Eric Fryson

From: Cooper, Roberta G <Roberta.G.Cooper@centurylink.com>
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To: Filings@psc.state.fl.us
Cc: Masterton, Susan S; Sherr, Adam
Subject: 090538 QCC Motion for Reconsideration/Request for Oral Argument
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Filed on Behalf of: Susan S. Masterton
Senior Corporate Counsel
CenturyLink
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301
Telephone: 850/599-1560
Email: susan.masterton@centurylink.com

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Roberta Cooper
Legal Assistant III- Susan Masterton and Kevin Zarling
Voice: 850-599-1563| Fax: 850-224-0794
Email: Roberta.G.Cooper@centurylink.com
315 S. Calhoun Street, Suite 500 |Tallahassee, FL 32301
Mailstop: D7592L0501-507

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May 16, 2013

VIA ELECTRONIC FILING
Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: **Docket No. 090538-TP - Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against TW TELECOM OF FLORIDA, L.P., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INC., FLATEL, INC., NAVIGATOR TELECOMMUNICATIONS, LLC, AND JOHN DOES 1 THROUGH 50, for unlawful discrimination**

Dear Ms. Cole:

Attached please find Qwest Communications Company, LLC, d/b/a CenturyLink QCC's Motion for Reconsideration and Request for Oral Argument, which we ask that you file in the above captioned docket.

Copies are being served upon the parties in this docket pursuant to the attached certificate of service.

Sincerely,

/s/ Susan S. Masterton
Susan S. Masterton

Enclosures

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SUSAN S. MASTERTON
Senior Corporate Counsel
315 S. Calhoun St., Suite 500
Tallahassee, FL 32031
Tel: (850) 599-1560
Fax: (850) 224-0794
susan.masterton@centurylink.com

CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP

I hereby certify that a true and correct copy of the foregoing has been served upon the following by electronic mail delivery and/or U.S. Mail this 16th day of May, 2013.

Florida Public Service Commission Theresa Tan Office of General Counsel 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 ltan@psc.state.fl.us	Division of Regulatory Analysis Jessica Miller Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399 JEMiller@psc.state.fl.us
Ernest Communications, Inc. 5275 Triangle Parkway, Suite 150 Norcross, GA 30092-6511 lhaag@ernestgroup.com	Flatel, Inc. c/o Adriana Solar Executive Center, Suite 100 2300 Palm Beach Lakes Blvd. West Palm Beach, FL 33409-3307 asolar@flatel.net
BullsEye Telecom, Inc. David Bailey 25925 Telegraph Road, Suite 210 Southfield, MI 48033-2527 dbailey@bullseyetelecom.com	Gunster, Yoakley & Stewart, P.A. Beth Keating 215 South Monroe Street, Suite 601 Tallahassee, FL 32301 bkeating@gunster.com
Navigator Telecommunications, LLC David Stotelmyer 8525 Riverwood Park Drive North Little Rock, AR 72113	Klein Law Group Andrew M. Klein/Allen C. Zoracki 1250 Connecticut Ave. NW, Suite 200 Washington, DC 20036 AKlein@kleinlawPLLC.com azoracki@kleinlawpllc.com
	TW Telecom of Florida L.P. Carolyn Ridley 2078 Quail Run Drive Bowling Green, KY 42104 Carolyn.Ridley@twtelecom.com

/s/ Susan S. Masterton
Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); tw telecom of florida, l.p.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; and John Does 1 through 50, for unlawful discrimination.	DOCKET NO. 090538-TP FILED: May 16, 2013

QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC's MOTION FOR RECONSIDERATION

In accordance with Rule 25-22.060, Florida Administrative Code, Qwest Communications Company, LLC d/b/a CenturyLink QCC ("QCC") submits its Motion for Reconsideration of Order No. PSC-13-0185-FOF-TP issued on May 1, 2013 ("Final Order").

I. Introduction

This case began in December 2009 when QCC filed its Complaint against multiple CLECs alleging that they had entered into agreements to charge QCC competitors significantly lower switched access rates than they charged QCC, in violation of Florida law and their filed price lists. QCC named several CLECs, including tw telecom of florida, l.p. ("TW"), in its original Complaint and as result of information gained from subpoenas served on several IXCs added several more CLECs, including BullsEye Telecom, Inc. ("BullsEye"), Ernest Communications, Inc., Flatel, Inc. and Navigator Telecommunications, LLC. to the Complaint in September 2010. Of the remaining respondents, only TW and BullsEye have actively participated in this case. They will be referred to as "Respondent CLECs" in this Motion.

