

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 21st day
of October, 2008.

In the Matter of Embarq Missouri, Inc.'s Application for)	
Competitive Classification Under Section 392.245.5,)	<u>Case No. TO-2009-0061</u>
RSMo 2008.)	Tariff No. YI-2009-0174

**ORDER GRANTING COMPETITIVE CLASSIFICATION
AND APPROVING TARIFF SHEETS**

Issue Date: October 21, 2008

Effective Date: October 27, 2008

Syllabus: In this Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request, pursuant to Section 392.245.5, RSMo,¹ for competitive classification of the residential services, other than exchange access service, in the Lone Jack exchange and the business services, other than exchange access service, in thirty-five exchanges. In addition, the Commission approves the tariff sheets Embarq filed to implement that classification.

Procedural History

On August 28, 2008, Embarq filed its verified Application for Competitive Classification pursuant to Section 392.245.5, RSMo. Embarq twice moved the Commission to allow it to amend its application by removing certain exchanges from its request. The Commission shall grant those motions.

¹ As amended by H.B. 1779, which became effective on August 28, 2008.

In its application, Embark requested that the Commission classify the residential services it offers in its Lone Jack exchange, other than exchange access services, as competitive. Embark also requested that the Commission classify the business services it offers, other than exchange access, in the following exchanges: (1) Appleton City, (2) Butler, (3) California, (4) Centerview, (5) Clinton, (6) Cole Camp, (7) Eugene, (8) Fort Leonard Wood, (9) Greenridge, (10) Harrisonville, (11) Henrietta, (12) Holden, (13) King City, (14) Lake Lotawana, (15) Leeton, (16) Lexington, (17) Lincoln, (18) Lone Jack, (19) Maryville, (20) Missouri City, (21), Montrose, (22) New Bloomfield, (23) Newburg, (24) Pickering, (25) Richland, (26) Russellville, (27) Sweet Springs, (28) Tarkio, (29) Tipton, (30) Ulrich, (31) Warsaw, (32) Waverly, (33) Wellington, (34) Weston, and (35) Windsor. Concurrent with the filing of its application, Embark filed proposed tariff sheets which reflected the requested competitive classification and had an effective date of October 28, 2008.²

On October 1, 2008, the Commission entered its Order Directing Notice and Directing Filing, in which the Commission provided notice of Embark'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. The Commission also ordered that any party wishing to object to the application or to request a hearing must do so no later than October 8, 2008. This order also established a date for the Staff of the Missouri Public Service Commission to file its recommendation. No objections or requests for a hearing were filed.

² Embark also amended its tariff sheets to reflect the changes in the amended application.

On October 15, 2008, Staff filed a verified pleading recommending that the Commission approve Embark's application with regard to the requests for competitive classification. Staff also recommended that the Commission approve the tariff sheets.

Findings of Fact

The Missouri Public Service Commission, having reviewed Embark's pending tariff, the verified amended application and supporting documentation, and Staff's verified recommendation and memorandum makes the following findings of fact:

1. Embark is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri.³
2. Embark is a large ILEC subject to price cap regulation.⁴
3. Verizon, Alltel, and US Cellular are each nonaffiliated commercial mobile service providers (aka, "wireless carriers") providing basic local telecommunications service to business and/or residential customers in the 35 exchanges that are the subject of this application.⁵
4. Sprint Nextel is a nonaffiliated commercial mobile service provider providing basic local telecommunications service to business and/or residential customers in all exchanges that are the subject of this application with the exception of the Appleton City exchange.⁶

³ *Second Amended Application for Competitive Classification (Application)*, para. 1.

⁴ *Id.*

⁵ *Application*, para. 5 and Attachment A; *Staff Recommendation*, Appendix A, p. 1.

⁶ *Application*, para. 5 and Attachment A.

