

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc. | DOCKET NO. 060763-TL
ORDER NO. PSC-07-0128-PHO-TL
ISSUED: February 13, 2007

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on February 7, 2007, in Tallahassee, Florida, before Commissioner Matthew M. Carter II, as Prehearing Officer.

APPEARANCES:

SUSAN S. MASTERTON, ESQUIRE, 1313 Blair Stone Road, Tallahassee, Florida 32301
On behalf of Embarq Florida, Inc. (EMBARQ).

ROBERT SCHEFFEL WRIGHT, ESQUIRE, and JOHN T. LaVIA III, ESQUIRE, Young VanAssenderp, P.A., 225 South Adams Street, Suite 200, Tallahassee, Florida 32301
On behalf of TREVISO BAY DEVELOPMENT, LLC (TREVISO BAY).

JASON K. FUDGE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission (STAFF).

PREHEARING ORDER

I. CASE BACKGROUND

On November 20, 2006, pursuant to section 364.025(6)(d), Florida Statutes, Embarq, filed a Petition for Waiver of its carrier of last resort obligations (COLR) in the Treviso Bay subdivision (development) in Collier County. In accordance with the statute, Embarq served a copy of the petition on that same day on the developers of Treviso Bay, Treviso Bay Development, LLC. By Order No. PSC-06-1076-PCO-TL, issued December 29, 2006, the procedural schedule and hearing dates for this docket were established.

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

DOCUMENT NUMBER-DATE

01435 FEB 13 2007

FPSC-COMMISSION CLERK

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 364, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-4, 25-6, 25-22, and 28-106, Florida Administrative Code, as well as any other applicable provisions of law.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1), F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, F.S. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a

request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
Michael J. DeChellis	EMBARQ	1, 2, and 5
Kent W. Dickerson	EMBARQ	1, 2, 3 and 5
Don J. Wood	TREVISO BAY	1, 2, 3, 4, 4A and 5

VII. BASIC POSITIONS

EMBARQ: Given the bulk agreement with an alternative provider for the provision of data and video services to Treviso Bay residents billed through homeowners' association dues, and the likelihood that a significant number of Treviso Bay residents will choose a provider other than Embarq for their voice services,

Embarq will be prevented from recovering its costs for placing facilities to serve the development as the carrier of last resort. The existence of the exclusive data and video arrangements and the availability of an alternative voice product from the exclusive data and video provider, which preclude Embarq from obtaining a sufficient number of voice customers to recoup the investment costs that it would incur to place the facilities necessary to serve Treviso Bay, constitute "good cause" to relieve Embarq of its carrier of last resort obligations for the development under section 364.025(6)(d).

TREVISO

BAY:

Embarq is an Incumbent Local Exchange Carrier ("ILEC") with carrier-of-last-resort ("COLR") obligations. Treviso Bay is a developer that has requested voice communications service from Embarq for its own needs and to serve the needs of the residents of the Treviso Bay development. Treviso Bay and the residents of its development expect to receive, and are entitled to receive, voice communications service from Embarq. Embarq's efforts to escape its COLR obligations and responsibilities because it would allegedly be "uneconomic" for Embarq to do so are misplaced. If Embarq does not provide the requested service, then the residents of Treviso Bay will not have access to voice communications service by a provider who is required by law to provide the requested service. For these and other reasons, the Commission should deny Embarq's petition to escape its COLR obligations and responsibilities.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: Will voice service from other providers be available to customers of Treviso Bay? If so, when and under what conditions?

POSITIONS

EMBARQ: As confirmed in the affidavit of Larry Schweber, Comcast's voice service will be available to the residents of Treviso Bay using the same facilities used to provide video and data service, and such voice services will be available to subscribers as homes are constructed. In addition to Comcast's voice service, residents will also have the option to use other voice service providers, such as Vonage, Skype and multiple wireless providers.

TREVISO

BAY: At this time, Treviso Bay believes that wireless voice service from several providers is available to the Treviso Bay area. Additionally, Treviso Bay understands that Comcast will be able to offer, and will likely offer, its VoIP product on a non-obligatory, retail-customer-by-retail-customer basis, to the residents of Treviso Bay after its facilities have been installed in the Treviso Bay development.