The Respondent CLECs unsuccessfully filed multiple motions in an attempt to have the Commission dismiss QCC's Complaint. In denying the CLECs' motions, the Commission found

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(both before and after 2011 Regulatory Reform Act) that it had jurisdiction over the subject matter of QCC's Complaint and that it had the authority to order refunds if it found that violations of the applicable statutes had occurred.

In the Final Order, the Commission reversed these prior decisions, finding instead that the 2011 legislative changes had removed its jurisdiction to enforce the statutes prohibiting price discrimination cited in QCC's Complaint and that the refunds QCC had requested to remedy such discrimination constituted impermissible "damages" that the Commission was not authorized to award. The Commission's conclusions in the Final Order were exactly the opposite of its conclusions in its Orders on the Motions to Dismiss. QCC believes that in reversing its prior decisions and denying QCC's Complaint the Commission overlooked or failed to consider several critical points of fact and law, including:

- That it previously determined that it continued to have jurisdiction to enforce statutory provisions prohibiting rate discrimination as to the Respondent CLECs' pre-July 2011 conduct, despite the repeal of those sections in 2011, that no Motion for Reconsideration of that prior decision had been timely filed and that its reversal or its prior decision deprived QCC of the opportunity to argue its case under the law the Commission ultimately determined to apply;
- that QCC provided substantial and unrefuted record evidence that the Respondent CLECs' discriminatory access rates were anticompetitive;
- that QCC provided substantial record evidence that it was similarly situated to AT&T regarding the access service it purchased from the Respondent CLECs and that the Respondent CLECs failed to submit evidence to the contrary;

- that the terms of BullsEye's and TW's price list required them to make the lower switched access rates they provided to AT&T available to other similarly situated IXCs and that they failed to do so; and
- that it previously determined that it had the authority to order refunds to remedy discriminatory and anticompetitive conduct and that it properly should have affirmed that decision in the Final Order.

Based on the Commission's improper reversal of its prior rulings on these key legal issues and its failure to consider the evidence on these critical factual matters, the Commission should reconsider and reverse its decision denying QCC's Complaint.

II. Argument

The standard for the Commission's review of a Motion for Reconsideration is well-settled.[1] The motion must identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. Further, in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance,* 394 So.2d 161 (Fla. 1st DCA 1981); and *Sherwood v. State,* 111 So.2d 96 (Fla. 3rd DCA 1959) citing *State ex.rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958). As this Motion will demonstrate, in denying QCC's Complaint the Commission has overlooked or failed to consider several key points of fact and law, which are fully set forth below.[2]

[1] See, e.g., *In re: Petition for increase in rates by Gulf Power Company*, Docket No. 110138-EI; Order No. PSC-12-0400-FOF-EI, Issued August 3, 2012 at pages 3-5.

[2] QCC's Motion for Reconsideration raises specific issues based on the applicable standard. It is not intended to address all issues that may be subject to QCC's right to appeal any issue in the Final Order based on the standards applicable to appellate review.

A. Commission's Authority

Despite its ruling on the CLECs' July 2011 Motion to Dismiss, Order No. 11-0420-PCO-TP, issued September 28, 2011 ("September 2011 Order), the Commission held in the Final Order that it no longer has the authority to enforce now repealed sections 364.08 and 364.10. (Final Order at page 7) This ruling reverses its previous decision, contrary to the Commission's procedures establishing the appropriate avenues for reconsideration. Specifically, Rule 25-22.0376, F.A.C. requires a Motion for Reconsideration of a non-final order to be filed within 10 days of issuance of the order. Rule 25-22.060, F.A.C., requires that a Motion for Reconsideration of a final order be filed within 15 days of issuance of the order. Both rules provide that failure to file a timely motion for reconsideration constitutes waiver of the right to do so. No party filed a motion for reconsideration of the September 2011 Order.[3]

In addition to violating the Commission's own procedural rules, this reversal also contravenes principles of law recognizing the binding effect of Commission decisions regarding its subject matter jurisdiction. In *Florida Power Corporation v. Garcia*, 780 So. 2d 34 (Fla. 2001), the Supreme Court found that that the Commission's previous dismissal of a request for declaratory ruling for lack of subject matter jurisdiction was binding as to the issue of the Commission's jurisdiction and required dismissal of a subsequent request for declaratory ruling on the same issue. While that decision was rendered in a procedurally different context (that is, successive requests for declaratory rulings on the same issue), its principles are surely applicable here, where the reversal of its prior jurisdictional ruling occurred during its consideration of the very same matter. See also *In re: Complaint against KMC Telecom III,* Order No. PSC-05-1065-FOF-TP, where the Commission found that a decision on a Motion to Dismiss for lack of subject

[3] It is unclear whether the September 2011 Order constitutes a non-final or a final order. The two previous orders in this proceeding denying motions to dismiss were designated as final orders (FOF). The September 2011 Order appears to be designated as a procedural order (PCO); however, the required Notice of Further Proceedings referred to Rule 25-22.060 as the applicable rule for reconsideration.

matter jurisdiction would be *res judicata* for that issue in its final decision on the case (discussed further in footnote 6, *infra*).

