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August 9, 2012

VIA HAND DELIVERY

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

Re: Docket No. 090538-TP - Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; 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:

Enclosed for filing on behalf of Broadwing Communications, LLC; Saturn Telecommunications Services, Inc. d/b/a EarthLink Business and DeltaCom, Inc. d/b/a EarthLink Business.; and tw telecom of florida, l.p., are an original and 15 copies of the prefiled rebuttal testimony and exhibits (Exhibits DJW-4 and DJW-5) of Mr. Don J. Wood. Also enclosed is a diskette containing a PDF version of Mr. Wood's rebuttal testimony and exhibits.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

Matthew Feil

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TEL 2
CLK 1-CD Rep (testimony only)

I. Introduction and Purpose

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Don J. Wood. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022.

Q. ARE YOU THE SAME DON J. WOOD WHO PREFILED DIRECT TESTIMONY IN THIS PROCEEDING ON JUNE 14, 2012?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to the prefiled direct testimony of William R. Easton, Dennis L. Weisman, Derek Canfield, and Lisa Hensley Eckert on behalf of Qwest Communications Company, LLC ("Qwest").

Throughout their testimony, the Qwest witnesses assume that a regime of cost-based, highly regulated CLEC switched access rates exists in Florida – a regime that in reality does not exist and never has existed in Florida. They then approach the issues as though Qwest has absolutely nothing to prove in this case other than the existence of an unfiled contract rate for switched access, and request a remedy that would retroactively place Qwest in a favored position never enjoyed by any other IXC.

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. Sections II through VII of my rebuttal testimony respond to the testimony of the Qwest witnesses that potentially relates to all of the CLECs named in the Qwest Complaints.

II. Qwest's Testimony is Noteworthy for What It Does *Not* Contain

Q. DO YOU HAVE ANY OVERALL OBSERVATIONS ABOUT THE CONTENT OF QWEST'S PREFILED DIRECT TESTIMONY?

A. Yes. The language of the Qwest Complaint and Amended Complaints suggested that testimony would be forthcoming in a number of areas. First, it is reasonable to expect a Qwest witness or witnesses to directly address the actual language of any Florida statute or Commission rule that Qwest seeks to rely on it this case. I do not expect a Qwest non-attorney witness to present legal conclusions in testimony (just as I do not attempt to do so in my testimony), but it is reasonable to expect that if the Qwest witnesses are providing the facts necessary for Qwest to meet its burden pursuant to Florida law, that the actual language of any Florida statute or rule would serve as the framework for presenting those facts. Based on my review of their direct testimony, none of the Qwest witnesses provide a direct reference to the complete actual language of *any* Florida statute or rule. Instead, the Qwest witnesses make broad statements regarding requirements for CLEC tariffing and pricing that are not applicable to Florida, and instead appear to be more

applicable to another state with very different requirements. I will address this issue later in my testimony.

Second, it is reasonable to expect that Qwest, as the party who filed the Complaint, would provide any testimony necessary to meet its burden in the case. For example, Qwest's claims rely in part on §364.08, which – prior to the 2011 Regulatory Reform Act[1] – stated in part that "a telecommunications company may not extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons *under like circumstances* for like or substantially similar service." Given the apparent importance of this former (now repealed) statute section to Qwest's claims, and the clear importance of the phrase "under like circumstances" to the language of the section, it is reasonable to expect that Qwest would devote a significant amount of its direct testimony to a demonstration that Qwest was "under like circumstances" when compared to the IXCs who entered into – and operated pursuant to – contracts with CLECs. But Qwest offers no facts in support of such a claim and makes no effort to meet this burden. Instead, Qwest witnesses (1) attempt to shift the burden to CLECs, to have the CLECs show that Qwest was *not* "under like circumstances," or (2) ask the Commission to simply assume that because Qwest was purchasing switched access services, that it should be presumed to be "under like circumstances" for the purposes of applying this former statute

[1] It is my understanding that §364.08 was repealed effective July 1, 2011.

section. But neither of these is a substitute for the required demonstration by Qwest.

Third, it is reasonable to expect that Qwest witnesses would provide a quantification of damages (or however they choose to describe the monetary payments that they seek as relief in this case) that is both consistent with Qwest's claims pursuant to any currently effective (or previously effective) sections of the Florida statutes or Commission rules *and* consistent with a "but for" scenario[2] that could actually have occurred. But the Qwest witnesses do neither of these. After asserting that CLECs have violated §364.04 by charging rates that "deviate from their tariffs or price lists," it is reasonable to expect that Qwest would propose a remedy consistent with this assertion. Such a remedy would require a CLEC to adjust any rates charged over the damages period to be consistent with those in its filed price list. But instead of seeking such a remedy, Qwest is asking the Commission to order CLECs to engage in an additional "deviation" and to charge Qwest an amount that also "deviates

[2] In other words, Qwest must quantify the financial impact of the alleged improper actions as the difference between its current position and a position it could have occupied "but for" the alleged improper actions. In this case, Qwest claims that CLECs improperly entered into contracts with other IXCs, but did not enter into those same contracts with Qwest. There are two plausible "but for" scenarios: one in which Qwest does not enter into a contract with a given CLEC, but neither do other IXCs; and one in which Qwest enters into the same contract with a given CLEC as other IXCs. But as I explain further in Section VI of my testimony, Qwest has not based its calculations on either of these scenarios. Instead, it has calculated damages as if it had received discounted rates for switched access service without entering into a contract with a CLEC – something that no other IXC was able to do. Such an approach is directly at odds with the "under like circumstances" clause in §364.08 upon which Qwest seeks to rely.

from a filed tariff or price list." This kind of approach to regulation is inconsistent with Qwest's interpretation of §364.04 and represents a very poor approach to public policy.

It is also reasonable to expect any damages calculation by Qwest to represent a scenario that could have occurred. But according to Mr. Canfield, his calculations represent the difference between the rates actually charged to Qwest and discounted rates for switched access service that were only offered to other IXCs within the context of a broader contract containing other terms and conditions. Mr. Canfield's calculations are not consistent with a scenario that Qwest could have availed itself of at any time during the damages period. As a result, Qwest's damages calculations are purely fictional: they represent a scenario that could not have actually occurred and seek to place Qwest in a preferred position that it never could have actually occupied at any time during the claimed damages period. When considering the merits of the Qwest Complaint, the Commission should consider that Qwest is not seeking to be treated like other IXCs, but is instead asking the Commission to retroactively place it in a favorable position that would provide an artificial advantage over any other IXC.

Q. IN YOUR DIRECT TESTIMONY, YOU OUTLINED A NUMBER OF CLAIMS THAT QWEST DID *NOT* MAKE IN ITS COMPLAINT. DID

QWEST WITNESSES MAKE ANY OF THESE CLAIMS IN THEIR DIRECT TESTIMONY?

A. No. It is noteworthy that the Qwest witnesses do *not* claim that the rates for CLEC-provided switched access service are, or ever have been, regulated by this Commission; do *not* claim that that the rates for CLEC-provided switched access service are, or ever have been, required to be tariffed in Florida; do *not* claim that the rates for CLEC-provided switched access service contained in CLEC price lists are unreasonable or otherwise unlawful; do *not* claim that Qwest has at any time in Florida been charged a rate for switched access service that exceeds the rates set forth in CLEC price lists; and do *not* claim that the switched access service provided by CLECs in Florida has been substandard in any way.

Throughout the period at issue, it appears that Qwest purchased the service from CLECs that it wanted, received the service that it expected, was pleased with the quality of service provided, and paid what it expected to pay. In spite of this experience throughout the damages period, Qwest is asking the Commission to order CLECs to retroactively charge Qwest a lower amount for the service it received, and act to retroactively place Qwest in a preferred position when compared to other IXCs operating in Florida during this period. Qwest is also asking to be placed in this preferred position on a prospective basis.

III. Contrary to Qwest's Claims, the Recent Colorado Case Does *Not* Represent a "Parallel Proceeding."

Q. YOU STATED PREVIOUSLY THAT THE DIRECT TESTIMONY OF THE QWEST WITNESSES APPEARS TO APPLY TO A DIFFERENT STATE WITH DIFFERENT RULES AND REQUIREMENTS. PLEASE EXPLAIN.

A. Throughout their testimony, the Qwest witnesses consistently attempt to portray a recent Colorado case as a "parallel proceeding."[3] In fact, much of the prefiled testimony is either identical, or nearly identical, to the testimony filed by the Qwest witnesses in Docket No. 08F-259T before the Colorado Public Utilities Commission.

What each Qwest witness fails to address is how the rules and regulations applicable to CLEC-provided switched access services differ between Colorado and Florida, and how these differences might impact what Qwest must demonstrate in this proceeding. Instead, the Qwest witnesses largely repeat their Colorado testimony as if the rules and regulations were the same in each state.

Q. ARE YOU FAMILIAR WITH THE RULES AND REGULATIONS THAT APPLY TO SWITCHED ACCESS SERVICES IN COLORADO?

A. Yes.

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[3] See Direct Testimony of William R. Easton, p. 2; Direct Testimony of Dennis L. Weisman, pp. 2, 12, 23; Direct Testimony of Lisa Hensley Eckert, pp. 10-11.

Q. WHAT IS YOUR UNDERSTANDING OF HOW CLEC-PROVIDED SWITCHED ACCESS SERVICES ARE REGULATED IN COLORADO?

A. It is my understanding, based on my experience with the regulatory environment in Colorado, a review of the Colorado statutes, and a review of the documents associated with the proceeding cited by Qwest, that the Colorado Commission regulates CLEC-provided switched access services in a number of ways that distinguish Colorado from Florida:

1. The Colorado Legislature enacted a statute that specifically regulates access charges and addresses discriminatory pricing for access services. In addition to containing general provisions concerning "unreasonable discrimination" in the rates of telecommunications providers (C.R.S. § 40-3-101 & 102), a separate Colorado statute explicitly regulates access charges of local exchange carriers. C.R.S. § 40-15-105(1) (entitled "nondiscriminatory access charges"), provides that "[n]o local exchange provider shall, as to its pricing and provision of access, make or grant any preference or advantage to any person providing telecommunications service between exchanges nor subject any such person to, nor itself take advantage of, any prejudice or competitive disadvantage for providing access to the local exchange network." The Florida statutes contain no similar provision concerning access charges.

2. CLECs are required to file tariffs for switched access service in Colorado. C.R.S. § 40-3-103 requires all carriers in Colorado to file tariffs showing all rates and terms of service. In his Recommended Decision in the case cited by Qwest, the ALJ in Colorado noted that "respondent CLECs are required to maintain a tariff on file with the Commission containing the rates, terms, and conditions governing its Part 2 and Part 3 services and products, including intrastate switched access."[4] The Colorado ALJ goes on in the same paragraph to note that in that state, CLECs "are obligated to comply with the terms and conditions of their filed tariff unless expressly authorized by the Commission to do otherwise." In contrast, the Florida statutes and Commission rules do not require CLECs to file tariffs for switched access charges.

3. The Colorado statutes require access charges to be cost based. C.R.S. 40-15-105 provides that "access charges by a local exchange provider shall be cost-based, as determined by the Commission." In contrast, the Florida statutes and Commission rules do not regulate CLEC-provided access rates or require those rates to be cost based.

4. In Colorado, contracts for switched access service are required to be filed with the Commission. C.R.S. § 40-15-105(3) provides that "contracts for access ... shall be filed with the commission and open to review

[4] Recommended Decision of Administrative Law Judge G. Harris Adams Partially Dismissing and Partially Granting Complaint ("*Colorado Recommended Decision*"), February 23, 2011, ¶230.

by other purchasers of such access." The ALJ in the Colorado case relied on the existence of this filing requirement when making his findings. In contrast, the Florida statutes and Commission rules permit CLECs to enter into contracts, but contain no filing requirement.

Q. BASED ON YOUR REVIEW, IS IT REASONABLE OR ACCURATE TO CHARACTERIZE THE COLORADO CASE CITED BY QWEST AS A "PARALLEL PROCEEDING" TO THIS CASE?

A. No. While it is true that Qwest has filed a similar complaint in both states, the context in which that complaint was filed appears to be fundamentally different in Colorado and Florida.

In Colorado, the Commission regulates CLEC-provided switched access service (including the rates for that service), CLECs are required to file and maintain tariffs for switched access services, the Commission regulates the rates for CLEC-provided switched access service based on cost, CLECs are explicitly prohibited by statute from engaging in discriminatory pricing for switched access service, CLECs are required by statute to file any contracts for switched access service with the Commission.

In Florida, CLECs are not required to file tariffs for switched access service, the Commission does not regulate the rates of CLEC-provided switched access (based on cost or by any other means), there is no statute section that explicitly addresses discriminatory pricing for switched access

service,[5] and CLECs are not required to disclose or file with the Commission any contracts for switched access service.

Despite these significant distinctions, the Qwest witnesses have chosen to ignore the differences between Colorado and Florida, characterize the Colorado case as a "parallel proceeding," and attempt to portray the issues before the Commission in this case as directly comparable to the issues before the Colorado Commission.

Q. YOUR TESTIMONY ABOVE DESCRIBES TWO STATES WITH VERY DIFFERENT APPROACHES TO THE REGULATION OF CLEC-PROVIDED SERVICES, INCLUDING SWITCHED ACCESS SERVICE. IS IT REASONABLE TO EXPECT THESE KINDS OF DIFFERENCES TO BE PRESENT?

A. Yes. In my experience, the degree of oversight exercised by state regulators over CLEC-provided services (including access services) varies significantly across the country. The legislatures and regulatory commissions of some states, like Colorado, have elected to regulate CLEC operations as they regulate ILEC operations, with the corresponding tariffing requirements and

[5] Section 364.08, cited by Qwest, was not specific to access services and, as noted at pp. 21-22 of my direct testimony, it is not clear that this section was ever intended to apply to carrier-to-carrier transactions prior to being repealed. Even if applied to carrier-to-carrier transactions, this section of the statute addressed only service provided to customers "under like circumstances." As noted at pp. 24-25 of my direct testimony, it is also unclear whether §364.10 was ever intended to apply to carrier-to-carrier transactions before being repealed.

restrictions on contract pricing for access services. Other states, like Florida, have elected to exercise a far different degree of regulatory oversight of CLEC-provided access services, with no tariffing requirements or restrictions on contract pricing. The Commission's oversight of CLEC-provided services has been limited to retail services provided to end users, and specifically to consumer protection requirements. The Florida Legislature and Commission have elected not to extend that type of regulatory oversight to the business transactions between CLECs and other carriers.

Q. IS THE DEGREE OF REGULATORY OVERSIGHT EXERCISED OVER CLEC-PROVIDED ACCESS SERVICES IN FLORIDA UNUSUAL?

A. No. In fact, the decision of the Florida Legislature and Commission not to regulate the rates for the intrastate switched access services provided by CLECs is consistent with the approach taken by the FCC for CLEC-provided interstate access services. As noted at pp. 11-13 of my Direct Testimony, the FCC has considered negotiated agreements – such as the contracts at issue in this case – to be the primary mechanism for establishing the switched access rates to be charged to IXCs by CLECs.[6] The FCC permits, but does not require, the tariffing of switched access services by CLECs, and has been clear that the purpose of any voluntarily-tariffed rates are to serve as "default

[6] See *FCC CLEC Access Order* (2001), ¶42; *FCC Intercarrier Compensation Reform Order* (2011), ¶739.

framework" to apply in the absence of a negotiated agreement (that is, a carrier-to-carrier contract addressing the rates, terms, and conditions of how access service will be provided).

Q. MUCH OF THE TESTIMONY OF THE QWEST WITNESSES SEEMS TO BE RESPONSIVE TO THE QUESTION "HOW SHOULD THE COMMISSION DECIDE THIS CASE IF COLORADO LAW APPLIED IN FLORIDA?" CAN YOU PERFORM A SIMILAR ANALYSIS BASED ON THE FCC'S REGULATIONS FOR CLEC-PROVIDED SWITCHED ACCESS?

A. Yes. The FCC has consistently been clear that a CLEC's interstate access tariff serves as a notice of the rates that will be in effect absent a negotiated agreement: "we recognize the attraction of a tariffed regime because it permits CLECs to file the terms on which they will provide service and to know that, *absent some contrary negotiated agreement*, any IXC that receives access service is bound to pay the tariffed rates. Similarly, IXCs know that, whatever the source or destination of their access traffic, they will be assured a rate that is either within the benchmark zone of reasonableness or is *one to which they have agreed in negotiations*."[7]

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[7] *FCC CLEC Access Order*, ¶42, emphasis added. The FCC reiterated this position in ¶ 739 of its 2011 *Intercarrier Compensation Reform Order*: "the transition we adopt sets a default framework, leaving carriers free to enter negotiated agreements that allow for different terms."

