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To: Filings@psc.state.fl.us
Cc: Susan Masterton
Subject: Docket #060763 Embarq's Prehearing Memorandum of Law
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ORIGINAL

February 13, 2007

Ms. Blanca Bayó, Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 060763-TL, Embarq Florida, Inc., Prehearing Memorandum of Law
Dear Ms. Bayó:

Enclosed for filing on behalf of Embarq Florida, Inc. is Embarq's Prehearing
Memorandum of Law, Docket No. 060763-TL.

Copies are being served on the parties in this docket pursuant to the attached certificate of
service.

If you have any questions regarding this electronic filing, please do not hesitate to call me
at 850/599-1560.

Sincerely,

s/ Susan S. Masterton
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE
DOCKET NO. 060763-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic, and US Mail (*) this 13th day of February, 2007 to the following:

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s/ Susan Masterton
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RIGIN

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.	Docket No. 060763-TL Filed: February 13, 2007
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EMBARQ FLORIDA, INC.'S PREHEARING MEMORANDUM OF LAW

Embarq Florida, Inc. ("Embarq"), in accordance with Order No. PSC-07-0128-PHO-TL, hereby files its Prehearing Memorandum of Law setting forth its legal arguments related to its petition for waiver of its carrier of last resort obligations at Treviso Bay.¹

INTRODUCTION

In 2006 the Legislature amended section 364.025, F.S., relating to universal service and establishing an ILEC's carrier of last resort obligation, to allow ILECs to obtain relief from the COLR obligation in certain multitenant properties either through meeting certain automatic conditions for relief or through proving good cause for a waiver. The criteria for automatic relief clearly contemplate situations where the universal service objectives of the statute are met through the availability of voice or voice replacement service from an alternative provider, thus eliminating the need for an ILEC to construct unnecessary duplicate facilities for the provision of voice services.

Under recognized principles of statutory construction, and in accordance with the express terms of the statute, the grounds for requesting a waiver of the COLR obligation clearly involve circumstances beyond the circumstances that justify automatic relief. In

¹ In accordance with the direction provided by staff at the prehearing conference, Embarq has endeavored to avoid reiterating in this Memorandum points already made by Embarq in its testimony and other filings in this docket. Instead, this Memorandum should be read as supplemental to, rather than cumulative of, those filings.

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its filings in this docket, Embarq has demonstrated good cause for a waiver through its evidence that:

- 1) the developer of Treviso Bay has entered into a bulk agreement with Comcast for the provision of data and video services;
- 2) Comcast will offer and be able to provide voice or voice replacement service to residents of the development over the same facilities over which it will provide data and video services;
- 3) voice or voice replacement service will be available to residents from an alternative provider, thereby meeting the goals of universal service; and
- 4) Embarq's construction of facilities to provide duplicate voice service will be unnecessary and uneconomic.

Based on these specific facts and circumstances existing at Treviso Bay, the Commission should grant Embarq's request for a waiver of its COLR obligation to this multitenant development.

ARGUMENT

Carrier of Last Resort Obligation

Embarq's Petition is consistent with the chapter 364

Section 364.025, F.S., defines universal service as access for Florida customers to telecommunications services at reasonable rates and establishes a "carrier of last resort" or COLR obligation for ILECs to ensure that these goals are met during the transition to competition, which began under the statute in 1995. Clearly, the focus of the COLR

obligation is to ensure that voice services are available to everyone, based on reasonable access and price.

During the more than 10 years since the introduction of competition in the local market in Florida, competition has advanced enough that the Legislature found it reasonable to provide a mechanism in section 364.025 that allows ILECs to be relieved of their COLR obligations to certain multitenant properties when circumstances warrant.² In effect, these new provisions of law that allow the Commission to grant relief from the COLR obligation are a specific mechanism for the Commission to carry out the more general provision set forth in section 364.01(4)(f) encouraging the Commission to exercise its jurisdiction to eliminate unnecessary regulation that impedes the transition to competition.

