

**Marguerite McLean**

090538-TP

**From:** Nicki Garcia [NGarcia@gunster.com]  
**Sent:** Tuesday, November 16, 2010 3:45 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Lee Eng Tan; Beth Keating; 'aklein@kleinlawpllc.com'; 'adam.sherr@qwest.com'; 'de.oroark@verizon.com'; 'janewhang@dwt.com'; 'Mary.smallwood@gray-robinson.com'; 'Chris.bunce@birch.com'; 'Tony.mastando@deltacom.com'; 'Edward.Krachmer@windstream.com'; 'Eric.branfman@bingham.com'; 'rcurrier@granitenet.com'; 'Kenneth.culpepper@cox.com'; Matthew Feil; 'Ed.baumgardner@level3.com'; 'Carolyn.Ridley@twtelecom.com'; 'John.ivanuska@xo.com'; Beth Salak; 'marsha@reuphlaw.com'; David Christian  
**Subject:** Electronic Filing - Docket No. 090538-TP  
**Attachments:** 20101116152407267.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:**

Matthew Feil  
 Gunster Law Firm  
 215 South Monroe Street, Suite 618  
 Tallahassee, FL 32301  
 Direct: 850-521-1708  
 Main: 850-521-1980  
[mfeil@gunster.com](mailto:mfeil@gunster.com)

**Docket Name and Number:** 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 connection with the provision of intrastate switched access services in alleged of Sections 364.08 and 364.10, F.S.

**Filed on Behalf of:** DeltaCom, Inc.

**Total Number of Pages:** 12

**Description of Documents:** Answer and affirmative defenses

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DOCUMENT NUMBER-DATE

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11/16/2010

FPSC-COMMISSION CLERK



# GUNSTER

ATTORNEYS AT LAW

Writer's Direct Dial Number: 850-521-1708  
Writer's E-Mail Address: mfeil@gunster.com

November 16, 2010

## ELECTRONIC FILING

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

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 connection with the provision of intrastate switched access services in alleged of Sections 364.08 and 364.10, F.S.

Dear Ms. Cole:

Attached for filing in the above referenced Docket, please find enclosed the Answer and Affirmative Defenses of DeltaCom, Inc.

If you have any questions, please contact me at 850-521-1708.

Sincerely,



Matthew J. Feil

MJF  
Attachment

cc: Parties of Record

DOCUMENT NUMBER-DATE

215 South Monroe Street, Suite 618 | Tallahassee, FL 32301-1804 | 850.521.1980 | Fax: 850.576.0902 | [www.gunster.com](http://www.gunster.com)

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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 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.

Docket No. 090538-TP

Filed: November 16, 2010

**ANSWER AND AFFIRMATIVE DEFENSES OF DELTACOM, INC.**

DeltaCom, Inc. ("DeltaCom"), by and through its undersigned counsel, and pursuant to Rule 28-106.203, Florida Administrative Code, and Commission Order No. PSC-10-0629-PCO-TP, issued October 22, 2010,<sup>1</sup> hereby files its Answer, Affirmative Defenses and Counterclaims to the Complaint of Qwest Communications Company, LLC ("QCC"),<sup>2</sup> and states as follows:

**ANSWER**

1. DeltaCom lacks personal knowledge of the facts alleged in Paragraph 1 and accordingly neither admits nor denies those allegations.

<sup>1</sup> The Commission's Order Granting Leave to File Amended Complaint permitted Qwest to amend its original complaint and gave respondents until November 16 to file any responses to the amended complaint.

<sup>2</sup> DeltaCom also reserves the right to join/adopt pleadings filed by other CLEC respondents.

2. DeltaCom lacks personal knowledge of the allegations in subparagraphs (a) – (j) and (l) - (t) in paragraph 2 concerning other carriers and accordingly neither admits nor denies those allegations, but QCC has had over a year to conduct its “ongoing investigation.” DeltaCom admits the allegations in subparagraph (k) of paragraph 2 but specifies that the certificate number cited is DeltaCom’s CLEC certificate

3. Paragraph 3 states a legal conclusion, rather than an allegation of fact, and accordingly DeltaCom neither admits nor denies that conclusion.

