

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day of
June, 2008.

In the Matter of Embarq Missouri, Inc. Application for)	
Competitive Classification Under Section 392.245.5)	<u>Case No. TO-2008-0380</u>
RSMo. (2005))	Tariff No. YI-2008-0733

ORDER GRANTING COMPETITIVE CLASSIFICATION

Issue Date: June 24, 2008

Effective Date: July 3, 2008

Syllabus: In this Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request, pursuant to Section 392.245.5, RSMo Cum. Supp. 2007, for competitive classification of the business services Embarq offers in its Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges, other than exchange access services. The Commission also grants Embarq's request that the Commission classify the residential services Embarq offers in its Salem exchange, other than exchange access services, as competitive. In addition, the Commission approves the substitute tariff sheets Embarq filed to implement those classifications.

Procedural History

On June 3, 2008,¹ Embarq Missouri, Inc. ("Embarq") filed its verified Application for Competitive Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2007. In its Application, Embarq requested that the Commission classify the business services it offers

¹ Unless otherwise specified, all dates refer to the year 2008.

in its Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges, other than exchange access services, as competitive. Embarq also requested that the Commission classify the residential services Embarq offers in its Salem exchange, other than exchange access services, as competitive. Concurrent with the filing of its Application, Embarq filed proposed tariff sheets which reflect the requested competitive classifications and have an effective date of July 3.²

On June 4, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date, in which the Commission provided notice of Embarq's Application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media serving the affected areas, that any party wishing to intervene in the proceeding must file an application no later than June 9. There were no requests for intervention. The Commission's June 4 order also established a full procedural schedule and reserved Monday, June 23, for an evidentiary hearing on Embarq's Application if any party objected to the Application. No objections were filed.

On June 13, Staff filed a verified pleading recommending that the Commission approve Embarq's Application. In particular, Staff stated that there were at least two qualifying carriers serving Embarq's Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges who are not affiliated with Embarq but provide basic local phone service to business customers in those exchanges, and that the competing carriers have local numbers available for use by business customers in the exchanges. Staff further stated that there were at least two qualifying carriers serving Embarq's Salem exchange who are

² The tariff sheets do not adjust Embarq's rates but simply reflect the requested competitive classifications in the relevant exchanges.

not affiliated with Embarq but provide basic local phone service to residential customers located within the exchange, and that the competing carriers have local numbers available for use by residential customers in the exchange. Finally, Staff recommended that the substitute tariff sheets filed along with Embarq's Application be approved to go into effect on July 3.

On June 16, OPC filed a pleading stating that it neither supported nor opposed Embarq's Application but acknowledging that, under the present state of the law as consistently interpreted and applied by the Commission (with which it disagreed), Embarq had provided sufficient information to qualify for competitive classification of the business and residential services it offers in the affected exchanges. The pleading further indicated that OPC was not requesting an evidentiary hearing or other briefing and had no objection to the Commission deciding this case on the basis of the record currently before it (*i.e.*, the Application, the Staff Recommendation, and the verified documents attached thereto).

Overview

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 incumbent local exchange carrier ("ILEC") with competitive status in an

exchange will have essentially the same pricing flexibility in that exchange as a competitive local exchange carrier ("CLEC").

Upon proper request, 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 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 to customers.

Findings of Fact

The Missouri Public Service Commission, having considered all of the verified pleadings (including attachments), which are hereby admitted into evidence, 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.

³ Section 392.245.5(6), RSMo Cum. Supp. 2007.

⁴ Section 392.245.5(1), RSMo Cum. Supp. 2007.

⁵ Section 392.245.5(2), RSMo Cum. Supp. 2007.

Embarq is a "telecommunications company" and a "public utility," as each of those phrases is defined in Section 386.020, RSMo 2000.⁶ CenturyTel is a large ILEC subject to price cap regulation.⁷

In its Application, Embarq requested that the Commission classify its business services, except for exchange access service, in its Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges as competitive.⁸ Embarq also requested that the Commission classify the residential services it offers in its Salem exchange, other than exchange access services, as competitive.⁹ In addition, Embarq filed substitute tariff sheets reflecting those classifications with a proposed effective date of July 3, 2008.¹⁰

Embarq's Application indicates that it faces competition from numerous non-affiliated wireless carriers and two facilities-based wireline carriers for business services in its Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges, and for residential services in its Salem exchange, other than exchange access services.¹¹

Staff provided a verified recommendation in favor of Embarq's Application. Staff's Recommendation was based on line count data obtained from 2007 annual reports submitted to the Commission, as well as verified information supplied by Embarq relating to telephone number porting that has occurred in each exchange for which competitive classification was sought; wireless trunking arrangements; and Local Exchange Routing Guide (LERG) data.¹² According to Staff's recommendation, which was based on its review

⁶ Application ("App.") at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Staff Recommendation ("Staff Rec.") at 1.

