BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Qwest Communications Company, LLC (U5335C) Complainant, v. TW Telecom of California, L.P. (U5358C), Cox California Telecom II, LLC (U5684C), Access One, Inc. (U6104C), Arrival Communications, Inc. (U5248C), Blue Casa Communications, Inc. (U6764C), BullsEye Telecom, Inc. (U6695C), Ernest Communications, Inc. (U6077C), Mpower Communications Corp. (U5859C), Navigator Telecommunications, LLC (U6167C), nii Communications, Ltd. (U6453C), Pacific Centrex Services, Inc. (U5998C), Telekenex, Inc. (U6647C), Telscape Communications, Inc. (U6589C), U.S. TelePacific Corp. (U5271C), and Utility Telephone, Inc. (U5807C) Defendants.	Case 08-08-006 (Filed August 1, 2008)

BRIEF OF ACCESS ONE, INC. (U6104C) AND BULLSEYE TELECOM, INC. (U6695C) ON CALCULATION OF REFUNDS

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Pursuant to the April 8, 2022 Ruling issued by Administrative Law Judge Miles, Defendants Access One, Inc. (U-6104-C) ("Access One") and BullsEye Telecom, Inc. (U-6695-C) ("BullsEye") (collectively, the "Competitive Carriers") respectfully submit this brief on the calculation of refunds. The refund proposal submitted by Qwest Communications Company, LLC ("QCC") on June 20, 2019 ("QCC Claim") is inappropriate and overstated for four distinct reasons:

(1) The QCC Claim ignores and thus fails to account for the California two-year statute of limitations that applies to refunds for rate discrimination.

(2) The doctrine of laches similarly requires—and reinforces the statutory mandate—that refunds be restricted to a two-year limitations period.

(3) The data used by QCC—which admittedly is based on "proxies" rather than actual billing data—is inaccurate, causing the QCC Claim to be overstated.

(4) The Commission should decline to award interest on refund amounts awarded.

The Commission should therefore limit and reduce the QCC Claim based on each of these grounds.

I. THE QCC CLAIM AMOUNTS ARE TIME BARRED, IN SIGNIFICANT PART, BY CALIFORNIA'S STATUTE OF LIMITATIONS

A. QCC's Refund Claim Is Subject to a Two-Year Statute of Limitations

The QCC Claim asks the Commission to award an amount under the assumption "the CLEC … provided QCC non-discriminatory rate treatment."[1] QCC thus calculates refunds based on the claimed difference between: (a) the Competitive Carriers' tariffed-based rates charges and (b) the rates found in the Competitive Carriers' respective contracts with AT&T, during the time

[1] QCC Claim, at 3. QCC's Amended Complaint likewise states that it seeks refunds for "unjust and unreasonable discrimination in connection with the provision of intrastate switched access services." Amended Complaint, at 1 (filed Apr. 15, 2009).

period when the two were at variance.[2]

The refunds sought by QCC are therefore plainly for rate discrimination under Cal. Pub. Util. Code § 453(a), which prohibits unreasonable differences in rates to similarly situated customers.[3] While the Commission has now also found a violation of Cal. Pub. Util. Code § 532, that statutory provision prohibits a public utility from charging unfiled rates. And since QCC was in fact charged a filed rate—and not charged an unfiled rate—the refund amounts asserted by QCC do not arise under § 532. That is, the ostensible Section 532 violation is irrelevant to and distinct from the refund methodology proposed by the QCC Claim, as the claimed difference in rates charged to QCC and AT&T exists regardless of whether the contracts were filed or unfiled.[4]

Refunds for rate discrimination under Section 453(a) are limited by statute to a two-year period from the accrual date. Cal. Pub. Util. Code § 735 states that such claims "shall…be filed with the commission…within two years from the time the cause of action accrues, and not after."[5] Accordingly, QCC's refund claim is subject to a two-year limitations period.

The application of the two-year limitations period here is thus a straightforward exercise. QCC's Complaint in this action was brought on August 1, 2008. All claims that accrued more than two-years prior to August 1, 2008—*i.e.*, prior to August 1, 2006—are time barred. The QCC Claim, however, inappropriately includes refund claims dating all the way back to June 2004 for

[2] QCC Claim, at 3 (stating that QCC seeks "a refund of the amount it overpaid each Defendant for intrastate switched access relative to the amount it would have paid had the CLEC abided by California law and provided QCC non-discriminatory rate treatment").

[3] Cal. Pub. Util. Code § 453(a).

[4] Moreover, given that QCC sued AT&T for receiving unfiled rates and settled with AT&T prior to filing the Complaint here, QCC apparently already received a remedy for the purported Section 532 violations.