4. Paragraph 4 states a series of legal conclusions, rather than allegations of fact, and accordingly DeltaCom neither admits nor denies those conclusions and denies any statements that are inconsistent with applicable law.

5. Paragraph 5 states a series of legal conclusions, rather than allegations of fact, and accordingly DeltaCom neither admits nor denies those conclusions and denies any statements that are inconsistent with applicable law.

6. DeltaCom admits that it has filed a price list and/or tariff (hereafter “price list”) with the Commission for intrastate access services and rates in Florida. DeltaCom lacks personal knowledge of the facts alleged as to the other companies and accordingly neither admits nor denies those allegations.

7. DeltaCom admits that it provides and bills QCC for intrastate switched access services in Florida. DeltaCom lacks personal knowledge of the extent of QCC’s operations in Florida, including but not limited to the quantity of intrastate switched access services that QCC purchases from other local exchange carriers, and therefore, DeltaCom neither admits nor denies the remainder of the allegations in paragraph 7.

8. The public record in the Minnesota Public Utilities Commission proceeding referenced in paragraph 8 speaks for itself, and DeltaCom denies any and all factual allegations that are inconsistent with that record.

9. The public record in the Minnesota Public Utilities Commission proceeding referenced in paragraph 9 speaks for itself, and DeltaCom denies any and all factual allegations that are inconsistent with that record.

10. DeltaCom lacks personal knowledge of the allegations in subparagraphs (a) – (j) and (l) - (t) in paragraph 10 concerning other carriers and accordingly neither admits nor denies those allegations. With respect to the allegations in subparagraph (k), DeltaCom states as follows:

i. DeltaCom admits that it has billed QCC for switched access (“SWA”) services out of Section 3 of the DeltaCom SWA Price List approved by and on file with the Commission but specifies that the ITC^DeltaCom Communications, Inc (“ITC^ DeltaCom”) Price List is not for a different entity, but for the same entity, because ITC^DeltaCom changed its name to DeltaCom March 2006<sup>3</sup> and the price list was updated to reflect that name change. DeltaCom otherwise denies the allegations in subparagraph 10.k.i.

ii. DeltaCom denies any allegations in the first sentence insofar as those allegations pertain to any entities which are not named respondents in this case and insofar as those allegations pertain to DeltaCom as a successor in interest to any entity. Further, as to the first and second sentences, for Florida, QCC has not attached any such agreements to its Amended Complaint and therefore, DeltaCom can neither admit nor deny QCC’s over-broad allegations but denies that any such agreements triggered any

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<sup>3</sup> See PSC Order No. 06-0460-FOF-TP, issued May 25, 2006, acknowledging the name change.

obligation vis-vis QCC within applicable law or limitations periods. As applied to states other than Florida, any such agreements are beyond the Commission's jurisdiction and accordingly DeltaCom neither admits nor denies those allegations. DeltaCom denies the remainder of the allegations in 10.k.ii, but DeltaCom admits that it provides and has provided QCC with intrastate switched access services in Florida under the rates, terms, and conditions of DeltaCom's applicable price lists rather than any agreement, DeltaCom admits that QCC operates as an IXC in Florida, and DeltaCom admits that QCC made a request for information to DeltaCom but denies the request had the character or significance QCC alleges.

11. DeltaCom restates and incorporates its answers in the foregoing paragraphs as if fully set forth here.

12. Paragraph 12 states legal conclusions, rather than allegations of fact, and accordingly DeltaCom neither admits nor denies those conclusions. Florida statutes speak for themselves, and DeltaCom denies any characterization of those statutes that is not consistent with applicable law.

13. DeltaCom denies the allegations in Paragraph 13 as they relate to DeltaCom. DeltaCom lacks personal knowledge regarding the allegations concerning other Respondent CLECs and accordingly neither admits nor denies those allegations.

