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Subject: 09-0538-TP - Budget Prepay Answer to Amended Complaint of Qwest Communication
Attachments: BUDGET v. QWEST Answer to Qwest Complaint 11-15-11-jlp.pdf

Enclosed for filing, please find Budget Prepay, Inc.'s Answer to Qwest's Amended Complaint.

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DOCUMENT NUMBER-DATE

08870 DEC-9 =

FPSC-COMMISSION CLERK

12/12/2011

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

Re: 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 COMMUNICATIONS, LLC, COX FLORIDA TELCOM, L.P., BROADWING COMMUNICATIONS, LLC, ACCESS POINT, INC., BIRCH COMMUNICATIONS, INC., BUDGET PREPAY, INC., BULLSEYE TELECOM, INC., DELTACOM, INC., ERNEST COMMUNICATIONS, INCL, 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 December 9, 2011

RESPONDENT BUDGET PREPAY, INC.'S ANSWER TO AMENDED COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC (fka QWEST COMMUNICATIONS CORPORATION)

Pursuant to Rule 28-106.203 of the Florida Administrative Code, Respondent BUDGET PREPAY, INC. ("BUDGET"), by and through the undersigned Counsel, hereby files its Answer to Amended Complaint of Qwest Communications Company, LLC (fka Qwest Communications Corporation), and in support thereof states as follows:

Response to Unnumbered Paragraphs

In response to the first unnumbered paragraph on page 2 of the Amended Complaint, BUDGET states that no response is necessary to the statement that Qwest is bringing a complaint against the named respondents.

In response to the second unnumbered paragraph on page 2 of the Amended Complaint, BUDGET denies that it has subjected Qwest to unjust and unreasonable rate discrimination in connection with the provision of intrastate switched access services. The paragraph sets forth legal conclusions to which no response is necessary. To the extent these legal conclusions can be deemed factual allegations, BUDGET answers those allegations below. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations regarding other respondent competitive local exchange carriers (“CLECs”), and therefore denies those allegations. BUDGET denies the remaining allegations of the second unnumbered paragraph on page 2 of the Amended Complaint.

Parties and Jurisdiction

1. In response to paragraph 1 of the Amended Complaint, BUDGET admits, upon information and belief, that Qwest is a Delaware corporation with its principal place of business in Denver, and is a telecommunications company authorized to provide certain telecommunications services, including interexchange (long distance) services in Florida. No response is necessary to the statement about Qwest’s contact information in paragraph 1.a. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations contained in paragraph 1.b., and therefore denies those allegations.
2. In response to paragraph 2 of the Amended Complaint, STS admits the allegations in paragraph 2.i. concerning BUDGET’s legal status. For purposes of this proceeding, BUDGET’s regulatory contact and legal counsel is: Alan C. Gold, Esquire, Alan C. Gold, P.A., 1501 Sunset Drive, 2nd Floor, Coral Gables, FL 33143; phone: 305-667-0475; fax: 305-663-0799; e-mail: agold@acgoldlaw.com. In response to paragraphs

2.a. through 2.h. and 2.j. through 2.t., BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.

3. In response to Paragraph 3 of the Amended Complaint, BUDGET admits that the Commission has jurisdiction over certain complaints, but denies that it has jurisdiction over all of the claims asserted by Qwest in the Amended Complaint.

Background

4. In response to paragraph 4 of the Amended Complaint, BUDGET states that sections of the Florida Statutes identified in this paragraph speaks for themselves, and denies all allegations inconsistent with those requirements. To the extent paragraph 4 includes legal conclusions, no response is necessary.
5. In response to paragraph 5 of the Amended Complaint, BUDGET states that sections of the Florida Statutes identified in this paragraph speaks for themselves, and denies all allegations inconsistent with those requirements. To the extent paragraph 5 includes legal conclusions, no response is necessary.
6. In response to paragraph 6 of the Amended Complaint, BUDGET admits the allegation that it has filed a price list with the Commission. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations, statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.
7. In response to paragraph 7 of the Amended Complaint, BUDGET denies all of the allegations therein. BUDGET is without knowledge or sufficient information to form

a belief as to the truth of statements regarding Qwest or other respondent CLECs, and therefore denies those allegations.

