Ruth Nettles

060476-TL

From: Cooper, Roberta G[EQ] [Roberta.G.Cooper@Embarq.com]
Sent: Monday, August 17, 2009 4:17 PM
To: Filings@psc.state.fl.us
Cc: Susan Masterton
Subject: 060476-Embarq's Supplemental Comments
Attachments: 060476 Embarqs Supplemental Comments 8-17-09.pdf

Filed on Behalf of: **Susan S. Masterton**
Senior Counsel
Embarq Florida, Inc.
1313 Blair Stone Road
Tallahassee, FL 32301
Telephone: 850/599-1560
Email: susan.masterton@embarq.com

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Roberta G. Cooper
Legal Specialist
EMBARQ

Voice: 850-599-1563| Fax: 850-878-0777
Email: Roberta.G.Cooper@embarq.com

1313 Blair Stone Road |Tallahassee, Florida 32301
Mailstop: FLTLHO0201

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Embarq
Mailstop: FLTLHD0102
1313 Blair Stone Rd
Tallahassee, FL 32301
embarq.com

August 17, 2009

FILED ELECTRONICALLY
Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 060476-TL
Embarq's Supplemental Comments

Dear Ms. Cole:

Enclosed please find Embarq's Supplemental Comments in the above referenced docket matter.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call my assistant, Roberta Cooper at (850) 599-1563.

Sincerely,

s/ Susan S. Masterton
Susan S. Masterton

Enclosure(s)

Susan S. Masterton
SENIOR COUNSEL
Voice: (850) 599-1560
Fax: (850) 878-0777
susan.masterton@embarq.com

CERTIFICATE OF SERVICE
DOCKET NO. 060476-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by regular U.S. Mail and electronic mail on this 17th day of August, 2009 to the following:

Richard Bellak
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
rbellak@psc.state.fl.us

Davis Graham & Stubbs LLP
Steven H. Denman
9040 Town Center Parkway, Suit 213
Bradenton, FL 34202
steve.denman@dgslaw.com

Florida Public Telecommunications Association, Inc. (FPTA)
Bruce W. Renard, Executive Director
9432 Baymeadows Road, Suite 140
Jacksonville, FL 32256-7988
brenard@fpta.com

Qwest Communications Corporation
Ms. Cathy Hansen
1801 California Street, 47th Floor
Denver, CO 80202-2605
Jeff.Wirtzfeld@qwest.com

Verizon Florida LLC.
Mr. David Christian
106 East College Avenue, Suite 710
Tallahassee, FL 32301-7721
david.christian@verizon.com

Dulaney L. O'Roark III
Vice President & General Counsel- SE Region Verizon
5055 North Point Parkway
Alpharetta, GA 30022
de.oroark@verizon.com

Intellicall Operator Services, Inc./
ILD Telecommunications
Ms. Marsha Pokorny
1049 N.E. Macedonia Church Avenue
Lee, FL 32059-7419
marsha.pokorny@ildmail.com

Pay Tel Communications, Inc./SE
Vincent Townsend
P.O. Box 8179
Greensboro, NC 27419
vtownsend@paytel.com

Administrative Procedures Committee
Scott Boyd
Executive Director and General Counsel
Holland Building, Room 120
Tallahassee, FL 32399-1300
Boyd.scott@leg.state.fl.us

AT&T Florida
Manuel Gurdian
Gregory Follensbee
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1561
Manuel.gurdian@att.com
greg.follensbee@att.com

s/ Susan S. Masterton
Susan S. Masterton

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to initiate rulemaking to amend Rules 25-24.630(1) and 25.24.516(1), F.A.C., by BellSouth Telecommunications, Inc.	DOCKET NO. 060476-TL Filed: August 17, 2009

EMBARQ'S SUPPLEMENTAL COMMENTS

In accordance with the Memorandum dated August 6, 2009 from Richard Bellak, Embarq Florida, Inc. and Embarq Payphone Services, Inc. (collectively, Embarq) submit these Supplemental Comments. As requested in the Memorandum, these comments address the applicability of rate caps to inmate payphones in light of the elimination of the Commission's authority to set maximum rates for operator services as a result of the enactment of SB 2626 (codified as ch. 2009-226, Laws of Florida). Embarq believes the statutes no longer authorize the Commission to impose caps for any operator services, including operator services provided to inmates in confinement facilities.

Under long-established and uncontroverted principles of Florida administrative law, agencies have only the powers accorded to them by the Legislature. See, *Florida Department of Transportation v. Mayo, 354* So. 2d 359, 361 (Fla. 1977).[1] If there is reasonable doubt as to whether agency authority exists it should be resolved against the

[1] Subsequent to the decision in the Mayo case, the Legislature amended the Florida Administrative Act to further clarify that agencies had only those powers delegated by specific statutory enactments. See, section 120.536(1), F.S., which states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

exercise of that authority. *Id.* The Commission appropriately has recognized and followed this principle. See, e.g., *In re: Complaint by MCI Telecommunications Corporation against GTE Florida Incorporated regarding antic-competitive practices related to excessive intrastate switched access pricing,* Order No. PSC-97-1370-FOF-TP, where the Commission found that the specific provisions of s. 364.163, related to access charges superseded the general provision in s. 364.01(4) related to anticompetitive behavior and that the specific provisions did not give the Commission the power to reduce access charges as MCI had requested.

