Eric Fryson

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Sent: Friday, September 14, 2012 2:18 PM

To: Filings@psc.state.fl.us

Cc: Adam Sherr; Alan Gold; Allen Zoracki; Andrew Klein; Beth Keating; Carolyn Ridley; O'Roark, Dulaney L; Edward Krachmer; Eric Branfman; Jane Whang; John Greive; Marsha Rule; Matthew Feil; Michael McAlister; Philip Macres; richard.brown@accesspointinc.com; Severy, Richard; Susan Masterton; Lee Eng Tan

Subject: Docket No. 090538-TP - Verizon Access' Prehearing Statement

Attachments: 090538 VZ Prehearing Statement 9-14-12.pdf

The attached is submitted for filing on behalf of Verizon Access Transmission Services by

Dulaney L. O'Roark III
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The attached document consists of a total of 25 pages - cover letter (1 page), Prehearing Statement (13 pages), Appendix A (8 pages) and Certificate of Service (3 pages).

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September 14, 2012 – **VIA ELECTRONIC MAIL**

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

Re: Docket No. 090538-TP
Amended Complaint of Qwest Communications Company, LLC, Against MCImetro Transmission Services LLC (d/b/a Verizon Access Transmission Services; XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; Deltacom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; Paetec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination

Dear Ms. Cole:

Enclosed is Verizon Access Transmission Services' Prehearing Statement for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please call me at 678-259-1657.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC, Against MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; Deltacom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; Paetec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, For unlawful discrimination	)	Docket No. 090538-TP Filed: September 14, 2012

VERIZON ACCESS'S PREHEARING STATEMENT

In accordance with Order No. PSC-12-0048-PCO-TP, MCImetro Access Transmission Services LLC, d/b/a Verizon Access Transmission Services ("Verizon Access" or "MCImetro"), hereby files this prehearing statement.

1. Witnesses

Verizon Access has pre-filed the following testimony:

Direct and Rebuttal Testimony of Peter H. Reynolds (Issues 1(c), 2, 3, 5, 6, 7, 8(a), 8(c) and 9).

Verizon Access also is co-sponsoring the following testimony:

Rebuttal Testimony of Terry Deason (Issues 1, 2 and 5).

2. Exhibits

Verizon Access intends to sponsor the following exhibits:

Reynolds (Direct)	PHR-1	WorldCom Bankruptcy Settlement Motion
	PHR-2	MCI-AT&T Bankruptcy Settlement Agreement (CONFIDENTIAL)
	PHR-3	March 2, 2004 Bankruptcy Court Order Approving Settlement
	PHR-4	Notice of Electronic Filing
	PHR-5	Qwest July 31, 2003 Objection
	PHR-6	Qwest-WorldCom Bankruptcy Settlement Motion
	PHR-7	Court Order Approving Qwest Settlement
	PHR-8	QCC Responses to MCI Interrog. Nos. 5 & 7
	PHR-9	QCC Responses to MCI Interrog. Nos. 4 & 24
	PHR-10	QCC Response to MCI Interrog. No. 29 (CONTAINS CONFIDENTIAL INFORMATION)
	PHR-11	QCC Response to time warner POD No. 4 (CONFIDENTIAL)
	PHR-12	QCC Response to MCI Interrog. No. 26 (CONTAINS CONFIDENTIAL INFORMATION)
	PHR-13	QCC Response to Broadwing Interrog. No. 18
	PHR-14	QCC Notice of Appearance
	PHR-15	QCC Response to MCI Interrog. No. 23
	PHR-16	Bankruptcy Court Scheduling Order
	PHR-17	Minnesota PUC July 22, 2004 Agenda
	PHR-18	Minnesota DOC April 25, 2005 Comments

