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090538-TP

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Subject: FL PSC Docket No. 090538-TP - Answer of Access Point, Inc. to the Amended Complaint of Qwest Communications Company, Inc.
Attachments: FL PSC Docket No 090538-TP Answer of Access Point Inc to Amended Complaint of Qwest Communications Company, LLC.pdf

Attached for electronic filing in the above-referenced docket, please find the attached Answer of Access Point, Inc. to the Amended Complaint of Qwest Communications Company, Inc. If you have any questions, please do not hesitate to contact us.

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11/16/2010

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: November 16, 2010

ANSWER OF ACCESS POINT, INC. TO THE AMENDED COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC

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(*) Request for being named a qualified representative has been separately filed in Docket No. 100008-OT.

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Filed: November 16, 2010

ANSWER OF ACCESS POINT, INC. TO THE AMENDED COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC

Access Point, Inc. ("Access Point"), by and through its undersigned counsel, hereby files its Answer to the Amended Complaint filed by Qwest Communications Company, LLC ("Qwest"), and states as follows:

ANSWER

1. As to the allegations in the first and unnumbered paragraph of Qwest's Amended Complaint that assert that Qwest has submitted its Amended Complaint against various named parties ("Respondent CLECs"), Access Point admits that Qwest has filed its Amended Complaint, but denies the charges against Access Point. Moreover, Access Point denies Qwest's allegation that Rule 25-4.114, Florida Administrative Code, applies to Access Point or is applicable in this proceeding. As to the allegations in the second unnumbered paragraph preceding the paragraph that Qwest numbered Paragraph 1 of its Amended Complaint that assert

that Access Point violated Florida law, Access Point denies those allegations. Moreover, the paragraph preceding Paragraph 1 of Qwest's Amended Complaint state conclusions of law to which no response is required. To the extent the legal conclusions can be deemed factual allegations, Access Point answers those allegations in the discussion associated with Paragraph 10 below. As for allegations in these unnumbered paragraphs that pertain to other Respondent CLECs, Access Point lacks sufficient knowledge or information to respond to them and, accordingly, neither admits nor denies those allegations. To the extent further answer is required for the paragraphs that precede Paragraph 1 of Qwest's Amended Complaint, Access Point denies those allegations. As to the allegations in Paragraph 1 of Qwest's Amended Complaint, Access Point lacks knowledge or information sufficient to form a belief as to whether the allegations are accurate or complete and therefore, neither admits nor denies those allegations.

2. As to the allegations in subparagraph 2(g), Access Point admits that it is a corporation organized under the laws of the State of North Carolina and is certified to provide telecommunications services in Florida. Access Point admits that its regulatory contact address is 1100 Crescent Green Street, Suite 109, Cary, North Carolina 27518-8105. Access Point lacks specific knowledge of the facts alleged in the other subparagraphs of Paragraph 2 as to the status of other Respondent CLECs and therefore, neither admits nor denies those allegations.

3. The allegations in Paragraph 3 of Qwest's Amended Complaint state a conclusion of law to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law.

4. The allegations in Paragraph 4 of Qwest's Amended Complaint state conclusions of law to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law.

5. The allegations in Paragraph 5 of Qwest's Amended Complaint state a conclusion of law to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law.

6. Access Point admits that it has a price list containing intrastate switched access rates on file with the Commission but lacks sufficient knowledge concerning the other Respondent CLECs, and accordingly Access Point neither admits nor denies the allegations in Paragraph 6 with respect to other Respondent CLECs.

7. Access Point admits that it bills Qwest for intrastate switched access services that Qwest uses, but lacks sufficient knowledge of Qwest's intended meaning and use of the term "large" in Paragraph 7 and therefore, denies this characterization. Access Point lacks sufficient knowledge of the other facts alleged in Paragraph 7 and, therefore, neither admits nor denies those allegations.

8. Access Point states that the allegations in Paragraph 8 of Qwest's Amended Complaint are a matter of public record and respectfully refers the Commission to the documents referenced as they speak for themselves and Access Point denies any and all factual allegations that are inconsistent with that record. Access Point denies that it was one of the subjects of the MN PUC's investigations. To the extent any further answer is required, Access Point denies the allegations in Paragraph 8.

9. Access Point states that the allegations in Paragraph 9 of Qwest's Amended Complaint are a matter of public record and seek to characterize and interpret certain documents, and respectfully refers the Commission to the documents referenced as they speak for themselves and Access Point denies any and all factual allegations that are inconsistent with that record. To the extent any further answer is required, Access Point denies the allegations in Paragraph 9.

