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Subject: FL PSC Docket No. 090538-TP - Joint Motion for Reconsideration of March 2, 2011 Order Denying Motion to Dismiss

Attachments: FL PSC Docket No 090538-TP - Joint Motion for Reconderation of March 2, 2011 Order.pdf

Attached for electronic filing in the above-referenced docket, please find the attached Joint Motion for Reconsideration of March 2, 2011 Order Denying Motion to Dismiss . If you have any questions, please do not hesitate to contact us.

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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 17, 2011

ACCESS POINT, INC., LIGHTYEAR NETWORK SOLUTIONS, LLC, NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., AND US LEC OF FLORIDA, LLC'S JOINT MOTION FOR RECONSIDERATION OF MARCH 2, 2011 ORDER DENYING MOTION TO DISMISS

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(*) Pursuant to Order No. PSC-10-0691-FOF-OT in Docket No. 100008-OT issued on November 18, 2010, Eric J. Branfman has been designated as a qualified representative for the above-referenced parties in this proceeding.

Dated: March 17, 2011

ACCESS POINT, INC., LIGHTYEAR NETWORK SOLUTIONS, LLC, NAVIGATOR TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., AND US LEC OF FLORIDA, LLC'S *JOINT MOTION FOR RECONSIDERATION* OF MARCH 2, 2011 ORDER DENYING MOTION TO DISMISS

Access Point, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; PAETEC Communications, Inc.; and US LEC of Florida, LLC (collectively "Movants"), by and through undersigned counsel, hereby move the Florida Public Service Commission ("Commission") to for reconsideration of its March 2, 2011 Order denying Movants' Motion to Dismiss.

I. INTRODUCTION AND SUMMARY

Qwest filed its Amended Complaint ("Complaint") on September 29, 2010. Qwest's first two Claims for Relief are pertinent to this motion. In its First Claim for Relief, Qwest alleges that Movants, by charging Qwest the rates in their filed price lists for intrastate switched access, engaged in unlawful discrimination against Qwest in violation of Florida Statute § 364.08(1) and § 364.10(1) because Movants charged other customers lower prices. In its Second Claim for Relief, Qwest alleges that the Movants violated Florida Statute § 364.04(1) and § 364.04(2) by failing to abide by their filed price lists for intrastate switched access services in Florida with respect to third parties, not Qwest. Movants' Motion to Dismiss, filed November 16, 2010, offered separate, distinct, and independent reasons for dismissing various aspects of the Complaint: The First Claim for Relief, the Second Claim for Relief, and Qwest's demand for refunds. The Commission's March 2, 2011 Order (the "Decision") denied Movants' Motion to Dismiss in its entirety.

Movants seek reconsideration of the Decision because it failed to address separately and independently each of the very distinct bases of Movants' Motion to Dismiss specific aspects of Qwest's complaint. The Motion to Dismiss demonstrated that Qwest's First Claim for Relief

should be dismissed because Qwest fails to state a prima facie claim of unlawful rate discrimination. The Motion to Dismiss separately demonstrated that Qwest's request for reparations in the form of refunds should be dismissed because Qwest is not entitled to refunds as a remedy for any of its claims for relief. The Motion to Dismiss further demonstrated that Qwest's Second Claim for Relief should be dismissed because Movants have not violated § 364.04, Fla. Stat., and even if they had, Qwest lacks standing to assert a claim of violation. Rather than addressing each basis for dismissal on its merits, the Decision erroneously addressed them in sweeping and conflated fashion. This is erroneous decision-making because each of the claims in Qwest's Complaint must be sustainable on its own and not confused by reference to other claims. Moreover, a evaluation of the Motion in a fashion that separately addresses each of the bases for dismissing various aspects of Qwest's Complaint demonstrates that dismissal of various aspects of Qwest's complaint is appropriate and therefore, reconsideration should be granted.

II. STANDARD OF REVIEW

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that this Commission failed to consider in rendering its Order. [1]

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[1] *In re: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.*, Docket No. 020413-SU; Order No. PSC-03-0259-PCO-SU, 2003 Fla. PUC LEXIS 146, *citing Diamond Cab Co. v. King,* 146 So.2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So.2d 161 (Fla. 1st DCA 1981).

