BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLECs whose true names are currently unknown) for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S.	DOCKET NO. 090538-TP ORDER NO. PSC-10-0296-FOF-TP ISSUED: May 7, 2010

The following Commissioners participated in the disposition of this matter:

NANCY ARGENZIANO, Chairman
LISA POLAK EDGAR
NATHAN A. SKOP
DAVID E. KLEMENT
BEN A. "STEVE" STEVENS III

ORDER GRANTING PARTIAL MOTION TO DISMISS, MOTION TO DISMISS REPARATIONS CLAIM AND DENYING MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

I. Case Background

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 (Verizon Access); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; (collectively Joint CLECs) and John Does 1 through 50 (CLECs whose true names are currently unknown).[1]

[1] Complaint 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) for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S.

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Generally speaking, switched access charges refer to payments made by long distance carriers to local service providers for originating and terminating calls on local telephone networks. Both ILECs and CLECs charge interexchange carriers (IXCs) interstate and intrastate access charges.

Qwest's complaint seeks relief from the Joint CLECs and Verizon Access for engaging in unlawful rate discrimination. Specifically, Qwest alleges that by extending other IXCs contracts or agreements, advantages were withheld from Qwest. The complaint further alleges that the Joint CLECs and Verizon Access failed to abide by their pricelists, and charged Qwest more for switched access than other similarly situated IXCs. Qwest requests that we order the Joint CLECs and Verizon Access to:

1) pay reparations with interest,

2) lower intrastate switched access rates to be consistent with rates offered to other IXCs,

3) cease and desist from offering intrastate switched access services to IXCs via undisclosed contract service agreements outside of and at rates lower than published in their tariffs or pricelists, and

4) file with us any such contract service agreements.

On December 22, 2009, the Joint CLECs filed an Agreed Motion for Extension of Time to Respond to Complaint, which we granted by Order No. PSC-10-0012-PCO-TP.

On January 29, 2010, Verizon Access filed a Motion to Dismiss Reparation Claim, a Motion for Final Summary Order Dismissing All Other Claims Against Verizon Access, and a Request for Oral Argument on the Motion. On that same date, the Joint CLECs filed a Partial Motion to Dismiss and a Request for Oral Argument on their Partial Motion to Dismiss.

On February 2, 2010, Qwest filed its Unopposed Motion for Extension of Time to Respond to both Motions to Dismiss, which was granted on February 10, 2010, by Order No. PSC-10-0079-PCO-TP.

We are vested with jurisdiction over this matter pursuant to Sections 120.57, 364.01, 364.04, 364.08, 364.337, F.S.

II. Analysis

A. Joint CLECs' Partial Motion to Dismiss and Verizon Access' Motion to Dismiss Reparations Claim

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true,

the petition still fails to state a cause of action for which relief may be granted. *Id.* at 350. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2nd DCA 1960). A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy*, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

Parties Arguments

Joint CLECs' Partial Motion to Dismiss

The Joint CLECs seek dismissal with prejudice of Qwest's request for reparations and cease and desist order. They assert that dismissal is proper because even if all the factual allegations in the Complaint were true, we lack jurisdiction to award the relief sought by Qwest.

The Joint CLECs argue that Qwest's Complaint seeks damages even though it may be styled as reparations. They assert that the Complaint seeks compensation for alleged rate discrimination, which falls within the definition of damages,[2] and that we have determined that we lack jurisdiction to award damages. *See Southern Bell Telephone and Telegraph Co. v. Mobile America Corporation, Inc.*, 291 So.2d 199, 202 (Fla. 1974) ("Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const.") *See In re: Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003) ("This Commission lacks any legal authority to award the type of money damages sought by AT&T."); *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) ("the Commission may not award monetary damages in resolving utility related disputes.")

