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090538-TP

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Subject: Docket No. 090538-TP- Qwest Communications Company, LLC - Response in Opposition of Joint Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument

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Docket No.:
Docket No. 090538-TP- Qwest Communications Company, LLC - Response in Opposition of Joint Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument

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March 24, 2011

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 090538-TP, Qwest Communication Company, LLC's Response in Opposition to Joint Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket is Qwest Communication Company, LLC's Response in Opposition to Joint Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP and Request for Oral Argument.

Thank you for your assistance with this filing and please do not hesitate to contact me if you have any questions.

Sincerely,

Michael G. Cooke

MGC:amb
Enclosure

RM:7896551:1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Amended Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (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, 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
	Filed:	March 24, 2011

QWEST COMMUNICATIONS COMPANY, LLC'S RESPONSE IN OPPOSITION TO JOINT MOVANTS' MOTION FOR RECONSIDERATION OF ORDER NO. PSC-11-0145-FOF-TP AND REQUEST FOR ORAL ARGUMENT

Qwest Communications Company, LLC, ("QCC"), by and through undersigned counsel and pursuant to Rule 25-22.060, Florida Administrative Code, responds in opposition to the Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP ("Motion") filed on behalf of Access Point, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PAETEC Communications, Inc., and US LEC of Florida, LLC ("Joint Movants") on March 17, 2011. The Motion shamelessly reargues the Joint Movants' initial motion to dismiss, and presents nothing under Florida law that would require the Commission to reconsider Order No. PSC-11-0145-FOF-TP (the "Order"), which properly denied the motion to dismiss. The Motion is an abuse of the Commission's reconsideration procedures,

and for the reasons explained more fully below, QCC respectfully submits that the Joint Movants' Motion must be denied.

I. BACKGROUND

On December 11, 2009, QCC filed its initial Complaint in this matter alleging that certain CLECs in Florida were violating Chapter 364, F.S., by providing favorable prices for intrastate switched access to certain interexchange carriers ("IXCs"), but not to QCC.[1] The initial Complaint named six specific respondents while making it clear that QCC expected to identify additional respondents as a result of further review during the course of the proceeding.[2] On September 29, 2010 (as corrected on October 11, 2010), QCC filed a Motion for Leave to File an Amended Complaint adding thirteen additional respondents, including the Joint Movants. The Commission granted QCC's Motion on October 22, 2010.[3]

On November 11, 2010, the Joint Movants filed a Motion to Dismiss QCC's First and Second Claims for Relief and Request for Reparations. The Joint Movants did not request oral argument at the time they filed their Motion to Dismiss, thereby waiving the right to oral argument.[4]

After requesting and receiving an extension of time,[5] QCC filed its Response on December 8, 2010. This normally should have been the end of the pleading cycle for this phase of the case. However, on December 13, 2010, the Joint Movants filed a Motion for Leave to File a "very short reply" brief to the QCC Response. The Joint Movants did so despite having been advised previously by the Prehearing Officer that the uniform rules do not contemplate such a reply and that it is not the practice of the

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1 *See* Qwest Communications Company, LLC's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds, filed December 8, 2010 ("QCC Response"), at pp. 1-2 (providing background regarding the critical and bottleneck nature of CLEC-provided switched access services in Florida).

2 Soon after QCC filed its original Complaint, a number of the originally-named respondents filed motions to dismiss asserting many of the same arguments raised in the Joint Movants' motion to dismiss. On the arguments raised again by the Joint Movants, the initial dispositive motions were denied. Order No. PSC-10-0296-FOF-TP.

3 See Order No. PSC-10-0629-PCO-TP.

4 *See* Rule 25-22.0022(1), F.A.C.; Order No. PSC-11-0014-PCO-TP, at p 2.

5 QCC received the extension over the objection of the Joint Movants, who refused to consent to the request for more time unless QCC agreed to allow the Joint Movants to file a reply brief. *See* Order No. PSC-10-0696-PCO-TP.

