

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 14th day  
of August, 2007.

In the Matter of Embarq Missouri, Inc.'s Application for	)	
Competitive Classification under Section 392.245.5	)	<b><u>Case No. TO-2008-0028</u></b>
RSMo (2005)	)	Tariff No. YI-2008-0080

**ORDER GRANTING COMPETITIVE CLASSIFICATION**

Issue Date: August 14, 2007

Effective Date: August 30, 2007

Syllabus: In this Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s, request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2006,<sup>1</sup> for residential services, other than exchange access service, for the Lebanon exchange. In addition, the Commission approves the tariff revisions filed to implement this classification.

**Procedural History**

On July 25, 2007,<sup>2</sup> Embarq Missouri, Inc. ("Embarq") filed its verified Application for Competitive Classification pursuant to Sections 392.245.5 and 392.245.5(6), in which it requested that the Commission classify the residential services Embarq offers in the Lebanon exchange, other than exchange access services, as competitive. On July 31,

---

<sup>1</sup> Hereinafter all references to the Revised Statutes of Missouri will be to the 2006 Cumulative Supplement unless otherwise noted.

<sup>2</sup> Unless otherwise specified, all dates refer to the year 2007.

2007, Embarrq filed a proposed tariff sheet designed to implement the competitive classification of its services with an effective date of August 30.<sup>3</sup>

On July 27, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date. The July 27 order directed the Commission's Data Center to provide notice of Embarrq'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. Among other things, the July 27 order also: 1) established a full procedural schedule and reserved Monday, August 13, for an evidentiary hearing on Embarrq's application; 2) established an August 1 deadline to request intervention; 3) established an August 3 deadline to file objections to Embarrq's application; and 4) directed its Staff to file a recommendation concerning Embarrq's application no later than August 3.

Staff filed its verified recommendation and supporting memorandum in favor of approving Embarrq's application on August 3, 2007. Staff further recommends that the Commission approve Embarrq's revised tariff sheet to go into effect on and after August 30. No requests for intervention or objections to the application were filed.

On August 6, 2007, the Commission issued an order establishing August 8 as the deadline for any party to request a hearing in this case. The order further advised the parties that if no request for a hearing was received the remainder of the procedural schedule would be cancelled, including the filing of testimony and hearing, and the Commission would make its determination based upon Embarrq's verified application and Staff's verified recommendation and memorandum. No party requested a hearing.

---

<sup>3</sup> Substitute sheets with the same effective date were filed also filed on July 31. The tariff sheets do not adjust Embarrq's rates but simply reflect the requested competitive classification in the Lebanon exchange.

## **Overview**

Embarq is a large incumbent local exchange carrier (ILEC) that is 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.

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.<sup>4</sup> The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.<sup>5</sup> 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."<sup>6</sup> 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.

---

<sup>4</sup> Section 392.245.5(6), RSMo Cum. Supp. 2006.

<sup>5</sup> Section 392.245.5(1), RSMo Cum. Supp. 2006.

<sup>6</sup> Section 392.245.5(2), RSMo Cum. Supp. 2006.

Embarq's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for business services in the Lebanon exchange.

### **Findings of Fact**

The Missouri Public Service Commission, having reviewed Embarq's pending tariff, the verified application and supporting documentation, and Staff's verified recommendation, memorandum and supporting documentation, which are 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.

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, RSMo 2000.<sup>7</sup> Embarq is a large ILEC subject to price cap regulation.<sup>8</sup>

In its application, Embarq requested that the Commission classify its residential services, except for exchange access service, in the Lebanon exchange as competitive, and filed proposed tariff sheets.<sup>9</sup> In support of this request, Embarq filed its verified application including maps of the service territory of wireless carriers in that exchange.<sup>10</sup>

---

<sup>7</sup> Application for Competitive Classification, page 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at Exhibit C.

<sup>10</sup> *Id.* at Exhibit A.

Staff also provided its verified recommendation and supporting memorandum in which it discussed its own investigation into the companies providing wireless and wireline service to the exchange. According to Staff's recommendation, the Lebanon exchange for which Embarq requests competitive status has 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.<sup>11</sup> Furthermore, Staff concluded that "those carriers have local numbers available for use by residential customers in the Lebanon exchange."<sup>12</sup> Finally, Staff recommended that Embarq's accompanying tariff filing, Tariff No. YI-2008-0080, be allowed to go into effect.<sup>13</sup> Attached to Staff's recommendation and supporting memorandum is a variety of documentary materials upon which Staff relied, in part, in reaching its conclusions, including, but not limited to: affidavits from representatives of various wireless providers;<sup>14</sup> responses to Staff's data requests from Fidelity Communications Services I, Inc. ("Fidelity");<sup>15</sup> and excerpts from the Local Exchange Routing Guide identifying telephone numbers assigned to specific carriers within the Lebanon exchange.<sup>16</sup>

The Commission finds that 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 exchange. The Commission finds that in the Lebanon exchange, facilities-based local voice service is

---

<sup>11</sup> Staff Recommendation, page 1, and Appendix A, pages 3-4.

<sup>12</sup> Staff Recommendation, Appendix A, page 4.

<sup>13</sup> Staff Recommendation, page 1, and Appendix A, page 4.

<sup>14</sup> Staff Recommendation, Appendix A, Attachment B.

<sup>15</sup> Staff Recommendation, Appendix A, Attachment A.

<sup>16</sup> Staff Recommendation, Appendix A, Attachment C.

being provided to at least two residential customers by Fidelity. In addition, the Commission finds that there is more than one non-affiliated commercial mobile radio services carrier, including U.S. Cellular and Alltel Communications, Inc., providing service to residential customers in the Lebanon exchange. The Commission further finds that Fidelity and the wireless carriers have local numbers available for use by residential customers in the Lebanon 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), 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 Lebanon exchange.

Section 392.245.5, 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.”<sup>17</sup> 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.”<sup>18</sup>

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.”

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.”<sup>19</sup>

Embarq is asserting that its residential services in the Lebanon exchange should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.<sup>20</sup>

---

<sup>17</sup> Section 392.245.5(1), RSMo Cum. Supp. 2006.

<sup>18</sup> Section 392.245.5(2), RSMo Cum. Supp. 2006.

<sup>19</sup> Section 386.020(52), RSMo 2000.

<sup>20</sup> *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 in making its decision in this case.<sup>21</sup>

### **Decision**

The undisputed evidence establishes that for residential customers in the Lebanon exchange 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 business customers in the Lebanon exchange 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 Lebanon exchange 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 August 30, 2007. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

### **IT IS ORDERED THAT:**

1. Embarq Missouri, Inc.'s, residential services, other than exchange access service, are classified as competitive in the Lebanon exchange.

---

<sup>21</sup> 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.



2. Embargo Missouri, Inc.'s proposed tariff revisions (Tariff No. YI-2008-0080) are approved to become effective for service on or after August 30, 2007. The tariff approved is:

**P.S.C. Mo. No. 22 Section 16**  
**Fifth Revised Page 23, Cancels Fourth Revised Page 23**

3. This order shall become effective on August 30, 2007.

**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., Gaw, Clayton,  
and Appling, CC., concur.  
Murray, C., absent.

Voss, Regulatory Law Judge