8. In response to paragraph 8 of the Amended Complaint, BUDGET is without knowledge or sufficient information to form a belief as to the truth of statements regarding proceedings before the Minnesota Public Utilities Commission (“MN PUC”). BUDGET was not involved in the proceedings before the MN PUC. BUDGET further states that the proceedings before the MN PUC speak for themselves, so no response is necessary.
9. In response to paragraph 9 of the Amended Complaint, BUDGET is without knowledge or sufficient information to form a belief as to the truth of statements regarding proceedings before the MN PUC. BUDGET was not involved in the proceedings before the MN PUC. BUDGET further states that the proceedings before the MN PUC speak for themselves, so no response is necessary.
10. In response to paragraph 10.i.i. and 10.i.ii. of the Amended Complaint, BUDGET admits that it has filed a price list with the Commission, but denies all of the other allegations therein. In response to paragraphs 10.a. through 10.h. and 10.j. through 10.t., BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding Qwest and other respondent CLECs, and therefore denies those allegations.

First Claim for Relief – Rate Discrimination

11. In response to paragraph 11 of the Amended Complaint, BUDGET restates and incorporates the allegations of the foregoing paragraphs as if fully set forth herein.

12. In response to paragraph 12 of the Amended Complaint, BUDGET states that sections 364.08(1) and 364.10(1) of the Florida Statutes speak for themselves, and denies all allegations inconsistent with those requirements. To the extent paragraph 12 includes legal conclusions, no response is necessary.
13. In response to paragraph 13 of the Amended Complaint, BUDGET denies that Qwest is similarly situated to other IXCs and denies that it has subjected Qwest to unreasonable prejudice and disadvantage and discriminatory treatment with respect to rates for intrastate switched access services. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations, statements of fact and claims regarding other respondent CLECs, and therefore denies those allegations.

Second Claim for Relief – Failure to Abide by Price Lists

14. In response to paragraph 14 of the Amended Complaint, BUDGET restates and incorporates the allegations of the foregoing paragraphs as if fully set forth herein.
15. In response to paragraph 15 of the Amended Complaint, BUDGET states that the sections of the Florida Statutes and Florida Administrative Code identified in this paragraph speak for themselves and BUDGET denies all allegations inconsistent with those requirements. To the extent paragraph 15 includes legal conclusions, no response is necessary. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.
16. In response to paragraph 16 of the Amended Complaint, BUDGET denies all of the allegations therein. Furthermore, BUDGET states that under Florida law, CLECs may enter into contracts to provide switched access service to interexchange carriers

and that such contracts are not required to be filed with the Commission. BUDGET therefore denies allegations that it violated Florida law by failing to abide by its published price list or by subjecting Qwest to unreasonable prejudice, disadvantage and discriminatory treatment. In response to allegations concerning other respondent CLECs, BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding Qwest and other respondent CLECs, and therefore denies those allegations.

Third Claim for Relief – Failure to Provide Customer-Specific Contract Terms to Similarly-Situated Customers (XO, Cox, Access Point, Birch, Budget, Bullseye Telecom, Lightyear, Navigator, Windstream, Nuvox, Paetec)

17. In response to paragraph 17 of the Amended Complaint, BUDGET restates and incorporates the allegations of the foregoing paragraphs as if fully set forth herein.
18. In response to paragraph 18 of the Amended Complaint, BUDGET states that the sections of the Florida Statutes and Florida Administrative Code identified in this paragraph speak for themselves and BUDGET denies all allegations inconsistent with those requirements. To the extent paragraph 15 includes legal conclusions, no response is necessary. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.
19. In response to paragraph 19 of the Amended Complaint, BUDGET denies all of the allegations therein. Furthermore, BUDGET states that under Florida law, CLECs may enter into contracts to provide switched access service to interexchange carriers and that such contracts are not required to be filed with the Commission. BUDGET

therefore denies allegations that it violated Florida law by failing to abide by its published price list or by subjecting Qwest to unreasonable prejudice, disadvantage and discriminatory treatment. In response to allegations concerning other respondent CLECs, BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations contained therein because they contain statements of fact and claims regarding Qwest and other respondent CLECs, and therefore denies those allegations.

