

Marguerite McLean

090538-TP

From: Nicki Garcia [NGarcia@gunster.com]
Sent: Tuesday, November 16, 2010 3:44 PM
To: Filings@psc.state.fl.us
Cc: Lee Eng Tan; Beth Keating; 'aklein@kleinlawpllc.com'; 'adam.sherr@qwest.com'; 'de.oroark@verizon.com'; 'janewhang@dwt.com'; 'Mary.smallwood@gray-robinson.com'; 'Chris.bunce@birch.com'; 'Tony.mastando@deltacom.com'; 'Edward.Krachmer@windstream.com'; 'Eric.branfman@bingham.com'; 'rcurrier@granitenet.com'; 'Kenneth.culpepper@cox.com'; Matthew Feil; 'Ed.baumgardner@level3.com'; 'Carolyn.Ridley@twtelecom.com'; 'John.ivanuska@xo.com'; Beth Salak; 'marsha@reuphlaw.com'; David Christian
Subject: Electronic Filing - Docket No. 090538-TP
Attachments: 20101116152343699.pdf

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:

Matthew Feil
 Gunster Law Firm
 215 South Monroe Street, Suite 618
 Tallahassee, FL 32301
 Direct: 850-521-1708
 Main: 850-521-1980
mfeil@gunster.com

Docket Name and Number: 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.

Filed on Behalf of: tw telecom of florida, l.p.

Total Number of Pages: 12

Description of Documents: Answer and affirmative defenses

Tax Advice Disclosure: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein. Click the following hyperlink to view the complete Gunster IRS Disclosure & Confidentiality note.

<http://www.gunster.com/terms-of-use/>

DOCUMENT NUMBER DATE

09452 NOV 16 e

11/16/2010

FPSC-COMMISSION CLERK



GUNSTER

ATTORNEYS AT LAW

Writer's Direct Dial Number: 850-521-1708
Writer's E-Mail Address: mfeil@gunster.com

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 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.

Dear Ms. Cole:

Attached for filing in the above referenced Docket, please find enclosed the Answer and Affirmative Defenses of tw telecom of florida, l.p.

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

215 South Monroe Street, Suite 618 | Tallahassee, FL 32301-1804 | 850.521.1980 | Fax: 850.576.0902 | www.gunster.com

MIAMI • TAMPA • JACKSONVILLE • ORLANDO • PALM BEACH • SEASIDE • TALLAHASSEE • WESLEY PALM BEACH

9452 NOV 16 2010
FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

Complaint of QWEST COMMUNICATIONS COMPANY, LLC, Against MCIMETRO ACCESS TRANSMISSION SERVICES, LLC (D/B/A VERIZON ACCESS TRANSMISSION SERVICES), XO COMMUNICATIONS SERVICES, INC., TWTELECOM OF FLORIDA, L.P., GRANITE TELECOMMUNICATIONS, LLC, COX FLORIDA TELECOM, L.P., BROADWING COMMUNICATIONS, LLC, AND JOHN DOES 1 THROUGH 50,
For unlawful discrimination.

Docket No. 090538-TP

AMENDED ANSWER AND AFFIRMATIVE DEFENSES OF TW TELECOM OF FLORIDA, L.P.

COMES NOW, tw telecom of florida, l.p., (tw telecom of florida) and files this its amended answer and affirmation defenses¹ to the Amended Complaint of Qwest Communications Company, LLC, (“Complaint”)² and would respectfully show to the Commission the following:

tw telecom of florida, l.p. denies that as a CLEC it has subjected Qwest Communications Company (“QCC”) to unjust and unreasonable rate discrimination as alleged in the prelude to the Complaint. tw telecom of florida is without knowledge of the corporate organization of QCC.

1. tw telecom of florida admits that Qwest Communications Company operates in Florida pursuant to Certificates issued by the Florida Public Service Commission. tw telecom of florida is without knowledge as to the type of telecommunications services provided by QCC

¹ Commission Order No. PSC-10-0629-PCO-TP, issued October 22, 2010, granted Qwest leave to amend its complaint and gave all CLEC respondents until November 16 to file any responses. Under the circumstances, a motion to amend is not required.

² tw telecom of florida also reserves its right to join and/or adopt any motions filed by other CLEC respondents.

DOCUMENT NUMBER-DATE

09452 NOV 16 09

FPSC-COMMISSION CLERK

throughout the State of Florida. tw telecom of florida is without knowledge of the attorney's information and the Company's ability to participate in the proceedings.

