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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:

Broadwing Communications, LLC
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Broadwing's response in opposition to Qwest motion for surrebuttal

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DOCUMENT NUMBER-DATE

06600 OCT-1 2012

FPSC-COMMISSION CLERK

10/1/2012

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,
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: October 1, 2012

**BROADWING COMMUNICATIONS, LLC'S
RESPONSE IN OPPOSITION TO QWEST COMMUNICATIONS COMPANY, LLC'S
MOTION FOR LEAVE TO FILE SURREBUTTAL TESTIMONY AND EXHIBITS**

Broadwing Communications, LLC ("Broadwing"), as permitted by Rule 28-106.204, Florida Administrative Code, hereby responds in opposition to the Motion for Leave to File Surrebuttal Testimony and Exhibits filed by Qwest Communications Company, LLC ("Qwest") on September 24, 2012. Qwest's motion should be denied because it is completely without merit, and Broadwing will be prejudiced if it is granted. In support, Broadwing states:

DOCUMENT NUMBER-DATE

06600 OCT-1 2012

FPSC-COMMISSION CLERK

BACKGROUND

1. Qwest initiated this proceeding on December 11, 2009 by filing a complaint (the "Complaint") against numerous CLEC respondents, including Broadwing. The parties met with PSC Staff on October 25, 2011, to identify issues for hearing and discuss other prehearing matters. During the meeting, Staff suggested a procedural schedule typically used by the Commission in complaint cases, in which all parties would have the opportunity to file direct testimony on the same date, followed by an opportunity for all parties to simultaneously file rebuttal testimony at a later date.

2. Qwest objected to the order of testimony proposed by Staff, and on November 8, 2011, filed a Motion for Surrebuttal. Among other things, Qwest argued that surrebuttal was necessary because "CLECs may dispute certain facts alleged by QCC, offer detailed explanations for their conduct and also offer information relating to affirmative defenses mentioned, thus far only in passing, in their answers." (Qwest motion, pg. 2) A group of CLECs, including Broadwing, responded to Qwest's Motion on November 14, 2011, noting that the order of testimony proposed by Staff was supported by Commission precedent, particularly in complaint cases initiated by one communications carrier against another carrier involving switched access services and applicable rates.

3. The Prehearing Officer denied Qwest's motion for surrebuttal in Order No PSC-12-0048-PCO-TP, and set a procedural schedule pursuant to which all parties would file direct testimony and exhibits on June 14, 2012, followed by rebuttal testimony and exhibits by all parties on August 9, 2012, eight weeks later. Qwest did not seek reconsideration of the Prehearing Officer's decision.

4. On June 14, 2012, Qwest filed the direct testimony and exhibits of four witnesses: William R. Easton, Dennis L. Weisman, Derek Canfield, and Lisa Hensley Eckert. Broadwing filed the jointly-sponsored direct testimony and exhibits of Don J. Wood on the same date. On August 9, 2012, Broadwing filed the rebuttal testimony and exhibits of Mack D. Greene and Bradley N. Collins, along with the jointly-sponsored rebuttal testimony of J. Terry Deason and Don J. Wood. Qwest served Broadwing with discovery regarding its rebuttal testimony on August 30, 2012.

5. On September 24, 2012, nearly seven weeks after Broadwing filed its rebuttal testimony and exhibits, Qwest filed its Motion to file surrebuttal testimony and exhibits in response to the rebuttal testimony of Messrs. Greene and Collins.

I.
SURREBUTTAL SHOULD BE DENIED BECAUSE BROADWING'S REBUTTAL TESTIMONY PROPERLY RESPONDED TO QWEST'S DIRECT TESTIMONY AND DID NOT INTRODUCE ANY NEW MATTERS

6. As this Commission has recognized, surrebuttal is *only* appropriate if a party's rebuttal testimony raises *new issues* that were not addressed in his opponent's direct case. *See*, Order No. PSC-00-2036-PCO-TP¹ (surrebuttal denied because rebuttal testimony did not introduce new issues); Order No. PSC-09-0512-PCO-EI² (surrebuttal permitted because rebuttal testimony substantially revised analyses in that party's own direct testimony). Thus, so long as rebuttal stays within its proper boundaries, surrebuttal is inappropriate. *See*, Order No. PSC-00-

¹ Issued on June 13, 2000, in Docket No. 991534-TP (*In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief*).

