

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 090538-TP

In the Matter of:

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. 3

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

DATE: Thursday, September 8, 2011

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

REPORTED BY: LINDA BOLES, RPR, CRR
Official FPSC Reporter
(850) 413-6734

DOCUMENT NUMBER - DATE

06694 SEP 19 =

FLORIDA PUBLIC SERVICE COMMISSION

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P R O C E E D I N G S

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CHAIRMAN GRAHAM: Item Number 3.

MS. TAN: Good morning, Commissioners. Lee Eng Tan on behalf of Commission Staff.

Item Number 3 is a complaint by Qwest that other CLECs have benefited from nontariff private contracts that offered favorable access rates unavailable to Qwest. Staff's recommendation addresses the joint CLECs' motion to dismiss for lack of subject matter jurisdiction.

Staff is recommending the Commission deny the motion because Staff believes that the Commission retains the jurisdiction over the matters raised in Qwest's complaint. The joint CLECs have requested oral argument. If the Commission decides to grant oral argument, Staff recommends that each side be allowed ten minutes. Should the Commission grant oral argument, Matt Feil, Marsha Rule, and De O'Roark are here today for the joint CLECs. Mike Cooke and Adam Sherr are here today on behalf of Qwest. In addition, Staff is available for any questions.

CHAIRMAN GRAHAM: Okay. Commission board, we are on Issue Number 1.

Commissioner Edgar.

1 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.

2 I would move that we approve the Staff
3 recommendation on Issue 1 for this item, which would
4 mean that we would hear oral argument with ten minutes
5 per side, and ask that before we begin we ask the
6 parties to share with us how they're going to use that
7 time.

8 **CHAIRMAN GRAHAM:** All right. It's been moved
9 and seconded to move Staff recommendation on Issue
10 Number 1. Any other discussion? Seeing none, all in
11 favor, say aye.

12 (Unanimous response.)

13 Any opposed?

14 (No response.)

15 Okay. All right. Who's going first? Matt
16 and you guys.

17 **MR. FEIL:** Mr. Chairman, there are 15
18 companies who signed the motion to dismiss you have
19 before you. I represent six of those. Mr. O'Roark
20 represents another, Ms. Rule represents another, and
21 there are still other attorneys who are monitoring.

22 To use the time effectively, as Commissioner
23 Edgar mentioned, I will be speaking on behalf of all the
24 companies in a direct argument. And for the direct
25 argument I propose a hard stop at six minutes so that we

1 can use our time effectively.

2 We would like the opportunity for rebuttal,
3 which Mr. O'Roark would do, representing and speaking on
4 behalf, speaking on behalf of all the companies again.
5 So with your permission, that's what we suggest as the
6 most effective way to address you today.

7 **CHAIRMAN GRAHAM:** I will let you know when you
8 hit the five minute mark and then the six minute mark so
9 you know that you're, you're coming up on your six
10 minutes, and then we'll let you come back and rebut for
11 the last four. Is that okay?

12 **MR. COOKE:** That's okay with us. Thank you.

13 **CHAIRMAN GRAHAM:** Okay. Matt, you have the
14 floor.

15 **MR. FEIL:** Thank you. Thank you, Mr.
16 Chairman.

17 One of the things we would like to do is pass
18 out a very short segment of the 2011 Regulatory Reform
19 Act with your permission, Mr. Chairman.

20 **CHAIRMAN GRAHAM:** Sure.

21 **MR. FEIL:** We have copies for everyone. Thank
22 you.

23 The issue before you today is whether you may
24 take action on the pending administrative claim after
25 the Legislature removes the limited jurisdiction that

1 authorized you to address the claim in the first place.
2 The answer under Florida law, we maintain, is absolutely
3 clear. If the Legislature removes an agency's
4 jurisdiction and does not include a savings clause, all
5 pending cases arising under that jurisdictional
6 authority fall with the law.

7 We've passed out the savings clause that is in
8 Chapter 364, and specifically Section 367.385 contains
9 the savings clause, and I'll come back to that later.

10 In summary, this pending case must be
11 dismissed because the agency lacks the power to address
12 the case. That said, dismissal does not rule out the
13 possibility that Qwest might be able to refile a
14 different claim that is within the Commission's
15 continuing jurisdictional authority or a civil case in
16 court under general commercial statutes, but you must
17 focus on the complaint that Qwest did file here with
18 you, and that complaint expressly relies on repealed
19 law. As such, the Commission simply does not have
20 jurisdiction to address the complaint.

