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State of Florida



Public Service Commission
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 TALLAHASSEE, FLORIDA 32399-0850

COMMISSION
CLERK**-M-E-M-O-R-A-N-D-U-M-****DATE:** April 14, 2011**TO:** Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Tan) *TW*
 Division of Regulatory Analysis (Gowen, Trueblood) *GT*

RE: Docket No. 090538-TP – 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.

AGENDA: 04/26/11 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Requested – Participation at the Discretion of the Commissioners

COMMISSIONERS ASSIGNED: All Commissioners**PREHEARING OFFICER:** Edgar**CRITICAL DATES:** None**SPECIAL INSTRUCTIONS:** None**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\090538.RCM.DOC**Case Background**

This recommendation addresses the March 17, 2011, Joint Motion for Reconsideration filed by Access Point, Inc, Lightyear Network Solutions, LLC, Navigator Telecommunications,

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LLC, Paetec Communications, Inc., and US LEC of Florida, LLC (Movants) of Order No. PSC-11-0145-FOF-TP (Order)¹ denying the Movants' Motion to Dismiss.²

On December 11, 2009, Qwest Communications Company, LLC (Qwest) filed a complaint regarding rate discrimination in connection with the provision of intrastate switched access services against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLECs whose true names are currently unknown).

On October 22, 2010, the Commission granted Qwest leave to file an Amended Complaint, adding additional Respondents and removing its Part D Prayer for Relief in which the company asked for a "cease and desist" order from the Respondents' actions. The additional Respondents are Access Point, Inc., Birch Communications, Inc., Bullseye Telecom, Inc., DeltaCom, Inc., Ernest Communications, Inc., Flatel, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PaeTec Communications, Inc., STS Telecom, LLC, US LEC of Florida, LLC, and Windstream NuVox.

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

On April 6, 2011, Qwest filed a Notice of Voluntary Dismissal without Prejudice of Cox Florida Telecom, L.P., releasing Cox Florida Telecom, L.P. as a party to the complaint.

The Commission is vested with jurisdiction over these matters pursuant to the provisions of Chapters 364 and 120, F.S.

¹ Issued on March 2, 2011.

² The Movants filed a Joint Motion to Dismiss on November 16, 2010. On November 17, 2010, Windstream NuVox filed a Notice of Joinder to the Joint Motion to Dismiss.

Discussion of Issues

Issue 1: Should the Movants' Request for Oral Argument be granted?

Recommendation: No. The Commission should deny the Movants' Request for Oral Argument. (Tan)

Staff Analysis: Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued. The respective arguments are summarized below.

I. Movants' Request for Oral Argument

Movants seeks reconsideration because the Order failed to "address separately and independently" each argument of the Movants' Motion to Dismiss. The Movants believe the Commission "overlooked or misunderstood" various points of law and fact.³ Movants argue that the issues raised are complex and that oral arguments will aid the Commission's "understanding and consideration of the issues" presented.⁴

II. Qwest's Response in Opposition

Qwest asserts that the Movants are attempting to use the Commission's reconsideration process to reargue their Motion to Dismiss. Specifically, Qwest argues that to grant the Request for Oral Argument would simply allow the Movants to reiterate matters that have been thoroughly considered and rejected by the Commission.

III. Analysis

The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying matter. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

Staff does not believe that the Commissioners would benefit from oral argument on the Movants' Joint Motion for Reconsideration of the March 2, 2011, Order because both parties provided sufficiently argued their positions in their pleadings. Therefore, staff recommends that the Commission deny the Movants' Request for Oral Argument. However, should the Commission, in its discretion, allow oral argument, staff recommends that each party be allowed five minutes to present its arguments.

IV. Conclusion

Staff recommends that the Movants' Request for Oral Argument be denied.

³ Movants' Motion for Reconsideration, pg. 1.

⁴ Movants' Request for Oral Argument, pg. 1, filed on March 17, 2011.

Issue 2: Should the Commission grant the Motion for Reconsideration of the Commission's Order reconsider its decision on Movants' Motion to Dismiss?

Recommendation: No. The Commission should deny Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP. (Tan)

Staff Analysis:

As set forth in the Case Background, Movants filed a Motion For Reconsideration of Order No. PSC-11-0145-FOF-TP (Order) and Qwest filed a Response in Opposition. The parties' arguments are addressed in the following analysis.

I. Standard of Review

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

II. Movants' Joint Motion for Reconsideration

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

The Movants also argue that the Commission can "issue a decision that a carrier discriminated if the plaintiff makes a prima facie discrimination case, which includes a showing of injury, and a court of law would then decide whether such competitive damages could be ordered."⁵

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

- Qwest fails to state a claim for unlawful rate discrimination and fails to allege a "quantifiable and actual" injury, stating that the injury must reflect a loss in profits from the alleged discrimination.⁶

⁵ Motion at 6.