Commission to grant such replies.[6] In utter disregard of the Prehearing Officer's prior statements, and without support of any rule, the Joint Movants filed their "request" to file a reply brief *and* incorporated therein five paragraphs of reply arguments—arguments which now have been incorporated into the present Motion. QCC objected and the Prehearing Officer denied the Joint Movants' request indicating that filing a motion for oral argument concurrently with the motion to dismiss would have been the proper way to seek an opportunity to the address the Commission after the pleading cycle had ended.[7] The Order also stated that the reply arguments and information included in the "request" for a reply would be given no weight.[8]

On January 27, 2011, Staff recommended denial of the Joint Movants' motion to dismiss. On February 22, 2011, the Commission unanimously voted to deny the Joint Movants' motion to dismiss. The Commission issued its Order Denying the Joint Movants' Motion to Dismiss on March 2, 2011.[9] In reaching its conclusion to deny the Joint Movants' motion to dismiss, the Commission specifically reviewed in its Order the following issues that had been raised by the Joint Movants:

> **Movants' Position:** As a threshold issue, the Movants contend that Qwest lacks standing to assert the claims in its complaint. The Movants request dismissal with prejudice of Qwest's First and Second Claim for Relief and Qwest's Prayer for Relief B seeking reparations. The Movants assert that Qwest fails to allege an injury resulting from alleged unlawful price discrimination and does not have a prima facie case of unlawful rate discrimination. The Movants further allege that they have not violated Section 364.04, F.S., arguing that the statute does not apply to the switched access [footnote omitted] service at issue in this case and that the statute does not prohibit carriers from selling at rates below those in their filed price lists. The Movants further contend that the statute does not provide a remedy to Qwest, which admits that it was charged the rates set forth in the filed price lists. Additionally, the Movants argue that we cannot order refunds to Qwest, stating that Qwest cannot receive a below-price rate that is more favorable than other purchasers. Other points raised by the Movants include:
>
> - Qwest is requesting a result that is contrary to public policy. The Movants note that Corporation De Gestion Ste-Foy Inc. v. Florida Power & Light Co. 385 So. 2d 124, 126 (Fla. 3rd DCA 1980) held that a "business whose rates are

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6 See Order No. PSC-10-0696-PCO-TP, at p. 2.

7 See Order No. PSC-11-0014-PCO-TP, at p. 2.

8 *Id.*

9 Order No. PSC-11-0145-FOF-TP.

governmentally regulated from granting a rebate or other preferential treatment to any particular individual" and that "a public utility or common carrier is not only permitted but required to collect undercharges from established rates, whether they result from its own negligence or even from a specific contractual understanding to charge a lower amount."

- If we were to determine that the Movants were unlawfully discriminatory, we are required to collect the undercharges and not pass through the refund to a third-party, such as Qwest, Section 364.08, F.S., states that "a telecommunications company may not extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege of facility not regularly and uniformly extended to all persons under like circumstances." The Movants assert Qwest's request for a refund would contradict this statute because Qwest would be receiving a benefit that other purchasers did not receive creating unlawful discrimination in favor of Qwest.

- The Movants argue that we lack statutory authority to grant retrospective relief for unlawful discrimination for any matter before it.

- The Movants further assert that under the Filed Rate Doctrine, the only rates that Qwest can be charged are the filed rates. [footnote omitted] The Movants argue that Qwest's claims for a refund based on its unlawful rate discrimination claim are prohibited by the Filed Rate Doctrine and must be dismissed.

- The Movants further contend Qwest's allegation that it was not charged the rates in the price list would prevent Qwest from being eligible for refunds, as the appropriate remedy in Florida would be for the Movants to collect the undercharges.[10]

As will be discussed in greater detail below, the Order's outline of the Joint Movants' arguments addresses all of the issues for which the Joint Movants now seek reconsideration. Offering nothing but a rehash of their earlier argument and a reply to QCC arguments that the Commission twice instructed the Joint Movants not to make, the present Motion represents the Joint Movants' attempted third bite at the apple. It should be denied without delay.