[5] The Competitive Carriers note that an analogous 3-year limitations period applies under Section 736 to claims for overcharges arising under Section 532. The refunds sought by QCC do not arise under Section 532, as explained above. But even if the Commission were to determine otherwise, a 3-year limitations period would still apply to the QCC refund claim.

Access One and November 2004 for BullsEye.[6] The Commission should therefore find that all principal and interest claims by QCC for the months of July 2006 and prior are prohibited by California law.

B. There Is No Legal or Factual Basis for Tolling the Limitations Period

In recognition of California's statute of limitations, QCC argues for an expansion of the refund period under a theory of discovery tolling. Commission precedent, however, establishes that "there is no provision…[in Section 735] which tolls the two-year time period until the illegal activities are uncovered."[7]

Indeed, the limitations periods imposed under the Cal. Pub. Util. Code not only fix the time period for instituting an action, but also limit the claimant's underlying rights to that same two-year period. As the Commission has explained, "in public utility law the running of a statute of limitations is more than a defense, it extinguishes the underlying right of action."[8] This conclusion derives from the Legislature's inclusion of the phrase "and not after" in the statute.[9]

The California Legislature drew the "and not after" clause from a federal statute that had been construed to extinguish rights and not merely to bar enforcement.[10] By including that language, the Legislature confirmed that the time bar imposed under Section 735 (and similar sections) should have the same effect: "remov[ing] all doubt that [they] should extinguish the

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[6] *See* QCC Claim, Attachment 2.

[7] *Westcom v. Pacific Bell* (1994) 54 CPUC2d 244, 25; *see also Home Owners Ass'n of Lamplighter v. Lamplighter Mobile Home Park* (1999) D.99-02-001, 84 CPUC 2d 727 ("A statute of limitations is not created to preserve the rights of a complainant. It serves as protection for a defendant, whether or not an untimely claim would otherwise have legal merit. We do not conclude that a statute of limitations is tolled when one or more parties is unaware of its legal rights.").

[8] *San Francisco Eye and Ear* (1973) 75 CPUC 758, 760.

[9] *See Equilla Allen v. GTE Cal. Inc.* (1992) 43 CPUC 2d 299, 304.

[10] *Id.*; *see A.J. Phillips v. Grand Trunk Ry.* (1915) 236 U.S. 662.

[underlying] debt rather than merely the right to sue."[11] Thus, as a matter of law, there can be no tolling of the two-year period imposed by Section 735—it is fixed regardless of when QCC learned of the Competitive Carriers' agreements with AT&T.

It should be noted that while the Commission later created a narrow exception in the *San Pablo Bay Pipeline Company* case when awarding more than $100 million in refunds from an oil pipeline company, the Commission specifically noted that the case involved "a plethora of equitable issues and extraordinary factual circumstances that [the Commission] believed were so compelling as to cause [it] to invoke [its] section 701 authority to toll the statute of limitations."[12] On appeal, the Fifth District found that "in the peculiar facts of this case, which was processed in a jurisdictional phase followed by a ratemaking and reparations phase, the Commission had the authority to bifurcate the matter into two phases and to conclude the limitations period did not run during the first phase."[13] The present case clearly does not involve similar circumstances or peculiar facts. Indeed, unlike *San Pablo*, this case does not involve a claim that the statute of limitations ran during the first phase of the case; rather, here the limitations period ran against certain claim amounts *before the first phase of the case was ever initiated by the claimant*.

But even assuming *arguendo* that the limitations period *could* be tolled in this case, there is no factual basis for doing so. As the party seeking relief, QCC has both the burden of pleading and the burden of proof with respect to discovery tolling.[14] Where discovery tolling is available,

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[11] *Id.*

[12] *Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline* (2014) D.14-06-052, 2014 WL 3368700, at *9-10

[13] *San Pablo Bay Pipeline Co., LLC v. Pub. Utils. Comm'n* (2015), 243 Cal.App.4th 295, 299

[14] *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1536; *Colonial Ins. Co. v. Indus. Acc. Comm'n* (1945) 27 Cal.2d 437, 440-41; *Permanente Med. Grp. v. Workers' Comp. Appeals Bd.* (1985) 171 Cal.App.3d 1171, 1183-84; *New Amsterdam Cas. Co. v. Indus. Acc. Comm'n of State of Cal.* (1924) 66 Cal. App. 86, 89-90.

the accrual of a cause of action is postponed until the plaintiff either discovers his or her injury (*i.e*. actual notice) or could have discovered the injury through a reasonable investigation (*i.e*. inquiry notice).[15] Claimants are "charged with presumptive knowledge of an injury if they have information of circumstances to put them on inquiry or if they have the opportunity to obtain knowledge from sources open to their investigation."[16] A plaintiff must act upon having *any reason* to suspect that any injury may have incurred.[17] In applying this standard, the California Supreme Court has explained that:

> [A plaintiff] has reason to discover the cause of action when [it] has reason at least to suspect a factual basis for its elements. [It] has reason to suspect when [it] has notice or information of circumstances to put a reasonable person on inquiry; [it] need not know the specific facts necessary to establish the cause of action; rather, [it] may seek to learn such facts through the process contemplated by pretrial discovery.[18]

The QCC Claim is silent concerning the applicable statutes of limitations, or any argument for tolling such; the Commission should thus find that QCC failed to meet its burden to establish any claim or right to tolling.