Prayer for Relief

20. In response to Qwest's Prayer for Relief, paragraph A. through F., BUDGET denies all allegations stated therein. The Commission should not initiate proceedings to adjudicate the issues set forth in Qwest's Amended Complaint as it relates to BUDGET and rule in BUDGET's favor. Qwest is not entitled to any relief against BUDGET. BUDGET has not violated Florida law as alleged by Qwest. Qwest is not entitled to reparations or interest. BUDGET has no knowledge or sufficient information to form a belief as to the truth of allegations and statements of fact regarding other respondent CLECs, and therefore denies those allegations.

WHEREFORE, Respondent BUDGET PREPAY, INC. respectfully requests judgment and/or relief in its favor and for any other relief deemed appropriate.

Affirmative Defenses

1. **First Affirmative Defense:** Failure to State Claim Warranting Relief. Qwest's Amended Complaint fails to state a claim with respect to BUDGET upon which relief can be granted.

2. Second Affirmative Defense: CLECs are Permitted to Enter Into Contracts for Switched Access Service. Qwest's Amended Complaint that BUDGET entered into an "undisclosed" contract to provide switched access service fails to state a cause of action under Florida law. CLECs in Florida are required to file price lists only for "basic local telecommunications services." PSC Rule 25-24.825(1), Fla.Admin.Code. CLECs have the "option," but are not required to file tariffs or price lists for any other service, including switched access service. PSC Rule 25-24.825(2). CLECs are permitted to enter into contracts with other telecommunications companies, a fact that Qwest admits. There is no requirement that a CLEC file any such contracts with the Commission, although Commission staff may request information about a carrier's services offering pursuant to PSC Rule 25-24.825(5).
3. Third Affirmative Defense: Failure to Allege Facts Warranting Reparations. Reparations generally are intended to compensate a customer for any payment that it made in excess of the amount that it should have been charged. Qwest has not alleged that BUDGET did not bill it in accordance with its intrastate price list. Thus Qwest is not seeking repayment of amounts that it was improperly billed in excess of the rates it alleges are in BUDGET's price list. Accordingly, there is no basis for an award of "reparations." Qwest, instead, is seeking damages for an alleged injury to its business, which is a relief this Honorable Commission has no jurisdiction to grant.
4. Fourth Affirmative Defense: Qwest is not entitled to relief under the filed-rate doctrine because BUDGET's price list on file, if any, with the Commission is presumed to be just and reasonable. The filed-rate doctrine prohibits Qwest from *arguing that it should be allowed to pay a rate different than that in the effective price*

list or obtain a refund based on filed rates that it concedes are lawful. The Commission has rejected such claims under the principle that if filed rates are ordered to be changed, they can only be changed prospectively, not retroactively. Qwest's request for compensation based on rates other than those on file with the Commission therefore must be dismissed or denied. *See Section-25-24.824, Fla.Admin.Code; Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986)("FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription"); *In re: Petition for Expedited Review of BellSouth Telecommunications, Inc.'s Intrastate Tariffs for Pay Telephone Access Services (PTAS) Rate with Respect to Rates for Payphone Line Access, Usage, and Features, by Florida Public Telecommunications Assoc.*, Docket No. 030300-TP, Order No. PSC-04-0974-FOF-TP (2004); *Southern Bell Tel. & Tel. co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780 (Fla. 1984)(Commission orders violated principle against retroactive ratemaking to the extent they required retroactive adjustment under parties' revenue distribution arrangement).

5. Fifth Affirmative Defense: Failure to State a Claim for Undue or Unreasonable Preference or Advantage. BUDGET has not engaged in any undue or unreasonable preference or advantage, and has not subjected Qwest to any undue or unreasonable prejudice or disadvantage that is prohibited by §§ 364.08(1) or 364.10(1), Fla. Stat. Qwest fails to allege any facts showing that it was "under like circumstances," or similarly situated to meet the terms of any alleged BUDGET switched access agreement.