The standard for reviewing a Motion to Dismiss requires that all of the complainant's factual statements are to be taken as true and considered in the light most favorable to the complainant. The grant or denial of dismissal makes no findings regarding the validity of these factual allegations. That same deference does not apply to determinations of the applicable law. In fact, the primary purpose of a Motion to Dismiss is to consider whether, with all factual issues considered favorably to the complainant, a cause of action for which relief may be granted is stated under the law.[4] In this case, the Commission's determination in the September 2011 Order that it retained jurisdiction over QCC's claims for pre-July 2011 conduct is a legal conclusion that is binding on the Commission absent a timely filed Motion for Reconsideration considered in accordance with the applicable standards. It appears the Commission deviated from the established and legally appropriate path in the Final Order because it failed to consider or mistook the scope of its prior ruling. On page 4 of the Final Order, the Commission describes the September 2011 Order as finding that "the Legislative intent was not sufficiently clear with respect to whether this Commission was to apply the Regulatory Reform Act retroactively." While the Commission did make this statement, it was in the context of ultimately recognizing that without clear legislative intent of retroactivity a statute is presumed to apply prospectively only. In that context, the plain language of the September 2011 Order finds quite clearly that "[f]or carrier actions prior to July 1, 2011, we find continuing jurisdiction under the statutes enacted prior to the Regulatory Reform Act..." (September 2011 Order at page 9)[5] While the September 2011 Order plainly held that the Commission continued to have jurisdiction over

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[4] See, e.g., *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

[5] The Commission also found that "Qwest has a vested interest for each billing period prior to the change in law as a result of the alleged anti-competitive behavior." (September 2011 Order at page 8).

QCC's claims for conduct prior to July 1, 2011, it did leave open the question of whether it continued to have jurisdiction to enforce QCC's claims for conduct occurring after July 1, 2011, stating that "we find that whether we retain jurisdiction prospectively would be more appropriately addressed during the issue identification and examined during the hearing process." (Id.) This is the only jurisdictional question that remained to be decided by the Commission in the Final Order.[6]

In the Final Order the Commission apparently thought that it had left undecided the question of its jurisdiction as it related to both pre-July 2011 and post-July 2011 claims.[7] As a result of this oversight or mistake, the Commission improperly rejected its prior decision in this case, without explanation or indication that it had received new evidence or argument as the basis for this reversal. A review of the briefs indicates that the arguments related to the jurisdictional issue were essentially identical to the arguments made previously in the Motion to Dismiss and, therefore, do not provide a basis for the Commission to alter its decision.[8] To further highlight this deficiency, if these same arguments had been presented again in a timely

[6] Issue 1 on the Issues List asks whether the Commission retained jurisdiction over QCC's claims for conduct prior to July 1, 2011. Thus, it is certainly proper that the Final Order addressed jurisdiction. Yet, the existence of the issue on the Issues List does not alter or dilute the *res judicata* effect of the September 2011 Order. Clearly, the Commission's jurisdiction is an issue in this case, and thus it was properly placed on the Issues List. But this particular issue was already resolved by the Commission and that decision was not timely challenged. Hence, the Commission was precluded from revisiting the issue in the Final Order. See *In re: Complaint against KMC Telecom III,* Order No. PSC-05-1065-FOF-TP, at p. 2 ("We note that the question of this Commission's jurisdiction will also be an issue presented for our final consideration as a post-hearing matter. Thus, our decision on the Motion to Dismiss will serve as *res judicata* to a significant extent with regard to Issue 1 in the case.").

[7] In reviewing the transcript of the Agenda Conference where the Commission ruled on the Motion to Dismiss, there appears to be some confusion by the Commissioners as to which jurisdictional issues would remain open for consideration at the hearing. However, the order itself is clear regarding the Commission's finding that it has jurisdiction over pre-July 2011 conduct under the statutes then in effect and QCC presented its case accordingly. As Commissioner Graham aptly stated: "if this is indeed an error, and some other court down the line can tell us it was or was not." 9/8/11 Agenda Conference Transcript at page 24. Absent a timely Motion for Reconsideration (which was not filed), the proper avenue to challenge the September 2011 Order is in an appellate court, not in the Final Order.

