

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.

DOCKET NO. 060822-TL
ORDER NO. PSC-07-0296-PAA-TL
ISSUED: April 6, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Case Background

On December 22, 2006, BellSouth Telecommunications, Inc. (BellSouth) filed its Petition for relief from its carrier-of-last-resort (COLR) obligations pursuant to Section 364.025(6)(d), Florida Statutes, to provide service at Coastal Oaks, Riverwood, and any other private communities in the development known as Nocatee located in Duval and St. Johns Counties.

On January 16, 2007, Nocatee Development Company, for itself and SONOC Company, LLC, Toll Jacksonville Limited Partnership, Pulte Home Corporation, and Parc Group, Inc. (hereinafter collectively referred to as "Nocatee") filed its Response In Opposition to BellSouth's Petition.

BellSouth is the carrier-of-last-resort for Duval and St. Johns Counties where the development known as Nocatee is located. Nocatee includes both private and non-private or "public" communities. In the public communities, BellSouth will provide service and no restrictions on the types of services it may offer exist. However, BellSouth is asking that this

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Commission grant its Petition to waive its COLR obligation for the Riverwood and Coastal Oaks subdivisions, and other like private communities planned for the Nocatee development.

Currently, the development is under construction and the first occupancy is expected in the summer of 2007. The Riverwood and Coastal Oaks subdivisions are private communities where the developer has entered into agreements with Comcast to be the exclusive provider of data and video services to homes in those subdivisions. Nocatee is requesting that BellSouth install its network facilities for the provision of voice-related services to the homes in the Riverwood and Coastal Oaks subdivisions, but has restricted BellSouth from providing data and video services to those homes by granting easements to BellSouth that specifically exclude the provision of data and video services.

This is one of the first cases under Section 364.025(6)(d), Florida Statutes, and presents unique circumstances and policy concerns not previously addressed by the Commission. During its 2006 session, the Legislature amended Section 364.025, Florida Statutes, and added Section 364.025(6), Florida Statutes, which permits a LEC to be automatically relieved of its COLR obligations if any of four specific conditions is satisfied. If a LEC is not automatically relieved pursuant to any of these four conditions, a LEC may seek a waiver of its COLR obligation from this Commission for good cause shown under subparagraph (d). In all other respects, the COLR obligation continues to apply to incumbent LECs.

In this case, BellSouth is seeking a waiver of its COLR obligations pursuant to Section 364.025(6)(d), Florida Statutes, which states:

A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

DISCUSSION

BellSouth's Petition

BellSouth is asking to be relieved from its COLR obligations for the Riverwood, Coastal Oaks, and other private subdivisions in Nocatee where the developer (Nocatee) has entered into exclusive arrangements with Comcast for the marketing and provision of video and data services. In its Petition, BellSouth contends the following facts demonstrate good cause:

- On December 13, 2006, BellSouth received the proposed form of easements for the Riverwood and Coastal Oaks subdivision from Nocatee. The form of easement restricts BellSouth to providing "voice-only" services in those two subdivisions. The easement

rights specifically excludes provision of internet/data services, video/television services, or telecommunications services other than voice service.

