Decision No. C12-0276

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08F-259T

QWEST COMMUNICATIONS COMPANY, LLC,

COMPLAINANT,

V.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, XO COMMUNICATIONS SERVICES, INC., TIME WARNER TELECOM OF COLORADO, L.L.C., GRANITE TELECOMMUNICATIONS, INC., ESCHELON TELECOM, INC., ARIZONA DIALTONE, INC., ACN COMMUNICATIONS SERVICES, BULLSEYE TELECOM, INC., COMTEL TELECOM ASSETS, LP, ERNEST COMMUNICATIONS, INC., LEVEL 3 COMMUNICATIONS, LLC AND LIBERTY BELL TELECOM, LLC, AND JOHN DOES 1-50 (CLECS WHOSE TRUE NAMES ARE UNKNOWN),

RESPONDENTS.

ORDER: (1) ADDRESSING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION; AND (2) REMANDING THE MATTER TO THE ADMINISTRATIVE LAW JUDGE WITH DIRECTIONS

Mailed Date: March 13, 2012
Adopted Date: February 15, 2012

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration (RRR) to Decision No. C11-1216 filed on December 5, 2011 by Eschelon Telecom, Inc. (Eschelon); MCImetro Access Transmission Services, LLC (MCImetro); tw telecom of colorado, LLC (TW); Ernest Communications, Inc. (Ernest); Qwest Communications Company, LLC, doing business as CenturyLink QC (QCC); XO Communications Services, Inc. (XO); BullsEye Telecom, Inc. (BullsEye); and Granite Telecommunications, LLC (Granite). Being fully advised in the matter and consistent with the discussion below, we grant in part, and deny in part, the RRR filed by Eschelon, MCImetro, TW, and QCC; and deny the RRR filed by Ernest, XO, BullsEye, and Granite. We also remand this docket to an Administrative Law Judge (ALJ) with directions.

B. Procedural History

2. The ALJ assigned to this docket discussed in detail the procedural history as well as the relevant background of the proceedings before the Minnesota Public Utilities Commission (Minnesota PUC) in Decision No. R11-0175 (Recommended Decision) mailed February 23, 2011, at ¶¶ 94-110 and 122-168. The Commission also discussed the procedural history and the

background in Decision No. C11-1216 (Order Addressing Exceptions and Motion to Reopen the Record) mailed November 15, 2011, at ¶¶ 2-13. We incorporate these statements of procedural history and background in this Order by reference. We will not reiterate these matters below, but will refer to them as needed to provide context to our rulings.

3. The parties filed their RRRs to Decision No. C11-1216 on December 5, 2011. By Decision No. C11-1383, mailed December 23, 2011, the Commission granted all eight RRRs to toll the statutory deadline in § 40-6-114(1), C.R.S. The Commission also denied a request for administrative notice filed by XO. In this Order, we will address the merits of these RRRs.

C. MCImetro

1. Statute of Limitations

a. Order Addressing Exceptions

4. In Decision No. C11-1216, the Commission agreed with QCC that the doctrine of equitable tolling tolled QCC's cause of action against MCImetro. The Commission generally agreed with the ALJ's analysis on the doctrine of equitable tolling. The Commission also agreed with the ALJ's conclusion that awareness of the unfiled off-tariff agreements in the Minnesota PUC proceeding, without more, did not give QCC knowledge of facts essential to the cause of action regarding intrastate tariffs on file in Colorado. The Commission found that, even though QCC may have known that the 2004 off-tariff agreements between AT&T Communications of the Mountain States, Inc. (AT&T) and MCImetro were nationwide, QCC was not able to confirm their applicability in Colorado before receiving a copy of these agreements. The Commission therefore rejected MCImetro's arguments that QCC's cause of action accrued as early as April 2005.

5. The Commission next discussed the difficult question of whether the cause of action in Colorado accrued on May 3, 2006, when QCC received an unredacted copy of the Second Unfiled Agreement. This document contained information about the unfiled off-tariff agreement that MCImetro entered into with AT&T regarding *Colorado* operations. The Commission considered § 40-15-105(3), C.R.S., which requires local exchange providers, such as MCImetro, to file off-tariff access contracts with the Commission. The Commission emphasized that § 40-15-105(3), C.R.S., has a critical role in promoting an open and competitive telecommunications marketplace. In addition, the Commission was concerned that MCImetro continued its failure to comply with the filing requirement even after similar non-compliance issues came to light in Minnesota. On the other hand, the Commission noted that QCC did not seek any relief with the Minnesota PUC with respect to the protective order concerning the Second Unfiled Agreement, which would enable QCC to assert its cause of action in Colorado.

6. The Commission stated that, while QCC's personnel and counsel in Minnesota could review the Second Unfiled Agreement on May 3, 2006, this was not the case for QCC's personnel and counsel in Colorado and therefore the instant cause of action did not accrue on May 3, 2006. This is because: (1) on May 3, 2006, MCImetro continued to violate its duty to file the agreement with the Commission; and (2) it is unlikely that the Minnesota PUC would have been able to act on any request to modify the protective order between May 3, 2006 and June 20, 2006 (two years before QCC commenced the instant action). The Commission found that, balancing the equities, the statute of limitations was equitably tolled and that QCC's claims against MCImetro were not time barred when QCC commended the instant action.

b. RRR

7. In its RRR, MCImetro argues the instant cause of action accrued no later than April 2005. MCImetro alleges that this is when QCC, including its Colorado-based counsel and personnel, learned of the existence and general terms of the 2004 agreements between MCImetro and AT&T. It cites to the comments filed by the Minnesota Department of Commerce (DOC) on April 25, 2005 with the Minnesota PUC. In these comments, the DOC alleged that MCImetro and AT&T entered into the off-tariff agreements to provide switched access service, which agreements have not been filed with the Minnesota PUC. The Minnesota DOC also stated that, pursuant to the 2004 agreements, MCImetro provided intrastate switched access at rates lower than those in the tariffs and offered to other interexchange carriers (IXCs). In this docket, QCC admitted it asked to be added to the service list in the Minnesota PUC proceeding in April 2005. QCC determined it had a specific interest in that proceeding, despite lacking knowledge of the specific provisions of the 2004 agreements. Additionally, QCC received a Minnesota PUC order, which explained that the off-tariff agreements extended beyond Minnesota.

8. MCImetro further argues that some of the same QCC personnel were involved in both the Minnesota PUC proceeding and the instant docket. MCImetro points out that Ms. Lisa Hensley-Eckert, QCC's lead witness in this docket, is responsible for *company-wide* switched access and inter-carrier compensation issues. Her responsibilities are nationwide, focusing on the 14-state region including both Colorado and Minnesota. Ms. Hensley-Eckert is based in Colorado and participated in the preparation of comments that QCC filed with the Minnesota PUC on August 24, 2005. MCImetro also points out that the Minnesota DOC filed an amended complaint against AT&T on October 27, 2005 and served this amended complaint on QCC (among other parties). Ms. Hensley-Eckert participated in all aspects of the new

proceeding. In one of the pleadings that she worked on, QCC described a *broad-scale* scheme by AT&T to pay below tariff access rates.

9. MCImetro argues that, by its participation in the Minnesota PUC proceeding, in 2005 QCC "learned facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of another" and that this is when QCC's cause of action accrued under Colorado law. MCImetro argues this is especially the case given the earlier 2004 public bankruptcy proceedings involving WorldCom, its corporate parent. At that time, the bankruptcy court approved the bilateral switched access agreements between MCImetro and AT&T after providing opportunity to all creditors, including QCC, to comment.

10. In any case, MCImetro argues that QCC obtained *actual knowledge* of the facts underlying its cause of action on May 3, 2006. On that date, QCC received the Second Unfiled Agreement, which contained the information that MCImetro entered into an off-tariff agreement with AT&T regarding *Colorado* operations. MCImetro basically argues that QCC's failure to assert its cause of action in Colorado became even less excusable at that time. MCImetro contends the same persons at QCC continued to be involved in these matters in both Colorado and Minnesota. MCImetro further argues that, in any case, the record evidence contradicts the finding that QCC's counsel and personnel in Minnesota and Colorado were insular and/or operated in a vacuum.

11. MCImetro argues that, in evaluating whether the statute of limitations has been equitably tolled, Colorado courts hold sophisticated and experienced parties to a higher standard than lay persons. *Skyland Metropolitan District v. Mountain West Enterprise, LLC*, 184 P.3d 106, 126-127 (Colo. App. 2007). This also applies to parties represented by counsel.

