Confidential Version

Decision No. R11-0175

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08F-259T

QWEST COMMUNICATIONS COMPANY, LLC,

COMPLAINANT,

V.

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

RESPONDENTS.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE G. HARRIS ADAMS PARTIALLY DISMISSING AND PARTIALLY GRANTING COMPLAINT

Mailed Date: February 23, 2011

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I. STATEMENT

1. On June 20, 2008, Qwest Communications Corporation (QCC or Qwest) filed a Formal Complaint against MCImetro Access Transmission Services, LLC (MCImetro); XO Communications Services, Inc. (XO); Time Warner Telecom of Colorado, LLC (TWT); Granite Telecommunications, Inc. (Granite); Eschelon Telecom, Inc. (Eschelon); Arizona Dialtone, Inc. (Arizona Dialtone); and John Does 1-50 (CLECs whose true names are unknown) (collectively, Respondents).

2. The matter was referred to an administrative law judge (ALJ) for disposition during the Commission's weekly meeting held July 2, 2008.

3. On July 7, 2008, the Commission issued its Order to Satisfy or Answer to each Respondent. On that same day, the Commission set the hearing in this docket for September 9, 2008. *See* Order Setting Hearing and Notice of Hearing.

4. On July 22, 2008, the Colorado Office of Consumer Counsel (OCC) intervened of right.

5. On August 6, 2008, Staff of the Public Utilities Commission (Staff) intervened of right.

6. By Decision No. R08-0906-I, issued August 27, 2008, the scheduled hearing was vacated and a prehearing conference was scheduled.

7. By Decision No. R08-0908-I, issued August 27, 2008, MCImetro's request to deny the OCC's intervention was denied.

8. By Decision No. R08-0973-I, issued September 12, 2008, discovery and confidentiality matters were addressed following a prehearing conference in the matter.

9. By Decision No. R08-1024-I, issued September 25, 2008, provision for electronic service was expanded to all filings and discovery in this docket.

10. By Decision No. R08-1261-I, issued December 9, 2008, Qwest was authorized to amend its Complaint in the proceeding and the caption was amended consistent therewith.

11. On December 12, 2008, the Amended Complaint of Qwest Communications Corporation was filed. The amendment added ACN Communications Services, Inc. (ACN); Affinity Telecom, Inc. (Affinity); BullsEye Telecom, Inc. (BullsEye); Comtel Telecom Assets LP

(Comtel); Ernest Communications, Inc. (Ernest); Level 3 Communications, LLC (Level 3); and Liberty Bell Telecom, LLC (Liberty Bell), as additional named Respondents.

12. On December 16, 2008, the Commission issued its Order to Satisfy or Answer to each additional named Respondent.

13. ACN, Arizona Dialtone, BullsEye, Comtel, Ernest, Eschelon, Granite, Level 3, Liberty Bell, MCImetro, TWT, and XO each filed answers to the Amended Complaint.

14. By Decision No. R09-0258-I, issued March 12, 2009, the Amended Complaint was dismissed as to Affinity. Affinity was dismissed as a party to the proceeding.

15. By Decision No. R09-0356-I, issued April 2, 2009, Michael D. Nelson and Gregory E. Sopkin, Esq., were permitted access to confidential information in the docket on behalf of Comcast Phone of Colorado, LLC (Comcast) subject to the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.[1] A condition precedent to access, which was fulfilled, was that those accessing confidential information agreed to be bound by the Commission rules regarding confidentiality as they relate to this proceeding.

16. By Decision No. R09-0022-I, issued January 28, 2009, Ms. Letty S.D. Friesen Esq. and Tom Asbury, AT&T Communications of the Mountain States, Inc.'s (AT&T-Mountain States) General Attorney and Docket Manager respectively, were permitted access to confidential information in the docket subject to the Commission's Rules of Practice and Procedure, 4 CCR 723-1.[2] A condition precedent to access, which was fulfilled, was that those accessing

[1] Comcast was the recipient of a subpoena in the proceeding.

[2] AT&T Inc.; AT&T Corp.; and AT&T Communications of the Mountain States, Inc. (collectively AT&T), were the recipients of a subpoena in the proceeding.

confidential information shall be bound by their agreement to be bound by the Commission rules regarding confidentiality as they relate to this proceeding.

17. By Decision No. R09-0103-I, issued February 2, 2009, a request for reconsideration was granted and the scope of relief granted by Decision No. R09-0022-I was modified and superseded. No party was required to make information available to AT&T-Mountain States that was otherwise claimed to be confidential and that did not involve AT&T (*i.e.,* agreements and any related documents). Ms. Friesen and Mr. Asbury remain bound by the agreement to be bound by the Commission rules regarding confidentiality as they relate to this proceeding.

18. By Decision No. R09-0248-I, issued March 6, 2009, Eschelon was granted leave to file its third party complaint against AT&T Corp., consistent with Eschelon Telecom, Inc.'s Motion for Leave to Assert Third Party Complaint.

19. On March 19, 2009, the Commission issued its Order to Satisfy or Answer to AT&T Corp.

20. By Decision No. R09-0495-I, issued May 7, 2009, Eschelon's Third Party Complaint against AT&T Corp. was dismissed upon AT&T's Motion to Dismiss Eschelon's Third-Party Complaint.

21. By Decision No. R09-0508-I, issued May 11, 2009, a new procedural schedule was established. By Decision No. R09-0788-I, issued July 21, 2009, the procedural schedule was modified.

22. On May 15, 2009, Qwest waived statutory time limits of § 40-6-108(4), C.R.S., applicable to this proceeding.

23. By Decision No. R09-0815-I, issued July 30, 2009, confidentiality of documents was decided. A broad dispute as to confidentiality of documents was addressed after Qwest challenged many claims of confidentiality made by Respondents in accordance with Commission rules.

24. By Decision No. R09-0953-I, issued August 27, 2009, the request to reconsider Decision No. R09-0815-I was denied.

25. By Decision No. R09-1031-I, issued September 16, 2009, Decision Nos. R09-0815-I and R09-0953-I were temporarily stayed until further order.

26. By Decision No. R09-1068-I, issued September 22, 2009, leave to file an interim appeal of Decision Nos. R09-0815-I and R09-0953-I filed by AT&T Corp. and AT&T-Mountain States was denied. Rather, by continuing the stay until resolution of the proceeding, the case proceeded so that exceptions might be addressed with the lifting of stay by this Recommended Decision.

27. By Decision No. R09-1264-I, issued November 6, 2009, one scheduled day of hearing was vacated.

28. By Decision No. R09-1343-I, issued December 2, 2009, the procedural schedule was vacated.

29. By Decision No. R09-1371, issued December 9, 2009, the Complaint filed by Qwest against Arizona Dialtone was dismissed without prejudice.

30. By Decision No. R09-1370-I, issued December 9, 2009, a new hearing was scheduled in the matter.

31. By Decision No. R09-1401, issued December 15, 2009, the Complaint filed by Qwest against Level 3 was dismissed without prejudice.

32. By Decision No. R10-0150-I, issued February 22, 2010, the scheduled hearing was again vacated.

33. By Decision No. R10-0364-I, issued April 19, 2010, all motions for summary judgment were denied because movants failed to meet their burden of proof to show that relief should be granted as a matter of law and because genuine issues of material fact remain in this proceeding. Notably, the applicable standard for ruling upon such motions entitles the nonmoving party to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party.[3]

34. By Decision No. R10-0454-I, issued May 10, 2010, Decision No. R10-0364-I was clarified such that disputed questions of material fact remain. However, such clarifications did not affect the outcome of the ruling on pending motions.

35. By Decision No. R10-0738, issued July 15, 2010, a settlement between Qwest and ACN was approved without modification. Based thereupon, the complaint against ACN was dismissed with prejudice.

36. By Decision No. R10-0392-I, issued April 26, 2010, a new hearing was scheduled in the matter.

37. At the scheduled time and place, the undersigned ALJ called the matter for hearing. All remaining parties appeared and participated through counsel, except OCC and Staff. During the course of the hearing, Exhibits 1 through 5, 5C, 6, 6C, 6D, 7, 7C, 8, 8C, 8D, 9, 9C, 10, 10C, 11, 11C, 12 through 14, 14C, 15C through 19C, 20 through 22, 23, 23C, 24 through 28, 29, 29D, 30 through 35, 35D, 36 through 39, 39D, 40, 40D, 41C through 55C, 56, 57, 60 through

[3] *AviComm, Inc. v. Colorado PUC,* 955 P.2d 1023, 1029 (Colo. 1998), citing *Bayou Land Co. v. Talley,* 924 P.2d 136, 151 (Colo. 1996).

38. 65, 76, 77C, 78, 79C through 83C, 84 through 88, 90, 90C, 91, 91C, 92 through 94, 97, 98, 100, 102, 103D, 105 through 107, 108C, 109C, 110 through 112, 114 through 116, 118, 120 through 125, 126, 127, 128 through 133, 133C,134D, and 136 through 147 were identified, offered, and admitted into evidence during the hearing. Exhibit 148 is admitted post-hearing, as ordered below.

39. Those exhibits ending in "C" (*i.e.,* 6C) were admitted as confidential exhibits subject to protections afforded by the Commission's Rules of Practice and Procedure. Those exhibits ending in "D" (*i.e.,* 6D) were admitted as highly confidential exhibits subject to protections afforded by prior decision, issued in accordance with the Commission's Rules of Practice and Procedure. Without objection, Exhibits 126 and 127 (two tariffs on file with the Commission) were admitted by administrative notice without a copy being provided for the record.

40. At the conclusion of the hearing, parties were provided an opportunity to file closing statements of position and responsive statements of position.

41. On September 3, 2010, the Request for Administrative Notice of California Public Utilities Commission Final Decision in Parallel Proceeding was filed by BullsEye, Comtel, Granite, Eschelon, Liberty Bell, MCImetro, TWT, Ernest, and XO. No responses were filed. Good cause shown for the unopposed request, it will be granted. Administrative notice of the Final Decision Dismissing Complaint of the California Public Utilities Commission, Decision 10-07-030, dated August 2, 2010, will be admitted and referred to herein as Hearing Exhibit 148. The final decision resulted from Hearing Exhibit 123.

42. The California Commission held that:

> 2. In D.07-12-020, the Commission authorized carriers to offer intrastate access services in voluntary contracts at rates different from the valid tariffed rate, without further Commission ratemaking review.
>
> 3. In D.07-12-020, the Commission required that tariffed intrastate access service be offered to all carriers subject to a cost cap but imposed no restrictions on the voluntary contractual rates for intrastate access services.
>
> 4. Qwest's allegations of voluntary contracts for intrastate access services at rates different from tariffed rates do not constitute a violation of California law or Commission regulation.[4]

43. On October 5, 2010, the Motion to Correct the Prefiled Rebuttal Testimony of Derek Canfield and Request for Waiver of Response Time was filed by Qwest. No responses were filed. Good cause shown for the unopposed request, it will be granted.

44. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS

A. QCC

45. QCC is organized under the laws of the State of Delaware with its principal place of business at 1801 California Avenue, Denver, Colorado. QCC is qualified to do business in Colorado, and is a telecommunications carrier certified to provide telecommunications services in Colorado. QCC provides, as relevant to this Complaint, interexchange (long-distance) telecommunications services throughout the State of Colorado.

46. The Commission granted QCC a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange telecommunications services as a CLEC in Colorado on April 2, 2004. Before QCC could commence operations under that CPCN and before it could

[4] *Hearing Ex.* 148.

provide local exchange telecommunications services in Colorado, QCC was required by the Commission's 2004 order to file an Advice Letter containing local exchange maps, local calling areas, and a proposed tariff. QCC filed its initial local exchange services tariff on March 2, 2007, with an effective date of April 2, 2007.

47. QCC is a CLEC but does not provide switched access service in Colorado. QCC has not previously provided switched access service in Colorado. QCC does not have a tariff authorizing it to provide switched access service in Colorado, and QCC has not had such a tariff since at least September 1, 2002.

48. QCC does not provide facilities-based switched local exchange service in Colorado. QCC has not previously provided facilities-based switched local exchange service in Colorado. QCC does not provide local exchange service using its own end-office switches in Colorado. QCC does not currently provide competitive local exchange service in Colorado using unbundled network elements. QCC has not previously provided competitive local exchange service using unbundled network elements in Colorado.

49. QCC is an interexchange carrier (IXC). QCC uses and is billed for intrastate switched access services by local exchange carriers (LECs). All Respondents are competitive local exchange providers (CLECs) in the State of Colorado.

50. Switched access is a service provided by local exchange carriers (including incumbent local exchange carriers (ILECs), rural LECs, and CLECs) that allows IXCs to reach the LEC's end user customer. Switched access is necessary for the provision of long distance

service by IXCs. Switched access is a "series of bottleneck monopolies over access to each individual end user."[5]

51. QCC's claims arise from intrastate switched access agreements between Respondents and AT&T and/or Sprint (other IXCs). In each instance, the agreements were not filed with the Commission pursuant to § 40-15-105(3), C.R.S., prior to the filing of the complaint that initiated this proceeding.

52. Each Respondent has an intrastate switched access service tariff on file with the Commission.

53. Each Respondent entered into one or more agreements with AT&T and/or Sprint to provide intrastate switched access service on prices, terms, and/or conditions that differ from the tariff on file with the Commission. Those agreements are not reflected in tariffs on file with the Commission.

54. Each Respondent charged QCC for intrastate switched access service in accordance with their respective tariff on file with the Commission.

B. BullsEye

55. As a CLEC, BullsEye provides local telephone service to customers in Colorado. BullsEye was granted a CPCN to provide competitive local exchange service in Colorado in Docket No. 02A-382T and began providing service thereunder in 2004.[6]

56. BullsEye offers intrastate switched access service via a tariff filed with the Commission.[7] BullsEye's tariff rate is $.031074 for originating switched access and $.044982

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[5] In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking (Apr. 27, 2001) ("7th Report and Order "), at ¶ 30. *See also* ¶¶ 28-29, 31-34.

[6] *Hearing Ex.* 10 at 1-2.

[7] *Hearing Ex.* 7, p.28, LBB-25 (BullsEye Colo. PUC Tariff No. 2).

for terminating switched access. It also charges a flat rate of $.000694 for each 8XX database query.[8] BullsEye charged its tariff rates to QCC.[9] BullsEye's tariff states that BullsEye may enter into individual case basis (ICB or special contract arrangements) agreements, but such "[s]ervice shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract."[10]

57. BullsEye entered into a switched access agreement with AT&T effective October 21, 2004.[11] Pursuant to the agreement, which is still in effect, AT&T pays [BEGIN CONFIDENTIAL] only $.012 per minute, for a discount of 61 percent off of BullsEye's tariff originating rate and 73 percent off of BullsEye's tariff terminating rate.[12] [END CONFIDENTIAL]

58. Had BullsEye provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [BEGIN CONFIDENTIAL] $33,327.76 [END CONFIDENTIAL] less than it was actually charged, through December 31, 2008.[13]

59. QCC became aware of the BullsEye-AT&T agreement on August 18, 2008.

60. BullsEye never filed the agreement with this Commission.[14]

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[8] *Hearing Ex.* 7, pp.28-29, LBB-25 (BullsEye Colo. PUC Tariff No. 2, Section 3.9).

[9] *Hearing Ex.* 7, p.28; *Hearing Ex.* 5C (Canfield Direct Testim.), pp.30-31, DAC-8; *Hearing Tr.* Vol. 2, p.62.

[10] *Hearing Ex.* 7, p.28, LBB-25 (BullsEye Colo. PUC Tariff No. 2, Section 6.1).

[11] *Hearing Ex.* 7C, p.28, LBB-23 (BullsEye-AT&T agreement); *Id.,* LBB-24, p.3 (BullsEye response to QCCData Request 1-2). *See also* LBB-24, p.4 (BullsEye response to QCC Data Request 1-3.e).

[12] *Id.,* p.29, LBB-23 (BullsEye-AT&T agreement), p.2 (Sec. 6), p.5 (Sch. A).

[13] *Hearing Ex.* 5C, p.31, DAC-8. As Mr. Canfield explained in his Direct Testimony, his calculations were compiled through year end 2008, and need to be updated to reflect the full amount of the overcharge. As discussed in Section IV.F.1.b of the Opening Statement, QCC suggests that the most efficient way to accomplish this would be for the Commission to order that reparations be paid and administered through a claim process. The Commission should establish the parameters for each CLEC's refund (for instance, in this case the Commission would direct BullsEye to provide refunds of all overcharges, plus interest at a set rate, from October 21, 2004 to the date of the fmal order in this proceeding), and direct the parties to confer regarding the correct calculation. If the

61. BullsEye never modified its Colorado tariff to reflect the AT&T agreement.

62. QCC continues to pay BullsEye's tariff rates for switched access services.

C. Comtel

63. In June 2006, Comtel acquired certain operating assets of Excel and VarTec through a bankruptcy proceeding before the United States Bankruptcy Court for the Northern District of Texas. Upon consummation of the associated asset purchase agreement, Comtel adopted the tariffs of Excel and VarTec through General Adoption Notices and Adoption Supplements on file with the Commission. Comtel then began operating as a CLEC in Colorado.

64. In connection with the bankruptcy proceedings through which Comtel acquired assets, QCC entered into a Stipulation and Order with Comtel. Hearing Exhibit 125 is a copy of the bankruptcy court order approving the settlement agreement between QCC and Comtel (Case No. 04-81694-HDH-11). It provides that QCC "shall be deemed to have fully and forever waived, released, extinguished and discharged Comtel...from any and all claims...known or unknown, present or future, fixed or contingent, and which [QCC] has, had, or may have or claim to have against [Comtel], from the beginning of time through the Effective Date.'"[15]

65. On cross-examination, Ms. Eckert acknowledged that she neither reviewed nor considered the stipulation and order of the bankruptcy court.[16] No relief is requested herein as to actions released.[17]

66. Although Comtel is a distinct legal entity from the entities selling assets in bankruptcy, it holds itself out to the public as Excel and VarTec. Both its tariffs and its billing

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parties disagree, they can return to the Commission within a prescribed period of time for resolution of the computational dispute.

[14] *Hearing Ex.* 7C, LBB-24, p.5 (BullsEye response to QCC Data Request 1-3.h.).

