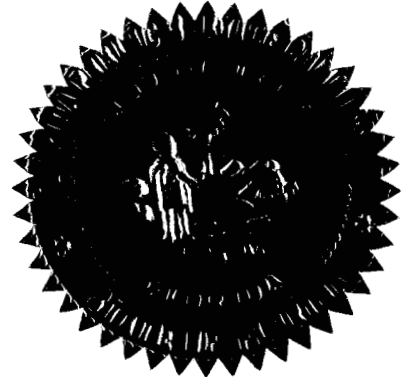


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060455-TP

In the Matter of:

COMPLAINT AGAINST 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.PREPAIDSERVICEGUIDE.COM D/B/A  
CONQUEST FOR FAILURE TO PAY INTRASTATE  
ACCESS CHARGES PURSUANT TO EMBARQ'S  
TARIFFS, BY EMBARQ FLORIDA, INC.,  
F/K/A SPRINT-FLORIDA, INCORPORATED.



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PROCEEDINGS:                   AGENDA CONFERENCE  
ITEM NO. 3

BEFORE:                       CHAIRMAN LISA POLAK EDGAR  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER ISILIO ARRIAGA  
COMMISSIONER MATTHEW M. CARTER, II  
COMMISSIONER KATRINA J. TEW

DATE:                         Tuesday, August 29, 2006

PLACE:                        Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY:                JANE FAUROT, RPR  
Official Commission Reporter  
(850) 413-6732

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FLORIDA PUBLIC SERVICE COMMISSION 08118 SEP-5 06

FPSC-COMMISSIONER

1 PARTICIPATING:

2 BRUCE MAY, ESQUIRE, and TRACY HATCH, ESQUIRE,  
3 representing AT&T.

4 SUSAN MASTERTON, ESQUIRE, representing Embarq.

5 MICHAEL COOKE, ESQUIRE, and ADAM TEITZMAN, ESQUIRE,  
6 representing Commission Staff.

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## P R O C E E D I N G S

1  
2 CHAIRMAN EDGAR: We will begin our discussions with  
3 Item 3.

4 MR. TEITZMAN: Good morning, Commissioners. Adam  
5 Teitzman on behalf of Commission staff.

6 Commissioners, Item 3 is staff's recommendation  
7 addressing the motion to dismiss or, in the alternative, stay  
8 the proceeding filed in Docket Number 060455-TP. Staff is  
9 recommending that the Commission deny the motion because it  
10 fails to raise arguments sufficient to support dismissal of the  
11 complaint.

12 AT&T has requested oral argument, and staff is  
13 recommending granting oral argument with ten minutes per party.

14 MR. MAY: Madam Chair, Commissioners, I'm Bruce May  
15 with the law firm of Holland and Knight, appearing today on  
16 behalf of AT&T. With me is Tracy Hatch also with AT&T.

17 With the Chair's permission, what I would like to do  
18 in my ten minutes of allotted time is to give you some brief  
19 background as to why we're here.

20 CHAIRMAN EDGAR: Okay. Mr. May, just a moment, if  
21 you would, and thank you.

22 So we've got Mr. May, we have Mr. Hatch, we have Ms.  
23 Masterton.

24 Commissioners, the first issue before us is whether  
25 we would like to hear oral argument.

1 COMMISSIONER DEASON: Move staff on Issue 1.

2 COMMISSIONER CARTER: Second.

3 CHAIRMAN EDGAR: Okay. All right. Then show Issue 1  
4 approved.

5 Now, Mr. May, if you will give me a minute. Ten  
6 minutes, and I think we are ready to go into it.

7 Ms. Masterton, do you have a comment you need to make  
8 before we do that?

9 MS. MASTERSON: No, I will just wait until after Mr.  
10 May is done with his remarks.

11 CHAIRMAN EDGAR: Okay. Now, Mr. May.

12 MR. MAY: I apologize for being presumptuous.

13 The reason we're here, Commissioners, is that on June  
14 14th of this year, Embarq filed virtually identical complaints  
15 in three separate jurisdictions. One complaint was filed in  
16 the Western District of the United States District Court in  
17 Missouri, the other complaint was filed before the North  
18 Carolina Public Utility Commission. And then, of course, this  
19 complaint was filed. Again, those complaints were filed on the  
20 same day in three separate jurisdictions. Each complaint is  
21 based on a common theme and a common claim, and that claim is  
22 that AT&T owes Embarq additional intrastate access charges for  
23 enhanced prepaid calling card traffic.

24 Embarq's scatter-gun litigation tactic has placed my  
25 client in the uncomfortable and awkward position of having to

1 try the same case three different times in three different  
2 forums with the potential for three different results. Faced  
3 with those multiple filings, what we have asked the Commission  
4 to do is to dismiss the complaint because the federal court and  
5 not the Commission has all of the requisite jurisdictional  
6 tools to comprehensively resolve this dispute. In the  
7 alternative, what we have asked is that the Commission,  
8 recognizing the principles of comity and judicial and  
9 administrative economy to defer any further proceeding in this  
10 case, pending the outcome of the federal court litigation.

11 Now, Embarq asserts, and your staff has recommended  
12 that both of our alternative motions be denied and you proceed  
13 forward, notwithstanding that there is a pending federal court  
14 proceeding on virtually the identical case. We respectfully  
15 disagree with staff's recommendation primarily for two reasons.  
16 And given the limited amount of time, I'm going to focus on  
17 these two reasons.

18 First, the recommendation itself is founded on the  
19 premise, we believe a faulty premise, that you can resolve this  
20 complaint simply by reviewing and enforcing the intrastate  
21 access charge tariff. That premise ignores AT&T's fundamental  
22 defense to this claim.

23 The staff recommendation overlooks the fact that  
24 AT&T's defense to each of the three complaints in each of the  
25 three jurisdictions is the same, and that is Embarq is barred

1 from recovering additional access charges because it has  
2 entered into a series of private settlement agreements with  
3 AT&T wherein it has released and has waived its right to  
4 recover these additional access charges from my client. Those  
5 private contractual agreements, Commissioners, go to the very  
6 heart of AT&T's defense in this case and in the federal case.  
7 Affirmative Defense Number 9 in the federal court litigation is  
8 just that, that Embarq has released AT&T and is not entitled to  
9 recover these additional access charges by virtue of it  
10 entering into these series of private settlement agreements.

11           Because those private contractual agreements are at  
12 the core of this case, in order to resolve this case you're  
13 going to have to do more than simply enforcing the tariffs.  
14 You're going to have to review, interpret, and enforce these  
15 private settlement agreements. The Commission does not have  
16 that kind of authority. In fact, if you look at staff's  
17 recommendation, and, in fact, if you look at Embarq's response  
18 to our motion to dismiss, both staff and Embarq acknowledge  
19 that the Commission does not have the authority to enforce  
20 private settlement agreements.

21           There are a couple of cases that I would like to  
22 bring your attention to. The KMC case, the KMC order. Order  
23 Number PSC-05-1122, which staff cites for the proposition and  
24 Embarq sites for the proposition of allowing the Commission to  
25 interpret private settlement agreements really does just the

1 opposite. Let me quote what you said, and this was in your  
2 November 7th, 2005, order. And I quote, "This Commission has  
3 recognized that it has no general authority to enforce  
4 contracts and that a settlement agreement is, in essence, a  
5 contract." You went on to say, and I quote, "This Commission  
6 is not the appropriate forum to enforce this settlement  
7 agreement that was neither filed nor approved by us."

8 Now, because the Commission does not have the  
9 authority to -- clearly does not have the authority to enforce  
10 the settlement agreements upon which we base our fundamental  
11 defense, we submit that you don't have all the necessary  
12 jurisdictional tools to resolve this case. It's like building  
13 a house with just a hammer. You need more than simply the  
14 ability to look at the tariff, you need to be able to enforce  
15 these private settlement agreements. Again, for that reason,  
16 we have asked you to defer to the federal court which clearly  
17 has much broader and comprehensive jurisdiction to enforce  
18 these settlement agreements.

19 Our second concern with staff's recommendation is  
20 really it is not a fault we are finding with staff's  
21 recommendation, it's the fact that there has been some recent  
22 developments after we filed our motion to dismiss that I want  
23 to bring your attention to. Staff's recommendation does not  
24 bring you up to speed and apprise you of the fact that there is  
25 a mandatory mediation proceeding ongoing in the federal court

1 in the Western District of Missouri, which if allowed to run  
2 its course, we believe, could resolve all or perhaps most of  
3 the issues in this case.

4           The mandatory mediation process for the Western  
5 District of Missouri is somewhat of a unique process, and if I  
6 might take a little bit of time to give you the history there.  
7 In 1990 Congress enacted the Civil Justice Reform Act, and in  
8 so doing designated the Western District of Missouri and four  
9 other federal district courts as demonstration projects to test  
10 whether alternative dispute resolution was effective.

