

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-06-1076-PCO-TL  
ISSUED: December 29, 2006

ORDER GRANTING EXPEDITED HEARING  
AND ESTABLISHING PROCEDURE

**I. Case Background**

On November 20, 2006, pursuant to section 364.025(6)(d), Florida Statutes, Embarq Florida, Inc. (Embarq), filed a Petition for Waiver of its carrier of last resort obligations (COLR) 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).

On December 5, 2006, Treviso Bay filed a response to Embarq's Petition disputing the factual allegations made in the Petition. On December 13, 2006, Embarq filed an Amended Petition for Waiver based, in part, on the staff recommendation in Docket No. 060763-TP, regarding the proposed rule to implement section 364.025(6)(d), Florida Statutes. In particular, Embarq cites to portions of the staff recommendation that provide "[t]here is nothing in the rule that would preclude a petitioner or a respondent from asking the Commission to expedite its decision at the time it files a petition" and further states that a petitioner may "ask for a hearing early in the proceedings, and need not wait to protest the Commission's proposed agency action."

Also on December 13, 2006, Embarq filed a Motion for Expedited Hearing on its Amended Petition for Waiver. In support of its Motion, Embarq states that requests for waiver of the COLR obligation are extremely time sensitive because there is a certain timeframe when facilities must be placed prior to construction. Embarq contends that if this window is missed, the cost of placing facilities increases dramatically. Embarq states that the construction schedule for the development requires that placement of facilities begin no later than mid March 2007 with service to model homes by mid April 2007.

On December 20, 2007, Treviso Bay filed a Response in Opposition to Embarq's Motion for Expedited Hearing. Treviso Bay contends that expediting the process beyond the current schedule would severely prejudice Treviso Bay's ability to protect its interest. Treviso Bay states that it has been unable to serve discovery on the Amended Petition or execute a confidentiality agreement to review the redacted portions of Embarq's Amended Petition.

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## II. Expedited Hearing

A motion for expedited hearing is a request that the Commission depart from the standard procedures we have developed to balance the competing interests of parties to a proceeding. Consequently such motions must be addressed on a case-by-case basis, taking into account the particular circumstances involved.

Here the motion for expedited hearing requires the Commission to balance Embarq's stated need for a timely determination of its petition against Treviso Bay's protected interest in having adequate opportunity to prepare for the hearing. Under Rule 28-106.211, Florida Administrative Code,<sup>1</sup> I have the authority, as presiding officer, to both grant Embarq's motion and to establish compressed timeframes for pre-hearing procedures if I find doing so is necessary to promote a just determination of the dispute before us.

Because this is a case of first impression under Section 364.025(6)(d), Florida Statutes, even this motion for expedited hearing presents unique circumstances and policy concerns not previously addressed by the Commission. ~~Embarq represents to the Commission that its petition is ripe for determination, and that a later hearing would render it moot.~~ Consequently, I find it appropriate that this matter be set for an administrative hearing.

I am mindful of the procedural concerns raised by Treviso Bay. I have addressed some of these concerns in the discovery timeline and hearing schedule. Given the compressed timeframes established in this case, I wish to impress upon the parties and the Commission staff the importance of good faith, effective, and ongoing communication with each other in complying with this order and preparing the case for hearing before the Commission.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

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<sup>1</sup> Rule 28-106.211, Florida Administrative Code, authorizes the presiding officer to issue "any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding."

**III. General Filing Procedures**

In accordance with Rule 25-22.028, Florida Administrative Code, parties filing documents in this proceeding shall submit the original document and the appropriate number of copies to the Division of the Commission Clerk and Administrative Services for filing in the Commission's docket file. Filings may be made by mail, hand delivery, courier service, or in some instances electronically. Please refer to the rule for the requirements of filing on diskette for certain utilities. To the extent possible, all filings made electronically or on diskette shall be provided in Microsoft Word format. Filings pertaining to this docket should identify the assigned docket number and should be addressed to:

Director, Division of the Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

**IV. Tentative List of Issues**

The issues to be addressed in this proceeding have not yet been identified; shortly after the issues identification meeting the final list of issues will be issued by separate order.

**V. Prefiled Testimony and Exhibits**

Each party shall file, in writing, all testimony and exhibits that it intends to sponsor, pursuant to the schedule set forth in Section X of this Order. An original and 15 copies of all testimony and exhibits shall be filed with the Director, Division of the Commission Clerk and Administrative Services, by 5:00 p.m. on the date due. A copy of all prefiled testimony and exhibits shall be served by regular mail, overnight mail, or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit sponsored by a witness in support of his or her prefiled testimony shall be:

- (1) Attached to that witness' testimony when filed;
- (2) Sequentially numbered beginning with 1 (any exhibits attached to subsequently filed testimony of the same witness shall continue the sequential numbering system);
- (3) Identified in the upper right-hand corner of each page by the docket number, a brief title, and the witness' initials followed by the exhibit's number; and

- (4) Paginated by showing in the upper right-hand corner of each page the page number followed by the total number of pages in the exhibit.