⁶ *I.C.C. v. United States*, 289 U.S. 385, (1933).

- Section 364.08, F.S., precludes the Commission from ordering refunds, and that the filed rate doctrine protects the Movants as Qwest was charged the amount in the price lists.⁷
- Movants have not violated Section 364.04, F.S., since Qwest was charged from the pricelist on file, and therefore Qwest's Second Claim for Relief should have been dismissed.⁸
- Qwest lacks standing on its Second Claim for Relief.
- Qwest's alleged economic harm is not legally sufficient.⁹

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

III. Qwest's Response in Opposition

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

Qwest contends that disagreeing with the Commission's decision does not justify the filing of a Motion for Reconsideration, nor is it a proper avenue to make new arguments to cure defects in earlier pleadings or reargue matters previously considered.¹⁰

Qwest argues the following:

- The Commission is not required to address separately each decision or every element raised in its order.¹¹
- The Commission did not overlook a fact or point of law, but rather considered and rejected the Movants' arguments.
- The Movants' Motion causes delay and is a waste of Commission resources.

⁷ Motion at pg. 6.

⁸ Motion at pg. 9, stating that Section 364.04, F.S. contains no requirement that the Movants changed only the rates in their published price lists.

⁹ Motion at 10, arguing that a third party, who was charged the filed rate, cannot enforce Section 364.08, F.S.

¹⁰ Response in Opposition to Motion to Dismiss (Response), pg. 5, citing Diamond Cab Co. of Miami v. King, 146 So.2d 889,891 (Fla. 1962) and See In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc. and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error, Order No. PSC-04-1160-PCO-EI (Nov. 22, 2004), Docket No. 030623-EI; In re: Development of local exchange telephone company cost study methodology(ies), Order No. PSC-92-0132-FOF-TL (March 31, 1992), Docket No. 900633-TL.

¹¹ Response, pg. 7, Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 718 (Fla. 1983) (holding that the Commission was not required to incorporate into its final order a separate list designating all of its conclusions of law).

Further, Qwest argues that the Movants' repeated arguments continue to lack merit and that the Movants failed to meet the standard of a Motion to Dismiss¹² in their initial filings. In response to the arguments raised previously, Qwest states the following:

- The Order determined that having to pay higher amounts for switched access "causes Qwest to suffer an immediate and ongoing injury in fact which is quantifiable and actual."¹³
- The Order established that the Commission has the authority to prevent anti-competitive behavior and unlawful rate discrimination, pursuant to Chapter 364, and that it has broad discretion to take remedial actions, such as ordering refunds of overcharges."¹⁴
- The Movants cannot assert that Section 364.04, F.S., does not require CLECs to charge only rates that are established in the published prices lists, because doing so contravenes the basic principles of statutory construction.
- The Commission determined that Qwest meets the Agrico¹⁵ 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.¹⁶

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

IV. Analysis

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

The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision...

...

[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion

¹² Motion at pg. 9, stating that "[taking] all allegations of a petition as true and in the light most favorable to the petitioner, the moving party must show that there is no circumstances under which a cause of action for relief may be granted."

¹³ Order at pg. 6.

¹⁴ Order at pg. 5.

¹⁵ Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d. 478 (Fla 2nd DCA 1981).

¹⁶ Order at pg. 6.

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.¹⁷

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

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

Staff believes the Movants have not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. Accordingly, staff recommends the Commission should deny the Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP.

V. Conclusion

Staff recommends that the Movants' Motion for Reconsideration of Order No. PSC-11-0145-FOF-TP be denied.

¹⁷ In re: Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida, LLC by Bright House Networks Information Services (Florida), LLC, Order No. PSC-11-0141-FOF-TP, issued March 1, 2011; in Docket 090501-TP; In re: Complaint and request for emergency relief against Verizon Florida, LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC, and In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone., Order No. PSC-08-0549-PCO-TP, issued August 19, 2008, in Dockets Nos. 070691-TP and 080036-TP, quoting Jaytex, 105 So.2d at 819.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission accepts staff's recommendation, this docket should not be closed until after an evidentiary hearing has been held and a final order issued. If the Commission denies staff's recommendation in Issue 2 and grants the Movants' Motion For Reconsideration, the Movants should be removed as parties and the docket should remain open for staff to address the status of the remaining parties. (Tan)

Staff Analysis: No. If the Commission accepts staff's recommendation, this docket should not be closed until after an evidentiary hearing has been held and a final order issued. If the Commission denies staff's recommendation in Issue 2 and grants the Movants' Motion For Reconsideration, the Movants should be removed as parties and the docket should remain open for staff to address the status of the remaining parties.