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090538-TP

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Sent: Tuesday, November 16, 2010 3:36 PM
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Subject: Electronic Filing - Docket No. 090538-TP
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From: Nicki Garcia
Sent: Tuesday, November 16, 2010 3:20 PM
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Subject: Electronic Filing - Docket No. 090538-TP

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 – 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; Cox Florida Telecom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLEC's whose true names are currently unknown) for rate discrimination connection with the provision of intrastate switched access services in alleged of Sections 364.08 and 364.10, F.S.

Filed on Behalf of: Birch Communications, Inc.

Total Number of Pages: 14

Description of Documents: Answer and affirmative defenses

DOCUMENT NUMBER-DATE

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11/16/2010

FPSC-COMMISSION CLERK

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November 16, 2010

ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 090538-TP – Complaint of Qwest Communications Company, LLC against MCI/metro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Cox Florida Telecom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLEC's whose true names are currently unknown) for rate discrimination connection with the provision of intrastate switched access services in alleged of Sections 364.08 and 364.10, F.S.

Dear Ms. Cole:

Attached for filing in the above referenced Docket, please find enclosed the Answer and Affirmative Defenses of Birch Communications, Inc.

If you have any questions, please contact me at 850-521-1708.

Sincerely,



Matthew J. Feil

MJF
Attachment

cc: Parties of Record

DOCUMENT NUMBER DATE

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FPSC-COMMISSION CLERK

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF FLORIDA**

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; Cox Florida Telcom, L.P.; Broadwing Communications, LLC; and John Does 1 through 50 (CLEC's whose true names are currently unknown) for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S.

Docket No. 090538-TP

Filed: November 16, 2010

**ANSWER AND AFFIRMATIVE DEFENSES OF BIRCH COMMUNICATIONS,
INC.**

Birch Communications, Inc. ("BCI"), by and through its undersigned counsel, and pursuant to Rule 28-106.203, Florida Administrative Code, and Commission Order No. PSC-10-0629-PCO-TP, issued October 22, 2010,¹ hereby files its Answer, Affirmative Defenses and Counterclaims to the Complaint of Qwest Communications Company, LLC ("QCC"),² and states as follows:

ANSWER

1. BCI lacks personal knowledge of the facts alleged in Paragraph 1 and accordingly neither admits nor denies those allegations.

¹ The Commission's Order Granting Leave to File Amended Complaint permitted Qwest to amend its original complaint and gave respondents until November 16 to file any responses to the amended complaint.

² BCI also reserves its right to join and/or adopt any motions filed by other CLEC respondents.

2. BCI lacks personal knowledge of the allegations in subparagraphs (a) – (g) and (i) - (t) in paragraph 2 concerning other carriers and accordingly neither admits nor denies those allegations, but BCI points out QCC has had more than a year to conduct its “ongoing investigation.” BCI admits the allegations in the first sentence in subparagraph (h) of paragraph 2 except that BCI’s principal place of business is 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia 30305. As to the second sentence of subparagraph (h), BCI denies all of the allegations therein and admits only the following: (1) Access Integrated Networks, Inc. changed its name to Birch Communications, Inc.³ (2) BCI was **not** the acquiring corporate party or assignee in the transactions involving IDS Telecom (“IDS”) or Cleartel Telecommunications, Inc. (“Cleartel”). A different certificated Florida CLEC which is not a named respondent in this case, Birch Telecom of the South, Inc., acquired substantially all of the assets and customers of Cleartel and assumed only limited and defined obligations of Cleartel in Florida.⁴ (3) None of said assumed obligations included obligations pertinent to this proceeding, and by neither law nor by contract is BCI a “successor-in-interest” to Cleartel (or IDS). BCI admits the allegations in the third sentence in subparagraph (h) but specifies that the certificate number cited is BCI’s CLEC certificate.

3. Paragraph 3 states a legal conclusion, rather than an allegation of fact, and accordingly BCI neither admits nor denies that conclusion.

³ See Order Acknowledging Name Change, Order No. PSC-08-0829-FOF-TP, issued December 23, 2008.

⁴ QCC’s allegations in paragraph 2(h) and related footnotes are jumbled and unclear, at best, regarding the referenced corporate parties and QCC’s theory of responsibility for said parties. No respondents should be prejudiced by that lack of clarity. The law does not permit QCC to make vague allegations against a corporate party **not** named as a respondents to the proceedings and then assert such allegations amount to a claim against a named party.

4. Paragraph 4 states a series of legal conclusions, rather than allegations of fact, and accordingly BCI neither admits nor denies those conclusions and denies any statements that are inconsistent with applicable law.

5. Paragraph 5 states a series of legal conclusions, rather than allegations of fact, and accordingly BCI neither admits nor denies those conclusions and denies any statements that are inconsistent with applicable law.

6. BCI admits that it has filed a price list and/or tariff (hereafter "price list") with the Commission for intrastate access services and rates in Florida. BCI lacks personal knowledge of the facts alleged as to the other companies and accordingly neither admits nor denies those allegations.

