

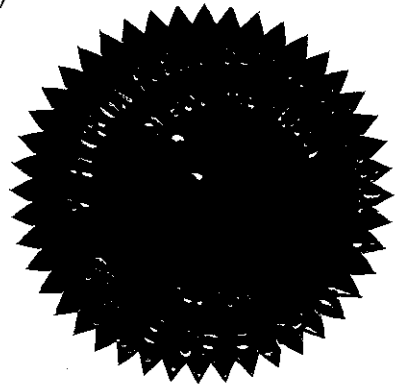
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080308-TP

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In the Matter of:

COMPLAINT AGAINST MCI COMMUNICATIONS
SERVICES, INC. D/B/A VERIZON BUSINESS
SERVICES FOR FAILURE TO PAY INTRASTATE
ACCESS CHARGES PURSUANT TO EMBARQ'S
TARIFFS, BY EMBARQ FLORIDA, INC.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 2

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, October 28, 2008

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

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

1 PARTICIPATING:

2 SUSAN S. MASTERTON, ESQUIRE, representing Embarq
3 Florida, Inc.

4 DE O'ROARK, ESQUIRE, and KIM CASWELL, ESQUIRE,,
5 representing Verizon Business Services.

6 CHARLES MURPHY, ESQUIRE, representing the Commission
7 Staff.

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P R O C E E D I N G S

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CHAIRMAN CARTER: We are now on Item 2.

Staff, you're recognized.

MR. MURPHY: Commissioners, Charles Murphy on behalf of the Commission staff. Docket Number 080308 is a complaint by Embarq against Verizon for failure to pay intrastate access charges in accordance with Embarq's tariffs. Verizon has filed a motion to dismiss this complaint, and has asked for oral argument on the issue, and staff recommends that the oral argument be granted.

CHAIRMAN CARTER: Commissioners, why don't we grant the parties five minutes each for oral arguments, and we will proceed from there.

With that, you're recognized.

MR. O'ROARK: Good morning, Mr. Chairman and Commissioners. I'm De O'Roark with Verizon. With me this morning is Kim Caswell, who will be giving the oral argument for Verizon.

CHAIRMAN CARTER: You have five minutes. You're recognized.

MS. CASWELL: Thank you.

As to the non-VoIP part of the staff's recommendation, Verizon agrees that if Embarq can make out a good faith claim that Verizon is not paying intrastate access charges on intrastate non-VoIP traffic, the Commission can hear

1 that claim. The Commission can and should, however, decline to
2 hear the claim because Embarq brought the same claim to federal
3 court a day after Verizon filed its motion to dismiss here.

4 However, if you decide to go forward on Embarq's
5 non-VoIP claim, you should require Embarq to amend its
6 complaint or file a new one that clearly states the non-VoIP
7 claim and only the non-VoIP claim and the relief Embarq seeks
8 for it. As it stands now, the complaint does not clearly state
9 a non-VoIP claim that is separate from Embarq's VoIP claim.

10 As to the VoIP part of the recommendation, the more
11 controversial part, the question is whether you have
12 jurisdiction to decide what compensation should apply to
13 certain VoIP traffic. Staff recommends deferring a decision
14 until it has gathered more information, but it doesn't say what
15 kind of information it thinks it needs. It suggests, though,
16 that some of it may be factual. To the extent staff is asking
17 to do fact discovery on Embarq's VoIP claim before the
18 Commission has even decided whether it has jurisdiction over
19 that claim, that would be impermissible.

20 Subject matter jurisdiction is a legal issue, not a
21 factual one. The only fact you need to know is on the face of
22 Embarq's complaint. It's a complaint about VoIP. Embarq has
23 alleged that certain VoIP traffic is intrastate and is asking
24 you to apply intrastate access to that VoIP traffic instead of
25 the interstate access Verizon is now paying.

1 Subject matter jurisdiction can be granted only by
2 state statute. So the question is whether any Florida law
3 gives you jurisdiction over Embarq's VoIP claim. There is no
4 such law. On the contrary, Florida Statutes explicitly exempt
5 VoIP from Commission jurisdiction. Section 364.011, entitled
6 Exemption from Commission Jurisdiction, lists VoIP as, "Exempt
7 from oversight by the Commission," except as specifically
8 authorized by federal law or another provision in Chapter 364.
9 Chapter 364.013 states that VoIP, "Shall be free of state
10 regulation." Section 364.01 says that VoIP is, "Not regulated
11 by the Florida Public Service Commission." Section 364.02,
12 Subsection 13 states that the term service in Chapter 364 does
13 not include VoIP, "For purposes of regulation by this
14 Commission."

