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Subject: PSC Filing - Docket No. 090538-TP

Attachments: 090538 - MotionDismiss.pdf

The attached is an electronic filing for the docket referenced below. If you have any questions, please contact Matt Feil at the number below. Thank you.

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Docket Name and Number: 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.

Filed on Behalf of: Joint CLECs (see signature page of pleading)

Total Number of Pages: 25

Description of Documents: Joint CLEC's Motion to Dismiss Qwest's Complaint for Lack of Subject Matter Jurisdiction.

DOCUMENT NUMBER-DATE

04705 JUL-8 =

FPSC-COMMISSION CLERK

7/8/2011



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July 8, 2011

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

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.

Dear Ms. Cole:

Please find attached Movants' Joint Motion to Dismiss Qwest's Complaint for Lack of Subject Matter Jurisdiction for filing in the above-referenced docket. (The Joint Movants are named on the first page of the pleading.)

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to call.

Sincerely,

Matthew J. Feil

MJF/ccg

cc: Certificate of Service

DOCUMENT NUMBER - DATE

04705 JUL-8 =

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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; Cox Florida Telecom, 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: July 8, 2011

**JOINT MOTION TO DISMISS QWEST'S AMENDED COMPLAINT
FOR LACK OF SUBJECT MATTER JURISDICTION**

July 8, 2011

DOCUMENT NO. DATE
04705-11-7,8,11
FPSC - COMMISSION CLERK

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In re: 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; 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: July 8, 2011

JOINT MOTION TO DISMISS QWEST'S AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Rule 28-106.204, Florida Administrative Code, the undersigned carriers¹ hereby move the Florida Public Service Commission ("Commission") to dismiss Qwest Communications Company, LLC's ("Qwest") September 29, 2010 Amended Complaint ("Complaint"). This Motion is brought because, as a result of significant recent repeal of and alterations to the statutes upon which Qwest's Complaint is predicated, the Commission now lacks subject matter jurisdiction to entertain Qwest's Complaint or grant the relief Qwest seeks. In support of this Motion, the Joint Movants state as follows:

¹ Access Point, Inc.; Birch Communications, Inc.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; DeltaCom, Inc.; Granite Telecommunications, LLC; Lightyear Network Solutions, LLC; MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services; Navigator Telecommunications, LLC; PAETEC Communications, Inc.; STS Telecom, LLC; tw telecom of florida, l.p.; US LEC of Florida, LLC d/b/a PaeTec Business Services; XO Communications Services, Inc.; and Windstream NuVox, Inc. (collectively, "Joint Movants").

I. INTRODUCTION AND SUMMARY

1. This case involves claims by Qwest that the Joint Movants discriminated against it by providing switched access services to other carriers at rates that were not offered to Qwest. Qwest asserts three "Claims for Relief," alleging that: (i) the Joint Movants discriminated against Qwest in violation of Sections 364.08(1) and 364.10(1), Florida Statutes, by not offering the lower rates to Qwest; (ii) the Joint Movants violated Section 364.04 by failing to abide by their filed price lists when they offered lower rates to other carriers but not to Qwest; and (iii) some of the Joint Movants violated Section 364.04 by failing to comply with price list terms that required them to offer individual case basis contracts ("ICBs") to similarly situated carriers, including Qwest.

2. Each of the statutory sections on which Qwest relies was repealed or substantially revised by Chapter 2011-36, Laws of Florida, officially known as the Regulatory Reform Act, which became effective on July 1, 2011. The Regulatory Reform Act repealed Sections 364.08(1) and 364.10(1) in their entirety and revised Section 364.04 to (among other things) clarify that carriers are not prohibited from entering into ICBs with rates that differ from those in their published schedules. The Act did not include a savings clause that would permit the Commission to continue exercising jurisdiction under those sections.