¹¹ Sprint Nextel, AT&T Wireless, Verizon, Alltel, T-Mobile and U.S. Cellular were identified as the wireless carriers, and Fidelity Communications Services I and Comcast Phone of Missouri, LLC were specified as the wireline carriers. App. at 2.

¹² Staff Recommendation to Approve Tariff Sheet ("Memo") at 2.

of this data, “there are two or more non-affiliated carriers with the ability to provide local numbers who are providing local voice service to business and residential customers in the named telephone exchange areas.”¹³ In particular, Staff concluded that the five exchanges for which Embarq requests competitive status of its business services (*i.e.*, Buckner, Odessa, Oak Grove, Pleasant Hill and Salem) all have two or more qualifying non-affiliated carriers providing basic local phone service to business customers located within the exchanges.¹⁴ Furthermore, Staff advised that “the competing carriers have local numbers available for use by business customers in those exchanges.”¹⁵

Likewise, Staff’s verified recommendation also indicates that the exchange for which Embarq requests competitive status of its residential services (*i.e.*, Salem) also has two or more qualifying non-affiliated carriers providing basic local phone service to at least two residential customers located within the exchange,¹⁶ and that the “competing carriers have local numbers available for use by residential customers in that exchange.”¹⁷

The Commission finds that the facts as submitted in the verified Application and the verified Staff Recommendation are reliable and support competitive classification of the business services Embarq offers in its Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges. The Commission finds that in each of those exchanges, there are two or more qualifying non-affiliated carriers providing basic local phone service to business customers located within the exchanges. The Commission further finds that the competing carriers have local numbers available for use by business customers in those exchanges.

¹³ Memo at 2.

¹⁴ Staff Rec. at 1-2.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

Moreover, the Commission finds that the facts as submitted in the record before it also support competitive classification of the residential services Embarq offers in its Salem exchange. The Commission finds that in this exchange, there are two or more qualifying non-affiliated carriers providing basic local phone service to residential customers located within the exchange, and that the competing carriers have local numbers available for use by residential customers located within the exchange.

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 Cum. Supp. 2007, 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 services in the Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges and its residential services in the Salem exchange.

Section 392.245.5, RSMo Cum. Supp. 2007, 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 telecommunications 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.”¹⁸ 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.”¹⁹

Section 392.245.5(3), RSMo Cum. Supp. 2007, defines “local voice service” as meaning “[r]egardless of the technology utilized . . . 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 2000.”

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.”²⁰

Embarq is asserting that its business and/or residential services in the relevant exchanges should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.²¹

¹⁸ Section 392.245.5(1), RSMo Cum. Supp. 2007.

¹⁹ Section 392.245.5(2), RSMo Cum. Supp. 2007.

²⁰ Section 386.020(52), RSMo 2000.

²¹ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Embarq and Staff, as well as the Recommendation submitted by Staff, in making its decision in this case.²²

Decision

The undisputed evidence establishes that for business customers in Embarq's Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges and for residential customers in Embarq's Salem exchange, Embarq has carried its burden to meet the statutory requirements for competitive service classification. Therefore, the Commission concludes that Embarq's application for competitive classification of its business services, other than exchange access services, in the Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges should be granted, and that its application for competitive classification of its residential services, other than exchange access services, in the Salem exchange should also be granted.

As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. Those tariff sheets, which Staff recommended be approved, carry an effective date of July 3. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

²² See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989). This is consistent with past Commission practice in adjudicating uncontested applications for competitive classification under Section 392.245.5, RSMo Cum. Supp. 2007 where there has been no request for a hearing by any party. See, e.g., Order Granting Competitive Classification, *In the Matter of Sprint Missouri Inc.'s Application for Competitive Classification Under Section 392.245.5 RSMo (2005)*, Case No. TO-2006-0375 (Apr. 20, 2006) (application granted based on verified application and verified Staff Recommendation without evidentiary hearing or on-the-record conference with the

IT IS ORDERED THAT:

1. Embark Missouri, Inc.'s business services, other than exchange access service, are classified as competitive in the Buckner, Odessa, Oak Grove, Pleasant Hill and Salem exchanges.

2. Embark Missouri, Inc.'s residential services, other than exchange access service, are classified as competitive in the Salem exchange.

3. Embark Missouri, Inc.'s proposed tariff revisions (Tariff No. YI-2008-0733) are approved to become effective for service on or after July 3, 2008. The tariff approved is:

P.S.C. Mo. No. 22 Section 16

Eighth Revised Sheet 23, Replacing Seventh Revised Sheet 23

4. This order shall become effective on July 3, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Lane, Regulatory Law Judge

Commissioners where there were no objections to the application by any party).