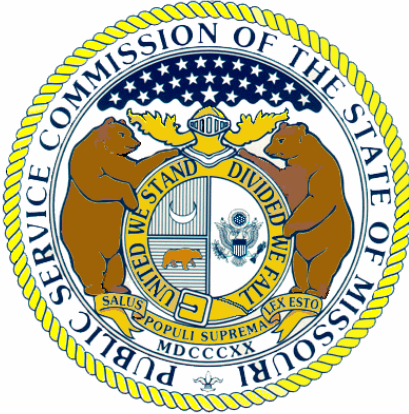


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Application of Embarras Missouri, Inc.,)
for Competitive Classification Under Section 392.245.5,)
RSMo 2005.)

Case No. IO-2006-0551
Tariff No. YI-2007-0002

REPORT AND ORDER

Issue Date: July 20, 2006

Effective Date: July 28, 2006

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Embarq Missouri, Inc.,)
for Competitive Classification Under Section 392.245.5,) **Case No. IO-2006-0551**
RSMo 2005.) **Tariff No. YI-2007-0002**

Appearances

Linda K. Gardner, Esq., Embarq Missouri, Inc., 6450 Sprint Parkway, Overland Park, Kansas 66251, for Embarq Missouri, Inc.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, and **David A. Meyer**, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo 2005, for residential services, other than exchange access service, for the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History and Pending Motions

On June 29, 2006, Embarq Missouri, Inc., filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. On July 3, 2006, Embarq filed a motion requesting to amend its application by attaching a verification page to it. Section (20) of 4 CSR 240-2.080 states that any party may amend a pleading within ten days without leave of the Commission if no responsive pleading has been filed. Therefore, the amended pleading is accepted.

In its application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. Concurrent with the filing of its application, Embarq filed proposed tariffs to become effective on July 31, 2006, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than July 6, 2006. No request for intervention was received.

The Commission also directed that any objections or recommendations from the Office of the Public Counsel or any other interested party be filed no later than July 10, 2006. On July 11, 2006, the Public Counsel filed its objections and a request to be allowed to file the pleading one day out of time due to technical difficulties. The Commission hereby grants the motion.

Staff filed its recommendation on July 10, 2006. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits

provided information about customers being served in the relevant exchanges. Staff recommended that Embark's application be granted.

The Commission held a hearing on July 18, 2006. Staff, Embark, and Public Counsel were represented at the hearing. The parties were given the opportunity to give closing arguments at the hearing in lieu of briefs. The Commission heard testimony from Staff's witnesses, Walt Cecil and Jon Van Eschen, and from Embark's witness, John Idoux.

On July 19, 2006, Staff moved to supplement the record in order to clarify its recommendation and the testimony of John Van Eschen. Staff's motion shall be granted.

Overview

Embark is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

On July 14, 2005, Senate Bill No. 237¹ (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute² for

¹ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), codified at Section 392.245, RSMo Cum. Supp. 2005.

² Section 392.245, RSMo.

determining whether the business and residential services of a price cap regulated ILEC should be classified as competitive in an exchange.

Before S.B. 237, the Commission was required to determine that “effective competition” existed for the requested services in the designated exchanges before classifying those services as competitive. Under this “effective competition” standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, however, the Commission no longer determines whether “effective competition” exists. Rather, S.B. 237 focuses on the number of carriers providing “basic local telecommunications service” within an exchange. The Commission must classify the ILEC’s services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.³

The statute provides that one commercial mobile radio service (CMRS) provider can be counted as an entity providing basic local telecommunications services.⁴ The other entity that can be counted as providing basic local telecommunications services is one that provides “local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest.”⁵ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

³ Section 392.245.5, RSMo.

⁴ Section 392.245.5(1), RSMo.

⁵ Section 392.245.5(2), RSMo.

Embarq's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in five exchanges.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Embarq is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020. Embarq is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245.

Embarq requested that the Commission classify the residential services, except for exchange access, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges as competitive. In support of this request, Embarq filed its verified application including maps of the service territory of wireless carriers in the relevant exchanges.⁶ Embarq also alleged that Comcast, through its Comcast Digital Voice® affiliate, is offering local phone service to residential customers and that Embarq has "experienced customer loss" in the subject exchanges as a result. Embarq cited to Comcast's website

⁶ Exhibit A.

www.comcast.com for further information. In addition, Embarq filed proposed tariff sheets.⁷

Embarq's witness, John Idoux, also appeared and testified at the hearing in support of the amended application.