15 These statutes mean just what they say. The
16 Commission has no jurisdiction over VoIP, it cannot regulate
17 VoIP, and it has no oversight over VoIP. Embarq is asking you
18 to regulate VoIP by finding that it's an intrastate
19 telecommunication service and deciding what intercarrier
20 compensation applies to that service. You have no jurisdiction
21 to do that.

22 The Commission reads the statutes the same way
23 Verizon does. In fact, the Commission has repeatedly
24 recognized that its lack of VoIP jurisdiction means that it
25 cannot even force companies to answer questions about their

1 VoIP activities, let alone exercise any regulatory oversight
2 over those activities.

3 The only exception to the jurisdictional bar is in
4 Section 364.013. That section states that the Commission
5 cannot regulate VoIP, but it recognizes that the Commission may
6 arbitrate and enforce interconnection agreements under Sections
7 251 and 252 of the Federal Telecom Act. But there is no
8 interconnection agreement involved here, so the exception does
9 not apply.

10 Embarq is instead asking you to apply state law in
11 its state access tariff to VoIP, and that tariff doesn't
12 mention VoIP at all. In fact, Embarq could not file a state
13 tariff that mentions VoIP because Section 364.013 states that a
14 LEC's duties with respect to VoIP are federal and only federal
15 in nature.

16 It makes no sense for Embarq to claim that you can
17 order Verizon to pay intrastate access on VoIP under a tariff
18 that doesn't even mention VoIP when Embarq could not revise the
19 same tariff to actually state that intrastate access charges
20 apply to VoIP.

21 In short, you can't pretend, as Embarq asks you to,
22 that VoIP traffic is no different from traditional telephone
23 traffic when the Legislature has so emphatically stated that it
24 is not. The Commission has all the information it needs to
25 decide today that it has no jurisdiction over Embarq's VoIP

1 claim, but if staff or the Commission has questions about
2 Verizon's legal arguments, Verizon would be happy to provide
3 additional briefing on those arguments once they are
4 identified.

5 The Commission could also decline to decide the
6 jurisdiction issue altogether. The Commission has recognized
7 that VoIP traffic is interstate in nature and that its
8 regulation belongs with the FCC, not the states. The issue of
9 VoIP compensation is pending before the FCC brought there by
10 Embarq itself as well as many others. The FCC plans to issue
11 an order on intercarrier compensation in less than two weeks.

12 In addition, Embarq has filed a federal lawsuit
13 claiming as it has here that its state tariffs require payment
14 of intrastate access charges on VoIP. There's no reason for
15 the Commission to waste its resources deciding the same issues
16 that Embarq has brought in multiple forums.

17 I know I don't have time to rebut --

18 **CHAIRMAN CARTER:** No, you are six minutes already.

19 **MS. CASWELL:** Okay.

20 **CHAIRMAN CARTER:** Next party.

21 **MS. CASWELL:** Thank you.

22 **MS. MASTERTON:** Good morning, Mr. Chairman and
23 Commissioners. Susan Masterton on behalf of Embarq.

24 I would like to thank you for the opportunity to
25 provides Embarq's position regarding Verizon's motion to

1 dismiss. And first, I would like to address an issue that
2 Verizon raised about the federal complaint that Embarq has
3 filed. It does not include a complaint based on Embarq's
4 Florida tariff for the issues that relate to the VoIP
5 complaint, and so we have not raised these issues in the
6 federal suit.

7 The federal suit is not based on federal law. It is
8 based on diversity jurisdiction of the federal court for
9 various other states, and the suit is -- and the state tariffs
10 for other state actions, and so it does not cover this Florida
11 complaint. This complaint was filed prior to the federal suit,
12 and because there was already a complaint before the Florida
13 Commission it was not included in that complaint.

14 Verizon has said that the Commission -- that the
15 Florida Statutes clearly provide that the Commission doesn't
16 have jurisdiction over VoIP, and Embarq respectfully disagrees.
17 First, in regards to subject matter jurisdiction, the class
18 action that this complaint addresses is intrastate access
19 charges. The statutes clearly give the Commission jurisdiction
20 to resolve complaints related to the payment of intrastate
21 access charges. It's set forth in the statute when it exempts
22 intrastate interchange companies from Commission jurisdiction.
23 The statute explicitly continues to require the payment of
24 intrastate access charges, and this Commission has exercised
25 its jurisdiction over intrastate access charges in many prior

1 cases.

2 Now, Verizon has raised more in the nature of an
3 affirmative defense that this traffic is VoIP and that's why
4 they haven't paid the intrastate access charges that Verizon
5 has assessed. Embarq thinks the Commission clearly has
6 jurisdiction over that, and the statutes say that. And when
7 they exempt VoIP from the definition of services, it explicitly
8 says nothing herein shall affect the rights and obligations of
9 any entity related to the payment of switched network access
10 rates.