Certain behaviors by developers and competitors have altered the competitive landscape and affected the viability of the COLR obligation. As Embarq described in its Amended Petition, some property owners and developers have seized on opportunities to take advantage of competition to increase their revenues by soliciting exclusive arrangements for the provision of voice, broadband and video services to the multitenant units or homes in a specific multitenant property, contingent upon the chosen provider entering into some sort of “profit-sharing” arrangement with the owner or developer. These “profit-sharing” arrangements generally take the form of door fees or a percentage of the monthly recurring revenues charged to the captive residents of the multitenant property. Further, some owners and developers have seen opportunities to enter into exclusive profit-sharing arrangements with alternative providers for bulk provisioning of

² Chapter 2006-80, L.O.F.

broadband and video services, while seeking to exploit the ILEC's carrier of last resort obligation to provide only voice services within the development merely as a backup to their profit-driven choice of alternative communications-platform provider. Where the ILECs are limited to marketing only voice services, in most instances it will be virtually impossible for the ILEC to recover its costs because of the widely available access to VoIP (i.e., voice replacement) services via the customer's broadband internet access and, also the availability of multiple wireless service providers.

The statute provides four circumstances that justify automatic relief for ILECs from their COLR obligations, including circumstances when the developer or owner of a multitenant property:

1. Permits only one communications service³ 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.

The basis of the automatic relief provided in subsection 364.025(6)(b) generally is the existence of an alternative voice or replacement service provider that is contractually obligated to serve a particular development, therefore eliminating the need for the ILEC to be required to place facilities duplicative of the facilities of the alternative provider to

³ "Communication service" is defined in the statutes as "voice or voice replacement services".

provide voice or voice replacement services that are already available from the alternative provider.

In addition to the four circumstances justifying automatic relief, the statute provides a mechanism for an ILEC to request a waiver for “good cause” based on the facts and circumstances of a particular development. According to its express terms, the statute contemplates that a waiver petition will involve circumstances other than the circumstances listed as automatic exemptions. However, it is reasonable to assume that the nature of the facts and circumstances justifying relief would be similar to the automatic exemptions. That is, it is reasonable to assume that the facts and circumstances justifying a waiver demonstrate the existence of an alternative provider with facilities in place to provide voice or voice replacement services that is subject to contractual benefits and obligations which obviate the need for the ILEC to serve the development in order for the universal service goals to be met.

As Embarq has demonstrated in its Petition, testimony and discovery responses, the facts and circumstances that are the basis for Embarq’s request for a waiver of its COLR obligations in Treviso Bay demonstrate just such circumstances that obviate the need for Embarq to act as the COLR to fulfill universal service obligations. It is unnecessary to require Embarq to make an uneconomic and duplicative investment in facilities in order to act as a “fall back” provider of voice services, when Comcast will already have in place the facilities necessary to provide voice or voice replacement service, will have 100% penetration of its data and video services, and will make its digital voice services available to Treviso Bay residents upon occupancy. As Mr. Dickerson explains in his Surrebuttal Testimony, forcing Embarq to incur these

unrecovered costs to provide unnecessary services harms rather than helps competition. Therefore, imposing this unnecessary and uneconomic COLR requirement on Embarq is just the type of unnecessary regulation that section 364.01(4)(f) and 364.025(6)(d) were designed to avoid.

Embarq's Petition is consistent with legislative intent

Treviso Bay and other developers⁴ argue that, because the Legislature restricted the automatic exemptions to situations involving exclusive alternative voice or voice replacement service providers only and because the Legislature replaced a specific provision that would have made circumstances similar to the circumstances in Treviso Bay an automatic exemption, the Legislature intended that these circumstances do not constitute grounds for a waiver.⁵ However, this interpretation violates one of the fundamental rules of statutory construction, that is, when interpreting multiple provisions of a statute, the provisions must be read together and all of the provisions must be given effect. See, *T.R. v. State of Florida*, 677 So. 2d 270, 273 (Fla. 1996), in which the Florida Supreme Court held that “where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.” If all of the provisions of section 364.025 are read together, clearly they set forth a scheme where, in general, the ILEC is to serve as a carrier of last resort, but where, in circumstances when a developer has chosen another voice or voice replacement service provider, either through actual or effective exclusion of the ILEC, or when other facts and circumstances result in a similar effective limitation on the ILEC’s provision of voice

⁴ See the Petition filed by Lennar in Docket No. 060732-T1 and the Response filed by Nocatee in Docket No. 060822-TL

service, the COLR obligation no longer applies. Were the Commission to accept the developers' arguments that the facts and circumstances justifying a waiver must be limited only to the existence of an exclusive alternative voice or voice replacement service provider, the provisions of section 364.025(6)(d) would be rendered effectively nil, contrary to the recognized principles of statutory construction.

