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-11-0222-FOF-TP ISSUED: May 16, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING RECONSIDERATION

BY THE COMMISSION:

I. Case Background

This Order addresses the March 17, 2011, Joint Motion for Reconsideration filed by Access Point, Inc, Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, Paetec Communications, Inc., and US LEC of Florida, LLC (Movants) of Order No. PSC-11-0145-FOF-TP (Order)[1] denying the Movants' Motion to Dismiss.[2]

[1] Issued on March 2, 2011.
[2] The Movants filed a Joint Motion to Dismiss on November 16, 2010. On November 17, 2010, Windstream NuVox filed a Notice of Joinder to the Joint Motion to Dismiss.

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On December 11, 2009, Qwest Communications Company, LLC (Qwest) filed a complaint regarding rate discrimination in connection with the provision of intrastate switched access services 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; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLECs whose true names are currently unknown).

On October 22, 2010, Qwest was granted leave to file an Amended Complaint, adding additional Respondents and removing its Part D Prayer for Relief in which the company asked for a "cease and desist" order from the Respondents' actions. The additional Respondents are 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, and Windstream NuVox.

We denied the Movants' November 16, 2010, Motion to Dismiss on the basis that Qwest's petition established sufficient factual allegations, which, when taken in the light most favorable to Qwest, stated a cause of action which is not subject to dismissal. We held that we have the authority to investigate the allegations in this Complaint, to prevent anticompetitive behavior and unlawful discrimination amongst telecommunications providers pursuant to Section 364.01(g), Florida Statutes (F.S.).

On April 6, 2011, Qwest filed a Notice of Voluntary Dismissal without Prejudice of Cox Florida Telecom, L.P., releasing Cox Florida Telecom, L.P. as a party to the complaint. At the April 26, 2011, Agenda Conference, oral argument was granted for discussions regarding the Movants' Motion for Reconsideration.

We are vested with jurisdiction over these matters pursuant to the provisions of Chapters 364 and 120, F.S.

Position of the Parties

A. Movants' Joint Motion for Reconsideration

The Movants argue that the Order fails to identify any portion of Qwest's Amended Complaint in which Qwest alleges an "injury in fact which is quantifiable and actual." The Movants further argue that the Order does not provide facts to show that Qwest has lost profits as a result of the alleged misconduct.

The Movants also argue that we can "issue a decision that a carrier discriminated if the plaintiff makes a prima facie discrimination case, which includes a showing of

injury, and a court of law would then decide whether such competitive damages could be ordered."[3]

The Movants contend that we did not consider the following arguments:

- Qwest fails to state a claim for unlawful rate discrimination and fails to allege a "quantifiable and actual" injury, stating that the injury must reflect a loss in profits from the alleged discrimination.[4]
- Section 364.08, F.S., precludes us from ordering refunds, and that the filed rate doctrine protects the Movants as Qwest was charged the amount in the price lists.[5]
- Movants have not violated Section 364.04, F.S., since Qwest was charged from the price list on file, and therefore Qwest's Second Claim for Relief should have been dismissed.[6]
- Qwest lacks standing on its Second Claim for Relief.
- Qwest's alleged economic harm is not legally sufficient.[7]

The Movants request that we dismiss with prejudice Qwest's First and Second Claims for Relief and Qwest's Second Prayer for Relief.

B. Qwest's Response in Opposition

Qwest supports the Order, asserting that the Movants reargue the Motion to Dismiss and fail to establish any point of fact or law that would require the us to reconsider the Order.

Qwest contends that disagreeing with our decision does not justify the filing of a Motion for Reconsideration, nor is it a proper avenue to make new arguments to cure defects in earlier pleadings or reargue matters previously considered.[8]

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[3] Motion at 6.
[4] I.C.C. v. United States, 289 U.S. 385, (1933).
[5] Motion at pg. 6.
[6] Motion at pg. 9, stating that Section 364.04, F.S. contains no requirement that the Movants changed only the rates in their published price lists.
[7] Motion at 10, arguing that a third party, who was charged the filed rate, cannot enforce Section 364.08, F.S.
[8] Response in Opposition to Motion to Dismiss (Response), pg. 5, citing Diamond Cab Co. of Miami v. King, 146 So.2d 889,891 (Fla. 1962) and *See* In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc. and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error, Order No. PSC-04-1160-PCO-EI (Nov. 22, 2004), Docket No. 030623-EI; In re: Development of local exchange telephone company cost study methodology(ies), Order No. PSC-92-0132-FOF-TL (March 31, 1992), Docket No. 900633-TL.

