

**Dorothy Menasco**

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**Sent:** Friday, November 18, 2011 4:55 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090538-TP- Qwest Communications Company, LLC - Statement Regarding Disputed Issues 5, 6, 7, 8h  
**Attachments:** 3747\_001.pdf

**From:** Bryson, Arlene **On Behalf Of** Cooke, Michael  
**Sent:** Friday, November 18 2011 4:51 PM  
**To:**  
**Cc:**  
**Subject:**

**Docket No.:**  
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.

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**Filed on behalf of:**  
Qwest Communications Company, LLC

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Eight (8) including this e-mail

**Description:**  
Qwest Communication Company, LLC's - Statement Regarding Disputed Issues 5, 6, 7, 8h

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November 18, 2011

Ms. Ann Cole, Director  
Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
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Re: Docket No. 090538-TP, Qwest Communication Company, LLC d/b/a CenturyLink QCC

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket is Qwest Communication Company, LLC d/b/a CenturyLink QCC's Statement Regarding Disputed Issues 5, 6, 7 and 8h.

Thank you for your assistance with this filing and please do not hesitate to contact me if you have any questions.

Sincerely,

Michael G. Cooke

MGC/  
Enclosure

RM:8170199:1

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

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 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.

Docket No. 090538-TP

Filed: November 18, 2011

**QWEST COMMUNICATIONS COMPANY'S  
STATEMENT REGARDING DISPUTED ISSUES 5, 6, 7 AND 8H**

At the direction of the Prehearing Officer, Qwest Communications Company, LLC d/b/a CenturyLink QCC ("QCC") hereby submits its brief written statement concerning disputed Issues 5, 6, 7 and 8(h). QCC respectfully urges the Prehearing Officer to adopt QCC's version of Issues 5-7 and to delete issue 8(h).

With Commission Staff's facilitation, the parties have largely reached consensus on the tentative issues list. Throughout the process, QCC has shown tremendous flexibility in an attempt to limit controversy and accommodate the unwavering demands of the CLEC respondents. As to Issues 5-7 and 8(h), however, for the reasons set forth below QCC feels that it simply cannot acquiesce.

**1. Issues 5-7**

Issues 5-7 are critical, as they summarize each of QCC's three claims for relief set forth in the Amended Complaint. The parties' diverging proposals are displayed in Appendix A.

The disagreement over these issues focuses on the CLECs' position that any relief awarded to QCC should be limited to actions prior to July 1, 2011, when Ch.2011-36 took effect. By explicitly limiting QCC's theories to Sections 364.01, .08 and .10, the CLECs hope to foreclose the Commission's ability to make a determination regarding QCC refunds for any post-July 1, 2011 conduct. In this respect, the CLECs are

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misusing the issue ID process. In addition, the CLECs' inappropriately narrow statements of the issues do not adequately reflect the Amended Complaint.

The Amended Complaint comprehensively states QCC's claims for relief. In ¶ 4, QCC asserts that the Commission "has jurisdiction over telecommunications companies regarding all matters set forth in Chapter 364 \*\*\* including complaints against CLECs for unreasonably prejudicial, anti-competitive or discriminatory conduct. \*\*\* This includes exercising exclusive jurisdiction to ensure that all telecommunications providers are treated fairly by preventing unreasonable preferential, discriminatory or anti-competitive behavior." QCC cited Section 364.01(4)(g), which has since been recodified as Section 364.16(2). The quoted allegation is restated and incorporated regarding each of the three claims for relief, which are succinctly summarized in QCC's issues 5-7. *See Amended Complaint, ¶¶11-19.*

QCC's recitations of Issues 5-7 simply refer the Commission to the Amended Complaint itself, without expanding or limiting QCC's claims. In contrast, the CLECs' statements of the Issues seek to restrict the Commission's consideration to the statutes *they* recite. Whether or not the Commission may or will determine that the CLECs engaged in behavior that was unreasonably preferential, discriminatory or anti-competitive either before or after July 1, 2011 is an issue for the Commission to address as part of its final ruling on Qwest's Complaint. The purpose of the issue identification process is not to alter or limit the complainant's causes of action, yet this is precisely what the CLECs seek to do. Nor is there any need for QCC to amend its complaint to change the reference from 364.01(4)(g) to 364.16(2). The CLECs insist that they are entitled to notice of those statutes they are being accused of violating. QCC agrees, and QCC's Issues 5-7 squarely point the CLECs and the Commission back to the Amended Complaint by use of the phrase, "as alleged in Qwest's \_\_\_ Claim for Relief."

