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Timolyn Henry

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Sent: Wednesday, October 18, 2006 4:27 PM
To: Filings@psc.state.fl.us
Cc: Masterton, Susan S [LTD]
Subject: Docket No. 060650-TP, Embarq's Answer & Motion to Dismiss
Attachments: 060650-TP, Embarq's Answer & Motion to Dismiss.pdf

Filed on Behalf of: Susan S. Masterton

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Docket No. 060650-TP

Title of filing: Embarq Florida, Inc.'s Answer and Motion to Dismiss

Filed on behalf of: Embarq Florida, Inc.

No of pages: 9 pages

Description: Docket No. 060650-TP, Embarq Florida, Inc's Answer and Motion to Dismiss the Joint Petition filed by the

Office of Public Counsel on behalf of the Citizens of the State of Florida and the Attorney General.

<<060650-TP, Embarq's Answer & Motion to Dismiss.pdf>>
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October 18, 2006

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 060650-TP, Joint petition against BellSouth Telecommunications, Inc., Embarq Florida, Inc., and Verizon Florida Inc. for billing charges unauthorized by Telecommunications Consumer Protection Act and request for refunds, by Citizens of the State of Florida and Attorney General.

Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc., is Embarq's Answer and Motion to Dismiss the Joint Petition filed by the Office of Public Counsel on behalf of the Citizens of the State of Florida and the Attorney General.

Copies are being served pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

Susan S. Masterton

Enclosure

Susan S. Masterton
COUNSEL
LAW AND EXTERNAL AFFAIRS- REGULATORY
Voice: (850) 599-1560
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09624 OCT 18 2006

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
DOCKET NO. 060650-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 18th day of October, 2006 to the following:

Office of the Attorney General
C. Crist/M. Palecki/A. Finn
The Capital – PL01
Tallahassee, FL 32399-1050

Florida Cable Telecommunications
Association, Inc. (Gross)
Michael A. Gross
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303

Office of Public Counsel
Harold McLean/Patricia Christensen
c/o The Florida Legislature
111 W. Madison St. Room 812
Tallahassee, FL 32399-1400

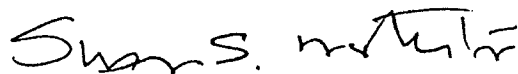
Florida Public Service Commission
Patrick Wiggins/Theresa Tan
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

BellSouth Telecommunications, Inc.
Ms. Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Florida Public Service Commission
Jason Fudge/Kira Scott
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Verizon Florida, Inc.
Mr. David Christian
106 East College Avenue, Suite 710
Tallahassee, FL 32301-7721

Florida Public Service Commission
Ray Kennedy/Melinda Watts
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Joint petition against BellSouth Telecommunications, Inc., Embarq Florida, Inc., and Verizon Florida Inc. for billing charges unauthorized by Telecommunications Consumer Protection Act and request for refunds, by Citizens of the State of Florida and Attorney General.	Docket No. 060650-TP Filed: October 18, 2006
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EMBARQ FLORIDA, INC.'S ANSWER AND MOTION TO DISMISS

Embarq Florida, Inc. ("Embarq"), in accordance with Rules 28-106.203 and 28-106.204, Florida Administrative Code, files this Answer and Motion to Dismiss the Joint Petition filed by the Office of the Public Counsel on behalf of the Citizens of the State of Florida ("OPC") and the Attorney General ("AG") (collectively, "Joint Petitioners").

ANSWER

1. Embarq agrees that the Florida Public Service Commission is the agency affected by the Petition.
2. Embarq is without knowledge to admit or deny the allegations of paragraph 2.
3. Embarq admits that section 350.0611¹, Florida Statutes, authorizes the Office of the Public Counsel to represent citizens before the Florida Public Service Commission. Embarq is without knowledge to admit or deny the remaining allegations of paragraph 3.
4. Embarq denies that the Florida Constitution authorizes the Attorney General to bring an action on behalf of the state's citizens before the Florida Public Service Commission, a role that by law is reserved specifically for the OPC.² Embarq is without knowledge to admit or deny the remaining allegations of paragraph 4.

¹ This section was erroneously cited in the Petition as section 350.11, F.S.

² Again, the Petitioners erroneously reference Article V, Section 4, which relates to the jurisdiction of the district courts of appeal. Embarq believes the intended reference was Article IV, Section 4.