Murry v. GuideOne Specialty Mutual Insurance Co., 194 P.3d 489, 494 (Colo. App. 2008) (the cause of action accrued when the plaintiff's counsel had sufficient information to initiate an investigation into the other party's actions). MCImetro contends that QCC's attorneys in Minnesota represented and had a fiduciary obligation to the entire company, rather than to only its Minnesota operations. Further, "an attorney is presumed to know the law, and an attorney's knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed." *In re Trupp*, 92 P.3d 923, 932 (Colo. 2004); *Brodeur v. Indus. Claims Appeals Office*, 159 P.3d 810, 813 (Colo. App. 2007); *Murry*, 194 P.3d at 494.

12. MCImetro disputes the Commission's conclusion that the cause of action did not accrue on May 3, 2006 because the Second Unfiled Agreement was subject to a protective order issued by the Minnesota PUC at that time. The Commission found it is unlikely that the Minnesota PUC would have been able to act on any request to modify the protective order between May 3, 2006 and June 20, 2006 (two years before QCC commenced the instant complaint). MCImetro argues this finding is irrelevant because there is no evidence QCC ever made such an effort. MCImetro also points out that the Minnesota PUC protective order did not stop QCC from filing a suit in a Minnesota state court in 2007, where QCC alleged the existence of the unfiled off-tariff agreement between MCImetro and AT&T *in Colorado*, among other states.

13. MCImetro finally claims that its failure to file the off-tariff agreement with AT&T was not intentional. MCImetro argues that the Commission placed too much reliance on the requirement to file the off-tariff agreements, arguing that it is not as important to promoting an open and competitive marketplace as the Commission believes it to be. MCImetro states the notice filing needs to contain only a limited amount of information, not the customers' name or

rates. Further, MCImetro states that the rules provide for the filing of notices and access agreements under seal and subject to non-disclosure agreements. *See*, Rule 2203(c) of the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* (CCR) 723-2. MCImetro concludes that the Commission failed to evaluate all other factors by focusing on the fact that MCImetro failed to file its off-tariff agreement with AT&T. MCImetro argues that, in determining whether the statute of limitations has been equitably tolled, the Commission did not engage in a fair and proper balancing of the equities, but only focused on one factor.

c. Discussion

14. The Commission must decide the time at which QCC discovered, or should have discovered by exercising reasonable diligence, facts essential to its cause of action against MCImetro. The ALJ was unconvinced by MCImetro's argument that the cause of action accrued sometime in April 2005 based on what QCC learned through its participation in the Minnesota PUC proceeding. We continue to agree. It is true in April 2005 QCC learned that MCImetro had entered into unfiled switched access agreements with AT&T (the so-called 2004 agreements) and that those agreements contemplated rates lower than those on file with the Minnesota PUC. QCC had also learned the agreements extended beyond Minnesota and were nationwide. There is no evidence, however, that in April 2005 QCC knew these 2004 agreements applied *in Colorado*. Thus, we disagree with MCImetro that QCC, in April 2005, discovered and/or should have discovered the facts essential to its complaint against MCImetro in Colorado. To quote the ALJ, "awareness of the agreements and various proceedings did not give [QCC] knowledge of facts essential to the cause of action varying from intrastate tariffs on file in Colorado." The mere fact that QCC was aware of MCImetro's conduct

in other states regarding intrastate access services is insufficient to show knowledge essential to QCC's cause of action in Colorado. *See*, Recommended Decision, at ¶¶ 201-205, Decision No. C11-1216, at ¶ 16.

15. The next question is whether QCC's cause of action against MCImetro accrued on May 3, 2006, when QCC obtained information that the 2004 agreements between MCImetro and AT&T applied *to Colorado*. On that date, in response to discovery served in the Minnesota PUC proceeding, QCC was served with the Second Unfiled Agreement, which contained that crucial information. We discuss this question below.

16. In its RRR, MCImetro correctly states that, since tolling of a statute of limitations is an equitable remedy, its application involves an examination of the facts and circumstances of individual cases to determine when equity requires such a remedy. *BP America Production Co. v. Patterson*, 263 P.3d 103, 109 (Colo. 2011). Equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice. *See, e.g., Dean Witter Reynolds, Inc. v. Hartman*, 91 P.2d 1094, 1096 (Colo. 1996). Thus, we must balance the equities for both MCImetro and QCC in determining whether equitable tolling applies in this case. However, this balancing does not necessarily mean that the scale tips in favor of MCImetro.

17. MCImetro correctly cites two legal principles applicable here: (1) the courts hold sophisticated and experienced parties to a higher standard than lay persons; and (2) an attorney is presumed to know the law, and an attorney's knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed. However, MCImetro only applies these principles to QCC and apparently does not hold itself to the same standard.

18. We agree that QCC is a sophisticated and experienced party and, as such, should be held to a higher standard than a lay person. In *Skyland*, 184 P.3d at 127, the Colorado Court

of Appeals, in evaluating whether a statute of limitation has been equitably tolled, stressed that the defendant's predecessor in interest was an experienced real estate developer and builder, with specific experience in matters at issue in the lawsuit. However, not only does QCC fall into the same category as the plaintiff in *Skyland*, but MCImetro does also. MCImetro is a large telecommunications provider, both a competitive local exchange carrier (CLEC), and an IXC, that operates in Colorado, Minnesota, and other jurisdictions.

19. As MCImetro asserts, it is also true that, at all times relevant to this proceeding, QCC was represented by attorneys who are presumed to know the law and whose knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed. However, the same is also true of MCImetro and its attorneys. MCImetro's attorneys are likewise presumed to know the law, including the filing obligations imposed by § 40-15-105, C.R.S., and applicable Commission Rules. That knowledge is imputed to MCImetro itself. In its RRR, MCImetro denies that it intentionally ignored the requirement governing the filing of switched access contracts.[1] Given the fact that MCImetro is a large CLEC/IXC represented by attorneys presumed to know the law, that claim is disingenuous. It is even more disingenuous after commencement of the Minnesota PUC proceedings, which were based on similar state filing requirements. Yet, even after these proceedings were commenced, MCImetro still failed to correct the problem in other jurisdictions, including Colorado.

20. The above claim is also irrelevant as a matter of law. First, § 40-15-105(3), C.R.S., plainly states that access contracts "*shall*[2] be filed with the [C]ommission…" *Emphasis added*. Section 40-15-105, C.R.S., does not excuse "unintentional" non-filing.

[1] *See*, RRR filed by MCImetro on December 5, 2011, p. 18.

[2] It is well-settled that the term "shall" is presumed to connote a mandatory meaning. *See, e.g., Burns v. Bd. of Assessment Appeals*, 820 P.2d 1175, 1178 (Colo. App. 1991).

Second, nowhere in the statute are exemptions from the filing requirements if the off-tariff access agreement is already public through some other manner. Thus, the fact that a federal bankruptcy court approved the 2004 agreements in no way exempts MCImetro from the filing requirements of § 40-15-105, C.R.S.

21. MCImetro's attempt to trivialize a statutory filing obligation and its failure to accept any responsibility for continually not filing the 2004 agreements are troubling. As explained in Decision No. C11-1216, these filing requirements are not a mere formality. Instead, disclosure through these filing requirements plays a critical role in promoting a competitive telecommunications marketplace envisioned by the Colorado General Assembly when it enacted § 40-15-105, C.R.S. Likewise, disclosure played a critical role in the statutes and public policies at issue in *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850 (Colo. 1992) and *Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720 (Colo. 1976), two Colorado court cases examining the doctrine of equitable tolling in the context of a party failing to make a legally required disclosure. Decision No. C11-1216, at ¶ 35. Even if, as MCImetro argues on RRR, the Rules allow for the filing of off-tariff agreements under seal and subject to non-disclosure agreements, this does not diminish the critical role of the filing requirement. The filed agreements can still be reviewed, most importantly by the Commission Staff (Staff), who has the ability to investigate and seek appropriate remedies.

22. We must consider another public policy factor in this case. If MCImetro charged unlawfully discriminatory rates to QCC,[3] this also results in QCC's customers paying unlawfully discriminatory intrastate toll rates. We have a general responsibility to protect the public interest,

[3] The substance of this claim will be examined on remand, as we discuss below.

regarding utility rates and practices. *See*, *City of Boulder v. Pub. Utils. Comm'n*, 996 P.2d 1270, 1277 (Colo. 2000). This is especially so with respect to consumers.