The FCC was also clear that it did *not* intend for a CLEC's benchmark tariffed rates to trump the rates in IXC contracts: "we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs. Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide."

Here in Florida, two IXCs paid CLECs for switched access service based on rates established by contract. Other IXCs, including Qwest, paid CLECs based on the rates in the CLEC's filed price list. Each option, and a scenario in which each of the two options occurs simultaneously – that is, some IXCs pay for switched access based on negotiated rates while other IXCs pay based on a filed price list – is fully consistent with the FCC's regulatory regime. It is also important to note that even when the FCC changes the regulatory treatment of a service, it does so prospectively. Here, Qwest is asking the Commission to fundamentally change the way in which CLEC-provided access rates are regulated, and to do so retrospectively. Such an approach – based on a process of changing the rules after the fact – would be highly unusual and would represent a poor approach to public policy.

Ultimately, of course, any discussion of how this case might be decided pursuant to Colorado law is simply irrelevant to the matter at hand. An analysis of the FCC's regulatory regime, while instructive, is of course not dispositive. The only question before the Commission is how Qwest's

complaint should be evaluated in Florida: a state in which CLECs are not required to file tariffs for switched access service, CLEC-provided switched access rates are not regulated (based on cost or by any other means), CLECs are not required to file or disclose any contracts for switched access service. Within this regulatory context, Qwest has made no claim that it has been charged rates for switched access service that are anything other than the rates set forth in CLECs' filed price lists, but instead takes issue with the fact that other IXCs entered into contracts that, among other terms and conditions, established different rates for switched access service. Qwest now seeks to have the rules changed retroactively in a way that would provide it with a better deal than was actually received by any other IXC at any time in Florida.

IV. Response to the Direct Testimony of Mr. Easton

Q. ARE THERE ANY ISSUES ON WHICH YOU AGREE WITH MR. EASTON?

A. Yes, there appear to be. At pp. 10-11 of his testimony, Mr. Easton acknowledges that CLECs in Florida are not required to file tariffs (or even price lists) for access services provided to other carriers, but are only required to file price lists for the basic retail services provided to end user customers. Mr. Eaton also acknowledges that the voluntarily-filed CLEC price lists do not constitute regulation of the services by the Commission, and correctly points

out (p. 11) that in Florida "CLECs are permitted to use individual contracts to deviate from their switched access price lists."

Q. MR. EASTON GOES ON TO DESCRIBE HIS UNDERSTANDING OF THE FLORIDA STATUTES REGARDING THE USE OF SUCH CONTRACTS TO ESTABLISH RATES FOR CLEC-PROVIDED SWITCHED ACCESS SERVICE. DO YOU SHARE HIS UNDERSTANDING?

A. No. I certainly agree with Mr. Easton that CLECs can enter into contracts with IXCs in Florida and these contracts may include, among any other terms and conditions, rates for switched access services that are different than those set forth in the CLEC's price list. But Mr. Easton goes further (p. 11), and provides his understanding that if CLECs enter into such a contract, "they must make those same rates, terms and conditions available to similarly-situated customers (IXCs) to ensure that they are not unlawfully discriminating." I have three fundamental areas of disagreement with Mr. Easton's assertion.

First, Mr. Easton does not provide any citation to a Florida statute for his assertion that a CLEC must publicly disclose any such contracts and make "those same rates, terms and conditions available to similarly-situated customers (IXCs)." Rather than any (current or previous) section of the Florida statutes, it appears that Mr. Easton is recalling the *Colorado* statute described above. I am not aware of any current or previous section of the Florida statutes that contains a provision requiring the filing or disclosure of a

carrier-to-carrier contract that includes rates, terms, or conditions for switched access service, and Qwest has not identified any such provision.

Second, Mr. Easton does not provide any citation to a Florida statute for his assertion that any failure of a CLEC to make contracts public and generally available means that the CLEC is "unlawfully discriminating." Rather than any (current or previous) section of the Florida statutes, it appears that once again Mr. Easton is recalling the *Colorado* statute when reaching this conclusion.

I am not aware of any current or previous section of the Florida statutes that contains a similar provision that would require a CLEC to make any contract-based rates, terms, or conditions for switched access service generally available, and Qwest has not identified any such provision.

Third, Mr. Easton's assertion regarding what he believes CLECs should have done is inconsistent with the way in which Mr. Canfield has calculated damages. Mr. Easton asserts (though, as noted above, with no foundation in Florida statutes) that a CLEC who enters into a contract with an IXC "must make those same rates, terms and conditions available to similarly-situated customers (IXCs) to ensure that they are not unlawfully discriminating." Yet Mr. Canfield has not made his calculations based on a scenario in which Qwest has subscribed to the "same rates, terms and conditions" agreed to by other IXCs in the contracts at issue, but has instead assumed that Qwest would have been able to avail itself of *only* the "rates, terms and conditions" that relate

specifically to switched access service. This is the antithesis of the anti-discrimination provision that Mr. Easton purports to be applying:[8] if the Commission were to order CLECs to make the payments to Qwest calculated by Mr. Canfield, it would be mandating that CLECs discriminate against other IXCs in favor of Qwest by retroactively placing Qwest in a preferred position never occupied by another IXC.

Q. AT P. 12 OF HIS TESTIMONY, MR. EASTON ASSERTS THAT CLECS HAVE SUBJECTED QWEST TO "UNREASONABLE DISCRIMINATION." DOES HE PROVIDE ANY BASIS FOR SUCH A CONCLUSION?

A. Ultimately, no. Specifically, Mr. Easton asserts that "QCC believes that the CLECs unreasonably discriminated against QCC by offering select IXCs lower switched access rates through secret agreements and by failing to make those rates available to QCC." As an initial matter, it is important to note that a requirement for a CLEC to disclose any contract containing rates, terms, and conditions for switched access service does not appear in any version of the Florida statute (current or previous). Mr. Easton's treatment of any contract arrangements for switched access service not affirmatively offered to Qwest as

[8] Mr. Easton's assertion is based on a provision of a Colorado statute that does not appear in any current or previous version of the Florida statute. The point is that even if the language relied upon by Mr. Easton did appear in the Florida statute, Mr. Canfield has made calculations that are directly at odds with an objective of preventing discrimination among IXCs.

per se improper appears to be based on a mistaken understanding that such a requirement is present in the Florida statutes or that this Commission should base its decisions on something other than Florida law.

While he makes no specific reference to any Florida statute, Mr. Easton's reference to "unreasonable discrimination" appears to be a consequence of Qwest's reliance in its Complaint on §364.10(1),[9] which prohibits a telecommunications carrier from subjecting "any particular person or locality to an undue or unreasonable prejudice or disadvantage." Based on this language, Qwest argues in its Complaint that CLECs were required to make "the terms" of any contracts entered into with other IXCs available to "similarly situated carriers."[10]

Based on Qwest's interpretation of §364.10, the salient question appears to be whether Qwest, when purchasing switched access service from certain CLECs, was "similarly situated" to the IXCs who had entered into contracts with those CLECs. Based on Qwest's reliance on this interpretation of §364.10 (and its reliance on an interpretation of 364.08 that would prohibit discrimination if a carrier is "under like circumstances"), I had expected Qwest's witnesses to devote a significant portion of their direct testimony to a

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[9] As noted above and in my direct testimony, it is not clear that §364.10 was ever intended to apply to carrier-to-carrier transactions before being repealed. Even if it did, Qwest has not made a demonstration of "unreasonable discrimination" in its testimony.

[10] While Qwest uses the phrase "similarly-situated" in its Complaint and direct testimony, the phrase does not appear in the cited sections of the statute.

demonstration that Qwest was "similarly situated" and/or "under like circumstances" to the IXCs who entered into contracts.

Q. DOES MR. EASTON OFFER ANY FACTS IN SUPPORT OF A CONCLUSION THAT QWEST WAS "SIMILARLY SITUATED" TO THE IXCS WHO ENTERED INTO CONTRACTS?

A. No. Mr. Easton offers only two statements in support of such a conclusion.[11]

First, at p. 12, Mr. Easton offers a conclusory statement that because switched access represents a "critical, monopoly service," Qwest should automatically be treated as "similarly situated" to any other IXC purchasing switched access. Here, Mr. Easton appears to be arguing (though with no supporting analysis of his opinion) that switched access service should somehow be treated differently because it represents – in Qwest's view – a "critical, monopoly service." Mr. Easton's testimony suggests that Qwest should be treated as presumptively "similarly situated" to any other IXC purchasing switching access service because the service occupies this unique position, and that any analysis of whether Qwest was "similarly situated" should be limited solely to the question of whether switched access service was

[11] In addition to his limited testimony on the subject, Mr. Easton also states (p. 3) that "Dr. Weisman also analyzes whether QCC is similarly situated" to the IXCs who entered into contracts. I will address Dr. Weisman's arguments in the next section of my testimony.

being purchased, with no consideration of any other terms and conditions contained in any contract between CLECs and IXCs.

What Mr. Easton fails to address in his testimony is the fact that the Florida Legislature *could* have concluded that CLEC-provided switched access service occupies such a unique position, and *could* have imposed statutory requirements in Florida based on such a finding, but did not do so. Like much of the Qwest testimony, Mr. Easton's testimony here represents a discussion of what Qwest believes Florida law ought to be, rather than how the facts of the case apply to the law as it actually exists (or has actually existed at some time during the claimed damages period).[12]

Second, Mr. Easton argues (p. 12) that Qwest was "similarly situated" to each of the IXCs who purchased switched access service from CLEC pursuant to contracts because "as IXC customers of tandem-routed CLEC switched access, AT&T, Sprint, and QCC are similarly situated." When making this claim, Mr. Easton offers no evidence regarding the type of routing used by other IXCs and no demonstration that other IXCs either exclusively (or even primarily) utilized tandem-routed switched access. As noted at pp. 37-40 of my direct testimony, a number of the contracts between CLECs and AT&T or Sprint included provisions (in the form of incentives or requirements) for other forms of network routing, including the establishment

[12] As I will address in the next section of my testimony, nearly all of Dr. Weisman's testimony falls into this category.

of direct end office trunks ("DEOTs"). Other contracts anticipate more comprehensive forms of network integration. Each of these would result in the IXC purchasing something other than "tandem-routed CLEC switched access" for at least some portion of the traffic exchanged with a given CLEC. Of course, Qwest retains the burden to prove its case, and Mr. Easton offers no evidence that the network routing of the access services purchased by Qwest was the same as the network routing of the access services purchased by other IXCs.

It is also important to recall that the contracts between CLECs and other IXCs contained additional terms and conditions and in most cases addressed the arrangements for services in addition to switched access. Even if Qwest were to demonstrate (and Mr. Easton offers nothing in his testimony beyond an unsubstantiated claim) that 100% of the access services purchased by Qwest, AT&T, and Sprint constituted identical "tandem-routed CLEC switched access," such a demonstration would fall short of demonstrating that Qwest was "similarly situated" to other IXCs who were operating pursuant to contracts that contained additional terms and conditions beyond discounted rates for switched access service.

Q. AT PP. 13-15 OF HIS TESTIMONY, MR. EASTON ADDRESSES "EXPLANATIONS" OFFERED BY CLECS FOR ENTERING INTO CONTRACTS WITH OTHER IXCS. ARE CLECS REQUIRED TO

PROVIDE AN "EXPLANATION" FOR ENTERING INTO SUCH A CONTRACT?

A. No. I am not aware of any section of the Florida Statutes (current or previous) that would require a CLEC to disclose the existence of a carrier-to-carrier contract, and certainly no provision that would require the CLEC to justify or otherwise explain a decision to enter into such a contract. These contracts represent unregulated agreements among carriers to provide a number of unregulated services (including, but usually not limited to, CLEC-provided switched access service).

While Qwest has sought "explanations" from CLECs in discovery, Mr. Easton offers no citation to any Florida Statute or Commission Rule to support an assertion that contracts must be "explained" by CLECs simply because one of the services addressed in the contract is a service that Qwest believes warrants special treatment.

Q. AT. PP. 15-16 OF HIS TESTIMONY, MR. EASTON ARGUES THAT CLECS HAVE THE RESPONSIBILITY TO JUSTIFY THE CONTRACTS THEY HAVE ENTERED INTO WITH OTHER IXCS. DOES HE PROVIDE ANY BASIS FOR THIS ASSERTION?

A. No. Specifically, Mr. Easton argues that "to date, no reasonable explanation has been given as to how and why QCC is not, in the context of intrastate

switched access in Florida, similarly situated to AT&T and Sprint." There are two fundamental problems with this assertion.

First, Mr. Easton does not explain why, pursuant to any of the sections of the Florida statute that Qwest cites in its Complaint, a CLEC would be required to provide such an explanation. Because Qwest filed the complaint, it is my understanding that it bears the burden of demonstrating that it was similarly situated to the other IXCs operating pursuant to contracts with CLECs. In contrast, the Qwest witnesses appear to be trying to shift this burden, and have CLECs demonstrate that Qwest was *not* similarly situated.[13] Arguing that CLECs have failed to provide a demonstration that they are not required to provide is not equivalent to Qwest providing the demonstration that it must provide in this case.

Second, Mr. Easton's description of the demonstration to be made is off target. Qwest's Complaint asserts that other IXCs were provided switched access service at lower rates in the context of contracts entered into with CLECs. Setting aside the issue who has the burden, Mr. Easton frames the issue as whether Qwest, "in the context of intrastate switched access in Florida," is "similarly situated to AT&T and Sprint." A more precise statement of the issue would be whether Qwest, in the context of the actual terms, conditions, and surrounding circumstances of any contracts between

[13] As noted above, the phrase "similarly situated" is used by Qwest in its Complaint and supporting testimony, but does not actually appear in the Florida statutes.

CLECs and IXCs that include switched access service, was "under like circumstances" to the IXCs who entered into (and operated pursuant to) those contracts. Qwest does not address this issue in the direct testimony of any of its witnesses.

Q. AT PP. 15-16 OF HIS TESTIMONY, MR. EASTON ARGUES THAT THE COST INCURRED BY A CLEC TO PROVIDE SWITCHED ACCESS SERVICE IS A RELEVANT CONSIDERATION IN THIS CASE. DO YOU AGREE?

A. No. Mr. Easton does not offer any evidence in support of his assertions regarding cost of service (he instead relies entirely on the testimony of Dr. Weisman), but does reach a number of conclusions that he asserts are relevant.

First, Mr. Easton argues that "a CLEC's cost of providing switched access does not vary from IXC to IXC." Such a statement is demonstrably false (as I will explain in my response to Dr. Weisman), but it is equally important to note that even if it were true, such an observation is irrelevant to an evaluation of Qwest's claims, because this Commission does not (and has not) regulated CLEC-provided switched access rates on any basis, including but not limited to a cost basis. Once again, Mr. Easton appears to be confusing Florida and Colorado. In Colorado, the state commission regulates the rates for access services on the basis of cost: C.R.S. 40-15-105(1) states in part that "access charges by a local exchange provider shall be cost-based, as

determined by the commission." But Mr. Easton offers no citation to any *Florida* statute that requires CLEC-provided access charges to be cost-based or for CLEC's to justify any differences in the rates to various IXCs based on the cost of providing service (or on any other basis).

Mr. Easton also argues (again relying on Dr. Weisman) that "the cost of providing switched access does not vary depending upon the amount of unrelated services purchased by an IXC." Mr. Easton misses the point here: while the cost of providing switched access service may (or may not) be impacted,[14] the value of the contract to a CLEC is very much a function of an IXC's commitments to purchase a given volume of access services and/or a commitment to purchase other services at a given price. Even where a specific commitment is not made, the value of a contact may also be a function of a CLEC's reasonable expectation of a customer's future volumes and commitments to timely payments on an ongoing basis. The value to the CLEC of the other terms and conditions of a contract directly impact that CLEC's willingness to sell switched access service at a given price. This basic truth provides the motivation for CLECs, IXCs, and other telecommunications companies to enter into a variety of carrier-to-carrier contracts on a regular basis.

[14] As I will explain below, the additional terms of the contracts almost certainly impacted the CLEC's cost to provide a number of services, including switched access service.

This "overall value of contract" concept also underscores why Qwest's damages calculations in this case are fundamentally flawed. CLECs entered into contracts that included discounts for switched access services, but those contracts also included other terms and conditions that directly impacted the value of the contract to the CLEC (and the CLEC's motivation to enter into the contract). Qwest now seeks to have the Commission retroactively place Qwest into a position of availing itself of *only* the switched access discounts, while ignoring all other terms and conditions of the contracts. There is no reason to believe that a CLEC would have entered into such an agreement (with Qwest or any other IXC), and no basis to retroactively place Qwest in such a preferred position.

