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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 10 pages.

e. The document attached for electronic filing is Treviso Bay Development, LLC's Memorandum of Law.

(see attached file: TBD.Memo of Law.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)	Docket No. 060763-TL
multitenant property in Collier)	
County known as Treviso Bay,)	Filed: February 13, 2007
by Embarq Florida, Inc.)	
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TREVISO BAY DEVELOPMENT, LLC'S MEMORANDUM OF LAW

Treviso Bay Development, LLC ("Treviso Bay"), pursuant to leave granted by the Prehearing Officer at the prehearing conference, and by and through undersigned counsel, hereby submits its Memorandum of Law addressing legal issues implicated by Embarq's petition for waiver of its Carrier of Last Resort obligations under Section 364.025, Florida Statutes.¹

SUMMARY OF ARGUMENT

The Commission should deny Embarq's petition for waiver of Embarq's Carrier of Last Resort ("COLR") obligations under Section 364.025, Florida Statutes, because granting Embarq's requested waiver is contrary to applicable Florida Statutes, contrary to the Legislature's intent, and contrary to the public interest. Granting Embarq's requested waiver would undermine the specific universal mandate of Section 364.025. Embarq has not shown good cause for its requested waiver, and moreover, Embarq should be prohibited from abdicating its COLR responsibilities in this instance because Embarq specifically told Treviso Bay, in writing on numerous occasions and pursuant to Treviso Bay's requests, that Embarq would provide the requested voice service throughout the Treviso Bay development pursuant to Embarq's tariff.

BACKGROUND

Treviso Bay Development, LLC is developing a residential subdivision in Collier County, Florida, known as Treviso Bay. The Treviso Bay subdivision will include several

¹ All references to the Florida Statutes in this Memorandum of Law are to the 2006 edition thereof.

different neighborhoods and is projected to have approximately 1,200 residences when it is fully built out. Treviso Bay has requested that Embarq provide voice telephone service to the Treviso Bay development, and Treviso Bay has provided easements for Embarq's facilities to provide such service. On several occasions, Embarq advised Treviso Bay in writing that Embarq would provide the requested service and that the easements and dedications were acceptable.

Treviso Bay believes that it is undisputed that Embarq does not qualify for any of the automatic exemptions from its COLR obligations pursuant to Section 364.025(6)(b)1, Florida Statutes. Treviso Bay believes that it is also undisputed that Embarq is the only communications service provider that is capable of providing, and statutorily required to provide, wire-line, land-line voice service, i.e., service that is commonly known as basic local exchange telecommunications service, to the residents of Treviso Bay.

ANALYSIS & ARGUMENT

I. Embarq's Requested Waiver Is Contrary To Its Carrier of Last Resort Obligations.

Embarq's petition for waiver of its COLR obligations is based on its claim that if it can't provide video and data/internet service to the residents of Treviso Bay, then it is uneconomic for Embarq to provide only voice service; Embarq then elevates this assertion into its claim that this asserted fact – that it will be uneconomic for Embarq to provide the requested service – constitutes "good cause" to be relieved of its COLR obligations pursuant to Section 364.025(6)(d), Florida Statutes. This argument is not supported by the plain language of applicable statutes.

The context of Embarq's waiver petition is its clear legal duty under Section 364.025, Florida Statutes, to provide "basic local exchange telecommunications service" to any person requesting it in Embarq's service area. Fla. Stat. § 364.025(1). The statutes are clear that it is

important that consumers have access to this service and that "universal service objectives be maintained after the local exchange market is opened to competitively provided services." Id.

In 2006, the Legislature amended Section 364.025 to provide for local exchange telecommunications companies ("LECs" or "ILECs"), here Embarq, to be relieved from their COLR obligations under specifically defined circumstances. Fla. Stat. § 364.025(6)(b). The definition of "communications service" is of particular relevance here: that term is defined as "voice service or voice replacement service through the use of any technology." The term does not include video or broadband services; indeed, the Commission has no jurisdiction over video or broadband service. See Fla. Stat. § 364.011, 364.013, 364.02(13)-(16), and 364.025.

There are four automatic exemptions for an ILEC to be relieved from its COLR obligations, including: (i) exclusion of the ILEC from being able to install its communications equipment; (ii) a developer's accepting rewards or incentives to exclude the ILEC; (iii) collecting fees for the provision of "communications service" from providers other than the ILEC; and (iv) a developer's accepting rewards or incentives to limit or restrict the ILEC's access to property. These are the four circumstances that the Legislature determined were sufficient to excuse an ILEC from its COLR obligations. None of these circumstances is met in this case involving Embarq and Treviso Bay; Embarq does not even assert that any of these conditions is met.

