

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060822-TL

In the Matter of:

PETITION FOR RELIEF FROM CARRIER-OF-
LAST-RESORT (COLR) OBLIGATIONS PURSUANT
TO FLORIDA STATUTES 364.025(6) (D) FOR TWO
PRIVATE SUBDIVISIONS IN NOCATEE DEVELOPMENT,
BY BELLSOUTH TELECOMMUNICATIONS, INC.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 17

BEFORE: CHAIRMAN LISA POLAK EDGAR
 COMMISSIONER MATTHEW M. CARTER, II
 COMMISSIONER KATRINA J. MCMURRIAN

DATE: Tuesday, March 13, 2007

PLACE: Betty Easley Conference Center
 Room 148
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 Tallahassee, Florida

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FLORIDA PUBLIC SERVICE COMMISSION

DOCUMENT NUMBER-DATE

02465 MAR 20 07

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7 Communications, Inc.

8 MICHAEL COOKE, General Counsel, PAT WIGGINS, ESQUIRE,
9 DALE BUYS, RICK MOSES and RAY KENNEDY, representing the Florida
10 Public Service Commission Staff.

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P R O C E E D I N G S

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CHAIRMAN EDGAR: We are on Item 17.

MR. BUYS: Good morning, Commissioners. Dale Buys with the Commission staff.

Item 17 is staff's recommendation in Docket Number 060822, regarding BellSouth's, now they are AT&T's, petition for relief from its carrier of last resort obligations at the Riverwood and Coastal Oaks Subdivisions in the Nocatee development located in Duval and St. Johns Counties.

Upon review of the information provided thus far in this docket, staff believes AT&T has not made a prima facie case for good cause, and the Commission should deny AT&T's petition and not relieve AT&T from its COLR obligation at the identified properties.

Representatives from AT&T and Nocatee, I believe, are here this morning, and we are all prepared to discuss this matter.

CHAIRMAN EDGAR: Thank you.

Mr. Meza.

MR. MEZA: Thank you, Madam Chair. Jim Meza again on behalf of AT&T Florida. Mr. Hatch will be providing BellSouth comments today.

MR. HATCH: Good morning, Commissioners. Tracy Hatch appearing on behalf of AT&T Florida. I think probably we ought to start out with we disagree with the ultimate conclusion of

1 staff's recommendation. We think they reached the ultimate
2 wrong result. In reading the recommendation, what it
3 essentially says is that we have not put on a sufficient amount
4 of information for a prima facie case to justify good cause.
5 But if I read the recommendation correctly, it appears from the
6 way staff has structured it that there could never be a way in
7 which a carrier could establish a prima facie case for
8 uneconomic deployment. Essentially, what they have said is we
9 didn't put forth any real examples, or any statistical data, or
10 anything like that that would justify a good cause relief from
11 COLR based on uneconomic deployment.

12 The nature of the COLR beast is that you can't do
13 that -- the way the staff has structured it there would never
14 be an occasion where you could actually do that. Each COLR
15 application is based on the facts and circumstances of that
16 particular instance. In this case you have got the Nocatee
17 development. There is no way, unless you actually deploy the
18 facilities, that you could give staff the kind of information
19 they seem to be asking for in order to justify the fact that it
20 is uneconomic deployment, in which case we have already
21 deployed the facilities on an uneconomic basis and how are we
22 going to recover our investment in those facilities. That is
23 the fundamental quandary that we find ourselves in with the
24 staff recommendation. There doesn't seem to be any way to get
25 there from here.

1 Another point, too, that you have to consider and go
2 back to the history of what COLR is and what COLR is not. If
3 you go back, and the staff touches on the history of all of
4 this briefly in its recommendation, talking about the concept
5 of universal service, what it is, how it came about and why it
6 is. But, essentially, it's what is generally referred to as
7 part of a regulatory compact. If you go back before 1995 there
8 was the phone company. If you go back to 1984 there is really
9 the phone company, when there was essentially only one phone
10 company in the United States. And the regulatory compact was
11 that we would, or the phone company would give service to
12 everybody under reasonable terms and conditions that wanted it
13 within a geographic area, and as part of that deal you got to
14 be the monopoly provider of telephone service. All of that
15 changed in 1995.

16 Now, the legislation that essentially created
17 competition or created the opportunity for competition in
18 1995 carried forth this COLR obligation, in which case we would
19 provide, or the incumbent would be the COLR provider, and would
20 provide service to those folks, reasonable terms and
21 conditions, within its serving territory. But you have to
22 understand COLR is the carrier of last resort. It is where
23 there is no other alternative. Prior to 1995 that question
24 never arose because there was only one alternative. I mean,
25 that is just the nature of the beast. Post '95 there are

1 alternatives. COLR really exists as a concept only where there
2 is no other alternative.

3 Now, if you look at Nocatee, there is clearly another
4 alternative, so you have to ask the question should COLR even
5 exist under these circumstances? I mean, that's a fundamental
6 question you have to ask yourself. It's clear from staff's
7 recommendation that Nocatee will be providing phone service to
8 those folks. And so, then, there is an alternative. One of
9 the things that Nocatee says is that the statute intends that
10 there be choice. No question, the 1995 statutes were designed
11 to create choice. COLR is not a requirement that we be a
12 choice. COLR is a requirement only where we are the only one
13 that's available under reasonable terms and conditions. So, in
14 a sense, we disagree with the staff's analysis as well as
15 Nocatee's on that issue.

16 Now, one of the things that we do agree with, with
17 respect to the staff's recommendation, and we would seek some
18 clarification here, is that if -- and then they refer to we
19 have other options under the Commission's rules in terms of
20 CIAC, contributions in aid of construction, so that we have
21 those tools available to us to essentially offset or at least
22 mitigate the issue of uneconomic deployment.

23 We may be able to live with staff's recommendation,
24 but we need to understand, first, who is able to invoke the
25 COLR obligation from us? Is it Nocatee as a developer or is it

1 end users when they actually desire service? That's a question
2 that is not answered. If it is the developer that can invoke
3 this COLR obligation for us to deploy facilities, the staff
4 suggests that is we can use the CIAC rule to recoup some of our
5 investment in deploying those facilities. I think we probably
6 can live with that. But the question then that we need at
7 least clarification on from the Commission is if we go forward
8 and Nocatee is able to invoke that COLR obligation for us to
9 deploy facilities to provide voice only service, then, is
10 Nocatee going to be responsible under the CIAC rule for paying
11 us, under the CIAC rule, for the deployment of those
12 facilities? That is the question. And if Nocatee says, I'm
13 not going to pay you, then, we don't have an obligation to
14 deploy those facilities.

15 One thing that you have to also consider here is the
16 size and scope of the Nocatee development. It's not like we
17 are denying subscribers phone service. At this point the only
18 thing that's on the table is, essentially, we are declining to
19 provide facilities to 3,000 homes that, at least as far as I
20 know, don't have people in them at this point. The real
21 question, of course, in any kind of economic deployment is how
22 many customers are actually going to buy your service, that
23 tells you whether it's going to be economic to deploy. We have
24 absolutely no idea how many people are going to, essentially,
25 subscribe to the service. We are limited in the Nocatee by

1 virtue of easement restrictions to providing voice-only
2 services.

