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CONFIDENTIAL

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Sent: Friday, May 04, 2007 3:42 PM
To: Filings@psc.state.fl.us
Subject: Resubmittal - Docket 060763-TL
Attachments: TBD.Resp.Embarq.Mot4Reconsideration.5-4-07.doc

ORIGINAL

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b. Docket No. 060763-TL

Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq, Florida, Inc.

c. Document being filed on behalf of Treviso Bay Development, LLC.

d. There are a total of 21 pages.

e. The document attached for electronic filing is Treviso Bay Development, LLC's Response to Embarq's Motion for Reconsideration.

(see attached file: TBD.Resp.Embarq.Mot4Reconsideration.5-4-07.doc)

Thank you for your attention and assistance in this matter.

The signature has been changed to conform to the PSC requirements. I apologize for any inconvenience this may have caused.

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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: May 4, 2007

TREVISO BAY DEVELOPMENT, LLC'S RESPONSE TO
EMBARQ'S MOTION FOR RECONSIDERATION

Treviso Bay Development, LLC ("Treviso Bay"), pursuant to Rule 25-22.060(1)(b), and Rule 28-106.204(1), Florida Administrative Code, and by and through its undersigned counsel, hereby files its response to the Motion for Reconsideration filed in this docket by Embarq Florida, Inc. on April 27, 2007. In summary, the Commission should deny Embarq's Motion because it improperly attempts to induce the Commission to re-weigh the evidence. Ample competent substantial evidence of record supports the Commission's decision, and the Commission's order shows that the Commissioners considered the testimony and exhibit evidence proffered by Embarq extensively and in great detail, and also that the Commission fully comprehended Embarq's argument and testimony that its petition for a waiver of its carrier-of-last-resort obligations was based on Embarq's assertion that it would be "uneconomic" for Embarq to provide voice service to Treviso Bay.

BACKGROUND

This docket was initiated by Embarq's Petition for Waiver of its carrier-of-last-resort ("COLR") obligations. The gist of Embarq's argument is that it would be uneconomic for it to provide "basic local exchange telecommunications service" (i.e., basic wireline voice service) to the Treviso Bay development because of a bulk sales agreement that Treviso Bay has entered into with Time Warner, now Comcast, for the provision of video and broadband services. After a formal evidentiary hearing, held at Embarq's request on an expedited basis, the Commission determined that Embarq's Petition should be denied. This decision was set forth in Commission order No. PSC-07-0311-FOF-TL, issued on April 12, 2007 (hereinafter "Order Denying COLR Waiver").

STANDARD OF REVIEW FOR RECONSIDERATION

The Commission has articulated its standard of review for motions for reconsideration in a number of orders. In an order denying motions for reconsideration in a telecommunications case in 2006, the Commission articulated its standard of review as follows:

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a material and relevant point of fact or law that the Commission overlooked or failed to consider when it rendered the Order. Diamond Cab v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161, (Fla. 1st DCA 1981). The

mere fact that a party disagrees with the order is not a basis for rearguing the case. Diamond Cab. Additionally, reweighing the evidence is not a sufficient rationale for granting reconsideration. State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

In re: Petition for Arbitration of Amendment to Interconnection Agreements by Verizon Florida Inc., Order No. PSC-06-0078-FOF-TP at 2 (Fla. Pub. Serv. Comm'n, February 3, 2006).

DISCUSSION

Summary

Generally, Embarq argues that the Commission "overlooked or failed to consider" evidence that Embarq believes supports its positions. However, the Commission obviously considered Embarq's evidence extensively and in great detail, spending part or all of the following pages from the 18-page Order Denying COLR Waiver discussing the direct testimony and exhibits of Embarq's witnesses Dickerson and DeChellis: 3, 4, 6 (most of the page), 7, 12 (nearly the whole page), and 13. (The Commission also devoted extensive discussion to Embarq's arguments advanced in its prehearing memorandum of law, prehearing statement, and closing oral argument.) The Commission also discussed the cross-examination testimony of witness DeChellis at pages 5, 8, 10 (the entire page), and 11.

Embarq is thus effectively arguing that the Commission, having considered everything that it specifically mentioned in the Order Denying COLR Waiver, "overlooked or failed to consider"¹ a raft of other information that Embarq provided. In fact, the opposite - and far more reasonable - inference should be drawn: that the Commission considered all evidence in the record, but, quite naturally, only recited and referred to what it deemed most important in its Order Denying COLR Waiver. Indeed, the most reasonable interpretation of the Commission's extensive discussion is that it understood Embarq's arguments and understood Embarq's evidence, and that it disagreed with Embarq's desired conclusions; then, rather than discussing all of Embarq's evidence in detail, the Commission devoted extensive attention to explaining exactly why it disagrees with Embarq.