	PHR-19	Qwest Added to Service List
	PHR-20	Minnesota PUC Order Dismissing Complaints
	PHR-21	Qwest August 24, 2005 Comments to Minnesota PUC
	PHR-22	Minnesota DOC October 27, 2005 Complaint
	PHR-23	QCC Petition to Intervene
	PHR-24	QCC Reply to Minnesota DOC Motion
	PHR-25	QCC "Demand Letter"
Reynolds (Rebuttal)	PHR-26	Response to QCC Minnesota Data Request (CONFIDENTIAL)
	PHR-27	*QCC v. AT&T* (Minnesota State Court Complaint)
	PHR-28	MCI's Term Sheet (LAWYERS ONLY CONFIDENTIAL)
	PHR-29	E-mail from AT&T to MCI (Feb. 13, 2004)
	PHR-30	E-mail from MCI to AT&T (Feb. 13, 2004)
	PHR-31	Cover letter from AT&T (Feb. 17, 2004)
	PHR-32	MCI Internal E-mail (LAWYERS ONLY CONFIDENTIAL)
	PHR-33	New York PSC Dismissal Order
	PHR-34	AT&T Testimony before Minnesota PUC
	PHR-35	Internal MCI Recommendation (Jan. 29, 2004) (LAWYERS ONLY CONFIDENTIAL
Verizon Demonstrative Exhibit		Chronology of Events

3. Verizon Access's Basic Position

Qwest Communications Company's ("QCC's" or "Qwest's") complaint against Verizon Access must be rejected as a factual matter because MCI's switched access agreement at issue was not "unduly" or "unreasonably" discriminatory, as those terms appeared in statutes that were repealed in 2011, and because QCC's complaint is barred by the statute of limitations.

In January 2004, MCI entered into a switched access agreement with AT&T as part of a comprehensive settlement of numerous claims and disputes during the WorldCom bankruptcy proceeding. The agreement was approved by the U.S. Bankruptcy Court, and expired by its terms more than five years ago, in January 2007. The agreement was one of two identical reciprocal agreements in which the CLEC affiliates of MCI and AT&T agreed to provide the other company's IXC affiliates switched access service on the same rates, terms and conditions throughout the United States (both companies operated as CLECs nationwide).

In order to prove *unreasonable* discrimination, QCC must demonstrate that, at the time, it was "under like circumstances" and "similarly situated" to the contracting parties, and would have been able to enter into a similar contractual arrangement. QCC was not, and could not. It was not legally or operationally capable of entering into the same type of agreement that MCI and AT&T had entered into. This is primarily because QCC did not provide switched access service in Florida, or anywhere else in the United States. Based on its chosen business model and limited presence as a CLEC, QCC could not have entered into the same *reciprocal* agreement and provided MCI's IXC affiliates with the same reciprocal rates, terms and conditions. Thus, QCC could not

have provided MCI with the same benefits (lower access rates on substantial amounts of interexchange traffic in Florida and nationwide) that it obtained through its reciprocal switched access agreement with AT&T. Through its complaint, QCC seeks to obtain the benefits of the MCI-AT&T agreement without incurring any of the corresponding obligations to provide switched access service to MCI on identical, uniform terms. If QCC wants the "same" deal, it must be able to show that it could have met the contracts' explicit terms, including the parties' agreement to provide switched access service *to each other*. It has not. Because QCC was not under like circumstances and similarly situated to the contracting parties, MCI's switched access agreement did not unreasonably discriminate against it.

QCC's complaint also must be denied to the extent it asserts claims that are barred by the statute of limitations. In the case of Verizon Access, the statute of limitations began to run on December 11, 2005, four years prior to the date on which QCC filed its complaint naming Verizon Access. QCC and its affiliates (Qwest) were parties to the WorldCom bankruptcy proceeding. In February 2004, Qwest and QCC were served with notice of the MCI-AT&T settlement agreement, including the reciprocal switched access agreements, and of the Bankruptcy Court's hearing where the agreement was to be considered. Several months later, in July 2004, QCC was made aware of a complaint case before the Minnesota Public Utilities Commission in which MCI's and other CLEC switched access agreements were at issue. In April 2005, Qwest became an active participant in the Minnesota proceedings. In August 2005, Qwest began filing comments, asserting that the reciprocal MCI-AT&T switched access agreement was discriminatory, unlawful and caused Qwest harm. Despite its

knowledge of the existence and nature of the January 2004 MCI-AT&T switched access agreement and its potential impact on Qwest, QCC waited more than four years before filing its complaint against Verizon Access in Florida. During the intervening years, QCC did not approach Verizon Access to discuss or negotiate a similar switched access agreement. In short, the statute of limitations bars Qwest's claims for relief that predate December 11, 2005.