3 Now, we are competing against the other alternative
4 phone provider, which is going to be Comcast, and they can
5 provide a whole range and host of services. Their economic
6 equation is radically different from ours, because they,
7 essentially, become the exclusive provider of video and data,
8 and they can add on voice if somebody wants to buy it. By
9 virtue of the easements from the developer, we are restricted
10 to providing voice only, and so our economic equation in terms
11 of recovery investment is radically different. The take rate
12 required to economically deploy facilities has to be much
13 higher in order to deploy those facilities.

14 One final comment with respect to the staff
15 recommendation, this is sort of an afterthought, is that the
16 staff suggests that the only way to really determine how to
17 make these judgments on COLR petitions is through a generic.
18 As I mentioned earlier, each of these cases, essentially, stand
19 alone in its own right, and you have got statutory obligations
20 to do them very quickly. The nature of these petitions are
21 fact based and individual circumstances, and they do not lend
22 themselves to any kind of a generic proceeding. We think that
23 deferring anything -- well, I don't think you can defer it. I
24 think the statute requires that you essentially act on the
25 petitions that are before you. But the generic proceeding in

1 and of itself would not lend itself to this kind of a
2 proceeding. We don't think that is the solution.

3 Thank you.

4 MR. SELF: Thank you, Madam Chairman, Commissioners.
5 Floyd Self of the Messer, Caparello and Self law firm,
6 appearing on behalf of Nocatee and all of the other entities
7 involved in the development of the Nocatee community.

8 It seems to me, Commissioners, that there is really
9 one question that you need to ask yourselves today, since this
10 is a carrier of last resort waiver, and that is, is there any
11 financial/legal access or other limitation on AT&T/BellSouth's
12 ability to offer voice telephone service? And the answer to
13 that question is no, there is absolutely no limitation on their
14 ability. They are provided full access to install any
15 facilities they want, but there is a limitation on their
16 ability to provide voice telephone service only. And, really,
17 that kind of goes to the last point that Mr. Hatch was talking
18 about, when he was discussing the fact that if you are going to
19 provide voice only the take rates have to be higher and all of
20 that kind of stuff.

21 To me, it seems that the not economic to serve unless
22 we can bundle in all of these other things is a very disturbing
23 argument to make, because if it is uneconomic for BellSouth
24 to -- and I apologize, I have been saying BellSouth for a long
25 time. It's going to take a while. I'm sure Mr. Hatch has the

1 same problem.

2 Anyway, if it is uneconomic for AT&T to serve a
3 private gated community unless they can also provide video and
4 data services or broadband services, then it seems that what
5 BellSouth is really saying is that it is uneconomic to serve
6 anyplace in the State of Florida. And I say that, because if
7 you think about a community that perhaps the customers in that
8 area don't take video and don't take broadband services, what
9 is the economic incentive for a company like AT&T or any other
10 incumbent LEC to serve or, importantly, to continue to serve in
11 that area? Because if the argument is we can only serve if we
12 can only bundle in all of these other things that are not
13 regulated by this Commission, and which have nothing to do with
14 the provision of telephone service, then I think that's a
15 slippery slope, the result of which is you slide all the way
16 down. Because I'm not sure if under that kind of analysis, if
17 there is anyplace in the state of Florida that would be -- that
18 would justify support for just voice-only telephone service.

19 And it seems that what AT&T is asking you to do is to
20 make a leap of faith, and it is faith that they will fail and
21 fail miserably, solely because they cannot offer the broadband
22 and video services. And I find that at least partially ironic,
23 because at the moment they really don't have a widespread
24 deployed video service that they can offer at all. As you saw
25 in the case background, Nocatee negotiated with them for a

1 considerable period of time to provide video as well as
2 broadband services, and ultimately the business decision was
3 made not to proceed with them because they could not offer the
4 video service. So, I find it very disturbing to say that you
5 have got to be able to bundle these things in. If that
6 argument is true, then why not say, well, if we can't also
7 offer, and pick any ridiculous thing that you want, toasters,
8 cars, cell phone service. Again, I think that is an argument
9 that doesn't stand up and which I think supports the staff
10 argument that there is no prima facie case.

11 I think in the final analysis in order to grant a
12 waiver -- I don't think this is an impossible question to
13 answer. The statute sets forth four situations in which a
14 carrier has been denied access, whether it is through physical
15 access or effective economic access. And I think the good
16 faith argument was thrown into the statute in order to give you
17 the flexibility to address situations that amount to the same
18 kind of denial of access. So I think if you had a situation
19 where they, AT&T, was unable to access those customers, for
20 example, perhaps Nocatee had entered into an arrangement with a
21 cell phone company and we put towers on all of the residences,
22 and we bundled in cell phone service into the purchase price
23 for the houses or there was a homeowners association that had
24 that kind of -- where that obligation existed, then I think you
25 might, at least theoretically, have a good argument that there

1 is a good faith or -- excuse me, a good cause denial of access
2 to that residence through that alternative provider. But I
3 think given what you have now, the fundamental fact that they
4 do have access to all of those residences, they can put in any
5 facilities that they want, I think makes it very clear that
6 under the statute that there is no prima facie case for good
7 cause.

8 One other point that Mr. Hatch raised, and the staff
9 recommendation touches upon this also, and that is this idea of
10 potentially of the CIAC and that the tariffs or the
11 Commission's rules provide a mechanism for the recovery of
12 that. I don't know whether that's appropriate or not. I would
13 only say at this point in time that to the extent that AT&T was
14 going to invoke that, that it would be important that it must
15 be applied fairly and nondiscriminatorily and that the
16 facilities at issue needed to focus on voice telephone service.

17 For example, if AT&T said, well, it's going to cost
18 \$2 million to build-out to serve this community, then I think
19 we have to look at what are the facilities that they are
20 including in that? Are they building in facilities that would
21 also provide data and video, or are they talking about
22 facilities that would be voice only? That's not an issue that
23 needs to be resolved today, but if we get to that point
24 downstream, I think that is important to look at.

25 And I'll be happy to answer any questions that you

1 may have.

2 CHAIRMAN EDGAR: Thank you, Mr. Self.

3 Commissioners?

4 COMMISSIONER McMURRIAN: I have some.

5 CHAIRMAN EDGAR: Commissioner McMurrian.

6 COMMISSIONER McMURRIAN: Let me see if I can get my
7 thoughts together here, though. We've got a lot of information
8 on this, definitely.

9 Mr. Self, I wanted to follow up with something you
10 said when you were talking about the leap of faith and that you
11 think that AT&T was making the argument that fails solely
12 because they can't offer video and broadband. And I guess I
13 understand it a little differently, so I just wanted to ask you
14 about this. I understand that, and I believe that Mr. Hatch's
15 argument touched on this, it is more about putting in the
16 facilities to serve voice and then not knowing how many voice
17 customers you're going to get. So it is more a recouping
18 investment issue than it is just that they can't get broadband
19 and video. They can't serve that because of the exclusive
20 arrangement.

21 I mean, at least it seems to me that it's a
22 combination of the two things. Maybe it's aggravated by the
23 fact that they can't get the broadband and the video and that
24 might help offset that recouping issue of the original
25 investment for voice. But do you really see it as solely

1 because they can't offer video and broadband? Maybe we just
2 have a difference of opinion.

