

Dorothy Menasco

From: Freedman, Maggie [Maggie.Freedman@ruden.com] on behalf of Cooke, Michael [Michael.Cooke@ruden.com]
Sent: Monday, November 07, 2011 5:02 PM
To: Filings@psc.state.fl.us
Cc: Adam L. Scherr; Alan Gold; Allen Zorachi, Esq.; Andrew M. Klein, Esq.; Dulaney O'Roarke, Esq.; Eric Branfman; Jane Whang; Jason Topp; John Greive; John Messenger; Margie Herlth; Marsha E. Rule, Esq.; Matthew Feil; Michael McAlister; Philip Macres; Richard Brown; Lee Eng Tan
Subject: Docket No. 090538-TP - Qwest Communication Company, LLC's Motion for Sur-Rebuttal
Attachments: Qwest 11-7-11.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.

Person Filing:
Michael G. Cooke
Ruden McClosky P.A.
215 S. Monroe Street, Suite 815
Tallahassee, FL 32301
(850) 412-2005
(850) 412-1305 facsimile
Michael.Cooke@Ruden.com

Filed on behalf of:
Qwest Communications Company, LLC

Total number of pages:
Seven (7)

Description:
Qwest Communication Company, LLC's Motion for Sur-Rebuttal

Maggie Freedman
Legal Secretary



215 South Monroe Street
Suite 815
Tallahassee, FL 32301
Direct 850-412-2021 | Fax 850-412-1321
Maggie.Freedman@ruden.com | www.ruden.com

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08255 NOV-8 =
FPSC-COMMISSION CLERK

11/8/2011



401 EAST JACKSON STREET
SUITE 2700
TAMPA, FLORIDA 33602

(813) 222-6685
FAX: (813) 314-6985
MICHAEL.COOKE@RUDEN.COM

November 7, 2011

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 090538-TP, Qwest Communication Company, LLC d/b/a CenturyLink QCC

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket is Qwest Communication Company, LLC d/b/a CenturyLink QCC's Motion for Sur-Rebuttal.

Thank you for your assistance with this filing and please do not hesitate to contact me if you have any questions.

Sincerely,

Michael G. Cooke

MGC/mbf
Enclosure

RM:8159494:1

BOCA RATON • FT. LAUDERDALE • MIAMI • NAPLES • ORLANDO • PORT ST. LUCIE • TALLAHASSEE • TAMPA • WEST PALM BEACH

DOCUMENT NUMBER DATE

08255 NOV -8 =

FPSC-COMMISSION CLERK

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: November 7, 2011

**QWEST COMMUNICATIONS COMPANY'S
MOTION FOR SUR-REBUTTAL**

Pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code ("F.A.C."), Qwest Communications Company, LLC d/b/a CenturyLink QCC ("QCC"), by and through its undersigned counsel, hereby files this Motion for Sur-rebuttal. In support hereof, QCC states the following:

BACKGROUND

QCC filed its Amended Complaint in this matter on October 11, 2010. The Amended Complaint primarily alleges that the respondent Competitive Local Exchange Carriers ("CLECs") have engaged in discriminatory behavior to the detriment of QCC with respect to the CLECs' provision of intrastate switched access. In their answers, the CLECs raised (but often only at a high level) various justifications and affirmative defenses.

On October 25, 2011, during an issue identification conference for this docket, staff of the Florida Public Service Commission ("PSC Staff") suggested using a procedural schedule for this docket in which two rounds of testimony would be filed. Specifically, PSC Staff proposed that QCC would file direct testimony first and that, on a subsequent date, all CLECs would file rebuttal testimony.

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During the October 25, 2011, issue identification conference, QCC noted that this suggested approach would deny QCC the opportunity to file testimony rebutting issues and allegations raised by the CLECs' rebuttal testimony. PSC Staff advised QCC that it could file a motion with the prehearing officer requesting an opportunity to file sur-rebuttal testimony. The instant motion requests that the procedural schedule include an opportunity for QCC to file sur-rebuttal testimony.

ALLOWING QCC TO FILE SUR-REBUTTAL TESTIMONY IS APPROPRIATE IN THIS CASE

As complainant in this matter, it is appropriate for QCC to file its direct case first and to allow the CLECs an opportunity to review QCC's direct testimony and to file testimony rebutting QCC's direct testimony. QCC anticipates that the CLECs may dispute certain facts alleged by QCC, offer detailed explanations for their conduct and also offer information relating to affirmative defenses mentioned, thus far only in passing, in their answers. The CLECs may also offer expert testimony opining on the issues raised in QCC's direct case.