QCC's complaint against Verizon Access also must be denied as a matter of law because the Commission lacks subject matter jurisdiction to address Qwest's claims that are based on statutes that have been repealed or substantially modified and because Qwest asks for damages that the Commission may not award. Moreover, the filed rate doctrine and the prohibition against retroactive ratemaking prevent Qwest from ordering switched access services under Verizon Access's switched access price list and later obtaining a different rate based on a contract negotiated by another party. Qwest's legal theory is mistaken for the additional reason that in Florida CLECs always have been free to negotiate off-price list deals with prices that may vary for a host of reasons, such as the services being provided, the expected volume of traffic, length of the contract term, pending disputes between the parties, and the parties' respective bargaining skills. And contrary to Qwest's theory in this case, no Florida statute or Commission rule has ever required that price variances be justified by differences in cost.

4. Verizon Access's Positions on Specific Questions of Fact, Law and Policy

Verizon Access addresses the following issues that involve mixed questions of fact, law and policy:

Issue No. 1: For conduct occurring prior to July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) **Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), Florida Statutes (F.S.) (2010);**

(b) **Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);**

(c) **Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010)?**

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 2: For conduct occurring on or after July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), F.S. (2010);

(b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);

(c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010)?

Verizon Access's Position: MCI's switched access agreement at issue expired by its terms and was terminated in January 2007. The agreement ceased to have any effect at that time. Verizon Access has charged AT&T in accordance with its price list ever since and has not entered into other switched access agreements in Florida. QCC therefore has no claim against Verizon Access for any alleged improper conduct or violations of any statute after July 1, 2011.

Verizon Access also adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 3: Which party has (a) the burden to establish the Commission's subject matter jurisdiction, if any, over Qwest's First, Second, and Third Claims for Relief, as pled in Qwest's Amended Complaint, and (b) the burden to establish the factual and legal basis for each of these three claims?

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 4: Does Qwest have standing to bring a complaint based on the claims made and remedies sought in (a) Qwest's First Claim for Relief; (b) Qwest's Second Claim for Relief; (c) Qwest's Third Claim for relief?

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 5: Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

Verizon Access's Position: No. MCI's contract with AT&T did not *unreasonably* discriminate against QCC. In order to prove *unreasonable* discrimination, QCC must demonstrate that it was "under like circumstances" and "similarly situated" to the contracting parties, and would have been able to enter into a similar contractual arrangement. At the time, however, QCC was not legally or operationally capable of entering into the same type of agreement that MCI and AT&T had entered into. This is primarily because QCC did not provide switched access service in Florida, or anywhere else in the United States. Based on its chosen business model and limited presence as a CLEC, QCC could not have entered into the same *reciprocal* agreement and provided

MCI's IXC affiliates with switched access service on the same reciprocal rates, terms and conditions. Thus, QCC could not have provided MCI with the same benefits (lower access rates on substantial amounts of interexchange traffic in Florida and nationwide) that it obtained through its reciprocal switched access agreement with AT&T. Because QCC was not under like circumstances and similarly situated to the contracting parties, MCI's switched access agreement did not unreasonably discriminate against it.

Verizon Access also adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 6: Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 7: Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

Verizon Access's Position: QCC's Third Claim for Relief does not mention Verizon Access, so this issue is not applicable to it.

Issue No. 8: Are Qwest's claims barred or limited, in whole or in part, by:

(a) the statute of limitations;

Verizon Access's Position: Yes. In the case of Verizon Access, the statute of limitations period began to run on December 11, 2005, four years prior to the date on which QCC filed its complaint here naming Verizon Access as a respondent. QCC

knew of the existence and nature of MCI's switched access agreement in 2004 and 2005, but failed to bring a timely action within four years, as Florida law requires.

