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Sent: Monday, October 02, 2006 4:48 PM
To: Filings@psc.state.fl.us
Cc: Masterton, Susan S [LTD]
Subject: Docket Nos. 060172 & 060173-EU, Embarq's Post-Hearing Comments
Attachments: 060172 & 060173-EU, Embarq's Post Hearing Comments, 10-02-06.pdf

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Docket No. **060172 & 060173-EU**

Title of filing: **Embarq's Post Hearing Comments**

Filed on behalf of: **Embarq Florida, Inc.**

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<060172 & 060173-EU, Embarq's Post Hearing Comments, 10-02-06.pdf>>

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October 2, 2006

Ms. Blanca S. Bayó, Director
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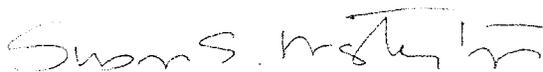
Re: Docket Nos. 060172-EU & 060173-EU, Embarq's Post Hearing Comments

Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc. are Embarq's Post-Hearing Comments regarding proposed rules 25-6.034, 25-6.0341 and 25-6.0342.

Copies are being served pursuant to the attached certificate of service. If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,



Susan S. Masterton

Enclosure

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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FLORIDA PUBLIC SERVICE COMMISSION

Proposed rules governing placement of new
electric distribution facilities underground, and
conversion of existing overhead distribution
facilities to underground facilities, to address
effects of extreme weather events
_____)

) Docket No. 060172-EU

Proposed amendments to rules regarding
overhead electric facilities to allow more
stringent construction standards than required
by National Electric Safety Code
_____)

) Docket No. 060173-EU

) Filed: October 2, 2006

POST-HEARING COMMENTS OF EMBARQ FLORIDA, INC.
REGARDING PROPOSED RULES 25-6.034, 25-6.0341 and 25-6.0342

INTRODUCTION

As instructed by the Commission at the rulemaking hearing in this docket held on August 30, 2006, Embarq Florida, Inc. submits its post-hearing comments. At the hearing, the Commission gave the parties (including investor-owned electric utilities, third-party attachers and joint users) 30 days to work together to see if they could reach common ground regarding revisions to the proposed rules to address concerns raised by the attachers and joint users. Embarq has participated actively and in good faith in these discussions throughout the 30-day period, but at this time the parties have been unable to come to final agreement on revisions. To the extent that discussions continue between the parties, Embarq intends to participate fully in these discussions. However, because no agreement was reached, these comments address the rules as they exist now, without revision.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Embarq agrees that public safety is vital and that improvements to the electric infrastructure may be necessary to mitigate some affects of hurricane force winds and flooding. However, Embarq has serious legal concerns about the improper delegation of authority embodied in the proposed rulemaking that provides unilateral authority to electric utilities to establish construction standards and attachment criteria in excess of the National Electrical Safety Code (NESC). In addition, Embarq has legal concerns regarding the Commission's lack of jurisdiction to regulate pole attachments and potential impairment of contract issues related to the pole attachment agreements that have governed the relationships between incumbent local exchange telecommunications companies and investor-owned electric utilities for decades. The results of the invalid delegation and exercise of the Commission's rulemaking authority reflected in the proposed rules may significantly jeopardize Embarq's ability to provide quality and expedient service to its customers in a cost-effective manner.

COMMENTS ON PROPOSED RULES

Embarq has previously submitted extensive comments concerning the proposed rules, both in writing prior to the hearing and orally (with an accompanying exhibit) at the hearing. Embarq will not restate all of those comments here, rather Embarq reiterates and incorporates by reference all of the comments and exhibits it has entered previously in this docket regarding the proposed rules.¹ In these post-hearing comments, Embarq will address some additional points arising from the testimony at the hearing, as well as the revised Statement of Estimated Regulatory Costs (SERC) presented at the hearing by Commission staff.

¹ See, Embarq's Request for Hearing and Proposed Lower Cost Regulatory Alternatives, filed July 28, 2006; Embarq's Workshop Comments, filed July 28, 2006; Embarq's Comments on Rules 25-6.034, 25-6.0341 and 25-6.0342, filed August 4, 2006; Hearing Transcript at pages 69-84; and Hearing Exhibit No. 5.