3 MR. SELF: Well -- and I don't know whether it is
4 semantics or not either. I'm just reading what the pleadings
5 say and, you know, whether it is stated this way or it is my
6 interpretation of it, what I'm seeing is it is uneconomic for
7 us to be in there unless we can also offer the video and the
8 broadband. And maybe there is more ambiguity today in a new
9 development when you are deploying some kind of wired network
10 for telephone, and potentially other services as well, as to
11 whether or not you're going to still get effectively 100
12 percent penetration on that versus 20 years ago.

13 I mean, we have all seen the stories about, you know,
14 college kids with cell phones and other people with cell phones
15 and not even having traditional landline telephone service. I
16 think if you buy into that argument that there is a question as
17 to what's the take rate going to be; it's not going to be our
18 traditional assumed virtually 100 percent penetration. Well,
19 that is really true the other way, as well. Even though
20 Comcast may be providing video and data services, there's no
21 guarantees either that they are going to have a high level of
22 penetration with respect to their voice telephone service.

23 I admit that question, you know, only time is going
24 to tell how difficult it's going to be or what the
25 circumstances are going to be for a carrier to know what the

1 take rate is going to be. You know, it is kind of a new day.
2 I don't know. I think it's fair to assume that these are
3 private gated communities. You know, if you want to make
4 assumptions, you know, I think it is safe to assume that they
5 are going to take video and broadband services. But I think it
6 is -- my assumption is it is also very safe to assume that
7 those types of customers are going to want traditional wired
8 telephone service, not VoIP and all of the issues that it may
9 have, not cellular with the issues that they may have. You
10 know, they want reliable, affordable, guaranteed phone service.
11 You know, I find it ironic that I'm arguing on their behalf,
12 but, I mean, that's what they offer.

13 COMMISSIONER McMURRIAN: I guess, Mr. Self -- and I
14 guess I will go ahead and follow up with you on it. I guess
15 what I'm struggling with is it seems to me there has to be some
16 scenario that gets to good cause or else what's the purpose of
17 it being there. And to me, when you look at the factors in
18 this case, it seems like if you are not there you are getting
19 awfully close. And I'm having trouble defining it for myself,
20 but I guess I will just ask you. What do you think would
21 constitute good cause, or do you think it's true what Mr. Hatch
22 said, that under staff's reading of this there really is
23 nothing to get you to the good cause.

24 MR. SELF: Well, I disagree with that. I think there
25 are scenarios where you could potentially have good cause. And

1 like I said before, it has got to amount to an effective denial
2 of access to the customers. One hypothetical may be they
3 contract with a cellular company and somehow between the
4 homeowners association or some other combination of things, you
5 end up with a deal that cellular service is provided. There's
6 base stations, cell phones. I don't know, I'm just sort of
7 making this up as I'm going along. But I could see a scenario
8 where that might be true.

9 There might be other types of business arrangements
10 whereby you are effectively denying AT&T access to those
11 customers, either through physical access or through some
12 economic combination that involves voice telephone service. We
13 certainly don't with the arrangement with Comcast have an
14 economic denial of access to those customers in the present
15 facts.

16 COMMISSIONER McMURRIAN: I guess this, perhaps, is
17 best asked of staff. What do you see as the purpose of the
18 COLR statute? I guess that would be -- I guess that would be
19 for Patrick -- Mr. Wiggins, I'm sorry.

20 MR. WIGGINS: The COLR statute or the COLR waiver?

21 COMMISSIONER McMURRIAN: Actually, I should probably
22 say what is the purpose of COLR, the carrier of last resort
23 concept, what is the purpose? And I know that we have gone
24 through some of the history in the rec.

25 MR. WIGGINS: All right. First of all, it's the

1 carrier of last resort, not the carrier of only resort. Let's
2 be clear, Mr. Hatch. The purpose of the carrier of last resort
3 obligation under the revisions to the '95 version of Chapter
4 364 were to embrace in a new regulatory bargain the standard or
5 historical common carrier obligation to provide services on a
6 nondiscriminatory basis to all those who request your service
7 within an area you are holding yourself out to provide it
8 indiscriminately. That was a long sentence.

9 What is unique about telephone companies in Florida
10 is they have a territorial description, just like they have a
11 property description, which says this is your territory, and
12 they say we are going to serve it. That means they build-out.
13 That is what they do and that started back in 1911. Okay. So
14 that has been there all along. And the common carrier
15 obligation to provide that service when it's asked goes back to
16 at least the eleventh century and probably back to Rome, so
17 this is nothing new, okay.

18 It is true, I'm not just winging this one. So the
19 purpose was to take that obligation that has been there all the
20 time and try to make it breathe and be alive in a price capped,
21 competitive evolving environment. So where we are left now is
22 that as competition is intruding, we are having situations
23 where previously it might have been uneconomic in a specific
24 situation for the ILEC to serve, but where they might have some
25 guarantee overall that they would be getting a fair rate of

1 return for their rates, where they know they are not going to
2 get their money back. They are going to lose money. There is
3 no back end on this.

4 So, the waiver, in looking at trying to balancing the
5 guarantees that we have that any user can have access to a
6 carrier of last resort, and that carriers have access to that
7 user, and that we can maintain the integrity of the public
8 switched network said, hey, you have got four situations where
9 automatically the switch is on or off or it is black or white,
10 these are them until 2009. Is it 2009 still? So 2009 and all
11 bets are off. But until then these four conditions.

12 Then, we have gray areas. And the Legislature in its
13 infinite wisdom says, PSC, you take care of the gray areas.
14 All right. What is happening here is that the ILEC and the
15 developers and the cable companies are saying, yeah, it's a
16 gray area, but treat it like it is black or white. It really
17 is not gray, they have not made their case; or it really is not
18 gray, we have made our case. Follow? So they are trying to
19 put us in an either/or position when there is no either/or
20 here.

21 The truth is I think that Mr. Hatch was right in most
22 everything he said, and I think Mr. Self is right in everything
23 he says. So how is it you can be sitting here with two people
24 being -- you know, two sides being essentially right? Well,
25 that is why it is a gray area. Okay. So that is where we are.

1 COMMISSIONER McMURRIAN: Well, I guess what I was
2 getting at, it seems to me that the purpose of COLR overall is
3 to provide a safety net for customers to have a phone. I mean,
4 is that correct? It seems to me that that is what the notion
5 is. And it seems to me that what the purpose of the COLR
6 relief statute was, was to come in and say there are
7 circumstances where we think that, essentially, we have taken
8 care of that because there is some competitor that has come in
9 and in some way or another locked out the traditional carrier
10 of last resort, and that customers then do have another
11 carrier. Granted that they don't have the same requirement
12 under the statutes that a traditional provider has, but that
13 essentially there is a provider of voice service.

14 MR. WIGGINS: Yes, ma'am. I think the interpretation
15 you gave is a permissible one. I think it is reasonable in the
16 evolving, but it is not what I see. I do not believe that the
17 purpose of the COLR obligation is to give the individual user a
18 safety net. I think the purpose of the COLR obligation is to
19 ensure that we have universal service in a public switched
20 network and facilities deployed to serve that public switched
21 network.

