

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

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.;
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.

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VOLUME 1
Pages 1 through 171

PROCEEDINGS: HEARING

COMMISSIONERS
PARTICIPATING: CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER EDUARDO E. BALBIS

DATE: Tuesday, October 23, 2012

TIME: Commenced at 9:38 a.m.
Concluded at 11:59 a.m.

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

REPORTED BY: LINDA BOLES, CRR, RPR
Official FPSC Reporter
(850) 413-6734

FLORIDA PUBLIC SERVICE COMMISSION

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CHAIRMAN BRISÉ: Good morning, everyone. Today is October 23, 2012. It is 9:30 something. And so we'll go ahead and call this hearing to order, and we'll ask our staff to read the notice.

MS. TAN: Pursuant to notice published September 14th, 2012, this hearing has been set for this time and place in Docket Number 090538-TP. The purpose of this hearing has been set forth in the notice.

CHAIRMAN BRISÉ: Thank you. At this time we will take appearances, and we'll start from my left, your right.

MR. SHERR: Good morning, Chairman. Adam Sherr on behalf of Qwest Communications Company.

MS. MASTERTON: Good morning, Mr. Chairman and Commissioners. Susan Masterton on behalf of Qwest Communications Company as well.

MR. KLEIN: Good morning. Andrew Klein on behalf of Bullseye Telecom, and with me is Mr. Peter LaRose of Bullseye Telecom.

MR. FEIL: I'm Matthew Feil with the Gunster Law Firm here in Tallahassee, address as stated on the Prehearing Order, and I'm representing tw telecom.

CHAIRMAN BRISÉ: All right. Thank you and good morning, everyone.

1 Mary Anne.

2 **MS. TAN:** Lee Eng Tan on behalf of Commission
3 staff, along with making an appearance for Larry Harris.

4 **MS. HELTON:** Mary Anne Helton, advisor to the
5 Commission.

6 **CHAIRMAN BRISÉ:** All right. Thank you, and
7 good morning to you, too.

8 Are there any preliminary matters that we need
9 to deal with?

10 **MS. TAN:** Yes. Staff has prepared a
11 Comprehensive Exhibit List. The list itself is marked
12 as Exhibit Number 1, and at this time staff asks that
13 Exhibit Number 1 be entered into the record.

14 **CHAIRMAN BRISÉ:** Okay. At this time if there
15 are no objections, we will enter Exhibit 1.

16 (Exhibit 1 marked for identification and
17 admitted into the record.)

18 **MS. TAN:** In addition, there are a number of
19 stipulated exhibits that staff recommends be marked as
20 Exhibits Number 2 through 36 and have them moved into
21 the record.

22 **CHAIRMAN BRISÉ:** Okay. We will move into the
23 record 2 through 36, if there are no objections. Seeing
24 none, we move in 2 through 36.

25 (Exhibits 2 through 36 marked for

1 identification and admitted into the record.)

2 **MS. TAN:** And it is also my understanding that
3 Bullseye has an exhibit that can be entered into the
4 stipulated exhibit list, and I believe that would be
5 number, Exhibit Number 23 -- 83.

6 **CHAIRMAN BRISÉ:** Okay. 83. Bullseye?

7 **MR. KLEIN:** Yes. That exhibit is, is here in
8 part. I believe that's going to be filed as a
9 late-filed exhibit. This is responses to discovery that
10 was received by Bullseye Telecom yesterday, and the
11 requisite number of copies of some of the attachments of
12 that discovery need to be, need to be produced.

13 (Late-Filed Exhibit 83 identified for the
14 record.)

15 **CHAIRMAN BRISÉ:** Okay. What would you like to
16 give as a title to the exhibit?

17 **MR. KLEIN:** Well, we do have the, the actual
18 copies of the discovery with the exhibit cover page that
19 we can distribute now.

20 **CHAIRMAN BRISÉ:** Okay. I think that that
21 would be acceptable. If you'd make it available to, to
22 our staff person so that they can be distributed.

23 **MS. TAN:** Excuse me. Could I ask if,
24 Bullseye's counsel if this is confidential filings?

25 **MR. KLEIN:** There is one page of confidential

1 information included within that.

2 **MS. TAN:** Okay. We would need, we would need
3 two different filings, one for the confidential portion
4 and one for the regular, unless --

5 **MS. HELTON:** I guess the concern here is that
6 we don't normally leave out, laying around, confidential
7 documents. So let me ask this question, if I may,
8 Mr. Chairman. Is the confidential document in this red
9 folder now?

10 **MR. KLEIN:** Yes, it is.

11 **MS. HELTON:** I think that maybe for everyone's
12 ease if we could take that out and keep that in the red
13 folder so it can be gathered back up at the end of the
14 day and mark that -- I think Ms. Tan's idea of marking
15 that separately from the nonconfidential documents might
16 help us keep everything straight and avoid disclosure of
17 the confidential information.

18 **CHAIRMAN BRISÉ:** Okay. So we will then mark
19 the confidential exhibit as 84.

20 (Confidential Exhibit 84 marked for
21 identification.)

22 **MS. HELTON:** Mr. Klein, when were you planning
23 on using the confidential document, or did you just want
24 it in the record?

25 **MR. KLEIN:** That will be used today.

1 **MS. HELTON:** Will we need it this morning, or
2 should we gather that back up for when you're going to
3 use it?

4 **MR. KLEIN:** I think that will be needed this
5 morning.

6 **CHAIRMAN BRISÉ:** Okay. Thank you.

7 **MS. TAN:** Chairman, we'll need titles for both
8 Exhibit Number 83, which will be late-filed, and also
9 for Exhibit Number 84.

10 **CHAIRMAN BRISÉ:** Okay. All right. So we have
11 a cover here that says Qwest Supplemental Response and
12 Selected Attachments.

13 **MS. MASTERTON:** Mr. Chairman, may I ask a
14 question?

15 **CHAIRMAN BRISÉ:** Sure, you may ask a question.

16 **MS. MASTERTON:** When this was circulated to
17 the parties yesterday to ask for their agreement to have
18 the exhibit entered into the record, it was our
19 understanding that it was going to be the entire
20 discovery response. So this selected attachments,
21 that's news to me. And I think if -- understanding that
22 it's not everything, we may want to ask to have the
23 entire response entered into the record. So maybe
24 Mr. Klein can explain.

25 **MR. KLEIN:** Yeah. There were several hundred

1 pages of attachments that we received yesterday, the day
2 before the hearing, when we were traveling to this
3 hearing. So we did not have an opportunity to produce
4 all of the attachments. It wasn't our understanding
5 that the entire attachments were, were necessary, so we
6 were trying to save some trees and save some time and
7 just produce selected attachments instead of the several
8 hundred pages. If Qwest's counsel would prefer to have
9 the entire attachments included, we would have no
10 objection to that.

11 **MS. MASTERTON:** Yeah. I had thought that's
12 what you meant when you said you were going to still
13 make copies and file it as a late-filed exhibit, that
14 that was what was taking the time. So, yes, thank you,
15 we would appreciate that.

16 **MR. KLEIN:** Okay.

17 **MS. HELTON:** And, Mr. Chairman, if I could add
18 one more thing.

19 **CHAIRMAN BRISÉ:** Sure.

20 **MS. HELTON:** When I flipped through the
21 package that was included in the red folder, it was not
22 readily clear to me what exactly was confidential.
23 Nothing is highlighted that would make it clear to
24 anyone in the room what's confidential and so we would
25 know what to keep separate and so that we would know

1 what information not to, to say out loud.

2 **MR. KLEIN:** It does appear that the
3 highlighting did not come through on the photocopying.
4 It is the third page of the exhibit.

5 **CHAIRMAN BRISÉ:** Third page.

6 **MR. KLEIN:** It's marked at the top, Begin
7 Lawyer's Only Confidential, and it has End Lawyer's
8 Confidential after the chart. But unfortunately the
9 highlighting did not come through. We apologize.

10 **CHAIRMAN BRISÉ:** Right. Okay. So then, in
11 essence, page 3 of the exhibit would be the confidential
12 portion.

13 **MR. KLEIN:** Yes, Mr. Chairman.

14 **CHAIRMAN BRISÉ:** Okay. All right. So 83 will
15 be the Qwest supplemental response and, and attachments.
16 And 84 will be the confidential, which is page 3 of 83.
17 Okay?

18 **MS. TAN:** In addition, Chairman, it was my
19 understanding that there was another document that
20 Bullseye wanted to enter in the Composite Exhibit List
21 or the Stipulated Exhibit List, and that was discovery
22 from Granite. And I may be incorrect, but I'd like to
23 double-check.

24 **CHAIRMAN BRISÉ:** Okay. Mr. Klein.

25 **MR. KLEIN:** That is correct, and I do have

1 that here as well.

2 **CHAIRMAN BRISÉ:** Okay.

3 **MR. SHERR:** Mr. Chairman, Adam Sherr. While
4 this is being distributed, just another point of
5 clarification.

6 With regard to Exhibit 84, I think Mr. Klein
7 will agree, at present in the folder there's only one
8 page that has confidential information, but the
9 attachments contain, that are going to be provided
10 later, contain many pages of confidential information.
11 I didn't want you to be under the belief that there was
12 only going to be one page that was confidential.

13 **CHAIRMAN BRISÉ:** Okay. So if sometime later
14 we can sort of amend what's on 84 and so we can have a
15 layout of what other pages should be dealt with as
16 confidential, that would be helpful.

17 **MR. KLEIN:** Okay. Very well.

18 **CHAIRMAN BRISÉ:** Exhibit 85 will be Qwest's
19 response to interrogatories 18, 21, and 22.

20 (Exhibit 85 marked for identification.)

21 Okay. Any other preliminary matters at this
22 time?

23 **MS. TAN:** None at this time.

24 **CHAIRMAN BRISÉ:** Okay.

25 **MR. FEIL:** Mr. Chairman, I did have one

1 request relative to the Prehearing Order, sir.

2 **CHAIRMAN BRISÉ:** Sure.

3 **MR. FEIL:** Since there have been a number of
4 parties who have been dismissed from the case between
5 the prehearing and now, I wanted to ask whether or not
6 we could change the order of witnesses, just two
7 witnesses on page 5. If we could flip the two people at
8 the bottom there, Mr. LaRose and Ms. Jones. And I ask
9 this because the witnesses before there, Mr. Wood and
10 Mr. Deason, are also tw only witnesses. Ms. Jones is a
11 tw only witness, and it seemed to me that we could silo
12 tw's case in that way rather than have Mr. LaRose
13 testify in there. I don't expect that we will have a
14 time issue over the course of the hearing, but that's my
15 proposal.

16 **CHAIRMAN BRISÉ:** Okay. Are there any issues
17 with that arrangement?

18 **MR. KLEIN:** No, Mr. Chairman. The only thing
19 I would note is that Mr. LaRose -- I don't anticipate a
20 time issue, as Mr. Feil said. But if it does become an
21 issue, we would prefer to stick with the initial order
22 to the extent this hearing runs longer than we
23 anticipate it will. But I do not anticipate that will
24 be an issue.

25 **CHAIRMAN BRISÉ:** Okay.

1 **MS. MASTERTON:** QCC has no objection to that.

2 **CHAIRMAN BRISÉ:** Okay. And then we'll hear
3 from our Prehearing Officer.

4 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.
5 I was just going to point out that the order of
6 witnesses that Mr. Feil has suggested is the way it is
7 listed on the witness order separate sheet that was
8 provided to us, and I do agree that that makes sense as
9 the case has developed as we've moved through. And I
10 certainly would think that if there are time constraints
11 as we go along, I'm glad to work with you and the
12 witnesses to facilitate.

13 **CHAIRMAN BRISÉ:** All right. Perfect. Any
14 other issues that we need to deal with?

15 **MS. TAN:** None at this time.

16 **CHAIRMAN BRISÉ:** Okay. Are we ready for
17 opening statements? Okay. We will take opening
18 statements, and per the Prehearing Order, we have 15
19 minutes per, per side. And so we will go in this order:
20 Qwest, CLEC group, Broadwing Communications, Bullseye,
21 and then tw of florida.

22 **MR. FEIL:** Mr. Chairman, since those, since
23 the CLEC group was representative of a larger group
24 that's not present anymore, may I suggest that either we
25 go with the order of Qwest, then Bullseye or tw.

1 **CHAIRMAN BRISÉ:** Understood. All right.

2 **MR. SHERR:** Should I proceed?

3 **CHAIRMAN BRISÉ:** Qwest.

4 **MR. SHERR:** Chairman and Commissioners, good
5 morning. My name is Adam Sherr and I represent Qwest
6 Communications Company, the complainant in this
7 proceeding. I'm joined by co-counsel Susan Masterton.

8 This is a case of great importance not only to
9 Qwest, but also to all long distance providers operating
10 in Florida. Given the Commission's statutory obligation
11 to ensure fair competition and to prevent
12 anticompetitive behavior, it is also important to the
13 Commission's ability to abide by its mandate.

14 As Qwest's prefiled testimony makes clear,
15 this case focuses on the respondent CLECs' provision of
16 intrastate switched access to Qwest in Florida. It
17 concerns the Respondents' unreasonable and unlawful
18 preference of some long distance providers, also known
19 as interexchange carriers or IXCs, over others. The
20 respondent CLECs entered into contracts with a select
21 few IXCs by which they agreed to charge the favored IXCs
22 switched access at far lower than the published rates
23 they charged and still charge Qwest.

24 Before diving deeper into the evidence that
25 establishes the CLECs' unlawful conduct, let's talk

1 about the service at issue, switched access. Switched
2 access is an absolutely critical input service required
3 to allow an IXC like Qwest to provide long distance
4 service. As a long distance provider, Qwest carries a
5 call between distant central offices but relies on the
6 calling and called party's end user -- the called end
7 user's local exchange providers to carry the call from
8 and to the end users. As an IXC, Qwest doesn't select
9 who the end users choose as their local exchange
10 companies.

11 When a Qwest long distance customer places a
12 long distance call from one Florida local area to
13 another, Qwest is handed the call from the calling
14 party's local exchange carrier and Qwest compensates
15 that carrier. That is known as originated switched
16 access or originating switched access. Qwest then
17 carries the call on its long distance network and hands
18 the call to the called party's local exchange carrier,
19 and Qwest compensates that, that company. That is known
20 as terminating switched access.

21 In Florida, CLEC switched access rates are not
22 set by the Commission and, in fact, are uncapped.
23 Accordingly, except in rare circumstances where Qwest
24 has very large volumes of traffic justifying the
25 purchase of special access to a given location, Qwest

1 must pay the rates unilaterally set by the CLEC when
2 Qwest carries a long distance call and hands it directly
3 to a CLEC for termination.

4 While the absolute rate of a CLEC -- while the
5 absolute rate a CLEC charges for switched access, be it
6 one cent per minute or ten cents per minute, is not
7 Commission set or approved, during the vast majority of
8 the time period relevant to Qwest's complaint *Florida*
9 *Statutes* expressly prohibited unreasonable rate
10 discrimination. That is, while the PSC didn't prescribe
11 the actual rate charged, state statute required the
12 CLECs charge all similarly situated interexchange
13 carriers the same rate. Through the secret switched
14 access agreements at the core of this case, other IXCs,
15 principally AT&T, received steep discounts on CLEC
16 provided switched access.

17 That Qwest was charged a couple or few cents
18 more per minute than its long distance competitors may
19 sound trivial, but it is not. Switched access is an
20 absolutely critical input in any long distance company's
21 provision of service. Switched access drives an IXC's
22 cost of providing long distance service and is thus
23 critical in establishing the price the IXC can charge
24 its retail and wholesale long distance customers.

25 By way of illustration, as Mr. Canfield

1 explains in his direct testimony, Qwest is billed in the
2 millions of dollars each year in Florida just by CLECs
3 and just for intrastate switched access. The access
4 rates Qwest is charged, it should be no surprise, play a
5 decisive role in determining Qwest's ability to compete
6 with other interexchange carriers. Secret, preferential
7 pricing for input services undoubtedly skews any market
8 and leads to anticompetitive results.

9 Dr. Dennis Weisman, a professor of economics
10 at Kansas State University, explains the harm of input
11 service discrimination in his prefiled direct and
12 rebuttal testimony.

13 Taking a step back, I'm reminded of what a
14 California Commission judge said about this case at a
15 prehearing conference a few years ago. She said, and I
16 certainly agree, that this case is factually simple but
17 procedurally complicated. As everyone in this room can
18 attest, the judge's description was pretty apt.

19 At an earlier stage, 18 different CLECs were
20 respondents in this case, and Qwest was tasked with
21 establishing its factual and legal case as to each of
22 those companies.

23 After the many dismissals, virtually all by
24 settlement, we're left with five respondents: Bullseye,
25 tw telecom, Ernest, Flatel, and Navigator. Each, each

1 of those companies entered into one or more secret
2 agreements with an IXC by which that IXC received
3 discounted below price list switched access in Florida.

4 Coming back to the California judge's comment,
5 the essential facts of this case are straightforward and
6 in fact nearly uncontested. The record evidence
7 demonstrates that the following facts are uncontested or
8 virtually so. Each of the remaining -- each of the
9 remaining respondent CLECs, one, provides intrastate
10 switched access in Florida to Qwest and other IXCs; two,
11 has in place a published price list which contains
12 generally applicable rates for switched access; three,
13 charged Qwest pursuant to those published price lists;
14 four, charged lower rates to one or more other IXCs by
15 virtue of secret written agreements; and five, failed to
16 publish or otherwise disclose to the PSC or to Qwest the
17 existence of those agreements or even just the
18 availability of the rates found in those agreements.

19 The fact that the respondents charged Qwest
20 more for switched access than they charged one or more
21 other IXCs for the identical service is uncontested.
22 Instead, the primary issue facing this Commission is not
23 whether discrimination occurred but whether the
24 discrimination was reasonable. Not surprisingly, the
25 parties sharply disagree on this point.

1 Through the testimony of Dr. Weisman and Qwest
2 witness Bill Easton, Qwest establishes the critical
3 elements required to answer this question. Beyond
4 doubt, the service provided to Qwest as well as the
5 preferred IXCs was identical, let alone similar.
6 Further, there is no record evidence suggesting that the
7 respondent CLECs' cost of providing switched access
8 differs as between customers. The cost of providing a
9 minute of switched access to Qwest is the same as it is
10 to provide a minute of switched access to AT&T.

11 In the absence of proof that the CLECs' cost
12 of providing service actually varied between customers,
13 Dr. Weisman explains that the CLECs' price
14 discrimination was unreasonable as a matter of
15 economics.

16 While the examination of potential cost
17 differences drives a rate discrimination analysis, Qwest
18 also analyzed the various excuses and justifications
19 offered by the CLECs in their testimony. In their
20 direct and rebuttal testimonies, Dr. Weisman and
21 Mr. Easton refute the applicability and legitimacy of
22 these excuses.

23 More specifically, Bullseye believes that it
24 was coerced by AT&T into entering the 2004 agreement at
25 issue. It asserts that AT&T and Qwest were not, quote,

1 under like circumstances because, unlike AT&T, Qwest
2 paid Bullseye's switched access invoices and did not
3 withhold payment on the basis of BullsEye's high rate
4 levels. While Bullseye may have believed it had no
5 choice but to enter into that agreement, this does not
6 explain why Qwest deserved to be punished by Bullseye
7 for being a customer which paid its bills.

8 As Dr. Weisman and Mr. Easton testified,
9 Bullseye's attempt to justify its admitted rate
10 discrimination is unreasonable as a matter of economics
11 and as a matter of public policy. To grant Bullseye
12 immunity from Florida Statute on that basis would be to
13 endorse and encourage self-help. It would send a
14 powerful signal to customers unhappy with a utility's
15 published rate to simply refuse to pay unless and until
16 a lower off-book discount is offered. And to that --
17 and to the utility here, Bullseye, it would send a
18 signal that secretly preferring disgruntled customers to
19 the detriment of all other dutiful customers is
20 acceptable and consistent with Florida public policy.

21 Tw telecom, on the other hand, suggests that
22 it is immune from liability in this case because it
23 charged AT&T lower switched access rates as one
24 component of a larger nationwide services agreement
25 through which AT&T purchased large volumes of other

1 services, primarily competitive and unregulated services
2 including special access and dedicated service.

3 As Dr. Weisman explains, tw telecom fails to
4 make any showing that its cost of providing AT&T
5 switched access was reduced or altered in any way by
6 AT&T's purchase of unrelated services. As to tw
7 telecom's provision of intrastate switched access
8 services in Florida, Qwest and AT&T are and were under
9 like circumstances except that tw telecom steeply
10 discounted its switched access rates to AT&T while
11 charging Qwest its higher price list rates.

12 I will say very little about Ernest, Flatel,
13 and Navigator because they have not actively
14 participated in this proceeding. They did not file
15 testimony, direct or rebuttal, and did not appear at the
16 Prehearing Conference. Qwest's presentation of evidence
17 as to those three CLECs is entirely uncontested.

18 As I mentioned before, the steep differences
19 in switched access rates are not trivial. The CLEC
20 practice of entering into secret switched access
21 agreements persisted for many years. In some cases it
22 began in 2001, and with some CLECs persists yet today,
23 even years after Qwest initiated these complaints, after
24 Qwest was awarded victory in the parallel case in
25 Colorado, and many years after the CLECs, some of which

1 paint themselves as the innocent victims of AT&T's
2 aggression and thus immune from all responsibility, had
3 the contractual right to terminate the agreements.

4 Given the high volumes of traffic in Florida
5 and the steep rate differentials, Qwest paid, just from
6 the remaining parties, many hundreds of thousands of
7 dollars more than it would have had the CLECs provided
8 switched access at the preferential rate.

9 Qwest's overcharge calculations are presented
10 in great detail by witness Derek Canfield of TEOCO
11 Corporation. Mr. Canfield thoroughly describes his
12 methodology and unique factors needed to calculate the
13 overcharge as to each individual CLEC, and of course
14 attaches very specific month by month overcharge
15 calculations. While Bullseye and tw telecom clearly
16 disagree that Qwest is entitled to relief in this
17 docket, their prefiled testimony reveals no
18 company-specific critiques of Mr. Canfield's
19 calculations.

20 As I mentioned earlier, most of the material
21 facts in this case are uncontested. I have said little
22 about the CLECs' prefiled testimony because much of it
23 contains legal argument. Qwest and the CLECs have
24 opposing views of former Sections 364.04, 08, and 10,
25 and those differences will be more appropriately

1 chronicled in post-hearing statements.

2 In brief, the CLEC's prefiled testimony of
3 Mr. Deason suggests that the statutes I just mentioned
4 were never meant to apply to CLEC provided switched
5 access, yet the language of those statutes doesn't
6 support his position. Also, Mr. Wood's testimony
7 repeatedly discusses the statute of limitations and how
8 it limits Qwest's relief. Qwest does not believe the
9 statute of limitations applies for this type of claim,
10 and even if it did, the secretive nature of the
11 agreements and the respondent CLECs' efforts to conceal
12 them limits any statute of limitations defense.

13 Qwest witness Lisa Hensley Eckert explains the
14 history of the switched access agreements in more
15 particularity in her direct testimony. She also
16 explains how and when Qwest first learned of the
17 agreements at least generally, and the many steps Qwest
18 took to gather information sufficient to protect its
19 rights.

20 I appreciate the opportunity to address you
21 today, and I believe that once you have, you have a
22 chance to hear the witnesses testify and consider all
23 the record evidence, it will be clear to you that Qwest
24 has been the victim of the respondent CLECs' unlawful,
25 unreasonable, and anticompetitive discrimination. Thank

1 you.

2 **CHAIRMAN BRISÉ:** All right. Bullseye.

3 **MR. KLEIN:** Thank you, Mr. Chairman,
4 Commissioners. Qwest has filed a complaint with this
5 Commission that has no basis and seeks relief that
6 simply makes no sense. Qwest clearly did not consider
7 the state of the law in Florida when it filed its
8 complaint here. The provision of intrastate access by
9 competitive carriers has never been subject to the type
10 of strict regulation that Qwest now asks this Commission
11 to retroactively impose.

12 Since this case has been pending, the law in
13 Florida has been even further clarified by the
14 Regulatory Reform Act. Those statutory revisions
15 confirm the lack of any cause of action by Qwest, as
16 well as a lack of jurisdiction by this Commission.
17 Qwest has failed to recognize that there is no
18 requirement in Florida that carriers price access at
19 cost or some other level, and there is likewise no
20 requirement that carriers even file price lists.
21 Indeed, when carriers such as Bullseye choose to file
22 price lists, they do so voluntarily and remain free to
23 enter into customer-specific contracts for access
24 services.

25 In fact, the price list filed by Bullseye

1 contains explicit language to that effect. It reads, in
2 part, at the option of the company services may be
3 offered on a contract basis to meet specialized pricing
4 requirements of the customer not contemplated by this
5 price list. The terms of each contract shall be
6 mutually agreed upon between the customer and company,
7 and may include discounts off of rates contained herein
8 and waiver of recurring, nonrecurring, or usage charges.
9 This language in Bullseye's price list took effect on
10 November 7th, 2003, nearly nine years ago.

11 Any carrier customer such as Qwest who cared
12 to review the Bullseye price list would clearly have
13 known that intrastate access services were available on
14 a contract basis and that such contracts may include
15 discounts off of rates contained in the price list.

16 Qwest apparently did not care to review the
17 price list, but Qwest never negotiated or requested
18 contract-specific pricing from Bullseye, nor did Qwest
19 ever notify Bullseye that Qwest disputed or otherwise
20 challenged the price list rates. Qwest simply
21 voluntarily paid the price list rates without dispute.

22 What Qwest did know, however, is quite
23 significant. Qwest itself entered into contracts with
24 other CLECs under which Qwest itself paid off-price list
25 rates for intrastate switched access services in Florida

1 or, in some instances, paid no rate at all. Not
2 surprisingly, Qwest did not reveal the existence of
3 these agreements. Instead, rather fortuitously, two
4 CLECs who were actually parties to such agreements with
5 Qwest revealed them earlier this year. Those two CLECs
6 are no longer parties to this proceeding.

7 When Qwest was then asked to reveal other such
8 agreements, Qwest refused. Thankfully Qwest was
9 compelled by the order of the Prehearing Officer that
10 was released on Friday to produce those agreements, and
11 those agreements with these other CLECs that Qwest has
12 were thankfully produced yesterday.