The general law of statutory construction is that the plain meaning of the statutes controls. As articulated by the Florida Supreme Court, "There is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning." Verizon Florida v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002). Here, the universal service mandates and the Carrier of Last Resort obligations are clear and are easily understood in their ordinary meaning.

Video and broadband services are outside the Commission's jurisdiction. Fla. Stat. § 364.011(2)-(3). The statute specifically addresses voice service only. Fla. Stat. § 364.025(6)(a)3. The statutory provisions that govern the issues in this case are predicated on exclusivity or financial arrangements that would restrict the ILEC's – Embarq's – ability to provide voice service. There are no such exclusions or financial arrangements present in this case, and there are no physical limitations on Embarq's ability to install its communications facilities to provide the requested basic local exchange telephone service. The Commission should not be induced to look to matters outside its jurisdiction to decide the simple matter – Embarq's universal service mandate and COLR obligation – that is actually before the Commission in this docket and that is plainly articulated in the statutes.

Granting Embarq's requested waiver would do away with the fundamental, statutorily defined universal service requirement of the statutes. The Legislature's mandate is clear, namely that "universal service objectives be maintained after the local exchange market is opened to competitively provided services" and that "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." Fla. Stat. § 364.025(1). The Legislature knows the difference between "basic local exchange telecommunications service" and VoIP service. See Fla. Stat. §§ 364.01(3), 364.011, 364.02(1), and 364.02(16). The Legislature understands that VoIP is not basic local exchange telecommunications service. If the Legislature had meant to write the Florida Statutes so that VoIP service would satisfy the universal service objectives of the statutes, it would have written the statutes differently, but it did not. Thus, if Embarq is excused from its COLR obligation, there will be no universal service, and there will be no "basic local exchange telecommunications service" available in the Treviso Bay development.

Granting Embarq's requested waiver would gut Chapter 364's universal service provisions, emasculate the statutory COLR obligations, and deprive customers of their right to basic local exchange telecommunications service under applicable statutes. The Commission should deny Embarq's petition.

II. Embarq's Requested Waiver Is Contrary To the Legislative Intent of Section 364.025, Florida Statutes.

Where a statute is not plain on its face – and Treviso Bay believes that the applicable statutes here are plain – it is acceptable to look to legislative intent in interpreting the statute. In this instance, examination of legislative intent following standard, recognized principles of statutory construction leads quickly and directly to the same conclusion reached above: that the statutes are not intended to permit COLR waivers in these circumstances.

First, as set forth above, there are four specific circumstances that, if any of the four is present, provide for automatic relief from COLR obligations. Obviously, the Florida Legislature considered these four specific circumstances to constitute good cause for relief from the statutory COLR obligations. It is well settled under Florida law that where a statute "expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. (1997)). Here, the Legislature spelled out four circumstances giving rise to an ILEC's ability to be relieved of its COLR obligations (with no "including but not limited to" language), and accordingly, following this principle of construction, the Commission must conclude that the statute is not intended to be expanded as sought by Embarq.

Moreover, where the Legislature considers and rejects certain proposed statutory language, such consideration and rejection are strongly indicative of legislative intent. See Health Options, Inc. v. Agency for Health Care Administration, 889 So. 2d 849, 852 (Fla. 1st DCA 2004). Here, the Legislature specifically considered – and rejected – a proposal that

would have expanded the bases for COLR waivers to include other types of services, such as cable and broadband services, and possibly also marketing arrangements, which form the basis for Embarq's claims here. The original version of House Bill 817 (in the 2006 session), which was one of the bills in which the COLR waiver or relief provisions originally appeared, contained the following additional basis for automatic relief, when the owner or developer:

Restricts or limits the types of services that may be provided by an eligible telecommunications carrier or enters into an agreement with a communications service provider which restricts or limits the types of services that may be provided by an eligible telecommunications carrier.

In sum and substance, when the Legislature considered what to include in its list of "good causes" for granting COLR waivers, the Legislature explicitly considered and rejected the grounds asserted by Embarq in this case. The conclusion is inescapable that the Legislature did not and does not consider the scenario posed in this case to constitute good cause, and the Commission should accordingly deny Embarq's petition for waiver of its COLR obligations.

III. Embarq's Requested Waiver Is Contrary To the Public Interest.

The Legislature has clearly articulated its view of the role of universal service and COLR obligations relative to the public interest. The applicable Florida Statutes accordingly mandate the COLR obligation on ILECs in broad and unequivocal terms. Universal service is in the public interest, specifically in the environment of local exchange markets having been opened to competitively provided services. Fla. Stat. § 364.025(1).

