BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLECs whose true names are currently unknown) for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S.	DOCKET NO. 090538-TP ORDER NO. PSC-11-0145-FOF-TP ISSUED: March 2, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

FINAL ORDER DENYING MOVANTS' MOTION TO DISMISS

BY THE COMMISSION:

I. Case Background

Qwest Communications Company, LLC (Qwest) filed a complaint regarding rate discrimination in connection with the provision of intrastate switched access services on December 11, 2009 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).

Qwest's complaint seeks relief from all parties for engaging in unlawful rate discrimination. Specifically, Qwest alleges that by extending to other IXCs contracts for switched access, advantages were withheld from Qwest. The complaint further alleges that all parties have failed to abide by their pricelists, and charged Qwest more for switched access than other similarly situated IXCs. Qwest requests that we find that:

A) the parties have violated Florida law by engaging in unlawful rate discrimination to the detriment of Qwest, by extending to other IXC's advantages of contract or

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agreement not extended to Qwest, by failing to abide by their price lists and by charging Qwest more for switched access than they charged other IXCs under like circumstances for like or substantially similar service,

B) parties should pay reparations with interest,

C) parties should lower intrastate switched access rates to be consistent with rates offered to other IXCs,

D) parties should be required to file with this Commission any such contract service agreements.

On October 22, 2010, we granted Qwest leave to file an Amended Complaint, adding Respondents and removing its Part D Prayer for Relief in which the company asked for a "cease and desist" order of 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; Windstream NuVox; and John Does 1 through 50.

Access Point, Inc; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; Paetec Communications, Inc.; and US LEC of Florida, LLC (Movants) filed a Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds (Joint Motion to Dismiss) on November 16, 2010. On November 17, 2010, Windstream NuVox, LLC filed a Notice of Joinder to the Joint Motion to Dismiss. On that same date, Qwest filed a Motion for Extension of Time to Respond to the Joint Motion to Dismiss, which was granted on November 22, 2010. Qwest's Response was filed on December 8, 2010.

We have jurisdiction over this matter pursuant to Sections 364.01, 364.04, 364.08, 364.10, 364.337, and Section 120.57, Florida Statutes (F.S.).

Position of the Parties

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[1] 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

[1] Switched access charges refer to payments made by long distance carriers to local service providers for originating and terminating calls on local telephone networks. Both ILECs and CLECs charge IXCs interstate and intrastate access charges.

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 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.[2] 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.

Qwest's Position: Qwest asserts it has standing, stating that it is a telecommunications company authorized to provide interexchange telecommunications in Florida that has been affected by unjust and unreasonable rate discrimination and was precluded from participating in lower rates, terms and conditions made available to telecommunications companies other than Qwest.

Qwest argues that the Movants entered into secret, off price list switched access discount agreements through which they provided lower rates for intrastate access services than the rates charged to Qwest. Qwest seeks to recover overcharges paid for intrastate access services and requests a level playing field on a going forward basis. Qwest argues that we must take all

[2] Global Access Limited v. AT&T Corp., 978 F. Supp. 1068, 1073 (S.D. Fla. 1997)

factual allegations in the Complaint as true and in the favor of Qwest. Therefore, for the purposes of the Motion to Dismiss, we must accept as true that the Movants entered into secret, off price list switched access discount agreements with a select few favored IXCs and that Qwest was charged and paid a higher rate for the identical service.

Specifically, Qwest argues that it has presented a prima facie case of rate discrimination by alleging the existence of differential rate treatment for "like" services and seeks to recover overcharges it paid for those services and to ensure a level competitive playing field. Other points raised by Qwest include:

- Qwest contends that we stated in its previous Order[3] that it has the authority to "award reparatory refunds if Qwest establishes it was discriminatorily overcharged", "to investigate the allegations in the Complaint", "to prevent anticompetitive and unlawful discrimination amongst telecommunications service providers", and "to determine the amount of any refunds and applicable interest, if any."

- Qwest further argues that the Movants use of Interstate Commerce Act provisions and cases interpreting provisions of other federal and state programs[4] simply deflect from the authority that we hold pursuant to Chapter 364, F.S.

- Qwest points out that Florida case law recognizes our authority to award refunds where there has been unlawful conduct. Qwest further asserts that the Filed Rate Doctrine and arguments of retroactive ratemaking do not preclude the Commission's authority to do so.[5]

- Qwest argues that it has alleged actual injury in fact; citing the Colorado Public Utility Commission's decision that being charged tariff rates when other companies were charged lower rates that were potentially unlawful is a quantifiable competitive injury.[6]

- In response to the Movants' argument that Qwest's failure to request economic damages precludes it from having a valid point of entry into the case; Qwest asserts that we have previously determined that it does not have the authority to award economic or consequential damages. Qwest asserts that it seeks to recover overcharges it paid to the CLECs for intrastate switched access.

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[3] Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Final Order, Docket No. 090538-TP, Order No. PSC-10-0296-FOF-TP (issued May 7, 2010).

