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090538-TP

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Sent: Tuesday, May 24, 2011 1:54 PM
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Subject: Docket No. 090538-TP - Qwest Communication Company, LLC's Response to Joint CLEC's Motion for Abeyance to Address Changes in Law

Attachments: Qwest 5-24-11 Response.pdf

Docket No.:

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.

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Total number of pages:

Seven (7)

Description:

Qwest Communication Company, LLC's Response to Joint CLEC's Motion for Abeyance to Address Changes in Law

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BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

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

Filed: May 24, 2011

**QWEST COMMUNICATIONS COMPANY, LLC'S RESPONSE TO JOINT
CLECs' MOTION FOR ABEYANCE TO ADDRESS CHANGES IN LAW**

Pursuant to Rule 28-106.204, Fla. Admin. Code, Qwest Communications Company, LLC ("QCC"), by and through its counsel, hereby responds to the May 19, 2011 motion filed by counsel for the CLEC Respondents in this case (hereinafter, the "Joint CLECs").¹ QCC urges the prehearing officer to deny the Joint CLECs' motion. The grounds for this response are as follows:

The Joint CLECs' motion to hold the case in abeyance while requiring both QCC and the respondents to present arguments on the Commission's alleged lack of authority to hear QCC's claims is contrary to the Uniform Rules of Procedure. Rule 28-106.204, Florida Administrative Code, governing motions, provides a fair and orderly way to address issues relating to the Commission's jurisdiction.

¹ In connection with this motion, the Joint CLECs are: Access Point, Inc.; Birch Communications, Inc.; Broadwing Communications, LLC; BullsEye Telecom, Inc.; DeltaCom, Inc.; Granite Telecommunications, LLC; Lightyear Network Solutions, LLC; MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; tw telecom of florida, l.p.; US LEC of Florida, LLC d/b/a PaeTec Business Services; XO Communications Services, Inc.; and Windstream Nuvox, Inc.

In contrast to the Uniform Rules, the procedure suggested by the Joint CLECs is designed to further delay this proceeding by adding an additional, unnecessary procedure that is prejudicial to QCC. If the Joint CLECs believe that the Commission lacks jurisdiction over the subject matter, they may file a motion pursuant to Rule 28-106.204, Florida Administrative Code. Thereafter, QCC has an opportunity to review the motion, analyze the arguments and citations of authority presented, and file an appropriate response.

Nothing in the Joint CLECs' motion justifies any departure from long standing, rule-mandated procedures.

The Extraordinary Proposed Procedures Are Inefficient, Are Designed to Cause Further Delay, and are Unfair to QCC.

The Joint CLECs suggest that, as a result of the revisions to Chapter 364, Florida Statutes, by Ch. 2011-36, Laws of Florida, the Commission's authority to address QCC's claims "is in doubt."² Uniform Rule of Procedure 28-106.204 sets out procedures whereby the Joint CLECs may address their perceived "doubt." Nothing in Rule 28-106.204 allows the procedure put forward by the Joint CLECs, nor requires the Commission to grind a complaint proceeding to a halt while disputed questions of law are argued and considered.

Instead of following the Uniform Rules of Procedure by filing a motion to dismiss, the Joint CLECs request the adoption of a new set of procedures, starting with a suspension of all activity in the case. The Joint CLECs then suggest that the parties simultaneously file "initial briefs, pleadings, or both"³ and then file a second, simultaneous round of responsive pleadings (or, perhaps, briefs) regarding the possible impact of Ch. 2011-36 on QCC's pending claims.⁴

The Joint CLECs fail to explain why Rule 28-106.204 is inadequate or inappropriate to raise their concerns stemming from Ch. 2011-36. Indeed, it is the Joint CLECs' burden to assert and establish such a conclusion by filing a Rule 28-106.204 motion to dismiss that meets the standard of review applicable to such motions.⁵ Only upon the service of an appropriate motion to dismiss is QCC obliged to serve and file a response. Here,

² Id. at paragraph 7, page 3.

³ It is unclear what distinction the Joint CLECs are drawing between pleadings and briefs in this context.

⁴ See Joint CLECs' motion at paragraph 13, page 5.

⁵ Under the applicable standard of review of a motion to dismiss, the Joint CLECs bear the burden of showing that the Amended Complaint fails to state a cause of action for which relief can be granted. See Order No. PSC-11-0145-FOF-TP, issued March 2, 2011 in this docket, at page 5. Through their proposed briefing cycle, the Joint CLECs seek to avoid this heavy burden by recasting their concerns about the Commission's jurisdiction as something other than a motion to dismiss. The Commission should reject this rather transparent ploy.

however, the Joint CLECs are seeking to shift this burden to QCC by asking that the Commission unfairly order QCC to address issues and arguments in an initial pleading *with no motion of any kind pending*. The “pleading” sequence proposed by the Joint CLECs forces QCC to simultaneously comment on arguments that have not even been raised by the Joint CLECs, requiring QCC to speculate about and rebut arguments that they have not made. This proposed procedure is unnecessary, is contrary to the Uniform Rules of Procedure and would cause serious prejudice to QCC. It also causes undue delay by adding the unnecessary briefing cycle (i.e., the Joint CLECs’ motion followed by this response) asking the Commission to opine on whether (and how) a dispositive motion should be brought.⁶

The Commission Orders Cited by the Joint CLECs Do Not Support Using This Process.