[15] *Hearing Ex.* 125 at 13-14 and *Hearing Ex.* 12 at 5.

[16] *Hearing Tr.* Vol. 1 at 166.

correspondence continue to reflect the names Excel and VarTec.[18] Under the names Excel and VarTec, Comtel offers intrastate switched access service via tariffs filed with the Commission.[19] For direct-routed traffic, its tariff rates are $.022995 for originating switched access and $.036903 for terminating switched access.[20] For tandem-routed traffic, its tariff rates are $.029051 for originating switched access and $.042959 for terminating switched access. It also charges a flat rate of $.003500 for each 8XX database query.[21]

67. Comtel charged its tariff rates to QCC.[22]

68. The VarTec and Excel tariffs state that the companies may enter into ICB agreements; however, "[t]he terms and conditions of each contract offering will be made available to similarly situated Customers in substantially similar circumstances."[23] Further, ICB Arrangements are to be developed "in response to a bona fide special request from a Customer or prospective Customer to develop a competitive bid for a service. ICB rates will be offered to the Customer-in writing and on a non-discriminatory basis." [24]

69. VarTec and Excel entered into a switched access agreement with AT&T effective February 1, 2003.[25] Pursuant to the agreement, AT&T is charged rates differing from tariff rates.

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17 *See Hearing Ex.* 6 at 6.

18 *Hearing Ex. 7, LBB-27* ("VarTec Telecom, Inc." Tariff No. 2 and "Excel Telecommunications, Inc." Tariff No. 3); *Hearing Ex. 48C* (December 2009 rate adjustment memoranda and invoices from "Excel Telecommunications" and "VarTec Telecom" to AT&T).

19 *Hearing Ex. 7, p.30, LBB-27* (VarTec Colo. PUC Tariff No. 2, Excel Colo. PUC Tariff No. 3).

20 Excel and Vartec's rates are disaggregated, as shown in Mr. Brotherson's Direct Testimony.

21 *Hearing Ex. 7, p.31, LBB-27* (VarTec Colo. PUC Tariff No. 2, Section 4.5; Excel Colo. PUC Tariff No. 3, Section 4.5).

22 *Hearing Ex. 7, p.30; Hearing Ex.* 5C (Canfield Direct Testim.), *pp.33-34, DAC-9, DAC-10.*

23 *Hearing Ex. 7, p.30, LBB-27* (VarTec Colo. PUC Tariff No. 2, Section 6.1; Excel Colo. PUC Tariff No. 3, Section 6.1).

24 *Hearing Ex. 7, p.30, LBB-27* (VarTec Colo. PUC Tariff No. 2, Section 6.2; Excel Colo. PUC Tariff No. 3, Section 6.2).

25 *Hearing Ex. 7C, p.30, LBB-26* (VarTec/Excel-AT&T agreement).

Under the agreement, AT&T paid [BEGIN CONFIDENTIAL] the ILEC intrastate rate.[26] [END CONFIDENTIAL] Comtel claims that the agreement terminated when Excel and VarTec filed bankruptcy in 2006.[27] Yet, Comtel also admits that, through "inadvertence," it continued to charge AT&T the contract rate until after Comtel was named as a Respondent in this complaint.[28] It claims that since December 2008, however, AT&T has been charged tariff rates, and that it has backbilled AT&T for the amount of the previous underbilling.[29] Comtel has not been repaid by AT&T, and thus for the period (as relevant to this proceeding)[30] from June 2006 until December 2008, AT&T paid a lower rate than did QCC to Comtel, which continued to act through a course of conduct consistent with the 2003 Excel and VarTec agreement.[31] Had Comtel provided equivalent rate treatment to QCC between June 2006 and December 2008, QCC would have been charged [BEGIN CONFIDENTIAL] $10,517.51 [END CONFIDENTIAL] less than it was actually charged.[32] QCC was charged [BEGIN CONFIDENTIAL] 95.9 percent [END CONFIDENTIAL] more than AT&T would have been charged for the same volume of services.

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26 *Id., p.29, LBB-26* (VarTec/Excel-AT&T agreement), *pp.2-3* (Sec. 6), *pp.6-7* (Sch. A).

27 *Hearing Ex. 12* (Gipson Answer Testim.), *p.2.*

28 *Id., p.4.*

29 *Id., p.4; Hearing Ex. 48C* (Comtel response and supplemental response to QCC Data Request 3-47). In her deposition, Comtel's substitute witness Leslie Ellis was **[BEGIN CONFIDENTIAL]** unsure whether Comtel had backbilled AT&T for the entire amount of the admitted underbilling that took place between June 2006 and December 2008. **[END CONFIDENTIAL]** *Hearing Ex. 133* (Ellis Depo. Tr.), *at pp.13-14.* Thus, AT&T may not have been backbilled for the entirety of the amounts it was billed at the contract rate after June 2006.

30 In answer testimony, Comtel witness Becky Gipson indicated that Qwest had waived all claims against Comtel through June 6, 2006 via a bankruptcy settlement. *Hearing Ex. 12, p.5.* Accepting that as true, Mr. Canfield revised his calculations through his rebuttal testimony to reflect only the period of June 2006-forward. While Comtel counsel sought to make the Qwest-Comtel settlement an issue during the evidentiary hearing (*Hearing Tr. Vol. 2, pp.128-129; Hearing Ex. 125* (Comtel-Qwest bankruptcy stipulation and order)), there is no issue. QCC has accepted June 2006 as the starting point of its claim for purposes of this litigation.

31 *Hearing Ex.. 133C, p. 14; Hearing Tr. Vol. 2, pp.132-136.*

32 *Hearing Ex. 6C, pp.6-7, DAC-16, DAC-17* (replacing DAC-9 and DAC-10).

70. QCC became aware of the Comtel-AT&T agreement when agreements involving Comtel's predecessor companies, Excel and VarTec, were produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008.

D. Ernest

71. Ernest offers intrastate switched access service via a tariff filed with the Commission.[33] Ernest's tariff rate is $.030083 for originating switched access and $.043991 for terminating switched access. It also charges a flat rate of $.004194 for each 8XX database query.[34] It is undisputed that Ernest charged rates to QCC similar to Ernest's tariff rates.[35] Ernest's tariff states that Ernest may enter into ICB agreements, but the tariff provides:

> The terms of each contract ... may include discounts off of rates contained herein and waiver of recurring, nonrecurring, or usage charges. The terms of the contract may be based partially or completely on the term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features. Service shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract.[36]

72. Ernest entered into two switched access agreements with AT&T effective June 20, 2001 and April 16, 2007.[37] Pursuant to the agreements, the latter of which is still in effect,[38] AT&T receives a discount off of Ernest's tariff rates. AT&T pays [BEGIN CONFIDENTIAL] the ILEC intrastate rate.[39] [END CONFIDENTIAL] Had Ernest provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [BEGIN CONFIDENTIAL] $18,245.60 [END CONFIDENTIAL] less than it was actually

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33 *Hearing Ex. 7, p.33, LBB-29* (Ernest Colo. PUC Tariff No. 1).

34 *Hearing Ex. 7, pp.33-34, LBB-29* (Ernest Colo. PUC Tariff No.1, Sections 3.9.3 and 3.9.4).

35 *Hearing Ex. 5C, p.38, DAC-11.*

36 *Hearing Ex. 7, p.33, LBB-29* (Ernest Colo. PUC Tariff No. 1, Section 6.1).

37 *Hearing Ex. 7C, p.33, LBB-28* (Ernest-AT&T agreements); *Hearing Ex. 15C* (Ernest response to QCC Data Request 1-2); *Hearing Ex. 16C* (Ernest response to QCC Data Request 1-3).

38 *Id.*

charged, through December 31, 2008.[40] QCC was charged [BEGIN CONFIDENTIAL] 50.3 percent [END CONFIDENTIAL] more than AT&T would have been charged for the same volume of services.[41]

73. QCC became aware of the Ernest-AT&T agreements when they were produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008. Ernest never filed the agreements with this Commission.[42] Further, it never modified its Colorado tariff to reflect the discounts provided to AT&T. It never advised QCC of the existence of the AT&T agreement and never offered QCC equivalent rate treatment.[43] Ernest admits it never sought permission from AT&T to file the agreement or share a copy with QCC.[44] QCC continues to pay Ernest's tariff rates.

E. Eschelon

74. Eschelon is a wholly-owned subsidiary of Integra Telecom, Inc. Eschelon provides telecommunications services, internet access, and business telephone systems in Colorado.

75. Eschelon offers intrastate switched access service via a tariff filed with the Commission.[45] Eschelon's tariff rate is $.029667 for originating switched access and $.049588

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39 *Hearing Ex. 7C, pp.34-35, LBB-28* (Ernest-AT&T agreements).

40 *Hearing Ex. 5C, pp.37-38, DAC-11.* Mr. Canfield's calculations require updating through the date of the final order herein.

41 *Id.*

42 *Hearing Ex. 16C, p.4* (Ernest response to QCC Data Request 1-3.h.).

43 *Id.* (Ernest response to QCC Data Requests 1-3.j, 1-3.l); *Hearing Ex. 128* (Ernest response to QCC Data Request 2-17).

44 *Hearing Ex. 128* (Ernest response to QCC Data Request 2-15).

45 *Hearing Ex. 7, p.21, LBB-16* (Eschelon Colo. PUC Tariff No. 3, Price List No. 3).

for terminating switched access. It also charges a flat rate of $.0039 for each 8XX database query.[46] It is undisputed that Eschelon charged its tariff rates to QCC.[47]

76. Eschelon entered into a switched access agreement with Sprint effective December 29, 2000.[48] The agreement terminated on March 6, 2005.[49] Pursuant to the agreement with Sprint, Sprint received a discount off of Eschelon's tariff rates. Sprint paid [BEGIN CONFIDENTIAL] $.032655 per minute for originating switched access and $.047954 per minute for terminating switched access from January 1, 2001 until June 30, 2001. Thereafter, Sprint paid the ILEC intrastate rate.[50] [END CONFIDENTIAL]

77. In addition, Eschelon entered into a switched access agreement with AT&T effective May 1, 2000. Pursuant to the AT&T agreement, AT&T received a discount off of Eschelon's tariff rates. [BEGIN CONFIDENTIAL] From May 1, 2000 to October 31, 2000, AT&T paid $.032655 per minute for originating switched access and $.047954 per minute for terminating switched access. Commencing November 1, 2000, AT&T was charged the ILEC intrastate rate.[51] [END CONFIDENTIAL]

78. Although the AT&T agreement terminated on March 6, 2005,[52] Eschelon and AT&T [BEGIN CONFIDENTIAL] thereafter agreed to an arrangement whereby AT&T continued to pay the contract rate (the ILEC intrastate rate). Eschelon billed AT&T at full tariff rates, but AT&T would only pay charges equivalent to the ILEC (contract) rate. This was then

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[46] *Hearing Ex. 7, p.21, LBB-25* (Eschelon Colo. PUC Tariff No. 3, Price List No. 3, Sections 1.1, 1.2).

[47] *Hearing Ex. 7, p.21; Hearing Ex. 5C, pp.23-24, DAC-5.*

[48] *Hearing Ex. 7C, p.20, LBB-14, pp.7-12* (Eschelon-Sprint agreement), *LBB-15, p.2* (Eschelon response to QCC Data Request 1-2).

[49] *Id.*

[50] *Hearing Ex. 7C, p.24, LBB-14* (Eschelon-AT&T agreement), *p.8* (Sec. 1.b), *p.12* (App. A).

[51] *Hearing Ex. 7C, pp.22-23, LBB-14* (Eschelon-AT&T agreement), *p.2* (Sec. 6), *p.6* (Sch. A).

[52] *Hearing Ex. 14* (Copley Testim.), *p.1, EC-1, EC-2.*

memorialized in an ostensibly backwards-looking agreement (the "Release and Settlement Agreements") approximately once per quarter.

79. The agreements themselves contemplate their serial nature by establishing that AT&T and Eschelon would enter into a Release and Settlement Agreement on a quarterly basis into the future.[53] Further, in discovery, Eschelon itself characterized the agreements as a backwards looking systematic attempt to resolve switched access disputes for the most recent quarter."[54] Admission of a "systematic" attempt indicates a prospective, rather than solely a retrospective, arrangement had been worked out between the contracting parties.

80. Finally, Eschelon's contemporaneous correspondence (drafted soon after the termination of the 2000 agreement) with AT&T reflects that Eschelon intended to continue to apply, going forward, the ILEC discount to AT&T.[55] In one email, Eschelon acknowledged its non-discrimination obligation and the desire to avoid being fined again (as it had been in Minnesota), but then (ignoring those known obligations) offers AT&T the ILEC rate, the same discounted rate it charged AT&T under the recently-terminated contract.[56] The last written quarterly agreement disclosed to QCC was dated March 2008, and covered charges through December 2007.[57] Since that time, Eschelon states that it has continued to bill AT&T the tariff rate, but that AT&T has continued to dispute charges above the ILEC rate. In fact, it has short-paid Eschelon since December 2007.[58] There is no evidence of any collection action against AT&T by Eschelon or that any civil or regulatory complaint was filed to enforce its tariff rates.[59] Thus, AT&T continues to pay lower rates than QCC for Eschelon's intrastate switched access.

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53 *Hearing Ex. 7C, p.23, LBB-14, p.41* (section I.4 of Oct. 5, 2006 quarterly agreement).

54 *Hearing Ex. 7C, p.23, LBB-15, p.5* (Eschelon response to QCC Data Request 1-3.c) (emphasis added).

55 *Hearing Ex. 7C, pp.23-24, LBB-15, pp.15-81.*

56 *Hearing Ex. 7C, p.24, LBB-15, p.22.*

57 *Hearing Ex. 7C, LBB-24, pp.62-66.*

58 *Hearing Ex. 14, p. 2; Hearing Ex. 132* (Copley Depo. Tr.), *pp.9-12.*

59 *Hearing Ex. 132, pp.12-13.*

Although Eschelon may submit a bill at tariff rates, there is no indication whatsoever that Eschelon seeks, anticipates, or requires full payment of those bills. Preferential treatment continues. [END CONFIDENTIAL]

81. While Eschelon emphasizes that these agreements do not contain forward-looking terms,[60] they were a concerted effort to continue charging prices varying from tariff terms on file with the Commission.

82. Had Eschelon provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [BEGIN CONFIDENTIAL] $120,117.34 [END CONFIDENTIAL] less than it was actually charged, through December 31, 2008.[61] QCC was charged [BEGIN CONFIDENTIAL] 38.1 percent [END CONFIDENTIAL] more than AT&T would have been charged for the same volume of services.[62] While Eschelon criticized QCC's manual invoice assumption, it is found that QCC's calculation was reasonable and accurate. Eschelon did not rebut the calculation as to manual invoices.

83. QCC contends it became aware of the Eschelon-AT&T agreements in part when they were produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008 and in part when they were produced by Eschelon pursuant to discovery served by QCC on August 15, 2008. QCC became aware of the Eschelon-Sprint agreement when it was produced to QCC on December 5, 2008 pursuant to a QCC subpoena served on Sprint on November 12, 2008. Eschelon never filed any of these agreements with this Commission.[63]

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[60] *See, e.g., Hearing Ex. 7, LBB-2* (Eschelon response to QCC Data Request 2), *p.2* (describing the quarterly agreements as follows: "Eschelon has entered into the following agreements which in some way address switched access services, but do not dictate rates for switched access in Colorado.").

[61] *Hearing Ex. 5C, p.24, DAC-5.* Mr. Canfield's calculations require updating through the date of the final order herein.

[62] *Id.*

[63] *Hearing Ex. 7C, LBB-15, p.6* (Eschelon response to QCC DR 1-3.h).

Further, Eschelon never modified its Colorado tariff to reflect the discounts provided to AT&T. QCC disputes that all the agreements became publicly known in the Minnesota regulatory proceedings. Further, QCC was never offered equivalent rate treatment.[64] QCC continues to pay Eschelon's tariff rates.

84. Eschelon disputes the substance of the agreements as shown by QCC and argues that Eschelon billed all carriers, including AT&T and Sprint, at the rates in Eschelon's Colorado switched access tariff.[65] Eschelon contends that AT&T then disputed a portion of each bill and a series of quarterly settlement agreements were negotiated to resolve the disputed bills. However, the parties' course of dealings fails to overcome QCC's showing of the substance of the agreements. Despite the fact that the last periodic settlement agreement covered bills through December 5, 2007, Eschelon has continued to bill AT&T in accordance with its tariff.[66] AT&T has refused payment, continues to dispute portions of Eschelon's billings, continues to be served, and no responsive action has been shown.[67]

F. Granite

85. Granite offers intrastate switched access service via a tariff filed with the Commission.[68] Granite's tariff rate is $.040686 for originating switched access and $.068502 for terminating switched access.[69] It also charges a flat rate of $.000694 for each 8XX database query.[70] It is undisputed that Granite charges its tariff rates to QCC.[71]

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64 *Id., pp.6-7* (Eschelon response to QCC Data Request 1-3.j, 1-3.l).
65 *Hearing* Ex. 14C (Copley Answer Testimony) at, p.2, I. 1-16.
66 *Hearing* Ex. 14C (Copley), p.2, 1. 18-29.
67 *Hearing Exs.* 14 and 14C, at 2.
68 *Hearing Ex. 7, p.18, LBB-13* (Granite Colo. PUC Tariff No. 2).
69 Granite's rates are disaggregated, as shown in Mr. Brotherson's Direct Testimony.
70 *Hearing Ex. 7, p.18, LBB-13* (Granite Colo. PUC Tariff No. 2, Section 5.1).
71 *Hearing Ex. 7, p.17; Hearing Ex. 5C, pp.20-21, DAC-4; Hearing Tr. Vol. 2, p.62.*

86. Granite entered into a switched access agreement with AT&T effective April 1, 2003 and an agreement with Sprint effective April 1, 2004.[72] Pursuant to the agreements, which are still in effect,[73] AT&T and Sprint receive a discount off of Granite's tariff rates. [BEGIN CONFIDENTIAL] AT&T pays the ILEC intrastate rate, while Sprint pays a flat rate of $.0215 per minute.[74] [END CONFIDENTIAL] Had Granite provided equivalent rate treatment to QCC since entering into the Sprint agreement, QCC would have been charged [BEGIN CONFIDENTIAL] $109,288.77 [END CONFIDENTIAL] less than it was actually charged, through December 31, 2008.[75] QCC was charged [BEGIN CONFIDENTIAL] 106.8 percent [END CONFIDENTIAL] more than Sprint would have been charged for the same volume of services.[76]

87. Granite did not sponsor a company witness. However, Dr. Ankum criticizes Mr. Canfield for utilizing the Sprint agreement for comparison purposes. He also points out that QCC's overcharge calculation would have been smaller had the AT&T agreement been utilized in the comparison.[77] QCC contends it is appropriate to use the deepest discount being provided to any Colorado IXC for purposes of the overcharge calculation given QCC's entitlement to non-discriminatory treatment.[78]

88. QCC became aware of the Granite-AT&T agreement no earlier than June 22, 2006 when it was made public in a docket at the Minnesota Public Utilities Commission (Minnesota

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[72] *Hearing Ex. 7C, p.17, LBB-11* (Granite-AT&T agreement and Granite-Sprint agreement); *Id., LBB-12 Substitute* (Granite response to QCC Data Request 1-2).

