

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint regarding BellSouth Telecommunications, Inc.'s failure to provide service on request in accordance with Section 364.025(1), F.S., and Rule 25-4.091(1), F.A.C., by Lennar Homes, Inc.

DOCKET NO. 060732-TL
ORDER NO. PSC-07-0335-PAA-TL
ISSUED: April 17, 2007

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER FINDING LETTERS IN COMPLIANCE
WITH SECTION 364.025, FLORIDA STATUTES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code. The Commission has authority over this matter under Chapter 364, Florida Statutes, generally, and Section 364.025, Florida Statutes, specifically.

Background

Lennar's Complaint

On November 7, 2006, Lennar Homes, Inc. (Lennar) filed a Complaint against BellSouth Telecommunications, Inc. (now AT&T Florida, hereinafter referred to as "AT&T") for alleged failure to provide service to three properties in alleged violation of its Carrier of Last Resort (COLR) obligation. The gravamen of the Lennar's complaint was that AT&T, as a condition of service, was requiring Lennar to execute a letter that contained unlawful requirements in violation of AT&T's COLR obligations.

COLR Obligation: Automatic Waiver and Discretionary Relief

The COLR obligation finds its statutory expression in Section 364.025, Florida Statutes. In 2006, the Legislature amended the statute by adding Section 364.025(6), a part of which defines four conditions¹ under which an incumbent local exchange company is "automatically

¹ Section 364.025(6)(b) 1.- 4., Florida Statutes.

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relieved of its obligations”² to serve as COLR for certain multitenant business or residential properties. Essentially, these conditions define the types of developer arrangements with “communication service providers”³ that amount to *per se* justification for relief of its COLR obligation.

The statutory revision also provided that an ILEC may seek a waiver of its COLR obligations from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property.⁴ In other words, the statute contemplates that there may be conditions that do not trigger automatic relief from the COLR obligation, but do justify discretionary waiver of the COLR obligation by this Commission. The statute, however, does not establish explicit criteria for discretionary waiver.

Lennar’s Objection to the Letter

As noted above the basis of Lennar’s complaint was that AT&T, as a condition of service, was requiring Lennar to execute a letter that contained unlawful requirements in violation of AT&T’s COLR obligations. Lennar contends that the letter indicates that if any affiliated party, homeowner, or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or bulk service agreement with a provider of any voice, data, or video service, within 18 months of first occupancy, Lennar will be responsible to AT&T for any “unrecovered costs associated with the engineering and installation of the initial facilities.” Lennar argues in part that an ILEC may not lawfully link provision of COLR service to the developer’s agreements with video providers, except to the extent those agreements trigger automatic relief of the COLR obligation under statute.

Good Faith Negotiations

As a result of good faith negotiations between the parties, AT&T has agreed to provide service to the three properties and that aspect of the complaint is now moot. With respect to the letter in question, the parties also attempted to resolve their differences over the form, purpose, content, timing, number and types of letters that AT&T could permissibly use in communicating with developers with respect to service for their projects.

On February 22, 2007, as a result of these discussions, the parties submitted proposed letters for review and also position papers on the policies involved in this docket.⁵ AT&T

² This explanatory language is found in Section 364.025(6) (d), Florida Statutes.

³ As define by Section 364.025(6) (a) 2, Florida Statutes, "(c)ommunications service provider" means any person or entity providing communications services, any person or entity allowing another person or entity to use its communications facilities to provide communications services, or any person or entity securing rights to select communications service providers for a property owner or developer.

⁴ Section 364.025(6)(d), Florida Statutes.

⁵ This Order addresses only the letters submitted by AT&T.

changed its approach by proposing two letters. The first letter would directly inquire into the existence of conditions that would trigger an automatic waiver of its COLR status as contemplated under Section 364.025(6), Florida Statutes. For ease of reference we refer to this letter as the "COLR Letter." The final version⁶ of the COLR Letter is attached as Attachment A and is to be considered a part of the body of this order.

