

Eric Fryson

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Sent: Friday, April 27, 2012 3:46 PM
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Subject: RE: PSC Filing - Docket No. 090538-TP - Joint Response of STS & Saturn to Qwest Motion for Leave ...
Attachments: PSC filing - Joint Resonse STS & Saturn 090538-TP.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.

Person Responsible for Filing:

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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: STS Telecom, LLC and Saturn Telecommunications Services, Inc.

Total Number of Pages: 16

Description of Documents: Joint Response of STS Telecom, LLC and Saturn Telecommunications in Opposition to Qwest Communication Company's Motion for Leave to File Second Amended Complaint to Withdraw the Complaint

DOCUMENT NUMBER DATE

02680 APR 27 2012

FPSC-COMMISSION CLERK

4/27/2012



GUNSTER

FLORIDA'S LAW FIRM FOR BUSINESS

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April 27, 2012

BY ELECTRONIC FILING

Ms. Ann Cole, Director
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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:

On behalf of STS Telecom, LLC and Saturn Telecommunications Services, Inc., please find attached to be filed in the above-referenced docket the Joint Response of STS Telecom, LLC and Saturn Telecommunications Services, Inc in Opposition to Qwest Communication Company's Motion for Leave to File Second Amended Complaint to Withdraw the Complaint as to STS Telecom, LLC and Add Saturn Telecommunication Services, Inc. d/b/a EarthLink.

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Ms. Ann Cole, Director
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If you have any questions, please advise.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew J. Feil". The signature is fluid and cursive, with a large, stylized initial "M".

Matthew J. Feil

MJF

Enclosure

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; 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

Dated: April 27, 2012

JOINT RESPONSE OF STS TELECOM, LLC AND SATURN TELECOMMUNICATIONS SERVICES, INC. IN OPPOSITION TO QWEST COMMUNICATION COMPANY'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO WITHDRAW THE COMPLAINT AS TO STS TELECOM, LLC AND ADD SATURN TELECOMMUNICATIONS SERVICES, INC. D/B/A EARTHLINK BUSINESS

Pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code, STS Telecom, LLC ("STS") and Saturn Telecommunications Services, Inc.¹ hereby file this joint response in opposition ("Response") to portions of the Qwest Communications Company, LLC d/b/a Century Link QCC ("Qwest" or "QCC") April 20, 2012, Motion for Leave to File Second

¹ As a CLEC operating in the state, the Commission has limited jurisdiction over Saturn, as set forth in Chapter 364, Florida Statutes. Through its participation in this joint filing, Saturn responds to the Second Motion to Amend as a showing of good faith and enters its appearance solely for purposes of responding.

DOCUMENT NUMBER DATE

02680 APR 27 2012

Amended Complaint to Withdraw the Complaint as to STS Telecom, LLC and Add Saturn Telecommunications Services, Inc. d/b/a EarthLink Business (the "Second Motion to Amend").²

In summary, STS and Saturn oppose the Second Motion to Amend's prayer to add Saturn as a party and, if a Second Amended Complaint is allowed, Saturn opposes any determination that such amendment would "relate back" to the date of the First Amended Complaint as to Saturn. Qwest's initial naming of STS as a respondent, rather than Saturn, was not the result of a misnomer occasioned by a lack of information available to Qwest. Rather, Qwest did not exercise reasonable diligence in identifying the correct respondent CLEC and for years ignored information available both to the public and to Qwest. Now Qwest wants the benefit of the doubt stemming from its own dilatory conduct and omissions. Qwest seeks to add a new defendant to the case years after the case was filed and with just over forty-five days left before direct testimony is due. The Commission should deny the Second Motion to Amend as set forth below.

