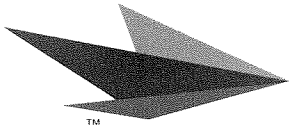

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December 29, 2006

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

RE: Docket No. 060644-TL, Embarq Florida, Inc.'s Memorandum of Law

Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc.'s is Embarq's Memorandum of Law, Docket No. 060644-TL.

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

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

Sincerely,

Susan S. Masterton

Enclosure

Susan S. Masterton
COUNSEL
LAW AND EXTERNAL AFFAIRS- REGULATORY
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CERTIFICATE OF SERVICE
DOCKET NO. 060644-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically and by US mail this 29th day of December, 2006 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Embarq Florida, Inc., pursuant to Florida Statutes §364.051(4), to Recover 2005 Tropical System Related Costs and Expenses	DOCKET NO. 060644-TL Filed: December 29, 2006

EMBARQ FLORIDA, INC.'S MEMORANDUM OF LAW

Embarq Florida, Inc. ("Embarq") pursuant to Order No. PSC-06-0981-PCO-TL (Issued November 28, 2006), and pursuant to direction at the prehearing conference,[1] hereby files its Memorandum of Law addressing the legal aspects of Issue 2(b): whether a line item charge on Embarq's wholesale UNE loops is appropriate pursuant to section 364.051(4)(b)(6), Florida Statutes, and federal law and Issue 4: on what date should any approved charge become effective.

INTRODUCTION

Section 364.051(4)(b), Florida Statutes, provides a mechanism for Embarq to recover a limited amount of the costs it incurs as a result of damage from named tropical systems occurring after June 1, 2005. The statute sets forth the manner for filing and considering a petition for storm cost recovery, provides a cap and time limitation on the charge that may be assessed to recover the eligible costs and enumerates the types of customers that may be assessed the charge, including retail basic and nonbasic telecommunications service customers and, as appropriate, wholesale loop unbundled network element customers. This Memorandum of Law addresses two issues arising out of Embarq's Petition for recovery of its 2005 storm costs pursuant to the statute.

[1] Docket No. 060644-TL, Transcript of December 20, 2006 Prehearing, at page 7.

The first issue involves legal issues regarding whether it is appropriate under state and federal law to assess the charge on wholesale loop unbundled network element customers. The Commission has already decided in the recent BellSouth storm cost recovery docket (Docket No. 060598-TL) that, as a matter of law, the charge may be assessed on these customers. The issue in the Embarq case is identical to the issue in the BellSouth case and, as a matter of law, the Commission should reach the same conclusion to allow Embarq to assess this charge on its wholesale customers as it did in the BellSouth case. In addition, based on the record in Embarq's case, the Commission should also authorize the charge to be imposed on wholesale customers who purchase loops pursuant to commercial agreements and resold access lines, as well as customers who purchase loops pursuant to §251 interconnection agremeents.

The second issue addresses when Embarq's charge should take effect. In the BellSouth case, the Commission decided that the charge should take effect as soon as practicable, but no sooner than 30 days after the Commission vote approving the charge. The staff position in Embarq's docket, as reflected in the Prehearing Order, Order No. PSC-06-1073-PHO-TL at page 9, is to make the charge effective in the same manner as the BellSouth charge. The Commission should adopt the staff's position and order that any storm recovery charge approved for Embarq should be effective as soon as practicable but no sooner than 30 days after the Commission vote.

ARGUMENT

ISSUE 2: (b). Is a line item charge on Embarq's wholesale UNE loop appropriate pursuant to Section 364.051(4)(b)(6), Florida Statutes and Federal Law?[2]

[2] In addition Issue 2(b) includes the following technical sub-issues, to be addressed depending on the resolution of the first issue: "If yes, on which types of lines should the charge be assessed and how should the lines be counted? What is the total number of UNE loops to be assessed, if any?"

The Commission has decided this issue in the BellSouth Docket

This docket is not the first time the Commission has considered the legal issue of whether it is appropriate to assess an approved storm recovery surcharge on wholesale UNE loop customers. At its December 19, 2006 Agenda Conference, the Commission voted on the identical issue in a similar docket in which BellSouth petitioned to recover its 2005 hurricane-related costs under section 364.051(4)(b), Florida Statutes.[3] Although the final written order in the BellSouth docket has not yet been issued, on the issue regarding the appropriateness of applying a storm recovery charge to UNE loops, the Commission adopted the Alternative Staff Recommendation in its entirety.[4] Because all of the legal arguments made by the parties were considered by the Commission in rendering its ruling in that docket, Embarq will not attempt to reargue all of those issues here. Nevertheless, for the purposes of the Commission's decision in this docket, Embarq believes that all of the arguments made by BellSouth in its Memorandum of Law filed on November 30, 2006 are equally applicable to Embarq, and adopts those arguments by reference herein.