[73] *Id., LBB-12 Substitute, p.5* (Granite response to QCC Data Request 1-3.e).

[74] *Id., pp.18-19, LBB-11* (Granite-AT&T agreement and Granite-Sprint agreement), *LBB-12 Substitute* (Granite response to QCC Data Request 1-3.b).

[75] *Hearing Ex. 5C, p.21, DAC-4.* Mr. Canfield's calculations require updating through the date of the final order herein.

[76] *Id.*

[77] *Id.*

[78] *Hearing Ex. 6C, p.10.*

PUC).[79] Granite did not file its off-tariff agreements with this Commission until after QCC filed the instant complaint.[80] Further, Granite never modified its Colorado tariff to reflect the discounts provided to AT&T and Sprint, never advised QCC of the existence of the agreements, and never offered QCC equivalent rate treatment.[81] QCC continues to pay Granite's tariff rates.

89. Ms. Hensley-Eckert acknowledges that Granite made a public filing dated June 22, 2006, in a proceeding in which QCC was on the service list, consenting to the public disclosure of the 2003 switched access agreement with AT&T.[82]

90. BullsEye and Granite contend that QCC knew and reasonably should have known the basic facts it needed to bring its complaints well before two years prior to actual filing based upon knowledge of various off-tariff agreements in the Minnesota PUC proceeding in the testimony presented by Lisa Hensley-Eckert demonstrating QCC's acquaintance with various nationwide off tariff agreements imposed by AT&T and others.

G. Liberty Bell

91. Liberty Bell offers intrastate switched access service via a tariff filed with the Commission.[83] Liberty Bell's tariff rate is $.030083 for originating switched access and $.043991 for terminating switched access.[84] It is undisputed that Liberty Bell charged its tariff rates to QCC.[85]

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79 *Hearing Ex. 138.*

80 *Hearing Ex. 7C, LBB-12 Substitute, p.5* (Granite response to QCC Data Request 1-3.h).

81 *Id. LBB-12 Substitute, pp.5-6* (Granite response to QCC Data Request 1-3.h., 1-3.j).

82 Hearing Tr. (July 27) at 148-149; *see also* Hearing Ex. 138, Granite MN PUC Filing containing Granite's consent to publicly disclose the AT&T-Granite agreement.

83 *Hearing Ex. 7, p.39, LBB-35* (Liberty Bell Colo. PUC Tariff No. 2).

84 *Hearing Ex. 7, p.39, LBB-35* (Liberty Bell Colo. PUC Tariff No. 2, Section 5.1). Liberty Bell's rates are disaggregated, as shown in Mr. Brotherson's Direct Testimony.

85 *Hearing Ex. 7, p.38; Hearing Ex. 5C, pp.44-45, DAC-13.*

92. Liberty Bell entered into a switched access agreement with AT&T effective January 2, 2005.[86] Pursuant to the agreement, which is still in effect,[87] AT&T receives a discount off of Liberty Bell's tariff rates. AT&T pays [BEGIN CONFIDENTIAL] $.033477 per minute for both originating and terminating, a discount of 24 percent off of Liberty Bell's terminating rate.[88] [END CONFIDENTIAL] Had Liberty Bell provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged [BEGIN CONFIDENTIAL] $42,309.47 [END CONFIDENTIAL] less than it was actually charged, through December 31, 2008.[89] QCC was charged [BEGIN CONFIDENTIAL] 31.8 percent [END CONFIDENTIAL] more than AT&T would have been charged for the same volume of services.[90]

93. QCC became aware of the Liberty Bell-AT&T agreement when it was produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008. Liberty Bell never filed the agreement with this Commission.[91] Further, Liberty Bell never modified its Colorado tariff to reflect the discounts provided to AT&T, never advised QCC of the existence of the AT&T agreement, and never offered QCC equivalent rate treatment.[92] QCC continues to pay Liberty Bell's tariff rates.

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[86] *Hearing Ex. 7C, p.38, LBB-33* (Liberty Bell-AT&T agreement); *Id., LBB-24, p.3* (Liberty Bell response to QCC Data Request 1-2).

[87] *Id., LBB-34, p.4* (Liberty Bell response to QCC Data Request 1-3.e).

[88] *Id., p.39, LBB-33* (Liberty Bell-AT&T agreement), *p.1.* **[BEGIN CONFIDENTIAL]** While AT&T pays a higher *originating* rate than the tariff provides, the *vast* majority of Liberty Bell's switched access appears to be terminating in nature. For example, 99.8 percent of Liberty Bell's switched access provided to QCC in Colorado was terminating, according to Mr. Canfield's review of the billing data. **[END CONFIDENTIAL]** *Hearing Ex. 5C, p.45.*

[89] *Hearing Ex. 5C, p.45, DAC-13.* Mr. Canfield's calculations require updating through the date of the final order herein.

[90] *Id.*

[91] *Hearing Ex. 7, LBB-34, p.5* (Liberty Bell response to QCC Data Request 1-3.h).

[92] *Id., pp.5-6* (Liberty Bell response to QCC Data Request 1-3.j, 1-3.l).

H. MCImetro Access Transmission Services, LLC

94. MCImetro is, and at all times relevant herein was, a CLEC in Colorado. MCImetro's affiliate, MCI Communications Services, Inc., doing business as Verizon Business Services, provides, and at all times relevant herein provided, interexchange services in Colorado. MCImetro provides, and at all times relevant herein provided, switched access service in Colorado. MCImetro provides, and at all times relevant herein provided, local exchange services to residential and business customers. During the time the 2004 Contracts were in effect, MCImetro provided local exchange service through its own facilities or by using the Unbundled Network Element Platform (UNE-P), and its commercial replacement.

95. These two companies were subsidiaries of WorldCom, Inc. (WorldCom) when WorldCom filed for bankruptcy in 2002. As it emerged from bankruptcy, the parent company changed its name from WorldCom to MCI, Inc. In January 2006, MCI, Inc. merged with Verizon Communications Inc. (Verizon). Since then, MCImetro and MCI Communications Services, Inc. have been indirect subsidiaries of Verizon.

96. On July 21, 2002 and November 8, 2002, WorldCom, Inc. and certain of its direct and indirect subsidiaries, including MCImetro, commenced cases under chapter 11 of the United States Bankruptcy Code. By Orders dated July 22, 2002 and November 12, 2002, the chapter 11 cases were consolidated for procedural purposes and jointly administered under Case No. 02-13533.

97. QCC admits that it was a party in the WorldCom, Inc. bankruptcy proceeding entitled In re WorldCom, Inc. United States Bankruptcy Court, Southern District of New York,

Chapter 11 Case No. 02-13533 (AJG) (WorldCom Bankruptcy Case).[93] QCC's Notice of Appearance and Request for Service was filed on or about July 24, 2002.

98. MCImetro continued to operate its businesses and manage its properties as debtor in possession. During its bankruptcy proceeding, WorldCom attempted to resolve the claims of thousands of creditors, three of which were AT&T Corp., on behalf of itself and its affiliates, Qwest Corporation, and QCC.

99. WorldCom entered into settlement agreements that resolved numerous claims and disputes between itself and its creditors. The switched access agreement with AT&T was one component of one such settlement agreement.

100. On February 23, 2004, WorldCom and AT&T entered into a settlement agreement to resolve their differences. WorldCom requested bankruptcy court approval of the settlement agreement, and notice of the filing was provided to all parties, including QCC and Qwest Corporation.[94] The Settlement Agreement was not submitted with the motion because it contains substantial proprietary and confidential information, as well as provisions imposing confidentiality and non-disclosure obligations.

101. WorldCom and AT&T were parties to various executory contracts. There were amounts owing and disputed claims pending regarding such agreements. There were also disputes as to assumption of contracts, cure costs, and UNE-P switching access in addition to legal disputes. The Settlement Agreement comprehensively resolved differences.

102. Considering whether to approve the comprehensive settlement agreement, the bankruptcy court did not decide the numerous issues of law and fact raised by the settlement.

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93 *Exhibit PHR-2 to Hearing Ex. 13.*

94 *See Exhibit LBB-1 to Hearing Ex. 13.*

Rather, it "canvassed" the issues to determine whether the settlement was within a range of reasonableness.[95]

103. The bankruptcy court found and determined that the Settlement Agreement was the product of good-faith, arm's length negotiations between the parties and was fair and within the range of reasonableness. Based upon good cause shown, and after due deliberation, the Settlement Agreement was approved.[96]

104. The bankruptcy court authorized the parties "to implement the Settlement Agreement," "take any and all actions reasonably necessary or appropriate to consummate" the agreement, and "perform any and all obligations contemplated therein."[97] The Debtors entered into two bi-lateral switched access service agreements with AT&T, *i.e.,* the "2004 Contracts."[98] The terms of the two 2004 Contracts were identical except for the names of the purchaser and seller.[99]

105. WorldCom and AT&T each had subsidiaries and affiliates that operate as CLECs and IXCs, and both entered into the agreements on behalf of their respective subsidiaries and affiliates, as applicable. Each company's CLEC agreed to provide switched access service to the other company's IXC pursuant to the terms of the agreements. The 2004 Contracts were nationwide in scope. Each company's CLEC and its affiliates agreed to charge the other company's IXC the same rate for switched access service wherever the CLEC and its affiliates

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95 *Exhibit LBB-1 to Hearing Ex. 13, at 8.*

96 *Exhibit PHR-5 to Hearing Ex. 13, at 2, PHR-3, PHR-7, and PHR-8.*

97 Ex. 13 (Reynolds Testimony), PHR-5 (In re WorldCom, Inc., March 2, 2004 Order) at 2.

98 *See Hearing Exs.* 80C-83C.

99 *See Hearing Exs.* 91 and 91C. The fact that QCC obtained the 2004 Contracts through the normal discovery process undermines QCC's contention that it "was never given an opportunity to evaluate the off-tariff agreements to determine if it wanted to take advantage of the off-tariff offerings." *Hearing Ex.* 2 (Hensley-Eckert Rebuttal) at 13:8-9 and 17-18; *see also* Amended Complaint at 20 ¶9 (QCC "was precluded" from obtaining the same contract terms).

provided local exchange service. The switched access charges contained in the 2004 Contracts applied to all types of switched access traffic, including specifically that which the CLEC provided using the UNE-P service delivery method. The switched access charges contained in the 2004 Contracts applied to all types of interexchange calls that originated from or terminated to the CLEC's local customers, both residential and business customers. The 2004 Contracts specified a single, uniform rate for all switched access traffic regardless of the jurisdiction. The 2004 Contracts expired on January 27, 2007, and are no longer in effect. The 2004 Contracts do not require the traffic exchanged by the parties to be in balance.[100]

106. MCImetro's affiliate, MCI Communications Services, Inc., is an IXC. It provides, among other things, a variety of long distance voice and data services throughout the United States, as well as internationally. Both companies are authorized to operate in Colorado, and both have been providing communication services to residential and business customers in the state for more than a decade.

107. MCImetro offers intrastate switched access service via a tariff filed with the Commission.[101] MCImetro's tariff rate is $.044692 for originating switched access and $.064583 for terminating switched access. It also charges a flat rate of $.0035 for each 8XX database query.[102] It is undisputed that MCImetro charged its tariff rates to QCC.[103]

108. AT&T-Mountain States and several of its affiliates are, and at all times relevant herein were, CLECs and IXCs in Colorado. AT&T-Mountain States provides, and at all times relevant herein provided, switched access service in Colorado.

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100 *Hearing Ex.* 13 (Reynolds Testimony) at 5:18-22; *Hearing Tr.* (July 27) at 95:1-8.

101 *Hearing Ex. 7, p.5, LBB-3* (MCI Colo. PUC Tariff No. 1).

102 *Hearing Ex. 7, p.5, LBB-3* (MCI Colo. PUC Tariff No. 1, Section 6.1).

103 *Hearing Ex. 5C, p.8, DAC-1; Hearing Ex. 6D, DAC-21; Hearing Tr. Vol. 1, p.64; Hearing Tr. Vol. 2, pp. 20, 211.*

109. MCImetro entered into a switched access agreement with AT&T effective January 27, 2004.[104] Pursuant to the agreement, which was extended through January 26, 2007,[105] AT&T was charged a rate less than MCImetro's tariff rates. AT&T paid **[BEGIN CONFIDENTIAL]** only $.005 per minute, for a discount of 89 percent off of MCImetro's tariff originating rate and 92 percent off of MCImetro's tariff terminating rate.[106] MCImetro emphasized that MCImetro and AT&T entered into dual agreements, whereby each company's CLEC charged the other's IXC affiliate the same $.005 per minute rate.[107] However, volumes under those agreements were significantly imbalanced, **[END CONFIDENTIAL]** resulting in a net discount [redacted]

110. Had MCImetro provided equivalent rate treatment to QCC between January 2004 and January 2007, QCC would have been charged **[BEGIN CONFIDENTIAL]** $1,268,878.07 **[END CONFIDENTIAL]** less than it was actually charged, applying the 2004 MCImetro CLEC agreement in isolation.[109] This reflects that QCC was charged **[BEGIN CONFIDENTIAL]** 1027.2 percent **[END CONFIDENTIAL]** more than AT&T would have been charged for the

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[104] *Hearing Ex. 7C, p.4, LBB-1* (MCI-AT&T agreement); *id., LBB-2, pp.6-12* (MCI response to QCC Data Requests 1-2, 1-3).

[105] *Id., LBB-2, p.10* (MCI response to QCC Data Request 1-3.e).

[106] *Id., p.6, LBB-1* (MCI-AT&T agreement), *p.2* (Sec. 6), *p.6* (Sch. A).

[107] *See* Exs 80C and 81C; In re WorldCom, Inc., et al, Chapter 11 Case No. 02-13533 (AJG). The Settlement Agreement is in Ex. 77C. Ex. 13 (Reynolds Testimony), pp.8-9 and PHR-1 contains the publicly-filed Motion requesting the Bankruptcy Court to approve the Settlement Agreement. The Settlement Agreement and the Motion referred to the two reciprocal switched access agreements as the "2004 Contracts." *See Id.* at 7; *Hearing Tr.* (July 28) at 195:6-17.

[108] MCImetro was aware of the imbalance of the dual agreements at the time it agreed to the "reciprocal" arrangement.

[109] *Hearing Ex. 5C, p.8, DAC-1.*

same volume of services.[110] In rebuttal testimony, Mr. Canfield provided an alternative calculation premised on applying the same net effect of the allegedly "reciprocal" arrangement to QCC billings during the relevant time period.[111] Even taking into consideration the net effect of the dual AT&T CLEC agreement, QCC would have been charged [redacted] less than it was actually charged.[112] QCC was charged a net **[BEGIN CONFIDENTIAL]** 51.5 percent **[END CONFIDENTIAL]** more than AT&T would have been charged.[113]

I. Time Warner Telecom

111. TWT offers intrastate switched access service via a tariff filed with the Commission.[114] TWT's switched access rates are disaggregated and have changed over time.[115] It is undisputed that TWT charged its tariff rates to QCC.[116] TWT's tariff states that TWT may enter into ICB agreements; however, "[s]uch contract offerings will be made available to similarly situated Customers in substantially similar circumstances....Contracts are available to any similarly situated Customer that places an order within 90 days of its effective date. Contracts executed pursuant to this section will be filed with the Commission pursuant to applicable law."[117]

112. TWT entered into a switched access agreement with AT&T effective January 1, 2001.[118] Pursuant to the agreement, AT&T received a discount off of TWT's tariff rates. AT&T

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110 *Id.*

111 *Hearing Ex. 6D, p.15, DAC-21.*

112 *Id.*

113 *Id.*

114 *Hearing Ex. 7, p.14, LBB-10* (TWT Colo. PUC Tariff No. 6).

115 *Hearing Ex. 7, pp.15-16, LBB-10* (TWT Colo. PUC Tariff No. 6, Sections 4.2, 4.4).

116 *Hearing Ex. 7, p.17; Hearing Ex. 5C, DAC-3.*

117 *Hearing Ex. 7, LBB-10* (TWT Colo. PUC Tariff No. 6, Section 5.1).

118 *Hearing Ex. 7C, p.14, LBB-8* (TWT-AT&T agreement); *Id., LBB-9, p.3* (TWT response to QCC Data Request 1-2).

paid **[BEGIN CONFIDENTIAL]** specified rates (which were theoretically premised on the ILEC's intrastate rate) that changed every few months.[119] While the TWT-AT&T agreement remains in effect, the parties amended it in November 2008 (following QCC's complaint filing) to remove the below-tariff discount for intrastate switched access.[120] **[END CONFIDENTIAL]**

113. Had TWT provided equivalent rate treatment to QCC since entering into the AT&T agreement, QCC would have been charged **[BEGIN CONFIDENTIAL]** $55,505.50 **[END CONFIDENTIAL]** less than it was actually charged, through December 31, 2008.[121] QCC was charged **[BEGIN CONFIDENTIAL]** 131.8 percent **[END CONFIDENTIAL]** more than AT&T would have been charged for the same volume of services.[122]

114. QCC became aware of the TWT-AT&T agreement when it was produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008. TWT never filed the agreement with this Commission,[123] never modified its Colorado tariff to reflect the discounts provided to AT&T, never advised QCC of the existence of the AT&T agreement, and never offered QCC equivalent rate treatment.[124]

115. TWT argues that QCC's claims in Colorado accrued based upon the Minnesota proceedings.

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[119] *Id., LBB-8* (TWT-AT&T agreement), *pp.66-67 ("Pricing Principles for Switched Access" exhibit); Hearing Ex. 8C, LBB-41* (rate tables); *Hearing Ex. 6C, pp. 12-13, DAC-19.*

[120] *Hearing Ex. 23C, p.7* (Sec. E.2.B); *Hearing Ex. 5C, p.16* (as modified at evidentiary hearing; *see Hearing Tr.* Vol. 2, p.98).