[8] In footnote 9 on page 6 of the Final Order, the Commission appears to intend to reference other Florida cases. However, the case cited is a 1916 U.S. Supreme Court case involving the transfer of jurisdiction over Indian property rights from the courts to a federal agency. This case was not newly introduced in the Final Order but was cited in the cases which appear to provide primary support for the Respondent CLECs' arguments in both their Motion to Dismiss and their briefs.

motion for reconsideration of the September 2011 Order, they likely would have been rejected under the applicable standard as a simple re-argument of matters already presented. Nonetheless and inexplicably, in its reversal of its prior ruling in the Final Order the Commission cited the same arguments and case law, but came to the opposite conclusion from its decision in the September 2011 Order. Such a reversal is impermissible and should be reconsidered and rejected.

Not only is the Commission's reversal of its prior decision at this late stage legally and procedurally inappropriate, it also has denied QCC the opportunity to properly present its claims. The Commission notes in the Final Order that "the majority of QCC's claims and arguments are based on Sections 364.08(1) and 364.10(1), F.S." (Final Order at page 15-16). Not surprisingly, QCC presented its case on these claims and arguments because of the clear ruling on the Motion to Dismiss that these statutes still applied to behavior that occurred prior to July 1, 2011. The Issues List – developed by the parties and with the assistance of Commission Staff after entry of the September 2011 Order – does not identify as a separate issue consideration of whether the CLECs engaged in anticompetitive behavior, which is the narrow standard the Commission ultimately applied. The exclusion of that issue (and focus on rate discrimination in Issue 5) is logical given that the Commission had concluded (in an order that was not challenged) that QCC's claims based on Sections 364.08 and 364.10 survived. The Commission erred in overturning its prior ruling in this case and consequently denied QCC an opportunity to fairly present its case. On this basis as well, the Commission should reconsider its decision on its jurisdiction prior to July 1, 2011 and should affirm its rulings in the September 2011 Order.

B. Discriminatory pricing of switched access service is anticompetitive.

The Commission attempted to cure the deficiency created by its improper and untimely reconsideration of its prior ruling regarding the applicability of ss. 364.08 and 364.10 by further

finding that "[w]hile these sections have been repealed, they relate to alleged unreasonable rate discrimination that would be considered anticompetitive behavior. As such the parties' arguments are still relevant to the resolution of this concern." (Final Order at page 16) Notwithstanding that bootstrapping QCC's rate discrimination claim into a claim based solely on anticompetitive behavior is legally flawed, the Commission also overlooked important, unrefuted evidence in the record when it concluded that no anticompetitive conduct occurred. This record evidence includes substantial testimony presented by QCC regarding the anticompetitive effects of rate discrimination.

The Commission's failure to consider this important evidence is highlighted by its finding, on page 18 of the Final Order that "[f]urther we find no evidence in this case of anticompetitive behavior by the CLECs toward QCC." However, the record included substantial evidence presented by QCC regarding the anticompetitive effects of rate discrimination relating to wholesale inputs, such as the switched access charges at issue here. Dr. Dennis Weisman offered expert testimony, apparently overlooked by the Commission, describing the anticompetitive effects of wholesale price discrimination. Weisman Direct Testimony, Tr. 346-348. In that testimony, Dr. Weisman explains how lowering the cost of switched access for one IXC allows that provider (even if less efficient than its IXC competitors) to lower its retail prices, placing the provider that is charged a higher rate at a competitive disadvantage. Significantly, Dr. Weisman explains how this effect can distort the market by allowing a higher cost provider to charge lower rates than a lower cost provider, because of the advantage conferred by the lower access rates.[9]

[9] Multiple QCC witnesses testify that switched access services are critical, extremely costly and a significant component of the cost to provide long distance service. See the Direct Testimony Derek Canfield (Tr. 254-255), the Direct Testimony of William Easton (Tr. 53) and the Direct Testimony Dennis Weisman (Tr. 342-346). QCC's testimony was unrebutted in this regard.

Dr. Weisman further describes the anticompetitive outcomes of discriminatory pricing in his Rebuttal Testimony (Tr. 380-381) where he discusses the appropriate remedy for the past discriminatory pricing. Specifically, Dr. Weisman opines that "...the favored IXCs were conferred an artificial competitive advantage by the CLECs that lowered their cost structure in the provision of long-distance telecommunications *vis-à-vis* QCC." Ultimately, Dr. Weisman concludes that refunds are the most appropriate mechanism to remedy these anticompetitive effects. (Tr. 381)

Notably, Dr. Weisman's testimony regarding the anticompetitive effects of the CLECs' practices is *unrebutted* in the record. Neither BullsEye's witness Peter LaRose (Tr. 650-674) nor TW's witness Don Wood (Tr. 425-554) rebuts or refutes Dr. Weisman's testimony regarding the anticompetitive nature of the Respondent CLECs' conduct. Mr. Wood sponsors 130 pages of pre-filed testimony, yet never once takes issue with Dr. Weisman's learned testimony regarding the anticompetitive ramifications of rate discrimination in input markets.