13 So now we have Qwest saying on the one hand
14 that the CLEC contract-based pricing agreements are
15 discriminatory if not extended to every other customer,
16 but on the other hand has now been shown to have had
17 those very same agreements which Qwest sought to keep
18 secret solely for Qwest's own benefit.

19 Moreover, part of Qwest's argument in this
20 case is that the CLEC agreements were somehow secret
21 agreements of which Qwest was not aware and that Qwest
22 was somehow prejudiced as a result. However, we now
23 know that Qwest was a party to such agreements before
24 these supposed secret agreements of other IXCs came into
25 existence. For example, Qwest had off-price agreements

1 with carriers in Florida as far back as 2002. The
2 Bullseye agreement about which Qwest complains did not
3 come into existence until the fourth quarter of 2004,
4 more than two years later. As if this was not enough,
5 Qwest was made aware that AT&T had entered into hundreds
6 of contract-based pricing agreements in the 2004/2005
7 time frame. At that time the Minnesota Commission
8 opened a docket to look into such agreements. Qwest --
9 Minnesota is a Qwest ILEC state, and Qwest became a
10 party to that proceeding in 2005.

11 So there's no secret that such agreements
12 existed, and any claimed prejudice results from Qwest's
13 own lack of effort in entering into contract-based
14 agreements or additional agreements more than it did.
15 Instead, upon finding out about AT&T's agreements during
16 the Minnesota proceedings, Qwest chose to sue AT&T
17 claiming that AT&T obtained its agreements through
18 anticompetitive conduct. Bullseye, in fact, agrees with
19 the way AT&T -- agrees that the, that the way AT&T went
20 about creating the CLEC agreements is significant.
21 Specifically, as Mr. Sherr noted, AT&T decided to
22 withhold payment of all access charges from CLECs with
23 whom it did not have an agreement to force those CLECs
24 to agree to AT&T's terms. Since AT&T was the largest
25 IXC and access payments were a very significant part of

1 each CLEC's revenue, nascent CLECs like Bullseye had no
2 choice but to enter into the settlement agreement under
3 which AT&T paid some of the access charges it had
4 withheld and agreed to pay in full, albeit at a lower
5 rate going forward.

6 Upon seeing all this, Qwest sued AT&T in court
7 seeking monetary damages and other relief. Qwest stated
8 in that case, not the CLECs, but Qwest stated that AT&T
9 coerced nascent CLECs to provide off-tariff rates with
10 various threats and incentives, including withholding
11 compensation. Qwest also said AT&T pursued its national
12 policy without regard to the unlawful results of its
13 policy in filed rate states, which included, according
14 to Qwest, Florida.

15 Qwest also said AT&T obtained enormous
16 financial leverage over the CLECs through its unilateral
17 decision to withhold payment of the tariffed access
18 charges. This created a financial squeeze on CLECs that
19 effectively eliminated meaningful opportunities for
20 negotiation. And finally, Qwest said that the financial
21 squeeze puts CLECs at the mercy of AT&T's demands.

22 In terms of the effect of the agreements,
23 Qwest said that the AT&T CLEC agreements are, quote,
24 void, illegal, and unenforceable. However, we now have
25 to stop and think for a moment about the same relief

1 that Qwest is asking of the Florida PSC. Qwest seeks to
2 enforce the terms of the AT&T/Bullseye agreement and
3 obtain for itself those same terms that Qwest argued
4 were the result of AT&T's anticompetitive conduct
5 towards small CLECs like Bullseye. In other words,
6 after obtaining a settlement from AT&T on the basis that
7 its agreements are void, illegal, and unenforceable,
8 Qwest is now seeking to obtain the same contractual
9 benefits that Qwest claims to have been unlawful in the
10 first instance. This is simply not consistent with
11 sound and fair public policy.

12 These are some of the many reasons why Qwest's
13 claims must be denied in their entirety. In brief,
14 these also include that the so-called refunds that Qwest
15 seeks in actuality constitute damages that the
16 Commission is respectfully without authority to award;
17 the lack of any demonstration by Qwest that it is under
18 like circumstances to AT&T such that Qwest could even
19 claim discrimination; and finally the fact that Qwest
20 actually had alternatives to the purchase of switched
21 access from Bullseye and other CLECs and actually used
22 those alternatives such that its bottleneck,
23 discrimination, and damages theories are completely
24 negated.

25 Any true remedy in this case for one to be

1 considered would be to bring AT&T up to the price list
2 rate that Qwest claims to have been -- that Qwest claims
3 to have paid, rather than permitting Qwest to obtain a
4 financial windfall from conduct that Qwest itself railed
5 against as coercive and unlawful. Thank you very much.

6 **CHAIRMAN BRISÉ:** Okay. Tw.

7 **MR. FEIL:** Mr. Chairman, at one time there
8 were over a dozen CLECs in this case. None, not one,
9 had a contract with another carrier who agreed to a
10 multimillion dollar take-or-pay revenue commitment for
11 an assortment of unregulated services. That is the
12 agreement at issue here for tw, tw's 2001 agreement with
13 AT&T.

14 As you'll hear Ms. Rochelle Jones testify,
15 2001, over ten years ago, tw secured that contract with
16 AT&T. It was a straightforward arms-length business
17 transaction whereby AT&T agreed to buy from tw several
18 million dollars worth of unregulated services, of which
19 switched access was a part. The agreement was
20 reasonable, it was economically justified, and involved
21 no coercion.

22 Under the contract, AT&T on a nationwide, not
23 a Florida-only, basis agreed to pay tw for these
24 services at varying pricing points whether AT&T actually
25 used those services or not. That is to say AT&T made a

1 composite multimillion dollar take-or-pay commitment for
2 all services. Thus, the AT&T/tw contract is not a
3 situation where one may take one rate for one service
4 out of that contract and compare it to one rate sold to
5 somebody else. That is an invalid comparison, apples to
6 oranges. You have to look at the deal as a whole, the
7 total financial obligation AT&T made to tw and tw to
8 AT&T.

9 Ms. Jones will also testify that Qwest had an
10 agreement for unregulated services with tw and has had
11 since 1995. That Qwest agreement is still in effect
12 today. It does not cover switched access, it does not
13 contain a multimillion dollar or avenue -- excuse me --
14 or any take-or-pay revenue commitment.

15 Did Qwest know it could negotiate a switched
16 access rate with tw? Yes. But did it negotiate a
17 switched access rate with tw? No. Has Qwest committed
18 to buying the volume of unregulated services that AT&T
19 committed to buying from tw? No. Is Qwest willing to
20 obligate itself to the multimillion dollar take-or-pay
21 commitment that AT&T agreed to? No. Can Qwest even
22 prove that the switched access rate from the AT&T/tw
23 contract would have existed but for the rest of the
24 rates, terms, and conditions of that agreement? Again,
25 no. Qwest pulls one building block out of a large

1 contractual structure as though the remainder of the
2 contract could have and would have existed unchanged and
3 totally undisturbed by this removal. As Ms. Jones will
4 testify, that is pure fiction. And that's not the only
5 fiction that you have to accept to rule in Qwest's
6 favor; there are many more.

7 Let me sum up Qwest's case and opening
8 statement for you. Because switched access for the
9 first time in this case should be designated a
10 bottleneck service, you should impose uniform rates for
11 switched access from CLECs and assume harm to other
12 carriers and assume harm in downstream markets stemming
13 from contract prices, all on a retroactive basis.
14 Decide today what might have been ten years ago and do
15 all even though you don't regulate the rates.

16 Former Chairman and Commissioner Terry Deason
17 will testify for tw that this Commission never asserted
18 authority over CLEC switched access pricing, never
19 placed cost basis or any regulatory parameters or filing
20 requirements on those services, never placed any
21 obligations to file, disclose, post contracts, contract
22 rates for switched access to avoid discrimination for
23 any other purpose. And the Commission never held that
24 switched access is or should be treated as a bottleneck
25 service and never applied to CLECs the now repealed

1 discrimination statutes Qwest raises here. A lesser
2 level of regulations for CLECs consistent with the
3 statute, Mr. Deason will testify, was employed beginning
4 in 1995 to encourage entry and investment in the state
5 of Florida by CLECs. And that lesser level of
6 regulation applied to the CLEC companies, not to one or
7 two or more of their services.

8 Moreover, Mr. Deason emphasizes the time for
9 Qwest's theoretical arguments, and those are the only
10 arguments they have, were in 1995, not now, not at this
11 point in time, not after the fact. Moreover, he also
12 asserts that it's just plain bad regulatory policy to
13 implement or impute new regulatory requirements and
14 apply them retroactively as Qwest asks you to do in this
15 case.

16 Also testifying for tw is Mr. Don Wood.
17 Mr. Wood sheds additional light on these Qwest fictions
18 I've just described as well as a few more. Mr. Wood,
19 for instance, debunks Qwest's reliance on FCC
20 pronouncements that switched access is a bottleneck. In
21 the very FCC orders Qwest cites, the FCC specifically
22 acknowledges that for CLEC switched access there are
23 standard offer rates and contract rates, just like here
24 in Florida.

25 Mr. Wood also busts the myth posited by Qwest

1 that Florida's regulatory requirements are in any way
2 similar to Colorado. He states in Colorado the rules
3 and statutes provide for mandatory tariff filing for
4 switched access, cost-based rates, and specifically
5 require contracts for switched access to be filed. None
6 of these requirements are present here in Florida.

7 Additionally, Mr. Wood addresses the illusion
8 that is Qwest's alleged harm. I ask that you please
9 note with attention Qwest's words used when describing
10 its alleged harm in downstream markets, words like may,
11 could, and then you may even hear a probably. But look
12 for real proof of harm in downstream markets or
13 elsewhere, any actual impact on Florida customers or
14 Florida rates. Absolutely none in this record. Look
15 for real proof of an impact on Qwest's market share or
16 probability. None. And as Mr. Wood states, there is no
17 nexus whatsoever between the money Qwest asks you to
18 force tw to remit to Qwest and this unproven harm.

19 A few quick points and I'll wrap up. Even if
20 you get past the jurisdictional issue, and we maintain
21 that you don't have jurisdiction to apply a repealed
22 law, you still have to get past the arguments that
23 Mr. Deason and Mr. Wood pose, but then you still have
24 one core question. Was Qwest treated unduly or
25 unreasonably by tw vis-a-vis AT&T? The answer to that

1 is emphatically no.

2 I'll wrap up. Tw maintains that actually the
3 opposite is true. If you rule in Qwest's favor, you
4 will actually be giving Qwest preferential treatment and
5 treating tw and AT&T unfairly and unreasonably. Thank
6 you.

7 **CHAIRMAN BRISÉ:** Thank you.

8 Okay. At this time we're going to move into
9 testimony. If I could have all the witnesses stand as
10 we -- we'll swear you in.

11 (Witnesses collectively sworn.)

12 All right. Thank you very much. You may be
13 seated.

14 Qwest, you may call your first witness.

15 **MR. SHERR:** Thank you, Chairman.

16 Qwest calls William Easton.

17 **CHAIRMAN BRISÉ:** Just to remind everyone that
18 each witness will have five minutes to summarize his or
19 her testimony.

20 Whereupon,

21 **WILLIAM R. EASTON**

22 was called as a witness on behalf of Qwest
23 Communications Company and, having been duly sworn,
24 testified as follows:

25 **DIRECT EXAMINATION**

1 BY MR. SHERR:

2 Q Are you ready, Mr. Easton?

3 A I am.

4 Q Can you please state your name for the record.

5 A My name is William Easton.

6 Q Okay. And by whom are you employed?

7 A I am employed by CenturyLink.

8 Q And just for the record, you were just sworn
9 in; is that correct?

10 A Correct.

11 Q Okay. You are appearing on behalf of QCC in
12 this proceeding?

13 A That is correct.

14 Q Okay. Do you have before you a copy of your
15 direct testimony?

16 A I do.

17 Q And that is 45 pages, plus a four-page index
18 of exhibits; is that correct?

19 A Yes.

20 Q Was this prepared by you or at your direction?

21 A It was.

22 Q Okay. Mr. Easton, do you also have before you
23 a document entitled QCC Testimony Errata Sheet
24 Reflecting Dismissals?

25 A Yes.

1 **MR. SHERR:** Okay. Mr. Chairman, we'd like to
2 mark this document for identification.

3 **CHAIRMAN BRISÉ:** Sure. We are on 86. What is
4 the short title that you suggested again?

5 **MR. SHERR:** QCC Testimony Errata.

6 **CHAIRMAN BRISÉ:** Perfect.

7 (Exhibit 86 marked for identification.)

8 **BY MR. SHERR:**

9 **Q** So, I'm sorry, Mr. Easton, you have that
10 document in front of you?

11 **A** I do.

12 **Q** Can you explain what it is?

13 **A** This errata is to account for the fact that a
14 number of parties in this proceeding have now been, have
15 settled and been dismissed from the case. As a result,
16 portions of the testimony need to be stricken.

17 **Q** Okay. So this, this document reflects the
18 pages and line numbers that need to be stricken?

19 **A** Yes.

20 **Q** Okay. Besides these, the corrections that are
21 indicated in hearing Exhibit 86, the errata sheet, do
22 you have any other corrections to your testimony?

23 **A** I do not.

24 **Q** And with the corrections indicated in hearing
25 Exhibit 86, the errata, is your testimony true and

1 correct to the best of your knowledge?

2 **A** It is.

3 **MR. SHERR:** Mr. Chairman, QCC moves that the
4 direct testimony of Bill Easton be entered into the
5 record as if read.

6 **CHAIRMAN BRISÉ:** Okay. We will enter --

7 **MS. TAN:** Excuse me, Chairman. Sorry. Qwest,
8 yesterday Qwest filed revised testimony reflecting the
9 change in the, the errata, and we need to note that that
10 has been, that we need to enter that into the record.

11 **MS. MASTERTON:** Okay. Lee Eng, I don't think
12 we filed that. I think we just provided that to the
13 parties so they could see what the page and line numbers
14 are. But we would be happy to file that if the
15 Commission, if that would make it easier for the
16 Commission, but we haven't filed it yet.

17 **MS. TAN:** We may want to enter it into the
18 record and we can do that at this time, the revised,
19 because the Commissioners all have those revised
20 testimonies.

21 **MS. MASTERTON:** Oh, okay. Sure. Sure. I
22 think all the parties have copies as well because we
23 handed it out. Sure. I think that would be easier. I
24 just wasn't sure if that was the process for the
25 Commission.

1 **MS. TAN:** And we can insert that in the other
2 testimony; is that correct? It's a complete --

3 **MS. MASTERTON:** Yes. We provided it for each
4 of the witnesses. Is that what you're asking?

5 **MS. TAN:** For everyone but Eckert; is that
6 correct?

7 **MS. MASTERTON:** Yes. Her testimony did not
8 change as a result of the dismissals.

9 **MS. TAN:** So, in other -- staff believes that
10 the revised testimony should be inserted into the record
11 as though read, instead of the current, what you were
12 currently doing.

13 **MS. MASTERTON:** Exactly. And those are the
14 pages that show, that physically strike these lines,
15 page and line numbers that are on the errata sheet.
16 Yes.

17 **MS. TAN:** Thank you. Excuse me.

18 **CHAIRMAN BRISÉ:** Okay.

19 **MR. KLEIN:** Mr. Chairman, Bullseye objects to
20 the proposed deletion of a page and a half of
21 Mr. Easton's direct testimony, more specifically page
22 29, line 1, through page 30, line number 7, as this
23 testimony deals with conduct of Qwest that remains at
24 issue in this case.

25 **MS. MASTERTON:** Could you repeat those page

1 and line numbers, please?

2 **MR. KLEIN:** Sure. Page 29, line 1, through
3 page 30, line 7.

4 **MR. SHERR:** May I have just a moment, Your
5 Honor, Mr. Chairman?

6 **CHAIRMAN BRISÉ:** Sure.

7 **MS. MASTERTON:** I'm sorry, Mr. Chairman. This
8 testimony that he's asking to keep in the record is
9 specifically related to Granite Telecommunications. And
10 Granite is no longer a party in the proceeding, so I
11 think it's actually, you know, inappropriate for it to
12 remain in the record.

13 **MR. KLEIN:** May I, Mr. Chairman?

14 **CHAIRMAN BRISÉ:** Sure.

15 **MR. KLEIN:** The conduct at issue addresses not
16 only what, what Qwest alleges Granite to have charged
17 Qwest but what Qwest received in terms of billings and
18 what Qwest knew. Line 14 on page 29, for example, Qwest
19 talks about QCC's knowledge about what was provided to
20 Qwest versus other carriers. And, in fact, you know, we
21 contend that that material has been shown to be
22 incorrect based on discovery that was just received
23 yesterday.

24 **CHAIRMAN BRISÉ:** Mary Anne.

25 **MS. HELTON:** Mr. Chairman, as I understand the

1 posture of this case, Qwest filed the complaint, Qwest
2 has the burden of proof, and I think it's within Qwest's
3 discretion that if it chooses not to present certain
4 testimony to you that it prefiled, I think, I mean, that
5 that is completely appropriate and within their, their
6 rights to do that.

7 **MR. KLEIN:** Your Honor, the testimony has been
8 presented and been accepted by the witness as accurate.
9 It was filed by Qwest and remains apparently the
10 position of Qwest.

11 **CHAIRMAN BRISÉ:** All right. So the question
12 at hand is whether we want to keep page 29, lines
13 1 through 7, and Granite is no longer an active
14 participant in this case.

15 **MR. KLEIN:** That's correct, Mr. Chairman.

16 **CHAIRMAN BRISÉ:** Okay. So we'll go ahead and
17 strike that. You may proceed.

18 **MR. SHERR:** Okay. Mr. Chairman, just to be
19 clear, so page 29, line 1, through page 30, line 7, will
20 be stricken as indicated in hearing Exhibit 86?

21 **CHAIRMAN BRISÉ:** That is correct.

22 **MR. SHERR:** Okay. Thank you. And has the
23 rest of Mr. Easton's direct testimony then been entered?

24 **CHAIRMAN BRISÉ:** Yes. We will enter
25 Mr. Easton's revised testimony as though read.

1 **MR. SHERR:** Okay. Thank you. I didn't want
2 to forget that part.

3 **BY MR. SHERR:**

4 **Q** Mr. Easton, do you also have before you copies
5 of testimony exhibits for your direct testimony?

6 **A** Yes.

7 **Q** Okay. And according to the Comprehensive
8 Exhibit List, those are identified on the Comprehensive
9 Exhibit List as Exhibits 37 and 39 through 57; is that
10 correct?

11 **A** Yes.

12 (Exhibits 37, and 39 through 57 marked for
13 identification.)

14 **BY MR. SHERR:**

15 **Q** Okay. And were those prepared by you or at
16 your direction?

17 **A** They were.

18 **Q** Okay. Do you have any corrections to those
19 exhibits?

20 **A** I do not.

21 **Q** Okay. Mr. Easton, do you have before you
22 copies of -- a copy of your rebuttal testimony?

23 **A** Yes.

24 **Q** Okay. And is that rebuttal testimony 37 pages
25 long?

1 **A** Yes.

2 **Q** Okay. And was that prepared by you or at your
3 direction?

4 **A** It was.

5 **Q** Okay. Do you have any corrections?

6 **A** I do not.

7 **Q** Is your rebuttal testimony true and correct to
8 the best of your knowledge?

9 **A** Yes.

10 **Q** Okay. Mr. Chairman, QCC moves that the
11 rebuttal testimony of William Easton be entered into the
12 record as if read.

13 **A** Okay. At this time we will enter Mr. Easton's
14 rebuttal testimony as though read into the record,
15 seeing no objections.

16 **MS. TAN:** Chairman, we also want to note that
17 this is the revised rebuttal testimony. Thank you.

18 **CHAIRMAN BRISÉ:** Okay. We will make that
19 adjustment, that this is the revised rebuttal testimony
20 that we will enter as though read, seeing no objections.
21 And if, moving forward, if there are revised testimony,
22 if the attorney would go ahead and, and state that so we
23 can have that clarification.

24 **MS. MASTERTON:** We will. Thank you, Mr.
25 Chairman.

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CHAIRMAN BRISÉ: Thank you very much.

BY MR. SHERR:

Q And just to be clear, Mr. Easton, were there any exhibits to your rebuttal testimony?

A There were not.

1 I. IDENTIFICATION OF WITNESS

2 Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND CURRENT
3 POSITION.4 A. My name is Dennis L. Weisman. I am employed by Kansas State University as a
5 Professor of Economics. My business address is Department of Economics, Waters Hall,
6 Kansas State University, Manhattan, Kansas 66506-4001.7 Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND
8 PROFESSIONAL EXPERIENCE.9 A. I received a B.A. in economics and mathematics from the University of Colorado; an
10 M.A. in economics from the University of Colorado; and a Ph.D. in economics from the
11 University of Florida with a specialization in industrial organization and economic
12 regulation. I have testified in numerous regulatory proceedings to the economic and
13 social impacts of regulatory policies and have served as an advisor to telecommunications
14 firms, electric power companies and regulatory commissions on economic pricing
15 principles, the design of incentive regulation plans and competition policies. My primary
16 research interests are in strategic behavior and government regulation. I have authored or
17 co-authored more than 100 articles, books and book chapters. My research has appeared
18 in the *Antitrust Bulletin*, *Economics Letters*, the *Journal of Regulatory Economics*, the
19 *Yale Journal on Regulation*, the *Journal of Policy Analysis and Management*, and the
20 *Federal Communications Law Journal*. My research has also been cited by the U.S.
21 Supreme Court in *Verizon v. FCC*,¹ both majority and dissenting opinions. I am the co-
22 author of DESIGNING INCENTIVE REGULATION FOR THE

¹ *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

1 TELECOMMUNICATIONS INDUSTRY, published by the MIT Press and the ABI
2 Press in 1996, and THE TELECOMMUNICATIONS ACT OF 1996: THE "COSTS" OF
3 MANAGED COMPETITION, published by Kluwer in 2000. I am also the author of
4 PRINCIPLES OF REGULATION AND COMPETITION POLICY FOR THE
5 TELECOMMUNICATIONS INDUSTRY - A GUIDE FOR POLICYMAKERS,
6 published by The Center for Applied Economics at the University of Kansas School of
7 Business in 2006. I currently serve as an editor for the *Review of Network Economic*
8 and on the editorial boards of the *Journal of Regulatory Economics* and *Information*
9 *Economics and Policy*. Finally, I am a member of the Board of Academic Advisors for
10 The Free State Foundation – a Washington D.C. “think tank” that champions free-market
11 principles in telecommunications and other high-technology industries.

12 A complete description of my academic and professional background is provided in my
13 curriculum vitae in Exhibit DLW 1.

14 **Q. HAVE YOU TESTIFIED BEFORE STATE REGULATORY COMMISSIONS?**

15 **A.** Yes. I have presented testimony before commissions in Arkansas, California, Colorado,
16 Kansas, Missouri, Oklahoma and Texas. I have also submitted testimony or filed
17 affidavits with the Federal Communications Commission, the Canadian Radio-Television
18 and Telecommunications Commission, the Alberta Utilities Commission, the Kansas
19 State Legislature and the United States Court of Appeals for the District of Columbia. As
20 relevant to this proceeding, I testified before the Colorado Public Utilities Commission in
21 Docket No. 08F-259T, QCC’s parallel complaint proceeding.

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1 **II. PURPOSE, THEMES AND ORGANIZATION OF TESTIMONY**

2 **Q. WHAT ISSUE IDENTIFIED IN THE ORDER ESTABLISHING PROCEDURE**
3 **(ORDER NO. PSC-12-0048-PCO-TP) DOES YOUR TESTIMONY ADDRESS?**

4 **A.** My testimony primarily addresses (in tandem with the testimony of William R. Easton
5 and Derek Canfield) Issue No. 5 on the Tentative List of Issues – “Has the CLEC
6 engaged in unreasonable rate discrimination, as alleged in Qwest’s First Claim for Relief,
7 with regard to its provision of intrastate switched access?”

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 **A.** The primary purpose of my testimony is to demonstrate the potential economic
10 distortions resulting from discriminatory pricing of (essential) switched access services in
11 the state of Florida. A secondary purpose of my testimony is to explain why, in the
12 absence of a credible basis for differential pricing, the default price for switched access
13 services should be a uniform price. In other words, as a general rule, all long-distance
14 carriers should pay the same price for switched access services unless the provider’s cost
15 of providing the service varies between customers.

16 **Q. PLEASE PROVIDE AN OVERVIEW OF THE KEY THEMES DEVELOPED IN**
17 **YOUR TESTIMONY.**

18 **A.** First, economic regulation serves as surrogate for market forces when competition for
19 essential services is infeasible or otherwise non-existent.^{2, 3} Second, it is important to

² Professor Alfred Kahn observes that “the single most widely accepted rule for the governance of the regulated industries is regulate them in such a way as to produce the same results as would be produced by effective competition, if it were feasible.” Alfred E. Kahn, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, Vol. I, New York: John Wiley and Sons, 1970, p. 17.

³ Professor James Bonbright observes that “Regulation, then, as I conceive it, is indeed a substitute for competition; and it is even a partly imitative substitute.” James C. Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES*, New York: Columbia University Press, 1961, p. 107.

1 distinguish between differential pricing and discriminatory pricing.⁴ Third, because
2 switched access is an essential input to the production of downstream, long-distance
3 services and is not competitively supplied, economic regulation should serve as a
4 substitute for such market forces. Fourth, in the absence of a credible basis for
5 differential pricing of switched access, the Commission should enforce a uniform price
6 for switched access charged to all long-distance carriers. Fifth, the respondents in this
7 case have not yet advanced any credible basis for engaging in differential pricing of
8 switched access services. Sixth, the fact that these "off-list" pricing agreements were
9 kept secret can undermine competition by precluding an equal opportunity for long-
10 distance carriers to compete.

11 III. DIFFERENTIAL PRICING VS. DISCRIMINATORY PRICING

12 Q. DO YOU USE THE TERMS "DIFFERENTIAL PRICING" AND
13 "DISCRIMINATORY PRICING" INTERCHANGEABLY?

14 A. No.

15 Q. CAN YOU DESCRIBE THE DISTINCTION BETWEEN DIFFERENTIAL
16 PRICING AND DISCRIMINATORY PRICING?

17 A. Yes. The term "differential pricing" generally refers to any deviation from a uniform
18 price. For example, this would occur when one long-distance carrier is charged one price
19 for switched access, while another long-distance carrier is charged a different price. The
20 term "discriminatory pricing" or price discrimination (as it is commonly used in the
21 economics literature) refers to price differences that cannot be explained by cost

⁴ *Id.*, p. 371 ("At times, the cases suggest a distinction similar to that drawn by economists, in deeming 'discriminatory' any rate differential not based on a cost differential.').