II. STANDARDS GOVERNING MOTIONS FOR RECONSIDERATION

The purpose of a motion for reconsideration is to identify a point of fact or law which was overlooked or which the tribunal failed to consider in rendering its order.[11] The moving party must bring to the administrative agency's attention a specific point that, had it been considered when presented in the

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10 Order No. PSC-11-0145-FOF-TP, at pp. 2-3.

11 *See Stewart Bonded Warehouse, Inc.* v. *Bevis*, 294 So, 2d 315 (Fla. 1974).

first instance, would have required a different decision.[12] A motion for reconsideration is not intended as a procedure for rearguing the case merely because the losing party disagrees with the judgment or order, or as an excuse to reargue matters that already have been considered by the Commission.[13]

The Commission has long recognized that a motion for reconsideration is not an appropriate vehicle to amplify prior arguments or make new arguments in order to cure defects in earlier pleadings.[14] In *United Gas Pipe Line Co. v. Bevis,* the Florida Supreme Court also has made it abundantly clear that attempting to use a motion for reconsideration to reargue a matter that has been fully considered is an unjustified waste of resources, and that it should not be used to invite complete re-analysis of what already has been argued. Justice England, concurring in the denial of reconsideration in the *United Gas Pipe Line* case, stated:

> I would deny rehearing in this case in the face of the multi-page, argumentative rehearing petitions which have been filed, for the reasons set forth in Texas Co. v. Davidson, 76 Fla. 475, 478, 80 So. 558, 559 (1918) . . . [and] Florida Appellate Rule 3.14(b), which states that a petition for rehearing shall be 'without argument' . . . .
>
> This expenditure of counsel's time, and the clients' money, is completely unjustified. This case had been argued, briefed and fully considered by the Court when the decision was initially rendered. *It is not the office of rehearing to invite a complete re-analysis of all that has gone before.* See State ex rel. Jaytex Realty Co. v. Green, 105 So.2d 817, 818-19 (1st DCA Fla. 1958).[15]

Here, similar to the situation addressed by the Supreme Court in *United Gas Pipe Line,* the Joint Movants filed a 12-page motion for reconsideration that is nothing more than a regurgitation of their prior arguments which the Commission carefully considered and rejected as legally deficient. The Motion does not meet the standard for reconsideration.

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[12] *See, United Gas Pipe Line Co. v. Bevis,* 336 So. 2d 560, 565 (Fla. 1976) (reh'g den. April 7, 1976); *State ex rel Jaytex Realty Co. v. Green,* 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (Wigginton, J., concurring); *Sherwood v. State,* 111 So. 2d 96 (Fla. 3d DCA 1959).

[13] *Diamond Cab Co. of Miami v. King,* 146 So.2d 889, 891 (Fla. 1962).

[14] *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,* 04 F.P.S.C. 11:364, Docket No. 030623-EI, Order No. PSC-04-1160-PCO-EI (Nov. 22, 2004); *In re: Development of local exchange telephone company cost study methodology(ies),* 92 F.P.S.C, 3:666, Docket No. 900633-TL, Order No. PSC-92-0132-FOF-TL (Mar. 31, 1992) (neither new arguments nor better explanations are appropriate matters for reconsideration).

[15] *United Gas Pipe Line,* 336 So. 2d at 565 (emphasis added).

III. ARGUMENT

The Motion should be denied because it utterly fails to meet the standards for reconsideration prescribed by Florida law. More specifically, the Motion improperly attempts to use the Commission's reconsideration procedures to reargue matters that have been fully aired and carefully considered by the Commission when it reviewed and denied the Joint Movants' motion to dismiss.[16]

The only statements the Joint Movants make which appear aimed at "identify[ing] a point of fact or law which was overlooked" are that (a) the Commission "failed to address separately and independently each of the very distinct bases of Movants' Motion to Dismiss," and (b) the Commission "erroneously addressed them in sweeping and conflated fashion."[17] As discussed below, the Commission is not required to address separately in its orders each conclusion it reaches.

