

Eric Fryson

From: azoracki@kleinlawpllc.com
Sent: Thursday, May 23, 2013 2:44 PM
To: Filings@psc.state.fl.us
Cc: Lee Eng Tan; jemiller@psc.state.fl.us; Beth Salak; asolar@flatel.net; 'Masterton, Susan S'; 'Ridley, Carolyn'; lhaag@ernestgroup.com; david@navtel.com; 'Sherr, Adam'; 'Andrew M. Klein'; 'Keating, Beth'
Subject: Docket No. 090538-TP - Response of BullsEye Telecom, Inc. to Motion for Reconsideration of Qwest Communications Company, LLC
Attachments: Docket No. 090538-TP - BullsEye Response to Qwest Mot for Recon.pdf

Attached for electronic filing in the above-referenced docket, please find the *Response of BullsEye Telecom, Inc. to Motion for Reconsideration of Qwest Communications Company, LLC*. If you have any questions, please do not hesitate to contact us.

a. Persons responsible for filing:

Andrew M. Klein
Allen C. Zoracki
KLEIN LAW GROUP ^{PLLC}
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
Phone: (202) 289-6955
AKlein@KleinLawPLLC.com
AZoracki@KleinLawPLLC.com

- b. Docket No.: 090538-TP – Amended Complaint of Qwest Communications Company, LLC against MCImetro Access, et al.
- c. Filed on behalf of: BullsEye Telecom, Inc.
- d. Total pages: 17 (including cover letter and certificate of service)
- e. Brief Description: BullsEye Response to Qwest Motion for Reconsideration

Respectfully submitted,

Allen C. Zoracki
KLEIN LAW GROUP ^{PLLC}
AZoracki@KleinLawPLLC.com
Direct: (518) 336-4300
General: (202) 289-6955

WWW.KLEINLAWPLLC.COM

The information contained in this communication is confidential and may be subject to the attorney-client privilege. It is intended solely for the use of the addressee(s). Unauthorized interception, use or disclosure of this communication is prohibited and may be unlawful. If you have received this communication in error, kindly notify us immediately by return e-mail and destroy this communication and any attachments.

DOCUMENT NUMBER-DATE

02860 MAY 23 2013

FPSC-COMMISSION CLERK

KLEIN LAW GROUP PLLC

1250 CONNECTICUT AVE N.W.
SUITE 200
WASHINGTON, DC 20036
202.289.6955

ALBANY, NEW YORK
518.336.4300

May 23, 2013

ELECTRONIC FILING – *filings@psc.state.fl.us*

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

Re: Docket No. 090538-TP – Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services, *et al.*

Ms. Cole:

Attached for electronic filing in the above-referenced docket, please find the *Response of BullsEye Telecom, Inc. to Motion for Reconsideration of Qwest Communications Company, LLC.* Should you have any questions with respect to this filing, please do not hesitate to contact us.

Respectfully submitted,

/s/

Andrew M. Klein
Allen C. Zoracki
KLEIN LAW GROUP PLLC
1250 Connecticut Ave. NW
Washington, D.C. 20036
(202) 289-6955
Counsel for BullsEye Telecom, Inc.

cc: Service List

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Amended Complaint of QWEST
COMMUNICATIONS COMPANY, LLC,
Against MCIMETRO ACCESS
TRANSMISSION SERVICES, LLC (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.