While QCC recognizes that the law does not require the Commission to identify every fact or argument that it considered in rendering its decision, the Commission's failure to acknowledge Dr. Weisman's unrefuted testimony regarding the anticompetitive effects of price discrimination indicates that it failed to consider this testimony in finding that there was no evidence of anticompetitive behavior. Had the Commission considered this evidence, QCC believes that it should have and would have reached a different conclusion, even under the revised statutory basis on which it chose to consider QCC's Complaint. If the Commission had properly considered this unrefuted testimony from Dr. Weisman, it would have had to conclude that the discriminatory pricing engaged in by the Respondent CLECs is just the sort of anticompetitive behavior the statutes obligate the Commission to prevent. On that basis, the

Commission should reconsider its decision and find in favor of QCC that the CLECs' conduct was unlawfully discriminatory and anticompetitive and, therefore, prohibited by the law.

C. The Respondent CLECs violated their price lists by not offering QCC lower rates.

The Commission also found that BullsEye and TW had complied with the provisions of their respective price lists which specifically provide that they may enter into agreements that vary from the price list rates under certain circumstances. (Final Order at page 19)[10] This finding ignores that Florida law imposed and imposes the duty to avoid discriminatory and anticompetitive behavior *on the CLEC* and, instead, appears to lay the responsibility at QCC's door for not pursuing an agreement in accordance with these provisions of the price list. (Final Order at page 17)[11]

In reaching this conclusion, the Commission overlooked significant evidence presented by QCC concerning why it was prevented from obtaining the discounts for itself. These circumstances were detailed in the testimony of QCC's witness Lisa Hensley Eckert. As Ms. Hensley Eckert testified, the agreements' confidentiality provisions kept secret the very existence of these agreements, not to mention the specific terms or the states in which they were applicable. Given that QCC was unaware that such discounts were being provided to AT&T, it had no basis to demand equivalent rate treatment from BullsEye and TW.[12]

QCC acknowledges that there were no regulatory requirements in Florida that individual agreements be filed or otherwise made public. However, the Commission appears to have

[10] The Commission's view concerning the relevance to this case of the TW price list provision authorizing individual contracts is unclear in the Final Order. While the Commission acknowledges that provision of the TW price list in its discussion of "Pricing of Intrastate Switched Access Service" on pages 18-19 of the Final Order, it appears to find that that provision is not an issue relative to TW in the discussion of "Price Lists" on pages 19-20.

[11] The Commission bases its decision that QCC was not similarly situated to AT&T in part on QCC's failure to negotiate switched access rates. The Final Order does not explain how a determination as to whether QCC was similarly situated could be made by the CLECs absent a discussion with QCC concerning the factors that led to and the basis for the decision to enter into an agreement with AT&T.

[12] QCC exchanges traffic with over 700 CLECs nationwide (Tr. 151), and any suggestion that it must affirmatively police each CLEC to ensure that it has not entered into secret discount switched access agreements is illogical, impractical and legally infirm.

overlooked or failed to consider that the plain language of the terms of the price lists requires BullsEye and TW to apprise other carriers of negotiated rates and make them available for a least some amount of time after entering into such agreements.

Specifically, the BullsEye price list says: "Services shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract." (BullsEye Price List Section 5.1., Hearing Exhibit 44, at page 6) Given that the agreements were not disclosed in any way and, in fact, were kept secret under their terms, there is no way that they could be made available to other carriers unless BullsEye took some affirmative action to apprise other carriers of their existence. The Commission found based on the evidence in this proceeding that QCC was not similarly situated to AT&T and, therefore, that BullsEye was relieved of its obligation to make QCC aware of the negotiated rates under its price list. However, the Commission failed to consider how BullsEye could determine that QCC was not similarly situated absent discussions with QCC concerning the factors that underlay the determination of the appropriate rates for AT&T.

Similarly, the TW price list says "[s]uch contract offerings will be made available to similarly situated customers in substantially similar circumstances." (TW Price List Section 8.1, Hearing Exhibit 57 at pages 2) Again, under the plain meaning of these terms, TW obligated itself to affirmatively make available these terms to other similarly situated carriers. As with the BullsEye price list terms, given that the terms were not otherwise disclosed and, in fact, were prohibited from being disclosed under confidentiality provisions in the agreement, there is no way other than apprising QCC of the existence of the agreement that TW could determine if other carriers were "similarly situated and in substantially similar circumstances" or fulfill its obligation to make the terms available to other carriers.

