

BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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
ORDER NO. PSC-07-0311-FOF-TL
ISSUED: April 12, 2007

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING PETITION

BY THE COMMISSION:

Introduction

On November 20, 2006, pursuant to Section 364.025(6)(d), Florida Statutes, Embarq Florida, Inc. (Embarq) filed its Petition for Waiver of its carrier-of-last-resort (COLR) obligations in the Treviso Bay subdivision (development) in Collier County. In accordance with the statute, Embarq served a copy of the petition on that same day on the developers of Treviso Bay, Treviso Bay Development, LLC (Treviso Bay).

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

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

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

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developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

In Order No. PSC-06-1076-PCO-TL, issued December 29, 2006, the Prehearing Officer granted Embarq's motion for an expedited hearing and established the procedural schedule and hearing dates for this docket.

On February 13, 2007, Order No. PSC-07-0128-PHO-TL was issued outlining the conduct and procedures to be used at the Hearing and the issues to be addressed in determining the petition.

Issue 1: Will voice service from other providers be available to customers of Treviso Bay? If so, when and under what conditions?

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?

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?

Issue 4: Has Embarq, formerly known as Sprint-Florida Incorporated, taken any action that would preclude Embarq from obtaining a waiver of its carrier-of-last-resort obligation in Treviso Bay?

Issue 4A: Is Embarq obligated to provide service to Treviso Bay by its tariff or by holding itself out as willing and able to provide service?

Issue 5: Has Embarq demonstrated "good cause" under Section 364.025(6)(d) for a waiver of its carrier-of-last-resort obligation in Treviso Bay?

Discussion

Issue 1: Will voice service from other providers be available to customers of Treviso Bay? If so, when and under what conditions?

We find that voice service from other providers using Voice over Internet Protocol technology and wireless cellular technology will be available on an individual customer basis at retail prices to the residents living within the Treviso Bay development at the time of each resident's occupancy. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

Parties' Arguments

In its Prehearing Memorandum of Law, Embarq asserts that the criteria for automatic relief from its COLR obligation pursuant to Section 364.025(6), Florida Statutes, clearly

contemplate situations where the universal service objective of the statute is met through the availability of voice or voice replacement service from an alternative provider.¹ Embarq further asserts and states in its Memorandum of Law that:

. . . it is reasonable to assume that the nature of the facts and circumstances justifying relief would be similar to the automatic exemptions. That is, it is reasonable to assume that the facts and circumstances justifying a waiver demonstrate the existence of an alternative provider with facilities in place to provide voice or voice replacement services that is subject to contractual benefits and obligations which obviate the need for the ILEC to serve the development in order for the universal service goals to be met.²

Embarq witness Dickerson argues that the purpose of the COLR obligation will be satisfied through the competitive alternative voice services that will be available to the residents of Treviso Bay. Embarq witness DeChellis maintains that Comcast DVS will be available to every resident from their first day of occupancy, and that residents will have access to voice service from competing VoIP providers via the broadband service each resident will be required to purchase under the bulk agreement that the developer entered into with Comcast.

Treviso Bay agrees that it has entered into a Bulk Cable Television Service and Easement Agreement with Time Warner Cable (assumed by Comcast) to be the provider for cable television and high speed data service.³ In its response to Embarq's Amended Petition, on page 3, Treviso Bay explains:

Under the terms of the Bulk Services Agreement, Time Warner [now Comcast] is the provider for cable television and high speed data service. Local phone service otherwise provided by an LETC [Local Exchange Telecommunications Company] is not included in the Bulk Services Agreement. . . . The Bulk Services Agreement does not restrict or prohibit any resident of the Property from obtaining voice telephone services or satellite television services from a LETC or other provider. Each resident is free to choose their voice services and/or satellite television service provider, if any.

Treviso Bay maintains that the only services billed in bulk through the homeowners' association dues are those relating to cable (video) and high speed data service. Voice phone service, whether provided by Embarq, Comcast, or another provider, is not included in the bulk

¹ Embarq Florida, Inc.'s Prehearing Memorandum of Law, Filed February 13, 2007, Docket No. 060763-TL, In Re: Petition for waiver of carrier-of-last-resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc., p. 1.

² Embarq's Memorandum of Law, p. 5.

