

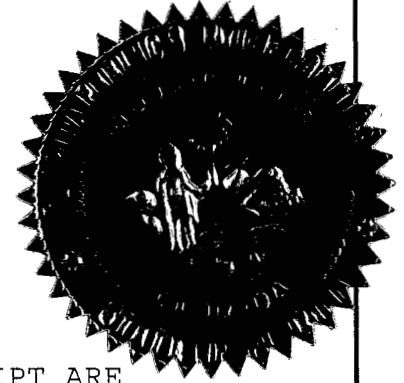
BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060763-TL

In the Matter of:

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

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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER MATTHEW M. CARTER, II  
Prehearing Officer

DATE: February 7, 2007

TIME: Commenced at 9:30 a.m.  
Concluded at 9:44 a.m.

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

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

DOCUMENT NUMBER-DATE

FLORIDA PUBLIC SERVICE COMMISSION

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1 PARTICIPATING:

2           SUSAN S. MASTERTON, ESQUIRE, Embarg Florida, Inc.,  
3 1313 Blairstone Road, Post Office Box 2214, Tallahassee,  
4 Florida 32301, appearing on behalf of Embarg Florida, Inc.

5           R. SCHEFFEL WRIGHT, ESQUIRE, and JOHN T. LAVIA, III,  
6 ESQUIRE, Young van Assenderp Law Firm, 225 South Adams Street,  
7 Suite 200, Tallahassee, Florida 32301, appearing on behalf of  
8 Treviso Bay Development, LLC.

9           JASON FUDGE, ESQUIRE, FPSC General Counsel's Office,  
10 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850,  
11 appearing on behalf of the Commission Staff.

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## P R O C E E D I N G S

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2 COMMISSIONER CARTER: The hearing will now come to  
3 order. Will staff read the notice.

4 MR. FUDGE: Pursuant to notice issued January 26th,  
5 2007, this time and place has been set for a prehearing  
6 conference in Docket Number 060763-TL.

7 COMMISSIONER CARTER: Okay. Now we'll take  
8 appearances.

9 MS. MASTERTON: Good morning, Commissioner.  
10 Susan Masterton on behalf of Embarq Florida, Inc.

11 COMMISSIONER CARTER: Okay.

12 MR. WRIGHT: Robert Scheffel Wright, Law Firm of  
13 Young van Assenderp, P.A., and I'd also like to enter an  
14 appearance for my partner John T. LaVia, III, on behalf of  
15 Treviso Bay Development, LLC.

16 COMMISSIONER CARTER: Okay. Staff?

17 MR. FUDGE: Jason Fudge on behalf of Commission  
18 staff.

19 COMMISSIONER CARTER: Okay. Okay. Any preliminary  
20 matters?

21 MR. FUDGE: No, Commissioner.

22 COMMISSIONER CARTER: Okay. Let's review the  
23 prehearing order. Any questions on Sections I through IV?  
24 Hearing none, Sections V, VI and VII.

25 MS. MASTERTON: Embarq has filed a motion for leave

1 to file surrebuttal testimony, and I don't know if this is the  
2 appropriate place to address it under VI or at the end under  
3 motions. I just wanted to raise that because it would affect  
4 Section VI depending on the resolution.

5 COMMISSIONER CARTER: Would that -- that would  
6 probably be -- I think, Mr. Fudge, is that Section XI? Do we  
7 have that in Section XI?

8 MR. FUDGE: Yes, Commissioner.

9 COMMISSIONER CARTER: We'll just, we'll take note of  
10 that on Section XI.

11 MS. MASTERTON: Okay. Thank you.

12 COMMISSIONER CARTER: So no, nothing from Sections V,  
13 VI and VII.

14 Section VIII. Hearing none --

15 MS. MASTERTON: Oh, I'm sorry. I was having to catch  
16 up with what VIII was. Embarq does have a change to its  
17 position on Issue Number 1, and I can read it and I also have a  
18 copy that I can provide to staff.

19 We'd like to change -- strike what's there and  
20 substitute it with the following. "As confirmed in the  
21 affidavit of Larry Schweber, Comcast voice service will be  
22 available to the residents of Treviso Bay using the same  
23 facilities used to provide video and data service, and such  
24 voice services will be available to subscribers as homes are  
25 constructed. In addition to Comcast voice service, residents

1 will also have the option to use other voice service providers  
2 such as Vonage, Skype and multiple wireless providers."

