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07 MAR -9 AM 11:43

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Wellington Office
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Vicki Gordon Kaufman
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February 20, 2007
Via Hand Delivery

William McCool
Clerk of the Court
United States District Court
Northern District of Florida
111 N. Adams Street
Tallahassee, FL 32301-7730

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OFFICE OF THE
GENERAL COUNSEL

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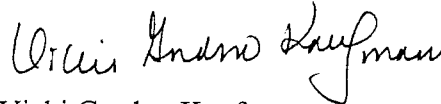
Re: Competitive Carriers of the South, Inc. and Florida Digital Network, Inc. v.
Lisa Polak Edgar, Chairman of the Florida Public Service Commission, in her official
capacity et al.

Dear Mr. McCool:

Enclosed for filing please find a Civil Cover Sheet, Complaint, and Rule 7.1 Disclosure
Statement. Also enclosed is an extra set of these documents for you to date stamp. Finally,
enclosed is the filing fee of \$350.00 to open a civil case.

Thank you for your attention to this matter. If there are any additional requirements to
initiate this proceeding, please let me know.

Sincerely,



Vicki Gordon Kaufman
Florida Bar No. 286672

- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____ VGK/pg
- Enclosures
- OPC _____ cc: Richard Bellak
- RCA _____ Jason Fudge
- SCR _____ Susan Masterton
- SGA _____ Charles J. Beck
- Michael Twomey
- SEC _____
- OTH Manquende

DOCUMENT NUMBER-DATE

02178 MAR-90

FPSC-COMMISSION CLERK

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Competitive Carriers of the South, Inc., and Florida Digital Network, Inc.

DEFENDANTS

See attachment

(b) County of Residence of First Listed Plaintiff Leon
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Leon
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Vicki Gordon Kaufman, 118 N. Gadsden Street, Tallahassee, FL 32301;
(850) 681-3828

Attorneys (If Known)
See attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input checked="" type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
				FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC 1331, 1343(3)(a)

Brief description of cause:
Federal preemption

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ _____
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Hinkle DOCKET NUMBER 4:07cv48 RH/WCS

DATE
2-20-07

SIGNATURE OF ATTORNEY OF RECORD
Vicki Gordon Kaufman

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Competitive Carriers of the South, Inc., and
Florida Digital Network, Inc.

v.

Lisa Polak Edgar et al. and
Embarq Florida, Inc.

Attachment to Civil Cover Sheet

DEFENDANTS: Lisa Polak Edgar, in her official capacity as Chairman of the Fla.
Public Service Commission, and Matthew M Carter II and Katrina
McMurrian, in their official capacities as Commissioners

and

Embarq Florida, Inc.

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Katrina McMurrian

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For: AARP/Joanna C. Sutherland/
Sugarmill Woods Civic Assn.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMPETITIVE CARRIERS OF THE
SOUTH, INC.

and

FLORIDA DIGITAL NETWORK, INC.,

Plaintiffs,

v.

LISA POLAK EDGAR, Chairman of the
Florida Public Service Commission, in her
official capacity; MATTHEW M. CARTER
II, and KATRINA J. McMURRIAN, in their
official capacities as Commissioners of the
Florida Public Service Commission;

and

EMBARQ FLORIDA, INC.,

Defendants.

Case No. 4:07cv 64 SPM/WLS

COMPLAINT

Plaintiffs, Competitive Carriers of the South, Inc. (CompSouth) and Florida Digital Network, Inc. (FDN), by and through undersigned counsel, do hereby file this Complaint and allege the following:

NATURE OF THE ACTION

1. This action is brought to enforce federal law, including the U.S. Constitution, specifically the Supremacy Clause and Impairment of Contract Clause, and various provisions of the Telecommunications Act of 1996, including, without limitation, 47 U.S.C. §§ 251(c)(3), 252(d), and state law, including, without limitation, the state constitutional provision prohibiting impairment of contract. This matter involves a decision of the Florida Public Service Commission (FPSC) that permits Embarq Florida, Inc. (Embarq) to increase the rates that Plaintiffs pay to Embarq pursuant to federally-mandated interconnection agreements (ICAs). ICAs are contracts that govern the Parties' business relationships in the telecommunications market. Prices contained in the ICAs for the purchase of unbundled network elements (UNEs) – the piece parts of the telecommunications network -- are set pursuant to federal law. Federal law requires the UNE prices which the FPSC approves pursuant to federal regulatory requirements, and which Embarq charges to Plaintiffs, to be set at Total Elemental Long Run Incremental Cost (TELRIC).

