Decision No. C11-1216

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08F-259T

QCC 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 ADDRESSING EXCEPTIONS
AND MOTION TO REOPEN THE RECORD

Mailed Date: November 15, 2011
Adopted Date: October 17, 2011

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I. BY THE COMMISSION

A. Statement

1. This matter now comes before the Commission for consideration of exceptions to Recommended Decision No. R11-0175 (Recommended Decision) filed on April 14, 2011 by the

following parties: Qwest Communications Corporation (Qwest or QCC); Time Warner Telecom of Colorado, LLC (TWT), Granite Telecommunications, Inc. (Granite); Comtel Telcom Assets, LP (Comtel); BullsEye Telecom, Inc. (BullsEye); Eschelon Telecom, Inc. (Eschelon), MCIMetro Access Transmission Services, LLC (MCIMetro); XO Communications Services, Inc. (XO); and Liberty Bell Telecom, LLC (Liberty Bell). Further, this matter comes before the Commission for consideration of a Motion to Reopen the Record (Motion) filed by Eschelon on April 14, 2011. On May 5, 2011, XO, BullsEye, Granite, MCIMetro, and QCC filed responses to exceptions, and on April 28, 2011, QCC filed a response to the Motion. Finally, QCC filed a notice of supplemental authority on August 4, 2011. Being fully advised in the matter and consistent with the discussion below, we address the exceptions below.

B. Background and Procedural History

2. In order for an interexchange carrier (IXC) (in this case QCC) to complete a long distance phone call for one of its customers, it needs to access the network of a local exchange carrier (LEC) (in this case respondent CLECs). For example, when a customer initiates a long distance call, the LEC routes that call from the customer to the IXC's point of presence. The IXC pays originating switched access to the LEC for performance of this function. To complete the call, the IXC hands the call off to a LEC who delivers it to the recipient. The IXC will then pay terminating switched access to the LEC who terminates the call.

3. QCC filed a formal complaint on June 20, 2008. In its complaint, QCC alleged that respondent Competitive Local Exchange Carriers (CLECs) entered into off-tariff agreements with IXCs other than QCC (including AT&T and/or Sprint) to provide intrastate switched access service on prices, terms, and/or conditions that differed from those on file with the Commission. These respondent CLECs, according to QCC, did not file their off-tariff agreements with the Commission before QCC filed its formal complaint, in violation of § 40-15-105(3), C.R.S.

In its formal complaint, QCC alleged undue discrimination, in violation of § 40-15-105(1), C.R.S., because the off-tariff agreements called for prices, terms, and conditions more favorable than the tariff prices, terms, and/or conditions paid by QCC.

4. The Commission referred this case to Administrative Law Judge (ALJ) G. Harris Adams. The ALJ held a hearing on July 27 and 28, 2010 and issued Recommended Decision No. R11-0175 on February 23, 2011. The ALJ concluded QCC's claims against MCIMetro were barred by the statute of limitations. However, the ALJ granted QCC's claims against the remaining respondent CLECs—TWT, Granite, Comtel, XO, BullsEye, Ernest Communications, Inc., Liberty Bell, and Eschelon. By way of remedy, the ALJ ordered these CLECs to pay reparations to QCC, based on the difference between the tariff rates that QCC paid during the relevant time periods and the off-tariff rates that CLECs charged to AT&T Communications of the Mountain States, Inc. (AT&T) and/or Sprint Communications Company, LP (Sprint).

5. On April 14, 2011, the parties filed exceptions to the Recommended Decision and Eschelon filed the Motion on the same date. The parties filed responses to exceptions, and QCC filed a response to the Motion on April 28, 2011.

C. Statute of Limitations

1. QCC v. MCIMetro

a. Background and the Minnesota Proceedings

6. In 2004, MCIMetro entered into off-tariff agreements with AT&T for switched access services. These contracts were nationwide in scope and specified a single, uniform rate for all switched access traffic, regardless of jurisdiction. The 2004 contracts expired on January 27, 2007 and therefore are no longer in effect. Under these contracts, MCIMetro charged AT&T a lower rate than what QCC was paying in accordance with MCIMetro's tariffs.

7. On June 16, 2004, the Minnesota Department of Commerce (Minnesota DOC) filed a complaint with the Minnesota Public Utilities Commission (Minnesota PUC) against 15 CLECs and AT&T, alleging the CLECs had entered into off-tariff agreements for switched access rates less than their tariff rates.

8. MCIMetro was a respondent in the action before the Minnesota PUC. The 2004 contracts were among the contracts at issue in that action. The parties to the instant action do not dispute that MCIMetro never offered to QCC the rates contained in the 2004 contracts between MCIMetro and AT&T. Instead, the key issue is the point in time at which QCC discovered the unfiled 2004 contracts and/or should have discovered them by exercising reasonable diligence.

9. On April 25, 2005, the Minnesota DOC filed comments in the matter pending before the Minnesota PUC, stating that MCIMetro and AT&T had entered into an agreement to provide switched access service that has not been filed with the Minnesota PUC. Minnesota DOC further alleged that MCIMetro provided rates that were lower than those in the tariff and offered to other IXCs. In the instant proceeding, QCC admitted that it asked to be added to the service list in the Minnesota PUC case in April 2005. QCC also admitted that it was aware of the 2004 off-tariff agreements in April 2005, although it lacked knowledge about the specific provisions.

10. In the instant proceeding, MCIMetro contended that QCC knew about the 2004 agreements and that QCC's cause of action to file the instant complaint accrued as early as April 2005, based upon the knowledge of QCC's counsel in the Minnesota PUC proceeding.

11. Further, QCC petitioned to intervene in the Minnesota PUC proceeding on or about February 27, 2006. On May 3, 2006, QCC received an unredacted copy of a document

identified as the "Second Unfiled Agreement," in response to a discovery request served in the Minnesota PUC proceeding. QCC, at that time became aware there were reciprocal MCIMetro agreements in jurisdictions other than Minnesota, including Colorado. In the instant proceeding, QCC emphasized that its access to the unredacted copy of the Second Unfiled Agreement was subject to a protective order, which prohibited QCC from using the information obtained in the Minnesota PUC proceeding outside of that proceeding.

12. QCC argued it became aware of the unfiled agreement between MCIMetro and AT&T when a companion agreement was made public as part of the Minnesota PUC docket on February 29, 2008. QCC also argues that the existence of this agreement or its applicability to Colorado was not confirmed until the agreement was produced to QCC on August 18, 2008, as part of the QCC subpoena served in the instant docket.

13. QCC commenced an action in a Minnesota state court in 2007, alleging that AT&T had violated the laws of several states, including Colorado, by executing off-tariff access agreements with CLECs such as MCIMetro.

b. Recommended Decision

14. The ALJ cited § 40-6-119(2), C.R.S., which states "[a]ll complaints concerning excessive or discriminatory charges shall be filed with the [C]ommission within two years from the time the cause of action accrues." The ALJ noted that the Commission previously held § 13-80-108(4), C.R.S., governed the accrual of a cause of action filed under § 40-6-119(2), C.R.S.[1] For its part, § 13-80-108(4), C.R.S., states "[a] cause of action for debt, obligation,

[1] *See*, Decision No. R03-0519, mailed May 15, 2003, at ¶¶ 46-54, in Docket No. 01F-071G (*Home Builders Association of Metropolitan Denver v. Public Service Company of Colorado*), and Decision No. C03-1093, mailed September 25, 2003, in the same docket.

money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed, or performance becomes due." Recommended Decision, at ¶¶ 185-187.

15. The ALJ relied on the doctrine of equitable tolling, which provides that equity may toll a statute of limitations in certain circumstances. For example, equity may toll a statute when one party fails to make a legally required disclosure and the other party is prejudiced from this failure. The ALJ concluded equity will only toll an applicable statute of limitations period until the claims are discovered and/or should have been discovered by the exercise of reasonable diligence. *Id.*, at 190-198. He also rejected the argument that the doctrine of equitable tolling does not apply to the accruals of causes of action governed by § 13-80-108(4), C.R.S., because it does not contain the "is discovered or should have been discovered by the exercise of reasonable diligence language," like other subsections of § 13-80-108, C.R.S. Instead, the ALJ implicitly found equitable tolling doctrine is independent of the discovery rule and that it applies to and can toll causes of action that accrue under any subsection of § 13-80-108, C.R.S.

16. The ALJ disagreed with MCIMetro and other respondents that the instant cause of action accrued based on the proceedings before the Minnesota PUC. The ALJ found "awareness of the agreements and various proceedings did not give knowledge of facts essential to the cause of action varying from intrastate tariffs on file in Colorado." *Id.*, at ¶ 201. The ALJ found that, even though the 2004 contracts were nationwide in scope, QCC did not have knowledge of their applicability in Colorado before it received a copy of these agreements. For example, the ALJ noted that QCC's comments filed in 2005 with the Minnesota PUC reference only the Minnesota rules and law regarding intrastate access services within Minnesota, and do not address conduct or agreement affecting services in Colorado. Just because QCC was aware of conduct in other states regarding intrastate services is insufficient to show knowledge of facts essential to claims in Colorado, according to the ALJ. *Id.*, at ¶¶ 202-205.

17. The ALJ relied on the concept that equitable tolling expires once a party discovers and/or should have discovered its claims by the exercise of reasonable diligence. The ALJ noted that, on May 3, 2006, QCC received an unredacted copy of the document identified as "Second Unfiled Agreement" in response to a discovery request served in the Minnesota PUC proceeding. The ALJ found that, when QCC received an unredacted copy of that document via its counsel, it learned of the facts essential to the cause of action in Colorado against MCIMetro as to all of the rates, terms, and conditions that form the basis of the instant proceeding. *Id.*, at ¶ 211.

18. The ALJ disagreed with QCC's argument that the cause of action did not accrue because it received the "Second Unfiled Agreement" on May 3, 2006 subject to the restrictions against the use of that information outside of Minnesota. The ALJ stated there was no evidence QCC attempted to gain authorization to make use of the Second Unfiled Agreement to assert its cause of action. *Id.*, at ¶ 212. The ALJ concluded that equitable tolling expired on May 3, 2006, because, as of that time, MCIMetro's failure to provide notice of the 2004 agreements no longer contributed to the passing of the statutory period.