III. ARGUMENT

A. Qwest's First Claim for Relief Must be Dismissed

Qwest's First Claim for Relief must be dismissed because Qwest fails to articulate a cognizable claim for unlawful rate discrimination, which "must be based on proof of an actual injury from discrimination."[2] The Decision recognizes that the Complaint must allege an actual injury from the discrimination, finding on page 6 that Qwest alleges a "quantifiable and actual" injury from the alleged discrimination. This finding, however, fails to consider the legal requirement that injury must reflect a loss in a plaintiff's profits that results from the alleged discrimination, and not merely the fact that the plaintiff paid less than another purchaser.

As the US Supreme Court has held, where an injury results from rate discrimination, it consists of lost profits that the plaintiff suffered because another customer paid the defendants a lower rate.[3] When a party that has paid the reasonable rate sues upon a claim of discrimination because some other party has paid less, "the difference between one rate and another is not the measure of the damages .... He is to recover the damages that he has suffered, which may be more than the preference or less .... The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."[4]

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[2] *Spa Universaire v. Qwest Communications International, Inc.*, 2007 WL 2694918, at *8 (D. Colo. Sep. 10, 2007), *citing AT & T Co. v. New York City Human Resources Admin.*, 833 F.Supp. 962, 980 (S.D. N.Y. 1993).

[3] *I.C.C. v. United States*, 289 U.S. 385, 389-91 (1933).

[4] *Id.*; *see also AT&T Co. v. New York v. City Human Resources Admin.*, 833 F.Supp. 962, 980-81 ("the City must allege, and provide evidence of, an injury from the discrimination in order to have a cognizable claim under Section 202(a). In other words, the City must show that its pecuniary damages would have been less if AT&T had collected the full tariff rate from the customers with whom AT&T has allegedly settled."); *Spa Universaire*, 2007 WL 2694918, at *8 ("Damages may not be measured simply by showing that [other customers] received the benefit

The Decision asserts that "Qwest has shown that being subjected to unreasonable rate discrimination, resulting in paying a higher amount 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." The Decision does not, however, identify any portion of Qwest's Amended Complaint in which Qwest alleges an "injury in fact which is quantifiable and actual." Moreover, an examination of the Complaint itself shows that the Complaint fails to allege any facts showing that it suffered actual injury from the alleged discrimination, apart from the fact that others paid less,[5] which as the Supreme Court has held,

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of the discounted rate. A plaintiff must show it was adversely affected by the fact that because these two carriers paid less for like services . . ."); *In re Exchange Network Facilities for Interstate Access*, 1 FCC Rcd. 618, 1986 LEXIS 2336, ¶ 69 (Nov. 14, 1986) ("[t]he measure of damages is not the difference between the discriminatory rate to customers and a just and reasonable rate, but actual damage to the complainant by virtue of the unlawful preference, or profits lost because of the ability of the favored customer, or profits lost because of the ability of the favored customer to control the market price of complainant's goods or services"); *In re Illinois Bell Telephone Co.*, 4 F.C.C. Rcd. 5268, 1989 FCC LEXIS 988, ¶ 10 (June 13, 1989) ("[i]n order to recover damages under Section 202(a), a complainant must be capable of showing that it actually was damaged by virtue of the unlawful discrimination or preference proscribed by that Section" and, thus, failure to allege damages warrants dismissal of such a claim); *Ad Visor v. General Telephone Co. of California*, 1976 Cal. PUC Lexis 1085, at *30 (Cal. P.U.C. 1976).

In opposing Movants' Motion to Dismiss, Qwest attempted to distinguish the foregoing cases on the grounds that they involved different statutes. 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 (" Qwest Response") at n. 15. However, the statutes involved similar prohibitions of discrimination and Qwest has not provided any basis for the Commission to apply different principles to proof of injury with respect to the discrimination alleged here.

The citation in footnote 15 of the Qwest Response to *Qwest Communications Corporation and Qwest Interprise America, Inc. v. Pacific Bell Telephone Company, dba SBC California,* D.06-08-006, 2006 Cal. PUC LEXIS 302 (Aug. 24, 2006) is inapposite because the defendant there promulgated two interim tariffs at different rates, and refused to allow Qwest to purchase under one of them, which was a lawfully filed tariff. This case does not involve a refusal by a carrier to allow Qwest to purchase under a lawfully filed tariff or price list.

