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Sent: Monday, December 04, 2006 4:53 PM
To: Filings@psc.state.fl.us
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Subject: E-filing for FPSC Docket 060644-TL
Attachments: Embarq Surcharge CompSouth Motion to Compel.doc

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To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket CompSouth's First Motion to Compel.

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

(a) The person responsible for this filing is:

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(b) Docket No. and Title: 060644-TL Petition of Embarq Florida, Inc. to Recover 2005 Tropical Storm Related Costs and Expenses.

(c) The party on whose behalf the document is filed: CompSouth

(d) Number of pages of the document: 8 pages.

(e) Description of each document attached: First Motion to Compel by CompSouth.

Thank You!

Glenda Chapman

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Life is like a coin, you can spend it any way you wish, but you can only spend it once....

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Embarq Florida, Inc.)	
To Recover 2005 Tropical Storm)	Filed: December 4, 2006
Related Costs and Expenses)	
_____)	Docket No. 060644-TL

COMPSOUTH'S FIRST MOTION TO COMPEL

Pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, The Competitive Carriers of the South, Inc. ("CompSouth") hereby moves the Commission to compel Embarq to respond to CompSouth's Interrogatories Nos. 1(a)-(c) and 2(a)-(b) and Request for Production of Documents No. 2 and provide CompSouth with adequate time to review such discovery prior to the deposition of Embarq's witness, Kent W. Dickerson, tentatively scheduled for December 14, 2006, and to grant CompSouth the right to continue the Dickerson deposition, if necessary, based upon the substance of any such compelled discovery responses received by CompSouth. In support of this motion, CompSouth states as follows:

1. CompSouth served Embarq with the above identified discovery requests on November 15, 2006. On November 30, 2006, Embarq filed responses to CompSouth's discovery including general and specific objections to Interrogatories Nos. 1(a)-(c) and 2(a)-(b), and Request for Production of Documents No. 2.

2. In Interrogatory No. 1(a)-(c), CompSouth requested the following:

For the most recent TELRIC studies performed by Embarq for Florida, provide a listing, by USOA investment account, of all Annual Cost Factors ("ACFs," sometimes referred to as Annual Charge Factors or investment-to-cost factors) used to convert investment to annual cost.

a. For each ACF, provide a listing of all capital and non-capital (expense) components that comprise that ACF. Provide both a descriptive label (e.g. "depreciation") and a numeric value for each component for each ACF.

b. Describe in detail how each component of the ACFs was calculated, including a description of all data relied upon and a description of the calculations involved.

c. For each ACF component that was calculated using data from multiple periods of time (whether used to calculate an average over multiple time periods, to conduct a trend analysis, or for any other use), provide the beginning date and ending date of the data used. For example, if the depreciation expense component of the ACF for a given USOA investment account was calculated based on an average of the yearly depreciation amounts for 1996 through 2005, the response would be "Account xxx, Depreciation, January 1, 1996 through December 31, 2005."

In Interrogatory No. 2(a)-(b), CompSouth requested the following:

In the last Embarq UNE cost case before the Commission (Docket 990694B-TP), Kent W. Dickerson, in his Direct Testimony at pages 20-21, stated,

"The direct maintenance expenses associated with UNE capital investments are applied in the UNE cost study process by including a direct maintenance expense component in the Annual Charge Factor. The Annual Charge Factor development is explained in detail in the ACF section of the documentation. Using the relationship of Florida-specific 2000 direct maintenance to the associated gross capital investment, the direct maintenance expense loadings shown in the Annual Charge Factor Module were developed. By applying these Florida-specific direct maintenance loadings to the corresponding forward-looking capital investments, an estimate of the forward looking direct maintenance is included in the UNE cost study".

a. In the development of its Annual Charge Factor, did Embarq include expenses and tasks associated with inspecting and reporting on the condition of plant investment to determine the need for repairs?

b. In the development of its Annual Charge Factor, did Embarq include expenses and tasks associated with restoring the condition of plant investment damaged by storms, floods, fires and other casualties?

In CompSouth's Request for the Production of Documents No.2, CompSouth requested the following:

In the last Embarq UNE cost case before the Commission (Docket 990694B-TP), Kent W. Dickerson, in his Direct Testimony at pages 20-21, stated,

"The direct maintenance expenses associated with UNE capital investments are applied in the UNE cost study process by including a direct maintenance expense component in the Annual Charge Factor. The Annual Charge Factor development is explained in detail in the ACF section of the

documentation.” Produce the ACF section of the documentation referenced in Mr. Dickerson’s testimony.

Embarq objected to Interrogatories Nos. 1(a)-(c), 2(a)-(b) and Request to Produce No. 2 with the same broad objection which states as follows:

Embarq objects to this Interrogatory on the grounds that it is not relevant to the subject matter of Embarq’s petition to recover the extraordinary costs it incurred during the 2005 hurricane season and is not likely to lead to the discovery of admissible evidence. Legislation adopted in 2005 authorizes Embarq to recover these storm-related costs from wholesale, as well as retail, customers. Embarq’s TELRIC cost studies developed as part of the proceeding to establish its UNE rates in 2003 are irrelevant to the statutory recovery mechanism.

2. Embarq bases its objection solely on its assertion that legislation adopted by the State of Florida renders information gathered as a part of Embarq’s federal TELRIC cost studies irrelevant.