19. The ALJ thus dismissed QCC's claims against MCIMetro, because more than two years passed from the time the cause of action accrued on May 3, 2006 to the filing of the complaint on June 20, 2008.

c. QCC

20. In its exceptions, QCC raises three arguments in support of its overall contention that the ALJ erred in finding its claims against MCIMetro were time barred. First, QCC argues MCIMetro is precluded, as a result of its conduct, from relying on the statute of limitations. QCC relies on *Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 724 (Colo. 1976), where the Colorado Supreme Court stated "a party will not be heard to plead the statute of limitations if he

himself is not in compliance with his statutory duty." QCC argues MCIMetro may not assert the statute of limitations defense, because MCIMetro never filed its off-tariff access agreements with the Commission, in violation of § 40-15-105(3), C.R.S.

21. Second, QCC argues it could not have lawfully utilized its knowledge about the MCIMetro-AT&T agreement on May 3, 2006 to initiate a complaint in Colorado. QCC stresses that its receipt of the Second Unfiled Agreement on May 3, 2006 was subject to the terms of a protective order issued by the Minnesota PUC. QCC argues it was precluded as a matter of law from using the Second Unfiled Agreement for any purpose outside of or beyond the scope of the Minnesota PUC proceeding. QCC contends it would have violated the terms of the Minnesota protective order had it filed a complaint in Colorado at that time. QCC contends the agreement was unavailable to QCC for use in this docket until 2008, when it obtained a public copy of the Second Unfiled Agreement. It is unreasonable to charge QCC with knowledge of the information contained in that document until that time, according to QCC.

22. Third, QCC contends the ALJ misapplied the statute of limitations by barring QCC's entire claim. This is because, even if MCIMetro is entitled to avail itself of a statute of limitations defense and QCC had actionable knowledge of the Second Unfiled Agreement on May 3, 2006, a significant portion of the claim still survives. QCC argues MCIMetro was in violation of the Colorado filing requirements for the entire period that its off-tariff agreement with AT&T was in effect—right up until its termination on January 27, 2007. In support of this argument, QCC relies on the *Home Builders* docket, 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 if an older portion of the claim is time-barred. In *Home Builders*, the petitioner filed a complaint on February 23, 2001, requesting reparations for improper tariff charges going back to 1996. The Commission ruled that the statute of limitation barred the older portion of

these claims, but awarded reparations beginning on February 24, 1999, the full two-year-period preceding the filing of the complaint.

23. QCC concludes that, at a minimum, it is entitled to reparations from MCIMetro for the period between June 20, 2006 (two years before this complaint was filed) and January 27, 2007 (the date the secret agreement was terminated).

d. MCIMetro

24. In its response to exceptions, MCIMetro argues it is not precluded from relying on the statute of limitations defense. It relies on *Shell Western E&P, Inc. v. Dolores County Bd. of Comm'rs*, 948 P.2d 1002 (Colo. 1997) and *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992) in support of the argument that a statute of limitations can be tolled "if a party fails to make a legally required disclosure *and the other party is prejudiced as a result*." (*emphasis added by MCIMetro*). In other words, a failure to make a legally required filing must contribute directly to the running of the statute of limitations. Even if a party conceals pertinent facts, the cause of action will nevertheless accrue once the plaintiff discovers the wrongdoing or by the exercise of reasonable diligence should have discovered it. MCIMetro argues that, since QCC knew about the facts essential to the cause of action no later than April 2005, MCIMetro's failure to file its 2004 agreements did not contribute to the running of the statute of limitations. The fact that MCIMetro failed to file its 2004 agreements with the Commission, in violation of the law, did not prejudice QCC, according to MCIMetro. MCIMetro concludes QCC's cause of action accrued in April 2005.

25. In response to QCC's second argument, MCIMetro states that the instant cause of action accrued in April 2005, long before QCC requested and obtained the off-tariff agreement between MCIMetro and AT&T itself. MCIMetro argues the notion of "actionable knowledge"

relied on by QCC finds no support in the Colorado law and QCC cites no support for this notion. MCIMetro points out QCC's receipt of the Second Unfiled Agreement on May 3, 2006 subject to a protective order did not prevent QCC from filing its lawsuit in a Minnesota state court in 2007 (before it obtained a public version of the document) or from discussing lower switched rates and switched access agreements with CLECs, including MCIMetro. MCIMetro concludes the ALJ properly ruled QCC's claims against MCIMetro were time barred and should be dismissed.

26. MCIMetro does not discuss QCC's third statute of limitations argument. Rather, it argues QCC is not entitled to any reparations for any time period within its complaint because it failed to prove MCIMetro unlawfully discriminated against it.

e. Discussion

27. The threshold issue is whether the doctrine of equitable tolling can toll causes of action accruing pursuant to § 13-80-108(4), C.R.S. The ALJ implicitly found it does. We agree. In *Patterson v. BP America Production Co.*, 240 P.3d 456, 460 (Colo. App. 2010), the Colorado Court of Appeals discussed a ruling that the court previously issued in the course of that litigation. The court determined § 13-80-108(4), C.R.S., applied to the plaintiffs' claims and reversed a lower court's ruling to the contrary. The court, however, did not reverse a lower court's ruling that there was a fact question as to whether or not the statute of limitations had been equitably tolled by the alleged fraudulent concealment. If the doctrine of equitable tolling doctrine did not apply to the accruals of causes of action under § 13-80-108(4), C.R.S., *per se*, as some of the respondent CLECs allege in the instant proceeding, then there would have been no fact question in *Patterson* as to whether the statute of limitations has been equitably tolled. We therefore find that the doctrine of equitable tolling can toll causes of action accruing pursuant to § 13-80-108(4), C.R.S., including the instant matter.

28. The court has applied the doctrine of equitable tolling to cases where the defendant's wrongful conduct prevented the plaintiff for asserting his or her claims in a timely manner. The principle behind the doctrine of equitable tolling is that a party should not benefit from its own wrongdoing. *See generally, Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096-97 (Colo. 1996).

29. Two Colorado Supreme Court cases, *Strader* and *Garrett*, discuss the application of the doctrine of equitable tolling in circumstances where, as here, a party fails to make a legally required disclosure. These cases are therefore applicable to this proceeding. In *Strader*, the lender was statutorily required to disclose the true interest rate to the plaintiff-borrower but failed to do so, even after being ordered to take corrective action by a regulatory agency. The borrower brought suit promptly after learning about the true interest rate. The court noted that the purpose of the Uniform Consumer Credit Code, including the disclosure requirement, was "to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost." *Strader*, 551 P.2d at 723. The court stated that "[w]here a party by its acts or omissions contributes to the running of a statute of limitations, the doctrine of equitable estoppel will prevent its raising that defense … a party will not be heard to plead the statute of limitations if he himself is not in compliance with his statutory duty." *Id.*, at 724 (internal citations omitted). The court concluded the statute of limitations was tolled because the borrower had no prior knowledge of the true interest rate. *Id.*

30. In *Garrett*, the employer failed to provide the injured employee with a medical report necessary to seek a reopening of a workers' compensation claim. The employer and its insurance carrier received this medical report before the statute of limitations expired, but failed to provide the employee or his attorney with a copy of the report, despite a regulatory obligation

to reveal pertinent medical documents. The employee admitted to knowing about some contents of the report before the time the statute of limitation expired, but he denied knowledge of other parts of the report that suggested his medical condition worsened. The court began by noting that a medical report at issue in the case played a crucial role in supporting a petition to reopen a disability claim. *Garrett*, 826 P.2d at 853. The court ruled that, to determine whether the statute of limitations should be tolled, the factual record required further development regarding the extent of the employee's knowledge before the statute of limitations expired, to ascertain whether the employer's failure to furnish the medical report prejudiced the employee. *Id.*, at 854. The court thus remanded the matter to a lower court to consider these issues.

31. In this case, MCIMetro never filed its off-tariff switched access agreements with AT&T with the Commission, in violation of § 40-15-105(3), C.R.S., and we must still inquire whether QCC discovered the wrongdoing or should have discovered it by exercising reasonable diligence *before* the statute of limitations period expired.

32. We begin that inquiry by reviewing the public policy interests behind § 40-15-105(3), C.R.S. The General Assembly has declared that "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, so that other purchasers of access services as well as the Commission can review the contracts to ensure compliance with the law. We agree with the ALJ that disclosure required by § 40-15-105(3), C.R.S., has a critical role in promoting a competitive telecommunications marketplace and that this must be taken into account in determining when or whether equitable tolling stopped and QCC's cause of action accrued. Recommended Decision, at ¶ 207.

33. We agree with the ALJ that awareness of the agreements at issue in the Minnesota PUC proceeding did not give QCC knowledge of facts essential to the cause of action regarding intrastate tariffs on file in Colorado. Even though the 2004 off-tariff agreements between AT&T and MCIMetro may have been nationwide, QCC did not have knowledge of their applicability in Colorado before it received a copy of these agreements. We therefore reject the argument of MCIMetro that the instant cause of action accrued in April 2005.

34. The issue of whether the instant cause of action accrued on May 3, 2006, when QCC received a copy of the "Second Unfiled Agreement" as part of discovery in the Minnesota PUC proceeding is a much closer question. It is true that document contained information about the off-tariff agreement that MCIMetro entered into with AT&T in Colorado. However, at that time, MCIMetro continued to violate its duty to file that off-tariff agreement with the Colorado Commission pursuant to § 40-15-105(3), C.R.S. QCC and its Colorado personnel and counsel thus continued to be deprived of an opportunity to review that agreement, even if its personnel and counsel in Minnesota were now able to do so. Further, even QCC's personnel and counsel in Minnesota were only able to review the "Second Unfiled Agreement" subject to a protective order, which precluded the use of that information for any purpose outside of the scope of the Minnesota PUC proceeding. In the Recommended Decision, the ALJ faults QCC for not seeking relief from the Minnesota PUC to obtain permission to make use of that document to assert its cause of action in Colorado. However, even if QCC took such steps and was successful, it still would not have obtained relief from the Minnesota PUC on the same day, on May 3, 2006, since it would have taken some time for MCIMetro to respond to any request for such relief and for the Minnesota PUC to rule on it. We therefore disagree with the ALJ that the instant cause of action accrued on May 3, 2006.