The second letter is directed toward network planning and information that might justify discretionary waiver of its COLR obligation. For ease of reference we refer to this letter as the "Network Planning Letter." It is attached as Attachment B and is to be considered a part of the body of this order.

Analysis

The issue before us is whether AT&T COLR Letter and Network Planning Letter comply with Section 364.025, Florida Statutes. We find that both comply.

COLR Letter

The COLR Letter inquires directly and specifically into the conditions for automatic waiver contained in Section 364.025(6)(b)1-4, Florida Statutes. The letter does not seek any information on video or data services, or marketing agreements as did the letter that sparked Lennar's complaint. This focus on the conditions for automatic waiver avoids conflating communications relating to automatic waiver of the COLR obligation, discretionary waiver of the COLR obligation and network planning, which are each distinct areas of inquiry.

The distinction between these areas of inquiry must remain clear to avoid counterproductive uncertainty for both the developer and the ILEC. For example, an overly broad or inartful inquiry by the ILEC can leave the developer uncertain about the ILECs intentions with respect to its COLR's obligation. On the other hand, inadequate inquiry by the ILEC or inadequate response by the developer can leave the ILEC uncertain in critical areas of network planning. Obviously, it is in the best interest of the ILEC and the developer to communicate to facilitate timely mutual expectations. The COLR Letter appears to be an appropriate step in this direction.

For the above reasons, we conclude that the COLR letter complies with Section 364.025(6)(b), Florida Statutes.

Network Planning Letter

We note that we are in the early stages of implementing Section 364.025(6)(d), Florida Statutes, which became law on July 1, 2006. At this stage it would be premature and perhaps counterproductive to subject the Network Planning Letter to heavy review. Rather, we believe

⁶ BellSouth submitted an updated version of the letter on or about March 13, 2007.

it's sufficient to ensure that the letter is clear and contains no statements that appear to violate the statute. This is the focus of our review.

The Network Planning Letter proposed by AT&T seeks information to,

“(1) assist AT&T Florida (AT&T) in network planning for the Development and (2) allow AT&T Florida to determine if circumstances exist that allow AT&T Florida to petition the Florida Public Service Commission to be relieved of its [COLR] obligation to provide basic local telecommunications service, under Section 364.025(6)(d), Florida Statutes.”

The Network Planning Letter first seeks this information through Yes/No answers; to the extent more is needed, the letter request only general information. If the Developer contends that the requested information is confidential, AT&T says it will not share such designated information with third parties. The Network Planning Letter also states why AT&T needs the information is and how it will be used. More importantly, the letter does not condition AT&T's COLR obligation on a response to the letter, although a response, if any, may lead AT&T to seek a discretionary waiver.

We thus find that the Network Planning Letter is clear and does not contain statements in violation of the statute. We therefore find the AT&T's Network Planning Letter complies with Section 364.025(6)(d), Florida Statutes.

Conclusion

For the reasons provided above, we find that both COLR letter and the Network Planning Letter of AT&T, as reflected respectively in Attachments A and B, are in compliance with AT&T's COLR obligation as established in Section 364.025, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T Florida's COLR Letter, attached as Attachment A, is hereby found to comply with Section 364.025, Florida Statutes. It is further,

ORDERED by the Florida Public Service Commission that AT&T Florida's Network Planning Letter, attached as Attachment B is hereby found to comply with Section 364.025, Florida Statutes. It is further,

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

ORDERED by the Florida Public Service Commission that that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 17th day of April, 2007.



ANN COLE
Commission Clerk

(S E A L)

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This

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petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 8, 2007.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

DRAFT 3/8/2007

Sender's Name

Deleted: 2/20

Sender's Address

Sender's Phone

Sender's email

Sender's Fax

(Enter Today's Date)

(Enter Recipient's Name) (Must be Legal Entity Name of Property Owner/Developer)

Attn: (Enter Name of Authorized Rep of Recipient)

(Enter Recipient's Address)

RE: (Enter Project Name/Phase of Project/Location)

Dear (Enter Authorized Rep Name):

It is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's ("AT&T Florida") understanding that (Company Name) is developing the above development (the "Development") located in AT&T Florida's franchised service area. AT&T Florida looks forward to building a successful relationship that will enable you and the occupants at the Development to enjoy AT&T Florida's full panoply of services, which may include voice, data and video. If at any time I can answer questions about AT&T Florida and the services that may be available to the Development, please feel free to contact me.