5. AT&T Wireless is a nonaffiliated commercial mobile service provider providing basic local telecommunications service to business and/or residential customers in all exchanges that are the subject of this application with the exception of the Hardin exchange.⁷

6. T-Mobile is a nonaffiliated commercial mobile service provider providing basic local telecommunications service to business and/or residential customers in all exchanges that are the subject of this application with the exception of the California, Clarksburg, Tipton, and Ulrich exchanges.⁸

7. Time Warner Cable Information Services, in conjunction with Sprint Communications Company, L.P., offers and provides local residential phone service in direct competition with Embarq in the Lone Jack exchange.⁹

8. Granite Telecommunications, LLC, offers and provides local business phone service in direct competition with Embarq in the 35 exchanges that are the subject of this application with the exception of the Fort Leonard Wood, Lake Lotawana, Lone Jack, and Weston exchanges.¹⁰

9. American Fiber Network, Inc., offers and provides local business phone service in direct competition with Embarq in the Butler, Clinton, and Maryville exchanges.¹¹

⁷ *Application*, para. 5 and Attachment A.

⁸ *Application*, para. 5 and Attachment A.

⁹ *Application*, para. 6; *Staff Recommendation*, Appendix A, p.1.

¹⁰ *Application*, para. 5 and Attachment B; *Staff Recommendation*, Appendix A, p.1.

¹¹ *Application*, para. 5 and Attachment B; *Staff Recommendation*, Appendix A, p.1.

10. One additional carrier offers and provides local business phone service in direct competition with Embark in most of the exchanges that are the subject of this application as shown in the “Highly Confidential” information in Attachment B to the *Application*.¹²

11. The residential services, except exchange access service, in the Fort Leonard Wood, Lake Lotawana, and Weston exchanges have previously been designated as competitive.¹³

12. Staff recommends that the Commission approve the tariff sheets.¹⁴

13. The facts as submitted in the verified application, verified Staff recommendation and supporting memorandum, and the related attached materials are reliable and support the grant of competitive classification in the requested exchanges.

Conclusions of Law

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

1. The Commission has jurisdiction over this matter pursuant to Section 392.245.5, which provides, in part, 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 nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business or residential customers within the exchange. Each telecommunications service offered to residential customers, other

¹² See also, *Staff Recommendation*, Appendix A, p. 1.

¹³ *Application*, para. 4; *Staff Recommendation*, Appendix A, p. 1. See also, Commission Case Nos. TO-2008-0147, IO-2006-0551, and IO-2006-0092.

¹⁴ *Staff Recommendation*, Appendix A, p. 2.

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

* * *

(6) . . . Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service. The commission shall approve such petition within sixty days.

2. 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 in making its decision in this case.¹⁵

3. Embarq is an incumbent local exchange telecommunications company regulated under Section 392.245, RSMo, and has requested competitive classification of its residential services, other than exchange access service, in its Lone Jack exchange. Embarq has also requested competitive classification of its business services, other than exchange access service, in 35 of its exchanges.

4. Section 392.245.5(3), 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.”

¹⁵ 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); n. 3 *supra*.

5. 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 service.”¹⁶

6. “If the commercial mobile service provider does not designate customers by business or residential class, such provider will be deemed to be providing service to both business and residential customers.”¹⁷ AT&T Wireless, Sprint Nextel, Alltel, US Cellular, Verizon, and T-Mobile are nonaffiliated commercial mobile service providers and are deemed to be providing service to both business and residential customers in the 35 exchanges that are the subject of this application.

7. In addition to the commercial mobile service providers, there is at least one additional provider of local voice service in each of the exchanges that are the subject of this application, including at least one additional provider of residential local voice service in the Lone Jack exchange.

8. The residential services, except exchange access service, in the Fort Leonard Wood, Lake Lotawana, and Weston exchanges have previously been designated as competitive.¹⁸

9. Two or more nonaffiliated entities compete with Embarq for local residential service in the Lone Jack exchange.

10. Two or more nonaffiliated entities compete with Embarq for local business services in the 35 exchanges that are the subject of this application.