As support for this proposal, the Joint CLECs assert that the Commission has followed this procedure in three other cases. The Joint CLECs rely on Order No. PSC-95-0916-FOF-TL (issued in Docket No. 940235-TL on July 28, 1995), Order No. PSC-96-0406-FOF-WS (issued in Docket No. 920199 on March 21, 1996) and Order No. PSC-1046-PCO-TL(issued in Docket No. 920260-TL on August 23, 1995). Each of these orders, however, was issued under circumstances that vary greatly from those of this case. In all three cases, the orders were issued only after full evidentiary hearings were held in the respective dockets. Importantly, in none of these cases did ordinary proceedings and motion practice provide an adequate opportunity to inform the Commission of the parties’ arguments and positions on the questions raised. In addition, none of the cases involved an allegation that the Commission was entirely without subject matter jurisdiction to hear the case.

With respect to Order No. PSC-95-0916-FOF-TL, for example, changes to provisions of Chapter 364 had been adopted by the Florida legislature *after* hearings had been held on the matter in question and post-hearing briefs had been filed. To be precise, the statutory changes occurred *after* all of the evidence had been presented and final arguments had been made in the case. Under these rare circumstances, the Commission requested that the changes be addressed in supplemental briefs before the taking a final vote on the matter. In requesting the supplemental briefs, the Commission expressly stated that this “rare” procedure, which would delay the Commission’s decision, “is warranted in a

⁶ The Joint CLECs’ desire to delay the proceeding was made even more obvious when they, almost immediately after filing the instant motion, asked Commission Staff to once again suspend the issue identification process. As QCC noted to the Joint CLECs and Commission Staff in response to the Joint CLECs’ request to suspend the issue identification, QCC is entitled to have its complaint resolved. Unless and until the Commission orders otherwise, the complaint process must proceed. In every case, the litigating parties disagree on the law. The Joint CLECs are asking that this case again be halted – even before receiving instruction from the Commission to do so – on the basis that they may now believe that QCC’s complaint should be dismissed on new grounds. If disagreement on the law precluded cases from moving forward, cases would never be resolved.

situation such as this one, where the governing law has been amended *after* post-hearing briefs were filed.” Order No. PSC-95-0916-FOF-TL in 95 FPSC 7:351 (emphasis added.)

In Order No. PSC-96-0406-FOF-WS, the Commission had conducted a full evidentiary hearing and had issued a final order in the proceeding. The Commission thereafter requested briefs to address the potential impact of a new Florida Supreme Court opinion that had been recently released in connection with a separate docket. The Commission believed that the Supreme Court decision might have bearing on the decisions it already had made. Under these circumstances, the Commission requested the parties to address whether the evidentiary record in the proceeding it had conducted should be reopened and whether refunds were appropriate in light of the new opinion.

Similarly, in Docket No. 920260-TL, at the conclusion of an evidentiary hearing conducted by the Commission, the Commission asked the parties to address four supplemental issues that had been identified only at the conclusion of the hearing process. None of the new issues identified raised a question of whether the Commission had subject matter jurisdiction to hear the case. Moreover, Order No. PSC-95-1046-PCO-TL, which amended the briefing procedure created by the Commission at the conclusion of the hearing, was issued in an attempt to address the type of due process problems caused by the ad hoc simultaneous briefing process that the Commission had crafted. *See, e.g.* Order No. PSC-95-1046-PCO-TL, at page 1 (the parties were put in an untenable position of not being able to respond arguments raised for the first time in the hearing).

These prior orders are of no assistance to the Joint CLECs. A reading of those orders suggests only that the Joint CLECs motion requests an unprecedented and unnecessary departure from established rules of procedure.

The Joint CLECs Have Not Demonstrated A Need for Unusual, Ad Hoc Procedures.

As the Joint CLECs’ own motion notes,⁷ no Order Establishing Procedure has been issued, no case schedule has been established, no issue identification has taken place, and little or no discovery has occurred in the QCC proceeding to date. To add the ad hoc “briefing or pleading” procedure has no basis and, at the same time, is highly prejudicial to QCC. The Joint CLECs have not demonstrated any need for what the Commission itself has labeled a “rare” practice. Rather, the request only perpetuates a pattern whereby the CLECs have attempted to draw out the proceeding by seeking unusual and unnecessary procedural steps that hinder, rather than assist, the Commission in its decisionmaking in this docket. *See* Order No. PSC-11-0014-PCO-TP, issued January 4, 2011, in this docket (denying request by respondent CLECs for a procedure that the uniform rules and Commission practice do not contemplate).

⁷ Joint CLECS’ motion at page 4.

Conclusion

For the foregoing reasons, QCC believes that the Joint CLECs request is designed to delay this proceeding. The proposal, contrary to the Uniform Rules of Procedure, is unwarranted and prejudicial to QCC. As such, QCC respectfully requests that the motion be immediately denied by the prehearing officer.

DATED this 24th day of May 2011.

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**CERTIFICATE OF SERVICE
DOCKET NO. 090538-TP**

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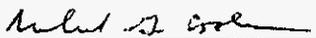
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