22 The fact that it translates into an individual right
23 of a consumer as a safety net is actually a function of it, but
24 I don't see that as being the driving purpose. However,
25 clearly, the existence of alternative access to the public

1 switched network through VoIP or others or cellular or
2 whatever, is clearly a consideration you can take into account.
3 That is why this is a gray area. We are just going to use our
4 best judgment as we move through this.

5 MR. SELF: And, Commissioner McMurrian, if I may. I
6 don't think it is the mere, the mere presence of an alternative
7 provider that is dispositive of the issue. I mean, I read
8 something the other day, there is like 220 million wireless
9 customers in the country. Well, you know, it seems that
10 virtually everybody over the age of 11 has a cell phone. The
11 Legislature has to be aware of the fact that cellular is out
12 there, that if you have a broadband connection there's multiple
13 VoIP alternatives.

14 If it was the mere presence of an alternative
15 carrier, then I think the statute would have been totally
16 different. There would be no COLR obligation at all. And it
17 may well be that come January 1st, 2009 that may well be the
18 situation that you are in if the existing terminal date does,
19 in fact, come to pass without another extension.

20 MR. WIGGINS: May I? This is a frame here that I
21 would like to add, Madam Chair, if I could, which may be
22 useful, particularly as we move forward with the other
23 comments. You know, in our mission statement as a Commission,
24 we say that part of our purpose is to remove regulatory
25 barriers to the marketplace to help the marketplace work,

1 right? And we're looking -- what we are seeing here is the
2 kind of impasse between developers and ILECs. For some reason,
3 negotiations aren't working. Why is that? Well, because it is
4 in an either/or position, that's why. You either come and put
5 your facilities in, and, by the way, we want you to put your
6 facilities in, but we may actually have an incentive to
7 encourage people not to use them, okay. Versus the ILEC
8 saying, not unless you pay everything we want, we're walking.
9 And that may be a harsh way to portray the two sides.

10 So what can we do to remove the regulatory barriers
11 to promote competition, promote the marketplace? What I think
12 staff's recommendation is, is that if you say in this moment as
13 teed up, sorry, you haven't actually proved the COLR waiver
14 yet. For one thing, you have not explored special
15 constructions, negotiations with the CIAC and the like with the
16 developer, with the middle ground, where you guys can negotiate
17 as business people to come to a deal. You haven't explored
18 that yet. Explore that first, and if you can't come to terms,
19 then come back.

20 And what we are hoping is that with what we have with
21 our statute and our statutory jurisdiction, which is voice,
22 that this approach will help remove some of the obstacles to
23 the developers and the ILECs getting what they need in the
24 situation, certainty, information and the ability to evaluate
25 whether they have a rational economic deal. So that is the

1 purpose of our recommendation.

2 MR. REHWINKEL: Madam Chairman, may I address you as
3 an interested person, solely on the issue of the legislation?

4 CHAIRMAN EDGAR: Mr. Rehwinkel.

5 MR. REHWINKEL: My names is Charles Rehwinkel. I'm
6 with Embarq, and I recognize that I have another docketed item,
7 and I will stay away from any mention of anything in there,
8 knowing the state of that docket.

9 But I wanted to address some comments that have been
10 made about the meaning of this legislation, and I would offer,
11 for whatever it is worth, for you to accept, ignore, disregard
12 as you see fit, but I was involved in the development of a
13 draft that was submitted in the legislative process. As a
14 citizen we are entitled to do that and to participate and to
15 take our representatives ideas for legislation, and we did
16 that.

17 At the time this legislation was being developed, we
18 were in a negotiating session with your staff, the staff of the
19 sponsor, and representatives of other companies. And, yes, it
20 is true that there are four scenarios that are laid out in the
21 statute that deal with virtual or actual denial of access to
22 the property. There was a fifth scenario proposed. It is very
23 similar to some of the scenarios that you are seeing here today
24 in this matter.

25 We were told that it would be preferable to not put a

1 fifth scenario in, but to bring language that's very similar to
2 what is in the statute today to bring it to the Commission to
3 have it have a hearing, and that the Commission would give a
4 quick turn around on that. So, that's the language, that is
5 how the statute came about. And I say that because it is not
6 just a different flavor of one of these four denials of access
7 to the property that you have heard advocated as a way to
8 interpret the statute.

9 If you look at the definition that's included in the
10 statute, there is a definition of communications service, which
11 means a voice service or a voice replacement service through
12 the use of any technology. There is an express recognition by
13 the legislature that there are other ways to serve properties.
14 So I don't believe that there is -- this statute changes the
15 paradigm as far as what the expectations are for service at the
16 property.

17 If you look at the waiver language, the good cause
18 shown language that has been discussed here today, and it says
19 that a party may petition for good cause shown based on the
20 facts and circumstances of provision of service to the
21 multi-tenant business or residential property. There is a
22 recognition that other types of service can be delivered at
23 that property, and we believe that that means that the parties
24 are entitled to bring these gray areas to you that don't have
25 to necessarily deal with the denial of access to the property.

1 So I just wanted to make it clear that there is a
2 recognition by the Legislature that things have changed, and
3 that the way service is provided is a factor for you to take
4 into consideration there. It is not just a matter about
5 whether there is a denial of service.

6 And, finally, I would urge on the matter of a generic
7 docket is to exercise a great deal of caution in that area. As
8 a provider that will probably be bringing petitions to you in
9 the future that involve millions of dollars of our precious and
10 scarce capital resources, we think we are entitled under the
11 law to have case-by-case decisions made at locations. And a
12 generic docket has the danger of going for a year or two years.
13 I have seen some generic dockets last ten years. And I'm not
14 suggesting that that is what the staff has in mind, but generic
15 dockets have no statutory time frames on them. They have no
16 APA time frames on them. They can go a long time. I would
17 hate for there to be a pending generic docket that sucked the
18 life out of every petition that was brought under the statute.

19 And as to the CIAC issue as it relates to these
20 petitions, the 90-day provision in the statute, I believe, is
21 intended to recognize that the developer world marches on. The
22 developer world doesn't sit around and decide whether we have
23 got time to negotiate CIAC agreements with developers or not.
24 There are times certain where you have to provide facilities in
25 the ground, you have got to provide service on an economic

1 basis. So just having that option doesn't necessarily provide
2 a silver bullet under the statute. We believe that the statute
3 recognized that there is a 90-day time clock, because there was
4 a need to get a yes or no, build/no build decision.

5 That's all I have to say. Thank you.

6 CHAIRMAN EDGAR: Commissioner McMurrin.

7 COMMISSIONER McMURRIAN: I guess I'll just follow up
8 on what I said earlier about struggling without determining
9 good cause, and I have had a lot of discussions with staff on
10 this. And, frankly, I haven't -- it doesn't seem like anyone
11 is able to say this is what we think constitutes good cause.
12 And I guess the reason I struggle with it is because it seems
13 like the circumstances we have here to me justifies good cause.
14 And maybe it's just one of those things I have to disagree, but
15 in this case you have a developer who has entered into an
16 exclusive service arrangement for data and video, and I realize
17 that that is not what the statute is about, it's about voice.
18 But, as I said earlier, I think it contributes to the
19 recoupment of investment to provide voice issue.

20 You have a service provider who's willing and able to
21 also provide a voice replacement service; you have other voice
22 replacement alternatives out there, such as wireless, like we
23 have talked about; and at least you have some demonstration on
24 behalf of the carrier to say that it is uneconomic.