14. DeltaCom restates and incorporates its answers in the foregoing paragraphs as if fully set forth here.

15. DeltaCom admits that it has filed price lists for its intrastate switched access services in Florida, but DeltaCom lacks personal knowledge regarding the allegations in the last sentence of paragraph 15 concerning other Respondent CLECs and

accordingly neither admits nor denies those allegations. The remainder of paragraph 15 states legal conclusions, rather than allegations of fact, and accordingly DeltaCom neither admits nor denies those conclusions. *Florida Statutes and Commission rules speak for themselves*, and DeltaCom denies any characterization of those statutes and rules that is not consistent with applicable law.

16. DeltaCom denies the allegations in paragraph 16 as they relate to DeltaCom within the applicable law and limitations periods. *DeltaCom lacks personal knowledge regarding the allegations concerning other Respondent CLECs and accordingly neither admits nor denies those or the other allegations of fact in paragraph 16 that are outside the Commission's jurisdiction.*

17. DeltaCom is not a named respondent for *Count III of the Complaint*; therefore, no response to this allegation is required. To the extent necessary, DeltaCom restates and incorporates its responses to the foregoing paragraphs as if fully set forth in paragraph 17.

18. DeltaCom is not a named respondent for *Count III of the Complaint*; therefore, no response to this allegation is required. To the extent necessary, DeltaCom states that it objects to the characterizations of the Florida statutes. The statutes speak for themselves with regard to the law and jurisdiction in Florida.

19. DeltaCom is not a named respondent for *Count III of the Complaint*; therefore, no response to this allegation is required or necessary.

### **QWEST'S PRAYER FOR RELIEF**

QCC's Prayer for Relief fails to specify which of its requested remedies applies to which counts of the Complaint. The Commission cannot impose conflicting or redundant remedies, so the Commission cannot grant QCC's requested relief as stated, absent sufficient clarity and lawful justification. This notwithstanding, DeltaCom denies that QCC is entitled to the relief it requests in its Prayer for Relief or any other relief, and DeltaCom otherwise denies all allegations in QCC's complaint not expressly addressed above. DeltaCom therefore, requests that the Commission deny QCC's complaint and dismiss it with prejudice.

### **DELTACOM'S AFFIRMATIVE DEFENSES**

1. The Complaint fails to state a claim upon which relief may be granted.
2. The Complaint is barred, in whole or in part, by the limitations period(s) established by applicable law and by the doctrine of laches.
3. The Complaint is barred, in whole or in part, by the filed rate doctrine.
4. The Complaint is barred, in whole or in part, by the doctrines of waiver and estoppel.
5. The Complaint is barred, in whole or in part, because the Commission lacks jurisdiction over the subject matter and lacks the authority to order the relief requested.
6. The Complaint is barred, in whole or in part, by the doctrine of unclean hands.
7. The Complaint is barred, in whole or in part, because the relief requested would violate the prohibitions against retroactive ratemaking.



8. QCC lacks standing to seek the relief it has requested in its Complaint.

9. QCC failed to properly dispute DeltaCom's SWA bills. For all billing periods covered by a negotiated settlement between DeltaCom and another IXC concerning disputed SWA bills, there is not, as a matter of law, any undue privilege or advantage in favor of that IXC against QCC.

10. Subsection 2.11 of DeltaCom's Florida Switched Access Price List provides, "All claims must be submitted to the company within 120 days of receipt of billing for those services. If the Customer does not submit a claim as stated above, the Customer waives all rights to filing a claim thereafter."<sup>4</sup> QCC failed to dispute invoices within 120 days; therefore, QCC's claims inconsistent with the required dispute date are barred.

