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**Subject:** Docket No. 090538-TP

**Attachments:** 2011.11.18. Joint CLEC Comments on Proposed Issues List.pdf

The attached is an electronic filing for the docket referenced below. If you have any questions, please contact Marsha Rule at the number below. Thank you.

**Person Responsible for Filing:**

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**Docket Name and Number:** 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.

**Filed on Behalf of:** Joint CLECs (Identified on first page of pleading, includes: BCI; DeltaCom; STS; tw telecom; XO; Windstream NuVox; Verizon Access; BullsEye; Granite; Access Point; Lightyear; Navigator; PAETEC; US LEC; Broadwing)

**Total Number of Pages:** 7

**Description of Documents:** Joint CLECs' Comments on Proposed Issues

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Amended Complaint of Qwest  
Communications Company, LLC against  
MCImetro Access Transmission Services (d/b/a  
Verizon Access Transmission Services), et al.

Docket No. 090538-TP  
Filed: November 18, 2011

**JOINT CLEC COMMENTS ON PROPOSED ISSUES LIST**

The Joint CLECs<sup>1</sup> hereby file their Comments in support of their proposed Issues 5-7 (addressing Qwest's First, Second and Third Claims for Relief) and Issue 8(h), and respectfully request the Commission to adopt these issues as proposed. The parties' proposed issues are provided in Attachment A for reference.

A. Issues 5-7: Issues 5, 6 and 7 address the First, Second and Third Claims for Relief alleged in Qwest's Amended Complaint. The issues must be framed for hearing to set forth clearly the specific factual and legal matters to be proven by Qwest and determined in this proceeding: whether the actions complained of by Qwest violate the statutes cited by Qwest. The Joint CLECs' proposed Issues 5-7 should be adopted because they do so, while Qwest's proposed issues inappropriately invite inquiry beyond the scope of the specific statutory sections Qwest's Amended Complaint alleges the Joint CLECs have violated.

The Joint CLECs' proposed Issue 5 asks whether a CLEC's alleged failure to provide Qwest the same switched access pricing as provided under an agreement with another IXC violated now-repealed Sections 364.08(1) or 364.10(1). The two subparts of this proposed issue track the standards used in the two statutory provisions that Qwest alleges were violated. In contrast, Qwest frames the issue as whether the CLEC engaged in "unreasonable rate discrimination" – a term not used in either statute – and attempts to distance itself from Sections 364.08(1) and 364.10(1), both of which have since been repealed, by not even referring to them. This approach fails to describe adequately the statutory violations alleged by Qwest or the question that must be resolved by the Commission, and should be rejected.

Similarly, the Joint CLECs' proposed Issue 6 asks whether any CLEC/IXC switched access agreement deviated from the CLEC's published price list and if so, whether that deviation violated Section 364.04(1) and (2), as alleged by Qwest. Again, this is the specific issue the Commission must decide in order to resolve Qwest's Amended Complaint. Qwest again attempts to avoid the issue. Qwest would have the Commission inquire instead whether the CLEC "abide[d]" by its price list, and if not, whether its conduct was "unlawful." As required by Rule 25-22.036(b), Florida Administrative Code, Qwest's Second Claim for Relief identified Sections 364.04(1) and (2) as the specific statutes allegedly violated by Respondents. The term

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<sup>1</sup> 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 LLC d/b/a Verizon Access Transmission Services; PAETEC Communications, Inc.; STS Telecom, LLC; 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. (collectively, "Joint CLECs").

“abide” does not appear in either 364.04(1) or (2), and further, fails to describe Qwest’s claim. Qwest’s claim does not concern whether each CLEC honored its price list with respect to Qwest, but whether certain third party carriers paid different rates. And Qwest again avoids referring to the statute on which it purports to base its claim, no doubt because the statute was substantially revised after the Amended Complaint was filed. The Joint CLECs’ issue statement is not only more accurate, but better describes the allegations against which each Joint CLEC must defend, and the question the Commission must resolve.

The Joint CLECs’ proposed Issue 7 asks whether some CLEC price lists required the offering to Qwest of the lowest agreement rate for switched access service; if so, under what conditions; and if the conditions were met, whether a CLEC’s failure to offer the lower terms to Qwest violated Section 364.04(1) and (2). Qwest frames the issue as whether the CLEC “abide[d]” by its price list by offering the off-price list terms to “similarly-situated customers,” and if not, whether that conduct was “unlawful.” Qwest follows the same pattern of not referring to the statute on which Qwest bases its claim (which, as noted, was substantially revised after the Amended Complaint was filed) and using terms not found in the statute. The Joint CLECs have stated the issue more accurately and precisely.

The Commission cannot permit Qwest to “hide the ball” through vaguely worded issues, leaving the Joint CLECs to continually guess from now until final briefing if they are accused of violating other sections of Chapter 364 (or rules or orders, for that matter), which would require different elements of proof and different defenses. Due process demands that the hearing issues clearly set forth the specific factual and legal matters to be proven by Qwest and determined in this proceeding: whether the actions complained of by Qwest violate the statutes identified by Qwest. The Joint CLECs’ proposed Issues 5-7 should be adopted because they do so, while Qwest’s proposed issues inappropriately invite inquiry beyond the scope of Qwest’s Amended Complaint.