1. Improper delegation

At the hearing the parties and the Commissioners engaged in significant discussion regarding whether Rules 25-6.034 and 25-6.0342 as proposed constitute an improper delegation of the Commission's rulemaking authority to private entities (i.e., investor-owned electric utilities). Embarq discussed several relevant decisions that support Embarq's position that the delegation of essentially unfettered discretion to the electric utilities to adopt construction and attachment standards that exceed the NESC constitutes an unlawful delegation. (Hearing Transcript at pages 75-79 and Hearing Exhibit No. 5 at pages 6 and 7) The electric utilities argue that the requirement for the utilities to "seek input" from attachers and the ability for affected parties to challenge the standards (which under the proposed rules would go into effect pending the outcome of the challenge) provide sufficient Commission oversight to overcome any unlawful delegation concerns. (Hearing Transcript at pages 141-143) In addition, the staff appears to argue that the Commission's retention of "staff audits," "the ability to ask questions," "staff's ability to bring it back before you," and "the ability of any person to bring a complaint" amount to sufficient oversight by the Commission to cure any unlawful delegation concerns. (Hearing Transcript at page 82)

The electric utilities and staff misunderstand the clear import of the 1978 Attorney General Opinion (1978 Op. Atty Gen. Fla. 1236) which upheld the Commission's creation of private ratemaking entities to recommend rates for motor carriers only on the condition that the Commission adopted the final rates. In addition, the electric utilities and staff appear to overlook the decision of the Florida First District Court of Appeals in a case relating to rules adopted by the Florida Board of Medicine regarding regulation of

the practice of nutrition counseling. (See, *Florida Nutrition Counselors Association v. DBPR*, 667 So. 2d 218 (Fla. 1st DCA 1995).) In that case, the Board of Medicine argued that the Board's ability to interpret through the disciplinary process standards that were otherwise invalid cured the potential invalidity. The Court rejected this argument and found the enforcement process insufficient to sustain the rules. (*Florida Nutrition Counselors Association* at page 221.)

As Embarq asserted at the hearing, one of the fundamental purposes of requiring an agency, rather than a private entity, to adopt regulations that substantially affect third parties, is to ensure that all of the procedural protections of the statutes relating to rulemaking, public records and public meetings apply. (Hearing Transcript at page 77) The open-ended delegation of the authority to set standards that exceed the NESC to electric utilities provided in the proposed rules violates this principle. Among other things, it denies affected third parties a clear point of entry to assert their concerns and precludes the Commission from properly weighing the costs and benefits imposed on affected parties prior to the adoption of the standards.

2. Lack of evidence

Several parties argued in their pre-hearing comments and at the hearing that the evidence does not support that attachments were a significant cause of electric distribution system failures during the 2004 and 2005 hurricanes or that exceeding the NESC standards would serve to prevent or lessen damage in similar future storms. To counter these arguments, TECO's representative Ms. Angiulli showed several slides that purported to depict faulty attachments, however, she did not discuss or attempt to demonstrate whether those attachments complied with the current NESC standards or

whether poles with attachments such as she depicted had been more likely to fail in prior storms. (Hearing Transcript at pages 145-150) Embarq's witness Mr. Finn, BellSouth's witness Mr. Smith, Verizon's witness Mr. Slavin and FCTA's witness Mr. Harrelson, all provided substantial evidence based on real-life experience that 1) attachments were not a significant cause of electric distribution facility failures during the 2004 and 2005 storms, and 2) applying standards in excess of the NESC will not prevent the majority of storm-related failures. (See, e.g., Hearing Transcript at pages 23, 33, 38, 55-56, 64, 71, 78, and 101-106)

The weight of the evidence demonstrates that the Commission's rules are based on flawed and speculative premises. As Mr. Smith stated, the application of the rules will be costly and the Commission should be certain that the proposed remedy is likely to result in a cure. (Hearing Transcript at page 33)

3. Revised SERC

In its request for a hearing filed on July 28, 2006, Embarq also proposed lower cost regulatory alternatives in accordance with section 120.541, F.S. As lower cost regulatory alternatives, Embarq proposed that the Commission adopt the NESC as the appropriate electric facility construction standards or, in the alternative, that the Commission, itself, adopt any requirements in excess of the NESC and that the facility location rule apply only to new construction. Section 120.541, F.S., provides that if a substantially affected party proposes a good faith lower cost alternative, an agency must either create a SERC, if one has not previously been developed, or it must revise its SERC to address the lower cost regulatory alternative. (Section 120.541(1)(b), F.S.)