11           By all accounts, this test proved very successful and  
12 very effective. And as a result of that test, the Western  
13 District of Missouri has adopted a special local rule which  
14 requires all civil litigation such as this to go through a  
15 mandatory mediation process. Again, we believe that process  
16 would be productive and could, in fact, resolve all of the  
17 issues before you today. We simply ask you to stay this  
18 proceeding to allow the parties to focus their efforts on  
19 potentially settling this dispute through this mandatory  
20 mediation process.

21           Now, I fully expect Ms. Masterton to argue that this  
22 is simply another delay tactic on behalf of AT&T. That's not  
23 the case. The mandatory mediation process in federal district  
24 courts is a fast-track process. Within the next three days,  
25 before September 1, the parties are required to appoint a



1 mediator and then conduct that mediation session within the  
2 next 30 days. So by the end of September, this mediation  
3 session will have occurred, and it is fully expected that the  
4 mediation process itself will be fully concluded within the  
5 next 60 days. Holding this proceeding in abeyance and allowing  
6 that mediation process to work itself out we think is a prudent  
7 course of action, and it's not going to cause any undue harm or  
8 delay.

9           Finally, Commissioners, staff's recommendation  
10 suggests that unless you move forward -- there is a suggestion  
11 that unless you move forward with this complaint you are  
12 somehow abdicating your statutory responsibility to enforce  
13 Chapter 364. I think that argument and that position or that  
14 suggestion ignores a long line of cases in Florida which  
15 encourage state courts and administrative agencies like you to  
16 defer to the federal court where the federal court has  
17 jurisdiction. The fact that you would defer to the federal  
18 court, at least hold this proceeding in abeyance pending the  
19 outcome of that mandatory mediation process I don't believe in  
20 good faith can be characterized as an abdication of your  
21 statutory responsibilities.

22           I know I'm approaching the end of my time, but before  
23 I conclude I want to leave with you with a clear understanding  
24 of what we are asking for here. And perhaps the best way to do  
25 that is to first let you know what we are not asking you to do

1 or we're not asserting. We're not claiming that you lack  
2 jurisdiction to interpret and enforce the intrastate access  
3 charge tariff of Embarq which you have approved. My client  
4 fully recognizes your authority in that regard and it respects  
5 your authority. What AT&T is saying is that the resolution of  
6 this case involves much more than simply looking at and  
7 enforcing an access charge tariff.

8           Again, the private contract, the private settlement  
9 agreements that the parties have entered into must be reviewed,  
10 interpreted, and enforced in order for AT&T to have its day in  
11 court. Again, we respectfully submit that that particular  
12 jurisdictional authority is not with you today. For that  
13 reason, we're simply asking that you allow the federal court to  
14 rule on these contractual defenses. If the court finds that  
15 those contracts would bar Embarq from recovering additional  
16 access charges, the need for this proceeding would evaporate.  
17 On the other hand, if the federal court were to determine that  
18 those contracts do not bar Embarq from recovering these  
19 additional access charges, then a proceeding before this  
20 Commission could be appropriate. However, we believe, again,  
21 it would be inefficient for all the parties concerned, and the  
22 Commission, to proceed forward with this case before the  
23 federal court rules on the threshold contract defenses.

24           In our original motion, Commissioners, we asked for  
25 two things. We asked for you either to dismiss the complaint

1 in deference to the federal court, or you hold this proceeding  
2 in abeyance until the conclusion of the federal court process.  
3 In light of the new development, the fact that there has been  
4 mandatory mediation required in this case, we think there is a  
5 third alternative that you should consider, and that is to hold  
6 this proceeding in abeyance until the federal court's mandatory  
7 mediation process runs its course.

8           Again, that's not an unduly long delay. We are  
9 talking 30 to 60 days. And, again, allowing the federal court  
10 mediation process to work, we believe, would conserve the  
11 resources of the parties, would conserve the resources of the  
12 Commission, and, more importantly, would advance your  
13 longstanding policy of encouraging settlement. That concludes  
14 my remarks. I will be glad to answer any questions.

15           CHAIRMAN EDGAR: Thank you.

16           Ms. Masterton.

17           MS. MASTERSON: Thank you, Madam Chairman.

18           Commissioners, AT&T has asked you to dismiss Embarq's  
19 complaint by suggesting that the Commission does not have  
20 jurisdiction to resolve it. In the alternative, AT&T pleads  
21 with you to stay Embarq's complaint pending resolution of a  
22 complaint filed by Embarq in federal court in Missouri. As  
23 your staff has recommended, you should deny AT&T's motion.

24           First, the Commission clearly has jurisdiction under  
25 state and federal law to resolve Embarq's complaint

1 demonstrating that AT&T failed to pay intrastate access charges  
2 that are due on AT&T's enhanced prepaid calling card traffic.  
3 And, second, while the Commission theoretically has the  
4 discretion to grant a stay, the Commission should decline to  
5 stay the proceeding because under state law it is the agency  
6 entrusted to resolve the issues raised in Embarq's complaint.

7           And I want to address a couple of the issues that  
8 AT&T raised. AT&T is saying that this is not just an issue to  
9 determine the applicability of Embarq's intrastate access  
10 tariff. But, in fact, the complaint -- on the four corners of  
11 the complaint Embarq has alleged a violation of that tariff and  
12 also provisions of state law that require AT&T to pay  
13 intrastate access charges and does not address the contract  
14 issues. I think those are defenses of AT&T, factual issues  
15 that the Commission may deem relevant to this case as it  
16 proceeds forward, but the law is clear that you can't dismiss a  
17 complaint because of the facts that are to be alleged, but  
18 rather it has to be decided within the four corners of the  
19 complaint as filed. And all of the allegations have to be  
20 construed in favor of the complaining party.

21           So I think that while that may be the defense that  
22 AT&T raises, it cannot serve as a grounds for dismissing AT&T's  
23 complaint today. And Embarq was a party in the KMC case that  
24 AT&T mentioned, and I think that they overlooked the true  
25 thrust of that ruling, that that was a case to interpret an

1 interconnection agreement and also to enforce a settlement  
2 agreement. And while the Commission granted Embarq's motion to  
3 dismiss the settlement agreement count, they were very clear,  
4 you all were very clear that you had the authority to consider  
5 and interpret the settlement agreement if it was relevant to  
6 the resolution of the interconnection agreement dispute. And I  
7 think that is entirely the same as the issue here where we are  
8 alleging a complaint under the tariff and perhaps those  
9 agreements may be relevant to the settlement of that dispute.

10 In addition, I wanted to address AT&T's point about  
11 the pending mediation in the federal court. It's true that  
12 that is a pending matter, and I understand the parties are  
13 working to establish a date, but the order that requires the  
14 parties to mediate on the federal court makes it clear that the  
15 federal litigation is not stayed while mediation is pending.  
16 In other words, everything proceeds forward in its normal  
17 course.

18 Certainly it is not intended to be a reason to stay a  
19 state proceeding. And given the history of negotiations  
20 between the parties, we have been discussing this issue with  
21 AT&T for a long time, including a significant time since the  
22 FCC issued the ruling that is the basis of Embarq's complaint  
23 and have not yet been able to come to an agreement, so there is  
24 no reason to anticipate overly eagerly that this mediation,  
25 this mandatory mediation process in the federal court will

1 result in a resolution.

2           Embarq filed its federal complaint under the federal  
3 court's diversity jurisdiction primarily to seek recovery in  
4 several states where the amount of traffic in each jurisdiction  
5 made it uneconomical for Embarq to pursue individual Commission  
6 complaints. In Florida, however, and also in North Carolina  
7 where we have filed a complaint to recover the North Carolina  
8 access charges, and I would say that, you know, they are  
9 actually three identical complaints. Obviously North Carolina  
10 is the jurisdiction where we would pursue the intrastate North  
11 Carolina access charges, and Florida is the jurisdiction where  
12 we would pursue the Florida access charges, and you can't  
13 pursue one in the other. They are separately under the  
14 jurisdiction of those respective state commissions.

15           In Florida and North Carolina the amount of traffic  
16 and the value of the avoided intrastate access charges that are  
17 in dispute represent a significant portion of the total traffic  
18 and amount that Embarq is seeking to recover. And, in  
19 addition, and perhaps more importantly, the access avoidance  
20 effects on the Florida and North Carolina competitive markets  
21 is much more material than in the other states where Embarq  
22 serves. And that justifies a resolution of these claims by  
23 this Commission as well as the North Carolina Commission for  
24 the North Carolina claims.

25           To fully protect all of Embarq's legal rights, Embarq

1 included the Florida and North Carolina traffic in its federal  
2 complaint in addition to filing the state complaints. And,  
3 there are issues related to statutes of limitation and claims  
4 that are appropriately pursued in a civil court rather than a  
5 administrative proceeding that needed to be included in that  
6 federal complaint. And to some extent it's like when you file  
7 a complaint in civil court that has regulatory issues and it's  
8 referred to the regulatory agency to address the regulatory  
9 issues and then back to the civil court to address the civil  
10 issues that are outside the jurisdiction of the Commission.

