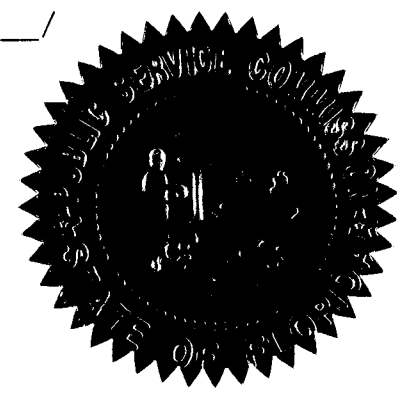


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060763-TL

In the Matter of:

PETITION FOR WAIVER OF CARRIER OF LAST
RESORT OBLIGATIONS FOR MULTITENANT PROPERTY
IN COLLIER COUNTY KNOWN AS TREVISO BAY, BY
EMBARQ FLORIDA, INC.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 18

BEFORE: CHAIRMAN LISA POLAK EDGAR
COMMISSIONER MATTHEW M. CARTER, II
COMMISSIONER KATRINA J. McMURRIAN

DATE: Tuesday, July 10, 2007

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

1 PARTICIPATING:

2 PATRICK K. WIGGINS, ESQUIRE, representing the Florida
3 Public Service Commission Staff.

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CHAIRMAN EDGAR: Okay. We are on Item 18. (Pause.)

Let me say for the record, again, this is 18. It is post-hearing, participation limited to Commissioners and staff and I'll ask Mr. Wiggins to start us out.

MR. WIGGINS: Good afternoon, Commissioners.

Before you is a motion for reconsideration of your final order in Docket Number 060763, which was Embarq's petition for waiver of its carrier of last resort obligation at Treviso Bay. There was also before you a motion for oral argument, and the parties are here, that would be Issue Number 1. And staff recommends denial of that request. But it is within your discretion. If you should grant, we would recommend that it be limited to, perhaps, five minutes.

CHAIRMAN EDGAR: Thank you very much.

Commissioner Carter and Commissioner McMurrian, recognize that generally we allow oral argument if we believe that there are items that we have overlooked or failed to consider in our previous deliberations, Commissioners, is there a desire for oral argument? If we do not have oral argument, we do have the opportunity to pose questions to our staff and have discussion amongst the three of us.

Commissioner Carter.

COMMISSIONER CARTER: I see no need for oral argument, Madam Chairman. It is substantially what we have

1 gone through before, and I don't see that the party could add
2 something to the case. The case is what it is. And I really
3 want to get into, you know, a discussion with my colleagues
4 about this issue, because this is something that we went on
5 this morning. And I really feel like we need to move forward
6 with these kind of issues and kind of bring them into one kind
7 of perspective so we have one voice, one set of standards, one
8 kind of accountability, one kind of notice, and all like that.

9 So I would venture that it would be a more productive
10 use of our time as Commissioners if we discuss the case and
11 move from there.

12 CHAIRMAN EDGAR: And I feel similarly, but,
13 Commissioner McMurrin, where are you?

14 COMMISSIONER McMURRIAN: I agree. In fact,
15 originally I was struggling with whether or not to ask about
16 oral argument, because it was a case of first impression. But
17 as I went through the questions and things I wanted to talk
18 about, I think the company has addressed those. I think
19 Treviso Bay has addressed those in the comments that we have
20 before us. So I don't think that would necessarily add
21 anything. I think the questions I have are more for staff, and
22 it's questions/comments.

23 CHAIRMAN EDGAR: Okay.

24 With that, then, do I have a motion for the staff
25 recommendation on Issue 1?

1 COMMISSIONER CARTER: So moved.

2 COMMISSIONER McMURRIAN: Second.

3 CHAIRMAN EDGAR: And I concur. So show that adopted.

4 And we are Issue 2.

5 MR. WIGGINS: Yes, ma'am.

6 Issue 2 is, in fact, the motion proper, in which
7 Embarq requests that you reconsider your decision as reflected
8 in the final order. This is an area where there is a very
9 clear standard. There is no debate that a motion for
10 reconsideration must show that some point of fact or law was
11 overlooked or misapprehended or ignored. The purpose is not to
12 reargue or rehash the merits of the case below, no matter how
13 strongly the parties believe that they were right below and
14 that we got it wrong.