35. *Garrett* and *Strader* establish that the doctrine of equitable tolling is based on the basic principles of fairness. To arrive at a fair result in this case, we must balance, on one hand, the fact that MCIMetro continuously violated its duty to file its off-tariff agreement with AT&T with the Commission, as required by § 40-15-105(3), C.R.S., even after similar conduct came to light in other jurisdictions. The requirement on the part of the local exchange carriers, in this case MCIMetro, to file their off-tariff access agreements is not a mere formality. Rather, disclosure plays a critical role in promoting a competitive telecommunications marketplace envisioned by the legislature, just as disclosure played critical roles in the statutory schemes and public policies at issue in *Garrett* and *Strader*. We acknowledge that the ALJ was persuaded by the facts that QCC's personnel and counsel in Minnesota did not seek relief from the Minnesota PUC to be able to assert a potential cause of action in Colorado on May 3, 2006; did not obtain an order from the Minnesota PUC authorizing such relief before June 20, 2006; and did not pass along the information to their Colorado colleagues during that time period. It is difficult to impute knowledge of the Minnesota action in the short time period between May 3, 2006 and June 20, 2006. We are persuaded that MCImetro had an ongoing obligation to cease its illegal activities, balancing the equities, the statute of limitations was not tolled. Therefore, we grant QCC's exceptions on this ground.

2. XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon v. QCC

a. Background and the Minnesota Proceedings

36. We incorporate the discussion regarding the Minnesota PUC proceeding in ¶¶ 6-13 above into this section of the Order. Eschelon and XO were parties in the Minnesota PUC proceeding discussed above; Liberty Bell, BullsEye, TWT, and Granite did not. Recommended Decision, at ¶¶ 122-153. The key contention on exceptions is the point in time at which QCC discovered or should have discovered, by exercising reasonable diligence,

the existence of the unfiled off-tariff agreements these respondents have entered into with AT&T and/or Sprint, as a result of QCC's participation in the Minnesota PUC proceeding or other means.

37. In May 2006, QCC signed a protective order enabling it to gain access to all trade secret information in the Minnesota PUC proceeding. Certain other documents became publicly available in the June/July time frame of 2006. *Id.*, at ¶ 127.

b. Recommended Decision

38. The ALJ found that QCC's claims against XO, Liberty Bell, BullsEye, Granite, Eschelon, and TWT were not barred by the statute of limitations. The ALJ implicitly found there was no evidence that, more than two years before QCC filed its formal complaint in this docket, it knew or should have known about unfiled off-tariff agreements these CLECs had entered into in Colorado.

39. The ALJ agreed with the CLECs that plaintiffs must exercise reasonable diligence in discovering the relevant circumstances of their claims. However, he rejected their arguments that QCC's claims in Colorado accrued based on the knowledge of claims in the Minnesota PUC proceeding that dealt with Minnesota intrastate access services. The ALJ ruled that, although the unfiled off-tariff agreements were nationwide in scope, general awareness of the agreements and various proceedings did not give knowledge of facts essential to the cause of action in Colorado. *Id.*, at ¶ 201. The ALJ also found that, in light of the public policy espoused by § 40-15-105(3), C.R.S., to promote a competitive marketplace and the critical importance of disclosure, the mere *potential* for discovery through alternative means (*i.e.,* means other than examining documents filed with the Commission) does not stop the equitable tolling of the statute of limitations. *Id.*, at ¶ 206. The ALJ concluded it would not have been reasonable for QCC to attribute the conduct

alleged in Minnesota to all carriers in all states. He rejected the argument that QCC should have employed legal process and discovery in the Minnesota PUC proceeding to have discovered the existence and scope of agreements affecting Colorado intrastate switched access. *Id.*, at ¶¶ 218-221.

c. XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon

40. In their exceptions, XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon all contend the ALJ erred in ruling QCC's claims against them were not barred by the statute of limitations. Further, Granite and TWT argue that the doctrine of equitable tolling doctrine does not apply. These parties argue the accrual of claims filed under § 40-6-119(2), C.R.S., is governed by § 13-80-108(4), C.R.S., rather than § 13-80-108(8), C.R.S. Granite and TWT point out that § 13-80-108(4), C.R.S., does not contain the "is discovered or should have been discovered by the exercise of reasonable diligence language," like § 13-80-108(8), C.R.S., and other subsections of § 13-80-108, C.R.S.

41. In the alternative, the respondent CLECs point out that QCC, as the party seeking equitable tolling of the statute of limitations, bears the burden of proof. The respondent CLECs argue that QCC must demonstrate it was neither aware of the underlying cause of nor could have discovered the cause by exercising reasonable diligence. The respondent CLECs argue that QCC may not rely on their failure to file the agreements with the Commission, but must show what efforts it took to discover additional information.

42. XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon contend that reasonable diligence would have enabled QCC to file its formal complaint well before June 20, 2006 (or two years before it actually filed the complaint). The respondent CLECs rely on the fact that, in the instant proceeding, QCC testified that it simply named as respondents all of the respondents from

the Minnesota PUC proceeding that also provide switched access in Colorado. XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon point out that QCC did not have the off-tariff agreements themselves before filing its complaint and, therefore, could have filed the very same complaint much earlier. The respondent CLECs claim that QCC had the information sufficient to give it a reason for further inquiries in April 2005, when it first became aware of the investigation by the Minnesota DOC regarding unfiled access agreements and requested to be added to the service list in the Minnesota PUC proceeding. The CLECs also point out that QCC admitted it was able to review some of the secret agreements between AT&T and CLECs by April 2006.

43. More specifically, TWT points out that QCC was a participant to the Minnesota proceeding to which TWT was named as a respondent in 2005. For its part, XO points out that, beginning in April 2005, QCC knew about an agreement between XO and AT&T, under which AT&T was paying rates for intrastate switched access services in Minnesota that were lower than the tariff rates in that state. XO argues QCC should have investigated further at that point. XO also points out that, in April 2006, QCC filed comments in the Minnesota PUC proceeding and indicated it was aware of a broad-scale scheme by AT&T to pay below tariff switched access rates.

44. Finally, some respondent CLECs argue QCC failed to use reasonable diligence to learn of the existence of its claims against them, because it knew about its claims against another CLEC, MCIMetro. These respondent CLECs argue that, either via discovery in the Minnesota PUC proceeding or by filing its own complaint against MCIMetro with the Minnesota PUC and conducting discovery there, QCC could have learned of the names of other CLECs that had off-tariff access agreements with AT&T and/or Sprint in other states. The respondent CLECs argue QCC could have learned of its claims against them in Colorado in this manner.

45. XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon conclude that the ALJ interpreted the obligation to exercise reasonable diligence too narrowly. The respondent CLECs further conclude that merely reviewing the Commission files should not be sufficient, since this approach would have the effect of rewarding willful ignorance by discouraging the parties from following up on the information in their possession. Liberty Bell adds that QCC has extensive corporate and legal resources and thus cannot argue that it was duped or tricked into inaction.

d. QCC

46. In its consolidated response to exceptions, QCC argues, as a preliminary matter, that the respondent CLECs are precluded from its conduct from raising the statute of limitations defense. Relying on *Strader*, QCC argues the respondent CLECs may not rely on the statute of limitations, because they never filed their off-tariff access agreements with the Commission, in violation of § 40-15-105(3), C.R.S.

47. In the alternative, QCC argues that its cause of action accrued less than two years before it filed the formal complaint. It also rebuts the arguments that the cause of action accrued based upon the knowledge of the Minnesota PUC proceeding.

48. QCC states that, as a result of the Minnesota PUC proceeding, it received access to only two off-tariff agreements relevant to this case on June 23, 2006 (which was less than two years before QCC filed the instant complaint). These are the Granite-AT&T agreement and the XO-AT&T agreement. However, those respondents' off-tariff agreements with Sprint were not disclosed at that time.

49. QCC argues that the Minnesota PUC proceeding did not put QCC on notice such that it would be compelled to file a complaint in Colorado. QCC further argues it was bound by

the protective orders from using the confidential information obtained in that proceeding outside of Minnesota.

50. QCC argues it acted with reasonable diligence and was not required to divine, as a result of the Minnesota PUC proceeding, which CLECs have entered into below-tariff switched access agreements in Colorado and when. QCC argues this would have involved investigating the practices of over 700 CLECs nationwide and/or immediate initiation of complex litigation in Colorado and in other states to preserve its right to non-discriminatory treatment. QCC contends Colorado law does not require a potential plaintiff to assume such a heavy burden to protect its rights.

51. QCC concludes the ALJ correctly found the Minnesota PUC proceeding did not impose an extra-legal duty on QCC to uncover the unfiled off-tariff agreements that respondent CLECs may have entered into in Colorado, in order to preserve its Colorado rights with respect to those agreements. QCC argues any other result would trivialize and make meaningless the filing requirements of Colorado law. QCC concludes the burden was on the respondents to file their off-tariff agreements with the Commission as required by Colorado law, not on QCC to piece together information from other states to sleuth out the existence of these agreements in Colorado.

e. Discussion

52. We incorporate the discussion regarding the equitable tolling doctrine embodied in *Garrett* and *Strader*, as well as the applicability of that doctrine to accruals of causes of action under § 13-8-108(4), C.R.S., in ¶¶ 31-32 above into this section of the Order. Further, we affirm the ALJ's conclusion that QCC's claims against XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon have been equitably tolled during the two-year period preceding the filing of the

formal complaint. Unlike QCC's claims against MCIMetro, where QCC at least received a copy of the document containing information about the off-tariff agreement that MCIMetro entered into with IXCs other than QCC in Colorado (albeit subject to a protective order), there is no evidence at all that QCC received any documents, more than two years before it filed its formal complaint, about the off-tariff agreements entered into by any of the remaining respondent CLECs in Colorado.

53. It is true that, as a result of participating in the Minnesota PUC proceeding, QCC obtained access to off-tariff agreements that some CLECs entered into with AT&T and/or Sprint in various jurisdictions. From this proceeding, QCC may also have 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 that particular CLEC in that particular jurisdiction. We agree with QCC and the ALJ 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. QCC did not have a duty to search for off-tariff agreements that each of the respondent CLECs may have entered into in Colorado and to initiate expensive litigation, merely to preserve its Colorado rights with respect to these agreements. This is especially true in light of the public policy interests behind § 40-15-105(3), C.R.S., and the critical role of disclosure in promoting these policies. Given these public policies and the overall facts of this case, we find the ALJ's approach is reasonable. It takes into account, on one hand, the fact that the respondent CLECs violated their Colorado filing obligations and, on the other hand, does not encourage willful ignorance on the part of QCC.

54. Finally, the CLECs are correct that QCC filed its formal complaint in the instant action on June 20, 2008 before actually knowing that each of the remaining CLECs entered into off-tariff agreements in Colorado. Instead, QCC simply named all of the respondents from the

Minnesota PUC proceeding that also provide switched access in Colorado as respondents in the instant action. However, we find this is irrelevant as to whether QCC's claims against the CLECs have been equitably tolled. If QCC was not required to initiate costly litigation to preserve its rights, it also should not be penalized for not embarking upon the very same expensive and risky approach earlier.