2. tw telecom of florida pursuant to paragraph 2.c. admits it is a limited liability company organized under the laws of the State of Delaware, with its principle place of business in Littleton, Colorado. tw telecom of florida admits it is certified to provide telecommunications services in Florida through Certificate # 3167. tw telecom of florida denies that it is also known as "Time Warner Telecom"³ and admits it is a subsidiary of tw telecom holdings, inc., f/k/a Time Warner Telecom Holdings, Inc. tw telecom of florida admits it is an affiliate of tw telecom of minnesota, llc, formerly Time Warner Telecom of Minnesota, LLC. tw telecom of florida admits that its regulatory contact address is as alleged. tw telecom of florida is without knowledge and no response is required of tw telecom of florida for the remaining parts of paragraph 2 and the allegations contained in each paragraph.

3. tw telecom of florida acknowledges that the Florida Public Service Commission has limited jurisdiction for the regulation of telecommunications companies. tw telecom of florida denies that the Public Service Commission has jurisdiction to grant the relief requested by portions of this Complaint.

4. tw telecom of florida admits that the Florida Public Service Commission has limited jurisdiction over telecommunications companies. The statutes as cited speak for themselves as to the law of Florida and the jurisdiction of the Commission.

5. tw telecom of florida admits that the Florida telecommunication statutes provide for some regulation of price lists or tariffs of telecommunications companies. tw telecom of

³ tw telecom of florida no longer has rights to that name.

florida denies and objects to the characterization of Qwest concerning the statutes providing jurisdiction as the statutes speak for themselves as to the authority and jurisdiction of the Commission.

6. tw telecom of florida admits it has filed price lists with the Florida Public Service Commission for intrastate switched access service and rates.

7. tw telecom of florida is without knowledge of the allegations of paragraph 7 and therefore denies same.

8. tw telecom of florida admits it is aware that the Minnesota PUC conducted a proceeding focused on certain contracts of certain CLECs, but does not agree with the characterization of the alleged findings.

9. tw telecom of florida admits that it has knowledge of the allegations in paragraph 9, but denies that any of its off-tariff agreements were discriminatory.

10. In response to paragraph 10.c.i., Respondent tw telecom of florida admits that it has on file with the Commission a tariff or price list specifying rates, terms and conditions for the provision of intrastate switched access in Florida. Respondent tw telecom of florida does in fact bill QCC the rates set out in section 3.6 of the price list for intrastate switched access services in Florida. tw telecom of florida admits that the tariff provides that tw telecom of florida may enter into customer-specific contracts pursuant to the tariff and that the terms of the contract may be made available to similarly situated customers. tw telecom of florida admits knowledge of an agreement between tw telecom of minnesota, llc, formerly Time Warner Telecom of Minnesota, L.L.C., and AT&T. tw telecom of florida can neither admit nor deny QCC's over-broad allegations regarding agreement(s) neither specified nor attached to the Complaint but denies that any agreement triggered any obligation vis-vis QCC within applicable law or limitations periods.

tw telecom of florida denies all other allegations of paragraph 10.c. tw telecom of florida is without knowledge or is not required to answer any of the other allegations of paragraphs 10.a.-10.g. and therefore denies same.

11. tw telecom of florida restates and incorporates its answers to the allegations of the foregoing paragraphs 1-10 as if fully set forth herein.

12. tw telecom of florida objects to the characterization by QCC of the wording of the statutes. The statutes will speak for themselves as to the jurisdiction and laws of Florida.

13. tw telecom of florida denies the allegations of paragraph 13 and denies that it has violated the laws of Florida to the detriment of QCC.

14. tw telecom of florida restates and incorporates its answers to the allegations to paragraphs 1-13 as if fully set forth in this paragraph.

15. tw telecom of florida admits that it has filed price lists for its intrastate switched access services in Florida. tw telecom of florida objects to the characterizations of Florida law. The statutes speak for themselves as to the jurisdiction and the laws of Florida.

16. tw telecom of florida denies any prior agreement for switched access service triggered any obligation vis-vis QCC within applicable law or limitations periods. tw telecom of florida denies that it has violated Florida law by failing to abide by its published price list and denies that it has subjected QCC to unreasonable prejudice, disadvantage and discriminatory treatment. tw telecom of florida has provided intrastate switched access services to QCC and billed for such services pursuant to tw telecom of florida's price list rates, terms and conditions in Florida.

17. tw telecom of florida is not a named respondent for Count III of the Complaint; therefore, no response to this allegation is required. To the extent necessary, tw telecom of

florida restates and incorporates its responses to the foregoing paragraphs as if fully set forth in paragraph 17.

