

**Matilda Sanders**

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**Sent:** Thursday, August 17, 2006 11:35 AM  
**To:** Filings@psc.state.fl.us  
**Cc:** Masterton, Susan S [LTD]  
**Subject:** Docket No. 060455-TP, Embarq's Notice of Supplemental Authority  
**Attachments:** 060455-TP, Embarq's Supplemental Authority.pdf

**ORIGINAL**

**Filed on behalf of:**

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**Docket No: 060455-TP**

**Title of filing:** 060455-TP, Embarq Florida, Inc.'s Notice of Supplemental Authority

**Filed on behalf of:** Embarq Florida, Inc.

**No. of pages:** 10 pages

**Description:** Embarq Florida, Inc.'s Notice of Supplemental Authority

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<<060455-TP, Embarq's Supplemental Authority.pdf>>

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August 17, 2006

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

RE: Docket No. 060455-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc. is Notice of Supplemental Authority.

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

Susan S. Masterton  
COUNSEL  
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**CERTIFICATE OF SERVICE  
DOCKET NO. 060455-TP**

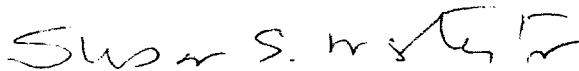
**I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail this 17<sup>th</sup> day of August, 2006 to the following.**

Florida Public Service Commission  
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2540 Shumard Oak Blvd.  
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Florida Public Service Commission  
Laura King/Nancy Pruitt  
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AT&T Communications of the Southern States, LLC  
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**Susan S. Masterton**

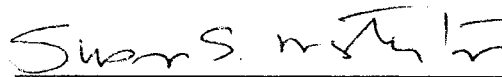
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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](http://www.prepayserviceguide.com) )  
d/b/a CONQUEST for failure to pay )  
intrastate Access charges pursuant to )  
Embarq's tariffs ) Filed: August 17, 2006  
\_\_\_\_\_ )

**EMBARQ FLORIDA, INC.'S**  
**NOTICE OF SUPPLEMENTAL AUTHORITY**

Embarq Florida, Inc. ("Embarq") hereby files the attached Order Ruling on AT&T's Motions issued by the North Carolina Public Service Commission on August 17, 2006 in a similar proceeding initiated by Embarq in North Carolina, related to North Carolina intrastate access charges for AT&T's "enhanced" prepaid calling cards, as supplemental authority for Embarq's Response to AT&T Communications of Southern States, LLC's Motion to Dismiss Embarq's Complaint or, in the Alternative, Stay the Proceeding, filed on July 17, 2006.

Respectfully submitted this 17th day of August 2006.



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Counsel for Embarq Florida, Inc.

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. P-140, SUB 91

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Carolina Telephone and Telegraph Company,	)	
	)	
Complainant	)	
	)	
v.	)	ORDER RULING
	)	ON AT&T MOTIONS
	)	
AT&T Communications of the Southern States, LLC,	)	
	)	
Respondent	)	

BY THE PRESIDING COMMISSIONER: On June 14, 2006, Carolina Telephone and Telegraph Company (Carolina) and Central Telephone Company (Central) (collectively, Embarq) filed a Complaint against AT&T Communications of the Southern States, LLC (AT&T) alleging that AT&T had intentionally and unlawfully misrepresented to Embarq certain prepaid calling card traffic as interstate traffic through manipulation of Percent Interstate Usage (PIU) reporting in violation of Embarq's Intrastate Access Tariffs,<sup>1</sup> state law,<sup>2</sup> and the rules of the Commission.<sup>3</sup> The alleged PIU manipulation occurred specifically with respect to prepaid calling card traffic using the 1+ Toll Free Number (8XX) calling format—AT&T's so-called "enhanced" calling card. Embarq charged that AT&T had manipulated PIU calculations for both the PIU factors it provided to Embarq and for Embarq's calculation of PIU factors by treating prepaid calling card originating traffic as though each call was two calls—one from the call originator to a phone number associated with a prepaid calling card platform and a second call from the calling card platform to the originally dialed terminating number, resulting in underbilling of intrastate access charges to AT&T by Embarq. As a result, from

<sup>1</sup> Specifically, Embarq cited to Section 2.3.14 of Carolina's Access Service Tariff and 2.3.11 of Central's Access Service Tariff. Embarq argued that, consistent with federal and state law, these provisions make plain that the end user endpoints of a call determine its jurisdiction for PIU reporting purposes.