21 We filed the motion to dismiss because the
22 2011 Regulatory Reform Act passed by the Legislature
23 became effective July 1 and it repealed your
24 jurisdiction over Qwest's claims in this case. This
25 motion, therefore, is unlike any prior filed in this

1 proceeding. As you know, the scope of your jurisdiction
2 over telecommunications companies is as provided in
3 Chapter 364, and the Commission may only regulate to the
4 extent Chapter 364 authorizes you to do so.

5 The 2001 Regulatory Reform Act repealed or
6 revised over 75 percent of the sections in Chapter 364.
7 Qwest's claims are for alleged discrimination in the
8 pricing of switched access services. The Commission's
9 jurisdiction to consider such claims, Qwest itself has
10 said in its complaint, arose under Section 364.08 and
11 364.10(1). Both of these sections have now been
12 repealed without a savings clause. As a result, the
13 Commission no longer has power to consider those claims.

14 Section 364.04 was significantly changed in
15 the Regulatory Reform Act. The statute now expressly
16 authorizes carriers to offer rates different from what's
17 in their price lists. The Commission therefore does not
18 have jurisdiction to address Qwest's claims that a
19 carrier offered rates that differ from the price list.

20 Qwest makes a number of arguments in response,
21 and I want to deal with the primary argument now, and in
22 rebuttal or question and answer we can deal with any
23 others as necessary.

24 Qwest argues that a statute or statutes are
25 presumptively prospective in effect and may only be

1 applied retroactively if, one, there is a clear
2 indication of legislative intent as to retroactivity,
3 and, two, retroactivity would be constitutional. The
4 problem with this argument is that it applies the wrong
5 test.

6 The test that Qwest applies and which Staff
7 mistakenly adopts concerns the effect of a change in
8 substantive law for claims before a court of law. You
9 are not a court. A different, well-established test
10 applies when the Legislature removes an agency's
11 jurisdiction to address a claim. That test is
12 straightforward. Pending claims may no longer be
13 addressed by the agency unless there's a savings clause
14 in the statute permitting you to do so, and we've cited
15 cases in our motion applying the correct test.

16 When you think about it, the test applicable
17 to agency authority makes sense. When the Legislature
18 eliminates an agency's jurisdiction over a, over a
19 regulatory matter, the Legislature has spoken. There's
20 nothing left to be said. The Legislature has withdrawn
21 the agency's power to act on the issue and there is
22 nothing more the agency can lawfully do. If the
23 Legislature wants to preserve jurisdiction over pending
24 claims, it may do so through a savings clause, and it
25 did not have a savings clause in this, for this case.

1 Applying the correct test is therefore a
2 simple matter here. By repealing Sections 364.08 and
3 Section 364.10(1) and changing Section 364.04 without
4 any savings clause, the Legislature has withdrawn the
5 Commission's authority to address Qwest's claims.

6 As you can see from the handout, in Section
7 364.385 the Legislature had specifically included a
8 savings clause with previous revisions to Chapter 364,
9 but it intentionally did not include a savings clause in
10 the 2011 Regulatory Reform Act.

11 The Legislature has expressed its intent not
12 to save this proceeding. As a result, the Commission --
13 or the jurisdiction the Commission previously had to
14 address the Qwest claims simply no longer exists, and
15 this case, therefore, must fall with the repealed laws
16 on which it expressly relies.

17 **CHAIRMAN GRAHAM:** You have one more minute.

18 **MR. FEIL:** We ask that you grant the motion
19 and dismiss this proceeding for lack of jurisdiction.
20 Thank you. That's the conclusion of our direct.

21 **CHAIRMAN GRAHAM:** Yes, sir.

22 **MR. COOKE:** Thank you, Mr. Chairman.

23 Commissioners, we support Staff's
24 recommendation and we support the conclusion that the
25 motion to dismiss should be denied.

1 If I may, I'd like to start by repeating
2 briefly a description of switched access service, which
3 is what's at issue in this case.

4 First of all, switched access service is not a
5 retail service. It's a bottleneck, wholesale service
6 provided by one carrier, such as a local exchange
7 carrier to another carrier, a long distance carrier.
8 It's in the nature of a monopoly service in that the
9 long distance carrier can't turn to any competitor of
10 the LEC in order to get that service. They have to use
11 the switch access provided by the local exchange carrier
12 that an end user chooses for service, and the long
13 distance carrier has to pay the prices that are charged
14 by the end user's local carrier.

