

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination.	DOCKET NO. 090538-TP ORDER NO. PSC-12-0048-PCO-TP ISSUED: February 2, 2012
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ORDER ESTABLISHING PROCEDURE

**I. Case Background**

Qwest Communications Company, LLC (Qwest) filed a complaint on December 11, 2009, alleging rate discrimination in connection with the provision of intrastate switched access services. Qwest was granted leave to file an Amended Complaint on October 22, 2010, adding additional Respondents.<sup>1</sup> The current Respondents are MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream NuVox; and John Does 1 through 50 (CLECs whose true names are currently unknown).<sup>2</sup>

<sup>1</sup> Qwest removed its Part D Prayer for Relief which asked for a “cease and desist” order from the Respondents’ actions.

<sup>2</sup> On April 6, 2011, Qwest filed a notice of Voluntary Dismissal without prejudice for its claims against Cox Florida Telecom, L.P.

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On May 7, 2010, the Joint Movants'<sup>3</sup> Partial Motion to Dismiss was granted in Order No. PSC-10-0296-PCO-TP, to the extent Qwest sought monetary damages and injunctive relief. On March 2, 2011, by Order No. PSC-11-0145-FOF-TP, the Commission denied the Joint Movants' Motion to Dismiss, holding that Qwest has standing to pursue a complaint, has stated a cause of action for which relief may be granted, and that the Commission has the authority to investigate the allegations in this Complaint. On May 16, 2011, in Order No. PSC-11-0222-FOF-TP, the Commission held that the Joint Movants did not identify a point of fact or law which was overlooked or which the Commission failed to consider in the previous decision, and denied the Joint Movants' Joint Motion for Reconsideration. On June 28, 2011, in Order No. 11-0282-PCO-TP, the Joint Movants' request for abeyance in the docket was denied and an issue identification meeting was scheduled.

On July 1, 2011, Chapter 2011-36, Laws of Florida, (Regulatory Reform Act) became effective, repealing and amending statutes in Chapter 364, Florida Statutes (F.S.). On July 8, 2011, the Joint Movants filed a Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction, a Joint Motion to Stay and Requests for Oral Argument for each Motion. On September 28, 2011, Order No. PSC-11-0420-PCO-TP, denied the Joint Movants' Motion to Dismiss, finding that the Commission retains subject matter jurisdiction to ensure a fair and effective wholesale market, including oversight of anti-competitive practices, such as predatory pricing. The Commission Order further determined that whether the Commission retained jurisdiction prospectively should be addressed and examined during the hearing process. Issue identification meetings were held on September 9, 2011, October 17, 2011 and October 25, 2011. This matter has been set for an administrative hearing on October 22-24, 2012.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code (F.A.C.), which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

## **II. General Filing Procedures**

In accordance with Rule 25-22.028, F.A.C., parties filing documents in this proceeding shall submit the original document and the appropriate number of copies to the Office of Commission Clerk for filing in the Commission's docket file. Filings may be made by mail, hand delivery, courier service, or in some instances electronically. Please refer to the rule for the requirements of filing on diskette for certain utilities. To the extent possible, all filings made electronically or on diskette shall be provided in Microsoft Word format. Filings pertaining to this docket should identify the assigned docket number and should be addressed to:

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<sup>3</sup> The Joint Movants are Access Point, Inc; Birch Communications, Inc.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; DeltaCom, Inc.; Granite Telecommunications, LLC; Lightyear Network Solutions, LLC; MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services; Navigator Telecommunications, LLC, PAETEC Communications, Inc.; STS Telecom, LLC, tw telecom of florida, l.p; and US LEC of Florida, LLC d/b/a PaeTec Business Services; XO Communications Services, Inc.; and Windstream NuVox, Inc

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**III. Tentative List of Issues**

The Parties were unable to reach agreement on all issues and requested a ruling by the Prehearing Officer on the wording of certain issues.<sup>4</sup> A list of the issues identified in this proceeding is attached hereto as Attachment A. Having reviewed each party's proposed issues, it is my finding that the issues listed in Attachment A will allow each party to argue their respective positions. As previously decided by the Commission, prospective jurisdiction should be addressed and examined during the hearing process.