<sup>2</sup> Embarq cited to G.S. 62-133.5, which requires Embarq to file tariffs for toll switched access services. Embarq contended that AT&T's failure to pay the applicable intrastate access charges means that AT&T has failed to fulfill its obligations under this provision. According to Embarq, in the absence of an order requiring AT&T to pay access charges in accordance with the tariff, AT&T has effectively received an unlawful discount for services for which similarly situated access customers paid the higher intrastate rates. Embarq contended that this result violated G.S. 62-139 (rates varying from schedule prohibited) and 62-140 (unreasonable discrimination prohibited) and other anti-discrimination and anti-competition prohibitions.

<sup>3</sup> Embarq referred here to its allegation that AT&T has underpaid its Commission regulatory fee, authorized pursuant to G.S. 62-302 and Rule R15-1.

August 2002 or prior thereto through at least April 2005, AT&T underpaid Embarq in excess of \$12.5 million, including applicable late payment interest charges in intrastate access revenues.

In general support of its Complaint, Embarq stated that it was plain that the jurisdiction of a call follows from where it originated and where it terminated and that the FCC had soundly rejected AT&T's contention that calls by way of its "enhanced" calling cards were interstate when the calling platform was out of state. See, *In Re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, 2005 Lexis 1195 (Feb. 23, 2005) (hereinafter, *AT&T Prepaid Calling Card Order*). Embarq also noted that it had attempted to conduct an audit of AT&T regarding this matter but that AT&T had been uncooperative. Embarq observed that the FCC and state commissions have consistently found that audits are discretionary under tariff provisions identical to those in this case and that the back billing parameters under the tariff provisions do not apply when the billing party is prevented from obtaining accurate information. See, e.g., *Thrifty Call, Inc., Petition for Declaratory Ruling*, 19 FCC Rcd 22240, 2004 Lexis 6410 (Nov. 12, 2004) (*FCC Thrifty Call Order*); *BellSouth Telecommunications, inc. v. Thrifty Call, Inc.*, Docket No. P-447, Sub 5 (April 11, 2001); and *Utilities Commission v. Thrifty Call, Inc.*, 154 N.C. App. 58, 571 S.E. 2d 622 (N.C. Ct. App. 2002) (*Thrifty Call 2002*).

#### AT&T Response

On July 31, 2006, AT&T filed a Motion to Dismiss Embarq's Complaint or, in the Alternative, Stay the Proceeding. AT&T also sought reconsideration regarding the Commission's July 26, 2006, Order allowing discovery to proceed. The essence of AT&T's arguments was (1) that the Commission ought to defer to the proceeding brought by Embarq now underway in the U.S. District Court for the Western District of Missouri (District Court) and (2) that, in any event, Embarq's bases for its North Carolina Complaint are without merit. AT&T asserted that, in the federal complaint Embarq is seeking relief that is functionally equivalent to, and not substantively different from, that which Embarq seeks from the Commission and that Embarq's claims before the Commission are inextricably intertwined with federal issues relative to interstate access charges. In fact, Embarq is seeking relief in the District Court based in part on the same North Carolina tariffs that underlie its claims before the Commission. Even though in its federal complaint Embarq asserts federal subject matter jurisdiction claiming federal issue jurisdiction, it also asserts jurisdiction on the basis of diversity of citizenship and pendant jurisdiction.

AT&T argued that, in the Complaint, Embarq had omitted three critical facts that demonstrate that the issues must be addressed and resolved at the federal level. First, Embarq failed to advise the Commission that resolution of the PIU dispute in the context of intrastate access charges will necessarily require interpretation and application of Embarq's federal access tariff concerning PIU disputes and retroactive adjustment to interstate access charges based on PIU audits, which are federal functions. Second, Embarq failed to inform the Commission that the issues in this proceeding can only be resolved by interpreting a series of private contracts between Embarq and AT&T, which a federal district court is specifically designed to perform. Third, Embarq has failed to

inform the Commission that it had filed its federal complaint against AT&T, that the District Court is reviewing issues identical to those in the North Carolina complaint, and that the District Court's resolution of those issues will be dispositive of all the legal and factual issues in the North Carolina proceeding.

