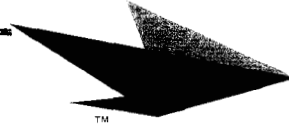


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April 27, 2007

Ms. Ann Cole
Office of Commission
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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RE: Docket No. 060763-TL, Embarq's Motion for Reconsideration of Order No. PSC-07-0311-FOF-TP and Request for Oral Argument.

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Dear Ms. Cole:

Enclosed for filing on behalf of Embarq Florida, Inc. are the original and fifteen (15) copies of Embarq's Motion for Reconsideration of Order No. PSC-07-0311-FOF-TP and Request for Oral Argument.

Copies are being served on the parties in this docket 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

Susan S. Masterton

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Hong

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FPSC-BUREAU OF RECORDS

Susan S. Masterton
COUNSEL
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**CERTIFICATE OF SERVICE
DOCKET NO. 060763-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail (*) this 27th day of April, 2007 to the following:

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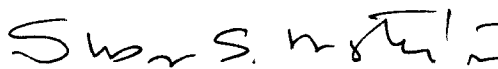
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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Filed: April 27, 2007
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EMBARQ FLORIDA, INC.'S
MOTION FOR RECONSIDERATION
OF ORDER NO. PSC-07-0311-FOF-TP

Pursuant to Rules 25-22.060 and 28-106.204, F.A.C., Embarq Florida, Inc. (hereinafter, "Embarq") files this Motion for Reconsideration of Order No. PSC-07-0311-FOF-TP ("Waiver Order"), issued April 12, 2007. Embarq seeks reconsideration of the decision of the Florida Public Service Commission ("Commission") denying Embarq's petition for waiver of its carrier of last resort (COLR) obligations in Treviso Bay. Specifically, Embarq seeks reconsideration of the Commission's decision on Issues 2, 3 and 5. The Commission should grant Embarq's request for reconsideration and grant Embarq's request for waiver of its carrier of last resort obligation (COLR) at Treviso Bay.

As support for this Motion, Embarq states as follows:

INTRODUCTION

To support its Petition requesting a waiver of its COLR obligations at Treviso Bay, Embarq presented evidence to establish three essential facts and circumstances constituting good cause for the waiver, in accordance with the provisions of section 364.025(6)(d), Florida Statutes. These facts and circumstances are:

- the developer of Treviso Bay entered into a bulk agreement with Comcast for the provision of data and video services;

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- voice or voice replacement service will be available to the residents of Treviso Bay through Comcast; and

- in light of the preceding facts, Embarq's construction of facilities to provide voice only services is uneconomic and unnecessary.

The first two facts were undisputed. Rather, the Commission's determination that Embarq had failed to demonstrate good cause for a waiver rested on its finding that Embarq had failed to establish that its provision of voice service to Treviso Bay would be uneconomic.

In determining that Embarq failed to establish good cause, the Commission overlooked or failed to consider several key facts in the record supporting Embarq's request. Because these facts and circumstances were critical to the Commission's denial of Embarq's request for waiver, the Commission should reconsider its findings as set forth herein, determine that Embarq has demonstrated good cause and grant Embarq's request for a waiver of its COLR obligations in Treviso Bay.

REQUEST FOR RECONSIDERATION

Standard for Reconsideration

As the Commission has recognized consistently in its rulings on Motions for Reconsideration, the standard for granting reconsideration is that the Motion must identify some point of fact or law that the Commission overlooked or failed to consider in rendering its decision. See, *Stewart Bonded Warehouse v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981). The Commission has held that it is not a sufficient basis for a Motion

for Reconsideration that the movant merely believes that a mistake was made nor is it appropriate for the movant to reargue the same points of fact or law that were considered in the original ruling. See, *Stewart Bonded Warehouse* at 317; *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958).

Embarq files this Motion for Reconsideration consistent with the Commission's established precedent and sets forth fully below the specific facts that the Commission overlooked or failed to consider in rendering its decision to deny Embarq's Petition.

