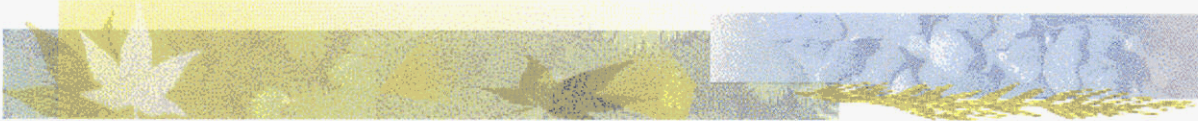


Ruth Nettles

From: Scobie, Teresa A (TERRY) [terry.scobie@verizon.com]
Sent: Friday, January 29, 2010 2:19 PM
To: Filings@psc.state.fl.us
Cc: Adam Sherr; Alex Duarte; Carolyn Ridley; David Christian; De O'Roark; Demetria Clark; Frank App; Greg Diamond; Jeff Wirtzfeld; John Ivanuska; Ken Culpepper; R. CUrier; Severy, Richard; Steven Denman
Subject: Docket No. 090538-TP - Verizon Access Transmission Services' Motion to Dismiss Reparations Claim and Motion for Final Summary Order Dismissing All Other Claims Against Verizon Access
Attachments: 090538 VZ Access MTD 1-29-10.pdf



The attached is submitted for filing in Docket No. 090538-TP on behalf of Verizon Access Transmission Services by

Dulaney L. O'Roark III
P. O. Box 110, MC FLTC0007
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The attached document consists of a total of 15 pages - cover letter (1 page), Motion to Dismiss with Affidavit (12 pages) and Certificate of Service (2 pages).

Terry Scobie
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Verizon Legal Department
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DOCUMENT NUMBER-DATE

00677 JAN 29 2010

FPSC-COMMISSION CLERK

Dulaney L. O'Roark III
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January 29, 2010 – VIA ELECTRONIC MAIL

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090538-TP
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; and John Does 1 through 50 (CLEC's whose true names
are currently unknown) 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.

Dear Ms. Cole:

Enclosed for filing in the above matter is MCImetro Access Transmission Services d/b/a
Verizon Access Transmission Services' Motion to Dismiss Reparations Claim and
Motion for Final Summary Order Dismissing All Other Claims Against Verizon Access.
Service has been made as indicated on the Certificate of Service. If there are any
questions regarding this filing, please contact me at (770) 284-3620.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosures

DOCUMENT NUMBER-DATE
00677 JAN 29 09
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Qwest Communications Company,) Docket No. 090538-TP
LLC against MCImetro Access Transmission Services) Filed: January 29, 2010
(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; and)
John Does 1 through 50 (CLEC's whose true names)
are currently unknown) 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.)
_____)

**MCIMETRO ACCESS TRANSMISSION SERVICES LLC D/B/A
VERIZON ACCESS TRANSMISSION SERVICES' MOTION TO DISMISS
REPARATIONS CLAIM AND MOTION FOR FINAL SUMMARY ORDER
DISMISSING ALL OTHER CLAIMS AGAINST VERIZON ACCESS**

MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services ("Verizon Access") moves to dismiss the complaint ("Complaint") filed by Qwest Communications Company, LLC ("Qwest") to the extent it seeks "reparations" from Verizon Access, and moves for a summary final order dismissing the claims against it to the extent they seek prospective relief. Through these motions, Verizon Access seeks to dismiss the Complaint against it in its entirety.¹

Verizon Access moves to dismiss Qwest's claims for reparations because Qwest is seeking monetary damages that the Commission is not authorized to award. Moreover, Qwest admits that it was charged the intrastate switched access rates in Verizon Access's price list filed with the Commission, so it is barred from recovery under the filed-rate doctrine.

¹ Verizon Access respectfully requests that, if the Commission does not dismiss the Complaint against Verizon Access in its entirety, that Verizon Access be given leave to file an answer within ten days after the Commission's order addressing these motions.

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FPSC-COMMISSION CLERK

Verizon Access moves for a summary final order dismissing Qwest's claims for prospective relief because Verizon Access has no individual-case-basis contracts ("ICBs") for intrastate switched access service in Florida,² which belies Qwest's claims that Verizon Access is using such ICBs to discriminate against it. And none of the prospective relief Qwest seeks could be granted in any event, because it hinges on the mistaken assertion that Verizon Access has such ICBs in Florida. To the extent Qwest is seeking to establish new requirements for ICBs maintained by competitive local exchange carriers ("CLECs"), despite the lack of a live dispute between the parties, that request must be rejected because such requirements only may be established through rulemaking.