5. a. Embarq admits the allegations of paragraph 5. Embarq's provision of third-party billing services is in accordance with the applicable Florida law and Commission rules. (Attachment 1 is a letter Embarq previously provided to the Commission describing Embarq's third-party billing practices.)

b. Embarq is without knowledge to admit or deny the allegations of subparagraph 5.b.

c. Embarq is without knowledge to admit or deny the allegations of subparagraph 5.c.

d. Embarq is without knowledge to admit or deny the allegations of subparagraph 5.d.

e. Embarq is without knowledge to admit or deny the allegations of subparagraph 5.e.

f. Embarq is without knowledge to admit or deny the allegations of subparagraph 5.f.

g. Embarq denies the allegations of subparagraph 5.g. as they relate to Embarq. Embarq's provision of third-party billing services is in accordance with the applicable Florida law and Commission rules.

h. Embarq denies the allegations of subparagraph 5.h.

6. Subsections 364.602(4) and (5), Florida Statutes, speak for themselves. Embarq denies that it has failed to comply with the provisions of the Telecommunications Consumer Protection Act. Embarq disagrees that these sections prohibit Embarq from providing third-party billing on behalf of Internet providers.

7. Embarq denies the allegations of paragraph 7.

8. Paragraph 8 is a request for relief and does not require a response from Embarq. However, Embarq asserts that there is no basis for granting the relief requested by the OPC and the AG.

MOTION TO DISMISS

The general standard for a Motion to Dismiss is whether the complaint alleges sufficient facts to state a cause of action as a matter of law. In disposing of a Motion to Dismiss the Commission must assume all of the allegations of the Complaint are true. *Varnes v. Dawkins*, 624 So. 2d 349 (Fla. 1st DCA 1993). Applying this standard, even assuming that all of the facts alleged in the Joint Petition are true, the Joint Petition fails to state a cause of action against Embarq because the facts alleged do not constitute a violation of the Telecommunications Consumer Protection Act (Sections 364.601-364.604, Florida Statutes, hereinafter “the Act”) cited by the Joint Petitioner or of any other law or Commission rule.

The Joint Petition Misinterprets the Telecommunications Consumer Protection Act

In paragraph 6 of the Joint Petition, Joint Petitioners appear to assert that section 364.602, Florida Statutes, restricts the types of entities that may bill their services on a telecommunication company bill to those types of entities defined as “originating parties” in section 364.602(4), Florida Statutes.³ That is, under the Joint Petitioners’ interpretation, only entities offering “telecommunications services” or “information services” (defined to include only 900 or 976 type services but to exclude Internet

³ “Billing party” is defined in section 364.602(1), Florida Statutes to mean: “any telecommunications company that bills an end user consumer on its own behalf or on behalf of an originating party.” “Originating party” is defined in section 364.602(4), Florida Statutes, to mean: “any person, firm, corporation, or other entity, including a telecommunications company or a billing clearinghouse, that provides any telecommunications service or information service to a customer or bills a customer through a billing party, except the term “originating party” does not include any entity specifically exempted from the definition of “telecommunications company” as provided in s. 364.02(14).” [underlining added]

services) are allowed to bill their services on telecommunications company bills. This interpretation is clearly erroneous in that nowhere does the Act state that the types of services that may be included on a telecommunications company bill are limited. Rather, in section 364.604, Florida Statutes, the Act addresses requirements for services that are billed on a telecommunications company's bill, specifically including telecommunications and information services. In addition, the statute explicitly excludes certain service providers from these requirements, that is, entities that are exempt from the definition of "telecommunications company" under section 364.02(14), Florida Statutes. Rather than prohibiting these entities from billing on telecommunications company bills, this exclusion allows them to be third-party billers without otherwise meeting the requirements of the statute. Since the Act provides no prohibitions on the types of entities or services that may be billed on a telecommunications company bill, as a matter of law Embarq cannot have violated this section by including EDN's charges on its bills.⁴

Embarq has complied with the law and the Commission's rules

Section 364.604(5), Florida Statutes, authorizes the Commission to implement section 364.604, Florida Statutes, through rulemaking. The Commission has exercised this authority through its adoption of Rules 25-4.003(4) and (40) and 25-4.110(2), (18), (19) and (20), Florida Administrative Code.

