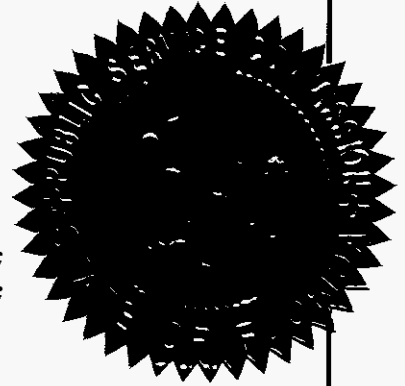


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

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.



PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 4

COMMISSIONERS
PARTICIPATING: CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER RONALD A. BRISÉ
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, April 26, 2011

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

1 P R O C E E D I N G S

2 CHAIRMAN GRAHAM: Next is going to be Item
3 Number 4. Good morning.

4 MS. TAN: Good morning. Good morning,
5 Commissioners.

6 Lee Eng Tan on behalf of Commission staff.
7 Item Number 4 is a complaint by Qwest that other CLECs
8 have benefitted from nontariff private contracts that
9 offered favorable access rates unavailable to Qwest.
10 Staff's recommendation addresses the movant's motion
11 for reconsideration. The movants have requested oral
12 argument. Staff recommends denying the request for
13 oral argument. However, should the Commission in its
14 discretion grant oral arguments, staff recommends that
15 each side be given five minutes.

16 Mike Cooke, local counsel for Qwest, is here
17 today. Adam Sharer (phonetic) from Qwest, and the
18 counsel for the movants, Philip Macres and Eric
19 Branfmen are also available by telephone should the
20 Commission have any questions. Staff is available for
21 questions.

22 CHAIRMAN GRAHAM: Thank you.

23 Commissioner Brown.

24 COMMISSIONER BROWN: I pulled this item
25 because I actually would like to hear from the parties.

1 I don't think that five minutes of oral argument
2 time -- I think that it may elucidate possibly the
3 movant's request for reconsideration, and I personally
4 would rather err on the side of an abundance of due
5 process than limit it in scope.

6 And at that, I would like to make a motion to
7 deny staff's recommendation on Issue 1 and allow the
8 parties five minutes time for oral argument, keeping in
9 mind to stick to the motion for reconsideration and not
10 reargue the merits of the case.

11 **COMMISSIONER EDGAR:** Second.

12 **CHAIRMAN GRAHAM:** It has been moved and
13 seconded to vote yes on Issue Number 1 as opposed to
14 vote no, staff recommendation.

15 Any further discussion on Issue Number 1?
16 All in favor say aye.

17 (Vote taken.)

18 **CHAIRMAN GRAHAM:** Any opposed? Okay.

19 We will have oral arguments.

20 Mr. Cooke.

21 **MR. COOKE:** Commissioner, Mr. Chairman, thank
22 you. Commissioners, good morning.

23 Michael Cooke for Qwest Communications. As
24 Ms. Tan mentioned, Adam Sharer, who is associate
25 general counsel for Qwest, also is available by

1 telephone. We appreciate the opportunity to address
2 you this morning.

3 Commissioners, the essence --

4 **MS. HELTON:** Commissioners.

5 **CHAIRMAN GRAHAM:** Hold on just a second.

6 **MS. HELTON:** Mr. Chairman, since it is the
7 movant's motion, I think that they should go first, and
8 I think they are here telephonically, and then Mr.
9 Cooke, I think, should respond.

10 **CHAIRMAN GRAHAM:** Okay.

11 **MR. BRANFMEN:** May it please the Commission;
12 this is Eric Branfmen, counsel for the movants.

13 The parties are agreed that the standard for
14 reconsideration is that the Commission's decision
15 overlooked or failed to consider some point of fact or
16 law. That standard is met here, and let me provide two
17 examples. The first example, Qwest's complaint
18 contains three counts. The first count claims
19 discrimination --

20 **CHAIRMAN GRAHAM:** Mr. Branfmen?