23. In making our decision on whether the doctrine of equitable tolling applies here, we do not ignore or excuse the fact that QCC let time lapse before filing its complaint. Instead, we balance the equities for *both* MCImetro and QCC. We balance the equities between two sophisticated and experienced telecommunications providers, both represented by attorneys presumed to know the law. Both companies could have proceeded differently—MCImetro could have filed its 2004 agreements with the Commission, which it was required to do under Colorado law, and QCC could have let less time elapse before filing its complaint. In the end, this comes down to two dates: the date MCImetro could have filed the 2004 agreements with AT&T, as early as February 23, 2004 (when these agreements were executed); and the date QCC received a copy of the Second Unfiled Agreement, May 3, 2006 (although subject to a protective order). QCC filed its complaint on June 20, 2008, at which time MCImetro still had not filed the agreements with the Commission. In other words, MCImetro failed to comply with § 40-15-105, C.R.S., for a longer time period than the time period QCC let elapse before filing its complaint.[4] We find that MCImetro's continual failure to comply with the statutory filing requirements was far more egregious and thus outweighs QCC's actions (or lack thereof).

[4] Even if we accept MCImetro's argument that QCC could have brought its claim in April of 2005 (which we do not), it still remains true that MCImetro failed to comply with § 40-15-105, C.R.S., for a longer time period than QCC let elapse before bringing its claim (February 2004 vs. April 2005).

For that reason and combined with the strong public policy considerations discussed above, we find that the balance of equities favors QCC and the doctrine of equitable tolling applies.[5]

2. Unlawful Discrimination

a. RRR

24. In its RRR, MCImetro argues that Decision No. C11-1216 contains neither a discussion nor findings of fact on whether MCImetro unlawfully discriminated against QCC. Instead, the Commission merely stated that it agreed with the ALJ that QCC made a *prima facie* showing of discrimination. However, the ALJ did not make any conclusions regarding the contract between MCImetro and AT&T. This is because the ALJ did not need to reach any legal conclusions on this issue, since he dismissed QCC's claim against MCImetro, in its entirety, on the statute of limitations grounds. MCImetro argues the Commission commits a clear legal error in this regard.

25. Similarly, in its own RRR, QCC points out that, in ¶ 110 of the Recommended Decision, the ALJ discussed the amount by which MCImetro charged more than AT&T during the period that its unfiled off-tariff agreement with AT&T was in effect. Further, Mr. Derek Canfield, a witness for QCC, presented an alternative calculation. This alternative calculation accounted for the fact that traffic between MCImetro and AT&T went in both directions while the traffic between MCImetro and QCC did not. The ALJ did not

[5] Further, even if the doctrine of equitable tolling does not apply to QCC's entire claim against MCImetro, it likely survives in part, as to the time period from June 20, 2006 to January 2, 2007. MCImetro was in violation of the Colorado filing requirements for the *entire* period that the unfiled agreement between MCImetro and AT&T was in effect—right up until its termination on January 27, 2007. On exceptions, QCC correctly cites to the Commission decisions issued in Docket No. 01F-071G (*Home Builders Ass'n v. Public Service*), where the Commission has held that § 40-6-119(2), C.R.S., permits reparations for the two-year period prior to the filing of a complaint, even where an older portion of the claim is time-barred. MCImetro never addressed this argument *on the statute of limitations grounds*. However, we do not make a decision on this alternative argument, given our conclusion that the doctrine of equitable estoppel applies to QCC's entire claim.

state which calculation was appropriate (as he dismissed the entire claim on the statute of limitations grounds) and the Commission did not do so either in Decision No. C11-1216. In its RRR, QCC requests that the Commission pick one of these two calculations to determine the amount of reparations owed by MCImetro.

b. Discussion

26. We agree with MCImetro that the ALJ did not make any findings that MCImetro unlawfully discriminated against QCC. The ALJ did not need to do so, as he dismissed QCC's entire claim against MCImetro on the statute of limitations grounds. Therefore, the calculations contained in ¶ 110 of the Recommended Decision, on which the Commission relied on in Decision No. C11-1216, are merely *dicta* rather than findings of fact or conclusions of law.

27. Neither the Recommended Decision nor Decision No. C11-1216 contains any findings or conclusions that MCImetro unlawfully discriminated against QCC. The mere fact that MCImetro charged QCC more than AT&T for intrastate switched access during the same time does not necessarily constitute undue or unreasonable preference in violation of § 40-15-105(1), C.R.S. These two decisions also do not discuss whether or not, in the event unlawful discrimination was established, any amount of reparations that should account for the fact that traffic between MCImetro and AT&T went in both directions. Thus, we grant the RRR filed by MCImetro on this ground and remand this docket to the ALJ to address these issues.

28. On remand, the ALJ shall determine whether MCImetro unlawfully discriminated against QCC by subjecting it to any prejudice or competitive disadvantage for providing access to the local exchange network, in violation of § 40-15-105(1), C.R.S. It is important to note that MCImetro raised arguments to rebut QCC's complaint that are very different from arguments raised by all other respondent CLECs. In essence, these arguments are that the 2004 contracts

between MCImetro and AT&T were reciprocal and bilateral. MCImetro contends that QCC was not similarly situated to AT&T because it was unable to enter into such a reciprocal arrangement and undertake the same reciprocal obligations to which MCImetro and AT&T had agreed. This is because, *inter alia*, QCC does not (and is not legally able to) provide switched access service in Colorado. MCImetro concludes QCC was not entitled to the benefits of the 2004 contracts in the form of lower rates because it was not able to meet the corresponding obligations of these contracts. We direct the ALJ to consider the above arguments in determining whether or not MCImetro unlawfully discriminated against QCC.

29. If the ALJ determines MCImetro unlawfully discriminated against QCC, the ALJ should also determine the proper measure of damages. This could be the total amount by which MCImetro charged QCC more than AT&T when the unfiled agreement between MCImetro and AT&T was in effect. It could also be the lower amount which accounts for the fact that traffic between MCImetro and AT&T went in both directions, which was not the case with the traffic between MCImetro and QCC, or another amount. Finally, as the scope of the remand is limited, we direct the ALJ to make the necessary findings and conclusions, to the extent possible, based upon the evidence already in the record.[6]

D. QCC

30. Besides the argument discussed above, QCC requests several minor clarifications in its RRR. First, QCC states that the Commission mistakenly included the word "not" in ¶ 35 of Decision No. C11-1216. The sentence now reads: "[w]e are persuaded that MCImetro had an

[6] Due to the remand, this Order is not a final Commission decision that is subject to further RRR or judicial review. *See, e.g., Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 489 (Colo. 1989) (a Commission order that it had subject matter jurisdiction over a matter and remanding it to a hearing examiner was not a final Commission order). However, we will consider the arguments regarding the remand on exceptions to the ALJ's recommended decision on remand.

ongoing obligation to cease its illegal activities, balancing the equities, the statute of limitation was *not* tolled." Emphasis added. QCC requests a correction of Decision No. C11-1216 on this point. We agree with QCC. Thus, we grant its RRR on this ground and strike the word "not."

31. QCC also states that, in ¶ 139 of Decision No. C11-1216, the Commission makes two references to ¶ 183 of the Recommended Decision. QCC believes the Commission instead intended to refer to ¶ 184 of the Recommended Decision. We agree and therefore grant QCC's RRR on this point.

32. Finally, in reviewing Decision No. C11-1216, we noted that there is a missing word "not" in the penultimate sentence of ¶ 94. That sentence currently reads: "[t]he holding of *Home Builders* is so narrow as the respondent CLECs suggest and is not limited to circumstances where the utility fails to follow the terms of its own tariffs." In light of the Commission's ruling on the issue, the sentence instead should read "[t]he holding of *Home Builders* is *not* so narrow as the respondent CLECs suggest and is not limited to circumstances where the utility fails to follow the terms of its own tariffs." *Emphasis added*. We therefore make this correction on our own motion.

E. Eschelon, TW, Ernest, XO, BullsEye, and Granite

33. In this section, we address the various arguments raised by Eschelon, TW, Ernest, XO, BullsEye, and Granite on RRR. We refer to these parties collectively as respondent CLECs or respondents. To avoid repeating same or similar arguments, we group the arguments raised by respondent CLECs, to the extent possible. We discuss the arguments unique to TW and Eschelon below in sections F and G respectively.