11. The Commission does not set or limit CLECs' SWA rates, does not require CLECs to file SWA price lists, and does not require CLECs to file or even post notice of individual case based ("ICB") agreements for SWA services. Further, SWA services are not consumer services, but rather are inter-carrier services purchased by very sophisticated, and often very large, companies like QCC. QCC's requested remedies would create a regulatory paradox: the Commission setting rates (through reparations/damages and prospective rate adjustments) for CLEC inter-carrier services when the Commission does not have regulatory authority to set such rates. Exacerbating that paradox is that QCC's requested relief goes well beyond the Commission's rate-making powers for rates the Commission actually does have express statutory authorization to set because QCC asks the Commission to set rates retrospectively, and

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<sup>4</sup> Subsection 2.10.3 provides, "In the event the Company incurs fees and expenses, including attorneys fees and/or court costs, in collecting, or attempting to collect any charges owed to the Company, the Customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred."

for an undefined prior period, as well as prospectively. QCC's claims are thus inconsistent with "light touch" regulation of CLECs intended by Chapter 367 and therefore must be denied.

12. QCC is not now and has not been discriminated against as a similarly situated carrier for several reasons, including but not limited to, traffic volume or payment or dispute history. Because QCC is not "similarly situated," QCC's claims against DeltaCom must fail.

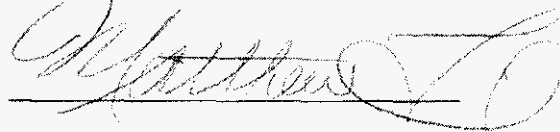
13. DeltaCom reserves the right to designate additional defenses as they become apparent throughout the course of discovery, investigation and otherwise.

Dated this 16th day of November, 2010.

Respectfully submitted,

DeltaCom, Inc.

By:



Matthew J. Feil  
Gunster Yoakley & Stewart, PA  
215 S. Monroe St., Suite 618  
Tallahassee, FL 32301  
(850) 521-1705  
Attorneys for DeltaCom, Inc.

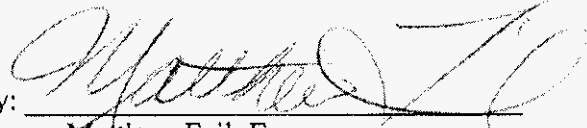
### CERTIFICATE OF SERVICE

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 16<sup>th</sup> day of November, 2010.

<p>Theresa Tan Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 <a href="mailto:ltan@psc.state.fl.us">ltan@psc.state.fl.us</a></p>	<p>Mary Smallwood GrayRobinson, P.A. 301 S. Bronough Street, Ste 600 Post Office Box 11189 Tallahassee, FL 32302 <a href="mailto:Mary.smallwood@gray-robinson.com">Mary.smallwood@gray-robinson.com</a></p>
<p>Beth Keating Gunster Law Firm 215 South Monroe Street, Ste 618 Tallahassee, FL 32301 <a href="mailto:bkeating@gunster.com">bkeating@gunster.com</a></p>	<p>Adam L. Scherr Qwest Communications Company, LLC 1600 7<sup>th</sup> Avenue, Room 1506 Seattle, WA 98191 <a href="mailto:Adam.sherr@qwest.com">Adam.sherr@qwest.com</a></p>
<p>Andrew M. Klein Klein Law Group PLLC 1250 Connecticut Avenue, NW Suite 200 Washington, DC 20036 <a href="mailto:AKlein@KleinLawPLLC.com">AKlein@KleinLawPLLC.com</a></p>	<p>Dulaney O'Roarke Verizon Six Concourse Parkway, NE Suite 800 Atlanta, GA 30328 <a href="mailto:De.oroark@verizon.com">De.oroark@verizon.com</a></p>
<p>Jane Whang Davis Wright Tremain Suite 800 505 Montgomery Street San Francisco, CA 94111 <a href="mailto:JaneWhang@dwt.com">JaneWhang@dwt.com</a></p>	<p>Access Point, Inc. 1100 Crescent Green, Suite 109 Cary, NC 27518</p>
<p>Chris Bunce Birch Communications, Inc. 2300 Main Street, Suite 600 Kansas City, MO 64108 <a href="mailto:Chris.bunce@birch.com">Chris.bunce@birch.com</a></p>	<p>Budget PrePay, Inc. 1325 Barksdale Boulevard, Suite 200 Bossier City, LA 71111</p>
<p>BullsEye Telecom, Inc. 25900 Greenfield Road, Suite 330 Oak Park, MI 48237</p>	<p>D. Anthony Mastando DeltaCom, Inc. 7037 Old Madison Pike Hunsville, AL 35806 <a href="mailto:Tony.mastando@deltacom.com">Tony.mastando@deltacom.com</a></p>