11 Verizon conveniently ignores that. But clearly, if
12 you read all of the statutes together, the Commission has
13 jurisdiction over disputes related to the payment of intrastate
14 access charges, and they have jurisdiction over VoIP when it
15 relates to the payment of intrastate access charges. So as far
16 as subject matter jurisdiction, I think the Florida law makes
17 it clear that the Commission has jurisdiction in this case.

18 Embarq believes that the Commission clearly has
19 jurisdiction, but as the staff has said in their
20 recommendation, it is not necessary for the Commission to
21 resolve that issue at this time. We have argued that Verizon
22 has failed to pay our access charges, and whether Verizon's
23 traffic is VoIP, how much of the traffic is VoIP, and whether
24 Verizon has erroneously characterized any non-VoIP intrastate
25 traffic as VoIP are all factual issues that need to be

1 addressed as the evidence is developed in the case.

2 As the staff noted in their recommendation, factual
3 issues and affirmative defenses cannot be considered when
4 ruling on a motion to dismiss. Verizon also asks in the
5 alternative that the complaint be delayed pending an
6 anticipated FCC ruling. And I want to make it clear that the
7 FCC has not, to date, usurped or preempted the Commission's
8 jurisdiction to address VoIP. So far they have not ruled on
9 what type of intercarrier compensation is due for VoIP, they
10 have not said that it's interstate in nature, they have not
11 said that intrastate access charges are not due on VoIP
12 traffic.

13 In addition, they have not preempted the Commission's
14 jurisdiction to decide those issues. So there is nothing in
15 the federal law today that says that the Commission cannot rule
16 on Embarq's complaint. Now, we all know that there is a
17 possible pending decision from the FCC that may address this
18 issue coming up, but there is no guarantee that it will and no
19 one knows in what way it will address that. So there is no
20 reason that the Commission needs to delay or dismiss the
21 complaint at this time based on some possibility of FCC action.

22 It's very early in the process, and the parties and
23 the Commission will have ample opportunity to address the
24 effect of any FCC rulings on the issues raised in Embarq's
25 complaint as the case proceeds forward through the normal

1 process. So, therefore, Embarq respectfully requests that you
2 approve the staff recommendation, and that you deny Verizon's
3 motion to dismiss or to delay the proceeding on Embarq's
4 complaint. Thank you.

5 **CHAIRMAN CARTER:** Thank you. Now we'll have staff to
6 introduce the issue. We have heard from the parties and their
7 oral argument.

8 Staff, you're recognized.

9 **MR. MURPHY:** Staff recommends that the Commission
10 deny Verizon's motion to dismiss because Embarq's complaint
11 states a cause of action that is within the Commission's
12 jurisdiction and for which relief may be granted. The
13 Commission does not have to reach a decision on its
14 jurisdiction with respect to access charges related to VoIP at
15 this time.

16 **CHAIRMAN CARTER:** Commissioner Skop, you're
17 recognized.

18 **COMMISSIONER SKOP:** Thank you, Mr. Chairman. I have
19 a quick question with respect to the, I guess, staff
20 recommendation. And, again, I don't want to get into the
21 merits, because I tend to agree with staff. But on Page 8 it
22 discusses at the bottom of Page 8 that staff believes the
23 Commission has jurisdiction to address the access charge
24 dispute with Verizon over non-VoIP traffic pursuant to the
25 statutory references, and then at the middle paragraph of Page

1 9 it recommends that the question of subject matter
2 jurisdiction be dealt with at a future time.

3 Would it be correct to say that we do have
4 jurisdiction on the non-VoIP, but that determination of the
5 subject matter jurisdiction for VoIP services could be
6 determined? Because I'm a little confused, and when you are
7 dealing with something --

8 **MR. MURPHY:** I believe that that's correct, and I
9 believe that Verizon and Embarq would concur with that.

10 **COMMISSIONER SKOP:** Okay. So it would be correct to
11 say, then, on the sentence in Page 9, staff recommends that the
12 question of subject matter jurisdiction with respect to VoIP
13 services be dealt with at a future time?

14 **MR. MURPHY:** Yes, I don't believe that Verizon would
15 concur with that, but I think they would agree that we have it
16 over the non-VoIP and that the issue would be over the VoIP.

17 **COMMISSIONER SKOP:** Thank you.

18 **CHAIRMAN CARTER:** Thank you. Commissioners?