15 In Qwest's amended complaint the gist of the
16 complaint is that the respondent CLECs in this case have
17 charged preferential pricing to other long distance
18 carriers other than Qwest.

19 Now the CLECs have discussed the potential
20 application of the Regulatory Reform Act to our claims.
21 And I think it's important to look at it in terms of
22 claims that arose due to actions that occurred before
23 July 1, the effective date of the statute, and those
24 that arise after July 1, the effective date of the
25 statute. So I'm going to talk about the so-called

1 retroactive period first.

2 The CLECs are arguing that there's a special
3 test that applies in this case, and we disagree. Both
4 the Florida Supreme Court and the U.S. Supreme Court
5 have consistently held that there's a two-prong test, a
6 two-prong analysis that applies in determining whether a
7 statute should be applied retroactively.

8 The first prong is to determine whether the
9 Legislature has clearly expressed its intent that the
10 new law should be applied retroactively. In the absence
11 of a clear expression of legislative intent to apply the
12 statute retroactively a law that affects substantive
13 rights is presumed to apply prospectively only.

14 For example, in *Arrow vs. Walsh*, which is one
15 of the Supreme Court cases that deals with this issue,
16 it states that the presumption against retroactive
17 application of a law that affects substantive rights is
18 a well established rule of statutory construction, and
19 it comes into play in the absence of an express
20 statement of legislative intent.

21 Now there are several cases in both our brief
22 and in the brief that's been filed by the joint movants
23 that deal with the application and this two-prong test
24 in the context of agencies that are attempting to
25 determine whether or not they should apply a statute, a

1 change in conditions retroactively. It's not limited to
2 only being applied by courts.

3 There is a second prong to the test, and that
4 is only reached once there has been a determination that
5 the Legislature truly intended for the statute to apply
6 retroactively, and that second prong deals with whether
7 or not the retroactive application is constitutionally
8 permissible.

9 Now in this case we think we have vested
10 rights that would be protected from the retroactive
11 application of the statute, but there is no need to
12 reach the second prong in this case. It can be decided
13 on principles of statutory construction alone because
14 there is no legislative intent that's clearly expressed
15 in the statute or in any of the supporting history of
16 the statute that suggests that the Legislature intended
17 to apply this retroactively to pending cases at the
18 Commission.

19 It's undisputed in this case that there's no
20 express statement in the Regulatory Reform Act that the
21 Legislature intends the revisions to apply
22 retroactively. The Legislature did not say, for
23 example, that it intended the revisions to apply
24 retroactively to cases pending on the effective date of
25 the statute. They could have done that. In many of the

1 cases that again are in the briefs, the Legislature does
2 take that step and make those express statements. The
3 *Promontory* case is one example of that.

4 Based on that alone, it's not necessary to go
5 any further. There is no express statement of
6 legislative intent to apply this statute retroactively,
7 and that should be the end of the analysis at this
8 point. But if you were to go beyond the express
9 language of the statute and look at the regulatory or
10 the statutory history, you'd find that the Legislature
11 did not intend in any way for the Regulatory Reform Act
12 to disrupt the consideration of pending cases involving
13 wholesale services, and, in fact, it only applied to
14 regulation of retail customers.

15 For example, in their March 29th senate bill
16 analysis, it states that the effect of the legislation
17 is to complete retail deregulation of wireline
18 telecommunication services, while maintaining the role
19 of the Public Service Commission in resolving wholesale
20 disputes between service providers. The March 29th bill
21 analysis also explains that the statute provides the
22 Commission with continuing regulatory oversight for
23 purposes of ensuring that all providers are treated
24 fairly in the telecommunications market.

25 And the final bill analysis states that the

1 legislation consolidates existing provisions related to
2 the PSC's oversight of carrier-to-carrier relationships
3 for purposes of ensuring fair and effective competition
4 among telecommunication service providers. It's clear
5 that it was designed to deal with regulatory customer
6 regulation. It does not address wholesale
7 carrier-to-carrier regulation.

8 The joint movants, we disagree with the test
9 that they want you to apply to this case. They
10 essentially are arguing that where a statute repeals
11 provisions and does not include a savings clause, then
12 that's the end of the discussion and the statute applies
13 retroactively. That's not the correct test. It is the
14 two-prong test of first looking at legislative intent to
15 determine what the Legislature meant in making these
16 changes.