Qwest argues the following:

a. This Commission is not required to address separately each decision or every element raised in its order.[9]

b. This Commission did not overlook a fact or point of law, but rather considered and rejected the Movants' arguments.

c. The Movants' Motion causes delay and is a waste of our resources.

Further, Qwest argues that the Movants' repeated arguments continue to lack merit and that the Movants failed to meet the standard of a Motion to Dismiss[10] in their initial filings. In response to the arguments raised previously, Qwest states the following:

- The Order determined that having to pay higher amounts for switched access "causes Qwest to suffer an immediate and ongoing injury in fact which is quantifiable and actual."[11]

- The Order established that we have the authority to prevent anti-competitive behavior and unlawful rate discrimination, pursuant to Chapter 364, and that it has broad discretion to take remedial actions, such as ordering refunds of overcharges."[12]

- The Movants cannot assert that Section 364.04, F.S., does not require CLECs to charge only rates that are established in the published prices lists, because doing so contravenes the basic principles of statutory construction.

- We determined that Qwest meets the Agrico[13] test, in that the discrimination suffered by failure to abide by price schedules results in immediate and ongoing injury in fact which is quantifiable and actual.[14]

Qwest requests that the Movants' Motion for Reconsideration be denied.

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[9] Response, pg. 7, Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 718 (Fla. 1983) (holding that we were not required to incorporate into its final order a separate list designating all of its conclusions of law).

[10] Motion at pg. 9, stating that "[taking] all allegations of a petition as true and in the light most favorable to the petitioner, the moving party must show that there is no circumstances under which a cause of action for relief may be granted."

[11] Order at pg. 6.

[12] Order at pg. 5.

[13] Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d. 478 (Fla 2nd DCA 1981).

[14] Order at pg. 6.

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering its Order. *See* Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). It is not appropriate to reargue matters that have already been considered by us. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. Rel. Jaytex Realty Co. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the records and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis, 317.

II. Analysis

While the Movants argue that the Order failed to consider their arguments, it appears that their true issue is disagreement with our decision. The Movants predicate their Motion for Reconsideration on the concept that we failed to address separately and independently each of the points raised in their Motion to Dismiss. Jaytex establishes that it is not necessary for us to address every argument and fact raised by each party. We have recognized that:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision...
>
> ...
>
> [a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.[15]

[15] In re: Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida, LLC by Bright House Networks Information Services (Florida), LLC, Order No. PSC-11-0141-FOF-TP, issued March 1, 2011; in Docket 090501-TP; In re: Complaint and request for emergency relief against Verizon Florida, LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC, and In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone., Order No. PSC-08-0549-PCO-TP, issued August 19, 2008, in Dockets Nos. 070691-TP and 080036-TP, quoting Jaytex, 105 So.2d at 819.

We find that the Movants' Motion For Reconsideration is without merit. The Movants' have not demonstrated that in addressing the Movants' Motion to Dismiss, overlooked, we failed to consider or misunderstood a point of fact or law. Specifically, the Motion fails because:

- The information in the Movants' Motion addresses facts previously considered and argues identical arguments to previous pleadings, which fails to meet the applicable standard.
- In rendering the decision, we considered, either explicitly or implicitly, each of the items that the Movants allege were not addressed.
- The Movants attempt to argue the merits of the complaint in its Motion, rather than establishing a point of fact or law that we overlooked, failed to consider or misunderstood.

III. Conclusion

The Movants have not identified a point of fact or law which was overlooked or which we failed to consider in rendering our Order. Accordingly, we find it appropriate to deny the Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Access Point, Inc, Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, Paetec Communications, Inc., and US LEC of Florida, LLC's Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP be denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 16th day of May, 2011.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.