Nonetheless, the record developed during the evidentiary hearing exhaustively demonstrates that QCC knew—or should have known—of the facts necessary for QCC to initiate this case within the two-year period after the Access One and BullsEye agreements became effective. A detailed timeline of these facts are presented in Attachment A.[19]

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[15] *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797.

[16] *Id.* at 807-08.

[17] *Id.* at 803.

[18] *Norgart v. Upjohn* (1999) 21 Cal.4th 383, 398; *see also id*. (stating that the discovery rule does not allow a complainant to "wait for [his rights] to find him…[H]e must go find them himself if he can and file suit if he does").

[19] The timeline provided in Attachment A was previously submitted with the Opening Post-Hearing Brief of Defendants (filed Nov. 22, 2013). Record citations for the facts set forth in Attachment A are incorporated by reference from the Opening Post-Hearing Brief of Defendants at 74-119.

In sum, below are some of the key, undisputed facts demonstrating that QCC was plainly on notice more than two years prior to the date QCC filed suit:

- BullsEye filed an intrastate access tariff in California on August 26, 2002.[20]
    - The BullsEye tariff stated under the heading "Special Contract Arrangements" that BullsEye's "services may be offered on a contract basis," the terms of which contracts "may include discounts off of rates contained herein."[21]
    - QCC admitted that it was on notice of the BullsEye tariff provisions as of August 27, 2002.[22]
- Between 2001 and 2004, ***QCC itself*** entered into many off-tariff, unfiled agreements with competitive carriers that included a 100% discount off each carrier's tariffed intrastate switched access rates – including California rates.[23]
- The Minnesota Public Utilities Commission, within Qwest Corp.'s ILEC territory, initiated a complaint proceeding in 2004. In that proceeding, on August 19, 2004, AT&T admitted that it had entered into "*hundreds of agreements*" with competitive carriers for intrastate switched access at below-tariff rates.
    - QCC became aware of that proceeding by April of 2005, and learned of AT&T's revelation that it had hundreds of agreements with competitive carriers for intrastate switched access at below-tariff rates.[24]
    - QCC's own stated basis for filing the Complaint in this proceeding, and requesting the Commission's September 22, 2008 subpoena to AT&T to obtain AT&T's agreements, was information that QCC had obtained in the Minnesota PUC proceeding *in early 2005*.[25]

Indeed, as to this last fact, QCC's California Complaint explicitly states that this action was filed based on information QCC obtained from the Minnesota PUC proceeding several years earlier:

> [T]he [Minnesota Department of Commerce] identified a total of

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[20] Hr'g Ex. 19 at 24.

[21] *Id*.; *see also* Hr'g Tr. at 33:3-34:26; 36:8-37:15 (Easton, QCC).

[22] Hr'g Tr. at 32:8-13 and 35:12-24 (Easton, QCC).

[23] *See* Hr'g Ex. 280-C.

[24] Hr'g Tr. at 563:4-18 (Hensley Eckert, QCC); Hr'g Ex. 611; QCC Complaint (filed Aug. 1, 2008), ¶ 9.

[25] *See* QCC Complaint, ¶ 9; Hr'g Ex. 639 at 005-006.

> twenty-seven (27) CLECs that had entered unfiled, off-tariff agreements with IXCs other than QCC. In public comments, IXC AT&T clarified that many more CLECs engaged in this practice. As AT&T explained, "[i]n the past four years or so, AT&T has entered into ***hundreds*** of agreements based on the same form with CLEC providers of switched access services ***throughout the United States***."[26]

This information was made public by AT&T in comments dated August 19, 2004—nearly four years before QCC initiated this case.

Thus, there can be no dispute that QCC had reason to discover its claims against BullsEye and Access One in early 2005, because QCC *did in fact* bring its claims in this case using the information QCC possessed at that time. The fact that QCC may not have had copies of all of AT&T's agreements in hand is irrelevant, as the applicable legal standard required QCC to obtain those agreements through pretrial discovery[27]—as QCC ultimately did by requesting the Commission to issue a subpoena to AT&T.

