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**Sent:** Tuesday, February 13, 2007 2:43 PM  
**To:** Susan Masterton; Beth Salak; Filings@psc.state.fl.us; Jason Fudge; Patrick Wiggins; Rick Moses; Schef Wright  
**Subject:** Electronic Filing - Docket 060763-TL  
**Attachments:** TBD Motion in Limine.Feb13.doc

ORIGINAL

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b. Docket No. 060763-TL

Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq, Florida, Inc.

c. Document being filed on behalf of Treviso Bay Development, LLC.

d. There are a total of 8 pages.

e. The document attached for electronic filing is Treviso Bay Development, LLC's Motion in Limine and Motion to Strike Testimony.

(see attached file: TBD Motion in Limine.Feb13.doc)

Thank you for your attention and assistance in this matter.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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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Docket No. 060763-TL

Filed: February 13, 2007

**TREVISO BAY DEVELOPMENT, LLC'S MOTION IN LIMINE AND MOTION TO STRIKE TESTIMONY**

Treviso Bay Development, LLC ("Treviso Bay"), pursuant to Rule 28-106.204(1), Florida Administrative Code, and by and through its undersigned counsel, hereby moves the Florida Public Service Commission to exclude Exhibits KWD-3, KWD-4, KWD-5, and KWD-6, filed with the Surrebuttal Testimony of Kent W. Dickerson on February 6, 2007, from the record of this proceeding. Treviso Bay also moves the Commission to strike Mr. Dickerson's testimony that purports to rebut various assertions made by Treviso Bay's witness Don J. Wood relating to the availability of alternate voice service from Comcast in the Treviso Bay development, relating to universal service goals, and relating to competition and the impacts on competition of granting Embarq's petition for waiver.

In summary, and as explained in more detail below, the subject exhibits are unnecessary, non-probative, and duplicative of other evidence in the case, and three of the exhibits are facially untimely. As explained in more detail below, Treviso Bay is moving the Commission to strike most of the first 7 pages, and the related testimony in his conclusion on page 11, of Mr. Dickerson's "Surrebuttal Testimony" because most of this material (a) does not identify what of Mr. Wood's assertions Mr. Dickerson is purporting to rebut; (b) is non-probative and duplicative of other evidence in the record; (c) is argumentative; (d) is in the nature of direct testimony, which is inappropriate for surrebuttal testimony; or is inappropriate for a combination of the foregoing reasons.

While Treviso Bay does not agree with Mr. Dickerson's characterizations of Mr. Wood's financial analyses, Treviso Bay agrees that the testimony at pages 8 through 10 of Mr. Dickerson's surrebuttal testimony is at least properly framed to rebut specific assertions of Mr. Wood's direct testimony.

In further support of its Motion in Limine and Motion to Strike Testimony, Treviso Bay states as follows.

**BACKGROUND**

This docket was initiated by Embarq on November 20, 2006, by the filing of Embarq's initial petition for waiver of its Carrier of Last Resort ("COLR") obligations with respect to the Treviso Bay development in Collier County. Its initial petition included affidavits of Mr. Kent W. Dickerson and Mr. Michael J. DeChellis. Embarq filed its amended petition, and testimony of Mr. Dickerson and Mr. DeChellis, on December 13. Pursuant to the procedural orders in this case, Treviso Bay filed the testimony of Mr. Don J. Wood on January 24, 2007. On February 6, Embarq filed the surrebuttal testimony and exhibits of Mr. Dickerson. Over Treviso Bay's objections to the timeliness of this filing – which was not allowed by any order on procedure and which was filed 13 days<sup>1</sup> after Treviso Bay filed its direct testimony – the Prehearing Officer, noting his concerns with Embarq's tardiness, granted Embarq's motion to file the testimony.

Also at that time, the undersigned advised the Prehearing Officer and all parties that Treviso Bay would move to exclude Embarq's surrebuttal exhibits. After more carefully reviewing Embarq's purported surrebuttal testimony, Treviso Bay believes that much of the testimony is improper, duplicative, argumentative, and in the nature of additional direct testimony, and accordingly, Treviso Bay is hereby moving to strike those portions of Mr.