[121] *Hearing Ex. 6C, p.13, DAC-19.* Mr. Canfield's calculations require updating through the final order herein. As Mr. Canfield, explained on cross-examination, the overcharge calculation for TWT will slightly decrease when updated by Mr. Canfield. *Hearing Tr. Vol. 2, pp.137-139.*

[122] *Id.*

[123] *Hearing Ex. 7, LBB-9, p.6* (TWT response to QCC Data Request 1-3.h).

[124] *Id., LBB-9, pp.6-7* (TWT response to QCC Data Requests 1-3.j, 1-3.l).

J. XO

116. XO offers intrastate switched access service via a tariff filed with the Commission.[125] XO's tariff rate is $.025784 for tandem-routed originating and terminating switched access. It also charges a flat rate of $.007859 for each 8XX database query.[126] It is undisputed that XO charged its tariff rates to QCC.[127]

117. XO entered into a switched access agreement with AT&T effective November 1, 2001 and a switched agreement with Sprint effective January 15, 2002.[128] Pursuant to the agreements, AT&T and Sprint each received a discount off of XO's tariff rates. AT&T and Sprint paid **[BEGIN CONFIDENTIAL]** the ILEC intrastate rate.[129] **[END CONFIDENTIAL]** Had XO provided equivalent rate treatment to QCC between January 2002 and January 2007, QCC would have been charged **[BEGIN CONFIDENTIAL]** $76,203.44 (exclusive of overcharges for minutes billed to QCC by Allegiance) **[END CONFIDENTIAL]** less than it was actually charged.[130] QCC was charged **[BEGIN CONFIDENTIAL]** 30.0 percent **[END CONFIDENTIAL]** more than AT&T would have been charged for the same volume of services.[131]

118. XO subsequently terminated the agreement with AT&T effective April 3, 2006,[132] and executed a second settlement agreement with Sprint that superseded the prior agreement and

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125 *Hearing Ex. 7, p.9, LBB-7* (XO Colo. PUC Tariff No. 7).

126 *Hearing Ex. 7, p.10, LBB-7, p.5* (XO Colo. PUC Tariff No. 7, Section 6.3.3). XO's switched access rates are disaggregated and have changed over time, as shown in Mr. Brotherson's Direct Testimony.

127 *Hearing Ex. 7, p.11.*

128 *Hearing Ex. 7C, p.7, LBB-4* (XO-AT&T agreement and XO-Sprint agreement); *Id., LBB-6, p.4* (XO response to QCC Data Request 1-2). QCC's prefiled testimony likewise details agreements entered into by CLEC Allegiance. *Hearing Ex. 7C, pp.7, 12-14, LBB-4, pp.10-32; Hearing Ex. 5, pp.10-14.* XO is Allegiance's successor-in-interest.

129 *Hearing Ex. 7C, LBB-4.*

130 *Hearing Ex. 6C, p.8, DAC-18.*

131 *Id.*

132 *Id.* at 9 (after which AT&T purchased switched access pursuant to XO's tariff).

confirmed that XO would charge Sprint the tariff rates for switched access services in Colorado as of October 1, 2006.[133] Thus, since 2006, these other carriers have been purchasing switched access from XO pursuant to its tariffs - and not under other agreements.

119. XO did not sponsor a company witness to dispute QCC's calculations. Through Dr. Ankum, XO critiqued Mr. Canfield for utilizing usage percentages derived from a review of electronically-provided invoices as a proxy for manually-provided invoices instead of locating, reviewing, and analyzing each lengthy monthly invoice by hand.[134] Dr. Ankum also criticized Mr. Canfield for including duplicate entries in calculating the XO overcharge.[135] As to the latter issue, Mr. Canfield accepted the critique and modified his calculation.[136] As to the former issue, QCC argues that switched access bills are extremely lengthy and a manual review (assuming each bill could even be obtained) would have been exceedingly resource intensive and prone to human error. Under the circumstances, Mr. Canfield's approach was reasonable and more likely than not accurate, as corrected.

120. QCC became generally aware of the XO-AT&T agreement on June 23, 2006 when it was made public in a docket at the Minnesota PUC.[137] QCC confirmed its applicability to Colorado when it was produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008. QCC became aware of the XO-Sprint agreements when they were produced to QCC on December 18, 2008 pursuant to a QCC subpoena served on Sprint on

133 *Id.* at 41 & 52.
134 *Hearing Ex. 11C, pp.44-47, 52.*
135 *Id., p.47.*
136 *Hearing Ex. 6C, p.8, DAC-18.*
137 *Hearing Ex. 143.*

November 12, 2008.[138] XO never filed the agreement with this Commission,[139] never modified its Colorado tariff to reflect the discounts provided to AT&T, and never offered QCC equivalent rate treatment.[140]

121. The first and only time QCC contacted XO about obtaining switched access services at rates other than those in XO's tariff was by letter dated March 14, 2008.[141] XO expressed willingness to discuss business arrangements with QCC for the services QCC purchases or would like to purchase from XO.[142] QCC did not respond.[143]

K. Minnesota Proceedings

122. On June 16, 2004, the Minnesota Department of Commerce (DOC) filed a complaint with the Minnesota PUC against 15 CLECs and AT&T alleging that the CLECs had entered into off-tariff agreements for switched access rates discounted from tariff rates.[144]

123. BullsEye was not a party to the Minnesota proceedings, but contends that the Minnesota investigation concerned agreements between various CLECs and AT&T that are identical, or nearly identical, to the agreements at issue here.[145]

124. Comtel was not a party to the Minnesota proceedings.

125. Ernest was not a party to the Minnesota proceedings.

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138 QCC became aware of the Allegiance-AT&T agreement when it was produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008.

139 *Hearing Ex. 7, LBB-6, p.7* (XO response to QCC DR 1-3.h).

140 *Id.* (XO response to QCC DR 1-3.j, 1.3.l).

141 *Hearing Ex.* 110 (QCC Response to XO DR 7).

142 *Hearing Ex.* 110.

143 *See Hearing Tr. (July 27)* at 131 (Hensley-Eckert).

144 *Hearing Ex. 1, p.12.*

145 *Hearing Ex. 10 at 3.*

126. Eschelon was a Respondent in this action. The complaint against Eschelon was resolved by the Minnesota PUC's approval of a Stipulation and Settlement on July 7, 2005, pursuant to which Eschelon paid a fine. Eschelon was not ordered to pay reparations.[146]

127. Effective May 1, 2000, Eschelon entered into agreements with AT&T that settled past switched access disputes and specified rates to be charged in the future in all of the states in which Eschelon operated, including Colorado.[147]

128. In May 2006, QCC representatives signed a protective order to be able to gain access to the Eschelon agreements. The nondisclosure agreements permitted QCC access to all the trade secret information in that docket. Documents were also made publicly available in the June/July time frame of 2006.[148]

129. In 2007, QCC commenced an action in Minnesota state court alleging, among other things, that AT&T had violated the laws of various states, including Colorado, by entering into off-tariff access agreements with CLECs.[149]

130. Eschelon argues that QCC was aware of the agreements at issue as part of the proceedings, including notices and pleadings. Eschelon contends that nothing prevented QCC from commencing the within action in a timely manner after learning of the existence of the access contracts in April 2005, had it followed reasonable inquiry regarding the agreements.

131. Granite was not a party to the proceedings.

132. Liberty Bell was not a party to the proceedings.

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146 Order Approving Stipulation, Dismissing Various Complaints and Providing for Response to Additional Complaint, Minnesota Public Utilities Commission, Docket No. C-04-235 (July 7, 2005).

147 *Hearing Ex. 14C (Copley Answer Testimony) at EC-3 at p. 347.*

148 *Hearing Tr. Vol.* 1 at 87.

149 *Hearing* Ex. 107.

133. MCImetro was a Respondent in this action. The 2004 Contracts were among the contracts at issue in the proceeding. The complaint was settled without any finding of liability or wrongdoing on the part of MCImetro in July 2005.[150]

134. On April 25, 2005, the Minnesota DOC filed comments in Minnesota PUC Docket C-04-235 stating that: 1) MCImetro and AT&T had entered into an agreement to provide switched access service; 2) the agreement had not been filed with or otherwise provided to the PUC; 3) the contract offered service at untariffed rates; 4) the rates in the agreement were lower than those in MCImetro's tariff; 5) the contract rates had not been submitted to or approved by the PUC; and 6) other IXCs had not received the same rates.[151]

135. Ms. Hensley-Eckert admits that on April 29, 2005, QCC asked to be added to the service list in the Minnesota PUC complaint proceedings that examined some of the switched access agreements upon which the complaint in this action was brought. Ms. Hensley-Eckert acknowledges that QCC was aware of the agreements and the possible impact of those agreements on QCC even if QCC lacked knowledge about the specific provisions.

136. QCC contends it became generally aware of the MCImetro-AT&T agreement when a companion agreement also involving MCImetro (as an IXC) and AT&T (as a CLEC) was made public in a docket at the Minnesota PUC on February 29, 2008. Further, that the existence of this agreement or its applicability to Colorado was not confirmed until it was produced to QCC on August 18, 2008 pursuant to a QCC subpoena served on AT&T on July 10, 2008.

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150 See Ex. 13 (Reynolds Testimony), PHR-9 (Order Approving Stipulations) at 4 ¶ 7-8, 5 § IV A.

151 *See* Ex. 13 (Reynolds Testimony), PHR-11 at 2-4.

137. MCI never filed the agreement with this Commission.[152] Further, it never modified its Colorado tariff to reflect the discounts provided to AT&T. The parties disagree as to whether MCImetro sufficiently advised QCC of the existence of the AT&T agreement, although MCImetro admits that it never offered QCC equivalent rate treatment.[153] MCImetro admits it never sought permission from AT&T to file the agreement or share a copy with QCC.[154]

138. QCC was provided with notice of the existence of the Minnesota investigation in early April 2005, when its attorneys were copied on a meeting notice describing the docket.[155]

139. QCC's witness acknowledged having received notice of the proposed settlements between the Minnesota DOC and various CLECs. QCC's standard procedure was for its counsel to review public documents filed to date in that docket.[156] The DOC comments in that file, Hearing Ex. 136, specifically references an agreement between XO and AT&T that included rates to be charged AT&T for intrastate switched access services that were lower than XO's tariffed rates.[157] However, no indication is given to the rate or applicability in Colorado.

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[152] *Hearing Ex. 7, LBB-2, p.10* (MCI response to QCC Data Request 1-3.h); *Hearing Tr. Vol. 2, pp.205-206* (MCI-AT&T agreement did not preclude compliance with state law obligations).

[153] *Id., pp. 10-11* (MCImetro response to QCC Data Request 1-3.j, 1-3.l); *Hearing Tr. Vol. 2, p.202* (MCImetro-AT&T agreement did not preclude MCImetro from providing equal rate treatment to QCC). In prefiled testimony, MCImetro witness Reynolds suggests that QCC bore the burden to approach MCImetro about entering into a similar agreement for switched access services. *Hearing. Ex. 13, pp.25-29.* Similarly, counsel for MCImetro, XO, and Granite each inquired at hearing as to whether QCC ever demanded lower switched access rates prior to filing the complaint herein. *Hearing Tr. Vol. 1, pp.96* (MCImetro), *131* (XO), *153-154* (Granite). If the Respondents are suggesting that the customer of a tariffed, bottleneck service is responsible for policing public utilities, ensuring that they are not engaging in rate discrimination, the Respondents are wrong. As the public utility bearing the statutory non-discrimination obligation, the Respondents should have applied the lower switched access rate to all IXCs, including QCC. If it felt that negotiation was required (a claim that should draw skepticism), the Respondent CLEC certainly was in the better position to approach IXCs about the off-tariff offering. As an IXC receiving switched access service from over 700 CLECs nationwide, QCC could not reasonably own the burden to contact all 700 to seek out secret discounts off of tariffed services.

[154] *Hearing Exs. 30* (MCImetro response to QCC Data Requests 3-24), *31* (MCImetro Response to QCC Data Request 3-26).

[155] *Hearing Tr.* Vol. I, p. 105, p. 21 - p. 107, l. 20; *Hearing* Ex. 105.

[156] *Hearing Tr. (July 27)* at 123, lines 18 through 124, line 2 (Hensley-Eckert).

[157] *Hearing Ex.* 136 at 3.

140. QCC admits knowledge of the Minnesota DOC complaint in April 2005 as well as the potential implications on QCC's operations. Qwest stated that the "agreements at issue might potentially impact QCC."[158] On cross-examination, Ms. Hensley-Eckert also admitted that, with respect to the MCImetro-AT&T agreement, "we first discovered it, in the April 2005 time frame."[159] QCC submitted comments in the Minnesota docket on August 25, 2005 that reflect previous comments by the Minnesota DOC. Qwest referred to an alleged "secret agreement" between AT&T and MCImetro in which one carrier provided the other a rate for intrastate switched access that was lower than the rate in the CLEC's tariff. Qwest asserted that the arrangement appeared to violate state law and that such a pricing practice "can materially distort the marketplace and harm competitors such as Qwest," and put "QCC ... at a severe competitive disadvantage."

141. On July 7, 2005, the Minnesota PUC issued its Order Approving Stipulations, Dismissing Various Complaints, and Providing for Response to Additional Complaint. Eschelon, XO, and MCImetro entered into a stipulation resolving the pending complaint.[160] The order included a copy of the stipulation and agreement, including a signature page for XO.[161]

142. By approval of the settlement, untariffed/unapproved access rates were superseded by new tariffed access rates filed by the CLECs. These new CLEC tariffed rates for switched access service would be lower than then-current tariffed rates.

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158 Ex. 2 (Hensley-Eckert Rebuttal) at 21:17–23; *Hearing Tr.* (July 27) at 107:18-20, 108:22 – 109:1; *see also* Ex. 13 (Reynolds Testimony) at PHR-12. Beginning as early as July 20, 2004, the Minnesota PUC issued several public notices that apprised the public of various developments in the docket in which negotiated contracts for switched access service were at issue. Qwest legal and regulatory personnel received some of these notices. *See, e.g.,* Exhibits 116, 105, 137; *Hearing Tr.* (July 27) at 144:23 – 145:25.

159 *Hearing Tr.* (July 27) at 80:15-16.

160 *Hearing Tr.* at 127, line 11 through 128, line 6 (QCC Hensley Eckert).

161 *Hearing Ex.* 112 at 4-5 & last page.

143. Beginning in April 2005, QCC knew that there was an agreement between XO and AT&T pursuant to which AT&T was paying rates for intrastate switched access services in Minnesota that were lower than XO's tariff rates on file with the Minnesota PUC.

144. The settlement was based solely on issues raised in the Complaint that are relevant to Minnesota and does not purport to invalidate or declare unreasonable any multi-state contract or tariffed rate applicable in other jurisdictions.

145. The signatory CLECs and IXCs do not admit to any violation of state law in the Stipulation. Rather, Paragraph 13 states: "This Settlement does not imply, nor does any Party to this Settlement Agreement admit, any violation of law, rule or Commission Order."

146. In the Stipulation, CLECs that contracted with AT&T to provide switched access service at untariffed rates agreed to discontinue that practice and to henceforward provide switched access service exclusively at tariffed rates.

147. The Stipulation and Agreement filed March 30, 2005 resulted in dismissal of allegations against MCImetro. Claims continued against AT&T, leading to AT&T's Motion to Dismiss, or in the alternative, a Motion for Definite Statement.

148. Qwest submitted comments regarding AT&T's motion on August 24, 2005. Qwest summarized: "the issue here is clear. The DOC has 'alleged that AT&T as a CLEC charged MCI subsidiaries (IXCs) untariffed switched access rates.' July 7 Order. p. 9...Indeed, the DOC's comments clearly allege that AT&T entered into a[n] agreement that provided one carrier with a rate for intrastate switched access that was lower than the rate in AT&Ts tariff."[162]

149. Qwest Corporation's Petition to Intervene was filed in the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding

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[162] *Hearing Ex. PHR-13 to Hearing Ex. 13 at 1-2.*

Negotiated Contracts for Switched Access Services on or about February 27, 2006.[163] Qwest had not seen the entire Second Unfiled Agreement at that time.

150. On May 3, 2006, QCC was provided an unredacted copy of the document identified by the Minnesota DOC as the "Second Unfiled Agreement" in response to discovery propounded in Minnesota PUC Docket No. P-442/C-04-235.[164] The Second Unfiled Agreement referenced is defined at Exhibit PHR-14 to Hearing Exhibit 13, at 8-9. At that time, Qwest was also aware that there were reciprocal MCImetro agreements.[165] Ms. Hensley-Eckert, admitted that she was one of three QCC attorneys who reviewed the 2004 Contracts at that time.[166]

151. By receipt of the unredacted agreement, QCC had knowledge of all of the rates, terms, and conditions in the agreement that is the basis of the within complaint.

152. On March 5, 2008, a copy of the expired MCImetro/AT&T agreement was sent to Qwest personnel via e-mail.[167] This public document is stated to show the rates being charged for intrastate switched access.