¹⁶ Section 392.245.5(1), RSMo.

¹⁷ Section 392.245.5(1), RSMo.

¹⁸ See Commission Case Nos. TO-2008-0147, IO-2006-0551, and IO-2006-0092.

11. The Commission no longer has authority to review whether the grant of competitive classification in the current application would be in the public interest.¹⁹

Decision

Embarq is an incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245, RSMo. 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 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 competitive local exchange carrier (CLEC).

The Commission must grant a petition to classify the ILEC's services as competitive in any exchange in which at least two other nonaffiliated carriers are providing basic local telecommunications services within an exchange.²⁰ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.²¹ The other entity that can be counted as providing

¹⁹ H.B. 1779, effective August 28, 2008, removed the part of Section 392.245.5(6) that allowed the Commission to deny competitive classification in a "60-day" application if the Commission found "that such classification is contrary to the public interest."

²⁰ Section 392.245.5(6), RSMo.

²¹ Section 392.245.5(1), RSMo.

basic local telecommunications services is *any* entity providing local voice service using its own facilities or the facilities of a third party, including the ILEC or an unaffiliated third-party Internet service.²²

Embarq's application indicates that it faces competition from at least one wireless carrier and one other carrier providing residential or business services in the 35 exchanges that are the subject of this application, including competition with regard to residential services in the Lone Jack exchange. Staff verified this information and supplemented it with its own investigation. In addition, the Commission has previously determined that residential competition exists in the Fort Leonard Wood, Lake Lotawana, and Weston exchanges.

The undisputed evidence establishes that for residential customers in the Lone Jack exchange and for business customers in the 35 exchanges that are the subject of this application, there is at least one entity providing local voice service meeting the requirements of Section 392.345.5(6). Furthermore, the undisputed evidence establishes that there is at least one nonaffiliated commercial mobile service provider providing basic local telecommunications service within the meaning of Section 392.245.5(1) to customers in the requested exchanges. Therefore, the Commission concludes that Embarq's application for competitive classification of its residential services, other than exchange access services, in the Lone Jack exchange and business services, other than exchange access service, in the 35 requested exchanges must be granted.

Embarq also submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of October 28, 2008. Since the

²² Section 392.245.5(2), RSMo.

submitted tariff sheets, as substituted, correspond with the Commission's decision, the Commission shall approve them.

THE COMMISSION ORDERS THAT:

1. The motions to amend the application filed by Embarras Missouri, Inc., on October 7, 2009, and October 14, 2009, are granted.

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

3. Embarras Missouri, Inc.'s business services, other than exchange access service, are classified as competitive in the following exchanges: (1) Appleton City, (2) Butler, (3) California, (4) Centerview, (5) Clinton, (6) Cole Camp, (7) Eugene, (8) Fort Leonard Wood, (9) Greenridge, (10) Harrisonville, (11) Henrietta, (12) Holden, (13) King City, (14) Lake Lotawana, (15) Leeton, (16) Lexington, (17) Lincoln, (18) Lone Jack, (19) Maryville, (20) Missouri City, (21), Montrose, (22) New Bloomfield, (23) Newburg, (24) Pickering, (25) Richland, (26) Russellville, (27) Sweet Springs, (28) Tarkio, (29) Tipton, (30) Urich, (31) Warsaw, (32) Waverly, (33) Wellington, (34) Weston, and (35) Windsor.

4. Embarras Missouri, Inc.'s proposed tariff revision (Tariff No. YI-2009-0174) is approved, as substituted, to become effective for service on or after October 28, 2008. The tariff sheets approved are:

P.S.C. MO. No. 22, Section 16

**Tenth Revised Page 23, Cancels Ninth Revised Page 23
Original Page 24**

5. This order shall become effective on October 27, 2008.

BY THE COMMISSION

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

Colleen M. Dale
Secretary

(S E A L)

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

Dippell, Deputy Chief Regulatory Law Judge