

**Matilda Sanders**

**From:** Glenda Chapman [gchapman@mail.fdn.com]  
**Sent:** Monday, December 11, 2006 2:45 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** E-filing for FPSC Docket 060644-TL  
**Attachments:** Docket 060644-TL Prehearing Statement.doc

**ORIGINAL**

To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket CompSouth's and FDN's Joint Prehearing Statement.

In accordance with the Commission's e-filing procedures, the following information is provided:

- (a) The person responsible for this filing is:
  - Name: Matthew J. Feil, General Counsel
  - Address: FDN Communications and co-counsel for CompSouth  
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  - Phone No: 407-835-0460
  - Email: mfeil@mail.fdn.com
- (b) Docket No. and Title: 060644-TL Petition of Embarq Florida, Inc. to Recover 2005 Tropical Storm Related Costs and Expenses.
- (c) The parties on whose behalf the document is filed: CompSouth and FDN Communications
- (d) Number of pages of the document: 7 pages.
- (e) Description of each document attached: Joint Prehearing Statement of CompSouth and FDN Communications.

*Thank You!*  
*Glenda Chapman*  
*Executive Administrative Assistant*  
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*Life is like a coin, you can spend it any way you wish, but you can only spend it once....*

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- COM \_\_\_\_\_
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DOCUMENT NO.
11312-06
12/11/06

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Embarq Florida, Inc.	)	
To Recover 2005 Tropical Storm	)	Filed: December 11, 2006
Related Costs and Expenses	)	
<hr/>		Docket No. 060644-TL

**JOINT PREHEARING STATEMENT OF  
COMPSOUTH AND FDN COMMUNICATIONS**

The Competitive Carriers of the South, Inc. (CompSouth) and Florida Digital Network, Inc. d/b/a FDN Communications (FDN), pursuant to Order No. PSC-06-0850-PCO-TL, file this Joint Prehearing Statement of Issues and Positions.

**A. APPEARANCES:**

**MATTHEW FEIL and ALLISON HICKS**, FDN Communications, 2301 Lucien Way, Suite 200, Maitland, FL 32751

**On Behalf of FDN and as Co-Counsel for CompSouth**

**VICKI GORDON KAUFMAN**, Moyle Flanigan Katz Raymond, White & Krasker, PA, 118 North Gadsden Street, Tallahassee, Florida 32301

**Co-Counsel for CompSouth**

**B. WITNESSES:**

**On Behalf of CompSouth**

<u>Witness</u>	<u>Proffered by</u>	<u>Issues</u>
Don J. Wood	CompSouth	1-4

**C. EXHIBITS:**

<u>Exhibits</u>	<u>Witness</u>	<u>Description</u>
DJW-1	Wood	Vita of Don J. Wood

DJW-2	Wood	Excerpt, Testimony of Kent W. Dickerson, Docket No. 990649-TP, November 7, 2001.
DJW-3	Wood	Excerpt, Bellsouth Telecommunications, Inc. response to #12b of CompSouth's Interrogatories, Docket No. 060598.

CompSouth and FDN reserve the right to use, as appropriate, cross-examination exhibits.

**D. STATEMENT OF BASIC POSITION:**

The Commission should reject Embarq's proposal to apply its requested storm surcharge to unbundled wholesale loop network element (UNE) customers. Embarq's proposed charge on UNEs is inconsistent and in conflict with federal law. Embarq seeks, through this surcharge, to reprice UNEs at above TELRIC prices. This is directly inconsistent with and violative of the Telecommunications Act of 1996 and FCC regulations which require UNEs to be priced at TELRIC rates.

Further, Section 364.051(4)(b)(6), Florida Statutes, explicitly states that a surcharge may only be applied to wholesale access lines if the Commission finds it appropriate. Such a charge is not appropriate because it would conflict with federal law. It is also inappropriate for the following reasons:

First, it is inappropriate under the Florida statute to assess a charge on CLECs because CLECs have incurred and must absorb significant expenses of their own related to storm damage. Second, unlike Embarq, CLECs have no practical market mechanism by which to impose such a surcharge on their own customers. Third, the way in which Embarq has counted access lines is inconsistent with the statute which directs the charge to be applied on a "per access line" or per customer basis, not a "per DSO equivalent" basis as Embarq seeks. Fourth, Embarq's proposed charge is not competitively neutral – it does not propose to apply the charge in the same way to wholesale and retail customers. Embarq proposes to charge wholesale customers more through its surcharge than retail customers for equivalent service.

**E. STATEMENT OF ISSUES AND POSITIONS:**

**ISSUE 1:** What is the appropriate amount of intrastate costs and expenses related to damage caused during the 2005 tropical storm season, if any, that should be recovered by Embarq, pursuant to Section 364.051(4), Florida Statutes?