21 **MR. BRANFMEN:** Yes.

22 **CHAIRMAN GRAHAM:** Hold on just a second. We
23 are having difficulty hearing you. Let's see if we
24 can't get that turned up a little bit, and I'll restart
25 you on your five minutes. Okay. Let's try that again,

1 sir.

2 **MR. BRANFMEN:** Thank you.

3 The parties are agreed that the standard for
4 reconsideration is that the Commission's decision
5 overlooked or failed to consider some point of fact or
6 law. That standard is met here, and let me provide two
7 examples. The first example, Qwest's complaint
8 contains three counts. The first count claims
9 discrimination, and the second count claims that the
10 movants failed to charge other carriers the lawfully
11 tariffed rate. Obviously each of those counts have to
12 stand on its own merit. The decision recognizes that
13 movants moved to dismiss for lack of standing, but
14 misapprehends which count movants were seeking to
15 dismiss on grounds of lack of standing.

16 Movants claim that Qwest lacks standing with
17 respect to the second count, alleging that movants
18 failed to charge other carriers the lawfully tariffed
19 rate. But the decision on its face misunderstood which
20 count movants claimed that Qwest lacks standing. The
21 decision found that Qwest had standing with respect to
22 its claims of discrimination, which is the first count,
23 but that isn't what movants argue.

24 Movants concede that Qwest has standing to
25 pursue its claim of discrimination, but argue that

1 Qwest lacks standing with respect to its claim in the
2 second count, which is that movants failed to charge
3 other carriers the lawfully tariffed rate. The fact
4 that the decision rejected a claim that movants did not
5 make and failed to address the claim that movants did
6 make is clear evidence that the decision entirely
7 failed to consider the law as applied to what movants
8 are arguing.

9 Now, I will move on to a second example.
10 Movants contend that the reparations that Qwest seeks
11 are not available based on the allegations of Qwest's
12 complaint. The decision states that reparations are
13 available because Qwest is claiming that it was
14 overcharged, but the cases on which the decision bases
15 the proposition that reparations are available in cases
16 of overcharge involve parties claiming that they paid
17 more than the lawfully tariffed rate for the service
18 that they received. The decision fails to consider
19 that here, unlike those cases, Qwest admits that it
20 was, in fact, charged the only lawfully tariffed rate.
21 And here the rates are set forth in price lists rather
22 than tariffs, but the law is the same with respect to
23 both.

24 Qwest's complaint is not that Qwest was
25 overcharged as compared with the lawfully tariffed

1 rate, but that other carriers were undercharged. They
2 were are charged less than the lawfully tariffed rate.
3 And the decision fails to consider that there is no
4 precedent for awarding reparations to a party that
5 complains that a competitor was charged less than the
6 lawfully tariffed rate. So those are examples why the
7 decision of March failed to consider important facts
8 and legal principles.

9 I would be prepared to discuss why, when
10 those principles are considered, the decision was
11 incorrect. But I would reserve on that, unless the
12 Commission wants to hear from me on that.

13 **CHAIRMAN GRAHAM:** Okay, sir. Thank you. Is
14 somebody else on the phone? Was it just --

15 **MS. TAN:** Commissioner, or Chairman, that
16 would be Mike Cooke for Qwest.

17 **CHAIRMAN GRAHAM:** Oh, I thought we had two
18 people on the phone that were going to speak.

19 **MR. COOKE:** Commissioner, Mike Cooke for
20 Qwest. Adam Sharer is also on the phone from Qwest and
21 he is available if there's questions.

22 I think that the parties agree on the
23 standard for review of a motion for reconsideration,
24 which is that the proponents of the motion have to show
25 that there is a point of fact or law that the

1 Commission has overlooked or not addressed, and that's
2 simply not the case in this matter. Even the two
3 examples that Mr. Branfmen raised were expressly
4 briefed and addressed in the proceeding that took place
5 that ended up denying the motion to dismiss.