³ Respondent's Objection to Petitioner's Request For Confidential Classification Under Section 364.183(1), Florida Statutes, And Response to Petitioner's Petition For Waiver ("Treviso Bay Response"), Filed December 1, 2006, Docket No. 060763-TL, p. 3, ¶ 16.

services offered at Treviso Bay. The customer will be required to sign up for and will be individually billed for such voice phone service from the provider of the resident's choice.⁴

Treviso Bay argues that the availability of alternative competitive providers for voice service does not satisfy the intent of the Florida Legislature that universal service and COLR objectives be maintained through the ubiquitous nature of the LEC's network. Treviso Bay witness Wood testified that:

The fact that an alternative to Embarq's voice service may be available in the future does not change the public policy adopted by the Legislature in §364.025(1): "it is the intent of the Legislature that universal service objectives be maintained after the local exchange market is opened to competitively provided services. It is also the intent of the Legislature that during this transition period the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives." This approach ensures the availability of basic telecommunications service during the transition to fully competitive markets. The Legislature did *not* conclude that the existence of a current competitor (or, more to the point in this case, a potential competitor) for basic telecommunications service in a given area is sufficient to ensure that universal service objectives are maintained, and did not conclude that there is no need for the ILEC to serve as a COLR under these circumstances. Given the Legislature's clear policy objectives and its conclusions regarding how those objectives should be met (at least until January 1, 2009), the question of whether Treviso Bay residents will have an alternative provider for voice services in the future is moot.

Analysis

There are three questions to answer for this issue. One, will voice service from other providers be available to customers of Treviso Bay? Two, when will voice service from other providers be available to customers in Treviso Bay? Three, under what conditions will voice service from other providers be available to the customers of Treviso Bay? The answers to questions one and two are undisputed. Alternative choices for voice service will be available upon request to the residents of Treviso Bay once they move in. Residents will be able to obtain voice service utilizing VoIP technology from Comcast and other VoIP providers, in addition to wireless cellular service from several cellular service providers.

The contentious question is under what conditions voice service will be provided. Both parties agree that each resident in Treviso Bay will be able to obtain voice service using VoIP technology via Comcast's broadband service, which will be connected to every home. Embarq witness Dickerson contends that the availability of Comcast DVS to all the residents of Treviso Bay satisfies the purpose of the COLR obligation. Conversely, Treviso Bay witness Wood argues that Comcast DVS is not the same as Embarq's wireline basic local telecommunications service that defines universal service, in that Comcast is not required to provide DVS to any

⁴ Treviso Bay Response, p. 6, ¶ 18.

person making a request within a reasonable amount of time, nor is Comcast required to continue to provide DVS if it determines after the fact that it is not profitable or desirable to do so. Treviso Bay argues that Embarq is obligated to provide service under its COLR obligation pursuant to Section 364.025, Florida Statutes.⁵

To date, the Federal Communications Commission (FCC) has not decided whether VoIP service that is interconnected with the Public Switched Telephone Network is a telecommunications service or an information service under the 1996 Act. Further, the FCC/NARUC VoIP Consumer Fact Sheet delineates three special considerations for using VoIP and recommends that if someone is considering replacing traditional telephone service with VoIP, to be aware that (1) some VoIP service providers may have limitations to their 911 service, (2) some VoIP services don't work during power outages and the service provider may not offer backup power, and (3) VoIP providers may or may not offer directory assistance/white page listings.

Embarq witness DeChellis testified that he agreed that the service Comcast will offer in Treviso Bay is known as VoIP service and that VoIP is not the same as basic local exchange telecommunications service. In his testimony, witness DeChellis stated that he did not know whether Comcast's digital voice VoIP product provides the same access to 911 and relay services, or provides an alphabetical directory listing as Embarq's wireline voice service. The record was void of any documentation regarding the technical capabilities of Comcast's DVS. However, in June 2005, the FCC adopted rules that impose E911 obligations on providers of VoIP services that interconnect with the public switched telephone network.⁶ Comcast DVS would have to comply with the FCC's rules; thus, Comcast DVS would have E911 capabilities.

It is indisputable that voice service from other providers offering alternative choices including VoIP and wireless cellular service will be available to the residents living in the Treviso Bay development.

Conclusion

Based on the information in the record, we find that voice service from other providers using Voice over Internet Protocol technology and wireless cellular technology will be available on an individual customer basis at retail prices to the residents living within the Treviso Bay development at the time of each resident's occupancy.

⁵ Treviso Bay Development, LLC's Memorandum of Law, Filed February 13, 2007, Docket No. 060763-TL, p. 2.

⁶ Order No. FCC 05-116, released June 3, 2005, WC Docket No. 04-36 and WC Docket No. 05-196, In Re: IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers.

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?

