

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to recover 2005 tropical system related costs and expenses, by Embarq Florida, Inc. | DOCKET NO. 060644-TL
ORDER NO. PSC-06-1073-PHO-TL
ISSUED: December 29, 2006

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on December 20, 2006, in Tallahassee, Florida, before Commissioner Matthew M. Carter II, as Prehearing Officer.

APPEARANCES:

SUSAN S. MASTERTON, ESQUIRE, 1313 Blair Stone Road, Tallahassee, Florida 32301

On behalf of Embarq Florida, Inc. (EMBARQ).

MATTHEW FEIL, ESQUIRE and ALLISON HICKS, ESQUIRE, FDN Communications, 2301 Lucien Way, Suite 200, Maitland, Florida 32751 and VICKI GORDON KAUFMAN, ESQUIRE, Moyle Flanigan Katz Raymond White & Krasker, PA, 118 North Gadsden Street, Tallahassee, Florida 32301

On behalf of Florida Digital Network, Inc. d/b/a FDN Communications and Competitive Carriers of the South, Inc. (Collectively COMPSOUTH).

HAROLD MCLEAN, ESQUIRE and CHARLES S. BECK, ESQUIRE, Office of Public Counsel c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400

On behalf of Florida's Citizens (OPC).

JASON K. FUDGE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850

On behalf of the Florida Public Service Commission (STAFF).

PREHEARING ORDER

I. **CASE BACKGROUND**

On September 25, 2006, Embarq Florida, Inc. (Embarq) filed its Petition to Recover 2005 Tropical System Related Costs and Expenses pursuant to 364.051(4), Florida Statutes.

An administrative hearing will be held on this matter on January 4, 2007.

DOCUMENT NUMBER-DATE

11871 DEC 29 06

FPSC-COMMISSION CLERK

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 364, Florida Statutes.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1), Florida Statutes, and Rule 25-22.006, Florida Administrative Code, shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, Florida Statutes. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), Florida Administrative Code, if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Each witness whose name is preceded by a plus sign (+) will present direct and rebuttal testimony together.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
+ Kent W. Dickerson	EMBARQ	1, 2, 3, 4
Iliana H. Piedra	STAFF	1

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Rebuttal</u>		
Don J. Wood	COMPSOUTH	1 – 4
<u>Surrebuttal</u>		
+ Kent W. Dickerson	EMBARQ	1, 2, 3, 4

VII. BASIC POSITIONS

EMBARQ: Hurricanes Dennis, Katrina and Wilma caused damage in 2005 to Embarq's facilities in five of the eight Florida districts where Embarq provides service. The total costs incurred by Embarq to repair, restore, and replace the lines, plants or facilities damaged by the storms was nearly \$60 million dollars. In accordance with Florida law, and consistent with the extraordinary cost standard applied in Embarq's proceeding to recover its 2004 storm costs, Embarq is seeking to recovery approximately \$10.3 million of its 2005 storm costs, through application of a 50 cent surcharge to be applied to all retail access lines and wholesale unbundled loops. The application of the extraordinary cost standard and the statutory cap on recovery of 50 cents per line result in a conservative amount of recovery, many times less than Embarq's actual damages and costs incurred and fully in compliance with the recovery allowed under Section 364.051(4), Florida Statutes.

COMPSOUTH: 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. To the extent that the commission determines that the surcharge level should increase with access line capacity, Embarq witness Dickerson recognizes in his surrebuttal that the basis for accessing a higher surcharge to higher capacity lines must be the same for wholesale and retail services.

OPC: The Commission should use an incremental cost approach for storm cost recovery. Use of an incremental cost approach is necessary in order to ensure that any storm surcharge approved by the Commission does not pay for costs that are already recovered through basic telephone rates. It appears that Embarq Florida has followed an incremental cost approach in this case.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. 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?**

POSITIONS

EMBARQ: Embarq's total costs incurred as a result of the 2005 hurricanes were \$59,940,742. Embarq's extraordinary intrastate costs totaled \$15,468,151. Based on the statutory recovery cap of 50 cents per line per month for 12 months, the total costs Embarq is entitled to recover are shown on line 44 of Exhibit KWD-2 that is, approximately \$10.3 million dollars.

