

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** September 4, 2008

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Mann, Murphy)  
Division of Regulatory Compliance (Bloom, King)

**RE:** Docket No. 080308-TP – 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.

**AGENDA:** 09/16/08 – Regular Agenda – Motion to Dismiss – Oral Argument Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Skop

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\080308.RCM.DOC

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### Case Background

On June 6, 2008, Embarq Florida, Inc. (“Embarq”) filed its complaint (“Complaint”) with the Commission in which Embarq alleges that MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”) is failing to pay intrastate access charges pursuant to Embarq’s tariffs.<sup>1</sup> Embarq asks that the Commission find that Verizon has violated the terms of

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<sup>1</sup> Access charges refer to payments made by interexchange carriers (IXCs) to local service providers for originating and terminating calls on local telephone networks. Both ILECs and CLECs charge IXCs interstate and intrastate access charges. The rates for intrastate access were designed to compensate the ILEC for the use of its local facilities while maintaining universal service.

Embarq's tariffs and Florida law by wrongfully designating certain intrastate interexchange traffic as interstate interexchange traffic and by failing to pay intrastate access charges due to Embarq; order Verizon to pay Embarq the difference between the access charges on intrastate calls Verizon has paid and the access charges on intrastate calls Verizon is required to pay under Embarq's tariffs; and order Verizon to pay Embarq late payment penalties on the difference between the access charges on intrastate calls Verizon has paid and the access charges on intrastate calls Verizon is required to pay under Embarq's tariffs.

On June 26, 2008, Verizon filed its Motion to Dismiss Complaint ("Motion"), as well as its Request for Oral Argument. Verizon alleges that Embarq's Complaint should be dismissed because it would require the Commission to assert jurisdiction over VoIP services and the provider of these services, in violation of Florida Statutes that exempt all VoIP services from Commission jurisdiction. On July 1, 2008, Verizon filed its Supplement to its Motion ("Supplement"), to advise the Commission that Embarq had now filed a complaint in federal district court regarding intrastate access charges on VoIP traffic.

On July 8, 2008, Embarq filed its Response to Verizon's Motion ("Response"). Embarq argues that Verizon's Motion should be rejected, as Embarq has stated a claim for which relief can be granted.

Staff's recommendation addresses Verizon's Motion to Dismiss, its Supplement, and its request for Oral Argument.

The Commission has jurisdiction pursuant to Sections 364.01, 364.163, and Chapter 120, Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should the Commission grant Verizon's Request for Oral Argument?

**Recommendation:** Yes. Staff recommends that the Commission grant Verizon's Request for Oral Argument, because staff believes that it might benefit the Commission to hear argument on the Motion to Dismiss. If the Commission grants oral argument, staff recommends allowing five minutes for each party. **(R. Mann, Murphy)**

#### **Staff Analysis:**

Verizon asks that the Commission hear oral argument if the Commission believes such argument useful in evaluating Verizon's position that the Commission does not have jurisdiction over Embarq's complaint because Embarq is asking the Commission to assert jurisdiction over VoIP services in violation of Florida Statutes. Verizon specifies that its Request for Oral Argument is exclusively for the purpose of contesting the Commission's jurisdiction, and that Verizon in no way accedes to the Commission's jurisdiction over Verizon's VoIP services or its status as a VoIP provider. Embarq does not object to oral argument.

#### *Analysis*

Staff observes that Embarq has asked the Commission for relief that involves Verizon's non-VoIP traffic, as well as possible VoIP traffic. In its Issue 2 recommendation, staff recommends that Verizon's Motion to Dismiss be denied because Embarq has stated a claim relating to Verizon's non-VoIP traffic that is within the Commission's jurisdiction, and for which relief can be granted; however, the Commission has not yet received sufficient information from the parties for staff to provide a sound recommendation addressing the Commission's subject matter jurisdiction over Embarq's dispute with Verizon as it may relate to possible VoIP traffic. Consequently, staff recommends in Issue 2 that the Commission order that this docket be held open pending further proceedings, wherein staff will gather the needed information through the discovery process.