STAFF: Staff has no position at this time.

ISSUE 2: Has Treviso Bay entered into any agreements, or done anything else, that would restrict or limit Embarq's ability to provide the requested communications service?

POSITIONS

EMBARQ: Yes. Treviso Bay has entered into an agreement for providing data and video services to Treviso Bay residents, billed through each resident's homeowner's association dues (i.e., a "bulk" agreement) with Comcast. With Comcast assured of 100% penetration of its video and data services to Treviso Bay residents, combined with Comcast's ability to offer voice telephone service as an add-on, Embarq's ability to obtain customers for its voice service will be severely limited. Due to the existence of the bulk agreement with Comcast, Embarq's ability to obtain customers for its data services will be effectively nil. Because of these limitations, Embarq's voice telephone service revenues will be limited to those derived from a small percentage of customers who might choose not to subscribe to the voice services offered by Comcast as an add-on to their video and data services.

TREVISO

BAY: No.

STAFF: Staff has no position at this time.

ISSUE 3: Do Treviso Bay's existing agreements make it uneconomic for Embarq to provide the requested communications service to the customers of Treviso Bay?

POSITIONS

EMBARQ: Yes. The effect of the bulk data and video agreement Treviso Bay has entered into with Comcast on Embarq's ability to obtain customers of its voice services is that the revenue generated from Embarq's expected customer penetration in the Treviso Bay development is grossly insufficient for Embarq to recover its capital

costs and incremental operating expenses associated with serving the development. Instead, the expected revenues yield negative net present value (NPV) cash flow for each year, for 20 years into the future.

TREVISO

BAY:

No. Although Treviso Bay believes that it is irrelevant whether it is economic or uneconomic for an ILEC to provide basic telecommunications service pursuant to COLR obligations, Treviso Bay believes that under many reasonable and plausible scenarios, it is highly likely that it will be economic for Embarq to provide the requested basic telecommunications service to Treviso Bay

STAFF:

Staff has no position at this time.

ISSUE 4:

Has Embarq, formerly known as Sprint-Florida, Incorporated, taken any action that would preclude Embarq from obtaining a waiver of its carrier of last resort obligation in Treviso Bay?

POSITIONS

EMBARQ:

No. Embarq has not taken any actions that preclude it from establishing “good cause” for and obtaining a waiver of its carrier of last resort obligations under section 364.025(6)(d), F.S., nor do the provisions of Embarq’s tariffs preclude Embarq from obtaining relief under this statute.

TREVISO

BAY:

Yes. Embarq has specifically stated in writing its willingness to provide service to Treviso Bay and to specific subdivisions within the Treviso Bay development pursuant to its tariffs, and accordingly, Embarq cannot now renege on those commitments. Moreover, Embarq has taken advantage of its ILEC and carrier-of-last-resort status to seek and obtain the Commission's approval for Embarq to recover storm restoration costs, and accordingly, Embarq cannot now abdicate its COLR responsibilities.

STAFF:

Staff has no position at this time.

ISSUE 4A:

Is Embarq obligated to provide service to Treviso Bay by its tariff or by holding itself out as willing and able to provide service?

POSITIONS

EMBARQ:

No. Embarq has not taken any actions that preclude it from establishing “good cause” for and obtaining a waiver of its carrier of last resort obligations under section 364.025(6)(d), F.S., nor do the provisions of Embarq’s tariffs preclude Embarq from obtaining relief under this statute.

TREVISO

BAY: Yes.

STAFF: Staff has no position at this time.

ISSUE 5: Has Embarq demonstrated “good cause” under section 364.025(6)(d) for a waiver of its carrier-of-last-resort obligation in Treviso Bay?

POSITIONS

EMBARQ: Yes. The bulk agreement Treviso Bay has entered into with an alternative provider for the provision of data and video services to Treviso Bay residents, billed through homeowners’ association dues, effectively precludes Embarq from marketing its data services and makes it likely that a significant number of Treviso Bay residents will choose a provider other than Embarq for their voice services, which will prevent Embarq from realizing sufficient revenues to recover its costs for placing facilities to serve the development as the carrier of last resort. Embarq’s inability to recover its costs due to the actions of the developer in entering into the bulk agreements, as well as the availability of voice services from the bulk video and data provider and others, constitute “good cause” for the Commission to relieve Embarq of its COLR obligations under section 364.025(6)(d), F.S.