1 differences.⁵ This would occur, for example, if long-distance carriers were charged
2 different rates when the costs of serving them are the same, or charged the same rate
3 when the costs of serving them are different. Hence, discriminatory pricing is a subset of
4 differential pricing.⁶

5 **IV. ECONOMIC DISTORTIONS AND INPUT PRICE DISCRIMINATION**

6 **Q. HAS THE FEDERAL COMMUNICATIONS COMMISSION (FCC)**
7 **DETERMINED THAT CLEC-PROVIDED SWITCHED ACCESS IS NOT A**
8 **COMPETITIVE SERVICE?**

9 **A.** Yes. The FCC has determined that switched access is a bottleneck service that is not
10 competitively supplied.⁷ For example, when it established the regulatory regime to set
11 the carrier access rates for competitive local exchange carriers (CLECs), the FCC
12 observed:

13 Sprint and AT&T persuasively characterize both the terminating and the
14 originating access markets as consisting of a series of bottleneck
15 monopolies over access to each individual end user. Thus, once an end
16 user decides to take service from a particular LEC, that LEC controls an
17 essential component of the system that provides interexchange calls, and it

⁵ See, for example, George J. Stigler, *THE THEORY OF PRICE*, New York: Macmillan Publishing, 1966, p. 209. (Here, price discrimination is defined as "the sale of two or more similar goods at prices which are in different ratios to marginal cost.")

⁶ The regulation and economics literature are not always consistent in their usage of these terms. For example, the regulation literature sometimes refers to any departure from uniform pricing as discriminatory pricing. See, for example, Bonbright *supra* note 3, chapter XIX.

⁷ *In the matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *SEVENTH REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING* (April 27, 2001), at ¶ 30. See also ¶¶ 28-29, 31-34.

1 becomes the bottleneck for IXCs wishing to complete calls to, or carry
2 calls from, that end user.⁸ (footnote omitted).

3 The significance of this fact in this particular context is that all providers of switched
4 long-distance services require switched access as an input to production and have no
5 economically viable alternative to purchasing these inputs from the LECs, be they
6 incumbent LECs or competitive LECs.⁹

7 **Q. HAS THE FCC HAD THE OPPORTUNITY MORE RECENTLY TO REAFFIRM**
8 **ITS POSITION THAT SWITCHED ACCESS CONSTITUTES A BOTTLENECK**
9 **INPUT?**

10 **A.** Yes. In a recent *Amicus Brief*, the FCC reaffirmed its previous findings in observing that
11 CLECs have the ability in the market for switched access services to impose “excessive
12 access charges on IXCs.”

13 This anticompetitive practice was possible because the market for these
14 services did not allow competition to discipline rates and CLECs thus
15 enjoyed a monopoly over access charges: in order to originate and
16 terminate long distance traffic, the IXC has no choice but to use the local
17 network of the LEC serving the end-user customer.¹⁰

⁸ Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) at ¶ 30.

⁹ See, for example, Jonathan E. Nuechterlein and Philip J. Weiser, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE*, Cambridge MA: The MIT Press, 2005, Chapters 2 and 9.

¹⁰ Brief for Amicus Curiae Federal Communications Commission. In the United States Court of Appeals for the Third Circuit. Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569) PAETEC Communications, Inc., et al., v. MCI Communications Services, Inc. D/B/A Verizon Business Services; Verizon Global Networks Inc. Case: 11-2268, Filed 3/14/2012, page 6.

1 The FCC further observed that the unique leverage that the CLECs enjoy in the market
2 for switched access services may allow the CLECs to “distort the long distance
3 market.”¹¹

4 **Q. DOES THE “BOTTLENECK” NATURE OF SWITCH ACCESS DEPEND ON**
5 **WHETHER THE PROVIDER OF SWITCHED ACCESS IS AN INCUMBENT**
6 **LEC OR A COMPETITIVE LEC?**

7 A. No. In fact, the above quotation from the FCC order is explicitly concerned with CLECs
8 rather than ILECs. The “bottleneck” characteristic of switched access derives from the
9 end-user's decision to subscribe to a particular local service provider. The absence of a
10 competitive choice for the long-distance carrier is not a function of whether that local
11 service provider is an ILEC or a CLEC, nor is it a function of the size of the LEC.

12 **Q. IN YOUR VIEW, DOES THE COMMISSION HAVE A PROSPECTIVE ROLE IN**
13 **CURTAILING DISCRIMINATORY PRICING OF SWITCHED ACCESS UNDER**
14 **THE RECENTLY PASSED FLORIDA DEREGULATION STATUTE?**

15 A. Yes. Competition, fueled by new technologies and accommodating legislation, has
16 thoroughly transformed the telecommunication marketplace in North America over the
17 last decade and this has resulted in a *paradigmatic shift* in regulatory policy.¹² The

¹¹ Id.

¹² As Thomas Kuhn observed in his classic treatise:

Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. . . . Their success therefore necessitates the relinquishment of one set of institutions in favor of another . . .

Thomas Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, Chicago: University of Chicago Press, 1962, pp. 92-93.

1 Florida Legislature voted last year, wisely in my view,¹³ to reverse long-standing public
2 policy as it relates to the interplay between regulation and competition in Florida's
3 telecommunications markets. In essence, a default reliance on competition to provide the
4 requisite market discipline has replaced a default reliance on economic regulation to
5 provide the requisite market discipline. What this means is that telecommunications
6 markets in Florida are now presumptively competitive with no need for regulatory
7 oversight rather than presumptively non-competitive with need for regulatory oversight.
8 These observations notwithstanding, the fact that economic regulation is now the
9 exception rather than the rule does not imply that regulation is unwarranted in all cases
10 and this is especially true when the failure to exercise the requisite regulatory oversight
11 can lead to economic distortions and anticompetitive outcomes. For all of the reasons
12 discussed herein, regulatory oversight to ensure non-discriminatory pricing of switched
13 access is just such an exception.

14 **Q. IS IT SIGNIFICANT THAT SWITCHED ACCESS IS NOT COMPETITIVELY**
15 **PROVISIONED?**

16 A. Yes. It is accepted doctrine that sound competition (regulatory) policy should serve to
17 protect the integrity of the competitive process rather than serve to favor or disfavor
18 individual competitors. In order for competition in downstream markets (in the present
19 case, the long-distance market that uses switched access as a critical input) to be
20 economic in the sense that it promotes competition on the merits,¹⁴ all similarly situated,

¹³ Glen O. Robinson and Dennis L. Weisman, "Designing Competition Policy for Telecommunications." *The Review of Network Economics*, Vol. 7(4), December 2008, pp. 509-546.

¹⁴ The term "competition on the merits" refers to the basic idea that the returns that a firm enjoys should reflect its superior efficiency and business acumen in the marketplace *vis-à-vis* its relatively less proficient rivals. In *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945), Judge Learned Hand observed that "A single

1 downstream competitors must have access to upstream inputs under comparable terms
2 and conditions. This is the well-known principle of competitive parity.

3 We have in various forums expounded what we have referred to as the
4 principles of competitive parity in cases of bottleneck monopoly, the
5 purpose and effect of which are to ensure that the competition between the
6 controller of the bottleneck facility—or supplier of the essential input—
7 and its actual and potential rivals is efficient. That is to say, rules framed
8 in accordance with those principles should produce a distribution of
9 responsibility for performing the contested function among the several
10 rivals on the basis of their respective costs and so minimize the total cost
11 of supplying the contested service (footnote omitted).¹⁵

12 **Q. CAN ECONOMIC DISTORTIONS AND ANTICOMPETITIVE OUTCOMES**
13 **RESULT IF THESE PARITY PRINCIPLES ARE VIOLATED?**

14 **A.** Yes. Should these parity principles be violated, competitors that are less efficient in
15 producing the downstream components of the service may be unduly favored in a manner
16 that violates competitive neutrality. Discriminatory pricing that affords selected long-
17 distance carriers discounts for switched access could sacrifice productive efficiency.¹⁶

producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry." For a more recent discussion of the term "competition on the merits" and its role in differentiating between competitive and exclusionary behavior in antitrust enforcement, see Antitrust Modernization Commission, Report and Recommendations, Washington D.C. 2007.

¹⁵ Alfred E. Kahn and William E. Taylor, "The Pricing of Inputs Sold to Competitors: A Comment," *Yale Journal on Regulation*, Volume 11, 1994, p. 227.

¹⁶ Productive (technical) efficiency is concerned with production at the lowest possible cost. A firm is technically efficient if it (i) uses the minimum possible amount of inputs to produce its output; or, equivalently, (ii) produces the maximum possible amount of output from any given quantity of inputs.

1 This is the case because such practices can serve to preclude the least-cost ("most
2 efficient") provider from being the least-price provider. Price discrimination for
3 intermediate goods (inputs) is likely to be particularly pernicious in this regard due to the
4 risk of efficiency distortions in the downstream market.

5 This potential for efficiency distortions explains why sound regulatory principles require
6 that bottleneck inputs, switched access, for example, be priced uniformly to all similarly-
7 situated purchasers of these inputs. That is to say, the default pricing of switched access
8 requires that a uniform price be levied on each provider absent a factual and credible
9 basis for departing from this uniform pricing standard.

10 **Q. CAN YOU PROVIDE A STYLIZED NUMERICAL EXAMPLE OF HOW THE**
11 **LEAST-COST PROVIDER CAN BE HAMPERED IN THE MARKETPLACE?**

12 **A.** Yes. Assume that the production of each minute of long-distance telephone service
13 requires one unit each of switched access, intercity transmission and retailing, the latter
14 two inputs being self-supplied by the long-distance carrier. Suppose there are two
15 similarly situated long-distance carriers, Carrier A and Carrier B, with per-unit costs of
16 intercity transmission of 3 cents and 4 cents, respectively. In addition, both carriers incur
17 costs of one cent per-minute for retailing. Carrier A pays the price-list rate for switched
18 access of 4 cents per minute while Carrier B is granted a discount on switched access and
19 hence pays only 1 cent per minute. The incremental cost per long-distance minute is thus
20 8 cents for Carrier A and 6 cents for Carrier B. These values are shown in Table 1 below.
21 The potential distortionary effect arises from the fact that Carrier B can set a price
22 between 6 cents and 8 cents per minute and yet still (profitably) under-price Carrier A in
23 the market even though Carrier A is the more efficient provider of long-distance

1 telephone service (i.e., Carrier A has a lower unit cost of provisioning intercity
2 transmission). The economic harm to Carrier A from discriminatory pricing of switched
3 access derives from the appropriation of its "margin on the merits." To see this, observe
4 that Carrier A should realize a cost advantage over Carrier B of 1 cent per minute,
5 reflecting its superior efficiency in self-supplying intercity transmission (i.e., $4\text{¢} - 3\text{¢}$).
6 The discriminatory pricing of switched access, however, confers an artificial cost
7 advantage on Carrier B over Carrier A of 2 cents per minute (i.e., $8\text{¢} - 6\text{¢}$).

8 It is in this sense that discrimination in the pricing of switched access services can lead to
9 an economic distortion because it precludes the least-cost provider from serving as the
10 least-price provider.

TABLE 1

Incremental Cost for Long-Distance Service

	<i>CARRIER A</i>	<i>CARRIER B</i>
SWITCHED ACCESS	4¢	1¢
INTERCITY TRANSMISSION	3¢	4¢
RETAILING	1¢	1¢
TOTAL	8¢	6¢

19 **Q. ARE THESE DISCRIMINATORY DISCOUNTS PROBLEMATIC EVEN WHEN**
20 **THE CARRIERS ARE EQUALLY EFFICIENT?**

21 **A.** Yes. As a matter of sound regulatory/competition policy, the pricing of a bottleneck
22 input should not work at cross-purposes with competition on the merits. In this particular
23 context, this means that the differential pricing of switched access should not provide one

1 or more carriers with an artificial cost advantage.¹⁷ This is precisely why regulatory rules
2 are structured so that all similarly situated carriers pay a uniform price for critical,
3 bottleneck inputs.

4 **Q. YOU STATED EARLIER THAT YOU TESTIFIED IN QCC'S PARALLEL**
5 **COLORADO PUC COMPLAINT CASE. DID THE COLORADO COMMISSION**
6 **MAKE ANY FINDINGS REGARDING THE BOTTLENECK NATURE OF**
7 **SWITCHED ACCESS?**

8 **A.** Yes. After considering QCC's testimony and briefing, as well as that of the respondent
9 CLECs, the Colorado Commission agreed with QCC that switched access is a bottleneck
10 service.¹⁸ At paragraph 73 of its 2011 Order Addressing Exceptions and Motion to
11 Reopen the Record, the Colorado PUC held as follows.

12 73. We also agree with the ALJ that LEC facilities are a monopoly
13 bottleneck since there are no alternatives for an IXC to reach a given end
14 user customer for a long distance call but through the switch of the LEC
15 that provides the local service to that end user. Indeed, as the ALJ and Dr.
16 Weisman pointed out, the Federal Communications Commission (FCC)
17 previously found and determined that switched access is a bottleneck
18 monopoly service that is not competitively supplied. This is because, once
19 a given end user decides to take service from a particular LEC, that LEC
20 controls an essential component of the system that provides interexchange
21 calls and it becomes the bottleneck for IXCs wishing to complete calls to, or

¹⁷ Note that when the two carriers are equally efficient, the artificial cost advantage conferred upon the "preferred carrier" (Carrier B) is precisely equal to the switched access discount of 3¢ per minute.

¹⁸ *QCC v. MCI Metro, et al*, Docket No. 08F-259T, Decision No. C11-1216 (mailed Nov. 15, 2011) at ¶¶57-61, 72-73.

1 carry calls from, that end user. [footnote omitted] We also agree with Dr.
2 Weisman that the FCC has not subsequently overturned or modified its
3 2001 order finding switched access is a bottleneck monopoly service. * * *

4 **Q. DO THE RESPONDENT CLECS IN THIS PROCEEDING DENY THAT**
5 **INTRASTATE SWITCHED ACCESS IS A BOTTLENECK SERVICE?**

6 **A.** The position of the Respondent CLECs is not altogether clear at this juncture, but at least
7 some of them appear to deny that switched access is a bottleneck service. For example,
8 in discovery QCC sought the CLECs' position on whether an IXC has the ability to
9 choose which local exchange carrier will provide its originating and terminating intrastate
10 switched access. A number of CLECs take the position that IXCs do have that ability.
11 For instance, Broadwing responded that an

12 "IXC makes a business decision on whether and how it will enter markets
13 based on a number of factors including, but not limited to, access costs.
14 An IXC also makes a business decision on whether to serve and where it
15 will serve as a stand-alone IXC or as both an IXC and a CLEC, and in
16 which markets. An IXC also makes a business decision on whether,
17 where and how it will explore ways to reduce switched access costs, such
18 as by use of special access or other arrangements. And, ultimately, the end
19 user customer chooses the carrier(s) from whom the end user obtains
20 service."

21 **Q. DO YOU AGREE WITH BROADWING?**

22 **A.** No, I do not. In the end, Broadwing undermines its own argument by acknowledging that
23 it is the *end user* who makes the decision as to which LEC will provide it service, the

1 destination of the call and consequently which LEC the IXC must obtain switched access
2 from. While I acknowledge that there are differences between originating and
3 terminating switched access, concerns related to the switched access bottleneck are
4 present in both cases because it is the end user (and not the IXC) that ultimately decides
5 on the LEC that supplies switched access to the IXC. While an IXC may choose to build
6 special access facilities to an individual end user, this is only cost-effective when volume
7 is sufficient to justify the expenditures on such facilities.

8 **Q. SOME CLECS SEEM TO SUGGEST THAT QCC CAN AVOID A PARTICULAR**
9 **CLEC'S SWITCHED ACCESS BY PURCHASING ALTERNATIVE**
10 **TERMINATION SERVICES FROM THIRD PARTIES.¹⁹ DO YOU AGREE?**

11 **A.** No. Unless a special access arrangement is being used to reach the end-user, switched
12 access charges are being paid, either by the IXC, or in situations where the IXC hands the
13 call off to an underlying carrier for termination, by the underlying third-party carrier.
14 The use of a third-party carrier merely changes the party that pays the terminating CLEC
15 switched access, but in no way avoids the payment of switched access.

16 **V. JUSTIFIABLE DEPARTURES FROM A UNIFORM PRICE**

17 **Q. IN THEORY, CAN DEPARTURES FROM A UNIFORM PRICE FOR**
18 **SWITCHED ACCESS SERVICES BE JUSTIFIED?**

19 **A.** Yes. As a theoretical matter, sound bases could exist for departing from uniform pricing
20 for switched access services. For example, such departures from uniform pricing may be
21 justified where the provider establishes that the relevant economic cost of provisioning
22 these inputs (i.e., switched access services) varies between customers (i.e., long-distance

¹⁹ See, e.g., Broadwing's response to QCC Interrogatory No. 3, a copy of which is attached to Mr. Easton's direct testimony as Exhibit WRE 6A.

1 providers) in a manner that would potentially justify differences in the price of these
2 inputs. I am not aware of any of the respondent CLECs in this docket having
3 demonstrated (or even endeavored to determine the existence of) any such cost
4 differentials.

5 QCC inquired of each respondent CLEC in discovery whether it performed cost or
6 demand studies in connection with establishing the intrastate switched access rates set
7 forth in the agreement(s). To my knowledge, not a single CLEC responded that it had
8 performed such a study.²⁰ The CLECs' failure to perform such studies suggests two
9 conclusions. First, the CLECs have no credible basis to assert that cost differentials exist
10 that may now be relied upon, retrospectively, as justification for the discounted pricing.
11 Second, cost differences were not, contemporaneously, the CLECs' rationale for offering
12 AT&T and Sprint the discounted rates for switched access. In the absence of economic
13 studies that credibly demonstrate that such differences in price are attributable to
14 corresponding differences in cost, sound regulatory policy would typically establish a
15 default of a uniform price so as to preserve competitive neutrality and reduce the
16 likelihood of the aforementioned efficiency distortions and anticompetitive outcomes in
17 the downstream market.

18 **Q. HYPOTHETICALLY SPEAKING, IF THE CLECS HAD PERFORMED COST**
19 **STUDIES FOR SWITCHED ACCESS, DO YOU BELIEVE IT IS LIKELY THAT**
20 **THEY COULD HAVE JUSTIFIED THE MAGNITUDE OF THE PRICE**
21 **DIFFERENCES AT ISSUE HERE?**

²⁰ See the CLECs' response to QCC Interrogatory Nos. 2(l) and 2(m). See, e.g., Direct Testimony of William R. Easton, Exhibits 6B (Broadwing), 34A (PAETEC) and 40 (US LEC).

1 A. No. I believe it would be unlikely that such a pronounced cost difference could exist
2 given that the service is essentially identical across carriers. In fact, I would go so far as
3 to say that that the credibility of any cost study that seemingly justified such a large
4 difference in price under these conditions would likely be called into question.

5 **Q. HAVE THE CLECS PUT FORTH ANY OTHER EXPLANATION FOR WHY**
6 **THEY AGREED TO THE DISCOUNTED SWITCHED ACCESS AGREEMENTS**
7 **FOR THE SELECTED IXCS?**

8 A. Yes. In discovery, QCC asked each of the respondent CLECs to identify and explain
9 their reasons for offering the preferential rates to the IXCs with which they entered into
10 switched access agreements. Many of the CLECs responded that they entered into the
11 agreement to resolve billing disputes with AT&T, which several CLECs described as
12 having "forced" the CLECs into the agreement.²¹ The CLECs further explained that
13 because AT&T refused to pay the published rates for switched access, entering into the
14 agreements (inclusive of the corresponding discounts) was the only cost-effective means
15 by which to induce AT&T to pay the CLECs for switched access.

16 **Q. DOES THIS EXPLANATION PROVIDE A VALID ECONOMIC BASIS FOR**
17 **DISCRIMINATING BETWEEN QCC AND THE IXCS THAT BENEFITED**
18 **FROM THE SWITCHED ACCESS AGREEMENTS?**

19 A. No. I have no doubt that the CLECs made what they perceived to be a rational
20 (economic) business decision to grant these discounts rather than run the risk of not being
21 paid for their services or incurring the cost of litigating the matter.

²¹ See, e.g., Direct Testimony of William Easton, Exhibits WRE 12, WRE 24A and WRE 24B.

1 As a matter of economics, I do not believe that “unwillingness to pay” on the part of
2 AT&T constitutes a legitimate basis for distinguishing between customers – particularly
3 for a bottleneck input such as switched access. From a policy perspective, I would think
4 that the Commission would not look favorably upon the unilateral decision by the CLECs
5 to redress their grievances in this manner, particularly when the effect of doing so is to
6 flout state law that explicitly required them to avoid unreasonable rate discrimination. To
7 the extent CLECs seek to blame the IXCs for their predicament, it would seem that
8 Commission or other appropriate legal proceedings rather than secret “off-price list”
9 agreements would have been the appropriate avenue through which to redress their
10 grievances with the selected IXCs.

11 **Q. DO YOU BELIEVE THE EXPLANATION PROFFERED BY THE CLECS TO**
12 **RATIONALIZE THE PREFERENTIAL TREATMENT FOR CERTAIN IXCS IS**
13 **RELEVANT TO THE COMMISSION’S EVALUATION OF THESE**
14 **AGREEMENTS?**

15 **A.** Yes. The CLECs’ explanation – that they were essentially forced into entering into these
16 agreements to avoid costly and protracted dispute resolution processes and to induce
17 AT&T to pay for switched access – is important in assessing any other “justifications”
18 the CLECs may later put forth to explain the differential treatment of QCC *vis-à-vis* the
19 favored IXCs. It is conceivable that the CLECs will set forth various arguments to
20 identify supposed differences between QCC and the favored IXCs. Should this occur, the
21 Commission will be in a better position to determine whether the CLECs (1) have
22 identified legitimate differences between the favored IXCs and QCC; or (2) are merely

1 grasping for any distinction that may provide an *ex post* justification for the agreements
2 they entered into with the favored IXCs.

3 **Q. DOES TW TELECOM ALLEGE THAT AT&T'S PURCHASE OF OTHER**
4 **SERVICES JUSTIFIED ITS DISPARATE SWITCHED ACCESS RATE**
5 **TREATMENT IN FLORIDA?**

6 **A.** Yes. tw telecom ("TWT") states that its agreement with AT&T discounted intrastate
7 switched access "in conjunction with a total revenue commitment set forth" in that
8 agreement. TWT states that "the provisions regarding switched access were dependent
9 upon all of the other provisions of the AT&T/TWTC Agreement, which also
10 encompassed purchases of other, non-intrastate service, most notably a revenue
11 commitment on a "take or pay" basis that required AT&T to pay the difference between
12 the applicable commitment in any contract year and its actual purchases of eligible
13 services under the AT&T/TWTC Agreement."²² TWT continues that QCC and AT&T
14 were not "similarly situated" in terms of its ability to make a revenue commitment at
15 similar levels (as AT&T).²³

16 Similarly, PAETEC's 2008 switched access agreement with AT&T conditions AT&T's
17 receipt of the fixed dollar credits shown in Schedule A of that agreement on AT&T's
18 purchase of "other services."²⁴

19 **Q. DO YOU AGREE WITH TWT THAT QCC AND AT&T WERE NOT**
20 **SIMILARLY SITUATED IN TERMS OF THOSE CLECS' PROVISION OF**
21 **INTRASTATE SWITCHED ACCESS IN FLORIDA?**

²² See Mr. Easton's Exhibit WRE 37 (TWT's response to QCC Interrogatory No. 2(b)).

²³ Id. [TWT's response to QCC Interrogatory No. 2(i)].

²⁴ See Mr. Easton's Exhibit WRE 33B.

1 A. No. In fact, I strongly disagree with TWT's position. Setting aside the legal question
2 (which I will leave for counsel to brief) of whether it is justifiable to condition a discount
3 off of bottleneck switched access services on the purchase of unrelated, competitive
4 services, TWT has not demonstrated a credible economic basis for favoring AT&T in its
5 pricing of intrastate switched access in Florida.

6 To the best of my knowledge, TWT has not demonstrated, nor has any economic study of
7 which I am aware demonstrated, that the cost of providing switched access varies with
8 the amount of unrelated services (including, I assume, dedicated or special access
9 services) purchased by an IXC. The absence of such proof does not surprise me. While I
10 am not a network engineer, it is my understanding that the two types of services
11 (switched access and special access) are virtually unrelated, except to the extent that an
12 IXC with large volumes of traffic to a particular calling area or location may find it
13 economically advantageous to purchase special (dedicated) access as an alternative to
14 switched access. To my knowledge, a LEC's per-minute cost of providing tandem-routed
15 switched access is invariant irrespective of which IXC customer is using the service, how
16 many minutes of use that IXC (or any IXC) uses in a particular month or what and how
17 many other unrelated services an IXC happens to purchase from the LEC.

18 Q. ~~HAS MCI RAISED ANY UNIQUE THEORY CONCERNING ITS SECRET~~
19 ~~AGREEMENT WITH AT&T?~~

20 A. ~~Based on MCI's testimony and briefing in the parallel Colorado proceeding and its~~
21 ~~responses to discovery in this case, I understand that MCI takes the following position:~~
22 ~~MCI argues that it entered into a "reciprocal" discount arrangement with AT&T, and that~~

1 ~~QCC was therefore not "similarly situated" to AT&T because QCC did not offer~~
2 ~~intrastate switched access at the time.~~²⁵

3 Q. ~~DO YOU AGREE THAT THE BILATERAL, "RECIPROCAL" NATURE OF~~
4 ~~THE AGREEMENTS BETWEEN MCI AND AT&T PROVIDED A CREDIBLE~~
5 ~~BASIS FOR THE DISCRIMINATORY RATE TREATMENT CONTAINED IN~~
6 ~~THE OFF PRICE LIST AGREEMENT?~~

7 A. ~~No. According to MCI, MCI and AT&T granted one another discounts from standard~~
8 ~~tariff switched access rates. And, according to MCI, because QCC could not satisfy the~~
9 ~~precondition of reciprocity, QCC was not and could not be "similarly situated." MCI's~~
10 ~~sylogism presupposes three critical facts: (i) that the arrangement with AT&T was truly~~
11 ~~"reciprocal" in any balanced sense; (ii) that reciprocity alone is a sufficient basis for~~
12 ~~discrimination; and (iii) that had QCC been offered the same arrangement, it would not~~
13 ~~have had cause to reevaluate the economic viability of offering intrastate switched access.~~
14 ~~As Mr. Easton describes in his direct testimony, the arrangement may not have truly been~~
15 ~~"reciprocal" and [BEGIN LAWYERS ONLY CONFIDENTIAL] [REDACTED]~~

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] [END LAWYERS
20 ONLY CONFIDENTIAL]

21 ~~Even accepting for the sake of argument that MCI's factual premise is true, this alone~~
22 ~~would not be sufficient to substantiate its case that discrimination was appropriate. MCI~~

²⁵ See Mr. Easton's Exhibit WRE 27 (MCI's response to QCC Interrogatory No. 2(i)).

