and the terms of the agreements, both in their literal wording and their practical effect, confidential.

i. The agreements used by AT&T have remained essentially the same over the several years that AT&T has been employing self-help measures, without changes

prompted by various decisions that were adverse to AT&T's practices and that put AT&T on notice of its violations of the laws in the Filed-Rate States.

41. The settlement amounts AT&T paid to any particular CLEC for intrastate switched-access charges constituted only partial payments for the tariffed rates for those services that had been used for long-distance calls prior to the dates of the settlements.

42. Not only did AT&T achieve significant savings through its off-tariff prices for services predating the agreements, AT&T also achieved significant savings with the prospective, unique, off-tariff rates it achieved through each deal.

43. Since off-tariff savings were and are not lawful in the Filed-Rate States, AT&T's gains are unlawful. The specific amounts of these unlawful gains are not yet known to Qwest.

44. As explained below, AT&T eventually agreed to abide by tariffed rates for intrastate switched access in Minnesota. However, AT&T continues to enjoy the benefits of its untariffed rate agreements for Filed-Rate States other than Minnesota, and continues to threaten CLECs with economic hardship, sanctions, claims for breach of contract, and other disincentives against complying with their tariffed rates for AT&T's use of their intrastate switched-access services in any state other than Minnesota.

45. Even in Minnesota, and except for a repayment to MCI, AT&T has not repaid to CLECs the amount of illegal rate relief it achieved through its deals with any CLEC for any services received prior to the date on which the DOC filed a complaint against AT&T and various CLECs. Rather, AT&T has agreed merely to honor specific tariffs in Minnesota on a going-forward basis.

Bi-Lateral Off-Tariff Deals Between AT&T and MCI

46. AT&T and MCI entered into a National Services Agreement (as amended) between Metro Access Transmission Services, Inc. and AT&T Communications, Inc., dated November 1, 1996, and a Switched-Access Services Agreement (as amended) between AT&T Corp. and MCI WorldCom Network Services, Inc., dated July 23, 1998. One or both of these agreements served as private contractual arrangements between these two competitors governing the respective amounts which AT&T's CLEC charged to MCI's IXC and which MCI's CLEC charged to AT&T's IXC.

47. On or about February 25, 2004, AT&T and MCI entered into a settlement to resolve, among other things, a complaint that AT&T had filed against MCI in the United States District Court, Eastern District of Virginia, in September, 2003. In addition to the settlement of the lawsuit, the parties also resolved a dispute about access charges, confirming that the access charges would be paid at contract rates, rather than tariff rates, for the period in question prior to the settlement. In addition, AT&T and MCI entered into reciprocal switched-access service agreements with two-year terms in a format consistent with the same format AT&T used with other CLEC deals. Under these reciprocal agreements, AT&T's CLEC agreed to charge MCI's IXC an off-tariff rate for all calls, including intrastate switched-access calls. And, MCI's CLEC agreed to charge AT&T's IXC the same off-tariff rate for the same classes of calls. During this time, AT&T maintained a filed tariff for its own switched-access for services for terminating calls at a rate that is higher than the rate it granted solely to MCI in the reciprocal deal.

48. The rates charged by AT&T's CLEC and MCI's CLEC deviated below their tariffed rates for intrastate switched-access service in Filed-Rate States.

49. Neither AT&T nor MCI complied with applicable filing and non-discrimination requirements for tariffed rates with respect to any of their reciprocal agreements as required under laws and regulations in the Filed-Rate States.

50. In reference to the reciprocal agreements between AT&T and MCI, Gregory J. Doyle, a Manager for the DOC, stated: "AT&T . . . engaged in self-help which resulted in discrimination and a thumbing of its nose at legal requirements." Doyle Rebuttal Testimony filed in *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched-access Contracts,* October 6, 2006 ("Doyle Rebuttal"), p. 18.

AT&T's Deceptions Concerning Tariffed Rates

51. Beginning in about 2001 and from time to time thereafter, AT&T filed its own tariffs in various states, including, without limitation, Arkansas, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey and New York, for the purpose of collecting a monthly "In-State Connection Fee" ("ISCF") from residential customers of approximately $1.95.

52. AT&T specifically or implicitly represented to regulators, the public and other parties in each of these states that it needed the ISCF in order to cover the difference between the rates for tariffed access charges for intrastate long-distance calls as compared with the rates for tariffed access charges for interstate long-distance calls.

53. AT&T concealed or failed to reveal to regulators, the public and other parties that AT&T was at that same time refusing to pay the tariffed intrastate switched-access rates to CLECs and demanding and obtaining off-tariff intrastate switched-access rates from CLECs far lower than the tariffed intrastate switched-access charges.

54. AT&T profited by collecting the ISCF from its residential customers at the same time as it was refusing to pay and avoiding payment of the tariffed intrastate switched-access charges upon which the ISCF was ostensibly predicated.

Tolling of Claims

55. The existence, terms, and conditions of the off-tariff agreements were not known to Qwest until recently and even now Qwest has only limited information about these off-tariff agreements.

56. AT&T required pre-negotiation confidentiality agreements as a condition of negotiations with a large number of CLECs.

57. Nearly all of the agreements AT&T imposed upon CLECs contained provisions that made the agreements confidential.

58. The DOC obtained information about a small number of off-tariff agreements, which led the DOC to file an administrative complaint with the PUC on June 15, 2004, against AT&T, MCI, and a number of other CLECs and IXCs. However, at that time, while the DOC's complaint described some information about the unfiled, off-tariff agreements between AT&T and the other parties, the agreements and their material terms were described and provided with most of the pertinent information redacted and unavailable to Qwest or the public. As explained by Mr. Doyle: "[T]his case was initiated in early 2004, and for two years, AT&T and the other parties to the agreements continued to abide by the veil of secrecy. Doyle Rebuttal, p. 3. Eventually, all of the CLECs and IXCs agreed to abide by tariffed rates in Minnesota going forward, and the DOC's complaint was dismissed against all parties, except against AT&T for its conduct as a CLEC with respect to the bi-lateral deal with MCI. The majority of AT&T's off-tariff intrastate switched-access pricing agreements, except for a small subset of those

agreements that formed the basis of certain administrative proceedings in Minnesota, have not yet been made public.

59. On December 30, 2005, the DOC filed an additional complaint with the PUC against AT&T and a number of other CLECs. The DOC had only recently become aware of those additional agreements between AT&T and those CLECs. Again, while the DOC's complaint described some information about the unfiled agreements between AT&T and the other parties, the agreements and their material terms were described and provided with most of the pertinent information redacted and unavailable to Qwest or the public.

60. As a result of AT&T's representation to the PUC in April 2006, Qwest has finally been permitted to receive and review a handful of AT&T's secret agreements with CLECs, including the discriminatory pricing rates that AT&T was able to extract from CLECs through its predatory practices. Qwest had no access to these agreements until after April 2006.

61. Even now, the only subset of agreements that has been made available to Qwest is the handful of agreements that have been revealed in Minnesota. The other similar agreements and pricing arrangements AT&T extracted from other CLECs, including a large number of those entered into applicable to Minnesota and including all of those affecting only other states, still have not been filed or made available to Qwest. Accordingly, while the veil of secrecy has been lifted enough to glimpse a small fraction of AT&T's conduct, AT&T continues to profit by its illegal actions in Filed-Rate States across the nation.

Regulators Reject AT&T's Assertions of Right to Evade Tariffed Rates

62. The Iowa Supreme Court confirmed that AT&T was obligated to comply with tariffed switched-access rates in *AT&T Commc'ns of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554 (Iowa 2004). The court affirmed an Iowa Utilities Board ruling that AT&T was

Notice and Order for Hearing on February 8, 2006, in *In the Matter of the Complaint of PrairieWave Telecommunications, Inc. Against AT&T Communications of the Midwest*, PUC Docket No. P-442/C-05-1842. In that Order, the PUC explicitly ruled:

> The Commission finds that AT&T is obligated to pay PrairieWave's tariffed access rates and that it has failed to do so. The Commission rejects AT&T's contention that it was authorized to withhold payment on the basis of its belief that the tariffed rates were excessive, unjust, unreasonable, and therefore illegal.

Order, at p. 2. The matter had come before the PUC on the complaint of PrairieWave that AT&T Midwest was refusing to pay PrairieWave's tariffed rates for intrastate switched-access services. AT&T Midwest admitted that it had not paid monthly invoices submitted by PrairieWave, but asserted in a counterclaim that the tariffed rates were unjust, unreasonable, discriminatory, anti-competitive, and therefore illegal. The DOC urged the PUC to resolve PrairieWave's complaint on legal and policy issues and to refer the counterclaim for an evidentiary hearing. At a hearing before the PUC on January 12, 2006, the PUC rejected AT&T's contention that it was allowed to withhold payment on the grounds that AT&T deemed the rates excessive. The PUC provided a detailed explanation in support of its decision that "AT&T was and is obligated to pay tariffed access rates," Order, at p. 2, starting with the invocation of the filed rate doctrine, embracing the following definition:

> **Filed rate doctrine.** Doctrine which forbids a regulated entity from charging for its services other than those properly filed with the appropriate federal regulatory authority.

Order, at p. 2. The PUC went on to explain:

> Although state and federal policy initiatives promoting competition in the local telecommunications market now give carriers unprecedented flexibility in pricing their services, the filed rate doctrine remains intact. No matter how flexible pricing decisions may become, prices and rates must be filed with the Commission and charged uniformly throughout carriers' service areas, including prices and rates subject to adjustment in response to unique cost, geographic, or market factors or unique customer characteristics.