With respect to the federal access tariff, AT&T stated that the interstate access tariff establishes both a comprehensive methodology for calculating PIU factors and a mechanism for resolving inter-company disagreements. With respect to private contracts, AT&T pointed out that Embarq's predecessor in interest, Sprint, and AT&T had entered into an Access Billing Supplier Quality Certification Operating Agreement specifically designed to address the methodology and procedures by which PIU calculations are audited and PIU disputes are resolved. AT&T also noted that Sprint had entered into a Settlement and Release Agreement in October 2004 (Settlement Agreement) that resolved several issues relative to the PIU dispute between the parties. Provisions of this agreement will govern parameters and timeframes within which recovery might be obtained. The Settlement Agreement also contains terms requiring that it be interpreted pursuant to the laws of Kansas. With respect to Embarq's federal complaint, AT&T noted that Embarq claimed therein that AT&T had violated its North Carolina Tariff. There can be no doubt that the resolution of Embarq's federal complaint will be more comprehensive than any resolution of issues in this proceeding.

In support of its Motion to Dismiss, AT&T maintained that the issues raised by Embarq must be resolved in a uniform fashion pursuant to federal law. Embarq's North Carolina Complaint is a classic dispute concerning jurisdictional separations. AT&T stated that Embarq had acknowledged that its FCC Tariff controlled the process for determining the jurisdictional basis for calls. Once the interstate usage percentage is calculated under the FCC tariff, the intrastate percentage of use is derivatively determined under Embarq's FCC tariff. If Embarq's complaint were solely to enforce intrastate tariffs and rely upon the intrastate PIU in a case where the Commission has jurisdiction to grant a remedy, the Commission's jurisdiction would be exclusive; but that is not the case here, especially in light of the fact that Embarq itself brought suit in the District Court. Only a federal court or agency can address the effect of interstate traffic on the PIU. AT&T also maintained that the Commission lacks jurisdiction to award monetary damages in a complaint brought by a regulated utility against a customer.

AT&T more specifically argued that, when a utility's customers refuse to pay for tariffed services or refuse to fulfill conditions imposed on the customer to receive service under the tariffed rate, the Commission is without jurisdiction to entertain complaints by the public utility against its customers to rectify the customer's non-compliance or refusal to pay. AT&T therefore criticized as erroneous the North Carolina Court of Appeals *Thrifty Call 2002* decision, in which the Court rejected Thrifty Call's argument that the back-billing approved by the Commission in that case constituted an award of monetary damages. AT&T stated that the Court of Appeals decision was an "outlier" and asserted that the General Assembly had not given the Commission authority to "collect unpaid access fees."

AT&T also maintained that Embarq's claims that AT&T had violated state law for violations of G.S. 62-139 and 140 were without merit. G.S. 62-139 prohibits a utility

from charging more or less for its services than its tariffs permit, while G.S. 62-140 prohibits a utility from engaging in unlawful or undue discrimination. These claims should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. Even further removed from any legitimate dispute between the parties is Embarq's assertion that AT&T has underpaid its regulatory fees. Embarq has no standing to police AT&T payments of regulatory fees.

With respect to the requested stay of the proceedings, AT&T argued that this course of action was both advisable and permissible. Under North Carolina law, when an action is pending between substantially the same parties on substantially the same issues, the trial court may stay the parallel action pending disposition of the prior action. See, *G.S. 1-75.12 and Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.* 46 N.C. App. 707, 713, 266 S.E.2d 368, 371 (1980). Courts in North Carolina have routinely stayed proceedings when prior, or more comprehensive, proceedings are pending in other states. This may even apply in favor of subsequently filed actions. The Commission itself has previously held a proceeding in abeyance pending resolution of parallel court proceedings on the basis that interpretation of a private agreement between the parties is a function best left to the court. See, e.g., *In the Matter of Application of Regional Investments of Moore, Inc.*, Docket No. W-6, Sub 13 (January 6, 1988). The convenience of the forum and of the parties and witnesses weighs in favor of staying the North Carolina proceeding. A stay will not deny Embarq's day in court but would rather ensure judicial economy.

AT&T concluded by arguing that a corollary to AT&T Motion to Dismiss or Stay is that the Commission should reconsider its July 26, 2006, Order requiring AT&T to respond to Embarq's first set of discovery requests by August 21, 2006. On August 8, 2006, AT&T asked for leave to supplement its Motion for Reconsideration in the form of a brief argument related to an attachment containing the decision of the Pre-Hearing Officer of the Florida Public Service Commission (Florida PSC), Katrina J. Tew, holding discovery in abeyance on the Embarq complaint with similar subject matter there pending the Commission's resolution of AT&T's Motion to Dismiss.

