

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 070649-TL

In the Matter of:

PETITION FOR DECLARATORY STATEMENT
REGARDING IMPLEMENTATION OF ORDER
PSC-07-0311-FOF-TL, RULE 25-4.094,
F.A.C., AND GENERAL EXCHANGE TARIFF
SECTION A5, G BY EMBARQ FLORIDA, INC.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 5

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
 COMMISSIONER LISA POLAK EDGAR
 COMMISSIONER KATRINA J. McMURRIAN
 COMMISSIONER NANCY ARGENZIANO
 COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, January 29, 2008

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

REPORTED BY: LINDA BOLES, RPR, CRR
 Official FPSC Reporter
 (850) 413-6734

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FLORIDA PUBLIC SERVICE COMMISSION 0900 FEB-5 8

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 SUSAN S. MASTERTON, ESQUIRE, representing Embarq.

3 ROBERT SCHEFFEL WRIGHT, ESQUIRE, representing Treviso
4 Bay Development, LLC.

5 RICHARD BELLAK, ESQUIRE, representing the Florida
6 Public Service Commission Staff.

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CHAIRMAN CARTER: We are now, Commissioners, on Item 5. Give staff a moment to get adjusted here. Staff, Item 5.

MR. BELLAK: Good morning, Commissioners.

CHAIRMAN CARTER: Is your microphone on, Richard?

MR. BELLAK: I believe it does.

CHAIRMAN CARTER: There you go. Sounding good.

MR. BELLAK: Item 5 is Embarq's petition for declaratory statement concerning its provision of carrier-of-last-resort service in the Treviso Bay Development. And staff has recommended issuing the declaratory statement because the advanced deposit rule is an appropriate mechanism in the staff's view to address the risks and uncertainties that the facts of the case indicate.

The parties have asked to address the Commission and it's within your discretion to hear them. There is a minor oral modification, which is that the transcript to the rule hearing which is identified as Attachment 5 to the petition actually should be corrected to be Attachment 8.

CHAIRMAN CARTER: It's a minor modification, Commissioners. We'll just show that done without objection. Is there any objection to that? Okay. Show it done.

Okay. Commissioners, we, we have a request here. Staff, what's your recommendation on proceeding further?

MR. BELLAK: Well, the parties have asked for leave

1 to address the Commission. And if the Commission believes that
2 hearing the parties will be useful to your consideration of the
3 petition, that you accord them some time.

4 CHAIRMAN CARTER: Thank you. Commissioners.

5 COMMISSIONER EDGAR: Mr. Chairman, if there is no
6 further discussion, I can make a motion in support of the staff
7 recommendation for Issues 1 and 2, which I think would put us
8 in a posture to hear from the parties, if there is support for
9 that.

10 COMMISSIONER SKOP: Second.

11 CHAIRMAN CARTER: Okay. It's been moved and properly
12 seconded to move staff on Issues 1 and 2 of this case. All
13 those in favor, let it be known by the sign of aye.

14 (Unanimous affirmative vote.)

15 Okay. I think that puts us in the posture to
16 hear Issue -- we'll hear from the parties and then we'll go to
17 Issue 3. I'm looking at my notes here. I think I took a page
18 out when I was flipping through here. Issue 4, that's on Page
19 4.

20 COMMISSIONER McMURRIAN: Page 4.

21 CHAIRMAN CARTER: Okay. Commissioners, I think we
22 ought to just listen to the parties. Would that be
23 appropriate? I think we'll just give the parties our standard
24 five minutes per side, unless you have any great desire for
25 more, but I think we can get there with that. Any Commissioner

1 need any more time than that?

2 Okay. We'll recognize the parties at five minutes
3 each. And, staff, also if you want to speak on that, we'll
4 give you five minutes as well.