1 ~~has not demonstrated, for example, that it contemporaneously determined that the cost of~~
2 ~~supplying switched access to AT&T was lower, let alone significantly lower, than the~~
3 ~~cost of supplying the same service to QCC and other IXCs.²⁶ Under these conditions, as~~
4 ~~well as the conditions described by Mr. Easton, the obvious concern would be that~~
5 ~~"reciprocity" is simply a means by which to grant a secret net discount to AT&T. In any~~
6 ~~event, MCI's reliance on "reciprocity" as a qualifying condition for the discount seems~~
7 ~~unfounded as a matter of economic theory.~~

8 **Q. HAVE OTHER REGULATORY COMMISSIONS FOUND THAT THESE TYPES**
9 **OF RECIPROCAL AGREEMENTS ARE ANTICOMPETITIVE?**

10 **A. Yes. The Minnesota Public Utilities Commission investigated the companion AT&T (as**
11 **CLEC) - MCI (as IXC) off-tariff agreement. In the following passage, the Minnesota**
12 **Commission describes how the twin agreements undermine the competitive process to**
13 **the detriment of consumers.**

14 ~~Ideally a competitive market would reward the most efficient firms. All~~
15 ~~[sic] else being equal, the most efficient firms would be able to offer lower~~
16 ~~prices - attracting customers away from competitors - and the promise of~~
17 ~~higher returns = attracting investors away from competitors. Here AT&T~~
18 ~~and MCI provided secret subsidies to each other's long distance~~
19 ~~operations, and not to other long distance carriers. As a result, these~~
20 ~~carriers were able to obtain a cost advantage over all other long distance~~
21 ~~carriers and report higher profits than if they had not received the~~

²⁶ See Mr. Easton's Exhibit WRE 27 (MCI response to QCC Interrogatory No. 2(i)).

1 ~~subsidies. This conduct distorts the market, harms competition, and~~
2 ~~ultimately harms consumers.~~²⁷

3 ~~The concern on the part of the Minnesota Commission is that the actions of AT&T and~~
4 ~~MCI served to undermine the integrity of the competitive process to the detriment of~~
5 ~~consumers.~~²⁸

6 **Q. HAVE THE CLECS PRESENTED CREDIBLE EVIDENCE TO SUBSTANTIATE**
7 **THE CLAIM THAT DIFFERENCES IN THE VOLUME OF SWITCHED**
8 **ACCESS SERVICES PROVIDED BY THE CLEC TO QCC, AT&T AND SPRINT**
9 **JUSTIFY DISPARATE RATE TREATMENT?**

10 A. No. A number of CLECs generally allege that QCC was not similarly situated to the
11 IXCs favored by the secret switched access agreements because those IXCs obtained
12 more switched access during the relevant period. For example, in response to discovery,
13 both Broadwing and DeltaCom alleged that volume differences sufficiently distinguish
14 QCC and the preferred IXCs to have permitted their price differentiation.²⁹

15 While volume differences can provide a credible basis for price differentiation, they do
16 not in the context of intrastate switched access. First, it is my understanding that none of
17 the agreements at issue in this case contain volume requirements. In other words, the

²⁷ ~~In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched Access Services, DOCKET NO. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235, Minnesota Public Utilities Commission, 2007 Minn. PUC LEXIS 146 October 26, 2007, issued, page 10.~~

²⁸ ~~Id.~~, page 10.

²⁹ ~~See Mr. Easton's Exhibit WRE 6A (Broadwing's response to QCC Interrogatory No. 2(i)) ("Broadwing believes that in Florida, Qwest pays Broadwing's tariffed/listed rate, which is the same rate paid by carriers that do not have the same collection of services, architectural arrangements, call volumes and types, and where applicable, the ability to provide reciprocal services, as the entities entering into the [subject] agreements. Further, certain agreements were entered into in settlement of unique disputes between the parties."). See also Mr. Easton's Exhibit WRE 15 (DeltaCom's response to QCC Interrogatory Nos. 2(b) and 2(i)).~~

1 preferred IXC received the stated discount regardless of whether it purchased 10 minutes
2 or 10,000,000 minutes of switched access from the CLEC. Clearly, it was not volume
3 levels that motivated the CLECs to enter into these secret agreements.

4 Further, and more importantly, the CLECs have not demonstrated (nor am I aware of any
5 study demonstrating) that a CLEC's cost of providing intrastate switched access in
6 Florida varies depending upon the volume of minutes provided to any particular IXC. As
7 such, "volume" is an irrelevant factor. In the parallel Colorado proceeding, the
8 Commission rejected the identical argument posed by the CLECs. In Decision No. C11-
9 1216, the Commission stated.

10 75. We agree with the ALJ that QCC effectively rebutted any
11 claim that differences in size or traffic volumes justified price
12 differentiation, in this particular case. This is because the cost of
13 providing switched access does not depend on the traffic volume, or which
14 IXC is utilizing that service. Further, the functionality, service elements,
15 and the facilities over which the respondent CLECs provided switched
16 access were identical in this case, regardless of whether a CLEC serviced
17 QCC or one of the other IXCs. It is true the costs of providing some
18 services can vary by volume, especially if dedicated facilities are
19 involved; however, these circumstances are not present here. Further, we
20 find persuasive QCC's argument that none of the unfiled off-tariff
21 agreements ties the discount to the IXC to the purchase of specific
22 volumes of switched access service. To the contrary, all of the unfiled
23 agreements at issue in the instant proceeding grant the discount in

1 unlimited fashion, regardless of how much switched access a favored IXC
2 purchases. This alone is fatal to the claim that differences in size or traffic
3 volumes justifies price discrimination in this case. * * *

4 VI. CONCLUSION AND RECOMMENDATIONS

5 Q. DO YOU HAVE ANY CONCLUSIONS AND RECOMMENDATIONS FOR THE
6 COMMISSION'S CONSIDERATION?

7 A. Yes. Throughout my professional career, in both my published works and expert
8 testimony, I have argued consistently and unwaveringly for the need for regulation to
9 defer to market forces when the latter could provide the requisite competitive discipline.³⁰

10 In the special case of switched access services, those market forces are clearly not
11 present, even when those services are provided by CLECs. As a result, the Commission
12 must intervene to provide the necessary oversight and serve as the surrogate for such
13 market forces in the provision of switched access services to ensure the development of
14 fair and effective competition and prevent anticompetitive behavior.

15 From an economic perspective, credible bases for differential pricing—cost differences,
16 for example—may exist, at least in theory. To date, however, no credible basis for
17 differential pricing has yet been advanced by the opposing parties in this case. Absent a
18 credible basis for differential pricing for switched access services, I would respectfully
19 recommend that the Commission find that any such differential pricing is inconsistent
20 with the principles of competitive neutrality. That is to say, absent a credible basis (both
21 economic and legal) for differential pricing of switched access services, the Commission

³⁰ Dennis L. Weisman, "A 'Principled' Approach to the Design of Telecommunications Policy." *Journal of Competition Law & Economics*, Vol. 6(4), December 2010, pp. 927-956; and Glen O. Robinson and Dennis L. Weisman, "Designing Competition Policy for Telecommunications." *The Review of Network Economics*, Vol. 7(4), December 2008, pp. 509-546.

1 should determine that the default price should have been and continue to be a uniform
2 price—each long-distance carrier pays the same price for switched access services.

3 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

4 A. Yes, it does.

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I. IDENTIFICATION OF WITNESS

2 **Q. PLEASE STATE YOUR NAME, CURRENT POSITION AND BUSINESS**
3 **ADDRESS.**

4 A. My name is Dennis L. Weisman. I am employed by Kansas State University as a
5 Professor of Economics. My business address is Department of Economics, Waters
6 Hall, Kansas State University, Manhattan, Kansas 66506-4001.

7 **Q. ARE YOU THE SAME DENNIS L. WEISMAN THAT FILED DIRECT**
8 **TESTIMONY IN THIS CASE?**

9 A. Yes.

10

II. PURPOSE AND SUMMARY OF MAIN POINTS

11 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

12 A. The purpose of my rebuttal testimony is to respond to the direct testimony of Mr.
13 Wood and Mr. Reynolds (hereafter, "opposing witnesses"). In crafting these
14 responses, I rely upon sound economic and public policy principles that are firmly
15 grounded in the economics and regulation literature.

16 **Q. PLEASE SUMMARIZE THE MAIN POINTS DEVELOPED IN YOUR**
17 **REBUTTAL TESTIMONY.**

18 A. The main points developed in my rebuttal testimony are as follows.

19 ▪ There is an important distinction between rate differences and rate
20 discrimination. The latter is defined as rate differences that cannot be explained by cost
21 differences.

22 ▪ Preventing unreasonable rate discrimination is not synonymous with rate
23 regulation. The Commission should intervene in wholesale telecommunications markets
24 to prevent unreasonable rate discrimination when the failure to do so could result in
25 market distortions and anticompetitive outcomes.

1 ▪ Two interexchange carriers (IXCs) that are “different” in certain respects are
2 presumptively similarly situated if there is no difference in the cost of supplying
3 switched access to them.

4 ▪ Distinctions between IXCs, including revenue commitments and reciprocal
5 serving arrangements, that do not result in differences in the cost of supplying switched
6 access are “distinctions without a difference.”

7 ▪ Switched access is a bottleneck input because the IXCs cannot generally
8 choose the CLEC from which they must purchase switched access.¹ The implication is
9 that the IXC is captive to the CLEC that has been chosen by the end-user customer and
10 is therefore not able to avoid unreasonable rate discrimination.

11 ▪ Simply forcing the favored IXCs to disgorge their undercharges or discounts
12 for switched access would not be an adequate remedy. The Commission should craft a
13 remedy that restores competitive parity, both prospectively and retrospectively.

14 **III. POINT-BY-POINT REBUTTAL OF OPPOSING WITNESSES**

15 **A. Mr. Wood**

16 **Q. DOES MR. WOOD CLAIM THAT QCC SEEKS TO HAVE THE**
17 **COMMISSION REGULATE CLEC-PROVIDED SWITCHED ACCESS?**

18 **A. Yes.** Mr. Wood states that “As I understand the Complaint, Qwest is effectively asking
19 the Commission to treat CLEC-provided switched access as a regulated service and to
20 determine a rate (or set of rates) for switched access that should have been charged to
21 Qwest ...”²

¹ As I previously observed, “While I acknowledge that there are differences between originating and terminating switched access, concerns related to the switched access bottleneck are present in both cases because it is the end user (and not the IXC) that ultimately decides on the LEC that supplies switched access to the IXC.” Weisman Direct Testimony, p. 14.

² Wood Direct Testimony, pp. 3-4.

1 Q. HAS MR. WOOD ACCURATELY CHARACTERIZED QCC'S POSITION
2 THAT THE COMMISSION SHOULD REGULATE CLEC-PROVIDED
3 SWITCHED ACCESS?

4 A. No. QCC fully recognizes that the rates for CLEC-provided switched access have not
5 been set by this Commission. There is an important distinction, however, between
6 setting and approving these rates, which the Commission does not do, and preventing
7 unreasonable rate discrimination and anticompetitive conduct, which I understand the
8 Commission is empowered and mandated to do. For example, the issue is not whether
9 the price list rate that QCC is charged for switched access is 1 cent or 6 cents per
10 minute. Rather, the issue is QCC being charged a rate of 6 cents per minute when
11 other similarly-situated IXCs are being charged a rate of 1 cent per minute. Hence, the
12 concern is unreasonable rate discrimination rather than rate regulation *per se*.

13 Q. DOES MR. WOOD CLAIM THAT QCC'S POSITION IS THAT RATE
14 DIFFERENCES ARE SYNONYMOUS WITH RATE DISCRIMINATION?

15 A. Yes. To be precise, Mr. Wood states that "Qwest appears to argue for 'per se'
16 discrimination - an idea that a rate is discriminatory simply because it is different."³

17 Q. HAS MR. WOOD ACCURATELY CHARACTERIZED QWEST'S POSITION?

18 A. No. As I stated in my direct testimony, there is an important distinction between rate
19 differences and rate discrimination.⁴ Rate differences that merely reflect cost
20 differences do not constitute rate discrimination. Rate discrimination refers to price
21 differences that cannot be explained by cost differences. In terms of this proceeding,
22 the CLECs claim that QCC is not similarly situated to the IXCs that received more
23 favorable rate treatment. The issue, however, is not whether QCC is different from the

³ Id., p. 22.

⁴ Weisman Direct Testimony, Section III.

1 IXCs that received more favorable rate treatment, but rather whether the differences
2 between the IXCs (as no two firms will ever be precisely identical in every sense), such
3 as they are, lead to differences in costs for the CLECs that fully explain the differences
4 in rates. In the absence of such a credible demonstration of cost differences, these rate
5 differences presumptively amount to unreasonable rate discrimination.

6 **Q. DOES MR WOOD CONTEND THAT COST DIFFERENCES FOR SWITCHED**
7 **ACCESS FULLY EXPLAIN THE RATE DIFFERENCES FOR SWITCHED**
8 **ACCESS?**

9 A. No. Mr. Wood claims that "Qwest ignores the fact that this industry is filled with rates
10 that would meet its definition of discriminatory."⁵ He cites two specific examples in
11 support of his argument. His first example is differential pricing for residence and
12 business local exchange services. Mr. Wood's second example is the initial pricing
13 structure for ILEC switched access services that provided for different switched access
14 rates for dominant and non-dominant IXCs.

15 **Q. DO YOU BELIEVE THESE TWO EXAMPLES ARE APT IN ATTEMPTING**
16 **TO JUSTIFY DISCRIMINATORY PRICING OF SWITCHED ACCESS?**

17 A. No. The first and most important observation to make is that in putting forth these
18 examples Mr. Wood is effectively confirming that the differential rate structure for
19 CLEC-provided switched access constitutes rate discrimination rather than mere rate
20 differences that are explained by cost differences.

21 Mr. Wood's first example, that of different rates for business and residential customers,
22 is inapt on two grounds. First, it is an example of *retail* price discrimination rather
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⁵ Wood Direct Testimony, pp. 22-23.

1 than *wholesale* or *input* price discrimination.⁶ Second, the “value-of-service” pricing
2 structure that explains this price discrimination arose in the pre-competitive era and
3 hence was the product of regulatory fiat.⁷ These types of discriminatory pricing
4 structures are unlikely to be sustainable under increasingly competitive market
5 conditions.

6 Mr. Wood’s second example, that of charging different switched access rates for
7 dominant and non-dominant EXCs, is also inapt on two grounds. First, when
8 competition was first introduced in the long-distance marketplace, it was technically
9 infeasible for the local exchange carriers to provide non-dominant EXCs with the same
10 quality of switched access as that provided the dominant EXC, AT&T.⁸ Hence, the rate
11 differential was designed, in part, to compensate the non-dominant EXCs for this
12 inferior quality of switched access. Second, the FCC was concerned that the
13 continuation of this discriminatory rate structure for switched access would lead to
14 economic distortions and anticompetitive outcomes.⁹ The following passage from an
15 article authored by FCC officials is instructive in understanding the specific nature of
16 the problem.

⁶ As I previously observed, “Price discrimination for intermediate goods (inputs) is likely to be particularly pernicious in this regard due to the risk of efficiency distortions in the downstream market.” Weisman Direct Testimony, p. 10.

⁷ Peter Tamin, *THE FALL OF THE BELL SYSTEM*. New York: Cambridge University Press, 1987, pp. 33-34. See also Alfred E. Kahn and William B. Shew, “Current Issues in Telecommunications Regulation: Pricing,” *Yale Journal on Regulation*, Vol. 4, 1997, pp. 194-199.

⁸ The Bell System was designed and engineered as an integrated network serving one long-distance provider, AT&T Long Lines. Hence, when competition first surfaced in the long-distance market, a patchwork of network connections was required to provide other common carriers with access to end-user customers. Indeed, as the FCC observed, “Because in the short run the superior quality access received by AT & T could be provided to only one carrier, we imposed a charge upon AT & T and its interexchange partners that would reflect an estimate of premium value, called the premium access charge.” Federal Communications Commission, FCC 86-504, In the Matter of Exchange Network Facilities for Interstate Access, CC Docket No. 78-371, *Memorandum Opinion and Order*, Released November 14, 1986, ¶ 26. See also Gerald W. Brock, *TELECOMMUNICATIONS POLICY FOR THE INFORMATION AGE*, Harvard University Press: Cambridge MA, 1994, pp. 139-141.

⁹ Federal Communications Commission, FCC 86-504, In the Matter of Exchange Network Facilities for Interstate Access, CC Docket No. 78-371, *Memorandum Opinion and Order*, Released November 14, 1986, ¶¶ 57-62.

1 It can be argued, for instance, that some of the Commission's regulatory
2 actions in the interexchange market that were designed to promote
3 competition during transition, such as highly discounted access pricing
4 for OCCs [Other Common Carriers] and restrictions on competitive
5 pricing responses by AT&T, in fact have encouraged entry by
6 uneconomic providers and uneconomic construction of excess capacity.
7 If this is true, the gradualist approach to deregulation of interexchange
8 markets will have resulted in substantial, unnecessary costs for society
9 that never would have been incurred in a truly competitive marketplace.
10 Moreover, this approach will have directly increased consumer costs by
11 requiring regulated firms to charge higher prices to protect competitors
12 during the transition.¹⁰

13 The bottom line is that the rate discrimination that Mr. Wood dismisses as standard
14 industry practice represents the very type of unreasonable rate discrimination that this
15 Commission's policies should seek to prevent.

16 **Q. DOES MR. WOOD CONTEND THAT THE 1996 TELECOMMUNICATIONS**
17 **ACT EXPLICITLY PROVIDES FOR THE TYPE OF RATE**
18 **DISCRIMINATION AT ISSUE IN THIS PROCEEDING?**

19 **A.** Yes. In support of his contention, Mr. Wood states that "The 1996 Federal
20 Telecommunications Act explicitly created different and discriminatory pricing for the
21 exchange of local versus interexchange traffic among carriers, even when the services
22 were technically equivalent."¹¹

¹⁰ Mark S. Fowler, Albert Halprin, and James D. Schlichting, "'Back To The Future': A Model For Telecommunications," *Federal Communications Law Journal*, Vol. 38(2), 1986, pp. 193-194. [At the time this article was written, the authors were, respectively Chairman, Chief, Common Carrier Bureau, and Special Counsel, Common Carrier Bureau, Federal Communications Commission.]

¹¹ Wood Direct Testimony, p. 23.

1 Q. DOES MR. WOOD'S INVOCATION OF THE 1996
2 TELECOMMUNICATIONS ACT RATIONALIZE THE RATE
3 DISCRIMINATION AT ISSUE IN THIS PROCEEDING?

4 A. No. Mr. Wood cites an example in which different types of telecommunications traffic
5 are subject to different rate treatment when the costs of providing the various services
6 in question are presumptively the same. However, this proceeding is concerned with
7 different IXCs being subject to disparate rate treatment when the costs of providing
8 switched access are presumptively the same. Hence, in Mr. Wood's example there is
9 discrimination across different traffic types, but not across different carriers. In
10 contrast, the issue in this proceeding involves discrimination across carriers that
11 provide the same type of traffic, presumptively unreasonable discrimination, and
12 therefore gives rise to market distortions and anticompetitive outcomes. Hence, once
13 again Mr. Wood's example is inapt for the purposes of the Commission's evaluation of
14 the issues in this proceeding.

15 Q. DOES MR. WOOD ATTEMPT TO EXPLAIN THE RATE DIFFERENCES
16 BETWEEN QCC AND THE FAVORED CARRIERS?

17 A. Yes. Mr. Wood's argument is essentially that QCC is not similarly situated to the
18 IXCs that were charged lower rates for switched access.¹² He further points out that
19 "§ 364.10(1) prohibits only 'undue or unreasonable preference' and undue or
20 unreasonable prejudice."¹³ He therefore implies that the rate discrimination at issue in
21 this proceeding does not constitute *unreasonable* or *undue* rate discrimination.

22 Q. DO YOU CONCUR WITH MR WOOD'S REASONING?

23 A. No. I am not an attorney, so I will defer to counsel to brief the legal interpretation of
24 this particular passage from the statute and limit my discussion and analysis to the

¹² Id., pp. 23-26

¹³ Id., p. 25.

1 relevant economic issues. It is my understanding that the Commission has a duty to
2 intervene in Florida's telecommunication markets when the failure to do so can lead to
3 market distortions and anticompetitive outcomes. Mr. Wood's counsel to the
4 Commission is two-fold. First, he opines that rate discrimination is standard practice in
5 the telecommunications industry and hence there is no sound rationale for the
6 Commission to intervene in the switched access market. Second, because Mr. Wood
7 believes QCC is not like the other LXC's that received favorable rate treatment, any
8 such rate discrimination fails to constitute undue preference or prejudice.

9 **Q. HOW DO YOU RESPOND TO MR WOOD'S FIRST ARGUMENT THAT**
10 **RATE DISCRIMINATION IS STANDARD PRACTICE IN THE**
11 **TELECOMMUNICATIONS INDUSTRY?**

12 **A.** Mr. Wood appears to ignore the critical distinction between retail rate discrimination
13 and wholesale (input) rate discrimination, particularly as it relates to a bottleneck
14 service such as switched access. Furthermore, the fact that rate discrimination is
15 common in the telecommunications industry does not imply that such practices do not
16 give rise to market distortions and anticompetitive outcomes under certain conditions.
17 As I explained at length in my direct testimony, switched access is one of those
18 exceptions that requires regulatory intervention to prevent unreasonable rate
19 discrimination.¹⁴ Contrary to Mr. Wood's suggestions, the conduct of other providers
20 in other contexts does not immunize Mr. Wood's clients from their duty to avoid undue
21 rate discrimination. Neither does it offset or mitigate the anticompetitive effects on
22 QCC of the CLECs' discriminatory switched access pricing.

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¹⁴ Weisman Direct Testimony, § IV.

1 Q. CAN YOU ELABORATE AS TO WHY PRICE DISCRIMINATION CAN BE
2 PROBLEMATIC UNDER CERTAIN CONDITIONS?

3 A. Yes. It is important to differentiate clearly between price discrimination in input
4 (generally wholesale) markets and price discrimination in output (generally retail)
5 markets. With respect to retail markets, the economics literature recognizes that price
6 discrimination can be welfare-enhancing when it leads to an increase in total output in
7 the market relative to a uniform price.¹⁵ There is a general consensus that price
8 discrimination is increasingly common in retail markets, that competition may actually
9 force firms to adopt discriminatory pricing schemes, and that it is presumptively
10 welfare-enhancing.¹⁶ This proceeding, however, involves rate discrimination in *input*
11 *markets*, as switched access is a wholesale service provided by one carrier to another
12 carrier.

13 Q. DO THE SAME ARGUMENTS THAT ARE GENERALLY SUPPORTIVE OF
14 PRICE DISCRIMINATION IN RETAIL MARKETS CARRY OVER TO THE
15 CASE OF INPUT MARKETS?

16 A. No. The general policy advisability of allowing price discrimination in retail markets
17 does not carry over to wholesale or input markets. The welfare implications of input
18 price discrimination are mixed, but the prevailing view in the literature is that it can
19 often be welfare diminishing.¹⁷ The problem arises from the fact that the input supplier
20 has an incentive to charge the relatively efficient provider a higher price for the input
21 and the relatively inefficient provider a lower price for the input, all things being equal.
22 The net effect of this price discrimination is to decrease the output of the efficient

¹⁵ See, for example, Jean Tirole, *INDUSTRIAL ORGANIZATION*, Cambridge MA: The MIT Press, 1988, pp. 137-140.

¹⁶ ANTITRUST MODERNIZATION COMMISSION, *REPORT AND RECOMMENDATIONS*, Washington D.C. 2007, Section 3.

¹⁷ See, for example, Michael Katz, "The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets," *The American Economic Review*, Vol. 77(1), March 1987, pp. 154-167; and Patrick DeGraba, "Input Market Price Discrimination and the Choice of Technology," *The American Economic Review*, Vol. 80(5), December 1990, pp. 1246-1253.

1 provider, increase the output of the inefficient provider and thereby raise the total
2 resource costs borne by society in producing any given level of output. These are
3 basically the same type of market distortions that I discussed in my direct testimony.¹⁸

4 **Q. DOES THIS OBSERVATION HAVE ANY IMPLICATIONS FOR THE**
5 **COMMISSION'S POLICY ON INPUT PRICE DISCRIMINATION AS**
6 **COMPARED TO RETAIL PRICE DISCRIMINATION?**

7 A. Yes. What this suggests is that, in contrast to retail price discrimination, there can be
8 no reasonable presumption that input price discrimination is welfare-enhancing. This
9 is important for regulatory policy because it suggests that in retail telecommunications
10 markets the presumption should be in favor of permitting price discrimination, but any
11 such presumption should be reversed in the case of input markets.¹⁹ That is to say,
12 input price discrimination (particularly for a service such as switched access) should be
13 deemed presumptively welfare-diminishing absent credible evidence to the contrary.
14 From an economic perspective, regulators and policymakers designing competition
15 policy should strive to prohibit particular business practices when they are welfare-
16 diminishing and should permit business practices when they are welfare-enhancing.
17 The objective would be to set the policy guideline so as to minimize the expected
18 social cost of error. Hence, if input price discrimination is more often welfare-
19 diminishing than welfare-enhancing, it is advisable to establish a default policy that
20 prohibits input price discrimination absent credible information to suggest that
21 departures from this policy are warranted.

22

¹⁸ Weisman Direct Testimony, pp. 8-13.