As Florida courts have observed, the usual order of presentation of evidence at trial involves three rounds of testimony. The plaintiff will first introduce evidence to prove the facts necessary to enable recovery. Then the defense will present evidence in support of its case, after which the plaintiff is entitled to present refutation evidence that denies, disproves, or otherwise sheds light on the defenses raised by defendants. See, e.g., *Rose v. Madden & McClure Grove Service*, 629 So. 2d 234, 236 (Fla. 1st DCA 1993) (*rehearing denied* Dec. 26, 1994).

Florida's courts have expressly determined that the plaintiff does not have an obligation to anticipate all possible defenses and attempt to disprove them in its main case. See, e.g., *McFall v. Inverrary Country Club, Inc.*, 622 So. 2d 41, 44 (Fla. 4th DCA 1993); *Heberling v. Fleisher*, 563 So. 2d 1086, 1087 (Fla. 4th DCA 1990). Hence, QCC has no obligation to present evidence anticipating every defense the CLECs might raise when it files its first round of testimony and QCC must be allowed to have an opportunity to respond to any defenses raised by the CLECs in their rebuttal testimony. If, contrary to precedent outlined in Florida law, QCC is not permitted to file sur-rebuttal testimony, QCC will have no opportunity to respond to various defenses raised and detailed by CLECs for the first time.

In addition to being unfair, denying QCC the opportunity to offer sur-rebuttal testimony will likely lengthen the evidentiary hearing and will inevitably result in key issues not being joined for presentation to the Commission. Permitting QCC to respond in *pre-filed* testimony will offer the Commission a far more comprehensive and logical body of evidence prior to the hearings. That will permit all parties to focus cross examination at hearing on only the most germane issues.

Pursuant to Rule 28-106.211, F.A.C., the prehearing officer may issue such orders as will promote the speedy, orderly, and inexpensive method of determining issues in the case. In judicial cases applying the Florida Rules of Evidence, the trier of fact has broad discretion whether or not to admit rebuttal testimony. However, *it is an abuse of discretion* to limit non-

cumulative rebuttal that refutes a defense theory. *Mendez v. John Caddell Const. Co., Inc.*, 700 So. 2d 439, 440-41 (Fla. 3rd DCA 1997)(abuse of discretion to exclude testimony of accident reconstruction expert's testimony on the implausibility of defense witness's perceptions that the crash "involved a low speed.").

Allowing sur-rebuttal in appropriate circumstances also is consistent with prior Commission practice. For example, this approach (allowing complainant to file its initial testimony, followed by respondent filing its initial testimony at a later date, and then allowing complainant to file rebuttal testimony) was used previously by the Commission in another proceeding where a complainant had alleged rate discrimination. See Order Establishing Procedure, In Re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. Against Tampa electric Company for Violation of Sections 366.03, 366.06(2) and 366.07, F.S., with Respect to Rates Offered under Commercial/Industrial Service Rider Tariff; Petition to Examine and Inspect Confidential Information; and Request for Expedited Relief, Docket No. 000061-EI, Order No. PSC-00-0392-PCO-EI, issued February 23, 2000. As with this previous complaint alleging rate discrimination, QCC, as the complainant in this case, should be offered the opportunity to provide evidence in response to the CLECs' attempt to justify their conduct.

In addition, allowing sur-rebuttal testimony is consistent with and contemplated by the Florida Administrative Procedure Act ("Florida APA"). Section 120.57(1)(b) of the Florida APA expressly states that "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination *and submit rebuttal evidence* " 120.57(1)(b), F.S. (emphasis added).

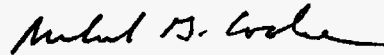
In sum, non-cumulative rebuttal, here called sur-rebuttal, is appropriate and should be allowed for QCC to meet defenses and explanations raised by CLECs in pre-filed testimony or to impeach the credibility of the CLECs' evidence. QCC is not required to present in its direct testimony evidence to meet or refute every possible or anticipated defense that the CLECs may or may not raise.

REQUEST FOR RELIEF

Therefore, consistent with Florida case law, Commission precedent and the Florida APA, QCC respectfully requests that a procedural order be issued in this case allowing three sequential rounds of testimony with QCC first filing its direct testimony, the CLECs then filing their rebuttal testimony, and QCC then filing its sur-rebuttal testimony. This will provide for a more orderly proceeding in which the issues will be most effectively joined prior to hearing and the will result in a more efficient hearing process.

Pursuant to Rule 28-106.204(3), F.A.C., counsel for QCC has contacted counsel of record for the CLECs in this proceeding and is authorized to represent that MCI, BullsEye Telecom, Granite Telecommunications, Budget Prepay, Broadwing, PaeTec, US LEC, Access Point, Inc., Lightyear, Birch, DeltaCom, STS Telecom, tw telcom of florida, Windstream-Nuvox, and XO object and intend to file responses.