10. As for the allegations in subparagraphs 10(a)-(f), 10(h)-(t) of Qwest's Amended Complaint, they pertain to other Respondent CLECs and, therefore, Access Point lacks sufficient knowledge or information to respond to them and, accordingly, neither admits nor denies those allegations. As to the allegations in the first and second full sentences in subparagraph 10(g)(i) of the Amended Complaint, Access Point admits that it has a price list on file with the Commission specifying rates, terms and conditions for its provision of intrastate switched access services and admits that the intrastate switched access rates that it bills Qwest are set out in Section 3 of the price list that Qwest references, *i.e.*, *Florida Price List No. 2* ("Price List"). As to the allegations in the third full sentence of subparagraph 10(g)(i) (which is the last sentence of subparagraph 10(g)(i)), Access Point states this Price List speaks for itself and denies any allegations that are inconsistent with this Price List.

As for the allegations contained in the first sentence of subparagraph 10(g)(ii) of Qwest's Amended Complaint, Access Point admits it entered into two confidential settlement agreements that resolved bona fide disputes concerning previously billed amounts with certain IXCs, that were national in scope and included terms relating to intrastate switched access charges in Florida and other states, as well as interstate switched access services, that Access Point did not file with Florida Public Service Commission ("Commission"). One agreement remains effective, although it will terminate on December 31, 2010, and other agreement was formally terminated over two years ago. Under these confidential settlement agreements and as partial consideration for the settlement of past disputed amounts these IXCs had outstanding to Access Point for switched access services, these IXCs obtained or obtain, among other things, intrastate switched access rates different from and lower than the rates set forth in Access Point's Florida Price List. Because these were confidential settlement agreements, they were unique situations and,

therefore, these agreements along with the intrastate rates in them were or are not available to other carriers. As for the allegations contained in the second sentence of subparagraph 10(g)(ii) of Qwest's Amended Complaint, Access Point admits that it has not submitted these confidential settlement agreements to this Commission, has not disclosed copies of these confidential settlement agreements to Qwest, and has not provided Qwest the identical provisions received by the IXCs that entered into these confidential settlement agreements with Access Point.

As for the allegations contained in the third sentence of subparagraph 10(g)(ii) of Qwest's Amended Complaint, Access Point recalls that Qwest made a demand on Access Point to disclose copies of its off-price list arrangements and to provide Qwest intrastate switched access services at the most favorable rates, terms and conditions provided to other IXCs. Based on information and belief, Access Point denies that Qwest's demand was made in good faith. Access Point denies that it did not honor Qwest's request. At the time that Access Point recalls Qwest making the demand, there were no off-price list arrangements (i.e., a non-settlement agreements) available to Qwest to enter into for the purchase of intrastate switched access service in Florida at off-price list rates so there was nothing responsive to be provided. Moreover, based on information and belief at this time and prior to 2008, Qwest never requested Special Contract Arrangements from Access Point pursuant to Section 6.1 of Access Point's Price List.

Furthermore, it warrants noting that Access Point has purchased wholesale long distance services from Qwest and its affiliates since approximately 1997. Over 90% of the access billing that is at issue in this case stems from that relationship, because the relationship results in originating long distance calls from most of Access Point's end user customers being routed to Qwest, which in turn results in Access Point billing Qwest for the originating access service it

provides on such calls. In connection with this relationship, Access Point management has met with senior managers of Qwest Wholesale at least twice a year face to face to discuss wholesale rates and the status of the relationship and the topic of Access Point's access charges being too high was never brought up. However, over the years there have been many changes in the rates charged to Access Point by Qwest to ensure the profitability of this relationship to Qwest and Access Point was assured that Qwest was happy with their rate of return on the services sold to Access Point. Likewise, Access Point took into consideration the access revenue it derived from Qwest when making the decision to remain a loyal customer of Qwest Wholesale over the years. During some of those meetings, Access Point brought up the topic of reducing the switched access rates it charged Qwest in exchange for reduced wholesale rates that Qwest would charge Access Point, but was told that Qwest lacked the capability to manage such arrangements.