> PrairieWave therefore lacked the right to accede to AT&T's request to retroactively adjust its access rates, and AT&T lacked the right to pay any rate other than the tariffed rate.
>
> Further, AT&T had a duty to promptly pay all access charges incurred. Both the seamless telecommunications network on which the public depends and the competitive telecommunications marketplace that state and federal policymakers seek, require the prompt satisfaction of inter-carrier financial obligations.

Order, at p. 3 (citations omitted).

64. As noted above, in another proceeding, the Minnesota DOC initiated a complaint against AT&T and others in June 2004. That administrative proceeding was given the Docket Number P-442 et seq./C-04-235. Eventually, the parties to that proceeding agreed to abide by filed tariffs on a prospective basis, except that AT&T did not reach an agreement with the DOC concerning its conduct as a CLEC with respect to the bi-lateral deals with MCI. The Minnesota PUC referred that complaint to the Office of Administrative Hearings ("OAH") for an evidentiary proceeding.

65. In the ensuing contested case proceeding concerning AT&T's conduct as a CLEC, on June 26, 2006, in a Recommendation on Motion for Summary Disposition, Administrative Law Judge Steve M. Mihalchick recommended that the Commission should find, among other violations, that "AT&T knowingly and intentionally violated applicable provisions of Minn. Stat. Ch. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237," and

> That AT&T engaged in discrimination by knowingly or willfully charging, demanding, collecting, and receiving the untariffed rates for intrastate-switched-access service under the terms of its unfiled Agreement with MCI, while offering, charging, demanding, collecting, or receiving tariffed rates for intrastate-switched-access service with regard to other IXCs under similar circumstances, in violation of Minn. Stat. § 237.09, subd. 1.

Recommendation, pp. 1-2. In explaining these recommendations, Judge Mihalchick explained that AT&T is required to file its tariff or price list for each service and noted that AT&T entered into two unfiled Agreements with MCI but did not file the terms as a unique price list or tariff term. "Instead, AT&T filed and maintained a separate tariff under which AT&T provided less favorable terms to other carriers *that did not reach* a unique agreement with AT&T." Recommendation, p. 9. The Administrative Law Judge continued:

> [B]y offering unique pricing to MCI that it did not file as a tariff, AT&T engaged in unreasonable discrimination .... CLECs, like AT&T [are permitted] to offer telecommunications service within the State only if the rates are uniform and the terms and rates are not "unreasonably discriminatory." . . . [A] CLEC's abililty to reasonably discriminate with respect to its rates and terms is limited to ... specific exceptions; anything else, is unreasonable discrimination. Moreover, ... a CLEC may only qualify for one of these exceptions if it first files its unique price offering with the Commission ....

Recommendation, pp. 12-13. The Administrative Law Judge concluded that AT&T's purposeful election to enter into an agreement with MCI—in which AT&T charged MCI less for intrastate switched-access than it charged other carriers and provided intrastate switched-access service to MCI on a unique separate basis, not pursuant to tariff under which the service was offered to all similarly situated carriers—was "illegal conduct" in which "AT&T purposefully engaged . . . [and] its actions were knowing and intentional." Recommendation, p. 14.

66. As noted earlier, the DOC initiated another complaint against AT&T and other parties in Docket No. P442/C-05-1282, filed December 30, 2005. This matter was resolved by stipulations confirming that the parties would honor filed tariffs on a prospective basis in April 2006.

67. Also, the DOC initiated another complaint against AT&T's subsidiary TCG in Docket No. P442/C-05-1282, filed June 7, 2006. On October 12, 2006, the PUC referred this complaint to the OAH for contested case proceedings.

Defendants' Ongoing Off-Tariff Deals in Filed-Rate States outside Minnesota

68. Although AT&T has agreed to abide by tariffed rates for intrastate switched-access service in Minnesota for agreements discovered and specifically challenged by the DOC, AT&T has not agreed to abide by tariffed rates for intrastate switched-access service for any other Filed-Rate States, and AT&T continues to enjoy the illegal fruits of off-tariff intrastate switched-access pricing agreements in all or at least most other Filed-Rate States.

69. AT&T continues to pursue tactics based upon the leverage afforded by the volume of its interexchange traffic rather than lawful compliance with filed tariffs. For example, on information and belief, while AT&T has begun to pay PrairieWave for its intrastate switched-access services at tariffed rates, AT&T has simultaneously determined to withhold other payments for which it is legally obligated. Thus, AT&T is honoring only the form of compliance with the PUC order while effectively flaunting requirements by transferring its withholding to other categories so that PrairieWave is given no net benefit by AT&T's ostensible compliance.

70. On information and belief, Defendants continue to pursue and enforce even the agreements with specific CLECs that operate in Minnesota, after those agreements have plainly been exposed as illegal contracts in Minnesota, so that even though it may be paying tariffed rates in Minnesota, it continues to pay the agreement rates for those same CLECs in all other jurisdictions, including other Filed-Rate States.

71. Defendants have no legitimate justification to use, enforce, or threaten to enforce their illegal off-tariff intrastate switched-access pricing contracts in Filed-Rate States.

72. Defendants' activities, and the activities of those with whom Defendants are in privity, violate statutes or cause violations of statutes in the Filed-Rate States, including but not limited to the following:

a. Alabama: The laws that those activities violated include Ala. Code § 37-2-10.

b. Arizona: The laws that those activities violated include Ariz. Rev. Stat. Ann. § 40-365, Ariz. Admin. Code §§ R14-2-1115 and R14-2-510, and Ariz. Rev. Stat. Ann. § 40-334.

c. Arkansas: The laws that those activities violated include Ark. Code Ann. §§ 23-4-88-107, 23-4-105, 23-4-106, and 23-3-114(a).

d. California: The laws that those activities violated include Cal. Pub. Util. Code §§ 489 (and General Order 96A adopted pursuant thereto), 556, and 558.

e. Colorado: The laws that those activities violated include Colo. Rev. Stat. §§ 40-15-105 and 40-3-101.

f. Connecticut: The laws that those activities violated include Conn. Stat. Ann §§ 42-110b, 16-247f, and16-247b.

g. Delaware: The laws that those activities violated include Del. Code Ann. tit. 26, § 304, Del. Code Regs §§ 10-800-020-3.5, 10-800-050-48.1, 10-800-050-5.2.1, and Del. Code Regs § 10-800-050-6 and Del. Code Ann. tit. 26, § 303.

h. Florida: The laws that those activities violated include, but are not limited to, Fla. Stat. §§ 501.204, 364.04, 364.08, and 364.09.

i. Georgia: The laws that those activities violated include Ga. Code Ann. §§ 46-2-25, 46-5-164, and 46-5-166.

j. Iowa: The laws that those activities violated include Iowa Code §§ 476.4 and 476.101.

k. Kansas: The laws that those activities violated include Kan. Stat. Ann. §§ 66-109, 66-1,190, 66-1,189, and 66-154a.

l. Kentucky: The laws that those activities violated include Ky. Rev. Stat. Ann. § 278.160.

m. Louisiana: The laws that those activities violated include La. Competition Reg. § 401(A).

n. Maryland: The laws that those activities violated include Md. Code Ann., Pub. Util. Cos. § 4-202.

o. Massachusetts: The laws that those activities violated include Mass. Gen. Laws 93A § 2, 159 § 19 and 116 § 14, and orders entered pursuant thereto.

p. Minnesota: The laws that those activities violated include Minn. Stat. §§ 325F.67, 325F.69, 237.07, 237.035, 237.74, 237.09, 237.60, and Minn. R. 7811.2210.

q. Mississippi: The laws that those activities violated include Miss. Code Ann. § 77-3-35.

r. Missouri: The laws that those activities violated include Mo. Stat. §§ 392.220, Mo. Code Regs tit. 4 § 240- 3.545, and Mo. Stat. § 392.200.

s. Nebraska: The laws that those activities violated include Neb. Rev. Stat. Ann. § 86-143.

t. Nevada: The laws that those activities violated include Nev. Rev. Stat. Ann. §§ 598.969, 598.0923, and 704.061 through 704.0130.

u. New Jersey: The laws that those activities violated include N.J. Stat. Ann. § 56:8-2, N.J. Admin. Code §§ 14:1-4, 14:10-5.3 through 14:10 10-5.11, and 48:3-1.

v. New Mexico: The laws that those activities violated include N.M. Stat. §§ 57-12-2, 57-12-3, and 63-9A-8.1.

w. New York: The laws that those activities violated include N.Y. Pub. Serv. L. §§ 92, N.Y. Comp. Codes R & Regs tit. 16 § 720-1.3, and N.Y. Pub. Serv. Law § 91.

x. North Carolina: The laws that those activities violated include N.C. Gen. Stat. §§ 62-133.5 and 62-134.

y. North Dakota: The laws that those activities violated include N.D. Cent. Code §§ 51.15-02, 49-05-05, 49-21-04, 49-04-07, 49-21-07, and 49-21-10.

z. Oklahoma: The laws that those activities violated include Okla. Stat. §§ 165:55-5-1 and 165:55-5-2.

aa. Pennsylvania: The laws that those activities violated include 66 Pa. Cons. Stat. Ann. §§ 1302, 1303 and 1304.

bb. Rhode Island: The laws that those activities violated include R.I. Gen. Laws §§ 39-3-10, 39-3-11, 39-2-2, 39-2-3, and 39-2-4.

cc. South Dakota: The laws that those activities violated include S.D. Stat. §§ 37-24-6, 49-31-12.2 49-31-19, 49-31-4, 49-31-4.2, and 49-31-11, and S.D. Admin. R. 20:10:27:06 and 20:10:27:17.

dd. Tennessee: The laws that those activities violated include Tenn. Code Ann. § 65-5-102 and Tenn. Comp. R. & Regs. 1220-4-1-.03 to .04.

ee. Texas: The laws that those activities violated include Tex. Util. Code § 52.251 and Tex. PUC Subst. R. 26.89(a)(3).

ff. Vermont: The laws that those activities violated include Vt. Stat. Ann. § 225.

gg. Virginia: The laws that those activities violated include Va. Code Ann. §§ 56-479.2(b), 56-236, 56-237, and 56-234.

hh. West Virginia: The laws that those activities violated include W. Va. Code §§ 24-3-1, 24-3-2, and 24-3-5, W. Va. Code R. §§ 150-2-2, 150-2-7, 150-2-16, 150-2-28, 150-6-9, and 150-6-15.

ii. Wyoming: The laws that those activities violated include Wyo. Stat. Ann. §§ 37-15-204, 37-15-404, and 37-15-404.