Docket No. 090538-TP

Dated: May 23, 2013

RESPONSE OF BULLSEYE TELECOM, INC.
TO THE MOTION FOR RECONSIDERATION OF
QWEST COMMUNICATIONS COMPANY, LLC

DOCUMENT NUMBER-DATE

02860 MAY 23 2013

FPSC-COMMISSION CLERK

Pursuant to Rule 25-22.060, Florida Administrative Code, BullsEye Telecom, Inc. (“BullsEye”) respectfully files this Response to Qwest Communications Company, LLC d/b/a CenturyLink QCC’s (“Qwest”) Motion for Reconsideration. BullsEye commends the Commission for correctly finding that Qwest’s claims in this proceeding have no basis in law or fact for a host of independent reasons, and accordingly denying Qwest’s unfounded request for relief, in Order No. PSC-13-0185-FOF-TP (“Final Order”). With its Motion for Reconsideration, Qwest would have the Commission believe that it somehow erroneously decided nearly *every* issue resolved by the Final Order. Qwest’s arguments, however, remain fundamentally flawed and are merely an unfounded and desperate attempt re-litigate the issues that the Commission properly resolved under the Final Order. For these and the reasons that follow, the Commission should deny Qwest’s Motion for Reconsideration.

STANDARD OF REVIEW

A valid motion for reconsideration must demonstrate that the Commission overlooked a specific point of fact or law that, if considered, would have required a different decision. As Qwest itself has previously noted in this docket, the Commission has consistently held that “a motion for reconsideration is not intended as a procedure for rearguing the case merely because the losing party disagrees with the judgment or order, or as an excuse to reargue matters that already have been considered by the Commission.”¹ Indeed, the Commission previously denied a motion for reconsideration in this docket that re-argued points raised in prior briefing.²

¹ Qwest Communications Company, LLC’s Response in Opposition to Joint Movants’ Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument, at 5 (filed Mar. 24, 2011).

² Order No. PSC-11-0222-FOF-TP, Order Denying Reconsideration, at 5 (issued May 16, 2011).

Remarkably, Qwest previously admonished in this case that “the Florida Supreme Court also has made it abundantly clear that attempting to use a motion for reconsideration to reargue a matter that has been fully considered is an *unjustified waste of resources*, and that it should not be used to invite complete re-analysis of what already has been argued.”³ Failing to heed its own prior advocacy, Qwest’s instant motion simply attempts to re-argue several issues which the Commission carefully considered and resolved following a comprehensive proceeding, thorough hearing, and detailed briefing. Qwest’s Motion thus does not meet the standard for reconsideration and must be denied.

DISCUSSION

I. THE COMMISSION PROPERLY DETERMINED THAT IT LACKS AUTHORITY TO RESOLVE QWEST’S COMPLAINT UNDER FORMER SECTIONS 364.08(1), 364.10(1) AND 364.04(1)-(2) (2010), F.S.

The Final Order held, under Issue 1 of the Commission’s Issues List, that the Commission is without jurisdiction to resolve claims under former Sections 364.08(1), 364.10(1) and 364.04(1)-(2) (2010), Florida Statutes, since those statutory provisions were repealed or substantively amended by the Regulatory Reform Act⁴ without any reservation of jurisdiction as to pending cases. Qwest’s Motion attempts to challenge this holding as somehow reflecting a “reversal of [the Commission’s] prior jurisdictional ruling” in this case, claiming that the Commission “overlooked” the legal doctrine of *res judicata*. The problem for Qwest, however, is that the premise of its argument is simply not true, because the Final Order is consistent with the preliminary jurisdictional decision, Order No. PSC-11-0420-PCO-TP (“Preliminary Order”).

³ Qwest Communications Company, LLC’s Response in Opposition to Joint Movants’ Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument, at 5 (filed Mar. 24, 2011).

⁴ Laws 2011, c. 2011-36, effective July 1, 2011.

In the Preliminary Order, the Commission addressed a motion to dismiss the Qwest complaint following passage of the Regulatory Reform Act. Viewing Qwest's complaint as a whole and in the light most favorable to Qwest as the non-moving party, the Preliminary Order denied the motion to dismiss upon finding that the Commission retained – as a general matter – some ongoing jurisdiction.⁵ The Preliminary Order stated that the Commission generally “retain[s] jurisdiction over anti-competitive behavior, including predatory pricing practices, and fair and effective competition.”⁶ The Commission determined that the specific scope of that jurisdiction, particularly as it relates to this case, would be determined post-hearing.