[5] That Qwest mistakenly believes that it is entitled not to its loss of profits resulting from others paying less, but rather to the difference between what it paid and what others paid is

does not in itself constitute injury. The closest Qwest comes to alleging that it was injured by the alleged discrimination is in Paragraph 13 of the Complaint, which vaguely alleges "unreasonable prejudice and disadvantage" but provides no facts to show or even to allege that Qwest lost any profits as the result of Movants' alleged conduct. This vague allegation is insufficient because it does not contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6] Moreover, as a matter of law, the mere claim that other customers paid a lower rate does not constitute an allegation that Qwest suffered injury, because such an allegation would have to rest on a claim that the receipt by others of service at a lower rate resulted in loss of profits by Qwest.

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. First, Qwest's citation of an order of an ALJ of the Colorado PUC that damages are not an element of a discrimination claim[7] is inapplicable to this Florida case because Colorado Revised Statutes § 40-6-108(d) provides that the Colorado "commission is not required to dismiss any complaint because of the absence of direct damage to the complainant," thus explicitly eliminating damages as a requirement in a case before the Colorado Commission. Florida lacks a similar statute. Moreover, the Colorado ALJ issued his Recommended Decision on February 23, 2011, citing (in his footnote 271) Colorado Revised Statutes § 40-6-119 as exempting Colorado from the general requirement that damages is an element of discrimination. Again, no

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shown by the contention at page 5 of the Qwest Response that Qwest "seeks to recover the amount it was overcharged."

[6] *Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)).

[7] Qwest Response at 6.

similar statute exists in Florida, and in any event, this Commission acknowledged at page 6 of the Decision that Qwest "must show injury in fact."

Second, Qwest that it need not allege damages because the Commission cannot award damages.[8] Contrary to Qwest's contention, 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.

B. The Decision fails to address Movants' arguments that § 364.08 precludes the Commission from ordering refunds to a customer that paid the rates in a carrier's filed price lists and because Qwest does not have a claim that it was overcharged, the Commission cannot order refunds in this case.

Qwest seeks a refund although it concedes that it paid the rate listed in Movants' filed price lists, and does not challenge the reasonableness of those rates. Pursuant to Florida Statute § 364.08, Movants are *required* to charge Qwest the rates in their filed price lists, and may not charge Qwest a rate lower than those who paid the rates set forth in the filed price lists.[9] Filed price lists "carry the force and effect of law and are enforceable by the Commission."[10] As the court found in *Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Co.,* 385 So. 2d

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[8] Qwest Response at 8.

[9] Contrary to Qwest's contention (Qwest Response at pp. 20-22), there is no requirement that a filed price list be approved by the Commission for it to have a binding effect. Section 364.08 is a legislative codification of the filed rate doctrine, and it clearly applies to filed price lists, whether or not they have been approved by the Commission.

[10] *In re: Complaint against MCI Communications Services, Inc. d/b/a Verizon Business Services for failure to pay intrastate access charges pursuant to Embarq's tariffs, by Embarq Florida, Inc.*, Docket No. 080308-TP; Order No. PSC-08-0752-PCO-TP, 2008 Fla. PUC LEXIS 560, *3 (Fla. P.S.C. Nov. 13, 2008); *see also MCI Telecommunications Corp. v. Obrien Marketing, Inc.*, 913 F. Supp. 1536 (S.D. Fla. 1995) (explaining that "tariffs filed with the F.C.C. pursuant to the Communications Act 'conclusively and exclusively control the rights and liabilities between a carrier and its customer.' Such tariffs 'are not mere contracts, but rather have the force of law.'" (citations omitted)).

124. 126 (Fla. 3rd DCA 1980), a carrier "is required to collect undercharges from established rates," even if they result "from a contractual undertaking to charge a lower amount." *See Brandon v. Lichty,* 133 Fla. 520, 182 So. 897 (Fla. 1938) ("a carrier could not be estopped or otherwise barred from recovering the full amount of freight charges indicated in the applicable ICC tariff, notwithstanding its express agreement to transport the goods in question for less").