5 MS. MASTERTON: Okay. Thank you, Mr. Chairman. Good
6 morning, Commissioners.

7 Embarq is here today to respectfully ask you to grant
8 --

9 CHAIRMAN CARTER: Ms. Masterton, if you'd just state
10 your name for the record so we have --

11 MS. MASTERTON: Oh, I'm sorry. This is Susan
12 Masterton on behalf of Embarq.

13 CHAIRMAN CARTER: Thank you.

14 MS. MASTERTON: And Embarq is here today to
15 respectfully ask the Commission to approve Embarq's petition
16 for declaratory statement and to approve staff's recommendation
17 in this docket.

18 Embarq's petition requests that the Commission find
19 that Embarq's request for an advance deposit from Treviso Bay
20 is consistent with the Commission's order on Embarq's request
21 for a COLR waiver, and to find that if Treviso Bay fails to pay
22 the requested deposit amount, Embarq is not required to
23 construct facilities to serve the development.

24 The issues raised in Embarq's petition are
25 appropriate for declaratory relief because Embarq is asking the

1 Commission to provide guidance regarding the applicability of
2 the Commission's order, the Commission's rules and Embarq's
3 tariffs to a specific set of circumstances. Those
4 circumstances include the order denying Embarq's COLR waiver
5 but specifically recognizing that Embarq may use existing rules
6 to ameliorate potential uneconomic service provisioning. They
7 also include the deposit request by Embarq in accordance with
8 the Commission's rules and Embarq's tariff, and they include
9 Treviso Bay's failure to pay the requested deposit. None of
10 these facts is in dispute.

11 Consistent with the purpose of a declaratory
12 statement, Embarq's petition asks the Commission to provide
13 guidance to Embarq about what Embarq should do under these
14 circumstances. The Commission's advanced deposit rule and
15 Embarq's implementing tariff are appropriate to apply in these
16 circumstances because Treviso Bay has requested Embarq to
17 provide underground facilities to serve the subdivision, and
18 there is a question as to whether Embarq will recover its cost
19 to provide this service in a reasonable period of time.

20 The deposit and refund mechanism under the
21 Commission's rule and Embarq's tariff appropriately balance the
22 risks to Embarq to construct facilities to Treviso Bay. If
23 Embarq gets sufficient customers, then Treviso Bay gets its
24 money back with interest. If Embarq does not get sufficient
25 customers, then Embarq's investment is protected. And that is

1 specifically the intent of the advanced deposit rule in
2 Embarq's tariff.

3 The fact that Embarq is under price regulation does
4 not make the rule and tariff inapplicable as Treviso Bay has
5 suggested. Embarq must still fulfill its regulatory obligation
6 to provide service, and the protections of the rule and tariff
7 should equally apply. Therefore, Embarq's petition for a
8 declaratory statement should be granted and the staff
9 recommendation should be approved.

10 And I want to thank you for the opportunity to
11 provide these remarks. I'm happy to answer any questions that
12 you might have, and I would like to reserve some time to
13 respond to Treviso Bay as necessary.

14 CHAIRMAN CARTER: Mr. Wright.

15 MR. WRIGHT: Thank you, Mr. Chairman and
16 Commissioners. My name is Robert Scheffel Wright. I'm with
17 the Young van Assenderp Law Firm, and I have the privilege of
18 representing Treviso Bay Development, LLC, in this case.

19 As y'all know, you denied Embarq's petition for COLR
20 waiver close to a year ago to serve our development and there
21 were some negotiations that went on in the meantime and led us
22 to today.

23 I want to make a preliminary remark as to Embarq's
24 assertion in its memorandum basically in response to our memo
25 that we waited until the 11th hour. First off, our memorandum

1 was timely within the Commission's procedures. And, second,
2 the reason we waited as long as we did was because we were
3 negotiating with Embarq attempting to work out a mutually
4 agreeable resolution that would have obviated this proceeding
5 altogether. So I think their attempted criticism of us for
6 having waited is completely out of line.

