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Sent: Monday, July 17, 2006 4:18 PM
To: Filings@psc.state.fl.us
Subject: 060455 Embarq's Response to AT&T to Dismiss Embarq's Complaint
Attachments: 060455 Embarq Response to AT&T to dismiss.pdf

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Docket No. 060455

Title of filing: Embarq's Response to AT&T to Dismiss Embarq's Complaint

Filed on behalf of Embarq

14 pages

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July 17, 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. 060455-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc. is Embarq's Response to AT&T of the Southern States, LLC to Dismiss Embarq's Complaint or, in the Alternative, Stay the Proceeding.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at 850-599-1560.

Sincerely,

Susan S. Masterton

Enclosure

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CERTIFICATE OF SERVICE
DOCKET NO. 060455-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail this 17th day of July, 2006 to the following:

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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Embarq Florida, Inc. f/k/a)	
Sprint-Florida, Incorporated against)	Docket No. 060455-TP
AT&T Communications of the)	
Southern States, LLC d/b/a AT&T d/b/a)	
Lucky Dog Phone Co. d/b/a ACC Business)	
d/b/a SmarTalk d/b/a Unispeaksm Service)	
d/b/a www.prepayserviceguide.com)	
d/b/a CONQUEST for failure to pay)	
intrastate Access charges pursuant to)	
Embarq's tariffs)	Filed: July 17, 2006
_____)		

EMBARQ FLORIDA, INC.'S RESPONSE TO AT&T COMMUNICATIONS OF SOUTHERN STATES, LLC'S MOTION TO DISMISS EMBARQ'S COMPLAINT OR, IN THE ALTERNATIVE, STAY THE PROCEEDING

Pursuant to Rule 28-106.204, F.A.C., Embarq Florida, Inc. (hereinafter, "Embarq") files this Response in opposition to the Motion of AT&T of the Southern States, LLC (hereinafter, "AT&T") to Dismiss Embarq's Complaint or, in the Alternative, Stay the Proceeding (hereinafter "AT&T's Motion").

INTRODUCTION

In its Motion, AT&T seeks dismissal or stay of Embarq's Complaint for the intrastate access charges AT&T wrongfully avoided by improperly reporting the jurisdiction of its "enhanced" prepaid calling card calls. The FCC already has determined that the jurisdiction of the calls should be based on their originating and terminating points, rather than the location of the calling card platform, so that all that remains is a determination of the amount of intrastate traffic that AT&T improperly reported as interstate. AT&T's Motion to Dismiss should be denied because the Commission clearly has subject matter jurisdiction over the payment of intrastate access charges to Embarq.

AT&T's Motion to Stay likewise should be denied because:

- Under Florida case law it is within the Commission's discretion whether to grant or deny a stay when there is a similar federal action pending.
- AT&T should not be allowed to benefit from its dilatory tactics to avoid paying avoided access charges that it has acknowledged are due.
- The Commission clearly has the requisite expertise and guiding precedent to resolve the issues set forth in Embarq's Complaint.
- Allowing Embarq to pursue its claim furthers the Commission's strong interest in fostering a full and fair telecommunications market in Florida.

ARGUMENT

I. Standard for Motion to Dismiss

The standard applied by the Commission in ruling on a Motion to Dismiss is well-established. A Motion to Dismiss raises, as a question of law, the sufficiency of the ultimate facts alleged in the original petition or complaint to state a cause of action. See, *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); *Pizzi v. Central Bank and Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971). The standard to be applied in ruling on a Motion to Dismiss is whether, assuming all the allegations in the complaint are true, the complaint states a cause of action upon which relief may be granted. *Id.* In making this determination the Commission may not look beyond the four corners of the Complaint. *Id.* Of course, the Commission also must have subject matter jurisdiction as a basis for considering the issues raised in a complaint.

AT&T does not allege that Embarq's Complaint fails to state a cause of action. Rather, the basis of AT&T's Motion appears to be that the Commission lacks subject

matter jurisdiction over the claims embodied in Embarq's Complaint. Contrary to AT&T's assertions, the Commission clearly has jurisdiction over Embarq's claims that AT&T violated Embarq's intrastate access tariffs and state law.