[4] Spa Universaire et al. v. Qwest Communications International, 2007 U.S. Dist. LEXIS 66665 (U.S.D.C. Colo.) Sept 10, 2007), General Telephone Co. of California ordered to amend its tariff on directory advertising, D.85334, 1976 Cal. PUC LEXIS 1085 (Jan. 13, 1976), and Qwest Communications Corporation and Qwest Interprise American, Inc. v. Pacific Bell Telephone Company, dba SBC California, D.06-08-006, 2006 Cal. PUC LEXIS 302 (Aug. 24, 2006).

[5] Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2nd DCA 1979).

[6] Interim Order of Administrative Law Judge G. Harris Adams denying Summary Judgment Motions, Docket No. 08F-259T, Decision R. 10-0364-I, 2010 Colo. PUC LEXIS 411 (Apr. 19, 2010).

- Qwest contends that if the Movants entered into off price lists with other IXCs, the Movants were obligated to make those rates, terms and conditions available to Qwest on a non-discriminatory basis. Qwest further contends that it is entitled to a refund in the amount overcharged, including interest.

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted. *Id.* at 350. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960). A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

To evaluate a motion to dismiss, all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted. See, e.g. Ralph v. City of Daytona Beach, 471 So.2d 1,2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1986); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

II. Analysis

Qwest's complaint alleges that the Movants were engaged in unlawful price discrimination. The Movants contend that Qwest's complaint should be dismissed for its failure to state a cause of action upon which relief can be granted.

Under the motion to dismiss standard, that all the factual allegations in the petition be taken as true and construed in the light most favorable to Qwest, Qwest has raised sufficient facts to allege that it has received anticompetitive treatment and unlawful discrimination. If one assumes as true allegations that the Movants have engaged in secret, off price list agreements available to select telecommunication companies, violating Section 364.01, 364.08, and 364.10, F.S., then Qwest has stated a cause of action for which relief may be granted.

We have 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), F.S. We also have the ability to review whether Qwest has suffered competitive harm as a result of the Movants' actions, pursuant to provisions of Chapter 364, F.S., and to determine the amount of any refunds, overcharges and applicable interest, if any, Qwest might be due. We retain broad discretion to take remedial actions, such as ordering refunds of overcharges should it be determined necessary and appropriate in keeping with statutory obligations. We have consistently proceeded with cases in which refunds where

requested. Order Denying Motion to Dismiss, Order No. PSC-03-0828-FOF-TP (July 16, 2003), Docket No. 030300-TP; Order Denying Motions to Dismiss, Order No. PSC-04-1204-FOF-TP (December 3, 2004), Docket No. 041144-TP; Order Denying Motion to Dismiss and Holding Docket in Abeyance, Order No. PSC-06-0777-FOF-TP (September 18, 2006), Docket No. 060455-TP. In addition, we have granted refunds where a customer has been overcharged. In re: Investigation and determination of appropriate method for issuing refunds to affected customers for apparent overcharges by Global Crossing Telecommunications Inc. for homesaver 1+ and calling card plans, Order No. PSC-07-0849-PAA-TI (October 22, 2007), Docket No, 070419-TI; In re: Investigation and determination of appropriate method for refunding overcharges and interest on 0+ calls made from pay telephones by USLD Communications, Inc., Order No. PSC-01-1744-PAA-TI (August 27, 2001), Docket No. 010937-TI.; In re: Investigation and determination of Method to credit access flow through reductions by MCI WorldCom Communications, Inc. and TTI National Inc., as required by Section 364.163, F.S., Order No. PSC-00-2139-PAA-TI (November 8, 2000), Docket No. 001411-TI.

To have standing, Qwest must meet 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). The company 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 "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote). It appears that Qwest meets the two-prong standing test in Agrico. Qwest has shown that being subjected to unreasonable rate discrimination, resulting in paying an amount higher for switched access service than was provided to other similarly situated companies causes Qwest to suffer an immediate and ongoing injury in fact which is quantifiable and actual. As discussed earlier, we have the authority to investigate anticompetitive behavior and unlawful discrimination amongst telecommunication providers, such as those alleged by Qwest in this proceeding. Therefore, we find that Qwest has standing to raise the issue of anticompetitive activity and unlawful discrimination pursuant to Agrico.

III. Decision

Upon review of the parties' arguments and consistent with our previous decision[7], we find that the Movants' Motion to Dismiss shall be denied because Qwest's petition established sufficient factual allegations, which, when taken in the light most favorable to Qwest, state a cause of action which is not subject to dismissal. An evidentiary hearing will allow us to determine whether the Movants engaged in anticompetitive behavior and unlawful rate

[7] Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Final Order, Order No. PSC-10-0296-FOF-TP, issued May 7, 2010.

discrimination. For the reasons set forth above, we find it appropriate to deny the Movants' Motion to Dismiss because Qwest has stated a cause of action for which relief may be granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Movants' Motion to Dismiss be denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 2nd day of March, 2011.

ANN COLE
Commission Clerk

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.