Notably, despite possessing the information QCC needed to initiate this case within the limitations period, QCC delayed initiating litigation against the Competitive Carriers—choosing instead to sue AT&T. On January 29, 2007, QCC filed suit against AT&T, alleging that AT&T had unlawfully forced the CLECs to enter unfiled contracts by withholding payment of tariffed charges.[28] Only after QCC settled its claims with AT&T did QCC pursue claims against the Competitive Carriers.[29] Thus, QCC's delay in bringing this case was not due to any inability to discover facts; rather, QCC's delay was caused by its own litigation strategy.

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[26] QCC Complaint, ¶ 9, *citing* AT&T Comments dated Aug. 19, 2004 (emphasis added by QCC).

[27] *See Norgart*, *supra*, at 398.

[28] *See* Hr'g Ex. 15 (Miller Direct) at 63-106 (QCC civil complaint against AT&T).

[29] See Hr'g Ex. 15 (Miller Direct) at 9:3-5; Hr'g Ex. 18 (LaRose Direct) at 10:15-17. Indeed, it would be entirely appropriate for the Commission offset and reduce any award here by the amount QCC already received as compensation from AT&T for the alleged rate discrimination (which was caused by AT&T's actions in forcing the agreements upon Access One, BullsEye and others).

In fact, QCC personnel and witnesses who pursued this case had *personal knowledge* of the AT&T agreements by early 2005.[30] These same QCC people were also involved in the 2007 lawsuit against AT&T *and* interfaced with the QCC staff responsible for QCC's own off-tariff access charge agreements with competitive carriers.[31] QCC attorney and key witness Lisa Hensley Eckert, for example, was involved in filing the claim against AT&T in early 2007.[32]

In sum, not only is tolling of the limitations period imposed by Section 735 impermissible, but there is also no factual basis to for any tolling even if it were allowed. QCC had (at the very least) constructive knowledge that AT&T had many nationwide, off-tariff agreements with CLECs by early 2005—more than 3 years prior to the date QCC initiated this proceeding. QCC sat on its rights for two years and then delayed bringing this action for over one more year when QCC chose to sue AT&T instead. QCC could have brought (and ultimately did bring) this action based on information QCC possessed in early 2005. Accordingly, there is zero basis to toll the limitations period beyond the two-years imposed by statute.

II. THE DOCTRINE OF LACHES LIKEWISE BARS ANY REFUNDS BEYOND THE TWO-YEAR STATUTORY PERIOD AND WHERE THERE EXISTS NO UNDERLYING BILLING DATA TO DETERMINE REFUNDS

"Laches in legal significance is such delay in the enforcement of a right as works a disadvantage to another."[33] The Commission has long held that "[t]he doctrine of 'laches' is based upon grounds of public policy, which for the peace of society requires discouragement of stale demands…. Laches is not merely an affirmative defense but a fundamental defect in the cause of

[30] *See, e.g.,* Hr'g Tr. at 562:26-563:18.

[31] The doctrine of unclean hands also comes into play here, as QCC itself entered into the same type of preferential rate agreements with carriers that QCC alleges to be unlawful.

[32] Hr'g Ex. 612; Hr'g Tr. 493:10- 492:6, 508:4-11; 567:27-568:3; 573:13-574:2 (Hensley Eckert, QCC).

[33] *Re City of Vallejo* (1985) 17 CPUC 2d 307, 317.

action."[34] Similarly, Cal. Civil Code § 3527 states that "[t]he law helps the vigilant, before those who sleep on their rights." Thus, where a complainant unreasonably sits on its rights and delays initiating a case and, as a result of the delay, the defendants are prejudiced, the complainant's claims should be barred or limited.

Here, the doctrine of laches reinforces the need to apply a firm two-year limitations period to QCC's refund claim with no allowance for tolling, because Competitive Carriers have been prejudiced due to QCC's intentional delay in initiating this case. For example, QCC's Claim as it relates to the Competitive Carriers is not based on actual billing information, as QCC failed retain over the intervening years the billing information needed to determine the actual amounts billed for intrastate switched access services in California. Instead, QCC relies on "proxies"—*i.e.*, assumptions not based on direct evidence—to estimate large portions of the minutes of use it now claims were billed by the Competitive Carriers.

Indeed, QCC witness Canfield testified that QCC did not have underlying billing detail for 62 percent of the minutes and dollars used in QCC's refund analysis for Access One.[35] Likewise, QCC did not have underlying billing detail for 49 percent of the minutes and dollars used in QCC's refund analysis for BullsEye.[36] Thus, there is no underlying billing data in the record to support QCC's claim that it was even overbilled for many of the months at issue. Nor is there any independent evidence that would allow the Commission or the Competitive Carriers to determine whether the proxies used by QCC are based on any statistically-sound methodology.