3. The changes made by the Regulatory Reform Act apply to pending cases, including Qwest's. The Legislature has delineated the Commission's jurisdiction over telecommunications companies in Chapter 364, which means it may regulate only to the extent a section in Chapter 364 authorizes Commission action.² When the Legislature repeals a section of Chapter 364, and does not include a savings clause, the Commission loses jurisdiction to

² See Section 364.01(1) ("The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter").

address pending claims arising under that section. Likewise, when the Legislature clarifies that the Commission may not prohibit certain conduct, and does not include a savings clause, the Commission may not consider claims that a party engaged in that conduct. Accordingly, Qwest's claims must be dismissed because the Commission no longer has subject matter jurisdiction over Qwest's Complaint.

II. THE COMMISSION'S JURISDICTION OVER TELECOMMUNICATIONS MATTERS IS RESTRICTED TO THAT WHICH THE LEGISLATURE DELEGATED TO THE COMMISSION

4. The Commission is a creature of statute with only such powers delegated to it by the Legislature.³ In this case, the Legislature has expressly spoken: the only law the Commission can apply is the Regulatory Reform Act. The Act embodies all of the pertinent Commission authority over this matter as of July 1, 2011. A savings clause would be required to preserve Commission authority to apply old law to pending cases, for "[t]he very nature of a savings clause imparts retroactivity upon the statutes within its ambit." *Florida Interexchange Carriers Association, Inc., v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996) (citations omitted) ("*FIXCA*"). The Regulatory Reform Act contains no savings clause that would preserve the Commission's jurisdiction over Qwest's claims.

5. Beginning July 1, 2011, the Commission is only authorized to regulate telecommunications carriers within the confines of the authority delegated to it by the Legislature through the Regulatory Reform Act. "Inasmuch as the PSC, like other administrative agencies, is a creature of statute, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *Southern States Util. v. Public Serv. Comm'n*, 714 So.2d 1046, 1051 (Fla. 1st DCA 1998) (*en banc*) (internal quotations and citations omitted). Indeed, it is a bedrock principle of administrative law that:

³ See, e.g., *State Dept of Transportation v. Mayo*, 354 So.2d 359, 361 (Fla. 1977).

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.

State Dept. of Env. Reg. v Falls Chase Special Taxing Dist., 425 So.2d 787, 793 (Fla. 1st DCA 1982) *review den'd* 436 So.2d 98 (Fla. 1983); *see Ocampo v. Dept. of Health*, 806 So.2d 633, 634 (Fla. 1st DCA 2002) (“An agency can only do what it is authorized to do by the Legislature”).

6. Since July 1, 2011, the Commission has been without power to regulate outside the confines of the Regulatory Reform Act or otherwise to enlarge, modify, or contravene the authority the Legislature delegated to the Commission by this Act. *See City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973) (“Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof . . . and the further exercise of the power should be arrested.”); *see also State Dept. of Transportation v. Mayo*, 354 So.2d at 361. If the Commission attempted to do so, whether intentionally or not, the Commission’s actions would be an unlawful attempt to seize legislative power away from the Legislature, rather than acting as an agent of the Legislature. Moreover, as the Florida Supreme Court has stated, “[t]o say that the jurisdiction of the Public Service Commission cannot be altered by the State Legislature is to admit that the government is beyond the control of the people – that an administrative Frankenstein, once created, is beyond the control of its Legislative creator.”⁴ These principles governing agency powers are firmly rooted in delegation concepts and the constitutional separation of powers confines them rigidly.

⁴ *City of Cape Coral* at 496.

III. THE REGULATORY REFORM ACT ELIMINATED THE COMMISSION'S JURISDICTION OVER QWEST'S CLAIMS FOR RELIEF

A. The Commission No Longer Has Jurisdiction to Hear Qwest's Claims

7. As discussed above, much of the Commission's former authority and jurisdiction over telecommunications matters was eliminated by the Regulatory Reform Act, which repealed nearly 60% and amended over 25% of the statutes in Chapter 364, Florida Statutes.⁵

8. As relevant here, the Regulatory Reform Act eliminated former Sections 364.08 and 364.10(1), Florida Statutes, and thus any Commission jurisdiction or authority grounded in those sections. The Regulatory Reform Act also specifically clarified in revised Section 364.04, Florida Statutes, that carriers are not prohibited from entering into ICBs containing rates that differ from those in a carrier's published price list. The Act thus eliminated any Commission authority to address Qwest's Claims for Relief since all are based on allegations of discrimination and request the Commission to exercise authority it no longer possesses.