25 Now, of course, we are not in a post-hearing

1 situation. We haven't gone through cross examination of
2 BellSouth's testimony or AT&T Florida's testimony about whether
3 or not the numbers they have provided hold up on the investment
4 side and how they could recoup them. I understand that. But
5 to me it seems like just at first blush, recognizing it is PAA,
6 to me you are leading up to a situation where I think good
7 cause has been shown.

8 MR. WIGGINS: Madam Chair, I want to answer two
9 questions Mr. Hatch asked before they get too -- as I recall,
10 you asked two questions. One is who has the right to invoke
11 the COLR obligation, and I think staff's view has been
12 consistently that's the customer, the end user. And, second,
13 given that, who would be the one that would make the --
14 contribute the CIAC, and that would be the --

15 MR. HATCH: The developer.

16 MR. WIGGINS: The developer, yes. I was getting
17 there. Fine. Thank you. He was so afraid I was going to say
18 the customer.

19 Although ultimately it will be the customer, because
20 sooner or later, you know, there is no free lunch, and that is
21 why we're here. So that would be the developer. And from my
22 perspective, at least, and although we have not discussed this
23 with staff, is that for some reason if they won a lottery and
24 got the same amount of money to contribute to defray the cost,
25 it is the same thing. The issue is whether a contribution or

1 special construction that can be worked out on an economic
2 commercial basis can, in fact, avoid rates for that development
3 that are confiscatory. So -- but I thought Mr. Hatch wanted
4 one of those questions answered, so. Thank you.

5 CHAIRMAN EDGAR: Commissioner McMurrian.

6 COMMISSIONER McMURRIAN: Thank you. I did have one
7 other comment and Mr. Wiggins reminded me.

8 On the CIAC issue, I really do applaud staff for sort
9 of thinking -- don't kill me for saying this, overquoted --
10 outside the box, and trying to spur the negotiations. And I
11 think that that was -- I think that that was a great idea, and
12 I'm not saying that that is not an idea that has merit in this
13 case or others. I guess for me, whenever I read that this case
14 didn't constitute good cause, to me then this case is going to
15 become a precedent for other cases. And I just couldn't come
16 up with what was really missing.

17 To me, the more I tried to come up with what my list
18 of what constituted good cause, I could see a situation where
19 you are going to find -- you are going to end up encouraging
20 behavior that was going to end you right back up with the same
21 question you had before, because then the developer may have
22 reason to go about it a different way and make sure then
23 that -- I just think that with the circumstances here, where
24 you are locked out of data and video, and you have that
25 provider that has contracted in that situation also providing

1 voice replacement service, and everyone agrees there are other
2 voice replacement services out there, and a demonstration,
3 again, realizing it has not gone through a hearing process,
4 that there will be uneconomic or there will be harm to the
5 entity that would be required to provide voice. I just think
6 that you get there. But, again, I think that the -- I think
7 that the CIAC issue is really a great idea and probably will
8 move this thing along, at least from the perspective of the
9 parties that may be polarized on one side of the issue.

10 MR. SELF: Commissioner, if I may just for one brief
11 moment. It seems to me that if your statement is correct, then
12 you have created an unfair bargaining position. Because if
13 what you say is true, then the only option that's available to
14 a developer is to take service with the incumbent local company
15 that is at least offering voice, video, and data services.
16 Because if you say that a developer that enters into an
17 agreement for voice -- I'm sorry, for video and data with
18 someone other than the incumbent local exchange company always
19 constitutes good cause, then they're in a position where they
20 can never do that.

21 COMMISSIONER McMURRIAN: I don't believe I said that.
22 I was saying that I think with all of those factors taken
23 together, and I might have misspoken earlier when we were
24 having an exchange. I didn't mean to say that any time that
25 you had a voice replacement provider that that in itself

1 constitutes good cause. I think it's a combination of the
2 things. And to me, I just think the circumstances here
3 constitute good cause. But, no, I don't -- I'm not saying that
4 any time there is an agreement with respect to data and video
5 that that in itself constitutes good cause.

6 I think that it has to be with a combination that
7 there are other providers out there, such as wireless, and I
8 believe the statute mentions using any technology. And to me
9 when you take the information we have in the statute, and it
10 leads you to a certain sort of overall intent of where they
11 were trying to go. And I think that, of course, they left the
12 good cause there to give us some discretion to decide when we
13 thought the circumstances met the good cause standard. And in
14 my opinion I think they do in this case.

15 MR. SELF: Well, I'm just concerned that given the
16 near ubiquitous nature of cellular and the fact that if you
17 have broadband you then have multiple VoIP options, then it
18 seems to me that if you have got a contract to provide even
19 just broadband, then you're done.

20 MR. MEZA: Madam Chair, if I may respond.

21 CHAIRMAN EDGAR: Mr. Meza, just a moment.

22 Commissioner Carter, did you want to jump in or would
23 you like to hear from the other end of the table first?

24 COMMISSIONER CARTER: I will wait for a moment.

25 CHAIRMAN EDGAR: Okay. Mr. Meza.

1 MR. MEZA: Thank you, Madam Chair. Jim Meza on
2 behalf of AT&T Florida. I just want to respond to Mr. Self's
3 comments. And we need to keep in mind that, your know, the
4 sympathy argument for the developer -- when you hear that
5 argument, remember that they are the ones that have entered
6 into this arrangement with an alternative provider for their
7 own financial reasons. They have made a business decision
8 which they are at liberty to do, that we are going to restrict
9 consumers at this property that buy our -- that buy these homes
10 to only getting data and video from a particular provider.

11 And so when he says in that situation and what you
12 are saying is that is good cause because there is always going
13 to be an alternative provider on the voice side, well, buyer
14 beware, developer beware. When you are entering into these
15 negotiations with cable providers that restrict our ability to
16 provide services that we know consumers want, then that's the
17 consequences of their action.

18 There should be an ability for us to provide all the
19 services that all our consumers want. And when there is not,
20 and it is uneconomic for us to spend \$1.6 million to deploy
21 facilities when there is an alternative provider for all
22 three services that consumers want, we should be relieved of
23 our obligation.

24 Thank you.

25 CHAIRMAN EDGAR: Commissioner Carter.

1 COMMISSIONER CARTER: Thank you, Madam Chairman.
2 Just to staff. As I understand the perspective as presented
3 for the reason to disregard the COLR requirement is AT&T is
4 saying, one, is that the exclusive agreement for video and data
5 by the developer and the cost of installing the infrastructure
6 purely for voice.

7 MR. KENNEDY: That's correct.

8 COMMISSIONER CARTER: Therefore, that should give
9 them good cause to ignore the carrier of last resort
10 requirement.

11 MR. KENNEDY: That's their position, yes, sir.

12 COMMISSIONER CARTER: Did I miss anything?

13 MR. KENNEDY: No, I don't think so.

14 COMMISSIONER CARTER: Is there anything in the
15 pleadings that would have precluded or anything in the process
16 that would have precluded AT&T from saying here is a plethora
17 of reasons why we should ignore the carrier of last resort
18 requirement?

19 MR. KENNEDY: They can lay out anything they desire
20 in their pleading, as I see it.

21 COMMISSIONER CARTER: And based upon what I have seen
22 here, other than the fact that the developer has an exclusive
23 agreement for video and data and the cost for installing the
24 infrastructure for voice, what else did they present?