3 COMMISSIONER CARTER: Okay. And you have copies for  
4 the parties and for staff?

5 MS. MASTERTON: Yes, I do.

6 COMMISSIONER CARTER: Mr. Fudge, recommendation?

7 MR. FUDGE: If Treviso Bay does not oppose it, we can  
8 incorporate it into the prehearing order.

9 COMMISSIONER CARTER: Mr. Wright?

10 MR. WRIGHT: We don't oppose it. It's their  
11 position.

12 COMMISSIONER CARTER: Okay. Show it done.

13 That was Section VIII.

14 Section IX and Section X.

15 Okay. Give me one second here to turn it over.

16 Okay. I said that on Section XI -- Ms. Masterton, you're  
17 recognized.

18 MS. MASTERTON: Thank you, Commissioner. This case  
19 is a case of first impression before the Commission. It's the  
20 first petition for waiver filed since the enactment of the 2006  
21 legislation that authorized those filings. And Embarq believes  
22 that the Commission should have a full and complete record in  
23 order to make a decision on this issue and that's why we've  
24 offered our surrebuttal testimony.

25 To facilitate an expedited schedule we filed our

1 direct testimony with our petition, and so that was before the  
2 specific issues were identified in this proceeding and also  
3 before any discovery was conducted.

4           On the other hand, Treviso Bay did not file its  
5 testimony until just two weeks ago today, I believe it was. So  
6 they had the benefit of not only responding to Embarq's  
7 testimony, but also to all the discovery information that was  
8 in the docket at that point.

9           The opportunity for a party to present and respond to  
10 testimony is a fundamental procedural right that's recognized  
11 in the Florida Administrative Procedures Act, and this right is  
12 particularly important for a petitioner who bears the burden of  
13 proving the case in order to have its relief granted. And it's  
14 also particularly important in this case because there's no --  
15 no posthearing filings are envisioned after so that the parties  
16 could summarize and make sure that they had presented their  
17 full case.

18           In addition, allowing petitioners to file surrebuttal  
19 testimony, especially in cases like this where there's just one  
20 party filing direct and another party filing rebuttal, is a  
21 common practice in Commission, in Commission proceedings. And  
22 Embarq's surrebuttal testimony is strictly surrebuttal. It  
23 addresses essentially three points that were made by Treviso  
24 Bay's witness regarding Embarq's positions and also information  
25 that was provided to support that petition.

1           Embarq doesn't believe that this prejudices  
2 Treviso Bay in any way since responding to surrebuttal  
3 testimony is not a common -- or it doesn't occur -- surrebuttal  
4 is the last filing, and also because Treviso Bay will have the  
5 opportunity to cross-examine Mr. Dickerson on the surrebuttal  
6 testimony at the hearing. However, to the extent that there is  
7 a perception that there might be some prejudice, Embarq has  
8 indicated its willingness to waive the discovery cutoff date  
9 and respond to any discovery that Treviso Bay or staff might  
10 have relating to the surrebuttal testimony in an expedited  
11 fashion, and by that I mean even more expedited than the time  
12 frames that are set forth in the procedural order. So based on  
13 that, Embarq respectfully requests that you grant our motion  
14 for leave to file surrebuttal testimony and accept it into the  
15 record of the proceeding. Thank you.

16           COMMISSIONER CARTER: Okay. Mr. Wright.

17           MR. WRIGHT: Thank you, Commissioner Carter.

18 Treviso Bay opposes Embarq's motion. We do not believe that  
19 Embarq has shown good cause for granting its motion because  
20 Embarq cannot show good cause for its delay in seeking this  
21 relief, at least the tenth hour, if not the eleventh hour.

22           To be sure, for the Commission to have a, whatever a  
23 complete record is before it is an appropriate goal and we  
24 don't, we don't disagree with that principle. But you can't  
25 divorce Embarq's request from the context in which it has been

1 made. The initial order establishing procedure in this case  
2 was issued on December 29th. That order did not provide the  
3 opportunity for Embarq to file additional testimony. The  
4 second order on procedure was issued on January 16th. The  
5 second order did not provide for surrebuttal testimony.  
6 Treviso Bay sought, by an appropriate motion to you as  
7 Prehearing Officer filed on January 5th, a one-week extension  
8 to file our testimony. This was granted in the second order on  
9 procedure on January 16th. By that order the Commission staff  
10 were given one week after we filed our testimony on the revised  
11 date of January 24th to file their testimony. In other words,  
12 staff had the opportunity to file their testimony, if any, on  
13 January 31st.