Legal Conclusion in the BellSouth Docket

In the BellSouth docket, CompSouth argued that imposition of the surcharge on UNE loops is inconsistent with federal law because it violates the TELRIC principles applicable to the establishment of UNE rates. (12/13 Staff Recommendation at pages 15-16) BellSouth, in its turn, argued that the imposition of the surcharge did not alter UNE

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[3] Transcript of the December 19, 2006 Agenda Conference, Item No. 8, at page 22.
[4] Staff Recommendation in Docket No. 060598-TL, *Petition to Recover 2005 tropical system related costs and expenses by BellSouth Telecommunications, Inc.*, dated December 13, 2006 (hereinafter, "12/13 Staff Recommendation"), at pages 15-22.

rates, but rather was a separate, temporary state-imposed charge to recover extraordinary costs not contemplated in TELRIC. (12/13 Staff Recommendation at pages 15-16) In adopting the Alternative Staff Recommendation, the Commission determined that the proposed imposition of the surcharge did constitute a "rate increase." (12/13 Staff Recommendation at page 19) Notwithstanding that characterization, the Commission determined that "TELRIC is inapplicable to this rate increase for one basic reason: TELRIC framework assumes that future costs are "normal" over the long run, while the costs being addressed here are not "normal" but rather catastrophic." (12/13 Staff Recommendation at page 20)

Additionally, in adopting the Alternative Staff Recommendation, the Commission found that "[s]ome disasters, whether the work of nature or man, can impose restoration costs so enormous that they cannot be handled in the TELRIC framework without rendering the 'hypothetical network' arbitrary and capricious and forward-looking rates both unjust and unreasonable." (12/13 Staff Recommendation at page 20) Based on these findings, in adopting the Alternative Staff Recommendation the Commission concluded that "the assumptions and purpose of TELRIC preclude that framework from being used to address widespread catastrophic damage in forward looking rates. Widespread catastrophic damage to an ILEC's system must be handled on an ad-hoc basis, and in this context, state authority remains primary." (12/13 Staff Recommendation at page 20) Ultimately, the Commission authorized BellSouth to impose a line item charge on wholesale UNE loop customers. (12/13 Staff Recommendation at page 21)

The legal analysis and conclusions adopted by the Commission in the BellSouth docket are equally applicable to Embarq's storm cost recovery request. The testimony of

Embarq's witness, Kent Dickerson, supports the Commission's conclusion that extraordinary storm events such as the 2005 storm season were not contemplated in setting UNE loop rates. (See, Dickerson Surrebuttal Testimony at pages 4-5; Dickerson Deposition Transcript at page 35) In addition, the language of Embarq's §251 interconnection agreements, which govern the purchase and provisioning of UNE loops, supports the imposition of the charge. The applicable provisions allow Embarq to pass through authorized taxes and fees. In addition, the agreements state the following: "To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties."[5] Thus, if the Commission orders a line item storm charge to be applied, the terms of the agreements will not be changed or affected since they already contemplate and provide a mechanism for handling such fees.

Further, the Commission's analysis and conclusions are consistent with the Telecommunications Act (47 U.S.C. §§151 et. seq.), which recognizes continuing state regulatory authority that is not inconsistent with the provisions of the Act.[6] In addition, the Commission's analysis and conclusions are consistent with the FCC's reasoning and conclusions regarding the imposition of a local number portability surcharge.[7] In authorizing that charge on telecommunications carriers, the FCC rejected arguments that the number portability surcharge it had authorized to be assessed on UNE switching ports must be based on TELRIC pricing principles. Specifically, the FCC differentiated between UNE prices and the surcharge it had authorized, under a separate provision of

[5] The applicable provisions of Embarq's standard interconnection agreement are included in Embarq's Response to CompSouth POD No. 1.
[6] See, 47 U.S.C 253(b). See also, §§ 251(d)(3) and 261(c).
[7] Memorandum and Order on Reconsideration in Docket No. 95-116, *In the Matter of Local Telephone Number Portability*, Order No. FCC 02-16, released on February 15, 2002

law, to allow ILECs to "recover their costs of implementing long term number portability."[8] The Commission's decision in the BellSouth case that the extraordinary costs incurred by ILECs as a result of catastrophic storm damage, authorized to be recovered under section 364.015(4)(b), should be differentiated from the forward-looking costs that form the basis of TELRIC UNE rates comports with the FCC's reasoning regarding the local number portability charge.