TREVISO

BAY: No.

STAFF: Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
			<u>Direct</u>
DeChellis	EMBARQ	_____ (MJD – 1)	Treviso Bay E-Mails
DeChellis	EMBARQ	_____ (MJD – 2)	Embarq Letter to Treviso Bay
DeChellis	EMBARQ	_____ (MJD – 3)	Comcast Triple Play Web Application

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
DeChellis	EMBARQ	<u>(MJD – 4)</u>	Comcast Triple Play Web Address Match
DeChellis	EMBARQ	<u>(MJD – 5)</u>	Comcast Triple Play Web Address Match Response
DeChellis	EMBARQ	<u>(MJD – 6)</u>	Comcast Triple Play Web Service Information
Dickerson	EMBARQ	<u>(KWD – 1)</u>	Treviso Bay Voice Network Construction
Dickerson	EMBARQ	<u>(KWD – 2)</u>	Treviso Bay Cash Flow Analysis
<u>Rebuttal</u>			
Wood	TREVISO BAY	<u>(DJW – 1)</u>	Vita of Don J. Wood
Wood	TREVISO BAY	<u>(DJW – 2)</u>	Sprint/Embarq letters to Treviso Bay committing to provide telephone service to Treviso Bay and subdivisions
Wood	TREVISO BAY	<u>(DJW – 3)</u>	Embarq Press Release
Wood	TREVISO BAY	<u>(DJW – 4)</u>	*CONFIDENTIAL* Embarq financial analyses with alternative assumptions
<u>Surrebuttal</u>			
Dickerson	EMBARQ	<u>(KWD – 3)</u>	Comcast 2006 Financial Report
Dickerson	EMBARQ	<u>(KWD – 4)</u>	Comcast Presentation to UBS Global Media and Communications Conference
Dickerson	EMBARQ	<u>(KWD – 5)</u>	Naples News article August 24, 2005
Dickerson	EMBARQ	<u>(KWD – 6)</u>	Naples News article October 15, 2005

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

There are no pending motions.

XII. PENDING CONFIDENTIALITY MATTERS

EMBARQ: Embarq has the following Claims of Confidentiality¹ pending:

Claim of Confidentiality for Document No. 00149-07, filed on 1/5/07.

Claim of Confidentiality for Document No. 00184-07 filed on 1/8/07.

Claim of Confidentiality for Document No. 00492-07 filed on 1/17/07.

Claim of Confidentiality for Document No. 00582-07 filed on 1/22/07.

Claim of Confidentiality for Document No. 00621-07 filed on 1/23/07.

TREVISO

BAY: Treviso Bay filed a Request for Confidential Treatment of certain of its responses to the Commission Staff's data requests on January 3, 2007. No response opposing Treviso Bay's request has been filed. However, no action has been taken on the request as of the filing of this prehearing statement.

XIII. RULINGS

A. EMBARQ'S MOTION FOR LEAVE TO FILE SURREBUTTAL TESTIMONY

The Motion was granted, but the discovery cut-off was extended until February 13, 2007.

¹ Embarq understands that in accordance with Rule 25-22.006, F.A.C., to the extent this discovery information is entered into the record of the proceeding, Embarq must file a Request for Confidential Classification within 21 days after the hearing.

B. OPENING AND CLOSING STATEMENTS

Opening and closing statements together shall not exceed fifteen minutes per party.

C. LEGAL MEMORANDUM

The parties are permitted to file legal memorandum of up to 10 pages no later than February 13, 2007.

It is therefore,


ORDERED by Commissioner Matthew M. Carter II, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

ORDERED that Embarq Florida, Inc.'s Motion for Leave to File Surrebuttal Testimony is hereby granted. It is further

ORDERED that the discovery cut-off is extended until February 13, 2007. It is further

ORDERED that the parties are permitted to file legal memorandum of up to 10 pages no later than February 13, 2007.

By ORDER of Commissioner Matthew M. Carter II, as Prehearing Officer, this 13th day of February, 2007.


MATTHEW M. CARTER II
Commissioner and Prehearing Officer

(SEAL)

JKF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.