As discussed further in Section III below, the months when QCC lacked underlying billing

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[34] *Id.*; *California Alliance for Utility Safety and Education v. San Diego Gas & Electric Company* (1997) 78 CPUC 2d 218, 220 (quoting *In re Alternative Regulatory Frameworks* (1994) 55 CPUC 2d 681, 687).

[35] Hr'g Ex. 12-C (Canfield Direct) at 12:13.

[36] *Id*. at 20:16-17.

detail comprise nearly all of the months during the first three years of QCC's refund claims, such that the absence of evidence is directly tied to QCC's delay in instituting the case. Had QCC timely acted in early 2005—which is when QCC admits knowing that AT&T had entered into hundreds of nationwide contracts—the Commission and the parties would not be faced with having to guess at billing and refund amounts using unsupported assumptions. In this respect, the doctrine of laches supports the same principle as the statute of limitations. As the Commission has stated:

> Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[37]

Since QCC's delay in instituting this case resulted in the unavailability of data necessary for QCC to calculate its claimed refunds, the Commission should find that (a) the doctrine of laches reinforces the need to impose a two-year limitations period and (b) QCC should be prohibited from seeking refunds for time periods where it does not have the underlying billing detail necessary to calculate any refunds under its proposed methodology.[38]

III. QCC'S USE OF ESTIMATES AND ASSUMPTIONS IN PLACE OF ACTUAL BILLING DATA CAUSES ITS REFUND CLAIM TO BE UNRELIABLE AND OVERSTATED

Significant portions of the QCC Claims relative to the Competitive Carriers are based on what QCC refers to as "proxies"—*i.e.*, assumptions not based on direct evidence—to create a refund calculation where QCC did not preserve the underlying billing data. That is, QCC does not know how much or for how many minutes of use it was billed by the Competitive Carriers for

[37] *In re Pacific Gas and Elec. Co.* (2007) D.07-09-041, 261 P.U.R.4th 69 (quotations and citations omitted).

[38] *See infra* Section III (identifying the months where QCC did not have underlying billing data).

intrastate switched access services in approximately 50-60% of the months at issue, and thus resorts to using assumptions to come up with an "estimate" of the amount it *may* have been billed.

In relying on these so-called "proxies," QCC fails to meet its burden of proof. In particular, where QCC relies on aggregated, summary invoices to determine a Competitive Carrier's volume of intrastate access traffic—which for Access One is 62% and for BullsEye is 49% of QCC's refund claim amounts—QCC admits that it does not have access to the actual billing detail underlying those invoices. In these instances, QCC has only the initial page of an access invoice, which provides an aggregate of *all switched access services* (intrastate, interstate, and international) for which the carrier billed QCC during a given month. Then, without relying on any supporting data or studies, QCC assumes that the percentage of billed dollars for a given defendant was constant over all the years for which QCC seeks refunds and manufactures a California intrastate percentage and claim amount.

Even a cursory review of QCC's month-to-month calculations demonstrates the clear flaws in this methodology. For example, QCC's refund claims against Access One rely on proxies for (a) all months from June 2004 to September 2005, (b) February 2006, and (c) all months from May 2006 to March 2007. This huge span of months includes nearly every month in which the claimed refund is significant, as for nearly every month after March 2007 the claimed refund is less than $1,000—and often less than $100. Thus, QCC's "proxy" for the California intrastate traffic percentage is based largely on months where the amount billed for California intrastate service was less than $100, yet QCC applies the ratios from those incongruous months to many months where the face page of the invoice indicates total billings of $10,000 or more.

Similarly, QCC's refund claims against BullsEye rely on proxies for (a) all months from November 2004 to July 2005, (b) September 2005, (c) all months from December 2005 to December 2006, and (d) all months from February 2007 to June 2007. Critically, these months

encompass nearly every month during the first three years of QCC's claim. As such, QCC's "proxy" for the California intrastate traffic percentage is based almost entirely on traffic patterns observed in July 2007 and thereafter. This process results in bizarre aberrations among the month-to-month refund claim amounts, , including one month (February 2007) where the "proxy" claim of over $15,000 is inexplicably more than three times the claim amounts for the surrounding months.

Manufacturing proxies from months where (a) traffic volumes either reflect an insignificant sample size or (b) traffic patterns are not presumptively similar due to changes in trends renders QCC's methodology statistically-flawed. Moreover, the intrastate traffic percentage proxies that QCC applies are far different from the industry data reported by the Federal Communications Commission. In fact, FCC data shows that industry-wide intrastate toll revenues were approximately *36-40%* of total revenues during the 2004-2008 timeframe.[39] QCC's proxies, however, incongruously assume that *76%* of Access One's total billings[40] and *82%* of BullsEye's total billings[41] relate to California intrastate traffic—nearly double the amount measured by the FCC.