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. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

Parties' Arguments

In its amended petition, Embarq agrees that the developer (Treviso Bay) has not entered into an exclusive agreement with Embarq or any other provider for voice service and that Treviso Bay residents are free to choose any provider for voice service.⁷ Embarq argues that because the Treviso Bay residents will receive their video and data services from a single provider (Comcast), it is extremely likely that Embarq will not be the voice provider of choice for a significant number of residents in Treviso Bay.⁸ Both parties agree that Treviso Bay executed a bulk agreement with Time Warner, which was assumed by Comcast, for the provision of data and video services to all residences within Treviso Bay, where all residents will be billed for the data and video services through their homeowners' association dues.

Embarq argues that because all of the residents will have Comcast broadband service paid for through their homeowners' association dues, and as a result, will have access to alternative voice services such as Comcast Digital Voice Service (DVS), Embarq's ability to obtain customers for its voice service will be limited. Embarq witness DeChellis testified that, "Comcast will have the ability to offer voice telephone services to the residents of this development via the same facilities used to provide video and data services. Comcast is actively marketing its 'Triple Play' of digital cable video, high-speed Internet and digital voice services throughout Collier County where this development is located." Witness DeChellis went on to describe the impacts on Embarq from Treviso Bay's agreement with Comcast:

With a 100 percent penetration of its video and data services to residents of Treviso Bay via its bulk agreement with the developer, and its ability to offer voice telephone services as an add-on, Comcast is in a strong position to garner a vast majority of the Treviso Bay residents' voice telephone services as well. Based on this scenario, if Embarq were required to place its facilities to provide service in this development, its potential revenues would be limited to only voice telephone services since Comcast has 100 percent penetration of video and data services through its bulk billing of these services, ultimately paid by the residents through their homeowners' dues. Embarq's voice telephone revenues would be further limited to those derived from a small percentage of customers who might

⁷ Embarq Florida, Inc.'s Amended Petition for Waiver, Filed December 13, 2006, p. 8.

⁸ Embarq's Amended Petition, p. 8.

choose not to subscribe to the voice services offered by Comcast as an add-on to their video and data services.

Embarq contends that Treviso Bay has entered into an agreement that limits its ability to obtain customers. Embarq states in paragraph 23, page 9, of its Amended Petition for Waiver that, "the existence of exclusive video and data arrangements and the availability of an alternative voice product from the exclusive data and video provider, which reduce the likelihood that Embarq will be able to obtain a sufficient number of voice customers to recoup the investment costs that it would incur to place the facilities necessary to serve Treviso Bay, constitute 'good cause' to relieve Embarq of its carrier of last resort obligations for the development under Section 364.025(6)(d)."

In its response to Embarq's Amended Petition, Treviso Bay agrees that Embarq is correct that Treviso Bay has entered into a Bulk Cable Television Service and Easement Agreement (Agreement) with Time Warner Cable, and under the terms of the Agreement, Time Warner (now Comcast) is the provider for cable television and high speed data service.⁹ However, Treviso Bay maintains that local voice phone service otherwise provided by a LEC is not included in the Agreement, nor does the Agreement restrict or prohibit any resident of the development from obtaining voice telephone services or satellite television services from a LEC or other provider.¹⁰ Each resident is free to choose their voice services and/or satellite television service provider, if any.¹¹

Treviso Bay maintains that the only services billed in bulk through the homeowners' association dues are those relating to cable and high speed data service. Voice phone service, whether provided by Embarq, Comcast, or another provider, is not included in the bulk services at Treviso Bay. The customer will be required to sign up for and will be individually billed for such voice phone service from the provider of the resident's choice.¹²

Analysis

Treviso Bay entered into a bulk agreement with Time Warner on August 8, 2005, for the provision of data and video services to all residences within Treviso Bay. After Treviso Bay executed the Bulk Services Agreement with Time Warner, Comcast obtained Time Warner's cable territory that includes the Treviso Bay development, and assumed the Bulk Services Agreement. The Bulk Services Agreement consists of a base offering of high speed data and video services that are paid for with fees collected through the residents' homeowners'

⁹ Respondent's Objection to Petitioner's Request For Confidential Classification Under Section 364.183(1), Florida Statutes, And Response to Petitioner's Petition For Waiver ("Treviso Bay Response"), In Docket No. 060763-TL, Filed December 1, 2006, p. 3, ¶ 16.

¹⁰Treviso Bay Response, p. 3, ¶ 16.

¹¹ Treviso Bay Response, p. 3, ¶ 16.

¹² Treviso Bay Response, p. 6.

association dues. The bulk services agreement between Treviso Bay and Comcast does not include voice service. Embarq asserts that Comcast has an alternative product allowing it to provide digital voice services over its high speed data facilities and actively markets this product in Collier County.¹³ Embarq reasons that given the bulk agreement with an alternative provider (Comcast) for data services (broadband Internet) billed through all Treviso Bay residents' homeowners' association dues, it is likely that a significant number of residents will choose a provider other than Embarq for their voice service.¹⁴ Hence, Embarq believes that its ability to obtain customers will be limited due to Treviso Bay's agreement with Comcast. Embarq is not precluded from providing video and data services to the residents in Treviso Bay, although it is unlikely that the residents would pay for video and data services from Embarq in addition to paying for like services from Comcast.