18. tw telecom of florida is not a named respondent for Count III of the Complaint; therefore, no response to this allegation is required. To the extent necessary, tw telecom of florida states that it objects to the characterizations of the Florida statutes. The statutes speak for themselves with regard to the law and jurisdiction in Florida.

19. tw telecom of florida is not a named respondent for Count III of the Complaint; therefore, no response to this allegation is required or necessary.

QWEST'S PRAYER FOR RELIEF

QCC's Prayer for Relief fails to specify which of its requested remedies applies to which counts of the Complaint. The Commission cannot impose conflicting or redundant remedies, so the Commission cannot grant QCC's requested relief, absent sufficient clarity and lawful justification. This notwithstanding, tw telecom of florida denies that QCC is entitled to the relief it requests in its Prayer for Relief or any other relief, and tw telecom of florida otherwise denies all allegations in QCC's complaint not expressly addressed above. Tw telecom of florida, therefore, requests that the Commission deny QCC's complaint and dismiss it with prejudice.

AFFIRMATIVE DEFENSES

tw telecom of florida hereby asserts the following affirmative defenses in response to the complaint:

a. The complaint, as filed by QCC, fails to state a cause of action against tw telecom of florida for which relief can be granted.

b. The Florida Public Service Commission lacks jurisdiction to grant QCC any “reparations” with or without interest of any amount. This lack of jurisdiction is also the subject of a Motion to Dismiss filed with other CLECs.

c. The Florida Public Service Commission lacks jurisdiction to grant a cease and desist order or other injunctive relief regardless of how titled. This lack of jurisdiction is also the subject of a motion to dismiss filed jointly with other CLECs.

d. Pursuant to Florida Statutes, legal or equitable actions on a contract, obligation or liability founded on a written instrument or any action on a statutory liability must be pursued within the statute of limitations. QCC failed to pursue its legal or equitable claims against tw telecom of florida and these claims are now barred by the statute of limitations.

e. QCC is estopped from pursuing its claims based on alleged contractual prices which may be different from the actual price list. QCC asked for and received the price list terms and condition and QCC is estopped pursuant to the price list and the filed rate doctrines.

f. QCC is not and never has been, pursuant to applicable law or tw telecom of florida’s price list, a similarly situated customer under substantially similar circumstances to any carrier with whom tw telecom of florida had prior agreement for switched access service.

g. tw telecom of florida denies the allegations of QCC state a cause of action against tw telecom and to the extent the alleged contracts include interstate services or mixed interstate and intrastate services, or the complaint other seeks relief beyond that which the Commission may award, this Commission lacks subject matter jurisdiction.

h. To the extent QCC seeks an order directing or prohibiting activities of unidentified “John Doe CLECs” or other statement of general applicability, the requested relief

would constitute a rule as defined in s. 120.52(16), Florida Statutes, and therefore is beyond the Commission's authority to grant in this proceeding.

i. QCC's complaint is barred by laches.

j. Subsection 2.10 of the tw telecom of florida SWA Price List provides, "Objections to billed charges must be reported to the Company within 120 days of receipt of billing. Any claim not filed within this time period shall be deemed waived." QCC failed to dispute any invoices within 120 days; therefore, QCC's claims are barred.

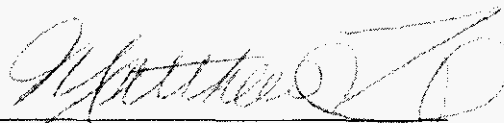
k. The Commission does not set or limit CLECs' SWA rates, does not require CLECs to file SWA price lists, and does not require CLECs to file or even post notice of individual case based ("ICB") agreements for SWA services. Further, SWA services are not consumer services, but rather are inter-carrier 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 even for rates the Commission actually has express statutory authorization to set because QCC asks the Commission to set rates retrospectively, and 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.

l. tw telecom of florida reserves the right to assert additional affirmative defenses as they may become apparent during the course of discovery and denying the proceedings

WHEREFORE, tw telecom of florida asks that this Commission deny the Complaint of Qwest Communications Company for the relief specified, that it dismiss the claims for “reparations,” and injunctive relief and that it order such other and further relief as it shall deem just and proper in this cause.

Respectfully submitted this 16th day of November, 2010.

tw telecom of florida, l.p.