- As a result of the restricted “voice-only” easement, BellSouth will not be able to offer subscribers in the Riverwood and Coastal Oaks subdivisions BellSouth’s full panoply of services that exist today or will be offered in the future, including data and video services.
- The restricted easement will result in (1) reduced revenue opportunities for BellSouth that create an extreme uncertainty as to whether BellSouth can ever recover the cost of its facilities’ investment, (2) the inability of BellSouth to offer subscribers discounts obtainable when purchasing a bundle of voice and data services, and (3) BellSouth incurring costs to modify its front-end ordering and provisioning systems to comply with the voice-only restriction.
- Comcast has compensated Nocatee for the rights to be the exclusive provider of data and video services.
- Nocatee has entered into (1) exclusive marketing arrangements with Comcast for its voice, data and video services within all communities in Nocatee, including the public and private communities, and (2) exclusive service arrangements with Comcast for video and data services in the private communities.
- Comcast offers voice service in the Jacksonville and St. Augustine areas and will offer voice service to residents in the Riverwood and Coastal Oaks subdivisions.
- Because of the exclusive service arrangements and exclusive marketing arrangements with Comcast, and the attendant service restrictions on BellSouth, there is uncertainty as to the anticipated demand, if any, for BellSouth voice services in the Riverwood and Coastal Oaks subdivisions, and in other private subdivisions where exclusive arrangements with Comcast are present.
- BellSouth estimates that it will cost approximately \$1.6 million to deploy facilities to serve the Riverwood and Coastal Oaks subdivisions in Nocatee.
- To date, Nocatee has been unwilling to reimburse BellSouth for any of the anticipated costs of BellSouth building a duplicate network in the Riverwood and Coastal Oaks subdivisions.

BellSouth also argues that while it does not object to Nocatee trying to maximize its revenues by entering into exclusive marketing and service agreements, such a decision should not be used to force BellSouth, pursuant to COLR, to make unwise economic decisions by installing duplicative facilities with no certainty of ever recouping the costs, much less being able to make any positive return on the investment. BellSouth further contends that the COLR statute was not enacted to support such an inefficient economic result, especially where

consumers are not in jeopardy of being stranded without voice service, where an alternate voice provider has been selected by the developer, is installing its own network, is being granted preferential marketing rights for its voice service (and its bundle of voice, video and data service) and, upon information and belief, will be offering voice service to residents. In this scenario, Nocatee is attempting to expand BellSouth's COLR obligations beyond its traditional and intended purposes for Nocatee's own economic interest.

BellSouth submitted a net present value cash flow analysis to support its position that it will not recover its costs of building out its network in the private communities if it is allowed to provide only voice service. In its response to our staff's first data request, BellSouth states, "The model indicates that you would have to assume a greater than 50% penetration (or take rate) for the project just to recover the capital investment in 10 years."

Nocatee's Response

Nocatee contends that the background and facts presented to this Commission by BellSouth are incomplete and inaccurate. Nocatee claims that BellSouth is attempting to link its provisioning of voice telephone services with its failed bid to also provide video and broadband services, both of which are outside the jurisdiction of this Commission and irrelevant to the COLR obligation. Nocatee also claims that the effect of BellSouth's waiver, if granted, is to deny over 3,000 Nocatee homes voice telephone services. Nocatee states that between June 2005 and April 2006, it negotiated an agreement whereby BellSouth would be the preferred provider of voice telephone, broadband, and video services within the Nocatee communities. Nocatee decided not to contract with BellSouth as the preferred provider due to concerns with BellSouth's ability to reliably, consistently, and legally provide all of the services requested. In its response to BellSouth's petition, Nocatee claims:

- Nocatee admits that for the private communities of Riverwood and Coastal Oaks, it has entered into a contract with Comcast whereby Comcast is to be the provider of video and broadband services.
- There are no limitations on the equipment BellSouth may place in the private communities and BellSouth may use those facilities to provide any voice telephony services.
- BellSouth may not offer video or broadband services within the private communities.
- In September 2006, BellSouth informed Nocatee that it would most likely not provide voice telephone service at all to the private communities.
- "The only alternative offered by BellSouth for the private communities was for Nocatee or Comcast to pay BellSouth's cost of the equipment and installation, otherwise, BellSouth's bottom line was that unless it could provide all three services, voice telephone, broadband and video in the private communities, BellSouth would

provide nothing.”¹ BellSouth is attempting to link the provision of video and broadband services as preconditions to providing voice telephone services.