DATED this 7th day of November, 2011

By: 
Michael G. Cooke
(Fla. Bar No. 0979457)
Ruden McClosky
401 E. Jackson St., Suite 2700
Tampa, FL 33606
Telephone: (813) 222-6685
Facsimile: (813) 314-6985
michael.cooke@ruden.com

Adam L. Sherr (not admitted in Florida)
Associate General Counsel
Qwest
1600 7th Avenue, Room 1506
Seattle, WA 98191
Tel: 206-398-2507
Fax: 206-343-4040
Email: Adam.Sherr@qwest.com

Attorneys for Qwest Communications
Company, LLC fka Qwest Communications
Corporation

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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 7th day of November, 2011, to the following:

Florida Public Service Commission
Theresa Tan
Florida Public Service Commission
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ltan@psc.state.fl.us

tw telecom of florida, l.p.
XO Communications Services, Inc.
Windstream NuVox, Inc.
Birch Communications, Inc.
DeltaCom, Inc.
Matthew J. Feil
Gunster Yoakley & Stewart, P.A.
215 S. Monroe Street, Suite 618
Tallahassee, FL 32301
mfeil@gunster.com

Qwest Communications Co., LLC.
Jason D. Topp, Corporate Counsel
Qwest Communications Co., LLC
200 S. Fifth Street, Room 2200
Minneapolis, MN 55402
Jason.topp@qwest.com

Broadwing Communications, LLC
Marsha E. Rule
Rutledge, Ecenia & Purnell
P.O. Box 551
Tallahassee, FL 32302-0551
marsha@reuphlaw.com

MCImetro Access Transmission Service
d/b/a VerizonAccess Transmission Services
Dulaney O'Roark
VerizonAccess Transmission Services
Six Concourse Pkwy, NE, Ste 800
Atlanta, GA 30328
De.oroark@verizon.com

XO Communications Services, Inc.
Jane Whang
Davis Wright Tremain
Suite 800
505 Montgomery Street
San Francisco, California 94111-6533
JaneWhang@dwt.com

Granite Communications, LLC
BullsEye Telecom, Inc.
Andrew M. Klein
Allen C. Zoraki
Klein Law Group, PLLC
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036
aklein@kleinlawpllc.com
azoracki@kleinlawpllc.com

STS Telecom, LLC
Alan C. Gold
1501 Sunset Drive
2nd Floor
Coral Gables, FL 33143
agold@acgoldlaw.com

Qwest Communications Co., LLC
Adam Sherr
Associate General Counsel
Qwest Communications Co., LLC
1600 7th Avenue, Room 1506
Seattle, WA 98191
adam.sherr@qwest.com

Navigator Telecommunications, LLC
Michael McAlister, General Counsel
Navigator Telecommunications, LLC
8525 Riverwood Park Drive
P. O. Box 13860
North Little Rock, AR 72113
mike@navtel.com

CERTIFICATE OF SERVICE

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Access Point, Inc.
Lightyear Network Solutions, LLC Navigator
Telecommunications, LLC PAETEC
Communications, Inc.
US LEC of Florida, LLC d/b/a PAETEC
Business Services
Eric J. Branfman
Philip J. Macres
Bingham McCutchen, LLP
2020 K Street NW
Washington, DC 20006-1806
eric.branfman@bingham.com
Philip.macres@bingham.com

Access Point, Inc.
Richard Brown
Chairman-Chief Executive Officer
Access Point, Inc.
1100 Crescent Green, Suite 109
Cary, NC 27518-8105
Richard.brown@accesspointinc.com

Flatel, Inc.
c/o Adriana Solar
2300 Palm Beach Lakes Blvd.
Executive Center, Suite 100
West Palm Beach, Florida 33409

Budget Prepay, Inc.
c/o NRAI Services, Inc.
2731 Executive Park Drive, Suite 4
Weston, Florida 33331
and
Budget Prepay, Inc.
General Counsel
1325 Barksdale Blvd., Suite 200
Bossier City, LA 71111

Lightyear Network Solutions, Inc.
John Greive, Vice President of Regulatory
Affairs & General Counsel
Lightyear Network Solutions, LLC
1901 Eastpoint Parkway
Louisville, KY 40223
john.greive@lightyear.net

PAETEC Communications, Inc. and
US LEC of Florida, LLC d/b/a PAETEC
Business Services
John B. Messenger, Vice President and
Associate General Counsel
PAETEC Communications, Inc.
One PaeTec Plaza
600 Willowbrook Office Park
Fairpoint, NY 14450
john.messenger@paetec.com

Ernest Communications, Inc.
General Counsel
5275 Triangle Parkway
Suite 150
Norcross, GA 30092

Budget Prepay, Inc.
Alan C. Gold
Law Offices of Alan C. Gold, P.A.
1501 Sunset Drive, Second Floor
Coral Gables, FL 33143
agold@acgoldlaw.com

s/ Michael G. Cooke
Michael G. Cooke