Q. AT P. 16, MR. EASTON ARGUES THAT QWEST IS ENTITLED TO "REFUNDS OF AMOUNTS IT OVERPAID RESPONDENT CLECS." DO YOU AGREE?

A. No. Qwest has presented no evidence that it "overpaid" any CLEC at any time. Each of the respondent CLECs billed Qwest rates no higher than those shown in that CLEC's voluntarily-filed price list. Qwest does not claim that any CLEC charged more than this amount at any time during the claimed damages period. To my knowledge, Qwest did not dispute the bills of any of the respondent CLECs claiming that it was charged a rate other than the rate

found in the price list. In short, even Qwest admits that it was billed pursuant to the price lists on file and that it paid what it expected to pay for the service.

Mr. Easton goes on to claim that Qwest's "overpayment" results from the difference between what Qwest actually paid and "the discounted amounts it would have paid had the CLECs extended the same discount to QCC as they did to AT&T and Sprint." When making this claim, Mr. Easton fails to recognize that, unlike Colorado, the Florida statutes do not (and have not at any time during the damages period) require CLECs to disclose contracts or to offer those contracts to other IXCs. Absent such a requirement, Mr. Easton does not explain why Florida CLECs were at any time required to "extend the same discount to QCC as they did to AT&T and Sprint."

Mr. Easton also fails to recognize that the CLECs did not simply offer other IXCs a discount for switched access service, but included such a discount as one element of multi-element contracts containing other terms and conditions that provided value to the CLEC. Mr. Easton (at p. 17) also notes that Qwest seeks prospective relief, again based on a flawed assumption that Qwest should be permitted to avail itself of only the part of any existing contract that addressed reduced rates for access services, while ignoring all other provisions of the contract that create obligations for IXCs and value to the CLEC.[15]

[15] The other relevant provisions of the contracts are addressed at pp. 30-41 of my direct testimony.

V. Response to the Direct Testimony of Dr. Weisman

Q. SEVERAL OF THE STATED "KEY THEMES" OF DR. WEISMAN'S TESTIMONY RELATE TO HIS BELIEF THAT CLEC-PROVIDED SWITCHED ACCESS SERVICES SHOULD BE REGULATED. IS THIS CASE THE PROPER FORUM SUCH A DISCUSSION?

A. No. Dr. Weisman devotes nearly all of his testimony to a description of why and how he believes the rates for CLEC-provided switched access service should be regulated by this Commission (and presumably by the FCC and other state commissions). While I disagree with his analysis, the larger point is that his testimony is well beyond the scope of this proceeding. It is my understanding that the question Qwest has put to the Commission is limited to whether any of the respondent CLECs have at any time violated Florida Statutes or Commission Rules as those statutes and rules actually exist (or actually existed at some point during the claimed damages period).

Dr. Weisman's testimony would be more appropriate in a legislative committee hearing, where the legislature is making a decision whether to regulate various aspects of CLEC-provided switched access services and if so, what form that regulation should take. But that is not the issue here; the Legislature has already made its determinations regarding the need for, and desirability of, the regulation of CLEC-provided access services – and has consistently elected not to regulate the rates for this service.

Specifically, Dr. Weisman argues for the regulation of CLEC-provided access service based on cost, a mandatory tariffing requirement, a mandatory uniform price for CLEC-provided access services, and the prohibition of negotiated prices for CLEC-provided access services. What Dr. Weisman either fails to recognize, or recognizes but fails to acknowledge in his testimony, is that the Florida Legislature has already made its determinations regarding these issues. For years prior to 2011, the Legislature had the opportunity to regulate CLEC-provided access services in the way advocated by Dr. Weisman, but elected not to do so. The Legislature did not decide to regulate CLEC-provided access service rates (based on cost or any other measure), did not require the tariffing of CLEC-provided access services (or even require CLECs to file a price list), did not require uniform prices, and did not prohibit CLECs from providing access services pursuant to a contract with another carrier. In 2011, the Florida Legislature took another clear step *away* from the kinds of regulations advocated by Dr. Weisman: the "Regulatory Reform Act" substantially revised the sections of Chapter 364 cited in the Qwest Complaint. §§ 364.08 and 364.10(1) were repealed effective July 1, 2011, and §364.04 was amended to clarify that a telecommunications carrier (whether ILEC or CLEC) is *not* prohibited from "entering into contracts establishing rates, tolls, rentals, and charges that differ from its published schedules or offering services that are not included in its published schedules."

In direct contrast, Dr. Weisman's testimony advocates for a rather dramatic swing in the opposite direction. He recommends aggressive regulation of CLEC-provided access, including a prohibition of contract pricing unless any price difference is based on a demonstrated underlying cost difference and a requirement that any and all contract prices for CLEC-provided access services be disclosed and made generally available.[16]

Q. DOES DR. WEISMAN ACKNOWLEDGE THE LEGISLATURE'S MOVEMENT AWAY FROM THE KIND OF REGULATION THAT HE IS PROPOSING?

A. Yes. At p. 8 of his testimony, he notes that the Florida Legislature adopted a public policy based on "a default reliance on competition to provide the requisite market discipline" rather than "a default reliance on economic regulation to provide the requisite market discipline."

Dr. Weisman, typically an unabashed advocate of relaxed regulation, then goes on to recommend an exception to that policy in this case. He argues that "the fact that economic regulation is now the exception rather than the rule does not imply that regulation is unwarranted in all cases ... regulatory

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[16] In Dr. Weisman's proposed regulatory regime, a CLEC would be unable to negotiate an agreement with an IXC that included, among other elements, any discounted price for switched access service. Such a restriction would take away the ability of CLECs in Florida to enter into the kind of carrier-to-carrier contracts that are standard in the industry and that are explicitly permitted by the FCC for interstate switched access service.

oversight to ensure non-discriminatory pricing of switched access is just such an exception." In his testimony, Dr. Weisman is asking the Commission to retroactively apply an aggressive form of regulation to CLEC-provided switched access service as an exception to his usual policy of allowing market-based discipline to take the place of regulation.

Q. IS IT YOUR OPINION THAT THIS CASE IS THE PROPER FORUM FOR A DISCUSSION OF WHAT PUBLIC POLICY APPROACH SHOULD BE ADOPTED BY THE FLORIDA LEGISLATURE WHEN ENACTING LEGISLATION, AND WHAT EXCEPTIONS TO THAT PUBLIC POLICY SHOULD BE MADE TO ACCOMMODATE THE INTERESTS OF INDIVIDUAL CARRIERS?

A. No. Setting aside questions regarding the merits of what he is advocating, the fact remains that Dr. Weisman's testimony would be more applicable to a legislative hearing than it is to this case. Nearly all of his testimony addresses the issues of what he believes Florida law should be or how he believes Florida law should be changed.

Having acknowledged the existing lack of regulation of CLEC-provided access service rates in Florida, Dr. Weisman nevertheless urges the Commission to act anyway. At p. 24 he asserts that "the Commission must intervene to provide the necessary oversight," but fails to explain how his new

regulatory regime could be applied retroactively, or even how it could be applied prospectively, without a change in Florida law.

Q. DR. WEISMAN BASES HIS RECOMMENDATIONS LARGELY ON HIS CLAIM THAT SWITCHED ACCESS SERVICE IS A "BOTTLENECK MONOPOLY" SERVICE. WHAT IS THE SIGNIFICANCE OF THIS CLAIM?

A. While the debate is interesting, Dr. Weisman's assertion regarding "bottleneck" services has no significance in this proceeding whatsoever.

At p. 6, Dr. Weisman asserts that "all providers of switched long distance services require switched access as an input to production and have no economically viable alternative to purchasing these inputs from the LECs, be they incumbent LECs or competitive LECs." This assertion of a "bottleneck" monopoly serves as the sole underpinning for his proposal to treat switched access service as an exception to his usual policy of allowing market forces to discipline prices, and for his proposal to have the Commission regulate the service in a way that it has never done before.

Q. DOES DR. WEISMAN UNDERTAKE AN EFFORT TO DEMONSTRATE THE ACCURACY OF HIS "BOTTLENECK MONOPOLY" CLAIM IN HIS TESTIMONY?

A. No. Instead, Dr. Weisman relies on some recent statements by the FCC to support his claim. In order to evaluate whether Dr. Weisman's bottleneck monopoly claim actually supports his proposed regulatory restrictions, it is instructive to review the language and subsequent actions of the FCC.

Q. WHAT LANGUAGE OF THE FCC DOES DR. WEISMAN RELY ON?

A. Dr. Weisman cites to language contained in the FCC's 2001 *CLEC Access Order*,[17] and notes that "when it established the regulatory regime to set the carrier access rates" for CLECs, the FCC based its decision on a conclusion that the markets for switched access service consist of a series of bottleneck monopolies.

Q. AS AN INITIAL MATTER, DO YOU AGREE WITH DR. WEISMAN'S ASSERTION THAT THE FCC ESTABLISHED A REGULATORY REGIME THAT "SET THE CARRIER ACCESS RATES" FOR CLECS?

A. Not at all. The FCC did adopt a regulatory regime based on its conclusion that CLEC access markets consist "of a series of bottleneck monopolies," but when doing so explicitly decided *not* to "set the carrier access rates" for CLECs. Instead, the FCC decided to permit any given CLEC to establish its own rates for switched access service based on negotiated agreements with IXCs, based

[17] This is the same FCC Order cited at p. 9 of my Direct Testimony and in Section III above.

on a voluntary tariff (subject to an upper but not a lower bound), or based on a combination of negotiated agreements and tariffed rates. It is inaccurate and overly misleading to suggest that the FCC has at any time *set* the rates for CLEC-provided switched access service.

Q, DOES DR. WEISMAN RELY ON ANY OTHER FCC LANGUAGE?

A. Yes. Dr. Weisman also cites (p. 6) to a recent *Amicus Brief* of the FCC, in which he claims "the FCC reaffirmed its previous findings in observing that CLECs have the ability in the market for switched access services to impose 'excessive access charges on IXCs'."

Q. IS THE ALLEGED ABILITY OF CLECS TO "IMPOSE EXCESSIVE ACCESS CHARGES ON IXCS" AT ISSUE IN THIS CASE?

A. No. In its Complaint, Qwest does not contend that the switched access rates that it paid to CLECs throughout the claimed damages period – the rates in the CLECs' voluntarily-filed price lists – were "excessive." To my knowledge, Qwest never came to this Commission during the damages period to complain that the rates in the voluntarily-filed price lists were excessive, and did not contest bills submitted to it by Florida CLECs on the basis that the rates being billed were "excessive."

Qwest's Complaint, when finally filed with the Commission in 2009, did not claim that CLEC rates were too high, but rather that some CLEC rates

for switched access to some IXCs were too low. As a result, a conclusion by the FCC that the existence of a "bottleneck monopoly" created an opportunity for CLECs "to impose excessive access charges on IXCs" does not appear to have any bearing on the questions before the Commission in this case.

Q. YOU STATED THAT AFTER CONCLUDING IN 2001 THAT THE GEOGRAPHIC MARKETS FOR CLEC-PROVIDED SWITCHED ACCESS SERVICE CONSISTED OF "A SERIES OF BOTTLENECK MONOPOLIES," THE FCC DECLINED TO SET RATES FOR CLEC-PROVIDED SWITCHED ACCESS SERVICE. WHAT DID THE FCC DECIDE TO DO?

A. Based on its conclusions regarding the presence of "bottleneck monopolies" for CLEC-provided switched access service, the FCC adopted a regulatory regime that permitted, but did not require, CLECs to file tariffs for switched access services, subject to a set of caps that placed an upper bound on rates. The FCC did not place a lower bound on the rates for these services, and did not prohibit the use of negotiated agreements in which a CLEC and an IXC might agree on switched access rates that are different from those in the CLEC's tariff.

As noted at pp. 11-12 of my Direct Testimony and in Section III above, the rates that CLECs were permitted to tariff served as a benchmark that would only apply, according to the FCC, "absent some contrary negotiated

agreement." The FCC was clear that it did not intend for a CLEC's opportunity to tariff benchmark rates to interfere with the ability of the CLEC to negotiate other rates with IXCs: "we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs. Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide." *After concluding in 2001 that the geographic markets for CLEC-provided switched access service consisted of "a series of bottleneck monopolies," the FCC explicitly decided to continue to permit CLEC switched access rates to be determined through negotiated contracts with IXCs.* This decision by the FCC is directly at odds with Dr. Weisman's recommendation in this case.

Q. YOU STATED THAT DR. WEISMAN RELIES ON THE FCC'S LANGUAGE REGARDING "BOTTLENECK MONOPOLIES" IN ORDER TO JUSTIFY HIS RECOMMENDATIONS REGARDING THE REGULATORY TREATMENT OF CLEC-PROVIDED INTRASTATE SWITCHED ACCESS SERVICE IN FLORIDA. AFTER CONCLUDING THAT THE GEOGRAPHIC MARKETS FOR CLEC-PROVIDED SWITCHED ACCESS SERVICE CONSISTED OF "A SERIES OF BOTTLENECK MONOPOLIES," DID THE FCC DECIDE TO REGULATE

CLEC-PROVIDED SWITCHED ACCESS SERVICE BASED ON COST AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No. The FCC rejected requests that it regulate CLEC-provided switched access service based on cost (as it does for ILEC-provided access service), and instead opted for an approach that provides the flexibility for CLECs to price the service based on rates negotiated with an IXC, based on voluntarily-filed rates, or based on a combination of these two options.

Q. DID THE FCC DECIDE TO MANDATE UNIFORM PRICING FOR CLEC-PROVIDED SWITCHED ACCESS SERVICE, AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No.

Q. DID THE FCC DECIDE TO REGULATE CLEC-PROVIDED SWITCHED ACCESS SERVICE BY REQUIRING NEGOTIATED RATES TO BE COST-JUSTIFIED, AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No.

Q. DID THE FCC DECIDE TO REGULATE CLEC-PROVIDED SWITCHED ACCESS SERVICE BY REQUIRING ANY NEGOTIATED AGREEMENTS

BETWEEN CLECS AND IXCS TO BE DISCLOSED, AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No.

Q. DID THE FCC DECIDE TO REGULATE CLEC-PROVIDED SWITCHED ACCESS SERVICE BY REQUIRING THAT ANY NEGOTIATED RATES BE OFFERED TO ALL IXCS, AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No.

Q. DID THE FCC DECIDE TO REGULATE CLEC-PROVIDED SWITCHED ACCESS SERVICE BY ORDERING ANY RETROSPECTIVE RELIEF, AS DR. WEISMAN PROPOSES IN THIS PROCEEDING?

A. No. To the contrary, the FCC explicitly found that existing contracts for switched access services would not be impacted by its decision, and explicitly permitted CLECs to continue to enter into contracts with IXCs on a going-forward basis.

Q. WHAT CONCLUSIONS CAN BE DRAWN FROM THE FCC DECISION CITED BY DR. WEISMAN?

A. It is clear that the FCC does not agree with Dr. Weisman regarding the significance of a conclusion that the markets for CLEC-provided switched

access consist "of a series of bottleneck monopolies." After reaching this conclusion, the FCC *rejected* requests that it regulate the level of CLEC access rates based on cost and *rejected* requests that it require CLEC-provided switched access to be tariffed. The FCC did *not* mandate uniform pricing for CLEC-provided access, and explicitly did *not* place any restrictions on the use of negotiated agreements between CLECs and IXCs to establish switched access prices. As recently as 2011, the FCC reiterated its policy of leaving CLECs and IXCs "free to enter into negotiated agreements that allow for different terms."[18]

Setting aside the issue whether any such "bottleneck monopoly" exists in Florida, Dr. Weisman's testimony that the existence of such a bottleneck is sufficient reason to adopt the regulatory constraints on CLEC-provided switched access services that he proposes is directly at odds with the actions of the FCC. Dr. Weisman offers no explanation why this Commission should adopt strict constraints of CLEC pricing based on a finding of a "bottleneck monopoly," when the FCC elected not to adopt any of the constraints he advocates (and explicitly rejected calls for at least two of them). Instead, the FCC decided to permit the kind of negotiated agreements that are the subject of Qwest's Complaint in this case.

[18] *FCC Intercarrier Compensation Reform Order*, ¶739.

Q. THROUGHOUT HIS TESTIMONY, DR. WEISMAN ARGUES THAT THE CLECS MUST BE ABLE TO DEMONSTRATE COST DIFFERENCES IN ORDER TO JUSTIFY DIFFERENCES IN RATES. DO YOU AGREE WITH HIS TESTIMONY?