Conversely, Treviso Bay has also entered into another agreement that may increase Embarq's ability to obtain customers. Treviso Bay has executed an agreement with Devcon Security Services Corp. (Devcon) whereby Devcon will provide on-site monitoring of all security systems installed in the homes in the Treviso Bay development. The fees for monitoring the security systems, like the Bulk Services Agreement, will be collected from each resident through his homeowners' association dues. Each resident will pay for the security system monitoring service whether or not the home has a security system installed.

In its response to Staff's First Set of Interrogatories, No. 2.c., Treviso Bay was asked if monitoring for the security system will require a telephone line at each residence. In its response, Treviso Bay states, "Yes. Devcon has stated that the monitoring of the security systems is conducted through a telephone line at each residence." Treviso Bay further states that the security system can be monitored using wireless technology via VoIP service. In its Rider To Electronic Protection Service/Monitoring Agreement (Rider), Devcon recommends that each subscriber to Devcon's monitoring service employ an additional method of communication, such as standard telephone service, in addition to any wireless form of communication.

During Treviso Bay's cross-examination, witness DeChellis was questioned about Devcon's recommended form of communication for monitoring purposes. Witness DeChellis agreed that Devcon does not believe that monitoring an alarm service using VoIP technology is a comparable alternative. Subsequently, our staff asked witness 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?" Witness DeChellis responded, "I think if, if I was a customer reading this document [Devcon's Rider], I would have a lot of concerns about that." The record indicates that a prudent person signing the security system monitoring agreement with Devcon would consider obtaining a standard telephone line for monitoring purposes. Hence, it is possible that the agreement between Treviso Bay and Devcon for security system monitoring services will increase the likelihood that more residents will subscribe to Embarq's wireline telephone service.

¹³ Embarq's Amended Petition, p. 8.

¹⁴ Embarq's Amended Petition, p. 9.

The record also shows that from June 20, 2006, through July 19, 2006, Embarq sent five letters to Johnson Engineering (Treviso Bay's Engineering contractor) indicating that Embarq had reviewed the proposed plat and that telephone service would be provided based on the rules and regulations covered in Embarq's Local and General Exchange Tariff. Additionally, on August 10, 2006, Treviso Bay executed a Communication System Right of Way and Easement Deed for Embarq's benefit whereby Embarq was granted an easement at Treviso Bay for the construction, maintenance, expansion, replacement, and removal of a communication system that would serve Treviso Bay.¹⁵ Hence, the record indicates Treviso Bay granted the necessary easements and access to allow Embarq to install its facilities in the development.

The record suggests that due to the Agreement between Treviso Bay and Comcast, it is likely that Embarq will obtain fewer subscribers in the Treviso Bay development than without such an agreement. However, Embarq did not proffer any testimony or evidence to establish that its ability to provide its basic local telecommunications service is restricted. Nothing in the record that shows Treviso Bay has entered into any agreement or taken any action that restricts or limits Embarq from installing its network in the Treviso Bay developments and providing service upon request to the residents of Treviso Bay. Conversely, the record indicates 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 development.

Conclusion

Based 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.

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?

We find that that Treviso Bay's existing agreements do not make it uneconomic for Embarq to provide the requested communications service to the customers of Treviso Bay

The negative net present value (NPV) analysis at the foundation of Embarq's case relies on an assumption regarding market penetration that lacks supporting evidence. In addition, the analysis uses per-household revenue calculations based on unweighted averages for customers in the Naples market. These assumptions, critical to Embarq's conclusion on this issue, are easily manipulated to produce a positive NPV result using evidence in the record. The fragile assumptions underlying the negative NPV analysis yield conclusions that fail to make a substantive case that entry into Treviso Bay will be inherently uneconomic. For these reasons, we find that Embarq has failed to meet its burden of proof on this issue.

In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

¹⁵ Treviso Bay's Response, p. 4, ¶ 17.

Parties' Arguments

In direct testimony, Embarq Florida, Inc. (Embarq) witness DeChellis testifies the existence of an exclusive agreement between Treviso Bay Development, LLC (Treviso Bay) and Comcast, Inc., to provide video and data services to residents of Treviso Bay compromises Embarq's revenue potential in the development. Witness DeChellis testifies, "Based on this scenario, if Embarq were required to place its facilities to provide service to this development, its potential revenues would be limited to only voice telephone services since Comcast has 100 percent penetration of video and data services through its bulk billing of these services, ultimately paid by the residents through their homeowners' dues."