11           And we see that as what would be operating here,  
12 given the usual course of the state administrative process  
13 compared to the federal court process, and the breadth of the  
14 issues in the federal complaint compared to the Florida  
15 complaint. We believe this Commission is likely to reach a  
16 decision on the Florida issues much more quickly than the  
17 federal court will resolve the issues in that complaint. And  
18 in that event, the federal court is likely to rely on the  
19 Commission's decision on the Florida tariff issues in resolving  
20 any remaining Florida issues in the federal complaint as well  
21 as the issues in general.

22           We have no intention of pursuing double recovery of  
23 our claims, and legal principles would not allow that kind of  
24 double recovery in any event. As far as administrative  
25 efficiency, which AT&T has pointed out as a reason for staying

1 the complaint, Embarq has indicated its readiness and  
2 willingness to work cooperatively with AT&T, and the staff has  
3 suggested its willingness to assist the parties in working out  
4 procedures that would eliminate any burdens from potentially  
5 overlapping discovery processes.

6 And I would note that the North Carolina Commission  
7 has already denied a similar motion by AT&T there, and is  
8 already in the process of litigating Embarq's complaints there.  
9 And part of that they are in the process of developing  
10 discovery procedures that will address some of those concerns,  
11 so should the Commission decide to go forward that would  
12 facilitate those discussions in Florida, I believe.

13 It's true that in the past the Commission has stayed  
14 proceedings because of pending federal actions, but typically  
15 those actions have involved policy considerations that the  
16 Commission felt would have an effect on its decision in the  
17 state, either would preclude it or would guide it. In this  
18 case, the FCC has already made the relevant policy  
19 determination when it issued its enhanced prepaid calling card  
20 order in response to a request from a declaratory statement by  
21 AT&T. In that decision the FCC said that the jurisdiction of  
22 those enhanced prepaid calling cards is to be determined by the  
23 originating and terminating points of the calling and called  
24 parties. So that some of the traffic is intrastate, not all of  
25 it interstate as AT&T had positioned in the request for the



1 declaratory statement.

2           And in issuing that ruling, the FCC recognized that  
3 the state commissions would be an appropriate forum for  
4 determining any retroactive access charges that were due. And  
5 that is exactly what Embarq is asking this Commission to  
6 decide. The Commission has an interest in these and the  
7 related state law violations that Embarq alleges. The statutes  
8 make the Commission responsible for ensuring that intrastate  
9 interexchange companies pay the appropriate intrastate access  
10 charges and it also asks the Commission to prevent the  
11 discriminatory effects on competition that might result when  
12 companies such as AT&T evade access charges and regulatory  
13 assessment fees that other providers who are operating lawfully  
14 must pay.

15           The Florida Commission should do as the North  
16 Carolina Commission has done. It should vote to approve the  
17 staff recommendation and proceed expeditiously to resolve  
18 Embarq's complaint. Thank you.

19           CHAIRMAN EDGAR: Thank you.

20           Commissioner Deason.

21           COMMISSIONER DEASON: I have a question for Ms.  
22 Masterton. You indicated that the Florida traffic was included  
23 in the federal case, is that correct?

24           MS. MASTERSON: Yes, that's correct.

25           COMMISSIONER DEASON: What happens if you have

1 conflicting decisions between the jurisdictions?

2 MS. MASTERSON: The Florida Commission decision would  
3 not be overruled by the federal court decision.

4 COMMISSIONER DEASON: How do you know that?

5 MS. MASTERSON: Just by the normal course of a court  
6 having jurisdiction to tell you what to do. The federal court  
7 in Missouri does not have that ability to guide the Commission.  
8 It's not like the Eleventh Circuit decision would govern what  
9 you all do. But the decision --

10 COMMISSIONER DEASON: Because the federal court --  
11 it's in a district, obviously, that doesn't have the impact,  
12 doesn't cover this geographic area, correct?

13 MS. MASTERSON: Right.

14 COMMISSIONER DEASON: Okay. Now, what happens if a  
15 favorable decision is obtained in Missouri, and it's to AT&T's  
16 benefit, and they seek to have that -- and we decide something  
17 contrary. Can't they basically take that to the Eleventh  
18 Circuit, or whatever circuit we're under. Is it the Eleventh  
19 circuit?

20 What I'm trying to get at is what is the most  
21 efficient way to handle this? It seems to me that -- and I  
22 have said it over and over again. I don't mind sitting here,  
23 taking evidence, making a decision, as long as our decision  
24 means something, and it's not going to be overturned either by  
25 the FCC or federal court. That's my concern.

1           How do you assure me that is not going to be the case  
2 here?

3           MS. MASTERSON: I don't think I can guarantee you  
4 that whatever you decide here that there might not be, you  
5 know, grounds to appeal it in the process here, and that if the  
6 federal court made a decision that was -- on the tariff issue  
7 that was different from the one here, that that would not,  
8 somehow, influence the --

9           COMMISSIONER DEASON: If you're convinced that the  
10 jurisdiction is here and we are the proper -- this is the  
11 proper forum to hear this complaint and resolve it, why did you  
12 include the Florida traffic in a separate court case in  
13 Missouri?

14           MS. MASTERSON: We felt that we had to to fully  
15 protect the rights because of the statute of limitations issues  
16 that were out there. Even though we could pursue the tariff  
17 issue here, our research indicated that probably that wouldn't  
18 toll the statute of limitations for some of the other claims we  
19 made in the federal court, which included fraud and the  
20 contract violations which might allow us some additional  
21 damages in addition to what you all can --

22           COMMISSIONER DEASON: Well, haven't you already  
23 chosen where you want this issue heard then by doing that?

24           MS. MASTERSON: We didn't believe so, no. We  
25 believed that the tariff issues can be addressed in the Florida

1 Commission, will be addressed more quickly. Therefore, I mean,  
2 just under any normal process of a federal court, it's not  
3 likely that that process will be complete before this one would  
4 be, and that the decision that the Florida Commission made here  
5 would actually govern what occurred in the federal court on  
6 those issues.

7           COMMISSIONER DEASON: Have you filed anything in the  
8 Missouri court asking them to hold in abeyance the Florida  
9 traffic until a decision is made by the Florida PSC because  
10 there is a separate proceeding?

11           MS. MASTERSON: No, we have not done that yet.

12           CHAIRMAN EDGAR: Commissioner Tew.

13           COMMISSIONER TEW: I have a question for Ms.  
14 Masterton, also. I think you mentioned that the FCC recognized  
15 that the states would be the appropriate forum for the  
16 intrastate traffic, and I was just wondering if you could help  
17 me -- could you point me specifically to where in that order it  
18 says that? I actually do have it.

19           MS. MASTERSON: It is actually Footnote 58 of the  
20 enhanced prepaid calling card order, and I will read it to you  
21 when I get there. "Claims for unpaid intrastate access charges  
22 should be filed in the appropriate court or state commission."  
23 And then it goes on to say the Commission, meaning the FCC, has  
24 held that it does not act as a collection agency for carriers  
25 with respect to unpaid tariff charges.

1 MR. MAY: Madam Chair, may I respond to --

2 CHAIRMAN EDGAR: Mr. May.

3 MR. MAY: Just to follow up on Commissioner Deason's  
4 point. I think the line of questions that Commissioner Deason  
5 just posed to Ms. Masterton was the very reason why we have  
6 asked as a third alternative to allow the mandatory mediation  
7 process to run its course. The potential for inconsistent  
8 results, and I disagree with Ms. Masterton, I think there is a  
9 real legitimate potential for inconsistent results. And in  
10 that event, the doctrine of primary jurisdiction could be  
11 invoked, also the doctrine of res judicata. It's a very  
12 uncertain area as to which decision would control.

13 Some of the case law suggests that the federal  
14 court's decision would control. There's other case law that  
15 suggest it is first in time. If the federal court were to rule  
16 first, then its decision on that particular issue could be  
17 res judicata for the case and control the Florida Commission.  
18 It's not a clear-cut -- there is no clear-cut answer to which  
19 decision would control. And, again, for that reason, because  
20 of the potential for inconsistent results, we think the most  
21 efficient way to do this is to allow the federal proceeding to  
22 run its course, at least through the mandatory mediation  
23 session, so that the parties can, at minimum, narrow the issues  
24 and decide which forum, or the mediator could suggest which  
25 forum is supposed to address which issues.

1           Embarq has invoked the jurisdiction of the federal  
2 court. We did not invoke that jurisdiction. And I would  
3 respectfully submit what is good for the goose is good for the  
4 gander. You can't forum shop, and then suddenly when you get a  
5 forum that asks you and requires you to do something say, whoa,  
6 wait a minute, we didn't really want this, we want to go down  
7 to Florida now.