A. No; I disagree with Dr. Weisman for several reasons.

First, his exclusive focus on cost appears to be based at least in part on statutes in effect in Colorado (the state for which much of his testimony appears to have originally been written). There, rates for switched access service are regulated by the Colorado Commission based on cost pursuant to C.R.S. 40-15-105(1), and contract pricing for access services is explicitly limited pursuant to C.R.S. 40-15-105(3). As noted previously in my testimony, there is no such regulation in Florida.

Second, Dr. Weisman's cost focus is too narrow to be valid. For example, at p. 19 he argues that CLECs have "not demonstrated, nor has any economic study of which I am aware demonstrated, that the cost of providing switched access varies with the amount of unrelated services ... purchased by an IXC." As I explain in more detail below, several of the elements of the contracts between CLECs and IXCs – including but not limited to a commitment by the IXC to purchase what Dr. Weisman describes as "unrelated services" – directly impact the CLEC's business risk. This business risk carries an inherent cost, and a reduction in risk results in a reduction in cost. Dr. Weisman has chosen to ignore this impact in his testimony.

Third, Dr. Weisman's cost-related testimony addresses what he argues to be "sound regulatory policy" (p. 15) or economic principles (p. 24), but does not directly address the sections of the Florida Statutes relied upon by Qwest in its Complaint. The question before the Commission is whether Qwest has met its burden to demonstrate that respondent CLECs have violated Florida Statutes either currently in effect or in effect during the claimed damages period. Even setting aside its flaws, Dr. Weisman's "policy" testimony does nothing to support such a demonstration.

Q. YOU STATED THAT THE CONTRACTS ENTERED INTO BY CLECS AND IXCS IMPACTED THE CLECS' BUSINESS RISK AND CONSEQUENTLY THEIR COSTS OF DOING BUSINESS. PLEASE EXPLAIN.

A. Unlike ILECs, CLECs did not begin operations with a large stable customer base and large stable cash flow. When making the investments necessary to enter new markets, CLECs (and their investors) faced the real possibility that they would be unable to attract enough customers and generate enough traffic volume to recover the cost of those investments. CLECs also faced a real possibility that even if services were provided in sufficient quantity, the CLEC would be unable to collect the amounts due from its customers (including end user customers and carrier customers, such as IXCs). These factors impacted the risk associated with a CLEC's investments and operations, and as a result

directly impacted the risk premium that a CLEC must pay to attract the capital necessary to invest and operate.

Dr. Weisman (p. 16) does acknowledge the existence of these kinds of risks, but then either ignores them or dismisses them outright when analyzing the cost impact on CLECs of entering into contracts with other carriers, including other IXCs.

Q. AT P. 18, DR. WEISMAN ARGUES THAT INCLUDING A TOTAL REVENUE COMMITMENT IN A CONTRACT DOES NOT IMPACT A CLEC'S COSTS. DO YOU AGREE?

A. No. A contract in which an IXC commits to a CLEC to purchase a given dollar amount of services decreases a CLEC's uncertainty regarding future revenues and cash flows. Decreasing uncertainty decreases the business risk inherent in that uncertainty, and reduces a CLEC's costs.

Q. AT P. 19, DR. WEISMAN ARGUES THAT INCLUDING A COMMITMENT FOR AN IXC TO PURCHASE ADDITIONAL SERVICES IN A CONTRACT DOES NOT IMPACT A CLEC'S COST OF PROVIDING SWITCHED ACCESS SERVICE. DO YOU AGREE?

A. No. A CLEC's cost to provide all services, including but not limited to switched access service, is a direct function of the CLEC's overall business risk. A commitment for the IXC to purchase additional services, even if Dr.

Weisman believes that these additional services are not directly related to switched access, decreases the CLEC's business risk[19] and therefore decreases one of the costs associated with provisioning switched access service.

Q. AT PP. 22-23, DR. WEISMAN ARGUES THAT VOLUME COMMITMENTS IN A CONTRACT DO NOT IMPACT A CLEC'S COST OF PROVIDING SWITCHED ACCESS SERVICE. DO YOU AGREE?

A. No, Dr. Weisman is both factually and conceptually wrong in this section of his testimony. Factually, he asserts (p. 22) that "none of the agreements at issue in this case contain volume requirements." As noted at p. 37 of my Direct Testimony, my review of the contracts at issue reveals that some contracts do include volume (and corresponding revenue) commitments.

Conceptually, it is undeniable that a commitment by an IXC to purchase certain volumes of services (whether switched access or other services) reduces uncertainty regarding future revenues and cash flows. This reduces risk – and costs – for a CLEC.

[19] A commitment by a customer, including an IXC customer, to purchase additional services from a CLEC reduces uncertainty regarding future cash flows and also helps to diversify the CLEC's product mix by generating revenues from carrier services other than switched access services. Both of these factors reduce business risk and therefore a CLEC's costs.

Q. AT PP. 15-16, DR. WEISMAN ARGUES THAT THE RESOLUTION OF DISPUTES IN A CONTRACT DOES NOT IMPACT A CLEC'S COST OF PROVIDING SWITCHED ACCESS SERVICE. DO YOU AGREE?

A. No. Many of the CLEC-IXC contracts in dispute contain provisions that resolve outstanding disputes and helped to avoid future disputes that could have resulted in delayed payment to CLECs for services purchased by IXCs. These contracts often resulted in the immediate payment of large sums to CLECs and acted to ensure timely payments going forward. It is undeniable that this large cash inflow, followed by a more stable revenue stream and cash flow going forward, reduced the risk and costs of CLECs.

Q. WHAT CONCLUSIONS CAN BE DRAWN REGARDING DR. WEISMAN'S COST-RELATED TESTIMONY?

A. Dr. Weisman's cost-related testimony proceeds from a premise that the rates for CLEC-provided switched access service are regulated in Florida based on cost. While Dr. Weisman may be correct that this is true for Colorado, it is not true for Florida: the Commission does not regulate and has not regulated CLEC-provided switched access service rates on any basis, including but not limited to cost. Furthermore, Dr. Weisman's assertion that cost differences represent the *only* legitimate basis for rate differences has no basis in Florida statutes. And while Dr. Weisman makes much of the fact that CLECs have not conducted studies to cost justify their rates in this case, he ignores the fact that

it is Qwest who bears the burden of proving its case, including any assertion that it has been subjected to some kind of "undue or unreasonable prejudice" pursuant to §364.10 (now repealed).

For all of these reasons, Dr. Weisman's assertion that any rate differential that has not been cost-justified by a CLEC should be treated as a *per se* form of "undue or unreasonable prejudice" should be rejected.

Q. *IF* THE RATES FOR CLEC-PROVIDED SWITCHED ACCESS WERE REGULATED IN FLORIDA BASED ON COST, AND *IF* DR. WEISMAN WERE CORRECT THAT COST SHOULD BE THE ONLY FACTOR CONSIDERED WHEN EVALUATING DIFFERENT PRICES, WOULD QWEST HAVE PROVEN ITS CASE?

A. No. While Dr. Weisman suggests that CLECs should have performed cost studies, it is Qwest, as the party filing a complaint alleging "undue or unreasonable prejudice" that must demonstrate that such prejudice has taken place. Dr. Weisman's testimony presents no actual cost analysis, but instead presents a series of high-level pronouncements that various elements of the contracts entered into by CLECs and IXC do not –according to Dr. Weisman – impact the CLECs' cost of operating in Florida. But Dr. Weisman's pronouncements aside, contracts that provide for revenue commitments, volume commitments, commitments to purchase additional services, agreements to pay outstanding debts, and agreements that increase the

likelihood that future debts will be collected, all impact a CLEC's business risk and therefore impact its costs. Dr. Weisman's extremely narrow focus causes him to omit the important cost considerations from his analysis.

Q. *IF* THE RATES FOR CLEC-PROVIDED SWITCHED ACCESS WERE REGULATED IN FLORIDA BASED ON COST, *IF* DR. WEISMAN WERE CORRECT THAT COST SHOULD BE THE ONLY FACTOR CONSIDERED WHEN EVALUATING DIFFERENT PRICES, AND *IF* QWEST HAD PRESENTED TESTIMONY DEMONSTRATING THAT CLEC COSTS WERE NOT IMPACTED BY ANY OF THE ELEMENTS OF THE CONTRACTS, WOULD DR. WEISMAN'S TESTIMONY SUPPORT THE RELIEF THAT QWEST IS SEEKING IN THIS CASE?

A. No. According to Dr. Weisman, if the rates for CLEC-provided switched access are regulated based on cost, if cost is the only factor considered, and if none of the contract elements impact a CLEC's cost, then the remedy is for the Commission to step in and enforce "uniform pricing;" that is, the Commission should ensure that all IXCs are paying the same switched access rate to a given CLEC.

But the "uniform pricing" advocated by Dr. Weisman is not what Qwest is seeking in this case. If the objective is uniform pricing, the means of reaching this goal would be for the Commission to directly address the pricing that Qwest contends gave rise to the "undue or unreasonable prejudice", and to

require the CLECs who previously were billed based on a contract to compensate the CLEC based on the rates in the CLEC's voluntarily-filed price list. Such a requirement would implement "uniform pricing" and eliminate the "undue or unreasonable prejudice" claimed by Qwest.

Rather than asking the Commission to act to eliminate the "undue or unreasonable prejudice" that it claims to exist, Qwest is instead asking the Commission to require CLECs extend the advantage of any alleged "undue or unreasonable prejudice" received by other IXCs to include Qwest. The requested relief would not implement Dr. Weisman's public policy of uniform pricing: there are a number of IXCs beyond Qwest who have not been parties to contracts with IXCs and who have instead been billed the rates in the CLECs' voluntarily-filed price lists, and the relief sought by Qwest would not change the rates paid by those IXCs. While Dr. Weisman expounds on the public policy merits of uniform pricing in his testimony, it is clear that this broader public policy is not Qwest's goal in this case. Instead, *Qwest is seeking to have the Commission perpetuate the alleged "undue or unreasonable prejudice" to Qwest's advantage.*

In reality, Qwest is asking for even more than this: it is seeking to have the Commission order CLECs to (retroactively and prospectively) offer Qwest the discounted contract rates for switched access service, but <u>not</u> to require Qwest to take on the variety of obligations taken on by other IXCs pursuant to those contracts. Ultimately, Qwest is asking the Commission to order "undue

or unreasonable prejudice" in Qwest's favor, by artificially placing it in a position enjoyed by no other IXC in Florida. Such a request is directly at odds with the public policy of "uniform pricing" described by Dr. Weisman in his testimony.

VI. Response to the Direct Testimony of Mr. Canfield

Q. WHAT IS THE STATED PURPOSE OF MR. CANFIELD'S TESTIMONY?

A. At p. 4, Mr. Canfield states that the purpose of his testimony is "to describe the financial impact upon QCC of the rate discrimination at issue in this complaint."

Q. DOES MR. CANFIELD PRESENT A CALCULATION OF THE "FINANCIAL IMPACT" ON QWEST OF ANY ALLEGED VIOLATIONS OF FLORIDA STATUTES?

A. No. There is no dispute that at all times during the claimed damages period, Qwest paid the rates set forth in the CLECs' voluntarily-filed price lists. Qwest does not claim that it suffered financial harm because the rates that it paid were excessive. Instead, Qwest claims that it suffered harm because the rates charged to other IXCs were lower, which – according to Qwest – placed Qwest at a competitive disadvantage in downstream markets.

As Dr. Weisman explains it, "in order for competition in downstream markets (in the present case, the long distance market that uses switched access

as a critical input) to be economic in the sense that it promotes competition on the merits, all similarly situated, downstream competitors must have access to upstream inputs under comparable terms and conditions."[20] Pursuant to this theory, Qwest would be harmed by the alleged discriminatory pricing because its ability to compete for retail customers of long distance services would be impacted by the fact that other IXCs paid a lower price for switched access. The financial impact to Qwest would manifest itself in the form of any lost customers (and ultimately lost profits) that might result. This kind of "lost profits" calculation represents the usual and accepted form of analysis used to calculated damages based on discriminatory pricing claims in other forums.

Q. DOES MR. CANFIELD PROVIDE ANY ANALYSIS OF THE IMPACT ON QWEST BASED ON THE DAMAGES THEORY DESCRIBED BY DR. WEISMAN?

A. No. Mr. Canfield offers no analysis of any Qwest claims of lost customers, lost revenues, or lost profits in downstream markets resulting from the alleged discrimination.

Q. WHAT CALCULATION DOES MR. CANFIELD ACTUALLY PERFORM?

A. At p. 7 of his testimony, Mr. Canfield states that in order to "determine the financial impact" on Qwest, he "evaluated the difference between what QCC

[20] Weisman Direct, pp. 8-9.

was actually billed by the CLEC for intrastate switched access (generally, the CLEC's price list rate multiplied by the minutes of use) and what QCC would have paid had QCC enjoyed the same discounts the CLEC provided the preferred IXCs for the same services during the same period of time."

There are two fundamental problems with Mr. Canfield's analysis. First, *Mr. Canfield did the calculation wrong*. In order to calculate the rates for switched access that Qwest would have paid as a "similarly situated" carrier "under like circumstances," Mr. Canfield would need to calculate Qwest's financial obligations when operating pursuant to the same contracts as other IXCs. He did not do this. Second, and perhaps more importantly, *Mr. Canfield did the wrong calculation*: instead of calculating any lost profits that Qwest might claim to have resulted in downstream markets from any alleged discrimination, he has simply calculated the difference between what Qwest actually paid (as he admits, a rate pursuant to the CLECs' voluntarily-filed price lists) and what MR. Canfield CONTENDS other IXCs paid when operating pursuant to a contract. Such a calculation does not represent damages allegedly suffered by Qwest and is inconsistent with the claims set forth in the Qwest Complaint.

Q. CAN THE AMOUNT CALCULATED BY MR. CANFIELD BE PROPERLY CHARACTERIZED AS A "REFUND"?

A. No. Conceptually, a refund would represent the difference between an amount actually charged and an amount that should be charged pursuant to a tariff. Here, there are no tariffed rates, and even Qwest does not claim that it was at any timed charged a rate higher than the rates in the CLECs' voluntarily-filed price lists. With no overcharge (and no claim of an overcharge), there can be no "refund."

Q. YOU STATED THAT MR. CANFIELD DID THE CALCULATION WRONG. PLEASE EXPLAIN.

A. In order to calculate the financial impact on Qwest of operating pursuant to the same contracts as other IXCs, Mr. Canfield would need to demonstrate (1) that Qwest was in a position to meet the obligations, terms, and conditions that other IXCs were subject to in these contracts, and (2) that Qwest was willing to meet these obligations. The contracts at issue contained multiple elements beyond simply the rates for switched access service, including commitments to purchase other services, commitments to minimum service volumes, commitments to minimum revenues, commitments to deploy network facilities in certain circumstances, and commitments to engage in broader network integration efforts. Any of these terms would affect the financial impact on Qwest of operating pursuant to the contract. As a result, Mr. Canfield's calculation is incomplete. He has calculated the impact of the financially beneficial aspects of these contracts, but has ignored any aspects of the

contracts that would not have been financially beneficial to Qwest. No IXC operated in the preferred position (all of the benefits and none of the costs of the contracts) assumed for Qwest by Mr. Canfield. As a result, his calculations do not apply to a "similarly situated" carrier operating "under like circumstances."

Q. YOU STATED THAT MR. CANFIELD DID THE WRONG CALCULATION. PLEASE EXPLAIN.

A. The calculation performed by Mr. Canfield does not represent financial damages suffered by Qwest and is inconsistent with Qwest's theory of the case as set forth in its Complaint.

As noted above, Mr. Canfield does not calculate, and does not claim to calculate, any financial harm to Qwest resulting from lost profits. As Dr. Weisman explains in his testimony, these lost profits represent the "harm" that would result from discriminatory pricing for an alleged "critical monopoly input" to Qwest's retail services.

Mr. Canfield's calculations also do not line up with Qwest's claims set forth in its Complaint. Qwest's claims of discrimination pursuant to §§364.04, 364.08, and 364.10 are conceptually addressed by adjusting the allegedly-discriminatory amounts that CLEC's charged the IXCs who were operating pursuant to contracts, and cannot effectively be addressed by somehow adjusting the amount that Qwest paid to CLECs.