6 I think, for example, the second example he
7 gave with regard to the reparations issue, it's
8 essentially a follow-the-rate-doctrine argument in that
9 they specifically argued in their pleadings that Qwest
10 was not arguing that we were being overcharged and that
11 in turn we were only being charged what was the
12 tariffed rate. Well, first of all, we gave plenty of
13 examples in our response that showed that that is not
14 necessarily the case in Florida. There is a case
15 called Rector (phonetic) that we briefed and discussed
16 in our pleadings, and the Commission considered that
17 and decided that it doesn't apply in these
18 circumstances.

19 In fact, the Commission considered that a
20 year ago in another motion to dismiss that was filed by
21 another CLEC when this case was first initiated. So I
22 don't think it's accurate to say that the Commission
23 has not considered that.

24 With regard to the lack of standing issue,
25 the order is generic in terms of discussing standing.

1 I think that is fair to say, but there is nothing in
2 Florida law that says that the Commission has to give
3 an independent separate analysis or discussion of every
4 point that's raised by a petitioner. In fact, there is
5 law to the contrary. The staff cited the Jaytex case
6 which specifically says language to the effect that
7 it's not the purpose of an order of a decision to
8 respond to every point that the petitioner might make.

9 And, in fact, there are going to be times
10 when portions of a case, aspects of a case aren't
11 discussed in an order. The petitioner should not take
12 that to mean that the Commission has not considered
13 that point. In the case of -- I think it was Pan Am
14 Airways versus the Public Service Commission, the
15 Florida Supreme Court specifically said that it's not
16 necessary for this Commission in its orders to list
17 independently all of its conclusions regarding the
18 decision that it has made.

19 So really what the movants are objecting to
20 is the wording of the order, but I don't think that any
21 of what they have raised, because these discussions
22 have all taken place or at least the pleadings have all
23 addressed all of these arguments that they are
24 discussing today. And that is the standard, is there
25 anything that the Commission overlooked or failed to

1 consider, and that simply is not the case here.

2 **CHAIRMAN GRAHAM:** Thank you, sir.

3 Commissioner Brown.

4 **COMMISSIONER BROWN:** I'm happy that we had an
5 opportunity to hear from the movants on the motion for
6 reconsideration, but I am not convinced that we should
7 not approve staff's recommendation on Issue 2. So I
8 would move to approve staff's recommendation on Issue
9 2.

10 **CHAIRMAN GRAHAM:** Two and 3?

11 **COMMISSIONER BROWN:** I'm sorry, 3. Is there
12 3? Yes, 2 and 3.

13 **CHAIRMAN GRAHAM:** It has been moved and
14 seconded, staff recommendation on Issues 2 and 3.

15 Any further discussion? Seeing none, all in
16 favor say aye.

17 (Vote taken.)

18 **CHAIRMAN GRAHAM:** Those opposed?

19 By your action you've approved staff
20 recommendation on Issues 2 and 3 on Item Number 4.

21 **MR. COOKE:** Thank you, Commissioners.

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1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)
4

5 I, JANE FAUROT, RPR, Chief, Hearing Reporter
6 Services Section, FPSC Division of Commission Clerk, do
7 hereby certify that the foregoing proceeding was heard
8 at the time and place herein stated.

9 IT IS FURTHER CERTIFIED that I
10 stenographically reported the said proceedings; that
11 the same has been transcribed under my direct
12 supervision; and that this transcript constitutes a
13 true transcription of my notes of said proceedings.

14 I FURTHER CERTIFY that I am not a relative,
15 employee, attorney or counsel of any of the parties,
16 nor am I a relative or employee of any of the parties'
17 attorney or counsel connected with the action, nor am I
18 financially interested in the action.

19 DATED THIS 29th day of April, 2011.
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24
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JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732