15 And, in this case, from staff's analysis of the
16 motion, this is essentially a reargument of the merits. The
17 issue the Commission decided -- excuse me, the essence of the
18 Commission decision was that Embarq's case was not persuasive
19 on its two-prong test for proving its right to be waived of its
20 obligation, i.e., that it would be uneconomic, and that there
21 were an available provider. And the motion for reconsideration
22 essentially differs with the Commission's order on how the
23 evidence was weighed and evaluated in coming to this
24 conclusion, and that is not the proper standard, that does not
25 meet the standard for reconsideration. But we are available

1 for more particular questions.

2 COMMISSIONER McMURRIAN: Thank you.

3 Commissioner McMurrian, questions.

4 COMMISSIONER McMURRIAN: Thank you.

5 And as I said earlier, and I will ask for you two to
6 bear with me, some of what I am going to say is just sort of
7 sharing with folks sort of my working through some of the
8 concerns I had. While I don't believe that the company has
9 raised issues that justify reconsideration. I was concerned
10 about some of the things that we talked about at the last
11 agenda and some of the points that I believe they raised in
12 their motion for reconsideration. And then, of course, having
13 Treviso Bay's responses to that.

14 And you all probably remember that when we discussed
15 Issue 2 at the agenda conference, I had some questions about
16 what the issue -- how the issue was framed. And I guess I
17 remain somewhat troubled that there appears to be disagreement
18 as to the meaning of the issue, but I'm just going to share
19 with you kind of how I worked through it. At the time when I
20 asked the question about the wording of Issue 2, staff
21 interpreted it to lean more towards the physical parameters in
22 the case. And it was lean toward, it wasn't specifically
23 physical, because the economic parameter was apparently covered
24 in Issue 3.

25 And I think that is fair that Issue 3, in staff's

1 mind, covered economic, it very clearly covers the economic or
2 uneconomic issue. And Issue 2 can reasonably be interpreted as
3 leaning toward physical, as Mr. Buys had said. However, I
4 don't think it was necessarily that clear on its face. It
5 wasn't clear to me at the time, so I guess I'm just sharing
6 some concern that at least in future cases, since we apparently
7 have several of these before us, that we try to make it real
8 clear.

9 And I realize this was a case of first impression.
10 I'm not putting blame on anyone. I didn't really understand
11 the issue, as worded, whether it included economic or physical
12 or both, but it just occurs to me that if you did include the
13 economic consideration in there, the answer might have been
14 different. But as I worked through that, even if that answer
15 hadn't been different, and maybe I should back up a minute.
16 The reason I think the answer might have been different if you
17 included economic considerations in there is because the way
18 the issue was worded about has Treviso Bay entered into any
19 agreements or done anything else that would restrict or limit,
20 if you consider that physical or economic, I believe there was
21 some things that were done that would limit, economically,
22 Embarq's ability to serve.

23 However, even if you factor that in, I don't think,
24 all other things equal in the case, that that changes the
25 outcome. Because I think you still have to do the economic

1 consideration in Issue 3. But I really just felt compelled to
2 share that, and perhaps more for future cases, that we try to
3 be very clear about whether we are looking at physical or
4 economic, because it seems fair that there was some confusion
5 on that point.

6 On Issue 3, here again, just for future, it seems
7 like maybe the question really should be is it uneconomic for
8 Embarq to provide voice to Treviso Bay specifically in this
9 case, or is it just uneconomic not so much -- and I wanted to
10 get staff's opinion on this -- not so much whether Treviso Bay
11 entered into agreements that did that, but just whether it's
12 uneconomic. So if someone would like to address that, because
13 I just need some help sorting through this stuff in my mind.

14 MR. WIGGINS: Yes, ma'am.

15 I think your point is well taken on Issue 2.
16 Although I was not lead counsel, as you may recall on this
17 case, I participated in the Issue ID conference, and there was
18 a discussion on how best to frame these so that we could give
19 Embarq a chance to make the case it wanted to make, which I
20 called it their two-prong test, which is the uneconomic and the
21 availability.