25 MR. KENNEDY: I missed the last part.

1 COMMISSIONER CARTER: What else did AT&T present?
2 I'm trying to find out in here what else is in here.

3 MR. KENNEDY: It is their cost and their fear of not
4 recovering their cost.

5 COMMISSIONER CARTER: Which is pretty much the cost
6 issue.

7 MR. KENNEDY: Correct.

8 COMMISSIONER CARTER: It is all part of the cost
9 issue, isn't it?

10 MR. KENNEDY: Right. One thing that stood out in my
11 mind was -- and it actually helped prompt us to add the CIAC in
12 the recommendation -- was that, apparently -- I believe they
13 said the developer was not willing to pay them to install their
14 network, and the CIAC would help recoup some of those costs, is
15 why we put that in there, and let them explore other avenues.

16 COMMISSIONER CARTER: Madam Chairman, if you will
17 bear with me momentarily. I'm trying to understand why if
18 given the opportunity and given the requirement for the carrier
19 of last resort, if I had an opportunity to show good cause on
20 why this requirement should be waived, I would obviously give
21 you the kitchen sink if it were me. I'm just saying just from
22 a common sense standpoint I would give you everything. But I
23 have only seen the fact that the developer has exclusive
24 agreement for video and data and the cost for installing the
25 infrastructure for voice.

1 MR. KENNEDY: Correct.

2 COMMISSIONER CARTER: That is pretty much it, right?

3 MR. KENNEDY: Yes, sir.

4 COMMISSIONER CARTER: So based upon these two factors
5 we should ignore the carrier of last resort, right?

6 MR. HATCH: Commissioner Carter, you are looking at
7 me. I assume you want a response. Let me jump in.

8 I don't think that's an accurate characterization.

9 COMMISSIONER CARTER: Okay. Show me in here where
10 it's different.

11 MR. HATCH: If you are looking for an instance in the
12 petition where there is a laundry list of all possible
13 objections to this, it isn't in the petition, per se. Let me
14 just jump in and say, I mean, even if you assume Mr. Wiggins is
15 right, and we have to provide service to anybody in our
16 territory that wants it, and even if you assume Mr. Self is
17 right, and that everybody is entitled to a choice and we are
18 the second choice regardless of whatever else is out there, the
19 carrier of last resort obligation, which stems from the old
20 universal service, has never in its entire history been
21 open-ended. There has always been a cost limit.

22 Some guy that lives on an island two hundred miles
23 offshore is not entitled to phone service if it is uneconomic
24 to serve him. Because, understand, under the old regulatory
25 compact the general body of ratepayers pay the price.

1 COMMISSIONER CARTER: Show me in the document where
2 this is -- just lay it out for me.

3 MR. HATCH: In the discovery that we have produced to
4 the staff, we had provided a net present value analysis of the
5 economics for this development. And based on our analysis and
6 those economics it is uneconomic to serve.

7 COMMISSIONER CARTER: And based upon your analysis
8 for economics --

9 MR. HATCH: That's correct.

10 COMMISSIONER CARTER: -- and based upon your reading
11 of the statute.

12 MR. HATCH: Yes. Our reading of the statute is that
13 we are here under the good cause standard, and for us the good
14 cause is it is not economic to provide it. We will never
15 recover our investment under the current -- the way it looks to
16 us.

17 COMMISSIONER CARTER: It is uneconomical to provide
18 voice?

19 MR. HATCH: Yes.

20 COMMISSIONER CARTER: That's what you are saying?

21 MR. HATCH: In a sense, yes. We are restricted to
22 providing voice. We will accept that. But based on the
23 limitations on what we can deploy, what services we can provide
24 to recover the investment in the deployment of those
25 facilities, after a ten-year period we still have not recovered

1 our investment, and that is based on some aggressive
2 assumptions even in the data that we provided.

3 For example, we assumed a 50 percent take rate, and
4 that is probably fairly aggressive based on this scenario. But
5 even based on our own analysis being fairly favorable to
6 deployment, it just doesn't -- it's not going to make us any
7 money.

8 COMMISSIONER CARTER: So, then, I guess you are
9 saying that there shouldn't even be a COLR requirement under
10 any circumstances --

11 MR. HATCH: We can debate --

12 COMMISSIONER CARTER: -- as it pertains to voice?

13 MR. HATCH: I mean, we can debate the philosophy of
14 why --

15 COMMISSIONER CARTER: I'm just asking you. I'm
16 asking you, based upon what you are saying is that for voice,
17 then there shouldn't be any COLR requirement?

18 MR. HATCH: No, I'm not saying that at all. The
19 statute actually creates a COLR requirement. You can fairly
20 read it, just assuming that you can fairly read it to be
21 limited solely to voice. Even if you say that, at some point
22 you don't have to provide service if it becomes too expensive
23 to provide. That has always been true historically.

24 COMMISSIONER CARTER: Madam Chairman, I realize I
25 have taken a lot more time than even I thought I would take on

1 this.

2 When you say it is uneconomical, in the process of
3 displaying or proving that it is uneconomical, did you submit
4 audited financials in your projections, or did you -- I mean,
5 what kind of cost analysis did you go through on that? I'm
6 trying -- I'm trying to find from the record here where this
7 would show clearly that it would be uneconomical to provide
8 voice service under the COLR requirement and the fact that the
9 exclusive agreement with video and data amplifies that. I
10 don't know how it falls into it, but those are the bases to
11 show good cause to ignore the COLR requirement.

12 MR. HATCH: We had provided our cost information to
13 the staff. It was filed, essentially, proprietary. The staff
14 can certainly provide that to you. They can give you their
15 reactions as to what the amount and quality of the data that we
16 provided to you is.

17 COMMISSIONER CARTER: And they did that. They did
18 that, and they still came up with this recommendation.

19 MR. HATCH: They dismissed it out of hand as
20 projections and, essentially, speculative. The problem with
21 that is, is in order to give you the actual physical economic
22 information that you would like to demonstrate it, I would have
23 to deploy the facilities first, figure out what the take rate
24 is, wait ten years and then tell you that it was uneconomic,
25 and that is what we're trying to avoid.

1 COMMISSIONER CARTER: Or we can just take your
2 guesstimation that it is uneconomic.

3 MR. HATCH: Yes, you could; and, certainly, we are
4 asking you to do that.

5 COMMISSIONER CARTER: Right. Well, I don't -- I
6 would disagree with your characterization of how staff views
7 the data that you presented to them. I disagree with you on
8 that characterization. I think that they are sincere, and they
9 looked at this data and gave it the worth that it deserves. I
10 don't think they discussed it and gave it no -- to say it's
11 willy-nilly, I don't think -- I would take issue with that
12 characterization.

13 But I still get -- I'm back to where I started, and
14 I'm still there with it. It seems to me the basis for good
15 cause to ignore the COLR requirement centers upon, one, the
16 developer has an exclusive agreement with another party to
17 provide video and data; and, two, the cost, the estimate it
18 costs of installing infrastructure for voice only. That's
19 where I am. Am I missing something? Staff, did I miss
20 something?