14           Now 12 days after receiving Treviso Bay's testimony  
15 and only six working days before the hearing Embarq is  
16 attempting to get additional testimony and exhibits into the  
17 record of this proceeding. We received their service by email  
18 at 5:29 p.m. on Monday and we still have not received the  
19 mailed service copies. Now I was able to print them out, so  
20 that's not prejudicial in and of itself. Embarq could have  
21 asked for the opportunity to file rebuttal testimony or  
22 surrebuttal testimony when it first saw the first order on  
23 procedure in December. It did not. Embarq could have asked  
24 for this relief when it saw the second order on procedure. It  
25 did not. Embarq could have asked when Treviso Bay filed our



1 testimony, which is as of today two weeks ago. It did not.  
2 Frankly, if Embarq had asked for this relief in December or had  
3 asked for this relief on January 5 when we filed our motion for  
4 an extension, we would have agreed to let them file rebuttal  
5 testimony. We would not have agreed to give them an extra 12  
6 days. We probably would have agreed to give them a week, to  
7 January the 31st, but we wouldn't have agreed to give them more  
8 time than the staff had, and I truly don't believe that the  
9 Commission would either.

10           The Commission -- what we've got here is a situation  
11 where Embarq has sat on its hands for weeks, and now more than  
12 five weeks after the first order on procedure, coming up to the  
13 eve of hearing, they've asked to bring additional testimony and  
14 exhibits into the case. And as an aside, at the appropriate  
15 time we're going to object to their exhibits on various  
16 grounds. And the problem that this poses for us is that it  
17 distracts us and interferes with our orderly preparation for  
18 this hearing. You know, having this dropped on us with six  
19 working days left before the hearing is, you know, at the very  
20 best a fairly serious inconvenience and we don't think it's  
21 fair. Embarq is asking for more time than the Commission staff  
22 had to prepare its testimony.

23           There's a sign you frequently see in automobile  
24 repair shops that says, "Procrastination on your part does not  
25 create an emergency on mine." Substantively, what we've got

1 here is Embarq trying to supplement the record in order to poke  
2 holes in our witness's testimony. The problem is that its  
3 efforts are untimely and inappropriate, and its proffered  
4 solution that it'll waive the discovery cutoff date misses the  
5 point. The point is if their delay prejudices us by dumping a  
6 bunch of extra work on us six days before the hearing, it  
7 interferes with and distracts from our orderly preparation for  
8 the hearing. And, accordingly, we would urge you respectfully  
9 to deny Embarq's motion. Thank you.

10 MS. MASTERTON: Commissioner, could I just respond to  
11 one point that Mr. Wright made?

12 COMMISSIONER CARTER: Briefly.

13 MS. MASTERTON: Of course, we weren't, didn't know we  
14 would need to file or couldn't really make a decision about  
15 filing surrebuttal testimony until we saw what was out there,  
16 and didn't want to burden the Commission with that until we  
17 knew if we thought it was necessary. But the point I wanted to  
18 make is that we would have been entitled, had we asked for it,  
19 and would have requested and had to wait to see if staff would  
20 file testimony before we could file surrebuttal since we would  
21 be entitled to rebut both the staff and Treviso Bay's  
22 testimony. And since the staff testimony wasn't due until  
23 January 31st, even had we requested it at an earlier time, and  
24 that was just a week ago today, I don't believe that the time  
25 frame that would have been set for filing the surrebuttal would

1 have been any earlier than the day on which we filed it. Thank  
2 you.

3 COMMISSIONER CARTER: Thank you. Any comment from  
4 staff?

5 MR. FUDGE: Well, staff agrees with Treviso Bay that  
6 we are troubled by the untimeliness of Embarq's motion for  
7 leave to file surrebuttal testimony. We also agree with Embarq  
8 that they have the burden to show that -- to prove their case.  
9 And we think that they should have that opportunity to develop  
10 the record fully, and staff would recommend that we grant the  
11 motion.

12 COMMISSIONER CARTER: Okay. I am troubled by the  
13 tardiness of Embarq's motion, but I do agree with staff that  
14 Embarq has the burden of proof in terms of establishing its  
15 case. Consequently, Embarq's motion is hereby granted, but the  
16 discovery cutoff is extended until February 13th of '07.  
17 That's my ruling.

18 We are now on -- any other matters under Section XI?  
19 Section XII.

20 MS. MASTERTON: Commissioner, I just wanted to note  
21 that because of things still going in, discovery still being  
22 responded to and also just since we submitted our prehearing  
23 statements, additional confidential information being  
24 submitted, that there are a few more claims for confidentiality  
25 that Embarq has filed, and I will try to make sure that staff

1 has those so they can note them in the prehearing order.