Effects of Defendants' Off-Tariff Deals

73. Qwest brings this action to obtain relief for harm that cannot be remedied in any other forum. Qwest has incurred loss of market share in the wholesale market for intrastate inter-exchange telephone service as a direct result of AT&T's practices since 1998. There is no adequate remedy for such damages to be had in the administrative agencies in the Filed-Rate States.

74. AT&T gained competitive advantages by exploiting evasion and secrecy in states that depended upon the filed rates for uniformity and even-handed, non-discriminatory treatment of competitors. In other words, IXCs like Qwest, which complied with the lawful requirements to pay the tariffed rates for intrastate switched access, were put at a disadvantage in the face of AT&T's conspiracy to deceive regulators, CLECs, the public, and competitors.

75. Defendants have no right to create wealth for themselves by exploiting a regulatory regime with illegal practices inuring to the exclusive benefit of Defendants. In the words of Mr. Doyle:

> AT&T, like other businesses, has an incentive to maximize shareholder wealth. This is generally healthy for the marketplace. However, that does not mean that a company can choose to create wealth by violating the law if it is unlikely that it will be caught, and even if caught, any penalty is unlikely to be as great as the benefit received.

Doyle Rebuttal, p. 4.

76. Defendants have no right to profit by their illegal conduct in Minnesota or in any other state that employs a comparable tariff filing requirement for switched-access services offered by CLECs. In the words of Mr. Doyle:

> There is value to regulatory certainty in the marketplace and regulatory certainty is created when all competitors are confident that, if they operate in compliance with the law, they will be operating on a level playing field and will not be disadvantaged by their honesty. AT&T's discriminatory tactics, if anything, created financial hardship on those companies that did not have the economic advantage of an illegal contract, and would create a disincentive for such companies to invest.

Doyle Rebuttal, p. 19.

77. Defendants' conduct has enabled them to gain unfair and illegal advantage at the expense of their competitors. In the words of Mr. Doyle:

> [N]ot all IXCs engaged in such contracts. Thus, only the very few IXCs that also obtained contracts with the same beneficial terms could compete effectively with each other. IXCs without contracts are clearly harmed. IXCs with fewer contracts are also harmed. If competition suffers, consumer benefits achieved through competition will also suffer. Only through non-discrimination by application of the tariffed rates for access services are IXCs effectively competing with one another.

Doyle Rebuttal, p. 20.

78. Defendants have harmed consumers by achieving their desired rate reductions through their illegal self-help measures rather than through appropriate regulatory channels. The IXC market is highly competitive and, as costs decline, prices for consumers tend to decline as well. However, because the Defendants secured secret cost reductions, market forces operated differently for those IXCs like Qwest whose costs were kept higher as they complied with filed rates. Mr. Doyle provided an additional perspective:

> In the P421/C-90-1184 and P999/C-93-90 dockets, AT&T was required to pass through the access charge savings to consumers through lower toll rates. Interexchange carriers would prefer that there be no regulatory requirement to reduce their toll rates if access rates are reduced. However, a pass-through was agreed to in the course of negotiations to reach a settlement in these previous cases. Thus, access charge reductions reached through the regulatory process, if a pass through of cost savings is required, does not have the same financial benefit to AT&T as access charge reductions achieved, as AT&T has done, through the unfiled agreements.

Doyle Testimony, *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched-Access Services,* July 28, 2006. In fact, AT&T's actions actually compounded the illegal consequences insofar as AT&T obtained authority to impose the ISCF upon its customers by representing that it was paying tariffed rates that it was in fact not paying.

79. AT&T was able to exploit the benefits of their bilateral off-tariff agreements. They were in a position to hoard the gains made possible by their mutual deception, because competitors in the marketplace, including Qwest, were driven to higher prices by incurring the full costs required by following the filed tariffs. Thus, since AT&T engaged in a conspiracy of self-help, it deprived the public consumers of the true benefit of open and fair competition.

80. Not only was the public harmed by the bilateral off-tariff agreements of AT&T, but so also were competitors such as Qwest that paid tariffed rates to AT&T and to other CLECs with whom AT&T had secret deals. In the words of Mr. Doyle:

> [T]here are a significant number of competitors in the interexchange market. In a competitive market, price moves toward cost and no individual company has the ability to establish the market price. . . . If a competitor is able to achieve a cost advantage that is not achievable by others, profit margins (if any) will be squeezed .... Obtaining a cost advantage from a self-help scheme can significantly harm competitors and reduce the benefits that legitimate competition brings to consumers.

Doyle Testimony, p. 21. Mr. Doyle also explained:

> [C]ompanies can compete on non-price factors, such as quality of service. The issue of discrimination resulting from the contract should legitimately consider cost and non-cost factors. Even though AT&T and MCI may not have changed prices during the term of the contract[s], to the extent the margin between price and cost increased, the contract created a competitive advantage. To the extent the company [such as AT&T and MCI] could afford to improve service quality since access costs were reduced, the contract created a competitive advantage.

Doyle Rebuttal, p. 21. Further,

> If one company has a sweetheart deal that no other company has, that company may use that cost advantage to directly improve the company's net income. The prices charged by competitors cannot squeeze out excessive profits if the underlying costs, over which a carrier has no control, are not the same. Over the long term, companies must keep their service prices above costs to stay in business. If a company is able to obtain a cost advantage, that company may simply flow that advantage to its bottom line.

Doyle Rebuttal, pp. 23-24. Defendants have exploited their series of sweetheart off-tariff deals in Filed-Rate States to impose illegal harm upon Qwest.

81. There is no legitimate competitive benefit in Defendants' practices of breaking the law to secure gains, nor is there any competitive benefit in Defendants' practices to discriminate against other IXCs (apart from the co-conspiring IXC with which they conspired).

82. Defendants' practices have caused direct and indirect harm to Qwest through an unfair competitive advantage, price manipulations, exploiting unlawful and hidden cost savings, causing a loss of market share, and other direct and consequential harm.

Claims

Count One
Statutory Claims for Violation of Tariffing and Related State Law Requirements

83. The allegations of paragraphs 1 through 82 are incorporated herein as if fully restated.

84. Defendants have engaged in violations of law in Filed-Rate States with respect to their off-tariff intrastate switched-access pricing agreements.

85. Defendants have engaged in, procured, assisted, aided, abetted, encouraged or conspired in the violations of law knowing that their conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

86. Defendants' conduct constitutes anti-competitive acts or practices in connection with Defendants' provision of telecommunications services.

87. Qwest has suffered substantial harm as a result of Defendants' violations of law in Filed-Rate States in an amount yet to be determined.

88. Qwest is entitled to recover damages and other relief, including attorneys' fees, for the violations of law of the Filed-Rate States with respect to Defendants' unfiled, off-tariff agreements for special pricing for intrastate switched-access service pursuant to applicable statutes, including but not limited to the following:

a. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Arizona pursuant to the law of Arizona, including without limitation, Ariz. Rev. Stat. Ann. § 40-423, and, by way of supplementation

or in the alternative, under remedial or procedural provisions in the forum state.

b. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Arkansas pursuant to the law of Arkansas, including without limitation, Ark. Code Ann. § 4-88-113, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

c. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of California pursuant to the law of California, including without limitation, Cal. Pub. Util. Code § 2106 and California Public Utilities Commission Decision No. 77406, 71 Cal. P.U.C. 229, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

d. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Colorado pursuant to the law of Colorado, including without limitation, Colo. Rev. Stat § 40-7-102, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

e. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Connecticut pursuant to the law of Connecticut, including without limitation, Conn. Stat. Ann § 42-110g, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

f. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Delaware pursuant to the law of Delaware, including without limitation, Del. Code Ann. tit. 6, §§ 2513, 2525 and 2533, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

g. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Florida pursuant to the law of Florida, including without limitation, Fla. Stat. §§ 501.204 and 501.211, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

h. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Georgia pursuant to the law of Georgia, including without limitation, Ga. Code Ann. § 46-2-90, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

i. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Kansas pursuant to the law of Kansas, including without limitation, Kan. Stat. Ann. §§ 66-176 and 66-178, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

j. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Massachusetts pursuant to the law of Massachusetts, including without limitation, Mass. Gen. Laws ch. 93A, §§ 2 and 11, and,

by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

k. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Minnesota pursuant to the law of Minnesota, including without limitation, Minn. Stat. §§ 325F.67, 325F.69, 325D.13, and 8.31, subd. 3a.

l. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Missouri pursuant to the law of Missouri, including without limitation, Mo. Stat. § 392.350, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

m. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Nevada pursuant to the law of Nevada, including without limitation, Nev. Rev. Stat. Ann. §§ 41.600(e), 598.0923, 598.9694, and 598.969, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

n. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New Jersey pursuant to the law of New Jersey, including without limitation, N.J. Stat. Ann. § 56:8-2.12 and 56.8-19, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

o. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New Mexico pursuant to the law of New Mexico, including without limitation, N.M. Stat. § 57-12-10, and, by way of supplementation

or in the alternative, under remedial or procedural provisions in the forum state.

p. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of New York pursuant to the law of New York, including without limitation, N.Y. Pub. Serv. Law § 93 and 349, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

q. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of North Dakota pursuant to the law of North Dakota, including without limitation, N.D. Cent Code § 49-05-10, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

r. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Pennsylvania pursuant to the law of Pennsylvania, including without limitation, 66 Pa. Cons. Stat. Ann. § 3309, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

s. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Rhode Island pursuant to the law of Rhode Island, including without limitation, R.I. Gen. Laws §§ 39-2-7, 39-2-8, and 39-1-22, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

t. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of South Dakota pursuant to the law of South Dakota, including without limitation, S.D. Stat. § 37-24-31, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

u. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the commonwealth of Virginia pursuant to the law of Virginia, including without limitation, Va. Code Ann. § 56-479.2(b), and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

v. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of West Virginia pursuant to the law of West Virginia, including without limitation, W. Va. Code §§ 24-4-7 and 24-4-3, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

w. Plaintiff is entitled to relief as a result of Defendants' unlawful activities in the state of Wyoming pursuant to the law of Wyoming, including without limitation, Wyo. Stat. Ann. § 37-12-208, and, by way of supplementation or in the alternative, under remedial or procedural provisions in the forum state.

89. Qwest is entitled to judgment for damages caused by Defendants' violations in an amount to be determined by the trier of fact.

Count Two
Misrepresentation, Omission or Fraud

90. The allegations of paragraphs 1 through 89 are incorporated herein as if fully restated.

91. AT&T has made express or implied statements of material fact to Qwest, regulators, the public and other parties to the effect that it was paying tariffed rates for intrastate switched-access service in Filed-Rate States. And, AT&T has procured actions by, assisted, encouraged, or acted in concert in a common design with CLECs with the result that CLECs have made express or implied statements of material fact to Qwest, regulators, the public and other parties to the effect that they were charging tariffed rates for intrastate switched-access service in Filed-Rate States.

92. AT&T has made indirect representations of material fact to the effect that it was paying tariffed rates for intrastate switched-access service in Filed-Rate States. And, AT&T has procured actions by, assisted, encouraged, or acted in concert in a common design with CLECs with the result that CLECs have made indirect representations of material fact to Qwest, regulators, the public and other parties to the effect that they were charging tariffed rates for intrastate switched-access service in Filed-Rate States.

93. AT&T has endorsed or confirmed representations of material fact made by others to the effect that AT&T was paying tariffed rates for intrastate switched-access service in Filed-Rate States.

94. The statements made directly or indirectly, implied, endorsed or confirmed, to the effect that AT&T was paying tariffed rates for intrastate switched-access service in Filed-Rate States were false or omitted facts necessary to make them not misleading. And, the statements to

obligated to pay the tariffed rates for past intrastate switched-access services. The court relied upon the filed-rate doctrine, observing that this doctrine "provides that the legal rights of the utility in the customer are measured exclusively by the published tariff." *Id.* at 562. The court concluded that the tariff rate on file was applicable and enforceable until it was found to be unlawful. (The Iowa case commenced when five CLECs filed an administrative complaint filed against AT&T Midwest with the Utilities Board for the State of Iowa Department of Commerce on August 16, 2000, objecting that AT&T had refused to provide payment for billed originating and terminating access services. Other CLECs intervened. Each of the CLECs had adopted and filed an intrastate switched-access tariff. AT&T argued that it should not be required to purchase and pay for access services from the CLECs at rates AT&T deemed to be non-competitive.) The Iowa Utilities Board ruling against AT&T, affirmed by the Iowa Supreme Court, had been reflected in a Decision and Order issued October 25, 2001. The Board ruled that:

> Any interexchange calls originating outside the called user's exchange using AT&T's services must be completed to the called user's telephone number and AT&T must pay the tariffed terminating access charges, even if the user's chosen LEC has terminating access charges that are higher than AT&T might like. Similarly, calls originating from customers of the complainant CLECs must be carried by AT&T, so long as AT&T serves any LEC in the exchange, and AT&T must pay the tariffed originating access charges.
>
> This does not put AT&T at the mercy of an "unconstrained monopoly," as AT&T argues. If AT&T (or any other interexchange carrier) believes at any time that a particular CLEC's access charges are unreasonable, the interexchange carrier may file a written complaint with the Board ..., asking the Board to determine the just and reasonable terms and procedures for exchange of toll traffic with the CLEC ....

The Board ordered that AT&T was obligated to pay for the access services at the CLEC's tariffed rates in effect at the time the services were used.

63. The Minnesota PUC has also ruled against AT&T on the off-tariff conduct. For example, the PUC issued its Order Finding Failure to Pay Tariffed Rate, Requiring Filing, and

the effect that CLECs were charging tariffed rates for intrastate switched-access service in Filed-Rate States were false or omitted facts necessary to make them not misleading.

95. AT&T knew or should have known that its statements of material fact and those procured, assisted, encouraged and in common with CLECs were false or misleading.

96. AT&T made misstatements of material fact, and procured, assisted, encouraged, and acted in common with CLECs and others with whom it was in privity in misstatements of material fact, in order to induce reliance upon those misstatements by others including, but not limited to, Qwest.

97. Qwest actually and justifiably relied upon the misstatements of fact by AT&T and those with whom AT&T was in privity.

98. Qwest has suffered damages in an amount yet to be determined through its reliance upon the direct and indirect misstatements of fact by AT&T and those with whom AT&T was in privity.

99. Qwest is entitled to judgment for damages caused by the violations of law frauds and misrepresentations engaged in, procured by, assisted, encouraged, and made in concert with, for, and by AT&T in an amount to be determined by the trier of fact.

Count Three
Conspiracy to Violate Tariffing Requirements

100. The allegations of paragraphs 1 through 99 are incorporated herein as if fully restated.

101. CLECs, including AT&T and MCI, which have entered into off-tariff agreements with Defendants for special pricing for intrastate switched-access service, have violated applicable statutes, regulations, orders and other laws in the Filed-Rate States.

102. Defendants have combined, conspired and agreed with MCI and CLECs and other parties to procure the violations of law by the CLECs in the Filed-Rate States in their exercise of economic leverage, refusal to pay tariffed rates, negotiations, demands, and agreements with the CLECs for special pricing for intrastate switched-access service.

103. The conspiracy or conspiracies have involved unlawful purposes or lawful purposes to be achieved by unlawful means.

104. Defendants have engaged in overt acts in furtherance of the conspiracy or conspiracies.

105. Defendants have engaged in the violations of law and the conspiracy or conspiracies for such violations, knowing that their conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

106. Qwest suffered substantial harm as a result of Defendants' conspiracy or conspiracies with CLECs in an amount yet to be determined.

107. Qwest is entitled to judgment for damages caused by the violations of law Defendants' conspiracy or conspiracies with MCI and CLECs and other parties in an amount to be determined by the trier of fact.

Count Four
Aiding and Abetting the Violations of Tariffing Requirements

108. The allegations of paragraphs 1 through 107 are incorporated herein as if fully restated.

109. Defendants have aided and abetted MCI and CLECs and other parties to procure the violations of law by the CLECs in the Filed-Rate States in their exercise of economic leverage, refusal to pay tariffed rates, negotiations, demands, and agreements with the CLECs for special pricing for intrastate switched-access service.

110. Defendants acted under a common design to violate the law or to encourage and assist violations of law by the CLECs.

111. Defendants have purposefully engaged in the violations of law and the aiding and abetting of such violations knowing that their unlawful conduct would and did afford them with an unfair and groundless competitive advantage over Qwest.

112. Qwest suffered substantial harm as a result of MCI's, CLECs' and other parties' violations of law and the Defendants' aiding and abetting of such violations in an amount yet to be determined.

113. Qwest is entitled to judgment for damages caused by the violations of law by MCI, CLECs and other parties and the aiding and abetting of such violations.

114. Qwest is entitled to judgment for damages caused by the violations of law by Defendants with MCI, CLECs and other parties in an amount to be determined by the trier of fact.

Count Five
Declaratory Judgment and Injunctive Relief

115. The allegations of paragraphs 1 through 114 are incorporated herein as if fully restated.

116. Defendants have violated applicable statutes, regulations, orders, and other laws in the Filed-Rate States directly or indirectly with respect to their agreements for off-tariff special pricing for intrastate switched-access service.

117. Qwest is entitled to a declaration that Defendants have violated applicable law in the Filed-Rate States with respect to off-tariff intrastate switched-access charges and rates.

118. Qwest is entitled to a declaration that Defendants are obligated to comply with filed tariffs for intrastate switched-access service.