8           I think the most efficient way, again, to resolve all  
9 of these issues is to allow the federal court proceeding to  
10 move forward and ferret out the issue. We're not asking for an  
11 indeterminate delay. We are asking for just everybody to catch  
12 their breath, allow the mediation process to run its course for  
13 the next 60 days, and then come back to this. At that point in  
14 time, again, the entire proceeding could be resolved, or if  
15 not, the entire proceeding could be narrowed with respect to  
16 the issues.

17           Finally, I wanted to just mention something just to  
18 correct Ms. Masterton with respect to the North Carolina  
19 proceeding. The North Carolina Commission has not ruled on  
20 that. There is an order of a prehearing officer which is  
21 subject to reconsideration. Reconsideration will be requested  
22 by the end of this week, and the full Commission will address  
23 this issue sometime thereafter. But the full North Carolina  
24 Commission has not ruled. Even if it has ruled, I would submit  
25 to you that the jurisdiction of that commission is state

1 specific and it should not control what you do down here.

2 CHAIRMAN EDGAR: Commissioner Tew.

3 COMMISSIONER TEW: This is for Mr. May. Does the  
4 federal court have subject matter jurisdiction to address the  
5 statutory violations that Embarq has alleged here?

6 MR. MAY: The statutory -- well, let me back up. The  
7 federal court does have the jurisdiction to address the relief  
8 requested by Embarq in this proceeding, and that's to recover  
9 additional access charges from AT&T. Embarq has conceded that  
10 by filing in the federal court. As far as enforcing the  
11 statutory violations, I think clearly that's within your  
12 bailiwick. And as I said at the outset, Commissioner Tew, we  
13 are not contesting your jurisdiction to do that. We just think  
14 it is putting the cart before the horse.

15 I think, back to Commissioner Deason's question of  
16 what is the most efficient way to resolve this, typically I  
17 would defer to the court with the most comprehensive  
18 jurisdiction. And the federal court recognizes your experience  
19 and your expertise and your authority over your tariffs that  
20 you have approved. Allow the federal court to get the  
21 proceeding on track and then call on you at the appropriate  
22 time to address these statutory violations, to address the  
23 access charges that are due under the tariff, et cetera. I  
24 think that is the more efficient and effective and productive  
25 way to proceed forward.

1 CHAIRMAN EDGAR: Commissioner Deason.

2 COMMISSIONER DEASON: I have a question for staff.  
3 If we were to approve your recommendation and proceed, what is  
4 the time frame anticipated to process this case?

5 MR. TEITZMAN: Actually it would be moving along  
6 fairly quickly, Commissioner. We have scheduled next week an  
7 issue identification conference to identify the issues, and I  
8 would say that they are reserved this time because the order  
9 establishing procedure has not come out, but currently we have  
10 reserved a hearing date in December, the first half of  
11 December.

12 COMMISSIONER DEASON: You heard Mr. May indicate that  
13 there is an expedited process at the federal level. I guess  
14 it's the Western District, is that correct, for Missouri?

15 MR. MAY: Yes, Commissioner.

16 COMMISSIONER DEASON: And that he anticipates that it  
17 would be fully concluded within 60 days. If that is correct,  
18 what is the harm in simply holding our proceeding in abeyance  
19 for at least 60 days, or until there is some type of an  
20 indication as to what the results are from the mandatory  
21 mediation proceeding?

22 MR. TEITZMAN: Commissioner, I don't know that there  
23 is a harm. Staff's main concern was making sure that because  
24 we're talking about intrastate traffic and charges, and because  
25 we are talking about specific Florida Statutes that Florida's



1 voice is heard on this matter. Therefore, if there is  
2 mediation, and it does, like Mr. May said, only take 60 days, I  
3 don't know that there would be a specific harm because the  
4 Commission could then still have the opportunity to address the  
5 issues raised in Embarq's complaint, and I guess we would see  
6 what would happen at the federal level, as well.

7           COMMISSIONER DEASON: And if the end result of all of  
8 this is that there are additional access charges which --  
9 intrastate access charges which must be paid, that amount is  
10 still going to be determined and is not going to effect the  
11 amount whether we add an additional 60 days to our proceeding,  
12 is that correct?

13           MR. TEITZMAN: As I understand it, there are late  
14 payment fees that I imagine would continue to accrue. So I  
15 think it would -- the 60 days would affect the amount,  
16 depending on what the Commission's final determination is, but  
17 if late payment fees are applicable, the 60 days would add to  
18 those.

19           COMMISSIONER DEASON: So, in other words, the parties  
20 are going to be made whole whatever the decision is. The fact  
21 that there is a 60-day delay is not going to harm one party to  
22 the benefit or detriment of the other party.

23           MR. TEITZMAN: I do not believe so.

24           MR. HATCH: Madam Chair, may I follow up on  
25 Commissioner Tew's question earlier?

1 CHAIRMAN EDGAR: Mr. Hatch.

2 MR. HATCH: She seemed to be particularly interested  
3 in the state law claims and whether there is any federal  
4 jurisdiction to resolve those. There is essentially three core  
5 statutory claims that Embarq has raised in its complaint. The  
6 first one is we didn't pay sufficient access charges. That's  
7 the first one. The second one is that AT&T is in violation of  
8 364.08, 364.09, and 364.10. The third one is that AT&T, by  
9 virtue of misreporting jurisdictional traffic splits, didn't  
10 pay sufficient regulatory assessment fees.

11 With respect to the first one on the access charges,  
12 clearly that's a legitimate complaint that they can file and  
13 they have made sufficient allegations to that. With respect to  
14 their statutory violations of 364.08, .09, and .10, those  
15 statutes no longer apply to IXCs since 2003 and the partial  
16 deregulation of IXCs. The only part of those statutory  
17 sections that apply to IXCs currently is 364.10. I think it's  
18 D and E or C and E. But those sections have only to do with  
19 Lifeline and that is not at issue here. So those statutory  
20 violations clearly as a matter of law can't stand.

21 The third one, which is regulatory assessment fee, I  
22 would respectfully submit that Sprint does not have standing to  
23 prosecute a complaint against AT&T for failure to pay  
24 regulatory assessment fee. The Commission may well have a bone  
25 to pick with us if we didn't pay a sufficient regulatory

1 assessment fee, but Sprint can't come in the door and file a  
2 complaint that says they didn't file enough regulatory  
3 assessment fee. That's strictly between the Commission and the  
4 carriers. If that is a legitimate basis for a complaint, then  
5 I can file the same complaint against Sprint saying they didn't  
6 pay enough regulatory assessment fees because they didn't  
7 report enough intrastate revenue through their access revenues  
8 that they should have gotten.

9 More to the point, and this is really, I think, the  
10 irony of that allegation is that the revenue that we derived on  
11 an intrastate basis is based on intrastate access charges.  
12 That's how we reported it. The intrastate revenue or the  
13 interstate access charges are somewhere in the neighborhood of  
14 a penny a minute, and our revenue is based on those access  
15 charges. For example, in the case of prepaid cards, you look  
16 at the Sam's card. They are three cents a minute. So if we  
17 are going to take three cents a minute, report that at  
18 intrastate access rates, Sprint's access rates for the relevant  
19 time period are in the neighborhood of nine to ten cents a  
20 minute. So in a sense we are going backwards on our RAF fee.  
21 We would report revenue at three cents a minute, but because  
22 IXCs deduct access from the calculation of RAF, it would be  
23 something in the order of a negative five cents a minute that  
24 we would owe you, which means then technically you would owe us  
25 money for the RAF.

1 MS. MASTERSON: Madam Chairman, may I respond?  
2 Apparently Mr. Hatch is now arguing that Embarq's complaint  
3 fails to state a cause of action on certain issues. However,  
4 that was not an argument of rationale that was presented in its  
5 motion to dismiss, therefore, Sprint has not had an  
6 opportunity -- I'm sorry, Embarq. I knew I was going to do  
7 that at least once today. Embarq has not had an opportunity to  
8 review them and adequately respond. And it just sounds to me  
9 like Mr. Hatch is making AT&T's case that would be made in  
10 testimony and in its answer here in our discussion of this  
11 motion to dismiss, which is inappropriate.

12 I also, though, wanted to address Commissioner  
13 Deason's question about prejudice to the parties if we delay.  
14 Any delay is going to delay everything. Right now we have  
15 outstanding discovery requests that have already been deferred  
16 until the ruling on this motion today. So if you delay for 60  
17 days, then AT&T won't even have been to begin responding to  
18 those discovery requests until after we see what the outcome of  
19 the mediation is. And that's going to put our testimony back,  
20 AT&T's testimony back, the hearing date back.