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?

In ruling on this issue, the Commission determined that “[b]ased on information in the record, we find that Treviso Bay has not entered into any agreements, or taken any action, that restricts or limits Embarq’s ability to provide basic local voice telecommunications service to the residents at the Treviso Bay development.” (Waiver Order at page 9) In rendering its decision, the Commission apparently narrowed the scope of the issue to address only whether Treviso Bay had entered into any agreements that physically restrict Embarq’s placement of the facilities necessary to provide voice communications to residents of Treviso Bay. (March 13, 2007 Agenda Conference Transcript at page 22) In narrowing the scope of its decision, the Commission overlooked or failed to consider the plain language of the statement of the issue in Attachment A to Order No. PSC-07-1076-PCO-TP (Second Order on Procedure) and as set forth above. In addition, the Commission overlooked or failed to

consider the substantial evidence in the record demonstrating that Treviso Bay's bulk agreements with Comcast would limit the number of customers who would request Embarq's voice service and, therefore, would limit Embarq's "ability to provide" the communications services Embarq has been requested to make available throughout the development.

As framed in the procedural order, the issue is not as narrow as the Commission's ruling reflects, nor had Embarq understood the issue to address only physical limitations on Embarq's ability to place its facilities in the development. The issues were agreed to by the parties at an issue identification conference held after Embarq filed its direct testimony supporting its Petition. Embarq understood the issues were intended to reflect the issues raised in Embarq's pre-filed testimony, as well as in Treviso Bay's response. It is clear that Mr. DeChellis's Direct Testimony framed the issue concerning restrictions or limitations on Embarq provision of service due to the bulk agreements between Comcast and Treviso Bay to encompass Embarq's ability to obtain customers in order to provide its services, not just whether Treviso Bay had physically restricted Embarq's placement of facilities. (Hearing Transcript at pages 35 and 36) In fact, Embarq's testimony does not address the latter aspect of this issue, since Embarq never alleged that Treviso Bay had imposed any physical restrictions.

By focusing its final ruling on the more narrow (and undisputed) question of whether Treviso Bay had physically restricted Embarq's placement of facilities, the Commission overlooked or failed to consider the substantial evidence offered by Embarq to show that the existence of the bulk data and video agreements, coupled with Comcast's ability and intent to

offer digital voice services to Treviso Bay's residents, severely limit Embarq's ability to obtain customers, which necessarily limits Embarq's ability to provide voice services to the residents of Treviso Bay.¹ And, in fact, the Commission recognizes in the Waiver Order the likely effect that these agreements will reduce the number of customers Embarq can expect to serve. (Waiver Order at page 9)

Contrary to the narrow decision reflected in the Commission's conclusion regarding this issue, in the analysis portion of the Waiver Order the Commission seems to recognize the broader scope of the issue in its lengthy discussion of the affect of the Devcon alarm services contract and the wireless rider to that contract on Embarq's ability to obtain customers. (Waiver Order page 8) However, inexplicably, in its conclusion the Commission ignores this evidence and its analysis and bases its decision only on whether any restrictions on Embarq's ability to physically place its facilities in the Treviso Bay development exist. (Waiver Order at page 9)

There is nothing in section 364.025(6)(d), Florida Statutes, that limits the Commission's consideration of this issue to physical limitations on Embarq's placement of facilities only. In fact, if physical limitations were the only consideration in the Treviso Bay development, Embarq would have sought relief through the automatic provisions of section 364.025(6)(b). Nor does the law require (or even allow) the Commission to ignore Embarq's testimony and other evidence regarding the limiting effects of the bulk data and video agreements on Embarq's ability to provide service. As detailed above, Embarq provided

¹ See, e.g., Hearing Transcript at pps. 29, 35 & 36 (DeChellis Testimony); Hearing Transcript at pages 76-77 (Dickerson Testimony); and Hearing Exhibit Nos. 3 & 4 (Response No. 3 to Staff's Data Request E-1.)

substantial, unrefuted evidence concerning these effects. Therefore, the Commission should reconsider its decision on Issue 2 and find that the bulk data and video agreements entered into by Treviso Bay, combined with the ability and intent of Comcast to offer its digital voice service to Treviso Bay's residents, significantly limit Embarq's ability to "provide the requested communications services" to the residents of Treviso Bay.