55. For the foregoing reasons, we deny the exceptions of XO, Liberty Bell, BullsEye, Granite, TWT, and Eschelon on this ground.

D. Discrimination

1. Recommended Decision

56. The ALJ began his discussion on discrimination by citing the applicable statutes. First, § 40-3-102, C.R.S., gives the Commission authority "to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state." Further, § 40-15-105(1), C.R.S., states that "[n]o local exchange provider shall, as to its pricing and provision of access, make or grant any preference or advantage to any person providing telecommunications service between exchanges nor subject any such person to, nor itself take any advantage of, any prejudice or competitive disadvantage for providing access to the local exchange network." That statute also requires access charges to be cost-based, subject to a statutory cap. Subsection (3) of § 40-15-105, C.R.S., seeks to prevent predatory pricing by the providers in control of monopoly or bottleneck facilities by requiring disclosure of access contracts. Finally, the Commission may authorize reparation upon a complaint for excessive or discriminatory charges pursuant to § 40-6-119, C.R.S. Recommended Decision, at ¶¶ 258-262.

57. The ALJ cited to the testimony of Dr. Dennis L. Weisman, testifying on behalf of QCC, that the Commission should not permit a departure from uniform rates for a bottleneck monopoly service that is not competitively supplied, in the absence of a demonstrated variation

in the costs of providing the service. Dr. Weisman opined that the differences in rates that QCC paid under the tariffs and rates that AT&T and/or Sprint paid under the unfiled agreements could not be the result of cost variations because the service provided is essentially identical across carriers. The ALJ noted that LEC facilities constitute a monopoly bottleneck because there are no alternatives for an IXC such as QCC to reach an end user local customer for long distance call but through the switch of the local carrier. *Id.*, at ¶¶ 273-274.

58. The ALJ ruled that QCC has made a *prima facie* showing that the functionality, service elements, and facilities that LECs utilize to provide switched access services to IXCs are identical. The ALJ noted that all IXCs must use switched access services to reach a particular end-use customer. In addition, the facilities used by LECs to accommodate one IXC serve all IXCs. The ALJ also noted that LECs enjoy bottleneck monopoly control over switched access services provided to their end-use customers, regardless of the identity of the IXC or the volume of calls completed. *Id.*, at ¶ 278.

59. The ALJ also ruled that QCC made a *prima facie* showing that the relative size of any given purchaser of switched access services is not relevant to specific access services. This is because each call is separate and distinct and carried in identical fashion (assuming no dedicated facilities to a particular local switch or end-user). Therefore, every IXC is similarly situated on a call-by-call basis. *Id.*, at ¶ 278.

60. The ALJ noted that respondent CLECs tried to overcome the *prima facie* showing of discrimination. The ALJ disagreed with the arguments that the tariff rates paid by QCC and the below-tariff rates paid by other IXCs were two independent lawful rates and that QCC was ineligible for the lower rates. The ALJ noted that neither the Commission nor any IXC that has not entered into these unfiled switched access agreements ever had an opportunity to review and

consider these agreements. The ALJ concluded the agreements not filed with the Commission in violation of § 40-15-105, C.R.S., cannot form the basis of lawful rates. *Id.*, at ¶ 280. Further, he found that combining switched access services with other services in one single contract could not change the consideration of whether there was discrimination with respect to switched access services. In essence, the ALJ ruled that the proper inquiry involved segregating access services and the pricing thereof. *Id.*, at ¶ 284.

61. The ALJ ultimately concluded that the respondent CLECs failed to demonstrated any lawful basis for varying from tariff rates under access agreements not filed with the Commission, and thus were in violation of § 40-15-105, C.R.S.

2. XO, TWT, Granite, BullsEye, Liberty Bell, and MCIMetro

62. In their exceptions, Granite, BullsEye, Liberty Bell, XO, and TWT contend QCC failed to meet its burden of proof that it is similarly situated to AT&T and/or Sprint. The CLECs point out that whether or not QCC is similarly situated to these other IXCs depends on a variety of case-specific factors, such as the costs, types of service, and characteristics of the service. The CLECs contend that QCC presented no evidence regarding the CLECs' underlying costs to provide switched access service to QCC and other IXCs or the levels of traffic handled by QCC versus other carriers. The CLECs argue that the ALJ simply accepted QCC's policy based arguments as to why the Commission should not allow for different rates for switched access service, in the absence of demonstrated variation in the economic costs to provide the service, and made factual findings without any evidence that QCC was indeed similarly situated to other IXCs.

63. Granite, BullsEye, Liberty Bell, XO, and TWT argue that the witness for QCC, Dr. Weisman, merely speculated that there should not be a cost-difference in providing switched

access services to QCC versus other IXCs. The respondent CLECs further contend their witness, Dr. August H. Ankum, refuted these speculations by testifying that switched access costs do vary by volume. The CLECs argue that they presented persuasive evidence that during the relevant time period QCC was not similarly situated to the other carriers because of its traffic volume. The respondent CLECs argue that they submitted evidence that the toll traffic revenues and market shares of AT&T and/or Sprint were substantially larger than those of QCC during the relevant time periods. The respondent CLECs argue that it was reasonable to offer lower per unit charges for larger volumes of switched access given these circumstances. The CLECs point to the testimony of Dr. Ankum for the proposition that, if an IXC has a sufficiently large traffic volume or a substantial market share, it may eventually avoid access charges through joint marketing of services with affiliate LECs. Thus, it is reasonable for a LEC to offer reduced rates to avoid losing a large customer.

64. TWT further argues that the Recommended Decision failed to examine the unique circumstances surrounding the off-tariff agreement between TWT and AT&T. TWT argues that nothing in § 40-15-105, C.R.S., requires the Commission to segregate the switched access services that TWT provided to AT&T from other parts of the TWT-AT&T off-tariff agreement.

65. In its response to exceptions, MCIMetro contends that its 2004 contracts with AT&T were reciprocal and bilateral. MCIMetro argues that QCC was not similarly situated to AT&T because it was legally and operationally unable to enter into an identical reciprocal arrangement and undertake the same reciprocal obligation to which MCIMetro and AT&T had agreed. This is because, among other things, QCC does not (and is not legally able to) provide switched access service in Colorado. MCIMetro concludes that 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.

3. QCC

66. In its consolidated response to exceptions, QCC contends that it has met is burden of proof regarding rate discrimination. QCC points out that each respondent CLEC admitted it had on file with the Commission, during all relevant time periods, a tariff establishing its lawful rates for intrastate switched access. QCC further points out that each respondent CLEC (except Comtel)[2] also admitted it charged QCC these tariff rates, but charged other IXCs below-tariff rates for the same service pursuant to the unfiled agreements. QCC argues that this rate disparity resulted in QCC being significantly overcharged in comparison to the preferred IXCs.

67. QCC further argues that respondent CLECs did not provide a lawful justification for their admitted discrimination and that it was similarly situated to the preferred IXCs (such as AT&T and Sprint) with regard to the provision of intrastate switched access services in Colorado for three reasons. First, QCC argues that the switched access service itself was absolutely identical, because the functionality, service elements provided to QCC and AT&T were identical, as were the facilities over which the service was provided. Second, the bottleneck nature of the service is identical regardless of whether the CLEC originates the call on behalf of QCC or AT&T. Third, the cost of providing switched access services to QCC is identical to the cost of providing these services to AT&T or Sprint.

68. QCC rebuts the arguments presented by CLECs that differences in size or traffic volumes justify different treatment in this case. QCC points out that none of the respondent CLECs sponsored testimony or offered any evidence establishing that differing traffic volumes result in different costs in the context of switched access. In addition, QCC cites to the testimony of its witnesses Ms. Lisa Hensley-Eckert and Dr. Weisman that there is no theoretical

[2] We discuss Comtel in more detail in ¶¶ 120-127 below.

or quantifiable basis upon which to conclude that volume discounts are cost-justified or otherwise appropriate in the context of switched access. QCC explains each minute of switched access costs the CLEC providing that access the same. In addition, QCC points out that none of the unfiled agreements calling for a lower off-tariff rate ties the discount to AT&T or Sprint to the purchase of a specific volume of switched access services. To the contrary, all unfiled agreements grant the discount in unlimited fashion, regardless of whether the favored IXC purchases a minute of switched access or one million minutes.

69. Further, QCC contends that any arguments that preferential treatment to AT&T and Sprint was justified by the larger size of these IXCs also fail because QCC is comparable in size to these IXCs. QCC states it is the third largest IXC in the nation and has a greater market share than AT&T in the West.

70. Further, in response to TWT's argument that QCC and AT&T are not similarly situated, QCC argues TWT introduced this new theory for the first time on exceptions. QCC argues it was denied an opportunity to rebut this new defense during the hearing and the ALJ was not able to assess this argument in the Recommended Decision. QCC also argues the Commission should find that a CLEC cannot lawfully distinguish between its IXC customers as far as pricing for bottleneck switched access services.

71. Finally, in response to MCIMetro's contention that its 2004 contracts with AT&T were reciprocal and bilateral, which allegedly justifies differential rate treatment, QCC concludes the record more than supports the findings and conclusions in the Recommended Decision with respect to MCIMetro.

4. Discussion

72. We agree with the ALJ that QCC has established a *prima facie* showing of discrimination prohibited by § 40-15-105(1), C.R.S. QCC has demonstrated that respondent CLECs entered into off-tariff switched access agreements to provide intrastate switched access services to other IXCs but did not provide equivalent treatment to QCC for the same services. Indeed, the respondents have not seriously disputed this point during the hearing.

73. We also agree with the ALJ that LEC facilities are a monopoly bottleneck since there are no alternatives for an IXC to reach a given end user customer for a long distance call but through the switch of the LEC that provides the local service to that end user. Indeed, as the ALJ and Dr. Weisman pointed out, the Federal Communications Commission (FCC) previously found and determined that switched access is a bottleneck monopoly service that is not competitively supplied. This is because, once a given end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.[3] We also agree with Dr. Weisman that the FCC has not subsequently overturned or modified its 2001 order finding switched access is a bottleneck monopoly service. Further, § 40-15-105(1), C.R.S., acknowledges the special nature of access services by requiring these services by a LEC to be non-discriminatory and cost-based. We take note of the ALJ's discussion of the legislative history of the statute, at ¶ 261 of the Recommended Decision, and agree that the legislature was especially concerned about the discrimination for these services.

