

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 29th day  
of November, 2007.

In the Matter of Embarq Missouri, Inc.'s Application	)	
for Competitive Classification Under Section 392.245.5,	)	<b><u>Case No. TO-2008-0147</u></b>
RSMo 2005.	)	Tariff No. YI-2008-0303

**ORDER GRANTING COMPETITIVE CLASSIFICATION**

Issue Date: November 29, 2007

Effective Date: December 6, 2007

Syllabus: In this order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2006, other than exchange access service, for residential services in the exchanges of Ft. Leonard Wood, St. Robert, and Waynesville, and for business services in the Warrensburg exchange. In addition, the Commission approves the tariff revision filed to implement these classifications.

**Procedural History and Pending Motions**

On November 6, 2007, Embarq Missouri, Inc., filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. On November 16, 2007, and November 19, 2007, Embarq amended its application by removing certain exchanges from its application. Section (20) of 4 CSR 240-2.080 states that any party may amend a pleading within ten days without leave of the Commission if no responsive pleading has been filed. Therefore, no leave was necessary regarding the first request

to amend. No response to the amended pleading was received, and therefore, leave is granted to amend the application as filed on November 19, 2007.

In its application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq also requested that its business services, other than exchange access service, be classified as competitive in its Warrensburg exchange. Concurrent with the filing of its application, Embarq filed a proposed tariff sheet to become effective on December 6, 2007, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than November 15, 2007. No request for intervention was received.

The Commission also directed that any objections or recommendations from the Office of the Public Counsel or any other interested party be filed no later than November 19, 2007. The order further advised the parties that if no request for a hearing was received the remainder of the procedural schedule would be canceled, including the filing of testimony and hearing, and the Commission would make its determination based upon Embarq's verified application and Staff's verified recommendation and memorandum.

Staff filed its verified recommendation on November 19, 2007. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits provided information about customers being served in

the relevant exchanges. Staff recommended that Embarras's application be granted. No other response to the application was received and no party requested a hearing.

### **Overview**

Embarras is a large incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.<sup>1</sup> The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.<sup>2</sup> The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of

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<sup>1</sup> Section 392.245.5(6), RSMo Cum. Supp. 2006.

<sup>2</sup> Section 392.245.5(1), RSMo Cum. Supp. 2006.

its affiliates have an ownership interest.”<sup>3</sup> Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

Embarq’s application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for each exchange and type of service requested.

### **Findings of Fact**

The Missouri Public Service Commission, having reviewed Embarq’s pending tariff, the verified application and supporting documentation, and Staff’s verified recommendation, memorandum and supporting documentation, which are admitted into evidence, makes the following findings of fact.

Embarq is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.<sup>4</sup> Embarq is a large ILEC subject to price cap regulation.<sup>5</sup>

In its amended application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq also requested that its business services, other than exchange access service, be classified as competitive in its Warrensburg exchange. Embarq also filed a proposed tariff sheet to

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<sup>3</sup> Section 392.245.5(2), RSMo Cum. Supp. 2006.

<sup>4</sup> Second Amended Application for Competitive Classification, page 1.

<sup>5</sup> *Id.*

reflect those classifications.<sup>6</sup> In support of this request, Embarq filed its verified application listing the facilities-based and wireless carriers competing in each exchange.

Embarq specifically stated:

Embarq has experienced residential customer loss in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges as a direct result of competitive entry by Comcast, Fidelity, EXOP, Mediacom and Time Warner. Embarq has experienced business customer loss in its Warrensburg exchange as a direct result of competitive entry by Time Warner, Comcast, AT&T, and Socket.<sup>7</sup>

Staff also provided its verified recommendation, supporting memorandum, and affidavits in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. According to Staff's recommendation, there is at least one facilities-based wireline carrier and at least one wireless carrier serving Embarq's Ft. Leonard Wood, St. Robert, and Waynesville exchanges who are not affiliated with Embarq but provide basic local phone service to at least two residential customers located within those exchanges. Further, Staff states that the competing carriers have local numbers available for use by residential customers in those exchanges.<sup>8</sup>

In addition, Staff states that there are at least two qualifying carriers serving Embarq's Warrensburg exchange who are not affiliated with Embarq but provide local phone service to business customers in these exchanges.<sup>9</sup> Staff states that the wireline

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<sup>6</sup> *Id.* at Exhibit A.

<sup>7</sup> *Id.* at paragraph 5.