Had Access Point charged Qwest a lower access rate, it would have negotiated a lower wholesale long distance rate, and if Qwest refused to reduce its wholesale long distance rate to reflect reduced access charges, Access Point would have moved its wholesale traffic to another wholesale long distance supplier. Thus, Qwest is seeking a windfall in this case, seeking to have the benefit of higher wholesale long distance rates that resulted from Access Point charging it tariffed access rates, but to pay the lower access rates that Access Points charged other IXCs.

Access Point denies all remaining allegations in all sentences of Paragraphs 10(g)(i) and 10(g)(ii) of Qwest's Amended Complaint, including, without limitation, any allegation relating to off-price-list, unfiled agreements for intrastate switched access services Access Point had or has via its "affiliates, subsidiaries or predecessors" that are not named as parties to this suit.

11. In response to Paragraph 11 of Qwest's Amended Complaint, Access Point restates and incorporates its answers to the allegations above as if fully set forth here.

12. The allegations in Paragraph 12 of Qwest's Amended Complaint state legal conclusions to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law.

13. Access Point denies the allegations in Paragraph 13 of Qwest's Amended Complaint as they relate to Access Point. Access Point lacks sufficient knowledge or information to provide an answer pertaining to the other Respondent CLECs and therefore, neither admits nor denies those allegations.

14. In response to Paragraph 14 of Qwest's Amended Complaint, Access Point restates and incorporates its answers to the allegations above as if fully set forth here.

15. The allegations in the first, second, third and fourth full sentences of Paragraph 15 of Qwest's Amended Complaint state legal conclusions to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law. As for the fifth full sentence of Paragraph 15 (which is the last sentence of Paragraph 15), Access Point (1) admits that it filed its Price List for its intrastate switched access services in Florida with the Commission and (2) lacks sufficient knowledge or information to provide an answer pertaining to the other Respondent CLECs and therefore, neither admits nor denies those allegations.

16. As to the allegations in Paragraph 16 of Qwest's Amended Complaint, Access Point lacks sufficient knowledge or information to provide an answer pertaining to the other Respondent CLECs and therefore, neither admits nor denies those allegations. With respect to Access Point, and as explained in Paragraph 10 above, Access Point admits it entered into two

confidential settlement agreements that resolved bona fide disputes concerning previously billed amounts with certain IXCs, that were national in scope and included terms relating to intrastate switched access charges in Florida and other states, as well as interstate switched access services, that Access Point did not file with the Commission. One agreement remains effective, although it will terminate on December 31, 2010, and other agreement was formally terminated over two years ago. Under these confidential settlement agreements and as partial consideration for the settlement of past disputed amounts these IXCs had outstanding to Access Point for switched access services, these IXCs obtained or obtain, among other things, intrastate switched access rates different from and lower than the rates set forth in Access Point's Florida Price List. Because these were confidential settlement agreements, they were unique situations and, therefore, these agreements along with the intrastate rates in them were or are not available to other carriers. Access Point denies all remaining allegations in all sentences of Paragraph 16 of Qwest's Amended Complaint.

17. In response to Paragraph 17 of Qwest's Amended Complaint, Access Point restates and incorporates its answers to the allegations above as if fully set forth here.

18. The allegations in Paragraph 18 of Qwest's Amended Complaint state legal conclusions to which no response is required and, therefore, Access Point neither admits nor denies those allegations and denies any allegations that are inconsistent with applicable law.

19. Access Point lacks sufficient knowledge or information to provide an answer pertaining to the other Respondent CLECs referenced in Paragraph 19 of Qwest's Amended Complaint and therefore, neither admits nor denies those allegations. With respect to the first sentence of Paragraph 19, Access Point states that the terms of its Price List speak for themselves and denies any allegations in Paragraph 19 that are inconsistent with its Price List. As to the

allegations in the second and fourth sentences of Paragraph 19, Access Point admits, as noted in Paragraph 10, that it entered into two confidential settlement agreements that resolved bona fide disputes concerning previously billed amounts with certain IXCs (which did not include Qwest), that were national in scope and included terms relating to intrastate switched access charges in Florida and other states, as well as interstate switched access services, that Access Point did not file with the Commission. One agreement remains effective, although it will terminate on December 31, 2010, and other agreement was formally terminated over two years ago. Under these confidential settlement agreements and as partial consideration for the settlement of past disputed amounts these IXCs had outstanding to Access Point for switched access services, these IXCs obtained or obtain, among other things, intrastate switched access rates different from and lower than the rates sets forth in Access Point's Florida Price List. Because these were confidential settlement agreements, they were unique situations and, therefore, these agreements along with the intrastate rates in them were or are not available to other carriers. Access Point denies the remaining allegations in all sentences of Paragraph 19.