¹⁹ For a discussion of these types of trade-offs in the telecommunications industry, see Dennis L. Weisman, "A 'Principled' Approach to the Design of Telecommunications Policy." *Journal of Competition Law & Economics*, Vol. 6(4), December 2010, pp. 927-956.

1 Q. DOES MR. WOOD ASSERT THAT SWITCHED ACCESS IS NOT A
2 MONOPOLY BOTTLENECK?

3 A. Mr. Wood does not directly assert that switched access is not a monopoly bottleneck,
4 but he does intimate it. He states in a footnote that "IXCs are not required to use the
5 network facilities of unaffiliated LECs to complete calls, and often do not do so."²⁰ I
6 have addressed the matter of switched access being a monopoly bottleneck and
7 therefore not a competitive service in my direct testimony.²¹ I will not repeat all of
8 those arguments here, but I would make two observations.

9 First, despite the fact that telecommunications markets are becoming increasingly
10 competitive, a fact recognized by the recently passed Florida legislation, this does not
11 mean that all sectors of the industry are experiencing the same level of competitive
12 intensity. It is paradoxical perhaps, but the problem of the switched access monopoly
13 bottleneck is not one that is remedied by competition, it is in fact one that is created by
14 competition. To wit, in the pre-competitive era of the former Bell System, there was
15 essentially a single vertically-integrated provider of local and local-distance
16 telecommunications and, of course, there is no economic incentive for a firm to
17 leverage its market power against itself.

18 Second, that the local exchange market is competitive means that *end-user customers*
19 can choose from a number of different providers for their local exchange telephone
20 service. Once the end-user customer enters into an agreement with a particular CLEC,
21 that CLEC enjoys a monopoly bottleneck that can be leveraged to charge differential
22 switched access rates to IXCs. The CLECs are effectively gatekeepers that control the
23 rights of passage and the fees for doing so. Furthermore, because the choice of CLEC

²⁰ Wood Direct Testimony, p. 8, note 3.

²¹ See, in particular, Weisman Direct Testimony, pp. 5-9, 12-14. In addition, unless a special access arrangement is being used to reach the end-user, an option that is cost-effective only when volume is sufficient to justify the expenditures on such facilities, switched access charges are being paid, either by the IXC, or in situations where the IXC hands the call off to an underlying carrier for termination, by the underlying third-party carrier.

1 is made by the *end-user customer*, whereas switched access charges are paid by the
2 IXC, there is no market mechanism that corrects this condition; it is inherent in the way
3 the market for long distance calls works. The following passage is instructive on this
4 point.

5 Because the terminating carrier controls the only line and local switch
6 connecting the called party to the network, that carrier has strong
7 incentives to extract as high a payment as possible from the calling
8 party's carrier. Competition at the retail level has not diminished the
9 terminating access monopoly of the carrier selected by the called party.

10 As a result ... regulators must ensure that terminating rates are cost-
11 based, and the need for regulation continues indefinitely.²²

12 Hence, once the IXC opts to provide long-distance service, it has no choice but to
13 originate/terminate the long-distance call over the CLEC facilities chosen by the end-
14 user customer.²³ Commission oversight is required under these conditions to serve as a
15 surrogate for competition and thereby prevent market distortions and anticompetitive
16 outcomes.²⁴

²² Glen O. Robinson and Thomas B. Nachbar, *COMMUNICATIONS REGULATION*, St. Paul MN: Thompson-West, 2008, pp. 527-28.

²³ As the FCC has recognized, this problem is further exacerbated by rate averaging requirements. Second, the Commission has interpreted Section 254(g) to require IXCs geographically to average their rates and thereby to spread the cost of both originating and terminating access over all of their end users. Consequently, IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges. Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. (footnote omitted)

Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) at ¶ 31.

²⁴ Weisman Direct Testimony, p. 3 and notes 2 and 3.

1 Q. HOW DO YOU RESPOND TO MR WOOD'S SECOND ARGUMENT THAT
2 QCC IS NOT SIMILAR TO THE OTHER IXCS THAT WERE THE
3 BENEFICIARIES OF FAVORABLE RATE TREATMENT?

4 A. Mr. Wood reflexively invokes the "not similarly-situated" criterion to justify discounts
5 to the favored IXCs that were not offered to QCC. The fact that there may be
6 differences between the favored IXCs and QCC is a necessary, but not a sufficient,
7 condition for rationalizing the differences in rate treatment. What is more, the
8 Commission should be aware that distinctions without a difference do not establish that
9 QCC and the preferred IXCs were not and are not similarly situated in the context of
10 the CLECs' provision of intrastate switched access in Florida.

11 Q. DID CLECS ALSO RAISE IRRELEVANT DISTINCTIONS IN THE
12 PARALLEL COLORADO PROCEEDING?

13 A. Yes. In the Colorado proceeding, the CLECs raised a laundry list of alleged
14 differences between the favored IXCs and QCC in an attempt to establish that QCC
15 was not similarly situated, and thus was not subjected to unlawful conduct. And yet,
16 the differences between the IXCs raised by the CLECs were not sufficient to establish
17 that the IXCs are not similarly situated. Indeed, as the Administrative Law Judge
18 (ALJ) in the Colorado proceeding observed.

19 Without regard to implementation, the thrust of MCImetro's second
20 theory is that QCC was not similarly situated to AT&T because QCC
21 could not undertake the reciprocal arrangement. ... the attempt to
22 distinguish customers by a combination of access with other tariff and
23 off-tariff provisions was previously rejected. The substance of access
24 agreements must prevail over form and access services cannot be
25 obscured or obviated by inclusion with other terms. Creativity of those

1 contracting for access . . . cannot change the access service provided nor
2 the unlawful pricing thereof.²⁵

3 Illustratively, the agreement between AT&T and MCI applies switched
4 access service regardless of delivery method. However, if the parties
5 had negotiated a commercial agreement to limit charges to a unique
6 negotiated methodology using traditional means plus delivery of a
7 peppercorn, or perhaps a unique billing requirement (e.g., use of
8 controlled proprietary applications), they would forever prohibit any
9 competitor from being similarly situated . . .²⁶

10 The key policy message to take away from the Colorado ALJ's decision, of course, is
11 that CLECs cannot simply point to any differences that may exist between IXCs as a
12 credible rationale to establish that the IXCs are not similarly situated. Indeed, as the
13 Colorado Commission observed, if this were not the case "the regulated entities would
14 be able to obscure their discriminatory conduct simply by executing off-tariff
15 agreements covering multiple services."²⁷

16 **Q. RECOGNIZING THAT NOT EVERY DIFFERENCE BETWEEN CLECS**
17 **CONSTITUTES A SOUND BASIS TO FIND THAT THEY ARE NOT**
18 **SIMILARLY SITUATED, DO YOU HAVE A VIEW AS TO WHAT CRITERIA**
19 **WOULD CONSTITUTE A SOUND RATIONALE THAT JUSTIFIES PRICE**
20 **DIFFERENCES IN THIS CONTEXT?**

21 **A. Yes. I believe that any differential rate treatment for switched access should be firmly**
22 **grounded in (and fully explained by) the differential costs for the CLECs' serving one**
23 **IXC vis-à-vis another IXC. Absent such a credible demonstration of cost differences,**

²⁵ *QCC v. MCI Metro, et al*, Docket No. 08F-259T, Decision No. C11-1216 (mailed June 21, 2012), Recommended Decision of Administrative Law Judge G. Harris Adams on Remand ("Colorado Remand Order"), ¶ 27.

²⁶ *Id.*, ¶ 28.

²⁷ *QCC v. MCI Metro, et al*, Docket No. 08F-259T, Decision No. C11-1216 (mailed Nov. 15, 2011) at ¶ 76.

1 the default policy should be that each IXC pays the same uniform rate for switched
2 access, all things being equal. To do otherwise would likely lead to market distortions
3 and anticompetitive outcomes.

4 **Q. HOW DO YOU RESPOND TO MR. WOOD'S CLAIM THAT "QWEST HAD**
5 **YET TO PROVIDE ANY EVIDENCE THAT IT WAS SIMILARLY SITUATED**
6 **TO ANY IXC WHOSE CONTRACT TERMS QWEST SEEKS TO CONFER**
7 **UPON ITSELF"?²⁸**

8 A. Mr. Wood's contention is that the burden for establishing that QCC and the favored
9 IXCs are similarly situated is wholly borne by the customers of the CLECs rather than
10 the CLECs themselves. In light of the above discussion, this implies that QCC bears
11 the burden for establishing that the CLECs' cost to provide switched access to the
12 favored IXCs is lower than the cost to provide switched access to QCC. The question
13 as to which party bears the burden of proof calls for a legal determination and hence
14 lies outside my particular area of expertise. I hasten to point out, however, that it is the
15 CLECs (and not QCC) that control cost information related to *their* provision of
16 switched access services to particular IXCs.²⁹

17 Hence, it would be illogical to assign responsibility for establishing the existence of
18 cost differentials on the IXC customers consuming the service rather than on the
19 CLECs producing the service. It is illogical because the burden would be assigned to
20 the party that is arguably the least well-positioned to credibly inform the record. It
21 would be akin to requiring an automobile customer to prove that it costs Ford Motor
22 Company less to produce an automobile for her than it does for someone else. It is

²⁸ Wood Direct Testimony, pp. 25-26.

²⁹ QCC inquired of each respondent CLEC in discovery whether it performed cost or demand studies in connection with establishing the intrastate switched access rates set forth in the agreement(s). To my knowledge, not a single CLEC responded that it had performed such a study. See the CLECs' response to QCC Interrogatory Nos. 2(l) and 2(m). See, e.g. Direct Testimony of William R. Easton, Exhibits 6B (Broadwing), 34A (PAETEC) and 40 (US LEC).

1 quite obvious that Ford Motor Company is better positioned than the customer to
2 establish the existence of any cost differences or lack thereof.

3 In the parallel Colorado proceeding, the Commission recognized this tension and
4 resolved it by first evaluating whether QCC had established a *prima facie* case. The
5 Commission then evaluated whether the CLECs effectively rebutted QCC's *prima*
6 *facie* showing.³⁰

7 **Q. DOES MR. WOOD TAKE ISSUE WITH THE REMEDY THAT QCC**
8 **PROPOSES FOR THE SWITCHED ACCESS OVERCHARGES?**

9 A. Yes. QCC's proposed remedy is that it be charged the same rate for switched access as
10 the favored IXCs and that it receive a refund equal to the amount of the overcharges,
11 plus interest. Mr. Wood states that "If public policy is best served by having all IXCs,
12 regardless of circumstances, pay the published rate (something Qwest has yet to
13 demonstrate), then the only remedy is to adjust the charges to the other IXCs who paid
14 a lower rate."³¹ In other words, the remedy would be to force the favored IXCs to
15 disgorge an amount equal to the switched access undercharges or discounts that they
16 received over the many years that the secret switched access agreements were in effect.
17 Notably, Mr. Wood's contention that refunds to QCC would only exaggerate
18 discrimination because they would leave other IXCs continuing to pay the publicly
19 stated rates was rejected outright by the Colorado Commission.

20 In response, QCC argues that, if the Commission were to accept the
21 argument that an award of reparations would result in further
22 discrimination, it would then accept and endorse the current level of
23 unlawful discrimination. QCC contends this claim, when taken to its

³⁰ Colorado Remand Order, ¶ 39 ("Qwest made a *prima facie* case that the Respondents' cost to provide service was the same as to all comers requiring access services and no Respondent demonstrated reasonable justification related to the variation in pricing.")

³¹ Wood Direct Testimony, p. 30.

1 logical conclusion, means that a customer aggrieved by rate
2 discrimination is never entitled to be made whole through an award of
3 reparations, so long as there are any other similarly situated parties.³²
4 We agree with QCC on this issue and deny the exceptions filed by XO,
5 Granite, and BullsEye on this ground. We agree that the above
6 argument presented by the respondent CLECs, when taken to its logical
7 conclusion, would frustrate the ability of any complainant to enforce the
8 non-discrimination and reparations statutes in Title 40, as long as any
9 other similarly situated parties chose not to prosecute a complaint.³³

10 **Q. ARE THERE OTHER CONCERNS WITH MR. WOOD'S PROPOSAL TO**
11 **FORCE THE FAVORED IXCS TO DISGORGE THE DISCOUNTS THAT**
12 **THEY RECEIVED?**

13 A. Yes.³⁴ Should the Commission find that the CLECs engaged in unreasonable rate
14 discrimination, Mr. Wood's proposal would have the effect of penalizing the favored
15 IXCs but not penalizing (and possibly even rewarding) the offending CLECs that
16 violated statutory obligations.³⁵ What is particularly "novel" about Mr. Wood's
17 proposal is that it seemingly punishes all of the parties except the offending parties.
18 This, of course, is problematic if one of the Commission's objectives in crafting an
19 appropriate remedy is to provide sufficient disincentives for the CLECs to engage in
20 unreasonable rate discrimination.

³² *QCC v. MCI Metro, et al.*, Docket No. 08F-259T, Decision No. C11-1216 (mailed Nov. 15, 2011) at ¶ 84.

³³ *Id.*, ¶ 85.

³⁴ Please note that my testimony only addresses the substantive concerns plaguing disgorgement as a remedy. Not being an attorney, I will not address any procedural shortcomings arising from the fact that the CLECs urging disgorgement did not act to include the favored IXCs as parties to this case. I assume that counsel will address this on brief.

³⁵ To the extent that the favored IXCs reduce long-distance rates to reflect the switched access discounts, the CLECs would, in turn, realize higher demand for switched access services. Hence, the CLECs benefit from the higher demand for switched access resulting from the switched access discounts while having those discounts returned to them as part of Mr. Wood's proposal.

1 Q. WHAT OBJECTIVES SHOULD GUIDE THE COMMISSION'S
2 DELIBERATIONS IN CRAFTING A SUITABLE REMEDY?

3 A. First, in the absence of credible cost studies that demonstrate that the rate differentials
4 are fully explained by the cost differentials, each IXC should by default pay the same
5 uniform rate for switched access. This implies that there should be pricing parity for
6 switched access. Pricing parity, of course, can be achieved either by decreasing the
7 rate for QCC or increasing the rate for the favored IXCs.

8 Second, increasing the rate for the favored IXCs achieves parity on a prospective basis,
9 but it does not retroactively address the competitive impact of the unlawful practice on
10 QCC. To wit, the favored IXCs were conferred an artificial competitive advantage by
11 the CLECs that lowered their cost structure in the provision of long-distance
12 telecommunications *vis-à-vis* QCC. Hence, it is not sufficient in terms of a remedy to
13 simply (i) require the favored IXCs to disgorge the amount of the undercharges or
14 discounts; and (ii) correct the switched access rate disparity going forward. This is
15 necessarily the case because the expected competitive impact on QCC in the retail long
16 distance market would already have occurred and it is not possible to "un-ring the bell"
17 so to speak.

18 The above discussion necessarily implies that any remedy should satisfy three
19 conditions: (1) Ensure parity pricing on a prospective basis to prevent market
20 distortions and anticompetitive outcomes; (2) retrospectively mitigate to the greatest
21 extent possible the impact on the party subject to rate discrimination; and (3) provide
22 sufficient disincentives for the CLECs to selectively employ rate discrimination as a
23 form of *self-help* in their business dealings with the IXCs – a tactic that is privately
24 beneficial for the CLECs and yet socially harmful in terms of competitive distortions in
25 Florida's telecommunications markets. While the CLECs may claim that providing a

1 discount to AT&T and Sprint was not beneficial to them, it must have been beneficial
2 to them relative to charging all IXCs the same rate because they would not have
3 rationally engaged in such conduct otherwise.³⁶ This conduct on the part of the CLECs
4 ensured collectibles from the preferred IXCs and, by keeping the discounts secret,
5 enabled them to continue to impose higher rates on other IXCs, including QCC.

6 Finally, by proposing that the CLECs recover large payments from the favored IXCs,
7 Mr. Wood has, in effect, devised a "remedy" that would potentially *reward* the party
8 that violated Florida law. Paradoxically, this is not a remedy for the victim of
9 discriminatory pricing, but rather a potential *windfall* for the party that perpetrated the
10 discriminatory pricing scheme.

11 **Q. DO YOU BELIEVE REFUNDS (REPARATIONS) ARE AN APPROPRIATE**
12 **REMEDY IN THIS CASE?**

13 A. Yes. Refunds would provide as much retrospective parity as is possible to assure in
14 this context. No remedy is perfect, but requiring the CLECs to make QCC whole for
15 what QCC overpaid over many years is the most sensible remedy. The Colorado ALJ
16 reached exactly this conclusion. In the recent Remand Order, the ALJ concisely
17 explained the rationale for refunds. The ALJ held, "[r]eparations are not an attempt to
18 calculate contract damages. Rather, reparations approximate a remedy of past unjust
19 discrimination and, consistent with prior Commission policy, avoids a windfall to the
20 utility from discriminatory conduct violating its own tariff obligations."³⁷

21 **Q. DO YOU HAVE A VIEW AS TO HOW PRICING PARITY SHOULD BE**
22 **ACHIEVED ON A PROSPECTIVE BASIS?**

23 A. Yes. As discussed above, pricing parity can be achieved either by decreasing the rate
24 for QCC or increasing the rate for the favored IXCs. Achieving parity by decreasing

³⁶ The rationality axiom postulates that economic agents behave in their own self-interest.

³⁷ Colorado Remand Order, ¶ 37.

1 the rate to QCC *vis-à-vis* increasing the rate to the favored IXCs would increase
2 economic efficiency because the rates for switched access would be more closely
3 aligned with the underlying marginal cost of switched access, all other factors being
4 equal. This, in turn, would be expected to lead to rate reductions across-the-board for
5 switched, long-distances service in Florida and thereby increase consumer welfare.

6 **B- Mr. Reynolds**

7 **Q. ~~DOES MR. REYNOLDS CONTEND THAT QCC IS NOT SIMILARLY-~~**
8 **~~SITUATED TO AT&T AND THEREFORE IS NOT ENTITLED TO THE~~**
9 **~~SAME DISCOUNTS FOR SWITCHED ACCESS?³⁸~~**

10 A. ~~Yes. In similar fashion to Mr. Wood, Mr. Reynolds invokes the not similarly-situated~~
11 ~~criterion to justify granting AT&T discounts that were not offered to other IXCs. And~~
12 ~~yet, it is not sufficient merely to assert that QCC and the other IXCs are not similarly~~
13 ~~situated to AT&T without credibly demonstrating that the characteristics that~~
14 ~~differentiate AT&T from the other IXCs explain the difference in rate treatment. What~~
15 ~~this means is that the similarly situated criterion must be grounded in economic reality.~~
16 ~~Mr. Reynolds provides the Commission with a litany of reasons why QCC is somehow~~
17 ~~different than AT&T. I am not questioning whether AT&T is different from QCC or~~
18 ~~any other IXC because that is not the substantive issue. I am questioning whether the~~
19 ~~differences that Mr. Reynolds identifies provide a credible, economic basis for the~~
20 ~~differences in rate treatment.~~

21 **Q. ~~DOES MR. REYNOLDS IDENTIFY SPECIFIC CRITERIA FOR CHARGING~~**
22 **~~QCC A HIGHER RATE FOR SWITCHED ACCESS THAN AT&T?~~**

23 A. ~~Yes. In essence, Mr. Reynolds' defense of MCI's rate discrimination is two-fold.~~
24 ~~First, QCC is not a vertically integrated provider so it cannot "reciprocate" in~~

³⁸ Reynolds Direct Testimony, p. 21.

1 ~~providing discounted switched access to MCI. Second, QCC does not generate the~~
2 ~~same traffic volumes as AT&T. Both of these arguments are fine and good as far as~~
3 ~~they go; the problem is that they don't go very far.~~

4 **Q. ~~WHY SHOULD THE COMMISSION BE CONCERNED ABOUT MR.~~**
5 **~~REYNOLDS'S FIRST CLAIM THAT QCC CANNOT "RECIPROGATE" IN~~**
6 **~~THE SAME MANNER AS AT&T?~~**

7 A. ~~Mr. Reynolds states that "QCC would not have been able to provide MCI's LYCs with~~
8 ~~the same benefits" as AT&T because it does not provide switched access.³⁹ The~~
9 ~~benefits that Mr. Reynolds is alluding to, of course, are the discounted rates for~~
10 ~~switched access that were a component of the arrangement between AT&T and MCI.~~
11 ~~And yet, absent credible cost information to establish that these rate differences reflect~~
12 ~~the underlying cost differences, this agreement amounts to discrimination against QCC~~
13 ~~simply because it is not a vertically integrated provider of local and long distance~~
14 ~~telecommunications. As I demonstrated in my direct testimony, the concern with this~~
15 ~~sort of discrimination is that it can result in market distortions (and inefficient~~
16 ~~foreclosure) by precluding the least cost provider from serving as the least price~~
17 ~~provider.⁴⁰ In other words, MCI and AT&T may prevail in the long distance market,~~
18 ~~not because they are necessarily the most efficient providers, but because they control~~
19 ~~the pricing of a bottleneck, monopoly input in the form of switched access.~~

20 **Q. ~~CAN YOU ELABORATE ON YOUR CONCERNS THAT THESE~~**
21 **~~ALLEGEDLY RECIPROCAL AGREEMENTS ARE DISTORTIONARY AND~~**
22 **~~POSSIBLY ANTICOMPETITIVE?~~**

23 A. ~~Yes. To illustrate with a stylized example, suppose that there are three transport~~
24 ~~companies, AT&T, MCI and QCC, that operate on a toll road from Tampa to Miami.~~

³⁹ Reynolds Direct Testimony, p. 24.

⁴⁰ Weisman Direct Testimony, pp. 9-12.

1 ~~AT&T owns the toll booth in Tampa and MCI owns the toll booth in Miami. Each~~
 2 ~~transport company must pass through these toll booths in order to enter and exit the toll~~
 3 ~~road. The public toll rate is \$4.00, but AT&T and MCI enter into a reciprocal~~
 4 ~~agreement granting each other discounted tolls of only \$1.00. Hence, QCC pays a toll~~
 5 ~~premium of \$3 = \$4 - \$1 on each end of the toll road. The competitive problem arises~~
 6 ~~from the fact that even if QCC is the most efficient transport company, it can be~~
 7 ~~inefficiently foreclosed from the market if its efficiency advantage on the Tampa-~~
 8 ~~Miami (Miami-Tampa) route is less than \$6 = 2 × \$3, the total toll premium it pays~~
 9 ~~relative to its rivals AT&T and MCI.~~

10 **Q. HAVE OTHER REGULATORY COMMISSIONS FOUND THAT**
 11 **RECIPROCAL AGREEMENTS OF THIS TYPE ARE ANTICOMPETITIVE?**

12 **A. Yes.** ~~As discussed in my direct testimony, the Minnesota Public Utilities Commission~~
 13 ~~investigated the companion AT&T (as CLEC) - MCI (as IXC) off-tariff agreement.⁴¹~~
 14 ~~The Minnesota Commission found that "This conduct distorts the market, harms~~
 15 ~~competition, and ultimately harms consumers."⁴²~~

16 ~~Further, the Colorado ALJ recently rejected MCI's reciprocity defense, noting that it~~
 17 ~~did not justify MCI's violation of Colorado law.~~

18 ~~MCI heavily relies upon the reciprocal scope and terms of the~~
 19 ~~negotiated 2004 Contracts and the fact that QCC could not undertake~~
 20 ~~those reciprocal obligations because QCC did not (and was not legally~~
 21 ~~able to) provide switched access in Colorado. However, the fact that~~
 22 ~~QCC could not enter into an identical agreement does not determine~~
 23 ~~unlawful discrimination of services provided within the scope of~~

⁴¹ ~~Id., pp. 21-22.~~

⁴² ~~In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched Access Services, DOCKET NO. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235, Minnesota Public Utilities Commission, 2007 Minn. PUC LEHS 146 October 26, 2007, Issued, p. 10.~~

1 ~~agreement, particularly in light of other applicable statutory~~
2 ~~requirements.~~⁴³

3 ~~For MCI to condition pricing or availability of intrastate access service~~
4 ~~upon reciprocation of service alone would directly contravene the~~
5 ~~limitations of § 40-15-105(1), C.R.S. An IXC requiring intrastate~~
6 ~~access service to terminate a call is totally independent of the reciprocal~~
7 ~~provision of access service. Such an IXC requiring access need not~~
8 ~~have any ability to provide access services. For MCI to lower the rate~~
9 ~~for access service only for those able to provide reciprocal service~~
10 ~~directly contravenes Colorado law.~~⁴⁴

11 ~~MCI unlawfully discriminated in failing to show that QCC was a~~
12 ~~relevant dissimilar customer class purchasing identical access service.~~
13 ~~MCI failed to overcome QCC's *prima facie* showing of unjust~~
14 ~~discrimination and no lawful price differentiation has been shown.~~⁴⁵

15 Q. ~~DO YOU HAVE ANY OTHER CONCERNS WITH MCI'S RECIPROcity~~
16 ~~THEORY?~~

17 A. ~~Yes. Even if reciprocity was a reasonable justification for input rate discrimination,~~
18 ~~my understanding is that it did not meaningfully exist in the MCI-AT&T~~
19 ~~arrangement.~~⁴⁶ ~~Accordingly, there is even less justification for Mr. Reynolds'~~
20 ~~reciprocity defense.~~

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⁴³ Colorado Remand Order, ¶ 19.

⁴⁴ Colorado Remand Order, ¶ 33.

⁴⁵ Colorado Remand Order, ¶ 34.

⁴⁶ See Direct Testimony of William Easton, pp. 31-33, Direct Testimony of Derek Gasfield, pp. 36-38 and Exhibit DAC-17.