As with any successful relationship, however, AT&T Florida needs to understand the facts and circumstances of providing services at the Development. Thus, before we can proceed with plans to serve the Development, we are requesting information to enable AT&T Florida to decide whether circumstances exist that impact AT&T Florida's "carrier of last resort" (or "COLR") obligation to provide basic local exchange telecommunications service under Section 364.025, Florida Statutes, attached as Attachment A. You may also receive a second letter asking a few additional questions about the circumstances of providing other services at the Development.

1. Please indicate if the owner, developer, condominium association, homeowners' association or any other entity having ownership of control over the Development has entered into any exclusive service arrangements with a communications service provider other than AT&T Florida, such that AT&T Florida will not be permitted to install its facilities at the Development to provide voice service.

Yes _____ No _____

If no, are such arrangements planned? Yes _____ No _____

2. Please indicate if the owner, developer, condominium association, homeowners' association or any other entity having ownership of control over the Development has entered into arrangements with a communications service provider other than AT&T Florida, where charges

for voice service provided by the other provider will be collected by any of those parties from occupants or residents at the Development in any manner, for example, via rent, fees, or dues.

Yes ___ No ___

If no, are such arrangements planned? Yes ___ No ___

3. Please indicate if the owner, developer, condominium association, homeowners' association or any other entity having ownership of control over the Development has entered into an agreement with a communications service provider other than AT&T Florida to accept incentives or rewards, which are, contingent upon provision of voice service at the Development by the other provider to the exclusion of AT&T Florida or upon restriction or limitation of AT&T Florida's access to the Development.

Yes ___ No ___

If no, are such arrangements planned? Yes ___ No ___

4. Will AT&T Florida be restricted in any way from providing voice service at the Development?

Yes ___ No ___

If the answer above is "yes," please explain, in general terms, how AT&T Florida will be restricted: _____

Please provide responses, signed by an authorized representative of (Company Name), to the address indicated above by (Date). If AT&T Florida believes that your responses indicate that conditions exist at the Development that would provide the basis for relief of AT&T Florida's COLR obligation under Section 364.025(6), Florida Statutes, which would then impact AT&T Florida's plans to serve the Development, you will be notified. If you have any questions, please call (###-###-####).

Sincerely,

AT&T Florida

(Owner/Developer Company)

Signed by: _____

(Authorized Representative)

Printed Name: _____

Title: _____

Date: _____

Deleted: arrangements

Deleted: that grant

Deleted: to any of those parties

Attachment A

364.025, Florida Statutes - Universal service.--

(1) For the purposes of this section, the term "universal service" means an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas. 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. Until January 1, 2009, each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory.

(2) The Legislature finds that each telecommunications company should contribute its fair share to the support of the universal service objectives and carrier-of-last-resort obligations. For a transitional period not to exceed January 1, 2009, the interim mechanism for maintaining universal service objectives and funding carrier-of-last-resort obligations shall be established by the commission, pending the implementation of a permanent mechanism. The interim mechanism shall be applied in a manner that ensures that each competitive local exchange telecommunications company contributes its fair share to the support of universal service and carrier-of-last-resort obligations. The interim mechanism applied to each competitive local exchange telecommunications company shall reflect a fair share of the local exchange telecommunications company's recovery of investments made in fulfilling its carrier-of-last-resort obligations, and the maintenance of universal service objectives. The commission shall ensure that the interim mechanism does not impede the development of residential consumer choice or create an unreasonable barrier to competition. In reaching its determination, the commission shall not inquire into or consider any factor that is inconsistent with s. 364.051(1)(c). The costs and expenses of any government program or project required in part II of this chapter shall not be recovered under this section.

