

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 6th day of
March, 2007.

In the Matter of Embarrq Missouri, Inc.'s Application for)	
Competitive Classification under Section 392.245.5)	<u>Case No. TO-2007-0301</u>
RSMo (2005))	Tariff No. YI-2007-0559

ORDER GRANTING COMPETITIVE CLASSIFICATION

Issue Date: March 6, 2007

Effective Date: March 10, 2007

Syllabus: In this Order, the Missouri Public Service Commission grants Embarrq Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2005, for business 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 February 8, 2007,¹ Embarrq Missouri, Inc. ("Embarrq") filed its verified Application for Competitive Classification pursuant to Sections 392.245.5 and 392.245.5(6), RSMo Cum. Supp. 2005, in which it requested that the Commission classify the business services Embarrq offers in the Lebanon exchange, other than exchange access services, as

¹ Unless otherwise specified, all dates refer to the year 2007.

competitive. Concurrent with the filing of its application, Embarq filed proposed tariff sheets with an effective date of March 10.²

On February 14, 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, that any party wishing to intervene in the proceeding must file an application no later than February 20. This order also established a full procedural schedule and reserved Monday, March 5, for an evidentiary hearing on Embarq's application should the Commission receive an objection to the application by any party. According to the procedural schedule, the parties' pre-filed testimony was due February 27; pretrial briefs, witness lists, and proposed findings of fact were due March 2; and the hearing itself was to be conducted on March 5.

On February 20, Fidelity Communication Services I, Inc. ("Fidelity") filed an Application to Intervene pursuant to Commission Rule 4 CSR 240-2.075 and requested an evidentiary hearing on the merits of Embarq's application. There were no other requests for intervention, or for a hearing. On February 23, Fidelity filed its formal written objections to Embarq's application, in which it renewed its request for a hearing. The same day, Staff filed its verified recommendation in favor of approving Embarq's application.

By order dated February 26, the Commission granted Fidelity's request to participate fully in this matter as an intervening party. Later that day, Fidelity filed a pleading withdrawing its objections to Embarq's application and asking that it be excused from the

² Substitute sheets with the same effective date were filed on February 15. The tariff sheets do not adjust Embarq's rates but simply reflect the requested competitive classification in the Lebanon exchange.

hearing. On February 27, Staff and Embarq pre-filed direct testimony from their witnesses in this matter.

Also on February 27, Embarq filed a Motion to Cancel Remainder of Procedural Schedule originally established in the Commission's order of February 14 in light of the facts that no party now objects to Embarq's application and no party is now requesting a hearing. The motion requested that the pre-filed testimony already submitted by Staff and Embarq be admitted into evidence without the necessity of the witnesses taking the stand or being cross-examined, and that the Commission decide this matter on the basis of Embarq's verified application, Staff's verified recommendation, and the pre-filed testimony. The motion further suggested that, should the Commission desire, it would be amenable to participating in an on-the-record conference with the Commissioners on March 5, a mechanism which has been used in the past when there are Commissioner questions but no opposition exists between or among the parties. Embarq advised that Staff supported Embarq's motion, and that Fidelity did not oppose it.

Consistent with past Commission practice in adjudicating uncontested applications for competitive classification under Section 392.245.5, RSMo Cum. Supp. 2005,³ on March 1, the Commission granted Embarq's motion, advised the parties that no on-the-record conference was necessary, and granted Fidelity's request to be excused from the hearing.

³ 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 Commissioners where there were no objections to the application by any party).

Overview

Embarq is a large incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245, RSMo Cum. Supp. 2005. 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.⁴ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ 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."⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one

⁴ Section 392.245.5(6), RSMo Cum. Supp. 2005.

⁵ Section 392.245.5(1), RSMo Cum. Supp. 2005.

⁶ Section 392.245.5(2), RSMo Cum. Supp. 2005.

facilities-based wireline carrier and one wireless carrier are providing services to customers.

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 considered all of the verified pleadings and pre-filed testimony (including attachments), 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 2000.⁷ Embarq is a large ILEC subject to price cap regulation.⁸

In its application, Embarq requested that the Commission classify its business services, except for exchange access service, in the Lebanon exchange as competitive, and filed proposed tariff sheets.⁹ In support of this request, Embarq filed its verified

⁷ Application at 1.