Critically, at no point did the Preliminary Order fully resolve all jurisdictional issues and, in particular, did not decide the specific issues set forth in Issue 1 of the Issues List – i.e., whether the Commission retains jurisdiction to enforce the particular statutory provisions that were repealed or significantly amended by the Regulatory Reform Act. Thus, in addressing these specific issues in the Final Order, the Commission could not – and did not – reverse or contradict the holding of the Preliminary Order.

Rather, the Final Order makes two complementary findings. First, the order correctly concludes that the Commission “cannot apply [former] Sections 364.08(1) and 364.10(1), F.S., to determine if violations have occurred before July 21, 2011” since those statutory provisions were repealed by the Legislature without any reservation of jurisdiction as to pending cases.⁷ Second, the Final Order holds that, “[c]onsistent with our decision in [the Preliminary Order]...we retain subject matter jurisdiction in this proceeding to determine whether alleged anticompetitive

⁵ See generally Preliminary Order, at 7-9.

⁶ *Id.* at 7.

⁷ Final Order, at 6.

behaviors occurred.”⁸ As such, the Final Order in no way reversed or contradicted the general holding of the Preliminary Order. Qwest’s current attempt to invoke the doctrine of *res judicata* is therefore unfounded and must be rejected.

It is also important to recall that the Commission and all parties – including Qwest – recognized that the specific jurisdictional issues identified in Issue 1 would be addressed during the hearing phase of this proceeding. During oral argument preceding the Preliminary Order, the Commission specifically noted that questions concerning the Commission’s jurisdiction were to remain open through the hearing phase:

COMMISSIONER BROWN: Thank you. Actually Commissioner Balbis just pointed out a question that I had for Staff with regard to if we deny the motion to dismiss, we can still put jurisdiction as an issue on the hearing.

MS. TAN: That is correct.⁹

In recognition of this fact, Qwest thereafter stipulated to the inclusion and wording of Issue 1 on the Issues List.¹⁰ Contrary to its current advocacy, Qwest indisputably acknowledged that the specific jurisdictional issues identified in Issue 1 were to be addressed during the hearing phase of this case.¹¹

⁸ Final Order, at 6.

⁹ Transcript, at 23 (Sept. 8, 2011).

¹⁰ See, e.g., Order No. PSC-12-0048-PCO-TP, at 3 and Attachment A.

¹¹ It should be noted that Qwest’s reliance on the Commission’s decision in *In re: Complaint against KMC Telecom III*, Order No. PSC-05-1065-FOF-TP, is misplaced. First, since there is no inconsistency between the Preliminary Order and Final Order, the doctrine of *res judicata* has no application in the first instance. Second, even in the *KMC Telecom* Order, the Commission noted that questions of the Commission’s jurisdiction “will also be an issue presented for our final consideration as a post-hearing matter” such that the Order only served as *res judicata* “to a significant extent.” Order No. PSC-05-1065-FOF-TP, at 1. Thus, in that case, the Commission recognized that jurisdictional issues heard preliminarily on a motion to dismiss could be further considered and resolved following hearing. Here, since the issues identified in Issue 1 were not addressed by the Commission’s Preliminary Order, they clearly remained open for resolution after hearing in the Final Order.

Qwest's attempt to now claim that it was somehow prejudiced by the resolution of Issue 1 in the Final Order is dubious, at best, and is simply not supported by the language of the Preliminary Order. The Preliminary Order made no determination as to whether the Commission retained jurisdiction under former Sections 364.08(1), 364.10(1) and 364.04(1)-(2) (2010), Florida Statutes, but instead generally found that the Commission had prior and ongoing jurisdiction to address allegations of anti-competitive behavior. Indeed, applying the reconsideration standard, it is clear that the Commission did not "overlook" the Preliminary Order at all, but in fact explicitly noted in the Final Order that its decision is entirely consistent with its prior decisions in the case.¹² Qwest has therefore failed to establish any basis for reconsideration, and its motion should accordingly be denied.