1. Statute of Limitations

a. Order Addressing Exceptions

34. In Decision No. C11-1216, the Commission affirmed the ALJ's conclusion that QCC's claims against all respondent CLECs other than MCImetro have been equitably tolled during the relevant time period. Unlike QCC's claims against MCImetro, where QCC at least received a copy of the document containing information about the unfiled off-tariff agreement that MCImetro entered into with IXCs other than QCC *in Colorado*, there was no evidence that QCC received information, more than two years before it filed its formal complaint, about the unfiled off-tariff agreements entered into by any of the other respondent CLECs *in Colorado*.

35. The Commission acknowledged that, as a result of participating in the Minnesota PUC proceeding, QCC received off-tariff agreements that some respondent CLECs entered into with AT&T and/or Sprint Communications Company, LP (Sprint) in various jurisdictions. From that proceeding, QCC has learned that the scheme was broad in scale. However, absent knowledge that *a particular CLEC* participated in this scheme *in a particular jurisdiction* during the relevant time period, the cause of action did not accrue against a particular CLEC in a particular jurisdiction.

36. The Commission agreed with QCC and the ALJ in that QCC was not required to divine from the Minnesota PUC proceeding which CLECs had entered into off-tariff switched access agreements *in Colorado* and when. The Commission ruled that QCC had no duty to search for off-tariff agreements that each of the respondent CLECs may have entered into in Colorado and/or initiate expensive litigation just to preserve its Colorado rights with respect to these agreements. This is especially true given the public policy interests behind § 40-15-105(3), C.R.S., and the critical role of disclosure in promoting these policies. The General Assembly has

declared "it is the policy of the state of Colorado to promote a competitive telecommunications marketplace." *See,* § 40-15-101, C.R.S. Section 40-15-105(3), C.R.S., advances that public policy by requiring local exchange providers to file access contracts with the Commission. Thus, other purchasers of switched access services as well as the Commission and its Staff can review these contracts to ensure compliance with the law. Given these public policies and the overall facts of this docket, the Commission found the ALJ's approach to be reasonable.

37. Finally, the Commission acknowledged that QCC filed its formal complaint on June 20, 2008, *before* actually confirming each of the respondent CLECs other than MCImetro had entered into unfiled off-tariff agreements *in Colorado*. However, the Commission found this was irrelevant to whether or not QCC's claims against the CLECs have been equitably tolled. The Commission stated that, if QCC was not required to undertake expensive steps to uncover this information just to preserve its rights, it also followed that QCC should not be penalized for not embarking upon the same expensive and risky approach at an earlier time.

b. RRR

(1) Granite and BullsEye

38. In their RRR, Granite and BullsEye argue that, pursuant to the plain language of applicable statutes, no discovery tolling can apply to discrimination claims. This is because the applicable accrual statute, § 13-80-108(4), C.R.S., does not provide for any discovery tolling. Granite and BullsEye argue that, given that other subsections of the same statute explicitly provide for discovery tolling, such as §§ 13-80-108(6), 13-80-108(7), and 13-80-108(8), C.R.S., the rules of statutory construction prohibit a discovery rule from being read into § 13-80-108(4), C.R.S.

39. Granite and BullsEye are correct in that § 13-80-108(4), C.R.S., does not contain explicit tolling language, unlike other accrual statutes. However, in Decision No. C11-1216, at ¶ 27, the Commission relied on *Patterson v. BP America Production Co.*, 240 P.3d 456, 460 (Colo. App. 2010). In *Patterson*, the Colorado Court of Appeals discussed a ruling that the Colorado Supreme Court previously issued in the course of that prolonged litigation, at 185 P.3d 811, 815 (Colo. 2008). In its ruling, the Colorado Supreme Court found that § 13-80-108(4), C.R.S., was the accrual statute applicable to the plaintiffs' claims and reversed a lower court's ruling to the contrary. But, the Court did not reverse the lower court's ruling that there was a fact question as to whether a statute of limitations had been equitably tolled by the defendant's alleged fraudulent concealment. If the doctrine of equitable tolling did not apply *per se* to the accruals of causes of action under § 13-80-108(4), C.R.S., as Granite and BullsEye argue, there would have been no fact question in *Patterson* as to whether the statute of limitations has been equitably tolled.

40. Granite and BullsEye presented the very same argument on exceptions, which the Commission rejected based on *Patterson*. In their RRR, Granite and BullsEye merely repeat the same argument instead of arguing, for example, that the Commission incorrectly read or applied *Patterson* or that this case for some reason does not apply. Granite and BullsEye are correct in that § 13-80-108(4), C.R.S., does not contain explicit tolling language; however, the Commission may not ignore *Patterson*, which implicitly finds that claims accruing under § 13-80-108(4), C.R.S., may be tolled. Because Granite and BullsEye present nothing new on RRR, we deny the RRR on this ground.

41. In their RRRs, Granite and BullsEye also argue that QCC had actual knowledge of the facts underlying its complaint well before the limitations period.

Granite and BullsEye rely on the fact that QCC admitted that, by April 2006, QCC "was able to receive and review a handful of AT&T's secret agreements with CLECs, including discriminatory pricing rates that AT&T was able to extract from CLECs through its predatory practices." However, they do not point to any evidence in the record that QCC had knowledge that *Granite* and *BullsEye* entered into secret agreements with AT&T *in Colorado*, more than two years before QCC filed its complaint. We therefore deny the RRR filed by BullsEye and Granite on this ground.

42. Finally, in their RRRs, Granite and BullsEye refer to certain statements made by the Commissioners during deliberations, which statements have not been incorporated into the Commission decision. We find these references to be improper and strike them from the RRRs on our own motion. As the Colorado Supreme Court ruled in *Bd. of County Comm'rs of County of San Miguel v. Pub. Utils. Comm'n*, 157 P.3d 1083, 1093-94 (Colo. 2007), thought processes of the Commissioners cannot be used as evidence to impeach a Commission decision.

(2) TW and Eschelon

43. On RRR, TW disputes the Commission's finding that, although QCC's personnel and counsel in Minnesota could review the unfiled agreements (through their participation in the Minnesota PUC proceeding) this was not necessarily the case for the personnel and counsel in Colorado. TW explains that Ms. Hensley-Eckert, QCC's staff director for public policy for the 14-state region that includes Colorado and Minnesota, participated in both the Minnesota and Colorado PUC proceedings related to unfiled switched access issues. Hence, according to TW, the explanation offered by the Commission "strains credulity." Likewise, TW argues the protective order issued by the Minnesota PUC did not prevent QCC from filing its complaint in Colorado.

44. It is true that some of the same personnel and counsel at QCC participated in both the Minnesota and Colorado PUC proceedings related to unfiled off-tariff switched access issues. We discuss this point further in connection with MCImetro above. However, unlike MCImetro, where QCC received a document containing information about the unfiled off-tariff agreement that MCImetro entered into in Colorado (the Second Unfiled Agreement), there is no evidence that QCC received anything containing Colorado-specific information pertaining to TW (subject to protective order or not) more than two years before it filed its complaint. TW does not claim otherwise in its RRR. In the absence of such information, even if the same QCC personnel and counsel participated in both Colorado and Minnesota PUC proceedings, QCC's cause of action in Colorado against TW did not accrue. We reiterate that knowledge that off-tariff agreements were nationwide or extended beyond Minnesota is not the same as knowledge that these agreements applied in Colorado. We deny the RRR filed by TW on this ground.

45. Finally, in its RRR, TW argues the Commission completely failed to address the point made by respondent CLECs, which is that QCC was able to file its complaint without first confirming each of the CLECs has entered into unfiled off-tariff agreements *in Colorado*. This is not the case. In ¶ 54 of Decision No. C11-1216, the Commission addressed this point and stated it was irrelevant. If QCC was not required to undertake expensive steps to uncover which CLEC entered into an unfiled off-tariff agreement in which jurisdiction in order to preserve its rights—especially in light of public policies mandating filing of such agreements with the Commission—QCC also should not be penalized for not embarking on the same risky and expensive approach earlier. For its part, Eschelon argues the statement in ¶ 54 of Decision No. C11-1216 means the Commission found the facts are irrelevant in determining when the statute of limitations began to run. This is also not the case. The facts are, indeed, very relevant,

but they do not establish QCC had knowledge that, more than two years before it filed its formal complaint, *Eschelon* or *TW* entered into unfiled agreements *in Colorado*. We deny the RRR filed by TW and Eschelon on this ground.