(3) If any party, prior to January 1, 2009, believes that circumstances have changed substantially to warrant a change in the interim mechanism, that party may petition the commission for a change, but the commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances, including that the provider's customer population includes as many residential as business customers. The commission shall act on any such petition within 120 days.

(4)(a) Prior to January 1, 2009, the Legislature shall establish a permanent universal service mechanism upon the effective date of which any interim recovery mechanism for universal service objectives or carrier-of-last-resort obligations imposed on competitive local exchange telecommunications companies shall terminate.

(b) To assist the Legislature in establishing a permanent universal service mechanism, the commission, by February 15, 1999, shall determine and report to the President of the Senate and the Speaker of the House of Representatives the total forward-looking cost, based upon the most recent commercially available technology and equipment and generally accepted design and placement principles, of providing basic local telecommunications service on a basis no greater than a wire center basis using a cost proxy model to be selected by the commission after notice and opportunity for hearing.

(c) In determining the cost of providing basic local telecommunications service for small local exchange telecommunications companies, which serve less than 100,000 access lines, the commission

shall not be required to use the cost proxy model selected pursuant to paragraph (b) until a mechanism is implemented by the Federal Government for small companies, but no sooner than January 1, 2001. The commission shall calculate a small local exchange telecommunications company's cost of providing basic local telecommunications services based on one of the following options:

1. A different proxy model; or
2. A fully distributed allocation of embedded costs, identifying high-cost areas within the local exchange area the company serves and including all embedded investments and expenses incurred by the company in the provision of universal service. Such calculations may be made using fully distributed costs consistent with 47 C.F.R. parts 32, 36, and 64. The geographic basis for the calculations shall be no smaller than a census block group.

(5) After January 1, 2001, a competitive local exchange telecommunications company may petition the commission to become the universal service provider and carrier of last resort in areas requested to be served by that competitive local exchange telecommunications company. Upon petition of a competitive local exchange telecommunications company, the commission shall have 120 days to vote on granting in whole or in part or denying the petition of the competitive local exchange company. The commission may establish the competitive local exchange telecommunications company as the universal service provider and carrier of last resort, provided that the commission first determines that the competitive local exchange telecommunications company will provide high-quality, reliable service. In the order establishing the competitive local exchange telecommunications company as the universal service provider and carrier of last resort, the commission shall set the period of time in which such company must meet those objectives and obligations.

(6)(a) For purposes of this subsection:

1. "Owner or developer" means the owner or developer of a multitenant business or residential property, any condominium association or homeowners' association thereof, or any other person or entity having ownership in or control over the property.
2. "Communications service provider" means any person or entity providing communications services, any person or entity allowing another person or entity to use its communications facilities to provide communications services, or any person or entity securing rights to select communications service providers for a property owner or developer.
3. "Communications service" means voice service or voice replacement service through the use of any technology.

(b) A local exchange telecommunications company obligated by this section to serve as the carrier of last resort is not obligated to provide basic local telecommunications service to any customers in a multitenant business or residential property, including, but not limited to, apartments, condominiums, subdivisions, office buildings, or office parks, when the owner or developer thereof:

1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;
2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;

3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or

4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property.

(c) The local exchange telecommunications company relieved of its carrier-of-last-resort obligation to provide basic local telecommunications service to the occupants or residents of a multitenant business or residential property pursuant to paragraph (b) shall notify the commission of that fact in a timely manner.

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

(e) If all conditions described in subparagraphs (b)1.-4. cease to exist at a property, the owner or developer requests in writing that the local exchange telecommunications company make service available to customers at the property and confirms in writing that all conditions described in subparagraphs (b)1.-4. have ceased to exist at the property, and the owner or developer has not arranged and does not intend to arrange with another communications service provider to make communications service available to customers at the property, the carrier-of-last-resort obligation under this section shall again apply to the local exchange telecommunications company at the property; however, the local exchange telecommunications company may require that the owner or developer pay to the company in advance a reasonable fee to recover costs that exceed the costs that would have been incurred to construct or acquire facilities to serve customers at the property initially, and the company shall have a reasonable period of time following the request from the owner or developer to make arrangements for service availability. If any conditions described in subparagraphs (b)1.-4. again exist at the property, paragraph (b) shall again apply.