21 So what looks like just a 60-day delay ends up into  
22 what I believe would ultimately be a several month delay. And  
23 Embarq would just say why can't we go forward with this  
24 process? And if the issues are narrowed by the mediation or  
25 whatever, we can consider that at that time. I could

1 understand having testimony filing dates after the deadline for  
2 mediation to avoid the parties filing testimony on issues that  
3 might not be necessary, but not delaying the entire proceeding,  
4 particularly the discovery that we have outstanding.

5 CHAIRMAN EDGAR: Commissioner Arriaga.

6 COMMISSIONER ARRIAGA: Mr. Teitzman, I want to say  
7 first that I appreciate the effort that you have made and staff  
8 has made to preserve the jurisdiction of the Commission on  
9 certain issues. Those are issues that are very dear to me and  
10 permanently -- I'm looking over those specific issues.

11 I have a question regarding the private contracts  
12 that are alleged as part of this whole proceeding. Is your  
13 recommendation that we enforce contracts or that we just use  
14 the contracts to analyze the case? What specifically are you  
15 recommending regarding private contracts?

16 MR. TEITZMAN: Commissioner, it would be the latter,  
17 that we would interpret the contracts, but as correctly stated  
18 earlier, this Commission cannot enforce those contracts.

19 COMMISSIONER ARRIAGA: So we are not looking to  
20 enforce any contract, but to use them in order to come up with  
21 a decision.

22 MR. TEITZMAN: They would be taken in as evidence,  
23 that's correct, Commissioner.

24 COMMISSIONER ARRIAGA: May I continue?

25 Mr. May, you have introduced in your initial remarks

1 an additional item which seems to be reasonable at first. So,  
2 are you still using the same arguments to question the  
3 jurisdiction? I think my question would be what is it  
4 specifically that you question regarding the jurisdiction of  
5 this Commission in this proceeding, and why did you introduce a  
6 third item, and does it variate from your original arguments in  
7 the docket?

8 MR. MAY: To answer your last question first, the  
9 reason we introduced the third item was because the designation  
10 for mandatory mediation occurred after the pleadings had been  
11 filed in this case. Therefore, I thought it was important to  
12 bring that new development to the Commission's attention.

13 To your first question, Commissioner Arriaga, again,  
14 we are not claiming that the Commission does not have  
15 jurisdiction to enforce the access charge tariffs. What we're  
16 saying is that our affirmative defense, AT&T's affirmative  
17 defense to this complaint and to the federal court complaint  
18 has been and will be that Embarq and its predecessor, Sprint,  
19 have entered into a series of private settlement agreements  
20 which, if enforced, would preclude them or bar them from  
21 recovering these additional access charges.

22 As your counsel has already conceded and stated, you  
23 don't have the authority to enforce those private contracts.  
24 Therefore, again, you are trying to -- I think you are put in a  
25 position of having to build a house with just a hammer. You

1 don't have all the tools necessary to construct a full and fair  
2 settlement. For that reason, again, I don't want to go too far  
3 on the jurisdictional issues, because I think for purposes of  
4 today, we recognize the jurisdiction of the Commission to  
5 address the access charge issues at the appropriate time. We  
6 are simply saying now is not the appropriate time. The more  
7 efficient course is to allow the mediation process to run  
8 through its processes, to conclude, and then determine whether  
9 you want to go forward with this case.

10 As I have said earlier, potentially all of these  
11 issues could go away in the mediation. If not, at least a lot  
12 of the issues will be ferreted out and the issues will be  
13 narrowed and so there will be a clear direction for this  
14 Commission to take in 60 days as opposed to where it is now.

15 COMMISSIONER ARRIAGA: Let me address the last  
16 statement that you made. Let us assume that 60 days from now  
17 you have cleared -- let's say there are ten items to be cleared  
18 and three remain. I went back to square one again. You're  
19 going to come back here to this Commission and this whole  
20 docket is going to be repeated all over again, isn't it?

21 MR. MAY: I don't think so, because the docket is not  
22 going to be dismissed. What we are asking for is simply this  
23 docket to be held in abeyance or stayed, allow the mediation  
24 process to run its course, and if the issues are not resolved,  
25 then, reenergize this proceeding and move forward.

1 I disagree with counsel for Embarq in that as  
2 Commissioner Deason pointed out and as counsel for the  
3 Commission pointed out, interest is continuing to accrue on  
4 these alleged outstanding amounts. The late payment penalties  
5 continue to accrue. So the parties are going to be held  
6 harmless. Embarq is going to be held harmless regardless of  
7 whether this case is tried in December or whether this case is  
8 tried before the Commission in February.

9 Again, I'm just asking for a mediation process to  
10 move forward and for you to recognize, as you have long  
11 recognized, the benefits of settlement discussions. We're  
12 simply asking you to allow this potential for settlement to run  
13 its course and hopefully resolve this matter short of  
14 litigation.

15 COMMISSIONER ARRIAGA: One last question, please.

16 Mr. Teitzman, it has been stated that we should wait  
17 for the court decision in order to guide our actions. That is  
18 what I'm understanding, but at the same time I have heard staff  
19 in several opportunities say that the courts give a lot of  
20 deference to the decision that this Commission makes. So where  
21 is the horse and where is the cart? What is it? Is it the  
22 courts pay attention to us or we pay attention to the courts,  
23 or both? How does it work?

24 MR. TEITZMAN: Commissioner, it's a difficult  
25 question to answer. I think, as you have heard earlier, if



1 there were opposing decisions, it is a fairly uncertain area,  
2 so I really -- I can't give you a specific answer to that  
3 question, and I apologize for that. I think there is certainly  
4 a lot of uncertainty as to what would occur. As I stated  
5 earlier, staff's concern in addressing this motion and  
6 addressing this complaint is making sure that Florida's voice  
7 is heard. Will there be uncertainty if there is a different  
8 federal decision? I'm afraid the answer to that is probably  
9 yes, there is uncertainty, and I do not know what might take  
10 place at that point.

11 COMMISSIONER ARRIAGA: Thank you.

12 CHAIRMAN EDGAR: Commissioner Tew.

13 COMMISSIONER TEW: I have a series of questions, if  
14 that's all right, maybe directed at different folks. My first  
15 question, I guess I will start with Mr. May. Is this mediation  
16 binding? I think the mediation is not, but --

17 MR. MAY: That's correct, Commissioner, it is not a  
18 binding mediation, but it is mandatory, and it is an  
19 interesting process. It's not an informal mediation by any  
20 stretch of the imagination. The local rules require that each  
21 principal have present during the mediation session a person  
22 who can actually make decisions and resolve all of the issues  
23 that are in dispute. Also, to the extent there are is any  
24 insurance coverage issues, the insurance carrier has to be  
25 present at the mediation. So this is not an informal kind of

1 loosey-goosey process. While it is not binding, it does set a  
2 structure, I believe, that would certainly facilitate  
3 settlement discussions among the parties.

4 COMMISSIONER TEW: And as a follow-up to that, and  
5 then I would like Ms. Masterton to address both questions, too.  
6 What if this mediation process doesn't get us any farther  
7 along? What would you suggest we do next?

8 MR. MAY: Is that directed to me, Commissioner Tew?

9 COMMISSIONER TEW: Yes.

10 MR. MAY: If the mediation process proves  
11 unsuccessful, I would hope that during the mediation process at  
12 least the parties would be able to agree on allocating these  
13 issues among the different forums so that you don't have  
14 duplicative efforts. The parties are not required to try the  
15 same case three different times in three separate forums.

16 Now, I have confidence that we will be able to work  
17 through that process and arrive at an efficient mechanism to  
18 the extent that this dispute is not resolved. But if you are  
19 not able to reach an issues agreement or some kind of structure  
20 with respect to issues, then I think at that point in time this  
21 proceeding kicks back in and you move forward with the items  
22 that are within your jurisdiction.

23 Again, our concern is if you do that, and maybe this  
24 is getting ahead of the game here, but our concern is if you do  
25 that and we answer the complaint, our first affirmative defense

1 is Embarq is barred from recovering additional access charges  
2 by virtue of it entering into this series of private settlement  
3 agreements, which Mr. Teitzman has already indicated you can't  
4 enforce.

5           So you are back in the position where you are almost  
6 spinning your wheels. Again, that is why I'm hoping what I  
7 think the appropriate course to take would have the federal  
8 court take control of this proceeding and then call on the  
9 North Carolina Commission, call on the Florida Commission to  
10 say in a vacuum, assuming all other things being equal, what  
11 kind of access charges are owed here. And then the federal  
12 court could take that information and could offset it against  
13 some of the other contractual claims that it has the authority  
14 to enforce.

15           The federal courts do that all the time. They call  
16 on you. They specifically target issues and direct them to you  
17 for your consideration and your ruling. But to do that in  
18 advance of this mandatory mediation process, again, we believe  
19 is inefficient and would run counter to the longstanding policy  
20 of promoting settlement.