17 The CLECs, the joint CLECs, the joint movants
18 rely in part on a case called *Bruner vs. The United*
19 *States* in which there was a repealing statute and there
20 was no savings clause in the statute. But that case
21 involved a situation where there were two available
22 jurisdictions that the parties, the plaintiffs could go
23 to. One was in the U.S. Court of Claims, one was in the
24 district court. And under those circumstances, the
25 *Bruner* court said that the jurisdiction could be

1 repealed immediately in the one court from which it was
2 repealed. It said, "Congress in that circumstance has
3 not altered the nature or the validity of the
4 petitioner's rights or the government's liability, but
5 has simply reduced the number of tribunals authorized to
6 hear and determine such rights and liabilities."

7 In other words, it's a very different
8 circumstance where they're simply saying there's no
9 longer two courts you can go to, there's one. There is
10 no impediment to pursuing it in the other court. That's
11 very different from this case.

12 As I tried to explain at the beginning,
13 Qwest's claims are based on Chapter 364. It's -- this
14 case is a statutory case involving provisions over which
15 the PSC has jurisdiction.

16 We disagree that we could take this case and
17 just transfer it into a civil court, for example. If
18 the Commission decides that this statute applies
19 retroactively and dismisses this action, Qwest
20 essentially has nowhere to go to enforce these claims.

21 **CHAIRMAN GRAHAM:** You have a minute left.

22 **MR. COOKE:** Thank you.

23 The joint movants also rely on the savings
24 clause provisions that are in the early portions of, or
25 the older portions of Chapter 364 that have been

1 removed. As the Staff recommendation correctly notes,
2 savings clauses are very unique, and in this case the
3 savings clauses they're referring to are 15 to 17 years
4 old, and in no way do they give any sort of indication
5 or shed any inference as to what the Legislature meant
6 when it enacted the Regulatory Reform Act.

7 It's been said by *Larson vs. Independent Life*
8 *Insurance Company* if retrospective interpretation has
9 nothing more than implication to support, it must be
10 unequivocal and have no room for doubt as to legislative
11 intent. I think it's hardly the case that provisions
12 that were not adopted contemporaneously with this act
13 and that predate it by 17 years or more can shed light
14 on what the Legislature, when enacting the Regulatory
15 Reform Act, meant with regard to retroactivity.

16 The *Promontory* case says, for example, "It's
17 not our function to divine legislative intent of
18 retroactivity with guess or assumption," and that's
19 essentially what the joint CLECs are asking you to do.

20 Let me just quickly state with respect to
21 prospective aspects of this case post July 1, we also
22 agree with Staff recommendation. We believe that there
23 were substantive changes in the Regulatory Reform Act
24 that provide ongoing substantive jurisdiction for the
25 Commission. And I'll end it with that. Thank you very

1 much.

2 CHAIRMAN GRAHAM: Thank you. For the --

3 MR. O'ROARK: (Inaudible.)

4 CHAIRMAN GRAHAM: Who was that?

5 MR. O'ROARK: That was me, Mr. Chairman. I
6 apologize.

7 CHAIRMAN GRAHAM: Oh. For the rebuttal, Qwest
8 went over about an extra 37 seconds, so you have about
9 five minutes and 15 seconds.

10 MR. O'ROARK: Thank you, Mr. Chairman. I'm De
11 O'Roark speaking on behalf of the joint CLECs this
12 morning.

13 First, let me say that it is clear that there
14 is a specific line of cases that applies when we're
15 talking about the removal of jurisdiction, and that rule
16 is simple. If the Commission doesn't express any intent
17 and simply removes the jurisdiction without a savings
18 clause, then all pending cases fall with the law. That
19 is not new or novel. That rule has been around for more
20 than 100 years.

21 One of the leading cases was authored by
22 Oliver Wendell Holmes in 1916. Legislatures are aware
23 of that rule of construction when they pass statutes.
24 They understand that if they don't have a savings
25 clause, that pending cases are going to fall when they

1 remove jurisdiction. And they had that in mind and the
2 Legislature this year had that in mind when it passed
3 the statute.

4 Now we've cited to you two cases, *Gewant* and
5 *Jennings*, which are the only two cases cited by either
6 side dealing with intervening changes to agency
7 jurisdiction. In both cases the courts ruled that
8 claims pending before the agencies fell with the law
9 because their jurisdiction had been eliminated and the
10 Legislature did not include a savings clause. These
11 cases leave no doubt that the Regulatory Reform Act must
12 be construed as eliminating the Commission's
13 jurisdiction over Qwest's pending claims.