COMPSOUTH: ¹CompSouth 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

¹ FDN's positions are included CompSouth's positions.

that Embarq had some amount of costs and expenses appropriate for recovery, no charge should be imposed on wholesale UNE customers.

OPC: No position at this time.

STAFF: Embarq's intrastate extraordinary costs of \$15.47 million should be reduced by the amount of carrying charges and interest requested in this petition, which results in intrastate extraordinary costs of \$13 million.

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?

POSITIONS

EMBARQ: The surcharge should be applied to all of Embarq's retail basic and nonbasic local exchange service lines, including residential and business lines, payphone lines, key system lines, PBX trunk lines, Centrex lines, ISDN BRI lines and ISDN PRI lines. In addition, lines that Embarq provides via resale arrangements with competitive carriers should be included in these lines. The total number of access lines to be assessed should be the access lines that are in service during the 12-month recovery period. The number of retail access lines that Embarq projects to be in-service are included on lines 11 and 12 of Exhibit KWD-5.

COMPSOUTH: No position.

OPC: No position at this time.

STAFF: Staff has no position at this time.

ISSUE 2(b): IS A LINE ITEM CHARGE ON EMBARQ'S WHOLESALE UNE LOOP 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?

POSITIONS

EMBARQ: It is appropriate for the Commission to approve the application of the storm recovery charge to Embarq's "wholesale unbundled network element loop customers" as well as Embarq's retail customers, since the

storm damage experienced by Embarq affected its facilities used to serve both retail and wholesale customers. The application of the storm cost recovery surcharge to wholesale unbundled loop customers is consistent with federal law because any approved Storm Recovery Surcharge fee will be distinct and separate from the UNE prices established pursuant to § 251 of the Telecommunications Act. Rather, the fee is for the purpose of recovering only the Commission-determined reasonable, intrastate portion of costs incurred to repair and restore Embarq's lines and facilities damaged by tropical storms in 2005. The agreements Embarq enters into with its wholesale customers support the imposition of such a Commission-approved fee.

The charge should be assessed on all DSO, DS1, DS3, UNE-P and Enhanced Extended Loops. Embarq proposes to assess the charge in a manner similar to how Embarq proposes to assess the charge on Embarq's retail DS 1-based retail services (that is, ISDN-PRI lines). Accordingly, Embarq is proposing to assess 5 charges per DS1 loop, which equates to \$2.50 per DS1. Further, Embarq is proposing to assess 30 charges per DS3 loop, which equates to \$15.00 per DS3. Embarq proposes that all other wholesale unbundled loop types be counted as 1 for each wholesale unbundled loop projected to be in service during the recovery period. The total number loops to be assessed should be the loops that are in service during the 12-month recovery period. The number of loops that Embarq projects to be in-service are included on line 13 of Exhibit KWD-5.

COMPSOUTH:

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.²

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

² 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.

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.

To the extent that the commission determines that the surcharge level should increase with access line capacity, Embarq witness Dickerson recognizes in his surrebuttal that the basis for accessing a higher surcharge to higher capacity lines must be the same for wholesale and retail services.

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.

OPC: No position at this time.

STAFF: Staff has no position at this time.

ISSUE 3: **WHAT IS THE APPROPRIATE LINE ITEM CHARGE PER ACCESS LINE, IF ANY?**

POSITIONS

EMBARQ: Since Embarq's total costs exceed the maximum amount that could be recovered under the statutory cap, the appropriate line item charge per access line is the statutory maximum of 50 cents per line per month for 12 months.

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

OPC: No position at this time.

STAFF: The appropriate monthly line item charge per access line is the amount, if any, approved in Issue 1 divided by the appropriate number of access lines, approved in Issues 2(a) and 2(b), divided by 12, as long as this amount does not exceed the statutory limitation of 50¢ per month per customer line as defined in Section 364.051(4), Florida Statutes.

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?

POSITIONS

EMBARQ: The charge should become effective as soon as possible after Commission approval, taking into consideration time for Embarq to modify its billing processes necessary to implement the Commission's order. Once Embarq begins billing the charge, it should be applied for the 12 consecutive months permitted by the statute, at which time the charge should 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.