Additionally, the Joint CLECs contend that Qwest's request for us to order the Joint CLECs to cease and desist from offering intrastate switched access services to IXCs via undisclosed contract service arrangements is injunctive[3] relief which we have no authority to grant. The Joint CLECs

[2] See Black's Law Dictionary (8th ed. 2004), which defines "damages" as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury" and "an amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." The definition of "reparations" ("compensation for an injury or wrong...") is substantially the same. Moreover, Qwest's discrimination claim necessarily requires a demonstration of damages, as opposed to an assertion of reimbursement for overcharges. *See ICC v. United States*, 289 U.S. 385, 389-92 (1933) (Cardozo, J.) (holding that where a party who has paid the tariffed rate sues upon a discrimination claim because some other party has paid less, "'the difference between one rate and another is not the measure of the damages[.]"

[3] An injunction is an "order commanding or preventing an action" Black's Law Dictionary (8th ed. 2004). See also 29 Fla. Jur. 2d Injunctions §1: "An injunction is a discretionary equitable remedy, primarily preventive in nature,

request that this part of the Complaint be dismissed because if all the factual allegations in the Complaint were found to be true, we lack jurisdiction to award the relief sought.

Verizon Access' Motion to Dismiss Reparations Claim

Verizon Access moves to dismiss the complaint to the extent that Qwest seeks "reparations" with interest from Verizon Access. Verizon Access states that Qwest is seeking monetary damages that we may not award. Verizon Access further argues Qwest is barred from recovery under the filed-rate doctrine[4] because Qwest was charged the intrastate switched access rates in Verizon Access' pricelist filed with this Commission. As such, Verizon Access argues that Qwest fails to state a claim for which relief may be granted, and Qwest's claim for reparation should be dismissed.

Qwest's Response to Joint CLECs Partial Motion to Dismiss and to Verizon Access Motion to Dismiss Reparations Claim

Qwest asserts that pursuant to Chapter 364, F.S., we have jurisdiction over telecommunications companies including complaints against CLECs for unreasonably prejudicial, anti-competitive or discriminatory conduct.[5] Qwest argues that we have the authority to provide the retrospective relief (in the form of refunds for past overcharges) and prospective relief.

Qwest argues that the Motions to Dismiss are "attacking" its prayer for relief, rather than the underlying cause of action. Qwest states that it is not pursuing civil damages but rather requesting refunds for being overcharged for switched access and therefore requests refunds. Qwest contends that we have authority for reparatory refunds under Sections 364.01 and 364.337(5), F.S., granting the power to resolve complaints against CLECs for unreasonably prejudicial, anti-competitive or discriminatory conduct. Further, Qwest asserts that sections 364.01(4)(g), 364.08 and 364.10(1), F.S., provide this Commission the power to prevent unreasonable, preferential, discriminatory or anti-competitive behavior. In addition, Qwest contends that Sections 364.08(1) and 364.10(1), F.S., grant the authority over tariffs or pricelists for intrastate switched access service, along with the oversight protection on the CLEC provision of basic local exchange service by Section 364.337(5), F.S.

Qwest notes that we have granted refunds where a customer has been overcharged. *In re: Investigation and determination of appropriate method for issuing refunds to affected customers for apparent overcharges by Global Crossing Telecommunications Inc. for homesaver 1+ and calling card plans*, Order No. PSC-07-0849-PAA-TI (October 22, 2007), Docket No, 070419-TI; *In re: Investigation and determination of appropriate method for refunding overcharges and*

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which is designed to protect one from irreparable injury by commanding acts to be done or prohibiting their commission."

[4] The filed-rate doctrine holds that "where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged." *Global Access Limited v. AT&T Corp.*, 978 F.Supp. 1068 (S.D. Fla. 1997); citing *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 615 (11th Cir. 1995).

[5] See Sections 364.01 and 364.337(2), F.S.

interest on 0+ calls made from pay telephones by USLD Communications, Inc., Order No. PSC-01-1744-PAA-TI (August 27, 2001), Docket No. 010937-TI.; *In re: Investigation and determination of Method to credit access flow through reductions by MCI WorldCom Communications, Inc. and TTI National Inc., as required by Section 364.163, F.S.*, Order No. PSC-00-2139-PAA-TI (November 8, 2000) Docket No. 001411-TI. Qwest asserts that it does not seek unspecified damages for lost profits or other economic harm and requests that we deny the Partial Motion to Dismiss and the Motion to Dismiss Reparations Claim.