9. Qwest's First Claim for Relief alleges a violation of Sections 364.08(1) and 364.10(1), Florida Statutes. Although Qwest admits that telecommunications companies may enter into contracts for switched access services at prices that differ from their tariffs or price

⁵ Of the 65 sections in Chapter 364, Florida Statutes, 37 were repealed and 17 were amended. Only 11 sections were neither amended nor repealed. Among other things, the Legislature eliminated Commission jurisdiction over basic local telecommunications service, nonbasic service, telecommunications service quality issues, price regulation, intrastate interexchange service, operator services, and shared tenant services. See Section 364.011 and former Sections 364.15, 364.051, 364.052, 364.337, 364.3376, and 364.339, Florida Statutes. The Legislature additionally removed the Commission's authority to regulate the terms of contracts between telecommunications companies and their customers, to investigate interstate rates, and to require consumer education materials. See former Sections 364.0252, 364.19 and 364.27, Florida Statutes. Moreover, the Regulatory Reform Act amended Section 364.336, Florida Statutes, to direct the Commission to decrease the regulatory assessment fee imposed on telecommunications companies to reflect its newly limited jurisdiction. In short, the Legislature clearly intended to effect a sweeping revision to Chapter 364 and a dramatic elimination of much of the Commission's telecommunications jurisdiction.

lists, it asserts that these two statutes, taken together, required the Joint Movants to “make the terms of those contracts available to other similarly-situated carriers on a non-discriminatory basis.”⁶ Qwest alleges that Joint Movants failed to do so, and asks the Commission to find that Joint Movants violated Florida Law.

10. The Regulatory Reform Act repealed both statutes upon which Qwest’s First Claim for Relief relies. Section 364.08, Florida Statutes, which was repealed in its entirety, previously stated as follows:

364.08 Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.—

(1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file or otherwise published and in effect at that time. 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 or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) A telecommunications company subject to this chapter may provide employee concessions without approval by the commission.

Section 364.10(1), Florida Statutes, also repealed, stated:

364.10 Undue advantage to person or locality prohibited; Lifeline service.—

(1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

11. Qwest’s First Claim for Relief relies solely on these two Sections. Although the parties disagree on the meaning and intent of these statutes as they existed prior to repeal, there

⁶ Complaint, ¶ 12.

can be no disagreement that the Regulatory Reform Act eliminated any authority the Commission had to enforce them.

12. The Commission's jurisdiction over Qwest's Second and Third Claims for Relief was similarly abrogated by the Regulatory Reform Act. Qwest's Second Claim alleges that the Joint Movants failed to abide by their price lists, in violation of Section 364.04. Qwest's Third Claim for Relief is closely related, alleging that certain named Joint Movants violated Section 364.04 by failing to abide by provisions in their price lists or tariffs that offered to make the terms of any individual contracts available to other, similarly situated customers. The Regulatory Reform Act revised Section 364.04, Florida Statutes, by (a) expressly eliminating the Commission's jurisdiction over the form and content of price lists and (b) expressly permitting carriers to enter into ICBs with rates that differ from their published rates (new language in Section 364.04 is underlined below):

364.04 Schedules of rates, tolls, rentals, and charges; filing; public inspection.—

(1) Every telecommunications company shall publish through electronic or physical media schedules showing the rates, tolls, rentals, and charges of that company for service to be performed within the state. The commission shall have no jurisdiction over the content or form or format of such published schedules. A telecommunications company may, as an option, file the published schedules with the commission or publish its schedules through other reasonably publicly accessible means, including on a website. A telecommunications company that does not file its schedules with the commission shall inform its customers where a customer may view the telecommunications company's schedules.

(2) This chapter does not prohibit a telecommunications company from:

(a) Entering into contracts establishing rates, tolls, rentals, and charges that differ from its published schedules or offering services that are not included in its published schedules; or

(b) Meeting competitive offerings in a specific geographic market or to a specific customer.