The scope of this proceeding will be based upon these issues as well as other issues raised by the parties up to and during the Prehearing Conference, unless modified by the Commission.

**IV. Prefiled Testimony and Exhibits**

Each party shall file, in writing, all testimony and exhibits that it intends to sponsor, pursuant to the schedule set forth in Section IX of this Order. An original and 15 copies of all testimony and exhibits shall be filed with the Office of Commission Clerk, by 5:00 p.m. on the date due. A copy of all prefiled testimony and exhibits shall be served by regular mail, overnight mail, or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double-spaced, with 25 numbered lines, on consecutively numbered pages, with left margins of at least 1.25 inches. All pages shall be filed on three-holed paper, unbound, and without tabs.

Each exhibit sponsored by a witness in support of his or her prefiled testimony shall be:

- (1) Attached to that witness' testimony when filed;
- (2) On three-holed paper, unbound, and without tabs;
- (3) Sequentially numbered beginning with 1 (any exhibits attached to subsequently filed testimony of the same witness shall continue the sequential numbering system);

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<sup>4</sup> Parties filed statements regarding the disputed issues.

- (4) Identified in the upper right-hand corner of each page by the docket number, a brief title, and the witness' initials followed by the exhibit's number; and
- (5) Paginated by showing in the upper right-hand corner of each page the page number followed by the total number of pages in the exhibit.

An example of the information to appear in the upper right-hand corner of the exhibit is as follows:

Docket No. 012345-EI  
Foreign Coal Shipments to Port of Tampa  
Exhibit BLW-1, Page 1 of 2

After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing.

**V. Discovery Procedures**

A. General Requirements

Discovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 364, F.S., Rules 25-22, 25-40, and 28-106, F.A.C., and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.

Unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Discovery shall be completed by October 1, 2012.
- (2) Discovery requests shall be served by e-mail, hand delivery, or overnight mail. If a request is served electronically, a hard copy of the request shall be served by hand-delivery, U.S. Mail, or overnight mail on the day that the request is served electronically.
- (3) Sets of interrogatories, requests for admissions, requests for production of documents, or other forms of discovery shall be numbered sequentially in order to facilitate their identification.
- (4) Within each set, discovery requests shall be numbered sequentially, and any discovery requests in subsequent sets shall continue the sequential numbering system.
- (5) Discovery responses shall be served within 30 calendar days (inclusive of mailing) of receipt of the discovery request. If responses are served electronically, a hard copy of the responses shall be served by hand-delivery, U.S. Mail, or overnight mail on the day that responses are served electronically.
- (6) Each page of every document produced pursuant to requests for production of documents shall be identified individually through the use of a Bates Stamp or other equivalent method of sequential identification. Parties should number their produced documents in an unbroken sequence through the final hearing.

- (7) Copies of discovery requests and responses shall be served on parties other than the party from whom discovery is sought to the extent required by the applicable provisions of the Florida Rules of Civil Procedure. In addition, copies of all responses to requests for production of documents shall be provided to the Commission staff at its Tallahassee office unless otherwise agreed.

Unless subsequently modified by the Prehearing Officer, the following shall apply for each party:

- (1) Interrogatories, including all subparts, shall be limited to 400.
- (2) Requests for production of documents, including all subparts, shall be limited to 200.
- (3) Requests for admissions, including all subparts, shall be limited to 75.

When a discovery request is served and the respondent intends to seek clarification of any portion of the discovery request, the respondent shall request such clarification within 5 days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

B. Confidential Information Provided Pursuant to Discovery

Any information provided to the Commission staff pursuant to a discovery request by the staff or any other person and for which proprietary confidential business information status is requested pursuant to Section 364.183, F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183(4), F.S. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

When a person provides information that it maintains as proprietary confidential business information to the Office of Public Counsel pursuant to a discovery request by the Office of Public Counsel or any other party, that party may request a temporary protective order pursuant to Rule 25-22.006(6)(c), F.A.C., exempting the information from Section 119.07(1), F.S.