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<sup>1</sup> Embarq delivered an electronic copy of Mr. Dickerson's testimony to Treviso Bay's attorneys in the late afternoon of February 5, 12 days after Treviso Bay filed Mr. Wood's testimony.

Dickerson's surrebuttal testimony. Treviso Bay will be prepared to argue these combined motions at the outset of the hearing on February 14, 2007.

## ANALYSIS AND DISCUSSION

### Motion in Limine to Exclude Exhibits

Treviso Bay moves the Commission to exclude all four of the exhibits to Mr. Dickerson's surrebuttal testimony. All of these exhibits are apparently intended to support Embarq's assertion that Comcast can and will offer its "Comcast Digital Voice" product, which utilizes Voice over Internet Protocol or "VoIP" technology, to the residents of the Treviso Bay development. In the first place, all four of these exhibits are thus in the nature of additional direct exhibits, addressing the point – which is a major part of the basis for Embarq's case in chief – that Comcast can and will likely offer its VoIP product in the Treviso Bay development. On February 5, Treviso Bay specifically articulated its understanding of this fact in its revised position on Issue 1 as follows:

At this time, Treviso Bay believes that wireless voice service from several providers is available to the Treviso Bay area. Additionally, Treviso Bay understands that Comcast will be able to offer, and will likely offer, its VoIP product on a non-obligatory, retail-customer-by-retail-customer basis, to the residents of Treviso Bay after its facilities have been installed in the Treviso Bay development.

Second, the exhibits, especially KWD-5 and KWD-6, the newspaper articles from 2005, are thus also duplicative of the simple statements contained in the Affidavit of Larry Schweber, which was filed in this docket on February 12, 2007, and which the parties (at least Embarq and Treviso Bay) were well aware of before Embarq filed Mr. Dickerson's surrebuttal testimony. Indeed, Mr. Dickerson referred to Mr. Schweber's Affidavit in his surrebuttal testimony. Third, Exhibits KWD-3 and KWD-4 are not probative of any relevant facts in this case: Comcast's financial results (Exhibit KWD-3) are not at issue here, nor is an overview of Comcast's

marketing and business plan (Exhibit KWD-4). Finally, Exhibits KWD-4, KWD-5, and KWD-6 were all known to Embarq before Embarq filed its Amended Petition for Waiver and Mr. Dickerson's direct testimony on December 13, 2006.

For all of the foregoing reasons, the Commission should exclude all four of Mr. Dickerson's purported surrebuttal exhibits from the record of this case, because they are in the nature of additional direct exhibits, they are duplicative of a fact that is confirmed by Mr. Schweber's Affidavit, which the parties have stipulated can be entered into the record, and because they are untimely and, in some cases, irrelevant and non-probative.

Allowing Embarq to present additional direct evidence, under the guise of surrebuttal or rebuttal testimony, supporting its direct case in chief – here, its evidence intending to show that Comcast can and will offer its VoIP product to the residents of Treviso Bay – is procedurally inappropriate because it is out of time, and because it is prejudicial to allow Embarq to have a second bite at the apple that it should have bitten the first time. Duplicative, cumulative, or repetitious evidence, whether exhibits or testimony, is disfavored for obvious reasons, but it is to be excluded pursuant to Section 120.569(2)(g), Florida Statutes. Similarly, irrelevant evidence, such as Comcast's financial results in Exhibit KWD-3 and Comcast's marketing plans in Exhibit KWD-4, is also to be excluded pursuant to the same section of the Florida Statutes.

### **Motion to Strike Testimony**

Treviso Bay also respectfully moves the Commission to strike most of the first seven pages of Mr. Dickerson's testimony, for one or more of the following reasons.

1. The testimony is not proper rebuttal, but rather is in the nature of additional direct testimony.
2. None of Mr. Dickerson's purported surrebuttal testimony contained on pages 1 through 7 of the testimony identifies with specificity what assertion or assertions of Mr. Wood's testimony are being rebutted.

3. Some of the subject testimony is argumentative, i.e., in the nature of legal argument.<sup>2</sup>
4. Much of the subject testimony, like Mr. Dickerson's exhibits, support the assertion that Comcast intends to offer its VoIP product to the residents of Treviso Bay, and accordingly, it is (a) in the nature of additional direct testimony, in that the availability of Comcast's VoIP product is a key part of Embarq's case in chief; (b) duplicative of Mr. Schweber's Affidavit; and (c) untimely because it was well known to Embarq long before (apparently as early as 2005) Embarq filed its petitions in this case.