2. Defendant FPSC violated these federal requirements by permitting Defendant Embarq to charge Plaintiffs prices for UNEs in excess of TELRIC. Defendant FPSC violated federal requirements by permitting Defendant Embarq to increase ICA prices without an amendment to the ICAs. Defendant FPSC violated federal and state

law by impairing the Parties' contracts and by permitting Defendant Embarq to charge arbitrary, capricious and unreasonable rates for UNEs. The FPSC's action violates its authority under 47 U.S.C. §§ 251, 252; Article I, Section 10 of the U.S. Constitution; Chapter 364, Florida Statutes; and Article I, Section 10 of the Florida Constitution.

3. Plaintiffs seek a ruling from this Court finding that Final Order No. PSC-07-0126-FOF-TL¹ is invalid and of no force and effect because it violates federal and state law and is preempted by federal law, and requiring a refund of all monies paid, with interest, pursuant to the Final Order.

4. The FPSC issued the *Final Surcharge Order* as a result of a petition filed by Embarq. In its petition, Embarq sought to assess and collect a \$.50 cent charge on UNEs based on a state statute. This statute, as applied by the FPSC in its decision, violates federal law which preempts the increased UNE charges Embarq proposed and which the FPSC approved. Thus, the FPSC's *Final Surcharge Order* violates the Supremacy Clause of the United States Constitution², as well as the federal³ and state⁴ prohibitions against impairment of contract. The *Final Surcharge Order* is also arbitrary, capricious, and unreasonable. The state statute⁵, pursuant to which the charge was approved, is unconstitutional as applied by Commissioner Defendants.

¹ *Petition to Recover 2005 Tropical System Related Costs and Expenses, by Embarq Florida, Inc.*, Docket No. 060644-TL (Feb. 12, 2007) ("*Final Surcharge Order*") (Exhibit A).

² Art. VI., U.S. Const.

³ Art. I, § 10, U.S. Const.

⁴ Art. I. § 10, Fl. Const.

⁵ Section 364.051(4), Florida Statutes.

PARTIES

5. Plaintiff, CompSouth is a not-for-profit corporation organized under the laws of Florida, comprised of competitive telecommunications providers. CompSouth members are Competitive Local Exchange Carriers (CLECs) who compete with incumbent carriers, like Embarq, to provide telecommunications services to retail end users.

6. FDN is a corporation organized under the laws of Delaware with its principal place of business at 2301 Lucien Way, Suite 200, Maitland, FL 32751. FDN is a CLEC and provides telephone services in Florida in competition with Embarq.

7. Defendant Embarq is a Florida corporation. Embarq has offices in Florida located at 1313 Blair Stone Road Tallahassee, Florida 32301. Embarq is a "Local Exchange Carrier" within the meaning of 47 U.S.C. § 153(26). Embarq is an "Incumbent Local Exchange Carrier" under the Act. Embarq provides local exchange, exchange access, and certain intrastate long-distance services within Florida.

8. Defendant Lisa Polak Edgar, Chairman of the FPSC, serves on the FPSC. Chairman Edgar's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

9. Defendant Matthew M. Carter II, Commissioner of the FPSC, serves on the FPSC. Commissioner Carter's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

10. Defendant Katrina J. McMurrian, Commissioner of the FPSC, serves on the FPSC. Commissioner McMurrian's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

11. Plaintiffs sue each Commissioner of the FPSC in his or her official capacity so that the full FPSC is bound by the final judgment in this case. Plaintiffs refer to the Commissioners collectively as the Commissioner Defendants.

12. Pursuant to §86.091, Florida Statutes, two copies of this Complaint have been served on the Attorney General of Florida via certified mail.

JURISDICTION AND VENUE

13. This is a civil action arising under federal and state law.

14. The Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 because it raises a federal question. The Court has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 28 U.S.C. § 1343(a)(3).

15. Jurisdiction is also appropriate under 28 U.S.C. § 1332, because Plaintiff, FDN and the Commissioner Defendants, and Defendant Embarq are citizens of different states and the amount in controversy exceeds \$75,000.

16. This action is also brought pursuant to 28 U.S.C. § 2201 et seq.

17. This Court has supplemental jurisdiction over the state law claims herein pursuant to 28 U.S.C. § 1367, because they arise out of the same set of operative facts and regard the same proceeding from which this Complaint arose.