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?

In ruling on this issue, the Commission determined that the "net present value (NPV) analysis at the foundation of Embarq's case relies on an assumption regarding market penetration that lacks supporting evidence." (Waiver Order at page 13) In addition, the Commission determined that the penetration and revenue assumptions "are easily manipulated to produce a positive NPV result using evidence in the record." (Id.) Finally, the Commission concluded that "[f]or these reasons, Embarq has failed to meet its burden of proof on this issue." (Id.) In concluding that Embarq failed to meet its burden of proof the Commission overlooked, failed to consider or fundamentally misunderstood the evidence offered by Embarq on several key points, discussed below.

Net Present Value

The Commission overlooked or failed to consider key evidence in arriving at the conclusion that Embarq's NPV assumptions were "easily manipulated to produce a positive NPV result using evidence in the record." (Waiver Order at page 13) The Commission based

its conclusion on Embarq's responses to hypothetical scenarios outlined in two Commission Staff Requests for Admissions. (Waiver Order at pages 12 & 13) This conclusion reflects that the Commission made three critical errors: 1) the Commission failed to consider evidence that shows that changes necessary to generate a positive NPV are not "minor;" 2) the Commission failed to consider evidence that shows that the penetration assumptions that the Commission relied upon in developing their conclusion that a positive NPV could be achieved are unrealistic and not achievable in Treviso Bay; and 3) the Commission failed to consider evidence that shows that the Commission's unrealistic penetration assumptions do not generate positive NPVs well beyond any reasonable timeframe for concluding that an Embarq investment of \$1.3M in capital would be considered economic.

The Commission's characterization that only minor changes to the penetration and per customer revenue assumptions produces a positive NPV result is not supported by the record. The analysis Staff requested Embarq perform, and upon which the Commission based its conclusion that a positive NPV could be generated, reflects a 67% increase in the percentage of customers subscribing to Embarq service and a 185% increase in the percentage of customers taking a bundle of services. (Hearing Exhibit 4, Embarq's Response to Staff's Request for Admissions No. 4) A second scenario requested by Staff reflected a 150% increase in the percentage of customers subscribing to Embarq service and a 185% increase in the percentage of customers taking a bundle of services. (Hearing Exhibit No. 3, Embarq's Response to Staff's Request for Admissions No. 3) Clearly, these changes in penetration assumptions are not "minor" as characterized by staff. (March 13, 2007 Agenda

Conference Transcript at page 13, line 18)

The Commission Staff implies that it conducted sensitivity analyses demonstrating positive results from various manipulations of the NPV as a basis for its conclusion that the NPV was “easily manipulated to produce a positive result.” (March 13, 2007 Commission Agenda Conference Transcript at pages 11 and 12) However, Staff did not produce these calculations so that Embarq could have an opportunity to review or respond to them. The only evidence offered in this regard was Embarq’s responses to Commission Staff’s Requests for Admissions which introduced hypothetical penetration and per-customer revenue assumption changes, with no evidence that these assumptions are reasonable or achievable in Treviso Bay. There is no record evidence that the penetrations of Embarq service in Treviso Bay postulated in Staff’s Requests for Admissions are achievable. Furthermore, there is no record evidence to support Staff’s bundle penetration assumptions. The Commission relied on Embarq’s responses to these Requests for Admissions to reach the conclusion that a positive cash flow result is possible using different values for penetration rates and per-customer revenues. (Waiver Order at page 13) While Embarq acknowledged that a positive cash flow result may be mathematically possible in a spreadsheet analysis, it is NOT possible in the practical, real world situation of Treviso Bay. (Hearing Exhibits 3 & 4, Embarq’s Response to Staff’s Request for Admissions Nos. 1-4 and 6) Therefore, the Commission erred in relying on the results of an unrealistic and unsupported set of penetration and per-customer revenue assumptions to reach their conclusion that a positive NPV was achievable for Embarq in Treviso Bay.