The parties agree and the Commission concluded that the issue of the appropriateness of applying the storm recovery surcharge under Florida and federal law primarily involves a determination of law. Principles of *stare decisis* mandate that the Commission reach the same legal conclusions regarding the appropriateness of assessing the charge under Florida and federal law in Embarq's case as it did in BellSouth's case. (See, Gessler V. Department of Business and Professional Regulation, 627 So. 2d. 501, 504 (Fla. 4th DCA 1993)) Therefore, the Commission should authorize Embarq to impose its storm cost recovery surcharge on UNE loop customers in the same manner as Embarq is authorized to impose the charge on its retail customers, just as the Commission ruled in the BellSouth case.

Other Wholesale Customers

In adopting the BellSouth Alternative Staff Recommendation, the Commission recognized that imposing the storm recovery surcharge on wholesale, as well as retail, customers is more equitable than imposing the surcharge on retail customers alone. (12/13 Staff Recommendation at page 21) However, the Alternative Staff Recommendation notes that BellSouth elected not to impose the line item surcharge on its wholesale loop customers taking services under commercial agreements or on resold

[8] *Id.* at ¶ 61.

service lines or special access lines. The Alternative Staff Recommendation expresses concerns about the potential anticompetitiveness of this unequal treatment of wholesale customers. (12/13 Staff Recommendation at page 21)

The Commission ultimately concluded that the record in the BellSouth case did not provide support for extending the surcharge to these other wholesale lines. (12/13 Staff Recommendation at page 21) Unlike the BellSouth record, the record in Embarq's case, including Embarq's testimony and discovery responses, provides a full record basis for applying the charge to wholesale customers purchasing loops under commercial agreements, as well as resold lines. As discussed in the following paragraphs, Embarq believes that the language of the statute supports imposing the charges on these customers. In addition, Embarq's existing commercial and resale agreements contain the same language regarding the imposition of taxes and fees as discussed above in relation to UNE loops purchased under §251 interconnection agreements.[9]

Loops Purchased Under Commercial Agreements

Because loops sold under commercial agreements had their origin as unbundled network elements, they should be treated like unbundled network element loops for application of the storm cost recovery charge. While federal regulation resulting from the FCC's TRRO proceeding draws a distinction between loops sold under commercial agreements and unbundled network element loops sold pursuant to §251 interconnection agreements, section 364.051(4)(b), F.S. does not appear to make that same distinction. Loops sold under commercial agreements are functionally equivalent to unbundled network element loops in that both are Embarq network facilities, leased by a CLEC to provide the connection from a customer location to an Embarq central office. (However,

[9] See, Embarq's Response to Staff's POD Nos. 3 and 5.

because loops sold under commercial agreements are packaged with Embarq provided switching services, such arrangements do exhibit differences from unbundled network element loops.)

While the term "wholesale loop unbundled network element" is not defined in the statute, the term is reasonably interpreted to include the lease of Embarq network connections from customer locations to an Embarq central office provided to wholesale customers who utilize the leased facilities to provide service to their end user customers. These network connections can be provided to wholesale customers subject to commercial agreements or interconnection agreements governed by §251. A reasonable interpretation of the statute allows the Commission discretion to order the application of a storm cost recovery charge to "wholesale loop unbundled network element customers." Whether purchasing loops under a commercial agreement or a §251 interconnection agreement, in both situations the purchaser is a wholesale customer of Embarq's network elements Therefore, it is appropriate to apply the storm recovery charge to loops provided under commercial agreements.

Resold Lines

Although the statute does not expressly discuss application of storm cost recovery charges to resold lines, Embarq's proposed application of the storm recovery charge to resold lines is based on a reasonable interpretation of section 364.051(4)(b)(6), Florida Statutes. Resold services are directly tied to Embarq's retail services and are included in Embarq price regulation filings completed under the provisions of Florida Statute 364.051. This approach is further supported by the FCC's definition of the resale obligations of local exchange carriers as specified in FCC Rule 51.603, which requires

ILECs to offer retail telecommunications services at resale in the same manner they provide those service to retail customers.[10] Therefore, it is appropriate to apply the storm recovery charge to resold lines.

