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Subject: Docket No. 090538-TP
Attachments: Jt CLEC. Motion to Dismiss.OA.01 29 2010.pdf

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The docket number and title of docket:

Docket No. 090538-TP
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 (CLEC's 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.

The name of the party on whose behalf the document is filed:

Joint CLECs (Broadwing Communications, LLC, XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; and Cox Florida Telcom, L.P.)

The total number of pages in the attached document: 12

A brief but complete description of each attached document:

Joint CLECs' Partial Motion to Dismiss (pgs. 1-9)
and
Request for Oral Argument on Joint CLECs' Partial Motion to Dismiss (pgs. 10-12)

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DOCUMENT NUMBER DATE
00667 JAN 29 2010
FPSC-COMMISSION CLECI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 (CLEC's whose true names are)
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connection with the provision of intrastate)
switched access services in alleged of)
Sections 364.08 and 364.10, F.S.)
_____)

Docket No. 090538-TP

Filed: January 29, 2010

JOINT CLECS' PARTIAL MOTION TO DISMISS

Pursuant to Rule 28-106.204, Florida Administrative Code, Broadwing Communications, LLC, ("Broadwing"), XO Communications Services, Inc.; tw telecom of florida, l.p.; Cox Florida Telcom, L.P., and Granite Telecommunications, LLC (collectively, "Joint CLECs"), move the Florida Public Service Commission ("Commission") to dismiss with prejudice Qwest Communications Company, LLC's ("Qwest") requests for "reparations" and injunctive relief on the grounds that the Commission lacks jurisdiction to grant such relief. In support, Joint CLECs state:

1. Qwest filed its complaint on December 11, 2009 against six named CLECs as well as unidentified "John Doe" CLECs. A motion seeking an extension of time by Broadwing, acting on behalf of itself, XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; and Cox Florida Telcom, L.P., was granted by Order No. PSC-10-0012-PCO-TP, with responses due on January 29, 2010.

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2. Qwest's Complaint ("Complaint") alleges that: (1) each Respondent CLEC has filed tariffs or price lists with the Commission for their intrastate switched access services and rates; (2) each Respondent bills Qwest at the rates set forth in the filed tariff for intrastate access service; (3) each Respondent had or has off-tariff, unfiled agreements in another state with certain IXCs other than Qwest; (4) such agreements offer intrastate access services at rates different from and lower than the rates set forth in the filed tariff for that state; (5) such off-tariff agreements are unfiled; and (6) the terms therein have not been offered to Qwest. The Complaint sets forth three causes of action: "Rate Discrimination"; "Failure to Abide by Tariffs or File ICBs" and (against XO and Cox only) "Tariff Violation – Failure to Provide Customer-Specific Contract Terms to Similarly-Situated Customers."

3. Qwest seeks multiple forms of relief on each cause of action. Qwest requests that the Commission (1) find that Respondents violated Florida law by engaging in unlawful rate discrimination; (2) require Respondents to pay "reparations" to Qwest in an unspecified amount; (3) order Respondents to lower their intrastate switched access rates to Qwest prospectively; (4) order Respondents to cease and desist from offering intrastate switched access services via undisclosed agreements; (5) order Respondents to file all such agreements that charge rates inconsistent with the CLECs' published rates; and (6) for general relief.

4. Without addressing the propriety of Qwest's other requested forms of relief, or the truth or falsity of Qwest's allegations, the Joint CLECs seek dismissal with

prejudice of Qwest's requests for "reparations" and a "cease and desist" order.¹ Dismissal is proper because if all the factual allegations in the Complaint were found to be true (although many are not), Qwest would not be entitled, as a matter of law, to such relief because the Commission lacks jurisdiction to award it.

STANDARD OF REVIEW

5. Under Florida law the purpose of a motion to dismiss in state court is to challenge the legal sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). To sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition fails to state a cause of action for which relief can be granted. *In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, Order No. PSC-95-0614-FOF-WS, Docket No. 941121-WS (May 22, 1995); *Varnes*, 624 So. 2d at 350. In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-1054-FOF-EI, Docket No. 981923-EI, (May 24, 1999)(citing to *Varnes*, 624 So.2d at 350).

THE COMMISSION LACKS JURISDICTION TO AWARD DAMAGES AND INJUNCTIVE RELIEF AS SOUGHT BY QWEST

6. A creature of statute, the Commission has only those powers granted by the Legislature and no common law or inherent powers. *State v. Mayo*, 354 So. 2d 359, 360 (Fla. 1977). ("[T]he Public Service Commission was created and exists through

¹ Movants limit the scope of this Motion to Dismiss to the issue of Qwest's incurable failure to state a claim upon which the relief of reparations and injunction can be granted. Movants do not waive other defenses, and expressly reserve the right to raise any other defense in other pleadings.

legislative enactment. Being a statutory creature, its powers and duties are only those conferred expressly or impliedly by statute.”); *see also City of Cape Coral v. GAC Utility*, 281 So. 2d 493 (Fla. 1973). Further, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). “Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” *State v. Mayo* at 361.

