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-11-0420-PCO-TP ISSUED: September 28, 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 MOTION TO DISMISS

BY THE COMMISSION:

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.[1] 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

[1] Qwest removed its Part D Prayer for Relief which asked for a "cease and desist" order from the Respondents' actions.

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).[2]

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), such as Qwest, interstate and intrastate access charges. In this complaint, Qwest alleges that private contracts gave other carriers rates that differed from a carrier's published pricelist and were far less than the prices offered to Qwest.

To date, all actions taken regarding this complaint have been preliminary in nature:

- On May 7, 2010, we granted the Joint Movants' Partial Motion to Dismiss 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, we 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 it has the authority to investigate the allegations in this Complaint.

- On May 16, 2011, in Order No. PSC-11-0222-FOF-TP, we held that the Joint Movants did not identify a point of fact or law which was overlooked or which we failed to consider in its previous decision, and denied the Joint Movants' Joint Motion for Reconsideration.

- On June 28, 2011, in Order No. 11-0282-PCO-TP, we denied the Joint Movants' request for abeyance in the docket and scheduled an issue identification meeting.

- On July 1, 2011, Chapter 2011-36, Laws of Florida, (Regulatory Reform Act) became effective, repealing and amending statutes in Chapter 364.

- 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.[3]

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

[3] 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.

- On July 11, 2011, Qwest filed a Request for Extension of Time to Respond to the Joint Motion to Dismiss.

- On July 18, 2011, Order No. PSC-11-0304-PCO-TP granted the extension of time and postponed the scheduled issue identification meeting pending resolution of the Joint Motion to Dismiss. Qwest filed its Response to the Joint Motion to Dismiss on August 1, 2011.

At the September 8, 2011, Commission Conference, oral argument was granted for discussions regarding the Joint Movants Motion to Dismiss.

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

Analysis:

Qwest's Amended Complaint Against all Respondents

Qwest's amended complaint seeks relief from the Joint CLECs and Verizon Access for engaging in unlawful rate discrimination. Specifically, Qwest alleges that by extending to other IXCs contracts or agreements that contained rates that differed from those published in rate schedules or pricelists, advantages were withheld from Qwest. As such 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 the following three claims of relief:

1) refund overcharges with interest,

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

3) file with this Commission any such contract service agreements.

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.[4] 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.[5] 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

[4] Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).
[5] *Id.* at 350.

has stated the necessary allegations.[6] A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.[7]

To evaluate a motion to dismiss, all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.[8]

The Joint Movants' Motion to Dismiss

The Legislature enacted a repeal and revision of applicable Statutes altering Commission jurisdiction.

The Joint Movants assert that because both statutes, 364.08, Florida Statutes (F.S.) (provided that a carrier must charge rates established in the schedule/available pricelist) and 364.10, F.S. (provided that a telecommunications company may not prejudice or show undue preference to any person or locality) have been repealed, Qwest's First Claim for Relief fails.

The Joint Movants contend that Qwest's Second and Third Claims for Relief are also impacted by the revision of Section 364.04, F.S. The Joint Movants identify the following changes to the statute:

- Commission jurisdiction over the form and content of pricelists was eliminated; and
- Carriers are permitted to enter into private contracts with rates that differ from published rates.

The Joint Movants believe the Legislature intended that claims such as those raised by Qwest be eliminated.[9]

The lack of a savings clause eliminates the Commission's jurisdiction over this complaint.

The Joint Movants argue that the Legislation lacks a savings clause thereby precluding us from retaining authority after July 1, 2011, and that powers are held only as delegated by the Legislature.[10] The Joint Movants believe that only with an express savings clause may we consider claims that a party engaged in prohibited conduct prior to a change in law.[11]

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[6] Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).
[7] Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.
[8] 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, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1st DCA, 1963).
[9] Motion to Dismiss at 8.
[10] Motion to Dismiss at 3, citing State Department of Transportation v Mayo, 354 So. 2d 359, 361 (Fla. 1977).
[11] Florida Interexchange Carriers Association, Inc. v. Clark (FIXCA), 678 So. 2d 1267, 1270 (Fla. 1996), stating that the "very nature of a savings clause imparts retroactivity upon the statutes within its ambit."