[3] *See*, Recommended Decision, at ¶ 274, and Rebuttal Testimony of Dennis L. Weisman, filed October 13, 2009, at p. 13, lines 8-16, *citing* Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001), at ¶ 130.

74. It is true, as respondent CLECs contend, that the legislature intended for intrastate switched access rates to vary, because it allowed negotiated off-tariff agreements with respect to this service. It is also true that differentiation in price for the same service alone is insufficient to establish discrimination; instead, a complainant must establish undue or unreasonable preference or advantage among similarly situated parties. However, we find, as did the ALJ, that the record evidence does not establish a lawful basis for price differentiation in this case.

75. We agree with the ALJ that QCC effectively rebutted any claims that differences in size or traffic volumes justified price differentiation, in this particular case. This is because the cost of providing switched access does not depend on the traffic volume, or which IXC is utilizing that service. Further, the functionality, service elements, and the facilities over which the respondent CLECs provided switched access were identical in this case, regardless of whether a CLEC serviced QCC or one of the other IXCs. It is true the costs of providing some services can vary by volume, especially if dedicated facilities are involved; however, these circumstances are not present here. Further, we find most persuasive QCC's argument that none of the unfiled off-tariff agreements ties the discount to the IXC to the purchase of specific volumes of switched access service. To the contrary, all of the unfiled agreements at issue in the instant proceeding grant the discount in unlimited fashion, regardless of how much switched access a favored IXC purchases. This alone is fatal to the claim that differences in size or traffic volumes justify price differentiation in this case. Likewise, we are persuaded by QCC's argument that the preferential treatment to AT&T and Sprint was not justified by the larger size of these IXCs. This is because QCC is actually comparable in size to these IXCs in the relevant markets.

76. Finally, we disagree with TWT and MCIMetro that unique circumstances specific to their off-tariff agreements with AT&T justified the preferential treatment. As an initial matter,

we agree with QCC that TWT introduced this argument for the first time on exceptions and that neither QCC nor the ALJ have had an opportunity to address the same. Further, we find that the statutes presume that, in evaluating a claim of discrimination for providing switched access, the Commission would consider this service on a stand-alone basis. Otherwise, the regulated entities would be able to obscure their discriminatory conduct simply by executing off-tariff agreements covering multiple services. Last, we agree with QCC that the fact that the 2004 agreements between AT&T and MCIMetro were reciprocal and bilateral does not justify price differentiation in this case, for reasons stated in ¶ 71 above.

77. For the above stated reasons, we deny the exceptions filed by XO, TWT, Granite, BullsEye, Liberty Bell, and MCIMetro on this ground.

E. Reparations, Filed Rate Doctrine, and Discrimination to Other IXCs

1. Recommended Decision

78. The filed rate doctrine prohibits a regulated entity from charging rates for services different from the rates filed with the regulatory authority. *U.S. West Communications v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997). In this docket, XO, Liberty Bell, BullsEye, Granite, and TWT have argued that an award of reparations to QCC would be unlawful because, among other things, it would discriminate against IXCs other than QCC, AT&T, and Sprint; and violate the filed rate doctrine. The ALJ relied on prior Commission decisions issued in Docket No. 01F-071G (*Home Builders Ass'n of Metro. Denver v. Public Service Co. of Colorado*) in addressing these arguments. In the *Home Builders* docket, the Commission analyzed the filed rate doctrine and the prohibition against retroactive ratemaking, as applied in a reparation action based upon tariff violations. In that docket, according to the ALJ, the Commission harmoniously construed §§ 40-6-119(1), 40-6-108(1)(d), and 40-3-102, C.R.S. Recommended Decision, at ¶ 247. These three statutes state, respectively, that: (1) the Commission may order reparations

provided that no discrimination will result from such reparation; (2) the Commission is not required to dismiss a complaint if there are no direct damages to the complainant; and (3) the Commission is charged with regulating rates, charges, and tariffs of every public utility and enforcing the same.

79. The ALJ, relying on the *Home Builders* decisions, determined that the filed rate doctrine does not preclude the Commission from awarding reparations for tariff violations. *Id.*, at ¶ 251. The ALJ reasoned that a contrary finding "…would deprive this Commission of much of its power to protect customers from unfair rates." *Id.*, at ¶ 248. The ALJ further noted that, in Decision No. C03-1292, mailed November 19, 2003 in Docket No. 01F-071G, the Commission found that, if a utility misleads the Commission or fails to follow the explicit standards set forth in its tariffs, the rule against retroactive ratemaking and the filed rate doctrine were not available as defenses to an order of reparations. This is because these two doctrines were not intended to permit a utility to subvert the Commission's ratemaking authority or its own tariffs. Otherwise, the utility would be able to charge any rate despite the requirements of its own tariffs, refund nothing if caught, and no incentive would exist for a utility to comply with its own tariff. *Id.*, at ¶ 249.

80. The ALJ found that respondent CLECs knew of the requirements to file rates and switched access agreements in accordance with their own tariffs and Colorado law. The CLECs thus were on notice that failure to do so could result in a finding that their rates were unreasonable or discriminatory, subjecting them to reparations under § 40-6-119, C.R.S. *Id.*, at ¶¶ 250-251. The ALJ also noted that the filed rates at issue in the instant proceeding went into effect by operation of law and stated that the filed rate doctrine does not bar reparations except when the underlying tariff has been affirmatively approved by this Commission.

81. The ALJ concluded that the filed rate doctrine, as applied under Colorado law, does not preclude the Commission from remedying unjust discrimination through reparations. This is the case because each respondent CLEC filed rates with the Commission for switched access service but instead charged different rates that were not filed with the Commission and thus were not subject to the Commission's consideration.

2. Discrimination to Other IXCs

a. XO, Granite, and BullsEye

82. In their exceptions, XO, Granite, and BullsEye argue that the Commission lacks authority to award reparations in this case, because this would result in further discrimination against other IXCs. These respondents point out that there are dozens of other IXCs (besides QCC, AT&T, and/or Sprint) that operate in Colorado and pay the tariffed rates. Therefore, permitting QCC to obtain the below tariff rates would only exacerbate the discrimination toward those other IXCs. The respondent CLECs point 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.

83. The respondent CLECs argue an award of reparations in this case would result in discrimination, in violation of § 40-6-119(1), C.R.S., and QCC has not met its burden of proof to the contrary. The CLECs argue that the ALJ, in the Recommended Decision, essentially adopted the principle that two wrongs make a right. The respondent CLECs suggest the proper remedy here would be to order the CLECs to bill AT&T and/or Sprint the additional amounts due under the tariff rates for the relevant time periods (*i.e.,* disgorgement) and file currently effective off-tariff access agreements with the Commission.

b. QCC

84. In response, QCC argues that, if the Commission were to accept the argument that an award of reparations would result in further discrimination, it would then accept and endorse the current level of unlawful discrimination. QCC contends this claim, when taken to its logical conclusion, means that a customer aggrieved by rate discrimination is never entitled to be made whole through an award of reparations, so long as there are any other similarly situated parties. This argument would also mean that the ability of any customer to protect its rights by enforcing the non-discrimination and reparations statutes would be frustrated, if not completely eliminated, argues QCC. QCC points out it can only prosecute a complaint on its own behalf and argues it should not be penalized just because other IXCs failed to do the same.

c. Discussion

85. We agree with QCC on this issue and deny the exceptions filed by XO, Granite, and BullsEye on this ground. We agree that the above argument presented by the respondent CLECs, when taken to its logical conclusion, would frustrate the ability of any complainant to enforce the non-discrimination and reparations statutes in Title 40, so long as any other similarly situated parties chose not to prosecute a complaint. We also agree with QCC that it can only pursue a complaint on its own behalf and should not be penalized if other IXCs chose not to file their own complaints against respondent CLECs.

3. Filed Rate Doctrine

f. XO, BullsEye, Granite, and TWT

86. In their exceptions, XO, BullsEye, Granite, and TWT argue the filed rate doctrine prohibits QCC from obtaining reparations in this docket. That doctrine, as noted above, prohibits a regulated entity from charging rates different than the rates contained in the tariffs filed with the regulatory authority. Therefore, according to the above respondent CLECs,

any claims that a customer (in this case QCC) is entitled to a rate other than the rate on file with the Commission, are preempted. The respondent CLECs argue an award of reparations to QCC would cause the very harm the filed rate doctrine serves to prevent, *i.e.*, price discrimination and uncertainty. The respondent CLECs conclude that two wrongs do not make a right.

87. The respondent CLECs also argue that the *Home Builders* precedent, which the ALJ relied on, does not apply here. The *Home Builders* case dealt with the failure of Public Service Company of Colorado (Public Service) to review and recalculate a "construction allowance" in its tariffs or request a waiver, despite a requirement within its tariffs to do so. The Commission has ordered Public Service to pay reparations to the complainant for overcharges resulting from the failure to update a construction allowance, since Public Service failed to comply with its own tariffs. The respondent CLECs argue that they, unlike Public Service, have strictly followed their tariffs in dealing with QCC. If anything, according to the respondent CLECs, it is QCC that has not followed tariff provisions regarding rate disputes or negotiation of off-tariff rates.

88. The respondent CLECs further argue that the ALJ erred by finding tariff rates may be challenged simply because they went into effect by operation of law, rather than affirmatively approved by the Commission. How a particular tariff went into effect is irrelevant, according to the respondent CLECs.

89. Finally, some of the respondent CLECs point out that, when the Minnesota PUC investigated a QCC affiliate for entering into unfiled off-tariff agreements, the QCC affiliate also argued that reparations were not available as a remedy. These respondents contend that, in *QCC Corp., v. Minnesota Pub. Utils. Comm'n*, 427 F.3d 1061 (8th Cir. 2005), the Eighth Circuit Court of Appeals ruled that reparations were not available as a remedy under the filed

rate doctrine and analogous state law. They conclude that this Commission likewise must find that QCC's request for reparations is barred by the filed rate doctrine and instead do what QCC advocated for before the Minnesota PUC: require all parties to pay tariff rates.

b. QCC

90. In its response to exceptions, QCC argues that the ALJ properly interpreted the filed rate doctrine in the Recommended Decision. QCC argues that the holding of *Home Builders* case—that the filed rate doctrine does not permit a regulated entity to violate its own tariffs or precludes the Commission from awarding reparations when violations occur—is squarely on point. QCC contends any other result would deprive the Commission of its power to protect customers and to remedy discriminatory conduct. QCC states any attempt to distinguish the *Home Builders* case from the instant proceeding fails. Even though the complainant in the *Home Builders* case was charged more than the tariffed rate and QCC was not, this is irrelevant, according to QCC. This is because the Commission has awarded reparations in various circumstances in the past. QCC further argues the Commission has applied the *Home Builders* principles to award reparations in an unfiled agreements case very similar to this one (through a Commission-approved settlement), Docket No. 02I-572T.