OPC: The charge should not take effect until Embarq completes billing the surcharge from the 2004 hurricane season, and it should stay in effect for no more than 12 months

STAFF: If a charge is approved in Issue 3, the charge may be assessed at Embarq's earliest convenience, but no earlier than 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. Embarq should provide staff the wording to be used on its bills regarding the storm charge prior to issuance.

ISSUE 5: SHOULD THE DOCKET BE CLOSED?

POSITIONS

EMBARQ: No. Embarq will monitor and review its cost recovery process and will, at the end of 12 months, demonstrate to the Commission that it collected the line-item charge in accordance with the Commission's order resulting from this proceeding. This docket should remain open pending such final review.

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.

OPC: No position at this time.

STAFF: If a charge is not approved, then this docket should be closed. If a charge is approved, then the docket should remain open. At the end of the collection period, Embarq shall file a report on the amount collected. If the collections exceed the amount authorized by the Commission in Issue 1, Embarq shall refund the excess.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Dickerson	EMBARQ	<u>(KWD - 1)</u>	Florida District Map – Embarq Southern Operations
Dickerson	EMBARQ	<u>(KWD - 2)</u>	Damage Resulting from 2005 Tropical Storm Systems
Dickerson	EMBARQ	<u>(KWD - 3)</u>	Storm Cost and Extraordinary Recovery
Dickerson	EMBARQ	<u>(KWD - 4)</u>	Summary Extraordinary Storm Costs & Recovery
Dickerson	EMBARQ	<u>(KWD - 5)</u>	Forecast Access Lines and Cost Recovery Amount
Piedra	STAFF	<u>(IHP - 1)</u>	Audit Report
<u>Rebuttal</u>			
Wood	COMPSOUTH	<u>(DJW - 1)</u>	Vita of Don J. Wood

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Wood	COMPSOUTH	<u>(DJW - 2)</u>	Excerpt, Testimony of Kent W. Dickerson, Docket No. 990649-TP, November 7, 2001
Wood	COMPSOUTH	<u>(DJW - 3)</u>	Excerpt, BellSouth Telecommunications, Inc. response to #12b of CompSouth's Interrogatories, Docket No. 060598-TL

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

The parties to this docket have agreed that the prefiled testimony of the following witnesses may be inserted into the record as though read, and the witnesses shall be excused from attending the hearing and being subject to cross-examination.: Iliana H. Piedra

XI. PENDING MOTIONS

EMBARQ: Embarq is aware of the following pending motions:

CompSouth's First Motion to Compel, filed 12/04/06 and Embarq's Response, filed 12/11/06

Motion for Temporary Protective Order (for Document No. 10437-06), filed 11/14/06

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

XII. PENDING CONFIDENTIALITY MATTERS

EMBARQ: Embarq has the following Requests for Confidential Classification or Claims of Confidentiality pending:

Request for Confidential Classification for Document Nos. 10730-06, 10731-06 and 10732-06, filed 12/8/06

Claim of Confidentiality for Document No. 10437-06-06, filed 11/13/06³

Request for Confidential Classification for Document No. 08857-06, filed 9/25/06

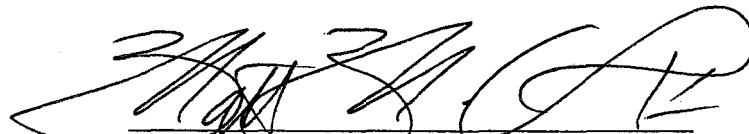
XIII. RULINGS

Opening and closing statements together shall not exceed fifteen minutes per party.

It is therefore,

ORDERED by Commissioner Matthew M. Carter II, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Matthew M. Carter II, as Prehearing Officer, this 29th day of December, 2006.



MATTHEW M. CARTER II
Commissioner and Prehearing Officer

(S E A L)

JKF

³ Embarq understands that in accordance with Rule 25-22.006, F.A.C., to the extent this discovery information is entered into the record of the proceeding, Embarq must file a Request for Confidential Classification within 21 days after the hearing.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.