

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; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; 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
ORDER NO. PSC-12-0305-PCO-TP
ISSUED: June 14, 2012

ORDER GRANTING REQUEST FOR SECOND AMENDMENT OF COMPLAINT,
SUBSTITUTION OF SATURN TELECOMMUNICATIONS SERVICES D/B/A EARTHLINK
BUSINESS FOR STS TELECOM, ACKNOWLEDGING VOLUNTARY DISMISSAL OF STS
TELECOM, XO COMMUNICATIONS SERVICES INC, AND ACCESS POINT, INC.

Qwest Communications Company, LLC (QCC) filed a complaint on December 11, 2009, alleging rate discrimination in connection with the provision of intrastate switched access services. QCC was granted leave to file an Amended Complaint on October 22, 2010, adding additional Respondents. Cox Florida Telecom L.P. was voluntarily dismissed without prejudice on April 7, 2011. Lightyear Network Solutions was voluntarily dismissed with prejudice by Order No. PSC-12-0210-FOF-TP.

On April 20, 2012, QCC filed a Motion for Leave to file a Second Amended Complaint to Withdraw the Complaint as to STS Telecom (STS) and to Add Saturn Telecommunications Services d/b/a/ Earthlink Business (Saturn).

On May 30, 2012, QCC filed a Notice of Voluntary Dismissal Without Prejudice of XO Communications Services, Inc. On June 1, 2012, QCC filed a Notice of Voluntary Dismissal With Prejudice of Access Point, Inc., stating that as a result of a confidential settlement agreement, all issues in the complaint are resolved as they relate to Access Point, Inc.

In its Motion, QCC states that it seeks to file a second amended complaint to withdraw its complaint against STS, substitute Saturn for references to STS, and reflect changes in the docket, including the withdrawal of Cox and Lightyear. QCC argues that STS and Saturn, which are

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affiliates, share many commonalities including officers, mailing addresses, and registered agents. QCC states that until October 2011, both companies operated under the same name, STS Telecom. QCC argues that because of the affiliates' commonalities and the fact that STS responded to the amended complaint, the second amended complaint should relate back to the date of original amendment. QCC cites *Darden v Beverly Health and Rehabilitation*, 763 So. 2d 542 (Fla. 5th DCA 2000). QCC does not believe that the amendment will affect any other respondent besides Saturn as the substance of the complaint remains unchanged. Pursuant to Rule 28-106.204(3), Florida Administrative Code, QCC notified all parties of the instant motion.¹

On April 27, 2012, Saturn and STS filed a Joint Response in Opposition to QCC's Motion for Leave to File Second Amended Complaint. STS states that it believes that the withdrawal should be with prejudice. In addition, Saturn states that the amended complaint should be denied due to QCC's lack of reasonable diligence and because Saturn will be prejudiced by the late amendment and need to expend significant resources to respond to the Complaint and file direct testimony due on June 14, 2012. Saturn further argues that although the companies are affiliates and similarly named, neither STS nor Saturn took any action to mislead QCC and therefore Saturn should not be added this late in the proceeding, citing, *Gray v. Executive Drywall, Inc.* 520 So.2d 619 (Fla 2nd DCA 1988). Saturn also argues that if QCC is allowed to substitute Saturn, it should be from the date of the filing of the Motion for Leave to File a Second Amended Complaint rather than when STS was added to the first amended complaint.

It is a general principle that an amendment should be allowed until the privilege to do so has been abused or the opposing party is prejudiced. See Order No. PSC-06-1033-PCO-TP, issued December 14, 2006, Docket No. 060684-TP, citing *Fouts v. Margules*, 98 So.2d 394 (3d DCA 1957). Pursuant to Rule 28-106.202, Florida Administrative Code, the prehearing officer may grant a petitioner's request for amendment. The Commission has broad discretion to allow amendments of pleadings, where the privilege to amend has not been abused, in order that disputes may be resolved on their merits. See Order No. PSC-99-1781-PCO-TP, issued September 10, 1999, in Docket No. 990874-TP (citing Order No. PSC-98-0332-PCO-TP, issued February 26, 1998, in Docket 970730-TP.) and Order No. PSC-04-0714-PCO-EI, issued July 20, 2004, in Docket No, 040086-EI.

Although QCC has requested an amendment late into this proceeding, there is no indication that the amendment will prejudice Saturn, given its relationship to STS. As discussed above, it is this Commission's policy that pleadings may be amended so that disputes may be decided on their merits, as long as the privilege to amend has not been abused. Both STS and Saturn operated under the same name at the time STS was named in the complaint² and both affiliates have the same officers, mailing addresses and registered agents and counsel.

¹ QCC states that Broadwing indicated that it generally objected to the Motion and reserved the right to file. However, Broadwing did not file a response.

² Saturn Telecommunication Services Inc. d/b/a Earthlink Business was granted a name change by Order No. PSC-11-0533-FOF-TX, issued November 16, 2011 in Docket No. 110291-TX.

Consequently, it is reasonable to believe that STS knew or should have known about Qwest's complaint.

Therefore, it appears reasonable and appropriate to grant Qwest's Motion for Leave to File a Second Amended Complaint, and Qwest's Second Amended Complaint shall be substituted for the existing Complaint.³ Given the finding that STS and Saturn are functionally related, I find it appropriate that Saturn shall be treated as if it had been properly named in the original October 22, 2010 Amended Complaint.⁴ The Second Amended Complaint also makes "housekeeping" changes to reflect the change in counsel, and the removal of Cox and Lightyear as parties. Although QCC did not indicate whether its voluntary dismissal of STS is with prejudice, given that QCC clearly states that STS is the incorrect affiliate, I find it is appropriate that the withdrawal be acknowledged with prejudice. The Voluntary Dismissal without Prejudice of XO Communications Services, Inc and the Voluntary Dismissal with Prejudice of Access Point, Inc. are also acknowledged.

The following controlling dates, as they pertain to Saturn, shall be established:

Saturn's Response to Second Amended Complaint – June 20, 2012

Saturn's Direct Testimony – July 14, 2012

All other controlling dates as established in Order No. PSC-12-0048-PCO-TP, issued February 2, 2012 and Order No. PSC-12-0304-PCO-TP, issued June 13, 2012, are reaffirmed.

Based on the foregoing, it is

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that Qwest Communications Company, LLC's Motion to file a Second Amended Complaint is granted. It is further

ORDERED that Saturn Telecommunications Services d/b/a Earthlink Business is substituted for STS Telecom as a respondent. It is further

ORDERED that the voluntary dismissal with prejudice of STS Telecom is acknowledged. It is further

ORDERED that the voluntary dismissal without prejudice of XO Communications Services, Inc. is acknowledged. It is further

³ The Second Amended Complaint was attached to the April 20, 2012 Motion.

⁴ Order No. PSC-10-0629-PCO-TP, issued October 22, 2010, granted QCC leave to file the Amended Complaint.

ORDERED that the voluntary dismissal with prejudice of Access Point, Inc. be acknowledged. It is further

ORDERED that the controlling dates, as they pertain to Saturn, are established as set forth in the body of this order.

ORDERED that Order Nos. PSC-12-0048-PCO-TP and PSC-12-0304-PCO-TP, issued June 13, 2012, are reaffirmed in all other respects.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 14th day of June, 2012.



LISA POLAK EDGAR
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.