II. THE COMMISSION CORRECTLY DETERMINED THAT QWEST FAILED TO DEMONSTRATE THAT BULLSEYE ENGAGED IN ANTICOMPETITIVE BEHAVIOR.

Qwest's attempt to reargue points already properly considered by the Commission does not warrant reconsideration. Qwest cites to no record evidence or law that was overlooked or not duly considered, such that the Qwest motion fails to warrant reconsideration of the correct determination that no anticompetitive activity occurred.

Qwest as the Complainant had the ability to frame its allegations and the asserted bases therefor, and then had a full and fair opportunity to present its case and attempt to meet its burden of proof. Qwest's case was based on allegations of rate discrimination, which the Commission evaluated for possible anticompetitive activity as well.¹³ Qwest's case failed for a number of reasons; foremost among them are (1) the fact that the statutes relied upon were modified or

¹² Final Order, at 6 (noting that the Final Order is "[c]onsistent with our decision in Order No. PSC-11-0420-PCO-TP [the Preliminary Order]").

¹³ See, e.g., *id.*, at 15-16.

repealed, without savings clauses, which not only negated Qwest's specific claims but actually validated the very actions about which Qwest complained, (2) the fact that the competitive access services at issue were never rate-regulated by the Commission, (3) the lack of any evidence that Qwest and AT&T were similarly situated or under like circumstances, and (4) the absence of any competitive harm.¹⁴

While Qwest obstinately proceeded to hearing notwithstanding the lack of any basis for its claims, Qwest failed entirely to present evidence essential to any claim of anti-competitive conduct. As Qwest's Motion makes clear, Qwest's affirmative case consisted merely of opinion testimony concerning what Professor Weisman theorized (with no empirical support) were potential (not actual) instances of anticompetitive behavior, which is of course of no value in determining whether a particular claim has actually been proven. In fact, Qwest witness Weisman openly admitted during the hearing that he did not even examine whether any anti-competitive effect had actually occurred:

Q. [Mr. Klein] Have you actually analyzed any market distortion in Florida that occurred as a result of any contract-based pricing agreements between a CLEC and an IXC?

A. [Dr. Weisman] No. The role of my testimony was the prospective economic distortions that could result from unreasonable rate discrimination. I did not do an actual market analysis, Mr. Klein.¹⁵

¹⁴ See, e.g., *id.*, at 18 (holding that "we find no evidence in this case of anticompetitive behavior by the CLECs towards QCC" upon consideration of the evidence and testimony presented during hearing).

¹⁵ Hearing Transcript, at 400-401 (*emphasis added*). Dr. Weisman even conceded that he had "no doubt that the CLECs made what they perceived to be a rational (economic) business decision" in entering their agreements, thereby admitting that the CLECs had no anti-competitive intent in entering the agreements. Hearing Transcript, at 353.

The other Qwest witnesses likewise acknowledged that they failed to consider critical facts or evidence in their testimony.¹⁶

In its Motion for Reconsideration, Qwest acknowledges that the testimony upon which it is relying is merely the opinion of its witness.¹⁷ Such academic testimony, such as that of Professor Weisman addressing theoretical “anticompetitive effects of rate discrimination relating to wholesale inputs,”¹⁸ certainly does not equate in any way to evidence of any actual anticompetitive behavior. This is precisely what the Commission correctly found to be lacking.¹⁹ While Qwest had a more-than-adequate opportunity to prove its case, the most Qwest can say in its reconsideration request is that its case showed what “can” theoretically happen, not what actually did.²⁰ While such testimony clearly failed to make out any affirmative case, and was undeserving of rebuttal, Qwest’s proffer was in any event already fully considered by the Commission in its deliberations. That Qwest’s purported evidence was found lacking is neither surprising, nor worthy of reconsideration.