B. Issue 8(h): Qwest’s Amended Complaint alleges the existence of individual-case-basis agreements between Respondents and certain IXCs and, as relief, Qwest effectively seeks to adopt those agreements and operate under their terms. Thus, the Qwest Amended Complaint is premised upon the assumption that the alleged agreements are valid and enforceable. Failure to prove this threshold issue would be fatal to Qwest’s case, and several CLECs have thus identified this as an issue that must be evaluated by the Commission when considering the merits of Qwest’s claim.<sup>2</sup>

This issue was previously raised by Qwest itself in a complaint against AT&T, in which Qwest affirmatively asserted – as a matter of Florida law and the laws of many other States – that

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<sup>2</sup> In proceedings before the Minnesota Public Utilities Commission concerning the same agreements, the Minnesota Department of Commerce found that the agreements were unlawfully obtained and should be voided. See Minn. P.U.C. Docket No. 05-1282, Reply Comments of Minnesota Dep’t of Commerce (filed March 13, 2006) (available through the Minnesota PUC’s electronic docket at: <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&searchType=new>). The agreements reviewed were ultimately cancelled in Minnesota.

the same agreements Qwest attempts to rely upon here are “void, illegal and unenforceable.”<sup>3</sup> Qwest settled that claim with AT&T, and now attempts to assert here a diametrically opposing position in an attempt to obtain a windfall from those same agreements that Qwest alleged were “void, illegal and unenforceable.”<sup>4</sup> Qwest’s current position that it does not “believe this issue (generally speaking) is relevant or the appropriate subject for the PSC’s resolution,”<sup>5</sup> directly contradicts Qwest’s prior legal assertions.

The issue, as framed by the Joint CLECs, objectively states the matter to be resolved and accurately paraphrases Qwest’s own legal contention in its complaint against AT&T. The Joint CLECs therefore respectfully request the Commission to include the issue as the Joint CLECs have stated it.

Respectfully submitted this 18<sup>th</sup> day of November, 2011.

/s/ Marsha E. Rule

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*On behalf of the Joint CLECs*

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<sup>3</sup> Qwest Complaint Against AT&T at ¶ 119 (*emphasis added*) (a copy of the Qwest Complaint against AT&T was attached to email correspondence from Andrew Klein to Commission Staff, dated October 25, 2011).

<sup>4</sup> *Id.*

<sup>5</sup> Email correspondence from Qwest Associate General Counsel Adam Sherr to Commission Staff, dated October 21, 2011. Qwest also argued that the Joint CLECs phrasing of the issue suggested that a finding of unenforceability has already been made. The phrasing simply does not support that assertion, as the issue is stated in a neutral manner. However, to the extent necessary, the Commission could resolve Qwest’s concern by simply revising the above language to read “(h) a finding *by the Commission* that...”. BullsEye and Granite additionally believe that Qwest’s service of discovery on this issue is inconsistent with Qwest’s position on this issue, and militates in favor of inclusion of this issue on the issue list.

## ATTACHMENT A

### ISSUES IN DISPUTE

#### Joint CLECs' Proposed Issues

5) Did a CLEC's alleged failure to provide Qwest the same pricing for switched access service as the CLEC provided in any CLEC/IXC agreement for switched access service:

a) constitute extending an advantage, benefit or privilege not regularly and uniformly extended under like circumstances for like or substantially similar services, and, if so, did it violate Section 364.08(1), Florida Statutes (2010), or

b) constitute an undue or unreasonable preference or advantage to any person or subject Qwest to undue or unreasonable prejudice or disadvantage, and, if so, did it violate Section 364.10(1), Florida Statutes (2010)?

6) Did any CLEC/IXC agreement for switched access service in this case deviate from the CLEC's published price list? If so, did such deviation violate 364.04(1) and (2), F.S. (2010)?

7) Did any CLEC named in Count III have a switched access price list that required the CLEC to offer Qwest the lowest agreement rate for switched access service, and if so, under what conditions (e.g., must Qwest be similarly situated to the IXCs that received the lowest rates; did Qwest, among other things, request the lowest rates; etc.)? Were these conditions met, and, if they were met, did a failure on the part of the CLEC to offer Qwest the lowest agreement rate violate Section 364.04(1) and (2), (2010), Florida Statutes?

8) Are QCC's claims barred or limited, in whole or in part, by

(h) a finding that a switched access service agreement between a CLEC and IXC is void, illegal, or unenforceable;

#### Qwest's Proposed Issues

5) Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

6) Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful, as alleged in Qwest's Second Claim for Relief?

7) Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

8) Qwest opposes Joint CLECs' proposed subissue (h).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email or U.S. Mail this 18th day of November, 2011.

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/s/ Marsha E. Rule

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