Q. HAS QWEST PERFORMED THE SAME DAMAGES CALCULATION IN A PREVIOUS CASE?

A. Yes. As Mr. Easton explains at p. 16 of his direct testimony, the relief calculated by Mr. Canfield and sought by Qwest in this case is "precisely" the same as Qwest calculated in the Colorado case that it characterizes as a "parallel proceeding." But as noted in Section III of my testimony, the Colorado case is not properly characterized as a "parallel proceeding": the Colorado and Florida state statutes are fundamentally different.

In its Complaint in this case, Qwest relies on claims of discrimination. Setting aside the merits of Qwest's assertions, in order to remedy the claims of discrimination set forth in the Complaint and direct testimony it is not necessary to award any monetary damages to Qwest. If, as Qwest asserts, CLECs were required pursuant to Florida law to charge the rates contained in their voluntarily-filed price lists, then the conceptually proper relief to Qwest – a form of relief that would restore Qwest to the position that it would have enjoyed had the CLECs not engaged in the alleged discrimination – would be to require CLECs to follow what Qwest asserts to be Florida law and require the CLECs to go back and charge other IXCs the rates for switched access contained in the CLECs' voluntarily-filed price lists.[21] Such an approach

[21] To the extent that Qwest suffered financial harm during the claimed damages period, that harm consisted of lost profits associated the retail customers in what Dr.

would fully address Qwest's claims and would be a much more effective response to the alleged problem: because Qwest is not the only IXC that did not operate pursuant to a contract with CLECs during Qwest's claimed damages period, the only way to neutralize the impacts of any alleged discrimination is to address the amount paid by the IXCs that Qwest asserts paid the discounted rates (and not simply the amount paid by Qwest). Qwest is not asking the Commission to provide a true remedy for the discrimination that it claims to have occurred, but is instead asking the Commission to order CLECs to engage in additional discrimination to Qwest's advantage.

VII. Response to the Direct Testimony of Ms. Hensley Eckert

Q. AT P. 3 OF HER TESTIMONY, MS. HENSLEY ECKERT PROVIDES HER DEFINITION OF "UNJUST AND UNREASONABLE DISCRIMINATION." DO YOU AGREE WITH HER TESTIMONY?

A. No. Specifically, Ms. Hensley Eckert argues that the respondent CLECs subjected Qwest to "unjust and unreasonable discrimination" by entering into "unfiled, off-tariff individual case basis agreements" with other IXCs. Like the other Qwest witnesses, Ms. Hensley Eckert appears to be basing her testimony in this case on the statutes and regulations of other states. It is nonsensical to

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Weisman calls the "downstream market." But Qwest has not provided any calculation of lost profits in this case, and Mr. Canfield does not even address this potential impact in his testimony.

refer to "off-tariff" agreements for CLEC-provided switched access services in Florida, because these services are not, and have never been, tariffed. Ms. Hensley Eckert also takes issue with the fact that these contracts were "unfiled," but in doing so ignores the fact that there is no requirement in Florida for such contracts to be filed with the Commission. Ms. Hensley Eckert's definition of "unjust and unreasonable discrimination" is based on requirements that may exist in other states, but do not exist (and have never existed) in the Florida Statutes or Commission rules.

Q. WHAT IS THE STATED PURPOSE OF MS. HENSLEY ECKERT'S TESTIMONY?

A. Ms. Hensley Eckert states (p. 2) that the primary purpose of her testimony is to address Issue 8(a): "Are Qwest's claims barred or limited, in whole or in part, by the statute of limitations?" She goes on to provide a variety of reasons why Qwest waited until December 11, 2009 to file its Complaint in Florida, even though Qwest, and Ms. Hensley Eckert, knew that CLECs were providing switched access service to IXCs pursuant to contracts much earlier. Ms. Hensley Eckert states that Qwest delayed filing its Complaint because it did not want to "launch into complex litigation," but she does not explain why Qwest could not have filed its complaint at the time it first became aware that such contracts existed (when it first knew that it had suffered the alleged

injury), or why it would not have been reasonable for Qwest to do so at that time.

Q. WAS MS. HENSLEY ECKERT IN A POSITION TO KNOW ABOUT CONTRACTS BETWEEN CLECS AND IXCS DURING QWEST'S CLAIMED DAMAGES PERIOD?

A. Yes. Ms. Hensley Eckert states (pp. 1-2) that since 2003, she has served as a Director with direct responsibility for "company-wide Intrastate Intercarrier Compensation issues, such as switched access." She goes on to state that "switched access agreement issues are within my areas of direct responsibility."

Q. WAS QWEST IN A POSITION TO KNOW ABOUT THE EXISTENCE OF CONTRACTS BETWEEN CLECS AND IXCS DURING QWEST'S CLAIMED DAMAGES PERIOD?

A. Yes. Qwest had a regulatory infrastructure in place (including, but not limited to, Ms. Hensley Eckert's organization) that had the responsibility to monitor regulatory activity in the states in which Qwest operates. Publicly-available information in forums monitored by Qwest's regulatory staff would have made Qwest aware of the existence of contracts between CLECs and IXCs no later

than 2004. Even Ms. Hensley Eckert acknowledges that Qwest was aware that contracts existed as early as 2005.[22]

Q. SETTING ASIDE FOR THE MOMENT THE QUESTION OF WHETHER QWEST BECAME AWARE OF THE CONTRACTS BETWEEN CLECS AND IXCS IN 2004 OR 2005, DOES MS. HENSLEY ECKERT EXPLAIN WHY QWEST WAITED UNTIL DECEMBER 2009 TO FILE ITS COMPLAINT?

A. No. At p. 3, Ms. Hensley Eckert states that between the time it became aware that that CLEC-IXC contracts existed[23] and the time it filed its Complaint in December 2009, Qwest was engaged in various efforts to determine "the identity of the contracting CLECs" and the "terms and scope" of the contracts (she goes on to describe these efforts at pp. 4-9). When doing so, she does not explain why Qwest waited until December 2009 to file its Complaint in Florida.

[22] I will address the issue of when Qwest would reasonably have become aware of the contracts later in this section of my testimony.

[23] As explained below, it is reasonable to conclude that Qwest knew that such contracts existed in 2004. Even if Ms. Hensley Eckert is right that Qwest's regulatory infrastructure (including her organization) was ineffective in this regard for almost a year (from July 2004 until April 2005), she does not provide a legitimate explanation of why Qwest elected to wait four and a half years – until December 2009 – before seeking action by this Commission.

Q. IS IT YOUR UNDERSTANDING THAT QWEST NEEDED TO WAIT UNTIL IT KNEW "THE IDENTITY OF THE CONTRACTING CLECS" BEFORE FILING A COMPLAINT IN FLORIDA?

A. No. In fact, it does not appear that Qwest knew "the identity of the contracting CLECs" at the time that it finally did decide to file its Complaint in Florida. At p. 2 of its December 11, 2009 Complaint, Qwest includes "John Does 1 through 50 (CLECs whose true names are currently unknown)." Ms. Hensley Eckert does not explain why Qwest, if it had chosen to do so, could not have filed this type of "John Doe" complaint immediately upon learning that contracts addressing switched access services between CLEC and IXCs existed. From Qwest's perspective, that is the time that it first knew that the alleged injury had occurred.

Q. IS IT YOUR UNDERSTANDING THAT QWEST NEEDED TO WAIT UNTIL IT KNEW "THE TERMS AND SCOPE" OF THE AGREEMENTS BEFORE FILING A COMPLAINT IN FLORIDA?

A. No. This is perhaps the most puzzling claim in all of the direct testimony of the Qwest witnesses. Throughout her testimony, Ms. Hensley Eckert makes much of the fact that Qwest was unable to discover the precise details of the contracts, including the specific terms and scope of those agreements, and suggests that Qwest could not reasonably have filed a complaint in Florida without such knowledge. Yet according to the language of the Complaint

itself, Qwest actually filed the Complaint without knowledge of the specific contracts. Instead, the Complaint states (p. 9) that it was brought on information from proceedings before the Minnesota Public Utilities Commission beginning in 2004, and in particular based on AT&T's Comments filed on August 19, 2004 that stated AT&T had entered into hundreds of such agreements with CLECs throughout the United States.

Ms. Hensley Eckert does not explain why, having apparently obtained enough regarding contract "terms and scope" sufficient to file its Complaint, Qwest chose to completely ignore any and all additional "terms and scope" of these contracts when presenting its case. As noted at pp. 30-41 of my direct testimony, the scope of the contracts between Florida CLECs and IXCs is broader than simply an agreement to provide switched access service at discounted rates; these contracts include a variety of additional terms and conditions that create obligations for both the CLEC and the IXC. According to Ms. Hensley Eckert, Qwest delayed the filing of its Florida Complaint in order to obtain this presumably important information. But according to Mr. Easton and Dr. Weisman, the only relevant "term" in the contracts is the fact that switched access service is being provisioned at a given price; no other terms or conditions are relevant (or, according to Dr. Weisman, even potentially relevant) and the broader scope of many of these agreements should not be considered.

Even Ms. Hensley Eckert admits (p. 2) that Qwest had "become generally aware that some CLECs had entered into secret switched access agreements with preferred IXCs" at least four and a half years before Qwest chose to file its Florida Complaint. According to Mr. Easton and Dr. Weisman, this is the only information that could be relevant, and was therefore the only information that Qwest needed.

Q. EVEN IF IT BELIEVED THAT IT COULD NOT FILE A COMPLAINT IN FLORIDA UNTIL IT KNEW "THE IDENTITY OF THE CONTRACTING CLECS" AND "THE TERMS AND SCOPE" OF THE AGREEMENTS, DID QWEST ACT CONSISTENLY WITH THAT BELIEF?

A. No. As an initial matter, Qwest did file a Complaint in Florida without knowing the identity of all of the CLECs or the details of the agreements. Qwest therefore did not require knowledge of all of the CLECs or the details of the agreements to file a complaint. But even if Qwest had believed that gathering this information was necessary, Qwest did not engage in the efforts to obtain it by filing a complaint over four years earlier.

As Ms. Hensley Eckert acknowledges at p. 10 of her testimony, Qwest filed its complaint in Colorado *without* complete information regarding "the identity of the contracting CLECs" and the "term and scope" of the agreements that it now says caused the delay in the filing of its Florida Complaint. Qwest

was then able to obtain any remaining facts in the Colorado proceeding by issuing subpoenas to a number of IXCs.

Based on Ms. Hensley Eckert's description, it appears that this approach was sufficient for Qwest. What Ms. Hensley Eckert does not explain is why Qwest did not pursue this option in Florida immediately in 2004 or 2005, upon learning that CLECs and IXCs had entered into contracts that included terms for switched access pricing (when Qwest first became aware that it had suffered the alleged injury).

Q. PREVIOUSLY, YOU STATED THAT QWEST HAD THE REGULATORY INFRASTRUCTURE IN PLACE TO BE AWARE OF THE EXISTENCE OF CLEC-IXC CONTRACTS IN 2004. PLEASE EXPLAIN.

A. At pp. 3-7, Ms. Hensley Eckert describes a proceeding before the Minnesota Public Utilities Commission ("Minnesota PUC") that directly involved an investigation of contracts between CLECs and IXCs that included terms related to the provisioning of switched access service.[24] According to Ms. Hensley Eckert, Qwest did not become aware of this investigation until April 15, 2005, when the Minnesota PUC issued a "Notice of Settlement and Request for Comment."

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[24] As Ms. Hensley Eckert concedes at pp. 9-10, the Minnesota PUC's investigation was based on state law that required CLEC-provided switched access services to be tariffed in Minnesota. Like the Colorado case addressed in Section III above, the Minnesota case does not represent a "parallel proceeding" because of this fundamental difference between Minnesota and Florida.

Such a statement must be considered suspect for at least two reasons. First, Ms. Hensley Eckert does not explain how she made the determination that no one at Qwest knew about the investigation before April 15, 2005. While it is possible that Ms. Hensley Eckert did not know about the investigation (though it is certainly reasonable to conclude that a Qwest Director with direct responsibility for company-wide intercarrier compensation issues, including switched access and "switched access agreements," should have been aware of such an investigation taking place in a Qwest state), Ms. Hensley Eckert does not explain why this Commission should assume that all other individuals in Qwest's regulatory organization similarly "dropped the ball" and failed to notice that such a potentially-important investigation was taking place.

Second, such an assertion is just not credible. On July 20, 2004, the Minnesota PUC issued a "Notice of Second Addendum to Commission Meeting," which provides "notice that the items listed on the attached agenda will be heard at the Commission's regularly scheduled telecommunications meeting on Thursday, July 22, 2004 at 9:30 a.m." Of the seven items listed on the Minnesota PUC's agenda, three directly involved Qwest (that is, Qwest is listed by name as an interested party). With these items on the agenda, it is certainly reasonable to expect that Qwest would have reviewed the agenda and attended the meeting. Item no. 7 on the agenda list AT&T Communications of the Midwest, Inc. (an IXC) and a number of CLECs as parties, and is styled

"In the Matter of [Department of Commerce] Investigation into Many Companies' Negotiated Contracts for Switched Access Service." The Minnesota PUC's published agenda specifically lists an IXC and multiple CLECs, specifically mentions switched access service, and specifically mentions contracts for switched access service. The attached Service List for the agenda includes the names and addresses of three persons at "Qwest Corporation, 200 South Fifth Street, Minneapolis, MN."[25] This notification would have reasonably put Qwest on notice that it should inquire further regarding how that case impacted Qwest's interests.

In order for Qwest to remain unaware of the investigation, it is necessary to assume that the persons at Qwest responsible for monitoring activity at the Minnesota PUC failed to read the meeting notice (a notice that included three items specifically involving Qwest) and that Qwest neglected to attend or at least monitor the Commission Meeting.

To the extent anyone at Qwest could reasonably have remained unaware of the existence of contracts between AT&T and CLECs in states beyond Minnesota, AT&T provided information on August 19, 2004 that should have made Qwest aware of the existence of such contracts in other states. AT&T filed Comments in Docket No. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 466/C-04-235 (the same the dockets noticed by the

[25] A copy of the Minnesota PUC's "Notice of Second Addendum to Commission Meeting," is attached as Exhibit No. __ (DJW-4).

Minnesota PUC on July 20, 2004). On page 2 of those Comments, AT&T reveals that it has entered into contracts with a number of Minnesota CLECs. These contracts, according to AT&T, "follow the same basic form, with modifications specific to the business relationship between AT&T and the individual CLEC providers." AT&T also explicitly reveals the geographic scope of its agreements with CLECs: "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."[26] This is the very 2004 statement by AT&T that Qwest used as the factual basis for its December 2009 Complaint in this proceeding.

Q. DOES MS. HENSLEY ECKERD ACKNOWLEDGE THAT SHE WAS AWARE OF AT&T'S DISCLOSURE OF HUNDREDS OF AGREEMENTS THROUGHOUT THE UNITED STATES?

A. Yes. At p. 7, she describes data collection efforts that she took "sometime in 2007," and concedes that "by that time, I was aware that AT&T had made some comments in the Minnesota proceedings about having entered into hundreds of agreements with carriers."

Ms. Hensley Eckert's language regarding the timing of her knowledge is at best ambiguous. She does not state that she became aware of AT&T's

[26] A copy of the AT&T Comments are attached as Exhibit No. ___ (DJW-5).

Comments in 2007, only that her awareness occurred prior to "sometime in 2007." As noted above, Qwest had notice that its interests were affected well before 2007, when AT&T stated in a public filing in 2004 that it had entered into hundreds of contracts with CLECs in multiple states. Qwest knew that it had suffered the alleged injury, as it made evident when it filed comments in the same Minnesota PUC case in 2005.

Of course, to the extent Ms. Hensley Eckert claims that she was not aware of the AT&T contracts until 2007, the question becomes Why did the Qwest Director with direct responsibility for company-wide intercarrier compensation issues, including switched access and "switched access agreements," remain unaware of the existence of "hundreds of agreements" in effect "throughout the United States" for three years after their existence was publicly disclosed by AT&T in a proceeding about which at least three representatives of Qwest had been given notice?

Q. WHAT CONCLUSIONS CAN YOU DRAW REGARDING MS. HENSLEY ECKERT'S TESTIMONY?

A. Portions of Ms. Hensley Eckert's testimony regarding the dates of Qwest's awareness of certain facts are ambiguous. But in the end, Mr. Hensley Eckert's testimony – even if taken at face value – does not explain why Qwest waited until December of 2009 to file its Complaint in Florida. Throughout her testimony, she attributes Qwest's delay to a need to determine "the identity

of the contracting CLECs" and the "terms and scope" of the contracts. But the language of the Qwest Complaint reveals that Qwest did not have complete information (and therefore did not need complete information) regarding "the identity of the contracting CLECs" at the time the complaint was finally filed, Ms. Hensley Eckert does not explain why the same complaint could not have been filed years earlier. Ms. Hensley Eckert's assertion that Qwest needed to know the "terms and scope" of the contracts is directly at odds with the testimony of Mr. Easton and Dr. Weisman, who assert that no "terms and scope" – beyond the fact that switched access service is being provided – are relevant or even potentially relevant.