II. Embarq's Complaint is clearly within the Commission's jurisdiction

To support its Motion to Dismiss, AT&T alleges that "the relief Embarq requests in its Complaint... involves intertwined federal issues" and points to a Complaint Embarq has filed in federal court in Missouri. (AT&T's Motion at page 1) However, as both the Commission and the FCC previously have ruled in similar instances, this Commission is in no way divested of jurisdiction because a decision related to the payment of intrastate access charges would also impact the payment of interstate access charges.

In a proceeding to consider whether LDDS Communications misreported its percent interstate use ("PIU") in Florida and, therefore, failed to pay United Telephone the appropriate amount of intrastate access charges, the FCC dismissed LDDS's federal complaint under United Telephone's interstate tariff on the basis that the FCC lacked subject matter jurisdiction over the payment of intrastate access charges. *In the Matter of LDDS Communications, Inc. v. United Telephone Company of Florida*, 15 FCC Rcd 4950, released March 8, 2000 (hereinafter "LDDS Complaint.")

In finding that the Florida Commission rather than the FCC had jurisdiction over the intrastate access payment dispute, the FCC stated:

The regulatory scheme that has developed under the Act and the Commission's regulations requires that transmissions that use access service be identified as either interstate or intrastate. Once assigned to the appropriate category, charges for the transmissions are separately regulated under the dual regulatory regime prescribed by the Act. Thus, the two categories of traffic are regulated along two separate but parallel tracks by independent agencies—the FCC for interstate communications

and the appropriate state commission for intrastate communications. (15 FCC Rcd at 4951)

Further, the FCC stated “The relationship between interstate and intrastate minutes of use does not subject to federal law, and the terms of the interstate tariff, all changes in a carrier’s minutes of intrastate use.” (15 FCC Rcd at 4954-4955) As in the LDDS Complaint, the substance of Embarq’s Complaint is AT&T’s liability for intrastate access charges.

The FCC followed its jurisdictional analysis in the LDDS Complaint in a proceeding involving BellSouth’s allegations that Thrifty Call misreported its Florida and North Carolina PIUs and, thereby, failed to pay BellSouth the correct amount of intrastate access charges. *In the Matter of Thrifty Call, Inc., Petition for Declaratory Ruling Concerning, BellSouth Telecommunications, Inc.*, Tariff FCC No. 1, 19 FCC Rcd 22240, released November 12, 2004 (hereinafter, “FCC Thrifty Call Decision.”) In that decision, the FCC again recognized the dual nature of the federal and state jurisdiction over access charges. (19 FCC Rcd at page 22243) Further, the FCC affirmed that the adjudication of a complaint “premised on an intrastate access charge billing dispute” is properly within the jurisdiction of the state commission. (19 FCC Rcd at page 22244) Clearly, based on the FCC’s rulings, the Florida Commission has subject matter jurisdiction to resolve the “intrastate access charge billing dispute” that is the subject of Embarq’s Complaint.

When considering the companion case to the FCC Thrifty Call Decision, this Commission also recognized its jurisdiction to resolve PIU disputes involving the underpayment of intrastate access charges. *In re: Complaint by BellSouth*

Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services, Order No. PSC-01-2309-FOF-TP, issued November 21, 2001 in Docket No. 000475-TP (hereinafter, “FPSC Thrifty Call Order.”) While the Commission ultimately granted a motion by Thrifty Call to stay the state proceeding pending the FCC’s ruling on a jurisdictional policy issue raised with the FCC, the Commission explicitly stated that it had no grounds to grant a stay based solely on Thrifty Call’s assertions that the federal tariff related to PIUs, rather than the state tariff, applied. (FPSC Thrifty Call Order at page 5) To the contrary, the Commission stated “Where the subject of the discrepancy being questioned is intrastate usage, it is entirely appropriate to look to the provisions of BellSouth’s Florida tariff for the resolution of discrepancies in reported usage and an audited PIU.” (*Id.*)