¹⁶ Qwest witness Canfield, for example, did not evaluate any traffic exchanged between AT&T and BullsEye, and thus did not know the volume of that traffic or whether any calls were VoIP or wireless. In fact, Mr. Canfield did not even consider the makeup of the Qwest traffic sent to BullsEye for termination. Hearing Transcript, at 328-330. Qwest witness Easton did not know BullsEye’s underlying costs, or whether Qwest paid more or less to the alternate routing carriers Qwest utilized than Qwest would have paid by directly routing the traffic to BullsEye. Hearing Transcript, at 172, 187. Mr. Easton likewise did not know whether any of the call traffic sent by Qwest or AT&T for termination was VoIP traffic, as to which the application of access charges was very much in dispute. *Id.*, at 169. Qwest witness Weisman further admits that he never looked at the underlying costs of BullsEye, AT&T or Qwest, and that he had no idea whether Qwest was a “least-cost provider” as he insinuated in the hypothetical examples on which his theories rely. Hearing Transcript, at 405.

¹⁷ See Motion for Reconsideration, at 8-9. Indeed, all Qwest’s Motion claims was “overlooked” was Dr. Weisman’s testimony on his theory that differential pricing could *potentially* have an anti-competitive effect. Qwest points to no evidence demonstrating that any anti-competitive effects *actually did occur*.

¹⁸ Motion for Reconsideration, at 8.

¹⁹ See Final Order, at 18.

²⁰ Motion for Reconsideration, at 8.

III. THE COMMISSION CORRECTLY DETERMINED THAT BULLSEYE DID NOT VIOLATE ITS PRICE LIST.

Qwest next attempts to re-litigate Issues 6 and 7 of the Issues List, which asked whether BullsEye and other CLECs abided by their price lists in their provision of switched access services. After fully considering this issue, the Commission's Final Order concluded that "[b]ecause the CLECs properly charged [Qwest] the price list rates for switched access, followed the terms of their price lists regarding individual contracts, and did not engage in anticompetitive behavior regarding the contracts' availability, we find the CLECs abided by their price lists in connection with the pricing of intrastate switched access service."²¹ The Commission further held that since Qwest was not similarly situated to AT&T, "there was no obligation on the CLECs' part to make such agreements available to QCC at all."²² Given that the Commission fully considered and resolved this issue, there is nothing that Qwest can now point to that was overlooked or not duly considered, such that its motion for reconsideration must accordingly be denied.

In attempting to re-litigate this issue, Qwest ignores the clear language of BullsEye's price list (which does not require that BullsEye make individual contracts available to non-similarly situated carriers, such as Qwest²³) and instead focuses on Qwest's unfounded claim that Qwest somehow did not know about the existence of individual agreements. As an initial matter, Qwest's knowledge is simply irrelevant to whether BullsEye complied with its price list, because neither BullsEye's price list nor Florida law required BullsEye to make the terms of individual contracts known to other customers. The issue with respect to price list compliance was whether Qwest was similarly situated to AT&T per the price list terms. Since the Commission properly determined

²¹ Final Order, at 19

²² Final Order, at 20.

²³ BullsEye Telecom, Inc. Florida PSC Price List No. 2, Original Page 66, § 5.1.

that Qwest was not similarly situated to AT&T, the Commission consequently found that BullsEye abided by and did not violate its price list.

Moreover, it should be noted that Qwest's attempt to feign lack of knowledge about individual contracts for access service, while irrelevant, is also demonstrably untrue. The fact of the matter is that Qwest knew of contractual arrangements for switched access services for at least ten years – since Qwest itself had such contractual arrangements.²⁴ Qwest therefore cannot claim “surprise” as to its discovery that AT&T also entered such contracts around the same time.²⁵ Furthermore, the existence of BullsEye's agreement gives rise to no legal claim in any event, as the Commission has correctly concluded.²⁶