RESPONSE TO QWEST'S PRAYER FOR RELIEF

Access Point denies Qwest is due any of the relief it requests.

AFFIRMATIVE DEFENSES AND OTHER DEFENSES

1. Qwest's Amended Complaint fails to state a claim upon which relief may be granted.
2. Qwest's Amended Complaint is barred, in whole or in part, by the applicable statute of limitations.
3. Qwest's Amended Complaint is barred, in whole or in part, by the filed rate doctrine.

4. Qwest's Amended Complaint is barred, in whole or in part, by doctrines of laches, waiver, estoppel, and/or unclean hands.

5. Qwest's Amended Complaint is barred, in whole or in part, because the Commission may lack jurisdiction over Access Point's confidential settlement agreements with certain IXCs that are referenced herein but not identified, or portions thereof.

6. Qwest's Amended Complaint is barred, in whole or in part, because Access Point's confidential settlement agreements with certain IXCs that are referenced but not identified herein must be read as a whole in determining whether a carrier is being unlawfully discriminated against.

7. Qwest's Amended Complaint is barred, in whole or in part, because Qwest is not similarly situated to the IXCs with respect to certain important terms and conditions in the confidential settlement agreements referenced herein between these IXCs and Access Point.

8. Qwest's Amended Complaint is barred, in whole or in part, because the Commission lacks jurisdiction over the subject matter and/or to order the relief requested.

9. Qwest's Amended Complaint is barred, in whole or in part, because the relief requested would violate the prohibitions against retroactive ratemaking.

10. Qwest's Amended Complaint is barred, in whole or in part, by virtue of the confidentiality provisions precluding Access Point from filing one or more of its confidential settlement agreements referenced herein between certain IXCs and Access Point with this Commission.

11. Qwest's Amended Complaint is barred, in whole or in part, to the extent it seeks to make any claims against affiliates, subsidiaries, predecessors or any other separately certified

entity associated with Access Point that is or are not specifically named in Qwest's Amended Complaint. Qwest is barred from bringing such non-particularized claims.

12. Qwest's Amended Complaint is barred, in whole or in part, from seeking reparations for the alleged unlawful discrimination because Qwest failed to allege facts or specifically show how it has been harmed by such alleged unlawful discrimination.

13. Qwest is not entitled to any reparations because, assuming arguendo, that the confidential settlement agreements referenced herein that Access Point entered into with the IXCs referenced herein but not identified violate Florida law, the remedy is to require that these IXCs pay Access Point its Price List access rates, to the extent they did not already do so, not to award Qwest any reparations based upon an agreement that violates Florida law.

14. Qwest's Amended Complaint is barred, in whole or in part, because Qwest did not make a timely bona fide request for contract rates.

15. Qwest's Amended Complaint is barred because the rates for intrastate switched access services set forth in Access Point's Price List on file with the Commission are just, reasonable, nondiscriminatory, and otherwise lawful.

16. Qwest's Amended Complaint is barred in part because Qwest has no standing to assert a claim that Access Point violated § 364.04, Fla. Stat.

17. Qwest's Amended Complaint is barred, in whole or in part, because the reparations in the form of refunds that Qwest seeks for discrimination is, by law, unavailable to it.

18. Qwest's Amended Complaint is barred, in whole or in part, because the confidential settlement agreements that Access Point entered into with certain IXCs that are at

issue herein are not available to Qwest because they are invalid and unenforceable since they were the result of economic duress and/or lack a valid form of consideration.

19. Qwest's claim is barred in whole or in part because Qwest is Access Point's toll provider and to the extent it believed it was economically harmed by Access Point, it had a duty to mitigate its damages by charging Access Point higher toll rates, but failed to do so.

Access Point reserves the right to assert additional affirmative defenses and other defenses.

WHEREFORE, for the reasons discussed above, Respondent Access Point respectfully requests that Qwest's Amended Complaint be dismissed with prejudice as it relates to Access Point, or in the alternative deny all the relief requested therein, and grant such other and further relief.¹

¹ Any correspondence concerning this matter that pertains to Access Point and/or filings made in this proceeding should be addressed and sent to the individuals referenced at the end of this Answer.

Dated this 16th day of November 2010.

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Respectfully Submitted,

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