21 MR. KENNEDY: No, sir.

22 COMMISSIONER CARTER: Madam Chairman, could we have a
23 moment, please. I think it's time for a break.

24 CHAIRMAN EDGAR: I could use a stretch. Let's take
25 about seven and come back at a quarter to.

1 We are on break.

2 (Recess.)

3 CHAIRMAN EDGAR: We are going to get started again.

4 Thank you all.

5 And, Commissioner McMurrin, I think we left with
6 you.

7 COMMISSIONER McMURRIAN: Thank you. I have a few
8 more questions. And this one, I guess, I will direct to AT&T
9 Florida, but I'm fine with other people responding to it, too.
10 Similar to a question I think I asked before, but, essentially,
11 could there be negative consequences on the remaining customers
12 of your company if you are required to build-out in an area
13 like this, and you actually don't get sort of a critical mass
14 of customers signing up for your voice service?

15 MR. HATCH: I think the answer to that is clearly
16 yes. At some point our customers have to pay the revenues that
17 support the enterprise. To the extent that we enter into
18 money-losing propositions, those customers support that loss
19 ultimately, or it goes to our bottom line and the stockholders
20 eat the loss. In a competitive market, essentially, that is
21 how it works in any event. We don't have rate base regulation.
22 We can't just file a rate case and go to the customers like a
23 rate base regulated customer can.

24 CHAIRMAN EDGAR: Anyone else want to respond to that?

25 MR. SELF: Yes, I agree with the answer, if the

1 question is what is that critical mass. You know, I was just
2 looking at the numbers. If you just accept the 1.6 million, if
3 only a thousand of the 3,000 homes took the service, you're
4 asked -- that means those thousand homes would have to,
5 basically, pony up over time \$1,600. You know, over five years
6 that is \$320. You know, I don't know what makes it work or
7 doesn't work economically, but it seems that if you are getting
8 320 bucks a year from these customers, that's \$28 a month or
9 \$24, something like that, that, you know, you are getting
10 close, and that is just assuming a one-third penetration. But
11 I don't know what the right numbers are for that.

12 MR. MOSES: Commissioner McMurrin, may I speak to
13 that, please? I think one thing that is getting lost in all of
14 these discussions is that CIAC option that they have got
15 available to them. If they can recover that expense up front
16 by applying that option, all of this other discussion is moot.
17 I mean, it is only going to have an effect of, I think my staff
18 has told me, approximately \$200 per household. So with that
19 minimum amount of money that the customers would have to
20 ultimately contribute, the facilities are paid for, they are in
21 there providing the services, now your customers have options.
22 So why give them a waiver when their money is going to be given
23 to them?

24 MR. SELF: And we did, Commissioner McMurrin, at
25 some point in the negotiations. I don't know how much, but

1 there was an offer to fund some of this. I wasn't a party to
2 the negotiations, but there was at least an offer to negotiate
3 some reasonable amount. I think maybe the CIAC statute or rule
4 may well give some context to that discussion.

5 COMMISSIONER McMURRIAN: I guess I would say to that,
6 Mr. Moses and Mr. Self, that I haven't forgotten about the
7 CIAC. And as I said earlier, I think it's a very good approach
8 to try to encourage parties to sort of come to some middle
9 ground, and perhaps these things won't be as contentious
10 anymore. Perhaps that is a good way to resolve this.

11 My concern is, as I read the rec, we are making a
12 finding that good cause has not been established here, and I'm
13 not comfortable doing that. I don't believe -- I can't really
14 come up with a situation where you are going to have more
15 factors that point you to the conclusion of good cause, and I
16 think it is there for some reason.

17 I mean, the Legislature could have stopped with the
18 four automatics and never put in a provision for good cause at
19 all. And I realize that in one of the bills there was another
20 automatic that was taken out. The good cause is there. And I
21 think I have some obligation to try to determine, at least in
22 my mind, whether I think this justifies good cause or not. And
23 maybe we don't have to make an exact finding of whether this is
24 good cause or not. That I don't know.

25 MR. MOSES: I think I could give you an example of

1 what possibly could be a good cause, something similar to like
2 Dog Island where they may have to put a submarine cable across
3 there, which is going to be excessively expensive. That
4 alternative probably wouldn't be even viable for the CIAC,
5 because it is going to be so expensive they couldn't -- the
6 customers couldn't afford it.

7 In that instance we ended up putting a radio system
8 out there, I think was what the ultimate resolution was. A
9 situation like that, good cause may be shown, because the CIAC
10 is such that it is not affordable for the customers to be
11 expected to pay that. Another alternative would have to be
12 done. We have had the same situation in South Florida for the
13 Seminole tribe. There is an area down there that is being
14 served by a radio system that is antiquated, needs to be
15 changed out, but you couldn't get landlines in there. It's too
16 expensive to do so. So there are some instances, I think, that
17 good cause could be shown. We just don't believe this is one
18 of them.

19 COMMISSIONER McMURRIAN: Well, let me follow up on
20 that point. To me what you are suggesting is that there is
21 some threshold amount of money that sets good cause. That if
22 the investment were such that, and I don't know what that
23 amount of money is, and I realize we're not in a hearing
24 situation here, so you have numbers that BellSouth has put out,
25 and we haven't litigated whether those numbers are valid or

1 not. And I think everyone would agree that there is a certain
2 amount of guessing going on about this anyway, because this is
3 such a new issue, it is a case of first impression for us. We
4 don't have data about how many people have taken voice service
5 in these kind of situations.

6 So, you know, my frustration is I feel like I'm
7 flying blind, other than the information that's in the statute.
8 And in the statute you have the four automatics, which I think
9 give you an idea of kind of where they were going. And I
10 realize that they didn't create another automatic just because
11 someone has locked them out on video and data. And, also, that
12 they didn't make an automatic exemption just because there was
13 some other voice provider. But I think when you start putting
14 those things together with some kind of demonstration of
15 economic harm --

16 MR. MOSES: And we understand the predicament that,
17 unfortunately, we have placed you in, but that is another
18 reason of that CIAC option in there is to try to mitigate the
19 economic part of it. It also gives them the opportunity they
20 can protest the PAA, they can come in and ask for a hearing,
21 they can go and flesh out all of these areas that you are
22 concerned with. We are just trying to convince you not to go
23 the opposite direction and grant it and set a precedent when we
24 haven't fleshed out all of those criteria.

25 COMMISSIONER McMURRIAN: Let me ask you another

1 question, if the Chairman is okay with it. The exclusive
2 marketing arrangements that are mentioned on the top of Page 7,
3 it says that Nocatee has entered into exclusive marketing
4 arrangements for all three types of services, but they have
5 entered into exclusive service arrangements for video and data,
6 and we have been talking a lot about that.

7 What exactly does it mean to have an exclusive
8 marketing arrangement? What are other providers prevented from
9 doing in that situation? And I'm trying to get my arms around
10 what is the likelihood of AT&T Florida being chosen by a
11 customer that comes in if they already have the video and
12 broadband. And we have said how important -- repeatedly in our
13 comp reports we have said how important that triple play is.
14 People like to get one bill. I know there are certain factors
15 with respect that VoIP that make it not equal to the others,
16 but what exactly happens with an exclusive marketing
17 arrangement?