I. QWEST'S ALLEGATIONS CONCERNING VERIZON ACCESS

Qwest acknowledges that Verizon Access has filed a price list with the Commission for its Florida intrastate switched access rates and bills Qwest at those rates.³ Qwest does not contend that those rates are excessive, unjust or unreasonable. Nor does it contend that Verizon Access has charged Qwest more than the rates specified in its price list or that there have any billing inaccuracies or errors. Qwest asserts "on information and belief" that Verizon Access entered into ICBs for intrastate switched access services with rates that are lower than the rates in its price list, including an ICB with AT&T.⁴ It also alleges "on information and belief" that despite Qwest's demands for copies of Verizon Access's past and current ICBs for switch

² See Affidavit of Peter H. Reynolds filed herewith.

³ Complaint ¶¶ 6, 10 a.i.

⁴ Complaint ¶ 10 a.ii. One of the agreements referred to by Qwest involved MCI WorldCom Network Services, an entity that no longer exists.

access services in Florida, Verizon Access has not provided them “in a manner allowing use in this proceeding.” In other words, Qwest does not deny that Verizon Access already has allowed it to review its ICBs (which have long since expired and are no longer in effect), but only objects because they have been disclosed on a confidential basis. Qwest finally complains that it has requested that Verizon Access provide switched access service at its most favorable rates, terms and conditions, but that Verizon Access has not agreed to do so.⁵

Qwest asserts two claims for relief against Verizon Access. First, Qwest claims that Verizon Access has discriminated against Qwest in violation of Sections 364.08(1) and 364.10(1), Florida Statutes, by offering to similarly situated carriers ICBs with below-price-list rates for intrastate switched access service that were not offered to Qwest.⁶ Second, Qwest claims that by offering below-price-list rates to other carriers, but not to Qwest, Verizon Access has violated Section 364.04, Florida Statutes, which according to Qwest requires that carriers “abide by their published price lists.”⁷

Qwest seeks retroactive and prospective relief. In its prayer for relief, it asks for “reparations,” which it requests with interest in an amount to be proved at hearing.⁸ For prospective relief, Qwest seeks (i) an order requiring Verizon Access to lower its intrastate switched access rate to its most favorable ICB rate; (ii) an order directing Verizon Access to cease and desist from offering intrastate switched access rates in unfiled ICBs with rates lower than provided in its price list; and (iii) an order requiring

⁵ *Id.*

⁶ *Id.* ¶¶ 12, 13.

⁷ *Id.* ¶¶ 15, 16.

⁸ *Id.*, Prayer for Relief ¶ B.

Verizon Access to file its ICBs with rates for intrastate switch access services that are different from the rates in its price list.⁹

II. MOTION TO DISMISS

The Commission must grant a motion to dismiss when, accepting all allegations in a complaint as facially correct, it fails to state a cause of action for which relief can be granted.¹⁰ Even accepting the Complaint's allegations as true, Qwest's claim for "reparations" fails because the Commission lacks authority to award damages and because such relief is barred by the filed-rate doctrine. Qwest therefore fails to state a claim for which relief may be granted, and its reparations claim must be dismissed.

Qwest leaves no doubt that its request for "reparations" involves monetary compensation because it asks that Verizon Access be ordered to "pay" reparations in an "amount to be proven at hearing," along with interest on the amount awarded.¹¹ The Complaint makes clear Qwest seeks such compensation based on the difference between the rates Qwest actually paid under Verizon Access's price list and the rates it contends it should have been permitted to pay under an ICB.¹² In other words, the "reparations" claim is a claim for monetary damages, which the Commission is not authorized to award.¹³ Indeed, the Commission rejected a similar request for damages

⁹ *Id.*, Prayer for Relief ¶¶ C-E.

¹⁰ *Petition by Sprint Comm. Co. for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecomm., Inc.*, Docket No. 070249-TP, Order No. PSC-07-0680 (Aug. 21, 2007).

¹¹ Complaint, Prayer for Relief, ¶ B.

¹² See, e.g., Complaint ¶ 13 (alleging "unreasonable prejudice," "disadvantage" and "discriminatory treatment," all of which concern supposed rate disparity).