(f) This subsection does not affect the limitations on the jurisdiction of the commission imposed by s. 364.011 or s. 364.013.

History.--s. 7, ch. 95-403; s. 18, ch. 97-100; s. 1, ch. 98-277; s. 1, ch. 99-354; s. 1, ch. 2000-289; s. 2, ch. 2000-334; s. 4, ch. 2003-32; s. 2, ch. 2006-80.

DRAFT 2/20/2007

Sender's Name

Sender's Address
Sender's Phone
Sender's email
Sender's Fax

(Enter Today's Date)

(Enter Recipient's Name) (Must be Legal Entity Name of Property Owner/Developer)

Attn: (Enter Name of Authorized Rep of Recipient)

(Enter Recipient's Address)

RE: (Enter Project Name/Phase of Project/Location)

Dear (Enter Authorized Rep Name):

It is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's ("AT&T Florida") understanding that (Company Name) is developing the above development (the "Development") located in AT&T Florida's franchised service area. AT&T Florida looks forward to building a successful relationship that will enable you and the occupants at the Development to enjoy AT&T Florida's full panoply of services, which may include voice, data and video. If at any time I can answer questions about AT&T Florida and the services that may be available to the Development, please feel free to contact me.

As with any successful relationship, however, AT&T Florida needs to understand the facts and circumstances of providing services at the Development. Thus, before we can proceed with plans to serve the Development, we are requesting information to (1) assist AT&T Florida in network planning for the Development and (2) allow AT&T Florida to determine if circumstances exist that allow AT&T Florida to petition the Florida Public Service Commission ("Florida PSC") to be relieved of its carrier of last resort ("COLR") obligation to provide basic local exchange telecommunications service, under Section 364.025(6)(d), Florida Statutes. In a separate letter, AT&T Florida requested information about other facts and circumstances that might impact AT&T Florida's COLR obligation, and attached a copy of the statute to that letter.

Please respond to the following questions.

1. Please indicate if the owner, developer, condominium association, homeowners' association or any other entity having ownership or control over the Development has entered into any exclusive service arrangements with a communications service provider other than AT&T Florida, such that AT&T Florida will not be permitted to install its facilities at the Development to provide any of the following services.

Data: Yes _____ No _____

If no, are such arrangements planned? Yes _____ No _____

Video: Yes _____ No _____

If no, are such arrangements planned? Yes _____ No _____

2. Please indicate if the owner, developer, condominium association, homeowners' association or any other entity having ownership or control over the Development has entered into any arrangements with a communications service provider other than AT&T Florida, where charges for any of the following services provided by the other provider will be collected by any of those parties from occupants or residents at the Development in any manner, for example, via rent, fees, or dues.

Data: Yes _____ No _____

If no, are such arrangements planned? Yes _____ No _____

Video: Yes _____ No _____

If no, are such arrangements planned? Yes _____ No _____

4. Will AT&T Florida be restricted in any way from providing data or video service at the Development?

Yes _____ No _____

If the answer above is "yes," please explain, in general terms, how AT&T Florida will be restricted: _____

Please provide responses, signed by an authorized representative of (Company Name), to the address indicated above by (Date). If you do not provide the requested information, AT&T Florida will make network planning decisions based on information otherwise available and may use the lack of information as a basis to seek COLR relief from the Florida PSC. If you consider the information requested to be confidential, please indicate in your response the information you consider to be confidential, and AT&T Florida will not share that information with any third parties. If you have any questions, please call (###-###-####).

Sincerely,

AT&T Florida

(Owner/Developer Company)

Signed by: _____

(Authorized Representative)

Printed Name: _____

Title: _____

Date: _____