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**Subject:** PSC Filing - Docket No. 090538-TP  
**Attachments:** 090538 - MotionStay.pdf

The 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.

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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:** 12

**Description of Documents:** Joint CLEC's Motion to Stay Proceeding.

DOCUMENT NUMBER-DATE

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July 8, 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 Movants' Joint Motion to Stay Proceeding for filing in the above-referenced docket. (The Joint Movants are named on the first page of the pleading.)

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to call.

Sincerely,

Matthew J. Feil

MJF/ccg

cc: Certificate of Service

DOCUMENT NUMBER - DATE  
04706 JUL -8 =  
FPSC-COMMISSION CLERK

**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); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, 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, 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: July 8, 2011

**JOINT MOTION TO STAY PROCEEDING**

Pursuant to Rule 28-106.204, Florida Administrative Code, the undersigned carriers<sup>1</sup> hereby move the Florida Public Service Commission ("Commission") to stay all activity in this proceeding until the Joint Movants' accompanying Motion to Dismiss is resolved. As discussed herein, the accompanying motion demonstrates unequivocally that the Commission ceased to have jurisdiction over Qwest Communications Company, LLC's ("Qwest") Amended Complaint ("Complaint") in this proceeding due to the repeal and alterations enacted in the Regulatory Reform Act, Chapter 2011-36, Laws of Florida, which became law on July 1, 2011 ("Regulatory Reform Act"). As this threshold issue concerns the Commission's power even to entertain this proceeding, it is incumbent on the Commission to stay any further case activity in this

<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; Navigator Telecommunications, LLC; 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 Movants").

proceeding until the question of the Commission's subject matter jurisdiction is resolved.<sup>2</sup> Implementation of the stay is necessary not only to promote administrative economy but, more importantly, to ensure Commission compliance with the law as it now stands.

In support of this Motion, the Joint Movants state as follows:

1. On December 11, 2009, Qwest filed its original Complaint in this docket, raising rate discrimination claims against six named CLECs and "John Does 1 Through 50." Thereafter, on September 29, 2010, Qwest moved for leave to file its Amended Complaint in order to raise its rate discrimination claims against 13 additional respondents. The Commission granted Qwest's motion by Order No. PSC-10-0629-PCO-TP, issued in this docket on October 22, 2011. After enactment of the Regulatory Reform Act, the undersigned carriers filed their Motion for Abeyance to Address Changes in Law on May 19, 2011, seeking a suspension of case activity during which the parties would brief the Commission on the impact of the new Act. The motion was denied by the Prehearing Officer in Order No. PSC-110282-PCO-TP on June 30, 2011. Concurrent with this Motion, the Joint Movants have filed a Motion to Dismiss Qwest's Amended Complaint in light of the fact that the Commission ceased to have subject matter jurisdiction over the Amended Complaint as a result of the enactment of the Regulatory Reform Act, Chapter 2011-36, Laws of Florida, effective July 1, 2011. With the exception of a single Document Request to Qwest by a respondent CLEC<sup>3</sup> and Qwest subpoenas served on non-parties in January 2010, no party has conducted discovery in

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<sup>2</sup> As explained further below, to the extent the Commission views this Motion as requesting relief similar to that sought in the Joint Movants' May 19, 2011 *Motion for Abeyance*, the Commission should reach the same result on reconsideration of its June 28, 2011 *Order Denying Abeyance*. Should, however, a stay not be imposed by the Prehearing Officer, the seriousness of the issue (*i.e.*, the Commission acting in the absence of lawful authority) requires consideration by the full Florida Public Service Commission. Joint Movants hereby request such consideration should that circumstance arise.

<sup>3</sup> On October 20, 2010, Broadwing served a Request for Production of Documents on Qwest, to which Qwest timely responded.

this docket.

2. As detailed in the Motion to Dismiss, both Florida Supreme Court and U.S. Supreme Court precedent mandate that “when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law.”<sup>4</sup> In the instant case, the Regulatory Reform Act (a) repeals Sections 364.08(1) and 364.10(1), removing the Commission’s jurisdiction over claims of rate discrimination, (b) revises Section 364.04 to expressly permit carriers to enter into contracts with rates that differ from those in their published schedules (Qwest’s central allegation), and (c) includes no savings clause that would permit the Commission to consider any pending claims. The Commission’s jurisdiction to entertain Qwest’s Complaint has therefore been divested and, as a result, Qwest’s Complaint “falls with the law.”

3. Because the jurisdictional issue raised in the Motion to Dismiss goes directly to the Commission’s authority to entertain this proceeding in the first instance, the Commission is obligated to stay all other case activity until this issue is resolved. Granting a stay in this circumstance will both (a) ensure that the Commission does not exceed its delegated authority and (b) promote administrative economy.

4. First, absent a stay, the Commission would unlawfully exceed its authority, in that it would be proceeding to the merits of a case over which it has no jurisdiction. It is a fundamental rule that, “[i]nasmuch as the PSC, like other administrative agencies, is a creature of statute, the Commission’s powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.” *Southern States Util. v. Public Serv. Comm’n*, 714 So.2d 1046, 1051 (Fla. 1<sup>st</sup> DCA 1998) (*en banc*) (*internal quotations and citations*

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<sup>4</sup> *Jennings v. Florida Elections Commission*, 932 So.2d 609, 612 (Fla. 2d DCA 2006); *see also Bruner v. United States*, 343 U.S. 112 at 116-117 (1952) (same).

*omitted*). Thus, where a question as to the Commission's jurisdiction is raised, "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof...and ***the further exercise of the power should be arrested.***" *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla. 1973) (*emphasis added*). To comply with these mandates the Commission must resolve the threshold issue of jurisdiction *before* conducting or ordering any process related to the merits of the case.