In the FCC Thrifty Call Decision, the FCC asserted jurisdiction over certain issues raised by Thrifty Call related to BellSouth’s interstate access tariffs. These issues involved an interpretation of federal orders related to a methodology for determining the jurisdiction of a call. Unlike the Thrifty Call case, in this case the FCC has already made the basic policy decision regarding the jurisdiction of the AT&T “enhanced” prepaid calling card traffic that is the subject of Embarq’s Complaint. *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, released February 23, 2005, 20 FCC Rcd 4826 (hereinafter, “Enhanced Prepaid Calling Card Order.”) In the declaratory ruling

requested by AT&T to determine the nature and jurisdiction of this traffic, the FCC rejected AT&T's position that all "enhanced" prepaid calling card traffic is interstate traffic. Under the FCC's ruling, the jurisdiction of the traffic is to be determined by the originating and terminating locations of the calling and called parties. (Enhanced Prepaid Calling Card Order at ¶¶ 22-28) The FCC's decision recently was upheld by the DC Circuit Court of Appeals. Based on the Enhanced Prepaid Calling Card Order, the only issues in Embarq's Complaint before the Florida Commission are how much of the prepaid calling card traffic that AT&T previously reported as interstate traffic is actually intrastate traffic and, consequently, the amount of additional intrastate access charges due to Embarq.¹ Notably, the FCC specifically recognized the state commissions as appropriate forums to determine the amount of any intrastate access charges that are due retroactively in footnote 58 of the Enhanced Prepaid Calling Card Order.²

AT&T also argues that Embarq's Complaint should be dismissed (or alternatively stayed) because in resolving it the Commission may be required to interpret contracts which it does not have the authority to enforce. (AT&T's Motion at pages 3 & 9) This argument is without merit. First, whether or not the contracts referenced by AT&T are relevant to this dispute is a factual issue outside the four corners of the Complaint, which cannot serve as the basis for

¹ As the Commission is well aware, Embarq's interstate access charges for the time period covered by this Complaint were significantly lower than Embarq's intrastate access charges.

² AT&T's arguments that a ruling by the Commission could result in AT&T paying Embarq more than 100% of access charges due are specious. Embarq is asking AT&T to pay only the difference between what it has paid (using a PIU that counted all of the prepaid calling card traffic as interstate traffic) and what it should have paid (properly characterizing a portion of the prepaid calling card traffic that originated and terminated in Florida as intrastate traffic). AT&T's payment of additional dollars based on the intrastate access charges due would amount to an accounting adjustment for jurisdictional reporting purposes.

dismissal. Second, while the Commission has ruled that it does not have the authority to enforce private contacts, it has also recognized that it may consider and interpret such contracts when they are presented as evidence to determine the issues before it. See, *In re: Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay intrastate access charges pursuant to interconnection agreements and Sprint's tariffs and for alleged violation of section 364.16(3)(a), F.S.*, Order No. PSC-05-1122-PCO-TP, issued November 7, 2005, in Docket No. 050581-TP at page 4 (in which the Commission noted that it could consider the terms of a settlement agreement as evidence). When considering and interpreting contracts in this light, the Commission will apply the laws of other states in accordance with the choice of law provisions of the contracts. See, *In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes*, Order No. PSC-02-0484-FOF-TP, issued April 8, 2002, In Docket No. 001097-TP, at page 22 (in which the Commission stated that the choice of law provision in an interconnection agreement merely dictated what law the Commission should apply to the dispute). See also, *In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreement with BellSouth Telecommunications, Inc.*, Order No. PSC-03-0528-FOF-TP, issued April 21, 2003 in Docket No. 020919-TP at pages

11 & 15 (in which both parties recognized that Georgia law was applicable to the interpretation of the interconnection agreement under dispute).

III. The Commission has discretion whether to stay the proceeding

Under Florida law, courts have broad discretion to rule on motions to stay proceedings pending the resolution of concurrent proceedings in another court.³ Various factors are considered in determining whether to grant or deny a stay, including: the forum in which the proceeding was first initiated; the similarity of the parties, the facts and the relief requested; and the greater potential for delay in one or the other forum.⁴ While the federal action filed in Missouri (on the same day as Embarq filed this Complaint) against AT&T Corporation by the Embarq local operating companies includes allegations related to Embarq's Florida tariffs, the federal case includes different parties, different issues and different bases for relief. In addition, the federal case does not include the allegations of violations state law included in Embarq's Complaint.⁵ By statute, the Commission has exclusive jurisdiction to enforce these statutes, so that these allegations could not appropriately be included in the federal action. (See, s. 364.01(2), F.S.)