2 MR. WRIGHT: And --

3 COMMISSIONER CARTER: Yes, sir.

4 MR. WRIGHT: -- just very briefly. You are aware,  
5 perhaps you're aware that Comcast has submitted an affidavit  
6 that's going to be admitted as a stipulated exhibit and we've  
7 all agreed on that. I believe that Comcast is going to file a  
8 request for confidential treatment of portions of that. And we  
9 have one, one item outstanding that has not -- we don't know  
10 that an order granting confidentiality has been granted.

11 COMMISSIONER CARTER: Okay. Well, work with staff  
12 and make sure that these matters are incorporated in the final  
13 order on this. Okay?

14 Any other matters in this section, Section XII? None  
15 by the parties, none by staff.

16 Section XIII. I think we have a recommendation on  
17 opening and closing statements, so we're just going to allow  
18 each party 15 minutes. You split it up however you deem  
19 necessary, but it'll be 15 minutes per side.

20 MR. WRIGHT: Question, Commissioner?

21 COMMISSIONER CARTER: Yes, sir.

22 MR. WRIGHT: The CASR does not mention posthearing  
23 filings and Ms. Masterton indicated that she is under the  
24 impression that there are not going to be posthearing filings.  
25 Just -- is that the case? Are we going to do this with opening

1 and closing statements only?

2 MR. FUDGE: That was staff's intention just to do  
3 opening and closing statements.

4 MR. WRIGHT: I will govern myself accordingly. Thank  
5 you.

6 COMMISSIONER CARTER: That would be most  
7 appreciative. We will be most appreciative of that.

8 Are there any other matters, Mr. Fudge, pending?

9 MR. FUDGE: No, Commissioner.

10 COMMISSIONER CARTER: Mr. Wright, you're recognized.

11 MR. WRIGHT: Sorry. Just in that regard, I think  
12 that it might be, I think that it might be helpful -- I know  
13 that staff intends to issue a recommendation per the CASR on  
14 March 1 for the March 13 agenda. Would we be able to file a  
15 memorandum of law on the, on the issue posed in this case,  
16 assuming that we file it by the day of the hearing?

17 COMMISSIONER CARTER: Mr. Fudge?

18 MS. MASTERTON: I'm not sure what Mr. Wright is  
19 proposing, so could, could you explain? You mean between the  
20 issuance of the staff recommendation and the hearing?

21 MR. WRIGHT: No. No. I -- Commissioner --

22 COMMISSIONER CARTER: You're recognized.

23 MR. WRIGHT: -- I meant to say, I probably just  
24 garbled it, that we would intend to file the memorandum of law  
25 by the day of the hearing, and the point would be to discuss

1 the statutory framework and why we believe that this is  
2 inappropriate, that Embarg's request is inappropriate.

3 MS. MASTERTON: Okay. So you're saying by February,  
4 okay, February 13. I mean, Embarg doesn't -- yeah.

5 MR. WRIGHT: And we file close of business  
6 February 13th.

7 MS. MASTERTON: I'm just trying to see if we, if  
8 we're okay with that because I hadn't heard it before. I don't  
9 think that we have an objection to both parties being allowed  
10 to file a memorandum of law.

11 MR. WRIGHT: And I was honestly under the impression  
12 we would have posthearing briefs and that's why I hadn't really  
13 thought of it until just now.

14 COMMISSIONER CARTER: That's fine.

15 MR. WRIGHT: Thank you.

16 COMMISSIONER CARTER: That's fine. At least you  
17 thought of it in a timely manner.

18 Mr. Fudge.

19 MR. FUDGE: Staff does not oppose that as long as  
20 it's not duplicative of the testimony that's already entered  
21 into the record, because I think some of it does go to the  
22 legal aspects policy-wise of the statute.

23 MS. MASTERTON: Maybe we could set a page limit that  
24 might help address that. Did you have anything in mind, Schef?

25 MR. WRIGHT: I try to be as efficient as possible.

1 Ten pages?

2 MS. MASTERTON: Ten would be fine with Embargo.

3 MR. FUDGE: That sounds fine to staff.

4 COMMISSIONER CARTER: Okay. Let's do that and just  
5 kind of get with staff if you have any further questions on it.  
6 But we will adhere to our time schedule.

7 Mr. Fudge, any other matters?

8 MR. FUDGE: No, Commissioner.

9 COMMISSIONER CARTER: Any matters by the parties?

10 Hearing none, the hearing is adjourned.

11 (Prehearing conference adjourned at 9:44 a.m.)

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1 STATE OF FLORIDA )  
2 COUNTY OF LEON ) : CERTIFICATE OF REPORTER

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

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

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

DATED THIS 8<sup>th</sup> DAY OF FEBRUARY, 2007.

Linda Boles  
LINDA BOLES, CRR, RPR  
FPSC Official Commission Reporter  
(850) 413-6734