A. The Commission lacks authority to award damages, regardless of how denominated.

7. It has long been established that the Commission lacks authority to award damages. *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.”) The Commission recognizes this fundamental limitation on its jurisdiction. *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 Filed by BellSouth Telecommunications, Inc.*, 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.”); *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.”).

8. Qwest cannot create jurisdiction by labeling its claim as one for “reparations.” Although Qwest admits that each Joint CLEC charged Qwest its tariffed or listed prices for intrastate switched access services, it seeks compensation for alleged rate discrimination, purportedly measured by the difference between the duly tariffed or listed rate Qwest was charged and paid, and some other unspecified price Qwest believes it should have been charged. Not only does such relief fall within the definition of damages,² but the Commission has determined that “[r]etroactive remedies, which are in the nature of reparations . . . are peculiarly judicial in character” and beyond the Commission’s jurisdiction. *In re: Application of Tampa Electric Company for Authority to Increase its Rates and Charges*, Docket No. 800011-EU, Order No. 9810 (February 23, 1981), quoting with approval *Mountain States Telephone and Telegraph Co. v. New Mexico Corporation Commission*, 563 P.2d 588, 604 (N.M. Sup.Ct. 1977), *emphasis in original*.

B. The Commission lacks authority to grant injunctive relief.

9. Qwest requests the Commission to order CLECs to “cease and desist from offering intrastate switched access services to IXC’s via undisclosed contract service arrangements outside of, and at rates lower than published in, their tariffs or price lists.”

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[.]”

Such relief is injunctive.³ The Commission acknowledges that it has no authority to issue injunctions and this request must be dismissed. *See, 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 (February 21, 1994); *Florida Power & Light Company v. Albert Litter Studios, Inc.*, 896 So.2d 891, (Fla. 3d DCA 2005); *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 (issued April 16, 2007); *In re: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.*, Docket No. 080631-TP, Order No. PSC-09-0515-PCO-TP (issued July 21, 2009). See also, *In re: Petition for expedited enforcement of interconnection agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida*, Docket No. 021006-TP, Order No. PSC-02-1705-FOF-TP, (December 6, 2002) (“[w]e note that Section 364.015, Florida Statutes, only authorizes this Commission to seek equitable relief in an appropriate circuit court, not to order equitable relief.”)

10. Although the Commission has authority to issue orders directing compliance with its statutes and rules, this is not the relief Qwest seeks. There is no rule or statute that prohibits CLECs from entering into contract service arrangements at rates lower than those set forth by tariff or price list, yet Qwest asks the Commission to enjoin

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

CLECs from doing so, without regard to whether any particular contract service arrangement is discriminatory. Further, if Qwest seeks an order directing or prohibiting activities of unidentified "John Doe" CLECs, the requested relief would constitute a rule as defined in Section 120.52(16), Florida Statutes, and therefore is beyond the Commission's authority in this proceeding.

CONCLUSION

11. Since the Commission lacks jurisdiction to award reparations or injunctive relief, Qwest's requests for such relief are fatally flawed and should be dismissed with prejudice. *Kapley v. Borchers*, 714 So.2d 1217, 1218 (Fla. 2d DCA 1998).

WHEREFORE, the Joint CLECs respectfully request the Commission to dismiss Qwest's requests for reparations and injunctive relief with prejudice.

Respectfully submitted:

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CERTIFICATE OF SERVICE

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Docket No. 090538-TP

Filed: January 29, 2010

**REQUEST FOR ORAL ARGUMENT
ON JOINT CLECS' PARTIAL MOTION TO DISMISS**

Pursuant to Rule 25-22.022, Florida Administrative Code, Broadwing Communications, LLC, ("Broadwing"), XO Communications Services, Inc.; tw telecom of florida, l.p.; Cox Florida Telcom, L.P., and Granite Telecommunications, LLC (collectively, "Joint CLECs") hereby request the Florida Public Service Commission to grant oral argument on the Joint CLECs' Partial Motion to Dismiss filed contemporaneously with this request.

Oral argument would aid the Commissioners in understanding and evaluating the issues to be decided in that the issues presented in Qwest's complaint are complex and unique and argument would assist the Commission's deliberations. The Joint CLECs request 15 minutes per side for oral argument.

WHEREFORE, Joint CLECs respectfully request the Commission to grant oral argument on the Joint CLECs' Partial Motion to Dismiss.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLECS

Respectfully submitted:

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