As the claimant, QCC has the burden of proof to establish the amount of any refunds claimed to be owed. QCC failed to produce evidence to support huge portions of its refund claims. QCC's attempt to rely on statistically-flawed, unreliable proxies to fill in those evidentiary gaps plainly fails, and QCC fails to meet its burden of proof as a result.[42] The Commission must

[39] *Trends in Telephone Service, September 2010*, at page 9-7, Table 9.2, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau *available at* https://www.fcc.gov/general/trends-telephone-service (last visited Apr. 27, 2022).

[40] Hr'g Ex. 12-C (Canfield Direct) at 14:13-20.

[41] Id. at 21:6-12.

[42] Notably, this lack of evidence is a direct result of QCC's own delay instituting this case, as the months for which billing data is not available largely correlate to the earliest time periods at issue. This further

therefore deny QCC's refund claims in all months where QCC attempts to use these faulty proxies.[43]

IV. NO INTEREST SHOULD BE AWARDED

Cal. Pub. Util. Code § 734 provides only that the Commission "*may* order that the public utility make due reparation to the complainant …, with interest from the date of collection if no discrimination will result from that reparation."[44] As such, an award of interest is optional and subject to the Commission's discretion. The Commission should decline that option here, consistent with both precedent and the specific facts of this case.

First, the Commission has in similar cases declined to award interest in disputes between carriers. In both D.06-06-005 and D.08-12-002, the Commission declined to award interest in carrier-to-carrier disputes that spanned many years and involved complex regulatory issues. As with those cases, there are no individual consumers involved here. Thus, in light of the complexity and volume of the regulatory issues, the Commission should not award interest.

Second, the long history of this case—which includes multiple dismissals and grants of rehearing—evidences the complex nature and uncertainty of the issues involved. Indeed, the Commission reversed itself at least three times in this proceeding, demonstrating at the very least that applicable law was not clearly defined. In 2010, the Commission dismissed QCC's complaint

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supports appropriate application of the statute of limitations and the doctrine of laches to QCC's refund claims.

[43] The excludable claim amounts attributable to QCC's evidentiary and burden of proof failures are those "manual bill" total amounts set forth in QCC's refund calculations. Hr'g Ex. 12-C (Canfield Direct) at Exhibit DAC-2 and DAC-8 (showing the amount of the refunds claimed from Access One and BullsEye calculated based on proxies rather than actual billing detail). In the event the Commission decides to use some proxy for the months where intrastate billings are unknown, though it should not as these portions of the QCC claim should be denied outright, the intrastate revenue percentage data reported by the FCC should be used in place of the plainly unreliable QCC proxies.

[44] Cal. Pub. Util. Code § 734 (emphasis added).

in full, finding that QCC had failed to even state a claim upon which relief could be granted.[45] In 2011, the Commission reversed itself and issued the 2011 Rehearing Decision, in which it gave precise guidance on what QCC would need to prove.[46] Following that guidance, an evidentiary hearing was conducted and subsequently, in 2016, the Commission again decided in favor of the Competitive Carriers, holding that QCC had failed to prove any violation of Section 489 or 532.[47] More than three years later, the Commission reversed itself again, granting rehearing in D.19-05-023, which completely reversed all material legal conclusions the Commission had reached in 2016 as well the express guidance the Commission gave in 2011 with respect to the legal standards applicable at hearing.[48] It would be inequitable to impose interest on the Competitive Carriers given the complexity and unpredictability of this case.

Third, given the length of this case—including in particular the significant time the Commission took to issue the 2019 Rehearing Decision—as well as QCC's delay in instituting this case, it would be unfair and inequitable to require the Competitive Carriers to pay interest on refunds. The Commission is required to resolve adjudicatory proceedings such as this one within twelve months of the given filing date.[49] This case, however, has spanned nearly 14 years to date, and the claimed refunds date back to time periods almost 20 years ago. It would be patently unfair to require the Competitive Carriers to pay nearly 20 years' worth of interest in light of the protracted procedural history of this case, especially given that all but the last three years of this case resulted in decisions fully in favor of the Competitive Carriers. The Commission should

[45] D.10-07-030.

[46] D.11-07-058.

[47] D.16-02-020.

[48] D.19-05-023; see also D.20-07-035 (modifying the 2019 Rehearing Decision).

[49] Cal. Pub. Util. Code § 1701.2(i).

therefore decline to award interest to QCC.