Embarq's position or theory in this case is that it would (allegedly) not be economic for Embarq to provide only basic local exchange telecommunications service unless it can bundle that service with its own video and broadband services, and that this constitutes good cause for Embarq to be relieved from its COLR obligation. As discussed above, the Legislature specifically rejected this argument in its consideration of what would constitute good cause. More significantly, however, granting Embarq's petition would be contrary to the public interest

in that it would deprive customers – approximately 1,200 residences, with perhaps 2,500 to 3,000 residents in the Treviso Bay development at full build-out – of the "basic local exchange telephone service" that the statutes require ILECs to provide under the universal service and COLR mandates of Section 364.025, Florida Statutes.

Additionally, Embarq is inappropriately attempting to leverage non-regulated video and broadband services into a basis for not providing basic telephone service. Ultimately, Treviso Bay believes that Embarq is attempting to use its position as the only provider capable of providing – and required to provide - basic local exchange telecommunications service to inhibit or chill potential competitors, likewise contrary to the public interest. Thus, granting Embarq's requested waiver is also contrary to the Legislature's intent to promote competition. The Commission should accordingly deny Embarq's petition for waiver of its COLR obligations.

IV. Where Embarq Has Specifically Advised Treviso Bay That It Would Provide Service Pursuant To Its Tariffs, Embarq Cannot Now Renege On Those Commitments.

On several occasions over the past two years, Treviso Bay has requested that Embarq provide basic telecommunications service to Treviso Bay and to specific subdivisions within the Treviso Bay development. In response to each request, Embarq replied that it had reviewed the proposed plat submitted by Treviso Bay, that Embarq was in concurrence with the dedication set forth for Treviso Bay and for specific subdivisions, and that "Telephone service will be provided based on the rules and regulations covered in our [Embarq's] Local and General Exchange Tariff, approved and on file with the Florida Public Service Commission." Five such letters from Embarq were provided as Exhibit DJW-2 to the testimony of Treviso Bay's witness Don J.

Wood. Significantly, four of the five letters were sent after the Legislature enacted the 2006 amendments to Section 364.025, Florida Statutes.²

Thus, Embarq knew of the provisions of Section 364.025(6) when it committed to provide service to at least four neighborhoods in Treviso Bay. In general, a tariff constitutes a binding offer to provide service subject to its terms. Treviso Bay requested service pursuant to Embarq's tariffs, and Embarq responded that it would provide service accordingly. It would be extremely unsound public policy, if not outright unlawful, to allow any utility to commit to provide service pursuant to its tariff and then attempt to escape those tariff obligations. Permitting this to occur would do more than gut the universal service obligations in Section 364.025, it would effectively allow Embarq to escape compliance with its tariffs. Embarq had an affirmative obligation, which it did not fulfill, to advise Treviso Bay of its position based on the law as it existed when Treviso Bay made its requests in the summer of 2006; instead, Embarq told Treviso Bay that it would provide the requested service pursuant to Embarq's tariffs. Embarq held itself out as being willing to furnish the requested service pursuant to its tariffs. Treviso Bay was entitled to rely, and reasonably relied, on Embarq's commitments in those letters.

CONCLUSION

Embarq's requested waiver is contrary to the plain requirements of Chapter 364, Florida Statutes, that mandate universal service and impose Carrier of Last Resort obligations on incumbent local exchange carriers. Indeed, Embarq's petition flies in the face of, and is directly contrary to the statutory mandate that universal service objectives be maintained after local exchange markets are opened to competition. Embarq's petition is also contrary to the

² The referenced letters were dated June 20, 2006 (for the Italia subdivision), June 20, 2006 (for the Piacere and Pavia subdivisions), June 27, 2006 (for the Via Veneto subdivision), July 19, 2006 (for the Lipari Ponziane subdivision), and July 19, 2006 (for the Vercelli subdivision).

Legislature's intent: not only did the Legislature spell out the four specific grounds for automatic COLR waivers, which obviously reflects the Legislature's determination of what constitutes good cause, the Legislature also explicitly considered language that would have granted an automatic exemption based on the grounds asserted by Embarq here, but the Legislature rejected that proposal. Accordingly, it is inescapable that the Legislature's intent is that the grounds asserted by Embarq here do not constitute good cause justifying waiver of COLR and universal service obligations.

Embarq is the only provider in the Treviso Bay area that is capable of providing, and required to provide, basic local exchange telecommunications service. Granting Embarq's petition would deprive the residents of Treviso Bay of basic telephone service, contrary to the statutes and contrary to the public interest. Granting Embarq's petition would improperly allow Embarq to escape its commitment to provide service pursuant to its tariff. For all of these reasons, the Commission should deny Embarq's petition for waiver of its COLR obligations.

WHEREFORE, based upon the foregoing, Treviso Bay Development, LLC respectfully submits that the Florida Public Service Commission should deny Embarq's petition for waiver of its COLR obligations.

Respectfully submitted this 13th day of February, 2007.

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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 U.S. Mail on this 13th day of February, 2007, to the following:

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