Witness DeChellis projects that Embarq's voice telephone revenues will be insubstantial because Treviso Bay residents will have an option to accept voice service from Comcast through a Voice over Internet Protocol (VoIP) arrangement. Witness DeChellis testifies, "Embarq's voice telephone revenues would be further limited to those derived from a small percentage of customers who might choose not to subscribe to the voice services offered by Comcast as an add-on to their video and data services." Based on the existence of an agreement between Comcast and Treviso Bay for data and video services and on his belief that a majority of Treviso Bay residents would subscribe to Comcast's VoIP service, witness DeChellis offers a confidential projection that a minority of the eventual 1200 households would accept wireline voice services from Embarq, which he describes as the "penetration rate" the company can expect.

Witness DeChellis acknowledges Treviso Bay's policy regarding alarm system monitoring may affect the penetration rate in the development, but offered no modifications to his estimate. According to the terms of a security system monitoring agreement between residents of Treviso Bay and the developer, each resident will be assessed a fee, payable to the security firm through homeowner dues, whether or not the resident has an alarm system. A rider to the monitoring agreement holds the security company harmless if residents use wireless telephone or VoIP service as the means of connecting an alarm system with the security monitoring company. Asked if the terms of the security monitoring agreement may lead residents to ask to have additional land lines installed, witness DeChellis responded, "I think if, if I was a customer reading this document, I would have a lot of concerns about that."

Witness DeChellis' penetration rate projection is the foundation for Embarq witness Dickerson' contention that Embarq can not provide voice service economically to Treviso Bay residents: "Key to the analysis is the expected [redacted]% voice service penetration discussed in the Testimony of Mr. DeChellis. The revenue assumed in my analysis is likely optimistic at best in that it assumes this [redacted]% of customers who purchase Embarq's services will purchase higher end bundles of voice services at the average Embarq penetration experience for the overall Naples market."

In an exhibit sponsored by Embarq witness Dickerson, using witness DeChellis' penetration rate, and projecting a fixed revenue-per-subscriber figure that is confidential, witness Dickerson contends that the revenue that will result from an investment of \$1.3 M, will be,

“predictably, grossly insufficient for Embarq to recover its capital costs and incremental operating expenses.”

Witness Dickerson testifies that in his projected cash flow analysis for Treviso Bay (EXH 21), “Both the revenue per customer buying stand alone residential service and an average amount of a la carte features, as well as the revenue per customer purchasing a bundle, were set based on the actual average experience for each from the Naples market.” (TR 64)

Treviso Bay witness Wood rejects the underpinnings of Embarq’s economic projections and the company’s assertion that its predicted economic losses validate a waiver of carrier-of-last-resort obligations under the “good cause shown” exemption in Section 364.025(6)(d), Florida Statutes. “. . . Embarq suggests that the mere existence of an ‘exclusive data and video arrangement’ would not constitute good cause, but that the combination of (a) an ‘exclusive data and video arrangement’ *and* (b) ‘the availability of an alternative voice product from the exclusive data and video provider’ *and* (c) a demonstration that the combination of these two circumstances would reduce the likelihood that it would be economic for the ILEC to provide basic telecommunications service, would meet the standard.”

On specific issues, related to Embarq’s financial assessment of the Treviso Bay development, witness Wood questions the validity of the penetration rate offered by Embarq witness DeChellis. Using a confidential exhibit, witness Wood refers to 18 developments to which Embarq provides service in the face of competition from VoIP providers. In each instance, witness Wood testifies, the percentage of addresses served by Embarq is greater than the penetration rate proposed by witness DeChellis.

In addition, witness Wood cites a second confidential exhibit showing Embarq’s penetration rate in six additional developments where cable internet phone service is available. In the six examples cited in the confidential exhibit, in two instances Embarq’s penetration rate is lower than that testified to by witness DeChellis and in four instances, Embarq’s penetration is more than double the rate projected by witness DeChellis. Witness Wood concludes, “These results are not consistent with a conclusion that the presence of ‘cable internet phone service’ in a given area represents an accurate predictor of Embarq’s market share.”

Embarq witness Dickerson agrees that while witness DeChellis’ estimated penetration rate may not be “precisely the ‘right’ answer,” because it is a projection, an exact number is not necessary. Witness Dickerson testifies, “Obviously Embarq is convinced of this negative result, or it would have gladly gone forward with the construction and operation of a profitable network in Treviso Bay.”