After making these two unsupported statements, the Joint Movants repeat *almost verbatim* the arguments they raised in their motion to dismiss and/or in their failed attempt to file a reply brief.[18] For example, the Joint Movants repeat in their Motion the following arguments that were raised, considered, and rejected by the Commission when it reviewed the motion to dismiss:

- that QCC must show lost profits before the Commission can conclude it has been injured as a result of discriminatory pricing;[19]
- that ordering a refund would violate Section 364.08;[20]

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16 In fact, some of the arguments repeated in the Motion, such as the arguments relating to filed rate doctrine, discussed at pages 6 to 9 in the Motion, and the right to refunds as a remedy, discussed at pages 3 to 6, had been rejected previously by this Commission when it considered the same issues in motions to dismiss filed by other respondents in this proceeding. Order No. PSC-10-0296-FOF-TP.

17 Motion at pp. 1-2.

18 *See e.g.*, Motion at p. 5 ("*While the Decision does not rely on them*, Qwest raised two other arguments in opposition to the Motion to Dismiss, neither of which support the result reached in the Decision.") (emphasis added). By responding to arguments they admit were not relied upon by the Commission, the Joint Movants reveal their hand. They are once again improperly replying to QCC's opposition to their motion to dismiss.

19 *See* Motion, at pp. 3-5; Joint Movants' motion to dismiss, at pp. 5-6; Joint Movants' attempted reply brief, at pp. 1-2.

20 *See* Motion, at pp. 6- 9; Joint Movants' motion to dismiss, at pp. 10-14; Joint Movants' attempted reply brief, at p. 2.

- that the Joint Movants are not required by Section 364.04 to abide by their price lists;[21] and
- that QCC lacks standing to assert a violation of Section 364.04.[22]

Hence, the Motion is nothing but a *transparent* abuse of the Commission's reconsideration procedure, which is "not intended to permit a litigant to submit what amounts to an additional brief."[23] The Motion will serve only to waste QCC's, the Staff's and the Commission's resources, and to cause delay in the setting of a procedural schedule allowing this case to proceed.

A. The Commission Was Not Required to Separately Explain the Flaws in Each of the Joint Movants' Arguments.

Without authority, the Joint Movants attack the Commission's Order, asserting that reconsideration should be granted because the Order erroneously addressed the merits of their motion to dismiss in "sweeping and conflated fashion."[24] In the headings used to introduce their arguments, and in the arguments themselves, the Joint Movants claim that the Commission's decision "failed to address" their arguments.[25] This does not meet the standard for granting a motion for reconsideration. Contrary to the Joint Movants' assertion, there is no requirement for the Commission to recite in detail in its orders the conclusions it has reached about each of the Movants' arguments, or to describe separately every conclusion it has reached. In *Pan American World Airways, Inc. v. Florida Public Service Commission,*[26] the Florida Supreme Court held that the Commission was not required to incorporate into its final order a separate list designating all of its conclusions of law. The court in *Pan American* held that the Commission's final order set forth its conclusions of law with sufficient clarity to allow full, informed review and provided due process in compliance with essential requirements of law.

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21 *See* Motion, at p. 9; Joint Movants' motion to dismiss, at pp. 6-9.

22 *See* Motion, at pp. 9-12; Joint Movants' motion to dismiss, at pp. 7-9.

23 *Paul Henry Cleveland v. State*, 887 So.2d 363, 364 (Fla. 5th DCA 2004)*(per curiam)*.

24 Motion, at p. 2.

25 *See, e.g.*, Motion, at pp. 6-9.

26 427 So.2d 716, 718 (Fla. 1983).

The *Jaytex* case, cited *supra*, also addresses this issue. In *Jaytex*, the court noted that the sole and only purpose of a petition for rehearing is to call to the court's attention some fact, precedent, or rule of law which the court has overlooked in rendering its decision. The court then explained that an opinion is not designed to address every element a litigant has argued.

> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters already discussed in briefs . . . . An 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.[27]

The Joint Movants have not identified any point of law which the Commission overlooked or failed to consider. They simply disagree with the decision the Commission made.

B. The Joint Movants' Arguments Still Lack Merit.

As noted above, the Motion reargues several points, listed below, that were raised by the Joint Movants in their motion to dismiss:

- that QCC is required to show "lost profits" before it can allege an injury due to price discrimination under Chapter 364;
- that the Commission cannot order a refund because QCC paid the Joint Movants' filed price list rates and ordering a refund would, in itself, violate Section 364.08;
- that the Joint Movants did not violate Section 364.04 by failing to abide by their published price lists; and
- that QCC lacks standing to allege that the Joint Movants' violated Section 364.04 by failing to abide by their price lists.

No matter how many times the Joint Movants repeat these arguments, whether in their motion to dismiss, in their attempt to file a reply brief, or in this Motion, their arguments are without merit. QCC will only

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[27] 105 So.2d 817, 819.

briefly address each reargument in turn, below.[28] In doing so, however, it is important to restate the standard of review for deciding a motion to dismiss. Accepting 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 circumstance under which a cause of action for relief may be granted.[29] The Joint Movants did not and do not meet this burden.

1. QCC's Claim for Recovery Based Upon Rate Discrimination is Authorized by Florida Law.

The Joint Movants repeat almost *verbatim* their earlier argument that QCC has not stated a *prima facie* case because it has not alleged lost profits or some other form of consequential, economic damages.[30] To support their assertion that QCC cannot claim to be harmed by having been overcharged as compared to other IXCs, but must instead allege lost profits, the Joint Movants cited no Florida law. Instead, they relied on opinions that interpret provisions of federal statutes. As QCC has responded previously, this case involves violations of *Florida,* not federal, statutes that proscribe the type of discriminatory behavior in which the Joint Movants and other respondents engage.[31] Based on its review of the statutes it administers and prior orders it has issued, the Commission concluded that having to pay higher amounts for switched access "causes QCC to suffer an immediate and ongoing injury in fact which is quantifiable and actual."[32] Thus, the Commission concluded that QCC had established a *prima facie* case. The Commission is required to interpret the statutes and rules it is charged with implementing and its construction of the statutes and rules it administers will be given great weight.[33] The fact that the Commission did not conclude, based upon review of the statutory provisions it administers, that QCC

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28 To avoid burdening the Commission, QCC does not intend to comprehensively repeat its rebuttal to each of the Joint Movants' recycled arguments. Instead, QCC refers the Commission to, and incorporates herein by this reference, the QCC Response.

29 *See Varnes v. Dawkins*, 624 So.2d 349 (Fla. 1st DCA 1993).

30 Motion, at pp. 3-9.

31 *See, e.g.* Sections 364.01, 364.08 and 364.10, F.S.

32 *See*, Order at p. 6.

33 *See, e.g., Pan American,* at 719; *see also, Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. 2nd DCA 1979) (PSC has exclusive jurisdiction to investigate alleged statutory violations and determine applicable refunds).

must prove "lost profits" to support a *prima facie* case does not mean the Commission "overlooked" the Joint Movants' contrived arguments on this issue. It means the Commission *rejected* them.

2. The Filed Rate Doctrine Does Not Preclude the Commission from Ordering Refunds.

The Joint Movants restate their prior arguments that Section 364.08 is a codification of the filed rate doctrine that precludes the Commission from ordering refunds.[34] In doing so, the Joint Movants cite no new authority or change in law, but simply repeat the same arguments they made previously--*i.e.*, that other IXCs were undercharged, but QCC was not overcharged. They identify no issue overlooked by the Commission. They simply pursue improper argument, attempting further rebuttal of authority that was cited by QCC and the Commission.[35]

As QCC has stated, QCC does not allege that off-price list agreements are *per se* unlawful. In its Amended Complaint, QCC stated that a carrier "may, in appropriate circumstances, enter into separate contracts with switched access customers which deviate from its tariffs or price lists."[36] As discussed below in connection with the requirement of Section 364.04 to publish price lists, the use of individual agreements is contemplated by Chapter 364. But the failure to disclose the agreements and make the lower rates provided in them available to QCC creates an undue preference toward the favored IXCs in violation of Florida law.