Matthew J. Feil
Gunster Yoakley & Stewart, PA
215 S. Monroe St., Suite 618
Tallahassee, FL 32301
(850) 521-1705
Attorneys for tw telecom of florida, lp

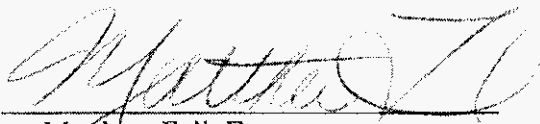
CERTIFICATE OF SERVICE

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.

Theresa Tan Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 ltan@psc.state.fl.us	Mary Smallwood GrayRobinson, P.A. 301 S. Bronough Street, Ste 600 Post Office Box 11189 Tallahassee, FL 32302 Mary.smallwood@gray-robinson.com
Beth Keating Gunster Law Firm 215 South Monroe Street, Ste 618 Tallahassee, FL 32301 bkeating@gunster.com	Adam L. Scherr Qwest Communications Company, LLC 1600 7 th Avenue, Room 1506 Seattle, WA 98191 Adam.sherr@qwest.com
Andrew M. Klein Klein Law Group PLLC 1250 Connecticut Avenue, NW Suite 200 Washington, DC 20036 AKlein@KleinLawPLLC.com	Dulaney O'Roarke Verizon Six Concourse Parkway, NE Suite 800 Atlanta, GA 30328 De.oroark@verizon.com
Jane Whang Davis Wright Tremain Suite 800 505 Montgomery Street San Francisco, CA 94111 JaneWhang@dwt.com	Access Point, Inc. 1100 Crescent Green, Suite 109 Cary, NC 27518
Chris Bunce Birch Communications, Inc. 2300 Main Street, Suite 600 Kansas City, MO 64108 Chris.bunce@birch.com	Budget PrePay, Inc. 1325 Barksdale Boulevard, Suite 200 Bossier City, LA 71111
BullsEye Telecom, Inc. 25900 Greenfield Road, Suite 330 Oak Park, MI 48237	D. Anthony Mastando DeltaCom, Inc. 7037 Old Madison Pike Huntsville, AL 35806 Tony.mastando@deltacom.com

<p>Earnest Communications, Inc. 5275 Triangle Parkway, Suite 150 Norcross, GA 30092</p>	<p>Flatel, Inc. Executive Center, Suite 100 2300 Palm Beach Lake Boulevard West Palm Beach, FL 33409</p>
<p>Lightyear Network Solutions, LLC 1091 Eastpoint Parkway Louisville, KY 40223</p>	<p>Navigator Telecommunications, LLC Post Office Box 13860 North Little Rock, AR 72113</p>
<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>
<p>US LEC of florida, LLC d/b/a PaeTec Business Services 6801 Morrison Boulevard Charlotte, NC 28211</p>	<p>Ed Krachmer Windstream NuVox, Inc. Director & Regulatory Counsel Windstream Communications, Inc. 4001 Rodney Parham Rd. MS: 1170-B1F03-53A Little Rock, AR 72212 Edward.Krachmer@windstream.com</p>
<p>Eric J. Branfman Bingham McCutchen LLP 2020 K Street, NW Suite 1100 Washington, DC 20006 Eric.branfman@bingham.com</p>	<p>Marsha Rule Rutledge, Ecenia, Purnell & Hoffman 215 South Monroe Street Suite 420 Tallahassee, FL 32301 marsha@reuphlaw.com</p>
<p>David Christian 106 E. College Avenue, Suite 710 Tallahassee, FL 32301 David.Christian@verizon.com</p>	<p>Dulaney L. O'Roark, Esquire 5055 North Point Parkway Alpharetta, GA 30022 De.oroark@verizon.com</p>
<p>Granite Telecommunications, LLC 100 Newport Avenue Extension Quincy, MA 02171 rcurrier@granitenet.com</p>	<p>Mr. Ken Culpepper Cox Communications 7401 Florida Boulevard Baton Rouge, LA 70806 Kenneth.culpepper@cox.com</p>

<p>Mr. Gregg Strumberger Broadwing Communications, LLC c/o Level 3 Communications, Tax Dept. 712 North Main Street Coudersport, PA 16915 <u>Ed.baumgardner@level3.com</u></p>	<p>Ms. Carolyn Ridley tw telecom of florida l.p. c/o Time Warner Telecom 555 Church Street, Suite 2300 Nashville, TN 37219 <u>Carolyn.Ridley@twtelecom.com</u></p>
<p>Mr. John Ivanuska XO Communications 10940 Parallel Parkway, Suite K #353 Kansas City, KS 66109 <u>John.ivanuska@xo.com</u></p>	<p>Beth Salak Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399 <u>bsalak@psc.state.fl.us</u></p>

By: 
Matthew Feil, Esq.