³ See, *ITT-Community Development Corp v. Halifax Paving*, 350 So. 2d 116, 118 (Fla. 1st DCA 1977) (stating that a Florida trial court has power to weigh the circumstances for and against a stay, including the unlikelihood of early disposition at the federal trial); Compare, *Lawyers Professional Liability Insurance Co. v. Shand, Morahan and Company*, 394 So. 2d 238, 240 (Fla. 1st DCA 1981) (in which the court overturned the Department of Insurance's refusal to grant a stay, but noted that certain circumstances may provide adequate grounds for a trial court, in its discretion, to deny a stay in a state court proceeding filed after a federal court action involving similar issues).

⁴ See, e.g., *Maloy v. Gunster Yoakley, Valdes-Fauli and Stewart, P.A.*, 850 So. 2d 578, 581 (Fla. 2d DCA 2003) (the court in which jurisdiction first attaches should determine the controversy); *Sebor and Phillipson v. Rief Designs and DRH Corp*, 706 So. 2d 52, 54 (Fla. 5th DCA 1998) (stay of earlier filed state action quashed because state claims could proceed without resolution of federal claims); *Sunshine State Service Corporation v. Dove Investments of Hillsborough*, 468 So. 2d 281, 283-284 (Fla. 5th DCA 1985) (quashing a stay granted by the trial court because the two actions did not have complete identity of parties and the state action was initiated prior to the federal action).

⁵ Embarq has alleged that AT&T has violated section 364.02, 364.08, 364.09, 364.10, 364.336 and 350.113, F.S.

The Commission previously has granted Motions to Stay its proceedings pending the results of federal proceedings. However, these motions typically have been based on pending proceedings at the FCC or federal courts that might result in policy rulings that could alter or overrule the decision of the Commission.⁶ In contrast, this case does not involve a determination of regulatory policy because the jurisdictional issues have already been resolved by the FCC in the Enhanced Prepaid Calling Card Order. Rather, this case addresses the amount of intrastate access charges AT&T must pay Embarq under its intrastate access tariff for traffic that has already been determined to be intrastate traffic under federal and Florida law. The Commission clearly has the jurisdiction and authority to rule on these issues. In fact, the Florida Legislature specifically authorized the Commission to ensure that intrastate interexchange companies pay the appropriate charges for access to local companies' networks. (See, s. 364.02(14), F.S.)

IV. The Commission should deny the stay and rule on Embarq's Complaint

While the Embarq local operating companies' federal complaint includes Embarq Florida, Inc. as a plaintiff and includes allegations involving the Florida tariff, the Commission should not stay the Florida Complaint on that basis. The Embarq local operating companies' have included the Florida claims in the federal complaint because

⁶ See, e.g., the FPSC Thrifty Call Order discussed above; *In re: Complaint by DIECA Communications, Inc. d/b/a Covad Communications Company against BellSouth Telecommunications, Inc. for alleged breaches of interconnection agreement*, Order No. PSC-05-1244-FOF-TP, issued December 21, 2005, in Docket No. 050881-TP; *In re: Petition by BellSouth Telecommunications, Inc. for investigation of wireless carriers' request for BellSouth to provide telecommunications service outside BellSouth's exchange*, Order No. PSC-02-1455-PCO-TL, issued October 22, 2002, in Docket No. 020868-TL. Compare, *In re: Complaint filed by BellSouth Telecommunications, Inc. against Global Crossing Telecommunications, Inc. regarding practices in reporting of percent of interstate usage for compensation for jurisdictional access service*, Order No. PSC-02-0081-PCO-TP, issued January 14, 2002, in Docket No. 011378-TP (cited by AT&T in support of its request) in which the Commission agreed to temporarily stay BellSouth's Complaint pending the resolution of a Motion to Dismiss in Global Crossing's earlier filed federal action. Global Crossing subsequently filed for bankruptcy so the case was never revived.