<p>Earnest Communications, Inc.  5275 Triangle Parkway, Suite 150  Norcross, GA 30092</p>	<p>Flatel, Inc.  Executive Center, Suite 100  2300 Palm Beach Lake Boulevard  West Palm Beach, FL 33409</p>
<p>Lightyear Network Solutions, LLC  1091 Eastpoint Parkway  Louisville, KY 40223</p>	<p>Navigator Telecommunications, LLC  Post Office Box 13860  North Little Rock, AR 72113</p>
<p>PaeTec Communications, Inc.  One PaeTec Plaza  600 Willowbrook Office Park  Fairport, NY 14450</p>	<p>STS Telecom, LLC  Post Office Box 822270  Pembroke Pines, FL 33082</p>
<p>US LEC of florida, LLC d/b/a  PaeTec Business Services  6801 Morrison Boulevard  Charlotte, NC 28211</p>	<p>Ed Krachmer  Windstream NuVox, Inc.  Director &amp; Regulatory Counsel  Windstream Communications, Inc.  4001 Rodney Parham Rd.  MS: 1170-B1F03-53A  Little Rock, AR 72212  <a href="mailto:Edward.Krachmer@windstream.com">Edward.Krachmer@windstream.com</a></p>
<p>Eric J. Branfman  Bingham McCutchen LLP  2020 K Street, NW  Suite 1100  Washington, DC 20006  <a href="mailto:Eric.branfman@bingham.com">Eric.branfman@bingham.com</a></p>	<p>Marsha Rule  Rutledge, Ecenia, Purnell &amp; Hoffman  215 South Monroe Street  Suite 420  Tallahassee, FL 32301  <a href="mailto:marsha@reuphlaw.com">marsha@reuphlaw.com</a></p>
<p>David Christian  106 E. College Avenue, Suite 710  Tallahassee, FL 32301  <a href="mailto:David.Christian@verizon.com">David.Christian@verizon.com</a></p>	<p>Dulaney L. O'Roark, Esquire  5055 North Point Parkway  Alpharetta, GA 30022  <a href="mailto:De.oroark@verizon.com">De.oroark@verizon.com</a></p>
<p>Granite Telecommunications, LLC  100 Newport Avenue Extension  Quincy, MA 02171  <a href="mailto:rcurrier@granitenet.com">rcurrier@granitenet.com</a></p>	<p>Mr. Ken Culpepper  Cox Communications  7401 Florida Boulevard  Baton Rouge, LA 70806  <a href="mailto:Kenneth.culpepper@cox.com">Kenneth.culpepper@cox.com</a></p>

<p>Mr. Gregg Strumberger  Broadwing Communications, LLC  c/o Level 3 Communications, Tax Dept.  712 North Main Street  Coudersport, PA 16915  <u><a href="mailto:Ed.baumgardner@level3.com">Ed.baumgardner@level3.com</a></u></p>	<p>Ms. Carolyn Ridley  tw telecom of florida l.p.  c/o Time Warner Telecom  555 Church Street, Suite 2300  Nashville, TN 37219  <u><a href="mailto:Carolyn.Ridley@twtelecom.com">Carolyn.Ridley@twtelecom.com</a></u></p>
<p>Mr. John Ivanuska  XO Communications  10940 Parallel Parkway, Suite K  #353  Kansas City, KS 66109  <u><a href="mailto:John.ivanuska@xo.com">John.ivanuska@xo.com</a></u></p>	<p>Beth Salak  Florida Public Service Commission  2540 Shumard Oak Boulevard  Tallahassee, FL 32399  <u><a href="mailto:bsalak@psc.state.fl.us">bsalak@psc.state.fl.us</a></u></p>

By:   
Matthew Feil, Esq.