18. Venue in this District is proper under 28 U.S.C. § 1391(b). All Commissioner Defendants perform their official duties in Tallahassee, Florida in accordance with the laws of Florida. Defendant Embarq transacts a substantial amount of business in this District. A substantial part of the events or omissions giving rise to this dispute occurred in this District.

BACKGROUND

19. **Federal law.** The Telecommunications Act of 1996⁶ restructured the local telecommunications market and ended the monopolies granted to local exchange carriers (LECs), like Embarq, to provide local service.⁷ One of the Act's main obligations requires incumbents, such as Embarq, to share their networks with competitors, such as CompSouth members, via the leasing of the piece parts of the incumbent's network – unbundled network elements or UNEs.⁸

20. Federal law requires that rates that incumbents, like Embarq, charge to competitors, like CompSouth members, for UNEs must be based on cost.⁹ Such rates, as well as other terms and conditions, must be included in ICAs, which are either negotiated or the subject of arbitration proceedings before state regulatory commissions.¹⁰

21. The Federal Communications Commission (FCC), pursuant to federal law, has adopted the TELRIC costing methodology to set UNE prices. This is the method that state regulatory commissions *must* use to set cost-based UNE rates under the Act. The

⁶ Pub. L. No. 104-104, 110 Stat. 56, codified at 47 USC §§ 151 et seq. (the Act).

⁷ *AT&T Corp. v. Iowa Utilities Board*, 525 US 366, 370 (1999).

⁸ 47 USC § 251(c)(3).

⁹ 47 USC § 252(d)(1)(A).

¹⁰ 47 USC § 252(a), (b).

United States Supreme Court has upheld the FCC's authority to design and designate a pricing methodology.¹¹ The FCC's authority to require state commissions to set rates using the TELRIC methodology has been upheld by the United States Supreme Court.¹² In its state UNE pricing proceeding, Defendant Commissioners recognized that they were required to use the TELRIC pricing methodology to set UNE rates to be incorporated into ICAs.¹³

22. The FCC's TELRIC methodology¹⁴ requires UNE costs to be forward-looking. The FCC defines forward-looking costs as:

The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.¹⁵

23. The TELRIC methodology explicitly prohibits the use or inclusion of embedded costs in UNE rates.¹⁶ 47 C.F.R. § 51.505(d)(1) prohibits the inclusion of "costs that the incumbent LEC incurred in the past and are recorded in the incumbent LEC's books of accounts." Federal law expressly prohibits the inclusion of historic book

¹¹ *Iowa Utilities Bd.* at 384-385.

¹² *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

¹³ *In Re: Investigation into unbundled network elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (May 25, 2001) at 23-24; Order No. PSC-02-1311-FOF-TP (Sept. 27, 2002). See also, *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D.Fla. 2000), *affm'd*, 298 F.3d 1272 (11th Cir. 2002).

¹⁴ See, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15,499, 15,844, ¶ 672 (1996); 47 C.F.R. § 51.505.

¹⁵ 47 CFR § 51.505(b).

¹⁶ 47 CFR § 51.505(d)(1); *WorldCom, Inc. v. Connecticut Department of Public Utility Control*, 375 F. Supp. 2d 86 (D. Conn. 2005).

costs and expenses related to repair, replacement or restoration of lines, plants or facilities damaged in the past in UNE rates.

24. State law. Section 364.051(4), Florida Statutes, permits incumbent telecommunications companies to elect the more flexible price cap regulation in lieu of traditional rate of return regulation. This state statute generally governs retail (not wholesale) rates. The statute permits incumbents to increase intrastate rates only in limited circumstances and only after an evidentiary showing of substantially changed circumstances.

25. Section 364.051(4)(b), Florida Statutes, provides that damage that has occurred to an incumbent's lines, plants or facilities as a result of a named tropical storm or hurricane automatically meets the "changed circumstances" criterion. In that circumstance, § 364.051(4)(b)5 permits the Defendant Commissioners to allow the incumbent to impose a charge not greater than 50 cents per month per customer line for no more than 12 months to recover storm-related costs. This charge is intended to allow incumbents to recover historical costs incurred in making repairs related to storm damage.