In support of this Response, STS and Saturn hereby state as follows:

1. Aside from asking whether it should be allowed to amend its complaint a second time to add an entirely new party 2 ¼ years after filing the original complaint, 1 ½ years after filing the first amendment which added thirteen new CLEC parties, and with just over 45 days before direct testimony is due from all parties, Qwest's Second Motion to Amend poses, without expressly requesting ruling on, the related question of whether a second amendment, if granted, "relates back"³ to a prior iteration of the complaint for

² Saturn does not oppose those portions of the Second Motion to Amend which are not directed at Saturn. STS does not oppose being removed from the docket, but such removal should be with prejudice.

³ See Second Motion to Amend, paragraph 7, page 3.

purposes of the statute of limitations.⁴ In this, and other respects, the relief sought in the Second Motion to Amend is decidedly NOT straight-forward, as Qwest may have the Commission believe, and should be denied as set forth below.

2. The burden is on Qwest as the moving party to show it is entitled to the relief sought. Qwest does not meet this burden for any of the questions posed by the Second Motion to Amend. Qwest's own lack of reasonable diligence in identifying the proper party is what brought us to this point, not anything STS has done or failed to do. Moreover, as set forth below, Saturn is prejudiced if the Second Motion to Amend is granted because: (1) Saturn will have to soldier significant resources to answer the complaint, send and respond to discovery, prepare testimony and witnesses, and, generally, defend itself with just over 45 days left to file its direct case and (2) Saturn's potential liability for damages may be significantly lower if a second amendment does not "relate back" to a prior version of the complaint filed 1 ½ years ago or more.

3. Qwest filed its original complaint some 2 ¼ years ago, in December 2009, which named six CLEC respondents. Qwest had the Commission issue subpoenas in January 2010 to the three largest IXCs operating in the state. The subpoenas sought all switched access contracts those IXCs had with CLECs in Florida. Qwest was granted leave to file a first amended complaint to add thirteen new CLEC parties, including STS, in October 2010. From the responsive information provided by the IXCs in the April – June 2010 timeframe,⁵ Qwest – and Qwest alone -- decided which CLECs to name as

⁴ As discussed below in this Response, Qwest does not specifically ask the Commission to rule that a second amended complaint, if allowed, would "relate back." Saturn addresses the subject in an abundance of caution.

⁵ See Qwest June 1, 2010, letter to the commission: <http://www.psc.state.fl.us/library/FILINGS/10/04552-10/04552-10.pdf>

respondents and which ones not to name in its October 2011 First Amended Complaint. Qwest then coyly deflected providing any specifics supporting its methodology for choosing which CLECs to sue and not sue.⁶

4. The Order Establishing Procedure in this case was issued February 2, 2012. Direct testimony for all parties, petitioner and respondents alike, is due to be filed June 14, 2012, roughly 45 days from now.

5. It is inconceivable that at this late date, when Qwest had responses to its subpoenas in mid 2010, that Qwest should now be allowed to name Saturn as a new party and that Saturn should be expected to adequately defend itself. The Commission must impose a reasonable cut-off point for adding parties. When, as in this case, we are over two years into the proceeding and just over 45 days remain before direct testimony is due, that cut-off point has passed long ago.

6. At all times pertinent to the complaint, any member of the public who bothered to inquire through the Commission's website and the Commission's open and available records would have seen that STS and Saturn have always been separate entities with separate certificates,⁷ separate participation in a variety of docketed matters,⁸ and separate price lists on file.⁹ Further, at all times pertinent to the complaint, any member

⁶ See Qwest response to tw telecom of florida, l.p. Interrogatory No. 6.

⁷ See, e.g. <http://www.psc.state.fl.us/utilities/mcd/Display.aspx?numPerPage=50>
<http://www.psc.state.fl.us/utilities/mcd/details.aspx?compcode=TX698>
<http://www.psc.state.fl.us/utilities/mcd/details.aspx?compcode=TX749>

⁸ See, e.g.
<http://www.psc.state.fl.us/utilities/mcd/associateddockets.aspx?compcode=TX749&docType=closed&count=2>
<http://www.psc.state.fl.us/utilities/mcd/associateddockets.aspx?compcode=TX698&docType=closed&count=29>

⁹ In Qwest's response to Staff Interrogatory No. 3, Qwest states, "[P]rior to naming each CLEC in the complaint or amended complaint, QCC searched the CCMI/Telview database in order to review the CLECs' Florida price lists. QCC reviewed at least a portion of the price lists of each respondent except Flatel, Ernest and STS (which QCC could not locate)." (Emphasis added.) Qwest's response to Staff Interrogatory No. 10(a), however, indicates that

of the public could have inquired as to the distinctness of STS and Saturn through the Florida Secretary of State's website.