The mere absence of mention of specific evidence in an agency's order does not demonstrate that the agency did not consider that evidence. The implication that the Commission, or any agency or administrative law judge, "overlooked or failed to consider" everything that the Commission did not mention in its order is absurd. Yet this is exactly what Embarq is arguing

¹ Embarq accuses the Commission of exactly this - i.e., that the Commission "overlooked or failed to consider" something that Embarq asserts the Commission should have considered but did not, at least 14 times in its Motion for Reconsideration, along with various other accusations that the Commission misunderstood something, failed, or erred.

here: that because the Commission doesn't agree with Embarq's view of the evidence, and because the Commission didn't mention other evidence in its order, the Commission must have overlooked or failed to consider it. This would impose an impossible burden on an agency, and would effectively require it to discuss every shred of evidence in its order, which would result in the order being as long as the record.

Moreover, the fundamental holding of the case is that Embarq has not demonstrated "good cause" to justify relief from its COLR obligations. Embarq's burden was and is a high burden, because of the importance that the Florida Legislature attaches to meeting universal service objectives by ensuring that customers who desire "basic local exchange telecommunications service" receive it from the incumbent local exchange companies, such as Embarq. Since only Embarq can provide this service to Treviso Bay, the Commission reached the correct conclusion.

Issue 2 - Whether Treviso Bay Has Restricted Embarq's Ability to Provide Basic Voice Telephone Service to the Treviso Bay Development

Embarq criticizes the Commission for, Embarq alleges, overlooking or failing to consider the plain language of Issue 1 (Motion for Reconsideration at 3) and the full scope of Issue 2 (Motion for Reconsideration at 15). Embarq also criticizes the Commission for allegedly "overlooking" or "failing to consider" various evidence relating to its claim that it would be

uneconomic to serve the Treviso Bay development. (Most of this latter material is discussed in the following section, which addresses Issue 3.)

With regard to Embarq's "plain language" argument, the Commission should consider the following. First, the Commission's statement of Issue 2:

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?

The key words in this issue statement are "restrict," "limit," and "ability." Webster's Ninth New Collegiate Dictionary defines these as follows:

"Restrict" means "to confine within bounds; to place under restrictions as to use or distribution."

"Limit" means "to assign certain limits to; to restrict to set bounds or limits."

"Ability" means "the quality or state of being able; esp: physical, mental, or legal power to perform."

Contrary to Embarq's protestations, the Commission used the ordinary, black-letter meanings of these key words in analyzing the issue. The Commission accordingly found that Treviso Bay did not restrict or limit Embarq's ability to provide the requested basic local exchange telecommunications service. Order Denying COLR Waiver at 9. In fact, the Commission also found,

based on specific evidence of record, that "Treviso Bay has taken the necessary steps that would permit Embarq to install its facilities to provide basic local telecommunications service to the residents in the Treviso Bay subdivision." Id.

Against Embarq's claims that the Commission failed to follow the plain meaning of the issue statement, the Commission should also note that the word "ability" is very different from the word "profitability."

Second, Embarq's argument is misleading and specious, because it is abundantly clear that the Commission fully considered Embarq's substantive "uneconomic to serve" argument in any event. Where Embarq, in its Motion for Reconsideration, cites the discussion between the Staff and Commissioners at the agenda conference, Embarq only mentions the Staff's indication that they "leaned more towards" the physical aspect of restriction in Issue 2. What Embarq omitted was the rest of the statement by Staff member Dale Buys, which, in its entirety was:

We interpreted Issue 2 to lean more towards the physical parameters in this case because the economic parameter was apparently covered in Issue 3.

Agenda Conference Transcript at 22 (emphasis supplied). Thus, while it may be technically true that the Commission focused on physical restrictions in Issue 2, it is equally clear that the Commission - and the Commission Staff - focused on Embarq's substantive "uneconomic to serve" argument in Issue 3. Indeed,

the Commission explicitly articulated its understanding of Embarq's substantive argument later in the Order Denying COLR Waiver:

This [Embarq's] "uneconomic" argument appears to be at the core of Embarq's petition.

Order Denying COLR Waiver at 17 (quotation marks in original).