7. BCI admits that it provides and bills QCC for intrastate switched access services in Florida. BCI lacks personal knowledge of the extent of QCC's operations in Florida, including but not limited to the quantity of intrastate switched access services that QCC purchases from other local exchange carriers, and therefore, BCI neither admits nor denies the remainder of the allegations in paragraph 7.

8. The public record in the Minnesota Public Utilities Commission proceeding referenced in paragraph 8 speaks for itself, and BCI denies any and all factual allegations that are inconsistent with that record.

9. The public record in the Minnesota Public Utilities Commission proceeding referenced in paragraph 9 speaks for itself, and BCI denies any and all factual allegations that are inconsistent with that record.

10. BCI lacks personal knowledge of the allegations in subparagraphs (a) – (g) and (i) - (t) in paragraph 10 concerning other carriers and accordingly neither admits nor

denies those allegations. With respect to the allegations in subparagraph (h), BCI states as follows:

i. BCI admits the allegations in the first, third and fourth sentences but can neither admit nor deny QCC's footnote 5 as that reference is vague and unclear. With respect to the second sentence, BCI admits that its filed and approved price list for intrastate switched access services ("SWA") is Birch Communications, Inc.'s Price List No. 2; the other price list cited in the second sentence is not that of respondent BCI. BCI otherwise denies the allegations in subparagraph 10.h.i.

ii. BCI denies any allegations in the first and second sentences insofar as those allegations pertain to any entities which are not named respondents in this case and insofar as those allegations pertain to BCI as a successor in interest to any entity. Further, as to the first and second sentences, for Florida, QCC has not attached any such agreements to its Amended Complaint and therefore, BCI can neither admit nor deny QCC's over-broad allegations but denies that any such agreement(s) triggered any obligation vis-vis QCC within applicable law or limitations periods. As applied to states other than Florida, any such agreements are beyond the Commission's jurisdiction and accordingly BCI neither admits nor denies those allegations. BCI denies the remainder of the allegations in 10.h.ii, but BCI admits that it provides and has provided QCC with intrastate switched access services in Florida under the rates, terms, and conditions of BCI's applicable price lists rather than any agreement, BCI admits that QCC operates as an IXC in Florida, and BCI admits that QCC made a request for information to BCI but denies the request had the character or significance QCC alleges.

11. BCI restates and incorporates its answers in the foregoing paragraphs as if fully set forth here.

12. Paragraph 12 states legal conclusions, rather than allegations of fact, and accordingly BCI neither admits nor denies those conclusions. Florida statutes speak for themselves, and BCI denies any characterization of those statutes that is not consistent with applicable law.

13. BCI denies the allegations in Paragraph 13 as they relate to BCI. BCI lacks personal knowledge regarding the allegations concerning other Respondent CLECs and accordingly neither admits nor denies those allegations.

14. BCI restates and incorporates its answers in the foregoing paragraphs as if fully set forth here.

15. BCI admits that it has filed price lists for its intrastate switched access services in Florida, but BCI lacks personal knowledge regarding the allegations in the last sentence of paragraph 15 concerning other Respondent CLECs and accordingly neither admits nor denies those allegations. The remainder of paragraph 15 states legal conclusions, rather than allegations of fact, and accordingly BCI neither admits nor denies those conclusions. *Florida Statutes and Commission rules speak for themselves*, and BCI denies any characterization of those statutes and rules that is not consistent with applicable law.

16. BCI denies the allegations in paragraph 16 as they relate to BCI within the applicable law and limitations periods. BCI lacks personal knowledge regarding the allegations concerning other Respondent CLECs and accordingly neither admits nor

denies those or the other allegations of fact in paragraph 16 that are outside the Commission's jurisdiction.

17. BCI restates and incorporates its answers in the foregoing paragraphs as if fully set forth here.

18. Paragraph 18 states legal conclusions, rather than allegations of fact, and accordingly BCI neither admits nor denies those conclusions. Florida statutes and Commission rules speak for themselves, and BCI denies any characterization of those statutes and rules that is not consistent with applicable law.

19. BCI's price lists speak for themselves, and BCI denies all characterizations and allegations concerning those price lists that are not consistent with the price list language. BCI denies the allegations in the second sentence of paragraph 19 as applied to BCI in Florida within applicable law and the limitations periods in the price lists and relevant statute of limitations; as applied to states other than Florida and the time period outside the relevant limitations periods, any such allegations are beyond the Commission's jurisdiction and accordingly BCI neither admits nor denies those allegations. BCI admits that QCC is, or operates as, an IXC in Florida, but BCI denies the remainder of the third sentence in paragraph 19. BCI denies that it has not abided by its price lists when providing switched access services to QCC, and therefore BCI denies the remainder of paragraph 19 with respect to the allegations concerning BCI. BCI lacks personal knowledge regarding the allegations concerning other Respondent CLECs and accordingly neither admits nor denies those allegations.

QWEST'S PRAYER FOR RELIEF

BCI denies that QCC is entitled to the relief it requests in its Prayer for Relief or any other relief, and BCI otherwise denies all allegations in QCC's complaint that BCI has not expressly addressed above. BCI, therefore, requests that the Commission deny QCC's complaint and dismiss it with prejudice.