7. If any disinterested member of the public exercising even a modicum of diligence would have discovered the distinctness of STS and Saturn from a simple web search, surely an interested party like Qwest could have and should have discovered the distinctness of STS and Saturn **before** filing suit. Remarkably, the Second Motion to Amend tries to cast blame on STS or otherwise excuse Qwest's own lack of diligence. Yet it is only now – some two years after it received responses to the IXC subpoenas, one and a half years after it first amended its complaint to include STS, four full months after STS's responded to Qwest discovery and forty-five days before the due date for testimony – that Qwest has finally gone to the Commission's website and the Division of Corporations website and examined information which was available to Qwest the entire time. Qwest failed to take the simple step of taking the IXC subpoena responses it had for two years¹⁰ and compared that information with the Commission's website information and the price lists on file before filing suit. It waited until now.

8. STS and Saturn were acquired by mergers with a subsidiary of EarthLink, Inc. ("EarthLink") in March 2011. STS's Answer and Affirmative Defenses to Qwest's First Amended Complaint was filed on November 16, 2010 ("STS Answer"), by STS's prior counsel, hired by prior owners. There was no discovery propounded on STS

every CLEC respondent had a switched access price list on file. As the Commission is aware, CLECs are not required to file price lists. This notwithstanding, STS has only a retail price list on file, not a switched access price list; however, Saturn has both a retail price list and a switched access price list on file. The foregoing price lists are available, and have been available, for public inspection at the Commission.

¹⁰ In the Second Motion to Amend, Qwest states that "STS Telecom" was one of the companies included in the IXC subpoena response documents. Second Motion to Amend, paragraph 3, page 2. Qwest fails to mention that the documents also refer to "Saturn Telecommunications Services, Inc. d/b/a STS Telecom."

between the date of STS's Answer through the March 2011 acquisition. In fact, Qwest did not propound discovery on STS until October 2011. At the time of the acquisition, STS notes that EarthLink was generally aware of the Qwest complaint against STS; however, at no point did Qwest substantiate to EarthLink that Qwest intended to target STS, Saturn or both. Indeed, even now, Qwest's intentions are not entirely clear since the Second Motion to Amend leaves STS "on the hook" insofar as the Second Motion to Amend does not dismiss STS with prejudice.

9. At no time has STS said or done anything to mislead Qwest or lull Qwest into inaction regarding the distinctness of STS and Saturn. STS has not been active in the case.¹¹ The STS Answer contains general denials, argues that there is no cognizable cause of action, asserts that the Commission lacks jurisdiction and invokes standard affirmative defenses.¹² The STS Answer is substantially the same as what was filed by almost every CLEC respondent in this case. STS has not propounded any discovery on Qwest, and STS answered all discovery propounded on it by Qwest and staff openly and honestly and within a reasonable time.¹³

10. Qwest seeks to add a new party because Qwest did not avail itself of information available to it and to the public until very late in the proceeding. This is not a case where Qwest could not possibly identify the proper party it intended to sue or

¹¹ The only motion STS signed onto was a joint motion by virtually every respondent CLEC in the case and filed July 8, 2011. <http://www.psc.state.fl.us/library/FILINGS/11/04705-11/04705-11.pdf>

¹² Qwest implies that STS's simple denial of the allegations of Qwest's First Amended Complaint is somehow improper. Second Motion to Amend, paragraph 4, page 2. Qwest presupposes STS knew or should have known who Qwest really wanted to sue, STS, Saturn or both, when Qwest's complaint then, and now, is vague, particularly insofar as it attempts to shotgun liability at defunct entities, affiliates, subsidiaries, and John Does.