In defining "originating party" and "billing party," Rule 25-4.003 uses definitions identical to the statutory definitions. Under these definitions, as under the statute, an

⁴ The Joint Petitioners also appear to allege that Embarq "inadequately" verified and monitored EDN's charges, although they do not cite to a specific statutory provision or Commission rule to support these allegations. In fact, there is none.

originating party includes an entity that provides telecommunication or information services or bills a customer through a billing party. Rule 25-4.110(2) sets forth requirements for displaying third-party charges on the bill. Rule 25-4.110(18) provides that “[i]f a customer notifies a billing party that they did not order an item appearing on their bill or that they were not provided a service appearing on their bill, the billing party shall promptly provide the customer a credit for the item and remove the item from the customer’s bill...” Rule 25-4.110(19) requires that customer be offered an option to block third-party billing, except for specified telecommunications services. The Joint Petitioners have not alleged that Embarq violated these rules or any other Commission rules relating to third-party billing and, in fact, Embarq’s billing practices comply with the requirements of the applicable rules.

The Joint Petition should be dismissed for failure to state a cause of action

The Joint Petition includes several allegations against EDN relating to the services EDN provides and the manner in which these services were advertised and solicited. (See, paragraphs 5 b.-f. of the Joint Petition) The Commission does not have jurisdiction over EDN to resolve these allegations and, in fact, the Attorney General has filed a complaint against EDN in Leon County Circuit Court under Florida’s Deceptive and Unfair Trade Practices Act for these alleged violations.⁵ The circuit court is the proper forum to resolve these issues.

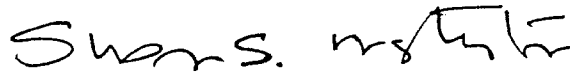
As far as the allegations and alleged violations relating to Embarq, taking all of the allegations in the Complaint as true, the Joint Petitioners have failed to demonstrate that Embarq has violated the Telecommunications Consumer Protection Act or any other

⁵ *Office of the Attorney General v. Email Discount Network, et al.*, Case No. 37 2006 CA 002475 filed September 28, 2006 in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida.

law or Commission rule. Therefore, the complaint fails, as a matter of law, to state a cause of action upon which the Commission can grant relief and the Petition should be dismissed.

WHEREFORE Embarq asks to the Commission to deny the relief sought by the Joint Petitioners and grant Embarq's Motion to Dismiss the Joint Petition.

Respectfully submitted this 18th day of October 2006.



Susan S. Masterton
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Counsel for Embarq Florida, Inc.

Voice | Data | Internet | Wireless | Entertainment

June 8, 2006

Ms. Melinda Watts
Bureau of Telecommunications Service Quality,
Certification and Enforcement
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



Embarq Corporation
Mailstop: FLTLH00201
1313 Blair Stone Road
Tallahassee, FL 32301
EMBARQ.com

Dear Ms. Watts,

In response to your inquiry regarding Embarq's process in Florida for 3rd party billing from OAN and The Billing Resource (formally known as Integretel), Embarq's billing and collection contracts with these companies contain language that requires companies placing charges on Embarq's bills to strictly adhere to Federal and State laws and regulations.

There is a comprehensive pre-billing approval process before a company is eligible to begin placing charges on our bills and it requires a significant financial deposit prior to billing for services, designed to protect both Embarq and its end user customers. This pre-billing approval process includes a requirement to provide Embarq with sales, marketing, and fulfillment information, and other materials related to the company's business practices. And, the company must provide copies of appropriate registrations or certifications.

In addition, the contract requires that the company placing the charge on the bill establish procedures for prompt resolution of all end user inquiries. The company placing the charges on the bill must provide a customer service function that includes a dedicated telephone number for customer service, reasonable availability to end user customers, and at a minimum regular business hours, plus added hours as may be required by regulatory authority guidelines. The contract also specifies that Embarq may fully adjust the customer's bills for these charges and may impose bill blocking upon customer request. To that end, Embarq's Methods and Procedures (M&Ps) allow its representatives to adjust third party billing charges and install bill blocking to prevent further charges from occurring. Embarq performs a monthly post-billing statistics review of customer complaint metrics to validate contract compliance.

Finally, the contract provides Embarq with explicit termination clauses when companies fail to comply with contract provisions, including termination for fraudulent billing.

Should you have any questions, please feel free to call me at 850-599-1027.

Sincerely,

F. Ben Poag
Director - Regulatory

F. B. (Ben) Poag
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