153. In accordance with the Minnesota PUC order dated January 30, 2008, AT&T filed a public version of the expired agreement between AT&T and MCImetro.[168]

154. TWT was not a party to the proceedings.

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163 *Hearing Ex. PHR-15 to Hearing Ex. 13.*
164 *Hearing Exs. 91 and 91C.*
165 *Hearing Ex PHR-16 to Hearing Ex. 13, at 2.*
166 *Hearing Tr.* (July 27) at 82:14 – 87:8 and *Hearing Exs.* 90, 90C, and 91C.
167 *Hearing Ex. PHR-17 to Hearing Ex. 13, at 6.*
168 *Hearing Ex. PHR-17 to Hearing Ex. 13, MCI 01•001 Attachment C.*

155. XO was not originally named as a Respondent in the Minnesota complaint, but was a party to the Stipulation and Agreement filed on March 30, 2005, which settled the Minnesota DOC's claims against specified CLECs, including XO.[169]

156. The Minnesota DOC also filed comments on April 25, 2005, in which it specifically referenced XO and advocated that the Minnesota PUC approve the Stipulation and Agreement with the inclusion of XO even though it had not been named in the original complaint.[170] The Minnesota PUC's May 12, 2005, Notice of Commission Meeting (which was served on QCC) included XO in the list of Respondent CLECs that were parties to the Stipulation and Agreement scheduled for deliberation at the commission's May 24, 2005 meeting.[171]

157. On June 23, 2006, QCC received an unredacted, nonconfidential copy of the agreement between XO and AT&T - the same agreement on which QCC bases its claims against XO in this docket.[172]

158. The AT&T-XO agreement on its face was national in scope and expressly applied in all states in which XO was a CLEC, obviously including Colorado.[173] At least as of June 23, 2006, therefore, QCC had discovered all of the information giving rise to its claims.

159. As to claims based upon the Sprint-XO agreement, XO contends that alleged conduct supporting Qwest claims is the same as the AT&T-XO agreement. QCC's witness

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169 *Hearing Ex. 136 at 2.*

170 *Hearing Ex.* 111 at 6.

171 *Hearing Ex.* 137.

172 *Hearing Ex.* 1 (Hensley-Eckert Direct) at 13, lines 3-6; Ex. 143 (QCC Response to XO DR 4); 7/28 *Hearing Tr.* at 59 (Easton).

173 See *Hearing Ex.* 7C (Easton Confidential Direct), Ex. LBB-4 at 2-3 ("XO will offer Switched Access Service to AT&T under the terms, conditions, and pricing principles of this Agreement within each geographic area in which XO directly or through an Affiliate (as defined in Section 9) provides local exchange services").

Derek Canfield testified that the rates for XO's Colorado intrastate switched access service in the Sprint-XO agreement were effectively the same as the rates in the AT&T-XO agreement, and the effective dates of the agreements overlapped for all but approximately six months.[174] Thus, XO contends that QCC had actual knowledge of all information it needed to bring its claims against XO more than two years before QCC filed its Complaint.

160. Based upon awareness of the Minnesota case, requesting service, and filing, MCImetro maintains that Qwest knew of the potential harm claimed herein and the cause thereof as early as April 2005.

161. MCImetro also argues based upon the knowledge of QCC's counsel in the Minnesota proceedings.[175] Applying the reasoning of *Brodeur*, it is claimed that the cause of action accrued no later than when Qwest's attorneys filed pleadings in Minnesota alleging wrongdoing and competitive harm. Thus, QCC would be deemed to know of its harm and the cause thereof, and its cause of action accrued no later than that day, *i.e.,* August 25, 2005.

162. Beyond the Minnesota proceedings, MCImetro points to Qwest's complaint filed against AT&T in Minnesota where substantially similar claims were alleged.[176]

163. TWT and XO argue that Qwest was "on notice" that the agreements were not limited to Minnesota for CLECs such as TWT and XO that have operations in multiple states,

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[174] *Hearing Ex.* 5C (Confidential Canfield Direct) at 13, lines 2-5; See *Hearing Ex.* 7C (Easton Direct), Ex. LLB-4.

[175] Argument is generally based upon complaints filed by the Minnesota DOC. However, allegations of a Minnesota complaint for intrastate services, unless shown to be admitted, are insufficient to demonstrate knowledge of claims in Colorado.

[176] *See Hearing Ex.* 13 (Reynolds Testimony), PHR-14 (Minnesota DOC's Amended Complaint filed October 27, 2005) at 8-12; PHR-15 at 1 (QCC's and Qwest's petition to intervene stated that the companies were "directly affected" and their "business [was] impacted" by the unfiled access agreements at issue); PHR-16 at 2 (QCC's pleading filed April 17, 2006, referred to "secret" "reciprocal" agreements between AT&T and MCImetro). Ex. 13 at PHR-14 and *Hearing Exs.* 90, 90C, 92, 93, 94, 97, and 98 contain additional documents in the Minnesota proceeding that demonstrate QCC's participation in the case and its awareness of facts relating to the 2004 Contracts.

including Colorado. Pointing to comments filed in April 2006, Qwest stated "that the Minnesota DOC's complaint 'describes one aspect of a broad-scale scheme by AT&T ... to pay access rates that were below CLECs' tariffed rates.'"[177]

164. On December 29, 2005, the Minnesota DOC brought a second complaint to the Minnesota PUC regarding an additional ten CLECs not named in the 2004 proceeding.[178] QCC intervened as a party in that docket and was able to obtain the agreements in dispute – subject to a protective order – for the ten CLECs in mid-2006.[179] Thus, unlike the 2004 proceeding, QCC was a party to the 2005 proceeding but, even so, it was able to obtain the agreements at issue in that docket only for use in that case.

165. QCC also attempted to obtain copies of the subject agreements directly from CLECs.[180] QCC requested, in writing, copies of the agreements from the Minnesota DOC on May 31, 2005. But, copies for use outside of Minnesota were not received until June 23, 2006. On that date, QCC only received six agreements. A week later it received public versions of several other agreements.[181] Many of these agreements related to Minnesota-only companies and, the one agreement that did relate to other states was heavily redacted.[182] Only two of the agreements made publicly available on June 23, 2006 are relevant to this case.[183]

166. On June 7, 2006, the Minnesota DOC filed a complaint against AT&T's CLEC for entering into an off-tariff access agreement with MCI's IXC.[184] As a result of this proceeding

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177 XO Statement of Position at 6, *citing* Ex. PHR-16 to *Hearing Ex.* 13 at 1-2.

178 *Hearing Ex. 1, p.12.*

179 *Id., p.13.*

180 *Hearing Ex. 1, p.15.*

181 *Id.*; *Hearing Ex. 1, p.13.*

182 *Hearing Ex. 147, p.22; Hearing Ex. 102, p.6, ¶13.*

183 These are the Granite-AT&T agreement and the XO-AT&T agreement. *See Hearing Exs 138, 143.* However, those Respondents' agreements with Sprint were not disclosed at that time.

184 *Id.*

AT&T (the CLEC) was ultimately ordered on February 29, 2008 (less than four months before QCC filed this complaint) to make its agreement with MCI (the IXC) publicly available.

167. The Minnesota proceedings arguably provided QCC with notice that certain CLECs had entered off-tariff switched access agreements in Minnesota. Ms. Hensley Eckert testified that the Minnesota proceedings alerted QCC generally to the existence of the issue but not about their specific terms and conditions.[185] QCC also relies heavily on the fact that it was bound by a protective order throughout the Minnesota Commission proceedings which prohibited QCC from using the agreements obtained in those Minnesota proceedings outside of those proceedings.[186]

168. BullsEye and Granite contend that, at a minimum, Qwest is not entitled to recovery relating to services provided prior to two years before the filing of the complaint herein.

III. DISCUSSION

169. The Commission has jurisdiction over this Complaint pursuant § 40-6-108, C.R.S.

A. Burden of Proof

170. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."[187] As to claims in the Complaint, complainants are the proponent of the order because they commenced the proceeding and are the proponent of the order as to the Complaint.[188] Rule 1500 states: "Unless previously agreed to or assumed by a party, the burden of proof and

185 *See Hearing Tr. Vol. 1, p.80.*

186 *Hearing Ex. 144; see also, Hearing Ex. 102, p.7, ¶ 14.*

187 § 24-4-205(7), C.R.S.

188 Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1.

the burden of going forward shall be on the party that is the proponent of the order. The proponent of the order is that party commencing a proceeding..."[189]

171. Complainants bear the burden of proof by a preponderance of the evidence as to claims stated in the Complaint.[190] The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.[191] A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.

172. "In civil cases, the burden of proof is on the plaintiff to prove the elements of the case by a preponderance of the evidence. This burden of proof does not shift during the proceeding, although it may be aided by a presumption or a shift of the burden of going forward with the evidence once the plaintiff has established a *prima facie* case."[192]

173. QCC acknowledges that it holds the ultimate burden of proof, but contends that Respondents hold the burden of establishing a lawful justification for their discriminatory conduct. Once QCC establishes the existence of a *prima facie* case, the burden shifts to the Respondents to establish rightful justification for their conduct and/or that their actions were lawful.

174. Qwest analogizes to the analytical framework employed by the Federal Communications Commission (FCC) when considering Section 202 discrimination claims as summarized in *Offshore Telephone Company v. South Central Bell*:

> Offshore, as complainant herein, bears the burden of proving that it was discriminated against in the first instance. * * * In the event of making such a

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189 Rule 1500, 4 CCR 723-1.

190 Section 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1.

191 *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985).

192 Decision No. C08-1182, Docket No. 07A-265E, issued November 14, 2008, citing § 13-25-127, C.R.S., and *W. Distributing Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992).

> threshold showing, defendants would then have to show that the discrimination was justified. * * * In order to establish a violation of Section 202(a), Offshore must show that it has been treated differently from similarly situated carriers in connection with the provision of "like" communications services or facilities or that the carrier has given an undue or unreasonable preference or advantage. Such a finding is made on a case-by-case basis and is dependent on the unique facts associated with each proceeding. * * *[193]

175. Thus, once the existence of differential rate treatment for "like" services is established, QCC argues the burden shifts to the Respondents to establish that discrimination was justified.

176. Respondents argue that QCC has the burden of proving each of its claims, and every element of each cause of action. QCC's complaint alleges unlawful rate discrimination. Thus, QCC must show "unreasonable rate discrimination" under § 40-15-105(1), C.R.S. The burden of going forward would not shift until QCC shows that unreasonable rate discrimination occurred.

177. MCImetro contends that QCC confuses two distinct concepts in its analysis: whether parties are similarly situated and whether rate differentials are reasonable. MCImetro argues the question of whether price differentiation is justifiable only needs to be addressed once there is a determination that the carriers are similarly situated. Also, when determining whether a carrier engaged in unreasonable discrimination, the Commission considers several factors, only one of which is cost. The Colorado Supreme Court has held:

> while cost-of-service may be a factor, it is certainly not the exclusive factor to be considered.... Accordingly, the fact that the cost of providing service to [two types of customers] is similar to the cost of providing service to other business customers fails to demonstrate that the [rates are] unlawfully discriminatory.[194]

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[193] In the Matter of the *Offshore Telephone Company v. South Central Bell Telephone Company* and AT&T, MEMORANDUM OPINION AND ORDER, 2 FCC Rcd 4546 ("Offshore Order") (Aug. 7, 1987), ¶32. Federal courts employ the identical 3-step analysis to resolve Section 202(a) discrimination claims. *Nat'l Communications Ass 'n v. AT&T Corp.*, 238 F.3d 124, 129 (2d Cir. 2001).

[194] Integrated *Network Services, Inc. v. Public Utilities Commission, supra,* 875 P.2d at 1383. *See also* MCImetro SOP at 8-9.

178. Thus, QCC's contention that a showing of cost differences is "a required prerequisite" of lawful price discrimination is argued to be legally incorrect. To meet its burden of proving unlawful discrimination, QCC may be required to show more.

179. The Colorado Legislature (Legislature) has addressed the burden of proof in complaint proceedings. Thus, there is no basis or need to refer to federal law or any other state law.

180. An attempt to shift the burden to a respondent to show that they did not unlawfully discriminate was rejected by the Commission in Docket No. 06F-124T.[195] In that case, the respondent argued in defense of an allegation of discrimination that the complainant consented to the alleged discriminatory treatment. When the complainant, argued that respondent failed to prove consent as a defense to a discrimination complaint, the Commission stated: "In effect, this is an assertion that Qwest, the Respondent in this case, had the burden of proving that it was not unlawfully discriminating against the Complainant McLeod. Of course, that assertion contravenes the legal standards relating to burden of proof in complaint cases....As the proponent of an order that Qwest had violated the laws relating to discriminatory service, McLeod was required to prove all elements of its claims."[196]

181. QCC must make a *prima facie* case as to each claim for relief in the Amended Complaint. Upon presentation of a *prima facia* case, the burden of going forward shifts to Respondents.

182. QCC claims discrimination because it was precluded from obtaining non-discriminatory, equal rates for identical intrastate switched access services, despite being

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[195] McLeodUSA v. Qwest Corporation, Order Denying Application for Rehearing, Reargument, or Reconsideration, Docket No. 06F-124T, Decision No. C07-0953, mailed November 13, 2007 ¶¶ 17-18.

[196] Decision No. C07-0953 at ¶18.

similarly situated to the IXCs that received preferential treatment from Respondents. As a result, QCC paid higher rates than others for identical, regulated services. Second, QCC claims that Respondents failed to file notice of agreements entered into with terms and conditions that deviated from their tariffed rates for intrastate switched access services. Third, QCC claims that Respondents failed to comply with the terms and conditions of tariffs on file with the Commission. It is alleged that Respondents entered into unfiled, off-tariff agreements with other IXCs, but have not made the discounts set forth in those agreements available to QCC.

B. Statute of Limitations

183. Qwest maintains that its claims are within the applicable statute of limitations, arguing that the claims accrued when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence. In support of the position, Qwest cites § 13-80-108(8), C.R.S.

184. Qwest argues the level of reasonable inquiry only requires that a prospective complainant look beyond documents readily available in the public domain.[197]

185. The Supreme Court of Colorado has held that "[o]nly if a rate payer files a complaint within the period prescribed by statute concerning complaints made to the Public Utilities Commission can that complainant be assured of an investigation of the matter by the PUC."[198] Section 40-6-119(2), C.R.S., provides in relevant part: "All complaints concerning

[197] *White v. Gurnsey*, 48 Or. App. 931, 618 P.2d 975 (1980) (libelous memorandum on employee was of a confidential nature not likely to have been discovered in exercise of reasonable diligence); *Manguso v. Oceanside Unified School Dist.*, 88 Cal. App. 3d 725, 152 Cal. Rptr. 27 (1979) (letter in teacher's permanent personnel file not inherently discoverable); *Kittinger v. Boeing Co.*, 21 Wash App. 484, 585 P.2d 812 (1978) (discovery rule applies to confidential business memoranda when plaintiff has no means, in the exercise of reasonable diligence, to discover the defamation).

[198] *Peoples Natural gas Div. of Northern Natural Gas Co. v. Public Utilities Com'n of State of Colo.*, 698 P.2d 255,263 (Colo. 1985).

excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues"[199]

186. In *Home Builders Ass'n of Metropolitan Denver v. Public Service Co. of Colorado,* the Colorado Commission held that the accrual of a cause of action under § 40-6-119(2), C.R.S., is governed by § 13-80-108(4), C.R.S.[200]

187. Section 13-80-108(4), C.R.S., states: "A cause of action for debt, obligation, money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed or performance becomes due."[201]

188. Some Respondents state that reliance upon such provision is misplaced, arguing that § 13-80-108(4), C.R.S., is controlling. By the plain language of § 13-80-108(8), C.R.S., the provision is only applicable for causes of action not otherwise enumerated in the section.[202] While including the discovery rule in some subsections of § 13-80-108, C.R.S., it was not included in other subsections (*e.g.,* § 13-80-108(4), C.R.S).[203] Thus, to apply the discovery rule in § 13-80-108(8), C.R.S., to all causes of action under § 13-80-108, C.R.S., would render superfluous inclusion of the discovery rule in some subsections. Consistent with the common principle of legal statutory interpretation, the expression of the discovery rule in some but not all causes of actions excludes the implication of inclusion as to all sections.

189. Qwest filed its Formal Complaint on June 20, 2008 and amended it to add additional parties on December 12, 2008. Thus, claims for obligations or performance prior to

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199 § 40-6-119(2), C.R.S.

200 *Home Builders Ass'n of Metropolitan Denver v. Public Service Co. of Colo.,* 2003 WL 21221189 (Colo. PUC 2003) (Docket No. 01F-071G, Decision No. R03-0519 issued May 15, 2003) (Home Builders Ass'n I).

201 § 13-80-108(4), C.R.S.

202 § 13-80-108(8), C.R.S.

203 *See e.g.,* §§ 13-80-108(1), (3), (6), and (7), C.R.S.

two years before such filing date would be barred.[204] However, suspension of the running of time may lie in equity.

1. Tolling in Accordance with Discovery Rule

190. Equity will toll a statute of limitations if a party fails to make a legally required disclosure and the other party is prejudiced as a result.[205] "[A] person should not be permitted to take advantage of his own wrong."[206]

191. The Supreme Court stated that "a party will not be heard to plead the statute of limitations if he himself is not in compliance with his statutory duty."[207] The court resorted to the doctrine of equitable estoppel to avoid application of a statute of limitations leading to an unjust result because a party's acts or omissions contributed to the running of a statute of limitations.[208] "Where a defendant's wrongful actions have been the cause of a plaintiff's failure to institute a timely action, the defendant may be estopped from relying upon the resulting delay as a defense to the plaintiff's claim."[209]

192. Colorado law provides for equitable tolling of a statute of limitations where "either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts."[210] The application of equitable tolling calls for the court to make "an inquiry into the

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[204] Timing of accrual is not determined as to John Does in the original complaint as such determination would not affect the outcome of this proceeding.

[205] *See Garrett v. Arrowhead Improvement Ass'n,,* 826 P.2d at 855 (notes omitted).

[206] *Klamm Shell v. Berg,* 165 Colo. 540, 545; 441 P.2d at 13 (Colo. 1968).

[207] *Strader v. Beneficial Finance Co.,* 551 P.2d 720, 724 (Colo. 1976) *citing Alfred v. Esser,* 91 Colo. 466, 15 P.2d 714 (1932); *Berkey v. County Commissioners*, 48 Colo. 104, 110 P. 197 (1910).

[208] See *Strader*, 191 Colo. at 211-12, 551 P.2d at 724; *see also Di Salle v. Giggal*, 128 Colo. 208, 213, 261 P.2d 499, 501 (1953); *C.W. Kettering Mercantile Co. v. Fox*, 77 Colo. 90, 92, 234 P. 464, 465 (1925).

[209] *Shell Western E&P v. Dolores County Bd. of Comm'rs*, 948 P.2d 1002, 1007 (Colo. 1997), *citing Duell v. United Bank of Pueblo*, 892 P.2d 336, 341 (Colo. App. 1994).