21           COMMISSIONER TEW: Before I ask Ms. Masterton to  
22 answer that question also, I was a little bit confused about  
23 something you said about if our proceeding kicks back in then  
24 you would make an argument that essentially Embarq would be  
25 barred from making certain claims here. So with your

1 alternative that you have proposed today to hold it in abeyance  
2 until the mandatory mediation at least concludes, are we  
3 essentially back to the original alternative to stay the whole  
4 proceeding because of the argument you just made? I mean, it  
5 sounds like we really -- or at least you'll make an argument  
6 that we won't be able to continue the case at that point if  
7 it's unsuccessful.

8 MR. MAY: Yes, ma'am. I really don't think that's  
9 the case. I think, the way I see things unfolding, if at the  
10 end of the mandatory mediation process things do not go as we  
11 hope and there is no resolution, we're back here, you could go  
12 forward and issue an order. But I don't think you could rule  
13 on our fundamental affirmative defense, so you would have to  
14 issue the order and couch it in terms of we have not been able  
15 to reach some of the fundamental threshold issues with respect  
16 to contract barred or claims being barred by contracts. But  
17 what we can tell you is setting those aside, if there is no  
18 bar, if there is no contractual bar, then AT&T would owe Embarq  
19 X or Embarq would owe AT&T X. I think that would be what would  
20 occur at that time. To me that would be the most efficient way  
21 to handle it.

22 COMMISSIONER TEW: So that argument is pertaining to  
23 the part where you're saying that this Commission can't  
24 determine the amount of interstate access that you may have  
25 already paid and that we can't determine that amount. That's

1 the --

2 MR. MAY: It really goes to your authority. It is  
3 really back to -- again, I'm repeating myself, I apologize, but  
4 it is back to our fundamental affirmative defense in this  
5 complaint and every other complaint, including the federal  
6 complaint, is that Embarg by entering into these settlement  
7 agreements with AT&T has waived its right to recover these  
8 additional access charges. And the only way we can have our  
9 day in court is for a tribunal to have the statutory or the  
10 authority to enforce those private agreements. And I think  
11 your counsel has already said you don't have that authority.  
12 So that is the dilemma we find ourselves in.

13 COMMISSIONER TEW: Ms. Masterton.

14 MS. MASTERSON: I'm sorry, could you repeat the first  
15 question because that was awhile ago and I want to make sure I  
16 got it.

17 COMMISSIONER TEW: The first question was is the  
18 mediation binding, and Mr. May said that it was not, but it was  
19 not an informal process, also. And you can speak to that. But  
20 then the follow-up was where will we be if the mandatory  
21 mediation doesn't resolve these issues, at least the ones that  
22 you brought before the Commission?

23 MS. MASTERSON: First, I agree with what Mr. May --  
24 how he described the mediation process. So basically if the  
25 mediation -- AT&T is asking to delay it because they are saying

1 we might resolve the issues in mediation, or at least some of  
2 the issues in mediation. So if that didn't occur, we'd be back  
3 where Embarq thinks we should be and should continue to be and  
4 that is pursuing the Florida claims based on the Florida tariff  
5 and the Florida law in Florida.

6           And I want to respectfully disagree with Mr. May's  
7 characterization that the Commission cannot rule on AT&T's  
8 affirmative defense. I believe it's clear that the Commission  
9 could take the provisions of any agreements that AT&T asserts  
10 are relevant into consideration in interpreting the tariff, how  
11 those agreements affect the implementation of the tariff. And  
12 if they determine that those agreements bar the application of  
13 the tariff, I believe that is fully within the jurisdiction of  
14 the Commission to decide.

15           What they can't do is if Sprint had made a claim for  
16 damages under the contract, the Commission does not have  
17 jurisdiction to rule on that. But that does not mean that the  
18 Commission cannot consider those contracts and interpret them  
19 as they relate to the claims that Embarq has made.

20           COMMISSIONER TEW: Something Mr. May said, too, about  
21 allocating the issues among the different forums, and I think  
22 that goes along with something Commissioner Deason mentioned  
23 earlier when he asked you if you, Ms. Masterton, if you had  
24 requested holding those issues with respect to Florida in  
25 abeyance in the federal proceeding. I guess I'll be putting

1 you on the spot, but would you consider holding those issues in  
2 abeyance?

3 MS. MASTERSON: I mean, to the extent that that would  
4 be something that the Commission would consider important, as  
5 to their decision whether to go forward with these claims,  
6 Embarq would consider that. We would like to ask that we would  
7 have an opportunity to discuss it. I couldn't make a  
8 representation today. I would have to discuss it with my  
9 clients and would ask that you defer your decision today and  
10 let us have an opportunity to do that if, in fact, that is the  
11 key issue as to whether you all decide to go forward with  
12 Embarq's complaint. I should say we are actually talking to  
13 our corporate people to try to get an answer, but I can't say  
14 that we will have something before you all have to make a  
15 decision today.

16 COMMISSIONER TEW: Okay. Well, maybe I can delay a  
17 little bit, ask some more questions. I have some questions  
18 specifically with regard to some things Mr. Hatch mentioned  
19 about 364.08, .09, and .10. And he pointed out that those  
20 statutory references do not apply to IXCs any longer. And my  
21 question for AT&T, whoever wants to answer it, because these  
22 statutes -- and I'll read a section of 364.08, which says a  
23 telecom company may not charge, demand, collect, or receive for  
24 any service rendered, or to be rendered any compensation other  
25 than the charge applicable to such services specified in its

1 schedule on file in effect at that time. And, of course, that  
2 is just a portion, and I realize we're not getting into the  
3 substantive issues too much today. But my question is could  
4 that requirement, and actually some of the other statutory  
5 references to me seem to sort of suggest that Embarq can't give  
6 certain deals to one entity that it doesn't provide to all of  
7 its customers. So could this situation that we are discussing  
8 today cause Embarq not to comply with Florida Statutes?

9 MR. HATCH: Technically, I think the answer is yes.  
10 I think the point of those statutes is it prohibits a carrier  
11 from doing things that are discriminatory. That's the thrust  
12 of all three of those sections. But the solution is not to  
13 file a complaint against the guy that got the benefit, the  
14 customer, if you will, to seek reimbursement for the benefit  
15 that was conferred. The solution is -- well, historically the  
16 solution would have been under rate base regulation to impute  
17 those revenues to the carrier and it all comes out even when  
18 you do calculate rates. And the carrier that violated the  
19 statute essentially is punished by imputation of the revenues.

20 In a competitive market where you don't do rate base  
21 regulation anymore, I think the solution for discriminatory  
22 conduct is to make the carrier give the same deal to everybody  
23 else. I mean, that's the real short answer to your question.  
24 But however you choose to proceed with it, it isn't the basis  
25 of the complaint against the customer.



1           COMMISSIONER TEW: Ms. Masterton, would you like to  
2 respond to that?

3           MS. MASTERSON: Embarq is alleging, yes, that  
4 derivatively AT&T, I suppose -- and I'm admitting this is a  
5 novel claim that I don't believe the Commission has considered  
6 yet, but we're saying that by its behavior and because Embarq  
7 itself could not know that it was giving AT&T the specific  
8 benefit due to the manner in which this occurred, that it  
9 caused Embarq to violate those statutes. And, yes, that the  
10 remedy for that would be to have AT&T pay the monies that  
11 should have been due to put it on the same playing field as all  
12 of the other carriers who were paying the appropriate fees.

13           COMMISSIONER TEW: I think I have one more, so  
14 hopefully someone is getting their answer.

15           Mr. May, you mentioned the release, and I don't fully  
16 understand it, so maybe if you could explain that a little bit  
17 more about the release in the settlement agreement you  
18 mentioned. But I guess my overall question is if there is a  
19 release that is so, in a sense, binding upon the decision that  
20 is made, why is there a reluctance to bring it here and point  
21 that out to us so that we can use that and make any  
22 determination about the interstate fees?

23           MR. MAY: There is absolutely no reluctance on our  
24 part to bring it to your attention. We'll certainly do that if  
25 you decide to move forward with this case. We have not yet

1 filed our answer to the complaint. We filed a motion to  
2 dismiss and, in the alternative, a request for abeyance. I  
3 would, again, submit to you that the order, the KMC order that  
4 is cited for the proposition by Embarq that you have the  
5 authority to interpret and apply these contracts, take a close  
6 look at that. That argument was raised, but at the end of the  
7 day what the Commission said was we do not have the authority  
8 to enforce private settlement agreements. And that is what we  
9 would be asking you to do. Not to interpret and apply, we  
10 would be asking you to enforce. Enforce our rights to bar  
11 Embarq from recovering these additional access charges. Again,  
12 at the appropriate time that will be an affirmative defense, if  
13 we are required to respond to the complaint, that will be  
14 affirmative defense number one to our answer.