26. In apparent recognition of the jurisdictional differences in the Commissioner Defendants' authority over retail and wholesale rates, § 364.051(4)(b)6, Florida Statutes, states:

The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers, its retail nonbasic telecommunications service customers, and, *to the extent the commission*

*determines appropriate, its wholesale loop unbundled network element customers.*¹⁷

That is, the statute directs the Commissioner Defendants to determine if an increase on wholesale charges is appropriate.

PROCEEDINGS AT THE FPSC

27. On September 25, 2006, Embarq filed a petition at the FPSC seeking to recover 2005 hurricane and tropical system related costs and expenses based on the state statute described above. Embarq sought FPSC approval to increase the wholesale rates it charges to competitive local exchange carriers, such as CompSouth members and FDN.

28. The FPSC granted intervention to CompSouth¹⁸ and to FDN.¹⁹

29. On December 29, 2006, pursuant to Order No. PSC-06-0981-PCO-TL, the Plaintiffs filed a pretrial memorandum addressing the federal preemption issue. A copy of Plaintiffs' memorandum is attached hereto as Exhibit B. Defendant Embarq also filed a pretrial memorandum.

30. On January 4, 2007, a hearing was convened. As to the federal preemption and TELRIC issues raised in this Complaint, the Parties' prefiled testimony was entered into the record without cross examination, as was all discovery conducted in the case.²⁰ At no time in the FPSC proceeding, did Embarq proffer a TELRIC cost study supporting

¹⁷ Emphasis added.

¹⁸ Order No. PSC-06-0942-PCO-TL (Nov. 13, 2006).

¹⁹ Order No. PSC-06-1034-PCO-TL (Dec. 14, 2006). Other intervenors in the case included the Office of Public Counsel, and Joanna Southerland/Sugarmill Woods Civic Association, Inc. and the AARP.

²⁰ Cross-examination was conducted as to surcharge implementation issues which are not relevant to this Complaint.

the rate increase it sought. At the Parties' request, the FPSC conducted oral argument on the preemption issue.

31. On January 16, 2007, the FPSC Staff issued its Recommendation for the FPSC's consideration at its regularly scheduled Agenda Conference.²¹

32. The Staff Recommendation stated that the surcharge on wholesale UNEs be permitted and that the proposed charge did not conflict with federal TELRIC pricing. Staff relied upon and used the same theory set out in the FPSC's Order No. PSC-07-0036-FOF-TL in the BellSouth storm surcharge case in which the same federal preemption arguments were raised.²²

33. The Staff Recommendation does not address the issue Plaintiffs raised regarding the federal requirement for an ICA amendment to effect a change in UNE rates.

34. On January 23, 2007, the FPSC voted to adopt the Staff Recommendation as to the TELRIC issue.

35. The *Final Surcharge Order* was rendered on February 12, 2007. While the FPSC found that the charge at issue was a rate increase, the *Final Surcharge Order* found TELRIC inapplicable to the increase because the costs were "not contemplated by TELRIC. . . ."²³ The *Final Surcharge Order* does not address the requirement for an

²¹ Staff Recommendation (Exhibit C).

²² *Petition to Recover 2005 Tropical System Related Costs and Expenses, by BellSouth Telecommunications, Inc.*, Docket No. 060598-TL (Jan. 10, 2007). A Complaint as to this order was filed in this Court on February 8, 2007. *Competitive Carriers of the South et al. v. Edgar et al.*, Case No. 4:07cv48 RH/WCS.

²³ *Final Surcharge Order* at 13.

amendment to the ICAs to effectuate a rate change, despite the fact that Plaintiffs raised this issue.²⁴

36. Defendant Embarq has indicated that it intends to begin billing the charge to Plaintiffs in November 2007.

COUNT I – FEDERAL TELECOMMUNICATIONS ACT

The FPSC's Decision is Contrary to Federal Law Because It Increases UNE Rates Above Federally Mandated TELRIC Rates

37. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 36 of this Complaint, as though fully set forth herein.

38. Plaintiffs are entitled, under 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 252(d), as implemented by the FCC in 47 C.F.R. § 51.505 and related orders and court decisions, to purchase UNEs at TELRIC rates pursuant to the terms of their ICAs with Defendant Embarq.

39. This proceeding was not treated as nor processed as a TELRIC cost proceeding.²⁵ Embarq filed no TELRIC-compliant cost study. Further, Embarq's currently approved TELRIC rates include an allowance for forward-looking storm costs. Embarq's double counting of such costs is also violative of federal costing requirements.