Analysis

In reviewing a motion to dismiss, we must take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, *e.g., Ralph v. City of Daytona Beach*, 471 So.2d 1, 2 (Fla. 1983); *Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell*, 262 So.2d 881, 883 (Fla. 1972); *Kest v. Nathanson*, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); *Ocala Loan Co. v. Smith*, 155 So.2d 711, 715 (Fla. 1st DCA, 1963). Whether we have the jurisdiction to grant injunctive relief and award damages has been raised by the Partial Motion to Dismiss and the Motion to Dismiss Reparations Claim. In addition, there is confusion over whether Qwest requested that we award damages or refunds.

Injunctive Relief

In requesting that we order the CLECs to cease and desist from offering intrastate switch access services to IXCs via non-tariffed undisclosed contract service agreements, Qwest has asked us to take an injunctive action. As a Legislative agency, we may not act like a court, and may take action only where authorized. *Southern Bell Telephone and Telegraph Co. v. Mobile America Corporation, Inc.*, 291 So.2d 199, 202 (Fla. 1974), *In re: Petition of AT&T of Communications if the Southern States, LLC, Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003); *In re: Complaint and petition of John Charles Heekin against Florida Power & Light*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999). *In re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210-FOF-WS (February 21, 1994); *In re: Petition to Investigate, Claim for Damages, Complaint and Other Statements Against Respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ*, Docket No 060640-TP, Order No PSC-07-0332-PAA-TP (April 16, 2007) We find that while Qwest states in its Response that it is not seeking injunctive relief from us, the company stated in its complaint that it requests that we issue a cease and desist order, which is effectively seeking injunctive relief. We find that we lack the authority to address Qwest's request for injunctive relief.

Damages/Refunds

Qwest's Complaint and Responses to the Motions referred to a variety of terms, such as reparatory refunds, "retrospective relief" (in the form or refunds for past overcharges) and prospective relief. The Joint CLECs and Verizon Access have referred to these requests as

"reparations" and "damages." Consequently, there is confusion regarding Qwest's prayer for relief, specifically whether Qwest is requesting refunds or damages.

Qwest asserts that we have the authority to award the relief requested, and has exercised that authority by ordering "reparatory refunds" to remedy various forms of utility misconduct. We retain broad discretion to take remedial actions, such as refunds, should it be determined necessary and appropriate in keeping with statutory obligations.

Pursuant to Section 364.01, F.S., we have the authority to order refunds as a remedy for overcharges in order to promote fair treatment for all providers of telecommunications services. Third District Court of Appeals has held that a litigant's strategic and repeated use of the phrases "money damages" and "damages" is insufficient to render a claim for a refund of overcharges outside our jurisdiction. *Florida Power & Light Co. v. Albert Litter Studios, Inc.,* 896 So. 2d 891, 894. This Commission has exclusive jurisdiction to remedy regulatory overcharges in connection with its exclusive authority to regulate the rates and service provided by public utilities), *Id.* at 895.

Consistent with prior decisions, we do not have the authority to award damages. To the extent that Qwest is requesting monetary damages, we find it appropriate that the Partial Motion to Dismiss and Motion to Dismiss Claims for Reparations be granted. We have the authority to investigate the allegations in the Complaint, to prevent anticompetitive and unlawful discrimination amongst telecommunications service providers, and to determine the amount of any refunds and applicable interest, if any, Qwest is due.

B. Verizon Access' Motion for Summary Final Order

Standard of Review

Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits."

Parties Arguments

Verizon Access' Motion for Summary Final Order

Verizon Access argues that it has presented indisputable facts showing that it has no undisclosed contract service agreements, known as individual-case-basis contracts (ICBs), in Florida as alleged by Qwest. In addition, Verizon Access argues that the switched access service agreement between Verizon Access and AT&T expired in January 2007 and that there are no ICBs currently in effect in Florida. Verizon Access believes that because Qwest's claims for relief rely on the existence of a current ICB, we must dismiss Verizon Access from this

proceeding. It also argues that since Qwest was charged the intrastate switched access rates in Verizon Access' pricelist filed with this Commission, Qwest is barred from recovery under the "filed rate" doctrine.