In its motion, Qwest even acknowledges that “there were no regulatory requirements in Florida that individual agreements be filed or otherwise made public.”²⁷ Qwest must likewise acknowledge that competitive carrier access rates were never cost-regulated in Florida, and the Commission “never considered switched access services by CLECs to be a regulated service that necessitated regulatory requirements in order to protect end use customers.”²⁸ Nonetheless, Qwest was well aware nearly a decade ago that AT&T had entered into hundreds of nationwide access agreements with CLECs, and had equal opportunity to request agreements from those carriers with whom Qwest did not already have a contract. Qwest could have made that request and attempted

²⁴ Hearing Exhibit No. 84 (Qwest Response to BullsEye Interrogatory No. 10 and Document Request No. 17, Bates No. QCC POD 3041-3163); Hearing Transcript at 156-157 (Easton) (admitting that Qwest was not being charged for switched access under its “CPLA” agreements).

²⁵ *See, e.g.*, Hearing Transcript at 178-183 (Easton).

²⁶ In fact, Qwest itself acknowledged over six years ago that it had no legal claim before this Commission owing to the AT&T contracts, albeit on different legal grounds. Hearing Exhibit No. 76 (PKL-1), at ¶ 73 (stating that “[t]here is no adequate remedy for such damages to be had in the administrative agencies” in Florida and other states).

²⁷ Qwest Motion for Reconsideration, at 10.

²⁸ Hearing Transcript, at 595 (Deason); *see also* Hearing Transcript at 599-600, 611 (Deason).

to negotiate its own agreement, but failed to do so. Qwest's effort to pass off that failure through this case has thankfully flopped, as the Commission properly found "based on evidence in this proceeding that QCC was not similarly situated to AT&T,"²⁹ that BullsEye had no obligation to make QCC aware of negotiated rates, and that BullsEye acted in accordance with its price list. Indeed, the Commission appropriately noted that such contracts were specifically authorized by the BullsEye price list, of which Qwest was on notice.³⁰ Contrary to Qwest's current assertions, the Commission clearly did fully consider and decide these issues. The fact that such issues were decided in a manner unfavorable to Qwest provides no basis for reconsideration.

IV. THE COMMISSION CORRECTLY DETERMINED THAT QWEST WAS NOT SIMILARLY SITUATED TO AT&T.

Qwest, as noted, had a full and fair opportunity to present its case and attempt to meet its burden of proof. Qwest presented its case, and admits that the "Commission found based on evidence in this proceeding that QCC was not similarly situated to AT&T[.]"³¹ Given that Qwest acknowledges that the Commission duly considered the evidence in the record, the Qwest request for reconsideration plainly fails.

The Qwest motion simply attempts to reargue the points it lost, violating the fundamental admonition against such wasteful motions.³² Qwest continues to argue, for example, that a new cost-based standard should somehow be adopted, and retroactively applied, despite the clear (and

²⁹ Qwest Motion for Reconsideration, at 11.

³⁰ Hearing Transcript at 177-178 (Easton) (admitting that Qwest has been on notice of BullsEye's price list since it was filed in 2003).

³¹ Qwest Motion for Reconsideration, at 11 (*emphasis added*).

³² Qwest Motion for Reconsideration, at 3.

correct) determination of the Commission that CLEC switched access was never rate-regulated on the basis of cost.³³

With regard to the record evidence – that Qwest admits the Commission fully considered – the deficiencies that Qwest once again attempts to claim simply serve to highlight failures of proof by Qwest itself as the Complainant. Although it would have been irrelevant under governing law, Qwest did not even attempt to present any evidence as to cost-differentials. Nor did Qwest present evidence of or have its witnesses examine call volumes, the various types of call traffic, or the specific manner of call routing used by Qwest and AT&T. The evidence presented did show, however, that Qwest had – and utilized – alternatives to CLEC switched access, such that it certainly was not the “bottleneck” that Qwest asserted it to be. Thus, even if one were to assume that Qwest had a valid claim, that claim was properly evaluated and denied based on a review of the record evidence. Qwest is able to cite no point of fact or law that was overlooked or not duly considered.