Nocatee’s Legal Argument and Analysis

Nocatee argues that, “BellSouth’s waiver is based solely on the theory that if it cannot provide video and broadband services within Nocatee, then it is uneconomic for it to provide voice telephone services.”² Nocatee contends that BellSouth’s theory is not supported by a plain reading of the COLR statute, the legislative intent of the statute, or public policy.³ Nocatee also argues that BellSouth cannot use a contract for video and broadband services, which are not regulated by this Commission, as a basis for denying voice telephone services to over 3,000 homes and their residents.⁴

Nocatee maintains that a reading of the plain language of the relevant statutes does not support BellSouth’s bundling argument. Nocatee claims that there is nothing in Section 364.025(6)(b), Florida Statutes, that authorizes this Commission to consider non-regulated services, such as video and broadband, when determining if the “good cause” standard has been met. Nocatee states that Chapter 364 specifically exempts video and broadband services from Commission jurisdiction, and Section 364.025(6)(a)(3) defines communications service as “voice service or voice replacement service through the use of any technology.” Nocatee goes on to reason that, for purposes of COLR, the term “service” means only voice or voice replacement service and the sole consideration for a COLR waiver only pertains to the provision of voice telephone services.

Nocatee also asserts that when the Legislature considered creating a COLR exemption, it specifically rejected language that would have expanded the basis for an automatic waiver of a LEC’s COLR obligation to include the ability to offer other types of services, such as cable or broadband. Nocatee notes that the original version of House Bill 817 contained an additional basis for automatic relief: if the developer restricts or limits the types of services that may be provided, or enters into an agreement with a communications service provider which restricts or limits the types of services that may be provided by an eligible telecommunications carrier. Nocatee goes on to say that by eliminating this language, the Legislature demonstrated its intent to focus the bill on voice service. Nocatee argues that given the rejection of the very argument BellSouth is now proffering, this Commission should not accept it as a basis for ending its COLR obligation to the Riverwood and Coastal Oaks subdivisions.

¹ Nocatee Response In Opposition To BellSouth’s Petition For Relief From Carrier Of Last Resort Obligations (Nocatee Response), filed January 16, 2007, in Docket No. 060822-TL, p. 5.

² Nocatee Response p. 7, ¶16.

³ Nocatee Response p. 7, ¶16.

⁴ Nocatee Response p. 7, ¶16.

Nocatee also claims that granting BellSouth's Petition would be contrary to the public interest. Nocatee states that the fundamental premise of BellSouth's Petition is that unless it can bundle voice service with video and broadband services, it is uneconomic for it to provide voice-only services. Nocatee avers the following four points in its argument:

First, Nocatee claims there is no competent substantial evidence that BellSouth's petition demonstrates good cause and that its request is in the public interest. Nocatee points out that BellSouth makes three arguments to support its position – reduced revenue opportunities, inability to offer customers discounts on bundled packages, and that BellSouth will need to modify its ordering and provisioning systems. Nocatee contends that BellSouth failed to explain how these facts, even if true, constitute a showing of good cause.

Second, Nocatee argues that BellSouth's attempt to bootstrap a restriction on its ability to provide video and broadband services into an argument that BellSouth does not have to provide voice telephone service is disingenuous and a violation of public policy. Nocatee asserts that BellSouth is trying to use non-regulated services as a basis for not providing regulated services, and if this theory is valid, then the denial of any other non-regulated business that BellSouth may be in or wish to enter would be justification for good cause.

Third, Nocatee argues that the fact that there may be a competitive alternative provider of voice service is not good cause. Nocatee states that the developers of Nocatee have not offered any exclusive financial or access arrangements to Comcast's VoIP service, nor are there any guarantees that each and every Nocatee resident will subscribe to Comcast's broadband service and also to its VoIP service. Nocatee argues that the presence of competitive voice offerings without any exclusivity or financial arrangements is insufficient to relieve BellSouth of its COLR obligation.