[210] *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996).

circumstances of the delay that prompted the statute of limitations to be invoked."[211] Moreover, once the statute of limitations is raised as an affirmative defense, the burden shifts to the plaintiff to show that the statute has been tolled, as "[t]his accords with the rule that the person asserting a claim in equity bears the burden of furnishing satisfactory proof."[212]

193. Being based in equity, tolling is not punitive for failure to comply with statutory duties. Rather, the statute of limitations may not be raised as a defense where the compliance failure contributes to the running of a statute of limitations. Thus, the statute of limitations defense will be heard if the specified time passed between when the claim was known and the filing of the complaint, without regard to statutory compliance (*e.g.,* knowledge of facts to support a claim). Should such period of time have passed, consideration of the surrounding circumstances may equitably toll such statute.

194. The Commission has recognized applicability of the discovery rule in the Public Utilities Law and its potential to equitably extend applicable statutes of limitations.[213] If equity requires tolling of the statute of limitations, the question arises as to the period of tolling. It is found that equity also requires that the statutory period be tolled only until claims are discovered or should have been discovered.

195. The key issue of accrual of a cause of action under the discovery rule was addressed by the Colorado Court of Appeals in *Murry v. GuideOne Specialty Mut. Ins. Co.* In the case of insurance proceeds available to a pedestrian hit by an insured car, the accrual of a

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[211] *Shell Western E & P, Inc. v. Dolores County Bd. of Com'rs,* 948 P.2d 1002, 1010 (Colo. 1997) *Western E & P, Inc. v. Dolores County Bd. of Com'rs,* 948 P.2d 1002, 1010 (Colo. 1997).

[212] *White v. Tharp,* 2008 U.S. Dist. LEXIS 113113, 19-20 (D. Colo. Jan. 23, 2008), citing *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992).

[213] *See Home Builders Assoc. v. Public Serv. Co.,* Decision No. R03-0519, 2003 Colo. PUC LEXIS 499, at 29-30 (2003).

claim based upon the "knew or should have known" standard related to factual underpinnings, rather than legal claims based upon those facts.[214] The court considered when the pedestrian "knew the facts essential to her claim and should have been motivated to inquire further."[215] The Court found that "any of the three events is independently sufficient to establish the accrual date of the pedestrian's claim: (1) the date she was advised that only basic benefits were available under the policy in 1996; (2) the date her basic benefits terminated in 1995; or (3) the date of announcement of the Brennan case applying the Thompson case to pedestrians while represented by counsel in 1998."[216]

196. Dictionaries define "knowledge" as "an awareness or an understanding" and "actual knowledge" as "[an awareness or an understanding] of such information as would lead a reasonable person to inquire further."[217]

197. In *Murry,* the trial court found, and the parties did not dispute that "that the pedestrian first had knowledge of her actual claim for relief at or about the time she filed her complaint in 2005."[218] Thus, claims at issue accrued under the discovery rule and none of the three points of accrual amounted to knowledge under the statute.

198. As to the discovery rule, Plaintiffs are required to exercise reasonable diligence in discovering the relevant circumstances of their claims.[219] Such due diligence requirement of the

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214 *Murry v. GuideOne Specialty Mut. Ins. Co.,* 194 P.3d 489, 494 (Colo. Ct. App. 2008).

215 *Id.*

216 *Murry v. GuideOne Specialty Mut. Ins. Co.,* 194 P.3d 489, 494 (Colo. Ct. App. 2008).

217 *Sulca v. Allstate Ins. Co.,* 77 P.3d 897, 900 (Colo. Ct. App. 2003) *citing e.g.,* Black's Law Dictionary 876 (7th ed. 1999); Webster's Third New International Dictionary 1252 (1986) (defining "knowledge" as "the act, fact, or state of knowing; . . . awareness [or] understanding").

218 *Murry v. GuideOne Specialty Mut. Ins. Co.,* 194 P.3d 489, 493 (Colo. Ct. App. 2008).

219 § 13-80-108(8), C.R.S.; *Murry v. GuideOne Specialty Mut. Ins. Co.,* 194 P.3d 489, 492 (Colo. Ct. App. 2008).

discovery rule "imposes an objective standard and does not reward denial or self-induced ignorance."[220]

2. Discussion

199. The Legislature established a framework furthering a policy of promoting a competitive telecommunications marketplace through fostering free market competition within the telecommunications industry.[221] While affording continued protection of appropriate confidentiality interests, competitors are assured direct access to the terms of access agreements. Subject only to confidentiality protections, access is intended to be readily available without the need to employ litigation expense or effort.[222]

200. To a point, the undersigned agrees with Ms. Eckert's rebuttal testimony that QCC has a right to conduct its business with the understanding that other carriers, including its suppliers, are acting in compliance with the law and are not unlawfully discriminating against it. This notion is founded in the regulatory compact that all providers must accept the burdens of regulation along with the benefits.

201. The statute of limitations will be equitably tolled under the facts and circumstances of this case until two years after essential facts are known or should be known under the discovery rule.

202. Arguments are made regarding accrual based upon proceedings before the Minnesota PUC. It is argued that QCC claims in Colorado should accrue based upon knowledge of claims in Minnesota proceedings regarding Minnesota intrastate services. This general

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220 *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 900 (Colo. Ct. App. 2003); *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489, 492 (Colo. Ct. App. 2008).

221 § 40-15-101, C.R.S.

222 § 40-15-105(3), C.R.S.

attribution of knowledge is rejected because 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.

203. Critically, each claim is for violation of Colorado law regarding intrastate service in Colorado. There is extensive evidence and argument that the applicable statute of limitations passed prior to the filing of the within complaint by QCC. The vast majority is based upon knowledge surrounding proceedings before the Minnesota Commission, the California Commission, and the United States Bankruptcy Court.

204. Although the 2004 Contracts were, in fact, nationwide in scope, it is found that QCC did not have knowledge of applicability in Colorado prior to availability of the agreements. Thus, essential facts affecting service in Colorado were not known before the entire agreement was available.

205. QCC's knowledge is argued based upon Qwest comments submitted August 24, 2005. However, such comments reference only Minnesota rules and law regarding intrastate services within Minnesota. The comments address no conduct or agreement affecting service in Colorado.[223] Additionally, knowledge cannot be attributed to QCC based upon unproven and contested allegations in comments or complaints.

206. As to when claims accrued under Colorado law, QCC's awareness of conduct in other states regarding intrastate services provided in other states, having different laws not applicable herein, is insufficient to show knowledge of facts essential to claims in Colorado. No party has shown authority to the contrary.

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[223] Exhibit PHR-13 to *Hearing Ex.* 13.

207. As to application of the discovery rule in light of the explicit, mandatory, statutory notice requirements in a regulated environment, the exercise of reasonable diligence by purchasers of intrastate access in Colorado regarding CLEC departure from tariff rates reasonably only requires review of Commission filings. In light of the strong policy interests to promote a competitive marketplace and the critical importance of disclosure required by § 40-15-105(3), C.R.S., to fulfilling policy objectives, the potential for discovery through alternative means will not stop the equitable tolling of the statute of limitations. Barring claims on the passage of time caused by the failure to comply with disclosure requirements only serves to encourage illicit actions and contradict legislative policy objectives expressed in § 40-15-105, C.R.S. In addition to thwarting notice intended by the Legislature, significant burdens would be imposed upon Colorado telecommunications providers to monitor and perhaps participate in proceedings across the nation without regard to cost.

208. However, it is equally true that the purpose underlying statutes of limitation also remains. Thus, once a party discovers claims or should have discovered claims by the exercise of reasonable diligence (*i.e.,* review of Commission filings as applicable here), equitable tolling expires.[224]

209. "An attorney is presumed to know the law, and an attorney's knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed."[225]

210. It is found that QCC was provided an unredacted copy of the document identified by the Minnesota DOC as the "Second Unfiled Agreement" in response to discovery propounded

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[224] As stated above, applying reasonable diligence to the case at bar is to monitor statutorily mandated notice requirements.

[225] In re Trupp, 92 P.3d 923, 932 (Colo. 2004); Brodeur v. Indus. Claim Appeals Office, 159 P.3d 810, 813 (Colo. App. 2007)." Murry v. GuideOne Specialty Mut. Ins. Co., 194 P.3d 489, 494 (Colo. Ct. App. 2008).

in PUC Docket No. P-et al./C-04-235 more than two years prior to the filing of the within complaint.[226] The Second Unfiled Agreement referenced is defined at Exhibit PHR-14 to Hearing Exhibit 13, at 8-9. At that time, Qwest was also aware that there were reciprocal MCImetro agreements.[227]

211. By receipt of the subject agreement through its counsel, QCC had knowledge of facts essential to the cause of action in Colorado against MCImetro as to all of the rates, terms, and conditions in the agreement that form the basis of its complaint here. The statute of limitations accrued upon such knowledge, more than two years prior to the filing of the within complaint against MCImetro. Based thereupon, the claims are barred by the applicable statute of limitations, including equitable extension, and will be dismissed.

212. Qwest makes arguments that the statute of limitations is affected by the fact that such knowledge was obtained subject to restrictions against use of information outside of Minnesota. As addressed above, this argument is rejected; the claim accrued under § 13-80-108(4), C.R.S. Rather, such circumstances might be a contributing factor to equitable tolling. In this case, there is no evidence of action taken or attempted to gain authorization to make use of known facts. Such inaction is the very conduct that statutes of limitation are intended to avoid. Had such efforts been shown, and have been shown to fail, further equitable tolling of the statute might have been appropriate.

213. Statutes of limitation are enacted to promote justice, discourage unnecessary delay, and forestall prosecution of stale claims.[228] Based upon Qwest's inaction upon knowledge of claims against MCImetro subject to confidentiality protections, equity shifts such that the

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226 *Hearing Exs.* 91 and 91C.

227 Ex.PHR-16 to *Hearing Ex.* 13, at 2.159.

228 *Rosane v. Senger,* 112 Colo. 363, 369, 149 P.2d 372, 375 (1944).

statute should no longer be tolled despite MCImetro's original failure to file the subject agreement. The failure to provide notice no longer contributed to passing of the statutory period.

214. The remaining arguments that claims are barred by the statute of limitations will next be considered. As to those parties hereto that were not a party to the Minnesota proceedings, evidence regarding such proceeding is insufficient to show that QCC had knowledge of facts essential to the cause of action in Colorado against those respective CLECs.

215. Arguments that equitable tolling of the statute is not appropriate in this matter are rejected based upon the discussion and findings above. Addressing *Home Builders* specifically, the Commission found in that proceeding that the complainant's claim was time barred because all information upon which the claim accrues was publicly available in the tariff.[229] Such circumstances preventing tolling of the statute of limitations are not present at bar. Without regard to whether the statute of limitations would have otherwise expired, equitable tolling based upon the discussion above makes remaining claims timely filed herein.

216. Although Granite does not appear to have been a party to the Minnesota proceedings, the April 2003 switched access agreement with AT&T was made publicly available on June 22, 2006, in response to the request of the Minnesota DOC.[230]

217. On or after June 23, 2006, QCC had knowledge of facts essential to the cause of action in Colorado against Granite, or equity does not require further tolling as of such date. The statute of limitations thus accruing, less than two years passed prior to the filing of the within complaint against Granite. Based thereupon the claims are not barred by the applicable statute of limitations, including equitable extension.

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229 Decision No. C03-1093, Docket No. 01F-071G, issued September 25, 2003.

230 *Hearing Ex.* 138.

218. Others involved in the Minnesota proceedings include Eschelon and XO. Based upon discussion and findings above, it is found that QCC had knowledge of facts essential to the Colorado cause of action against those respective CLECs less than two years prior to the filing of the complaint, or that equity requires tolling of the statute based upon the respective CLECs' failure to comply with disclosure requirements. Based thereupon, claims are timely filed herein.

219. The Minnesota proceedings did not give QCC knowledge that would compel QCC to file a complaint in Colorado. Illustratively, Level 3 entered into to a nationwide agreement for intrastate access. Although that agreement was not filed with the Commission, the rates provided for therein were maintained in Level 3 tariffs on file with the Commission and charged to IXCs pursuant thereto.[231] Similarly, it is not reasonable to attribute conduct alleged in Minnesota to all carriers in all states.

220. Arguments are presented that Qwest should have employed legal process in pending proceedings in other states to have discovered the existence and scope of agreements affecting Colorado intrastate switched access. Such arguments are rejected based upon the present facts.

221. First, there were explicit confidentiality provisions making it highly questionable as to what benefit would have been gained from the pursuit of such efforts. As to litigation processes in other proceedings, there is no reason to believe that parties would have provided information, or access, in light of the prevalent use of confidentiality provisions. Likewise, it is not clear that discovery would have been available if the purpose was disclosed. Illustratively, in the Minnesota proceedings, if access to the entirety of agreement were sought to understand its applicability to intrastate switched access in Colorado, it is by no means certain that such access

[231] *Hearing Ex.* 9 at 3-6.

would have been afforded in light of underlying confidentiality concerns and the scope of discovery reasonably calculated to the discovery of admissible evidence in that proceeding. While it may have otherwise been provided, it is not even clear that the settlement agreement approved by the bankruptcy court was provided to the court. The motion states it did not accompany the filing.

222. Secondly, such arguments ignore the purpose underlying filing requirements in Colorado. Because the agreements at issue herein were not filed with the Commission, those failing to file agreements to provide regulated services upon terms varying from their filed tariff will not be heard to claim that others might have discovered the unfiled agreement through other means. Reason did not require such efforts or processes. Such an interpretation ensures compliance with mandatory disclosure to competitors, the OCC and the Commission. All Colorado local exchange providers will remain on equal footing.

C. Applicable Law on Merits

223. Section 40-15-102(1), C.R.S., defines "access" to mean "special access and switched access."[232]

224. Section 40-15-102(28), C.R.S., defines "switched access" as "the services or facilities furnished by a local exchange company to interexchange providers which allow them to use the basic exchange network for origination or termination of interexchange telecommunications services."

225. Section 40-15-105, C.R.S., requires access charges be non-discriminatory: "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

[232] § 40-15-102(1), C.R.S.

nor subject any such person to, nor itself take advantage of, any prejudice or competitive disadvantage for providing access to the local exchange network. Access charges by a local exchange provider shall be cost-based, as determined by the commission, but shall not exceed its average price by rate element and by type of access in effect in the state of Colorado on July 1, 1987."[233]

226. Contracts for the pricing and provisioning of access shall be filed with the Commission and open to review by other purchasers of such access.[234] By Decision No. C08-0800, issued August 4, 2008, the Commission opened and designated Docket No. 08M-335T as a single repository for all such agreements.

227. The obligations imposed upon local exchange providers entering into access contracts pursuant to § 40-15-105, C.R.S., are unequivocal and define the statutorily-mandated notice with regard thereto.

228. Section 40-15-301(2)(e), C.R.S., defines switched access as a Part 3 Emerging Competitive Telecommunications Service. In promulgating rules for Part 3 services, the Commission shall "consider such alternatives to traditional rate of return regulations as flexible pricing, detariffing, and other such manner and methods of regulation as are deemed consistent with the general assembly's expression of intent pursuant to section 40-15-101."[235]

229. Section 40-15-401, C.R.S., defines special access as a Part 4 service exempted from regulation under Public Utilities Law.

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233 § 40-15-105(1), C.R.S.
234 § 40-15-105(3), C.R.S.
235 § 40-15-302(1)(a) C.R.S.

230. There are challenges in interpreting § 40-15-105, C.R.S., in the context of the statute adopted at the time. The section covers special and switched access. However, special access is defined to be exempt from regulation and switched access is defined as a Part 3 service.

231. Respondent CLECs are required to maintain a tariff on file with the Commission containing the rates, terms, and conditions governing its Part 2 and Part 3 services and products, including intrastate switched access.[236] Carriers are obligated to comply with the terms and conditions of their filed tariff unless expressly authorized by the Commission to do otherwise.

232. "Tariffs are the means by which utilities record and publish their rates along with all policies relating to the rates. *See* § 40-3-103, 17 C.R.S. (1993); *U.S. West Communications, Inc. v.* City of Longmont, 948 P.2d 509, 516 (Colo. 1997). Tariffs are legally binding, see Longmont, 948 P.2d at 517, and the proper application of rates and tariffs is within the regulatory authority of the PUC. See 40-3-102, 17 C.R.S. (1993); Silverado, 893 P.2d at 1320."[237]

233. As applicable here, in absence of the statutorily mandated filing requirements in § 40-15-105, C.R.S., CLEC rates must be in accordance with the tariff or price list on file with the Commission, unless approved otherwise.

234. The Commission has broad authority to rectify unlawful utility action, including an order of reparations. Thus, the Commission exercises remedial as well as regulatory power.[238]

235. "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

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[236] Rules 2122 and 2203(c), 4 CCR-723-2, Rules Regulating Telecommunications Providers, Services, and Products.

[237] *AviComm, Inc. v. Colorado* PUC, 955 P.2d 1023, 1031 (Colo. 1998) (footnote omitted).

[238] *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1081 (Colo. Ct. App. 2006).

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."[239]

236. As MCImetro argues, provision for contracting in § 105 would of be no purpose in allowing contracts if carriers could not offer service on terms that deviate from their tariffs. Thus, consistent with Commission interpretation, differences in rates for switched access service resulting from individual contracts may be lawful, so long as they are not unreasonably discriminatory. While cost is a factor in considering levels of discimination, it is not an exclusive factor.

237. The Commission has explicitly stated that "in order to avoid a Commission finding of discrimination, [the Company] must treat all similarly situated customers in a similar manner."[240]

238. Application of the no undue discrimination principle is illustrated in the requirement that "all similarly-situated customers should be treated the same. Thus, if a utility offers something (such as facility enhancement or a lower rate) as an inducement to one customer to convert from sales service to transportation service, other similarly-situated customers should be able to find out about and receive the same treatment."[241]

239. Finding undefined terms arising from House Bill (HB) 1336, the Commission will look to Part 1: "guidance is available to the Commission in the general requirements of Part 1 ...

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[239] § 40-6-119(1) C.R.S.