<sup>8</sup> Staff Recommendation, page 2, and Appendix A.

<sup>9</sup> Staff Recommendation, page 2, and Appendix A.

competitor, Socket, has only one business customer in the Warrensburg exchange.<sup>10</sup> Staff also notes that the wireless carrier for which it attached a supporting affidavit does not distinguish between business and residential customers in the Warrensburg exchange.<sup>11</sup> The competing carriers have local numbers available for use by business customers in the Warrensburg exchange.<sup>12</sup>

Staff states that it has no objection to and recommends (1) competitive classification for Embark's residential services, other than exchange access service, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges, and (2) competitive classification for Embark's business services, other than exchange access service, in the Warrensburg exchange. Accordingly, the Staff recommends the Commission allow the substituted tariff sheet to go into effect.

The Commission finds that the facts as submitted in the verified application, as amended, verified Staff recommendation and supporting memorandum, and the related attached materials, all of which are admitted into evidence, are reliable and support the grant of competitive classification in the requested exchanges.

The Commission finds that in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges, facilities-based local voice service is being provided to at least two residential customers by Fidelity I. In addition, the Commission finds that there is at least one non-affiliated wireless services carrier, U.S. Cellular, providing service to residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. The Commission further finds that Fidelity and U.S. Cellular have local numbers

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<sup>10</sup> Staff Recommendation, page 2, and Appendix A.

<sup>11</sup> Staff Recommendation, page 2, and Appendix A.

<sup>12</sup> Staff Recommendation, page 2, and Appendix A.

available for use by residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges.

The Commission finds that in the Warrensburg exchange, facilities-based local voice service is being provided to business customers by Socket and at least one other facilities-based or wireless carrier.<sup>13</sup>

### **Conclusions of Law**

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Embarq is an incumbent local exchange telecommunications company and has requested competitive classification of its residential services, other than exchange access service, in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq has requested competitive classification of its business services, other than exchange access service, in its Warrensburg exchange.

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<sup>13</sup> Embarq's verified application indicates business customer loss as the result of four facilities-based carriers. In addition, Staff's verified pleading indicates its opinion that at least one wireless carrier, Verizon Wireless, is providing service, though Verizon does not distinguish between residential and business customers.

Section 392.245.5, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing “basic local telecommunications services.”<sup>14</sup> The statute also requires the Commission to consider as a “basic local telecommunications service provider” any entity providing “local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest.”<sup>15</sup>

Section 392.245.5(3), defines “local voice service” as meaning “[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000.”

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and

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<sup>14</sup> Section 392.245.5(1), RSMo Cum. Supp. 2006.

<sup>15</sup> Section 392.245.5(2), RSMo Cum. Supp. 2006.



routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”<sup>16</sup>

Embarq asserts that, other than exchange access services, its residential services in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges, and its business services in the Warrensburg exchange should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.<sup>17</sup>

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Embarq and Staff in making its decision in this case.<sup>18</sup>

### **Decision**

The undisputed evidence establishes that for residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Therefore, the Commission concludes that Embarq’s application for competitive classification of its residential services, other than

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<sup>16</sup> Section 386.020(52), RSMo 2000.

<sup>17</sup> *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

<sup>18</sup> See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 supra.

exchange access services, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges should be granted.

The undisputed evidence establishes that for business customers in the Warrensburg exchange there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). The undisputed evidence also establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to business customers in the Warrensburg exchange.

As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. That tariff sheet carries an effective date of December 6, 2007. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

**IT IS ORDERED THAT:**

1. Embarq Missouri, Inc., is granted leave to amend its application.
2. Embarq Missouri, Inc.'s residential services, other than exchange access service, are classified as competitive in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges.
3. Embarq Missouri, Inc.'s business services, other than exchange access service, are classified as competitive in the Warrensburg exchange.

4. Embargo Missouri, Inc.'s proposed tariff revision (Tariff No. YI-2008-0303) is approved as amended to become effective for service on or after December 6, 2007.

The tariff sheet approved is:

**P.S.C. Mo. No. 22 Section 16**

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**Seventh Revised Page 23, Cancels Sixth Revised Page 23**

5. This order shall become effective on December 6, 2007.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Appling, and  
Jarrett, CC., concur.  
Clayton, C., concurs; a separate  
concurring opinion may follow.

Dippell, Deputy Chief Regulatory Law Judge