

Diamond Williams

090538-TP

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Sent: Thursday, May 19, 2011 2:15 PM
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Subject: Electronic Filing - Docket No. 090538-TP
Attachments: Joint CLEC Motion.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:

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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 (see signature page of pleading)

Total Number of Pages: 10

Description of Documents: Joint CLEC's Motion for Abeyance to Address Changes in Law.

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DOCUMENT NUMBER-DATE

03502 MAY 19 =

FPSC-COMMISSION CLERK

5/19/2011



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May 19, 2011

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: 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.

Dear Ms. Cole:

Please find attached the Joint CLEC's Motion for Abeyance to Address Changes in Law. Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to call.

Sincerely,



Matthew J. Feil

DOCUMENT NUMBER-DATE

03502 MAY 19 =

FPSC-COMMISSION CLERK

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF FLORIDA**

In re: 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; Cox Florida Telecom, L.P.; 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 19, 2011

JOINT CLECs' MOTION FOR ABEYANCE TO ADDRESS CHANGES IN LAW

COME NOW, Access Point, Inc. ("Access Point"); Birch Communications, Inc. ("Birch"); Broadwing Communications, LLC ("Broadwing"); BullsEye Telecom, Inc. ("BullsEye"); DeltaCom, Inc. (DeltaCom"); Granite Telecommunications, LLC ("Granite"); Lightyear Network Solutions, LLC ("Lightyear"); MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("Verizon Access"); Navigator Telecommunications, LLC ("Navigator"); PAETEC Communications, Inc. ("PAETEC"); tw telecom of florida, l.p. ("TWTC"); US LEC of Florida, LLC d/b/a PaeTec Business Services ("US LEC"); XO Communications Services, Inc. ("XO"); and Windstream NuVox, Inc. ("Windstream NuVox") (hereinafter "Joint CLECs"), by and through their undersigned

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counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, and hereby moves the Commission to hold this case in abeyance and provide the parties time within which to file briefs and pleadings to address the changes in law contained in Chapter 2011-36, Laws of Florida. In support of this motion, Joint CLECs state as follows:

1. Qwest Communications Company, LLC (“QCC”) filed the complaint that initiated the captioned docket on December 11, 2009 (“Original Complaint”). The Original Complaint named Verizon Access, XO, TWTC, Granite, Cox Florida Telecom, L.P. (“Cox”),¹ Broadwing, and “John Does 1 Through 50” as respondent CLECs.

2. By Order No. PSC-10-0629-PCO-TP, issued October 22, 2010, QCC was allowed to amend its complaint to add additional named CLEC respondents, and QCC made other clarifying and conforming changes to its Original Complaint. QCC’s First Amended Complaint, filed September 29, 2010 (with QCC’s motion to amend the Original Complaint), named the following as additional CLEC respondents: Access Point, Navigator, Lightyear, US LEC, PAETEC, Birch, Windstream NuVox, DeltaCom, STS Telecom, LLC (“STS”), and BullsEye.² The First Amended Complaint replaced the Original Complaint.

3. The First Amended Complaint asserts three causes of action. Count I and Count II list all of the above-named CLECs as respondents. Count III names only XO, Access Point, Birch, Budget, BullsEye, Lightyear, Navigator, Windstream NuVox and PAETEC as respondents.

¹ On April 6, 2011, QCC filed a notice of voluntary dismissal, without prejudice, as to Cox Florida Telecom, L.P. (“Cox”). Accordingly, Cox is no longer a party to this proceeding.

² QCC has yet to identify other additional CLEC respondents included in the reference to “John Does 1 Through 50.”

4. Committee Substitute for Committee Substitute for House Bill No. 1231 was passed by the Florida Legislature and, on May 5, 2011, was signed by Governor Rick Scott. The bill was thereafter enrolled as Chapter 2011-36, Laws of Florida (“Ch. 2011-36”). Pursuant to Section 62 of Ch. 2011-36, the new law becomes effective July 1, 2011. Ch. 2011-36 makes significant changes to Chapter 364, Florida Statutes, which governs the Commission’s authority over telecommunications companies.

5. In the First Amended Complaint, QCC relies upon Sections 364.08(1) and 364.10(1), Florida Statutes, as authority for its claims in Count I. Ch. 2011-36 repeals Section 364.08 in its entirety and repeals existing 364.10(1). Neither of these repealed provisions is replaced or re-inserted elsewhere in the Florida Statutes.

6. In the First Amended Complaint, QCC cites Section 364.04(1) and (2), Florida Statutes, in its claims for Count II and Count III. Ch. 2011-36 has made significant modifications to Section 364.04. Furthermore, Count II and Count III are, essentially, discrimination claims relying on Sections 364.08(1) and 364.10(1), both repealed by Ch. 2011-36.