Special Access

Unlike UNE loops provided under commercial agreements and resold access lines, Embarq is not proposing to assess the storm recovery charge on special access lines in this filing. While Embarq believes is would be appropriate to apply the storm recovery surcharge on special access lines, since the storm recovery efforts included the repair of facilities used to provide special access services, Embarq's understanding of statute 364.051(4)(b)(6) is that it does not specifically provide for application to special access lines. Because "special access" is a commonly used industry term, and one not normally subsumed in references to a term such as "wholesale loop unbundled network element customers," Embarq believes it is more likely that the legislature would have explicitly included special access in the statute if they intended the surcharge to be applied to this service.

ISSUE 4: If a line item charge is approved in Issue 3, on what date should the charge become effective and on what date should the charge end?

Embarq's 2005 storm recovery surcharge should be implemented similar to the manner in which the Commission ruled that it be implemented in the BellSouth storm

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[10]FCC Rule provides:
51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

recovery docket. That is, the Commission should determine that, if a line item charge is approved, the charge may be assessed as soon as practicable, but no earlier than 30 days from the date of the Commission vote.[11] Very late in Embarq's proceeding, after the staff asked some interrogatory questions about the possibility of overlapping surcharges but, without any foundation in the record testimony or otherwise, the Office of the Public Counsel changed its stated position of "No position" on this issue to suggesting that Embarq's 2005 storm surcharge should be delayed until the imposition of its 2004 storm costs was complete. As Embarq demonstrates below, for the Commission to delay the beginning date for Embarq's recovery of its 2005 storm costs until late in 2007 is contrary to the clear goals of the enabling statute and, therefore, arbitrary. In addition, a delay runs counter to considerations of good public policy.

The statute does not prohibit overlapping charges for multiple storm seasons

There is nothing in section 364.051(4)(b) that precludes Embarq from charging any approved charge for costs incurred during the 2005 storm season, in addition to its previously authorized 2004 storm surcharge. First, from a statutory construction standpoint, section 364.051(4)(b) is crystal clear that the conditions and mechanism for local exchange companies to recover their costs for 2005 forward were not intended to address or affect Embarq's then pending 2004 cost recovery petition.[12] Embarq's petition was contemplated at the time the 2005 legislation passed and was signed into law by the Governor, and clearly sought recovery over a two-year period. The bill's sponsor specifically asked about and was advised of these facts prior to passage.[13] If the

[11] This issue was stipulated by the parties in the BellSouth docket. See, 12/13 Staff Recommendation at page 6.
[12] The statute explicitly states that it was not intended to affect consideration of that petition.
[13] See, Kent Dickerson Deposition Transcript at page 28.

Legislature had wanted to prohibit concurrent recovery from two completely different storm seasons, based on two different statutes, it could have (and would have) said so. Against this background, delaying Embarq's recovery would be unfounded and, therefore, arbitrary.

Delay is inconsistent with the statute and legislative intent

Embarq does not agree that it was the intent of section 364.051(b)5. to limit the increased costs for consumers to 50 cents per month per line for multiple storm seasons. Actually the intent of the legislation, considering the applicable 120-day time frame and the 50 cents per access lines cap, is more reasonably interpreted to be to give quick and streamlined review and recovery in exchange for recovery of very limited storm cost dollars.

The plain language of the statute does not address the potential for overlapping recovery for multiple storm seasons. And, as previously discussed, the statute explicitly is not intended to allow retroactive consideration--in the context of a post-2004 storm season docket--of Embarq's recovery of its 2004 storm costs approved under pre-existing law. To interpret the statute to require or suggest that Embarq must delay the application of any charge approved for 2005 storms (pursuant to a statute that expressly did not apply to the Commission's approval of Embarq's 2004 storm costs) until Embarq completes the assessment of the 2004 charge (approved by the Commission under a different a different set of statutory requirements) violates fundamental principles of statutory construction. These principles of construction preclude the Commission from inserting words into the statute or supplying an omission that was not in the minds of the Legislature when the statute was enacted. See, *Armstrong v. City of Edgewater*, 157 So. 2d 422 (Fla. 1963).

Reading into the statute an unfounded requirement that storm charges approved based on the 2005 legislation cannot be imposed until after completion of any surcharges approved under a pre-existing statutory mechanism is just the type of insertion of words into a statute that the courts have rejected.