¹³ See *Southern Bell Tel. and Tel. Co. v. Mobile America Corp.*, 291 So. 2d 199, 202 (Fla. 1974) ("the PSC does not have any authority to award money damages"); *Florida Power & Light Co. v. Leonard A. Glazer*, 671 So. 2d 211 (Fla. 3rd DCA 1996), citing *Southern Bell Tel. & Tel. Co.*, 282 So. 2d 181, 184 (Fla. 1st DCA 1973) ("The Commission has no jurisdiction to award plaintiff damages or to reimburse plaintiff for its losses"); *Bert Smith Oldsmobile, Inc. v. General Motors Corp.*, 2005 U.S. Dist. LEXIS 23283

made by AT&T (before its merger with SBC) against BellSouth in a claim involving BellSouth's intrastate switched access tariff. AT&T asked the Commission to require BellSouth to change the volume discount feature of BellSouth's tariff and award damages based on the difference between the amount paid by AT&T under the tariff and the amount AT&T would have paid under what it considered to be appropriate volume discount terms. The Commission granted BellSouth's motion to strike the damages claim, noting that it "lacked any legal authority to award the type of monetary damages sought by AT&T."¹⁴ The Commission has consistently rejected monetary damages on the same grounds.¹⁵ Accordingly, Qwest's damages claim in this case fails as a matter of law and must be dismissed.

Likewise, the filed-rate doctrine bars the monetary compensation that Qwest seeks. As Qwest acknowledges, the Commission's rules permit CLECs to establish intrastate switched access rates by filing price lists with the Commission.¹⁶ Qwest admits that Verizon Access has established its switched access rates in this manner and that Qwest was charged those rates for the switched access services it received.¹⁷

(M.D. Fla. May 18, 2005) ("Plaintiff seeks monetary damages, which an administrative forum has no authority to award").

¹⁴ *Petition of AT&T Comm. of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. FI2002-01 Filed By BellSouth Telecomm., Inc.*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Jan. 6, 2003).

¹⁵ See, e.g., *Complaint of Freeman against Florida Power & Light Co. for violation of Rule 25-6.105, F.A.C.*, Docket No. 080039-EI, Order No. PSC-08-0380-PCO-EI (June 9, 2008) (noting the Commission does not have jurisdiction to consider claims for damages); *Petition to Investigate Claim for Damages, Complaint, and Other Statements Against Respondents Evercom Systems, Inc.*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (April 16, 2007) (dismissing claim for monetary damages because "[a]s a Legislative agency, this Commission may not entertain requests that it act like a court"); *Complaint of Chapman Against Florida Digital Network Regarding Interruption of Service*, Docket No. 021122-TX, Order No. PSC-03-0127-FOF-TX (Jan. 22, 2003) (stating the Commission "lacks any legal authority to award the type of monetary compensation requested by" the claimant); *Complaint of Robbins Against BellSouth Telecomm., Inc. for Violation of Rule 25-4.073(1)(c), F.A.C., Answering Time*, Docket No. 020595-TL, Order No. PSC-02-1344-FOF-TL (Oct. 3, 2002) (granting motion to dismiss in part based on Commission's lack of jurisdiction to award compensatory damages).

¹⁶ Section 25-24.825, Florida Administrative Code.

¹⁷ Complaint ¶¶ 10 a.i.

The filed-rate doctrine prohibits Qwest from arguing that it should be allowed to pay a different rate or seeking damages based on rates that Verizon has filed with the Commission.¹⁸ 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.¹⁹ Qwest's request for compensation based on rates other than those on file with the Commission therefore must be rejected.

III. MOTION FOR SUMMARY FINAL ORDER

Under Section 120.57(1)(h) of the Florida Statutes and Section 28-106.204(4) of the Florida Administrative Code, a summary final order shall be granted if the pleadings, affidavits and other materials on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled as a matter of law to the entry of a final order.²⁰ Verizon Access moves for a summary final order dismissing Qwest's claims against it because it has presented indisputable facts demonstrating that Verizon Access does not have switched access ICBs in Florida.²¹ Because Qwest's claims for

¹⁸ See, e.g., *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").

¹⁹ See *Petition for Expedited Review of BellSouth Telecomm., Inc.'s Intrastate Tariffs for Pay Telephone Access Services (PTAS) Rate with Respect to Rates for Payphone Line Access, Usage, and Features*, by Florida Pub. Telecomm. Ass'n, Docket No. 030300-TP, Order No. PSC-04-0974-FOF-TP (Oct. 7, 2004). See also *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).