of the potential legal ramifications of excluding any claims from the federal suit (which the Embarq local operating companies' intended to file for several states where the amount of potential recovery was not significant enough individually to justify separate state commission actions) and to protect and preserve all of its legal options for pursuing its claims.⁷

Embarq has been negotiating with AT&T to resolve the prepaid calling card issues with AT&T for some time. AT&T has resisted all Embarq's attempts to resolve the dispute without resorting to litigation. AT&T should not be rewarded for its attempts to avoid its acknowledged liability for unpaid intrastate access charges.⁸ It is clear that the Florida Commission has jurisdiction over Embarq's claims under its intrastate access tariff that are the basis of the Florida action. Also, clearly, the Commission has the necessary expertise, guided by established precedent, to resolve PIU disputes, making it the appropriate forum for these issues to be decided. If the Commission denies AT&T's request for a stay and allows Embarq to proceed with its Complaint, in all likelihood the Florida Commission decision on the tariff issues would ultimately inform the federal court's decision on the claims Embarq has raised there.

⁷ For example, there is the possibility that filing a complaint at the Florida Commission alone might not toll the statutes of limitation for any future federal actions. Embarq's claims are presently timely. However, depending on the length of these proceedings, but for the federal filing, AT&T may attempt to argue that some claims become limited or barred by the additional passage of time. This is of particular concern since AT&T's pattern in other similar lawsuits is to engage heavily in motion practice, interlocutory appeal, and other methods to delay. Indeed in the Embarq local operating companies' federal litigation, AT&T's first action was to request a 30-day extension of its response time, even though it has been litigating the same issues with other carriers for well over a year. Embarq indicated it would agree to AT&T's requested 30-day extension if AT&T would just agree to promptly commence the federal discovery process. Instead of acknowledging Embarq's conditional agreement to the requested extension, AT&T misleadingly reported to the federal court that Embarq simply would not agree to an extension. Had limitations not been a potential issue, the Embarq local operating companies' would not have felt it necessary to include the Florida claims in the federal complaint.

⁸ Attachment B to Embarq's Complaint contains AT&T's SEC 10 Q filings in which AT&T estimates its anticipated liability should the FCC rule that its "enhanced" prepaid calling card were subject to intrastate access charges, which the FCC did in the Enhanced Prepaid Calling Card Order.

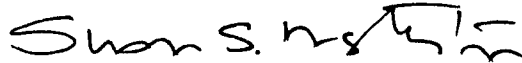
Denying AT&T's request for a stay and allowing Embarq to proceed with its claims also advances important policy goals of the Commission. One of the primary purposes of Florida Commission regulation of the telecommunications industry, as set forth in the governing statutes, is to ensure full and fair competition in the telecommunications market. (See, ss. 364.01(4)(b), (d), (g) and (h), F.S.) This case is, at heart, a case of abuse of the regulatory process by AT&T to gain an unfair advantage over its competitors. In so doing, AT&T's behavior has distorted pricing in the marketplace for telecommunications services in Florida, and these distortions affect both consumers and other providers.

For a competitive market to operate efficiently, prices must accurately reflect the costs incurred by providers, because these prices serve as signals to other competitors. If one provider has a legitimate cost advantage over another, its prices will reflect that advantage. Seeing the lower prices, customers will respond accordingly and competing firms will try to increase their own efficiency. But when a provider creates the *illusion* of a cost advantage—as MCI infamously did in the late 1990s by mischaracterizing its access payments and as AT&T has done in this case by avoiding access payments—other carriers respond to what are in fact false signals of artificial efficiency. The Florida Commission should send a strong message to the telecommunications industry in Florida that it will not condone unilateral abuse of the regulatory process to the detriment of fair competition. The Commission can accomplish this aim by allowing Embarq to pursue its Complaint with the Commission to recover the intrastate access charges it was denied by AT&T's willful mischaracterization of the jurisdiction of its "enhanced" prepaid calling card traffic.

CONCLUSION

Wherefore, for the reasons set forth above, the Commission should deny AT&T's Motion to Dismiss and its alternative Motion to Stay and should allow Embarq to proceed with its Complaint.

Respectfully submitted this 17th day of July 2006,



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