22 And if you look at how they interpreted Issue 2, they
23 interpret it through the lens of their two-prong test, which is
24 uneconomic, and so that to me is how they saw that. And I'm
25 disappointed that I didn't hear that well enough so that we

1 could also be clear that, from my perspective, we were looking
2 at some other things, as well. But it is good advice. We are
3 getting better at framing these issues as we go forward.

4 Next, with respect to Issue 3 in terms of -- I think
5 it does make sense to frame it in terms of whether it's
6 uneconomic or not, not whether the source of that is the
7 agreements. I think the way we got there, even with Issue 2,
8 is if you look at the automatic criteria, they speak in terms
9 of restrict or limit access to the facilities, and they speak
10 about the developer's arrangements to exclude the ILEC or the
11 COLR. So I think that's how we got there. But as we get
12 better at this we are seeing that that is not what ought to be
13 the driver, that maybe shouldn't be the driver of how we frame
14 the issues. So those are good points.

15 COMMISSIONER McMURRIAN: Okay. I'm not at all
16 assigning blame, because it is not something that I had even
17 considered until we were sitting down here at the hearing that
18 day. It just sort of occurred to me. And, of course, we heard
19 a lot more about that point in the motion for reconsideration.

20 Let's see. One other thing, and we have talked a lot
21 about the Devcon rider in past forums, and as I read over
22 Embarq's arguments about how we misunderstood or misinterpreted
23 that, their reference to Page 10 of the order, I guess,
24 concerned me as I read over it. And in Page 10 of the
25 Commission's order there is a reference, it's in the middle of

1 the page, it says a rider to monitoring agreement holds a
2 security company harmless if residents use wireless telephone
3 or VoIP service as the means of connecting an alarm system with
4 a security monitoring company. And in Embarq's motion they
5 pointed out that in earlier parts of the order that the
6 Commission had framed it properly by saying it was wireless
7 through VoIP technology. And I believe it was even referencing
8 some language that Treviso Bay had used. I believe that was on
9 Page 8 of the order. And I guess I wanted to ask staff if you
10 agreed that perhaps that's not as clear as it should have been
11 given our discussion of that Devcon rider and what it actually
12 meant, and perhaps ask if you think that it is something that
13 we should on our own motion clarify.

14 MR. WIGGINS: It was inartful language. I take
15 responsibility for it, because I had the final say on that, and
16 I think it could be clarified.

17 COMMISSIONER McMURRIAN: So you would recommend -- I
18 mean, as I --

19 MR. WIGGINS: That is a bone of contention,
20 Commissioner, I'm okay with that. But that I would like to go
21 back and just that, as I recall, the order said there was also
22 some things out there that might encourage or incent use of
23 Embarq's service. For example, the security arrangements.
24 That in itself would be enough. Then we go to the Devcon rider
25 which says, oh, by the way, not only are you generally

1 encouraged to use wireline in our discussions with you and the
2 like, but if you are using --

3 COMMISSIONER McMURRIAN: Wireless.

4 MR. WIGGINS: -- wireless VoIP, you had better use
5 wireline. And so our idea was that looking at that, a typical
6 person would say, you know, I've got a \$500,000 home here, I
7 think I will get this extra line. And I believe even -- I
8 think the language was Mr. DeChellis said that would cause him
9 or the consumer some concern. So that is the point we are
10 making. I don't think it is -- to me it's not even the tail
11 wagging the dog, it might even be almost the flea on the tail.
12 But I wish I had written that differently.

13 COMMISSIONER McMURRIAN: And, actually, as you have
14 represented that point, I mean, I agree with that.

15 Commissioners, I'm not taking issue with the fact --
16 I realize how Embarq interprets our discussion about the rider,
17 and staff has consistently pointed out, I believe, that the
18 purpose of that was just to, perhaps, say that that could have
19 an impact on the take rate. Not to say that that would keep
20 anyone from signing up for VoIP service, but it seems like the
21 distinction of wireless through VoIP, or saying wireless or
22 VoIP might, in fact, be important. I mean, I guess there is
23 the possibility that this order may see another venue, and it
24 just appears to me that it is one of those things that I know
25 we talked about at length to try to be careful that we were

1 actually using the terminology that was from the agreement
2 rather than suggesting wireless or VoIP. So I appreciate that,
3 Mr. Wiggins.