The Decision fails to consider that if the Commission were to require Movants to make refunds to Qwest, it would be ordering Movants to violate Florida Statute § 364.08 and the principle of these cases. If a remedy is needed for the alleged failure of Movants to charge other carriers the rates set forth in Movants' filed price lists, the only remedy consistent with the statute would be for the Commission to order Movants to collect the undercharges from those carriers that paid less than the rates in the filed price lists.

Apart from the fact that a refund would violate § 364.08, the Decision bases its conclusion that it can proceed with cases in which refunds were requested by pointing to cases in which refunds were ordered "where a customer has been overcharged," citing a number of supporting cases.[11] The overcharge cases relied upon by the Commission are not apposite because they involve claims that a customer was charged for more minutes of service than it received,[12] charged a higher rate than set forth in the tariff,[13] or failed to receive rate reductions

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[11] Decision at p. 6.

[12] *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.

[13] *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.

required by statute.[14] In other words, those cases all involved a customer being charged more than the law allowed. Here, Qwest concedes that it was charged the amount set forth in Movants' price lists, which under § 364.08 is precisely what the law allows and indeed requires.[15] Thus it was not "overcharged." Rather, others were "undercharged."

The Decision also cites cases in which a refund was not ordered, but the Commission proceeded to investigate.[16] These cases, too, are inapposite. They involved a claim that the defendant failed to comply with an FCC Order requiring a rate reduction,[17] a claim that the defendant charged for reciprocal compensation where not permitted by applicable law,[18] and a collection action in which defendant conceded that the complaint stated a cause of action, but argued that the PSC lacked jurisdiction to set off interstate access charges that were paid against Florida intrastate access charges that were owed.[19] Thus, these cases also involved a customer being charged more than the law allowed, except for the last one, in which the sole question was

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[14] *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.

[15] If Qwest is correct that the off-tariff/price list agreements are unlawful because they violated § 364.08(1) and § 364.10(1), Fla. Stat., the agreements were never "in effect" for purposes of these Florida Statutes or otherwise available to other entities. Qwest, according to its own allegations, cannot now be, and never was, entitled to the rates set forth in unfiled agreements to provide service at rates below those in the filed price lists, which unfiled agreements Qwest implicitly contends are illegal and unenforceable.

[16] Decision at pp. 5-6.

[17] Order Denying Motion to Dismiss, Order No. PSC-03-0828-FOF-TP (July 16,2003), Docket No. 030300-TP.

[18] Order Denying Motions to Dismiss, Order No. PSC-04-1204-FOF-TP (December 3, 2004), Docket No. 041144-TP.

[19] Order Denying Motion to Dismiss and Holding Docket in Abeyance, Order No. PSC-06-0777-FOF-TP (September 18, 2006), Docket No. 060455-TP.

the Commission's jurisdiction not to order a refund, but rather to reduce the amount claimed by plaintiff to account for amounts already paid by defendant.[20]

C. The Decision Fails to Address Movants' Request that the Second Claim for Relief be Dismissed Because Movants Have not Violated § 364.04, Fla. Stat.

The Decision did not address Movants' request to dismiss Qwest's Second Claim for Relief, which is a claim that Movants failed to abide by their price lists when they charged others the rates in their filed price lists, based on Florida Statute § 364.04, the only statutory section invoked by Qwest in its Second Claim for relief.[21] This section contains no requirement that Movants charge only the rates in their published price lists. While § 364.08 does in fact require Movants to charge only the rates in their published price lists, that Section applies to the service that Movants provide to Qwest, as well, and could not serve as the basis for an order requiring Movants to provide a refund to Qwest, because, as shown above, any refund would result in a violation of Florida Statute § 364.08.

D. The Decision Fails to Address Movants' Argument that Qwest Lacks Standing to Assert its Second Claim for Relief that Movants did not Adhere to their tariffs.