Contending that the absence of a savings clause means that we have no ability to enforce the repealed statute, the Joint Movants argue that a "repeal of a statute that has conferred jurisdiction eliminates such jurisdiction, even over pending matters."[12] Further, the Joint Movants claim agencies cannot apply prior law to pending cases where the conduct in question is no longer prohibited by a statute.[13]

Applying a statute that has been repealed after the effective date, would allow us to operate beyond the control of the Legislature.[14] The Joint Movants argue that the Legislature has previously contemplated and enacted savings clauses, including in 1980, 1990, 1995, 2007 and 2010.[15] Therefore, the Joint Movants contend that with respect to our jurisdiction, we would be reversed by the appellate court if we attempt to assert jurisdiction over matters in this docket, where the court determined that the statutory amendments should not be applied retroactively to pending cases.[16]

Implementation of the Regulatory Reform Act in other areas of regulation.

By closing pending wireless ETC applications due to lack of jurisdiction, the Joint Movants argue that we recognize that own authority "only extends to the applicable laws delegated to it by the Legislature that are in effect at the time of its decision, not the law when the case commenced."[17] The Joint Movants assert that the lack of our jurisdiction questions Qwest's vested rights and standing to bring forth a claim before the Commission. Ultimately, the Joint Movants argue that Qwest's complaint should be dismissed in its entirety, stating that no jurisdiction remains over any portion of Qwest's complaint.

Qwest's Response to the Joint Motion to Dismiss

Qwest argues that the Joint Motion to Dismiss seeks to prevent us from evaluating the Respondents "unlawfully discriminatory and anti-competitive conduct."[18] Qwest asserts that legislation is presumed not to have retroactive effect and may only be applied retroactively if a) the legislature clearly intended the legislation to be retroactive and b) it would be constitutionally permissible to apply it retroactively.[19] Qwest argues that the Joint Movants have not established that the Legislature intended the Regulatory Reform Act to be retroactive or that it intended to limit our jurisdiction to prevent anti-competitive carrier-to-carrier behavior.

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[12] Motion at 8, citing Bruner v. United States, 343 U.S. 112 at 116-117 (1952) ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law.")
[13] Motion to Dismiss at 15, citing Gewant v. Florida Real Estate Commission, 166 So. 2d 230 at 233 (Fla 4th DCA 1964).
[14] Motion to Dismiss at 4, citing City of Cape Coral v. GAC Utilities, Inc of Florida, 281 So. 2d 493, 496 (Fla. 1973).
[15] Motion to Dismiss at 9, citing City of Cape Coral v. GAC Utilities at 499-500, when the Commission's jurisdiction over water and sewer system was amended.
[16] Motion to Dismiss at 10, citing Jennings v. Florida Elections Commission, 932 So. 2d 609 (Fla. 2nd DCA 2006).
[17] Motion to Dismiss, footnote 10.
[18] Response to Motion to Dismiss at 2.
[19] Response to Motion to Dismiss at 6, citing Metropolitan Dade Co. v. Chase Federal Housing Corp., 737 So. 2d 494, 499 (Fla. 1999).

Clear legislative intent for retroactive application has not been established.

Qwest contends that absent clear legislative intent, Florida law establishes that new statutes cannot be applied retroactively if new legal consequences are attached to events completed prior to the enactment of the new law.[20] Clear legislative intent, determined primarily by the language of the statute, establishes that the Legislature considered any potential unfairness.[21]

Qwest asserts that although Sections 364.08 and 364.10(1), F.S., created substantive protections against rate discrimination, we have recognized other sources of jurisdiction over Qwest's claims. Specifically, Sections 364.16(1) and (2), F.S., continue to establish our jurisdiction over carrier-to-carrier relationships and the prevention of anti-competitive behavior.[22]

Qwest contends that clear evidence of legislative intent to apply the legislation retroactively must first be established before determining that a statute may be applied retroactively, otherwise the law is prospective.[23] Rather, a statute without a savings clause may not be applied retroactively where substantive rights are involved.[24] Qwest contends that if we were unable to address the Joint Movants' behavior which occurred prior to the change in law, Qwest's substantive claim would be lost.

Qwest asserts that the legislative intent was to limit our jurisdiction over retail services and not carrier-to-carrier anti-competitive behavior.[25] Qwest notes that in the Regulatory Reform Act, the Legislature was silent and did not provide an explicit provision that carriers who have violated non-repealed provisions are no longer responsible or liable for actions prior to July, 2011.[26]

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[20] Response to Motion to Dismiss at footnote 8, citing Metropolitan Dade.