91. QCC further argues that the filed rate doctrine does not bar reparations in this case because the tariffs went into effect by operation of law and therefore were never affirmatively approved by the Commission. QCC urges the Commission to affirm the ALJ on this point.

c. Discussion

92. The filed rate doctrine, also known as the filed tariff doctrine, prohibits regulated entities, in this case XO, BullsEye, Granite, and TWT, from charging rates for their services that are different from the rates filed with the regulatory authority, in this case the Commission.

See, *U.S. West Communications*, 948 P.2d at 516. This doctrine prevents the regulated entities from engaging in price discrimination as between their ratepayers. Further, this doctrine preserves the exclusive role of regulatory agencies in approving reasonable rates for regulated services, which role these agencies are most competent to perform. *See, e.g.*, *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479 (2nd Cir. 1998).

93. In the Recommended Decision, the ALJ relied heavily on the prior Commission decisions issued in the *Home Builders* docket. In that case, Public Service had a tariff sheet and a gas extension policy on file with the Commission. These filings required a review and recalculation of construction allowances at least once a year, unless Public Service obtained authorization for a waiver of the recalculation requirement from the Commission. Public Service failed to update the construction allowance or request a waiver of the recalculation requirement for at least five years before the Home Builders Association filed its formal complaint. The Commission found that the last approved construction allowance of $360.00 stopped being just and reasonable when Public Service failed to update it or request a waiver of the recalculation requirement, in violation of its tariffs. The Commission found that Public Service, by failing to do so, continuously prevented the Commission from making an informed decision about the reasonableness of the construction allowance. *See* Decision No. C02-0687, Docket No. 01F-071G, issued June 19, 2002, pp. 21-26. The Commission further found that, "…if a utility misleads us or fails to follow the explicit standards of its own tariff [by failing to update construction allowance or requesting a waiver, despite explicit tariff requirements to that effect], the … filed rate doctrine [is] not available as a defense to an order of reparations." Otherwise, the utility would be able to charge any sort of rate despite the requirements of its own tariffs, refund nothing if caught, and no incentive would exist for a utility to comply with its own tariff. *See* Decision No. C03-1292, Docket No. 01F-071G, issued November 19, 2003, at ¶ 22.

94. In the instant case, it is true that XO, BullsEye, Granite, and TWT, unlike Public Service, have strictly followed their tariffs in dealing with QCC. However, by failing to file their off-tariff agreements with AT&T and/or Sprint with the Commission, in violation of § 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 our view, *Home Builders* stands for the proposition that the filed rate doctrine does not apply when the regulated entity prevents the Commission from making an informed decision on whether the filed rates are just and reasonable—regardless of the way in which it is done. The 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. We find that the filed rate doctrine is not a defense in this case.

95. Further, the CLECs are incorrect when they state *QCC Corp., v. Minnesota Pub. Utils. Comm'n*, 427 F.3d 1061, 1067 (8th Cir. 2005) stands for the proposition that reparations are not available as a remedy under both the filed rate doctrine and analogous state law. In that case, the Eighth Circuit Court of Appeals struck down an award of reparations by the Minnesota PUC in another unfiled agreements case because the Minnesota PUC had no authority under Minnesota law to award reparations. The court, however, did not discuss whether the filed rate doctrine also barred reparations. It is well-settled that this Commission, unlike the Minnesota PUC, has the authority to order reparations. *See, e.g., Peoples Natural Gas v. Pub. Utils. Comm'n*, 698 P.2d 255 (Colo. 1985); *Archibold v. Pub. Utils. Comm'n*, 58 P.3d 1031 (Colo. 2002). Therefore, *QCC Corp., v. Minnesota Pub. Utils. Comm'n* is inapposite here.

96. Finally, we agree with the ALJ and Qwest that the filed rate doctrine does not bar an award of reparations in this case because the filed tariffs at issue went into effect by operation of law and were never affirmatively approved by the Commission. In *Arizona Grocery Co. v.*

Atchison Topeka and Santa Fe Ry. Co., 284 U.S. 370, 390 (1931), the United States Supreme Court held that, where a regulatory agency has, after a hearing, declared what is the maximum reasonable rate to be charged by a regulated entity, it may not, at a later time declare its own finding as to reasonableness erroneous, or subject the regulated entity which conformed thereto to the payment of reparation measured by what the agency now holds it should have decided in the earlier proceeding to be a reasonable rate. The Commission previously explained that *Arizona Grocery* stood for the proposition that, where rates have been prescribed by the Commission, no reparations are permitted. Thus, reparations under § 40-6-119, C.R.S., can only apply in cases where the Commission has not, by order, previously established the rates, but rather where the rates were established by the utility filing rates which became effective without Commission action. Decision No. C89-178, issued February 10, 1989 in Investigation and Suspension Docket No. 1766. The Commission later affirmed the distinction between rates that are allowed to go into effect by operation of law and rates that have been closely examined and tested at a hearing. Decision No. C94-1115, mailed August 31, 1995 in Docket No. 94S-060CY. This distinction is an additional reason for our holding the filed rate doctrine does not bar an award of reparations in the instant proceeding.

97. In conclusion, we reject the argument presented by XO, BullsEye, Granite, and TWT that the filed rate doctrine precludes an award of reparations in this case and hence deny their exceptions on this ground.

F. Proof of Damages

1. Granite, BullsEye, TWT, and XO

98. In their exceptions, Granite, BullsEye, TWT and XO contend that QCC failed to make a *prima facie* case that the alleged discrimination caused it to suffer injury and/or undue harm. These CLECs argue that, in order to sustain a claim for discrimination, a plaintiff must

show it suffered an actual injury resulting from the allegedly discriminatory rate given to other carriers under the unfiled agreements. These CLECs cite to *Cheesman v. QCC Communications Int'l, Inc.*, 2008 WL 2037675, at *2 (D.Colo. 2008) and *Spa Universaire v. QCC Communications Int'l, Inc.*, 2007 WL 2694918, at *8 (D.Colo. 2007) in support of these arguments.

99. Granite, BullsEye, TWT, and XO contend that QCC's allegation of injury based on the price difference between the tariff rates and the off-tariff rates paid by other IXCs is insufficient as a matter of law. Instead, according to the CLECs, QCC had the burden of showing that the unfiled agreements caused reduced profits to QCC, a reduced market share, or a forced reduction in prices. Granite, BullsEye, TWT, and XO argue QCC was required to prove actual economic harm from their allegedly discriminatory conduct. In support of this claim, the CLECs rely on *ICC v. United States*, 289 U.S. 385, 390 (1933), where the U.S. Supreme Court ruled that, to sustain a discrimination claim, "… the difference between one rate and another is not the measure of the damages … The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse it is because others have paid less." The respondent CLECs further contend that § 40-15-101, C.R.S., itself supports the same proposition, because it does not prohibit differences in rates, but instead proscribes the subjecting of customers to a "competitive disadvantage." The respondent CLECs conclude QCC failed to show it was economically harmed by the alleged discrimination, since it only generally discussed price discrimination and the potential for anti-competitive outcomes during the hearing.

100. The respondent CLECs also contend that the failure to file an off-tariff agreement, without more, does not constitute discrimination. The statutory requirement to file an off-tariff agreement does not mean a third party may enforce a violation of this requirement or that there is

a private right for reparations, according to the respondent CLECs. They argue that, in any case, QCC has not proven an injury from the failure to file the off-tariff agreements itself. The CLECs conclude the only relief appropriate from the failure to file off-tariff agreements, if any, would be to find any remaining unfiled agreements invalid and require the other IXCs to pay the tariff rate. In the alternative, the CLECs suggest the Commission can take an enforcement action directly against the CLECs for failure to file off-tariff agreements.

2. QCC

101. In its response to exceptions, QCC points out Colorado law expressly prohibits unreasonable rate discrimination. It argues that Colorado law also empowers the Commission to remedy violations by issuing reparations. QCC emphasizes its complaint is about discrimination and not economic compensatory damages for lost profits or market shares, so it does not need to prove these types of damages. QCC contends that the showing of economic damages is not, and has never been a requirement for proving a violation of Colorado rate discrimination laws. It is not relevant, according to QCC, whether this element is required to also demonstrate a violation of federal non-discrimination laws. QCC argues that, if a plaintiff must prove economic damages to obtain relief under § 40-15-105, C.R.S., then the plain language within that statute prohibiting discrimination would have no meaning.

3. Discussion

102. In the Recommended Decision, the ALJ found there was no need to refer to the federal law on rate discrimination in order to interpret the Colorado law pertaining to the same topic. Recommended Decision, at ¶ 302. In other words, the ALJ found that just because proof of actual damages (such as, among other things, reduced profits, reduced market share, or forced reduction in prices) is required to prove discrimination under federal law, this is not necessarily

true under § 40-6-119, C.R.S. The ALJ found the Colorado Legislature provides for Colorado claims that are independent of the applicable federal law.

103. We begin our analysis of this subject by reviewing the pertinent statutes. Section 40-15-105(1), C.R.S., states:

> No local exchange provider shall, as to its pricing and provision of access, make or grant any preference or advantage to any person providing telecommunications service between exchanges nor subject any such person to, nor itself take advantage of, any prejudice or competitive disadvantage for providing access to the local exchange network […]
>
> Section 40-6-119(1), C.R.S., 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.

104. We find that the plain language of these two statutes does not require a plaintiff to prove economic damages such as reduced profits, a reduced market share, or a forced reduction in prices to sustain a claim of discrimination. It is irrelevant whether economic damages must be shown to sustain a discrimination claim under federal laws. It is well-established that, where the legislature could have restricted the application of a statute, but chose not to, the courts (and the agencies) may not read additional restrictions into the statute. *See, e.g.*, *Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009). In addition, competitive disadvantage is only one of the outcomes prohibited by § 40-15-105(1), C.R.S. It is not required to sustain a claim under that statute. This is because § 40-15-105(1), C.R.S., has a disjunctive "or," not a conjunctive "and" before the term "competitive disadvantage." Finally, § 40-6-108(1)(d), C.R.S., further supports our finding that a plaintiff is not required to prove economic damages to sustain a discrimination claim. That statute plainly states that the Commission is not required to dismiss a complaint

because there are no direct damages to the complainant. For the above reasons, we deny the exceptions filed by Granite, BullsEye, TWT, and XO on this issue.