⁸ *Id.*

⁹ *Id.*; Exhibit C to Application.

application including maps of the service territory of wireless carriers in that exchange.¹⁰

The application also included evidence, in the form of a 2006 press release printed from Fidelity's website, that Fidelity is now providing local phone service to several business customers physically located within the Lebanon exchange.¹¹

Staff also provided its verified recommendation 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 business customers with addresses within the exchange.¹² Furthermore, Staff concluded that "those carriers have local numbers available for use by business customers in the Lebanon exchange."¹³

In addition to these verified pleadings, the record also contains the pre-filed direct testimony of two witnesses: Adam C. McKinnie, a regulatory economist for the Telecommunications Department Staff of the Commission,¹⁴ and John R. Idoux III, a Senior Manager for Regulatory Affairs for Embarq.¹⁵ Attached to their testimony is a variety of documentary materials upon which they relied, in part, in reaching their conclusions, including, but not limited to: affidavits from representatives of various wireless providers;¹⁶

¹⁰ Exhibit A to Application.

¹¹ Application at 2; Exhibit B to Application.

¹² Staff Recommendation at 1; Appendix A to Staff Recommendation at 1-2.

¹³ Staff Recommendation at 1-2.

¹⁴ McKinnie testimony at 1.

¹⁵ Idoux testimony at 1.

¹⁶ Schedules 3-1 through 3-5 to McKinnie testimony.

responses to Staff's data requests from Fidelity and Embarq;¹⁷ online records from the Missouri Secretary of State's Office;¹⁸ and directory listings of wireless carriers in Lebanon.¹⁹

Mr. McKinnie testified that, according to the documentary materials attached to his testimony, at least one wireless carrier unaffiliated with Embarq (e.g., Cingular and Sprint Nextel) is providing local voice service to business customers within the Lebanon exchange and has local numbers available for use by business customers in the Lebanon exchange.²⁰ He also testified that Fidelity is serving at least two business customers (e.g., Mid-Missouri Bank and Mid-Missouri Investment Center) in whole or in part over its own facilities with telephone numbers rated as local within the Lebanon exchange, and that Fidelity has local numbers available for use by business customers in the Lebanon exchange.²¹ Finally, Mr. McKinnie recommended that Embarq's accompanying tariff filing, Tariff No. YI-2007-0559, be allowed to go into effect.²² Mr. Idoux provided similar testimony, stressing that Embarq faces business competition from two or more non-affiliated entities in the Lebanon exchange, including multiple non-affiliated wireless providers and a wireline provider (Fidelity) using their own facilities, in whole or in part, to provide basic local telecommunications services.²³

The Commission finds that the facts as submitted in the verified application, the verified Staff Recommendation, and the pre-filed testimony and related attached materials

¹⁷ Schedules 4P, 5P, 6P, 7P, 8P, 9-1P, and 9-2P to McKinnie testimony.

¹⁸ Schedules 10 and 11 to McKinnie testimony.

¹⁹ Schedule JRI-3 to Idoux testimony.

²⁰ McKinnie testimony at 4-7.

²¹ McKinnie testimony at 8P, 9P, 10.

²² McKinnie testimony at 2-3, 10.

²³ Idoux testimony at 3, 5, 6-8.

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 being provided to at least two business customers by Fidelity. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services carrier, including Cingular, providing service to business customers in the Lebanon exchange. The Commission further finds that Fidelity and Cingular have local numbers available for use by business 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), RSMo Cum. Supp. 2005, 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, RSMo Cum. Supp. 2005, 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.”²⁴ 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.”²⁵

Section 392.245.5(3), RSMo Cum. Supp. 2005, 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.”²⁶

²⁴ Section 392.245.5(1), RSMo Cum. Supp. 2005.

²⁵ Section 392.245.5(2), RSMo Cum. Supp. 2005.

²⁶ Section 386.020(52), RSMo 2000.

Embarq is asserting that its business 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.²⁷

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing without subsequently withdrawing its request prior to the hearing date, the Commission may rely on the verified pleadings filed by Embarq and Staff, as well as the pre-filed testimony they submitted, in making its decision in this case.²⁸

Decision

The undisputed evidence establishes that for business 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), RSMo Cum. Supp. 2005. 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), RSMo Cum. Supp. 2005. Therefore, the Commission concludes that Embarq's application for competitive classification of its business 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

²⁷ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

²⁸ 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*.

March 10, 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 business services, other than exchange access service, are classified as competitive in the Lebanon exchange.

2. Embarq Missouri, Inc.'s proposed tariff revisions (Tariff No. YI-2007-0559) are approved to become effective for service on or after March 10, 2007. The tariff approved is:

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

Fourth Revised Page 23, Replacing Third Revised Page 23

3. This order shall become effective on March 10, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Lane, Regulatory Law Judge