119. Qwest is entitled to a declaration that Defendants' off-tariff agreements for special pricing for intrastate switched-access service have been and are void, illegal and unenforceable in the Filed-Rate States.

120. Qwest is entitled to an injunction requiring Defendants to abide by filed tariffs with respect to intrastate switched-access service in the Filed-Rate States without evasion or offset.

WHEREFORE, Qwest demands judgment against Defendants:

1. For declaratory and injunctive relief against Defendants;

2. For damages in an amount yet to be determined greater than $50,000;

3. For attorneys' fees, costs and other relief as is allowed by applicable laws; and

4. For such other and further relief as the Court may deem just and proper.

Dated: January 29, 2007

GREENE ESPEL, P.L.L.P.

By _____
Larry D. Espel, Reg. No. 27595
John M. Baker, Reg. No. 174403
William J. Otteson, Reg. No. 290440
200 S. Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830

Attorneys for Plaintiff Qwest Communications Corporation

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

Larry D. Espel

#290772v12

Severy, Richard

From: peter.h.reynolds [Peter.H.Reynolds@mci.com]
Sent: Thursday, February 05, 2004 11:31 AM
To: 'Handal, Robert P, JR (Bob), NKLAM'
Subject: Switched Access Business Terms

Attachments: MCI - ATT Sw Access Business Terms 230PM Feb 5 2004.doc

MCI - ATT Sw Access Business T...

Bob:

This message and the enclosure with it are provided pursuant to settlement negotiations within the meaning of Federal Rule of Evidence 408 and any applicable state or common law doctrine or principle.

Per our discussion, enclosed are the business terms MCI believes should form the basis of the new switched access agreement or agreements between MCI and AT&T, consistent with the settlement terms reached between the parties.

Please review and advise.

Regards,

Peter

Peter H. Reynolds
Director
National Carrier Initiatives
MCI
(703) 886-1918
Vnet 806-1918
Peter.H.Reynolds@mci.com

DOCKET NO. 090538-TP

EXHIBIT PHR-28

PAGES 2 OF 8 THRU 8 OF 8

MCI/AT&T SWITCHED ACCESS RECIPROCAL CONTRACT TERMS: OVERVIEW OF KEY BUSINESS TERMS

ENTIRE DOCUMENT IS LAWYERS ONLY CONFIDENTIAL

Severy, Richard

From: Ritchie,David J (Dave) - LGBIZ [djritchie@att.com]
Sent: Friday, February 13, 2004 12:36 PM
To: Peter.H.Reynolds@mci.com
Cc: Handal,Robert P (Bob) - NKLAM; Dagger,Thomas G (Tom) - LGBIZ
Subject: RE: AT&T's 5th Response on Sw Acc Draft-Subject to 408 FRE, etc.

Importance: High

Attachments: MCI Sell Contract 040209--ATT 5th Response.doc

MCI Sell Contract 040209--ATT ...

Peter:

Attached please find AT&T's fifth draft of the MCI Sell Agreement, which contains the language in Sections 4, 7.D and 7.E that you just agreed to in your conversation with Tom Dagger this afternoon (as well as the other changes the parties had settled upon last evening and att 11 AM today.

Please call Bob Handal this afternoon with your acceptance of these terms. When you have done so, we will prepare a final copy and then do the oft-discussed, never yet done "flip" to put AT&T's name in the boxes for the "CLEC" and MCI's name in the buyer's block as well as throughout the document in AT&T's place. That second and reciprocal document will be known as the "AT&T Sell Agreement." We'll get that out first thing Monday, and wrap that up in short order.

dave.esq
Chief Counsel-Access, Network Operations & Customer Care
908.658.0601
908.658.2346 (Fax)
djritchie@att.com

-----Original Message-----
From: Ritchie,David J (Dave) - LGBIZ
Sent: Thursday, February 12, 2004 6:37 PM
To: 'Peter.H.Reynolds@mci.com'
Cc: Handal,Robert P (Bob) - NKLAM
Subject: AT&T's Response to MCI 2/12 Comments on Sw Acc Draft-Subject to 408 FRE, etc.
Importance: High

For our 7PM discussion.

Severy, Richard

From: peter.h.reynolds [Peter.H.Reynolds@mci.com]
Sent: Friday, February 13, 2004 1:28 PM
To: 'Ritchie,David J (Dave) - LGBIZ'
Cc: 'Handal,Robert P (Bob) - NKLAM'; 'Dagger,Thomas G (Tom) - LGBIZ'; 'Vogel, Tim'; 'Beach, Michael A.'
Subject: RE: AT&T's 5th Response on Sw Acc Draft-Subject to 408 FRE, etc.

Importance: High

Attachments: MCI Sell Contract 040209--ATT 5th Response.doc

MCI Sell Contract 040209--ATT ...

Dave, Bob, Tom:

This is subject to FRE 408, etc.

MCI accepts the changes in the fifth draft provided by AT&T's email below and enclosed. We appreciate and accept your offer to create the final "MCI Sell Agreement" and also the mirror "AT&T Sell Agreement". The MCI party to the AT&T Sell Agreement should be "MCI WORLDCOM Network Services, Inc., on behalf of itself and each of its Affiliates". Please let us know if you need clarification on this.

I will not be in the office on Monday but will be on email.

I hope you have a good weekend.

Regards,

Peter H. Reynolds
Director
National Carrier Initiatives
MCI
(703) 886-1918
Peter.H.Reynolds@MCI.com

-----Original Message-----
From: Ritchie,David J (Dave) - LGBIZ [mailto:djritchie@att.com]
Sent: Friday, February 13, 2004 3:36 PM
To: Peter.H.Reynolds@mci.com
Cc: Handal,Robert P (Bob) - NKLAM; Dagger,Thomas G (Tom) - LGBIZ
Subject: RE: AT&T's 5th Response on Sw Acc Draft-Subject to 408 FRE, etc.
Importance: High

Peter:

Attached please find AT&T's fifth draft of the MCI Sell Agreement, which contains the language in Sections 4, 7.D and 7.E that you just agreed to in your conversation with Tom Dagger this afternoon (as well as the other changes the parties had settled upon last evening and att 11 AM today.

Please call Bob Handal this afternoon with your acceptance of these terms. When you have done so, we will prepare a final copy and then do the oft-discussed, never yet done "flip" to put AT&T's name in the boxes for the "CLEC" and MCI's name in the buyer's block as well as throughout the document in AT&T's place. That second and reciprocal document will be known as the "AT&T Sell Agreement." We'll get that out first thing Monday, and wrap that up in short order.

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Chief Counsel-Access, Network Operations & Customer Care
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From: Ritchie,David J (Dave) - LGBIZ
Sent: Thursday, February 12, 2004 6:37 PM
To: 'Peter.H.Reynolds@mci.com'
Cc: Handal,Robert P (Bob) - NKLAM
Subject: AT&T's Response to MCI 2/12 Comments on Sw Acc Draft-Subject to 408 FRE, etc.
Importance: High

For our 7PM discussion.

Severy, Richard

From: Block,Paula - LGBIZ [paulablock@att.com]
Sent: Tuesday, February 17, 2004 3:49 PM
To: peter.h.reynolds@mci.com
Cc: Vogel, Tim; Ritchie,David J (Dave) - LGBIZ; Handal,Robert P (Bob) - NKLAM
Subject: MCI Sell Agreement and AT&T Sell Agreement

Attachments: ATT Sell Agreement 040217.doc; MCI Sell Agreement 040217.doc


ATT Sell Agreement 040217.doc ...


MCI Sell Agreement 040217.doc ...

> Attached are clean versions of the 2 reciprocal agreements. We accepted both sets of revisions that MCI sent today on the AT&T Sell Agreement. On that agreement, we also put "MCI" in the signature block, and fixed the footer (changed "AT&T" to "MCI" and deleted "For Discussion Purposes Only").
>
> On the MCI Sell Agreement, we accepted the one set of revisions that MCI sent today, and also fixed the footer (deleted "For Discussion Purposes Only").
>
> > <<ATT Sell Agreement 040217.doc>> > > <<MCI Sell Agreement
> > 040217.doc>>
>
Paula Block
Senior Attorney
AT&T Corp.
phone: 908.658.0612
fax: 908.658.2346

DOCKET NO. 090538-TP

EXHIBIT PHR-32

PAGES 1 OF 2 AND 2 OF 2

ENTIRE DOCUMENT IS LAWYERS ONLY CONFIDENTIAL

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 15, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca

CASE 09-C-0555 - Complaint of Qwest Communications Company, LLC against MCI Metro Access Transmission Services, LLC; XO Communications Services, Inc., et al. Regarding Unreasonable Rate Discrimination in Connection with the Provision of Intrastate Switched Access Services.