V. THE COMMISSION CORRECTLY DETERMINED THAT THE RELIEF SOUGHT BY QWEST DID NOT CONSTITUTE REFUNDS.

Lastly, Qwest again misconstrues the Commission’s prior orders with respect to the relief that Qwest sought in this proceeding. In another flawed attempt to raise the doctrine of *res judicata*, Qwest’s motion for reconsideration argues that the Final Order “reverses [the Commission’s] prior decisions” on this issue. Again, however, this Qwest argument ignores the actual language of the Commission’s prior decisions.

In Order No. PSC-10-0296-FOF-TP, the Commission made a preliminary determination on its authority to address Qwest’s claims for relief. In that Order, the Commission found that it

³³ See, e.g., Final Order, at 16-18; Qwest Motion for Reconsideration, at 12-13.

does not have authority to award damages, and held that “[t]o the extent that Qwest is requesting monetary damages, we find it appropriate that the Partial Motion to Dismiss and Motion to Dismiss Claims for Reparations be granted.”³⁴ However, the Commission also found that – as a general matter – it does have jurisdiction “to remedy regulatory overcharges” through refunds.³⁵ Without ever reaching a conclusion as to whether the specific relief sought by Qwest was for “regulatory overcharges,” or constituted damages, the Commission held that it had authority to investigate the allegations of the complaint and “to determine the amount of any refunds and applicable interest, *if any*, Qwest is due.”³⁶ Thus, the Commission’s prior orders never resolved the issue presented at hearing: whether Qwest was entitled to and could receive from the Commission any relief at all.

Consistent with its prior rulings, the Final Order determined – after hearing – that “the relief [Qwest] seeks here is not a refund,” but instead “are more appropriately damages.”³⁷ The Commission noted that (a) it was undisputed that “the CLECs charged Qwest the rates in their price lists and that they were permitted to enter into contracts with other carriers at different rates” and (b) that the Commission has “never rate-regulated CLECs in any way and now lacks the authority to rate regulate any telecommunications company.”³⁸ Given these factors, the Commission properly held that “if we were to grant any of [Qwest’s] claims, the rates paid by [Qwest] would not be refundable overcharges but financial damages.”³⁹ Thus, the Commission properly determined in its Final Order that it lacked authority to make any monetary award to

³⁴ Order No. PSC-10-0296-FOF-TP, at 6.

³⁵ *Id.*

³⁶ *Id.* (emphasis added).

³⁷ Final Order, at 31 (emphasis in original).

³⁸ *Id.*

³⁹ *Id.*

Qwest in this proceeding and that no refunds were awardable to Qwest.⁴⁰ As this conclusion is entirely consistent with the Commission's prior orders, Qwest's motion for reconsideration is based on an incorrect premise and should be denied accordingly.

VI. THE COMMISSION SHOULD DENY QWEST'S MOTION FOR ORAL ARGUMENT.

Given that the Qwest motion presents no valid grounds for reconsideration and seeks merely to re-argue issues already decided by the Commission, BullsEye respectfully submits that oral argument on the motion is totally unwarranted and requests that the Commission deny Qwest's concurrent motion accordingly. It should also be noted that Qwest's request for oral argument is inconsistent with Qwest's position on similar requests under analogous circumstances.⁴¹ Finally, this lengthy proceeding has taxed the resources of all concerned, and in particular those companies that have had to incur a significant expense to defend against claims that were ultimately found to be without merit. Denial of Qwest's motion for oral argument will at least help to conserve the resources of the parties and the Commission from this point forward, and arrest the throwing of more good money after that which has already been cast to the wind.

CONCLUSION

WHEREFORE, BullsEye respectfully requests that the Commission deny Qwest's motion for reconsideration for the following reasons:

- The Commission's Final Order is entirely consistent with its Preliminary Order on jurisdictional issues, such that Qwest's attempt to invoke the doctrine of *res judicata* on reconsideration is misplaced and invalid.