²⁰ See *Complaint Against BellSouth Telecomm., Inc. Seeking Resolution of Monetary Dispute Regarding Alleged Overbilling Under Interconnection Agreement by Saturn Telecomm. Services, Inc.*, Docket No. 040732-TP, Order No. PSC-05-0702-FOF-TP (June 29, 2005); *Complaint and Petition by CAT Comm. Int'l, Inc. Against BellSouth Telecomm., Inc. for Alleged Unlawful Emergency Tel. Service Charge*, Docket No. 040026-TP, Order No. PSC-04-0500-FOF-TP (May 14, 2004); *Request for Arbitration Concerning Complaint of ITC DeltaCom Comm., Inc. Against BellSouth Telecomm., Inc. for Breach of Interconnection Terms*, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP (Aug. 24, 2000).

²¹ See the attached Affidavit of Peter H. Reynolds, who is the director of National Carrier Contracts and Initiatives for Verizon Services Operations. In his sworn statement, Mr. Reynolds confirms that Verizon Access does not have any ICBs with any interexchange carrier customers in Florida, and that the single

prospective relief hinge on the mistaken allegation that Verizon Access does have such ICBs, those claims must be dismissed.

Florida law authorizes the Commission to waive statutory provisions that would otherwise require CLECs to publish rate schedules for all their services.²² Acting on that authority, the Commission has established rules that only require CLECs to file price lists for basic services and that permit them to file price lists for other services such as intrastate switched access on an optional basis.²³ CLECs thus may establish switched access service arrangements through price lists or by other means, including ICBs, at their option. Qwest admits this fact.²⁴ CLECs are not required to file their ICBs, but rather must make available information concerning their service offerings to Staff upon request.²⁵ In short: (i) CLECs may file price lists for their switched access services, but are not required to do so; (ii) CLECs may enter into ICBs with individual customers for switched access services without filing them with the Commission; and (iii) CLECs must make available such ICBs to Staff upon request.

Qwest claims that Verizon Access has violated Florida law by maintaining switched access ICBs with discriminatory terms and asks the Commission to direct Verizon Access to lower its intrastate access rates to match its most favorable ICB rate; to stop offering “undisclosed” switched access ICBs; and to file its ICBs with the Commission.²⁶ These claims must be rejected because they mistakenly assume that

switched access service agreement between Verizon Access and AT&T expired by its terms in January 2007, and has not been in effect since then.

²² Section 364.337(2), Florida Statutes.

²³ See Section 25-24.825(1)-(2), Florida Administrative Code.

²⁴ Complaint, ¶ 5 (“A carrier may, in appropriate circumstances, enter into separate contracts with switched access customers which deviate from its tariffs or price lists (‘off-tariff agreements’ or arrangements”).

²⁵ See Section 25-24.825(5), Florida Administrative Code.

²⁶ Complaint, ¶¶ 11-16; Prayer for Relief, ¶¶ C-E.

Verizon Access has switched access ICBs in effect for interexchange carrier customers in Florida. In fact, however, Verizon Access does not have any switched access ICB with any interexchange carrier customers in Florida and has not had any such ICB in effect in Florida in the last three years.²⁷ Even assuming that the existence of switched access ICBs could somehow constitute a violation of Florida law (it would not), Qwest cannot sustain its claims because no such ICB involving Verizon Access exists.

Moreover, because Verizon Access has no ICBs in place, there is no prospective relief for the Commission to grant. Verizon Access has no more favorable ICB switched access rates to which its price list rates could be lowered; has no “undisclosed” switched access ICBs that it could stop offering; and does not have any switched access ICBs that it could file with the Commission.

Finally, to the extent Qwest is asking the Commission to establish rules to govern CLECs’ switched access ICBs, it has chosen the wrong vehicle to accomplish that objective. Under the Administrative Procedure Act, changes to the Commission’s rules must be made in a rulemaking proceeding,²⁸ not in an individual dispute proceeding like this one.

For all of these reasons, Qwest’s claim for prospective relief against Verizon Access must be dismissed. Verizon Access therefore respectfully requests that the Complaint against it be dismissed with prejudice.

²⁷ Reynolds Aff. ¶¶ 3, 5.

²⁸ Sections 120.52(16), 120.54(1), Florida Statutes.

Respectfully submitted on January 29, 2010.