In overlooking the plain language of BullsEye's and TW's price lists, the Final Order errs by not concluding that both BullsEye and TW failed to comply with these terms, denying QCC the opportunity to establish that it was similarly situated or otherwise negotiate non-discriminatory rates. On this basis, as well, the Final Order should be reconsidered and reversed.

D. The record does not support that QCC was not similarly situated to AT&T

Key to the Commission's ultimate decision that QCC had not proved its Complaint was the Commission's determination that QCC was not similarly situated to AT&T and that, therefore, the CLECs' rate discrimination did not violate the statute. (Final Order at page 18) Yet, that conclusion is unsupported by the record evidence and is contrary to Florida law in numerous respects. Aside from merely listing the arguments of the parties, the Final Order does not thoroughly analyze the question of whether QCC and AT&T were similarly situated. With minimal or no explanation, the Final Order identifies six different factors upon which it apparently relies to conclude that QCC did not establish that it was similarly situated to AT&T. Each should be reconsidered because the Commission overlooked or failed to consider the evidentiary record in reaching its conclusions.

First, the Final Order indicates that there are no statutes, regulations or orders that "ever required CLEC switched access to be based on cost...." (Final Order at page 18) However, the Commission ignores the critical role cost differences play under Florida law when assessing whether differentiated pricing is reasonable or unreasonable. See *Mohme v. City of Cocoa, 328 So.2d 422, 424 (Fla. 1976), citing Cooper v. Tampa Electric Co., 154 Fla. 410 (1944)* and *Clay Utility Co. v. City of Jacksonville, 227 So.2d 516 (1st D.C.A.Fla. 1969).* See also *Florida East Coast Ry. Co. v. King, 158 So.2d 523, 526 (1963); In Re: Rate Schedule Modification of the City of Tallahassee, Order No. 11221 (1982); In Re: Petition of Florida Power and Light Company for Approval of Large Power Agreement with Union Carbide Corporation. Order No. 19231*

(1988). While QCC does not contest the Commission's finding at page 16 of the Final Order that there was "no cost-based standard in Florida for setting switched access rates," the issue in this case is not whether the Respondent CLECs properly set their price list switched access rates. Instead the issue is whether the Respondent CLECs' decision to deviate from those published rates in favor of AT&T alone was lawful given the total absence of credible proof that their cost to provide the service to AT&T differ from the cost to provide the service to QCC. There is no evidence in the record demonstrating a difference in costs.

Second, the Final Order indicates that there are no statutes, regulations or orders that "declared CLEC switched access a monopoly service..." (Final Order at page 18) Again, the Final Order appears to miss the point. The record also does not show that there are any statutes, regulations or orders declaring that CLEC switched access is *not* a bottleneck service. More importantly, QCC's complaint is not premised on – nor reliant upon – a finding that Florida statute, regulation or order has previously declared CLEC access to be a bottleneck service. Regardless of the lack of an express statute or rule on the subject, the record evidence is uncontroverted that CLEC switched access is, in function and in terms of available alternatives, a bottleneck service. CLEC witness Don Wood does not challenge Dr. Weisman's conclusion that CLEC-provided switched access is a bottleneck service. To the contrary, Mr. Wood repeatedly acknowledges (without disagreement) that the FCC found CLEC switched access to be a series of bottleneck monopolies. (Tr. 520-527) He also appears to endorse QCC's belief that intrastate CLEC switched access is functionally identical to interstate switched access, the service the FCC squarely found to be a bottleneck service. (Tr. 433) While Mr. Wood obviously disagrees with the relief QCC seeks, he does not contest Dr. Weisman's testimony that CLEC switched access is a bottleneck service and (as discussed above) that CLEC discriminatory rate treatment is likely to have anticompetitive effects. BullsEye witness LaRose likewise fails to contest Dr.

Weisman's testimony that CLEC switched access is a bottleneck service. (Tr. 650-654) Thus, Dr. Weisman's expert testimony is uncontested in the record. In the face of this uncontroverted evidence, the Commission is well positioned to find, in the context of determining whether the CLECs' conduct was discriminatory and anticompetitive, that CLEC-provided switched access is a bottleneck service. By limiting its analysis to a determination that this question has not been addressed in the past, the Commission clearly failed to consider QCC's substantial and uncontested evidence on this point.