⁴⁰ *Id.*

⁴¹ Qwest Communications Company, LLC's Response in Opposition to Joint Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument, at 13 (filed Mar. 24, 2011). As in prior instances where oral argument was permitted, to the extent oral argument is to be entertained, BullsEye would respectfully request an equal allotment of time.

- The Commission's Final Order fully evaluated and considered whether Qwest had demonstrated any anti-competitive behavior, and found that Qwest did not. Qwest's motion for reconsideration of this issue is merely an attempt to re-argue issues fully considered and resolved, and should be rejected accordingly.
- The Commission's Final Order fully evaluated and considered whether BullsEye complied with its price list, and found that BullsEye did. Qwest's motion for reconsideration of this issue is merely another attempt to re-argue issues fully considered and resolved, and should likewise be rejected accordingly.
- The Commission's Final Order fully evaluated and considered whether Qwest was similarly situated to AT&T, and found Qwest was not. Qwest's motion for reconsideration of this issue is merely another attempt to re-argue issues fully considered and resolved, and should likewise be rejected accordingly.
- The Commission's Final Order is entirely consistent with its prior orders concerning the lack of authority to award damages, such that Qwest's attempt to portray the Final Order as a "reversal" of a prior order is flatly erroneous.

Qwest's motion for reconsideration plainly fails to meet the high standard under which such motions are evaluated. The Commission should therefore deny Qwest's motion for reconsideration, deny the motion for oral argument, and uphold its Final Order without hesitation.

Dated: May 23, 2013

/s Andrew M. Klein

Andrew M. Klein*
Allen C. Zoracki*
KLEIN LAW GROUP PLLC
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
Phone: (202) 289-6955
AKlein@KleinLawpllc.com
AZoracki@KleinLawpllc.com
*Counsel for Respondent
BullsEye Telecom, Inc.*

* Designated as a qualified representative in Docket No. 100008-OT

**CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 23rd day of May, 2013, to the following:

Florida Public Service Commission
Theresa Tan
Jessica Miller
Florida Public Service Commission
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ltan@psc.state.fl.us
jemiller@psc.state.fl.us

Flatel, Inc.
c/o Adriana Solar
2300 Palm Beach Lakes Blvd.
Executive Center, Suite 100
West Palm Beach, Florida 33409
asolar@flatel.net
flatel@aol.com

*Qwest Communications Company, LLC d/b/a
CenturyLink QCC*
Adam L. Sherr
Associate General Counsel, Qwest
1600 7th Avenue, Room 1506
Seattle, WA 98191
Tel: 206-398-2507
Fax: 206-343-4040
Email: Adam.Sherr@qwest.com

*Qwest Communications Company,
LLC d/b/a CenturyLink QCC*
Susan S. Masterton
CenturyLink
315 S. Calhoun St., Suite 500
Tallahassee, FL 32301
Tel: 850-599-1560
Fax: 850-224-0794
susan.masterton@centurylink.com

tw telecom of florida, l.p.
Beth Keating
Gunster Yoakley & Stewart, P.A.
215 S. Monroe Street, Suite 618
Tallahassee, FL 32301
bkeating@gunster.com

tw telecom of florida l.p.
Carolyn Ridley
2078 Quail Run Drive
Bowling Green, KY 42104
carolyn.ridley@twtelecom.com

Navigator Telecommunications, LLC
Michael McAlister, General Counsel
Navigator Telecommunications, LLC
8525 Riverwood Park Drive
P. O. Box 13860
North Little Rock, AR 72113
mike@navtel.com

Ernest Communications, Inc.
General Counsel
5275 Triangle Parkway
Suite 150
Norcross, GA 30092
lhaag@ernestgroup.com

/s Allen C. Zoracki
Allen C. Zoracki