Embarq's 2004 storm cost recovery petition was filed and approved under a different statutory scheme. In its ruling on Embarq's 2004 petition, the Commission recognized that the capping limitations of the 2005 legislation were not applicable to Embarq's recovery of its 2004 costs. Under the pre-existing law, Embarq was permitted to file for unlimited recovery for a much more costly storm season. In its 2004 request, Embarq followed the precedent established by the investor-owned electrics to spread recovery of significant amounts over at least 24 months, to ease the impact on ratepayers. The OPC concurred in this time frame. Notably, even if Embarq's surcharge had been doubled and recovered over 12 months, it still would have been less than any of the investor-owned electric utility surcharges (even when those were spread over 24 plus months).

Embarq should not now be retroactively penalized for doing the right thing in spreading its 2004 cost recovery over a two-year period, by requiring Embarq to arbitrarily defer recovery of its 2005 costs until late 2007. Even if the Commission has any discretion in this area, it should only apply to recovery in 2005 and subsequent years.[14] The 12-month statutory time frame for recovery, and the OPC's anit-overlapping interpretation of the statutes, more logically applies to implementation under the 2005

[14] Although Embarq does not believe that the statute prohibits the assessment of more than one surcharge for different storm seasons, even after 2005, the explicit application of the recovery mechanism to storms occurring after June 1, 2005 mandates that any limitation on such recovery be applied only to storm surcharges approved after that date.

change in the law and for recovery after the 2005 storm season, e.g. 2006 and beyond. This prospective application of the statute avoids retroactive impacts of interjecting this *post hoc* concept into the 2004 recovery mechanism.

Delay is contrary to good public policy

In addition to the principles of law that do not support a delay of Embarq's 2005 storm recovery, delaying Embarq's recovery of its 2005 storm costs until the 2004 storm cost recovery completes in October 2007 is contrary to good public policy. First, delay would set up the potential of "stacking" future year's storm recovery costs. For example, if implementation of Embarq's recovery of the 2005 storm costs is delayed until October 2007, the recovery period would then be extended through September 2008. If Embarq were to sustain storm damage in the 2007 storm season and pursue a recovery of those costs in 2007, recovery of the 2007 costs could potentially overlap with the delayed 2005 cost recovery charge which would run through September 2008. In addition, such a delay would push recovery of hurricane costs onto a greater number of customers who were not customers at the time of the storms, as well as allowing those customers who exercise competitive choice to avoid paying their fair share of storm-related costs.

Finally, any implication that an overlap in the recovery period for Embarq's 2004 and 2005 storm costs constitutes "double recovery" is absurd. Embarq has not sought any double recovery of costs or recovery of unnecessary costs in this docket. The costs approved for recovery in Docket No. 050374-TL are specific to the 2004 storms. Similarly, costs submitted for recovery in this proceeding relate to the 2005 storms. Thus, there is no "double-recovery" of costs. Rather, Embarq's proposal in this proceeding, using an extraordinary cost standard, combined with the 50-cent statutory

cap on recovery, results in a conservative amount of recovery of Embarq's costs associated with the 2005 storms, many times less than Embarq's actual damages and costs incurred and fully in compliance with the recovery allowed under Section 364.051(4)(b).

The Commission should follow its decision in the BellSouth storm recovery docket and allow Embarq to implement its 2005 storm cost recovery charge upon Commission approval in this proceeding and not be required to delay implementation until the 2004 recovery charge is completed. Such a proposed deferral of cost recovery is contrary to the clear and unambiguous purpose of the statute to allow local exchange companies to seek timely, limited and streamlined recovery of storm-related costs.

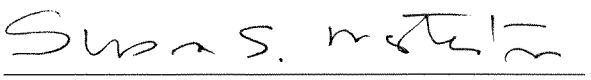
CONCLUSION

WHEREFORE, the Commission should:

- Follow its ruling in the BellSouth docket and find that any surcharge approved for Embarq should also be applied to Embarq's wholesale loop customers, including customers who purchase loops under commercial agreements as well as §251 agreements and resold lines; and

- Reject the OPC's unfounded position that the assessment of any 2005 surcharge approved for Embarq should be delay until the assessment of its 2004 charge is completed and, instead, follow its staff's position and the ruling in the BellSouth storm recovery docket and order that the charge be assessed as soon as practicable but no sooner than 20 days after the Commission vote.

Respectfully submitted this 29th day of December 2006.



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