14 The, the second issue that Qwest raises is,
15 all right, even if that's what the Legislature, even if
16 that's the way this legislation should be construed, we
17 think there's a constitutional issue, Qwest says, that
18 not so fast, you should not be able to impair our vested
19 rights. There are several arguments that you need to
20 take into account and require that that argument be
21 rejected.

22 First, that's a constitutional argument. The
23 Commission lacks the authority to rule on constitutional
24 matters and cannot rule on the constitutionality of a
25 statute. That's something that courts can do but

1 regulatory agencies cannot do.

2 Second, a party has no vested rights in
3 administrative claims, so Qwest has no vested rights
4 here as it might if it were in court.

5 Third, there has been no showing that Qwest
6 cannot assert its claims in another forum. In fact, in
7 its papers all Qwest said was that arguably, and that's
8 its word, arguably it might lose its claims. And
9 although counsel has taken a stronger position and
10 argument this morning, there's been no showing before
11 you that they can't go somewhere else.

12 You heard from Qwest counsel this morning that
13 you should only consider the statute as dealing with the
14 Commission's retail jurisdiction. That argument makes
15 no sense. Qwest's claims were expressly grounded in
16 364.08, 10(1) and .04. Its wholesale discrimination
17 claims were based on those statutes. The Commission --
18 or rather the Legislature repealed those statutes. It
19 did not move into another place or recreate them
20 elsewhere, it repealed them -- or 08 and 10(1) repealed
21 them lock, stock and barrel, and 04 modified, as Mr.
22 Feil explained.

23 And by the way, the legislative history does
24 not say that the statute only deals with the
25 Commission's retail jurisdiction. There was a preface

1 to the legislative history that counsel didn't mention.
2 The preface was, speaking broadly, the effect of the
3 bill is to ... and then talk about retail jurisdiction.

4 Now to be sure, the statute does a lot to
5 eliminate the Commission's retail jurisdiction, but
6 that's not all it did. It also dealt with statutes like
7 the ones here that dealt both with retail and wholesale
8 jurisdiction. You can't rely on alleged legislative
9 history to override what the Legislature actually did in
10 repealing the jurisdiction.

11 **CHAIRMAN GRAHAM:** You have about 30 seconds
12 left.

13 **MR. O'ROARK:** 30 seconds left? And with
14 respect to prospective claims, we certainly agree that
15 the Commission has jurisdiction over certain wholesale
16 disputes, but your wholesale dispute authority must be
17 exercised over a matter that is within your
18 jurisdiction; in other words, in the context of
19 enforcing interconnection agreements and resolving
20 disputes concerning violations of Chapter 364. There
21 are no longer any discrimination provisions in Chapter
22 364, so there can be no discrimination claims for Qwest
23 to pursue. Thank you.

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

25 Staff, what is your analysis?

1 **MS. TAN:** Staff believes that the Commission
2 retains the authority because the Legislature has not
3 repealed the Commission in this area of law. Although
4 certain statutes were repealed and amended with regards
5 to wholesale carrier-to-carrier disputes, the Commission
6 has not lost authority.

7 **CHAIRMAN GRAHAM:** Commission board.

8 Commissioner Brown.

9 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

10 This is a question first for the joint
11 movants. You referenced in your opening statements that
12 a party has no vested rights in administrative claims.
13 What is your authority with regard to that statement?

14 **MR. O'ROARK:** Commissioner, let me cite you to
15 a couple of cases on that. We cite them in our papers.

16 The first is *BellSouth Telecommunications vs.*
17 *Southeast Telephone*, 462 F.2d 650. That's a Sixth
18 Circuit case. And then there's also a Florida 1st DCA
19 case that's *Lakeland Regional Medical Center vs.*
20 *Florida*. That's at 917 So.2d 1024. In that case, a
21 challenge to an application had not become final when
22 the statute became effective, so the challenging party,
23 quote, had only a mere expectation of a continuing right
24 under the statute, close quote.

25 **COMMISSIONER BROWN:** Okay. Thank you. And if

1 I may, a question for Staff. For analogous cases, how
2 has the Commission typically treated dockets that have
3 been filed and then a statute changes? Whoever wants to
4 take it over there.

5 **MS. TAN:** We don't have any case law on that.

6 **COMMISSIONER BROWN:** How -- rather than case
7 law, how has the, in general how has the Commission
8 treated dockets that have been filed and a statute has
9 changed? Does -- is there a vested right with that
10 pending docket under the law that was in existence when
11 it was filed?