An example of the information to appear in the upper right-hand corner of the exhibit is as follows:

Docket No. 012345-EI  
Foreign Coal Shipments to Port of Tampa  
Exhibit BLW-1, Page 1 of 2

After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing.

## **VI. Discovery Procedures**

### **A. General Requirements**

Discovery shall be conducted in accordance with the provisions of Chapter 120, Florida Statutes, and the relevant provisions of Chapter 364 Florida Statutes, Rules 25-22, 25-40, and 28-106, Florida Administrative Code, and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.

Unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Discovery shall be completed by February 7, 2007.
- (2) Discovery requests shall be served by e-mail, hand delivery, or overnight mail. If a request is served electronically, a hard copy of the request shall be served by hand-delivery, U.S. Mail, or overnight mail on the day that the request is served electronically.
- (3) Sets of interrogatories, requests for admissions, requests for production of documents, or other forms of discovery shall be numbered sequentially in order to facilitate their identification
- (4) Within each set, discovery requests shall be numbered sequentially, and any discovery requests in subsequent sets shall continue the sequential numbering system.
- (5) Discovery responses shall be served within *FIVE* calendar days (inclusive of mailing) of receipt of the discovery request. If responses are served electronically, a hard copy of the responses shall be served by hand-delivery, U.S. Mail, or overnight mail on the day that responses are served electronically.
- (6) Each page of every document produced pursuant to requests for production of documents shall be identified individually through the use of a Bates Stamp or other equivalent method of sequential identification. Parties should number their produced documents in an unbroken sequence through the final hearing.
- (7) Copies of discovery requests and responses shall be served on parties other than the party from whom discovery is sought to the extent required by the applicable

provisions of the Florida Rules of Civil Procedure. In addition, copies of all responses to requests for production of documents shall be provided to the Commission staff at its Tallahassee office unless otherwise agreed.

Unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Interrogatories, including all subparts, shall be limited to 100.
- (2) Requests for production of documents, including all subparts, shall be limited to 100.
- (3) Requests for admissions, including all subparts, shall be limited to 50.

When a discovery request is served and the respondent intends to seek clarification of any portion of the discovery request, the respondent shall request such clarification within five days of service of the discovery request. **All responses or objections to discovery must be served within five days from the date of receipt of the discovery request. The five-day and longer periods mentioned above shall include Saturdays, Sundays, and legal holidays, except that when the last day is a Saturday, Sunday, or legal holiday, the period is extended to the next day which is not a Saturday, Sunday, or legal holiday.** These procedures are intended to reduce delay in resolving discovery disputes.

B. Confidential Information Provided Pursuant to Discovery

Any information provided to the Commission staff pursuant to a discovery request by the staff or any other person and for which proprietary confidential business information status is requested pursuant to Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183(4), Florida Statutes. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

When a person provides information that it maintains as proprietary confidential business information to the Office of Public Counsel pursuant to a discovery request by the Office of Public Counsel or any other party, that party may request a temporary protective order pursuant to Rule 25-22.006(6)(c), Florida Administrative Code, exempting the information from Section 119.07(1), Florida Statutes.

When a party other than the Commission staff or Office of Public Counsel requests information through discovery that the respondent maintains as proprietary confidential business information, or when such a party would otherwise be entitled to copies of such information

requested by other parties through discovery (e.g., interrogatory responses), that party and respondent shall endeavor in good faith to reach agreement that will allow for the exchange of such information on reasonable terms, as set forth in Rule 25-22.006(7)(b), Florida Administrative Code.

## VII. Prehearing Procedures

### A. Prehearing Statements

All parties in this docket and the Commission staff shall file a prehearing statement pursuant to the schedule set forth in Section X of this Order. The original and 15 copies of each prehearing statement shall be filed with the Director of the Division of the Commission Clerk and Administrative Services by 5:00 p.m. on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission.