V. CONCLUSION

WHEREFORE, the Commission should reject the QCC Claim for each of the reasons discussed above and limit and reduce any refund award as follows:

- Apply the two-year limitations period imposed by statute, as reinforced by the doctrine of laches, and subtract from the QCC Claim all amounts claimed by QCC for the months of July 2006 and prior given that those months fall outside the California statute of limitations period.
- Eliminate and deduct those amounts claimed by QCC for which no actual California intrastate bill data exists, as to which QCC asserted unreliable "proxies" that fail entirely to satisfy QCC's burden of proof as claimant; this reduction, as discussed in detail above, equates to a:
  - 62% reduction in the QCC Claim against Access One, and
  - 49% reduction in the QCC Claim relative to BullsEye.
- Consider offsetting and reducing the QCC Claim by the amount QCC already received as compensation from AT&T for the alleged rate discrimination, to prevent double-recovery.
- Award zero interest to QCC.

Dated: May 6, 2022

Respectfully submitted,

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ATTACHMENT A

STATUTE OF LIMITATIONS/LACHES TIMELINE

Date	Event
10/23/98	The existence of negotiations between CLECs and AT&T is revealed in a high-profile AT&T petition filed with the FCC. AT&T states that it has negotiated with "a number of CLECs, seeking reductions in those carriers' access rates."
12/7/98	U S WEST (QCC's future ILEC affiliate) files comments in the FCC docket initiated by AT&T's petition.
5/1999-10/2001	The existence of switched access negotiations and settlements between CLECs and IXCs is disclosed in FCC complaint proceedings and civil litigation: • *FCC litigation between Mpower and AT&T*: ➢ **7/6/99** – In an Order rejecting AT&T's claims that Mpower is not entitled to collect tariffed switched access charges because AT&T allegedly did not order switched access service, the FCC's Common Carrier Bureau repeatedly refers to negotiations between Mpower and AT&T. ➢ **2/17/00** - Mpower issues press release stating that its litigation with AT&T had been "resolved to the mutual satisfaction of both Mpower and AT&T." • *FCC litigation between Mpower and Sprint*: ➢ **5/11/00, 8/18/00 –** Sprint Complaints claim Mpower had agreements AT&T and MCI under which Mpower provided switched access service at below-tariff rates. ➢ **5/15/00** – *Communications Daily*, an industry publication to which QCC and its affiliates subscribed and used on a daily basis, publishes an article entitled "Sprint Accuses CLEC of Charging Variable Rates to IXCs," which states that "Sprint believes AT&T and MCI are paying rates to [Mpower] substantially below tariffed rates. ➢ **6/13/00** – *Communications Daily* article refers to Sprint's claim that Mpower was "offering lower access rates to other companies" ➢ **10/13/00 –** FCC Enforcement Bureau issues order describing Sprint's allegations as follows: "(1) [Mpower] is providing Sprint, pursuant to the same switched access services that [Mpower] is providing to other interexchange carriers (IXCs) pursuant to contract; (2) that the tariffed access rates are substantially higher than the contract rates; (3) that there is no justification for the price disparity." ➢ **11/28/00 –** FCC announces that the parties have reached settlement. • *FCC litigation between TelePacific and AT&T*: ➢ **6/6/00 –** TelePacific files complaint, which contains attachments showing that TelePacific and AT&T had been engaged in the negotiation of an agreement for both interstate and intrastate switched access service. ➢ **5/4/01 –** FCC announces that the parties have reached a settlement.