Treviso Bay witness Wood insists the projection of a negative economic result cannot be extrapolated based on the evidence or testimony provided by Embarq witnesses DeChellis and Dickerson: “there is no correlation there between Embarq’s reported market share and even the existence at all of a cable company providing voice service. So there may be some factors that can be used to accurately predict what Embarq’s market share would likely be, but based on any statistical measure, the presence of a cable company offering VoIP service is not one of those factors.”

Analysis

Some economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast, but we do not believe evidence presented by Embarq witnesses DeChellis and Dickerson is sufficiently rooted in objective statistical or fiscal analysis to be dispositive.

Witness DeChellis predicts a low percentage of Treviso Bay residents will choose wireline voice service from Embarq but offers no basis for his assumption. 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. It remains, however, difficult to reconcile witness DeChellis' projected penetration rate for Treviso Bay with any other evidence in the record. It also appears Embarq witness DeChellis fails to account for wireline demand that may result from Treviso Bay's insistence that all residents pay for security system monitoring, whether or not they use a system, and that a wireline connection is the only means by which the security company will accept liability for system failures .

The task of reconciling witness DeChellis' expected penetration rate in Treviso Bay is compounded by inconsistent statements by Embarq witness Dickerson on the relevance of what percentage of Treviso Bay residents Embarq expects to serve. Initially, Embarq witness Dickerson appears to place great stock in witness DeChellis' projection, noting in direct testimony, "Key to the analysis is the expected [redacted]% voice service penetration discussed in the Testimony of Mr. DeChellis."

Subsequently, witness Dickerson appears to infer the actual penetration rate, previously described as "key" to his analysis, may not be as significant: "And I would point out that there is a wide range of penetrations and prices that produce the same result. So handwringing (sic) over what the precise penetration of our dismal amount of sales is going to be, you can nearly double what we believe the ceiling is for our likely sales and still reach a conclusion that this is an uneconomic venture for Embarq." Finally, witness Dickerson testifies, "I would emphasize again, as I did in my summary, that you can, you can put a higher, more optimistic view for sales of our voice-only service into my net present value analysis and still conclude that it's an uneconomic venture for Embarq."

This testimony appears to contradict responses provided by Embarq in discovery, in which the company acknowledges changing certain assumptions may result in a positive net present value (NPV) analysis. Embarq was asked to adjust witness Dickerson's net present value analysis to project serving 50 percent of Treviso Bay residents with all customers purchasing some form of a bundled voice package and, separately, to adjust the analysis to assume serving 75 percent of Treviso Bay households, with each household purchasing a bundled voice package.

In both instances, the witness responded, “While the mathematical result of the postulated . . . penetration for customers and 100% purchase of bundles yields a positive cumulative NPV, Embarq denies that this mathematical exercise yields a positive NPV relative to Embarq’s petition given what Embarq believes to be an effectively zero probability of the assumed Embarq customer and voice bundle penetration assumptions occurring.” Thus it appears that despite Embarq witness Dickerson’s assertions to the contrary, a positive cash flow result is possible using different values for penetration rates and per-customer revenues.

In addition to uncertainty surrounding Embarq witness DeChellis’ penetration rate projection, questions arise stemming from Embarq witness Dickerson’s testimony regarding revenue streams on a per-customer basis. Witness Dickerson testified that in his projected cash flow analysis for Treviso Bay he relies on per-customer revenues that “were set based on the actual average experience” for the Naples market.

Marketing materials from the Treviso Bay development indicate the least expensive dwelling unit prices will be between \$595,000 and \$725,000, while custom home prices will begin at \$4.5 million excluding the price of a lot, which have a range of \$830,000 to \$930,000. There are no per-capita income figures for the Naples area in the record of this proceeding, however, it would appear based on home prices alone that residents of Treviso Bay will be part of an economic demographic distinct from what is average for the Naples market. A prudently constructed cash flow analysis for Treviso Bay should be modeled on developments comparable in value to Treviso Bay in the Naples area to bring economic assumptions more closely into line with realities of the existing market. In addition, the weighted average per-customer revenue figure used in Embarq witness Dickerson’s NPV analysis reflects the provision of a single line to each of the residences Embarq projects it will serve. This is a conservative assumption. Record evidence shows residents will be biased toward using a land line for alarm service monitoring because they are obligated to pay for the service whether or not they use the service and because the monitoring company waives liability if residents use wireless or VoIP technologies for monitoring.