Verizon Access further contends that since the company has no ICBs in place and cannot offer any alternatives, there is no prospective relief for us to grant. Verizon Access requests that the complaint against the company be dismissed with prejudice or that a Summary Final Order be issued.

Qwest's Response to Verizon Access' Motion for Summary Final Order

Qwest argues that Verizon Access' Motion is premature and must be denied. Qwest contends that Florida case law holds that final summary judgment, equivalent to a Chapter 120 proceeding, requires the opportunity to conduct discovery. *Brandauer v. Publix Super Markets, Inc.*, 657 So.2d 932 Fla. 2d DCA (1995) (grant of summary judgment reversed where plaintiff had not yet deposed any representative of the corporate defendant); *Singer v. Star*, 510 So.2d 637, 639 (summary judgment should not be granted until facts have been developed sufficiently for court to be reasonably certain no issue of material fact exists). Qwest contends that we have consistently held that discovery should be finished before filing of a Motion for Summary Final Order. Qwest also asserts that while Verizon Access maintains that it has no ICBs in Florida, Qwest has not had the opportunity to test Verizon Access' factual assertion. Qwest states that there has been no opportunity to conduct discovery in this proceeding, pointing out that neither depositions nor interrogatories have been filed. Qwest further contends that the relief requested is appropriate regardless of whether Verizon Access has an existing business arrangement in Florida.

Analysis

The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." *Green v. CSX Transportation, Inc.*, 626 So. 2d 974 (Fla. 1st DCA 1993) (citing *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977)). The burden is on the movant to demonstrate that the opposing party cannot prevail. *Christian v. Overstreet Paving Co.*, 679 So. 2d 839 (Fla. 2nd DCA 1996). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985); *City of Clermont, Florida v. Lake City Utility Services, Inc.*, 760 So. 1123 (5th DCA 2000). "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." *Moore*, at 475. If the record reflects the existence of any issue of material

fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. *Albelo v. Southern Bell,* 682 So. 2d 1126 (Fla. 4th DCA 1996).

Verizon Access has failed to meet the requirements of Section 120.57(1)(h), F.S., for the granting of a Motion for Summary Final Order. Specifically, Verizon Access has not made a conclusive showing that there is no genuine issue of material fact in dispute. Verizon Access has also not shown that it is entitled to judgment as a matter of law on the undisputed facts. At this stage of the proceeding, no evidence has been entered into the record; thus, we must draw factual inferences in favor of Qwest.

The appropriate time to seek summary final order is after testimony has been filed and discovery has ended. (*In re: Complaint of Florida Competitive Carriers Association v. against BellSouth Telecommunications, Inc. regarding BellSouth's practice of refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider, and request for expedited relief,* Order No. PSC-02-1464-FOF-TL (October 23, 2002), Docket No. 020507-TL, *See also, In re: Applications for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, Order No. PSC-00-2388-AS-WU (December 13, 2000) Docket No. 991437-WU. However, once a movant has tendered competent evidence through discovery to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. *Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So.2d 254, 254-255 (Fla. 5th DCA 1985). Until the parties have had the opportunity to proceed with discovery and file testimony, it is premature to decide whether a genuine issue of material fact exists.

III. Decision

Upon review of the parties' arguments and consistent with our previous decisions, the Joint CLECs' Partial Motion to Dismiss and Verizon Access' Motion to Dismiss Reparations Claim shall be granted to the extent Qwest seeks monetary damages or injunctive relief. We find that this Commission lacks the authority to (a) issue injunctions or (b) award damages. However, we note that this Commission does have the authority to order refunds, if applicable.

A conclusive showing that there is no genuine issue of material fact in dispute has not been made by Verizon Access. Therefore, Verizon Access' Motion for Summary Final Order is hereby denied without prejudice.

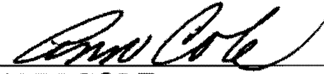
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Joint CLECs' Partial Motion to Dismiss and Verizon Access' Motion to Dismiss Reparations Claim shall be granted to the extent Qwest seeks monetary damages and injunctive relief. It is further

ORDERED that Verizon Access' Motion for Summary Final Order shall be denied without prejudice. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 7th day of May, 2010.



ANN COLE
Commission Clerk

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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.