Nevertheless, staff believes that oral argument might be beneficial if the Commission would like to hear the parties explain the statutes that Verizon asserts preclude the Commission from addressing Embarq's Complaint, and is consistent with Rule 25-22.0022, F.A.C. If the Commission grants oral argument, staff recommends that the Commission grant the parties five minutes each.

**Issue 2:** Should the Commission grant Verizon's Motion to Dismiss Embarq's Complaint?

**Recommendation:** No. Staff recommends that the Commission deny Verizon's Motion to Dismiss, because Embarq's Complaint states a cause of action that is within the Commission's jurisdiction and for which relief may be granted. **(R. Mann, Murphy)**

**Staff Analysis:**

On June 6, 2008, Embarq filed its Complaint against Verizon regarding Verizon's alleged refusal to pay tariffed intrastate access charges. On June 26, 2008, Verizon filed its Motion to Dismiss Embarq's Complaint for lack of subject matter jurisdiction by the Commission. Verizon followed this with its Supplement on July 1, 2008. On July 8, 2008, Embarq filed its Response to the Motion to Dismiss. These filings are summarized below.

*Embarq's Complaint*

In its Complaint, Embarq alleges that:

- In January 2005, Verizon notified Embarq of its unilateral decision that interstate access charges, rather than intrastate access charges,<sup>2</sup> would apply to all VoIP traffic regardless of the physical endpoints of the call.
- Verizon is refusing to pay intrastate access charges pursuant to Embarq's intrastate access tariff, "for certain interexchange traffic that was originated and terminated in Florida."
- The Commission has jurisdiction to address Embarq's Complaint pursuant to section 152 of the Federal Communications Act of 1934, as amended, and Chapters 350 and 364, Florida Statutes. [¶6]
- Verizon has "self-identified a subset of the minutes of the total interexchange traffic terminated to Embarq that it alleges to be VoIP." [¶19]
- Using the industry-standard tracking system for Verizon interexchange traffic, there are conflicts with Verizon's percent interstate usage ("PIU") involving both VoIP and non-VoIP traffic. [¶19]
- The appropriate classification of its interexchange traffic as interstate or intrastate and VoIP or non-VoIP is at the heart of the access charge dispute between Embarq and Verizon, and Embarq and Verizon differ substantially concerning the nature of the traffic. ¶[20]
- Even accepting Verizon's "patently wrong and self-serving claim that interstate access charges, rather than intrastate access charges, apply to all VoIP traffic regardless of the

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<sup>2</sup> Historically, intrastate rates have been higher than interstate rates. Embarq's interstate access charge is \$.006426 per minute of use, while its intrastate access charge is \$.023424 per minute of use.

physical endpoints, Verizon has identified more VoIP minutes to be jurisdictionally intrastate than Embarq has billed at intrastate rates.” [¶19]

- Verizon has failed to pay Embarq approximately \$1,204,599 of intrastate access charges plus late payment penalties that are rightfully due Embarq, “irrespective of the question whether interstate access charges apply to all VoIP traffic.” [¶33]

*Verizon’s Motion to Dismiss and Supplement*

In its Motion to Dismiss, Verizon alleges that Embarq’s Complaint should be dismissed because the Commission lacks subject matter jurisdiction for the following reasons:

- Addressing the Complaint would require the Commission to impermissibly assert jurisdiction over VoIP services in violation of Florida Statutes. [p. 1]
- The FCC has jurisdiction over VoIP and currently has several active proceedings before it seeking to clarify intercarrier compensation that applies to VoIP traffic. [pp.1, 2]
- Addressing Embarq’s Complaint that Verizon is wrongfully designating VoIP traffic that Verizon originates or terminates as jurisdictionally interstate would require the Commission impermissibly to “examine VoIP traffic, to determine whether some VoIP traffic can be classified as jurisdictionally intrastate, to determine what intercarrier compensation rates apply to VoIP calls, and to compel a provider of VoIP services to pay a particular compensation rate.” [p. 2]
- Consistent with cited authorities, this case belongs to a specific class of cases (VoIP) over which the Commission has no jurisdiction pursuant to Chapter 364, F.S. [p. 3]
- Consistent with cited authorities, the Commission has jurisdiction only over the classes of cases which are “explicitly delineated elsewhere in Chapter 364 or authorized by federal law.” [p. 3]
- The Commission’s lack of jurisdiction is confirmed by language contained in Sections 364.011, 364.013, 364.01, 364.02(13), F.S., by language contained in Chapter 350, F.S., and by language contained in section 152 of the Communications Act of 1934, as amended. [pp. 4-10]
- The FCC, which does have jurisdiction, is already actively considering the issues that are raised here by Embarq. [p. 10]
- Embarq has presented a related claim to the FCC and thereby acknowledged that the FCC is the appropriate forum to settle issues about application of access charges to VoIP traffic. [p. 11]