Further, in determining that Embarq's NPV was "fragile" and "easily manipulated" the Commission overlooked or failed to consider the number of years it would take for Embarq's NPV to become positive despite significant upward values in the projected penetration, projected revenues or both. Contrary to the Commission's conclusion on page 9 of the Waiver Order that Embarq's NPV analysis is "easily manipulated to produce positive NPVs," significant manipulations of both the penetration rate and the revenue assumptions still result in negative NPVs for time periods well beyond 10 years. These unacceptable time frames are patently apparent by just looking at the examples referenced in the Waiver Order from Embarq's Response to Staff's Request for Admission. (Waiver Order at pages 12 & 13; Hearing Exhibits 3 & 4, Embarq's Responses to Staff's Request for Admissions Nos. 3 & 4) There is no evidence in the record or in Commission practice to support that operating with a negative NPV for this length of time is economically sound for Embarq.² And, these negative results completely ignore the virtual certainty that the penetration or revenue assumptions contrived in the staff's requests will never occur in Treviso Bay.³

The Commission clearly overlooked or failed to consider these unacceptable and uneconomic negative NPV results in determining that Embarq did not meet its burden of demonstrating that it would be uneconomic to provide voice service to Treviso Bay. Therefore, the Commission should reconsider its decision on this point and find that Embarq has met its burden of proof that the provisioning of service under the facts and circumstances

² In fact, the Commission's own rules regarding "contributions in aid of construction" (Rule 25-4.067, F.A.C.) recognize that, if the cost of facilities exceeds what Embarq can recover from expected exchange revenues over 5 years, Embarq is entitled to require the customers to be served to pay the excess costs.

³ See, e.g., Hearing Exhibits 3 & 4 (Embarq's Responses to Staff's Request for Admissions Nos. 1-4 and

existing at Treviso Bay would be uneconomic for Embarq.

Significance of Penetration rate to NPV Analysis

In reviewing the evidence Embarq presented, the Commission appeared to be troubled by what it perceived to be an inconsistency in the testimony of Embarq's witness Mr. Dickerson regarding the significance of the penetration rate in the NPV calculations. Quoting Mr. Dickerson's Direct Testimony, the Commission believed that Mr. Dickerson initially stated that the exact penetration rate set forth in Mr. DeChellis's testimony was a key factor in Embarq's analysis. (Waiver Order at page 10) Based on this misunderstanding of the meaning of Mr. Dickerson's Direct Testimony, the Commission apparently viewed subsequent statements by Mr. Dickerson to the effect that varying penetration rates still produced a negative NPV as inconsistent with his initial testimony. (Waiver Order at page 12) Consequently, the Commission appeared to determine that this "inconsistency" impaired the evidentiary value of Mr. Dickerson's testimony supporting the penetration rate. (Id.) In reaching this conclusion, the Commission overlooked or failed to consider the focus of Mr. Dickerson's Direct Testimony on the penetration rate as a key component of the NPV analysis where he allowed that the penetration rate used in the NPV analysis was "optimistic at best." (Hearing Transcript at page 63) It is clear from that testimony that Mr. Dickerson recognized that the penetration rate used in his NPV analysis might not be the precise number, given that is a prediction of future outcomes, of customers who ultimately subscribe to Embarq's services, which is why Embarq later conducted the sensitivity analyses referred

to by Mr. Dickerson at hearing. (Hearing Transcript at page 77) Mr. Dickerson's Direct Testimony is entirely consistent with Mr. Dickerson's subsequent testimony that, even assuming higher penetration rates, the NPV is still negative. (Hearing Transcript at pages 72 and 77) In fact, this subsequent testimony emphasizes and supports, rather than undermines, the essential point of Mr. Dickerson's Direct Testimony, that is, that Embarq's provision of service under the facts and circumstances existing in Treviso Bay will be uneconomic.⁴