Just as in these cases, the statutes no longer provide the Commission the power to continue to impose rate caps on operator services provided to inmates at confinement facilities. In SB 2626, the Legislature amended section 364.3376, F.S., to remove the language that served as the basis of the Commission's authority to set rate caps for operator services.[2] This change was intentional, as evidenced by the staff analyses describing the impact of this change. According to the April 21, 2009 Senate Staff Analysis of SB 2626, "[t]he bill removes the commission's authority to establish maximum rates and charges for operator services. Operator services rate schedules would no longer be filed with the commission, but would be subject to the general publication requirements established in the legislation for all services."[3] Importantly, the Legislature chose not to amend Section 364.3375, F.S., which governs the requirements for certification of payphone providers and sets forth the Commission's jurisdiction to

[2] The deleted language in subsection (3) provided that "[f]or operator services, the commission shall establish maximum rates and charges for all providers of such services within the state."

[3] Similarly, the April 21, 2009 House Staff Analysis states "[t]he bill removes the PSC's authority to establish maximum rates and charges for operator services. Operator services rate schedules would no longer be filed with the PSC, but would be subject to the general publication requirements established in the bill for all services."

regulate these providers. Section 364.3375, F.S., contains no authority for the Commission to establish maximum rates for any payphone providers or operator services, nor does any other provision of chapter 364, F.S. address rate caps for operator services or payphone services. Without this specific authority, the Commission has no legal basis to retain rate caps for any operator services, including operator services provided to inmates.

Mr. Bellak's Memorandum alludes to section 364.01(4)(c), F.S. as possible authority for the Commission to retain rate caps for operator service related to inmate payphones. Section 364.01(4) sets forth general directives to the Commission concerning how it should exercise its powers as they are set forth in ch. 364. Paragraph (c) directs the Commission to exercise its authority to "[p]rotect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation." However, just as the Commission held in the MCI Complaint, well-recognized principles of statutory construction prevent the Commission from relying on these general provisions to exercise its powers in a manner that contravenes the specific provisions governing the regulation of payphones and operator services in sections 364.3375 and 364.3376. See, also, *Crist v. Jaber*, 908 So. 2d 426 (Fla. 2005) where the Florida Supreme Court upheld the Commission's implementation of a specific statutory provision authorizing the ILECs to rebalance their rates, despite claims from opponents that the rebalancing violated the general directives in section 364.01(4). While it might (arguably) appear that the directive in section 364.01(4) (c) and the repeal of the Commission's authority to impose rate caps on operator services provided in the inmate environment are in conflict, (similar to the

conflict noted by Justice Lewis in his concurring opinion in the *Crist* case), this conflict alone is not sufficient to allow the Commission to ignore the legislative will expressed in SB 2626. As Justice Lewis aptly opined, "[a]s pertains to the inherently conflicting obligations imposed by the governing statutory provisions, the true and only recourse for all concerned stakeholders lies in the halls of the Florida Legislature." 908 So. 2d 434

Embarq recognizes that, in the past, the Commission has applied its payphone regulations differently to inmate payphones in confinement facilities, specifically by exempting inmate payphones from various requirements applicable to payphone and operator services provided in other environments. However, the Commission's authority to grant these exemptions from the application of various rules is specifically authorized in section 364.3775, which states in paragraph (1)(b) that consistent with the public interest the Commission "may exempt a pay telephone provider from some or all of the requirements of this chapter." Unlike the Commission's authority to grant waivers, the Commission's authority to impose rate caps no longer exists, as a result of the repeal of that authority in SB 2626. The Legislature did not provide for different treatment regarding rates for operator services provided to inmates in confinement facilities, nor did it authorize the Commission to do so.

Because the Legislature in SB 2626 removed the Commission's authority to establish rate caps for all operator services, without retaining that authority for inmate payphones, the Commission no longer has jurisdiction to establish these caps. The general provisions of section 364.01(4)(c), F.S., cannot be used to override the specific provisions of Sections 364.3375 and 364.3376 and the Legislature's specific action to repeal the Commission's authority to set maximum rates for operator services. Therefore,

as a result of the enactment of SB 2626, the Legislature no longer has the authority to set rate caps for any operator services and Rules 25-24.515 and 25-24.605, F.A.C. should be amended accordingly.

Respectfully submitted this 17th day of August 2009.

s/ Susan S. Masterton
Susan S. Masterton, Esq.
P.O. Box 2214
1313 Blair Stone Road
Tallahassee, FL 32301
(850) 599-1560 (Phone)
(850) 878-0777 (Fax)
susan.masterton@embarq.com

COUNSEL FOR EMBARQ