² Issued on July 21, 2009, in Docket No. 090172-EI (*In re: Petition to determine need for Florida EnergySecure Pipeline by Florida Power & Light Company*).

2282-PCO-TP³ (motion to strike or for surrebuttal denied because challenged rebuttal testimony properly responded to and rebutted other party's direct testimony and addressed an issue established in the procedural order).

7. In support of its claims, Qwest filed the direct testimony of William Easton, who asserts that Broadwing and/or its predecessor, Focal, has or had allegedly-discriminatory agreements, including those specified by Mr. Easton. Both Mr. Easton and Mr. Canfield assert that Broadwing and/or Focal charged in the past and continue to charge certain specified rates to named IXCs. Mr. Greene responds to and rebuts these claims, and explains why they are incorrect. In direct, Mr. Canfield produced calculations of Qwest's alleged damages; in rebuttal, Mr. Collins contests Mr. Canfield's specified assumptions, and corrects errors and omissions in his calculations. The rebuttal testimony of Messrs. Greene and Collins is thus proper rebuttal that responds directly to and rebuts the specific claims made by Mr. Easton and Mr. Canfield. *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978), quoting *Luttrell v. United States*, 320 F.2d 462, 464 (5th Cir. 1963) (the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party;" once a party opens a door to a particular line of testimony, he cannot object to the other party "accepting the challenge and attempting to rebut the presumption asserted.").

8. Qwest cannot demonstrate that either Mr. Greene or Mr. Collins raised any new matter in responding to Qwest's direct testimony, and in fact Qwest made no attempt whatsoever to identify a single new matter raised by either witness. To the contrary, Qwest essentially admits that that the testimony to which it seeks to respond did *not* raise any new matter; Qwest

³ Issued on November 30, 2000 in Docket No. 000907-TP (*In re: Petition by Level 3 Communications, LLC, for arbitration of certain terms and conditions of a proposed agreement with Bellsouth Telecommunications, Inc.*).

states that it had “not previously considered” certain information; that it “was under the impression” that its direct testimony was correct; and that it did not “firmly understand” that its claims were simply wrong. In other words, Qwest seeks surrebuttal simply because Broadwing’s rebuttal testimony directly and effectively addressed, contradicted and refuted claims and theories raised in the direct testimony of Qwest witnesses Easton and Canfield. This is the purpose of rebuttal testimony. Qwest’s direct testimony, which Qwest admits reflects its failure to “understand” and “consider” information in its possession, opened the door to Broadwing’s rebuttal, and does not justify surrebuttal.⁴

9. Further, the only three orders cited by Qwest in support of its request are inapposite. Two of the orders reveal that the surrebuttal motions were unopposed and thus were granted as a matter of course,⁵ and the third order granted the surrebuttal motion of an intervenor after the petitioner filed rebuttal testimony which revised the petitioner’s own analyses, which

⁴ Broadwing objects to and disagrees with Qwest’s assertion that Broadwing’s counsel was aware of Qwest’s “impression” that it was being billed by Focal. The undersigned had no such awareness, and believes, based on extensive discussion during the course of this proceeding with Broadwing’s then in-house counsel, that he had no such awareness. Further, there is no objectively reasonable basis for Qwest’s alleged misimpression. Focal has not issued an invoice to Qwest since September 1, 2005; invoices issued to Qwest beginning October 1, 2005 clearly state that they are issued by Broadwing; and the billing OCN/company code has been registered to Broadwing in the LERG and NECA Tariff No. 4 since 2005. Broadwing was neither aware of nor responsible for Mr. Canfield’s apparent failure to look at the invoices he was auditing. Further, Qwest clearly understood when it initiated this case in 2009 that Broadwing, not Focal, currently holds a CLEC certificate and provides switched access service in Florida. *See*, Qwest Complaint, para. 2(f), wherein Qwest asserts that Broadwing is Focal’s successor in interest, and which notes that Qwest reviewed the Commission’s website to determine information about both carriers before filing its Complaint.