¹³ See, STS's December 16, 2011, First Supplement to Objections and Response to Qwest Communications Company, LLC's First Set of Interrogatories (Nos. 1 – 8) and Document Requests (Nos. 1 – 6) and STS's December 16, 2011, First Supplement to Objections and Responses to Staff's First Set of Interrogatories (Nos. 1 – 9).

where STS misled Qwest or lulled Qwest into inaction. Qwest has no one to blame but itself for its failure to sue the party Qwest apparently wanted to sue in the first place, Saturn.

11. Contrary to Qwest's argument, STS and Saturn maintain the test for substituting one party for another via an amendment (and having the amendment relate back) is not simply whether there exists "identities of interest," e.g. common ownership, financial reporting, counsel, etc., between the original defendant and new defendant. Were that the only inquiry, all principals, subsidiaries and affiliates of any corporate defendant would be vulnerable to suit by amendment at virtually any time before trial regardless of circumstance, and the legal status of individual business organizations would be lost. Instead, the identities of interest inquiry occurs separately, after the party seeking to amend has established a misnomer for which plaintiff is blameless and, as many of the cases indicate, the defendant has somehow misled the plaintiff.

12. In Gray v. Executive Drywall, Inc., 520 So.2d 619 (Fla. 2nd DCA 1988), Executive Plastering, Inc. ("Plastering") and Executive Drywall, Inc. ("Drywall") were separate entities who shared numerous commonalities, such as some common ownership, common representation at job sites, common attorney, etc.. Id at 620. Gray, an employee of a contractor, sued Drywall for injuries at a job site, but, after the limitations period expired, sought to add Plastering as a defendant. The Gray court held that, despite the similarity in names of the two firms and the commonalities noted, the plaintiff's naming Drywall as the only original defendant was not a misnomer. Id. Drywall, the court continued, did not engage in any improper or misleading conduct, such as engaging in extensive discovery to prolong matters until the statute of limitations ran out. Id. The

plaintiff, in other words, was not duped by the original defendant's conduct. And with respect to the prejudice to the potential new defendant, Plastering, the court stated:

[W]e do not conclude that the mere facts that Plastering had knowledge of the litigation prior to the running of the statute of limitations, knew or should have known that plaintiff could have added Plastering as an additional defendant, and thereby suffered no prejudice by being added after the running of the statute of limitations requires a different result. There was no obligation to advise plaintiff who to sue. Plaintiff had twenty-nine months between filing the suit and running of the statute of limitations in which to learn through discovery about Plastering as a possible defendant.

Id. at 621 (citations omitted). Here, Qwest had ample time and ample information to figure out who to sue from the onset, whether STS, Saturn or both. STS engaged in no improper conduct to dupe or lull Qwest into inaction. The inaction here was entirely Qwest's own doing.

13. Qwest cites only two decisions to support its position to amend and, apparently relate back, an amendment: Darden v. Beverly Health & Rehabilitation, 542 So.2d 763 (Fla. 5th DCA 2000) and Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd., 725 So.2d 451 (Fla. 4th DCA 1999). Both are distinguishable from the situation in the instant case. The Darden opinion is sparse on detail, but holds that where the plaintiff initially sued a parent company and filed an out-of-time amendment to instead sue the subsidiary for the same cause of action, the parent company was not prejudiced because it "actively defended this lawsuit in the trial court for nine months." 763 So.2d at 543. In Chamberlain, the court found a misnomer due to similarly named defendants, looked at the identities of interest and then, in addressing prejudice stated that the later-named defendant had to know the plaintiff mistakenly named the wrong entity. Significantly, the Court also noted the original defendant "undertook extensive discovery . . . expended

considerable time and resources taking depositions, filing subpoenas . . . , sending interrogatories to the plaintiffs and requesting documents from them.” 725 So.2d at 453.