The Commission correctly focused on physical restrictions and considered specific evidence, cited in the Order Denying COLR Waiver at page 9, to support its decision. The Commission in fact found both that Treviso Bay had not done anything to restrict or limit Embarq's ability to provide basic voice service to the Treviso Bay development, and that Treviso Bay had in fact, with Embarq's knowledge and written confirmation, done everything appropriate to facilitate the provision of the voice telecommunications service. Id.

Finally, if Embarq was in doubt as to the meaning of the issue statement, it was Embarq's responsibility to seek clarification. In light of the specific phrasing of Issue 3, which specifically addressed whether "Treviso Bay's existing agreements make it uneconomic for Embarq to provide the requested communications service," it seems obvious that Embarq should have understood that its "uneconomic to serve" issue was being addressed there, and Embarq should have thus understood Issue 2 to address other

aspects of restrictions and limitations. It seems equally obvious that the Staff, the Prehearing Officer, and Treviso Bay were fully justified in understanding Issue 2 to have the meaning indicated by the ordinary definitions of the words used.

Issue 3- Whether Service to Treviso Bay Would be Uneconomic

Embarq asserts that the Commission failed to consider evidence that, Embarq urges, would show: (a) that changes in assumptions necessary to produce a positive net present value of revenues vs. costs are not "minor;" (b) that the assumptions about penetration rates are unrealistic (at least in Embarq's view); (c) that the Commission misunderstood the terms under which the security system provider will provide security monitoring services to the residents of Treviso Bay; and (d) that the Commission misunderstood the market share studies in evidence.

In general, Embarq is again asking the Commission to re-weigh the record evidence because it doesn't like the Commission's conclusions. Treviso Bay believes that the Commission, having heard all the evidence in the hearing, considered all of the evidence and devoted substantial parts of the Order Denying COLR Waiver to explaining its understanding of

Embarq's arguments and then, to explaining why it does not accept those arguments.

First, as a general point, it is in its discussion of Issue 3 that the Commission directly and unequivocally addresses Embarq's argument that the agreement between Treviso Bay and Comcast "compromises Embarq's revenue potential" and its argument that "Embarq's voice telephone revenues will be insubstantial because Treviso Bay residents will have an option to accept" VoIP service from Comcast. Order Denying COLR Waiver at 10.

Treviso Bay offers the following discussion with regard to some of Embarq's specific assertions.

Assumptions and Penetration Rates. The Commission recognized that "some economic risk does exist for Embarq in Treviso Bay" resulting from Treviso Bay's bulk services agreements with Comcast. However, having weighed the evidence, the Commission simply is not convinced that the prospects are as dire as Embarq argues. As the Commission recognizes, this case was framed by Embarq to focus on Embarq's allegation that it will be uneconomic for Embarq to provide basic local exchange service to the residents of Treviso Bay. In its direct testimony, Embarq offered the testimony of witness DeChellis, who testified that he expected a low penetration rate (the number is confidential) for Embarq voice service in the Treviso

Bay development. Mr. DeChellis was Embarq's witness on the issue of the projected or assumed penetration rate for Treviso Bay. None of the exhibits attached to Mr. DeChellis's direct testimony addressed the basis for his assumed low penetration rate. Treviso Bay's witness Don J. Wood criticized Embarq's assumption. In response to a data request from the Commission Staff, Embarq provided a document entitled "Embarq Florida Market Share Study - Summer 2006," which was received into evidence as part of Exhibit 4. In surrebuttal testimony by Embarq's witness Kent Dickerson, Mr. Dickerson criticized Mr. Wood's testimony and cited to the Summer 2006 Market Share Study, testifying generally that the developments in the Study are not comparable to Treviso Bay, and that even if they were, the penetration rates in the other developments don't show that Embarq will reap net positive profits from providing the requested service.

The Commission explicitly considered Mr. DeChellis's and Mr. Dickerson's testimony and this exhibit. Order Denying COLR Waiver at 12. The Commission also considered Mr. Dickerson's arguments regarding the penetration rates, the Devcon Rider (see below), Mr. Wood's testimony, and the high-economic-end demographics of the Treviso Bay development. At the end of its analysis and consideration of all the evidence, the Commission simply was not persuaded that Embarq had met its burden of proof

on Issue 3 that it would, as a matter of fact, be "inherently uneconomic" for Embarq to provide basic telephone service to Treviso Bay. Order Denying COLR Waiver at 13. The fact that the Commission chose to accept Treviso Bay's evidence, and other evidence contrary to Embarq's positions, over Embarq's evidence does not demonstrate that the Commission "overlooked" Embarq's evidence.

As to the legal aspect of this Issue 3, The Commission further stated the following:

Moreover, although an uneconomic condition is an important consideration, we remain unconvinced that it amounts per se to a sufficient justification for relieving a carrier of its COLR obligation.