Verizon Access also adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(b) Ch. 2011-36, Laws of Florida;

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(c) terms of a CLEC's price list;

Verizon Access's Position: Verizon Access's price list requires a customer to dispute an invoice within 90 days of receipt and to provide documentation to substantiate the dispute. Although QCC filed several billing disputes during the three years the switched access agreement with AT&T was in effect, QCC did not dispute the rates it was charged under Verizon Access's price list, even though QCC knew of the switched access agreement and knew that it contained rates different than those in the price list. QCC cannot ignore the dispute process set forth in Verizon Access's price list. Because it did not timely dispute the rates it was charged, it has waived its right to object.

(d) waiver, laches, or estoppel;

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(e) the filed rate doctrine;

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(f) the prohibition against retroactive ratemaking;

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(g) the intent, pricing, terms or circumstances of any separate service agreements between Qwest and any CLEC;

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

(h) any other affirmative defenses pled or any other reasons?

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 9 (a): If the Commission finds in favor of Qwest on (a) Qwest's first Claim for Relief alleging violation 01'364.08(1) and 364.10 (1), F.S. (2010); (b) Qwest's Second Claim [or Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (e) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010), what remedies, if any, does the Commission have the authority to award Qwest?

Verizon Access's Position: Verizon Access adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

Issue No. 9(b): If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:

(i) **If applicable, how should the amount of any relief be calculated and when and how should it be paid?**

(ii) **Should the Commission award any other remedies?**

Verizon Access's Position: The Commission cannot award QCC monetary relief based on QCC's showing regarding Verizon Access. There is no nexus between Mr. Canfield's calculation of "reparations" and the type of "harm" that Dr. Weisman alleges QCC theoretically could have experienced. Mr. Canfield's calculation of the "financial

impact" of the January 2004 switched access agreement between MCI and AT&T was also erroneous because it did not take into account the reciprocal nature of the 2004 contracts and did not include the amounts that QCC and its ILEC affiliates would have owed MCI's IXC affiliates had they entered into an identical reciprocal nationwide agreement. In addition, Mr. Canfield's calculation failed to include the substantial up-front payment that AT&T made in connection with and as a condition for entering the reciprocal switched access agreements. This omission caused the amount of "reparations" he claimed Qwest is owed to be grossly overstated. There is no basis for Mr. Canfield's alternative theory of "reparations," because it assumes an alleged "discount" that Mr. Canfield calculated years after the contracts expired and that had not been part of the negotiated agreement between MCI and AT&T. Finally, the Commission should reject the amount of "reparations" calculated by QCC because it fails to exclude any claims for months that are outside the statute of limitations period, and thus are barred from any recovery.

Verizon Access also adopts the joint CLEC Group Position Statement attached hereto as Appendix A.

5. Stipulated Issues

There are no stipulated issues.

6. Pending Motions and Other Matters

Verizon Access's only pending motions are its motions for protective orders associated with its pending requests for confidential classification.

7. Pending Requests for Confidentiality

Verizon Access has two requests for confidential classification and motions for protective order pending that were filed with respect to the Direct and Rebuttal Testimony of Peter H. Reynolds.

8. Objections to a Witness's Qualifications as an Expert

Verizon Access has no objections to a witness's expert qualifications at this time.

9. Procedural Requirements

Verizon Access is unaware of any requirements set forth in the Commission's Order Establishing Procedure that cannot be complied with at this time.

Respectfully submitted on September 14, 2012.

By: s/ Dulaney L. O'Roark III
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678-259-1657 (telephone)
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Attorney for Verizon Access

CLEC Group List of Issues and Positions

Issue No. 1: For conduct occurring prior to July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), Florida Statutes (F.S.) (2010);

(b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);

(c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010)?