**COMPSOUTH:**<sup>1</sup> CompSouth has no position on this issue except to note, as explained in more detail in Issues 2 and 3, that even if the Commission were to find that Embarq had some amount of costs and expenses appropriate for recovery, no charge should be imposed on wholesale UNE customers.

- ISSUE 2:**
- (a) What is the appropriate type and number of retail access lines, basic and nonbasic, to which any storm damage recovery may be assessed?
  - (b) Is a line item charge on Embarq's wholesale UNE loops appropriate pursuant to Section 364.051(4)(b)(6), Florida Statutes, and federal law? If yes, on which types of lines should the charge be assessed and how should the lines be counted? What is the total number of UNE loops to be assessed, if any?

**COMPSOUTH:**

- (a) No position.
- (b) No. A line item charge on UNEs is inappropriate under both Florida and federal law. Embarq's attempt to apply the proposed charge to UNE customers is inconsistent with and preempted by federal law. The United States Supreme Court in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), approved the FCC's adoption of the TELRIC pricing methodology, which state commissions must apply in regard to UNE pricing. Imposing a charge on top of already approved TELRIC prices is in conflict with federal law.<sup>2</sup>

Under Florida law, the proposed surcharge is inappropriate because:

- 1) Unlike Embarq, CLECs have no practical market mechanism by which to impose such a surcharge on their own customers;
- 2) The way in which Embarq has counted access lines is inconsistent with the statute which directs the charge to be applied on a per access line or per customer basis. Instead, Embarq has redefined the statute's terms which refer to "access line", "customer line", and "unbundled loop" to mean "DSO equivalent." Such an interpretation is inappropriate, bears no relationship to cost and would inappropriately increase the burden on CLECs.
- 3) Embarq's proposed charge is not competitively neutral – it does not propose to apply the charge in the same way to wholesale and retail

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<sup>1</sup> FDN's positions are included CompSouth's positions.

<sup>2</sup> The issues of law which will impact the Commission's decision in this case will be addressed in CompSouth's pretrial memorandum which will be filed on December 29, 2006 pursuant to Order No. PSC-06-0981-PCO-TL.

customers. The effect of this disparate treatment is that wholesale customers will be charged more for equivalent service.

The number of UNE loops assessed should be those in service while any new rate (which FDN and CompSouth oppose in this case) is in effect.

**ISSUE 3:** What is the appropriate line item charge per access line, if any?

**COMPSOUTH:** For the reasons delineated in Issue No. 2, no charge should be imposed on UNEs.

**ISSUE 4:** If a line item charge is approved in Issue 3, on what date should the charge become effective and on what date should the charge end?

**COMPSOUTH:** If the Commission approves any storm charge, it should not be applicable to wholesale UNE customers. If any charge is applied to wholesale customers, which it should not be, such a charge cannot be applied unless and until any applicable interconnection agreements are amended. Finally, any charge must end 12 months after its effective date.

**ISSUE 5:** Should the docket be closed?

**COMPSOUTH:** As noted above, no charge should be imposed on UNE customers. If the Commission imposes a charge on retail customers, it should keep the docket open to monitor collection of the charge so as to ensure that Embarq does not collect any monies in excess of what the Commission permits.

**F. STIPULATED ISSUES:**

None at this time.

**G. PENDING MOTIONS:**

FDN has filed a Petition to Intervene in this Docket that is pending as of the date of this filing.

CompSouth has filed a Motion to Compel Discovery Responses in this Docket that is pending as of the date of this filing.

**H. PENDING CONFIDENTIALITY REQUESTS:**

CompSouth and FDN have no pending confidentiality requests.

**I. REQUIREMENTS THAT CANNOT BE COMPLIED WITH:**

CompSouth and FDN are not aware of any requirements with which they cannot comply at this time. However, CompSouth reserves the right to argue it has been prejudiced as set forth in the pending Motion to Compel.

**J. DECISIONS WHICH MAY IMPACT THIS CASE:**

The Commission's decision in Docket No. 060598, Petition to Recover Tropical System Related Costs and Expenses by BellSouth Telecommunications, Inc., may impact the Commission's decision in this proceeding.

**K. OBJECTIONS TO WITNESS QUALIFICATIONS:**

Embarq has not designated any of its witnesses as experts. CompSouth and FDN reserve the right to challenge any expert designations Embarq may proffer.

s/ Matthew Feil

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s/ Vicki Gordon Kaufman

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Joint Prehearing Statement was furnished by electronic and U.S. Mail this 11<sup>th</sup> day of December, 2006 to:

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