Each party's prehearing statement shall set forth the following information in the sequence listed below:

- (1) The name of all known witnesses whose testimony has been prefiled or who may be called by the party, along with subject matter of each such witness' testimony;
- (2) A description of all prefiled exhibits and other exhibits that may be used by the party in presenting its direct case (including individual components of a composite exhibit) and the witness sponsoring each;
- (3) A statement of the party's basic position in the proceeding;
- (4) A statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party's position on each issue, and, where applicable, the names of the party's witness(es) who will address each issue. Parties who wish to maintain "no position at this time" on any particular issue or issues should refer to the requirements of subsection C, below;
- (5) A statement of issues to which the parties have stipulated;
- (6) A statement of all pending motions or other matters the party seeks action upon;
- (7) A statement identifying the party's pending requests or claims for confidentiality;
- (8) Any objections to a witness' qualifications as an expert. Failure to identify such objection will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing;
- (9) A statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore

Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position on each such issue.

B. Attendance at Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held January 24, 2007, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Unless excused by the Prehearing Officer for good cause shown, each party (or designated representative) shall personally appear at the prehearing conference. Failure of a party (or that party's representative) to appear shall constitute waiver of that party's issues and positions, and that party may be dismissed from the proceeding.

C. Waiver of Issues

Any issue not raised by a party either before or during the Prehearing Conference shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the Prehearing Conference shall demonstrate each of the following:

- (1) The party was unable to identify the issue because of the complexity of the matter.
- (2) Discovery or other prehearing procedures were not adequate to fully develop the issue.
- (3) Due diligence was exercised to obtain facts touching on the issue.
- (4) Information obtained subsequent to the Prehearing Conference was not previously available to enable the party to identify the issue.
- (5) Introduction of the issue would not be to the prejudice or surprise of any party.

Specific reference shall be made to the information received and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall take a position on each issue by the time of the Prehearing Conference or by such later time as may be permitted by the Prehearing Officer. If a party is unable through diligence and good faith efforts to take a position on a matter at issue for that party, it shall explicitly state in its Prehearing Statement why it cannot take a position. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue, and the party's position shall be shown as "no position" in the Prehearing Order. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement. Commission staff may take "no position at this time" or a similar position on any issue without having to make the showing described above.

D. Motions to Strike Prefiled Testimony and Exhibits

Motions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing no later than FIVE days after the filing of such testimony. Motions to strike any portion of prefiled testimony and related portions of exhibits at hearing shall be considered untimely, absent good cause shown.

E. Demonstrative Exhibits

If a party wishes to use a demonstrative exhibit or other demonstrative tools at hearing, such materials must be identified by the time of the Prehearing Conference.

F. Official Recognition

Parties seeking official recognition of materials pursuant to Section 120.569(2)(i), Florida Statutes, shall notify all other parties and staff in writing no later than two business days prior to the first scheduled hearing date. Such notification shall identify all materials for which the party seeks official recognition and, to the extent such materials may not be readily available to all parties, such materials shall be provided along with the notification.

**VIII. Hearing Procedures**

A. Attendance at Hearing

Unless excused by the Presiding Officer for good cause shown, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date of the following:

- (1) All parties agree that the witness will not be needed for cross examination.
- (2) All Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness' testimony.

B. Use of Confidential Information at Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the



proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files. If such information is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidentiality filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), Florida Administrative Code, if continued confidentiality of the information is to be maintained.

#### **IX. Post-Hearing Procedures**

If the Commission (or assigned panel) does not render a bench decision at the hearing, it may allow each party to file a post-hearing statement of issues and positions pursuant to the schedule set forth in Section X of this Order. In such event, a summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 50 words. If a post-hearing statement is required and a party fails to file in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 20 pages and shall be filed at the same time, unless modified by the Presiding Officer.

**X. Controlling Dates**

The following dates have been established to govern the key activities of this case:

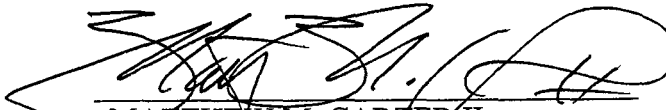
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|--|-------------------|
| (1) Issue ID                               | January 5, 2007   |
| (2) Rebuttal testimony and exhibits        | January 17, 2007  |
| (3) Staff's testimony and exhibits, if any | January 24, 2007  |
| (4) Prehearing Statements                  | January 19, 2007  |
| (5) Prehearing Conference                  | January 24, 2007  |
| (6) Discovery deadline                     | February 7, 2007  |
| (7) Hearing                                | February 14, 2007 |

In addition, all parties should be on notice that the Prehearing Officer may exercise the discretion to schedule additional prehearing conferences or meetings of the parties as deemed appropriate. Such meetings will be properly noticed to afford the parties an opportunity to attend.

Based upon the foregoing, it is

ORDERED by Commissioner Matthew M. Carter II, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner Matthew M. Carter II, as Prehearing Officer, this 29th day of December, 2006.

  
MATTHEW M. CARTER II  
Commissioner and Prehearing Officer

(SEAL)

JKF

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.

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.