CLEC Group Position: No, as to all subparts. Even if sections 364.08(1), 364.10(1) and 364.04, F.S. (2010) did apply as Qwest alleges (which CLECs dispute), Chapter 2011-36, Laws of Florida ("the Regulatory Reform Act"), repealed and did not replace 364.08(1) and 364.10(1), which are the basis for Qwest's First Claim. The Regulatory Reform Act also modified 364.04 to clarify the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by contract) is entirely permissible. The Regulatory Reform Act did not include a savings clause to preserve Commission jurisdiction over pending cases, as had been done for prior legislative changes to chapter 364. The Commission only has the powers granted to it by the Legislature. Thus, Florida courts have long held for administrative cases that "[w]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." Reliance on a "vested right" theory cannot be used to avoid this rule. Regulatory statutes do not create absolute obligations or rights, and a litigant to an administrative proceeding has no constitutionally protected right in pursuing a non-final (pending) administrative hearing claim. Therefore, the Commission has no jurisdiction to hear Qwest's claims made for conduct prior to July 1, 2011 under statutes repealed by the Regulatory Reform Act.

Issue No. 2: For conduct occurring on or after July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

(a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), F.S. (2010);

(b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);

(c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010)?

CLEC Group Position: No, as to all subparts. The Regulatory Reform Act repealed and did not replace 364.08(1) and 364.10(1), on which the First Claim is based, and modified 364.04 to clarify that the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by contract) is entirely permissible. Therefore, the Commission has no jurisdiction to address any portion of Qwest's Claims for conduct occurring on or after July 1, 2011.

There are no other Claims for Relief in the Qwest Amended Complaint, and no other provisions of the statute are encompassed within this issue or properly before the Commission for adjudication. Qwest has not alleged a violation of any other statute, either before or after July 2011, and has never attempted to amend its Complaint to allege any such violation.

Issue No. 3: Which party has (a) the burden to establish the Commission's subject matter jurisdiction, if any, over Qwest's First, Second, and Third Claims for Relief, as pled in Qwest's Amended Complaint, and (b) the burden to establish the factual and legal basis for each of these three claims?

CLEC Group Position: The burden of proof to demonstrate subject matter jurisdiction is placed on the party asserting jurisdiction, and remains on that party throughout the entire proceeding. Qwest thus bears the burden of proof on this issue because it is the party invoking the Commission's jurisdiction by the filing of its complaint. This burden requires Qwest to demonstrate the existence of jurisdiction "beyond a reasonable doubt." As the Florida Supreme Court has held, "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested."
Further, in the absence of statutory authority to the contrary, the party asserting the affirmative of an issue before an administrative tribunal bears the burden of proving both the factual and legal basis for its claims. The burden remains with that party in the absence of a burden-shifting legal presumption. The Legislature has not created any such presumption that applies here, and administrative agencies have no authority to create or apply legal presumptions in the absence of specific statutory or constitutional authority. Accordingly, the burden of establishing the factual and legal basis for its claims remains with Qwest throughout the proceeding.

Issue No. 4: Does Qwest have standing to bring a complaint based on the claims made and remedies sought in (a) Qwest's First Claim for Relief; (b) Qwest's Second Claim for Relief; (c) Qwest's Third Claim for relief?

CLEC Group Position: No. In order to have standing, Qwest must demonstrate that it suffered an injury in fact of a type which the proceeding is designed to protect. Qwest has not shown, and cannot show, that its alleged injuries were within the "zone of interest" that the now-repealed statutes upon which it relies (sections 364.08(1), 364.10 (1) and 364.04(1) and (2), F.S. (2010)) were designed to protect. Further, even if Qwest, in the past, would have had standing to bring a complaint based on the claims in its First, Second and Third Claims for Relief under §§ 364.08(1), 364.10(1) and 364.04(1) and (2), F.S. (2010), which CLECs dispute, it certainly lacks standing to raise or maintain such claims after the Legislature enacted The Regulatory Reform Act, which repealed and did not replace 364.08(1) and 364.10(1), on which the First Claim is based, and modified 364.04 to clarify that the conduct at issue in Qwest's Second and Third Claims (*i.e.*, providing service by contract) is entirely permissible. Qwest has not alleged a violation of any current statute, and has never attempted to amend its Complaint to allege any such violation.