15 COMMISSIONER TEW: Itty-bitty, maybe.

16 I just want to clarify what you just said, and I  
17 guess the way to ask it is can't we look to the contract and  
18 determine whether it should apply to whatever issues we  
19 determine are necessary in this case before the Commission  
20 without enforcing the contract?

21 MR. MAY: I really don't think -- I mean, it's a fine  
22 line to me. Interpreting and applying and enforcing, that's a  
23 distinction without a difference. If you are going to  
24 interpret a contract and apply the contract that infringes or  
25 impinges upon the rights of a party under that contract, you're

1 enforcing the contract. And, in the KMC case, again, you  
2 didn't do that. What you did, you took the terms of that  
3 settlement agreement and you considered it as evidence as to  
4 whether there was a violation of an interconnection agreement  
5 which you had approved. That's not something that we would be  
6 asking you to do. We would be asking you to enforce our rights  
7 under that settlement agreement that would bar Embarq from  
8 recovering these additional charges.

9 COMMISSIONER TEW: That's the only thing, is if  
10 Ms. Masterton wanted to reply to anything else. And then, I  
11 guess, staff, too, if they wanted to reply to anything that I  
12 had asked.

13 MS. MASTERSON: I mean, just to the issues of the  
14 settlement agreement. I mean, first, as we have said, that is  
15 a factual issue. It cannot be considered in determining  
16 whether to dismiss Embarq's complaint. In fact, we have  
17 positions as to the meaning of that settlement agreement that  
18 are contrary to AT&T positions. The agreement itself has  
19 confidentiality provisions that prohibit me from today going  
20 into detail about that, although I think we're going to have to  
21 work that issue out as we go forward on the confidentiality,  
22 but I don't feel free to get into the specifics of the  
23 agreement today.

24 But what you decided in the KMC complaint was  
25 actually very similar to this. KMC was alleging that a

1 settlement agreement was violated in addition -- a settlement  
2 agreement, in addition to the interconnection agreement terms,  
3 in asking the Commission to enforce that. The Commission  
4 said -- they dismissed the count relating to enforcing the  
5 settlement agreement, but said, "However, the dismissal of  
6 Count 4 does not prevent us from considering the settlement  
7 agreement as evidence in this current dispute." And I think  
8 the intent of that was in the very same fashion as what we  
9 would say with the settlement agreement would be, the role it  
10 would play in this dispute. And I'm aware of cases where those  
11 types of agreements have been raised as evidence and considered  
12 by the Commission in resolving disputes under either  
13 interconnection agreements -- well, interconnection agreements  
14 largely, but where settlement agreements have been considered  
15 by the Commission as evidence. And the Commission has not --  
16 and neither have parties objected to the Commission's ability  
17 to consider those agreements in reaching a decision.

18 Thank you.

19 CHAIRMAN EDGAR: Mr. May, did you have a brief  
20 follow-up?

21 MR. MAY: Just to conclude. Again, without getting  
22 into the weeds as far as what our positions will be in the  
23 future, we're asking the Commission to consider our third  
24 alternative, and that is simply to hold this proceeding in  
25 abeyance until the mandatory mediation runs its course, which

1 shouldn't be longer than 30 to 60 days. And at that time, just  
2 the potential benefits for that approach we think far outweigh  
3 any minor inconvenience that delay might cause. Thank you.

4 CHAIRMAN EDGAR: Mr. Teitzman.

5 MR. TEITZMAN: Just real quick, Chairman. I would  
6 like to agree with Ms. Masterton's assessment that the contract  
7 is a factual matter that cannot sustain the motion to dismiss  
8 today. And I would also like to point out something important  
9 that Commissioner Tew mentioned, which is we don't even know  
10 what that contract says. We haven't seen it, we don't know  
11 what it applies to, so I just wanted to out that out, as well.

12 CHAIRMAN EDGAR: Thank you.

13 Commissioner Carter.

14 COMMISSIONER CARTER: Thank you, Madam Chair. For  
15 our legal staff just a couple of questions. This is the  
16 underlying matter with us, but there is also a federal case  
17 that has already been filed, correct?

18 MR. TEITZMAN: Yes, Commissioner.

19 COMMISSIONER CARTER: And in the federal case that  
20 has already been filed, they are operating under the law of the  
21 case, correct? The law of the case. When they file a case  
22 there is a law that applies, remember that procedure?

23 MR. TEITZMAN: Yes, Commissioner.

24 COMMISSIONER CARTER: Good. And in that law of the  
25 case, there is a procedure that is employed by the case, the

1 courts, and under our local rules, or in this case based upon  
2 the Southern District of Missouri these are the procedures that  
3 we have employed. They may be local rules, and under the local  
4 rules one of the requirements is in this case mandatory  
5 mediation.

6 MR. TEITZMAN: (Indicating affirmatively.)

7 COMMISSIONER CARTER: Notwithstanding what we say or  
8 do here today, those rules still apply, am I correct?

9 MR. TEITZMAN: Yes, Commissioner.

10 COMMISSIONER CARTER: Madam Chairman. About the only  
11 thing that what we do today would have an impact on is possibly  
12 the mediation process, at best?

13 MR. TEITZMAN: At best, yes.

14 COMMISSIONER CARTER: Thank you.

15 CHAIRMAN EDGAR: Commissioner Deason.

16 COMMISSIONER DEASON: I have a question for  
17 Mr. Teitzman, and you may have already answered it in a  
18 previous response that you gave. But the question that I have  
19 is what is staff's understanding of the private settlement  
20 agreements? And I think you indicated you have not seen those,  
21 you have not reviewed them.

22 MR. TEITZMAN: Yes, I really couldn't comment  
23 specifically on them. I have not seen them. All I know is  
24 what I have read in the motion and the response.

25 COMMISSIONER DEASON: Is the first instance where we

1 have seen a private settlement agreement somehow alter, amend,  
2 or change obligations under a tariff? I mean, it seems like it  
3 is a relatively new thing. I don't recall it before, but it  
4 may have happened.

5 MR. TEITZMAN: I'm not aware of it coming before this  
6 Commission previously.

7 COMMISSIONER DEASON: Let me ask Ms. Masterton.  
8 There are private settlement agreements that affect your rights  
9 or obligations under a tariff?

10 MS. MASTERSON: Well, Embarq is not conceding that,  
11 okay. I mean, we are not conceding that that settlement  
12 agreement does what AT&T is alleging that it does. That is  
13 what AT&T is saying that it does, we are not saying that that  
14 is the case.

15 COMMISSIONER DEASON: Well, have you entered into a  
16 private settlement agreement which somehow addresses your  
17 obligations or rights under a tariff?

18 MS. MASTERSON: We entered into a settlement  
19 agreement that addressed issues in dispute not just in Florida,  
20 but it was a global settlement agreement related to the PIUs  
21 reported by AT&T for its traffic. There are parts of the  
22 settlement agreement that are directly relative to this  
23 dispute, and I guess with AT&T's permission, since they have  
24 raised the settlement agreement, I can breach the  
25 confidentiality and --

1           COMMISSIONER DEASON: No, I'm not asking you to do  
2 that, so please don't go there.

3           MS. MASTERSON: We do not believe that the settlement  
4 agreement in any way overrides the tariff or our rights under  
5 the tariff.

6           COMMISSIONER DEASON: And who is going to make that  
7 determination? Is that something that a federal court needs to  
8 determine?

9           MS. MASTERSON: I mean, we think this Commission can  
10 make that determination in applying our tariff, which is what  
11 we have asked you to do. If you believe that anything that we  
12 have agreed to in the settlement agreement precludes you from  
13 making that tariff determination we believe you have the  
14 ability to decide that.

15           COMMISSIONER DEASON: But you just said that  
16 agreement was a global agreement which interpreted the minutes  
17 of use allocations, I guess, between jurisdictions, between  
18 interstate and intrastate, is that correct?

19           MS. MASTERSON: No, it was a lot more complicated  
20 than that. In fact, the issues were actually addressed in the  
21 settlement agreement. The issues that were settled have  
22 nothing to do with this dispute, in Embarq's opinion, and that  
23 is what we will argue.

24           MR. COOKE: Madam Chairman.

25           CHAIRMAN EDGAR: Mr. Cooke.



1 MR. COOKE: I think the issue of the settlement  
2 agreement is raising a lot of questions. And just to be clear,  
3 maybe to break this down into actionable items, the primary  
4 issue to be addressed is whether AT&T has supported a motion to  
5 dismiss. And I think on that issue AT&T bears the burden of  
6 showing that there are not facts in question and that the  
7 complaint on its face does not state a cause of action.

8 So to the extent that the settlement agreement raises  
9 questions of fact, for example, then it will be my view that  
10 that burden hasn't been met. The issues on the abeyance, et  
11 cetera, is much more of a policy issue as to how to effectively  
12 and efficiently administer this process.