Specifically, Treviso Bay moves the Commission to strike the following parts of Mr.

Dickerson's surrebuttal testimony, for the reasons given to the right of each passage.

Page 1, lines 20-23

The subject testimony is non-specific and is essentially inappropriate and non-probative. Indeed, reading Mr. Dickerson's testimony, nowhere does he identify Mr. Wood's alleged misrepresentation, and nowhere does he cite to Mr. Wood's testimony that he would have the Commission believe could mislead the Commission.

Page 2, line 3 - page 3, line 1

The subject testimony does not identify what part or parts of Mr. Wood's testimony are being rebutted, and is argumentative. Indeed, there is no reference to Mr. Wood's testimony in this passage, and the material at lines 5 through 18 of page 2 reads like a legal brief.

Page 3, line 3 – page 4, line 14

The subject testimony addresses the ability and intent of Comcast to offer its VoIP product to the residents of Treviso Bay. It does not indicate what, if anything, in Mr. Wood's testimony is being rebutted. This testimony is additional direct testimony, attempting to bolster what all parties know, namely, that Comcast can and intends to offer its VoIP product in Treviso Bay once its facilities are

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<sup>2</sup> Such testimony is legally inappropriate and inconsistent with Commission practice and orders. In a similar situation, Commissioner Julia L. Johnson, serving as prehearing officer struck a similar attempt to offer legal opinion as expert testimony, stating as follows:

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument . . . . Legal argument is more appropriately reserved for argument of counsel in a party's brief.

In Re: Investigation Into the Appropriate Rate Structure for Southern States Utilities, Inc., 94 FPSC 3:724. In the instant docket, the Prehearing Officer has granted the parties the opportunity to file memoranda of law and to present closing statements.

installed. It is thus also duplicative of Mr. Schweber's Affidavit and should be stricken on that ground as well.

Page 5, line 6 – page 7, line 22

The subject testimony does not identify specifically what statements in Mr. Wood's testimony the surrebuttal testimony is intended to rebut.

Page 11, lines 4-9

The subject testimony is in the nature of additional direct testimony and restates, duplicatively, the point that the residents of Treviso Bay will have the opportunity to purchase VoIP service from Comcast, a point which is already confirmed by Mr. Schweber's Affidavit.

**STATEMENT PURSUANT TO RULE 28-106.204(3), F.A.C.**

The undersigned has conferred with counsel for the Commission Staff and is authorized to state that the Staff take no position on the motion. The undersigned has conferred with counsel for Embarq and is authorized to state that Embarq opposes this motion.

**CONCLUSION**

As explained in detail above, the exhibits proffered with Mr. Dickerson's surrebuttal testimony are duplicative, untimely, and in the nature of additional direct evidence that Embarq could (except for Exhibit KWD-3) and should have filed with its direct case in chief.

Accordingly, these exhibits should be excluded from the record of this docket.

Additionally, most of the first seven pages of Mr. Dickerson's purported surrebuttal testimony is, in fact, additional direct testimony that is also duplicative of known facts, specifically that Comcast will be able to, and will, offer its VoIP product to the residents of Treviso Bay once its facilities are installed. Some of the testimony is argumentative, in the nature of a legal brief; this is not appropriate testimony. None of Mr. Dickerson's testimony that Treviso Bay is moving to strike identifies with specificity what of Mr. Wood's testimony it is supposed to be rebutting. Accordingly, the Commission should strike the portions of Mr. Dickerson's testimony identified above.

WHEREFORE, based upon the foregoing, Treviso Bay Development, LLC respectfully moves the Florida Public Service Commission to exclude proffered Exhibits KWD-3 through KWD-6 from the record of this case, and to strike those portions of Mr. Dickerson's testimony specifically identified above.

Respectfully submitted this 13th day of February, 2007.

s/Robert Scheffel Wright \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and by hand delivery on this 13<sup>th</sup> day of February, 2007, to the following:

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