Conclusion

The negative net present value (NPV) analysis at the foundation of Embarq’s case relies on an assumption regarding market penetration that lacks supporting evidence. In addition, the analysis uses per-household revenue calculations based on unweighted averages for customers in the Naples market. These assumptions, critical to Embarq’s conclusion on this issue, are easily manipulated to produce a positive NPV result using evidence in the record. The fragile assumptions underlying the negative NPV analysis yield conclusions that fail to make a substantive case that entry into Treviso Bay will be inherently uneconomic. For these reasons, Embarq has failed to meet its burden of proof on this issue.

Issue 4: Has Embarq, formerly known as Sprint-Florida Incorporated, taken any action that would preclude Embarq from obtaining a waiver of its carrier-of-last-resort obligation in Treviso Bay?

In this case of first impression, we are not persuaded that Embarq's behavior in dealing with Treviso Bay should be considered as valid grounds for denying Embarq the ability to prosecute its petition for waiver. In reaching this conclusion we considered the arguments of the parties and the record as reflected below.

Parties' Arguments

Treviso Bay witness Wood testified that for the past two years, Treviso Bay has requested that Embarq provide basic telecommunications service to Treviso Bay and to specific subdivisions within the development. Witness Wood also states that in each instance, Embarq has stated that "telephone service will be provided based on the rules and regulations covered in our Local and General Exchange Tariff, approved and on file with the Florida Public Service Commission." Treviso Bay asserts that based on Embarq's representations, it cannot now renege on those commitments. Treviso Bay argues that once it requested service from Embarq, Embarq was bound to provide those services subject to the terms of the tariff. Treviso Bay claims that it would be unsound public policy to "allow any utility to commit to provide service pursuant to its tariff and then attempt to escape those tariff obligations."

Embarq contends that Treviso Bay's arguments are based on the principles of estoppel and detrimental reliance. Embarq explains that to establish estoppel, a party must show that: "1) there was a representation of material fact that is contrary to a later asserted position; 2) there was a reliance on that representation; and 3) the reliance was detrimental to the party claiming the estoppel." (Embarq ML 8, *citing Mandarin Paint and Flooring v. Potura Coating*, 744 So. 2d 482 (Fla. 1st DCA 1999)). Embarq argues that while Treviso Bay has asserted that it has relied on Embarq's representations, Treviso Bay has failed to allege that it suffered any detriment as a result of that reliance.

Embarq argues that estoppel and detrimental reliance are civil law concepts based on fraud and contract law, which are outside our jurisdiction. Embarq also contends that such arguments are irrelevant to its request for waiver of its COLR obligation, which is governed by Section 364.025, Florida Statutes. Finally, Embarq states that to the extent Treviso Bay believes Embarq has suffered damages based on Embarq's actions, the proper remedy is a civil circuit court action for breach of contract.¹⁶

¹⁶ Embarq points out that all the letters relied on by Treviso Bay are unsigned and therefore argues that any contract for service from Embarq was never consummated by the parties.

Treviso Bay contends that because of Embarq's representations during the past two years, Embarq is precluded from obtaining a waiver of its COLR obligation.¹⁷ Treviso Bay contends that it would be unsound public policy to allow Embarq to commit to provide service pursuant to its tariff and then seek to escape those tariff obligations.¹⁸

Analysis

We recognize Treviso Bay's arguments that it believed that build-out of the telecommunications infrastructure by Embarq was not in doubt. We further believe that Embarq should have been more forthright and timelier in expressing its position to Treviso Bay.

We also agree that a validly filed tariff "constitutes the contract of carriage between the parties." *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 859 (Fla. 2002). Nevertheless, "contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts." *H. Miller and Sons v. Hawkins*, 373 So. 2d 913, 914 (Fla. 1979).

Conclusion

In this case, the Legislature has determined that in some instances a carrier-of-last-resort can be relieved of its obligation to serve upon a showing of good cause. Moreover, this is a case of first impression in applying section 364.025(6)(b) or (d). Therefore, we conclude that it is permissible for Embarq to seek a waiver of its COLR obligations despite its representations to Treviso Bay.

Issue 4A: Is Embarq obligated to provide service to Treviso Bay by its tariff or by holding itself out as willing and able to provide service?

We hold that Embarq is required to provide service in accordance with its tariff and applicable law, unless the conditions set forth in either section 364.025(6)(b) or (d), Florida Statutes, have been met. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected above in the analysis for Issue 4.

¹⁷ Treviso Bay argues that four of the five letters sent by Embarq were sent after the Legislature enacted the 2006 amendments to Section 364.025, Florida Statutes. However, the amendments to Section 364.025, Florida Statutes, became effective June 7, 2006, which was before the letters were sent to Treviso Bay. Laws of Florida 2006-80.