Issue No. 5: Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

CLEC Group Position: No. Qwest's First Claim alleges that each Respondent CLEC independently violated former Sections 364.08(1) and 364.10(1), Florida Statutes (2010). Even if the Commission were to apply these repealed statutes to the CLECs, Qwest cannot demonstrate that any Respondent CLEC violated the repealed statutes by failing to "extend to any person any advantage of contract or agreement . . . to persons **under like circumstances** for like or substantially similar service" or by giving "**undue or unreasonable** preference or advantage" to any person for the following independent reasons:

1. The Commission never applied the repealed statutes to CLECs. CLECs have always been subject to a lesser level of regulation and have been allowed to operate as other businesses in a free market that negotiate prices with their customers. As with any business negotiation, rates may vary based on the particular circumstances of the provider and the customer. Such deals are reasonable and permitted under Florida law and Commission rules.
2. Qwest mistakenly asserts that variations in switched access prices negotiated with customers must be based on cost differences. No Florida statute or Commission rule imposes such a requirement. To the contrary, the Commission has never (1) required CLECs to charge cost-based switched access rates or (2) required CLECs to justify price differences based on cost. The circumstances of each transaction may vary for any number of reasons, such as the volume and type of services being provided, the expected volume of switched access traffic, the term length, pending disputes between the parties, and the parties' respective bargaining skills. Because Qwest ignores such factors, it fails to demonstrate any "unreasonable discrimination."
3. The Commission has never required CLECs to charge only a uniform switched access rate to all IXCs and has never required CLECs to disclose, file and offer any non-uniform contract prices for switched access to all IXCs.

Issue No. 6: Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

CLEC Group Position: Each CLEC ***did*** abide by its Price List in connection with its pricing of intrastate switched access service to Qwest, because each CLEC charged Qwest the switched access rates in their respective Price Lists.

Moreover, a CLEC's entry into an agreement for switched access service with one IXC, but not another, does not constitute a violation of law or a failure to abide by a Price List. In fact, Qwest's complaint admits that Florida law permits – and has always permitted – CLECs to enter customer-specific agreements for switched access service.

Issue No. 7: Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

CLEC Group Position: This claim only applies to Budget, BullsEye and Saturn. Each of these CLECs ***did*** abide by its Price List. While Qwest's Third Claim alleges that certain CLECs did not abide by Price List provisions specifying that agreements will be made available to "similarly situated customers in substantially similar circumstances," this claim obviously hinges on a demonstration by Qwest that Qwest is in fact an IXC "similarly situated and in substantially similar circumstances" to each IXC that has an agreement for switched access.

Qwest has failed to make the requisite demonstration. Instead, Qwest relies solely on an assertion that all IXCs are presumptively "similarly situated" unless there is a cost-based reason as to why they are not. However, such assertion is untenable under Florida law, because the Commission has never (1) required CLECs to charge cost-based switched access rates, (2) required CLECs to justify price differences based on cost, (3) required CLECs to charge only a uniform switched access rate to all IXCs or (4) required CLECs to disclose, file and offer any non-uniform contract prices for switched access to all IXCs contemporaneous to the effective date of such contracts. Qwest's case thus fails to account for the variety of legitimate reasons reflecting why Qwest is not "similarly situated and in substantially similar circumstances" to the contracting IXCs, and consequently fails to demonstrate that the Price List provisions somehow obligated any CLEC to extend an IXC's customer-specific agreement to Qwest.

Issue No. 8: Are Qwest's claims barred or limited, in whole or in part, by:

(a) the statute of limitations;

CLEC Group Position: Yes. The Florida Statute of Limitations, in Chapter 95, Florida Statutes, applies because Qwest has filed and pursued, and the Commission has processed, this case as a private right of action in the manner of a civil lawsuit. Specifically, either §§ 95.11(3)(f) or (3)(p) serve as an absolute bar to any portion of Qwest claims against a given CLEC that pre-dates by more than four years Qwest's naming that CLEC as a respondent. Specifically, the statute of limitations bars claims before December 11, 2005 for Respondents named in Qwest's original complaint; October 22, 2006 for Respondents first named in Qwest's Amended Complaint; and June 14, 2008 for the Respondent named in Qwest's Second Amended Complaint. In addition, under Florida law the delayed discovery doctrine does not apply, no conditions exist which would toll the limitation period, and filing a "John Doe" complaint does not toll the limitations period. Even if, contrary to Florida law, the delayed discovery doctrine were considered, Qwest has failed to meet its burden to prove any fact that would support its application here. In fact, Qwest knew of the alleged violation of its legal rights no later than June 2005, more than 4 years before Qwest chose to file its original complaint in Florida in late December 2009. Qwest inexcusably took more than 4 years to file a complaint and has neither pled nor proven any other basis for the Statute of Limitations to not apply.