#### Embarq Reply to AT&T Motions

On August 7, 2006, Embarq replied to AT&T's Motions. First, Embarq argued that AT&T's Motion to Dismiss should be denied because, clearly, the Commission has subject matter jurisdiction over the payment of intrastate access charges and Embarq's complaint clearly states a claim upon which relief can be granted. Second, Embarq argued that the Motion to Stay should be denied because the issuance of a stay when there is a similar federal action pending is discretionary in nature; the Commission has the requisite expertise and guiding precedence to resolve the issues in Embarq's complaint; AT&T should not be allowed to benefit from its dilatory tactics; and hearing Embarq's complaint would foster a full and fair telecommunications market in North Carolina. Third, the Motion for Reconsideration of the Commission's July 26, 2006, Order should be denied because that Order neither contains nor is based upon an error of law or fact; there has been no significant change of circumstances; and Embarq's July 21, 2006, Response and the July 26, 2006, Order fully support that Order.



With respect to the Motion to Dismiss, Embarq pointed out that the standard under which a motion to dismiss for failure to state a claim upon which relief can be granted (N.C.R.Civ.P 12(b)(6)) should be evaluated is whether the complainant is entitled to relief "under any state of facts which could be presented in support of the claim." A Rule 12(b)(6) Motion should be granted only if the pleading at issue "fails to allege a sufficient legal or factual basis for the claim, or reveals a fact which necessarily defeats the claim." AT&T has not met this standard. Rather it focuses its fire on the Commission's supposed lack of jurisdiction. (N.C.R. Civ.P. 12(b)(1). AT&T's arguments here are also unavailing. The Commission clearly has jurisdiction over Embarq's claims that AT&T violated Embarq's *intrastate* access tariffs and state law. As both this Commission and the FCC have previously ruled in similar circumstances, 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. For example, *In the Matter of LDDS Communications, Inc. v. United Telephone Company of Florida*, 15 FCC Rcd 4950, released March 8, 2000) (*LDDS Complaint*), the FCC recognized that the Florida PSC had jurisdiction over the intrastate access payment dispute, "the two categories of traffic" being "regulated along two separate but parallel tracks by independent agencies." The FCC followed this jurisdictional analysis in the *FCC Thrifty Call Order*, affirming that the adjudication of a complaint was "premised on an intrastate access charge billing dispute" which state commissions have jurisdiction to decide. It is true that, in the *FCC Thrifty Call Order*, the FCC did assert jurisdiction over certain issues raised by Thrifty Call related to BellSouth's interstate access tariffs, but it should be noted that these issues involved an interpretation of federal orders related to a methodology for determining the jurisdiction of the call. Relative to the instant case, the FCC has already made the basic policy decision regarding the jurisdiction of AT&T's "enhanced" prepaid calling card traffic in the *AT&T Prepaid Calling Order* by rejecting AT&T's proposition that such traffic is necessarily interstate in nature. The FCC's decision was recently upheld on appeal by the U.S. Court of Appeals for the District of Columbia in Case No. 05-1096, *AT&T v. FCC*, 2006 U.S. App. LEXIS 17719 (decided July 14, 2006).

Embarq gave short shrift to AT&T's argument that Embarq is seeking the award of monetary damages, which the Commission lacks jurisdiction to award. Embarq cited to the North Carolina Court of Appeals' decision in *Thrifty Call 2002*, where the Court wrote that "[t]he commission's authority to require the payment of sums that should have been paid but were not because of inappropriate classification is well-established and does not constitute an award of damages." The Court noted that that the Commission was simply affording a remedy to BellSouth to collect unpaid access fees under its North Carolina tariff and, were this remedy denied, BellSouth would have been prevented from enforcing its tariff and protecting consumers.

As for other North Carolina law supporting Embarq's Complaint, Embarq admitted that G.S. 62-139 does not apply to Embarq since both Carolina and Central are price regulated but urged that this exception does not relieve AT&T from the application of this or other statutes and does not excuse the ultimate discrimination that has resulted from AT&T's activities.