13 CHAIRMAN EDGAR: Thank you, Mr. Cooke.  
14 Commissioner Arriaga.

15 COMMISSIONER ARRIAGA: Mr. May, the proposal you  
16 introduced today was completely new to the record that I was  
17 reading before, and I welcome that, I really do, because it  
18 opens up a door. But nevertheless I think Embarq also deserves  
19 consideration and deserves a timely response from the  
20 Commission, and even from the courts. Can your proposal be  
21 tweaked so that it is not open ended until the mediation  
22 process takes place?

23 Because as a good attorney as you are, you know that  
24 we know when we go into court, but we don't know when we are  
25 going to get out. So my problem here is you say until the

1 mediation process ends, but it could end five months from now,  
2 it could end 60 days from now. What if it doesn't end? I  
3 would prefer to see something that says you need X amount of  
4 days, and if you don't come to the mediation agreement you are  
5 right back here where you started.

6 MR. MAY: May I consult with my client? (Pause.)

7 Commissioner Arriaga, I will amend my proposal. We  
8 feel confident enough to say that within 60 days there will be  
9 a conclusion to the mediation. So we would ask no more than 60  
10 days for this proceeding to be abated to allow that process to  
11 run its course. And, again, you know, if it's not finished in  
12 60 days, we will take our medicine, but we feel confident that  
13 it will be concluded within 60 days.

14 COMMISSIONER ARRIAGA: Okay.

15 CHAIRMAN EDGAR: Commissioners, further questions?  
16 Commissioner Tew.

17 COMMISSIONER TEW: I was wondering if we had an  
18 answer on that earlier question of Embarq?

19 MS. MASTERSON: No. No answer today. Although, as I  
20 said, we could offer, you know, to further pursue that and ask  
21 that this be deferred while we determine whether that's a  
22 viable option for us.

23 COMMISSIONER TEW: But not 60 days?

24 MS. MASTERSON: Not 60 days.

25 CHAIRMAN EDGAR: Commissioners, we have had good

1 discussion and questions. Is there further discussion or a  
2 question at this time?

3 Commissioner Deason.

4 COMMISSIONER DEASON: Madam Chairman, I agree that  
5 the motion to dismiss should be denied. But at the same time,  
6 I think there is a legitimate question as to whether we should  
7 abate this proceeding for 60 days to at least get the benefit  
8 of whatever may be the result of the mandatory mediation  
9 proceeding. I just think it may be a wise use of resources and  
10 time. And when I say abated, that would mean discovery. We  
11 would just simply abate the proceeding for 60 days, and then at  
12 the end of the 60 days, I believe the parties would be free or  
13 staff would be free to advise us of the status of the mediation  
14 proceeding and we would be better advised as to how to proceed  
15 from that point forward.

16 So, I guess I would -- on Issue 2, I guess I would  
17 agree with staff that we would deny the motion to dismiss, but  
18 that we would abate the proceeding here for 60 days.

19 CHAIRMAN EDGAR: Commissioner Tew.

20 COMMISSIONER TEW: I don't know if this is actually a  
21 request for an amendment in any way, but I just wanted to try  
22 something. Mr. May said earlier something that caught my  
23 attention. I think I already asked a question about it earlier  
24 about allocating the issues among the different forums. And I  
25 think within that 60 days, I think, of course, they will be

1 working together through the mandatory mediation process  
2 anyway, and I think he was suggesting that during that process  
3 that they hope that that would be an outcome.

4           And I would like to encourage that outcome and for  
5 each party to get clear, at least in their minds, and hopefully  
6 an agreement collectively, which issues they want to bring here  
7 and which issues need to go to federal court. And if there are  
8 filings that need to be made in each forum to make that clear,  
9 to consider that. And I don't know if that is really an  
10 amendment to the motion or not, or a request for a friendly  
11 amendment to the motion.

12           COMMISSIONER DEASON: If that is an amendment, it is  
13 certainly acceptable to me.

14           CHAIRMAN EDGAR: Mr. Teitzman.

15           MR. TEITZMAN: It might assist staff if the  
16 Commission was to require the parties to file a status report  
17 on the 60th day from this decision. Each party could then file  
18 the status report on the mediation.

19           COMMISSIONER DEASON: If that is an amendment, that  
20 is agreeable to me, as well.

21           MR. TEITZMAN: Thank you, Commissioner.

22           CHAIRMAN EDGAR: Commissioner Arriaga.

23           COMMISSIONER ARRIAGA: It's a question of the motion,  
24 Madam Chair. Commissioner Deason, I just want to clarify. Is  
25 your motion saying that if at the 60th day after the filing has

1 motion, the Commission's own motion we are going to abate the  
2 proceeding for 60 days and require a status report at the  
3 conclusion of the 60 days addressing the mandatory mediation  
4 proceedings. And we will then make a decision as to how we  
5 proceed.

6 And, Commissioner Tew, I will let you offer your  
7 amending language to that basic motion.

8 COMMISSIONER TEW: I think I would add that we  
9 strongly encourage that the parties make their best effort to  
10 allocate issues among the different forums and make whatever  
11 filings they deem appropriate to get us there.

12 CHAIRMAN EDGAR: Okay. Commissioners, I think this  
13 is where we are as of almost 11:00 o'clock. We have a motion  
14 to deny the motion to dismiss, to abate this proceeding for 60  
15 days with a status report to come in at the end of that 60 days  
16 addressing the mandatory mediation proceedings that will be  
17 going on, and a direction from this Commission encouraging the  
18 parties to allocate issues by forum for clarification and  
19 hopefully efficiency.

20 With that being the motion, we had a second that  
21 stands. Is there further discussion? Okay. Seeing none, all  
22 in favor of the motion say aye.

23 (Unanimous affirmative vote.)

24 CHAIRMAN EDGAR: Opposed?

25 Show the motion carried.

1 been done as requested by staff, mediation is still going on,  
2 does that mean that we cannot continue the proceeding?

3 COMMISSIONER DEASON: No, no, it's just 60 days. It  
4 is not contingent upon there being a result from the mediation  
5 at all, that we are just going to abate for 60 days and get a  
6 status report filed by the parties at the conclusion of the 60  
7 days and then we can assess where we go from that point  
8 forward.

9 COMMISSIONER ARRIAGA: Thank you, Commissioner.  
10 Then I would second the motion with all the  
11 amendments that have been discussed.

12 CHAIRMAN EDGAR: Commissioners, we have a lengthy  
13 motion and we do have a second. Is there discussion or further  
14 clarification?

15 Commissioner Tew.

16 COMMISSIONER TEW: I'm just seeing confusion over to  
17 my left with all the amendments we added, and I'm not sure I  
18 can piece it together again. Perhaps if Commissioner Deason  
19 could try his part, I can perhaps better word my part and add  
20 in staff's.

21 COMMISSIONER ARRIAGA: We are going to miss you,  
22 Commissioner Deason. We are going to miss you.

23 COMMISSIONER DEASON: The motion simply was to  
24 approve staff's recommendation to deny the AT&T motion to  
25 dismiss. It fails. But we are going to, perhaps on our own

1           We need to address Issue 3, which would be to close  
2 the docket, and administratively the docket will need to remain  
3 open per the motion that we just passed.

4           Do I have a motion to that effect?

5           COMMISSIONER CARTER: So moved.

6           COMMISSIONER DEASON: Second.

7           CHAIRMAN EDGAR: A motion and a second. All in favor  
8 say aye?

9           (Unanimous affirmative vote.)

10          CHAIRMAN EDGAR: Opposed? Show the motion carried.

11 And that concludes --

12          MS. MASTERSON: Madam Chairman, could I just ask --

13          CHAIRMAN EDGAR: Ms. Masterton.

14          MS. MASTERSON: -- a procedural question about the  
15 effect of what you all just did. We have an order outstanding  
16 that made AT&T's -- our discovery to AT&T due 14 days after the  
17 ruling on this motion today. Would this 60 days toll that, and  
18 then the 14 days would run at the end of the 60-day period? Is  
19 that how --

20          CHAIRMAN EDGAR: That is my understanding, but I'm  
21 going to ask Mr. Cooke to please address your question.

22          MR. COOKE: Based on what I understood of the motion,  
23 you are holding everything in abeyance, so it would toll that  
24 period.

25          MS. MASTERSON: Thank you.

1           CHAIRMAN EDGAR: Okay. Thank you, Ms. Masterton.  
2           That concludes our discussions on Item 3.  
3           Let's take kind of an informal five minutes to  
4 regroup, and then we will come back in approximately five  
5 minutes and begin for Item 4.

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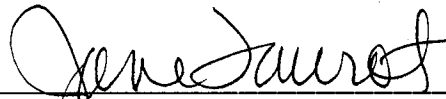
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I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 5th day of September, 2006.




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