When a party other than the Commission staff or Office of Public Counsel requests information through discovery that the respondent maintains as proprietary confidential business information, or when such a party would otherwise be entitled to copies of such information requested by other parties through discovery (e.g., interrogatory responses), that party and respondent shall endeavor in good faith to reach agreement that will allow for the exchange of such information on reasonable terms, as set forth in Rule 25-22.006(7)(b), F.A.C.

**VI. Prehearing Procedures**

A. Prehearing Statements

All parties in this docket and the Commission staff shall file a prehearing statement pursuant to the schedule set forth in Section IX of this Order. The original and seven copies of each prehearing statement shall be filed with the Office of Commission Clerk by 5:00 p.m. on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission.

Each party's prehearing statement shall set forth the following information in the sequence listed below:

- (1) The name of all known witnesses whose testimony has been prefiled or who may be called by the party, along with subject matter of each such witness' testimony;
- (2) A description of all prefiled exhibits and other exhibits that may be used by the party in presenting its direct case (including individual components of a composite exhibit) and the witness sponsoring each;
- (3) A statement of the party's basic position in the proceeding;
- (4) A statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party's position on each issue, and, where applicable, the names of the party's witness(es) who will address each issue. Parties who wish to maintain "no position at this time" on any particular issue or issues should refer to the requirements of subsection C, below;
- (5) A statement of issues to which the parties have stipulated;
- (6) A statement of all pending motions or other matters the party seeks action upon;
- (7) A statement identifying the party's pending requests or claims for confidentiality;
- (8) Any objections to a witness' qualifications as an expert. Failure to identify such objection will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing; and
- (9) A statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position on each such issue.

B. Attendance at Prehearing Conference

Pursuant to Rule 28-106.209, F.A.C., a prehearing conference will be held on October 3, 2012, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Unless excused by the Prehearing Officer for good cause shown, each party (or designated representative) shall personally appear at the prehearing conference. Failure of a party (or that party's representative) to appear shall constitute waiver of that party's issues and positions, and that party may be dismissed from the proceeding.

C. Waiver of Issues

Any issue not raised by a party either before or during the Prehearing Conference shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the Prehearing Conference shall demonstrate each of the following:

- (1) The party was unable to identify the issue because of the complexity of the matter.
- (2) Discovery or other prehearing procedures were not adequate to fully develop the issue.
- (3) Due diligence was exercised to obtain facts touching on the issue.
- (4) Information obtained subsequent to the Prehearing Conference was not previously available to enable the party to identify the issue.
- (5) Introduction of the issue would not be to the prejudice or surprise of any party.

Specific reference shall be made to the information received and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall take a position on each issue by the time of the Prehearing Conference or by such later time as may be permitted by the Prehearing Officer. If a party is unable through diligence and good faith efforts to take a position on a matter at issue for that party, it shall explicitly state in its Prehearing Statement why it cannot take a position. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue, and the party's position shall be shown as "no position" in the Prehearing Order. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement. Commission staff may take "no position at this time" or a similar position on any issue without having to make the showing described above.

D. Motions to Strike Prefiled Testimony and Exhibits

Motions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing no later than the Prehearing Conference. Motions to strike any portion of prefiled testimony and related portions of exhibits at hearing shall be considered untimely, absent good cause shown.

E. Demonstrative Exhibits

If a party wishes to use a demonstrative exhibit or other demonstrative tools at hearing, such materials must be identified by the time of the Prehearing Conference.

F. Official Recognition

Parties seeking official recognition of materials pursuant to Section 120.569(2)(i), F.S., shall notify all other parties and staff in writing no later than two business days prior to the first scheduled hearing date. Such notification shall identify all materials for which the party seeks official recognition, and to the extent such materials may not be readily available to all parties, such materials shall be provided along with the notification.

**VII. Hearing Procedures**

A. Attendance at Hearing

Unless excused by the Presiding Officer for good cause shown, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date of the following:

- (1) All parties agree that the witness will not be needed for cross examination.
- (2) All Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness' testimony.