The Commission overlooked or failed to consider the relevance of Mr. Dickerson's testimony regarding the effect of the anticipated penetration rate on the NPV Embarq projects for Treviso Bay. Therefore, the Commission should reconsider its decision on this point and find that, even with a significantly higher penetration rate than Embarq expects at Treviso Bay, Embarq's provision of service to Treviso Bay will result in an unacceptable and uneconomic NPV for Embarq.

Devcon Wireless Rider

The Commission also misunderstood the scope and meaning of the rider to the Devcon alarm monitoring agreement relating to wireless monitoring (Hearing Exhibit No. 5 at page 263). In addition, the Commission overlooked or failed to consider that Comcast's digital voice service is not a wireless service. The Commission relied extensively on the rider and the Commission's mistaken understanding that the rider applies to Comcast's digital voice service as countervailing evidence to Embarq's projected penetration and revenue

⁴ The Commission also concludes that Mr. Dickerson's testimony and Embarq's Responses to Staff's Request for Admissions are contradictory regarding the effect of altering the penetration rates. (Waiver Order at pages 12-13) In reaching this conclusion, the Commission misunderstood the import of Embarq's Responses. The Commission's failure to properly consider this evidence is discussed on infra at pages 6-9.

assumptions. (Waiver Order at pages 8, 10, 12, and 13) Therefore, the Commission's failure to properly consider the evidence weighed heavily in the Commission's final determination that Embarq had failed to support its projected negative NPV.

Notably, the Waiver Order is inconsistent in its representations of the language and meaning of the wireless rider. In the discussion regarding the rider under Issue 2, the Order correctly reflects that the rider applies to "wireless communications via VoIP" rather than to VoIP as a stand alone service. (Waiver Order at page 8) In contrast, in the discussion of the rider under Issue 3, the Order incorrectly reflects that the rider applies to wireless or VoIP services, separately. (Waiver Order at page 10) The exact language of the rider (under the heading "Wireless Communication") is:

The Subscriber acknowledges that *wireless* (emphasis added) communications, whether through (sic) cellular, radio or VOIP (Voice Over Internet Protocol) technology, may be unpredictable and that Devcon may be unaware of the occurrence of any interruption. (Hearing Exhibit No. 5 at page 263)

Mr. Dickerson clearly articulates this plain meaning of the wireless rider in response to staff's cross-examination at the hearing, that is, that the rider applies only to wireless services, including as a subset wireless VoIP services. (Hearing Transcript at pages 92 & 93)

In addition to erroneously interpreting the Devcon rider to apply separately to wireless and VoIP services, the Commission overlooked or failed to consider that Comcast's digital voice service is not a wireless service. Rather it is a wired service that travels over Comcast's cable facilities.⁵ Because the exclusions of the wireless rider do not apply to

⁵ See, *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Services*, FCC Order 05-116, released 6-3-05, at footnote 80 distinguishing between "fixed" VoIP services such as the service

Comcast's digital voice service, the rider will not encourage residents to choose Embarq's wireline voice service over Comcast's digital voice service using Comcast's cable wires, as the Commission incorrectly surmises. Based on this incorrect assumption, the Commission erred in finding that the wireless rider contradicted Embarq's expected penetration and revenue assumptions.

The Commission's erroneous conclusions regarding Embarq's penetration and revenue assumptions as a result of its failure to consider essential facts related to the wireless rider was a critical factor in the Commission's determination that Embarq failed to meet its burden of proof on Issue 3. Therefore, the Commission should reconsider its decision on this significant point and recognize that the wireless rider will have little or no effect on Embarq's projected penetration rate. With this correct interpretation of the evidence in the record, the Commission should find that Embarq met its burden of proof to establish that it would be uneconomic to provide voice only services to the residents of Treviso Bay.