G. Granite and BullsEye Miscellaneous Arguments

1. Unenforceability of Unfiled Agreements

105. In their exceptions, Granite and BullsEye argue QCC is not entitled to reparations as a result of the unfiled agreements between the CLECs and other IXCs, since these agreements are void and unenforceable. Granite and BullsEye contend the ALJ failed to analyze this issue in the Recommended Decision.

106. In its consolidated response, QCC argues it is irrelevant whether the unfiled off-tariff agreements are void and unenforceable between the contracting parties. Rather, according to QCC, the relevant fact is that the respondent CLECs gave preferential treatment to other IXCs without a lawful justification.

107. We agree with QCC that, just because the unfiled off-tariff agreements are void and unenforceable between the contracting parties, does not change the fact that the respondent CLECs extended preferential treatment to IXCs other than QCC. We also note that the argument presented by Granite and BullsEye, if taken to its logical conclusion, would frustrate the ability of any plaintiff to obtain reparations or other remedies arising from any unlawful contract, since an unlawful contract often is unenforceable as between the contracting parties. That argument would also limit the ability of any plaintiff to enforce § 40-15-105(3), C.R.S. For the foregoing reasons, we deny the exceptions filed by Granite and BullsEye on this issue.

2. Failure to File Notices of Dispute Pursuant to the Filed Tariffs

108. In their exceptions, Granite and BullsEye argue that QCC waived all claims because it failed to file notices of dispute, as required by the tariffs filed by these CLECs.

The terms of the filed tariffs, according to Granite and BullsEye, carry the force of law. These respondent CLECs allege that QCC's failure to dispute its claims with the companies is fatal and that the ALJ failed to address this issue in the Recommended Decision.

109. In its consolidated response to exceptions, QCC argues that billing dispute provisions in the filed tariffs cannot trump statutory non-discrimination and filing obligations or establish a condition precedent to pursuing statutory claims. We agree with QCC and hence deny exceptions filed by Granite and BullsEye on this issue.

H. Eschelon Miscellaneous Arguments

1. Motion to Reopen the Record

a. Eschelon

110. In its Motion filed on April 14, 2011, Eschelon argues that the Commission should reopen the record to admit certain evidence. The Motion is supported by an affidavit.

b. QCC

111. In its response to the Motion, QCC argues that the Commission should deny the Motion, both as to its timing and the factual support. QCC contends the Motion is untimely. QCC argues that admitting this new information into the record would deprive it of due process with respect to the new information or, in the alternative, would delay this proceeding. It contends this alone should prevent the Commission from finding good cause exists to grant the Motion. In addition, QCC argues that the new evidence does not prove what Eschelon claims it does.

c. Discussion

112. We agree that admitting the information contained in the confidential version of the Motion would either deprive QCC of due process with respect to that information or would

delay a final decision in this proceeding. In addition, we agree with the substantive arguments made by QCC in its response to the Motion. The new evidence does not prove what Eschelon claims it does, since the affidavit supporting the Motion is incomplete as to the crucial piece of information. We therefore deny the Motion.

2. Non-Discrimination Requirements and Retrospective Settlements of Billing Disputes

a. Eschelon

113. In its exceptions, Eschelon argues the ALJ erred in applying the statutory filing and nondiscrimination provisions to off-tariff access agreements that have no prospective effect. Eschelon states it has terminated its off-tariff access agreements with Sprint and AT&T in 2005. However, after that time, AT&T refused to pay the tariffed rates, so Eschelon was forced to enter into a series of settlement agreements that resolved, on a retrospective basis, all billing disputes raised by AT&T. Eschelon explains it has entered into these settlements on a quarterly basis. It also argues that it entered into these settlement agreements not because the claims asserted had merit, but because AT&T was a much larger adversary. Eschelon contends the statutory filing and non-discrimination requirements do not apply to retrospective settlements of billing disputes, only to forward-looking agreements; otherwise, the parties would be discouraged from entering into settlements.

b. QCC

114. In its response to exceptions, QCC argues that, even though the Eschelon-AT&T settlement agreements do not contain forward looking terms, these settlement agreements were contrived to mask Eschelon's continued adherence to the below-tariff rates. Indeed, according to QCC, the settlement agreements themselves contemplate their serial nature and even Eschelon itself characterized the settlements as a *systematic* attempt to resolve billing disputes

(emphasis added). QCC argues a party would not describe a backwards looking settlement as systematic unless a prospective arrangement has also been reached. QCC also states there was no that evidence Eschelon took any collection action against AT&T or filed any complaint to enforce its tariffed rates.

c. Discussion

115. We deny the exceptions filed by Eschelon on this point. First, Eschelon cites no legal authority supporting the proposition that statutory filing and nondiscrimination provisions do not apply to retrospective settlement agreements. In any case, we agree with QCC that these so-called retrospective settlement agreements were really prospective in substance, as evidenced by their systematic nature.

3. Procedure for Calculating Reparations

a. Eschelon

116. In the Recommended Decision, the ALJ found that, following a final Commission decision approving the initial reparations, QCC may file a motion to increase the calculation of reparations and must file for a decrease in the calculation of reparations if certain conditions are met. In its exceptions, Eschelon contends that the ALJ does not describe any procedure for the determination of such motions. Eschelon also argues this portion of the Recommended Decision would have the effect of authorizing a modification of a Commission order based upon evidence submitted after the record of the proceeding has closed and evidence that has not been subject to cross-examination, discovery, or rebuttal evidence. It argues that the Commission should, at the very least, clarify that any adjustment of the reparations calculation that is based on any evidence that is not already in the record be subject to discovery and cross-examination, as necessary to protect due process. Eschelon finally argues that, in the event any respondent CLEC believes a

reduction in the calculation of reparations is appropriate, it should be given the ability to request appropriate relief. Eschelon concludes that the procedure recommended by the ALJ for calculating reparations is contrary to due process.

117. In their responses to exceptions, TWT and XO echo these concerns.

b. QCC

118. In its response to exceptions, QCC argues that the process for updating reparations calculations envisioned by the ALJ is reasonable. QCC argues that the modifications to the process proposed by the CLECs are unnecessary and apparently are intended to further protract this litigation. QCC also states that, once it files a motion to update the reparations calculations, the Recommended Decision already contemplates the CLECs will have an opportunity to respond. QCC finally argues that nothing in the Recommended Decision precludes an adversely affected respondent from filing its own motion to update the reparations.

c. Discussion

119. To the extent Eschelon, TWT, and XO argue the process for updating reparations, as proposed by the ALJ in the Recommended Decision, would only delay a final decision in this proceeding, we agree. The Commission and the respondent CLECs do not know what sorts of updates Qwest may propose and therefore cannot foresee whether additional evidentiary hearings on the matter may be required. We believe a better course of action would be for Qwest to seek the types of relief it would seek via the process envisioned by the ALJ in a separate proceeding. We therefore grant the exceptions filed by Eschelon, as to this issue, and strike ordering ¶¶ 5(f) and 5(g) from the Recommended Decision.

4. Methodology for Calculating Reparations

a. Eschelon

120. Eschelon argues it has presented evidence during the hearing, largely unrebutted, which established that QCC substantially overstated its reparations calculation. Eschelon further argues that the ALJ failed to discuss that evidence in the Recommended Decision. Instead, according to Eschelon, the ALJ merely concluded that "Eschelon did not rebut the calculation as to manual invoices." Recommended Decision, at ¶ 81. Eschelon argues that it has thoroughly rebutted QCC's manual invoice theory and established that QCC overstated the amount of access charges billed during the relevant time period. Eschelon explains that, in performing its analysis, QCC relied on its internal records, which included electronic and manual invoices. Eschelon contends that this overstatement was caused, in part, by certain assumptions that QCC made regarding the time periods for which it had only manual invoices. Rather than reviewing the manual invoices, QCC merely assumed the proportion of intrastate and interstate access minutes was the same as for the electronic invoices. Eschelon states that, in his testimony, Dr. Ankum explained that this assumption resulted in grossly overstated intrastate amounts. Eschelon further argues that QCC failed to respond to these concerns. Eschelon also claims that this was not the only deficiency in QCC's calculation of reparations.

b. QCC

121. In its consolidated response to exceptions, QCC states that it has thoroughly specified and summarized its reparations calculations, CLEC by CLEC, in its Statement of Position.

122. QCC argues its methodology was simple and reasonable. QCC states its witness Derek Canfield calculated the difference between what QCC was charged by each respondent CLEC (at the tariff rates) and what it would have been charged during the same periods if

QCC had been granted the same preferential rates as AT&T and/or Sprint pursuant to the unfiled agreements. QCC points out that the ALJ approved these calculations after reviewing various criticisms lodged by various respondent CLECs during the hearing. QCC argues Eschelon offers nothing new on exceptions, but instead repeats the same critiques of QCC's methodology that QCC earlier rebutted.

c. Discussion

123. We note that the respondent CLECs have not presented any method of calculating reparations into the record; QCC was the only party to do so. In the Recommended Decision, at ¶ 307, the ALJ found that QCC has reasonably approximated a calculation of the variance in rates during the time the off-tariff agreements were in effect.

124. In his rebuttal testimony, Mr. Canfield addressed Eschelon's criticisms regarding the assumptions made regarding the time periods for which QCC had only manual invoices. Mr. Canfield disagreed that there was a flaw in these assumptions. Further, he testified that 91 percent of his analysis was based upon the electronic bill data and offered to update his analysis if Eschelon were to produce the bill data that makes up the other 9 percent. Mr. Canfield also testified that, absent copies of invoices that Eschelon submitted to AT&T and a confirmation that these rates were indeed paid, he was left to calculate the rates based upon the language of the agreement between those two entities. Further, he disagreed with Dr. Ankum that there was a qualitative difference between electronic and manual invoices. Mr. Canfield testified that the manual invoices were for the same switched access services and listed the same billing account numbers as the electronic invoices; the only difference is the time period(s) represented by the particular invoices. He also offered to update his analysis if the CLECs were able to produce the bill data that makes up those manual invoices. Further, in his rebuttal testimony, Mr. Canfield states he removed the duplicate invoices he discovered upon his review

of the manual invoice calculations. Finally, he rebuts Dr. Ankum's allegation that QCC failed to take into account tandem switching charges in calculating Eschelon's settlement agreement rate.