⁵ Order No. PSC-01-2399-PCO-TP, issued on December 1, 2001 in Docket No. 990649A-TP (*In re: Investigation into pricing of unbundled network elements (BellSouth track)*) and Order No. PSC-02-1613-PCO-GU, issued on November 21, 2002 in Docket No. 020384 (*In re: Petition for rate increase by Peoples Gas System*).

were previously filed in its direct testimony.⁶ Noting that “[s]urrebuttal testimony provides a way for a party to respond to evidence given on rebuttal that introduces a new matter into the proceeding,” the Commission declined to permit the petitioner in that case to accomplish by rebuttal the exact result that Qwest admittedly seeks to accomplish in the instant case by surrebuttal – a “last word” opportunity to revise the same testimony and analyses it filed on direct.⁷

10. Importantly, Qwest has cited no instance in which the Commission permitted even proper surrebuttal over objection in a complaint case. As noted in Broadwing’s jointly-filed response to Qwest’s 2011 motion for surrebuttal, simultaneous filing of testimony is the norm in Commission complaint cases initiated by one communications carrier against another carrier, including complaints involving switched access services and applicable rates.⁸ This procedure gives each party an opportunity to rebut the other party’s direct case. It is not intended to give the parties an opportunity to rebut the other party’s rebuttal.

⁶ Order No. PSC-09-05120-PCO-EI, issued on July 21, 2009 in Docket No. 090172-EI (*In re: Petition to determine need for Florida EnergySecure Pipeline by Florida Power & Light Company*).

⁷ Qwest admits that the purpose of its proposed surrebuttal testimony is to revise the very same analyses of Qwest’s claims against Broadwing that it presented in its direct testimony. *See*, Canfield direct testimony, page 11, lines 3-18 and Canfield proposed surrebuttal, page 2, lines 19-21. In addition, Mr. Canfield specifically admits that his new Exhibits DAC-33 and DAC-34 are intended as complete and revised replacements of his initial analyses in Exhibits DAC-1 and DAC-2.

⁸ *See, e.g.*, Order No. PSC-05-0125-PCO-TP, issued January 31, 2005 in Docket No. 041144-TP (complaint by Sprint against KMC); Order No. PSC-11-0417-PCO-TP, issued September 27, 2011, in Docket No. 110056-TP (complaint by Bright House against Verizon); Order No. PSC-08-0235-PCO-TP, issued April 10, 2008 in Dockets Nos. 070691-TP and 080036-TP (complaints by Comcast and Bright House against Verizon); and Order No. PSC-09-0653-PCO-TP, issued September 30, 2009, in Docket No. 090135-TP (complaint by Cbeyond against AT&T).

11. Qwest appears to believe that Broadwing had an obligation to file direct testimony to address and rebut the claims raised in Qwest's Complaint. Qwest is mistaken, and its request for surrebuttal indicates a misunderstanding of its burden of proof in this proceeding. In the absence of a show cause order from the Commission, Broadwing was not required to provide direct testimony to pre-emptively demonstrate that it did not violate Florida Statutes as alleged by Qwest. Its decision not to do so does not entitle Qwest to revise its direct testimony.

12. Qwest has the burden of proving that Broadwing engaged in unreasonable rate discrimination in violation Florida Statutes, as alleged in Qwest's Complaint, and further has the burden of proving how, if at all, it has been harmed by the alleged discrimination. Broadwing and other respondent CLECs have the burden of proving their affirmative defenses. Each party is responsible for providing direct testimony to meet its burden of proof. The scope of rebuttal testimony is determined by matters addressed in the *other party's direct testimony* and not, as Qwest appears to assert, by matters addressed in each party's own direct testimony. As noted above, Broadwing's rebuttal testimony properly addresses the specific matters raised in Qwest's direct testimony. Qwest therefore is not entitled to revise its analyses and present as surrebuttal the testimony that in retrospect, it wishes it had presented in its direct case.