Purportedly in accordance with this requirement, the Commission staff prepared a Revised SERC on August 29, 2006 for distribution at the hearing. The Revised SERC fails to meet the requirements of the statute both in estimating the potential costs of the rules and in explaining why Embarq's lower cost alternatives were rejected.

Section 120.541(2), F.S., provides that a Statement of Estimated Regulatory Costs must include:

(a) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.

(b) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

(c) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. As used in this paragraph, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, and the cost of monitoring and reporting.

(d) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined by s. 120.52.

(e) Any additional information that the agency determines may be useful.

(f) In the statement or revised statement, whichever applies, a description of any good faith written proposal submitted under paragraph (1)(a) and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule. (underlining added)

The Revised SERC fails to meet this requirement, first, because it is not able to estimate all of the costs that electric companies (and derivatively their customers) or affected third parties (such as third-party attachers, joint users and their customers) may

potentially incur as a result of the proposed rules. The staff admits that many of these costs are unknowable. For instance, the Revised SERC states at page 3: “Other rule changes would have additional costs but estimates are not available.” In addition, at page 4, the Revised SERC recognizes, but does not refute, Embarq’s statement that “because the Commission cannot know what the standards will ultimately be, it cannot know the added value of the additional costs any new standards exceeding the NESC may engender.” This information is not available because of the Commission’s improper delegation of open-ended authority to the investor-owned electric utilities to develop standards in excess of the NESC.

In addition to the deficiencies in the Revised SERC resulting from the Commission’s inability to assess the true cost impacts of the rule, the Revised SERC makes little, if any, attempt to justify why Embarq’s lower cost regulatory alternatives are rejected, as required by 120.541(2)(f), F.S. First, the staff attempts to reject the lower cost alternatives because they are outweighed by potential benefits, however, these benefits are not quantified, nor are they factually supported by the record.² In many cases the Revised SERC merely notes Embarq’s proposed alternatives but does not explain why those alternatives should be rejected. Instead, the Revised SERC offers a conclusory statement, with no supporting analysis, that “these lower cost alternatives would not meet the objective of increasing the reliability of the existing electric distribution system.”

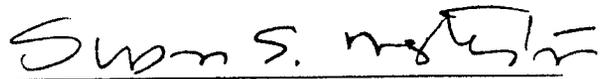
² In several places the Revised SERC recognizes benefits deemed “significant” or “substantial” but does not quantify the dollar impact of the benefits, e.g., on page 3 “Electric company customers will benefit significantly from the proposed rule changes because the electric service systems should better withstand storms and hurricanes” and on page 4 “these entities [referring to attachers] would also benefit substantially from fewer and shorter outages from downed power lines.”

CONCLUSION

Based on Embarq's comments as set forth above, in its earlier filings and at the hearing, Embarq requests that the Commission adopt changes to the proposed rules that:

- Adopt the NESC as the basis for electric utility construction and attachment standards in Proposed Rules 25-6.034 and 25-6.0342.
- Include cost impacts on attachers, joint users and their customers in analyzing the cost-effectiveness of the proposed rules, in addition to the cost impacts on electric utilities and their customers.
- If standards in excess of the NESC are determined to be cost-effective and are justified to increase electric utility safety and reliability, set forth the specific standards in excess of the NESC in Proposed Rules 25-6.034 and 25-6.0342 or require Commission approval of the standards developed by the electric utilities prior to their implementation.
- Apply Proposed Rule 25-6.0341 only to new construction.
- To the extent that the Commission determines that Proposed Rule 25-6.0341 should be applied to expansions, relocations or rebuilds, require the electric utilities to notify attachers and joint users of their construction plans as soon as practicable after they become aware of them.

Respectfully submitted this 2nd day of October 2006.



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**CERTIFICATE OF SERVICE
DOCKET NOS. 060172 & 060173-EU**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail this 2nd day of October, 2006 to the following:

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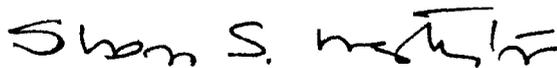
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