5. This same rule is applied by federal courts, whose jurisdiction is likewise circumscribed by statute. The U.S. Supreme Court explains:

Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause...The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (*citations omitted*).

6. In compliance with this rule, federal courts must stay all merits-related process where a challenge to subject matter jurisdiction is raised. For example, in *Cherry v. FCC*, the District Court for the Middle District of Florida held the case in abeyance while a motion to dismiss for lack of subject matter jurisdiction was considered. 2009 WL 1184350, at \*1 (M.D. Fla. 2009). The Court noted that an abeyance was necessary, because "[t]his Court must determine whether it has jurisdiction before considering the merits[.]" *Id.* The same holds true here.

7. Second, a stay should also be granted to promote administrative economy. Because the jurisdictional issue raised here is a straightforward question of law that may (and should) result in the dismissal of this entire proceeding, any further process or activity in this proceeding that is outside of the pending Motions filed will unnecessarily waste the

Commission's (and therefore taxpayers') resources and will require all parties to incur unnecessary expense. Qwest will not be prejudiced if this Motion is granted,<sup>5</sup> but Joint Movants will be greatly prejudiced if they are forced to proceed to issue identification and litigation regarding claims over which the Commission has no jurisdiction. Thus, as both governing law and the policy of administrative economy support a stay, the Commission should respectfully grant this Motion.

*Consideration As Motion for Reconsideration*

8. The instant Motion seeks relief distinct from the Joint Movants' May 19, 2011 *Motion for Abeyance* (which sought an abeyance to establish a briefing schedule on jurisdictional issues), and as such should not be viewed as a request for reconsideration. However, to the extent the Commission decides to consider this Motion as seeking relief similar to the Joint Movants' May 19, 2011 *Motion for Abeyance*, the Joint Movants respectfully move for reconsideration of the Commission's June 28, 2011 *Order Denying Abeyance* ("Order").

9. Rule 25-22.0376, Florida Administrative Code, provides that "[a]ny party who is adversely affected by a non-final order may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order." A motion for reconsideration should be granted where the motion identifies a point of fact or law that was overlooked, or that the Commission failed to consider in rendering an order.<sup>6</sup> Reconsideration of the Order under this standard is warranted for multiple reasons.

10. First, the Order does not discuss – and therefore overlooks – the legal principles delineated in the *Motion for Abeyance* and which require Commission subject matter jurisdiction

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<sup>5</sup> Qwest waited nearly ten months before amending its complaint to include additional respondents, and to date has conducted no discovery on the parties to this proceeding.

<sup>6</sup> Order Denying Reconsideration, Docket No. 090538-TP, Order No. PSC-11-0222-FOF-TP (issued May 16, 2011).



to be established as a threshold matter – before any other issues. Since those legal principles require that the Commission stay all merits-related case activity when a question as to the Commission’s jurisdiction is raised, the Commission should grant reconsideration and impose a stay.

11. Second, the facts on which the Order was predicated have changed now that a Motion to Dismiss has been filed. In fact, in opposing the *Motion for Abeyance*, Qwest itself argued that the proper procedure would be for Joint Movants to file a motion to dismiss to raise the jurisdictional issue before the Commission.<sup>7</sup> Thus, reconsideration is warranted since the filing of the Motion to Dismiss alleviates any concerns over process.

12. Moreover, the filing of the Motion to Dismiss also addresses the concerns raised in the Order, which found that proceeding to issue identification would help “identify any issues affected by the change in law.” Further delineation of the issues is unnecessary for the jurisdictional analysis particularly where, as here, a pending Motion to Dismiss focuses the jurisdictional questions based on the pleadings alone. Because the Motion to Dismiss clearly outlines the issues affected by the change in law – demonstrating within the four corners of the Amended Complaint that the case *in its entirety* must now be dismissed – issue identification or any other further process or activity in this proceeding outside of the pending Motions would be inappropriate at this juncture, as demonstrated above.<sup>8</sup> Therefore, the Commission should, in the alternative, grant reconsideration and issue a stay until it rules on the Motion to Dismiss.

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<sup>7</sup> Qwest Communications Company, LLC’s Response to Joint CLECs’ Motion for Abeyance to Address Changes in Law, at 2 (filed May 24, 2011); *see also* Joint CLECs’ Motion for Abeyance to Address Change in Law, at ¶ 15 (filed May 19, 2011) (stating that “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”).

<sup>8</sup> Furthermore, establishing the Commission’s jurisdiction is a necessary prerequisite to any issue identification on the merits of a case. One must first determine the limits of the Commission’s jurisdiction to understand what issues may lawfully be considered in a given proceeding.

\* \* \*

13. Counsel for Joint Movants have conferred with counsel for Qwest regarding this Motion and were informed that Qwest opposes the relief requested.

**WHEREFORE**, in consideration of the foregoing, and particularly considering the critical fact that as of July 1, 2011, the Commission ceased to have jurisdiction over the Qwest Complaint, Joint Movants request the Florida Public Service Commission stay all activity in this proceeding pending resolution of the accompanying Motion to Dismiss.

Dated this 8<sup>th</sup> day of July, 2011.

Respectfully submitted,



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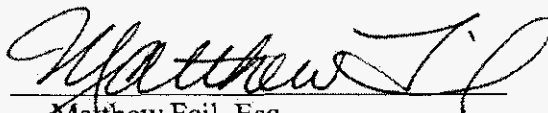
**CERTIFICATE OF SERVICE**

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 8th day of July, 2011.

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By:   
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