[240] Decision No. C95-0796, Docket No. 95I-394G, issued August 21, 1995, at 19. *See also* Decision No. C87-1347, Case No. 6633, issued September 28, 1987, at 16.

[241] Decision No. R05-0523, Docket No. 03R-520G, issued May 6, 2005 at 11.

in the requirements of §§ 40-3-102 & 106, C.R.S., against maintaining any unreasonable difference as to rates or services which are still specifically applicable to Part 3 services."[242]

D. Filed Rate Doctrine and Retroactive Ratemaking

240. QCC argues the primary purpose of the filed rate doctrine is to prevent carriers from engaging in price discrimination.[243] The doctrine does not excuse discriminatory conduct.[244] It is also argued that the Commission explicitly rejected Respondents' argument in Decision No. C04-0011.[245] QCC also argues that the Filed Rate Doctrine is not applicable in this proceeding because the Commission has not approved any rate at issue in this proceeding.

241. QCC alleges that certain Respondent CLECs violated their tariffs on file by failing to offer QCC the same contractual terms set forth in the unfiled agreements.

242. CLECs argue that QCC claims are barred by the filed rate doctrine and the Commission must apply only the filed rate. Thus, even if QCC successfully demonstrates that Respondent CLECs' failure to abide by tariffs on file, QCC would not be entitled to any form of monetary recovery. Because QCC seeks a remedy that conflicts with filed tariffs, it is argued that the filed rate doctrine bars relief requested.

243. Several parties also contend that granting Qwest relief in the proceeding would be unconstitutional retroactive ratemaking.

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242 Decision No. C87-1347 at 6.

243 *Fax Telecommunications Inc. v. AT&T,* 138 F.3d 479, 489 (2d Cir. 1998).

244 *Maislin Indus., US., Inc. v. Primary Steel. Inc.,* 497 U.S. 116, 127 (1990) (explaining that the purpose of the doctrine is to prevent shipping clerks and other agents of carriers from giving preferential treatment to certain carriers). *See also In The Matter of Halprin, Temple, Goodman & Sugrue v. MCI Telecomm 'n. Corp.,* 14 FCC Red 21092 (1999) (holding that the filed rate doctrine does not bar a claim when the terms of the tariff do not clearly set forth when the tariff is superseded by an individual agreement); *MCI Telecomm 'n. Corp. v. FCC,* 59 F.3d 1407, 1413-14 (D.C. Cir. 1995) (rejecting the filed rate doctrine as a defense against a claim for the difference between the maximum rates under a rate of return order and the rates contained in a tariff).

245 *Home Builders Assoc. v. Public Servo Co.,* Order Granting Second Application for RRR in Part and Denying in Part, Docket No. 01F-071G, Decision No. C04-0011, (December 22, 2003), 2003 Colo. PUC LEXIS 1430.

244. BullsEye and Granite argue that granting retroactive relief necessarily would result in prohibited discrimination by § 40-6-119(1), C.R.S. It is argued to be improper for QCC to benefit from unlawfulness or discrimination that benefited AT&T to the detriment of all other providers.

245. Complainant and Respondents accuse the other side of turning the filed rate doctrine on its head. Rather than order reparations, Respondents encourage that the Commission ensure that tariff rates are assessed by the CLECs on a going forward basis and are paid by all IXCs.

246. "The 'filed tariff doctrine' prohibits a regulated entity ... from charging rates for its services different from the rates filed with the regulatory authority."[246]

247. The filed rates at issue went into effect by operation of law. The filed rate doctrine does not bar reparations except when the underlying tariff has been affirmatively approved by this Commission.[247] In a 1989 order, the Commission stated,

> Section 40-6-119, C.R.S., provides that the Commission has the authority to order reparations for an excessive or discriminatory amount collected after a complaint has been made. Reparations in § 40-6-119, C.R.S., can only apply in those situations 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. The landmark case of Arizona Grocery Company v. Atchison Topeka and Santa Fe Railway Company, 284 U.S. 370, 52 S.Ct. 183 (1931) makes it clear that this Commission is bound to recognize the validity of a rule of conduct prescribed by it and is not permitted to retroactively repeal its own enactment. Where rates have been prescribed by the Commission, no reparations are permitted.[248]

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[246] *U S West Communs. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997)(citations omitted).

[247] Investigation and Suspension of Proposed Changes and Additions to Exchange and Network Services Tariff Telephone, Mountain States Telephone and Telegraph Company, Denver, Colorado 80202, Pursuant To Advice Letter No. 2092, Docket No. 1766, Decision No. C89-178 at 33 (Feb. 10, 1989), 1989 Colo. PUC LEXIS 2, at *66-67. *See also Bonfils v Public Util. Com 'n of State of Colo,* 189 P. 775 (Colo. 1920) and *Archibold v. Public Util. Com 'n of State of Colo.,* 58 P.3d 1031 (Colo. 2002).

[248] *Id.*

248. In Docket No. 01F-071G, the Commission thoroughly reviewed and analyzed the filed rate doctrine and retroactive ratemaking as applied in a reparation action based upon tariff violations.[249] The Commission harmoniously construed §§ 40-6-119(1), 40-6-108(1)(d), and 40-3-102, C.R.S. On Rehearing, Reargument, and Reconsideration (RRR), the Commission reiterated findings, without fully restating the legal analysis of Decision No. C02-0687, Docket No. 01F-071G, issued June 19, 2002, that a utility cannot duck its responsibilities for violating its tariff.[250]

249. The regulatory role and statutory duties of the Commission permit reparations for tariff violations.[251] To find otherwise "would deprive this Commission of much of its power to protect customers from unfair rates....In the area of utility regulation, the Commission has broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it."[252]

250. Holding that the reparations were permitted, the Commission held:

> Based upon the findings of the U.S. Supreme Court and our own supreme court regarding this matter, we find that if a utility misleads us or fails to follow the explicit standards of its own tariff, the rule against retroactive ratemaking and the filed rate doctrine are not available as a defense to an order of reparations. These two doctrines were not intended to permit a utility to subvert the integrity of our ratemaking authority or even the utility's own tariff. To give credence to Public Service's reasoning would surely undercut this Commission's authority and allow a utility to charge any sort of rate despite the requirements of its own tariff, and refund nothing if caught. No incentive would exist for a utility to comply with its own tariff.[253]

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249 See Decision Nos. C02-0687, C03-1292, and C04-0011.

250 Decision No. C03-1292 at 8.

251 *Id.*

252 *Id. citing* City of Montrose v. Public Util. Comm'n, 629 P.2d 619 (Colo. 1981).

253 Decision No. C03-1292, Docket No. 01F-071G, issued November 19, 2003. On RRR, by Decision No. C04-0011, the Commission clarified that it was not found that Public Service Company of Colorado intentionally misled the Commission or intentionally violated its tariff and hid such information from the Commission. However, the Commission maintained that the filed rate doctrine and the rule against retroactive ratemaking were not available as a shield to the reparations.

251. CLECs certainly knew of the requirement to file rates and/or agreements in accordance with tariffs and Colorado law. Thus, they were on notice that the failure to do so could result in unlawfully charging rates found to be unreasonable or unlawfully discriminatory, subjecting it to reparations under § 40-6-119, C.R.S.

252. Each Respondent has a rate filed with the Commission for access service that went into effect by operation of law. Each Respondent established rates differing from tariffs on file with the Commission for some IXCs. Those rates varying from tariffs were never filed with the Commission in any way and were not subject to Commission consideration. Based upon the foregoing discussion, any reparations ordered herein are not barred by the filed rate doctrine or the prohibition against retroactive ratemaking. The filed rate doctrine, as applied under Colorado law, does not preclude the Commission from remedying proven unjust discrimination arising therefrom through reparations.

E. Avoidance of Contracts

253. Several parties contend that QCC cannot be granted relief in the proceeding based upon the alleged invalidity of the agreements that are alleged to give rise to discriminatory rates. As a defense, proponents have failed to meet their burden of proof in this proceeding. As to the Commission or a third party, it is found that claims as to the invalidity of those agreements are not properly before the Commission in this Complaint proceeding. The parties to the agreements are not parties herein.

F. Failure to File Contracts

254. Section 40-15-105(3), C.R.S., requires contracts for the pricing and provisioning of access to be filed with the Commission and open to review by other purchasers of such access. By maintaining strict disclosure of rates for access services, it appears the Legislature recognized the lack of competitive opportunity for the service.

255. It is found that each of the Respondents entered into contracts for the pricing and provisioning of access.

256. It is further found that none of the Respondents filed such contracts with the Commission prior to the filing of the within complaint.[254] Although no remedy is explicitly specified in § 40-15-105(3), C.R.S., the scope of the Commission's jurisdiction is available.

257. It is found that Qwest has met its burden of proof. Each Respondent violated § 40-15-105(3), C.R.S., by failing to file such contracts with the Commission.

258. Section 40-15-105, C.R.S., contemplates private negotiation and agreement regarding the provision of access. However, before an agreement is effective, the provider of access services is required to file the agreement with the Commission.[255] The notice process contemplated by the Legislature is analogous to the filing process clarified by the Commission as to interconnection agreements required to be filed pursuant to § 252 of the Telecommunications Act of 1996 and Commission rules. After filing, upon Complaint or Commission action, a determination can be made as to compliance with applicable law.

G. Discrimination.

259. Section 40-3-102, C.R.S., vests broad authority in the Commission "to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state."[256] Section 40-6-119, C.R.S., authorizes reparations upon complaint for excessive or discriminatory charges.

260. CLECs are required to maintain tariffs on file with the Commission. However, § 40-15-105, C.R.S., permits entry of contracts for access services varying from tariffs, subject to

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254 During the pendency of the proceeding, Granite filed a contract in Docket No. 08M-335T.

255 Decision No. C08-0962, Docket No. 08M-335T, issued September 15, 2008.

256 § 40-3-102, C.R.S.

disclosure and Commission consideration. Subject to a statutory cap, access charges must also be cost based. When presented to the Commission, due consideration of a contract must be given as to any preference or advantage to customers or classes of customers for access to the local exchange network.

261. Section 40-15-105, C.R.S., was enacted into law by HB 87-1336. The Legislature intended to promote and foster a competitive telecommunications marketplace. However, the bill addressed an industry then regulated under the doctrine of regulated monopoly – the local exchange market had not been opened to competition. The strength of competitive force was recognized to vary widely between markets and products and services. § 40-15-101, C.R.S.

262. HB 87-1336 was substantially amended in both the House and Senate. In the House, the bill was first amended so that § 40-15-105(1), C.R.S., would not have been limited to access charges. Rather, that limitation came in a later House amendment. Also, the filing requirement of § 40-15-105(3), C.R.S., was permissive as the bill left the House. In the Senate Business Affairs & Labor Committee, the filing requirement was amended to be mandatory. Passage of differing bill versions led to a conference committee to resolve differences among versions. In the end, the Senate version of § 40-15-105, C.R.S., was adopted. The Legislature clearly contemplated and intended to restrict the scope of § 40-15-105, C.R.S., only to access services and to differentiate treatment of such services.

263. Section 40-15-105, C.R.S., protected competitive providers from predatory pricing of incumbent providers controlling monopoly or bottleneck facilities by requiring disclosure of access contracts. ILECs were precluded from taking advantage of control of the same bottleneck facilities at issue in this proceeding for the benefit of some long-distance customers and to the detriment of others.

264. Section 40-3-106(1)(a), C.R.S., provides:

> Except when operating under paragraph (c) or (d) of this subsection (1) or pursuant to article 3.4 of this title, no public utility, as to rates, charges, service, or facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The commission has the power to determine any question of fact arising under this section.[257]

265. Sections 40-3-106 and 40-15-105, C.R.S., both include explicit prohibitory language (*e.g.,* "any preference or advantage"). The Commission previously interpreted the phrase "any preference" in § 40-3-106, C.R.S., in Decision No. C00-1057, Docket No. 00A-008E, issued September 26, 2000. Noting the term "preference" was not statutorily defined, the Commission concluded "that the Legislature intended that the Commission examine the factual circumstances involved in specific cases to determine whether a particular ratemaking practice is an illegal preference."[258] The parties advocate an analogous interpretation of § 40-15-105, C.R.S.

266. The Supreme Court found an illegal preference in violation of § 40-3-106(1), C.R.S., when the Commission approved a lower rate to selected customers unrelated to the cost or type of the service provided.[259] The Supreme Court has also upheld the Commission's jurisdiction to approve different rates among classes of customers having an equivalent cost of service.[260] The court distinguished treatment of different classes of customers, analyzing use of services (own use versus resale) and primary business function (hotel versus resale of telecommunications services) of differing customers.

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257 § 40-3-106(1)(a), C.R.S.

258 *Id.* at ¶7.

259 *Mountain States Legal Foundation v. Public Utilities Com.,* 197 Colo. 56, 60 (Colo. 1979).

260 *Integrated Network Servs. v. Public Utils. Comm'n,* 875 P.2d 1373 (Colo. 1994).

267. The Colorado Supreme Court acknowledged the specter of discrimination under § 40-15-105(1), C.R.S., in the appeal of the Commission's Decision No. C96-0011, Docket No. 94M-543T, issued January 10, 1996, denying exceptions to Recommended Decision No. R95-0709.[261]

268. In Decision No. C96-0011, the Commission addressed potential violations based upon a service provider operating in contravention of the terms of its tariff. U S WEST Communications, Inc. (U S WEST) offered a functionally equivalent service in two effective tariffs. However, a customer was violating the terms and conditions of service in the tariff from which the service was being purchased. By permitting that customer to purchase the functionally-equivalent service in violation of the tariff, the Commission stated that the provider permitted the purchasers to discriminate against other companies purchasing the functionally equivalent service through a different tariff, citing § 40-15-105(1), C.R.S.

269. It was found that U S WEST was not treating all purchasers alike if it permits some to purchase services from one tariff as opposed to the other, concluding that U S WEST "is probably in violation of § 40-15-105(1), C.R.S." The Commission went on to consider whether the same conduct potentially amounted to a preference in violation of § 40-3-106(1)(a), C.R.S. In conclusion, the Commission did not condone the potential violations found.[262]

270. In the original Recommended Decision, Administrative Law Judge William J. Fritzel found that "[b]y permitting Petitioners as interexchange providers to purchase from U S WEST's network service tariff, while requiring other interexchange providers to purchase from the switched access tariff, U S WEST discriminates against other interexchange carriers

261 *AviComm, Inc. v. Colorado PUC,* 955 P.2d 1023, 1028 (Colo. 1998) and Docket No. 98M-583T.

262 Decision No. C96-0011 at 11-13.

who are required to purchase from U S WEST's access tariff in order to provide interexchange telecommunications service."[263]

271. Functionally equivalent services at issue allowed customers purchasing U S WEST's basic local exchange service to originate and terminate intrastate telephone calls from one local calling area to another local area without incurring long distance charges. Permitting some interexchange providers to purchase functionally equivalent products from one tariff while other providers are required to buy functionally equivalent service from a different tariff was found to be discriminatory. Accordingly, it was noted that such discrimination potentially subjects U S WEST to a violation of § 40-15-105(1), C.R.S.

272. In sum as applicable herein, unlawful discriminatory access service occurs when functionally equivalent services are sold to similarly situated classes of customers at differing rates without reasonable cost justification.

273. QCC contends it has made a *prima facie* case of discrimination by showing that Respondents entered into off-tariff switched access agreements and failed to provide equivalent rate treatment to QCC for the same service. Further, that Respondents unlawfully discriminated against it by providing service to other IXCs below tariff and failing to provide equivalent rate treatment to QCC. It contends that § 40-15-105(1), C.R.S., requires that the bottleneck and homogeneous nature of the service at issue have a cost-based differentiation to avoid a finding of unreasonableness.

274. Dr. Weisman presents several policy based arguments that the Commission should not permit a departure from uniform rates for a bottleneck monopoly service that is not competitively supplied, in absence of demonstrated variation in the economic cost to provision

[263] Decision No. R95-0709, Docket No. 94M-583T, issued July 31, 2005, at 14.

the service. In the case at bar, he opines that that magnitude of variation observed between rates charged to QCC and its competitors cannot be the result of cost variations because the service provided is essentially identical across carriers.

275. LEC facilities constitute a monopoly bottleneck because "there are no alternatives for an IXC to reach an end user local customer for long distance call but through the switch of the local carrier who provides local services to the end user."[264] When the CLEC controls the last mile to the customer premise, practical control remains without regard to the legal owner of the facility. Thus, as Dr. Weisman testified, monopoly control of the facility can occur without it being an "essential facility" because it cannot be economically duplicated. The FCC summarized:

> Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user. Thus, once an 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.[265] (footnote omitted).

276. Joint CLECs contend that the Legislature intended for access rates to vary because negotiated contracts are permitted for switched access service on an individual case basis. Differentiation in price for the same service alone is insufficient to show unjust discrimination. Rather, undue or unreasonable preference or advantage must be shown as to similar customer classes. CLECs defend discrimination claims arguing reasonable differences based upon QCC not being similarly situated to contracting counter parties. Accordingly, Joint

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[264] Eckert Rebuttal at 24.

[265] 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.

CLECs contend that QCC failed to make a *prima facie* case of discrimination based upon a showing that different rates were charged and QCC was charged the tariff rate.

277. Joint CLECs contend that switched access is a competitive service. However, FCC nationwide analysis of interstate access has not been shown applicable to intrastate access in Colorado. Without regard to the extent of vertical integration, no IXC can reach a CLEC's customer to complete a long distance call without significant duplication of facilities. Encouraging end-use customers to switch to an affiliated LEC is simply not an option for all IXCs operating in Colorado and is not feasible beyond the operating footprint of such affiliate. Qwest argues that Dr. Weisman's testimony is more consistent with FCC orders on the subject and that concerns regarding such bottlenecks are ongoing.[266]

1. Discussion

278. While Dr. Ankum notes the transitional nature of the original FCC findings regarding access, he failed to show how subsequent industry changes in Colorado have negated those transitional concerns, consistent with the public policy statement by the Legislature. In any event, the Legislature has not acted to amend § 40-15-105, C.R.S., as to intrastate service without regard to FCC's consideration of subsequent interstate concerns.