Fourth, Nocatee claims that the cost data that BellSouth provided does not constitute good cause shown. Nocatee alleges that there is nothing in the record to substantiate the cost, that the cost is reasonable, nor that the cost is uneconomic to serve the Riverwood and Coastal Oaks subdivisions with just voice service. Nocatee contends that even if the cost were uneconomic, there is nothing in the petition to demonstrate that it is in the public interest for BellSouth to be relieved of this cost.

Analysis

BellSouth is seeking a waiver of its COLR obligation for good cause shown based on the facts and circumstances of provision of service to those subdivisions pursuant to Section 364.025(6)(d), Florida Statutes. We agree with Nocatee that BellSouth has not proven its case and has failed to establish good cause to warrant relief from its COLR obligation for provision of voice services to the Riverwood and Coastal Oaks subdivisions.

It appears that a voice replacement service will be available to the residents in the Riverwood and Coastal Oaks subdivisions. Both parties agree that Comcast will offer its VoIP Digital Voice Service (DVS) to the Nocatee development. Both parties concede that the only broadband service available to the homes in those subdivisions will be Comcast broadband. However, according to Nocatee, the residents are not required to subscribe to Comcast's broadband or voice service, nor are fees for such collected through homeowners' association dues. Nocatee indicates that the residents would be free to choose voice service from BellSouth. It is important to note that the combination of cable services and traditional landline telephone service as requested by Nocatee has been available in most Florida neighborhoods for years. The one difference in this case is that BellSouth is restricted from providing its broadband service in the private communities.

We disagree with Nocatee's premise that for the purposes of COLR, the term "service" means only voice or voice replacement service, which by definition would exclude video and broadband. We note that Section 364.025(6)(a)(3), Florida Statutes, defines "communications service" as "voice service or voice replacement service through the use of any technology." The plain reading of "through the use of any technology" would certainly include VoIP provided through the use of broadband. In addition, we believe that if the legislature intended to require "basic local telecommunications service" as the only alternative that would relieve a COLR of its obligation, it would not have specified "voice service or voice replacement service" as sufficient to relieve a COLR of its obligation when it is excluded from providing service in a multitenant business or residential property.

Next, Nocatee argues that there is nothing in Section 364.025(6), Florida Statutes, that authorizes the Commission to consider non-regulated services and that this Commission cannot consider services beyond voice telephone service to determine if the "good cause" standard has been met. We also note that in the context of an automatic waiver, the underlying premise is that a communications service provider is providing "voice service or voice replacement service through the use of any technology." See section 364.025(6)(b)1.-4., Florida Statutes. Likewise, we believe that in determining whether there is sufficient "good cause" to waive the COLR obligation, this Commission must determine whether there is other "communications service" available.

Nocatee also argues that BellSouth is trying to use a restriction on its ability to provide non-regulated services as a basis for not providing regulated services. In this case, it appears that BellSouth is arguing that complying with its COLR obligation, which only requires basic local exchange telecommunications service, would be uneconomical because of its inability to offer other services. Nevertheless, we believe that standing alone, BellSouth's inability to provide non-regulated services is insufficient to relieve BellSouth of its COLR obligation. Further, we are concerned with establishing a criterion that is based solely on the profitability of providing basic local exchange telecommunications service without first evaluating a complete record and comments from all interested parties in a generic proceeding.

Finally, Nocatee notes that the Legislature specifically rejected language that would have included a fifth provision for an automatic waiver of a LEC's COLR obligation if the developer restricts or limits the types of services that may be provided by an eligible telecommunications

carrier -- as in this case. However, the only legislative intent that can be gleaned from House Bill 817 is that the legislature did not consider a restriction on the types of services a telecommunications carrier could provide sufficient for an *automatic* waiver.