6. Sixth Affirmative Defense: Statute of Limitations. Qwest's claim against BUDGET are barred by the applicable statute of limitations.
7. Seventh Affirmative Defense: Claims Barred by Equity. Qwest's claims are barred in whole or in part by laches, waiver, estoppel, and/or unclean hands.
8. Eighth Affirmative Defense: Mitigation of Damages. Qwest failed to mitigate its damages and is therefore not entitled to relief to the extent of its failure to mitigate its damages.
9. Ninth Affirmative Defense: Lack of Jurisdiction. The Commission lacks jurisdiction to grant the relief sought by Qwest. Specifically, the statutes under Chapter 364 which concern the Commission's authority to set rates for ratepayers does not provide the source of jurisdiction to the Commission for modification of contracts between telephone companies. See United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986). The statutes under Chapter 364 which empower the Commission to alter unjust, discriminatory rates as applied to ratepayers also do not authorize the Commission to alter the contractual relationship between telephone companies in an attempt to correct inequities. See id. at 119. Chapter 364, similar to its federal counterpart, is designed to give the Commission the power to protect the public interest, not to protect the economic interest of utility companies. See id. (citing Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 355 (1956)). The regulatory authority to correct "unjust, unreasonable, unduly discriminatory or preferential" practices extends only to those practices unjust in reference to the public, i.e. the ratepayers, not utility companies. See id. (citing

Metropolitan Edison Co. v. Federal Energy Regulatory Commission, 595 F.2d 851, 855 (D.C.Cir. 1979).

10. Tenth Affirmative Defense: Qwest lacks standing to bring suit before the Commission. Specifically, the statutes under Chapter 364 which concern the Commission's authority to set rates for ratepayers does not provide the source of jurisdiction to the Commission for modification of contracts between telephone companies. See United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986). The statutes under Chapter 364 which empower the Commission to alter unjust, discriminatory rates as applied to ratepayers also do not authorize the Commission to alter the contractual relationship between telephone companies in an attempt to correct inequities. See id. at 119. Chapter 364, similar to its federal counterpart, is designed to give the Commission the power to protect the public interest, not to protect the economic interest of utility companies. See id. (citing Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 355 (1956)). The regulatory authority to correct "unjust, unreasonable, unduly discriminatory or preferential" practices extends only to those practices unjust in reference to the public, i.e. the ratepayers, not utility companies. See id. (citing Metropolitan Edison Co. v. Federal Energy Regulatory Commission, 595 F.2d 851, 855 (D.C.Cir. 1979)).
11. Eleventh Affirmative Defense: To the extent Qwest seeks damages, the Commission lacks jurisdiction to award damages. Specifically, the statutes under Chapter 364 which concern the Commission's authority to set rates for ratepayers does not provide the source of jurisdiction to the Commission for modification of contracts between

telephone companies. See United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986). The statutes under Chapter 364 which empower the Commission to alter unjust, discriminatory rates as applied to ratepayers also do not authorize the Commission to alter the contractual relationship between telephone companies in an attempt to correct inequities. See id. at 119. Chapter 364, similar to its federal counterpart, is designed to give the Commission the power to protect the public interest, not to protect the economic interest of utility companies. See id. (citing Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 355 (1956)). The regulatory authority to correct “unjust, unreasonable, unduly discriminatory or preferential” practices extends only to those practices unjust in reference to the public, i.e. the ratepayers, not utility companies. See id. (citing Metropolitan Edison Co. v. Federal Energy Regulatory Commission, 595 F.2d 851, 855 (D.C.Cir. 1979)).

12. Twelfth Affirmative Defense: Qwest failed to join indispensable parties to the petition, namely BellSouth and/or AT&T.

WHEREFORE, Respondent BUDGET PREPAY, INC. respectfully requests judgment and/or relief in its favor and for any other relief deemed appropriate.

Respectfully submitted,

s/ Alan C. Gold
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CERTIFICATE OF SERVICE
Docket No. 090538-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

Electronic Mail only this 9th day of December, 2011 to the following:

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