(3) Ernest

46. In its RRR, Ernest[7] points out that QCC admitted that it was aware of the "2004 off-tariff agreements in April 2005." Ernest acknowledged this relates specifically to off-tariff agreements between MCImetro and AT&T, but argues this knowledge is sufficient to put QCC on notice of agreements with other CLECs. In Decision No. C11-1216, the Commission rejected this argument. Further, there is no record evidence, and Ernest certainly does not cite to any, that QCC knew, more than two years before it filed its complaint, that *Ernest* entered into unfiled off-tariff agreements *in Colorado*. We therefore deny the RRR filed by Ernest on this ground.

47. In the alternative, Ernest points out that QCC did not add Ernest as a respondent in this case until December 12, 2008. It argues that any damages accruing more than two years before that time are barred. Regardless, there is no record evidence QCC knew, more than two years before it filed its complaint against Ernest (which would be December 12, 2006), that *Ernest* had entered into any unfiled agreement *in Colorado*. Thus, we do not believe any portion of QCC's claims against Ernest is time barred.

(4) XO

48. In its RRR, XO argues the fact that QCC did not have state-specific information before the statute of limitation had run is irrelevant because statute of limitation accrues not only when the party had actual knowledge of the cause of action but also when the claim should have

[7] Ernest did not file exceptions to the Recommended Decision.

been discovered by the exercise of reasonable diligence. XO appears to argue that knowledge that a specific CLEC entered into unfiled off-tariff agreements in other states means that QCC, in the exercise of reasonable diligence, should have begun investigating whether such agreements also existed in Colorado. Given the public policy interests behind § 40-15-105(3), C.R.S., and the critical role of disclosure in promoting these policies, we do not find that to be the case. In the absence of state-specific information, QCC had no cause to begin investigating. We deny the RRR filed by XO on this ground.

2. Commission Authority to Order Reparations in this Case

a. RRR

49. In their RRR, Granite, BullsEye, XO, and Eschelon argue that Decision No. C11-1216 is in error because it awards reparations to QCC. These respondent CLECs argued in their exceptions that the Commission has no authority to award reparations in this case because this would result in further discrimination against other IXCs. These respondents relied on the fact that there are other IXCs in Colorado (besides QCC, AT&T, and Sprint) that operate in Colorado and pay the tariff rates charged by the CLECs. Thus, permitting QCC to obtain the below tariff rates (through an award of reparations) would exacerbate the discrimination toward those other IXCs. These respondent CLECs conclude that "two wrongs do not make a right."

50. Granite, BullsEye, XO, and Eschelon cite to § 40-6-119(1), C.R.S., which states:

> When complaint has been made to the commission concerning any rate, fare, toll, rental, or charge for any product or commodity furnished or service performed by any public utility and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity, or service, the commission may order that the public utility make due

> reparation to the complainant therefor, with interest from the date of collection, *provided no discrimination will result from such reparation.*

Emphasis added. The respondents argue that an award of reparations to QCC would result in discrimination to other IXCs not involved in this docket, in violation of § 40-6-119(1), C.R.S., and QCC has not met its burden of proof to the contrary.

b. Discussion

51. In Decision No. C11-1216, at ¶ 85, the Commission denied the exceptions on this ground. The Commission found that this argument, when taken to its logical conclusion, would frustrate the ability of any complainant to rely on the non-discrimination and reparations statutes if any other similarly situated party chose not to join in a complaint. The Commission agreed with QCC that it can only pursue a complaint on its own behalf and it should not be penalized if other IXCs chose not to file their own complaints against respondent CLECs. Because Granite, BullsEye, XO, and Eschelon do not present any new argument on RRR, we deny their RRR for the same reasons as stated in Decision No. C11-1216.

52. Further, we do not agree with Granite, BullsEye, XO, and Eschelon that an award of reparations to QCC will result in discrimination to IXCs not involved in this docket (*i.e.*, IXCs other than QCC, AT&T, and Sprint) or will violate § 40-6-119(1), C.R.S. First, other IXCs could have intervened in this proceeding to protect their interests but chose not to. We note that Staff as well as the Colorado Office of Consumer Counsel have intervened in this docket to protect their interests. The other IXCs, who are sophisticated parties that regularly appear before the Commission, were more than capable of doing the same. This is especially the case since, besides QCC, AT&T, and Sprint, most other IXCs that presently operate in Colorado are affiliated with a past or present party in this docket and therefore had additional notice.

53. Second, while respondent CLECs are correct that the statutory interpretation rules require courts and administrative agencies to give effect to every word and clause contained in a statute,[8] that rule is not without exceptions. It is well settled that a statutory interpretation that leads to an absurd result should not be followed. *See, e.g., Avicomm, Inc. v. Pub. Utils. Comm'n*, 955 P.2d 1023 (Colo. 1998). It is absurd to require a complainant to join every potentially similarly situated party before receiving reparations, no matter how egregious the discrimination. We deny the RRR filed by Granite, BullsEye, XO, and Eschelon on this ground.

3. Filed Rate Doctrine

a. Order Addressing Exceptions

54. In Decision No. C11-1216, at ¶¶ 92-97, the Commission found that the filed rate doctrine did not bar an award of reparations to QCC in this case. The Commission found that, by failing to file their off-tariff agreements with AT&T and/or Sprint with the Commission, contrary to § 40-15-105(3), C.R.S., the respondent CLECs continuously prevented the Commission from making an informed decision on whether their filed tariff rates were just and reasonable. In part relying on the *Home Builders* precedent,[9] the Commission found that the filed rate doctrine did not apply where the regulated entities (in this case, the respondent CLECs) have prevented an administrative agency from making an informed decision on whether the filed rates are just and reasonable. In this case, the respondent CLECs have done so by failing to file their off-tariff agreements with AT&T and/or Sprint with the Commission. Finally, relying on *Arizona Grocery Co. v. Atchison Topeka and Santa Fe Ry. Co.*, 284 U.S. 370, 390 (1931) and prior Commission decisions, the Commission determined the filed rate doctrine did not bar an award of reparations

[8] *See, e.g.*, RRR filed by Eschelon, p. 7.
[9] Decision No. C02-0687, issued June 19, 2002, pp. 21-16, and Decision No. C03-1292, issued November 19, 2003, at ¶ 22, both issued in Docket No. 01F-071G.

in this case. This is because the respondent CLECs' filed tariffs went into effect by operation of law and were never affirmatively approved by the Commission.

b. RRR

55. In their RRR, Granite, BullsEye, TW, Eschelon, and Ernest argue the Commission erred in making the above conclusions. In doing so, these respondent CLECs largely repeat the arguments previously presented on exceptions. In addition, Granite and BullsEye argue that the filed rate doctrine, which does not apply to tariffs that went into effect by operation of law, does not apply in this case. Granite and BullsEye argue that this proposition applies only to the complaints based on reasonableness of the filed rate, not discrimination. Granite and BullsEye cite *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 577 (1920) in arguing that challenges to filed tariffs based on reasonableness versus those based on discrimination are treated differently.

c. Discussion

56. For reasons more fully discussed in Decision No. C11-1216, we deny the RRR filed by Granite, BullsEye, TW, Eschelon, and Ernest on this ground. We are not persuaded by the arguments presented and believe Decision No. C11-1216 is correct in this regard. Further, we are not persuaded by the additional argument made by Granite and BullsEye. *Bonfils*, 67 Colo. at 576-77, treats the claims based on reasonableness of the filed rate versus discrimination differently. *Bonfils* does not require the parties that have paid unreasonable rates (as opposed to discriminatory rates) to prove actual damages. Second, *Bonfils* was decided prior to *Arizona Grocery*, which makes no distinction between claims based on reasonableness versus discrimination in so far as challenging tariffs that went into effect by operation of law. We were not able to find any case decided after *Arizona Grocery* that supports the argument presented by Granite and BullsEye. If anything, *Arizona Grocery*, 284 U.S. at 384, states the

whole purpose of the filed rate doctrine is to prevent discrimination and other abuses. *See also*, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). We deny the RRR filed by Granite and BullsEye on this ground.

4. Proof of Damages

57. In their RRRs, Granite, BullsEye, XO, and Ernest argue that Decision No. C11-1216 is in error because it awards reparations to QCC without QCC showing that it suffered actual injuries resulting from the alleged discrimination. These respondent CLECs argue that an allegation of injury based on the price difference between the tariff rates and the off-tariff rates is insufficient as a matter of law. They contend that QCC had to establish that unfiled agreements caused reduced profits to QCC, a reduced market share, a forced reduction in prices, or another type of economic harm. These respondent CLECs rely on *ICC v. United States*, 289 U.S. 385, 390 (1933) in support of this argument.