13. The Joint Movants have repeatedly denied Qwest's allegations, raised affirmative defenses against its claims, and disputed its interpretation of Sections 364.04(1), 364.08, and 364.10(1). Regardless of the parties' positions on the meaning of these statutes or the pertinent facts, however, Qwest's claims and the Commission's jurisdiction and authority to review alleged discriminatory actions have been extinguished. The Legislature intended this result, and the Commission must adhere to that intention.

B. There are No Savings Clauses in the Regulatory Reform Act that Would Otherwise Preserve the Commission's Jurisdiction to Hear Qwest's Claims

14. Nothing saves the Commission's authority to enforce these repealed statutes in this case. In the absence of a savings clause, the repeal of a statute that had conferred jurisdiction eliminates such jurisdiction, even over pending matters. *Bruner v. United States*, 343 U.S. 112 at 116-117 (1952) ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."). See also *Republic Nat. Bank of Miami v. U.S.*, 506 U.S. 80 at 100 (1992) (when jurisdiction is conferred by an Act of Congress, repeal of the Act repeals jurisdiction over pending cases).

15. Florida law, and the Commission itself, recognize, and apply this longstanding principle of administrative jurisprudence. In *Gewant v. Florida Real Estate Commission*, 166 So.2d 230, 233 (Fla. 4th DCA 1964), the court quashed an order of the Florida Real Estate Commission that found a broker in violation of a statute that was repealed without a savings clause during the pendency of the proceeding, stating that the effect of the repeal was to "eliminate the jurisdiction of the Florida Real Estate Commission over this particular violation" and "put an end to the authority of the [Commission] to punish for such violations." Stated

differently, without a savings clause, if certain conduct is no longer prohibited by an agency statute, the agency may not apply prior law to pending cases and punish that conduct.⁷

16. Had the Legislature intended for the Commission to retain jurisdiction over pending cases, the Legislature would have told the Commission to do just that through the inclusion of a savings clause, as it did in the *FIXCA* case, noted above, and in prior amendments to the Commission's jurisdiction.⁸ The Legislature decided, however, not to include a savings clause in the Regulatory Reform Act, and the Commission, as an agency of the Legislature, must comply and not otherwise ignore that decision.⁹ Indeed, the Commission has already demonstrated its understanding that it must comply with the Legislature's narrowing of its jurisdiction via the Regulatory Reform Act when it recently closed a wireless ETC application docket because the Regulatory Reform Act divested the Commission of jurisdiction over the issues raised in that docket.¹⁰

⁷ *FIXCA*, 678 So.2d at 1270, also exemplifies the principle that a savings clause is necessary for the Commission to apply anything other than current law to a pending administrative proceeding. In *FIXCA*, the issue on appeal concerned the proper interpretation of a savings clause—an issue not present in this case given the lack of any savings clause.

⁸ See *City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493, at 499-500 (Fla. 1973) (setting forth a savings clause that the Florida Legislature enacted when amending the Commission's authority over water and sewer systems).

⁹ See *FLXCA*, 678 So.2d at 1270.

¹⁰ Prior to passage of the Regulatory Reform Act, the Commission had at least one pending application for a wireless ETC designation, in Docket No. 110101-TP. Because there is no savings clause in Chapter 2011-36, the Commission's authority was immediately divested as of July 1, 2011. Therefore, Commission staff took the position that Chapter 2011-36 repealed the Commission's authority to designate wireless ETC carriers. The Commission staff accordingly confirmed the loss of jurisdictional authority over the pending Docket No. 110101 applicant and closed the docket. See <http://www.psc.state.fl.us/library/FILINGS/11/03871-11/03871-11.pdf>. This case is no different. Without a savings clause, the Commission's authority only extends to the applicable laws delegated to it by the Legislature that are in effect at the time of its decision, not the law when the case commenced.