Qwest could have filed its Complaint in Florida in 2004 (or 2005 at the latest) at the time it became aware that CLECs and IXCs had entered into contracts that included terms related to the provisioning of switched access services and therefore that Qwest had suffered the alleged harm.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; 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.; 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

Exhibit ____ (DJW-4)

MN PUC Agenda Notice: July 20, 2004

Rebuttal Exhibit of Don J. Wood
Filed August 9, 2012

C7-02-582

STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

July 20, 2004

NOTICE OF SECOND ADDENDUM TO COMMISSION MEETING

PLEASE TAKE NOTICE that the items listed on the attached agenda will be heard at the Commission's regularly scheduled telecommunications meeting on **Thursday, July 22, 2004** at **9:30 a.m.** The meeting will be held in the Commission's large hearing room, Suite 350, 121 7th Place East, St. Paul, MN 55101-2147.

Occasionally items may need to be rescheduled. Commission staff will make all reasonable efforts to notify you if your item is rescheduled. However, if you wish to confirm this hearing date, or to request permission to address the Commission at the meeting, please call (651) 282-6446, and you will be directed to the appropriate staff person.

The Commission hearing rooms have wheelchair access. If other reasonable accommodations are needed to enable you to fully participate in a Commission meeting (i.e., sign language, or large print materials), please call (651) 297-4596 or 1-800-657-3782 at least one week in advance of the meeting.

BY THE COMMISSION
Burl W. Haar
Executive Secretary

Attachment

COMMISSION MEETING
THURSDAY, JULY 22, 2004 AT 9:30 A.M.
TELECOMMUNICATIONS AGENDA

***1. P-6028/RV-04-943 World Communications Satellite Systems, Inc.**

Revocation of the Company's certificate of authority. (PUC: Oberlander; DOC; Dietz)

***2. PT-6182,6181/M-02-1503 RCC Minnesota, Inc.; Wireless Alliance, LLC**

In the Matter of the Petition of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2).

Should the Commission amend its July 31, 2003 Order to permit the petitioners to file directly with the FCC on their service area redefinition proposal? (PUC: **Brion**)

***3. P-421/C-03-1024 Qwest Corporation; Velocity Telephone, Inc.**

In the Matter of the Complaint of Velocity Telephone, Inc. Against Qwest Corporation Regarding Qwest's Anti-competitive Conduct and Request for Expedited Proceeding.

I. Should the Commission approve the parties' settlement and dismiss the complaint?
II. What other action, if any, should the Commission take regarding the settlement agreement? (PUC: **Lindell)**

****4. ~~P-5695/M-04-226~~ PULLED WWC Holding Co., Inc. d/b/a CellularOne**

In the Matter of the Petition by WWC Holding Co., Inc. d/b/a CellularOne for Designation as an Eligible Telecommunications Carrier and Redefinition of Rural Telephone Company Service Area Requirement.

Commission consideration of WWC Holding Co.'s ETC Petition. (PUC: **Brion)**

****5. P-421/CI-02-582 Qwest Corporation**

In the Matter of a Commission Investigation into the Issues Raised by New Access Communications Regarding the Application of Qwest's Avoided Cost Discount to its Competitive Response Program.

What action, if any, should the Commission take on the arbitration award concerning damage claims made by New Access regarding the application of Qwest's "win-back" tariff? (PUC; **Krishnan**)

ADDENDUM

*6.	**P-421/C-02-1597**	**Desktop Media, Inc.;** **Qwest Corporation**

In the Matter of the Complaint of Desktop Media, Inc. Against Qwest Corporation Regarding Interconnection Terms:

Should the Commission approve the settlement agreement? (PUC: **O'Grady**)

SECOND ADDENDUM

*7.	**P-442,5798,5340,5826,** **5025,5643,443,5323** **5668,466/C-04-235**	**AT&T Communications of the Midwest, Inc.;** **Arizona Dialtone, Inc.;** **Eschelon Telecom of Minnesota, Inc.;** **Focal Communications Corporation of Minnesota;** **Global Crossing Telecommunications, Inc.;** **Integra Telecom of Minnesota, Inc.;** **MCI WorldCom Network Services, Inc.;** **McLeodUSA Telecommunications Services, Inc.;** **NorthStar Access, L.L.C.;** **Sprint Communications Company L.P.**

In the Matter of DOC Investigation into Many Companies' Negotiated Contracts for Switched Access Services.

Consideration of proposed protective agreement. (PUC: **Moy**)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651-297-4596 (voice) or 1-800-627-3529 (TTY relay service).

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JULY 22, 2004

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JULY 22, 2004

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JULY 22, 2004

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; 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.; 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

Exhibit ____ (DJW-5)

AT&T Comments: August 19, 2004

Rebuttal Exhibit of Don J. Wood
Filed August 9, 2012

Steven H. Weigler
Senior Attorney
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August 18, 2004

Via Overnight Mail

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Re: In the Matter of Negotiated Contracts for the Provision of Switched Access Services, Docket No. P-422,5798,5340,5826,437,5643,443,5323,5668, 466/C-04-235.

Dear Dr. Haar:

Enclosed for filing are the original and fifteen copies of AT&T's Comments, Motion to Dismiss and Motion for Summary Judgment in this matter.

Sincerely,

Steven H. Weigler

cc: Service List

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts for Switched Access Services	)	Docket No. P-442,5798, 5340,5826 5025,5643,443,5323,5668,466/ C-04-235

AT&T'S COMMENTS, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits Comments regarding the Minnesota Department of Commerce's "Complaint and Request for Commission Action" (hereinafter "Complaint") in the above styled action. AT&T submits these comments to demonstrate that the Minnesota Department of Commerce ("MDOC" or "Department") is incorrect on many of the factual and legal assertions it makes in its Complaint. Accordingly, when the facts and relevant law are examined in proper context, it is clear that AT&T should be dismissed from this Complaint as a party. However, as further articulated below, AT&T would seek non-party participant status in order to protect its legal interests essentially because AT&T has determined that it will not be protected by the other parties in this proceeding.

I. INTRODUCTION

In the fall of 2003, the Department made a formal request of AT&T to supply agreements that AT&T has with competitive local exchange carriers ("CLEC(s)") that provide AT&T with access services within the state of Minnesota at other than tariffed

rates[1]. In AT&T's annual report to the Department for 2002, AT&T had stated that it had such agreements and had provided a list of the CLEC providers from which it was purchasing access services in Minnesota pursuant to those agreements. AT&T fully complied with the MDOC Information Requests to produce the agreements. AT&T also provided the CLEC providers with which AT&T had entered into the agreements the pre-disclosure notice that the agreements required.

In its Complaint, the Department refers to agreements that AT&T has with six CLEC providers of switched access services: Arizona Dialtone ("AZD"), Eschelon Telecom ("Eschelon"), Focal Communications Corp. ("Focal"), Integra Telecom ("Integra"), McLeod USA Inc. ("McLeod"), and NorthStar Access ("NorthStar").[2] The agreements all follow the same basic form, with modifications specific to the business relationship between AT&T and the individual CLEC providers. 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 undertook this substantial contracting effort because CLECs were charging interexchange carriers ("IXC(s)"), including AT&T, exorbitant rates for switched access services.[3] Often, both

[1] *State of Minnesota Department of Commerce Utility Information Request 7 Response* (dated October 17, 2003); Docket Number: Telecommunications Carrier Annual Report 2002 (hereinafter referred to as "Information Requests").

[2] Most of the agreements have been in effect for years. The Effective Dates of the agreements are as follows: AZD agreement: January 21, 2003; Eschelon agreement: May 1, 2000; Focal agreement: December 25, 2001; Integra agreement: July 1, 2001; McLeod agreement: July 1, 2001; and NorthStar agreement: September 11, 2002. In fact, AT&T had difficulty finding employees with knowledge of the agreements, given the considerable passage of time since their negotiation.

[3] On this point, AT&T is in agreement with the Department which states, at page 2 of its Complaint, that "Since [IXCs] are captive customers of the local service providers for switched access services, and the rate levels of CLECs receive little regulatory oversight, the switched access rates of CLECs are often higher than the switched access rates of the incumbent local exchange carrier ["ILEC"]".

the CLEC providers' interstate *and* intrastate rates (in states that did not have mandated access rates) were exorbitant.[4]

In the agreements with the six CLEC providers specified above, AT&T is solely and exclusively a customer purchasing switched access services and not a provider.

Each agreement has a section entitled "[CLEC Provider] Regulatory Approvals and Tariffs" in which the CLEC provider warranted "that it has and will maintain, at its own expense, all regulatory certifications, authorizations, and permits needed to offer the Switched Access Service described in this Agreement." All but one of the agreements also include language explicitly anticipating the CLEC provider's filing of tariffs; for example, " [CLEC provider] will not file any tariff or tariff revisions that alter the terms and conditions, or pricing of switched access as specified in this Agreement," unless required to do so.

As discussed in detail in Section II below, the Regulatory Approvals and Tariffs section in each of the agreements effectively memorialized an obligation that both parties knew belonged and continues to belong only to the CLEC providers; that is, the filing of terms of the CLEC provider's service pursuant to applicable law. Although the agreements also contain broad mutual protection for each party's confidential and proprietary information, the CLEC providers would not have been prohibited from adhering to applicable regulatory obligations, if any.

[4] It was not until the middle of 2001 that the Federal Communications Commission ("FCC") imposed a benchmark rate above which most CLECs were not permitted to tariff interstate switched access rates. *FCC's Seventh Report and Order and Further Notice of Proposed Rulemaking re Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Docket 96-262, Released April 27, 2001. The benchmark rate established in that Order is a rate that declined over the past 3 years until now, when the rate most CLECs may charge IXCs may be no greater than the rate the competing ILEC would charge the IXC.

The AZD and Focal agreements included the settlement of formal actions and the Eschelon, Integra. McLeod and NorthStar agreements included the settlement of informal disputes. Thus, AT&T agreed to pay each CLEC no less than a six- or seven-figure settlement amount before any of the individual agreements went into effect. The agreements also include comprehensive mutual releases generally of all issues arising or that could have arisen as of an agreement's effective date[5].

Finally, as discussed in greater detail in Section III, NorthStar's position (as articulated by the Department in its Complaint) is correct, at least as it applies to AT&T: NorthStar does not have agreements with IXCs to charge untariffed rates for the provision of intrastate access services.[6] Among other reasons, because the NorthStar agreement does not contain intrastate access rates, this Commission does not have jurisdiction over that agreement. AT&T provides a few key facts to put the NorthStar agreement in context in order to allay any regulatory concerns. *See* Exhibit A, Affidavit of Debbie H. Joyce.

With these facts in mind, AT&T's legal analysis will establish that the Department's Complaint, as related to AT&T, is meritless as a matter of law and should be dismissed as a matter of law.

[5] The Eschelon agreement, the oldest agreement of the six by more than a year, is the sole exception.
[6] *See* Complaint at page 12.

II. THE DEPARTMENT FAILS TO ESTABLISH VALID CLAIMS AGAINST AT&T AS A MATTER OF LAW

As a threshold matter, AT&T submits that the Commission's seven year-old comprehensive access proceeding would be the appropriate forum to address the Department's policy position on access rather than the instant matter.[7] Furthermore, in this docket, AT&T is simply the customer in the above-referenced agreements with the CLEC providers. Finally, the Department's summation of why these settlements occurred and its perspective on the parties positions,[8] besides being extremely oversimplified and factually suspect, has no relevance under Minnesota law as there is an actual contract that spells out, in unambiguous terms the intent, terms and conditions of the parties' agreements. We develop these points more fully below.

In all events, the settlement agreements at issue were the "result of a compromise" between the parties and constitute "full and final satisfaction of the dispute."[9] Minnesota law is clear that compromise and settlement of a lawsuit is contractual in nature. *Ryan v. Ryan*, 292 Minn. 52, 55, 193, 295, 297, 193 N.W.2d 295 (1971).[10] The only reasons to invalidate a settlement agreement/contract is because of "**mutual** mistake, fraud or misrepresentation," *Ryan v. Ryan*, 292 Minn. 52, 55, 193, 295, 297, 193 N.W.2d 295 (1971)(emphasis added), *Sorenson v. Coast-to-Coast Stores, Inc.*, 353 666, 669-70 (Minn. App. 1984), or if the contracts are illegal. *Barna, Guzy, & Steffen, Ltd. v. Beans*, 541 N.W.2d 354, 356 (MN. App. 1995). No such reasons exist in the instant circumstance.

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[7] *In the Matter of a Commission Investigation of Intrastate Access Charge Reform*, Docket No. P999/CI-98-674.
[8] *See* Department's Complaint at p.12-14.
[9] *See* e.g. McLeod Agreement, Department's Exhibit ML-1 at A.2 and 3.
[10] Although the Eschelon agreement does not contain these terms, the result is the same under law.

Because the issues the Department is pursuing relate to the existence and interpretation of a contract, this matter must be decided as a matter of law, *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (MN App. 2004), looking exclusively at the four corners of the instrument(s) in question. *Id.* Accordingly, the unsubstantiated assertions in the Department's Complaint such as:

1) "The switched access agreements appear to have been formed as a means for the CLECs to obtain some payment from the interexchange carrier, which, in some cases, refused to pay the tariffed rates of the CLECs.[11]
2) "CLECs felt that resolving their billing dispute by engaging in contracts to charge lower access rates was the best way to avoid litigation and resume some cash flow."[12]
3) "Interexchange Carriers believed the CLECs were taking advantage of their captive status with high access rates"[13]
4) "...large interexchange carriers are able to exert market power to receive lower switched access rates."[14]

are irrelevant in the instant dispute (even though AT&T may agree with some of the characterizations)[15] because none of these facts are found in the four corners of the settlement agreement. *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (MN App. 2004).

Furthermore, as a practical matter, there is extreme peril if this Commission decided to look outside the four corners of the settlement agreement/contract, essentially reviewing the parties' positions *de novo.* For example, as Exhibit B attached demonstrates, Eschelon would dispense with the exchange the parties bargained for -- a commercial bargain that has lasted and worked for both parties ***for more than four years***

[11] Complaint at p.12.
[12] *Id.* at p.14.
[13] *Id.* at p.13.
[14] *Id.*
[15] AT&T notes that this Commission is looking at these issues in the generic access reform docket which has been pending in front of this Commission for seven years. *See* Docket No. P999/CI-98-674.

-- in an attempt to gain more revenue from AT&T in terms of increased retroactive access rates where AT&T is wholly without fault.

A real question exists, furthermore, as to whether this Commission would have the power to, or would want to engage in precedent where, it sought to collect past due amounts from AT&T, which is the customer under the Eschelon and the other five agreements with the CLEC providers. When the FCC was presented with similar facts, it found that it did not have the power to collect past amounts due from a customer. See *Tel-Central v. United Tel.Co.*, File No. E-87-59, Memorandum Opinion and Order, 4 FCC Rcd 8338 (1988) which states: "the complaint procedures make a carrier liable to a customer for damages that result from the carrier's unlawful actions or omissions...However, this statutory scheme does not constitute the Commission as a collection agent for carriers with respect to unpaid tariff charges. In the normal situation if the carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action **in contract** to compel payment." (Emphasis added.)

As expressed above, this Commission should summarily dispose of this Complaint as a matter of law because the Department cannot establish that the contract terms are void or voidable. No party, including the Department, has raised that there has been mutual mistake, fraud or misrepresentation that would invalidate a contract thus permitting the Department or any other party to restructure, reinterpret or suppose the intent behind a settlement agreement. *See e.g., TNT Properties, LTD v. Tri-Star Developers LCC*, 677 N.W.2d 94, 98-102 Minn. App. 2004). As such the terms of the agreements remain.

More importantly, in looking at the four corners of the settlement agreements at issue, no terms make those settlement agreements illegal or suggest in any way that AT&T violated its Certificate of Authority or any relevant law. In order to establish this point, AT&T will compare the specific allegations made by the Department with the actual terms of the contract.