7 Second, we don't believe, I don't believe that Embarq
8 needed or needs a declaratory statement at all. Embarq had put
9 the ball in Treviso Bay's court by demanding a deposit. We
10 were attempting to negotiate a resolution. If those efforts
11 had failed, and so far they haven't fortunately, although they
12 kind of move around, it would have been up to us, up to Treviso
13 Bay to file a complaint in which all issues, not only those
14 that are on the table here, the rule's applicability and the
15 tariff interpretation issue that are present today, but also
16 the factual issues that will still be present no matter what
17 you do today, i.e., how much should the deposit be, when should
18 it be paid, how should it be calculated, could have and would
19 have been litigated appropriately in a tariff dispute
20 proceeding.

21 Ms., Ms. Masterton said in her remarks that what
22 Embarq is seeking here is guidance. I would suggest to you
23 that what they're really asking for is in the nature of an
24 advisory opinion, and it's black letter law that declaratory
25 statements are not appropriate for an advisory opinion. The

1 appropriate means to resolve this dispute, if it ever became a
2 dispute, i.e., if we had been unable to work it out, would have
3 been for us to file a tariff dispute and sort all the issues
4 out there.

5 Now we believe and, you know, the staff don't agree
6 with us and that's, that's how things are sometimes, but we
7 don't believe that, that Embarq's tariff is applicable to
8 achieve the result they want. There is no difference between
9 the facilities we are asking for to provide voice service and
10 what Embarq would provide to, what Embarq would install to
11 provide voice service. At worst they can't install any more
12 facilities, you know, any more facilities to provide voice
13 service than the minimum required to provide voice service, so
14 at worst the cost of the facilities requested is equal to and
15 probably less than the cost of the panoply of services that
16 Embarq would like to provide, to install in order to be able to
17 provide their Triple Play.

18 Now we believe that Embarq is really trying to get a
19 third bite of the apple here. We had an evidentiary hearing,
20 we had reconsideration, and now we've got a declaratory
21 statement. In our view they can't invoke the rule unless they
22 show they need the rule because it would be uneconomic to
23 provide the service, and this they fail to do.

24 Finally, you know, if the staff don't agree with us
25 as to how the rules ought to be interpreted -- and I'll agree

1 with you, if you look at the language cited by the staff on
2 Page 8, you know, you can read the language the staff cites
3 either way. We agree that a utility is entitled to such
4 protection in the interest of all other subscribers and suggest
5 that, et cetera. It seems pretty clear to me that, that the
6 real criterion here is ratepayer protection in the interest of
7 all other subscribers. That is the justification for
8 protecting the utility. Under price regulation that, that no
9 longer exists. And so we don't agree that the rules should be
10 applicable at all.

11 Finally, with regard to -- we do agree with one thing
12 and we appreciate the staff's recognition that the Commission,
13 on Page 7 of the recommendation that the Commission would not
14 be approving a particular deposit amount since that would
15 present a factual issue potentially subject to challenge. If
16 we -- we continue to try to work it out with Embarq in a
17 cost-effective and mutually acceptable way, and if we can,
18 that's fine. And if we can't, then we will perhaps be back
19 with a real live factual dispute. Thank you very much for the
20 opportunity to address you today.

21 CHAIRMAN CARTER: Thank you, Mr. Wright. Let's hear
22 from staff.

23 MR. BELLAK: I think a lot of what is in the
24 recommendation was covered by the parties, but I would add to
25 it the fact that the, the declaratory statement is functional

1 in this case and Treviso Bay's arguments prove that it's
2 functional to have a declaratory statement because they,
3 they're starting out at the idea that for the tariff purposes
4 the correct amount of the deposit would be zero because there's
5 no difference between what would be provided under COLR and
6 what they're asking for. And these are the kinds of arguments
7 that we've disposed of in the declaratory statement. Those are
8 off the table if you issue the declaratory statement. There is
9 a substantial deposit involved in this because -- and it has
10 nothing to do with whether Embarq was able to prove that what
11 they're going to do will be uneconomic. There's a substantial
12 deposit involved because of the uncertainties inherent in the
13 situation and that's what the deposit is meant to mitigate.