II.
QWEST WILL NOT BE PREJUDICED IF ITS MOTION IS DENIED, BUT
BROADWING WILL BE PREJUDICED IF QWEST IS PERMITTED TO FILE
SURREBUTTAL TESTIMONY

13. Qwest filed its Complaint on December 11, 2009. Direct testimony was filed by all parties on July 14, 2012, followed by rebuttal testimony on August 9, 2012. Although Qwest had well over two years to prepare before it filed its direct testimony, it essentially admits that it failed to review its own invoices, failed to review Broadwing's discovery responses and the

documents it subpoenaed from IXCs in 2010, and that it did not “previously consider” or “firmly understand” the factual basis for its claims against Broadwing. In order to correct its admitted failings, Qwest now seeks an opportunity to revise its direct testimony via surrebuttal, and thereby shift to Broadwing the burden of Qwest’s own failure to timely and diligently prepare its case.

14. The analysis Qwest seeks to present could have, and should have, been presented in Qwest’s direct testimony. Permitting Qwest to revise its direct testimony under the guise of surrebuttal improperly relieves Qwest of its burden of going forward with evidence of its claims and prejudices Broadwing by eliminating its right to file rebuttal to such testimony.

15. Broadwing also will be prejudiced in its efforts to prepare for hearing if Qwest’s motion is granted. The hearing in this case is scheduled for three full days, and is only three weeks away. In order to prepare for hearing, Broadwing’s counsel must evaluate 16 testimony filings and over 150 pre-filed exhibits, as well as thousands of pages of discovery responses, after which it must prepare its own witnesses to present direct testimony and respond to cross examination, as well as prepare to cross examine Qwest’s four witnesses. In addition to their demanding full-time work, Broadwing’s witnesses will be similarly occupied with preparation for cross examination.

16. Nevertheless – and although Qwest waited almost *seven weeks* after rebuttal testimony was filed before it sought to revise its testimony – Qwest suggests that Broadwing should now cease preparation for the upcoming hearing in order to take on the task of reviewing and preparing to address Qwest’s belatedly-revised direct case, as well as conducting discovery if necessary, simply because Qwest’s “understanding of certain fundamental facts” has changed. It is fundamentally prejudicial to require Broadwing to do so at this late date.

17. As noted above, Qwest has identified no new matter raised by Broadwing's witnesses that could possibly require the "revised analysis" it now proposes, and will not be prejudiced if its motion is denied. To the extent Qwest seeks to agree with Broadwing's testimony or reduce its claims, it is free to do so without filing testimony. To the extent Qwest seeks to dispute Broadwing's rebuttal testimony, it may readily do so through cross-examination.²

CONCLUSION

Qwest does not require and is not entitled to surrebuttal because Broadwing's witnesses did not raise any new matters or issues in their rebuttal testimony. Broadwing had no obligation to present direct testimony to pre-emptively disprove Qwest's claims, and its rebuttal testimony properly responded to the specific matters and issues raised in Qwest's direct testimony. The surrebuttal sought by Qwest should have been presented in its direct testimony. Permitting Qwest to bolster its direct testimony under the guise of surrebuttal and thereby shift the burden of its lack of preparation to Broadwing is fundamentally prejudicial and under the present circumstances, will impair Broadwing's ability to prepare for hearing. Accordingly, Qwest's motion should be denied.

² Broadwing notes that its responses to discovery propounded by Qwest regarding Broadwing's rebuttal testimony will be available for Qwest's use in cross examination of Broadwing's witnesses.

Respectfully submitted this 1st day of October, 2012.

/s/ Marsha E. Rule

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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served by U. S. mail or email to the following persons on this 1st day of October, 2012:

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