58. In Decision No. C11-1216, at ¶¶ 103-104, the Commission found that the plain language of §§ 40-15-105(1) and 40-6-119(1), C.R.S., does not require a complainant to prove economic damages: for example, a complainant is not required to prove reduced profits, a reduced market share, or a forced reduction in prices to sustain a claim of discrimination. The Commission found that it was irrelevant whether economic damages must be shown to sustain a discrimination claim under federal laws, such as the federal statutes discussed in *ICC v. United States*.

59. We remain unpersuaded by the above argument presented by Granite, BullsEye, XO, and Ernest. In *ICC v. United States*, the Supreme Court was interpreting the provisions of the Interstate Commerce Act (as it was in effect at that time). Nothing in that case stands for the proposition that economic damages must be proven to sustain a discrimination claim under all

other laws. The respondent CLECs also rely on (or have relied on previously) *Spa Universaire v. QCC Communications Int'l, Inc.*, 2007 WL 2694918 (D. Colo. 2007) and *Cheesman v. QCC Communications Int'l, Inc.*, 2008 WL 2037675 (D. Colo. 2008), where the courts stated that a price difference was insufficient to establish damages. However, these two cases discussed the claims asserted pursuant to the Sherman Act, the Federal Communications Act of 1934, and the Telecommunications Act of 1996, none of which are at issue here. These cases also do not state that economic damages must be proven under all other state or federal laws. For reasons more fully discussed in Decision No. C11-1216, we deny these RRRs on this ground.

5. The Claim that QCC's Claims are Barred Because QCC Previously Argued that Off-Tariff Agreements are Unlawful and Invalid

60. In their RRRs, Granite and BullsEye argue QCC's claims are barred as a matter of law. This is because QCC previously took a legal position that off-tariff agreements are unlawful and invalid under Colorado law. QCC took this position in a lawsuit it filed in a Minnesota state court in 2007 (Hearing Exhibit 107). In support of their argument, Granite and BullsEye cite the principle that a party may not adopt one course of action and thereafter pursue another which is mutually inconsistent. *David v. Hitti*, 480 P.2d 581 (Colo. App. 1970).

61. The fact that the unfiled off-tariff agreements are unlawful and invalid under Colorado law does not affect the inquiry of whether the respondent CLECs discriminated against QCC. The claim that illegality and invalidity of the unfiled off-tariff agreements means no reparations are permitted, if taken to its logical conclusion, would frustrate the ability of any complainant to obtain reparations or any other remedies arising from an unlawful contract. This is because unlawful contracts often are unenforceable as between the contracting parties. That argument would also limit the ability of any complainant to enforce § 40-15-105(3), C.R.S. We deny the RRRs filed by Granite and BullsEye on this ground.

6. Unlawful Discrimination

a. Order Addressing Exceptions

62. In Decision No. C11-1216, at ¶¶ 72-75, the Commission agreed with the ALJ that QCC has made a *prima facie* showing of discrimination prohibited under § 40-15-105(1), C.R.S. The Commission also affirmed the ALJ's finding that local exchange carrier (LEC) facilities are a monopoly bottleneck, as there are no alternatives for an IXC to reach a particular end user customer for a long distance call but through the switch of the LEC that provides local service to that end user. In evaluating whether QCC met its burden of proof with respect to its claim of undue or unreasonable preference or advantage among similarly situated parties, the Commission took into account several factors.

63. The Commission took into account, on one hand, the special nature of switched access service and the concern about the discrimination for these services and, on the other hand, the legislative intent for the intrastate switched access rates to vary, so long as the off-tariff agreements are filed with the Commission.

64. The Commission agreed with the ALJ that QCC effectively rebutted the claims that differences in size or traffic volumes justified price differentiation between the tariff rates and those contemplated in the unfiled off-tariff agreements. This is because the cost of providing switched access service does not depend on the traffic volume or which IXC is using the service. Further, the functionality, service elements, and the facilities over which the respondent CLECs provided switched access were identical, regardless of whether a CLEC serviced QCC or one of the other IXCs. The Commission acknowledged that the costs of providing some services could vary by volume, especially if dedicated facilities are involved. However, this circumstance was not present here. The Commission was also persuaded by the fact that none of the unfiled

off-tariff agreements tied 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 an unlimited fashion, regardless of how much switched access a favored IXC purchased. The Commission found this alone was fatal to the claim that differences in size or traffic volumes justify price differentiation in this case. The Commission was also persuaded by QCC's argument that preferential treatment to AT&T and/or Sprint was not justified by the alleged larger size of these IXCs. This is because, in the relevant markets, QCC was actually comparable in size to these IXCs.

b. RRR

65. In their RRRs, Granite and BullsEye argue that QCC failed to meet its burden of proof to demonstrate unreasonable discrimination and that the Commission relieved QCC of its burden in Decision No. C11-1216. Granite and BullsEye cite to the Colorado Supreme Court cases to argue that mere inequality in charges does not amount to unjust discrimination. Instead, according to Granite and BullsEye, QCC had to prove specific facts demonstrating it is in fact similarly situated to the other IXCs. Granite and BullsEye argue that QCC did not submit any evidence to support a showing that it may be similarly situated to these other carriers. Therefore, Granite and BullsEye conclude the Commission's findings that "the cost of providing switched access does not depend on traffic volume" and that "the functionality, service elements, and the facilities … were identical" are not supported by any evidence in the record.

66. Likewise, in its RRR Ernest argues that QCC failed to show it is similarly situated to AT&T. Ernest cites to the testimony of Dr. Ankum for the proposition that QCC and AT&T are not similar. It argues that QCC did not present evidence to show the opposite.

67. Finally, XO contends that the legislature intended for intrastate switched access rates to vary, because it allowed negotiated, off-tariff agreements with respect to these services. Thus, XO argues that all purchasers of switched access services are not entitled to pay the same rate, even if the underlying facility is a monopoly bottleneck service. XO argues that, rather than holding QCC to its burden of proving it was similarly situated to the other IXCs who negotiated lower rates, the Commission improperly shifted the burden onto the respondent CLECs to justify the price differentiation. XO also argues that the fact that volume is not included as a term of the contracts does not undermine volume as a basis for price differentiation in circumstances where the party in question has a history of the amount of traffic exchanged.

c. Discussion

68. The respondent CLECs are correct that QCC, as the complainant in this docket, had the burden of proof to establish its case by preponderance of the evidence. Section 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1. This standard requires a finder of fact to determine whether existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party meets that burden of proof when the evidence, on the whole and however slightly, tips in its favor. *Id.* The respondent CLECs are also correct that mere inequality in charges does not amount to unjust discrimination.

69. However, contrary to the claims made by Granite, BullsEye, XO, and Ernest on RRR, QCC has met its burden of proof regarding unreasonable discrimination, and presented specific facts showing that it is similarly situated to the IXCs with whom the respondent CLECs entered into unfiled access agreements. The evidence in the record supports a determination that the existence of these facts is more probable than their non-existence. In addition, QCC rebutted

the arguments made by the respondent CLECs, *i.e.*, that they were justified in providing the other IXCs with off-tariff rates on intrastate switched access due to lower costs and/or larger traffic volumes. We affirm the findings and conclusions reached in Decision No. C11-1216 on these points.

70. By way of evidence in the record, QCC presented testimony that it is has a greater market share in the West than AT&T, as defined by the Federal Communications Commission.[10] QCC also presented information that Sprint was no larger than QCC during the relevant time periods and generated switched access volumes on par with QCC.[11] This testimony supports the finding that QCC was similarly situated to the preferred IXCs, as well as rebuts the claims that preferred IXCs were much larger than QCC and that differences in treatment were justified for that reason.