In response to our staff's data request, BellSouth submitted a financial projection to support its position that it will be uneconomic to provide voice service to the Riverwood and Coastal Oaks subdivisions. This projection is based on the results of a net present value (NPV) cash flow analysis of the project. One of the key inputs to the NPV analysis is an assumption of its expected penetration rate in the subdivisions. BellSouth indicated that it expects that fewer than one-half of the residents will subscribe to its voice service. BellSouth did not provide actual examples or statistical evidence to support its assumptions. For BellSouth to break even within ten years, it predicts that one-half of the residents would need to subscribe to BellSouth's voice service. Thus, one could infer that if more than 50% of the residents subscribed to BellSouth's voice service, BellSouth would conceivably make money.

In response to our staff's data request, Nocatee provided our staff with copies of its agreements with Comcast that relate to the provision of voice, data and video services, and any exclusive marketing arrangements for those services. The entire response was filed under a claim of confidentiality. Nocatee and Comcast have executed an exclusive marketing agreement that relates to Comcast DVS that could potentially reduce the take rate for BellSouth's voice service. However, there is no way to predict with certainty the take rate for either Comcast's or BellSouth's voice service offerings in the Riverwood and Coastal Oaks subdivisions. Even though Comcast is the exclusive provider of video and data services, the residents are under no obligation to purchase Comcast's video, data, or voice services. According to Comcast's price list for its DVS, the price of residential service in Jacksonville is \$54.95 for DVS only, and \$39.95 bundled with internet and video service. Thus, it appears that Comcast's DVS is available as a voice-only offering.

We note that Rule 25-4.067, Florida Administrative Code, Extension of Facilities - Contributions in Aid of Construction, allows BellSouth to recover a portion of its costs for extending its facilities pursuant to the rule and its standard extension provisions set forth in its tariff. Under this policy, BellSouth could seek to recover the portion of construction expense that exceeds five times the annual exchange revenue of the residents. By denying the petition, this Commission maintains BellSouth's status as the carrier-of-last-resort. This Commission decision, however, would not preclude BellSouth from using the tools that may be available to it in addressing the alleged problem of uneconomic service to the identified locations.

Conclusion

For this Commission to grant BellSouth its petition to be relieved of its COLR obligation to serve the homes in the Riverwood and Coastal Oaks subdivisions, BellSouth is required to show good cause. BellSouth asserts that good cause exists because it believes it cannot recover its costs of installing its network to provide service under its COLR obligations. BellSouth is restricted from providing broadband and video service bundled with its voice service; because it cannot sell its bundled services, it is unlikely that homeowners will choose BellSouth voice service over Comcast's DVS bundled with its Triple Play offering. Thus, BellSouth is uncertain

if it will be able to obtain the number of customers necessary to generate enough revenue over time to payback the cost of installing its network facilities. We agree that there is some level of economic risk based on the uncertainty of obtaining customers, but BellSouth is basing its argument on conjecture and assumptions that are not supported in the documentation provided in this docket.

Therefore, we conclude that BellSouth has not made a prima facie case for good cause, and we find it appropriate to deny BellSouth's Petition for relief of its carrier-of-last-resort obligations for the provision of basic local telecommunications service to the Riverwood and Coastal Oaks subdivisions in the development known as Nocatee, located in Duval and St. Johns Counties.

This decision, however, does not preclude BellSouth, as the carrier-of-last-resort, from using the tools that may be available to it in addressing the problem of providing uneconomic service to the identified locations. For example, BellSouth may seek recovery of a portion of its costs for the extension of facilities pursuant to Rule 25-4.067, F.A.C., and the line extension provisions set forth in its tariffs.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s petition for relief from its carrier-of-last-resort obligations pursuant to Section 364.025(6)(d), Florida Statutes, to provide service at Coastal Oaks, Riverwood and any other private communities in the development known as Nocatee located in Duval and St. Johns Counties, is hereby *denied*. It is further

ORDERED that the findings made in the body of this Order are hereby approved in every respect. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of April, 2007.



ANN COLE
Commission Clerk

(S E A L)

PKW

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 that is available under Section 120.57, 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 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.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 27, 2007.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.