Third, the Commission appears to rely on "call volumes" as a matter distinguishing QCC and AT&T. (Final Order at page 17) Once again, the Commission appears to have overlooked or failed to consider the lack of record evidence showing that traffic volumes were in any way relevant or related to the Respondent CLECs' decision to provide preferential rate treatment to AT&T. The agreements do not tie the discounts to the purchase of any particular volume of switched access (Hearing Exhibits 42 and 55), and the Respondents provided no evidence that their cost of providing switched access varies depending on the volume of service provided. It is telling, and again uncontroverted, that the CLECs' price lists do not vary switched access rates based on the volume of switched access minutes purchased. See Hearing Exhibits 44 and 57. If volume was a legitimate basis for differentiating between IXC customers, one would fairly expect to see volume-specific pricing in a published price list. Yet none exists.

Fourth, the Commission found that "AT&T's traffic type included wireless and VoIP originating traffic" and that this distinguished QCC from AT&T. (Final Order at page 17) This is yet another example of the Commission overlooking the lack of competent evidence supporting the CLECs' allegations regarding the differences between QCC and AT&T. There is no factual evidence in the record as to the nature of AT&T's traffic that was subject to the lower access rates in the agreements at issue in this Complaint. Rather, as far as QCC can ascertain,

"this fact" consists solely of the speculation of BullsEye's counsel that AT&T's traffic and QCC's traffic may differ.[13] The finding also ignores certain QCC data request responses (admitted into the record) that demonstrate that QCC believes it also delivered wireless-originated and VoIP-originated traffic to BullsEye. See Hearing Exhibit 15, bates numbered pages 358-359. These responses also indicate that BullsEye possesses the call detail records necessary to quantify how much wireless- and VoIP-originated traffic was delivered to BullsEye, yet BullsEye produced no such evidence. Given the total lack of evidence supporting this "factor" so centrally relied upon in the Final Order, the Commission should reconsider its decision.

Fifth, the Commission determines that QCC and AT&T were not similarly situated based on the IXCs' "total spend" with the respective CLECs. (Final Order at page 17) However, the Commission failed to consider that the contracts do not bind AT&T to any particular "spend" on switched access. The agreements of BullsEye, Ernest, Navigator and Flatel impose no "total spend" requirements in any context, and even the TW total spend obligations are non-specific to switched access. Hearing Exhibits 42, 45, 46, 49, 52 and 55. AT&T could have satisfied its revenue commitment obligation to TW without purchasing any intrastate Florida switched access, or any switched access at all. The record simply does not support a finding that AT&T's "total spend" with the Respondent CLECs justified discriminatory pricing for intrastate switched access in Florida.

Finally, the Commission determined that QCC was not similarly situated based on its "failure" to negotiate its own switched access agreement. This conclusion was also based on a flawed understanding of the evidence, as discussed above.

[13] See, BullsEye's Post-hearing Brief, pages 22-23, which does not cite to any testimony in the record. Likewise, the staff recommendation on this point (at page 29) cited only to BullsEye's brief, but not to any testimony or other evidence supporting this finding.

Not only did the Commission overlook the lack of evidence to support the CLECs' claims that QCC was not similarly situated to AT&T, but the Commission also apparently discounted QCC's testimony that for the purposes of switched access charges, QCC was similarly situated to AT&T. See, e.g., Easton Direct Testimony, Tr. 53-56; Weisman Direct & Rebuttal Testimony, Tr. 351-361, 366-367, 375-378. For instance, Mr. Easton testified that: 1) QCC's routing of access traffic is similar to other large IXCs; 2) QCC uses the same facilities to originate and terminate its switched access as other IXCs; and 3) like other IXCs QCC has no choice over the LEC that provides switched access. Dr. Weisman further testified that switched access service is essentially identical across carriers. In the Final Order, the Commission appears to have wholly failed to consider this testimony in rendering its decision that QCC is not similarly situated to AT&T for the purposes of the establishing a non-discriminatory rate for switched access.

The Commission should reconsider its decision and find that there is no evidence in the record to support the Final Order's conclusory findings that QCC and AT&T were not similarly situated. Upon reconsideration the Commission should find that based on the preponderance of the evidence there is no relevant basis to distinguish the two carriers for the purposes of determining whether the lower access rate that Respondent CLECs charged AT&T was discriminatory to QCC.