17. Though this case remains in the preliminary stage, even if Qwest's Complaint had proceeded to hearing before the statute was repealed the same rule would apply. *See Jennings v. Florida Elections Commission*, 932 So.2d 609 (Fla. 2nd DCA 2006).¹¹ The court in *Jennings* specifically acknowledged that general principles for determining whether a newly enacted statute should be applied prospectively or retrospectively were inapplicable where the new law restricted the agency's jurisdiction. 932 So.2d at 612. The court therefore held that jurisdictional changes in law must be applied to pending cases and that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Id.* at 613 (internal quotes and citation omitted). The court further explained that the fact that the hearing was completed was irrelevant in the absence of a savings clause because:

[t]he statute does not distinguish violations unearthed by the Commission before its effective date from violations discovered thereafter. If the legislature had intended its restriction on the Commission's power to apply only to the latter, it could easily have said so. Just as easily, the legislature could have exempted pending proceedings from the operation of the statute. It did neither.

Id.

¹¹ In *Jennings*, a citizen filed a sworn complaint with the Florida Elections Commission ("Elections Commission"), alleging that Jennings, a member of the Sanibel City Council, had violated various campaign finance laws during his candidacy. The Elections Commission opened an investigation and issued a probable cause order that included charges in addition to those alleged in the sworn complaint. 932 So.2d at 610. After a hearing conducted by an administrative law judge ("ALJ"), but prior to the ALJ's issuing a recommended order, the Legislature amended the statute upon which the Election Commission's additional charges were based. The statutory amendment restricted the agency's authority to investigate violations, thereby limiting the agency to investigations of violations alleged in a sworn complaint. Jennings moved to dismiss the charges that were not contained in the sworn complaint, arguing that they were outside the Elections Commission's newly limited statutory jurisdiction. The ALJ agreed that the statutory amendment removed the agency's jurisdiction over the additional charges, and recommended their dismissal. Theorizing that the statutory amendment should not be applied retroactively to pending cases, the Elections Commission reinstated the charges and found that Jennings had violated the applicable statute. *Id.* at 611. The appellate court, however, reversed the Elections Commission's decision.

18. The Regulatory Reform Act eliminated all Commission jurisdiction and authority under prior Sections 364.08 and 364.10(1), Florida Statutes, and any authority the Commission arguably had to prohibit ICBs under 364.04(1), Florida Statutes, effective July 1, 2011. Had the Legislature intended this elimination of Commission authority to apply only to events after July 1, it would have preserved transitional jurisdiction to the Commission in Section 364.385, the telecommunications savings clause statute – just as it did in 1980, 1990, 1995, 2007 and 2010. The Legislature declined to so do in 2011, amending Section 364.385 without preserving authority to the Commission under any of the numerous statutes repealed or amended by the Regulatory Reform Act. The Legislature clearly intended to reform the Commission’s jurisdiction on a “flash cut” basis. As a result, the Commission no longer has jurisdiction over Qwest’s claims.¹²

IV. DISMISSAL OF QWEST’S COMPLAINT IS WARRANTED

A. Qwest’s Complaint Must be Dismissed

19. Because the Commission no longer has jurisdiction over the three Claims for Relief Qwest’s Complaint seeks, Qwest’s Complaint must be dismissed.¹³ Moreover, any attempt by Qwest to recharacterize its claims to avoid dismissal should be rejected by the

¹² If the Commission attempted to exercise jurisdiction over Qwest’s Claims for Relief, the result would be the same as *Jennings*, with an appellate court reversing the agency for acting outside of its jurisdiction.

¹³ As the party invoking the Commission’s jurisdiction by filing its Complaint, Qwest bears the burden of proof to demonstrate the Commission’s subject matter jurisdiction throughout the entire proceeding. Moreover, this burden requires that Qwest demonstrate the existence of the Commission’s jurisdiction beyond any reasonable doubt. As the Florida Supreme Court has held, “[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested.” *City of Cape Coral*, 281 So.2d at 496 (Fla. 1973). In addition, where, as here, the Commission’s statutes do not empower the Commission to address a complaint in any respect whatsoever, there cannot even be a colorable claim of Commission jurisdiction over that complaint. As demonstrated herein, the Commission lacks jurisdiction over Qwest’s claims and therefore cannot address Qwest’s Complaint.