(b) Ch. 2011-36, Laws of Florida;

CLEC Group Position: Yes. Qwest's claims are completely barred by the Regulatory Reform Act. See CLEC Group positions on Issues Nos. 1 and 2 (jurisdiction) and 4 (standing).

(c) terms of a CLEC's price list;

CLEC Group Position: Yes. Qwest's claims are barred for two reasons:

(i) The CLECs' price lists require that any disputes be submitted within a set time period. For years prior to filing its complaint in this case, Qwest knew it had a dispute with CLECs, but failed to submit disputes based on its claims in this case and continued to pay the price list rates.

(ii) The price lists of Budget, BullsEye, DeltaCom, Saturn and TWTC also provide that contract rates are available to all IXCs. While Qwest acknowledges both the right of CLECs to provide services by contract and its own right to negotiate such contacts with the CLECs and has in fact exercised that right with some CLECs, Qwest simply failed to negotiate a contract pursuant to the price lists, but claims entitlement to benefits of negotiations it consciously chose not to pursue. Qwest is not entitled to any benefit of what amounts to an imputed contract, and, in particular, is not entitled to imputation, on a retroactive basis, of one finite aspect (rates) of a contract between a CLEC and another IXC.

(d) waiver, laches, or estoppel;

CLEC Group Position: Yes, Qwest's claims should be barred in whole. Qwest knowingly waived its rights and should not otherwise be allowed to assert those rights because Qwest: (i) knew of the alleged violation of its legal rights, yet inexcusably took more than 4 years to assert them; and (ii) knew that it had the duty to submit billing disputes to, and seek contract negotiations with, the CLECs but refused to do so, even though, all the while, Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Therefore, Qwest cannot be heard to complain now when Qwest failed to timely pursue rights it knew it had.

(e) the filed rate doctrine;

CLEC Group Position: Yes. The CLECs in this case filed price lists with the Commission that were approved by the staff pursuant to authority delegated to the staff by the Commission in accordance with section 2.07 C.5.a(16) of the Administrative Procedures Manual. Those price lists provide a rate or rates that apply in the absence of a negotiated rate, require that billing disputes be timely submitted, and in some cases prescribe negotiation for contract rates. Unless an IXC negotiates a different rate, it is obligated to pay the rates in the CLEC's switched access price list when it originates or terminates interexchange traffic from or to the CLEC. Qwest may not "cherry pick" parts

of the filed price lists that CLECs are required to honor and at the same time ignore other portions of the price list that impose obligations on Qwest, as a customer that obtained service pursuant to the price list. Qwest has asserted in other venues that the filed rate doctrine applies to CLEC switched access service in Florida. Qwest therefore should not be heard to take a conflicting position in this case.

(f) the prohibition against retroactive ratemaking;

CLEC Group Position: Yes. Qwest's claims for monetary relief should be barred entirely. Qwest seeks to have the Commission establish a rate different than that in a CLEC's price list and different than the rate Qwest paid, and to apply that rate retroactively to the date when Qwest alleges its claim began. More specifically, Qwest asks the Commission to permit it to retroactively dispute CLEC bills (going back many years) and pay a different amount based on a contract rate that Qwest never negotiated. Because Qwest did not negotiate switched access rates with any of the CLECs, it was obligated to pay the "default" rates in the CLECs' price lists. Establishing a new rate and applying it to Qwest's bills in this proceeding would violate the well-established principle against retroactive ratemaking. Qwest's complaint is also designed to have the Commission assert cost-based ratemaking authority over CLEC switched access charges on a retroactive basis when the Commission does not have rate-setting authority over any CLEC services. This, too, would constitute prohibited retroactive ratemaking.