On July 1, 2008, Verizon filed its Supplement, in which it argues that:

- The day after Verizon filed its Motion to Dismiss, Embarq and its subsidiaries filed with the federal district court a complaint that included “exactly the same claim for intrastate access charges on VoIP traffic as alleged in Embarq’s Complaint” before this Commission. [p. 2]
- By bringing the VoIP access charge issue before the federal court, Embarq has acknowledged that “this Commission is not the appropriate forum to hear VoIP claims.” [p. 2]
- The federal court filing should provide additional motivation to the Commission to promptly dismiss Embarq’s Complaint. [p. 2]

#### *Embarq’s Response*

In its Response, Embarq argues that:

- This Commission has subject matter jurisdiction over VoIP services regarding the payment of access charges by an intrastate interexchange carrier. [p. 3]
- Section 364.01, F.S., provides broad regulatory authority to the Commission “over and in relation to telecommunications companies, in all matters set forth in Ch. 364, F.S.” [p. 3]
- While both Sections 364.011 and 364.013, F.S., exempt VoIP from Commission jurisdiction, such exemption is made, “except to the extent delineated in this chapter.” [pp. 3,4]
- While Section 364.02(13), F.S., excludes VoIP services from the definition of “service,” that same Section explicitly states that such exclusion does not affect “the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet-protocol service.” [p. 5]
- While Section 364.02(14), F.S., excludes “intrastate interexchange telecommunications companies” from the definition of “telecommunications company,” it expressly provides that each intrastate interexchange telecommunications company shall “continue to pay intrastate switched network access rates or other intercarrier compensation to the [LEC or CLEC] for the origination and termination of interexchange telecommunications service.” [pp. 4,5]
- The Commission “consistently has recognized its jurisdiction to consider and resolve disputes regarding the payment of intrastate switched access.” [p. 5]
- In Comcast IP Phone v. Missouri Public Service Commission, Case No. 06-4233-CU-C-NKL, slip op., decided January 18, 2007, 2007 U.S. Dist. LEXIS 3628 at pages 13 and 15,

the United States District Court for the Western District of Missouri, held that the “FCC has not pre-empted the entire field of VoIP” and that “the fact that the FCC has opened a rulemaking proceeding is not an expression of the FCC’s intent to pre-empt the entire field of VoIP services.”

Analysis

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the complaint as facially correct, the complaint still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., Order No. PSC-95-0614-FOF-WS, Docket No. 941121, 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When “determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.” Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Jurisdiction of the subject matter does not mean jurisdiction of a particular case, but rather jurisdiction of the class of cases to which the particular controversy belongs. See Lusker v. Guardianship of Lusker, 434 So. 2d 951 (Fla. 2d DCA 1983). The subject matter jurisdiction of the court must be shown by the allegations of the initial pleading. See Tobin & Thomson P.A. v. Golan, 568 So. 2d 100 (Fla. 3d DCA 1990).

The Commission generally has jurisdiction over intrastate access charge disputes between ILECs and IXCs, pursuant to Section 364.163 and 364.02(14), F.S.

Section 364.02(14), F.S., provides in pertinent part that:

The term “telecommunications company” does not include: (g) An intrastate interexchange telecommunications company.

However . . . each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a) and (d), 364.163 . . . shall continue to pay intrastate switched network access rates or other intercarrier compensation to the local exchange telecommunications company for the origination and termination of interexchange telecommunications service . . . .

Section 364.02(13), F.S., provides in pertinent part that:

“Service” is to be construed in its broadest and most inclusive sense. The term “service” does not include . . . voice-over-Internet-protocol service for purposes of regulation by the commission. Nothing herein shall affect the rights and

obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet-protocol services.