1 Q. ~~SHOULD THE COMMISSION BE CONCERNED ABOUT MR. REYNOLDS'S~~
2 ~~SECOND CLAIM THAT QCC DOES NOT GENERATE THE SAME TRAFFIC~~
3 ~~VOLUMES AS AT&T?~~

4 A. ~~Yes. First, [REDACTED]~~
5 ~~[REDACTED] As such, this post hoc rationalization is not credible.⁴⁷~~

6 ~~Further, there is no evidence to indicate that the cost to MCI in provisioning switched~~
7 ~~access to AT&T is lower than the cost to MCI in provisioning switched access to QCC~~
8 ~~due to differences in traffic volumes. Hence, granting AT&T but not QCC switched~~
9 ~~access discounts on the basis of traffic volumes amounts to discrimination against QCC~~
10 ~~simply because it is a smaller provider than AT&T. The economic concern is the same~~
11 ~~as that discussed above, that these practices can serve to preclude the least-cost~~
12 ~~provider from serving as the least-price provider and lead to inefficient foreclosure. In~~
13 ~~the absence of a cost justification, this disparate rate treatment is unjustified from an~~
14 ~~economic perspective.~~

15 Q. ~~WHAT CONCLUSIONS DO YOU DRAW ABOUT MR. REYNOLDS' CLAIMS~~
16 ~~THAT QCC IS NOT SIMILARLY SITUATED TO AT&T?~~

17 A. ~~Mr. Reynolds' claims fall victim to the same fallacy as that of Mr. Wood in that he~~
18 ~~identifies meaningless distinctions to support his contention that QCC is not similarly~~
19 ~~situated to the favored IXCs. For all of the reasons that I have identified above and in~~
20 ~~my direct testimony, it is critical that any claims on the part of the ELECs that QCC is~~
21 ~~not similarly situated to AT&T be grounded in economic reality — that any difference~~
22 ~~in rates for switched access be explained by differences in costs for switched access.~~

⁴⁷ *QCC v. MCI Metro, et al*, Docket No. 08F-259T, Decision No. C11-1216 (mailed Nov. 15, 2011) at ¶ 75. (“Further, we find most persuasive QCC’s argument that none of the unfiled off-tariff agreements ties the discount to the IXC to the purchase of specific volumes of switched access service. To the contrary, all of the unfiled agreements at issue in the instant proceeding grant the discount in unlimited fashion, regardless of how much switched access a favored IXC purchases. This alone is fatal to the claim that differences in size or traffic volumes justify price differentiation in this case.”)

1 ~~Absent such a credible demonstration of cost differences, I believe the Commission's~~
2 ~~policy should be that each IXC pays the same uniform rate for switched access.~~

3 **Q. DOES MR. REYNOLDS DEFEND MCI'S PRACTICE OF CHARGING QCC A**
4 **HIGHER RATE THAN THE FAVORED IXCS?**

5 A. ~~Yes. Mr. Reynolds states that "MCImetro charged QCC the switched access rates in~~
6 ~~its intrastate price list on file with this Commission."⁴⁸ ~~The intimation is that there can~~
7 ~~be no claim of rate discrimination when QCC is charged access rates that are in~~
8 ~~compliance with the price list on file with the Commission. This is incorrect as a~~
9 ~~matter of economics. What matters in a competitive marketplace is relative~~
10 ~~positioning. It is not possible to confer an advantage on one IXC without~~
11 ~~simultaneously conferring a disadvantage on another IXC, particularly in the case of a~~
12 ~~monopoly bottleneck input like switched access. The relevant issue is the absence of~~
13 ~~pricing parity for switched access between QCC and AT&T. It is immaterial that QCC~~
14 ~~was charged the rate on file with the Commission when other IXCs were charged a~~
15 ~~lower rate. What Mr. Reynolds fails to recognize is that it is the practice of selectively~~
16 ~~departing from the public price list when there is no cost justification for doing so that~~
17 ~~constitutes rate discrimination. In point of fact, had the GLECs departed from the~~
18 ~~public price list uniformly for all IXCs (absent any difference in costs) there would be~~
19 ~~no rate discrimination issue.~~~~

20 **Q. DOES MR. REYNOLDS BELIEVE THAT ANY REMEDIES ARE**
21 **APPROPRIATE IN THIS CASE?**

22 A. ~~No. Mr. Reynolds supports his claim by arguing that "MCImetro complied with its~~
23 ~~Florida price list at all times by charging QCC the switched access rates contained~~
24

⁴⁸ Reynolds Direct Testimony, p. 27.

1 ~~therein.⁴⁹ He further states that "MCImetro did not unreasonably discriminate against~~
2 ~~QCC with respect to the rates it charged QCC for switched access in Florida. .⁵⁰~~

3 **Q. ~~DO YOU CONCUR WITH MR. REYNOLDS CLAIM THAT NO REMEDIES~~**
4 **~~ARE CALLED FOR IN THIS CASE?~~**

5 **A. ~~No. The basis for Mr. Reynolds' claim is that there was no rate discrimination because~~**
6 **~~MCImetro charged QCC the switched access rate contained in its Florida price list.~~**
7 **~~The concept of rate discrimination does not turn on rate levels, however, but on rate~~**
8 **~~differences that cannot be explained by cost differences. According to Mr. Reynolds'~~**
9 **~~logic, MCI could charge AT&T 1/2 cent per minute for switched access, charge QCC~~**
10 **~~\$10 per minute for switched access and yet still claim that it was not engaged in~~**
11 **~~unreasonable discrimination as long as the \$10 per minute rate is contained in the~~**
12 **~~Florida price list. This is a fallacious argument and should be accorded no weight by~~**
13 **~~the Commission.~~**

14 **IV. CONCLUSION**

15 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

16 **A. Yes.**

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⁴⁹ Reynolds Direct Testimony, p- 43.
⁵⁰ Id.

1 BY MR. SHERR:

2 Q Okay. Have you prepared a summary of your
3 testimony?

4 A Yes.

5 Q Would you please provide that summary?

6 A For many years the respondent CLEC subjected
7 QCC to unjust and unreasonable rate discrimination in
8 connection with the provision of intrastate switched
9 access services. These CLECs entered into off-price
10 list agreements with select interexchange carriers and
11 have failed to make those same rates, terms, and
12 conditions available to QCC as otherwise required by
13 statute, and in many cases the terms of the CLEC's own
14 price list.

15 At the heart of the issue is the fact CLECs
16 contracted to provide certain IXCs a critical monopoly
17 service at lower, often far lower rates than their
18 competitors paid. As IXC customers of tandem routed
19 CLEC switched access, AT&T and QCC are under like
20 circumstances. The same facilities are used to reach
21 the same end user customers. The relative size of any
22 given company is not relevant when it comes to switched
23 access since each call is separate and distinct and
24 carried in identical fashion.

25 The CLECs in this case have raised a couple of

1 explanations for offering special deals to the preferred
2 carriers. One common argument advanced by the CLECs is
3 duress. They argue that AT&T forced the CLECs into
4 discriminatory behavior by refusing to pay any switched
5 access charges, thereby forcing the CLECs to offer
6 discounted rates in order to obtain some switched access
7 revenues from those nonpaying IXCs. This argument
8 places the blame for the CLECs' action upon the IXC
9 customer, QCC, for not engaging in the same type of
10 self-help. This argument is not particularly persuasive
11 as a matter of public policy and in no way excuses the
12 CLECs' discriminatory behavior.

13 The respondent CLECs had the ability to bring
14 such behavior to the attention of the Commission. In
15 fact, other CLECs did so in Minnesota and Iowa and were
16 successful. Certainly settling their differences with
17 AT&T by giving AT&T and only AT&T substantial and secret
18 discounts is not appropriate and should not be adoned
19 [sic] by -- should not be condoned by the Commission as
20 a reasonable justification for the CLECs' rate
21 discrimination.

22 Some CLECs have also argued that the
23 agreements in question are, in fact, settlements of
24 disputes. However, the crux of those disputes appear to
25 be that AT&T did not want to pay the high CLEC switched

1 access rates and, rather than challenge the rates in a
2 regulatory proceeding, chose the self-help mechanism of
3 withholding payment.

4 Instead of bringing AT&T's nonpayment to the
5 attention of state commissions or pursuing other legal
6 avenues, CLECs opted to enter into agreements through
7 which they settled past disputes and perspectivevely set a
8 heavily discounted rate for interstate switched access.
9 In most cases, the discounted rates were not apparently
10 tied to term or volume commitments.

11 Based on my analysis of the individual
12 agreements, the discounted rates were also not related
13 to any concessions made by the favored IXCs. In my
14 experience, switched access settlements are generally
15 related to disputes regarding improper jurisdiction,
16 improper billing, failure to follow rules. They do not
17 typically relate solely to an IXC challenging the LEC's
18 published rate.

19 The CLECs' defense also focuses on
20 differences, relevant or not, between QCC and AT&T to
21 try and escape responsibility for their conduct. To
22 date, no reasonable explanation has been given as to how
23 and why QCC is not, in the context of intrastate
24 switched access, under like circumstances to AT&T. In
25 fact, the CLECs' true motivation had nothing to do with

1 the size or serving characteristics of AT&T or other
2 language in the agreement. Instead, the CLECs desired
3 to quickly resolve billing disputes with the nonpaying
4 IXCs. As a matter of public policy, QCC's willingness
5 to pay its bills should not be held against QCC by
6 permitting this factual distinction to justify the
7 CLECs' rate discrimination.

8 QCC is seeking two forms of relief in this
9 docket. Retrospectively, QCC believes it is entitled to
10 refunds of amounts it overpaid the respondent CLECs
11 relative to the amounts it would have paid had the CLECs
12 extended the same discounts to QCC as they did to AT&T.
13 This is precisely the relief QCC sought and was awarded
14 in the parallel Colorado proceeding. Prospectively, QCC
15 believes it should be awarded the same discounted rates
16 still in effect for the IXCs benefiting from the CLEC
17 agreements.

18 The joint CLECs have argued that a more
19 appropriate remedy would be to require the favored IXCs
20 to pay the higher price list rates, but such a remedy
21 would serve only to reward the CLECs for their
22 discriminatory behavior. QCC respectfully requests that
23 this Commission order relief, the relief that QCC is
24 seeking. Thank you.

25 **MR. SHERR:** Thank you, Mr. Easton.

1 Mr. Chairman, the witness is available for
2 cross-examination.

3 **CHAIRMAN BRISÉ:** Okay. Thank you.

4 Bullseye.

5 **MR. FEIL:** I'll volunteer to go first, if
6 that's okay with you, Mr. Chairman.

7 **CHAIRMAN BRISÉ:** Okay. That's fine with me.

8 **MR. FEIL:** Thank you.

9 **CROSS EXAMINATION**

10 **BY MR. FEIL:**

11 **Q** Good morning, Mr. Easton.

12 **A** Good morning.

13 **Q** You state in several places in your testimony
14 that CLECs have a duty to disclose and offer contract
15 rates to all other IXCs; that's correct?

16 **A** Yes.

17 **Q** And your testimony also states that Qwest's
18 position is that it's not the fact that CLECs signed
19 agreements for contract rates or that they didn't file
20 contract rates with the PSC, but what Qwest takes
21 offense to was the CLECs' conduct afterwards; is that
22 correct?

23 **A** That's correct.

24 **Q** And specifically by the conduct afterwards,
25 you mean that the CLECs are supposed to disclose an

1 offer of the contract rates to other IXC's in Florida;
2 correct?

3 A Yes. The CLECs did not make those same rates
4 available to QCC.

5 Q Okay. In your opinion, when are the CLECs
6 supposed to disclose an offer of contract rates in terms
7 of timing? I want to make sure I understand.

8 A Once those rates have been offered to AT&T,
9 those rates should also be offered to QCC.

10 Q So immediately, is that your testimony?

11 A To the extent -- yes, to the extent they are
12 not made available at that same time, QCC is
13 disadvantaged.

14 Q Okay. How are the CLECs supposed to disclose
15 an offer of the contract rate to every IXC? Is it
16 supposed to write a letter, issue a notice? What is it
17 supposed to do?

18 A There are different ways they could go about
19 it. Certainly letters to the IXC's making those rates
20 available would be one option. Another option would be
21 to file those rates with this Commission.

22 Q So would the CLEC under your testimony then
23 have to have a price list or doesn't have to have a
24 price list as long as it writes a letter?

25 A The IXC's such as QCC need to be made aware of

1 the rates that are available. Whether that's done by a
2 letter, by a filing with the Commission, that's not so
3 important as the fact that the IXCs are aware.

4 Q All right. So if I send a letter but I don't
5 change the price list, then am I complying with the
6 obligation that you've asserted in your complaint to
7 charge only a price list rate?

8 MR. SHERR: Objection. This question and many
9 of them before are asking Mr. Easton for a legal
10 conclusion.

11 MR. FEIL: Mr. Chairman, his testimony says
12 that we didn't follow our obligations, and I'm asking
13 him what our obligations are.

14 CHAIRMAN BRISÉ: I'll allow the question.

15 THE WITNESS: Could you repeat the question,
16 please?

17 BY MR. FEIL:

18 Q If I remember the question. I asked you if
19 the CLEC chose to take your alternative of sending the
20 IXCs a letter rather than changing the price list, would
21 the CLEC be violating the argument you have in your
22 complaint that you have to charge, a CLEC has to charge
23 what's in its price list?

24 A Let's be clear about my testimony. At no
25 point in my testimony do I require -- do I state that

1 CLECs are required to charge the price list rate. We
2 just had a discussion that I acknowledged CLECs are free
3 to negotiate rates with different IXCs to the extent
4 they make those rates available.

5 Q So you're saying then that the count in your
6 complaint that states that CLECs are supposed to charge
7 the standard offer rate in their price list is not a
8 valid count, is that what your testimony is, Mr. Easton?

9 A I'll leave it up to the lawyers what my
10 testimony is. As I just stated, is that I believe CLECs
11 are free to depart from their price list rates to the
12 extent they make those rates available to other
13 carriers.

14 Q Okay. So if a CLEC has one contract and that
15 has a contract rate in it rather than a price list rate
16 and there's a subsequent contract that has a higher
17 rate, what is the CLEC supposed to do in that situation,
18 Mr. Easton?

19 A Please, please repeat the hypothetical.

20 Q If a CLEC has a contract rate and then has a
21 subsequent contract rate that is higher than the first,
22 what is a CLEC supposed to do in that environment?

23 A Is the lower rate still in effect?

24 Q If the -- in your, in the hypothetical, yes,
25 the lower rate is still in effect.

1 **A** I would argue that if that lower rate is still
2 in effect, that lower rate needs to be made available to
3 other IXCs. And let's be clear, we're talking
4 specifically with regard to switched access rates.

5 **Q** Yes, sir.

6 **A** Okay.

7 **Q** So you only have to disclose an offer of lower
8 rate, not a higher rate; is that your testimony?

9 **A** I believe you should probably disclose both
10 rates.

11 **Q** Okay. Well, let's say you have a contract
12 where one rate, origination, is higher and the other
13 rate, termination, is lower. What is, what is the CLEC
14 supposed to do in that environment?

15 **A** I believe that the CLEC should be offering
16 both the origination rate that's in effect and the
17 termination rate that's in effect to other IXCs.

18 **Q** So both the higher rate and the lower rate are
19 supposed to be disclosed and offered?

20 **A** Well, again, we're talking about, if I
21 understand your question, two different elements of
22 switched access.

23 **Q** Correct.

24 **A** Correct. And I believe that the rates for
25 each element of switched access should made, be made

1 available to other IXCs.

2 Q Whether it's higher or lower; is that what
3 your testimony is?

4 A Whether it's higher or lower. Again, the rate
5 for origination is the rate for origination.

6 Q And it's your testimony, Mr. Easton, that
7 CLECs should have known to follow this disclose and
8 offer routine and immediately follow that routine after
9 it signed any contract; is that correct?

10 A My position is that there are
11 antidiscrimination statutes in Florida, and it is the
12 obligation of the CLECs to make sure they comply with
13 those statutes.

14 Q And in a situation like with the tw/AT&T
15 agreement, was tw supposed to disclose and offer all
16 terms and conditions of the agreement or just the
17 switched access rate?

18 A We're talking here specifically in the context
19 of switched access. So I believe that those switched
20 access rates should have been made available to QCC.

21 Q So is your testimony then that all the other
22 terms and conditions did not have to be disclosed and
23 offered?

24 A I believe to the extent those other terms are
25 relevant, they should have been disclosed.

1 Q To the extent those other terms are relevant.
2 How would they be relevant or irrelevant in your
3 opinion?

4 A It depends. Mr. Wood has argued that each and
5 every term in these contracts is relevant and QCC has to
6 be willing to opt into each and every one of those
7 terms. I don't believe that is true. And, in fact,
8 from an economic standpoint, Dr. Weisman will explain in
9 detail why that doesn't make sense from an economic
10 standpoint.

11 Q So in the context of the tw/AT&T agreement
12 specifically are you saying that the other rates, terms,
13 and conditions of the agreement are not relevant?

14 A I would argue they are not relevant when it
15 comes to determining whether discrimination has
16 occurred.

17 Q All right.

18 A To the extent those terms are not cost-based,
19 they're not relevant.

20 Q So we would not have to offer and disclose
21 those other terms; is that your testimony?

22 A That would be my testimony.

23 Q Okay. Mr. Easton, you agree with Dr. Weisman,
24 don't you, that the cost basis is the only economical --
25 excuse me, economically justifiable reason for contract

1 rate pricing; is that correct?

2 A I do.

3 Q And you agree that CLECs have the right to
4 contract for switched access rates. I believe you said
5 that.

6 A I do.

7 Q And IXCs have the right to seek out such
8 contract rates from CLECs; correct?

9 A They do.

10 Q So if I'm a CLEC and I sign a switched access
11 contract rate in Florida and I think it's economically
12 justified, what do I do? Do I file something with the
13 Commission?

14 A I believe we've been over this line of
15 questioning. That rate in some form needs to be made
16 available to other IXCs.

17 Q Well, let's say I choose not to make it
18 available to everybody. Do I file something with the
19 Commission?

20 A I'm afraid I don't understand the question.
21 You choose not to make the rate available?

22 Q I do not disclose and offer the rate to all
23 other carriers because I think I have an economic
24 justification. Do I file something at the Commission,
25 and, if so, what do I file at the Commission?

1 **A** Okay. In this case, I would believe you would
2 think you would be in compliance with antidiscrimination
3 statutes. You would not need to file anything. To the
4 extent another party disagreed with you, that other
5 party is certainly free to bring that issue before this
6 Commission, just as we've done here today.

7 **Q** So if I believe I'm in compliance -- well,
8 scratch that.

9 And the requirements we've just been talking
10 about, disclose an offer requirement, filing something
11 with the Commission, that's what you're saying CLECs
12 should have done, are supposed to do in all
13 circumstances; correct?

14 **A** What I'm saying again, just to be clear, is
15 that they need to make that rate available to other
16 IXCs.

17 **Q** Okay. For the 2002, 2008 period of time, do
18 you agree with me that CLECs had no obligation to either
19 file or publish switched access rates in Florida?

20 **A** I would agree.

21 **Q** All right. The -- and it's your
22 understanding, is it not, that tw only had one agreement
23 with AT&T; correct?

24 **A** I believe that's correct. Yes.

25 **Q** Does that one agreement in your mind

1 constitute a practice?

2 **A** I'm afraid I don't, don't understand what you
3 mean by "practice."

4 **Q** Mr. Sherr mentioned in his opening that CLECs
5 had a practice of signing these agreements. Does one
6 agreement between tw and AT&T constitute a practice?

7 **A** Well, certainly from the evidence I've looked
8 at in this case and from the agreements I've put in my
9 testimony as a part of this case, that was a practice of
10 the CLECs in the state of Florida.

11 **Q** Was it a practice of tw is what I'm asking
12 you, Mr. Easton?

13 **A** Well, clearly tw has an agreement with AT&T,
14 or had an agreement with AT&T.

15 **Q** And there was just one; correct?

16 **A** There was just the one agreement that I have
17 in my testimony.

18 **Q** You have responded to, or Qwest has responded
19 to discovery regarding the, what's called the CPLA
20 mechanism or program, and that was a program whereby
21 Qwest received reduced access or waivers of CLEC access
22 charges in wholesale contract environments; is that
23 correct?

24 **A** Yes. CPLA is a rather unique situation.

25 **Q** I didn't ask you to -- I just asked you

1 whether or not that was what was in your testimony and
2 that was what the program was. But I have another line
3 of questions for you unrelated to that.

4 Did Qwest tell the CLECs with whom it had CPLA
5 contracts that if the contract rate with Qwest was not
6 supported by cost, that the CLEC was at risk for
7 discrimination claims?

8 **A** To help answer your question, I think it would
9 be appropriate for me to be allowed to explain what the
10 CPLA program is and then we can come back to your
11 question.

12 **Q** My only question is whether or not you told
13 carriers with whom you had CPLA agreements that they
14 were at risk for discrimination claims. That's my
15 question. That's all I want to know.

16 **A** I don't believe that carriers who had CPLA
17 agreements with Qwest were at risk of discrimination
18 claims.

19 **Q** You don't believe they were at risk. But did
20 you tell them that they were at risk?

21 **A** I don't know whether they were told they were
22 at risk. Again, I don't believe they were at risk. And
23 I can explain why, if you'd like.

24 **Q** No. I've, I've seen your explanation already.
25 It's in the record. I don't need any more information

1 on that.

2 **MR. SHERR:** Mr. Chairman, it's my
3 understanding of Florida practice that the witness is
4 allowed to explain his response. And Mr. Feil is
5 repeatedly trying to cut the witness off from offering
6 an explanation to his question, and I think he should be
7 allowed to explain.

8 **MR. FEIL:** Mr. Chairman, if I may. His
9 explanation has nothing to do with my question.

10 **CHAIRMAN BRISÉ:** Thank you, Mr. Feil.

11 Our practice is that if there's a question
12 that can be answered by yes or no or a direct statement,
13 that that is the preference. If there's a question that
14 requires a subsequent explanation, then we generally
15 allow that. Okay? And from the question that I heard I
16 think the question was pretty direct with respect to
17 what -- the response that was given. And you also have
18 the opportunity on redirect.

19 **MR. SHERR:** Thank you, Mr. Chair.

20 **BY MR. FEIL:**

21 **Q** Did the CLECs with whom you had CPLA
22 arrangements, did you, did Qwest ask for cost
23 information from those CLECs?

24 **A** There was no need to ask for cost information
25 for the CLECs because, as I stated before, this is not a

1 case of discrimination. These were very different types
2 of agreements than the off-price list agreements the
3 CLECs entered into with AT&T. These agreements were
4 neutral agreements. Neither party was disadvantaged,
5 unlike the case of the off-price list agreements at
6 issue here.

7 Q You said that they were neutral. Do you have
8 any document or data proof that they were neutral, that
9 they had no impact in downstream markets?

10 A Yes, I do.

11 Q All right. Well, we'll, we'll address that as
12 we get to that point.

13 A And, in fact, in my testimony I have language
14 from the CPLA.

15 Q Right. You quote them. I, I have seen that.

16 A And --

17 **CHAIRMAN BRISÉ:** Mr. Feil, please allow
18 Mr. Easton to finish.

19 **MR. FEIL:** I'm sorry, Mr. Chairman.

20 **THE WITNESS:** And perhaps we can look at that
21 language to help support my answer to your question
22 about whether in fact they were neutral.

23 **BY MR. FEIL:**

24 Q What page and line are you referring to,
25 Mr. Easton?

1 **A** I'm trying to find it here.

2 **Q** Okay.

3 **MR. SHERR:** Mr. Easton -- Mr. Chairman, I just
4 want to remind the witness to be mindful of what is
5 confidential and what is not confidential.

6 **THE WITNESS:** Good point.

7 **CHAIRMAN BRISÉ:** Thank you.

8 **THE WITNESS:** In light of that, let me just
9 point to the language here. It's on page 19 of my
10 rebuttal testimony and it's lines 7 through 14. And it
11 is the language that describes what each party is giving
12 and -- is receiving and is giving up. Based on my
13 analysis of those agreements, it leaves each party as it
14 was before and does not disadvantage any other carriers.

15 **BY MR. FEIL:**

16 **Q** Well, the question I asked you, Mr. Easton,
17 and I appreciate your reference, was whether or not you
18 had any data supporting your allegation that these were
19 neutral. The only thing you're pointing to me right now
20 is the language.

21 **A** And what that language explains is that one
22 party is giving up something to which they're entitled,
23 and in compensation for that they are receiving an
24 offset. So those two zero each other out, and at the
25 end of the day it's neutral.

1 Q You referred me to page 19, lines 7 through
2 14; is that correct?

3 A Yes.

4 Q Look at the word on line 10, "regardless."
5 And I'll repeat to you my prior question: Do you have
6 any data showing that this was in fact neutral to the
7 CLEC?

8 A I have no quantitative data. The basis for my
9 statement is that was in fact the intent and I believe
10 the result of the CPLA agreements.

11 Q The CPLA agreements we're talking about were
12 secret; correct?

13 A They were not filed with the Commission to the
14 best of my knowledge. I don't believe they were secret.
15 In fact, letters were sent out by QCC to carriers who
16 could take advantage of this CPLA.

17 Q Were these actual contracts signed by the
18 CLECs secret or not secret?

19 A It depends on what you mean by "secret."

20 Q You use the term "secret" in your testimony.
21 I'm meaning it in the same sense you used it in your
22 testimony.

23 A No. I don't believe they were secret. As I
24 stated a moment ago, QCC sent out letters to all
25 carriers who purchased unbundled switching from Qwest

1 that would allow them to enter into these agreements.
2 I -- that certainly doesn't meet my definition of
3 secret.

4 Q If I wrote you a letter and asked you for a
5 copy of one of these contracts with a CLEC, would I be
6 able to get it?

7 A No. If you asked me -- if you wrote me a
8 letter and said I am a purchaser of UNE-P and I would
9 like to enter into a CPLA agreement during this
10 relative -- relevant time frame, we certainly would have
11 allowed you to do that.

12 Q You referred to UNE-P, Mr. Easton. Isn't it
13 true that you never followed up with the carriers who
14 signed these agreements to determine whether or not they
15 were exclusively UNE-P in all states?

16 A That I don't know. It was our understanding
17 that these are UNE-P carriers. That was, again, the
18 intent of the agreement.

19 Q That was the intent. But the follow-up may
20 not have taken place; isn't that true?

21 A I can't speak to the follow-up that, that our
22 sales teams did or did not perform.

23 Q Okay. When we were talking earlier, you, you
24 agreed with me that both CLECs and IXCs have a right to
25 negotiate contract rates in Florida.

1 **A** I agree.

2 **Q** Okay. And tw's price list specifically allows
3 tw to negotiate contract rates; correct?

4 **A** I believe it does.

5 **Q** Okay.

6 **A** And, and further that it requires that to the
7 extent it does, make those available to other carriers
8 in like circumstances.

9 **Q** Well, isn't it correct, Mr. Easton, that Qwest
10 had no interest in negotiating its own switched access
11 contract rate with tw because what it really wanted was
12 the AT&T contract rate?