19 Commissioner McMurrian.

20 **COMMISSIONER McMURRIAN:** This is for the staff. I
21 guess what I keep struggling with, and we talked about this a
22 good bit yesterday, is if a party brings a motion to dismiss
23 based on jurisdiction, shouldn't the Commission answer the
24 jurisdictional question before we decide a motion to dismiss?

25 **MR. MURPHY:** Well, the motion to dismiss included --

1 the complaint included things that would not survive a motion
2 to dismiss, so that was where the focus was. Staff hasn't
3 caucused on this, but I believe the staff has jurisdiction or
4 the Commission has jurisdiction over the VoIP access charges
5 based on the language, the clear language in the statute that
6 access must be charged, that it is a tariffed thing, that there
7 is a dispute with respect to whether it's even VoIP traffic.
8 It's not delivered to Embarq as VoIP traffic. But we thought
9 that it would be better to brief that and to have that be an
10 issue in whatever, however it's addressed going forward.

11 **COMMISSIONER McMURRIAN:** I guess if I can follow up
12 on that, Mr. Chairman.

13 **CHAIRMAN CARTER:** You're recognized.

14 **COMMISSIONER McMURRIAN:** What would be the process
15 for determining that? If we were to approve staff's
16 recommendation today, what would be the process in determining
17 jurisdiction? Would we be determining jurisdiction before we
18 get into the factual aspects of the case, or would we be doing
19 that concurrent with a hearing on the factual dispute?

20 **MR. MURPHY:** Well, I'm not even sure that staff
21 believes that you would start with a hearing. You might go
22 forward with a proposed agency action and try to work with the
23 parties. But I think you would need to establish whether or
24 not all of the traffic at issue is, in fact, VoIP. That would
25 be an issue that appears to be in dispute.

1 Just saying that it's VoIP -- I mean, I don't know
2 how Embarq gets a remedy if someone just alleges that
3 everything is VoIP and you can't touch it. But once you have
4 an idea that there is, in fact, VoIP traffic involved, then I
5 think you would address the merits of the arguments and you
6 would have the parties brief it, or present some sort of
7 evidence on it, or legal argument.

8 **COMMISSIONER McMURRIAN:** I guess I do have one more.

9 **CHAIRMAN CARTER:** One itty-bitty one.

10 **COMMISSIONER McMURRIAN:** Right. Sorry,
11 Commissioners.

12 Since you mentioned about trying to determine whether
13 it is VoIP or non-VoIP, and I think you're saying that you need
14 to do discovery in order to determine that, what do you say to
15 Ms. Caswell's argument that you shouldn't even be doing
16 discovery if you don't have jurisdiction over VoIP?

17 **MR. MURPHY:** I would say it assumes a fact that's not
18 in evidence.

19 **MS. CASWELL:** May I respond briefly?

20 **CHAIRMAN CARTER:** Briefly.

21 **MS. CASWELL:** Okay. We have to remember there are
22 two claims here and one is a non-VoIP claim, and we don't
23 disagree that you have jurisdiction over non-VoIP services. So
24 to the extent we want to go forward with that, aside from the
25 fact that it's already in the federal complaint, we agree with

1 that. So jurisdiction will be decided before we go forward on
2 that.

3 On the VoIP claim, we would vigorously oppose any
4 kind of discovery or factual investigation before we go forward
5 because it is, in fact, correct that we need to decide
6 jurisdiction before we go forward on a claim.

7 So two separate issues. And I think what Charles is
8 getting at is -- will be the investigation that goes to the
9 first part of the issue whether traffic -- how much of the
10 traffic is VoIP and how much of the traffic is non-VoIP.

11 **CHAIRMAN CARTER:** You're recognized.

12 **MS. MASTERTON:** Yes. I was just going to basically
13 say, yes, the issue is that we are saying they owe us
14 intrastate access charges. They are saying they don't owe it
15 to us because it's VoIP. So I think that is a defense and a
16 factual fact that is so far only asserted by Verizon, but has
17 not been proven. And Embarq is disputing that it is, or that
18 it is the type that isn't subject to access charges and
19 asking -- and how much of it, if all of those have to be
20 decided. And ultimately, I guess, the Commission might decide
21 for the VoIP, any that is actually identified as VoIP we don't
22 have jurisdiction. But I don't think you can do that on the
23 front end because there is really no evidence other than
24 Verizon's assertion that it is VoIP.

25 **CHAIRMAN CARTER:** Okay. Commissioner Edgar.

1 **COMMISSIONER EDGAR:** Thank you. And Commissioner
2 McMurrian's questions went to some of this, but let me just ask
3 it again so I can maybe hear the answer again.