4. Florida Rule of Civil Procedure 1.280(b)(1) permits discovery “regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party...” In this Commission’s Second Order on Procedure in this matter¹ the Commission attached a list of issues identified by the parties and Commission Staff as relevant to Embarq’s Petition. Issue No. 2(b), as agreed by the parties, states as follows: “Is a line item charge on Embarq’s wholesale UNE loop appropriate pursuant to Section 364.051(4)(b)(6), Florida Statutes and Federal Law?” Further, the Second Order on Procedure states that the parties agreed to file prehearing legal memoranda to specifically address this issue. Thus, the issue of whether Federal Law preempts Embarq’s requests made under its Petition and the issue of whether to assess additional costs on wholesale customers are squarely before this Commission

¹ Second Order on Procedure, Docket No. 060644-TL, Order No. PSC-06-0981-PCO-TL, issued November 28, 2006.

and as these issues directly relate to the defense of the party (CompSouth) seeking discovery in this matter², CompSouth's discovery requests are relevant and the response of Embarq should be compelled.

5. CompSouth asserts that all of the information sought in its Interrogatories Nos. 1(a)–(c), 2(a)-(b) and Request for Production No. 2 is relevant and material to this proceeding. It is inconsistent for Embarq to agree that there is an issue before this Commission with respect to Federal Law and then to object on the basis of relevancy to CompSouth's requests for information concerning Embarq's TELRIC cost studies, which were conducted pursuant to the very same Federal Laws at issue. Embarq has already agreed that there is a Federal preemption question at issue in this matter and cannot now argue otherwise to avoid CompSouth's legitimate discovery request. CompSouth further asserts that a ruling in favor of Embarq's objection would in effect prejudice the final decision of this case with respect to the Federal Law preemption issue.

6. Moreover, it is completely relevant for CompSouth to enquire what costs were or could be included (whether as actual inputs or by virtue of the TELRIC methodological construct) in the development of Embarq's TELRIC rates. The Florida Statute at issue in this proceeding establishes no presumptions one way or another in this regard, contrary to the insinuation in Embarq's objection. Rather, the statute asks the Commission to determine, in very broad terms, like Issue No. 2(b), whether it would be "appropriate" to assess wholesale customers an add-on rate. Thus, the permissible scope of discovery on this point must likewise be very broad.

7. More specifically, the Annual Cost Factors (ACFs) cited in Interrogatories Nos.

² Rule 1.280(b)(1), Florida Rules of Civil Procedure.

1(a)-(c), 2(a)-(b) and Request for Production No. 2 were factors to be used by Embarq, pursuant to Federal Law, to convert investment to annual cost to create a pooled allocation of costs with respect to the creation of UNE rates. The issue of whether or not there was previous opportunity for Embarq to include storm related costs in its calculation of UNE rates is directly relevant to Issue No. 2(b), is reasonably calculated to lead to the discovery of admissible evidence and therefore within the permissible scope of discovery.

8. Further evidence of the relevancy of CompSouth's discovery requests with respect to ACFs is Embarq's own response to CompSouth's Interrogatory No. 14. CompSouth requested Embarq to describe any potential market repercussions that may result from a line item charge on wholesale unbundled loop customers. The last sentence of Embarq's response to Interrogatory No. 14 states: ... "not allowing the application of the storm recovery charge to UNE loops requires Embarq's shareholders to absorb those costs and thereby subsidize the purchasers of UNE loops." Embarq cannot on the one hand assert that the UNE rates are irrelevant to this case, but on the other hand assert that UNE rates will not compensate Embarq for the costs Embarq seeks to recover through the add-on rate at issue here. By the latter assertion, Embarq opens the door on UNE rate inputs and development. CompSouth is lawfully entitled to put these Embarq assertions to the test given the extremely broad issue of "appropriateness" in this proceeding; and on these points, CompSouth's discovery is right on target.

9. Finally, it is important to mention that substantially similar discovery was propounded by CompSouth on BellSouth Telecommunications in its Petition based on the same Florida Statute at issue in this matter.³ Rather than object to this discovery, BellSouth accepted its relevance by responding to the discovery with the requested information, and that information

³ In Re: Petition by BellSouth Telecommunications, Inc. pursuant to Florida Statutes § 364.051(4) to Recover 2005 Tropical Storm Related Costs and Expenses, Docket No. 060598-TL.

is slated to be entered into the record by stipulation of the parties and staff in that proceeding. There is no reason for the Commission to have the benefit of a complete record in the BellSouth proceeding on this issue and a record lacking relevant information in this proceeding.

10. CompSouth's interrogatories solicit Embarq's knowledge of discoverable facts and are reasonably calculated to lead to the discovery of admissible evidence. Therefore, CompSouth moves the Commission to grant the relief sought in this motion, to wit: Compel Embarq to provide immediate answers to CompSouth's discovery, in time for CompSouth to prepare for the Dickerson deposition tentatively set for December 14, 2006, and to grant CompSouth the right to continue the Dickerson deposition, if necessary, based upon the substance of any such compelled discovery responses received by CompSouth. Without such relief, CompSouth is unquestionably and severely prejudiced in its ability to contest Embarq's Petition due to Embarq's failure to provide CompSouth with responses to CompSouth's lawful discovery.

11. On December 4, 2006 (the date of this Motion), at about 2:00 p.m., the undersigned counsel contacted the counsel for Embarq regarding this Motion and left a voicemail message requesting a return call, advising that this Motion would be filed promptly. As of 4:30 p.m., the parties' counsel had not conferred. However, due to the compressed schedule for this case, this Motion needed to be filed as soon as possible. The undersigned will subsequently follow up with counsel for Embarq as needed.

WHEREFORE, for the reasons stated above, CompSouth moves the Commission to deny Embarq's objections to the CompSouth discovery identified herein, compel Embarq to respond to said discovery in time for CompSouth to prepare for the Dickerson deposition tentatively set for December 14, 2006, and to grant CompSouth the right to continue the Dickerson deposition,

if necessary, based upon the substance of any such compelled discovery responses received by CompSouth.

RESPECTFULLY SUBMITTED, this 4th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and U.S. mail to the persons listed below this 4th day of December, 2006:

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