ORDER DISMISSING COMPLAINT IN PART, INITIATING FURTHER INVESTIGATION AND ADDRESSING PENDING DISCOVERY REQUESTS

(Issued and Effective March 20, 2012)

BY THE COMMISSION:

INTRODUCTION

In its July 2, 2009 complaint, Qwest Communications Company, LLC (Qwest), a provider of long distance telecommunications services (interexchange carrier (IXC)) in New York, alleges that several Competitive Local Exchange Carriers (CLECs) engaged in rate discrimination in connection with off-tariff agreements that they failed to file in compliance with the Public Service Law's (PSL) tariff filing requirements (PSL §§92(1) and 92(2)(d)). The named respondents subject to the complaint are MCI Metro Access Transmission Services (MCI) d/b/a Verizon Access Transmission Services (Verizon Business), XO Communications Services, Inc. (XO), Granite Telecommunications,

Inc. (Granite) and Broadwing Communications, LLC (Broadwing) and other unnamed CLECs.[1] Qwest requests that the Commission initiate a formal evidentiary proceeding to investigate its complaint, determine in the proceeding that the CLECs violated the PSL, order them to pay compensation, and require them to file their off-tariff agreements and lower the rates charged Qwest during the pendency of the formal proceeding and prospectively. Qwest requests that the Commission issue subpoenas directing Verizon Business, AT&T and Sprint to produce agreements relating to switched access service with any New York CLEC to Qwest. In this Order, we deny Qwest's complaint relating to Verizon Business, grant Verizon Business' Motion to Dismiss and direct further investigation of the Qwest complaint against XO, Granite, Broadwing and other unnamed CLECs.

QWEST'S COMPLAINT

Qwest claims that the CLECs originate and terminate intrastate switched access traffic on behalf of Qwest at New York switched access tariff rates, but provide the same services to other IXCs in accordance with off-tariff agreements that contain lower rates.[2] Qwest asserts that these companies must abide by their tariffs, or summarize and file any off-tariff agreements with the Commission.[3] Qwest states that failure to do

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[1] Qwest included tw telecom of NY L.P, (tw) among the CLECs subject to its complaint. After the complaint was filed, Qwest and tw stipulated that the complaint against tw is withdrawn without prejudice (Stipulation Withdrawing Complaint against tw telecom of NY, L.P., dated August 27, 2009).

[2] In order to deliver long distance calls, Qwest pays switched access charges to local telephone companies including CLECs. The charges cover the costs for originating and terminating the long distance calls.

[3] See MCI v. PSC, 169 A.D.2d 143 (3rd Dept. 1991).

so violates PSL §§92(1) and 92(2)(d). Qwest states that, while it made good faith attempts to obtain copies of the off-tariff agreements, it has been unsuccessful to date. In its original complaint and again by subsequent letters, Qwest requests that the Commission issue subpoenas duces tecum directing Verizon Business, AT&T and Sprint, to produce copies of any agreements with any CLEC executed after January 1, 1998 relating to rates, terms and conditions for switched access service provided to each IXC.

VERIZON BUSINESS MOTION TO DISMISS

Verizon Business[4] filed a Motion to Dismiss Qwest's complaint. Verizon Business states that Qwest cannot meet its burden of proving unlawful rate discrimination with respect to the switched access agreements between Verizon Business and AT&T. While Verizon Business does not deny the existence of off-tariff agreements, it states that Qwest is not entitled to the rates established in the agreements because they are reciprocal in nature. Specifically, Verizon Business argues that the parties agreed that each company's CLEC affiliate would charge the other company's IXC a single uniform rate for the exchange of switched access service anywhere in the country where such CLEC affiliate provided local exchange service. Qwest, according to Verizon Business, does not have a CLEC affiliate in New York and, therefore, could not be considered a similarly-situated customer to take advantage of this lower switched access rate.

[4] MCI, formerly a subsidiary of Worldcom, Inc. (Worldcom), is now owned by Verizon New York Inc. (herein referred to as Verizon Business). As it emerged from the WorldCom bankruptcy, MCI merged with Verizon Communications, Inc.

Notwithstanding the foregoing, Verizon Business states that the Commission has no authority to make retroactive rate adjustments or to award damages. Verizon Business maintains that Qwest's complaint is time barred by the applicable statute of limitations under bankruptcy law. It reasons that Qwest was given notice and an opportunity to be heard on the final approval of these agreements as part of a comprehensive settlement of all claims between Worldcom and AT&T in Bankruptcy Court and did not object or raise any concerns at that time.[5] Verizon Business states that the proper time for Qwest to complain or object occurred in February or March 2004 when the matter was pending for approval before the Bankruptcy Court. In any event, Verizon Business states that the agreements with AT&T expired in 2007. As to the issuance of subpoenas, Verizon Business submits such issuance is usually reserved for formal evidentiary proceedings.

XO RESPONSE

XO denies that it has any currently effective agreements for intrastate switched access service with any IXCs that include rates that are different from, or lower than, the rates set forth in XO's New York tariffs. However, XO acknowledges that it had, pursuant to a settlement with one IXC, contracts that provided lower rates based upon factors specific to that carrier. Since these were settlement agreements, XO says that the terms were not available to other carriers. XO admits that it did not file the off-tariff arrangement or attach addendum to its New York tariffs summarizing the settlement agreements.

[5] Verizon Business claims that Qwest's complaint is also time barred under the three year statute of limitations set forth in Civil Practice Law and Rules (CPLR) §214.

GRANITE AND BROADWING RESPONSES

Granite states that Qwest's demand for reparations must be denied because it fails to allege any claim upon which reparations may be granted. Granite believes that, under the filed rate doctrine, a claim that is inconsistent with the rates and terms of a Commission-approved filed tariff is barred. Granite asserts that Qwest's claims for relief are based on mutually inconsistent legal conclusions, in that Qwest claims that the alleged off-tariff, unfiled agreements are unlawful and, at the same time, argues that it is entitled to the rates set forth in the agreements. Broadwing denies the allegations in the complaint, does not support the opening of a proceeding and states that Qwest's complaint is barred on several legal and jurisdictional grounds.

QWEST RESPONSE

Qwest states that the various defenses set forth in the above replies are without merit and the issuance of subpoenas should go forward. Qwest points out that the respondents do not dispute their conduct and that Granite, XO and Verizon Business even admit to entering into off-tariff intrastate switched access agreements with Qwest's competitors. Regarding respondents' claim that the Commission cannot order reparations, Qwest disagrees, citing PSL §118. Qwest adds, however, that reparations are only one form of relief. The other forms of relief are a determination that the respondents violated the PSL, should file any current off-tariff agreements and lower their rates to Qwest to be consistent with the most

favorable rate offered to any other long distance carrier in New York.[6]

As to Verizon Business' claim that Qwest would not have been able to obtain the same rate because it was not in a similar situation as AT&T (i.e., offering local exchange service in New York), Qwest states that Verizon Business has not provided sufficient justification for this conclusion because the rates and conditions in the agreements remain secret[7] and the secrecy of the agreements undermines the basic integrity of the regulatory regime requiring rate schedules to be filed with the Commission and made public. Qwest further states that the Commission must determine whether or not the distinction of offering switched access service in New York justifies the special pricing treatment offered to AT&T. Qwest argues that reciprocity alone is not a reasonable basis for price differentiation because switched access service is a bottleneck service consisting of three facilities - the loop, switching and transport. Accordingly, Qwest believes that, unless the CLECs seeking to justify their price differentiation can identify and support a cost-basis for their preferential rates to select IXCs, switched access service should be priced uniformly.

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[6] Specifically, Qwest states that PSL §91 prohibits a telephone corporation from imposing any charges which are unjust or unreasonable or more than allowed by law or order of the Commission, and that §91(2) prohibits a telephone corporation from offering special rates or from collecting or receiving compensation from any person or corporation that is greater or less than it collects from another for like services "under the same or substantially the same circumstances and conditions." In summary, §91(3) prohibits undue or unreasonable preference and §92(d) prohibits charging or demanding rates other than those specified in filed tariffs.

[7] It is our understanding that Qwest has since had the opportunity to review the Verizon Business agreement (Letter from Keith Roland dated February 17, 2012).

In any event, Qwest argues that these off-tariff agreements are not truly reciprocal. According to Qwest, they were simply a means of financing payment to AT&T pursuant to the bankruptcy proceeding. In other words, Verizon Business would not receive an equal financial benefit from the agreements. Were the dollars between the companies balanced, AT&T, according to Qwest, would effectively receive no greater financial benefit than it was receiving prior to the agreements and that would be contrary to the negotiated outcome of the Bankruptcy Court.

Upon receipt of Verizon Business' confidential switched access agreements on February 17, 2012, Qwest submitted a redacted and unredacted letter response. Qwest states that "in isolation" those agreements do not provide complete information as to whether Verizon Business' agreements were truly reciprocal in nature and, in the absence of certain baseline information surrounding those agreements, the Commission cannot conclude they were "reciprocal." Qwest claims that its participation in the WorldCom bankruptcy does not impute knowledge of these agreements to Qwest. In fact, Qwest claims that these documents were not disclosed to it in the bankruptcy proceeding. Finally, Qwest argues that the Bankruptcy Court's approval of these switched access agreements does not divest the Commission of its jurisdiction over intrastate rates and tariff filing requirements.

DISCUSSION

The Public Service Law requires telephone corporations to file rates for intrastate switched access services and obtain Commission approval (PSL §92). While individual case base (ICB) pricing arrangements are allowed, the law is well settled that telephone corporations are required to file those rates as addenda to the tariffs to insure against rate discrimination

and/or preferential treatment. Verizon Business, Granite, Broadwing and XO admit that they previously entered into off-tariff agreements and failed to file the necessary tariff addenda. Accordingly, there is no dispute that these carriers violated the tariff filing requirements of the PSL.

However, there is an issue as to whether Qwest alleges a basis for which relief, particularly refunds, can be granted. Public Service Law §118(3), does provide for "power to require a public utility . . . to provide a refund or credit to a customer when a payment has been made in excess of the correct charge for actual service rendered to the customer." Nevertheless, we find that Qwest has no basis for refunds or other monetary relief as against Verizon Business and grant Verizon Business' Motion to Dismiss. Verizon Business established that Qwest could not have qualified for the special pricing arrangement. For the remaining named respondent CLECs, a question of fact as to whether refunds are possible remains. This question warrants further investigation by Department of Public Service Staff (Staff), as discussed in more detail below.