7. The Commission is a creature of statute and has only the power and jurisdiction granted it by statute. Through Ch. 2011-36 the Legislature comprehensively altered and limited the Commission’s authority, without providing a savings clause authorizing the Commission to address pending matters under prior law. Therefore, the Commission’s authority to address QCC’s claims is in doubt.

8. In the past, the Commission has temporarily delayed proceedings and requested that the parties address intervening changes in law. See, e.g., Order No. PSC-95-0916-FOF-TL, issued in Docket No. 940235-TL on July 28, 1995 (the Commission required additional

briefing to address changes in statute that became effective after the hearing and initial briefing).³ The Commission should likewise pause and reflect here. Since this matter has not gone beyond the initial pleading phase, the Commission should hold this case in abeyance pending the Commission's consideration of how Ch. 2011-36 affects the Commission's authority over QCC's claims.

9. As of the date of this motion, no Order Establishing Procedure has been issued, no case schedule has been established, the parties have engaged in virtually no discovery, and issue identification has not yet taken place.⁴ This case is not subject to a statutory deadline for decision.

10. The relief requested in this motion will promote the efficient administration of justice because the Commission may eliminate or narrow issues based on the new law **prior** to the parties and the Commission expending significant resources for litigating the case.

11. Joint CLECs request a general suspension of all case activity (*i.e.*, all discovery, issue identification, establishment of and compliance with a case schedule, etc.) in this docket pending (1) the parties' filing of briefs, pleadings or both regarding the impact of Ch. 2011-36 on the pending QCC claims and (2) the Commission's consideration of the parties' filings, as well as any other matters the Commission deems necessary and related.

12. No party is prejudiced by this request. As noted above, issue identification has not taken place, a case schedule has not yet been established and there is no statutory deadline for the Commission to make a decision on QCC's claims.

³ See also Order No. PSC-96-0406-FOF-WS, issued in Docket No. 920199 on March 21, 1996 (the Commission reconsidered an order on its own motion because of a recent Florida Supreme Court decision and required parties to brief the issues in light of that new decision) and Order No. PSC-95-1046-PCO-TL, issued in Docket No. 920260-TL on August 23, 1995 (the Commission allowed supplemental briefs to address changes in the statute which occurred just prior to hearing).

⁴ Staff has recently suggested that issue identification take place in June 2011.

13. Joint CLECs propose that the order granting this motion allow all parties thirty (30) days from the date of the order to file initial briefs, pleadings or both regarding the impact of the changes in law on this matter. Ordinarily, Rule 28-106.204(1), Florida Administrative Code, would allow other parties seven (7) days from service of a written motion to file a response in opposition. Given the unique circumstances of this case, Joint CLECs suggest that parties be given fourteen (14) days after the initial filings to file briefs, pleadings or both in response to the other parties' initial filings.

14. Ch. 2011-36 has altered the Commission's subject matter jurisdiction over telecommunications issues.⁵ Joint CLECs maintain that the abeyance and filing schedule requested provides a cost-effective, fair and orderly mechanism for the parties to address issues associated with, and to assert their rights under, the new law.

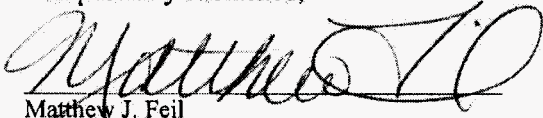
15. Counsel for Joint CLECs conferred with counsel for QCC regarding this motion and was informed QCC opposes the procedure Joint CLECs request herein. QCC also stated that if the CLECs believe that the new legislation has dispositive effect on one or more portions of the litigation, the appropriate course of action would be for the CLECs to file a motion to dismiss.

WHEREFORE in consideration of the foregoing, Joint CLECs move that the Commission grant this motion for abeyance, as set forth in the body of this motion.

Dated this 19th day of May, 2011.

⁵ Joint Movants have the right to assert at any time that the Commission lacks subject matter jurisdiction over this case, in accordance with Fla. R. Civ. Pro. 1.140(b) and Commission precedent. *See, e.g.*, Order No. PSC-05-1065-FOF-TP, issued in Docket No. 041144-TP on November 1, 2005, and Order No. PSC-02-0484-TP, issued in Docket No. 001097-TP on April 8, 2002.

Respectfully submitted,



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* Designated as qualified representatives in Docket No. 100008-OT.

** Pursuant to Order No. PSC-10-0691-FOF-OT in Docket No. 100008-OT, issued on November 18, 2010, Eric J. Branfman has been designated as a qualified representative for the above-referenced parties in this proceeding.

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 19th day of May, 2011.

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<p>Brenda Merritt Division of Regulatory Analysis Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399 bmerritt@psc.state.fl.us</p>	<p>Mr. David Christian Verizon Access Transmission Services 106 East College Avenue, Suite 710 Tallahassee, FL 32301-7721 david.christian@verizon.com</p>

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By: 
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