Market Share Studies

The Commission overlooked or failed to consider factors relating the market share analyses provided by Embarq that support, rather than contradict, Embarq's projected penetration rate. First, the Commission failed to consider the substantial evidence in the record explaining that the market share analyses relied on or produced by Embarq in this proceeding involved developments where no bulk data or video agreements existed, so that Embarq's penetration rate in Treviso Bay is more than likely to be even lower than the

provided by Comcast and portable VoIP services and at ¶ 28, recognizing that VoIP may be provided over wired as well as wireless facilities.

penetration rates shown in these developments. (Hearing Exhibit No. 3, Embarq's Response No. 3 to Staff's Data Request E1) Second, the Commission overlooked that Comcast digital voice service will be available to Treviso Bay residents on day one, unlike the majority of the developments in the market share analyses, where cable voice services, in general, became available after Embarq began providing services to the developments. (Hearing Exhibit No. 3, Embarq's Response to Staff's Data Request E1; Hearing Exhibit No. 4, Confidential Market Share Study attached to Embarq's Response No. 3 to Staff's Data Request E1; Hearing Exhibit No. 10, Embarq's Response to Treviso Bay's Interrogatory No. 7 and Hearing Exhibit No. 11, Embarq's Confidential Response to Treviso Bay's POD No. 7). Third, the Commission failed to consider Embarq's analysis that demonstrates that none of the actual ranges of market penetrations from other developments served by Embarq result in a positive NPV 20 years into the future in Treviso Bay. (Hearing Transcript at page 72, lines 13-23)

The Commission should reconsider its findings regarding the evidentiary value of these market share studies, based on its failure to consider key facets of these studies and determine that Embarq has met its burden of producing evidence that supports its projected penetration rates and demonstrate that Embarq's provision of voice service would be uneconomic in Treviso Bay.

ISSUE 5 – Has Embarq demonstrated "good cause" under section 364.025(6)(d) for a waiver of its carrier-of-last resort obligation to Treviso Bay?

In its ruling on Issue 5, the Commission recognized this issue was a “fall-out” of Issues 1 -4A. (Waiver Order at page 17) The Commission held that “based on evidence adduced and arguments made under the preceding issues, we conclude that Embarq has not demonstrated “good cause” under Section 364.025(6)(d), Florida Statutes, for a waiver of its carrier-of-last-resort obligation in Treviso Bay. Therefore, we deny Embarq’s petition.” (Id.)

As Embarq has demonstrated in its request for reconsideration of Issues 2 and 3, the Commission overlooked or failed to consider material evidence that contradicts its findings regarding several key points, including:

- the full scope of the issue to be resolved under Issue 2;
- the lack of record evidence to support the “minor” changes to penetration and per-customer revenue factors, upon which the Commission based its conclusion that Embarq’s provision of service to Treviso Bay could produce a positive cash flow;
- the length of time it would take for Embarq’s NPV to turn positive even considering upward revisions to the penetration and revenue assumptions;
- the meaning and scope of the wireless rider to the alarm monitoring contract and the nature of Comcast’s digital voice service; and
- important facets of the market share studies Embarq introduced to support its penetration assumptions.

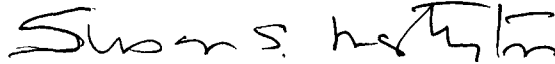
Based on these critical issues of fact that the Commission overlooked or failed to consider in reaching its decision to deny Embarq’s request for a waiver, the Commission

erred in determining that Embarq had failed to meet its burden of proof and should reconsider its decision and grant Embarq's request.

CONCLUSION

Wherefore, the Commission should grant Embarq's Motion for Reconsideration of Issues 2, 3 and 5 and grant Embarq's Petition for Waiver of its COLR obligation in Treviso Bay.

Respectfully submitted this 27th day of April 2007.



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