Id. at 17.

Devcon Rider. The Treviso Bay development will receive security monitoring services from Devcon Security Services Corp. Among the conditions that Devcon insists on is its requirement that customers execute a Rider to Electronic Protection Service/Monitoring Agreement ("Rider") acknowledging that Devcon is not responsible for any security monitoring failures due to wireless or VoIP communications services. The Commission correctly concluded that this requirement makes it more likely that Treviso Bay residents will purchase basic local exchange telecommunications service from Embarq, and accordingly, correctly considered this evidence, along with the rest of the

record, in concluding that Embarq's pessimistic market penetration and revenue assumptions were not adequately supported by the record.

Embarq asserts that the Commission misapprehended the import of the Rider by misinterpreting certain language in the Rider. However, Embarq omitted from its Motion for Reconsideration other language from the Rider that makes crystal clear Devcon's requirement that Devcon is not responsible for any failure of VoIP service to transmit an alarm signal to Devcon's monitoring station, and still other language that makes clear Devcon's intent that customers acknowledge that "standard telephone service" is what Devcon believes is the best service to ensure reliable security monitoring. Moreover, Embarq completely omitted from its Motion for Reconsideration any explanation of its own witness DeChellis's testimony, cited in the Order Denying COLR Waiver, that strongly supports the Commission's conclusions.

First, as to the language of the Rider: at page 12 of its Motion, Embarq correctly quotes part of the Rider as follows:

The Subscriber acknowledges that wireless communications, whether th[r]ough 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 5 at 263. Embarq then improperly attempts to persuade the Commission, through its Motion for Reconsideration,

that the Commission misunderstood the requirements of the Rider as indicating that "wired" VOIP service, e.g., VOIP service over broadband cables, is acceptable to Devcon, and that the Commission thus erred in concluding that customers would be more inclined to purchase basic wireline service from Embarq.

Embarq, however, fails to advise the Commission of other specific language in the Rider that contradicts Embarq's argument for reconsideration. First, immediately following the language quoted by Embarq, the Rider states the following:

Devcon recommends that all Subscribers employ an additional method of communication, such as standard telephone service, in addition to any wireless form of communication.

Id. (Emphasis supplied.) And, if that weren't enough, Devcon states the following six lines further down in the Rider:

As the subscriber, you understand that: Devcon Security Services is not responsible for any failure of the alarm system/VOIP service to transmit an alarm signal to our monitoring station, failure to respond to any unintelligible signal, or any signal which can not be clearly interpreted by our automation system and/or central station personnel. Services such as remote programming, arming disarming, and code changes may not be available. Service requests due to alarm panel troubles caused by telephone failures or interference by the VOIP service are chargeable to the Subscriber.

Id. (Bold emphasis in original; underlining emphasis supplied.)

Thus, contrary to Embarq's selective quotation from the Rider, Devcon makes it clear that it recommends "standard telephone service" over VOIP, and that Devcon is not responsible for any

failures of the VOIP service or interference caused by the VOIP service.

Moreover, although Embarq spends 2 full pages of its Motion on the Rider issue, Embarq fails to mention its own witness's testimony that directly supports the Commission's findings with regard to the impact of the Rider. At page 10 of the Order Denying COLR Waiver, the Commission quoted the testimony of Embarq witness Michael DeChellis, who was responsible for the market penetration rate that underpins Embarq's claims that providing service to the Treviso Bay development would be uneconomic. In his cross-examination of Mr. DeChellis, Commission Staff attorney Fudge posed the following question:

Mr. DeChellis, based on your earlier statement about the, Devcon's position on VoIP, would you agree that a prudent customer would choose to have an additional line installed?

Hearing Transcript at 54-55. Mr. DeChellis replied as follows:

I think if, if I was a customer reading this document, I would have a lot of concerns about that.

Id. at 55.

The plain language of the Rider is more than ample to support the Commission's conclusion that Devcon does not believe that VoIP service is adequate to ensure reliable security service, and the natural extension of that conclusion that the customers in the upscale Treviso Bay development are therefore more likely to purchase wireline services from Embarq. And

then, to cement the Commission's conclusion, Embarq's own witness acknowledged that the Rider would cause serious concern to customers subscribing to the security service. Embarq's arguments for reconsideration on this point are misleading and incomplete, and the Commission should reject those arguments and deny Embarq's Motion for Reconsideration.