A. AT&T as an IXC Customer Had No Obligation Under Minnesota Law or Rule to File Tariffs or Assure that Tariffs were Filed

AT&T, as the customer of access service, had no obligation to submit tariffs to the Commission for services that it bought. That obligation, if it indeed exists, falls exclusively on the provider in question. *See e.g., Minn. Stat. § 237.07.* The Department fails to acknowledge that AT&T, as the purchaser of access services, is completely distinguishable under law from the CLEC provider of service. Without specific citation, the Department claims that "Minnesota law requires all regulated telephone and telecommunication carriers, including CLECs and interexchange carriers, to operate in accordance with their tariffs and accordance with Commission rules and Orders."[16] The Department then cites MN Stat. §237.121(a)(3) which states "(a) telephone company or telecommunications carrier may not...fail to **provide** a service, product or facility to a telephone company or telecommunications carrier in accordance with the applicable tariffs, price lists, **or** contracts and with the Commissions rules and orders." (Emphasis added). As the Commission can see, the statutory responsibility under law falls exclusively to the *provider* of services. The Department further cites *Minn. Rule* 7810.8400 which states "(a) telephone company shall keep on file with the department its tariffs and price lists showing or referencing specific rates, tolls, rentals, and other

[16] Complaint at p.9.

charges **for the services offered by it** either alone or jointly and concurrently with other telephone companies." (Emphasis added). Again, the rule applies to the *provider* of services. As the very rules that the Department relies on are inapplicable to AT&T as a customer, AT&T cannot be found to have violated any law or Commission rules in this matter.

Furthermore, the four corners of the settlement agreements in question alone (entirely apart from the Department's extrinsic innuendo), mirror Minnesota Statute and Rule requirements by assigning the obligation to file such tariffs and otherwise adhere to legal requirements to the CLECs and not AT&T. The relevant sections of the settlement agreements all include the following statement:

> [CLEC provider] warrants that it has and will maintain, at its own expense, all regulatory certifications, authorizations, and permits needed to offer the Switched Access Service described in this Agreement.

Furthermore, all but one of the agreements include language explicitly anticipating the CLEC provider's filing of tariffs: for example, (the CLEC) "will not file any tariff or tariff revisions that alter the terms and conditions or pricing of switched access as specified in this Agreement". In summary, the settlement agreements each specifically acknowledge what is clear under Minnesota law: that the obligation is on the provider of service to comply with the provisions of Minnesota laws and rules in providing its services not the purchaser. Accordingly, AT&T as the purchaser of these services should be dismissed from this proceeding as a matter of law.

B. AT&T Has Not Violated "Conditions Associated With" Its Certificate of Authority

Unable to establish that AT&T violated any specific Minnesota rule or statute, the Department recommends that this Commission find that AT&T (and other IXCs) violated conditions associated with its certificate of authority.[17]

The Department cites no legal authority for its position that AT&T would have to assure that it was purchasing only tariffed services to be in compliance with its certificate of authority.[18] A review of AT&T's certificate of authority conclusively shows that it contains no conditions that prohibit it from a negotiating an access rate. AT&T has attached its certificate of authority, which contains no terms about purchasing access services as an interexchange provider at set tariffed rates.[19]

To the extent that the Department claims that the violations were not in the *actual* certificates of authority, but in the conditions associated with the Commission's October 15, 1985 Order in Docket No. P442, 443, 444, 421, 433/NA-84-212 [20] such claims are factually incorrect. Neither of the Orders cited in the Department's Complaint contain such a condition, nor does the original Order granting AT&T Interexchange authority contain any condition related to assuring that AT&T was buying tariffed services.

- Pages 27-28 of the October 15, 1985 Findings of Fact, Conclusions of Law and Order listed the ten conditions for expanding AT&T's certificate to include intraLATA toll services. While some conditions concern the rates AT&T may charge as a provider, none of the conditions concern "payment of switched access services at tariffed rates." Thus, Item 2 states "AT&T/MW is hereby granted an extension of its existing certificate of public convenience and necessity in such a manner as to authorize it to provide intraLATA telecommunications services to

[17] *See* Complaint at pp. 18-19.
[18] Instead, as discussed above, the Department cites Minn. Stat. §237.121(a)(3) and Minn. Rule 7810.8400. The Department's proposition of law is related to the *provider* of service, and not AT&T, which is the *purchaser* of services in these agreements.
[19] *See* Exhibit C.
[20] Department's Complaint at p.14.

customers within Minnesota in addition to its present authority to provide interLATA telecommunications subject to all requirements of this order including a requirement to submit an annual report of its Minnesota intrastate operations and financial results in accordance with the Uniform System of Accounts and as specified by the DPS." Item 5 states "Changes in intrastate toll rates sought by any interexchange carrier, including AT&T/MW and NWB, shall be evaluated and considered in accordance with the provisions of this Order." Item 6 states "No interexchange carrier, including AT&T/MW and NWB, shall implement rates or tariffs that deaverage toll rates based on the basis of geographic location or that discriminate in the terms and conditions under which services will be made available on the basis of geographic location without the express approval of the Commission."

- The November 2, 1987 85-582 docket is void of the condition that requires AT&T as the purchaser of services to assure that rates that are paid are tariffed. See Ordering paragraphs 1 through 28 on pages 58 through 63.
- Finally the Order Granting Certificate of Public Convenience and Necessity in Docket P-442/M-83-640 issued on December 23, 1983 which grants AT&T's certificate of Public Convenience and Necessity to provide the intrastate, interLATA toll service contains no condition on paying tariffed rates. See Order at page 3 for the six ordering paragraphs.

Furthermore, even if AT&T's certificate of authority contained terms requiring AT&T to tariff terms as a purchaser of access services, as discussed in Section II, A. above. there are specific terms in each of the agreements that addressed each CLEC provider's responsibility to obtain "all regulatory certifications, authorizations, and permits needed to offer these switched access services." Accordingly, the four corners of the settlement agreements acknowledged the responsibility to comply with regulatory requirements, and just as Minnesota Statutes and Rules do, place that responsibility on the CLEC provider of services to comply with any tariffing requirements, not the IXC purchaser.

Finally even if the statute, rules, certificates of authority, and relevant settlement agreements were not unanimous that customers of services have no responsibility to file tariffs, as a policy matter, it would be inappropriate to impose on customers any obligation to assure that the bargained-for rate of services that they were buying were

properly tariffed by the provider of those services.[21] Quite simply, it would turn the customers' simple purchase decision into a decision about the regulatory compliance of the provider.

In sum, AT&T did not violate any conditions associated with its certificate of authority.

C. The Settlement Agreements in Question Did Not Contain Discriminatory Non-Disclosure Terms

The Department claims that "(t)he confidentiality clauses in [the] agreements [in question] prevented regulatory agencies such as the Department and the Commission from reviewing the agreements for compliance with Minnesota law and the Commission's rules and Orders." Such a position is not supported by the only relevant evidence: the four corners of the settlement agreements themselves.

Confidentiality provisions are commonplace in settlement agreements and adjudicative bodies should take proper steps to safeguard the confidential nature of settlement terms. *See e.g., In re: L-Tryptophan Cases*, 518 N.W.2d 616, 622 (MN App. 1994). As such, there is nothing wrong with the parties making the settlement terms confidential as long as there were provisions that would allow the parties to meet the various regulatory and legal requirements, if applicable. The relevant provisions of the AZD, Focal, Integra, and NorthStar agreements contain the following language:

> For purposes of this agreement, "Proprietary Information" means information that is marked or otherwise specifically identified in writing as proprietary, confidential or trade secret. Proprietary Information includes, but is not limited to, this Agreement, the payments to [CLEC Provider] by

[21] AT&T notes that the Department did not take this position in the Qwest Secret Deals case where the responsibility to file agreements pursuant to 42 U.S.C. 252 was far more straightforward. The Department filed a complaint against the seller of such services, Qwest, and not against the purchasers including Eschelon and McLeod.

> AT&T and volume of traffic between the parties. Notwithstanding the forgoing, either party may advise a state or federal regulatory body, including without limitation the FCC, that it has reached a resolution of the Dispute, although neither party may disclose the terms of the Agreement except as expressly provided for elsewhere in this Agreement.
>
> Each party will hold in confidence Proprietary Information disclosed by the other party except if it (1) was previously known by the receiving party free from any obligation to keep it confidential, (2) is independently developed by the receiving party, (3) becomes publicly available, or (4) is disclosed to the receiving party by a third party without breach of any confidentiality obligation.
>
> If either party is compelled to disclose Proprietary Information in judicial or administrative proceedings, such party will give the other party the opportunity, in advance of such disclosure, to seek protective arrangements and will cooperate with the other party in that regard.[22]

The Eschelon and McLeod agreements contain the foregoing language (except for a sentence from the first paragraph)[23], as follows: "Notwithstanding the forgoing, either party may advise a state or federal regulatory body, including without limitation the FCC, that it has reached a resolution of the Dispute, although neither party may disclose the terms of the Agreement except as expressly provided for elsewhere in this Agreement."

As discussed above, the Regulatory Approvals and Tariffs Section in each of the agreements – in which the CLEC providers warranted that they have "and will maintain...all regulatory certifications, authorizations, and permits necessary to offer the Switched Access Service" described in each agreement[24] -- effectively memorialized an obligation belonging to the CLEC providers: the filing of terms of each CLEC provider's

[22] Department's Exhibit AD-3 at B11.
[23] The Eschelon agreement also contains some terms in the section on confidentiality and proprietary information relating to the treatment of such information in the event that Eschelon becomes a publicly-held company or undergoes a "private placement or other financial arrangement", which are not relevant here.
[24] *See e.g., id.*, at B3.

service pursuant to applicable law. Accordingly, AT&T would have no reason to assume that the CLEC providers would not have either tariffed the rates or more likely sought special pricing consideration. The provisions in the agreements regarding the treatment of confidential and proprietary information would not have stood in the way of the CLEC providers' compliance with those obligations. AT&T's responses to the Department's Information Requests demonstrate how the provision related to the treatment of confidential and proprietary information operate (*See* Statement of Facts). Quite simply, AT&T merely first notified the CLEC providers that AT&T intended to produce the agreements in response to the Information Requests, and then AT&T produced the agreements[25]. Furthermore, four of the agreements contain the statement that each party "may disclose the terms of this Agreement . . . as expressly provided for elsewhere in this Agreement". To the extent, then, that the CLEC providers have or had obligations to file terms of their agreements with state regulatory bodies, the Regulatory Approvals and Tariffs section of each agreement provides a permitted exception to the general prohibition against disclosure of confidential and proprietary information. Thus, if the CLECs believed the access rates needed to be tariffed or otherwise reviewed, they simply needed to "give [AT&T] the opportunity in the advance of such disclosure, to seek protective agreements"[26] and then tariff the terms. That notification process was precisely what AT&T engaged in, without objection of the CLECs, in an extremely

[25] We note that all of the agreements contain the language stating that "If either party is compelled to disclose Proprietary Information in judicial or administrative proceedings, such party will give the other party the opportunity, in advance of such disclosure, to seek protective arrangements and will cooperate with the other party in that regard."
[26] *See* e.g., Department's Exhibit AD-3 at B11(c).

straightforward manner. [27]

The Department also argues that the AT&T/CLEC negotiated agreements "foreclosed the possibility that other interexchange carriers would receive the rates or terms available to AT&T, MCI WorldCom, Sprint and Global Crossing [and that the] impact on the marketplace is that the interexchange carrier with an agreement has an unfair competitive advantage over other interexchange carriers."[28] The Department offers no facts to support these vague, conclusory allegations, and the Commission should wholly disregard them.

Furthermore, if the Department seeks to rely on language in certain agreements stating that (the CLEC) "will not file any tariff or tariff revisions that alter the terms and conditions or pricing of this agreement,"[29] such language merely requires the CLEC not to alter the terms of the agreement *through* a tariff. It does not preclude other IXCs from receiving the same terms and conditions that AT&T received; rather it simply ensures that the CLEC will not undermine the mutual agreement through unilateral use of the tariffing process.

Again, in looking at the four corners of the documents in question, there is no language that suggests discriminatory non-disclosure terms. Accordingly, the Department's claim that "(t)he confidentiality clauses in these agreements prevented regulatory agencies such as the Department and the Commission from reviewing the agreements for compliance with Minnesota law and the Commission's rules and Orders,

[27] Furthermore, in reviewing the terms of the agreements in question, it is debatable if the access rates that AT&T was paying to the CLECs were even confidential as the terms regarding confidentiality did not specifically include the pricing. *See e.g., Exhibit AD-3* at B11(A) indicating proprietary information includes, but is not limited to, this Agreement, the payments to (the CLEC) by AT&T and the volume of traffic between the parties.
[28] Complaint at p.12.
[29] *See* Department's Exhibit AD-3 at 3.

and foreclosed the possibility that other interexchange carriers would receive the rates or terms available to AT&T...."[30] is groundless.

In summary, there were no terms in any of the agreements that violated Minnesota law and this Commission should dismiss AT&T from this proceeding as a matter of law.

III. THE COMMISSION SHOULD DISMISS THE NORTHSTAR PIU CLAIM OR GRANT AT&T SUMMARY JUDGMENT

Without any discussion or legal analysis, the Department seeks to have this Commission "(f)ind that the percentage interstate use in the agreement between NorthStar Access and AT&T should be the percentage used prior to entry into the contract, since the intent of the change is to evade interstate access charges."[31] As established below, the issue of what percentage of interstate usage ("PIU") factor is appropriate is determined by application of the federal tariff; thus, this question is not properly before this Commission. In all events, even if this matter were properly before this Commission, as established below, the Department brings forward no evidence for the claim that the parties' "intent" in using a 100% PIU was to "evade interstate access charges". In fact, all evidence is contrary to that proposition. For those reasons, summary judgment would be appropriate.

Summary judgment is appropriate when the pleadings, affidavits, and other documents before the court show that there is no genuine issue of material fact and judgment is appropriate as a matter of law. *Jorgensen v. Knudson,* 662 N.W.2d 893, 897 (Minn. 2003); *Mon-Ray v. Granite Re, Inc.* 677 N.W.2d 434, 439 (MN App. 2004). As discussed in greater detail below, based on the sworn affidavits of both NorthStar and

[30] Department's Complaint at p.12.
[31] Department's Complaint at p.15.

AT&T witnesses, the Department cannot bring forward any *genuine* issue of material fact, and based on FCC rules and case law, summary judgment is appropriate as a matter of law.

As discussed in the affidavit of Debbie H. Joyce, as corroborated by NorthStar witnesses. the parties believed that the majority of the traffic exchanged was interstate but could not determine the exact amount of traffic being transported. Accordingly, the parties applied a factor of 100% PIU.[32] Because the Department was not part of the negotiations, it would not be able to provide contradictory material facts. Accordingly, because the Department cannot establish that there is a *de minimis* amount of interstate traffic traveling over the trunks at issue, the traffic is interstate in nature, affording jurisdiction exclusively to the Federal Communications Commission, and requiring judgment in favor of the parties' agreement to be entered as a matter of law.

This Commission is well aware of the U.S. District Court's decision in *Qwest v. Scott*, 2003 WL 79054 (D.Minn.) (attached) which addresses the FCC's 10% Rule of dual jurisdiction. The Court accurately articulates the FCC's 10% Rule as follows:

> The FCC had.... assigned all lines with even a de minimums amount of interstate traffic "to interstate jurisdiction," such that parties could avoid the state tariff by including even a tiny proportion of interstate communications on these circuits. *In the Matter of GTE Operating Cos.*, 13 F.C.C.R. 22,466 ¶25 (1998) ("10% Order"); *In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 F.C.C.R. 1352 ¶¶ 1,30 (1989) *adopted by 10% Order ¶8,9.* The FCC adopted the 10% allocation rule to allow states to retain control over intrastate lines carrying small amounts of interstate transmissions. *See 10% Order* ¶2. The FCC concluded that permitting intrastate circuits with 10% or less interstate traffic to be tariffed at the state level would accord "proper recognition (to) state regulatory interests. *Id.* ¶7. Thus, the FCC concluded "that the (10% Rule) separations

[32] *See* Exhibit A: Affidavit of Debbie H. Joyce. *See also*, Initial Comments of NorthStar.

> procedure properly reflect the dual jurisdictional regulatory structure of the Act. *Id.*

Qwest Corporation v. Scott, 2003 WL 79054 (D.Minn.) at p.2.

As the affidavits disclose, the parties reasonably believed that 92% of the traffic was interstate in nature, thus making interstate rates applicable to all switched access traffic under the agreement. Accordingly, because the Department cannot establish that there was 10% or less interstate traffic being routed, judgment must be afforded to AT&T as a matter of law on the Department's claim.

IV. EQUITABLE AND POLICY CONSIDERATIONS

Even if there were not a compelling legal basis to dismiss AT&T from this matter, there are numerous equitable and policy considerations that this Commission should take into consideration while determining how to address this matter.