71. Next, regarding the claims that the underlying costs of providing switched access service to QCC versus AT&T and/or Sprint justified differential treatment, Dr. Weisman testified that QCC inquired of each respondent CLEC in discovery whether it had performed any cost or demand studies in connection with establishing the below-tariff rates set forth in the unfiled off-tariff agreements.[12] Dr. Weisman testified that the respondent CLECs have not demonstrated, nor has any economic study demonstrated, that the costs of providing switched access varies with the volume of switched access generated by a particular IXC.[13] Given the absence of such economic studies, Dr. Weisman concluded that claims regarding cost differences were only

[10] Direct testimony of Lisa Hensley-Eckert, p. 4 (Hearing Exhibit 1).
[11] Rebuttal testimony of Lisa Hensley-Eckert, p. 16 (Hearing Exhibit 2); Rebuttal testimony of Dr. Dennis Weisman, p. 30.
[12] Rebuttal testimony of Dr. Dennis Weisman, p. 13.
[13] *Id.*, at p. 29. He also testified that, since the CLECs control the cost-related information related to their provision of switched access services to particular IXCs, it is unreasonable to expect QCC to submit studies to prove a negative (that there are no cost differentials) regarding services provided by other carriers (the CLECs). *Id.*, at p. 27.

after-the-fact justifications rather than *bona fide* rationales for offering below-tariff rates to preferred IXCs.[14] Instead, the evidence supports the finding that, the true rationale was the CLECs' desire to settle disputes (lawfully or unlawfully) in response to alleged coercion by AT&T, not cost, volume, or any other *bona fide* considerations.[15] By Decision No. C11-1216, the Commission agreed.

72. Further, QCC presented credible testimony that the cost of providing switched access service generally does not depend on the volume of traffic. For example, Dr. Weisman testified that a LEC's per-minute cost of providing tandem routed switched access does not vary based on which IXC is using the service or how many minutes of use that IXC uses a particular month. To the extent an IXC has a large volume of traffic originating from or terminating to a particular location, it would typically opt to use a dedicated serving arrangement such as special access as a substitute for some or all of the switched access services.[16] Ms. Hensley-Eckert also testified there is no marginal cost difference or cost savings associated with increased volumes of switched access sales and, therefore, no basis for offering a volume-based discount for switched access services.[17]

73. Most importantly, Ms. Hensley-Eckert testified that the overwhelming majority of the access agreements at issue in this case did not tie the off-tariff rates to volume commitments or any other triggers. Rather, these agreements merely offer unilateral discounts from the tariff rate.[18] Likewise, our review of these agreements does not indicate that any off-tariff agreements at issue in this case actually tied the discount to a volume commitment.[19] In Decision

[14] *Id.*, p. 13.
[15] Many of the respondent CLECs discuss this alleged coercion by AT&T at length in their pleadings.
[16] Rebuttal testimony of Dr. Dennis Weisman, at p. 30.
[17] Rebuttal testimony of Lisa Hensley-Eckert, pp. 17-18.
[18] *Id.*, pp. 15-16; Hearing Transcript, July 28, 2010, pp. 65-66 (as to Granite).
[19] Certainly the respondent CLECs did not claim otherwise in their RRRs.

No. C11-1216, the Commission found this effectively rebutted the claims that larger volume was the basis for price differentiation. XO's claim that an explicit volume commitment was not necessary as the party in question has a history of the amount of traffic exchanged rings hollow. It does not explain what the historical amount of traffic was between itself and a preferred IXC, or actually confirm that this volume was greater than the historical amount of traffic exchanged with QCC. In other words, XO's claim has no support. Finally, none of the unfiled off-tariff agreements called for dedicated infrastructure, which is one of the circumstances where costs of providing intrastate switched access actually can vary from IXC to IXC.[20]

74. In sum, the evidence in the record does support QCC's claim that it was similarly situated to the preferred IXCs with respect to market share and call volumes. QCC also offered evidence rebutting the defenses offered by the respondent CLECs. To the extent the respondent CLECs argue that their witnesses and evidence supporting the opposite conclusions were more persuasive than those offered by QCC,[21] the ALJ, who observed all witnesses as they testified at the hearing, clearly disagreed. We, on the other hand, did not have this opportunity.

[20] Again, the respondent CLECs do not argue otherwise in their RRRs.
[21] For example, some respondent CLECs argued that Dr. Weisman did not properly consider certain facts.

75. This is why the Commission generally defers to an ALJ's assessment of witness credibility.[22] We do so in this case.

76. Public policy also supports the result reached in this case. Given the potential for anti-competitive outcomes that can result from price discrimination, generally uniform prices for switched access makes sense, absent certain circumstances.[23] This potential is caused by the fact that switched access is a bottleneck service that is not competitively supplied. It is undisputed all providers of switched long-distance services require switched access as a production input and have no economically viable alternative to purchasing these inputs from a LEC (whether a CLEC or an incumbent local exchange carrier).[24] The legislative history of § 40-15-105(1), C.R.S., indicates the Colorado General Assembly was concerned about discrimination for switched access services. *See*, Recommended Decision, at ¶ 261. It is true the General Assembly intended for intrastate switched access rates to vary, because it allowed off-tariff agreements (provided they are filed with the Commission). However, the circumstances where such variances may be proper (such as dedicated facilities or volume commitments) are not present here. Finally, on public policy grounds, we agree with Dr. Weisman and do not look favorably upon unilateral self-help decisions by the respondent CLECs to redress the "unwillingness to pay" from AT&T and other preferred IXCs. This is especially true when the effect of doing so would violate state law that requires filing of the off-tariff agreements.[25] The Commission and other lawful forums

[22] The Commission determines what weight to give to factual evidence. *RAM Broad. of Colorado, Inc. v. Pub. Utils. Comm'n*, 702 P.2d 746, 750 (Colo. 1985); *Board of County Comm'rs of San Miguel County v. Pub. Utils. Comm'n*, 157 P.3d 1083, 1090 (Colo. 2007). In addition, the Commission's findings are supported by the record even if the evidence was conflicting or more than one inference could have been drawn from the evidence. *Colorado Municipal League v. Mountain States Tel. & Tel. Co.*, 759 P.2d 40, 44 (Colo. 1988).

[23] Rebuttal Testimony of Dr. Dennis Weisman, p. 37, Hearing Transcript July 27, 2010, p. 188.

[24] Direct Testimony of Dr. Dennis Weisman, p. 6; Rebuttal Testimony of Lisa Hensley-Eckert, p. 24.

[25] As some of the respondent CLECs state, albeit in a different context, two wrongs do not make a right.

in Colorado and other jurisdictions were available to redress these grievances and alleged coercion by AT&T.[26]

77. For the foregoing reasons, we deny the RRR filed by Granite, BullsEye, Ernest, and XO on this ground. We affirm the findings and conclusions reached in Decision No. C11-1216 that QCC has met its burden of proof regarding unreasonable discrimination and presented specific facts establishing it is similarly situated to the preferred IXCs.

F. TW

1. The Claim that the Amount of Reparations is Incorrect and Should be Reconsidered

78. In its RRR, TW contends that the amount of reparations is incorrect and therefore should be reconsidered. TW points out that in ¶ 119 of Decision No. C11-1216 the Commission deleted ordering ¶ 5(g) of the Recommended Decision, which would have allowed the parties to update the reparations calculations. TW argues that Decision No. C11-1216, if not reconsidered, will result in an award of an amount that QCC's own witness admitted was excessive. TW also points out that QCC's witness Mr. Canfield admitted originally calculating an amount based on a time period that ran through December 31, 2008. However, any alleged discrimination ended on October 1, 2008. TW also states that Mr. Canfield admitted this at the hearing.[27] TW concludes that the Commission should reinsert ordering ¶ 5(g) of the Recommended Decision to allow for this correction.

79. We agree with TW that the total amount of reparations is incorrect, as it is based on an incorrect time period. TW is also correct that Mr. Canfield admitted this at the hearing. In Decision No. C11-1216, the Commission struck ordering ¶ 5(g) of the Recommended

[26] *See*, Direct Testimony of Dr. Dennis Weisman, p. 15.
[27] Hearing Transcript, July 28, 2010, p. 139.

Decision in response to a claim made by some respondent CLECs (not TW) that the process envisioned by the ALJ for updating the reparations calculations, without an evidentiary hearing, was contrary to due process. For the same reason, we decline to reinsert that paragraph at this time. Instead, we remand this matter to the ALJ, for the purpose of determining the correct amount of reparations owed by TW to QCC.[28] We grant the RRR filed by TW on this ground, in part.

2. The Claim that the Commission Erred by Not Considering an Argument Raised for the First Time on Exceptions

a. RRR

80. In Decision No. C11-1216, the Commission addressed TW's argument that QCC and AT&T were not similarly situated because, *inter alia*, the off-tariff agreement between TW and AT&T covered not only intrastate switched access but multiple services (both regulated and not regulated). The Commission briefly addressed the merits of that argument in *dicta*. It further agreed with QCC that TW improperly introduced this argument for the first time on exceptions. QCC argued that it was denied an opportunity to rebut this new defense during the hearing and the ALJ was not able to assess it in the Recommended Decision. *See,* Decision No. C11-1216, at ¶¶ 70 and 76.