13 **A** Well, again, let's be clear. QCC was not
14 aware of the agreement between tw and AT&T until we got
15 in the midst of these complaint proceedings.

16 **Q** At any point in time did Qwest initiate a
17 contact with tw to negotiate its own switched access
18 rate?

19 **A** QCC could only assume that the price list
20 rates in Florida were the rates that tw was offering.
21 Keep in mind that there's 700 CLECs that QCC is dealing
22 with. What you're proposing makes it the responsibility
23 of QCC to constantly police those 700 CLECs to determine
24 what agreements they've entered into.

25 **Q** Even after you had the AT&T/tw agreement, did

1 Qwest ask for its own switched access rate with tw?

2 A That I don't know.

3 Q The only rate you were interested in was the
4 AT&T contract rate; correct?

5 A To the extent that tw had granted that rate to
6 AT&T, they needed to make that rate available to QCC
7 under the antidiscrimination statutes in Florida and
8 also under the language in its own agreement -- or its
9 own price list. Excuse me.

10 Q Mr. Easton, you don't know then if Qwest
11 expressed an interest in negotiating its own rate with
12 tw, whether or not you would have gotten it or not,
13 because you never attempted to negotiate; isn't that
14 true?

15 A Perhaps that might be a more appropriate
16 question for Ms. Hensley Eckert, who talks in her
17 testimony about what QCC did when it found out about
18 these off-price list agreements.

19 Q Well, let me ask the question this way,
20 Mr. Easton. Isn't it true that Qwest has no interest
21 whatsoever in accepting the tw/AT&T agreement in whole?
22 The only thing you have an interest in is the switched
23 access rate from that agreement.

24 A We are interested in that switched access
25 rate. Correct.

1 **Q** So Qwest, so Qwest has no interest in making a
2 multimillion dollar revenue commitment to tw; isn't that
3 correct?

4 **A** That is correct. As we spoke earlier, I don't
5 believe those commitments are relevant when it comes to
6 determining whether discrimination has occurred.

7 **Q** And, Mr. Easton, isn't it also correct that
8 you have no idea whether or not that switched access
9 rate in the AT&T agreement would have even existed but
10 for the multimillion dollar revenue commitment in the
11 contract?

12 **A** Again, from the question of determining
13 whether discrimination has occurred, that revenue
14 commitment is not relevant.

15 **Q** So the answer is no, you don't know.

16 **A** Let's repeat the question, please.

17 **Q** The question is whether or not you know if
18 that switched access rate from the tw/AT&T agreement
19 would have even existed but for the multimillion dollar
20 revenue commitment.

21 **A** I believe it would have existed.

22 **Q** You believe it would have. And what do you
23 base that belief on?

24 **A** Because I don't believe that the revenue
25 commitment is a relevant issue here.

1 Q All right. Mr. Easton, we'll move on. There
2 were some CLECs in Florida who had contract rates with
3 other IXC's that Qwest did not involve at all in this
4 proceeding; isn't that correct?

5 A That I don't know.

6 Q You don't know?

7 A No.

8 Q Okay.

9 A I do know that there were obviously, you know,
10 18 other parties at one time in this docket.

11 Q So were you involved at all in the analysis of
12 whether or not there was discrimination by CLECs after
13 Qwest received subpoena responses with the contracts?

14 A No. I was not involved in that analysis.

15 Q You didn't make any decisions relative to
16 whether or not there was discrimination or not?

17 A No, I did not.

18 Q Okay. On page 40, line 14, of your direct,
19 you referred to this earlier, where you refer to tw's
20 price list and the offering of a contract rate in the
21 price list.

22 **MR. SHERR:** I'm sorry, Counselor. Can you
23 give the reference again?

24 **MR. FEIL:** Page 40, line 14, I believe, of his
25 direct.

1 **MR. SHERR:** Of direct testimony?

2 **THE WITNESS:** Yes.

3 **BY MR. FEIL:**

4 **Q** When did Qwest discover this language in tw's
5 price list?

6 **A** That I don't know.

7 **Q** But it's in your testimony?

8 **A** It is in my testimony. I analyzed the
9 contracts as I was preparing for this case. I saw the
10 language in the contract. In fact, it's contained in my
11 exhibit here.

12 **Q** So you don't know whether or not it was
13 discovered before or after the complaint was filed.

14 **A** That I can't tell you.

15 **Q** Could I refer you to -- well, your
16 understanding of the contract rate between tw and AT&T
17 was that the rate ended in 2008; isn't that correct?

18 **A** That's correct.

19 **MR. FEIL:** Okay. Nothing further. Thank you,
20 Mr. Chairman.

21 **CHAIRMAN BRISÉ:** Thank you.

22 Bullseye?

23 **MR. KLEIN:** Thank you, Mr. Chairman.

24 **CROSS EXAMINATION**

25 **BY MR. KLEIN:**

1 Q Good morning, Mr. Easton.

2 A Good morning.

3 Q Mr. Easton, on page 2 of your direct testimony
4 you state that the CLECs failed to make certain rates,
5 terms, and conditions available to QCC as otherwise
6 required by statute, but you don't provide a statutory
7 cite there; is that accurate?

8 A I do not.

9 Q You said in your testimony you'll identify the
10 intrastate switched access price lists used by each
11 respondent CLECs to charge QCC. My question is whether
12 QCC was charged by each CLEC in accordance with its
13 price list.

14 A I believe they were.

15 Q Did QCC have agreements with certain CLECs
16 under which QCC was not charged price list rates?

17 A With regard to switched access?

18 Q Yes.

19 A I don't believe so.

20 Q There was discussion with Mr. Feil, counsel
21 for tw telecom, a moment ago regarding CPLA agreements.

22 A Right.

23 Q Aren't CPLA agreements agreements under which
24 Qwest was not being charged for switched access by
25 certain CLECs?

1 **A** Correct. The way I interpreted your question
2 was Qwest was not charging its price list rates. Here
3 we're talking about another party.

4 **Q** So under those CPLA agreements Qwest was not
5 being charged switched access by certain CLECs.

6 **A** Correct. In exchange for those certain CLECs
7 receiving lower wholesale long distance rates.

8 **Q** Okay. And did those CLECs who did not charge
9 access, intrastate access in Florida to Qwest, have
10 price lists with this Commission?

11 **A** That I don't know. As I stated in my
12 testimony, they're not required to file such price lists
13 with the Commission.

14 **Q** Has Qwest determined in this proceeding that
15 those CPLA agreements should be marked confidential?

16 **A** I believe so.

17 **Q** Will Qwest consent to making those agreements
18 public? Do you feel those agreements should be made
19 public?

20 **MR. SHERR:** Mr. Chairman, this question seems
21 inappropriate for the witness. The answer to that
22 question is no. I mean, he's asking, he's asking the
23 witness to essentially give a legal opinion or bind the
24 company to a legal position. That doesn't seem like a
25 question for cross-examination.

1 **CHAIRMAN BRISÉ:** Okay. If you could move on.

2 **MR. KLEIN:** Okay. Thank you. I'll rephrase.

3 **BY MR. KLEIN:**

4 **Q** Mr. Easton, you testified earlier today that
5 you thought that Qwest had publicized those agreements,
6 the CPLA agreements to certain CLECs. Is that accurate?

7 **A** They made those available to the UNE-P CLECs,
8 yes.

9 **Q** So in your opinion was it appropriate to make
10 those available to those CLECs?

11 **A** Yes.

12 **Q** Why is it therefore not appropriate to make
13 those agreements public to other carriers?

14 **A** I don't know what all is contained in those
15 agreements. I do know that counsel has deemed that
16 those should be confidential.

17 **Q** On page 4 of your direct testimony you state
18 that QCC is a CLEC but does not currently charge
19 switched access to other IXCs. Is that accurate?

20 **A** That is accurate. We in fact do not offer
21 switched access in the state of Florida.

22 **Q** But Qwest does act as a local exchange carrier
23 in Florida.

24 **A** We are certified as a local exchange carrier
25 in Florida. Correct.

1 Q Does QCC charge Qwest Corporation switched
2 access?

3 **MR. SHERR:** Objection.

4 **THE WITNESS:** QCC, again, does not offer
5 switched access.

6 **BY MR. KLEIN:**

7 Q You also state on that same page 4 that QCC is
8 a primary provider of wholesale services for long haul
9 traffic; is that accurate?

10 A That is accurate.

11 Q Do those wholesale terms vary with the access
12 rates?

13 A As we discussed earlier, in the case of CPLA
14 that is true. It was an offset for the UNE-P CLECs'
15 inability to bill for the switched access to which they
16 were entitled. They received compensation for that
17 inability through lower wholesale long distance rates.

18 Q And in exchange QCC was not charged intrastate
19 switched access by certain CLECs.

20 A Correct, due to the inability of those CLECs
21 to charge that.

22 Q Okay. And which CLECs were unable to charge
23 switched access?

24 A Well, there are eight CLECs in the state of
25 Florida. I believe that was made available to you.

1 Q Are some of those CLECs named in the complaint
2 that Qwest filed in this proceeding?

3 A That I don't know. I do know of the
4 remaining, for example, Bullseye and tw, they were not
5 CPLA.

6 Q Hasn't Qwest in fact alleged that certain of
7 those CLECs who had CPLA agreements charged Qwest for
8 switched access in Florida?

9 A I believe that is the case, that in fact some
10 carriers, despite the claim that they were unable to
11 charge for switched access, did in fact charge QCC for
12 switched access.

13 Q Did there come a point in time where Qwest
14 realized that it was incorrect in asserting that certain
15 of those CPLA CLECs had actually charged Qwest for
16 intrastate switched access?

17 A Could you repeat that, please?

18 Q Was there a point in time where Qwest realized
19 that its contention that certain of those CLECs with
20 CPLA agreements had charged Qwest was actually
21 incorrect?

22 A Well, I guess I'd rephrase it. It became
23 clear that some of those CLECs who said they were unable
24 to charge for switched access and would waive their
25 charges for switched access in fact did not waive the

1 charges.

2 Q Was that the case with all or some of those
3 carriers?

4 A I believe it was just some.

5 Q And did Qwest modify its claims with regard to
6 those CLECs?

7 A That I don't know.

8 Q You state in your testimony that, that access
9 charges directly drive the cost of providing long
10 distance services, but you don't know the precise
11 percentage. Is that correct?

12 A Again, it's a major input to the provision of
13 long distance service.

14 Q Now you were director of --

15 A And I, I do cite a percentage there on page 5
16 of my testimony. This is rather dated, but at one time
17 the FCC stated that switched access comprised 40% of an
18 IXC's cost of providing long distance service.

19 Q And that figure is 20 years old; correct?

20 A That is, as I mentioned, it is out of date.
21 But, again, that, I think we would all agree that that
22 is certainly one of the major inputs to long distance
23 service.

24 Q What is the -- what is that percentage today?

25 A I have no idea what it is today.

1 Q You are a Director of Wholesale Finance, or at
2 least were a Director of Wholesale Finance. You don't
3 know that percentage?

4 A I do not know that percentage. At the time I
5 was Director of Wholesale Finance we had not been
6 granted 271 relief and were not providing long distance
7 service.

8 Q Haven't there been huge changes in the
9 industry in the last 20 years?

10 A There certainly have. I guess I would just
11 argue that if it wasn't still a significant input to
12 long distance service, AT&T wouldn't have been
13 withholding payment, we wouldn't be sitting here today.
14 It remains a significant issue.

15 Q Mr. Easton, you state on page 5 that QCC's
16 routing of access traffic is similar to other IXCs.
17 What's the basis for that assertion?

18 A Again, I'm talking specifically about tandem
19 routing. I mean, switched access is switched access.
20 There's only so many ways you can do it. You can use
21 common transport, you can use dedicated transport. I
22 mention all of those things in my testimony. It's
23 pretty much a commodity, if you will.

24 Q Well, let me ask you specifically with regard
25 to line 17 of page 5 of your direct testimony. You were

1 asked, does QCC route switched access in the same manner
2 as other IXCs? Answer, yes, QCC's routing is similar to
3 other IXCs. My question is what's the basis for your
4 assertion in that regard?

5 **A** If I want to route a call to a Bullseye end
6 user customer, I'm going to route that call just as any
7 other IXC is going to route it. Either I'm going to
8 tandem route it and go to a switch, a tandem switch that
9 is subtended by a Bullseye switch, or I, to the extent I
10 have enough traffic, I would use direct trunk transport.

11 Actually let me back up. I believe Bullseye
12 does not have its own switch. Instead, it's a UNE-P
13 provider -- or purchaser from probably BellSouth. So in
14 fact I would route it just as other IXCs would, going
15 either to BellSouth's tandem or maybe, to the extent
16 there was enough volume of traffic, to a direct trunk to
17 a particular BellSouth end office. I mean, those are
18 the only options that are available to IXCs.

19 **Q** Well, respectfully, Mr. Easton, I don't think
20 you've answered the question. The question is what's
21 the basis for your assertion that other IXCs route
22 traffic the same way that Qwest does or that Qwest
23 routes it the same way that they do?

24 **A** I think I just gave you the explanation.

25 **Q** Have you ever worked for AT&T?

1 A Yes, I have. If, if --

2 Q Okay. When, when was that?

3 A I became employed by the Bell system in 1980.

4 But let's go back to your question.

5 Q Well, let me ask you, that was Pacific,

6 Pacific Northwest Bell?

7 A That's correct.

8 Q And that subsequently became US West?

9 A That subsequently became US West.

10 Q And then Qwest and now CenturyLink.

11 A Correct.

12 Q Okay. In the last ten years have you worked

13 for AT&T?

14 A I have not.

15 Q Okay. Do you know how AT&T routes its calls?

16 A If I could please go on with my example, I

17 think I can explain that.

18 Q Well, I'm asking you a question, please.

19 A Yes, I do.

20 Q Okay. How do you know that?

21 A If you look through my testimony, it talks
22 about there's only so many different ways that the calls
23 can be routed. It can either be routed over common
24 transport, dedicated transport, or to the extent there's
25 significant enough volume to a particular customer you

1 could have a private line to that customer.

2 Q And you're saying those are the only ways that
3 any call can be routed?

4 A That's correct.

5 Q Okay. What about alternate routers? Can't
6 carriers use alternate routing?

7 A Certainly carriers can use alternate routers.

8 Q Can carriers use VoIP carriers?

9 A Well, let's come back to the alternate
10 routers.

11 Q Well, let me ask you, can carriers use VoIP
12 carriers to carry their traffic?

13 A They could certainly use VoIP carriers.

14 Q Do you know which, which particular calls AT&T
15 routes to each of those alternate methods?

16 A No, I don't.

17 Q Okay. You say in your testimony that
18 depending on the volume of calls, traffic may be routed
19 in one way versus another. Is that accurate?

20 A That is accurate.

21 Q Okay. And when you talk about call volume,
22 what specifically are you referring to? Is that just
23 the volume of, of calls?

24 A I'm referring specifically to the minutes of
25 use related to those volumes of calls.

1 Q And you indicate --

2 A To the extent, to the extent you have a
3 significant enough number of minutes of use, it makes
4 more sense to pay a flat rate for a dedicated facility
5 rather than pay on a per minute basis.

6 Q And I believe you testify, correct me if I'm
7 wrong, that if the volume of calls is high enough, calls
8 can be routed to an end office to help lower the overall
9 access expense.

10 A That's correct.

11 Q Okay. And if there's also sufficient traffic,
12 an IXC can build a direct connection or buy a direct
13 connection to an end user.

14 A Correct, using special access or private line.

15 Q Okay. And those methods, that latter method
16 will avoid switched access charges altogether, won't it?

17 A That it will.

18 Q Okay. In that, in that sense it sometimes
19 becomes more economical to do that.

20 A If there's truly significant enough volume
21 going to one particular end user, that would be a, a
22 viable option.

23 Q Okay. And I think you specifically state on
24 page 9 that special access is designed to bypass all of
25 the switching elements, local and tandem, and is

1 purchased when there are very high volumes of traffic to
2 or from a single end user location.

3 A Correct. It is not a switched service.

4 Q Now you indicate also on page 9 of your
5 testimony your opinion that switched access is a
6 monopoly; is that correct?

7 A That's correct.

8 Q Do all providers of interLATA services pay
9 access?

10 A Could you repeat the question, please?

11 Q Do all providers of interLATA traffic pay
12 access charges?

13 A To the extent they use switched access, yes,
14 they would.

15 Q Okay. But to the extent they don't use
16 switched access the answer would be no?

17 A Well, they wouldn't pay for a service that
18 they didn't use, I would assume.

19 Q So there are certain carriers providing
20 interLATA services that do not pay switched access?

21 A Well, again, if they went through the local
22 carrier switch to reach that end user customer, yes,
23 they would be charged for switched access.

24 Q Okay. But that wasn't my question.

25 A Maybe I didn't understand what the question

1 was.

2 Q Okay. The question is are there not certain
3 carriers providing interLATA carriage that are not
4 paying switched access charges?

5 A If they are, in fact, using switched access
6 services, I would assume that they're being charged for
7 switched access.

8 Q Okay. Let me ask you if you've ever heard of
9 Voice over Internet Protocol.

10 A I have.

11 Q Okay. Does Qwest use Voice over Internet
12 Protocol, or VoIP for short, in its network?

13 A I believe we do.

14 Q Okay. When, when VoIP traffic is terminated,
15 does Qwest pay access charges?

16 A There is still an issue in the industry --
17 well, I guess actually it's not an issue at this point,
18 given that the Connect America order came out, and in
19 fact switched access charges are assessed now on VoIP
20 traffic.

21 Q And effective as of when?

22 A Whatever the effective date of that order is.

23 Q Okay.

24 A Late 2011, I believe.

25 Q And prior to that order was Qwest, was Qwest

1 paying switched access for termination of VoIP traffic?

2 **A** I believe we were in some cases.

3 **Q** But not in others?

4 **A** Again, it was not clear in the industry. It's
5 been a subject of some debate whether switched access
6 was charged for VoIP traffic. That has now been made
7 clear in the Connect America order.

8 **Q** Okay. And that's been within the last year or
9 so?

10 **A** Correct.

11 **Q** Okay. So during the time period covered by
12 Qwest's claims in this case there was a question as to
13 whether access charges apply to VoIP traffic
14 termination; correct?

15 **A** Different parties had different views of that
16 issue. Correct.

17 **Q** Was there any traffic that was originated by
18 Qwest during the time period covered by its claims that
19 was originated as tandem traffic and then terminated as
20 VoIP traffic?

21 **A** That I don't know.

22 **Q** Mr. Easton, you indicate in your testimony
23 that, that AT&T's size could have a bearing on the
24 manner in which AT&T's traffic is being routed and
25 terminated; correct?

1 **A** To the extent that they had sufficient enough
2 traffic to a particular end office, they may purchase
3 direct trunk transport rather than using common
4 transport. To the extent they had sufficient traffic to
5 a specific end user, they could have purchased private
6 line and avoid switched access. So the size would be
7 relevant in that sense. To the extent they had neither
8 of those and used common transport, I would argue that
9 the size was not relevant.

10 **Q** So to the extent AT&T had a significant volume
11 of traffic, AT&T could avoid switched access charges.

12 **A** To the extent they had significant enough
13 volume to a particular end user, they could have
14 purchased special access and avoided switched access.
15 Yes, I would agree with that.

16 **Q** Let me, let me ask you again with regard to
17 your contention that switched access is a monopoly. Are
18 there instances in which Qwest terminated traffic to the
19 respondents in this case that was not sent directly by
20 Qwest to those carriers?

21 **A** I believe you're referring to the use of
22 underlying carriers. And Qwest does, like everybody
23 else in the industry, use underlying carriers. With an
24 underlying carrier, that would be a case where we would
25 hand it off for another carrier, who would in turn

1 deliver it to Bullseye, for example. In no way is
2 switched access avoided in that scenario. In fact, I
3 would assume Bullseye would charge switched access, but
4 the party they would charge it to is the party that
5 dropped it off to them, the underlying carrier.

6 Q Do you know for a fact as you sit here today
7 that each of those underlying carriers used by Qwest
8 paid switched access to Bullseye?

9 A That was certainly the intent of our agreement
10 with those underlying carriers. In fact, in our
11 contracts they are required to follow the letter of the
12 law, they're required to use Feature Group D to
13 terminate the traffic. That is -- was our intent and
14 that's our assumption that they're following the terms
15 of the contract.

16 Q So as a matter of fact you do not know that?

17 A I do not know that in each case. But, again,
18 that's the intention of QCC when it enters into those
19 contracts with underlying carriers. To the extent we
20 find out they're not following those procedures, we'll
21 take them off, off the network.

22 Q Okay. And have you taken any of those, such
23 carriers off that network?

24 A Carriers have been removed from the network,
25 yes.

1 Q Okay. When was the most recent instance of
2 that occurring?

3 A I'm not familiar with all the specific
4 occurrences.

5 Q When was just the most recent?

6 A I know of cases in the last year, for example.

7 Q Okay. And why were those carriers removed?

8 A There were issues about whether they were
9 following the terms of the contract and appropriately
10 delivering the traffic to the terminated carrier.

11 Q Were some of those carriers engaging in access
12 avoidance schemes?

13 A That I can't tell you for sure.

14 Q Okay. Who would know that?

15 A Folks who actually deal with our underlying
16 carrier contracts and the carriers themselves.

17 Q Okay. But in what way is it your
18 understanding that those carriers did not comply with,
19 with your expectations, with Qwest's expectations?

20 A That, most likely that they did not deliver
21 the traffic over Feature Group D as required in the
22 contract.

23 Q Did Qwest pay more or less to those underlying
24 carriers than it would have paid by directly routing the
25 traffic to Bullseye?

1 **A** I don't know the answer to that. If we
2 directly send the traffic to Bullseye as we discussed
3 earlier, we're going to be paying switched access. When
4 we contract with an underlying carrier, we're paying for
5 what I would refer to as a termination service. It's
6 not --

7 **Q** Do any of those other underlying carriers have
8 off-price contracts with any of the carriers that were
9 involved in this proceeding?

10 **A** I don't know that.

11 **Q** Is that something you've researched?

12 **A** I have not researched it.

13 **Q** Do you know if in some instances Qwest did pay
14 less to terminate calls to Bullseye than it would have
15 paid by directly routing those calls to Bullseye?

16 **A** That's possible, and that's possible for a
17 couple of reasons. An underlying carrier may have
18 sufficient enough volumes of traffic, unlike Qwest, that
19 they would be able to purchase direct trunk transport to
20 an end office; whereas, QCC may not have sufficient
21 enough volumes to do that. It also has to do with the
22 location of the underlying carrier's point of presence.
23 They may be, their point of presence may be closer to
24 the particular end office or tandem switch than QCC's
25 would be, and so in fact they would pay less in switched

1 access than QCC would.

2 Q Let me turn to your understanding of the
3 requirements of Florida regulation. You state on page
4 10 that the CLECs are only required to provide price
5 lists for basic services in Florida; correct?

6 A Correct.

7 Q And that CLECs are not required to file
8 tariffs or price lists for switched access services in
9 Florida.

10 A That's my understanding.

11 Q It's also your understanding set forth in your
12 testimony that CLECs are permitted to use individual
13 contracts to deviate from their switched access price
14 list; is that correct?

15 A That's correct.

16 Q And you, you had the discussion with Mr. Feil
17 earlier with regard to how you felt those contract-based
18 agreements should be publicized, do you recall that?

19 A I do.

20 Q Is it your understanding that the agreements
21 between Qwest and CLECs that provide for off-price list
22 contract rates have been publicized?

23 A Excuse me. Could you repeat the question?

24 Q Is it your understanding that the contracts
25 that Qwest has entered into that provide for off-price

1 list switched access have been publicized by Qwest?

2 **A** I don't believe that we've entered into
3 agreements that provide for off-price list switched
4 access. Again, QCC does not offer switched access in
5 the state of Florida.

6 **Q** Let me ask you with regard to page 14 of your
7 testimony, I think you indicate that you, you have
8 experience with regard to switched access settlements.

9 **A** Yes.

10 **Q** Okay. And switched access settlements can
11 involve items such as improper jurisdiction, improper
12 billing, or failure to follow specific rules; is that
13 correct?

14 **A** That's correct.

15 **Q** And when there is a settlement of a switched
16 access dispute that Qwest initiates, does Qwest
17 generally pay more or less than the amount that it
18 disputed to begin with?

19 **A** Repeat the question. I guess I'm not --

20 **Q** To the extent Qwest has engaged in disputes of
21 switched access charges, does Qwest often times end up
22 paying less than the initial amount billed by the, by
23 the LEC, the local exchange carrier?

24 **A** Sometimes to the extent, the extent that
25 dispute is upheld.

1 Q Let me ask you, is it your testimony that AT&T
2 engaged in self-help with regard to the CLEC contracts
3 at issue in this case, or at least with regard to
4 Bullseye's?

5 A I believe that's true.

6 Q And that self-help included the withholding of
7 payment from the CLECs?

8 A That appears to be the case.

9 Q Again, you talk about the CLEC motivations in
10 entering those agreements. How do you know those CLEC
11 motivations?

12 A We're getting into an area of confidential
13 information. Let me just say generally I had access to
14 e-mails that indicated at least one particular carrier
15 wanted to enter into this agreement so they could ensure
16 some level of collectibles going forward.

17 Q Were you involved, Mr. Easton, in the suit
18 between Qwest Communications Company and AT&T regarding
19 the switched access agreements?

20 A This was the civil suit in Minnesota you're
21 referring to?

22 Q Yes.

23 A I was not involved in that, no.

24 Q At what point did you first become aware of
25 that lawsuit?

1 **A** I became involved in this case, I believe,
2 sometime in around 2009. So sometime several years
3 after that suit was brought.

4 **Q** Mr. Easton, is it your understanding that
5 tariffs and publicly filed price lists put customers on
6 notice as to what terms that carrier is offering service
7 under?

8 **A** I would agree with that.

9 **Q** Okay. Did there come a time when Bullseye
10 Telecom filed a price list with the Florida Public
11 Service Commission?

12 **A** Excuse me? Please repeat that.

13 **Q** Did there come a time when Bullseye Telecom
14 filed a price list with the Florida Public Service
15 Commission?

16 **A** Yes, I believe I, I noted in my testimony that
17 the price list I have as an exhibit was filed with the
18 Florida commission.

19 **Q** Okay. When did you first examine the terms of
20 that price list?

21 **A** Probably sometime within the last year.

22 **Q** So sometime between 2011 and 2012?