Embarq's tariffs, which carry the force and effect of law and are enforceable by the Commission,<sup>3</sup> provide a substantial difference between the rate for intrastate access charges (\$.023424 per minute-of-use) and the rate for interstate access charges (\$.006426 per minute-of-use).

Embarq alleges that at some point in 2005, Verizon unilaterally decided, without any support from a change in federal or state law, that it would no longer be required to pay intrastate access tariff rates to Embarq for its VoIP intrastate traffic because all calls transported using VoIP are subject to interstate access rates, regardless of the physical endpoints of a call.

Verizon argues that the Commission does not have subject matter jurisdiction over the class of cases to which Embarq's Complaint belongs and that the subject of Embarq's Complaint is Verizon's VoIP traffic that is terminated on Embarq's network. A separate subject of Embarq's Complaint, however, is Verizon's non-VoIP traffic. Embarq brings its Complaint against Verizon "for its unlawful refusal to pay intrastate access charges, billed by Embarq in accordance with Embarq's intrastate access tariff, for certain interexchange traffic that was originated and terminated in Florida." Embarq's Complaint does allege a dispute with Verizon regarding Verizon's unilateral determination that all VoIP traffic must be billed at interstate access charge rates. However, Embarq's Complaint also asserts that it brings for resolution a dispute with Verizon over that portion of Verizon's interexchange traffic which is non-VoIP and is intrastate in nature, yet Verizon nevertheless refuses to pay Embarq's billing of these non-VoIP calls. Embarq alleges that Verizon has "significantly underpaid Embarq for non-VoIP intrastate traffic for which intrastate access charges are unquestionably due." Consequently, "Verizon has failed to pay Embarq approximately \$1,204,599 of intrastate access charges that are rightfully due Embarq, irrespective of the question whether interstate access charges apply to all VoIP traffic."

Verizon accepts, in footnote 9 of its Motion, Embarq's factual allegations as facially correct for purposes of its Motion. Staff believes that Verizon does not demonstrate that, accepting all of Embarq's factual allegations as facially correct, the Complaint fails to state a cause of action for which the Commission has jurisdiction and for which relief can be granted.

Verizon's Motion is based solely on the proposition that all of its VoIP traffic, whether interstate or intrastate, must be charged at the interstate rate. Verizon does not address its alleged non-VoIP intrastate traffic. While Embarq's Complaint may address, in part, a dispute over VoIP traffic, it also addresses disputed non-VoIP intrastate access charges. Staff believes that the Commission has jurisdiction to address Embarq's access charge dispute with Verizon over

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<sup>3</sup> See Magdalena v. Southern Bell, 382 So.2d 1246 (Fla. 4<sup>th</sup> DCA 1980); and In re: Complaint by Mr. Paul Leon and Mr. Joseph Loadable against Florida Power and Light Company regarding tariffs for moving electric light poles, Order No. PSC-98-1385-FOF-EI, in Docket No. 981216-EI.



this non-VoIP traffic, pursuant to the statutory sections cited above. Accordingly, Verizon does not meet the requirements for a motion to dismiss Embarq's Complaint.

Staff believes that Verizon's argument regarding the Commission's lack of jurisdiction over anything related to VoIP services is premature at this time. Staff has concerns about Verizon's arguments that the Commission lacks subject matter jurisdiction over a dispute involving the payment of intrastate access charges for VoIP traffic. Staff has questions about Verizon's interpretations of the various cases, orders and Commission comments, as well as the statutes that it cites. Staff recommends that the question of subject matter jurisdiction be dealt with at a future time. The factual information provided to the Commission thus far is insufficient for a valid analysis and a well-reasoned judgment by the Commission.

Staff recommends that the Commission deny Verizon's Motion to Dismiss and allow staff to gather necessary information before presenting a recommendation to the Commission concerning subject matter jurisdiction over intrastate access charges for VoIP traffic.

**Issue 3:** Should this Docket be closed?

**Recommendation:** No. If the Commission approves staff's recommendation in Issue 2, this Docket should be held open pending further proceedings. **(R. Mann, Murphy)**

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 2, this Docket should be held open pending further proceedings.