Commission. Indeed, the Commission has already noted in this case, citing *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891 (Fla. 3rd DCA 2005), that it is the nature of the relief sought, not the words used in the complaint, that governs the jurisdictional determination regarding Qwest's claims.¹⁴

20. The Commission should again consider "the nature of the relief sought" for perspective on jurisdiction over this matter, since the nature of the relief sought for all three counts of Qwest's Complaint seek redress only for alleged discrimination. Indeed, all three counts¹⁵ of Qwest's Complaint seek the same, overlapping remedies – all undeniably sounding in discrimination – through a single Prayer for Relief (relevant excerpts as follows):

A. That the Commission find that the Respondent CLECs have violated Florida law by engaging in unlawful rate discrimination to the detriment of QCC, by extending to other IXCs advantages of contract or agreement not extended to QCC to the detriment of QCC, by failing to abide by their price lists and by charging QCC more for switched access than they charged other IXCs under like circumstances for like or substantially similar service.

B. That the Commission order the Respondent CLECs to pay QCC reparations, with applicable interest, in an amount to be proven at hearing.

C. That the Commission order the Respondent CLECs to lower their intrastate switched access rates to QCC prospectively consistent with the most favorable rate offered to other IXCs in Florida.

(Complaint at 23)

¹⁴ Order No. PSC-10-0296-FOF-TP, Docket No. 090538-TP, Order Granting Partial Motion to Dismiss, Motion to Dismiss Reparations Claim and Denying Motion for Summary Final Order, at 6 (issued May 7, 2010).

¹⁵ Not all Joint Movants are named as Respondents in Qwest's Third Claim for Relief.

21. Qwest cannot be heard to argue that other words in its Complaint should now matter more or otherwise transcend their original meaning,¹⁶ as nothing could say more about the nature of the relief sought than this Prayer for Relief. Qwest seeks redress for one thing and one thing only: alleged discrimination. In fact, Qwest's responses to the motions to dismiss previously filed are replete with references to Qwest's claims as discrimination claims.¹⁷ Qwest even specified in its responses that the measure of "reparatory refunds" it requests for all counts is the measure of alleged discrimination, *i.e.*, the difference between the price list rates Qwest paid without protest and the rates Qwest claims it should have paid were it not the victim of discrimination.¹⁸ Since all of Qwest's claims seek relief for discrimination, all of Qwest's claims must fall with the Legislature's repeal of the anti-discrimination sections of Chapter 364, as explained above.¹⁹

¹⁶ Even confining the analysis to the "four corners of the complaint" with "all material allegations construed in the complaining party's favor," this Commission's role does not include redrafting Qwest's Complaint to either revise the nature of the relief sought or make the complaint consistent with applicable changes in the law. Moreover, no amount of strained reasoning from Qwest can sever the nature of the relief sought from the rest of Qwest's Complaint.

¹⁷ See pp. 2, 5, 6, 9, 10, 13, 15, 16, 17, 21 and 22 of Qwest's March 9, 2010, Response to Joint Movant's Motion to Dismiss and to MCI's Motion for Summary Final Order; and pp. 1, 3, 4, 5, 9, 11, 12, 13, 16, 20, 23, and 24 of Qwest's December 8, 2010, Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds.

¹⁸ *E.g.* pp. 12 and 21 of Qwest's March 9, 2010, Response to Joint Movant's Motion to Dismiss and to MCI's Motion for Summary Final Order.

¹⁹ On a related point, Qwest now lacks standing because its alleged discriminatory injuries are not of a type or nature which the Commission has jurisdiction to remedy under the Regulatory Reform Act. *Florida Society of Ophthalmology v. State Board of Ophthalmology*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1333 (Fla. 1989); *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 482 (Fla. 2nd DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982).

22. Even if the Commission could ignore the nature of the relief sought, Qwest's Complaint does not survive through any other statutory sections. In a response to a CLEC motion to dismiss filed before the Regulatory Reform Act, Qwest argued:

[T]he CLECs seek dismissal of QCC's complaint by contorting Florida law in a manner that, if accepted, essentially divests the Commission of any authority to enforce the statutory prohibition against rate discrimination. The CLECs effectively ask the Commission to write Sections 364.01, F.S., 364.08, F.S., 364.10, F.S., and 364.337(5), F.S., out of the law.²⁰

Although this mischaracterizes the Joint Movants' prior arguments, the Legislature has now done precisely what Qwest indicated would have to be done for its Complaint to be dismissed: the Legislature wrote all of the cited sections (except parts of 364.01 on which Qwest does not rely) completely out of the law and, with that, the Commission's authority to address Qwest's Complaint. Sections 364.08 and 364.10(1), the discrimination provisions, were repealed and not replaced. Section 364.337(5) – cited by Qwest for an inapplicable purpose²¹ -- was also repealed and not replaced.