279. The sole issue in this matter regards intrastate access services. In the case at bar, QCC has made a *prima facie* showing that the functionality and service elements used to provide access services are identical, as were the facilities they were provided over. All IXCs must utilize such access service to reach a given end-use customer. The facilities to accommodate one IXC serve all IXCs. LECs enjoy bottleneck, monopoly control over switched access services provided to their end-use customers without regard to the identity of the IXC or the volume of

[266] *Hearing Ex.* 4 (Weisman Rebuttal Testim.), pp.13-14.

calls completed. Identical service was provided over identical facilities to IXCs completing calls to CLEC customers. QCC was charged tariff rates when others were charged lower rates. There is no showing that any IXC other than QCC was charged at the tariff rate. QCC made a *prima facie* showing that the relative size of any given purchaser of access services is not relevant to specific access services since each call is separate and distinct and carried in identical fashion (assuming no dedicated facilities to a particular local switch or end-user). Thus, on a call-by-call basis, every IXC is similarly situated. While roles have changed, this is the very purpose for which § 40-15-105, C.R.S., was adopted.

280. CLECs attempt to overcome the *prima facie* showing of discrimination as if two independent lawful rates exist and the issue is QCC's eligibility for each of those rates. Such circumstances have not been shown applicable to the case at bar. Respondents contend that the class of customer and service at issue are determined by the scope of the contractual agreements entered into with some IXCs, but not others, and that the relevant customer classes must be determined in light of the contractual scope. However, no disclosure was made as a condition precedent to effectiveness and neither the Commission nor any other IXC ever had an opportunity to consider those agreements. Thus, the unlawful contracts cannot form the basis of a lawful rate.

281. No lawful basis has been demonstrated for any Respondent to vary from tariff rates pursuant to access agreements not filed with the Commission as required by § 40-15-105(3), C.R.S. By charging rates in accordance with such agreements, rather than filed rates, it has been shown that Respondents varied charges from lawful rates.[267]

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[267] *See also U S West Communs. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997).

282. The issue remains whether the rate charged unlawfully discriminates against similar customer classes purchasing the identical service pursuant to tariff. Respondents failed to overcome QCC's *prima facie* showing of unjust discrimination. There is no relevant separate customer class shown to purchase access services.

283. Each Respondent has an intrastate switched access tariff rate on file with the Commission in Colorado. Each Respondent charged an IXC other than QCC a lower rate for intrastate switched access than provided for in the providers' tariff on file with the Commission. Respondents discriminated first in unlawfully departing from tariff rates, as addressed above. Further, as to QCC, the same access services were sold to other IXCs needing to complete intrastate interLATA telephone calls. Qwest made a *prima facia* case that the Respondents' cost to provide service was the same as to all comers requiring access services and no Respondent demonstrated reasonable justification related to the variation in pricing.

284. In the case at bar, QCC has proven that each Respondent CLEC unjustly discriminated by granting an unreasonable preferential and advantageous access service to an IXC other than QCC by departing from tariff rates while denying such preference and advantage to QCC.

285. In any event, the combination of access with other tariff and off-tariff provisions in contract cannot change consideration of statutory compliance for access services. The substance of access agreements must prevail over form and access services cannot be obscured or obviated by inclusion with other terms. Focusing upon the access service at issue, as segregated consistent with § 40-15-105, C.R.S., the creativity of those contracting cannot change the access service provided nor the unlawful pricing thereof.

H. Claim of Tariff Violations

286. Tariffs filed with the Commission by Respondents TWT, ACN, BullsEye, Comtel, and Ernest include assurances of non-discriminatory access to ICB switched access agreements granted to other customers.

287. TWT's Colorado Tariff No. 3, Original Sheet 70, provides:

> The Company may provide any of the services offered under this terms and conditions document, or combinations of services, to Customers on a contractual basis. The terms and conditions of each contract offering are subject to the agreement of both the Customer and Company. Such contract offerings will be made available to similarly situated Customers in substantially similar circumstances. Rates in other sections of this terms and conditions document or the applicable tariff do not apply to Customers who agree to contract arrangements, with respect to services within the scope of the contract.
>
> Services provided under this terms and conditions document are not eligible for any promotional offerings which may be offered by the Company from time to time.
>
> Contracts in this section are available to any similarly situated Customer that places an order within 90 days of their effective date.[268]

288. Comtel's Colorado P.U.C. Tariff No. 2, Original Page No. 88, provides:

> 6.1 Contracts
>
> The Company may provide any of the services offered under this rate sheet, or combinations of services, to Customers on a contractual basis. The terms and conditions of each contract offering are subject to the agreement of both the Customer and Company. Such contract offerings will be made available to similarly situated Customers in substantially similar circumstances. Rates in other sections of this rate sheet do not apply to Customers who agree to contract arrangements, with respect to services within the scope of the contract.
>
> Services provided under contract are not eligible for any promotional offerings which may be offered by the Company from time to time.
>
> 6.2 Individual Case Basis Arrangements
>
> Arrangements will be developed on an ICB in response to a bona fide special request from a Customer or prospective Customer to develop a competitive bid

[268] Ex. 10 to *Hearing Ex.* 7.

for a service. ICB rates will be offered to the Customer-in writing and on a non-discriminatory basis.[269]

289. ACN's Colorado PUC Tariff No. 2, Original Page 64, provides:

> 5.1 Special Contract Arrangements
>
> At the option of the Company, services may be offered on a contract basis to meet specialized pricing requirements of the Customer not contemplated by this tariff. The terms of each contract shall be mutually agreed upon between the Customer and Company and may include discounts off of rates contained herein and waiver of recurring, nonrecurring, or usage charges. The terms of the contract may be based partially or completely on the term and volume commitment, type of access arrangement, mixture of services, or other distinguishing features. Service shall be available to all similarly situated Customers for a fixed period of time following the initial offering to the first contract Customer as specified in each individual contract.
>
> 5.2 Special Service Arrangements
>
> 5.2.1 If a Customer's requirements cannot be met by services included in this tariff, or pricing for a service is shown in this tariff as "ICB", the Company will provide, where practical, special service arrangements at charges to be determined on an Individual Case Basis. These special service arrangements will be provided if the provision of such arrangements are not detrimental to any other services furnished under the Company's tariffs.

BullsEye's Colorado PUC Tariff No. 2, Original Page 65, and Ernest's Colorado PUC Tariff No. 1, Original Page 68, include identical terms (with different section numbers).

290. QCC argues that the failure of CLECs to make contracted discounts addressed above available to QCC is a violation of the respective tariffs.

291. Some context of analysis is necessary. The provisions alleged to have been violated are only limited in scope to regulated services. In word and inference, the provision is the exception in application of the tariff, rather than rule. Where customer requirements necessitate exception, the tariff provisions afford an opportunity to meet a specific customer requirement or demand that perhaps cannot otherwise be met under the tariff. Practically, the provider can only become aware of a specific customer requirement from the customer.

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[269] Comptel adopted the tariff of VarTec.

292. QCC points to correspondence sent to Respondents in 2008.[270] The correspondence presents no unique need or requirement other than a request for "most-favored-nation" pricing. Additionally, the requests are dated long after the agreements at issue.

293. QCC failed to establish validity of the ICB agreements subject to the cited provisions or any obligation on the part of Respondents to proactively seek QCC out and offer terms of agreement. QCC also failed to demonstrate any basis upon which it is entitled to be specifically notified of all ICB agreements including services that it purchases. Finally, having shown no unique circumstance, it is unlikely that solely a request for the lowest price would have led to an ICB under the desired terms.

294. It is found that QCC failed to meet the burden of proof that Respondents violated the tariff provisions in failing to make ICBs available to QCC without a genuine request.

I. QCC Reparations and Prospective Relief

295. In this case, Respondents have ignored statutory and Commission requirements regarding access contracts. While attempts are made to shift blame to counter parties, CLECs unmistakably violated obligations to charge lawful rates. Respondents entered into contractual agreements including a rate lesser than tariff rates for access services. The record as to how the subjects generally came about reflects Respondents' willingness to accept a lesser rate as well as an unwillingness to enforce tariffs on file.

296. There is no showing as to rates charged to IXCs, other than Sprint and AT&T pursuant to contract, and QCC pursuant to tariff.

297. While CLECs might have undertaken appropriate actions to mitigate discrimination some time ago, they did not do so. Rather, QCC invoked the Commission's

[270] *Tr. Vol. 1* at 94 and Exhibit LHE-1 to *Hearing Ex.* 1.

complaint jurisdiction to remedy the unjust discriminatory conduct of CLECs preferring other IXCs over QCC. Thus, this matter will consider reparations for the fact that QCC unjustly paid higher rates for identical access services provided to similarly situated IXCs.

298. QCC claims that Respondents precluded it from obtaining non-discriminatory, equal rates for identical intrastate switched access services. Because of the identical services, QCC claims it is similarly situated to IXCs that received preferential treatment from the Respondents pursuant to terms of contractual agreements. As a result, QCC was charged, and paid, higher rates than it should have for identical, regulated services.

299. QCC has the burden of proof to show the reparations it claims. QCC argues the appropriate reparations are based upon the financial impact of the difference between the rate QCC was charged and the rate charged to the IXC receiving the largest discount, from the inception of the off-tariff agreement to the earlier of the termination date of the agreement or the date of the final order in this proceeding.

300. QCC further seeks an order requiring Respondents to lower their intrastate switched access rates consistent with the most favorable rate offered in Colorado.

301. Respondents contend that QCC only alleges "detriment" from discrimination without any specification or quantification. However, it is acknowledged that QCC alleged payment of Respondents' tariff rates for switched access that were higher than those allegedly charged to other IXCs pursuant to contractual agreements.

302. It is argued that QCC cannot demonstrate a specific competitive injury in the retail long-distance marketplace resulting from the alleged rate discrimination because of the relatively small portion of the market represented. Further, that no advantage that any single Respondent might have conferred upon any other IXC could have caused a competitive injury.

303. Respondents argue that, like discrimination under federal law, QCC must demonstrate that it actually was harmed to carry its burden of proof that it has been unreasonably discriminated against. *See Cheesman v. Qwest Communs. Int'l, Inc.,* 2008 U.S. Dist. LEXIS 38507 (D. Colo. May 12, 2008) (noting that a complaint was defective because "plaintiffs have failed to show injury from a discriminatory rate given to the favored local carriers under the secret contracts," and that "damages that are alleged are speculative [and] conjectural"). Based upon the discussion above, there is no need to refer to federal law to consider violation of state law at issue. As stated above, the Legislature has provided for Colorado claims that are independent of applicable federal law.[271] The showing urged by Respondents has not applied to Colorado law.[272]

304. Similarly, the FCC stated: "[t]he competitive injury resulting from rate discrimination, such as a loss of profits or market share as the result of the competitive advantage afforded to the preferred party, is a critical component of a valid unlawful rate discrimination claim for which reparations can be awarded."[273] While competitive advantage afforded could be relevant to discrimination claim under Colorado law, damages for competitive injury do not control the amount of appropriate reparations. To the extent it is argued that QCC must effectively demonstrate damages from others being charged a lower rate before any reparation may be ordered, such arguments must fail. Reparations may be due pursuant to Colorado law without regard to the demonstration of consequential or expectation damages. The Commission

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[271] Illustratively, the United States Supreme Court defined an element of a discrimination cause of action to be proof of damages; however, reparations under § 40-6-119, C.R.S., need not be based upon proven damages.

[272] *See e.g., Mountain States Legal Foundation v. Public Utilities Com.,* 197 Colo. 56 (Colo. 1979).

[273] In re Exchange Network Facilities for Interstate Access, 1 FCCRcd. 618, 1986 LEXIS 2336, at 69 (November 14, 1986).

can fashion reparations within its authority to achieve remedies such as refunding charges or adjusting rates to reflect the service received.

305. It is also argued that QCC has already been compensated for any proven wrong based upon the previously-entered settlement agreement with AT&T relating to the same off-tariff agreements with QCC at issue here. Exhibit No. 109-C. **[BEGIN CONFIDENTIAL]** Several AT&T entities across the United States entered into a settlement agreement with QC and QCC. In the underlying litigation, there were cross allegations of providing service through agreements not filed with various Commissions.

306. Qwest paid $5 million to settle and release all claims against AT&T that have been or could be brought by Qwest in any jurisdiction regarding the claims in the CLEC Switched Access Agreements Case. While claims based upon AT&T's conduct were resolved, there is no expression or indication that benefits of the settlement were intended to inure to the benefit of Respondents or to compensate for Respondents' actions. To the contrary, the agreement explicitly preserves claims against any CLEC, other than AT&T's CLECs. **[END CONFIDENTIAL]** Thus, it is found that QCC's claims against Respondents are not affected by the settlement agreement between Qwest and AT&T.

307. QCC has reasonably approximated calculation of the variance in rates during the time of applicability of CLEC agreements. Where one CLEC has more than one access agreement overlapping in time, it is appropriate that reparations be based upon the greatest proven unjust discrimination.

308. The past discrimination proven by QCC is rooted in CLECs' failure to disclose access agreements as required by statute. Based upon such failure, those agreements were never subject to Commission consideration and CLECs were not authorized to vary from tariff rates.

Thus the merits of any specific contract are not directly at issue herein. Discrimination resulted to the extent of variation from tariff rates charged to QCC.

309. There is no certainty beyond a reasonable doubt that QCC would have been able to achieve identical pricing based upon the totality of facts and circumstances. There will never be a way to know. Thus, remediation approximates remedy of past unjust discrimination and, consistent with prior Commission policy, avoids a windfall to the utility from discriminatory conduct violating its own tariff obligations.

310. However, QCC's request for prospective rate relief will not be granted. Rather, an attempt will be made to alleviate the root cause of the discrimination through prospective compliance. Respondents will be ordered to file any access agreement in Docket No. 08M-335T that remain in effect according to the written or oral terms of the agreement. Through filing compliance and disclosure, the contracts could then properly be put at issue and the lost opportunities complained of by QCC will be restored. Reparations shall only be due to the earlier of cessation of contracted discounts rates varying from tariffs, the date this decision becomes a final decision of the Commission, or appropriate filing of the respective CLEC's agreement, as applicable.[274]

311. Finally, QCC requests an award of interest on reparations due, pursuant to § 40-6-119(1) C.R.S. at the rate established pursuant to § 13-21-101 C.R.S. Such rate, on its terms, is not controlling as it applies to actions on damages. It is found that the Commission's customer deposit rate is a more appropriate interest rate on awarded reparations herein. The essence of reparations is a return of the customer's money held by the utility. The Commission has previous

[274] As mentioned above, Granite filed its access agreement in Docket No. 08M-335T during the pendency of this case.

applied the customer deposit rate in ordering customer refunds.[275] It is found that the customer deposit rate is more closely applicable and reasonably compensates the time value of customer money in the utility's hands.

IV. ORDER

A. It Is Ordered That:

1. The Request for Administrative Notice of California Public Utilities Commission Final Decision in Parallel Proceeding filed by Respondents BullsEye Telecom, Inc.; Comtel Telom Assets LP; Granite Telecommunications, LLC; Eschelon Telecom, Inc.; Liberty Bell Telecom, LLC; MCImetro Access Transmission Services, LLC; Time Warner Telecom of Colorado, LLC; Ernest Communications, Inc.; and XO Communications Services, Inc. on September 3, 2010, is granted. The Final Decision Dismissing Complaint of the California Public Utilities Commission, Decision 10-07-030, dated August 2, 2010, will be admitted and referred to as Hearing Exhibit 148.

2. The Motion to Correct the Prefiled Rebuttal Testimony of Derek Canfield and Request for Waiver of Response Time filed by Qwest Communications Corporation (QCC) on October 5, 2010, is granted. The filed correction is accepted in place of the original filing.

3. The stay of Decision Nos. R09-0815-I and R09-0953-I is lifted.

4. The Complaint filed by QCC against MCImetro Access Transmission Services, LLC is dismissed with prejudice.

5. The Complaint filed by QCC is granted in part as to remaining Respondents.

   a. Each Respondent violated § 40-15-105(3), C.R.S., by failing to file access agreements.

[275] *See* Decision Nos. C05-1387 and C06-1152.

b. Each Respondent unlawfully discriminated against QCC by permitting similar customer classes to purchase functionally equivalent tariff intrastate switched access services at a lesser rate without reasonable cost justification.

c. QCC is awarded reparations from each Respondent from the time contracted discounts varying from tariff rates commenced to the earlier of cessation of contracted discount rates varying from tariffs, the date this decision becomes a final decision of the Commission, or appropriate filing of the a respective CLEC's agreement in Docket No. 08M-335T, as applicable. Initial ordered reparations are as follows: [BEGIN CONFIDENTIAL]

CLEC	FROM	THROUGH	INITIAL REPARATION
XO	1/1/2002	8/1/2006	$76,203
TWT	5/1/2002	12/31/2008	$55,502
GRANITE	4/14/2004	11/10/2008	$0[276]
ESCHELON	11/1/2002	12/31/2008	$120,117
BULLSEYE	10/21/2004	12/31/2008	$33,328
COMTEL-EXC	6/1/2006	12/31/2008	$7,046
COMTEL-VAR	6/1/2006	12/31/2008	$3,471
ERNEST	8/1/2002	12/31/2008	$18,246
LIB. BELL	1/2/2005	12/31/2008	$42,309

[END CONFIDENTIAL]

d. Respondents shall pay QCC ordered initial reparations within 60 days of a final Commission decision approving such reparations.

e. Unpaid reparation amounts shall accrue interest on the outstanding balance accrued at the customer deposit interest rate for each year since the beginning of the initial reparation period above.

f. Within 30 days of a final Commission decision approving initial reparations above, QCC **may** file a motion to increase the calculation of reparations due from each Respondent to the earlier of cessation of

[276] The initial amount is set at zero due to the level of detail available in the record. QCC may include the correct calculation for the dates given in the motion provided for below.

contracted discount rates varying from tariffs, the date this Decision becomes a final decision of the Commission, or appropriate filing of a respective CLEC's agreement, as applicable. Ordered reparations shall thereafter be modified in accordance with resolution of such motion.

g. Within 30 days of a final Commission decision approving initial reparations above, QCC **shall** file a motion to decrease the calculation of reparations due from each Respondent, if applicable, to the earlier of cessation of contracted discount rates varying from tariffs, the date this Decision becomes a final decision of the Commission, or appropriate filing of a respective CLEC's agreement, as applicable. Ordered reparations shall thereafter be modified in accordance with resolution of such motion.

6. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

7. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director