A. Fairness and Consistency

As AT&T expressed to the Department,[33] it is puzzled by the inconsistencies of the Department's position in different fora: it did not complain about the consumer of services in one docket (specifically the Minnesota Qwest Secret Deals Complaint (Docket No. P-421/C-02-197) in which the Department filed a Complaint against the provider of services, Qwest, but here it is seeking remedies against both the seller and purchaser of services. This is especially true when in this docket, the agreements contain an express warranty from the seller of those services to the buyer that the seller would comply with any regulatory requirements. Such regulatory warranties were certainly not

[33] AT&T notes, that as expressed in Section I above, its discussion with the Minnesota Department of Commerce was perfunctory with no discussion about the actual terms of the agreements.

included in the Secret Deals Complaint. Regardless, taking enforcement action against the purchaser of services, especially when there is an express warranty from the seller of regulatory compliance, would have serious chilling effect on the purchase of telecommunications services in Minnesota and is unprecedented under law.

B. Ramifications of Action

The Department suggests that this Commission redefine and invalidate legal agreements that were entered into by two willing parties. For example, the Department wishes that this Commission "(f)ind that the percentage interstate usage in the agreement between NorthStar Access and AT&T should be the percentage used prior to entry into the contract."[34]

AT&T respectfully suggests that this Commission will commit regulatory overkill if it begins to second guess PIU factor declarations and other mutually agreed to terms in a contract.

More importantly, by reformulating contracts, this Commission would actually be rewarding the *non-compliant party*: the provider of services to which any tariff-obligation belongs. For example, as shown by Exhibit B, Eschelon Telecom, Inc. has notified AT&T that "it may be required to begin charging AT&T the standard tariffed rates for switched access services in Minnesota as of June 16, 2004, the date the Complaint was filed. Furthermore, Eschelon may seek to adjust previous bills so as to charge AT&T the standard Minnesota tariffed access rate for all previous applicable billing periods." [35] As one can see, Eschelon has every reason to seek such an inequitable windfall in response to the allegation of failing to file tariffs for services. It is for that

[34] Complaint at p.15.
[35] *See* Exhibit B.

reason that AT&T would seek to continue participating in this case as a participant to protect its interests against parties like Eschelon, unless this Commission dismisses AT&T from this matter and orders that there be no recourse against AT&T.

C. Need for Complete Investigation

If the Commission decides to go forward in this matter, AT&T notes that the Department investigation was far from complete. As the Department indicated, its investigation began when AT&T was the only party who voluntarily disclosed and provided the existence of agreements.[36] The Department complains that some parties have been evasive in their answers, while others have failed to respond.[37] Because the Department only relied upon the agreements and other information that were voluntarily provided by AT&T and some of the CLEC providers and IXCs before filing its complaint, this Commission has an extremely incomplete picture of the issue, because neither the Department nor the Commission have reviewed the plethora of agreements that exist in Minnesota which contain access terms.

If the Commission is interested in proceeding, AT&T would suggest a complete investigation of industry practices including Department investigation and disclosure of how many access agreements with similar terms exist, the terms of such agreements, if other access agreements not yet disclosed contain material differences, PIU factors contained in every agreement filed in Minnesota, and ILEC access agreement differences.

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[36] Complaint at p.2.

[37] Complaint at p.2-3. AT&T notes that that the Department did not name the parties who failed to answer the Department's information requests. Accordingly, the Department only pursued violations on those who voluntarily provided information. Again, questions of equity are presented with respect to AT&T, which not only did not have an obligation to file, or assure that the CLEC providers filed, information about the terms of the agreements, but also fully complied with the Department's requests and its contractual obligations towards the CLEC providers.

Otherwise, the Commission would be acting on this matter without complete disclosure of industry practices and the effect on any purchaser of services.

V. LEGAL RESERVATION OF RIGHTS

AT&T notes that this Commission sought comments on this matter and accordingly, provides the facts and law necessary to demonstrate to the Commission that all claims against AT&T should either be dismissed as a matter of law, or AT&T should be granted summary judgment. AT&T reserves its rights to present additional evidence or pursue additional legal remedies afforded to it by law if it is not dismissed from this Complaint. For example, AT&T believes that there are additional reasons why this Commission does not have jurisdiction over this matter: all six of the agreements contain a choice of law provision, with only one agreement – Eschelon's -- providing for the application of Minnesota law to "all substantive matters pertaining to the interpretation and enforcement of the terms of th[e] Agreement"[38] AT&T will address this and other legal issues in due course, if required.

VI. CONCLUSION

For the foregoing reasons, AT&T requests that this Commission dismiss it from the Complaint as to the Department's allegation that it failed to adhere to conditions associated with its certificate of authority and grant summary judgment to it regarding the Department's allegation that the PIU factor should be changed in the NorthStar agreement. AT&T also notes that there are numerous equitable considerations in play that would weigh against moving forward on this Complaint. Finally, AT&T reserves the right to pursue all remedies available to it against any party as allowed by law.

[38] The AZD agreement provides for Arizona law to apply, while the other four agreements provide for New York law to apply.

Respectfully submitted on August 19, 2004.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.

By _____

Mary B. Tribby
Steven H. Weigler
AT&T Law Dept.
1875 Lawrence St., Suite 1575
Denver, CO 80202
303-298-6957

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts for Switched Access Services	)))	Docket No. P-442,5798, 5340,5826 5025,5643,443,5323,5668,466/ C-04-235

AFFIDAVIT OF DEBBIE H. JOYCE

I, Debbie H. Joyce, being first duly sworn, depose and state as follows:

1. I am currently employed by AT&T Corp. ("AT&T") as a Business Developer. I have been in this position since 1999.

2. I negotiated the Settlement and Switched Access Agreement between AT&T and NorthStar Access, LLC ("NorthStar"), effective date September 11, 2002 ("Agreement"), on behalf of AT&T.

3. I submit this Affidavit in support of AT&T's Comments in the above-captioned proceeding, which I understand involves the Agreement.

4. AT&T has direct trunks in Minnesota with a NorthStar affiliate and decided to use those trunks for the switched access traffic that it would be sending to NorthStar for termination in Minnesota.

5. At the time the parties entered into the Agreement, like many telecommunications companies trying to achieve efficiencies, the NorthStar affiliate did not break out actual percentages of usage over such trunks, but instead applied a set percentage to all traffic: 92% interstate usage ("PIU"); 8% intrastate usage.

6. NorthStar was thus unable to determine the jurisdiction of the traffic that AT&T sent to NorthStar over those trunks, although NorthStar believed that the majority of the traffic was interstate.

7. Because of the difficulties in determining jurisdiction, and the likelihood that the traffic was mostly interstate, NorthStar informed AT&T that it preferred to apply a factor of 100% PIU.

8. In addition to the reasons listed above, NorthStar stated that a 100% PIU would simplify its billing process, therefore the parties did not pursue discussions regarding intrastate rates at the time the Agreement was negotiated.

9. In the Spring of this year, the parties have had discussions in which NorthStar has informed AT&T that it may soon be able to determine the jurisdiction of traffic and, if so, AT&T has indicated its willingness to revisit the PIU factor and, consequently, reasonable intrastate switched access rates.

Dated August 17, 2004.

Debbie H. Joyce

STATE OF GEORGIA)
)ss.
COUNTY OF COBB)

Subscribed and sworn to before me
this 17th day of August, 2004.

Leanne M. Turnis
Notary Public

My Commission Expires: Jan. 12, 2008

LEANNE M. TURNIS NOTARY PUBLIC EXPIRES GEORGIA January 12, 2008 FULTON COUNTY

July 1, 2004

Via Airborne Express Mail

Robert P. Handal, Jr.
AT&T Corp.
900 Route 202/206 North--Room 2A109
Bedminster, NJ 07921-0752

Re: Switched Access Service Agreement - Minnesota

This is to notify AT&T that the Minnesota Department of Commerce has filed a complaint with the Minnesota Public Utilities Commission in Docket No. P442,5798, 5340,5826,437,5643,443,5323,5668,466/C-04-235, in which it alleges that several carriers, including Eschelon Telecom of Minnesota, Inc. have violated state law by not charging AT&T Communications of the Midwest, Inc. the filed tariffed rate for switched access services in Minnesota. The Department also alleges that AT&T and others violated conditions of their certificates of authority by failing to pay switched access services at tariffed rates.

While Eschelon disagrees with the allegations of the Department of Commerce as to Eschelon and intends to dispute them, Eschelon is giving AT&T notice pursuant to Section 8 of the Switched Access Service Agreement that it may be required to begin charging AT&T the standard tariffed rates for switched access services in Minnesota as of June 16, 2004, the date the complaint was filed. Futhermore, Eschelon may also be required to adjust previous bills so as to charge AT&T the standard Minnesota tariffed rate for all previous applicable billing periods under the Agreement.

Eschelon is not implementing these changes at this time since it does not appear that the Department has ordered Eschelon to take any action at this time.
However, we wanted to give AT&T notice of the possibility of a regulatory order that would require such actions.

Please contact me if you have any questions about Eschelon's position in this matter.

Sincerely,

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
612.436.6249 (direct)
612.436.6349 (fax)
ddahlers@eschelon.com

cc: Steve Weigler

12-29-83

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Terry Hoffman	Chairman
Leo G. Adams	Commissioner
Roger L. Hanson	Commissioner
Cynthia A. Kitlinski	Commissioner
Lillian Warren-Lazenberry	Commissioner

1/3/84

In the Matter of the Application of AT&T Communications of the Midwest, Inc. for Authority to Engage in the Construction, Operation, or Extension of Telecommunications Systems and Services within the State of Minnessota.

DOCKET NO. P-442/M-83-640

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Procedural History

On October 25, 1983, AT&T Communications of the Midwest, Inc. (AT&T/MW or the Company) filed a request with the Minnesota Public Utilties Commission (the Commission) for a Certificate of Public Convenience and Necessity (Certificate) to engage in the construction, operation or extension of telecommunications systems and services, within Minnesota, pursuant to Minn. Stat. § 237.16, subd. 4 (1982). AT&T/MW is an Iowa corporation and is currently a wholly-owned subsidiary of Northwestern Bell Telephone Company (NWB). It is managed by its own officers and directors.

This matter arises out of the Modified Final Judgment (MFJ) Order in United States of Aserica v. Western Electric Corporation, Inc. and American Telephone and Telegraph Company, Civil Action No. 83-0192 (D.C. Cir., August 24, 1982). The MFJ requires that American Telephone and Telegraph Company (AT&T) divest NWB and leave to NWB sufficient facilities, personnel, systems and technical information to permit NWB to perform exchange telecommunications and exchange access functions. Under the MFJ, beginning on January 1, 1984, AT&T/MW will separately conduct interexchange switching and transmission service, using certain facilities, equipment, etc., presently owned in the name of NWB. The Company will provide intrastate, interLATA long distance (toll) telephone service in Minnesota, Iowa, North Dakota, South Dakota and Nebraska. It will have its headquarters in Omaha, Nebraska as well as offices and staff in the five jurisdictions where it operates.

Ownership of AT&T/MW is to be transferred to AT&T on January 1, 1984; its financial strength will reflect the resources of its parent organization. In this request for a Certificate, the Company is asking for authority to provide the intrastate, interLATA toll service for telephone users within Minnesota to be divested by NWB on January 1, 1984, and authority to "[respond] where appropriate in the future to the demands and opportunities of increased competition in the telecommunications marketplace which it faces from other interexchange carriers, resellers and common carriers."

The names and addresses of the Company's Board of Directors are:

M. Tanenbaum	295 North Maple Avenue Basking Ridge, N.J. 07920
B. H. Gaynor	Rt. 202/206 Bedminster, N.J. 07921
A. A. Green	295 North Maple Avenue Basking Ridge, N.J. 07920
J. E. Harrington	295 North Maple Avenue Basking Ridge, N.J. 07920
R. W. Kleinert	Rt. 202/206 Bedminster, N.J. 07921
A. C. Partoll	295 North Maple Avenue Basking Ridge, N.J. 07920
S. P. Willcoxon	295 North Maple Avenue Basking Ridge, N.J. 07920

The names, addresses and phone numbers of the Company's present officers are:

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201-326-2610

D. L. Steinmeyer
Comptroller
1314 Douglas-on-the-Mall
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Omaha, Nebraska 68102
402-633-7776

On December 14, 1983, the Minnesota Department of Public Service (DPS) filed comments to the Company's request for a Certificate. The DPS alleged that if the Company desired a Certificate prior to January 1, 1984, it must file a joint petition with NWB for Commission approval of the purchase/transfer of NWB property to AT&T/MW pursuant to Minn. Stat. § 237.23 (1982). Furthermore the DPS argued that if AT&T/MW's request for a Certificate were denied, the intrastate, interLATA toll services would be transferred to the Company on January 1, 1984 by operation of law pursuant to the MFJ. The DPS further claimed that the Certificate being requested was overly broad.

The Company's Reply dated December 9, 1983 denied the allegations contained in the DPS comments.

On December 20, 1983, the Commission met to consider AT&T/MW's application for a Certificate. Based upon the information contained in the application, supporting documents, map and files, the Commission made the following findings:

FINDINGS

1. That the MFJ requires NWB to discontinue performing intrastate, interLATA toll services beginning January 1, 1984.

2. That public convenience and necessity requires that telephone users within Minnesota continue to have intrastate, interLATA toll services available to them.

3. That AT&T/MW has agreed to file a joint petition with NWB for Commission approval of the transfer of assets necessary for performing intrastate, interLATA toll services. As a successor company to Northwestern Bell, AT&T/MW will perform intrastate, interLATA toll services. The Company will pruvide telephone services of the same quality and, initially at the same rate levels that have been authorized for NWB.

4. That the standards for authorizing a Certificate set forth in Minn. Stat. § 237.16, subd. 4 (1982) have been met.

5. That the Commission finds that the broader authority requested in the Company's petition will be better addressed at a later date.

IT IS THEREFORE ORDERED:

ORDER

1. AT&T/MW is granted a Certificate of Public Convenience and Necessity to provide the intrastate, interLATA toll service for telephone users within Minnesota as a successor company to Northwestern Bell on January 1, 1984. The Company shall provide telephone services of the same quality and, initially at the same rate levels that have been authorized for NWB.

2. The granting of this Certificate is contingent upon the filing by NWB and AT&T/MW of a joint petition pursuant to Minn. Stat. § 237.23 (1982) for the Commission's approval of the transfer of assets from NWB to AT&T/MW pursuant to the federally mandated divestiture.

3. AT&T/MW shall operate in conformance with Minn. Stat. Ch. 237 (1982) and all other applicable Minnesota Statutes.

4. AT&T/MW shall operate in conformance with all applicable Rules of the Public Utilities Commission, including Minn. Reg. PSC 170 - 219.

5. Other authority requested in the Company's petition will be addressed at a later date.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Randall D. Young
Executive Secretary

SERVICE DATE: DEC 29 1983

(S E A L)

RDY:RC:sj

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Kenneth Nickolai	Commissioner
Phyllis Reha	Commissioner

In the Matter of Negotiated Contracts for the Provision of Switched Access Services	Docket No. P-422,5798,5340,5826,437, 5643,443,5323,5668,466/C-04-235

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
)ss.
COUNTY OF DENVER)

Janet Keller, being first duly sworn, deposes and says that on the 18th day of August, 2004, she served AT&T's Comments, Motion to Dismiss and Motion for Summary Judgment to the attached service list by U.S. Mail and/or overnight delivery service.

Janet Keller

Subscribed and sworn to before me
this 18th day of August, 2004.

Adam W Walczak
Notary Public

My Commission Expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

SERVICE LIST
Docket No. P-422,5798,5340,5826,437,5643,443,5323,5668,466/C-04-235.

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Paula Block
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 9th day of August, 2012.

Lee Eng Tan Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 ltan@psc.state.fl.us	Ms. Bettye Willis 13560 Morris Rd., Suite 2500 Milton, GA 30004 Bettye.j.willis@windstream.com
Mr. Greg Diamond Broadwing Communications, Inc. c/o Level 3 Communications 1025 Eldorado Boulevard Broomfield, CO 80021-8869 Greg.Diamond@level3.com	Mr. David Bailey BullsEye Telecom, Inc. 25925 Telegraph Road, Suite 210 Southfield, MI 48033-2527 dbailey@bullseyetelecom.com
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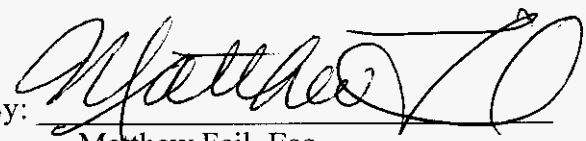
By: 

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