By: Dulaney L. O'Roark III
Dulaney L. O'Roark III
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770-284-3620 (telephone)
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Attorney for MCImetro Access
Transmission Services LLC d/b/a
Verizon Access Transmission Services

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

Complaint of QWEST COMMUNICATIONS)
COMPANY, LLC, Against MCIMETRO ACCESS)
TRANSMISSION SERVICES LLC (D/B/A VERIZON)
ACCESS TRANSMISSION SERVICES), XO)
COMMUNICATIONS SERVICES, INC., TW) Docket No. 090538-TP
TELECOM OF FLORIDA, L.P., GRANITE)
TELECOMMUNICATIONS, LLC, COX FLORIDA)
TELCOM, L.P., BROADWING COMMUNICATIONS,)
LLC, AND JOHN DOES 1 THROUGH 50,)
For unlawful discrimination.)
_____)

AFFIDAVIT OF PETER H. REYNOLDS

On this 28th day of January, 2010, personally appeared before me in Loudoun County, Virginia, the undersigned, Peter H. Reynolds, a person of lawful age, who being first duly sworn, on his oath, deposes and says:

1. I am the Director, National Carrier Contracts and Initiatives, for Verizon Services Operations. I am responsible for 1) overseeing local interconnection agreements that MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, or "Verizon Access," has or requires with other carriers, 2) vendor and contract management for a wide range of telecommunications service providers, and 3) dispute management involving intercarrier compensation billing for Verizon Access. In this capacity, I am authorized to make these representations.

2. Verizon Access is the only affiliate of Verizon that operates and provides service as a Competitive Local Exchange Carrier ("CLEC") in Florida.

Verizon Access provides switched access service, as well as other telecommunication services, at various locations in Florida. Verizon Access has on file with the Public Service Commission of Florida ("Commission") a price list specifying rates, terms and conditions for the provision of intrastate switched access services. See MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, F.P.S.C. Price List No. 1.

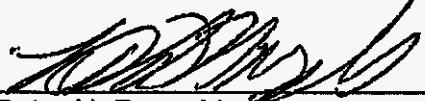
3. At the present time, Verizon Access only offers intrastate switched access service in Florida pursuant to its price list on file with the Commission. Verizon Access does not have any agreement with any interexchange carrier (or any other customer) to provide intrastate switched access service in Florida at rates, terms and conditions that are different than those in its filed price list.

4. On January 27, 2004, Verizon Access entered into a single agreement to provide switched access service in Florida and other states at rates that were different than those in its price list. That agreement was entered into as part of a comprehensive Settlement Agreement that Verizon Access's former corporate parent, WorldCom, entered into to settle numerous contractual, commercial and legal disputes between WorldCom and AT&T that were resolved during the bankruptcy proceeding of WorldCom and its domestic subsidiaries. The Settlement Agreement, including the January 27, 2004 switched access agreement, was publicly disclosed in a "Motion of the Debtors" filed with the U.S. Bankruptcy Court, Southern District of New York, on February 23, 2004, in Case No. 02-13533 (AJG). The Bankruptcy Court provided electronic notice of the filing of the Motion of the Debtors on parties to WorldCom's bankruptcy

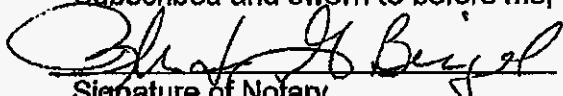
proceeding, held a hearing on the Motion, and approved the Settlement Agreement on March 2, 2004. The switched access agreement had an effective date of January 27, 2004. The term initially was for two years, and was later extended in all material respects for one additional year. The agreement expired on January 26, 2007, and is no longer in effect.

5. Since the expiration of its agreement with AT&T described in the previous paragraph, Verizon Access has not entered into any other agreement to provide intrastate switched access service to any customer in Florida.

6. I have read the "Motion for Final Summary Order Dismissing All Other Claims Against Verizon Access" in Docket No. 090538-TP, and know the contents thereof. I am informed and believe that the matters contained in the Motion are true and correct and on that basis I believe them to be true.


Peter H. Reynolds

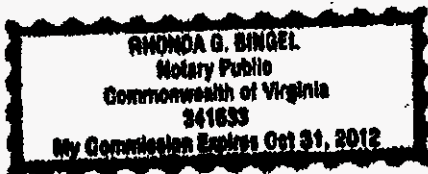
Subscribed and sworn to before me, this 28th day of January, 2010.


Signature of Notary

Rhonda G. Bingel
Printed or typed name of Notary

NOTARY PUBLIC

My commission expires: 10/31/12



By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on January 29, 2010 to the following:

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s/ Dulaney L. O'Roark III