40. The *Final Surcharge Order*, authorizing Embarq to charge more than TELRIC rates for UNEs that Embarq is obligated to make available to Plaintiffs, violates 47 U.S.C. §§ 251(c)(3), 252(d), 47 C.F.R. § 51.505, and the FCC's implementing orders as well as court decisions.

²⁴ *Id.* at 21.

²⁵ *See, i.e.,* footnote 13, *supra*.

41. Commissioner Defendants' *Final Surcharge Order* providing that Embarq is authorized to charge more than TELRIC rates for UNEs evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

COUNT II – FEDERAL TELECOMMUNICATIONS ACT

The FPSC's Decision is Contrary to Federal Law Because It Effects An Increase in UNE Rates Without an Amendment to the Parties' Interconnection Agreements

42. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 36 of this Complaint, as though fully set forth herein.

43. Plaintiffs are entitled under 47 U.S.C. § 251(c)(3) and 47 USC § 252 to purchase UNEs pursuant to the prices, terms and conditions set out in their ICAs. The Act provides a process via which parties achieve an ICA which then governs their business relationship.²⁶ The Act provides for agreements arrived at through negotiation or mediation.²⁷ If an agreement is not reached via negotiation or mediation, the Act provides for compulsory arbitration.²⁸ Once an agreement is executed, it is submitted to the state regulatory commission for approval.²⁹

44. Plaintiffs are entitled to purchase UNEs pursuant to their existing approved ICAs until such ICAs are replaced by the Parties (either voluntarily or through arbitration) and the FPSC approves the new ICAs. Commissioner Defendants' *Final*

²⁶ See, 47 USC § 252.

²⁷ *Id.* § 252(a).

²⁸ *Id.* § 252(b).

²⁹ *Id.* § 252(e).

Surcharge Order illegally and unilaterally alters approved ICAs and sanctions a de facto rate increase for the purchase of UNEs outside of the negotiation and/or arbitration process the Act mandates. Defendant Embarq's increased charges for UNE rates alters the ICAs (the contracts between the parties) by increasing the UNE rates Defendant Embarq may charge for the UNEs it is obligated to provide to Plaintiffs pursuant to federal law. Absent an explicit provision to the contrary, the Parties are bound by the terms and conditions of the ICAs. Unless and until these contracts are amended with the consent of the Parties or through arbitration, the rates Plaintiffs are charged cannot be unilaterally increased.

45. Commissioner Defendants' *Final Surcharge Order*, providing that increased rates may be charged to Plaintiffs that are outside the requirements of the valid ICAs between Plaintiffs and Embarq, and which are not TELRIC compliant, violates 47 U.S.C. §§ 251(c)(3), 252, and the FCC's implementing rules and orders. Defendant FPSC does not have authority under 47 U.S.C. §§ 251 and 252 to unilaterally amend existing, approved interconnection agreements.

46. Commissioner Defendants' *Final Surcharge Order* authorizing a rate amendment outside of the requirements of the ICAs evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

COUNT III – IMPAIRMENT OF CONTRACT

Commissioner Defendants' Interpretation of the State Statute is Contrary to Federal and State Law Because it Impairs Plaintiffs' Contractual Rights

47. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 36 of this Complaint, as though fully set forth herein.

48. Article I, § 10 of the U.S. Constitution provides that: "No State shall ... pass any ... Law impairing the Obligation of Contracts" Article I, § 10 of the Florida Constitution prohibits laws "impairing the obligations of contracts. . . ."

49. Plaintiffs have contractual rights defined by their TELRIC-compliant ICAs with Embarq. The ICAs govern the conduct of Plaintiffs' and Defendant Embarq's business relationships, including the rates Plaintiffs pay to Embarq for UNEs. Plaintiffs are entitled, pursuant to federal and state constitutional guarantees, to proceed under those contracts without the FPSC's unilateral revision of the terms of the agreements.

50. Commissioner Defendants' interpretation of § 364.051(4)(b)6, Florida Statutes, so as to require Plaintiffs to pay more than the contractual rates for UNEs interferes with and impairs the existing interconnection contracts between Plaintiffs and Defendant Embarq. This impairment is substantial and increases Plaintiffs' costs.

51. Commissioner Defendants' *Final Surcharge Order* permits Defendant Embarq to unilaterally alter its contracts with Plaintiffs and violates the federal and state constitutional prohibitions against impairment of contracts.