4 MR. WIGGINS: I think that would be a good thing to
5 do. I think it is useful to be as clear and accurate as
6 possible, and we have tried to be. And like I said, I wish I
7 had gotten that.

8 COMMISSIONER McMURRIAN: And actually that was my
9 only other statement. I have just tried to share with you all
10 some of the concerns that were raised. Again, I don't think
11 that it rose to the level of granting reconsideration, but I
12 did think there were some points raised that gave me concern
13 partly because they were things I was concerned about earlier,
14 and we had had some discussion about. But I suppose you can
15 see that I was suggesting, perhaps, on our own motion
16 clarifying that one phrase within that order. And, again, I
17 don't believe that changes the outcome of the order, I just
18 think it would be more accurate to reflect the exhibit that we
19 had before us.

20 MR. WIGGINS: I think you can grant --

21 CHAIRMAN EDGAR: Excuse me.

22 MR. WIGGINS: I'm sorry. I apologize.

23 CHAIRMAN EDGAR: Commissioner Carter.

24 COMMISSIONER CARTER: Thank you, Madam Chairman.

25 I think that where we are in this case is more of a

1 procedural matter, and I don't think that -- this is just kind
2 of me thinking aloud. I don't think that they have raised it
3 to the level to where, you know, we should accept Embarq's
4 claim on it because of a procedural matter. I do think this
5 case is different than the one we were discussing this morning
6 in that there were -- as Commissioner McMurrian says about when
7 you get into the economic analysis, there is a different
8 perspective there.

9 In one case you had an economic incentive for the
10 developer. In this case, there is an economic incentive for
11 the wireline company. And I think that's a different issue
12 than arguing the merits of a procedural matter. This is a
13 procedural matter here. And based upon the procedural
14 matter -- and this is not to say whether we missed it or not,
15 because I don't think we missed it. I think we considered all
16 the aspects of it. I don't think any court or any semi or
17 quasi-judicial agency ever puts every jot and tittle in the
18 order. I think we are comparable there, but I do think in the
19 context of -- I said that because I was the one advocating
20 Having the standards and things like that, but I do think that
21 this case is distinguishable even if we were arguing the
22 merits, and the case we talked about this morning. But I think
23 that I appreciate the representation from legal that they be a
24 lot more clear or clarity, whichever is the appropriate
25 terminology, in laying out these issues.

1 So at the appropriate time, Madam Chairman, I would
2 move staff on the issue.

3 CHAIRMAN EDGAR: I think we have all kind of sat on
4 this issue, or on this item, and on the related items on
5 similar issues that we have discussed today and previously. I
6 think we are all, what I would term, just speaking for myself,
7 as kind of in the incipient time frames. Policy is evolving as
8 we are looking at statutes that we are implementing in somewhat
9 different and somewhat similar factual situations for basically
10 the first times.

11 Commissioner McMurrian, I very much want to
12 accommodate and address your concerns always, as I always try
13 to with all of our colleagues, but I have some discomfort
14 because, quite frankly, I don't have the order in front of me.
15 I was not aware that this was a particular sentence or
16 paragraph that we were going to be looking at. If we were
17 going to do any change, I would need to look at it all in its
18 entirety and think it through, as well.

19 And I also have to note that every Commissioner has
20 the opportunity to get with staff and review a draft order
21 before it's issued, and if there are points that we have
22 particular -- any of us have particular interest in wanting to
23 make sure that the language communicates what we feel was the
24 collective decision. So I want to try to address your
25 concerns, but I, quite frankly, am not ready to amend an order

1 from the bench at this time.

2 COMMISSIONER McMURRIAN: I appreciate that. And
3 perhaps I should have taken that into consideration and brought
4 copies even. I guess in preparing for it and going over the
5 concerns that were raised in the motion for reconsideration,
6 and because I had been concerned about being careful about how
7 we characterize the technology that was referenced in that
8 exhibit, I just thought that this was -- I really didn't know
9 how else to bring it up, but I thought this was the proper
10 forum to say perhaps there is a way to change that phrase so
11 that it's consistent with the way it's phrased in the other
12 parts of the order.