Embarq has demonstrated that Treviso Bay has entered into an exclusive agreement for data and video services with Comcast, which will offer its digital voice service over the same broadband facilities that it will be providing to 100% of the Treviso Bay residents, such that Embarq will be unable to obtain sufficient customers and revenues to pay the costs of meeting its COLR obligations. These facts and circumstances show "good cause" beyond the automatic relief circumstances for the Commission to grant Embarq's request for a waiver of its COLR obligation at Treviso Bay.

Estoppel and Detrimental Reliance

In addition to its arguments relating to the purposes of universal service and the carrier of last resort obligation, Treviso Bay has argued that Embarq's waiver petition should not be granted because Embarq represented to Treviso Bay that it would provide telecommunications services pursuant to its tariffs and Treviso Bay relied on that representation.⁶ Treviso Bay's argument is essentially a legal one founded on principles of estoppel and detrimental reliance.

Elements of Estoppel and Detrimental Reliance

⁵ The summary of amendments to the House Bill that formed the basis for the 2006 legislation (HB 817) in the March 23, 2006, staff analysis by the House Utilities and Telecommunications Committee staff reflects this removal of one provision and addition of the other.

⁶ In fact, after the 2006 legislation passed Embarq amended its tariffs to recognize the contingent nature of its obligation to provide service under section 364.025, F.S. (See Embarq General Exchange Tariff, Section A2, Second Revised Sheet 14, Section C.1.c.)

Estoppel is generally presented as an “affirmative defense” to a civil claim, often based on principles of contract law or fraud. Florida case law consistently sets forth the elements that are necessary to establish estoppel, including that: 1) there was a representation of material fact that is contrary to a later asserted position; 2) there was a reliance on that representation and 3) the reliance was detrimental to the party claiming estoppel. See, *Mandarin Paint and Flooring v. Potura Coating*, 744 So. 2d 482 (Fla. 1st DCA 1999). See also, *Humhosco Inc. v. Florida Department of Health and Rehabilitative Services*, 501 So. 2d 388 (Fla. 1st DCA 1990).

Key to a party successfully asserting the affirmative defense of estoppel is proof that the party suffered detrimental reliance as a result of actions of the party against whom the defense of estoppel is asserted. See, *Williams v. Florida Construction Industry Licensing Board*, 911 So. 2d 890 (Fla. 1st DCA 2005) Although Treviso Bay has asserted that it relied on Embarq’s representations that it would provide service, Treviso Bay has failed to allege, much less prove, that it suffered any detriment as a result of such reliance. In fact, Embarq does not believe that Treviso Bay can establish any such detriment, since the record clearly shows that residents of Treviso Bay will have access to voice service through multiple providers other than Embarq, including the provider from whom the residents will already purchase their data and video services.

Commission Jurisdiction

The affirmative defense of estoppel and the related demonstration of harm required to prove “detrimental reliance” are civil law concepts generally based on fraud and contract law, and are claims for relief outside the jurisdiction of the Commission. In particular, these claims are irrelevant to Embarq’s request to be relieved of the regulatory

requirements associated with its carrier of last resort obligations in accordance with specific statutes giving the Commission specific authority to grant such relief. To the extent that Treviso Bay believes that Embarq's plat approval and service availability letters, as well as the terms of Embarq's tariffs, constitute contracts that Embarq has breached through the filing of its waiver petition and that it has suffered damages as a result, the remedy Treviso Bay seeks is properly pursued in a civil court action for breach of contract.⁷

CONCLUSION

WHEREFORE, based on the facts and circumstances Embarq has demonstrated to exist at Treviso Bay, and the arguments presented in this Memorandum, the Commission should grant Embarq's Petition to be relieved of its COLR obligations at Treviso Bay.

RESPECTFULLY SUBMITTED this 13th day of February 2007.

s/ Susan S. Masterton
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⁷ The plat approval and service availability letters that Treviso Bay has included as Exhibits to Mr. Wood's testimony and in responses to staff discovery requests require that Treviso accept the requirements set forth in the letters. The letters produced by Treviso Bay are unsigned and to Embarq's knowledge signed letters have never been returned by Treviso Bay. Consequently, Embarq denies that any contract for service from Embarq was ever consummated by the parties.