In their Motion to Dismiss, Movants also argued that Qwest lacks standing to assert its Second Claim for Relief, a claimed private right of action to recover on the grounds that

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[20] While the Commission did not rely on it, the Qwest Response (at pp. 19-20) also cited the case of *Richter v. Florida Power Corp.*, 366 So. 2d 798 (Fla. 2nd DCA 1979). That case does not support the Commission's authority to award refunds in this case because the complaint there alleged that "an illegal scheme" prevented the Commission from having the true facts when establishing the tariffed rates, resulting in "unreasonably high" rates as a result of "extraordinary circumstances" permitting the Commission to alter a final decision. Id. at 800. There are no similar "extraordinary circumstances" here, nor does Qwest contend that the rates it paid are "unreasonably high." It simply claims that others paid a lower rate or stated differently, were undercharged.

[21] Complaint ¶ 15.

Movants failed to adhere to the rates in their filed price list *when charging third parties (not Qwest) for service.*[22] Movants did not contend that Qwest lacked standing to assert its First Claim for Relief, which is based on a claim of discrimination.

In discussing standing, the Decision cites *Agrico Chemical Co. v. Department of Regulations*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981) as setting for the test for standing that the plaintiff "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 Decision then concludes that Qwest meets this test because "Qwest has shown that being subjected to unreasonable rate discrimination, resulting in paying an amount higher for switched access service that was provided to other similarly situated companies causes Qwest to suffer an immediate and ongoing injury."[23] The Decision thus discusses standing only in the context of Qwest's *First Claim for Relief*, discrimination, and fails to consider Movants' argument that Qwest lacks standing to assert the *Second Claim for Relief*, failure to abide by filed price lists.

While Florida Statute § 364.08 prohibits each Movant from charging a rate other than its filed rate, it does not suggest that the statute may be enforced by a third party who was in fact charged the filed rate. Qwest failed to allege specific facts demonstrating that it was injured or harmed by Movants' alleged failure to charge others the rates listed in its price lists, asserting only the vague claim that it was subject to "unreasonable prejudice and disadvantage" because it was not charged the same rates as similar providers.[24] Such vague claims are insufficient and in

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[22] Motion to Dismiss at pp. 7-9.

[23] Decision at p. 6.

[24] Complaint, ¶ 16.

any event are based on discrimination, not on the failure of Movants to adhere to their filed price lists.

In *Florida Society of Ophthalmology v. State Board of Optometry*, ophthalmologists sought to challenge an agency's ruling that permitted optometrists to compete with them in certain respects.[25] The ophthalmologists were denied standing because the appellate court found that while the ophthalmologists "may well suffer some degree of loss due to economic competition from optometrists certified to perform services that appellants alone were previously permitted to perform, we fail to see how this potential injury satisfies the 'immediacy' requirement."[26] As in that case, Qwest complains in its Second Claim for Relief not that it was treated poorly, but that others were treated too well.

Qwest's speculative and vague assertions of economic harm are, thus, "legally insufficient" to demonstrate standing, and Qwest does not show that these alleged injuries are within the "zone of interest" that Florida Statute § 364.04 or Florida Statute § 364.08 were designed to protect. In order to survive a motion to dismiss, Qwest must state a "plausible claim for relief," which contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[27] Qwest's vague claims of "prejudice" and "disadvantage" contain no factual content sufficient to survive a motion to dismiss, the alleged injuries are not within the "zone of interest" that § 364.04 04 or Florida Statute § 364.08 were designed to protect.

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[25] 532 So. 2d 1279 (Fla. 1st DCA 1988).

[26] *Id.* at 1285.

[27] *Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)).

To the extent that Qwest's Second Claim for Relief claim also alleges discrimination, it is redundant of the First Claim for Relief and any allegations of discrimination in the Second Claim for Relief should be stricken as redundant.

IV. CONCLUSION

For the reasons set forth above, the Commission should dismiss with prejudice Plaintiff Qwest's First and Second Claims for Relief and Qwest's Second Prayer for Relief seeking reparations in the form of refunds.

Respectfully submitted,

s/ Eric J. Branfman

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Dated: March 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Access Point, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PaeTec Communications, Inc., and US LEC of Florida, LLC's Joint Motion for Reconsideration of March 2, 2011 Order Denying Motion to Dismiss has been furnished by email or by U.S. Mail to the following on this 17th day of March 2011.

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