13 Just frankly, to clarify our intent and not have
14 possibly a court with jurisdiction at some point focus in on an
15 issue that didn't sway the case one way or the other, but it's
16 just to make our orders more accurate with respect to the
17 exhibit that we had before us. So I'm just -- I don't know if
18 it is procedurally proper or not, but I guess I was thinking
19 that I could make a motion to clarify the order, but that it
20 would not impact Issue 2 before us. It would just be a
21 separate motion raised from the bench. But I realize that you
22 haven't had a chance to read it, and I look toward Legal staff
23 to perhaps give some guidance as to how we can address it, if
24 at all.

25 COMMISSIONER CARTER: Madam Chair, if I may.

1 CHAIRMAN EDGAR: Commissioner Carter.

2 COMMISSIONER CARTER: Before Legal, I would think
3 that we would want to confine ourselves to the four corners of
4 the docket here, and that this is purely a procedural matter.
5 We can always, if we want to do something sua sponte do that,
6 but we probably shouldn't mix apples and grapefruit and just
7 deal with this procedural matter here. There are some other
8 issues that we could talk about at another time, but I think we
9 would kind of confuse the issues if we do this. This is purely
10 a procedural matter, a motion for reconsideration and
11 reargument of the issues that was the case before.

12 There is no procedural error, notwithstanding the
13 allegations of the movant, and so I think that this procedural
14 matter stands on its own merits, notwithstanding any other
15 things that we may want to do as a body. And I would caution
16 us to go beyond that because then that does rise to the level
17 of procedural error. So we want to confine ourselves within
18 the confines of this document here. It is what it is. However
19 inartful or whatever, it is what it is, and that is a
20 representation that we made and we have ruled on it and all
21 like that. So I think that I would be reticent to do anything
22 in conjunction with this procedural matter other than handling
23 the procedural matter. If the Commission wanted to do other
24 things, then we can do that. We don't need this case to do it,
25 we can just do it.

1 CHAIRMAN EDGAR: Commissioner Carter, I have to say I
2 concur. Again, if you have concerns, I know our Legal staff
3 will work with you. And as presiding officer, I will certainly
4 try to find a way to address. I do, though, as one
5 Commissioner, have a concern about amending orders from the
6 bench without the chance to review. And, quite frankly, don't
7 find the procedural motion for reconsideration to be the
8 appropriate venue.

9 COMMISSIONER McMURRIAN: And, again, I was not
10 intending for it to impact Issue 2. In fact, I probably should
11 have said, because of some of the other things I raised, I
12 think, were discussed within the context of that. And, of
13 course, that statement was made within the context of Issue 2
14 on the motion for reconsideration. I just wanted to share all
15 of those thoughts, but I wasn't suggesting that Issue 2 before
16 us today is impacted by whether or not you change a phrase in
17 the order. I think I was just struggling with -- I didn't know
18 any way to ask for clarification of an order other than what we
19 have before us.

20 CHAIRMAN EDGAR: I think we are about ready to bring
21 this in for a landing.

22 Commissioner Carter, is there a motion?

23 COMMISSIONER CARTER: Move staff.

24 CHAIRMAN EDGAR: Is there a second?

25 COMMISSIONER McMURRIAN: Second.

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CHAIRMAN EDGAR: And I concur, so show Item 18

adopted.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

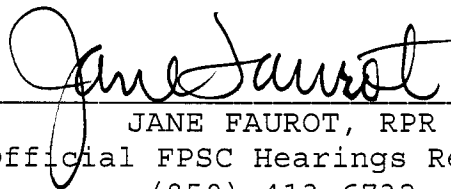
3 COUNTY OF LEON)

4
5 I, JANE FAUROT, RPR, Chief, Hearing Reporter Services
6 Section, FPSC Division of Commission Clerk, do hereby certify
7 that the foregoing proceeding was heard at the time and place
8 herein stated.

9 IT IS FURTHER CERTIFIED that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript constitutes a true transcription of my notes of said
13 proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a relative
16 or employee of any of the parties' attorney or counsel
17 connected with the action, nor am I financially interested in
18 the action.

19 DATED THIS 16th day of July, 2007.

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JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732