14 In fact, I think it was Commissioner McMurrian in
15 the, in the waiver case that summed it up when she said that
16 the only way you can find out how many customers Embarq is
17 going to get is if they put the facilities in the ground first
18 and then see how many customers sign up. That's the very
19 purpose of the deposit is to mitigate that risk. And no one
20 knows exactly what's going to happen. And it's easy for
21 Treviso Bay to gamble with Embarq's money and to put on a
22 witness that says they're just going to do fine.

23 Well, if they do fine, Treviso Bay has nothing to
24 complain about because under this declaratory statement and
25 application, application of this rule, they get their deposit

1 back so they don't have anything to complain about. The
2 problem is that no one knows in advance how it's going to turn
3 out. And if it goes the other way and it turns out everybody
4 is wrong, Treviso Bay is wrong, the Commission's view that they
5 hadn't proved that they weren't, that it was going to be
6 uneconomic, that turns out to be wrong, everybody turns out to
7 be wrong except Embarq, but the only entity that loses dollars
8 over that is Embarq. That's not a reasonable state of affairs
9 under this. It's not balanced. And so it was worthwhile for
10 them to ask whether they could apply the rule.

11 And if it turns out that there is a dispute about how
12 much of a deposit falls out of the tariff in the rule, then
13 Treviso Bay can come to the Commission and have that factual
14 issue resolved. But it's worthwhile to have the legal
15 parameters established so that they're not starting out with
16 the idea, well, they owe us this service under all of these
17 circumstances no matter what and the correct amount of the
18 deposit should be zero. That's just not a reasonable reading
19 of the law or the facts of the case.

20 CHAIRMAN CARTER: Thank you. Commissioners.
21 Commissioner Edgar.

22 COMMISSIONER EDGAR: Mr. Chairman, did staff counsel
23 suggest that the Commission may ultimately be found to be
24 wrong?

25 CHAIRMAN CARTER: That was just a rhetorical

1 statement; right?

2 (Laughter.)

3 MR. BELLAK: I quoted a Commissioner to the effect
4 that nobody knows.

5 COMMISSIONER EDGAR: Hypothetical. Absolutely.
6 I do have one question for Mr. Wright, if I may.

7 CHAIRMAN CARTER: You're recognized.

8 COMMISSIONER EDGAR: Thank you.

9 Mr. Wright, you said in your comments that, that
10 Embarq was looking for a third bite at the apple. And my --
11 and actually I can't find it here in the analysis, although it
12 may be there, but my recollection is that in the order that
13 this Commission issued that there was either a direction or
14 suggestion to Embarq to pursue other available options under
15 Commission rules. And if that is an accurate statement on my
16 part, then I don't see that characterization of a third bite at
17 the apple as exactly accurate, and I would just like you to
18 speak to that point for me, if you would.

19 MR. WRIGHT: I addressed -- all I really have to say
20 is that we don't believe they can invoke the rule unless they
21 can show that it's uneconomic. Staff distinguishes that from
22 revisiting the allocation of risk, but they had a chance to
23 show that it was uneconomic. They had a chance to bring an
24 omnibus proceeding in the first place, which normally one might
25 do. They didn't do that. So they had a hearing, they couldn't

1 show it's uneconomic, they sought reconsideration, and now
2 they're back here asking you to allow them to apply their rule
3 with no showing.

4 CHAIRMAN CARTER: Any other questions, Commissioners?
5 Okay. Commissioner McMurrin, you're recognized.

6 COMMISSIONER McMURRIAN: I can make a motion to
7 approve staff's recommendation.

8 COMMISSIONER SKOP: Second.

9 CHAIRMAN CARTER: It's been moved and properly
10 seconded that we approve staff's recommendation. That's on
11 Issues 3 and 4; is that right? Okay. Correct, Commissioners?
12 You've had a chance to consider. All in favor, let it be known
13 by the sign of aye.

14 (Unanimous affirmative vote.)

15 All those opposed, like sign.

16 Okay. Thank you so kindly.

17 (Agenda Item 5 concluded.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 4th day of February, 2008.

Linda Boles
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