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090538-TP

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Subject: RE: Docket No. 090538-TP - Answer of BullsEye Telecom, Inc. to Amended Complaint
Attachments: Docket No. 090538-TP - Answer of BullsEye to Amended Complaint.pdf

Attached for electronic filing in the above-referenced docket, please find the Answer of BullsEye Telecom, Inc. to the Amended Complaint of Qwest Communications Company, LLC. If you have any questions, please do not hesitate to contact us.

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b. Docket No.: 090538-TP – In re: Complaint of Qwest Communications Company, LLC against MCImetro Access, et al.

c. Filed on behalf of: BullsEye Telecom, Inc.

d. Total pages: 12

e. Brief Description: Answer of BullsEye Telecom, Inc. to Amended Complaint of Qwest Communications Company, LLC

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FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF FLORIDA

In re: Complaint of QWEST COMMUNICATIONS)
COMPANY, LLC against MCIMETRO ACCESS)
TRANSMISSION SERVICES (d/b/a VERIZON) Docket No. 090538-TP
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) Filed: November 16, 2010
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 rate discrimination in connection)
with the provision of intrastate switched access services)
in alleged violation of Sections 364.08 and 364.10, F.S.)
_____)

**ANSWER OF BULLSEYE TELECOM, INC. TO
AMENDED COMPLAINT OF QWEST COMMUNICATIONS COMPANY, LLC**

Pursuant to Order No. PSC-10-0629-PCO-TP issued in the above-captioned matter, Respondent BullsEye Telecom, Inc. respectfully submits this Answer to the Amended Complaint of Qwest Communications Company, LLC ("QCC") filed on October 11, 2010 in the above-captioned matter. As a fundamental matter, BullsEye has not subjected QCC to any alleged "unjust and unreasonable discrimination." Further, QCC would not be entitled to any reparations under the claims for relief stated in the Amended Complaint, even if the factual allegations set forth therein were proven. In filing this Answer, BullsEye explicitly reserves the right to later seek dispositive relief based on any or all of the grounds and defenses raised herein.

In deciding the Motion to Dismiss filed by other Respondents January 29, 2010, the Commission determined that it is without authority to award damages. Commission Order No. PSC-10-0296-FOF-TP, at 6. The Commission stated that it may order refunds, where appropriate, but did not decide whether any such refunds would be available to QCC under the facts alleged in the Complaint. *Id.* Critically, QCC's claim for "reparations" is not cognizable since, *inter alia*, QCC's claim remains one seeking damages. *See* Amended Complaint, at Prayer for Relief. Indeed, even if QCC properly sought refunds, such relief is not available to a Complainant under a discrimination claim where the Complainant admits (as QCC does here) that it was billed and paid the filed rate. *See id.*, at ¶ 10. In filing this Answer, BullsEye specifically reserves and does not waive its right to raise these matters, as well as any other legal points and defenses not theretofore previously raised.

In response to the specific allegations set forth in the Amended Complaint, BullsEye states as follows:

1. BullsEye denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 1 (including its subparagraphs) of the Amended Complaint.

2. BullsEye denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 2 (including its subparagraphs), except admits the allegations contained in subparagraph 2.j.

3. The allegations of paragraph 3 state a legal conclusion and, as such, BullsEye neither admits nor denies the allegations. BullsEye respectfully refers all questions of law to the Commission for determination after hearing.

4. The allegations of paragraph 4 state a legal conclusion and, as such, BullsEye neither admits nor denies the allegations. BullsEye respectfully refers all questions of law to the Commission for determination after hearing.

5. The allegations of paragraph 5 state a legal conclusion and, as such, BullsEye neither admits nor denies the allegations. BullsEye respectfully refers all questions of law to the Commission for determination after hearing.

6. BullsEye denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 6, except admits that BullsEye has filed a price list with the Commission containing rates for intrastate switched access services provided in Florida.

7. BullsEye denies knowledge or information sufficient to form belief as to each and every allegation contained in paragraph 7, except admits that BullsEye has provided intrastate switched access services to QCC in Florida and has billed QCC in accordance with its price list on file with the Commission.

8. BullsEye denies the allegations set forth in paragraph 8, except admits that the Minnesota Public Utilities Commission opened dockets to investigate the terms under which various carriers were providing intrastate switched access services in Minnesota, and respectfully refers to the public record of those proceedings for the scope and results thereof.

9. BullsEye denies the allegations set forth in paragraph 9, except admits that certain agreements between CLECs and IXCs relating to intrastate access services were identified during the Minnesota Public Utilities Commission proceedings, and respectfully refers to the public record of those proceedings for the scope and results thereof.

10. Paragraphs 10.a., 10.b., 10.c., 10.d, 10.e., 10.f., 10.g., 10.h., 10.i., 10.k., 10.l., 10.m., 10.n., 10.o., 10.p., 10.q., 10.r., 10.s., and 10.t. (including their subparagraphs) do not

relate to BullsEye, and therefore do not necessitate any response from BullsEye. To the extent any response is required, BullsEye denies knowledge or information sufficient to form a belief as to each and every allegation contained therein.

11. BullsEye denies each and every allegation contained in subparagraph 10.j.i., except admits that BullsEye has a price list on file with the Commission and has billed QCC intrastate access charges in accordance with the rates and terms of such price list, including Section 3 of BullsEye Telecom, Inc., FL Price List No. 2, and respectfully refers the Commission to that price list for its terms.

12. BullsEye denies each and every allegation contained in subparagraph 10.j.ii, except admits that BullsEye has billed QCC intrastate access charges in accordance with the terms of its filed price list; that BullsEye was compelled to enter into an invalid, unenforceable “settlement agreement” with AT&T in 2004, under which access rates charged to AT&T were capped on a nationwide basis; and that QCC sent correspondence to BullsEye demanding, *inter alia*, off-tariff rates, terms and conditions, and copies of third-party agreements. BullsEye respectfully refers all questions of law to the Commission for determination after hearing.