B. Cross-Examination

The parties shall avoid duplicative or repetitious cross-examination. Further, friendly cross-examination will not be allowed. Cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Any party conducting what appears



to be a friendly cross-examination of a witness should be prepared to indicate why that witness's direct testimony is adverse to its interests.

C. Use of Confidential Information at Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such information is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidentiality filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

**VIII. Post-Hearing Procedures**

If the Commission (or assigned panel) does not render a bench decision at the hearing, it may allow each party to file a post-hearing statement of issues and positions pursuant to the schedule set forth in Section IX this Order. In such event, a summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 50 words. If a post-hearing statement is required and a party fails to file in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time, unless modified by the Presiding Officer.

**IX. Controlling Dates**

The following dates have been established to govern the key activities of this case:

- |  |                     |
|--|---------------------|
| (1) Direct testimony and exhibits (all) <sup>5</sup> | June 14, 2012       |
| (2) Rebuttal testimony and exhibits (all)            | August 9, 2012      |
| (3) Prehearing Statements                            | September 14, 2012  |
| (4) Discovery deadline                               | October 1, 2012     |
| (5) Prehearing Conference                            | October 3, 2012     |
| (6) Hearing  | October 22-24, 2012 |
| (7) Briefs   | December 10, 2012   |

In addition, all parties should be on notice that the Prehearing Officer may exercise the discretion to schedule additional prehearing conferences or meetings of the parties as deemed appropriate. Such meetings will be properly noticed to afford the parties an opportunity to attend.

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<sup>5</sup> On November 8, 2011, Qwest filed a Motion for Surrebuttal. In its November 14, 2011, response, the Joint CLECs offered an alternative choice, that all parties file direct and rebuttal testimony. This alternative choice effectively offers all parties the ability to address through rebuttal any issues raised in direct testimony. I find that this procedure will result in a more efficient hearing process.

Based upon the foregoing, it is

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 2nd day of February, 2012.



LISA POLAK EDGAR  
Commissioner and Prehearing Officer  
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TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of

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Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Tentative List of Issues

1) For conduct occurring prior to July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

- (a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), Florida Statutes (F.S.) (2010);
- (b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);
- (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010)?

2) For conduct occurring on or after July 1, 2011, does the Florida Public Service Commission retain jurisdiction over:

- (a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10(1), F.S. (2010);
- (b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010);
- (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010)?

3) Which party has (a) the burden to establish the Commission's subject matter jurisdiction, if any, over Qwest's First, Second, and Third Claims for Relief, as pled in Qwest's Amended Complaint, and (b) the burden to establish the factual and legal basis for each of these three claims?

4) Does Qwest have standing to bring a complaint based on the claims made and remedies sought in (a) Qwest's First Claim for Relief; (b) Qwest's Second Claim for Relief; (c) Qwest's Third Claim for relief?

5) Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

6) Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

7) Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

8) Are Qwest's claims barred or limited, in whole or in part, by:

- a) the statute of limitations;
- b) Ch. 2011-36, Laws of Florida;

- c) terms of a CLEC's price list;
- d) waiver, laches, or estoppel;
- e) the filed rate doctrine;
- f) the prohibition against retroactive ratemaking;
- g) the intent, pricing, terms or circumstances of any separate service agreements between Qwest and any CLEC;
- h) any other affirmative defenses pled or any other reasons?

9 a) If the Commission finds in favor of Qwest on (a) Qwest's First Claim for Relief alleging violation of 364.08(1) and 364.10 (1), F.S. (2010); (b) Qwest's Second Claim for Relief alleging violation of 364.04(1) and (2), F.S. (2010); and/or (c) Qwest's Third Claim for Relief alleging violation of 364.04(1) and (2) F.S. (2010), what remedies, if any, does the Commission have the authority to award Qwest?

9 b) If the Commission finds a violation or violations of law as alleged by Qwest and has authority to award remedies to Qwest per the preceding issue, for each claim:

- (i) If applicable, how should the amount of any relief be calculated and when and how should it be paid?
- (ii) Should the Commission award any other remedies?