Market Shares. Embarq attempts to argue that the Commission overlooked evidence to the effect that the market share information in the record was not comparable to the Treviso Bay situation. Again, Embarq simply doesn't like the way that the Commission viewed and weighed the evidence. As shown in the following quote from the Order Denying COLR Waiver, the Commission expressly and explicitly recognized Embarq's argument and its witness's testimony on this point, and even recognized that the argument "has some validity":

Exhibits 4(a) and 10(a) indicate Embarq fares significantly better at attracting customers in competitive environments in Naples than Embarq witness DeChellis projects. Embarq witness Dickerson suggests these figures are unreliable because the comparison is dissimilar, noting that unlike the developments cited by Treviso Bay witness Wood, "Comcast has every customer that exists in Treviso Bay the day they move in." Embarq witness Dickerson's criticism of the penetration rates in the developments subject to comparison has some validity.

Order Denying COLR Waiver at 12 (emphasis supplied). Thus, the Commission explicitly considered the evidence that Embarq suggests it overlooked, as well as Embarq's witness's testimony

on this point, and even recognized that this evidence affords some validity to Embarq's position. However, the Commission remained unconvinced by the totality of the evidence. Again, in spite of the Commission's consideration of Embarq's evidence on this point, which was explicitly articulated in the Order Denying COLR Waiver, Embarq doesn't like the way that the Commission weighed all the evidence. This is insufficient to support reconsideration: the Commission considered the evidence, and the Commission should accordingly deny Embarq's Motion. The fact that the Commission chose to accept Treviso Bay's evidence, and other evidence contrary to Embarq's positions, over Embarq's evidence does not demonstrate that the Commission "overlooked" or misinterpreted Embarq's evidence.

Issue 5 - Whether Embarq Has Demonstrated "Good Cause"

Embarq also seeks the Commission's reconsideration of its decision on Issue 5, which is the summary issue as to whether Embarq had shown "good cause" to be relieved of its COLR obligation to serve the Treviso Bay development. As the Commission noted and Embarq recognizes, this is a fall-out issue from the Commission's determinations on the preceding issues.

Embarq's burden was and is a high burden, because of the importance that the Florida Legislature attaches to meeting universal service objectives by ensuring that customers who desire "basic local exchange telecommunications service" receive

it from the incumbent local exchange companies, such as Embarq. Since only Embarq can provide this service to Treviso Bay, the Commission reached the correct conclusion.

As discussed above, Treviso Bay believes that the Commission fully considered the evidence and that Embarq simply disagrees with the Commission's analysis and conclusions. The Commission's own order clearly demonstrates that it considered Embarq's evidence extensively and in great detail, and Embarq's argument for reconsideration is really just re-argument of the evidence. The Commission should, accordingly, deny Embarq's Motion for Reconsideration.

Fundamental Law and Holding of the Case

Treviso Bay believes that the Commission did not err as claimed by Embarq. Treviso Bay believes that the Commission considered all evidence in the record, as shown in the Order Denying COLR Waiver. Having said that, and not claiming to know exactly what the Commissioners considered or what weight it gave to all the evidence, Treviso Bay believes the following: Whatever else may be true about the Commissioners' consideration of the record, the Commission did not misapprehend the fundamental law governing this dispute, nor did the Commission misapprehend the fundamental facts that support its decision - indeed, the key fact was conceded by Embarq's own witness.

The fundamental law governing this dispute is Section 364.025(1), Florida Statutes (2006), in which the Legislature clearly articulated its intent that universal service objectives be maintained after local exchange markets are opened to competition, specifically by ensuring the provision of "basic local exchange telecommunications service" by the incumbent local exchange companies, including Embarq, to anyone requesting it.

Within the framework of the statutes, this case should thus have ended with the admission, on the stand, by Embarq's witness DeChellis that "VoIP is not the same as basic local exchange telecommunications service." Order Denying COLR Waiver at 5. Once Embarq conceded this fact, it is clear that granting Embarq's petition would violate the Legislature's express intent that universal service objectives be maintained after local exchange markets are opened to competition, specifically by ensuring the provision of "basic local exchange telecommunications service" by the incumbent local exchange companies, including Embarq, to anyone requesting it. Embarq is the only entity capable of providing "basic local exchange telecommunications service" to the Treviso Bay development, and Embarq's own witness has admitted that the Comcast VoIP alternative is not "basic local exchange telecommunications service."

Accordingly, the Commission should deny Embarq's Motion for Reconsideration.

CONCLUSION

WHEREFORE, based on the foregoing, the Commission should deny Embarq's Motion for Reconsideration.

Respectfully submitted this 4th day of May, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 4th day of May, 2007, to the following:

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