13. BullsEye responds to the allegations contained in paragraph 11 to the extent and in the same way BullsEye has responded to QCC’s allegations contained in paragraphs 1 through 10.

14. BullsEye denies each and every allegation contained in paragraph 12 to the extent they relate to BullsEye, except admits that a telecommunications company may in appropriate circumstances enter into contracts with customers that deviate from its tariffs, and respectfully refers all questions of law to the Commission for determination after hearing.

15. BullsEye denies each and every allegation contained in paragraph 13 to the extent they relate to BullsEye, and respectfully refers all questions of law to the Commission for determination after hearing.

16. BullsEye responds to the allegations contained in paragraph 14 to the extent and in the same way BullsEye has responded to QCC's allegations contained in paragraphs 1 through 13.

17. BullsEye denies each and every allegation contained in paragraph 15 to the extent they relate to BullsEye, except to admit that BullsEye has a price list on file with the Commission that contains rates and terms for intrastate switched access services, and respectfully refers all questions of law to the Commission for determination after hearing.

18. BullsEye denies each and every allegation contained in paragraph 16 to the extent they relate to BullsEye, except admits that BullsEye has billed QCC intrastate access charges in accordance with the terms of its filed price list; that BullsEye was compelled to enter into a settlement agreement with AT&T whose terms relates to intrastate access rates in many States, including Florida, under which access rates to AT&T were capped on a nationwide basis, which agreements was made known to QCC and the general public several years prior to the QCC Complaint. BullsEye respectfully refers all questions of law to the Commission for determination after hearing.

19. BullsEye responds to the allegations contained in paragraph 17 to the extent and in the same way BullsEye has responded to QCC's allegations contained in paragraphs 1 through 16.

20. BullsEye denies each and every allegation contained in paragraph 18 to the extent they relate to BullsEye, and respectfully refers all questions of law to the Commission for determination after hearing.

21. BullsEye denies each and every allegation contained in paragraph 19 to the extent they may relate to BullsEye, except admits that BullsEye has billed QCC intrastate access charges in Florida in accordance with the terms of its filed price list, and respectfully refers to said price list for its terms and refers all questions of law to the Commission for determination after hearing.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

22. The agreements about which QCC complains are invalid and unenforceable, and QCC cannot benefit from the rates and terms of an invalid and unenforceable agreements. To the extent the alleged settlement agreements are determined to be invalid or unenforceable, the IXCs must pay BullsEye in accordance with BullsEye's duly filed tariff.

SECOND AFFIRMATIVE DEFENSE

23. QCC has failed to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

24. BullsEye has not engaged in any unlawful rate discrimination under Florida law, or otherwise violated applicable laws and regulations.

FOURTH AFFIRMATIVE DEFENSE

25. BullsEye has complied with all obligations imposed under Florida statutes and regulations in all material respects.

FIFTH AFFIRMATIVE DEFENSE

26. The rates for switched access service set forth in BullsEye's price list on file with the Commission are just, reasonable, nondiscriminatory, and otherwise lawful.

SIXTH AFFIRMATIVE DEFENSE

27. Any rates for switched access services charged by BullsEye under agreement are just, reasonable, nondiscriminatory, and otherwise lawful.

SEVENTH AFFIRMATIVE DEFENSE

28. QCC's claims are barred by applicable statutes of limitation.

EIGHTH AFFIRMATIVE DEFENSE

29. QCC lacks standing to allege a violation of any applicable statute or regulation.

NINTH AFFIRMATIVE DEFENSE

30. QCC's claims for monetary relief, including without limitation its claim for "reparations" or any claim for refunds, are barred by Florida law and/or the filed rate doctrine.

TENTH AFFIRMATIVE DEFENSE

31. The Commission does not have jurisdiction to hear the Amended Complaint and/or award the relief that QCC's Amended Complaint seeks.

ELEVENTH AFFIRMATIVE DEFENSE

32. QCC's claims are barred in whole or in part by laches, waiver, estoppel, and/or unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

33. The Amended Complaint is barred, in whole or in part, since QCC is not similarly situated to any IXCs with which BullsEye may have an agreement for intrastate switched access services.

THIRTEENTH AFFIRMATIVE DEFENSE

34. Assuming *arguendo* that the QCC claim for reparations had any merit, awarding such relief to QCC would only further the alleged discrimination about which QCC complains and would condone the unlawful actions of the IXC that forced BullsEye to enter an off-tariff agreement.

FOURTEENTH AFFIRMATIVE DEFENSE

35. QCC failed to timely or properly dispute BullsEye's access invoices pursuant to the terms of BullsEye's price list, such that QCC's late-filed claims are barred and/or must be deemed waived.

WHEREFORE, BullsEye Telecom, Inc. respectfully requests that the Commission issue an Order (1) dismissing the Amended Complaint and/or otherwise denying the relief sought by QCC, (2) determining that, to the extent any remedial action is warranted, the only lawful outcome is an order requiring all carriers to pay the rates set forth in the price lists on file with the Commission, and (3) granting to BullsEye such further relief as the Commission deems just and proper.

Respectfully submitted,

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Dated: November 16, 2010

By: s/ Andrew M. Klein
Andrew M. Klein
Counsel for Respondent
BullsEye Telecom, Inc.

*Request for naming of qualified representatives to be separately filed in Docket No. 100008-OT

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

I hereby certify that a true and correct copy of the foregoing was served by regular U.S. Mail and/or electronic mail on this 16th day of November 2010, to the following:

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