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5/1999-10/2001 (cont.)	• *Civil litigation between Mpower and Global Crossing*: ➢ **7/11/00 –** Global Crossing files defense to Mpower collection action, claiming that Mpower had switched access agreements with other IXCs. • *Civil and FCC litigation between AT&T, Sprint and several CLECs*: ➢ **4/20/00** – *TR Daily*, an industry publication to which QCC and its affiliates subscribed and used on a daily basis, publishes an article about civil court litigation filed by various CLECs against AT&T and Sprint. The article notes that the civil court litigation is related to Mpower's litigation before the FCC, in which the existence of Mpower's agreements were disclosed. ➢ **1/19/01** – Under a primary jurisdiction referral from federal court, AT&T petition at FCC states that AT&T has "engaged in negotiation with scores of CLECs with a view to entering into arrangements for access services at competitive prices or reduction in CLEC's tariff rates." ➢ **2/20/01** – QCC attorneys McKenna and Devine file comments on AT&T and Sprint petitions, confirming that they have read the petitions. ➢ **6/6/01** – CLEC Allegiance files AT&T's template agreement, which covers both interstate and intrastate switched access rates. ➢ **10/22/01** – FCC states that all parties in the federal action have settled.
8/27/99	FCC initiates major rulemaking proceeding to investigate, among other things, the "reasonableness of CLEC access rates" (hereinafter, "FCC Access Reform docket"), in which U S West actively participated.
6/14/00	AT&T files comments in the FCC's Access Reform docket, which state that AT&T was "currently purchasing access service from numerous CLECs on mutually agreeable terms." AT&T's comments also discuss Mpower's above-mentioned litigation with AT&T and Sprint at the FCC.
7/12/00	Sprint files comments in FCC Access Reform docket, stating that Mpower has "publicly admitted that it has contractual arrangements with the two largest IXCs."
11/8/00	AT&T files comments in the FCC's Access Reform docket, stating that AT&T had "signed agreements with about 28 CLECs for switched access services." AT&T's comments claim that CLEC interstate *and* intrastate rates are excessive.
11/14/00	Mpower SEC filings disclose that "[a]s of September 30, 2000, we were successful in bringing over 70% of our switched access revenue and traffic under contract."
1/26/01	Sprint files comments in the FCC's Access Reform docket state that Sprint had "succeeded in reaching formal agreements with a number of CLECs in the last year."
3/12/01	QCC signs first of many "CPLA" agreements with CLECs, all of which provide QCC with a rate of $0.00 for California intrastate switched access service. None of these QCC/CLEC access charge agreements are filed with the CPUC.
4/3/01	AT&T discloses in FCC Access Reform docket that it has an employee responsible for "negotiating and managing agreements for AT&T's purchases" of switched access from CLECs.

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4/27/01	FCC releases *Seventh Report and Order* in the Access Reform docket, stating that its newly adopted cap on CLEC tariffed interstate access rates would have "no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs. Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide[.]" The *Seventh Report and Order* further states that "absent some contrary, negotiated agreement," tariffed rates would apply.
11/2003	QCC witness Hensley Eckert begins working on switched access issues, handling "all things switched access."
6/16/04	Minnesota PUC opens proceeding to investigate switched access agreements.
7/22/04	Minnesota PUC issues protective order allowing parties to access confidential information filed in proceeding, including the CLEC agreements with IXCs identified in that proceeding.
8/19/04	AT&T files comments in Minnesota PUC proceeding that it had entered into "hundreds of agreements…with CLEC providers of switched access services throughout the United States."
3/17/05	In litigation between QCC and TelePacific, filings show that QCC had knowledge of TelePacific's agreement with MCI for switched access service at below-tariff rates.
4/29/05	QCC's attorney Joan C. Peterson requests to be added to the service list in the Minnesota PUC proceeding investigating switched access agreements.
5/2005	QCC testimony admits that by May 2005 it knew of the existence of nationwide switched access agreements between CLECs and other IXCs, including AT&T.
8/24/05	QCC files comments in Minnesota PUC docket, in which QCC states its theory that "[i]f certain CLECs make available lower access rates to some but not all competitors, competitors such as QCC can be put at a severe competitive disadvantage."
2/27/06	QCC formally intervenes in Minnesota PUC docket investigating switched access agreements.
5/15/06	QCC, for the first time, signs onto the Minnesota PUC's protective order, allowing QCC to obtain copies of the switched access agreements filed in the proceeding.
4/2006-6/2006	QCC receives public copies of 12 switched access agreements between CLECs and IXCs. Four of those CLECs were later named as defendants in this case.
1/29/07	Rather than pursuing any claims against CLECs, QCC sues AT&T in Minnesota state court. QCC's complaint against AT&T states that AT&T "coerced" nascent CLECs to enter agreements by withholding payment of tariffed access charges. QCC's complaint alleged that AT&T had violated the law of several states, including California. QCC's complaint further states that QCC "brings this action to obtain relief for harm that cannot be remedied in any other forum," including the State Commissions.
2007	Nancy Lubamersky, a representative of TelePacific and Mpower, discloses to QCC the existence of their switched access agreements with IXCs, and expresses willingness to negotiate with QCC.
11/07	QCC settles its Minnesota state court complaint against AT&T.
8/1/08	QCC files complaint with CPUC. The complaint states that it was based on information disclosed by AT&T in April 2005 during the Minnesota PUC proceeding.

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8/7/08	QCC files a declaration with CPUC in support of a subpoena directed to AT&T in which QCC seeks discovery of agreements between CLECs and AT&T. QCC's declaration cites, as the sole factual basis for its discovery request, information from the Minnesota PUC proceeding made public in April 2005. QCC prepares and files a similar subpoena and declaration to obtain documents from Sprint, another IXC.
4/15/09	Upon receiving the discovery it requested, QCC amends its complaint to add additional defendants, including Access One and BullsEye.