Verizon Business' Motion to Dismiss

A Motion to Dismiss should only be granted if there is a clear showing that no genuine issue as to any material fact exists; and, the moving party is entitled to a dismissal as a matter of law.[8] Qwest is entitled to all favorable inferences that may be drawn from the undisputed facts.[9] Verizon Business bears the burden of establishing the validity of its rates, whether filed under the PSL or not (see PSL §92(2)(f)).

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[8] See generally, Collins v. Telcoa Intern. Corp., 283 A.D.2d 128 (2nd Dept. 2001).

[9] Id.

The PSL requires telephone corporations to file rates under individually negotiated agreements, so that customers and competitors are aware of prices charged in such special arrangements. Addenda to tariffs authorizing special pricing arrangements satisfy both requirements (PSL §92(1)). It is not required that telephone corporations offer the same contract to all customers, because such special agreements are tailored to specific circumstances. However, any similarly-situated customer should be able to obtain special pricing arrangements, if the terms of those ICBs likewise apply to the similarly-situated customer.

Staff reviewed the switched access service agreements at issue between Verizon Business and AT&T. Staff advises that an essential component of those agreements, which are now expired, is that the company receiving the reduced intrastate switched access rate had the ability to offer the same intrastate switched access rate to the other's IXC through a local exchange affiliate.

As an initial matter, we agree with Qwest that Verizon Business did not file its agreement or an addendum as it should have under the PSL.[10] We also agree that, if Verizon Business' agreement was still in effect it should be filed immediately. However, since that agreement is no longer in effect, there is nothing to file. Accordingly, the question we now turn to is whether Qwest would have qualified for the reduced rate even if the contract had been filed properly when it was in effect.

Qwest does not dispute that it did not, at the time, have a local CLEC affiliate in New York capable of terminating

[10] By our action today, this proceeding is continued and, at this point, there is no need to institute a formal evidentiary proceeding.

another IXC's intrastate switched access traffic. Instead, Qwest argues that CLECs seeking to justify price differentiation must identify and support the rate differences through cost-based analysis and obtain Commission approval. Neither, according to Qwest, occurred here.

Qwest fails to demonstrate that the practice of providing a lower intrastate access rate, provided there is a local exchange affiliate capable of offering the same rate, is without a rational basis, despite Verizon Business' admitted failure to file its agreement pursuant to the PSL.[11] Indeed, despite this failure, we note the agreement was a product of the bankruptcy settlement involving WorldCom, where several competing financial interests were ultimately brought to bear. After considerable due process, the Bankruptcy Court determined that the settlement agreement was based upon good faith negotiations and decided to approve it. We do not believe it would be appropriate here to upset the balance of the Bankruptcy Court's settlement,[12] especially where Qwest was a party.

Moreover, AT&T's local affiliate in New York offered a uniform off-setting rate to terminate intrastate switched access traffic to Verizon Business. While AT&T potentially stood to

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[11] It appears that Verizon Business' access tariff allows for this practice of discounted rates through an authorization of ICBs. Under the PSL, these arrangements would have to be filed, but failure to file does not support a claim for relief if, as here, Verizon Business can show Qwest would not be eligible for the rate in the unfiled arrangement.

[12] In 2002, WorldCom filed for bankruptcy. As result of that proceeding, WorldCom entered into a settlement agreement that resolved numerous claims and disputes between itself and its creditors. The off-tariff switched access agreements between MCI (Verizon Business) and AT&T and their respective CLEC affiliates constituted one such component of that settlement. The switched access agreements specified a single, uniform rate regardless of jurisdiction.

benefit from this arrangement based on the alleged imbalances of traffic being exchanged, that benefit in and of itself is also not a reason to find the arrangement unreasonable. Given the unique circumstances surrounding the WorldCom settlement agreement, we believe it was justified. Qwest fails to demonstrate that had Verizon Business appropriately filed its off-tariff agreement with AT&T, it would have qualified for that lower rate. The fact remains that without a CLEC affiliate in New York capable of terminating intrastate switched access traffic for the other's IXC, Qwest would not have been able to obtain the benefit of the lower switched access rate in the Verizon Business/AT&T agreement.[13]

Based on the foregoing, we agree with Qwest that Verizon Business violated the PSL and should have filed its agreement. However, because Qwest would not have been able to adopt the terms of that agreement, we find no basis for requiring Verizon Business to pay refunds to Qwest.[14]

CLEC Respondents

Turning to the remaining respondent CLECs (XO, Granite and Broadwing), there is a potential basis for refunds. Qwest could be entitled to refunds because the respondent CLECs were not, as we understand, at the time affiliated with any IXCs. In addition, Staff preliminarily reviewed the respondent CLECs' off-tariff agreements, filed under protective cover, and advises that they are not a product of the Bankruptcy Court's settlement, nor do they involve a reciprocal exchange of traffic

[13] We further note that access rates are not cost-based in New York, but have historically been set to yield a contribution to maintain lower local rates.

[14] Any other agreements that Staff uncovers will be reviewed on a case-by-case basis to determine if Qwest could adopt the terms.

between IXCs and local exchange affiliates. Qwest was apparently charged the tariff rate, while certain other IXCs were charged lower off-tariffed rates through separate agreements. We direct Staff to report to us its future recommendations relating to the respondent CLECS' off-tariff agreements. Further, PSL §92 requires telephone corporations to file ICB pricing arrangements as addenda to tariffs. Therefore, we require XO, Granite and Broadwing to file with the Secretary to the Commission a description of any rates established in off-tariff agreements with any IXC currently in effect, or a letter stating that no such agreements exist, within 15 business days of the date of this Order.

To determine whether any potential basis for refunds exists with respect to agreements between other unnamed CLECs and IXCs, additional discovery is warranted. Staff is directed to determine whether additional off-tariff agreements, which formed the basis for intrastate switched access billed by other unnamed CLECs after July 2, 2003[15] exist, to obtain copies of such agreements and to report its findings and recommendations when available.[16]

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[15] Quest filed its complaint on July 2, 2009, and under our established practice we only provide refunds for a period of six years prior to a complaint. This limitation period is patterned after the six year statute of limitations under CPLR §213. Specifically, only off-tariffed agreements that formed the basis for intrastate switched access billed at lower intrastate switched access rates after July 2, 2003 would be subject to Qwest's claims for refunds here.

[16] Because the Commission has statutory authority to require the production of these contracts (PSL §94(3)), and a Protective Order was issued in this case on December 22, 2011 to facilitate the exchange of information, there is no need to grant Qwest's request for subpoenas here.

Related Discovery Matters

By letter dated June 29, 2011, Verizon Business declined to provide responses to certain discovery requests submitted by Qwest. In response, Qwest, in a letter dated July 8, 2011, urged us to direct Staff to issue the same requests for information to Verizon Business. In light of our discussion above, this request is moot.

In its original petition and again by subsequent letters, Qwest requested that we issue subpoenas directing Verizon Business, AT&T and Sprint to produce copies of any agreements they have entered into with any CLEC since January 1, 1998, relating to rates, terms and conditions for switched access service provided to each IXC. Because we are, by this Order, directing Staff to take all necessary steps to identify and evaluate all such agreements, we will deny Qwest's request for now, without prejudice to renewing its request in the future should circumstances warrant a different outcome.

CONCLUSION

Based on the foregoing, Qwest's complaint as it relates to Verizon Business is denied and Verizon Business' Motion to Dismiss is granted. XO, Granite and Broadwing shall file a description of any currently available off-tariff agreements with any IXC, in accordance with the PSL, within 15 business days of the date this Order or a letter stating that no such agreements exist. Staff is directed to report to the Commission the status of the XO, Granite and Broadwing off-tariff agreements and any off-tariff agreements involving other unnamed CLECs when available.

The Commission orders:

1. Qwest Communications Company, LLC's complaint is denied in part, in accordance with the discussion in the body of this Order.

2. MCI Metro Access Transmission Services d/b/a Verizon Access Transmission Services' Motion to Dismiss is granted, in accordance with the discussion in the body of this Order.

3. The request of Qwest Communications Company, LLC for issuance of discovery requests to MCI Metro Access Transmission Services d/b/a Verizon Access Transmission Services is denied.

4. The request of Qwest Communications Company, LLC for the issuance of subpoenas duces tecum is denied without prejudice.

5. XO Communications Services, Inc., Granite Telecommunications, Inc. and Broadwing Communications, LLC shall file copies of a description of any rates established in off-tariff agreements with interexchange carriers currently in effect, or a letter stating that no such agreements exist, with the Secretary to the Commission within 15 business days of the issuance of this Order.

6. The Secretary is authorized to extend the deadlines set forth in this order.

7. This proceeding is continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

(SIGNED) JACLYN A. BRILLING
Secretary

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 WASHINGTON SQUARE, SUITE 1700
MINNEAPOLIS, MN 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 SEVENTH PLACE EAST, SUITE 350
ST. PAUL, MN 55101-2147

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Rhea	Commissioner
Thomas Pugh	Commissioner

In the Matter of DOC Complaint and Request for Commission Action in Regard to Negotiated Contracts for for Switched Access Services	)))))	OAH Docket No.: 12-2500-17084-2 MPUC Docket No. P-442, 5798, 5340, 5826, 437, 5643, 443, 5323, 5668, 466/C-04-235

REPLY TESTIMONY OF ROBERT P. HANDAL, JR.