BCI'S AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.
2. The Complaint is barred, in whole or in part, by the limitations period(s) established by applicable law and by the doctrine of laches.
3. The Complaint is barred, in whole or in part, by the filed rate doctrine.
4. The Complaint is barred, in whole or in part, by the doctrines of waiver and estoppel.
5. The Complaint is barred, in whole or in part, because the Commission lacks jurisdiction over the subject matter and lacks the authority to order the relief requested.
6. The Complaint is barred, in whole or in part, because the relief requested would violate the prohibitions against retroactive ratemaking.
7. QCC lacks standing to seek the relief it has requested in its Complaint.
8. QCC failed to properly dispute BCI's SWA bills. For all billing periods covered by a negotiated settlement between BCI and any other IXC concerning disputed SWA bills, there is not, as a matter of law, any undue privilege or advantage in favor of that IXC against QCC.

9. Subsection 2.5.2 of BCI's approved Florida Price List No. 2 provides, "If the Company does not receive notice of a dispute in writing within 90 days from the receipt of the invoice, the invoice shall be considered correct, final, and binding on the Customer for all purposes and the Customer shall be deemed to have waived any right to dispute that invoice."⁵ QCC failed to dispute invoices within 90 days; therefore, QCC's claims inconsistent with this obligation are barred.

10. Subsection 2.1.4, paragraph J, of BCI's approved Florida Price List No. 2 provides, "no action or proceeding against the Company shall be commenced more than one year after the service is rendered." QCC's claims exceed more than one year from the date services were rendered to QCC; therefore, QCC's claims inconsistent with this one year limit are barred.

11. The Commission does not set or limit CLECs' SWA rates, does not require CLECs to file SWA price lists, and does not require CLECs to file or even post notice of individual case based ("ICB") agreements for SWA services. Further, SWA services are not consumer services, but rather are inter-carrier services purchased by very sophisticated, and often very large, companies like QCC. QCC's requested remedies would create a regulatory paradox: the Commission setting rates (through *reparations/damages and prospective rate adjustments*) for CLEC inter-carrier services when the Commission does not have regulatory authority to set such rates. Exacerbating that paradox is that QCC's requested relief goes well beyond the Commission's rate-making powers for rates the Commission actually does have express statutory authorization to set because QCC asks the Commission to set rates retrospectively, and

⁵ This subsection also provides, "In the event the Company incurs fees and expenses, including attorneys fees, in collecting, or attempting to collect, any charges owed the Company, the Customer will be liable to the Company for the payment of all such fees and expenses reasonable [sic] incurred."

for an undefined prior period, as well as prospectively. QCC's claims are inconsistent with "light touch" regulation of CLECs intended by Chapter 367 and therefore must be denied.

12. BCI's Price List No. 2 authorizes ICB arrangements to "similarly situated customers under substantially similar circumstances" and contains a Volume Service Offering. QCC is not a "similarly situated" carrier to any other IXC for several reasons, including but not limited to the following: (1) BCI purchases wholesale services from QCC, and solely for that reason, QCC has a unique traffic profile, with costs already accounted for in the parties' wholesale pricing. For traffic exchanged with QCC, the ratio of originating intrastate minutes of use (MOU) to terminating intrastate MOU is approximately 5.5 : 1. The pricing and terms of the wholesale services contract reflect QCC's obligation to pay BCI's Price List SWA rates, and for years, the parties' practice has been consistent with that approach. QCC cannot now ask the Commission rewrite the wholesale services bargain QCC accepted and has benefitted from for years. (2) Wholesale services aside, QCC is not now and has not been similarly situated to other IXCs based on traffic volume or payment or dispute history. Further, QCC does not qualify for the Volume Service Offering. Because QCC is not "similarly situated," QCC's claims against BCI fail and must be dismissed.

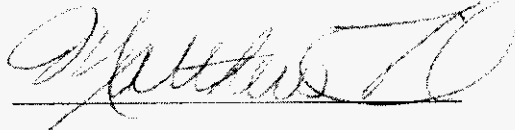
13. BCI reserves the right to designate additional defenses as they become apparent throughout the course of discovery, investigation and otherwise.

Dated this 16th day of November, 2010.

Respectfully submitted,

Birch Communications, Inc.

By:

A handwritten signature in cursive script, appearing to read "Matthew J. Feil", written over a horizontal line.

Matthew J. Feil
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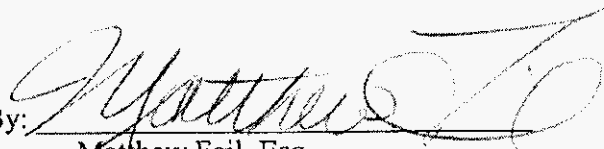
CERTIFICATE OF SERVICE

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 16th day of November, 2010.

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<p>PaeTec Communications, Inc. One PaeTec Plaza 600 Willowbrook Office Park Fairport, NY 14450</p>	<p>STS Telecom, LLC Post Office Box 822270 Pembroke Pines, FL 33082</p>
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By: 
Matthew Feil, Esq.