23 **A** Correct.

24 **Q** And was this lawsuit, this proceeding already
25 underway prior to that time?

1 **A** It was. I believe this complaint was filed at
2 the end of 2009 in Florida.

3 **Q** Okay. And do you know when Bullseye was added
4 as a party?

5 **A** That I don't know.

6 **Q** Okay. Have you at any time reviewed Section
7 5.1 of the Bullseye price list which relates to
8 individual-based contracts?

9 **A** I believe I have, yes.

10 **Q** Okay. And does that section of the Bullseye
11 price list indicate that Bullseye may enter into
12 individual contracts for switched services and provides
13 that such contracts will be made available to other
14 customers who are similarly situated?

15 **A** Yes.

16 **Q** So it's fair to say Qwest was on notice as to
17 the terms of, of that price list.

18 **A** It was --

19 **Q** Okay.

20 **A** -- in fact on notice as to the terms of that
21 price list. What it was not on notice to was the fact
22 that in fact Bullseye had entered into an off-price list
23 agreement with another carrier offering more favorable
24 terms than QCC was receiving.

25 **Q** In 2004, did Qwest ask Bullseye whether it had

1 any off-price list agreements?

2 A I don't believe we did. As I stated earlier,
3 you know, that puts the burden on QCC to monitor the
4 price list and agreements of, of over 700 CLECs in this
5 country.

6 Q In 2005, did QCC ask Bullseye whether it had
7 any off-price list contracts?

8 A I know we sent out a letter after the
9 off-price list issue became known in Minnesota. I don't
10 recall when that letter was sent out.

11 Q Now those agreements to which you just
12 referenced in Minnesota --

13 A Excuse, excuse me.

14 Q -- became aware in 2005; correct?

15 A It was in 2008, February of 2008 we sent out a
16 letter to the different CLECs.

17 Q Okay.

18 A Asking if they had --

19 Q Okay.

20 A -- a price list or off-tariff agreements.

21 Q In 2008?

22 A Correct.

23 Q Okay. And in April of 2005 Qwest became aware
24 of the Minnesota proceeding dealing with these access
25 agreements, did it not?

1 **A** Yeah. I think when we get into the area of
2 specific timelines related to when we found out about
3 these, that really falls in the area of Ms. Hensley
4 Eckert's testimony and she'd probably be the appropriate
5 party.

6 **Q** Okay. But you would take it that in 2005
7 Qwest became aware of the Minnesota proceeding and these
8 contracts.

9 **A** We did become aware of -- in the proceeding of
10 the existence of the contract. I don't believe we had
11 the particulars at that time.

12 **Q** Okay. And in 2005 did Qwest ask Bullseye for
13 an off-price list contract for Florida switched access?

14 **A** Again, I think this is probably an appropriate
15 question for Ms. Hensley Eckert. I don't know that in
16 2005 we knew that Bullseye had an off-tariff or
17 off-price list agreement.

18 **Q** But do you know whether Qwest asked for an
19 agreement in 2005?

20 **A** I don't know. Again, that's probably a
21 question more appropriate for Ms. Hensley Eckert.

22 **Q** And, similarly, you don't know if one was
23 requested in 2006 or 2007, I imagine.

24 **A** Correct.

25 **Q** In 2002, Qwest was aware that off-price list

1 contracts existed for switched access; correct?

2 A I don't know that.

3 Q Well, didn't Qwest in fact have those
4 agreements as early as 2002?

5 A I don't believe so.

6 Q Okay. Let me ask you to turn to what's been
7 marked and entered as Exhibit 84. It's a confidential
8 page.

9 A Is that in my testimony?

10 Q It is not. I will provide you with a copy, if
11 that's my responsibility.

12 A Okay.

13 **MS. MASTERTON:** I mean, I think -- isn't it?
14 You're the one asking the questions; right?

15 **BY MR. KLEIN:**

16 Q With regard to Exhibit 84, which Qwest
17 contends is confidential, does that exhibit indicate the
18 date on which Qwest had first entered into an agreement
19 under which Qwest was not being charged intrastate,
20 intrastate switched access in Florida?

21 A It appears that the first one --

22 **MR. SHERR:** Mr. Chairman, I'm sorry. Again I
23 want to remind the witness that information may be
24 confidential. I apologize for that.

25 **THE WITNESS:** Thank you very much. It does,

1 this exhibit does show the dates when CPLA began by
2 carrier.

3 **BY MR. KLEIN:**

4 Q Okay. And without setting forth that date,
5 was that date more or less than ten years ago today?

6 **THE WITNESS:** It would be --

7 **MR. SHERR:** Mr. Chairman, same -- he's asking
8 for confidential information.

9 **MR. KLEIN:** I'm not sure why that would be
10 confidential.

11 **MR. SHERR:** Well, the document states a date.
12 I don't know why it needs to be repeated.

13 **MR. KLEIN:** Well, I'm asking just for a
14 general time frame. I don't think that that would be
15 confidential, particularly in light of the witness's own
16 testimony.

17 **CHAIRMAN BRISÉ:** Let me help you out here. If
18 you could simply identify, say the column and how many
19 down, and then you all can agree on, on that, that would
20 help out. Thank you.

21 **BY MR. KLEIN:**

22 Q Okay.

23 A All right. It would be the third column over.
24 The title of the column is Wholesale Product Begin Date.
25 The earliest one is five rows down.

1 Q Okay. And is that date prior to the date of
2 the Minnesota proceeding to which you referenced
3 earlier?

4 A That's correct. Again, when I was answering
5 that question, I was assuming you were talking about QCC
6 entering into off-price list agreements. And, again,
7 QCC does not offer switched access in Florida.

8 Q Okay. Now I was asking about Qwest as a
9 purchaser of switched access.

10 A That's correct.

11 Q That is what's at issue here.

12 A Yes.

13 Q But it's fair to say that prior to the time of
14 the Minnesota proceeding Qwest was aware that there
15 existed in Florida off-price list contracts for switched
16 access services.

17 A I believe that would be true, yes.

18 Q And, in fact, Qwest had itself several of
19 those agreements prior to that time.

20 A Agreed.

21 Q Okay. On page 29 of your testimony,
22 Mr. Easton -- I'm sorry. That was testimony that was
23 stricken.

24 Let me ask you generally, was it your opinion
25 that AT&T got better rates for switched access

1 termination -- or origination, rather, than did Qwest in
2 Florida?

3 A I don't think there's any question. That is
4 in fact what this case is all about.

5 Q Well, if AT&T paid some rate and Qwest paid
6 zero, which party would be getting the better rate?
7 Wouldn't it be Qwest?

8 A In your hypothetical that would be true.

9 Q Okay.

10 A Now to the extent you're talking about CPLA, I
11 would argue that in fact AT&T made out much better than
12 Qwest. As we discussed earlier, the intent of CPLA was
13 not to advantage either party, either QCC or the CPLA
14 purchaser. And that to me --

15 Q So you're saying agreements can't be taken in
16 isolation, that the entire terms of agreements need to
17 be considered?

18 A No. That's, that's not what I'm saying. I'm
19 saying in the case of the rates AT&T received, they
20 received lower rates. That's it. They were advantaged
21 by those lower rates.

22 In the case of CPLA that we've been talking
23 about, yes, QCC received lower rates, but in exchange
24 they granted those CPLA carriers lower long distance,
25 wholesale long distance rates. The two offset each

1 other. Neither party was advantaged or disadvantaged,
2 unlike the case of the AT&T agreement.

3 Q Isn't it true that Qwest asserted in this
4 proceeding that Qwest was charged price list rates by
5 certain CLECs, when in fact Qwest was not charged any
6 rate by those same CLECs under the CPLA agreements?

7 A Under the CPLA agreements those carriers did
8 not charge Qwest switched access. In return, Qwest
9 granted those carriers lower wholesale long distance
10 rates.

11 Q Let me ask you to turn to your rebuttal
12 testimony, please. On pages 1 and 2 of your rebuttal
13 you indicate that -- you refer to credible justification
14 for differential pricing; is that correct?

15 A Do you have a specific line cite?

16 Q Let me find that for you. The top of page 2.

17 A Yes, I see that.

18 Q And I believe you rely on Dr. Weisman's theory
19 that rate differences cannot be explained by differences
20 in the cost of providing the services?

21 A Yes.

22 Q And there's a presumption that there's
23 discriminatory pricing?

24 A Correct.

25 Q But there's no Florida rule that requires

1 cost-based pricing for switched access; correct?

2 A That is correct.

3 Q Are you aware of any rule or statute in
4 Florida that specifically requires a CLEC to provide a
5 justification for its access rates in response to a
6 carrier claim?

7 A No.

8 Q Have you analyzed the underlying cost
9 structure of Bullseye's switched access service?

10 A I don't have access to the cost information
11 that would be necessary for such an analysis.

12 Q And I believe you've testified earlier you're
13 aware that Bullseye's price list on file with this
14 Commission permits price differences based on reasons
15 other than cost?

16 A Excuse me. Repeat the question.

17 Q You're aware that Bullseye's price list on
18 file with this Commission allows for rate differences
19 based on reasons other than cost.

20 A It clearly allows, as we discussed earlier, to
21 negotiate off-price list agreements. And, further, it
22 requires that it make those agreements available to
23 other similarly situated or carriers in like
24 circumstances.

25 Q With regard to those CLECs with whom Qwest has

1 a CPLA under which Qwest is not charged switched access,
2 does the, do those CLEC costs vary as between the cost
3 to provide the service to Qwest and the cost to provide
4 it to another IXC?

5 A Again, I don't know what those CPLA CLECs'
6 costs are and I don't know what, what other carriers'
7 costs would be. Actually in the case of the CPLA
8 carriers, to the extent they're purchasing switching
9 from Qwest --

10 Q We're not talking about purchasing. We're
11 talking about providing, in terms of providing switched
12 access.

13 A In terms of providing switched access. But in
14 fact the switched access is being provided by the
15 carrier selling the unbundled network element. In this
16 case though that would be BellSouth. Again, I wouldn't
17 know what BellSouth's underlying costs are. I wouldn't
18 know what other carriers' underlying cost of providing
19 switched access was.

20 Q So you do not know what BellSouth or now
21 AT&T's price is for unbundled switching to any
22 particular carrier that's leasing that switching today?

23 A The price, I could go out and find it in
24 their, you know, interconnection agreements. But their,
25 but their costs I don't know.

1 Q But you're aware that UNE-P is no longer, but
2 you're aware that UNE-P is no longer a required service
3 as, as a UNE element.

4 A That's correct, although unbundled switching
5 is still made available through commercial agreements.

6 Q Which are themselves confidential; correct?

7 A Certainly in some cases they are.

8 Q Would you agree with Dr. Weisman that economic
9 regulation is now the exception rather than the rule?

10 A You know, I think that's probably a question
11 to explore with Dr. Weisman. I'm not an economist.

12 Q You don't have an opinion on that?

13 A No.

14 Q Okay. On page 2 of that same rebuttal
15 testimony you refer to Qwest seeking a refund of the
16 amounts it overpaid, and you state then that QCC is not
17 seeking civil damages; correct?

18 A Correct.

19 Q Okay. What are civil damages as used in that
20 sentence?

21 A Again, we're getting into a legal term. But
22 it's, it's my understanding when you're talking about
23 damages, you're talking about pricing out that harm, can
24 be lost market share. Again, we have not priced out any
25 of those types of damages in this case.

1 Q For lost market share.

2 A For lost market share.

3 Q Okay. And, and no other downstream impacts;
4 correct?

5 A Correct.

6 Q Okay. So what are civil damages as you use
7 that here? Are there any other civil damages as you use
8 that term here that you're, that you're not seeking?

9 A Again, we're not seeking any damages at all
10 here.

11 Q Okay.

12 A We're seeking refunds.

13 Q Okay. And are refunds a monetary remedy?

14 A Yes.

15 Q And can a monetary remedy also be a civil
16 damage remedy as you use that word in your testimony?

17 A I'm assuming it could be a part of that.
18 Again, I'm not a lawyer.

19 Q I believe that you testified earlier that QCC
20 was charged the rate in Bullseye's price list; is that
21 correct.

22 A Yes.

23 Q So QCC was not charged more than the rate set
24 forth in Bullseye's price list?

25 A That's correct.

1 Q But Qwest's contention is that it was
2 overcharged in, by Bullseye; is that correct?

3 A Yes. It was, was overcharged relative to what
4 AT&T was charged.

5 Q Okay. Isn't that the flip side of saying that
6 AT&T was undercharged?

7 A From QCC's perspective, no.

8 Q Okay. But AT&T was the only IXC that QCC
9 alleges to have been charged something other than the
10 price list rate.

11 A Again, QCC was disadvantaged because they were
12 charged a higher rate.

13 Q That's not what I was asking. Please listen
14 to my question.

15 A All right.

16 Q We'll get through this more quickly.

17 A Please repeat your question.

18 Q Okay. Isn't it true that Qwest's contention
19 is that AT&T was the only IXC charged below the price
20 list rate set forth by Bullseye in its price list?

21 A With regard to Bullseye, yes.

22 Q And there are dozens of IXCs operating in
23 Florida; correct?

24 A Correct.

25 **MR. KLEIN:** Mr. Chairman, would it be

1 convenient to take just a five-minute break to get a
2 drink of water? I do have more for this witness. I
3 don't want to interrupt the schedule at all. I was just
4 wondering if it might be a convenient time for a --

5 **CHAIRMAN BRISÉ:** We typically go to about
6 noon. We take a break at around 11:30 to give our court
7 reporter an opportunity to rest a little bit. We were
8 trying to forge through 'til noon.

9 **MR. KLEIN:** Okay.

10 **CHAIRMAN BRISÉ:** So if you'll indulge us.

11 **MR. KLEIN:** Certainly. If I may just have a
12 moment.

13 **CHAIRMAN BRISÉ:** Okay.

14 (Pause.)

15 **BY MR. KLEIN:**

16 **Q** Mr. Easton, on page 3 of your rebuttal
17 testimony, line 17, you testify that other IXCs got
18 preferential treatment. Is that accurate?

19 **A** That's accurate.

20 **Q** Because they were charged something other than
21 the price list rate.

22 **A** They were charged a rate lower than the price
23 list rate.

24 **Q** Okay. And in what ways is Qwest's nonpayment
25 of access charges not also improperly preferential?

1 **A** I guess I don't understand the question. For
2 Qwest nonpayment of access charges?

3 **Q** Well, to the extent Qwest paid other CLECs
4 below the price list rate, wouldn't that similarly be a
5 preferential rate in violation of Florida rules?

6 **A** Again, we don't offer switched access in the
7 state of Florida.

8 **Q** In terms of purchasing switched access.
9 Perhaps I was not clear.

10 **A** And I'm assuming you're again referring to
11 CPLA agreements that we talked about earlier?

12 **Q** Yes.

13 **A** Again, I don't believe that is a case of
14 discrimination. In fact, no other carriers were
15 disadvantaged as a result of that.

16 **Q** So Qwest can get a below price list rate. But
17 when other IXCs get a below price list rate, that's
18 improperly preferential.

19 **A** If, in fact, it results in discrimination, as
20 I believe it does here, yes, that's the case. You and I
21 have had the discussion a number of times this morning,
22 in the case of CPLA, that was not the intent and that
23 was not the result. Other carriers were not
24 disadvantaged as a result of those CPLA agreements.

25 **Q** Now on page 16 of that same testimony you

1 refer to penalizing QCC for paying its bills while
2 rewarding carriers that do not. I believe that
3 Mr. Sherr made reference to that same assertion. Do you
4 recall that testimony?

5 A I do.

6 Q Hasn't Qwest previously taken the position
7 that AT&T should not be allowed to profit from the
8 action it took in withholding those access charge
9 payments to CLECs?

10 A I believe you're referring to the civil,
11 Minnesota civil suit?

12 Q Yes. Was that not Qwest's position in that
13 case?

14 A Yes, I believe it was.

15 Q So wouldn't it make sense for Qwest to be
16 contending here that AT&T should be brought up to the
17 price list rate to remedy that misbehavior?

18 A I don't think, and as I stated in my
19 testimony, that that would be the appropriate remedy
20 here. What would happen if you did that is that you
21 would be rewarding the CLECs who engaged in the
22 discriminatory behavior because they would be receiving
23 additional monies from AT&T. I don't think from a
24 public policy standpoint that that, that is appropriate.

25 Q So, Mr. Easton, do you disagree with Qwest's

1 contention that the, that AT&T coerced the nascent CLECs
2 into providing those off-tariff rates?

3 **A** I believe there was a certain amount of
4 coercion involved. It's clear to me from looking at
5 this that AT&T withheld payment from CLECs. The real
6 issue is, to me is what the CLECs did in response to
7 that coercion. And as I stated in my testimony, they
8 could have brought complaints to this Commission.

9 **Q** Mr. Easton, did you bring a complaint to this
10 Commission in 2005 when Qwest first became aware of
11 those agreements?

12 **A** We have brought a complaint before this
13 Commission. That's why we're here today.

14 **Q** Four and a half years after you found out
15 about those agreements.

16 **A** I think that would be an appropriate line of
17 questioning for Ms. Hensley Eckert. That is what her
18 testimony addresses.

19 **Q** Did Qwest pursue relief against AT&T?

20 **A** You and I discussed earlier that in fact we
21 filed a civil suit against AT&T.

22 **Q** And how did that work out for Qwest? Did
23 Qwest receive any money?

24 **A** The civil suit was bounced out, said that that
25 was not the appropriate venue.

1 Q Because there were 35 other jurisdictions in
2 which Qwest needed to pursue its relief; is that
3 correct?

4 A That's correct.

5 Q Okay. And did Qwest pursue that relief in 35
6 other jurisdictions?

7 A We have pursued that relief in a number of
8 other jurisdictions, including Florida.

9 Q Well, my question is whether Qwest pursued the
10 relief against AT&T in 35 other jurisdictions --

11 A No, we didn't.

12 Q -- after Minnesota said it was not the
13 appropriate forum for all of those.

14 A No.

15 Q But it's your contention that the much smaller
16 CLECs should have done that against AT&T.

17 A I believe that they certainly had the ability
18 to do that, as I have stated in my testimony and as I
19 mentioned in my opening remarks. In fact, CLECs did
20 take similar issues before the Minnesota Commission and
21 the Iowa Commission, and they were successful in
22 addressing AT&T's self-help remedies.

23 Q So in one state the CLECs were successful, as
24 you just pointed out.

25 A Well, I --

1 **Q** Were they successful in 35 states?

2 **A** I don't know that they brought those. And,
3 again, I said Minnesota and Iowa, so we're talking two
4 states. I don't know if those suits were brought in
5 other states. No.

6 **Q** Which company do you suppose has more
7 financial and legal resources, AT&T or Bullseye Telecom?

8 **A** I would suggest that AT&T has more resources.

9 **MR. KLEIN:** If I may have a moment.

10 **CHAIRMAN BRISÉ:** Sure.

11 (Pause.)

12 **MR. KLEIN:** Okay. Thank you, Mr. Easton. No
13 further questions at this time.

14 Thank you, Mr. Chairman.

15 **CHAIRMAN BRISÉ:** Thank you.

16 Staff?

17 **MS. TAN:** Staff has no questions.

18 **CHAIRMAN BRISÉ:** All right. Thank you.

19 Commissioners? Okay. No questions.

20 Redirect.

21 **MR. SHERR:** Can I have just another minute?

22 **CHAIRMAN BRISÉ:** Sure.

23 (Pause.)

24 **MR. SHERR:** Thank you for your patience. I'm
25 going to need just one more moment, please.

1 (Pause.)

2 **REDIRECT EXAMINATION**

3 **BY MR. SHERR:**

4 **Q** Mr. Easton, I just have a couple of redirect
5 questions. Mr. Klein was asking you about the use of
6 underlying carriers. Do you recall that?

7 **A** I do.

8 **Q** Are -- is any of the traffic that Qwest would
9 have delivered or had terminated via underlying carriers
10 at issue in this case?

11 **A** No. No, it is not. Mr. Canfield's analysis
12 is based on switched access billing to QCC. As I stated
13 in my response to underlying carriers, it's the
14 underlying carrier who's charged for switched access by
15 the CLEC, and so those minutes would not be in
16 Mr. Canfield's analysis.

17 **Q** Okay. What, what is in Mr. Canfield's
18 analysis then?

19 **A** His analysis is based on the actual CLEC
20 billing to QCC for switched access.

21 **Q** Mr. Klein also asked you whether you analyzed
22 Bullseye's cost structure. Do you recall that?

23 **A** I do.

24 **Q** And I believe you answered that we didn't have
25 that information; is that correct?

1 **A** I'm, I'm sorry?

2 **Q** I think we -- I think your response was that
3 you don't have that information; is that correct?

4 **A** I have no access to Bullseye's cost structure.

5 **Q** Do you know whether QCC asked for cost
6 analyses in this case?

7 **A** In the course of discovery QCC did ask each of
8 the parties for cost analysis. It's my understanding
9 that nothing was provided.

10 **Q** Okay. And that includes Bullseye?

11 **A** Correct.

12 **MR. SHERR:** That's all I have. Thank you.

13 **CHAIRMAN BRISÉ:** All right. Thank you. At
14 this time we will deal with exhibits.

15 **MR. SHERR:** I appreciate the reminder. Qwest
16 would request the entry into the record of Mr. Easton's
17 prefiled exhibits, which have been marked on the
18 Comprehensive Exhibit List as hearing exhibits 37 and 39
19 through 57.

20 **CHAIRMAN BRISÉ:** Okay. 37, 39 through 57?

21 **MR. SHERR:** Yes. Yes. Thank you.

22 **CHAIRMAN BRISÉ:** Okay. Seeing no objections,
23 we will move in Exhibits 37, 39 through 57.

24 **MR. SHERR:** Thank you. Mr. Chairman.

25 (Exhibits 37 and 39 through 57 admitted into

1 the record.)

2 **CHAIRMAN BRISÉ:** We're not quite done with you
3 yet, Mr. Easton.

4 All right. Were we seeking to move in any
5 other exhibits, Qwest, at this time?

6 **MR. SHERR:** Not with regard to Mr. Easton.
7 Thank you.

8 **CHAIRMAN BRISÉ:** Okay. Bullseye?

9 **MR. KLEIN:** Bullseye would move in
10 Exhibits 83 and 84 that I believe were moved in by
11 stipulation.

12 **MR. SHERR:** I don't believe copies of those
13 have yet been provided, so --

14 **MR. KLEIN:** Subject to completion of the, of
15 the exhibit attachments, which I would suggest at this
16 time we just mark as a separate exhibit.

17 **CHAIRMAN BRISÉ:** Okay. So we will move in 83.
18 And we will move in 84, understanding that it is
19 specifically to page 3, and we will deal with the other
20 attachments as, as a separate exhibit.

21 **MR. KLEIN:** Thank you, Mr. Chairman.

22 **MR. SHERR:** And, Mr. Chairman, those will
23 however -- those will be admitted into the record;
24 correct?

25 **CHAIRMAN BRISÉ:** Yes.

1 **MR. SHERR:** Okay. Thank you.

2 **CHAIRMAN BRISÉ:** 83 and 84 will be moved into
3 the record at this time.

4 (Exhibits 83 and 84 admitted into the record.)

5 I think we have two other exhibits, 85 and 86.

6 **MR. KLEIN:** Yes. I would also move in 85.

7 **CHAIRMAN BRISÉ:** Which was the interrogatory
8 18, 21, and 22. Okay. So we will move into the record
9 85 and 86 as well, seeing no objections.

10 **MR. SHERR:** Our intention was to move Exhibit
11 86 into the record after Dr. Weisman testifies, the last
12 of the Qwest witnesses, if that's convenient.

13 **CHAIRMAN BRISÉ:** Okay. We can accommodate
14 that.

15 **MR. SHERR:** Okay. Thank you.

16 (Exhibit 85 admitted into the record.)

17 **CHAIRMAN BRISÉ:** Okay. So we have moved into
18 the record 37, 39 through 57, 83, 84 and 85.

19 Is there anything else for Mr. Easton? Okay.
20 Seeing nothing else --

21 **MS. TAN:** Chairman, I just wanted to make sure
22 that 83 will be late-filed because we're still waiting
23 for that from the parties?

24 **CHAIRMAN BRISÉ:** No. That's going to be --
25 the other attachments are going to be a separate

1 exhibit.

2 **MS. TAN:** Including his confidential then?

3 **MR. SHERR:** Well, if I -- sorry.

4 **CHAIRMAN BRISÉ:** The confidential page 3 is
5 Exhibit 84.

6 **MS. TAN:** But it's my understanding there were
7 additional confidential attachments that were also to be
8 submitted.

9 **CHAIRMAN BRISÉ:** Right. And those will be a
10 separate exhibit.

11 **MR. SHERR:** Just for clarification though, 83,
12 there are also additional public attachments to our,
13 those discovery responses. So there was a, just to be
14 clear, there was a short response, which is the document
15 I believe you have in the red folder here which has been
16 provided, but then there was a, there were a number of
17 confidential exhibits. Those are what we've been
18 talking about that need to be provided. And then there
19 was also a number of public documents. All of that
20 comprises Qwest's response to these discovery responses.
21 So there may be two more exhibits is another way to put
22 it.

23 **CHAIRMAN BRISÉ:** Okay. Understood.

24 **MR. SHERR:** Thank you.

25 **CHAIRMAN BRISÉ:** Thank you. All right.

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MR. SHERR: Thank you, Mr. Easton.

CHAIRMAN BRISÉ: Okay. At this time we will excuse Mr. Easton.

MR. SHERR: Thank you.

CHAIRMAN BRISÉ: All right. It is noon. We will break for lunch. We'll see you back here at 1:00 p.m.

(Recess taken.)

(Transcript continues in sequence in Volume 2.)

1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)

4 I, LINDA BOLES, RPR, CRR, Official Commission
5 Reporter, do hereby certify that the foregoing
6 proceeding was heard at the time and place herein
7 stated.

8 IT IS FURTHER CERTIFIED that I
9 stenographically reported the said proceedings; that the
10 same has been transcribed under my direct supervision;
11 and that this transcript constitutes a true
12 transcription of my notes of said proceedings.

13 I FURTHER CERTIFY that I am not a relative,
14 employee, attorney or counsel of any of the parties, nor
15 am I a relative or employee of any of the parties'
16 attorneys or counsel connected with the action, nor am I
17 financially interested in the action.

18 DATED THIS 30th day of October, 2012.

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