4 If the motion to dismiss is not granted today, which
5 I tend towards that at this moment anyway. If it is not
6 granted, then how will the issue of subject matter jurisdiction
7 come back before us?

8 **MR. MURPHY:** If it's a proposed agency action, it
9 would come before you as a recommendation that you would vote
10 on whether or not you had jurisdiction. If it goes to hearing
11 it would be briefed by the parties. We will be working -- if
12 we're going the proposed agency action route, we would be
13 working with the parties, and I assume that we would have them
14 brief it or whatever form they would like to provide their
15 legal analysis of it.

16 **COMMISSIONER EDGAR:** And then those proposed issues
17 would come before the prehearing officer, if, indeed, we went
18 to hearing.

19 **MR. MURPHY:** Yes, prehearing officer or -- yes, if
20 you went that route.

21 **COMMISSIONER EDGAR:** If we went that route. Thank
22 you.

23 **CHAIRMAN CARTER:** Commissioner Skop.

24 **COMMISSIONER SKOP:** Thank you, Mr. Chair.

25 I have a quick question again. I'm still trying to

1 struggle with, I guess, it may be the semantics of how things
2 are presented and things that are being said, but I thought
3 that I heard staff say in response that some elements of the
4 Embarq claim would not survive a motion to dismiss.

5 Am I correct in what I thought I heard there?

6 **MR. MURPHY:** I may have said it backwards. That
7 there are things about the Embarq claim that Verizon could not
8 prevail in a motion to dismiss. There is --

9 **COMMISSIONER SKOP:** That clarifies things. Because,
10 again, to me, certainly the Commission has jurisdiction under
11 the non-VoIP traffic, and in terms of the VoIP traffic that is
12 still up in the air. But, I guess I have a question with
13 respect to the subject matter jurisdiction on the VoIP
14 services.

15 Now, I know that that is under the federal body of
16 law for VoIP, but with respect to intercarrier compensation, I
17 have a question in relation to Florida Statute 364.0213 where
18 it provides, I guess pursuant to this staff recommendation on
19 Page 7, in pertinent part, that nothing herein shall affect the
20 rights and obligations of any entity related to the payment of
21 switched network access rates or other intercarrier
22 compensation, if any, related to Voice-over-Internet-Protocol
23 services.

24 So would it be correct in staff's view that if we are
25 dealing with intercarrier compensation on interstate VoIP

1 services that we, in fact, pursuant to that statute may, in
2 fact, have subject matter jurisdiction?

3 **MR. MURPHY:** You are saying on interstate?

4 **COMMISSIONER SKOP:** Yes.

5 **MR. MURPHY:** The focus of this had been that this
6 traffic is intrastate.

7 **COMMISSIONER SKOP:** Intrastate, that's what I'm
8 trying to --

9 **MR. MURPHY:** I think that you would, but I think that
10 there could be more discussion on that clearly. There could be
11 more review of that. But it would appear that, yes, that this
12 is service for which a VoIP provider owes access charges.
13 Access charges are tariffed. Now, what we have heard this
14 morning is that there is nothing in the tariff to address VoIP.
15 That's a wrinkle that had not been on our radar screen. So I
16 don't know. It would take some more review.

17 **COMMISSIONER SKOP:** Okay. So I guess breaking this
18 down in simple terms with respect to the alleged complaint with
19 non-VoIP traffic we do have subject matter jurisdiction?

20 **MR. MURPHY:** Yes, sir.

21 **COMMISSIONER SKOP:** Okay. And with respect to the
22 VoIP services, and intercarrier compensation on interstate
23 point-to-point termination of that traffic intrastate, we may
24 or may not, pending further discussion, actually have subject
25 matter jurisdiction.

1 **MR. MURPHY:** Yes, sir.

2 **COMMISSIONER SKOP:** Thank you.

3 **CHAIRMAN CARTER:** Anything further? The chair is now
4 open for a recommendation.

5 Commissioner Skop, you're recognized.

6 **COMMISSIONER SKOP:** Thank you, Mr. Chairman. I guess
7 based on the discussion, unless there is any further comments,
8 I guess I would respectfully move to accept the staff
9 recommendation on Issues 1, 2, and 3.

10 **COMMISSIONER EDGAR:** Second.

11 **CHAIRMAN CARTER:** Moved and properly seconded.

12 Commissioners, any further debate? Hearing none, all
13 those in favor let be it known by the sign of aye.

14 (Simultaneous aye.)

15 **CHAIRMAN CARTER:** All those opposed, like sign? Show
16 it done. Thank you, staff.

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1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)
4

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

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

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

19 DATED THIS 10th day of November, 2008.

20


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24

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