23. Qwest's passing reference to Section 364.01 in its Complaint, and, in particular, Section 364.01(4)(g), does not prevent dismissal. Section 364.01(g) was deleted. While new section 364.16 expresses the legislature's intent that when resolving disputes within its jurisdiction the Commission should prevent anticompetitive behavior, Qwest cannot now attempt to re-spin its entire Complaint to rely on the new section 364.16 to avoid dismissal. Without conceding that such a cause of action could exist on the facts Qwest has pled, the Joint Movants assert that their alleged behavior (*i.e.*, Joint Movants entering into individual case based ("ICB"))

²⁰ Qwest's March 9, 2010, Response to Joint Movants' Motion to Dismiss and to MCI's Motion for Summary Final Order, at p. 2.

²¹ Section 364.337(5) governs **only** CLEC provision of basic local telecommunications service. Switched access service is not basic service. *See* Section 364.02(1).

contracts with some IXCs but not others) *cannot* be deemed anticompetitive because such conduct is expressly permitted by the new clarification in Section 364.04(2). Specifically, the Regulatory Reform Act revises Section 346.04 to add subsection (2), which provides as follows:

This chapter does not prohibit a telecommunications company from:

- (a) Entering into contracts establishing rates, tolls, rentals, and charges that differ from its published schedules or offering services that are not included in its published schedules; or
- (b) Meeting competitive offerings in a specific geographic market or to a specific customer.

(Emphasis added.) Thus, ICB contracts, which (as Qwest admits and Joint Movants have maintained all along are permissible) are now expressly permitted, whether tied to competitive offerings or not.

24. Moreover, Qwest's complaint does not plead any distinct allegation of competitive harm in the marketplace, and there is no recognition anywhere in the law that competitive harm is measured as and cured by the "reparatory refunds" Qwest seeks (representing the purported difference between rates paid and rates desired). Nor could such refunds ever be awarded in this case because, as explained, the behavior about which Qwest complains is expressly sanctioned by the Section 364.04(2) clarifications and would run afoul of the Legislature's express repeal of Sections 364.08 and 364.10(1).

25. Qwest's citations to the prior version of Section 364.04 in its Second and Third Claims for Relief do not in any way save Qwest's claims. As explained above, without a savings clause, if conduct is no longer prohibited by an agency statute, the agency may not apply prior law to pending cases in an attempt to punish that conduct. *See Gewant v. Florida Real Estate Commission*, 166 So.2d at 233. Thus, in the instant case, even if ICB contracts were previously barred (and Joint Movants, and even Qwest, contend they were not), they are now clearly

allowed by Section 364.04(2)(a). Therefore, consistent with *Gewant*, no Qwest claims based on the prior Section 364.04 survive.

26. For the foregoing reasons, Qwest's Complaint must be dismissed.

B. Qwest Has No Vested Right in Its Claims and Therefore Dismissal is Further Justified

27. While not an issue related to jurisdiction of the Commission, Qwest may argue, in an attempt to avoid dismissal, that the Regulatory Reform Act unconstitutionally impairs vested rights. Such an argument must be rejected because the Commission may not rule on a statute's constitutionality and in any event, Qwest has no vested right in its administrative claims.

28. In Florida, "[i]t is a firmly established principle of law that challenges to the constitutionality of acts of the legislature . . . are for the courts alone to determine" and "an administrative agency cannot be empowered or authorized to make this determination."²² The Commission has recognized this principle, ruling that "[a]dministrative agencies are not the appropriate forum for determining constitutional questions and are without authority to determine the constitutionality of statutes."²³ The Commission therefore cannot address arguments Qwest might raise concerning the constitutionality of the Regulatory Reform Act.

29. In any case, Qwest has no vested rights in its administrative claims. To be vested, a right "must be more than a mere expectation based on an anticipation of the continuance of an

²² *Adams Packing Ass'n v. Fla. Dep't of Citrus*, 352 So.2d 569, 571 (Fla. 2nd DCA 1977). See also *Dependable Air Conditioning and Appliances, Inc. v. Office of Treasurer*, 400 So.2d 117, 120 (Fla. 4th DCA 1981) (hearing officer properly ruled that constitutional question could not be decided in an administrative proceeding); *Laborers' Int'l Union v. Greater Orlando Aviation Auth.*, 385 So.2d 716, 717 (Fla. 5th DCA 1980) ("Challenges to the constitutionality of acts of the Legislature are for the courts alone to determine"); *Dep't of Transp. v. Morehouse*, 350 So.2d 529, 533 (Fla. 3^d DCA 1977) ("the Administrative Procedure Act cannot relegate matters of constitutional proportions to administrative agency resolution").

²³ *In re: Application of Michael Christian*, Docket No. 780884-CCT, Order No. 15252 (1979).

existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.”²⁴ Thus, a party does not have a vested right in the hoped-for outcome of an administrative proceeding. For example, when a statutory amendment foreclosed a hospital’s challenge to another hospital’s certificate-of-need application, the First District Court of Appeals held that the challenging party had “no constitutionally protected property right in pursuing its non-final administrative hearing challenge.”²⁵

30. Likewise, in *BellSouth Telecommunications v. Southeast Telephone*, 462 F.3d 650 (6th Cir. 2006) (“*BellSouth*”), a federal appellate court held that a CLEC did not have a vested right when it filed a petition to adopt an interconnection agreement provision. In that case, the FCC replaced its “pick-and-choose” rule with an “all-or-nothing” rule after the CLEC filed its petition. The court rejected the CLEC’s argument that applying the new rule would impair its vested rights because “filing an application with an agency does not generally confer upon the applicant an inviolable right to have the agency rule on the application pursuant to the regulations in effect at the time of filing.”²⁶

31. In concluding that the CLEC did not have vested rights, the court in *BellSouth* emphasized that the underlying statute imposed obligations on ILECs that were conditional, and

²⁴ *Div. of Workers’ Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982) (quoting *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 284 (Tex. Civ. App. 1975)). See also *Promontory Enters., Inc. v. Southern Eng’g and Contracting*, 864 So. 2d 479, 486 (Fla. 5th DCA 2004) (“Possibilities based on what may or may not occur in the future do not create vested rights because possibilities are not immediate and fixed rights of present or future enjoyment”).

²⁵ *Lakeland Regional Med. Ctr. v. Florida*, 917 So. 2d 1024, 1031-32 (Fla. 1st DCA 2006) (challenge to application had not become final when statute became effective, so challenging party “had only a mere expectation of a continuing right under the statute”).

²⁶ *BellSouth*, 462 F.3d at 660-61 (citing *Pine Tree Med. Assocs. v. Sec. Of Health and Human Servs.*, 127 F.3d 118, 121 (1st Cir. 1997)).

therefore any corresponding CLEC rights were likewise contingent.²⁷ The same is true here: The statutes underlying Qwest's discrimination claims did not create absolute obligations or rights. Because the statutes have been repealed and not otherwise revised or replaced, the Commission lacks jurisdiction to consider Qwest's Complaint

V. CONCLUSION

The Commission's jurisdiction is limited to the powers delegated to it by the Legislature, and the Legislature has eliminated the Commission's jurisdiction over the issues raised in Qwest's Complaint. Because the Legislature chose not to incorporate a savings clause in the legislation eliminating the Commission's power, the Commission lacks jurisdiction to adjudicate Qwest's Complaint.

WHEREFORE, in consideration of the foregoing, Joint Movants request that the Commission grant this Motion to Dismiss.

Dated this 8th day of July, 2011.

Respectfully submitted,



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²⁷ *BellSouth*, 462 F.3d at 660.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 8th day of July, 2011.

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