52. Commissioner Defendants' *Final Surcharge Order* evidences an erroneous interpretation of law in violation of § 120.68(7)(d), Florida Statutes, and

contravenes or violates constitutional provisions in violation of § 120.68(7)(e), Florida Statutes.

COUNT IV – FEDERAL TELECOMMUNICATIONS ACT

Commissioner Defendants' Decision is Contrary to Federal Law and State Law Because The Increase in UNE Rates Is Arbitrary, Capricious, and Unreasonable

53. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 36 of this Complaint, as though fully set forth herein.

54. 47 USC § 252(d) of the Act requires that rates for elements and for interconnection provided under § 251(c) be just, reasonable and based on the cost of providing the UNE. As noted above, the FCC has established pricing rules to implement this § 252(d) requirement, known as TELRIC pricing rules. Plaintiffs are entitled, pursuant to these provisions as well as to FCC orders, to pay rates to incumbent Defendant Embarq, based on the cost of the UNE purchased.

55. Commissioner Defendants' *Final Surcharge Order* permits Defendant Embarq to collect charges which have no basis or relation to the cost of repairing the UNEs Plaintiffs purchase and thus violates 47 U.S.C. §§ 251(c) and 252(d), as well as the arbitrary and capricious standards of state and federal law. Embarq is prohibited by 47 U.S.C. §§ 251 and 252 from imposing rates, terms or conditions on any CLEC, including Plaintiffs, which are unjust or unreasonable. Thus, Embarq is not permitted to charge Plaintiffs UNE rates which have no relationship to cost and which are not the result of a TELRIC-compliant cost study.

56. Commissioner Defendants' *Final Surcharge Order* permits Embarq to charge rates that are excessive, unjust, and unreasonable, and thus violates 47 U.S.C. §§ 251 and 252.

57. Commissioner Defendants' *Final Surcharge Order* that permits Embarq to collect arbitrary and capricious charges which are unrelated to cost, is not based on competent, substantial evidence in violation of § 120.68(7)(b), Florida Statutes, evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. Declare that the *Final Surcharge Order*, which increases the rates Plaintiffs pay for UNEs, is contrary to federal law because it imposes UNE rates which exceed TELRIC, in violation of 47 USC §§ 251(c)(3), 252(d) and Article VI of the U.S. Constitution;

2. Declare that the *Final Surcharge Order*, which increases the rates Plaintiffs pay for UNEs, is contrary to federal law because it results in a de facto increase in UNE rates without utilizing the required ICA amendment procedures in violation of 47 USC §§ 251(c)(3) and 252(c);

3. Declare that the *Final Surcharge Order*, which increases the rates Plaintiffs pay for UNEs as set forth in their ICAs, is contrary to federal and state law

because it impairs Plaintiffs' contractual rights in violation of Article I, § 10 of the U.S. Constitution and Article I, § 10 of the Florida Constitution;

4. Declare that the *Final Surcharge Order*, which increases the rates Plaintiffs pay for UNEs as set forth in their ICAs, is contrary to federal and state law because it is arbitrary, capricious and unreasonable in violation of 47 USC §§ 251(c) and 252(d) ;

5. Declare that Defendant Embarq must provide UNEs to Plaintiffs at the rates contained in their ICAs;

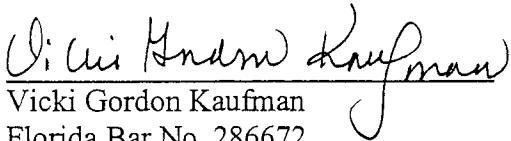
6. Enjoin all the Defendants, and all parties acting in concert therewith, from seeking to enforce and continue implementation of the *Final Surcharge Order* against Plaintiffs;

7. Require Defendant Embarq to refund to Plaintiffs, with interest, any and all charges collected pursuant to the *Final Surcharge Order*;

8. Grant Plaintiffs such further relief as the Court may deem just and reasonable.

Dated: February 20, 2007

Respectfully submitted,



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*Counsel for Competitive Carriers of the South,
Inc. and Florida Digital Network, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint has been provided by (*) hand delivery, (**) electronic mail or (+) certified mail to the following on this 20th day of February, 2007:

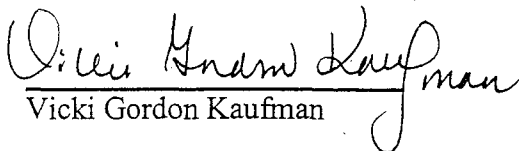
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