(g) the intent, pricing, terms or circumstances of any separate service agreements between Qwest and any CLEC;

CLEC Group Position: Yes. Qwest's claims should be barred in whole. Throughout the alleged damages period, Qwest sought and received contract rates for switched access from CLECs with whom Qwest had other dealings. Qwest cannot have it both ways: Qwest cannot be both a beneficiary of contract rates and an opponent of contract rates. Additionally, Qwest's Complaint in this case asks the Commission to reverse Qwest's own choice not to pursue contract rates with Respondent CLECs. This the Commission cannot and should not do.

(h) any other affirmative defenses pled or any other reasons?

CLEC Group Position: Yes. Qwest's claims should be barred in whole. Contrary to the Legislature's direction and the Commission's own history of minimal regulation for CLECs, Qwest asks the Commission, for the first time in this case, to comprehensively regulate CLEC access rates, and to do so in a manner inconsistent with and more restrictive than utility rates the Commission actually does have authority to regulate and set. Further, most if not all of the positions Qwest asks the Commission to adopt would constitute agency rules. For the Commission to adopt such positions in this case outside a proper rulemaking proceeding and then to apply such rules retroactively would be unlawful under Chapter 120 and violate the CLECs' rights.

Additionally, any relief to Qwest should be barred as a matter of policy given that (a) Qwest filed a civil complaint in 2007 against AT&T, claiming that AT&T's agreements with CLECs were "illegal" and should be canceled in several States (including Florida) and seeking damages for harm allegedly resulting from such agreements; (b) Qwest obtained a settlement from AT&T under those claims; and (c) Qwest now seeks to benefit from the very agreements Qwest previously claimed were void and unenforceable. The Commission should thus deny any relief to Qwest to prevent Qwest from obtaining double recovery by asserting diametrically opposite positions in different forums.

Issue No. 9 (a): If the Commission finds in favor of Qwest on (a) Qwest's first Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) Qwest's Second Claim for Relief alleging violation of 364.04(1)and (2), F.S. (2010); and/or (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010), what remedies, if any, does the Commission have the authority to award Qwest'?

CLEC Group Position: The Commission has no current authority to award a remedy for violation of statutes that have been repealed. Qwest has not alleged a violation of any other statute, either before or after July 2011, and has never attempted to amend its Complaint to allege any such violation.

Qwest's claim for "reparations" is, in fact, a request for compensation due to alleged discrimination. In other words, this claim is for damages, which are beyond the Commission's authority to award. Further, the Commission lacks specific statutory authority to award or calculate prejudgment interest.

In addition to monetary damages, Qwest asks the Commission to order Respondents to lower their intrastate switched access rates to Qwest prospectively to reflect any contract rate offered to any IXC and to file their contract service agreements with the Commission. Even if the Commission had such authority before July 1, 2012, it clearly lacks authority to do so thereafter.

Issue No. 9(b): If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:

(i) If applicable, how should the amount of any relief be calculated and when and how should it be paid?

CLEC Group Position: Qwest is not entitled to any relief, even if the Commission were to find a violation of law within the four-year statute of limitations period (beginning December 11, 2005 for Respondents named in Qwest's original complaint; October 22, 2006 for Respondents first named in Qwest's Amended Complaint; and June 14, 2008 for the Respondent named in Qwest's Second Amended Complaint), and even if Respondents' Affirmative Defenses are denied.

According to Qwest's witness, Dr. Weisman, the only arguable harm occurred, if at all, in the "downstream" retail market, but Qwest provided no evidence that any such harm actually occurred, nor has it attempted to quantify any such harm. Qwest provided no

evidence that it was unable to recover intrastate switched access charges from its customers or that it lost customers or market share. Instead, Qwest claims as the measure of its damages the estimated difference between Respondents' price list rates and the amounts Respondents charged certain other IXCs. The monetary relief Qwest seeks is therefore entirely improper.

(ii) Should the Commission award any other remedies?

CLEC Group Position: No. See CLEC Group position on Issue No. 9(a). No other remedies are appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail(*) and/or U.S. mail(**) on September 14, 2012 to:

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