81. In its RRR, TW states that the Commission should not have denied this argument solely because TW introduced it for the first time on exceptions. TW claims that QCC would not have been harmed by the consideration of this "similarly situated" argument, as other respondent CLECs presented similar arguments during the hearing. TW concludes that the ALJ and QCC have had an opportunity to consider and respond to similar arguments generically.

[28] *See* fn. 6 *supra*.

TW further contends the Commission previously considered legal arguments raised by a party for the first time on exceptions. *See*, Decision No. C04-0722, mailed on June 29, 2004 in Docket No. 04A-120CP-Extension.

b. Discussion

82. In general, the Commission is reluctant to hear new arguments presented for the first time on exceptions because of basic fairness to the opposing party and the ALJ. Here, even though other respondent CLECs have argued, during the hearing, that QCC and other IXCs were not similarly situated, only TW argued this was the case because its off-tariff agreement bundled several regulated and non-regulated services. No other respondent CLEC had an agreement with an IXC covering multiple services, or at least raised this as a defense. Thus, neither the ALJ nor QCC have had an opportunity to consider and respond to the above argument at the hearing.

83. Decision No. C04-0722 is also distinguishable from this docket. In that decision, although the Commission addressed the merits of an argument presented by a party for the first time on exceptions, it did so only after denying that argument for procedural reasons. In other words, the Commission discussed the merits of a new argument only as *dicta*. Finally, several more recent Commission decisions consistently reject arguments brought for the first time on exceptions. *See*, Decision No. C09-0596, at ¶ 44, mailed June 9, 2009 in Docket No. 08A-095G ("Finally, we agree with Public Service that it is improper for Staff to raise the issue of hedging budget reduction for the first time in exceptions and we deny the exceptions on this ground."); *See also*, Decision No. C09-0767, at ¶ 11, mailed July 17, 2009 in Docket No. 06A-608R ("Exceptions are not the first time that the Commission should be informed of proposed changes [to the costs and purported clearances of the new grade separated crossing]").

84. For the foregoing reasons, we find the Commission was well within its discretion in declining to entertain the argument first raised by TW on exceptions. Therefore, we deny the RRR filed by TW on this ground.

G. Eschelon

1. RRR

85. Eschelon argues that the Commission incorrectly found, at ¶ 123 of Decision No. C11-1216, that QCC was the only party that presented a method of calculating reparations into the record (through Mr. Canfield) and that respondent CLECs have not presented an alternative methodology. Eschelon contends that, irrespective of what other respondent CLECs may have done, Eschelon did offer an alternative methodology for calculating, as well as a calculation of, reparations into the record (via testimony of its employee Ms. Ellen Copley and Dr. Ankum, a consultant retained by the respondent CLECs).

86. Eschelon cites to the testimony of Ms. Copley, who stated that she has reviewed the relevant invoices and calculated the differences between the rates charged to AT&T and the rates charged to QCC for the comparable time period.[29] Ms. Copley contends this calculation is based on a straight forward comparison of the rates AT&T paid to Eschelon and rates charged to QCC during the same time period. Ms. Copley testifies that she applied the AT&T rates to the QCC usage and calculated the difference. In addition, Eschelon states it presented an additional method of calculating reparations, through the testimony of Dr. Ankum. Dr. Ankum testified that he used Mr. Canfield's methodology, but adjusted for several factors. Eschelon states that Dr. Ankum came to a calculation very similar to Ms. Copley.[30]

[29] She presents the total amount in her answer testimony, Hearing Exhibit 14C.
[30] That calculation is presented in Hearing Exhibit 11C, Answer Testimony of Dr. August Ankum.

87. Eschelon argues the Commission erred in accepting an estimate presented by Mr. Canfield, who did not have direct knowledge of Eschelon's actual switched access billing, over the direct evidence offered by Ms. Copley, who had such direct knowledge. Eschelon contends Mr. Canfield's recommended amount of reparations is excessive and is four times greater than the amount that results from using Eschelon's actual billing.

88. Finally, Eschelon argues that QCC's calculation of reparations is flawed because it includes a time period when Eschelon did not offer or agree to a discounter rate to AT&T and thus no discrimination occurred. The last of the quarterly settlement agreements entered into by Eschelon and AT&T covered billings through December 5, 2007. Since that time, Eschelon had billed AT&T the full tariff rate (which AT&T disputed and the parties have not settled). In the Recommended Decision, the ALJ agreed with QCC that the time period after December 5, 2007 should be included in the calculation of reparations, because there was no evidence that Eschelon attempted to collect anything from AT&T. Eschelon argues this finding is incorrect. Eschelon points out it filed a third party complaint against AT&T in this docket, which the ALJ dismissed. Eschelon also argues this finding, if taken to its logical conclusion, would mean that any failure of a utility to fully collect any unpaid or disputed bill is rate discrimination. Eschelon contends this proposition is not supported by the law.

2. Discussion

89. We agree with Eschelon that the time period after December 5, 2007 should not have been included in the calculation of reparations. Regardless of whether Eschelon could have done more to collect from AT&T for time periods after December 5, 2007, it did not offer an off-tariff rate to AT&T after that date. In this regard, we find that Eschelon is different than Comtel Telecom Assets, LP (Comtel), another respondent CLEC in this docket.

Comtel also argued that, under the ALJ's rationale, a carrier may become liable for discrimination just because a customer did not pay its bills. In the case of Comtel, however, the customer (AT&T) did not simply fail to pay its bills. Rather, Comtel actually billed AT&T the incorrect rate, which just happened to be the same rate as previously charged under the unfiled off-tariff agreements. On the other hand, Eschelon, after December 5, 2007, actually billed the full tariff rate to AT&T. During the hearing, Mr. Canfield agreed that, after that time, Eschelon billed the full tariff rate to AT&T.[31]

90. We remand this matter to the ALJ, to determine the correct amount of reparations owed by Eschelon to QCC. On remand, the ALJ may adopt the calculation presented by either Ms. Copley or Dr. Ankum, as these calculations are premised on the correct time period. In the alternative, the ALJ may adopt the calculation presented by Mr. Canfield, if there is evidence in the record to support an adjustment of his total amount to the correct time period.[32] We therefore grant the RRR filed by Eschelon on this ground, in part.

II. ORDER

A. The Commission Orders That:

1. The application for rehearing, reargument, or reconsideration (RRR) to Decision No. C11-1216 filed on December 5, 2011 by Eschelon Telecom, Inc., is granted, in part, and denied, in part, consistent with the discussion above.

2. The RRR to Decision No. C11-1216 filed on December 5, 2011 by MCImetro Access Transmission Services, LLC, is granted, in part, and denied, in part, consistent with the discussion above.

[31] Hearing Transcript July 28, 2010, p. 15, lines 18-20.

[32] *See* fn. 6 *supra*.

3. The RRR to Decision No. C11-1216 filed on December 5, 2011 by tw telecom of colorado, LLC, is granted, in part, and denied, in part, consistent with the discussion above.

4. The RRR to Decision No. C11-1216 filed on December 5, 2011 by Ernest Communications, Inc., is denied, consistent with the discussion above.

5. The RRR to Decision No. C11-1216 filed on December 5, 2011 by Qwest Communications Company, LLC, doing business as Century Link QC, is granted, in part, and denied, in part, consistent with the discussion above.

6. The RRR to Decision No. C11-1216 filed on December 5, 2011 by XO Communications Services, Inc., is denied, consistent with the discussion above.

7. The RRR to Decision No. C11-1216 filed on December 5, 2011 by BullsEye Telecom, Inc., is denied, consistent with the discussion above.

8. The RRR to Decision No. C11-1216 filed on December 5, 2011 by Granite Telecommunications, LLC, is denied, consistent with the discussion above.

9. The Commission, on its own motion, corrects the penultimate sentence of ¶ 94 of Decision No. C11-1216 as follows: "[t]he holding of *Home Builders* is *not* so narrow as the respondent CLECs suggest and is not limited to circumstances where the utility fails to follow the terms of its own tariffs."

10. This docket is remanded to the Administrative Law Judge with directions, consistent with the discussion above.

11. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING February 15, 2012.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

MATT BAKER

Commissioners