E. Refunds are not damages.

Similar to its reversal of its earlier decision regarding jurisdiction, in the Final Order the Commission also inexplicably reversed its prior decisions that it had authority to order the refunds requested by QCC to remedy past discrimination and anticompetitive conduct.[14] The Commission's decision that a refund of the overcharges constituted "damages" appears to be

[14] See, Order No. PSC-10-0296-FOF-TP at page 6 and Order No. PSC-11-0145-FOF-TP at page 5.

related, in significant part, to the Commission's untimely reversal of its decision concerning its jurisdiction to enforce ss. 364.08 and 364.10 for discriminatory conduct prior to July 1, 2011. In explaining its conclusion in the Final Order that QCC's request for refunds constituted damages, the Commission stated that it no longer had authority to issue refunds based on QCC's reliance on the repealed statutes prohibiting rate discrimination. (Final Order at page 31) As discussed above, this reversal of its prior decision concerning its jurisdiction was a mistake of law justifying reconsideration. In the same vein, the Commission should reconsider its decision that the refunds QCC has requested are damages in the context of the statutory prohibition on rate discrimination and anticompetitive behavior.

Such reconsideration would be consistent with its prior rulings in this case, where the Commission consistently affirmed its authority to award refunds as necessary to address discriminatory and anticompetitive behavior. Further, the Final Order still seems to embrace the idea that if the Commission were to find anticompetitive behavior it would have the authority to award refunds. The relief QCC is seeking of the difference in the access rates it paid and the lower rates paid by AT&T constitutes just the sort of refunds that the Commission clearly contemplated in these rulings, and clearly has the authority to award.[15] The reversal in the Final Order of its previous decisions regarding the Commission's authority to order refunds should be reconsidered, based on a finding that the Respondent CLECs' behavior violated the law, as discussed above.

[15] *See, e.g., Charlotte County v. General Dev. Util., Inc.*, 653, So.2d 1081, 1085 (Fla. 1st DCA 1995) (holding that "the PSC has jurisdiction to resolve the question of the alleged overcharges...."); *Florida Power Corp. v. Zenith Indus.*, 377 So.2d 203 (Fla. 2nd DCA 1979) (holding that "jurisdiction to determine and award refunds of the alleged overcharges does not lie in the court but in the [Commission]"); *Richter v. Florida Power Corp.*, 366 So.2d 798, 801 (Fla. 2nd DCA 1979) (holding that the Commission has exclusive jurisdiction to issue a refund when the plaintiff alleges an unreasonably high electric rate).

III. Conclusion

As described in detail in this Motion, the Final Order overlooks or fails to consider several critical issues of fact and law in reaching the decision to deny QCC's Complaint. QCC respectfully requests that the Commission reconsider the Final Order and find in favor of QCC as set forth above.

Respectfully submitted this 16th day of May 2013.

/s/ Susan S. Masterton
Susan S. Masterton
CenturyLink QCC
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301
850-599-1560
850-224-0794 (fax)
susan.Masterton@centurylink.com

Adam L. Sherr
CenturyLink QCC
1600 7th Avenue, Room 1506
Seattle, Washington 98191
206-398-2507
206-343-4040 (fax)
adam.sherr@centurylink.com

ATTORNEYS FOR QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); tw telecom of florida, l.p.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Navigator Telecommunications, LLC; and John Does 1 through 50, for unlawful discrimination.	DOCKET NO. 090538-TP FILED: May 16, 2013

QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC's REQUEST FOR ORAL ARGUMENT

In accordance with Rule 25-22.0022, Florida Administrative Code, Qwest Communications Company LLC d/b/a CenturyLink QCC ("QCC") hereby requests oral argument on its Motion for Reconsideration which has been filed concurrently with this request. Oral argument will aid the Commission in understanding and evaluating the complex and interrelated issues to be decided in QCC's Motion as follows:

1. Oral argument will allow counsel for QCC to further discuss the factual grounds and legal standards which necessitate reconsideration of the Commission's decision denying QCC's Complaint. As more fully explained in QCC's Motion for Reconsideration, the Commission's decision overlooked or failed to consider several critical points of fact and law, which form the basis of QCC's Motion.

2. In light of the complex interrelationship of the issues raised in QCC's Motion and the precedential effect of the issues regarding the finality of Commission rulings related to its subjection matter jurisdiction, QCC anticipates that the Commission may have questions. Oral

argument will allow counsel for QCC to respond to questions from the Commission to assist the Commission in understanding the factual basis and legal grounds supporting its motion.

WHEREFORE, QCC requests that oral argument be heard on its Motion for Reconsideration and that QCC be granted 10 minutes for such oral argument.

Respectfully submitted this 16th day of May 2013.

/s/ Susan S. Masterton

Susan S. Masterton
CenturyLink QCC
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301
850-599-1560
850-224-0794 (fax)
Susan.Masterton@centurylink.com

Adam L. Sherr
CenturyLink QCC
1600 7th Avenue, Room 1506
Seattle, Washington 98191
206-398-2507
206-343-4040 (fax)
Adam.Sherr@centurylink.com

ATTORNEYS FOR QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC