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Subject: FL PSC Docket No. 090538-TP - Joint Motion for Leave to File a Very Short Reply to Qwest's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds
Attachments: FL PSC Docket No 090538-TP - Joint Motion for Leave to File A Very Short Reply.pdf

Attached for electronic filing in the above-referenced docket, please find the attached Joint Motion for Leave to File a Very Short Reply to Qwest's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds. If you have any questions, please do not hesitate to contact us.

a. Persons responsible for this filing:

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b. Docket No. 090538-TP

c. Filed on behalf of: Access Point, Inc., Lightyear Network Solutions, LLC, Navigator Telecommunications, LLC, PAETEC Communications, Inc., and US LEC of Florida, LLC

d. Total pages: 6

e. Brief Description: Joint Motion for Leave to File a Very Short Reply to Qwest's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds

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12/13/2010

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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: December 13, 2010

**ACCESS POINT, INC., LIGHTYEAR NETWORK SOLUTIONS, LLC, NAVIGATOR
TELECOMMUNICATIONS, LLC, PAETEC COMMUNICATIONS, INC., AND US LEC
OF FLORIDA, LLC D/B/A PAETEC BUSINESS SERVICE'S JOINT MOTION FOR
LEAVE TO FILE A VERY SHORT REPLY TO QWEST'S RESPONSE TO JOINT
MOTION TO DISMISS QWEST'S FIRST AND SECOND CLAIMS FOR RELIEF AND
REQUEST FOR REPARATIONS IN THE FORM OF REFUNDS**

The undersigned Movants respectfully request leave from the Commission to file a reply of 500 words or less to Qwest's 12/8/10 Response to the Movants' 11/16/10 Motion in the above-captioned proceeding. While it is not the practice for this Commission to grant replies, good cause exists for the Commission do to so in this instance so that Movants can respond to the manifestly incorrect legal assertions contained Qwest's 12/8/10 filing. Illustrative of the completely incorrect and unfounded statements by Qwest that cry out for a reply are:

- QCC's citation (p. 6) of an interim order of an ALJ of the Colorado PUC that allegations of damages are not required. That order is plainly irrelevant because Colorado Revised Statutes § 40-6-108(d) provides "The commission is not required to dismiss any complaint because of the absence of direct damage to the complainant." Florida lacks a similar statute.

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- Qwest's citation (n.15) of *Qwest v. SBC*. The citation is plainly irrelevant because SBC did not allow Qwest to purchase under a certain publicly available and filed rate schedule, while this case involves Qwest's claim that it was not allowed to purchase under unfiled agreements that were not generally and publicly available.
- Qwest's claim (p. 8) that the Motion is circular in relying on Qwest's failure to allege damages, which the Commission cannot award. This claim is plainly unfounded because the Commission can issue a decision that a carrier discriminated if the plaintiff makes a *prima facie* discrimination case, which includes asserting damages, and allow the courts to decide damages.
- Qwest's citation (p. 19) of *Richter*. That case is plainly inapposite because that complaint alleged that "an illegal scheme" prevented the Commission from having the true facts when establishing the tariffed rates, resulting in "extraordinary circumstances" permitting the Commission to alter a final decision. Qwest does not similarly contend that the Movants' filed rates, as reflected in their filed price schedules, that were charged to Qwest, were the product of wrongdoing.
- Qwest's assertion (p. 21) that the filed rate doctrine only applies to Commission-approved rates. This assertion is plainly misplaced because Florida codified the filed rate doctrine in the first sentence of § 364.08(1) with respect to rates in a filed schedule, regardless of Commission approval.

Moreover, good cause exists for granting this request because Qwest was given two weeks longer than afforded under Rule 28-106.204, providing Qwest the time to submit a 26 page response that is not only longer than the Movants' Motion but contains numerous lengthy footnotes in very small font. Because the issues in this case are complicated, as Qwest has asserted, and to avoid prejudice, it is only fair that since an exception to the rule was granted to Qwest by giving it two weeks longer to respond to the Motion to Dismiss, then an exception to the rule should likewise be provided to Joint Movants in the form of an opportunity to submit a very short reply. Moreover, the submission of such reply will not unduly delay the case because Movants agree to submit their reply on the next business day after they are provided notice of the Commission's ruling on this motion.

Pursuant to Rule 28-106.204(3), Fla. Admin. Code, counsel for Movants sought consent of Qwest's counsel for this motion to file a reply of 500 words or less on the next business day

after the Commission's ruling. Qwest's counsel advised that Qwest will oppose this Motion. Counsel for MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services advised that it does not oppose this Motion. Counsel for Granite Telecommunications, LLC and BullsEye Telecom, Inc. advised that they consent to this Motion. Counsel for XO Communications Services, Inc., Windstream Nuvox, Inc., Birch Communications, Inc., tw telecom of florida, l.p., and DeltaCom, Inc.'s advised that they will not object to this Motion. Counsel for Movants did not receive a response from the remaining parties of record.

WHEREFORE, Movants respectfully request that the Commission grant this Motion.

Respectfully submitted,

s/ Eric J. Branfman

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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: December 13, 2010

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 Docket No. 090538-TP - Joint Motion for Leave to File a Very Short Reply to Qwest's Response to Joint Motion to Dismiss Qwest's First and Second Claims for Relief and Request for Reparations in the Form of Refunds has been furnished by email or by U.S. Mail to the following on this 13th day of December 2010.

/s/ Kimberly A. Lacey

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