12 **MS. HELTON:** I can't think of anything off the
13 top of my head, Commissioner Brown. What I can think of
14 is when a rule has changed or a rule has, a new rule has
15 been adopted, we have always applied the rule that was
16 in existence at the time the petition or docket was
17 filed.

18 **COMMISSIONER BROWN:** For example, the
19 acquisition adjustment.

20 **MS. HELTON:** That's what's coming to mind.

21 **COMMISSIONER BROWN:** That's what came to my
22 mind too. Okay. Thank you.

23 And this case was filed in 2009; is that
24 right? Or, I'm sorry, the docket was filed in 2009.

25 **MS. TAN:** That is correct.

1 **COMMISSIONER BROWN:** Do you recall how many
2 motions have been filed from that point on? I know
3 there's been a lot of delays, and I just want to know if
4 there -- how many motions have been filed.

5 **MS. TAN:** We've had three motions to dismiss,
6 one motion for reconsideration, and a number of
7 procedural motions.

8 **COMMISSIONER BROWN:** Okay. No other
9 questions.

10 **CHAIRMAN GRAHAM:** Commissioner Balbis.

11 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.
12 I just want to make a few comments.

13 Obviously what's before us is a motion to
14 dismiss and, as Staff correctly pointed out, the
15 standard for a motion to dismiss is, is pretty high.
16 And to speak about whether or not the Legislature has
17 removed our authority, I believe both parties agree that
18 the Legislature did maintain our authority over certain
19 disputes and certain issues, especially wholesale
20 carrier-to-carrier disputes. So it's not as if the
21 Legislature completely removed all of our oversight and
22 jurisdiction over all telecommunications.

23 So with the high standard that a motion to
24 dismiss requires, I would not be comfortable granting
25 that motion to dismiss because there are some questions

1 associated with it. And I believe on, when we have
2 ruled on similar questions on jurisdiction, and I
3 believe recently we have decided to move forward with it
4 and then have a, one of the issues to continue to be
5 whether or not the Commission has the authority. So
6 with that, I would move Staff's recommendation on all of
7 the issues for this matter.

8 **CHAIRMAN GRAHAM:** It's been moved and seconded
9 Staff recommendations on all issues in this matter.

10 Commissioner Brown.

11 **COMMISSIONER BROWN:** Thank you. Actually
12 Commissioner Balbis just pointed out a question that I
13 had for Staff with regard to if we deny the motion to
14 dismiss, we can still put jurisdiction as an issue on
15 the hearing.

16 **MS. TAN:** That is correct.

17 **COMMISSIONER BROWN:** Thank you. I second.

18 **CHAIRMAN GRAHAM:** Commissioner Edgar.

19 **COMMISSIONER EDGAR:** I am comfortable with the
20 motion and pleased to be able to support it. I would
21 add, to follow up on Commissioner Brown's question, that
22 I am the Prehearing Officer. And although I have not
23 counted, there have been a lot of motions and
24 preliminary documents that have been filed in this to
25 date and I suspect there will be more, as is the right

1 of all parties.

2 In my mind -- I know Staff will continue to
3 work with the parties. In my mind the question of
4 jurisdiction, one, as to, on point, changes in the
5 statute; and, two, as to whether it falls within our
6 wholesale regulatory authority. Both of those I believe
7 are at issue and I would certainly expect to be issues
8 in the case, if indeed we do move forward.

9 CHAIRMAN GRAHAM: Well, I am comfortable with
10 Staff's recommendation. As you all know, I am not an
11 attorney, as I say many, many times. And not being an
12 attorney, if there is a question of law, I think it's
13 always -- if you're going to err, err on the side of
14 cautiousness. And I think by us moving forward with
15 Staff's recommendation makes us err on the side of
16 cautiousness, if this is indeed an error, and some other
17 court down the line can tell us it was or was not.

18 So that all being said, we have a motion and a
19 second to move Staff's recommendation on the entirety of
20 Item Number 3. If there's no further comments, all in
21 favor, say aye.

22 (Unanimous response.)

23 Those opposed?

24 (No response.)

25 By your action, you have approved Staff

1 recommendation on Item Number 3.

2 (Agenda item concluded.)

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STATE OF FLORIDA)
): CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 19th day of September, 2011.

Linda Boles
LINDA BOLES, RPR, CRR
FPSC Official Commission Reporter
(850) 413-6734