With respect to the Motion to Stay, Embarq pointed out that that the issuance of a stay is discretionary with the trial court, and argued that AT&T has presented no convincing arguments as to why this discretion should be exercised in deference to the District Court. AT&T's assertions as to inconvenience to the parties and witnesses as this docket proceeds are unconvincing. Neither Carolina nor Central has a large public utility operation in Kansas. Moreover, Embarq pointed out that not all the issues in the North Carolina Complaint were subsumed by the federal litigation. Relative to the federal case, the action in North Carolina involves different parties, different issues, and different bases for relief. The federal case, for example, does not include allegations of violations of state law.

Regarding AT&T's Motion to Reconsider with regard to discovery, Embarq stated that there had been no error of law or misapprehension or disregard of facts that would justify reconsideration. AT&T's concerns regarding wasteful discovery are overdrawn, and Embarq is more than willing to enter into a discovery agreement containing suitable provisions to eliminate duplicative discovery. Given the lack of progress in settlement discussions to date and AT&T's dilatory discovery conduct in other pending actions on these issues, this matter should continue to move forward efficiently and without unnecessary delay.

With respect to AT&T's filing regarding the Florida PSC's decision to hold discovery in abeyance pending decision on AT&T's Motion to Dismiss, Embarq repeated its argument that the Commission's July 26<sup>th</sup> Order was well-reasoned. Embarq asserted that AT&T has the resources to respond to discovery and that AT&T has at least some of the documents furnished in other cases readily available for production in this one. Embarq also stated that it had sought to reach agreement with AT&T on discovery issues, as the Commission requested in its July 26<sup>th</sup> Order, providing a proposed Discovery Procedures Agreement and Proposed Protective Agreement, but thus far AT&T has not responded.

WHEREUPON, the Presiding Commissioner reaches the following

#### CONCLUSIONS

After careful consideration, the Presiding Commissioner concludes that good cause exists to deny AT&T's Motions for Dismissal, Stay, and Reconsideration for the reasons as generally set forth by Embarq. The Presiding Commissioner does, however, conclude that the due date for AT&T to respond to Embarq's first set of data requests should be extended to September 11, 2006.

Concerning the Motion for Dismissal, the Presiding Commissioner concurs with Embarq that Embarq has stated a claim upon which relief can be granted and that the Commission has jurisdiction to grant such relief. The Commission undeniably has jurisdiction over disputes related to the payment of intrastate access charges, which is at the core of this Complaint. The Presiding Commissioner also finds AT&T's argument that the relief Embarq seeks constitutes "monetary damages"—which the Commission cannot grant—to be unconvincing, particularly given the decision in *Thrifty Call 2002*, which is binding on the Commission.

Concerning the Motion for Stay, the Presiding Commissioner concurs with Embarq that deference to the District Court is discretionary with this Commission and that a compelling case has been not been made, either as a matter of necessity or efficiency, for staying the present complaint proceeding.

In view of the determinations above, the Presiding Commissioner therefore does not believe that reconsideration of the Commission's July 26, 2006, Order involving discovery should be granted. The Presiding Commissioner appreciates AT&T's providing a copy of the Florida PSC's order holding discovery in abeyance but notes, that, by its terms, it is held in abeyance only until such time as AT&T's Motion to Dismiss has been resolved in Florida. In North Carolina AT&T's Motions to Dismiss or Stay are being resolved today.

Nevertheless, the Presiding Commissioner notes that the parties have complied with the Commission's July 26, 2006, Order Ruling on Discovery Motions. That Order provided that the parties should confer with a view toward submitting suitable discovery procedures or, if they could not agree on them, to submit separate documents. The parties submitted separate documents on the due date of August 15, 2006. The date set in the Order Ruling on Discovery Motions on which AT&T was supposed to respond to Embarq's first set of data requests was extended to August 21, 2006. In light of the submission of recommendations regarding discovery procedure made by the parties on August 15<sup>th</sup>, the Presiding Commissioner believes that, in order to allow time for the Commission to consider those proposals, the due date for AT&T's responses to the first set of data requests should be extended roughly by the amount of time between the date on which AT&T filed its Motions to Dismiss, Stay, or Reconsider (i.e., July 31, 2006) and the date on which this Order is being issued (i.e., August 17, 2006). Accordingly, the Presiding Commissioner concludes that the due date on which AT&T should respond to Embarq's first set of data requests should be extended to September 11, 2006.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 17<sup>th</sup> day of August, 2006.

NORTH CAROLINA UTILITIES COMMISSION

*Gail L. Mount*

Gail L. Mount, Deputy Clerk