Staff provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. Walt Cecil and John Van Eschen of the Commission's Telecommunications Department testified in support of the application at the hearing. According to Staff's recommendation, all of the exchanges for which Embarq requests competitive status have at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to at least two residential customers with addresses within the exchange. In addition, according to Staff the wireless and wireline companies have the ability to provide local numbers to those customers.

Comcast Phone of Missouri, L.L.C., is a company certificated by the Commission to provide basic local telecommunications services. Its affiliate, Comcast Digital Voice, a non-certificated entity, is providing voice over internet protocol (VoIP) services to two or more customers in the subject exchanges. Comcast Digital Voice uses facilities owned by itself and/or its affiliates to provide local service from the customer premise to the "head-end" (similar to a central office). Comcast Phone provides Comcast Digital Voice with telephone numbers, collects and pays access and collects and pays Universal Service Fund and relay surcharges for Comcast Digital Voice. A Comcast company also owns an IP-based switch with all the functionality of a traditional Class 5 switch.

⁷ Exhibit B.

Attached to Staff's recommendation were the affidavits of John G. Sullivan, Vice President of Comcast Phone of Missouri, LLC, d/b/a Comcast Digital Phone,⁸ Kenneth A. Schifman, Director, State Regulatory, Sprint Nextel Corporation,⁹ Lawrence J. Krajci, Staff Manager of External Affairs of Alltel Communications, Inc.,¹⁰ and Teri Y. Ohta, Corporate Counsel, on behalf of T-Mobile Central, LLC.¹¹

The affidavits of the wireless carriers indicated that there were at least two wireless residential customers in each exchange. Alltel stated that it has at least two customers in the Oak Grove, Odessa, and Pleasant Hill exchanges. T-Mobile indicated that it has at least two customers in the Oak Grove and Odessa exchanges. Neither Alltel nor T-Mobile can identify its customers as residential or business. Sprint, however, stated that it had at least two residential customers residing at addresses in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.

Staff also stated in its recommendation that Embarq had provided it with local exchange routing guide (LERG) information indicating that local numbering resources are available in the five exchanges and that numbering assignments have been made to at least one of the wireless companies. The LERG information also indicated that the certificated Comcast company had received numbering assignments. In addition, each of these exchanges is part of the Kansas City Metropolitan Calling Area (MCA).

The Commission finds that the facts as submitted in the verified application, the verified Staff Recommendation, including the affidavits of competing carriers and the

⁸ Attachment 1.

⁹ Attachment 2.

¹⁰ Attachment 3.

¹¹ Attachment 4.

hearing testimony are reliable and support the grant of competitive classification in the requested exchanges. Based on that information, the Commission finds that Comcast is providing facilities-based local voice service to residential customers in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. In addition, the Commission finds that there is at least one non-affiliated CMRS carrier providing service to residential customers in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo, as amended in 2005 by S.B. 237, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Embarq is an incumbent local exchange telecommunications company and has requested competitive classification of its business or residential services in several exchanges.

Section 392.245.5, RSMo, as amended in 2005 by SB 237, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecom-

munications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing “basic local telecommunications services.”¹² The statute also requires the Commission to consider as a “basic local telecommunications service provider” any entity providing “local voice” service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest.¹³

S.B. 237 defines “local voice service” as meaning “[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo.”¹⁴

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”¹⁵

¹² Section 392.245.5(1).

¹³ Section 392.245.5(2).

¹⁴ Section 392.245.5(3).

¹⁵ Section 386.020(52).

Embarq is asserting that its services in various exchanges should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.¹⁶

DECISION

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing “local voice” service, in whole or in part, over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that Embarq’s application for competitive classification of its residential services, other than exchange access services, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges should be granted.

As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of July 31, 2006. Since the submitted tariff complies with the Commission’s decision, that tariff is approved.

IT IS ORDERED THAT:

1. The verified application as amended on July 3, 2006, by Embarq Missouri, Inc., is accepted.

¹⁶ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

2. The Office of the Public Counsel's Request for Leave to File Out of Time is granted.

3. The Motion to Supplement the Record filed by the Staff of the Missouri Public Service Commission on July 19, 2006, is granted.

4. Embarr Missouri, Inc.'s residential services, other than exchange access service, are classified as competitive in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.

5. Embarr Missouri, Inc.'s proposed tariff revisions (Tracking No. YI-2007-0002) filed on June 29, 2006, are approved to become effective for service on or after July 31, 2006.

6. All other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.

7. This Report and Order shall become effective July 28, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., and Clayton, C., concur;
Gaw, C., concurs, with separate
concurring opinion to follow;
and certify compliance with the
provisions of Section 536.080, RSMo.
Murray and Appling, CC., absent.