ON BEHALF OF AT&T COMMUNICATIONS OF THE MIDWEST, INC.

September 15, 2006

I. Introduction.

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Robert P. Handal, Jr. and my business address is One AT&T Way, Bedminster, N.J. 07921.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by AT&T Corporation, a 272 affiliate of AT&T Inc., ("AT&T") as a Director – Global Access Management. In my current position, I manage the Commercial Contract Relations with carriers in countries outside of the United States.

Q. PLEASE BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND AND PRIOR WORK EXPERIENCE.

A. I have a Bachelor of Arts from the University of Vermont and an MBA from Hartford Graduate Center.

I have been employed by AT&T since 1989 in various sales, marketing and vendor management roles. At the time the agreement at issue in this proceeding was entered into, I was a Division Manager in Access Management.

Q. HAVE YOU TESTIFIED BEFORE THE MINNESOTA COMMISSION PREVIOUSLY?

A. No.

Q. HAVE YOU EVER PRESENTED TESTIMONY BEFORE ANY STATE REGULATORY COMMISSION?

A. No. I have never held a position at AT&T that required any familiarity with state regulation or required me to appear before a state regulatory commission.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. The purpose of my testimony is to respond to various claims made by Gregory J. Doyle of the Minnesota Department of Commerce in his testimony regarding AT&T's motives for entering into the single contract at issue in this case: the contract between AT&T, the CLEC, and MCI, the IXC ("CLEC Contract"). I provide testimony regarding the real reasons AT&T and MCI entered into this contract. In addition, in my testimony I confirm that AT&T did not seek to hide the contract from regulators or customers, AT&T's conduct was not intentional or purposeful, and AT&T did not obtain any financial gain or benefit as a result of entering into the contract.

Q. ARE YOU FAMILIAR WITH THE AT&T CLEC CONTRACT THAT IS AT ISSUE IN THIS PROCEEDING?

A. Yes. I was one of the AT&T representatives that negotiated this contract.

Q. PLEASE DESCRIBE THE AT&T CLEC CONTRACT.

A. The contract is a reciprocal agreement that sets forth the terms and conditions for each party's provision of switched access services to the other party. The CLEC Contract specifies the terms and conditions that

apply to AT&T, the CLEC's, provision of switched access services to MCI and it subsidiaries and affiliates.

Q. WHAT WERE THE CIRCUMSTANCES THAT LED TO THE FORMATION OF THE CLEC CONTRACT?

A. Prior to the entry into the CLEC Contract, MCI was in bankruptcy and had numerous outstanding accounts payable, accounts receivable issues, and other dispute with AT&T. In addition, AT&T and MCI were involved in a significant fraud litigation that AT&T filed against MCI involving MCI's routing of certain traffic using Onvoy through a Canadian gateway. AT&T and MCI entered into a global settlement of all of these issues. The CLEC Contract was part of the overall settlement that was issued. The settlement was approved by the Bankruptcy Court.[1]

Q. BRIEFLY, WHAT WERE THE VARIOUS ISSUES THAT WERE IN DISPUTE BETWEEN AT&T AND MCI?

A. As reflected in the Motion filed by MCI in the Bankruptcy proceeding seeking the Court's approval of a settlement with AT&T ("MCI

[1] *See In re WORLDCOM, INC., et al.*, Chapter 11 Case No. 02-13533 (AJG), U.S. Bankruptcy Court, Southern District of New York, Order Pursuant to Bankruptcy Rule 9019 Approving Debtors' Settlement and Compromise of Certain Matters with AT&T Corporation, dated March 2, 2004. A copy of this Order is attached as Exhibit RPH-1.

Motion"),[2] the following matters were in dispute between MCI and AT&T:

1. The fraud claim asserted by AT&T against MCI in a lawsuit filed by AT&T in Virginia relating to MCI/Onvoy Canadian Gateway project;
2. MCI's Contempt Motion filed in the Bankruptcy proceeding relating to the Virginia lawsuit, claiming that the lawsuit violated the automatic stay;
3. A host of creditor claims asserted by AT&T against MCI in the Bankruptcy proceeding and claims asserted by MCI against AT&T, with AT&T claiming that it was owed in excess of $100 million and MCI claiming that it was owed in excess of $220 million dollars, and both parties disputing these amounts;
4. The dispute between MCI and AT&T arising over the provision of switched access service for certain UNE-P services.

Q. HOW WAS THE CLEC CONTRACT PART OF THE OVERALL SETTLEMENT OF THESE DISPUTES?

A. The switched access rate agreed to between MCI and AT&T was designed to offset, in part, the amounts owing, or claimed to be owing, by AT&T to

[2] *Id.*, Motion of the Debtors Pursuant to Bankruptcy Rule 9019 Seeking Approval of a Settlement and Compromise of Certain Matters with AT&T Corporation. A copy of this Motion is attached as Exhibit RPH-2.

MCI in connection with the UNE-P dispute that was at issue in the Bankruptcy proceeding.

Q. MR. DOYLE ASSERTS THAT WHEN AT&T ENTERED INTO THE CLEC CONTRACT, AT&T KNOWINGLY, INTENTIONALLY AND PURPOSEFULLY VIOLATED MINNESOTA LAW AND REGULATIONS. IS THAT THE CASE?

A. His statement is completely false. As I indicated, AT&T entered into the CLEC Contract to settle certain disputes that arose during the MCI Bankruptcy proceeding. As the lead business negotiator of the contract, I was not aware of any specific Minnesota legal requirements that would allegedly be violated by AT&T by entering into the contract. Moreover, I was not advised by anyone at AT&T that any Minnesota laws or Commission rules would be violated by AT&T entering into the contract.

Q. MR. DOYLE CONTENDS THAT AT&T TOOK STEPS TO ENSURE THAT THE CLEC CONTRACT WAS HIDDEN FROM REGULATORS AND CUSTOMERS. DO YOU AGREE?

A. Absolutely not. In fact, in MCI's Motion filed with the Bankruptcy Court, a publicly filed document, MCI specifically states that AT&T and MCI had entered into bilateral switched access contracts, one of which is the CLEC Contract. AT&T reviewed and approved MCI's Motion before it was submitted to the Court. This public disclosure to the Bankruptcy Court confirms that neither AT&T nor MCI intended to hide the contracts from regulators or customers.

In addition, the bilateral contracts contain a standard confidentiality provision that sets forth the process for disclosure of the contract when such disclosure is required by law. These provisions were not included in the contracts to hide the agreements from the Commission or from customers. They are standard provisions I have seen in many contracts. At no time was there ever any discussion internally within AT&T or during the course of negotiations with MCI concerning concealing the contracts from regulators or other providers.

Q. DID AT&T INTENTIONALLY AND PURPOSEFULLY NOT FILE THE CLEC CONTRACT WITH THE MINNESOTA COMMISSION?

A. Definitely no. There were no discussions, either internally at AT&T or with MCI, from the period when the CLEC Contract was being negotiated up to the time the Complaint was filed by the Department of Commerce regarding whether the contracts should or should not be filed with state commissions, in general, and the Minnesota Commission, in particular. Because the contracts were part of the Bankruptcy proceeding, and the Court approved the contracts as part of the overall settlement of the Bankruptcy, whether additional filings or approvals were required simply wasn't on AT&T's (or apparently MCI's) radar screen. I was involved in negotiating the contract and the folks that worked for me at the time were responsible for post approval implementation of the contract and the

access-related terms of the settlement. While I am not a lawyer and neither I nor my team were familiar with the law in Minnesota, I can assure you that if AT&T was required to file the contract in Minnesota, our failure to file was not an intentional or purposeful act and it was not an effort to conceal the contracts from the Commission or customers. We were simply unaware that there might be some obligation to make such a filing and we had no understanding that we needed to investigate whether such a filing was required.

Q. MR. DOYLE CONTENDS THAT AT&T ENTERED INTO THE CLEC CONTRACT TO GAIN A FINANCIAL BENEFIT OR A COMPETITIVE ADVANTAGE. IS THAT THE CASE?

A. No. The CLEC Contract had a negative revenue effect on AT&T, the CLEC. Consequently, AT&T, the CLEC, could not have possibly gained some competitive advantage as a result of entering into a contract that had negative financial consequences. In fact, both contracts taken together, resulted in a financial impact that was revenue neutral to AT&T. In short, in total, the two contracts did not improve AT&T's financial or competitive position. That was simply not the motive for AT&T entering into these contracts. AT&T entered into these contracts as part of a larger settlement of numerous disputes in the Bankruptcy proceeding. The bilateral access contracts were just one piece of that settlement.

Q. MR. DOYLE CONTENDS THAT THE CLEC CONTRACT WAS PART OF A "GRANDER SCHEME" TO FINANCIALLY BENEFIT AT&T, THE IXC. DO YOU AGREE?

A. I couldn't disagree more. As I previously discussed and as MCI's Motion clearly reveals, AT&T and MCI entered into the bilateral switched access contracts to resolve issues that were in dispute in the Bankruptcy proceeding. There was no "interexchange" financial agenda that AT&T was trying to advance when it entered into the CLEC Contract.

Q. DOES THAT CONCLUDE YOUR TESTIMONY?

A. Yes.

DOCKET NO. 090538-TP

EXHIBIT PHR-35

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ENTIRE DOCUMENT IS LAWYERS ONLY CONFIDENTIAL