Further, QCC's Issues 5-7 are far more streamlined than the CLECs' variants. They also more fairly permit each party to lodge their respective arguments, as framed by the Amended Complaint and the CLECs' Answers. QCC's Issues 5-7 do not preclude any party from making its arguments, and do not re- or mis-characterize the complaint or the answers. Nor do they preclude any parties' ability to seek relief from the Commission should another party make a procedurally-inappropriate argument. QCC's Issues 5-7 should be adopted.

2. **Issue 8(h)**

Issue 8 summarizes the CLECs' affirmative defenses *and* provides a catch-all for any yet-unarticulated affirmative defense (see issue 8(i)).

Issue 8(h) is inappropriate for two reasons. First, it is unnecessary, as the Issue 8(i) catchall will permit the CLECs to raise this issue should they so desire. Second, as worded, Issue 8(h) is confusing and suggests that a finding *has been made elsewhere*, or should be made in this case, that the secret switched access agreements are "void, illegal or unenforceable." This case is not a civil contract dispute whereby one party seeks to disavow its contractual obligation by convincing the court that the contract is unenforceable as a matter of contract law. And, contrary to the CLECs' wording of Issue 8(h), no finding has been made elsewhere that the subject contracts are void or unenforceable.<sup>1</sup> To QCC's knowledge, none of the respondent CLECs has pursued such civil relief or has refused to abide by their contractual obligations under the secret discount agreements. Yet, Issue 8(h) suggests otherwise. Because it is disingenuous and misleading, and because the issue is irrelevant to the Commission's resolution of QCC's claims, the issue should simply be deleted. At bare minimum, the Commission should replace the CLEC-proposed language with the compromise language suggested during the issue identification process by Staff. See Appendix A. While QCC would prefer the issue simply be deleted, if the Prehearing Officer concludes that it should be included, adoption of Staff's suggested language will ensure a more neutral and straightforward presentation of the issue.

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<sup>1</sup> As the CLECs frequently repeat, QCC made such an allegation in a Minnesota state civil complaint in 2007. That case was dismissed and, as CLEC counsel is aware, no finding was entered that the contracts are void, illegal or unenforceable. The Colorado PUC reached this exact conclusion earlier this week in its final order granting QCC's complaint in a parallel proceeding. See Decision No, C11-1216, Colorado PUC Docket No. 08F-259T (mailed Nov. 15, 2011), ¶¶105-107.

## APPENDIX A

### (Summary of Disputed Issues 5-7, 8h)

<del>Issues 5-7</del>	
QCC	CLECs
<p>5) Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?</p>	<p>5) Did a CLEC's alleged failure to provide Qwest the same pricing for switched access service as the CLEC provided in any CLEC/IXC agreement for switched access service:</p> <p style="margin-left: 20px;">a) constitute extending an advantage, benefit or privilege not regularly and uniformly extended under like circumstances for like or substantially similar services, and, if so, did it violate Section 364.08(1), Florida Statutes (2010), or</p> <p style="margin-left: 20px;">b) constitute an undue or unreasonable preference or advantage to any person or subject Qwest to undue or unreasonable prejudice or disadvantage, and, if so, did it violate Section 364.10(1), Florida Statutes (2010)?</p>
<p>6) Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful, as alleged in Qwest's Second Claim for Relief?</p>	<p>6) Did any CLEC/IXC agreement for switched access service in this case deviate from the CLEC's published price list? If so, did such deviation violate 364.04(1) and (2), F.S. (2010)?</p>
<p>7) Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?</p>	<p>7) Did any CLEC named in Count III have a switched access price list that required the CLEC to offer Qwest the lowest agreement rate for switched access service, and if so, under what conditions (e.g., must Qwest be similarly situated to the IXCs that received the lowest rates; did Qwest, among other things, request the lowest rates; etc.)? Were these conditions met, and, if they were met, did a failure on the part of the CLEC to offer Qwest the lowest agreement rate violate Section 364.04(1) and (2), (2010), Florida Statutes?</p>

<del>Issue 8h</del>		
QCC	CLECs	Staff
<p>[delete issue]</p>	<p>Are QCC's claims barred or limited, in whole or in part by: *** <i>a finding that a switched access service agreement between any separate service agreement between a CLEC and IXC is void, illegal, or unenforceable.</i></p>	<p>Are QCC's claims barred or limited, in whole or in part by: *** <i>alleged unenforceability of the switched access agreements between and IXCs.</i></p>

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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery and/or U.S. Mail this 18<sup>th</sup> day of November, 2011, to the following:

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