

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

In the Matter of the review of the)	
Competitive Classification of the Exchanges)	Case No. IO-2008-0092
Of Embarq Missouri, Inc., d/b/a Embarq)	

**EMBARQ MISSOURI, INC.'S REPLY TO
OPC'S REQUEST FOR AN EVIDENTIARY HEARING**

EMBARQ Missouri, Inc. ("Embarq") respectfully submits the following Reply to the Office of Public Counsel's ("OPC's") October 30, 2007 Request for an Evidentiary Hearing ("Motion") and states as follows:

I. OPC HAS NOT PROVIDED ANY JUSTIFICATION FOR AN EVIDENTIARY HEARING.

On September 28, 2007, Staff filed its Staff Report concerning its review of the continued competitive classification of Embarq's competitively classified exchanges in which Staff concluded that conditions for competitive classification continue to exist. In addition, on October 29, 2007, Staff filed a Supplemental Report maintaining its prior recommendation that the Commission find that competitive conditions continue to exist in Embarq's exchanges and in part updating Staff's Memorandum to include more recent Competitive Local Exchange Company ("CLEC") information. In addition, Staff filed its Memorandum along with a sworn affidavit asserting that the information included was in fact true and correct. Moreover, Staff based its conclusions and recommendation in its report on a comprehensive review and analysis of annual reports filed with the Commission by the CLECs operating in Embarq exchanges. As such, the fundamental basis for Staff's conclusions is the data submitted by the competitors themselves, the CLECs.

In its motion, OPC asks the Commission to require “strict proof”¹ of compliance with the statutory requirements contained in Section 392.245. However, while making the assertion that “strict proof” is needed, at no time does OPC dispute the validity of the CLEC annual report data, or dispute the validity of Staff’s ultimate recommendation. Moreover, OPC has not identified or provided any evidence to support its request for a hearing; rather, OPC has simply made a broad request for an evidentiary hearing without demonstrating a legal or factual basis or need for a hearing. OPC asserts that “a factual record of the proceeding” is needed to “serve as the basis of the Commission’s decision.”² As discussed below, this is legally incorrect. Moreover, Staff’s verified Memorandum and supporting data provides all the factual support necessary to establish the lawfulness of a Commission decision finding that the conditions for competitive classification continue to exist in Embarq’s competitive exchanges.

II. THERE IS NO STATUTORY BASIS FOR REQUIRING AN EVIDENTIARY HEARING UNDER THESE CIRCUMSTANCES

The Commission is required to periodically review the exchanges in which it has granted competitive classification to determine if conditions have changed. Subsection 392.245.5, RSMo, states:

The commission shall, at least every two years, or where an incumbent local exchange telecommunications company increases rates for basic local telecommunications services in an exchange classified as competitive, review those exchanges where an incumbent local exchange carrier’s services have been classified as competitive, to determine if the conditions of this subsection for competitive classification continue to exist in the exchange and if the commission determines, after hearing, that such conditions no longer exist for the incumbent local exchange telecommunications company in such exchange, it shall reimpose upon the incumbent local exchange telecommunications company, in such exchange, the provisions of paragraph (c) of subdivision (2) of subsection 4 of

¹ OPC Request for an Evidentiary Hearing p. 1

² *Id.*

section 392.200 and the maximum allowable prices established by the provisions of subsections 4 and 11 of this section . . .³

This statutory language states that only after a hearing can the Commission *revoke* competitive classification. However, nowhere does the statute require a hearing to determine whether conditions for competitive classification continue to exist. If the legislative intent was to require a hearing every two years, the statute would have explicitly stated this requirement. Consequently, there is no statutory requirement for a hearing, unless the Commission initially agrees that there is some basis to pursue revocation of competitive classification. When a hearing is not required by law and the Commission proceeds on that basis, i.e., via a noncontested case, the Commission's decision need only be "lawful" (statutorily authorized) and the decision does not need to be based on "competent and substantial evidence on the whole record."⁴ Therefore, the Commission does not have to hold a hearing, or make findings of fact, *per se*, in this case, and a Commission order citing to the requirements of Section 392.245.5.(6) and citing to the information in Staff's verified Memorandum would easily establish the lawfulness of an order finding that the conditions for competitive classification still exist.

In addition to the explicit language in Section 392.245.5.(6), the overall statutory scheme in Section 392.245.5.(6) clearly evidences legislative intent that these periodic reviews *should not* result in a hearing unless competitive classification is likely to be revoked. For example, the statutory language identifies two types of competitive exchanges, the "60-day track" and the "30-day track." The "30-day track" requires that the Commission designate the business and/or residential services in an exchange as competitive within 30-days of a request if the Commission finds that "two nonaffiliated entities in addition to the incumbent local exchange company are

³ Section 392.245.5, RSMo.

⁴ See *State ex rel. Public Counsel v. Public Service Commission, et al.*, 210 S.W.3d 344, 349, 354 – 355 (Mo. Ct. App. 2006).

providing basic local telecommunications service to [business and/or] residential customers within the exchange.”⁵ The criteria for obtaining competitive classification under the “30-day track” requires a lesser showing and does not contain a public interest element as is required under the “60-day track,” a fact recently conceded by OPC.⁶ All of Embarq’s exchanges that are being reviewed in this case are considered “30-day track” exchanges. Accordingly, the standard for initially ordering competitive classification under the 30-day track is very straightforward and objective. It follows that the statute would not impose a higher or more subjective standard for these periodic reviews than for the initial grant of relief, and there is no statutory language to support such a differing standard for these periodic reviews by the Commission. However, in the final paragraph of OPC’s Motion, OPC requests a wide-ranging evidentiary investigation for the ostensible purpose of demonstrating the “extent of competition offered by the providers” identified in Staff’s report. Such a request goes well beyond the statutory criteria applicable to an initial grant of competitive classification under the 30-day track, and such a request clearly exceeds what is required for this review.

Because all of Embarq’s competitive exchanges are “30-day track” exchanges for the purposes of this case, all that is required is a finding that two nonaffiliated entities continue to provide basic local telecommunications services in each exchange. Consequently, Staff’s verified report is sufficient to address this issue and a hearing is not needed and is not contemplated by the statute under these circumstances.

III. CONCLUSION

The data, analysis, and conclusions contained in Staff’s September 28, 2007 and October 29, 2007 reports confirm that the business and residence customers in Embarq’s competitively

⁵Section 392.245.5, RSMo.

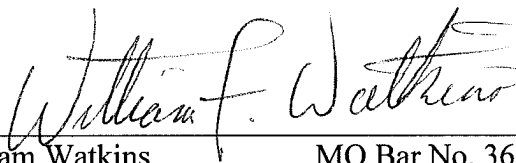
⁶Direct Testimony of Barbara A. Meisenheimer, Case No. TO-2007-0053, p 3.

designated exchanges continue to have sufficient competition under the statutory requirements. Moreover, OPC has not demonstrated a need for a public hearing, has not contested the data used in Staff's report, nor contested Staff's ultimate recommendation. Therefore, the Commission should deny OPC's request for an evidentiary hearing and accept Staff's findings concerning Embarq's competitive exchange classification.

WHEREFORE, Embarq respectfully requests that the Commission reject OPC's request for an evidentiary hearing.

Respectfully submitted,

EMBARQ MISSOURI, INC.

A handwritten signature in cursive script, reading "William F. Watkins". The signature is written in dark ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on the following parties by electronic mail, this 16th day of November 2007.

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