125. We have reviewed the testimony of witnesses Canfield and Ankum regarding the methodology of calculating reparations, particularly the assumptions made by QCC regarding the manual invoices. We find that QCC offered a reasonable methodology of calculating reparations into the record. The ALJ found that methodology to be credible, especially since the respondents did not offer alternative methodologies into the record. We find that the ALJ is in the best position to judge the credibility of the witnesses and will defer to the ALJ in his weighing of evidence and credibility determinations. We agree with QCC that Eschelon does not present anything new on exceptions, but rather repeats the arguments already considered by the ALJ. We therefore deny the exceptions filed by Eschelon on this ground.

I. Comtel Miscellaneous Arguments

1. Comtel

126. In its exceptions, Comtel contends that QCC should not be awarded any damages or reparations against it. Comtel explains that it had no off-tariff agreements relating to switched access service in Colorado, unlike other respondent CLECs, and that it should have never been included as a respondent in this docket. Comtel contends that the only evidence that QCC offered regarding its claims against Comtel were agreements to which Excel Communications (Excel) or VarTec Telecom (VarTec) allegedly were parties. Comtel states it acquired the assets of these two CLECs through a bankruptcy sale in 2006 and that this was a limited asset acquisition overseen by a bankruptcy court. Comtel argues it was not a party to the VarTec and Excel off-tariff agreements and it did not acquire or assume them with its limited asset acquisition in the bankruptcy court.

127. Comtel also points out that QCC had already entered into a settlement agreement with Comtel in the bankruptcy court proceeding. Comtel concludes that QCC's claim is legally barred by an order of the bankruptcy court approving the settlements. Comtel disagrees with the ALJ's finding that it is responsible for the VarTec and Excel agreements because its tariffs and invoices utilize the names of these old entities. Comtel argues that this finding is in direct conflict with the bankruptcy court order and applicable law and violates QCC's stipulation with Comtel.

128. Comtel finally states that it has billed all IXCs in Colorado in accordance with its filed tariffs over all relevant time periods. Comtel admits it discovered its billing system contained an inadvertent error which had caused Comtel to bill AT&T an erroneous rate from June of 2006 to December of 2008. Comtel states it back-billed AT&T for the undercharges upon discovering the error. Comtel argues that it is irrelevant whether AT&T had paid the back-bill. Otherwise, a carrier would become liable for discrimination just because one of its customers does not pay its bills.

2. QCC

129. In its response to exceptions, QCC argues that Comtel holds itself out to the public as Excel and VarTec, not as a distinct entity. For example, according to QCC, Comtel's tariffs and billing correspondence continue to reflect these names, four years after the bankruptcy purchase. QCC also states that VarTec and Excel entered into an off-tariff agreement with AT&T and that this agreement did not terminate with the bankruptcy court proceeding in 2006. Instead, Comtel continued to charge AT&T the contract rate until after Comtel was named as respondent in the instant docket. QCC also argues that, despite a back-bill, AT&T has never paid the difference between the two rates. Given these facts, QCC argues that the ALJ properly

concluded that Comtel should be liable for reparations to the same extent as other respondent CLECs.

3. Discussion

130. The stipulation that QCC and Comtel entered into as part of the bankruptcy court proceeding (Hearing Exhibit 125) only released QCC's claims through the effective date of that agreement. That stipulation does not preclude any claims arising *after* its effective date, or June 6, 2006. The stipulation, at ¶ 14, states "[a]ny disputes under the QCC Agreements for invoices dated after the Effective Date shall be governed solely by such respective QCC Agreement and shall be unaffected by this Stipulation and Order."

131. Further, given the totality of circumstances in this case, we agree with QCC and the ALJ that Comtel holds itself out to the public as Excel and VarTec. For example, its tariffs and billing correspondence continue to reflect these names. Further, Comtel continued to charge AT&T the rate provided in the off-tariff agreements that Excel and VarTec had entered into with AT&T *after* the bankruptcy sale. We disagree with Comtel that, if the Recommended Decision is upheld, a carrier may become liable for discrimination just because one of its customers did not pay its bills. Here, the customer (AT&T) did not simply not pay its bills. Rather, Comtel actually billed the customer the incorrect rate, which happened to be the same rate as previously charged under the unfiled off-tariff agreements. We therefore agree with QCC and the ALJ that the VarTec and Excel off-tariff agreements did not terminate from the bankruptcy proceeding in 2006 but continued after the stipulation.

132. We deny the exceptions filed by Comtel on this point, in part, and grant, in part. We note the ALJ ordered Comtel to pay reparations as a result of the Excel and VarTec off-tariff agreements that both began shortly before June 6, 2006, the effective date of the stipulation that

the parties entered into through the bankruptcy court proceeding. However, the time period and therefore the amount of reparations that must be adjusted is *de minimis*. We therefore uphold the entirety of the reparations amounts that the ALJ ordered Comtel to pay to QCC.

J. QCC Requests for Clarification

1. Granite Reparations

133. QCC points out that the ALJ accepted QCC's reparations calculations concerning its claim against Granite, in ¶ 86 of the Recommended Decision. However, at footnote 276, the ALJ concludes that the record does not include sufficient data to support a reparations calculation as applied to Granite. QCC urges the Commission to correct this apparent inconsistency within two sections of the Recommended Decision. QCC also argues that the Commission should amend the ALJ's finding that reparations owed by Granite should be terminated as of November 2008, when Granite filed its off-tariff agreement in Docket No. 08M-335T. This is because, according to QCC, Granite did not offer QCC the discounted rates reflected in its off-tariff agreements and thus that filing had no legal or practical significance.

134. We will grant this request for clarification, in part. We agree with QCC that the information in the record supports the reparations calculation with respect to Granite, as stated in ¶ 86 of the Recommended Decision. We will therefore amend footnote 276 and ordering ¶ 5 of the Recommended Decision accordingly. Further, the fact that Granite filed its off-tariff access agreement in November 2008 does not negate its responsibility for earlier time periods. On the other hand, we will defer to the ALJ's conclusions regarding the legal significance of the November 2008 filing.

2. Interest

135. In its exceptions, QCC states that ordering ¶ 5 of the Recommended Decision is unclear on how interest should be applied to the reparations calculations. QCC argues it is not clear whether the interest will date back to the accrual of the claims or whether the interest will be assessed only if respondent CLECs fail to make the required payments of reparations within the 60 days permitted under the Recommended Decision. QCC requests that the Recommended Decision be clarified on this point. QCC further argues that interest on all reparations amounts should date back to the accrual of each overcharge, regardless of when each respondent CLEC submits payment. Qwest argues this will ensure it is made whole.

136. We agree that an order of interest on the reparations dating back to the accrual of each overcharge is appropriate, as it will make Qwest closest to the position it would have been but for the discrimination. We therefore find that the interest in this matter shall date back to the accrual of each overcharge and should be calculated using the customer deposit rate(s) in effect during the relevant time periods from the accrual of overcharge to the date of the final Order in this matter.

3. CLEC Filing Obligations

137. QCC argues that ¶ QCC 310 of the Recommended Decision should be clarified, to require respondent CLECs to file their off-tariff access agreements in Docket No. 11M-002T. QCC points out that, in ¶ 310, the Recommended Decision strives to alleviate the root cause of the discrimination by requiring the respondent CLECs to file their effective access agreements in Docket No. 08M-0335T. The Commission established that repository docket soon after QCC commenced the instant litigation in 2008. QCC points out that, since that time, the Commission has opened new repository dockets each year, including Docket No. 11M-002T, to receive off-tariff switched access agreements filed in 2011. QCC suggests that the Commission direct

the CLECs to file their off-tariff access agreements in the 2011 repository docket instead of Docket No. 08M-335T, to ensure consistency and avoid confusion.

138. We agree with QCC that its proposal will avoid confusion. We therefore grant QCC's request for clarification on this issue and direct respondent CLECs to file their off-tariff access agreements in Docket No. 11M-002T.

4. Typographical Error Regarding QCC Advocacy

139. QCC requests the Commission clarify ¶ 183 of the Recommended Decision. It states that the Recommended Decision purports to characterize QCC's position regarding the level of reasonable inquiry required of potential complaints in conjunction with the application of the discovery rule regarding the statute of limitations. QCC argues that, while likely a mere typographical error, the Recommended Decisions states "QCC argues the level of reasonable inquiry only requires that a prospective complainant look *beyond* documents readily available in the public domain." Emphasis added. In its Opening Statement of Position, QCC pointed to various authorities in support of its argument that the "exercise of reasonable diligence" *does not require* a prospective complainant to look beyond documents readily available in the public domain. In order to avoid confusion and the potential misuse of this language by other parties regarding QCC's position both in this docket and in litigation in other states, QCC requests that the word "beyond" in ¶ 183 of the Recommended Decision be replaced by the word "to," consistent with its advocacy.

140. We find this request for clarification reasonable and therefore grant the same.

II. ORDER

A. The Commission Orders That:

1. Exceptions to Recommended Decision No. R11-0175 (Recommended Decision) filed on April 14, 2011 by QCC Communications Corporation are granted.

2. Exceptions to the Recommended Decision filed on April 14, 2011 by Time Warner Telecom of Colorado, LLC, are denied.

3. Exceptions to the Recommended Decision filed on April 14, 2011 by Granite Telecommunications, Inc., are denied.

4. Exceptions to the Recommended Decision filed on April 14, 2011 by Comtel Telcom Assets, LP, are granted, in part, and denied, in part.

5. Exceptions to the Recommended Decision filed on April 14, 2011 BullsEye Telecom, Inc., are denied.

6. Exceptions to the Recommended Decision filed on April 14, 2011 by Eschelon Telecom, Inc. (Eschelon) are granted, in part, and denied, in part.

7. Exceptions to the Recommended Decision filed on April 14, 2011 by MCIMetro Access Transmission Services, LLC, are denied.

8. Exceptions to the Recommended Decision filed on April 14, 2011 by XO Communications Services, Inc., are denied.

9. Exceptions to the Recommended Decision filed on April 14, 2011 by Liberty Bell Telecom, LLC, are denied.

10. The Motion to Reopen the Record filed on April 14, 2011 by Eschelon is denied.

11. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

12. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING October 17, 2011.

(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