14. Unlike in Darden and Chamberlain, here, STS has not engaged in any discovery, has not actively participated in the case and has not otherwise engaged in any conduct which would lull Qwest into thinking that Qwest sued who it intended on suing. Further, in neither Darden nor Chamberlain could the plaintiffs avail themselves of public information which they could readily use to help identify their intended defendants. Here, as explained above, Qwest could have and should have used public information to do just that. From the time that it received responses to its subpoenas from the IXCs nearly two years ago, Qwest could have known and should have known who to sue.

15. While there is copious authority on the subject of “relate back” amendments other than Grey, Darden and Chamberlain, the undersigned is not aware of any decisions where, as in this case, the plaintiff had information availability to it for years which would have allowed it to sue who it apparently intended to sue but, instead, the plaintiff sought to excuse its own lack of diligence with the explanation that the original and added defendant parties have certain identities of interest.

16. Aside from the prejudice Saturn will endure by being added as a party this late in the case¹⁴ – through no fault of its own – Saturn is further and independently prejudiced if the Commission finds that an amendment to add Saturn “relates back” to some prior date. This is so by virtue of the combined effect of the proper application of

¹⁴ As indicated above, Saturn will require adequate time to file an answer, time to serve and analyze responses to discovery, time to prepare witness testimony – all in a very truncated interval.

the statute of limitations¹⁵ and Chapter 2011-36, Laws of Florida, effective July 1, 2011. Saturn maintains that its potential liability for retroactive monetary relief (“damages”) is at one level if Saturn is added as a respondent effective as of a prospective date and is at a significantly higher level if Saturn is deemed added as of some retroactive date. Logically, it should make little or no difference for purposes of a prejudice determination whether a plaintiff’s claims would be completely or partially defeated. Even a partially invalid claim will be significant to any CLEC in this case, and any change to the date of filing suit impacts the validity and value of the claim. Saturn has not quantified precise figures for the difference in potential damages, as Saturn has not been a party to the case and thus had no right to conduct discovery.

17. The Prehearing Officer, even if she grants the Second Motion to Amend, should not permit amendment to relate back to the First Amended Complaint.¹⁶ There are ample grounds set forth above for the Prehearing Officer to find that Qwest knew or should have known it wanted to sue Saturn instead of STS as long as two years ago but failed to perform reasonable diligence. Alternatively, since Qwest does not specifically request that a second amendment relate back, and such a decision has implications beyond a mere procedural question, the Prehearing Officer could simply refuse to rule on the question.

¹⁵ Qwest has acknowledged, and CLECs agree, that Chapter 95, Florida Statutes (the Statute of Limitations), applies to Qwest’s claims in this case. However, Qwest and the CLECs have different views on how the Statute of Limitations applies.

¹⁶ STS was added as a respondent by the First Amended Complaint in October 2010. The original Complaint was filed in December 2009. Even if the Commission were to address the “relate back” issue, which the Commission should not, there is no legal basis for a second amendment to “relate back” to a date before STS was even named a respondent.

WHEREFORE, in consideration of the foregoing, the Commission should deny the Second Motion to Amend insofar as the motion prays to add Saturn as a party to the case. However, in the alternative, if the Commission allows Saturn to be added as a party by a second amendment to the complaint, the Commission should also rule: (1) Qwest must dismiss STS with prejudice, (2) Saturn, if it chooses to file an answer, should do so within fourteen days of the Commission's order, (3) to minimize potential prejudice to Saturn, Qwest must respond to any discovery propounded by Saturn (before direct testimony is due) within ten (10) days of service of that discovery, and the Commission will entertain any reasonable requests by Saturn for additional time to file its testimony, and (4) the second amendment does not relate back to any prior iteration of the complaint or, alternatively, a determination of whether the second amendment relates back is expressly withheld.

Respectfully submitted this 27th day of
April, 2012

By:



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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 27th day of April, 2012.

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By: 
Matthew Feil, Esq.