[21] Response to Motion to Dismiss at footnote 8, citing Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994) and Response to Motion to Dismiss at 9, citing Campus Communications Inc. v. Earnhardt, 821 So.2d 388, 395 (Fla. 2002).

[22] Section 364.16(1) and (2), F.S., provides:
(1) The Legislature finds that the competitive provision of local exchange service requires appropriate continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition.
(2) It is the intent of the Legislature that in resolving disputes, the commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior, including, but not limited to, predatory pricing.

[23] Response to Motion to Dismiss at 6, footnote 16, citing State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983) and

[24] Response to Motion to Dismiss at 8, citing Bruner, at 117 (where the nature of validity of a petitioner's rights should not be altered by a loss in jurisdiction, only the number of tribunals authorized to hear and determine such rights and liabilities should change.) See also, Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994) (quoting Hollowell v. Commons, 239 U.S. 506, 508 (where the application of a new jurisdiction rule usually takes away no substantive right).

[25] Response to Motion to Dismiss at 28, citing Larson v. Independent Life and Accident Insurance Co., 29 So. 2d 448 (1947) and Promontory Enterprises, Inc. v. Southern Engr'g & Contracting, Inc. 864 So. 2d 479, 484 (5th DCA)(2004).

[26] Response to Motion to Dismiss at 10.

Retroactive application is not constitutionally permissible.

Qwest argues that a retroactive application of the legislation would not be constitutionally permissible.[27] If a retroactive application of a statute impairs "vested rights, creates new obligations, or imposes new penalties," the retroactive application is flawed.[28] Qwest asserts a vested right, as the conduct occurred prior to the enactment of the change in law.[29] Assuming for the purposes of the Motion to Dismiss that the allegations are correct, Qwest contends that for each billing period prior to and including June 30, 2011, there is a vested right to a cause of action stemming from the statutes, mainly Sections 364.04, 364.08, and 364.10, F.S.[30]

The Commission retains jurisdiction over anti-competitive behavior.

Qwest believes that the legislature clearly intended for us to retain authority to protect carriers against anti-competitive behavior, including the allegedly discriminatory rate treatment of the purchase of intrastate switched access, which is a wholesale service.[31] Qwest notes that the legislature also amended Section 364.16, F.S., continuing our regulatory oversight over carrier-to-carrier relationships and the prevention of anti-competitive behavior.[32] Qwest argues that the legislature intended for us to continue to prevent the abuse of switched access practices.

Qwest contends that the legislature intended to deregulate retail services and continue our jurisdiction over wholesale, carrier-to-carrier practices.[33] Qwest notes that the Senate bill analysis reflects the intent to deregulate retail services, maintain our role in resolving wholesale disputes, and ensure fair market treatment.[34] Qwest believes Chapter 364 continues to prevent and correct business practices that impose high switched access rates for certain IXCs while charging other IXCs lower, private rates for identical services. Qwest requests that denial of Joint Movants' Motion to Dismiss and allow issue identification to proceed.

Analysis

We continue to retain jurisdiction over anti-competitive behavior, including predatory pricing practices, and fair and effective competition.[35] While the Regulatory Reform Act

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[27] Response to Motion to Dismiss at 10, citing Metropolitan Dade.
[28] Response to Motion to Dismiss at 10, citing R.A.M. of So. Fla v. WCI Communities, Inc., 869 So. 2d 1210, 1217 (2nd DCA 2004).
[29] Response to Motion to Dismiss at 11, citing R.A.M. at 1220.
[30] Response to Motion to Dismiss at 11, stating that the determination of vested rights depends whether the rights are based upon statutory provision or common law cause of action.
[31] Response to Motion to Dismiss at 12.
[32] Section 364.16(1) and (2), F.S., states that:
(1) The Legislature finds that the competitive provision of local exchange service requires appropriate continued regulatory oversight of carrier-to-carrier relationships in order to provide for the development of fair and effective competition.
(2) It is the intent of the Legislature that in resolving disputes, the commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior, including, but not limited to, predatory pricing.
[33] Response to Motion to Dismiss at 13.
[34] Response to Motion to Dismiss at 13, citing March 29, 2011, Senate bill analysis.
[35] Section 364.16(2), F.S.

repealed and amended parts of Chapter 364, we clearly maintain jurisdiction over wholesale, carrier-to-carrier disputes. The legislation has not modified our exclusive jurisdiction over wholesale carrier-to-carrier disputes, and our obligation to ensure fair and effective competition among telecommunications service providers; therefore, we still retain jurisdiction to oversee fair and effective competition.[36]

The lack of a savings clause is not clear legislative intent for retroactive application.