Hence, nothing in Section 364.08 precludes the Commission from ordering refunds. Doing so, in fact, makes the preferential rates available to QCC as contemplated by Chapter 364. The Commission

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[34] Motion, at pp. 6-8.

[35] *See, e.g.*, Motion, at footnote 20, where the Joint Movants attempt to distinguish cases, such as *Richter*, *supra*, that clearly support the Commission's authority to order refunds, even in the face of tariffed rates. The Joint Movants attempt to distinguish the behavior in *Richter* (i.e., "an [alleged] illegal scheme,") from their own, and note that the "illegal" behavior in *Richter* prevented the Commission from having the "true facts." First, it is ironic that parties which entered into undisclosed, off-price list agreements would seek to use concealment behavior, such as is described in *Richter*, as a shield. But even more importantly, the *violation* in *Richter* – i.e., the "illegal" act upon which refunds ordered by the Commission were based– was not the alleged fraud or concealment in that case, but the violation of the underlying statutory provisions, such as Section 366.03 and 366.04. Those statutes require the Commission to establish rates that are "fair and reasonable." See, *Richter*, at page 799. Indeed, the Commission has found that a violation of such statutory provisions can be based upon rather mundane behavior, including imprudent management decisions, when circumstances warrant. In this proceeding, the Joint Movants have not denied that their behavior has discriminated against QCC – i.e., that they have violated underlying statutory provisions such as Sections 364.08 and 364.10(1). Under these circumstances, based upon substantial Commission precedent, and the regulatory scheme established by Chapter 364, it is absurd to assert that the filed rate doctrine precludes the Commission from ordering refunds.

[36] Amended Complaint, at paragraph 5.

expressly noted in its Order that it has 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.[37]

It also should be noted that the Commission has already *twice* addressed and rejected the filed rate doctrine defense in this proceeding, once in response to a motion to dismiss filed by other respondents in 2010 and a second time in response to the Joint Movants' motion to dismiss. In both instances, the Commission denied the motions to dismiss and flatly disagreed with the CLECs arguing that the Commission lacks authority to award reparatory refunds.[38] It is the Commission's responsibility to ensure fair rates and the Commission has long held that it has authority to order refunds, when appropriate, where acts such as those of the Joint Movants have led to a violation of an underlying statutory provision. This authority to order refunds has been upheld by reviewing courts even though tariffed rates were at issue in the case.[39] As stated in its Amended Complaint, QCC has been subjected to unjust and unreasonable rate discrimination and is entitled to refunds that the Commission is fully authorized to order.

3. The Joint Movants Violated the Provisions of Sections 364.04.

Section 364.04 requires every telecommunications company to publish the rates, tolls, rentals, contracts, and charges for services it performs in Florida.[40] The Joint Movants, however, assert that Section 364.04 does not require CLECs to charge only rates that are set forth in their published price lists. If companies are free to disregard their filed price lists, Section 364.04 serves no purpose. This renders the Joint Movants' reading of that section contrary to basic principles of statutory construction.[41] The

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37 *See* Order, at p. 5.

38 *See* Order No. PSC-10-0296-FOF-TP, issued May 7, 2010, at page 6; Order, at page 5.

39 *See, e.g., Gulf Power Co. v. Florida Public Service Commission*, 487 So.2d 1036 (Fla. 1986).