¹⁸ While Treviso Bay asserted that it reasonably relied on Embarq's commitments, it provided no support for that assertion. In fact, it appears that Treviso Bay failed to take even the slightest objective action in signing and returning the service availability letters upon which its claim is based.

Issue 5: Has Embarq demonstrated "good cause" under Section 364.025(6)(d) for a waiver of its carrier-of-last-resort obligation in Treviso Bay?

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, and we therefore deny Embarq's petition for a waiver of its carrier-of-last-resort obligation in Treviso Bay. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected in our treatment of Issues 1 through 4(a), and as further reflected below.

Analysis

Embarq's case for a waiver of its carrier-of-last-resort obligation in Treviso Bay arises from two sets of circumstances. First, Treviso Bay has entered into agreements with Comcast for the provision of data and video services to the future residents of Treviso Bay. Second, Comcast retail digital voice service allegedly will be available to residents of Treviso Bay who wish to subscribe to it on the day that they move in.

Embarq's petition for relief of its COLR obligation is grounded in the consequences that allegedly arise from the above circumstances. These alleged consequences are as follows:

- The existence of the bulk data and video agreement with Comcast ensures Comcast virtually 100 percent penetration for these services, and it means that Embarq can anticipate effectively zero revenue from Treviso Bay customers for its data and video offerings.
- Because Comcast will have 100 percent penetration for its data and video services, it will have the advantage in marketing its digital voice service as an add-on to its bulk data and video service. This advantage will detrimentally affect Embarq's ability to obtain customers for the voice-only services that Treviso wants Embarq to provide.
- Embarq expects a low penetration rate for its services and, as a result, will not be able to realize sufficient revenues to cover the costs it will incur to stand ready as the COLR provider of voice services to Treviso Bay.

These circumstances and consequences were addressed within the framework of Issues 1 through 4A to assess Embarq's attempt to demonstrate a showing of "good cause" under Section 364.025(6)(d), Florida Statutes. Based on the evidence of record, the following summarizes our determinations with respect to each issue.

Issue 1

Voice service via Voice over Internet Protocol (VoIP) technology and wireless cellular technology will be available to the residents of Treviso Bay at the time of each resident's occupancy. Typically, people anywhere in Florida have access to voice service via wireless

technology and VoIP services (if they have broadband connections.) We conclude that the availability of these services, although a factor, is not sufficient to warrant a COLR waiver.

Issue 2

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 of Treviso Bay. Treviso Bay has entered into bulk agreements for video and broadband with Comcast. However, these agreements do not restrict or limit Embarq's ability to provide voice service to the residents of Treviso Bay. Prior to the spin-off of its wireline services, we note that Sprint made attempts to market its video, wireline, and broadband services to Treviso Bay. Sprint was apparently willing to execute a revenue sharing arrangement with Treviso Bay. Were Sprint's efforts successful, then Embarq would have been the beneficiary as the successor to Sprint, just as Comcast was as the successor to Time Warner.

Issue 3

Embarq has not met its burden of proof that it will be uneconomic to provide voice telephone service to Treviso Bay. Because Comcast has exclusive agreements with Treviso Bay for its video and broadband services, Embarq believes that it will not be in its economic interests to invest in a network to provide voice services to the residents of Treviso Bay. Embarq believes that this factor, coupled with the other circumstances at Treviso Bay, warrant relief of its COLR obligations. This "uneconomic" argument appears to be the core of Embarq's petition. However, due to the fragile assumptions underlying its NPV analysis, we conclude that Embarq failed to make a substantial case that its entry into Treviso Bay will be inherently uneconomic. 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.

Issues 4 and 4A

Embarq can seek a waiver of its COLR obligations despite its prior representations to Treviso Bay.

Conclusion

Issue 5 is a fall-out of Issues 1 through 4A, and only addresses whether Embarq has established "good cause" for a waiver of its COLR obligation in Treviso Bay. Having reviewed the affirmative case presented by Embarq based on the 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.

By denying the petition we maintain Embarq's status as the carrier-of-last-resort to Treviso Bay. Our decision does not preclude Embarq from using the tools that may be traditionally available to it under other existing rules in addressing the alleged problem of uneconomic provisioning of service.

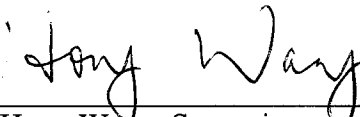
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Embarq Florida, Inc.'s petition for waiver of its carrier-of-last-resort obligations in the Treviso Bay subdivision in Collier County is hereby *denied*.

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

By ORDER of the Florida Public Service Commission this 12th day of April, 2007.

ANN COLE
Commission Clerk

By: 

Hong Wang, Supervisor
Case Management Review Section

(SEAL)

PKW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.