Without an actual savings clause addressing the repealed and amended statutes, we cannot speculate what the Legislature's intent would be regarding Chapter 364.[37] A savings clause is unique to each statute to which it applies; therefore, without specifics, it would be impossible to determine how a savings clause might affect the repealed statutes.[38] The absence of a savings clause is not an express statement of legislative intent that a change in law be retroactively applied to carrier actions prior to July 1, 2011. Without an express statement of legislative intent, there is a presumption against retroactivity.[39] Therefore, the "general rule is that in the absence of clear Legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively."[40]

Retroactive application is not constitutionally permissible.

Even in a situation where there is no clear indication that the Legislature intended a statute to have retroactive application, a savings clause must be constitutionally permissible. In such a situation, a determination must be made that the retroactive application of a statute cannot impair "vested rights, create new obligations or imposes new penalties."[41] A vested right is a "fixed" right that cannot be taken away without violation of the possessor's right to due process.[42] Under Sections 364.08 and 364.10, F.S., Qwest was allegedly treated to discriminatory pricing on switched access rates prior to July 1, 2011. Viewing the petition in the light most favorable to Qwest and taking all allegations in the petition as true, consistent with Varnes, we find that Qwest has a vested interest for each billing period prior to the change in law as a result of the alleged anti-competitive behavior.[43]

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[36] Section 364.16(1), F.S.

[37] A Legislature creates a savings clause in legislation when it intends to preserve something from immediate interference, such as where the agency affected by the law continues to retain specific, targeted authority over a statute that has been repealed or amended. Arnold v. City of Chicago, 387 Ill. 532, 541.

[38] In Order No. PSC-96-1536-FOF-TL, issued December 17, 1996, we determined that a savings clause established situations to which applicable cases pending before July 1 would continue under our jurisdiction.

[39] Florida Insurance Guaranty Association, Inc. vs. Devon Neighborhood Association, Inc. d/b/a Devon Neighborhood & Condominiums A-J Association, Inc., 36 Fla. L. Weekly S 311, 319 (June 20, 2011), citing Arrow Air at 425, quoting Landgraf at 722-723.

[40] Metropolitan Dade, citing to Hassen v. State Farm Auto Ins. Co., 674 So. 2d 106, 108 (Fla. 1996) and Arrow Air, at 425.

[41] R.A.M. at 1217.

[42] The court found that due process considerations prevent the State from retroactively abolishing vested rights. Metropolitan Dade at 503.

[43] Response to Motion to Dismiss at 11.

An application for certification is not similar to a violation.

We disagree with the Joint Movants' belief that we should treat this complaint similar to that of a wireless ETC certification. There is a distinction between preexisting violations that occurred during the Commission's authority and an application for a prospective certification over which the Commission has yet to take action. We find that we retain jurisdiction over the preexisting violations.

We retain jurisdiction over this complaint.

For carrier actions prior to July 1, 2011, we find continuing jurisdiction under the statutes enacted prior to the Regulatory Reform Act and we continue to have jurisdiction over predatory pricing under the new law enacted by the Regulatory Reform Act. Nonetheless, we find that whether we retain jurisdiction prospectively would be more appropriately addressed during issue identification and examined during the hearing process.

Conclusion

This Commission is vested with the subject matter jurisdiction to ensure a fair and effective wholesale market, including oversight of anti-competitive practices such as predatory pricing among telecommunication service providers. Consistent with our previous Commission decisions,[44] we find it appropriate that the Joint Movants' Motion to Dismiss should be denied, and the issue identification meeting shall be rescheduled.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Joint Movants' Motion to Dismiss is hereby denied for the reasons set forth in the body of this Order. It is further

ORDERED that the issue identification meeting shall be rescheduled. It is further

ORDERED that the docket shall remain open.

[44] Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Final Order, Order No. PSC-10-0296-FOF-TP, issued May 7, 2010 and Final Order Denying Movants' Motion to Dismiss, Order No. PSC-11-0145-FOF-TP, issued March 2, 2011.

By ORDER of the Florida Public Service Commission this 28th day of September, 2011.

ANN COLE
Commission Clerk
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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.

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.