40 The Joint Movants filed their price lists at the Commission. *See* Amended Complaint, at page. 21.

41 *See State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) (the Legislature does not intend to enact useless provisions and courts should avoid readings that would render part of a statute meaningless).

gravamen of QCC's claim is that if the CLECs entered into such agreements, they were obligated to make those rates, terms and conditions available to QCC on a non-discriminatory basis. The Movants' conduct, entering into secret contracts at prices lower than those included in their published price lists, clearly violates Section 364.04. This conduct, especially when viewed in conjunction with the Movants' secret discounts to a select few IXCs, violates the plain language, meaning and purpose of Section 364.04.[42]

4. QCC Has Standing to Assert Claim for Relief Based Upon Section 364.04.

Finally, the Joint Movants recycle their argument that, even if they violated Section 364.04, QCC does not have standing to bring a claim under that provision. They assert that QCC was not harmed when the Joint Movants charged other IXCs lower rates than what they charged QCC, and that, therefore, QCC did not have standing to assert a claim for violation of Section 364.04.[43] However, the failure to adhere to their published price lists (for the benefit of an exclusive few IXCs, at least) led directly to QCC paying a discriminatorily inflated rate. The Amended Complaint details specific acts and omissions of the Joint Movants that affect QCC's substantial interests. Their actions violate Sections 364.01, 364.04, 364.08 and 364.10, which the Commission is required to enforce.[44] Further, as specifically alleged by QCC, those statutes have been and continue to be violated by the Joint Movants, causing consequences that the statutes are designed to prohibit.

Clearly in this context, Section 364.04 requires that *customers* and *potential customers*, not just the Commission, are entitled to receive accurate pricing information, and it was the intent of Section 364.04 to require complete information to be made publically available. Utility customers such as QCC have a substantial interest in receiving accurate and complete information about the pricing that is

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42 The Amended Complaint clearly identifies the facts and legal theory underlying QCC's second cause of action. It also clearly puts the Movants on notice of the nature of the claims against them. That said, QCC could have also referenced Section 364.08(1) as additional support for its second cause of action, just as it did in support of its first cause of action. To the extent the Commission finds that the Amended Complaint would be clearer if QCC repeats its reference to Section 364.08 in conjunction with its second claim, QCC is willing to do so. It would certainly exalt form over substance to dismiss QCC's second cause of action on this basis given the clarity of QCC's allegations.

43 Motion, at p. 10.

44 Section 364.01(1), F.S. ("The Florida Public Service Commission *shall exercise* over and in relation to telecommunications companies *the powers conferred in this chapter.*") (emphasis added).

available to them. Without accurate information, QCC is put at an immediate cost disadvantage relative to other IXCs that receive the benefits of secret, off-price list rates. To the extent that CLECs can deviate from their published price lists, customers like QCC are harmed in that they cannot avail themselves of advantageous pricing because some of the available prices are hidden or secret. That results in an immediate financial detriment that is within the zone of interests that section 364.04 is intended to protect. Thus, as the Commission determined, the standing requirements of the *Agrico* case clearly are met.[45]

IV. THE JOINT MOVANTS' REQUEST FOR ORAL ARGUMENT

Although QCC is prepared for oral argument should the Commission request it, it is obvious that the Joint Movants are misusing the Commission's reconsideration procedure solely to reargue their motion to dismiss, to reply to QCC arguments they were *twice* instructed not to reply to and to delay this proceeding. The request for oral argument simply is an attempt in hindsight by the Joint Movants to undo their prior waiver of their right to address the Commission on their motion to dismiss. As such, oral argument would serve no purpose other than to allow the Joint Movants to reargue matters that already have been thoroughly considered and rejected by the Commission.

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[45] Under the two-prong standing test set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), QCC must show (1) that it will suffer injury in fact which is of sufficient immediacy, and (2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The Commission determined that QCC meets the *Agrico* 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. *See* Order, at p. 6.

WHEREFORE, for the foregoing reasons, the Joint Movants' Motion for Reconsideration should be denied.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 24th day of March, 2011, to the following:

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