18 MR. KENNEDY: The way I understand it one thing is
19 the customers may not automatically have Comcast for video and
20 broadband. It is not paid for in their dues, homeowners dues,
21 so they have to buy it. I suspect some people may not buy
22 broadband. You know, who knows. And that is another unknown.
23 If they don't buy the broadband, they may not be able to buy
24 the voice from Comcast. Who knows. But the marketing
25 agreement, basically, in reviewing their agreement, which we

1 have a copy of, and most of it is unclassified. In the offices
2 where they are promoting the homes there will be documentation
3 on Comcast service, voice service, all services. In the
4 closings they will present Comcast products to the people who
5 are buying the homes. So on site Comcast's name will be very
6 visible. BellSouth cannot hang their marketing materials on
7 site. They do it through newspapers, direct mails, or however
8 they do it. Phone calls, whatever. So exclusive marketing is
9 Comcast will be visible for the voice.

10 COMMISSIONER McMURRIAN: I think that is where I'm
11 going. Perhaps that is something that leads even to a factor,
12 because I think it is going to affect -- I think it is a
13 reasonable assumption to think that the exclusive marketing may
14 affect the take rate if AT&T is required to come in, the take
15 rate that they would be able to receive because they have to go
16 through, presumably, tougher measures. Most of us don't answer
17 the phone with an 800 number.

18 MR. KENNEDY: Right.

19 COMMISSIONER McMURRIAN: But, anyway, I guess that's
20 my concern with that.

21 But you raised something in your analysis that I was
22 wanting to ask about, and I have probably lost my train of
23 thought. I have. I was going to ask BellSouth or AT&T
24 Florida -- it's going to take some time.

25 MR. HATCH: Don't feel bad, I do it all the time.

1 COMMISSIONER McMURRIAN: Something about the
2 exclusive marketing arrangements. Why don't I do it this way.
3 Why don't I let you respond to what you just heard the staff
4 say, and maybe I will remember my point.

5 MR. HATCH: As I understand an exclusive marketing
6 arrangement, it is where the developer would market to home
7 buyers the products with whom they have the exclusive
8 arrangement, in this case Comcast. And as staff said, when
9 they come and they shop and they buy, then the developer, in
10 addition to selling them the house is also trying to sell them,
11 you know, Comcast Internet, Comcast cable, that kind of stuff,
12 and VoIP as well, probably, as part of their package.

13 It does not preclude anybody else from trying to sell
14 to them, it's just that it puts the exclusive marketing
15 arrangement or that provider in a preferred position,
16 vis-a-vis, the developer in doing the initial sale of the
17 property. In general, we don't have any objection to exclusive
18 marketing arrangements. We think that we can compete on
19 marketing as well as anybody.

20 But the difference and to be contrasted is what you
21 also have here is the exclusive service agreement. And that
22 exclusive service agreement takes the form of an easement that
23 the developer, who is currently the property owner, imposes on
24 the property. And it becomes a restriction that runs with that
25 property, so that when that property is sold to a homeowner,

1 the homeowner -- the easement with that property then precludes
2 us from providing anything other than voice services over the
3 facilities that are installed.

4 MR. MEZA: If I may. I apologize for tag-teaming,
5 but I just want to add something. And that is, if there was
6 not an exclusive service arrangement for data and video here,
7 and it was exclusive marketing for all three, we probably
8 wouldn't have filed the petition.

9 MR. HATCH: Because it changes the economics.

10 COMMISSIONER McMURRIAN: Essentially, you are saying
11 that you would just be competing on who could get to the
12 customer fastest?

13 MR. MEZA: That's right, yes. The customer is a free
14 agent. And we may be disadvantaged to some degree, but we will
15 take on that risk. It's when we can only provide voice, but
16 our competitor can provide all three, that is when we need
17 relief.

18 COMMISSIONER McMURRIAN: And I want to make sure I
19 understand your position, too. Because of something that was
20 said earlier, you are not saying that the one criteria, that
21 you are locked out of, video and data, in itself justifies good
22 cause, or are you? I want to make sure.

23 MR. HATCH: No, it is not just because we are locked
24 out of voice and data -- I mean, video and data that
25 constitutes the good cause.

1 COMMISSIONER McMURRIAN: So if I understand
2 correctly, I think what you are saying is you are locked out of
3 video and data, that contributes to the impact of the concern
4 that you won't recoup the initial investment to provide voice,
5 because you also -- you don't have that other option to make
6 revenue.

7 MR. HATCH: In a sense, yes. It becomes -- it's
8 always an economic decision regardless. If we have the ability
9 to market -- when we deploy facilities, if we can market
10 multiple versions of services over those facilities, then it
11 changes the economics. It makes the revenue recovery of our
12 investment easier and faster. And to the extent that you peel
13 away all the potential sources of revenue, then you reduce the
14 economics, and that crossover point where it becomes profitable
15 versus money losing gets pushed further and further in or
16 further out, actually.

17 MR. SELF: And, Commissioner, my problem with that is
18 if you can bundle nonregulated services then where do you stop?
19 Today they tell you it's data and video, which they don't have
20 any authority to even provide in one county or any technology
21 that has been deployed. Where do you draw the line? What
22 other nonregulated services can you bring into this mix to say,
23 well, because we also can't do these other things, it's
24 uneconomic to do it.

25 MR. WIGGINS: Madam Chair.

1 CHAIRMAN EDGAR: Mr. Wiggins.

2 MR. WIGGINS: Let me see if I can make this very
3 brief.

4 There are two factors that I don't think are being
5 talked about enough here by the parties or any of us. One is
6 the end user and the second is the public switched network. I
7 think we would all agree that part of the Commission's charge
8 is to promote this public switched network that we've
9 cultivated for a hundred plus years, and not to see it
10 vulcanized or unnecessarily truncated because of squabbles
11 between developers and ILECs.

12 Secondly, ultimately I think we would all agree that
13 where the technology is now, even though it may sound
14 redundant, we would all prefer to have telecommunications
15 facilities wired in a first class development in addition to
16 having just cable. That would be in the public interest.

17 With that in mind, I think part of staff's
18 recommendation is how do we promote that, and I have already
19 touched on one way to do that is to allow them to discuss CIAC.

20 This brings us to the economic fairness issue. As
21 I've listened to your comments, Commissioner McMurrian, it
22 seems to me that weighing heavy on your mind is that why isn't
23 there good cause when the carrier of last resort can say, look,
24 they are not physically locking us out, but they have taken two
25 out of the three -- two out of the three triple play, and they

1 have given the developer an incentive not to have us really be
2 that successful with the voice. I mean, why should we even go?
3 It's hardly fair. And looking at it from that point of view
4 that makes a lot of sense.

5 But looking at it from a regulator's point of view,
6 with the public switched network still being an essential
7 facility, there still being, as we know from rate rebalancing
8 and hurricane, and all of that, it is still treated as a
9 essential facility. The question we ask ourselves is, well,
10 you have never been required not to have the opportunity to
11 earn a reasonable return on your investment. You have never
12 been denied that. And one of the mechanisms we use in water
13 and wastewater, sometimes in electric and sometimes in telecom
14 is negotiate a front-end contribution in aid of construction
15 that will allow you to avoid that fundamental unfairness, and
16 that is what we have suggested there. And I think until 2009,
17 when the COLR thing goes away, that is where we are, and that
18 is what our recommendation is, and that's why we think it is
19 not unfair to them.

20 COMMISSIONER McMURRIAN: Mr. Wiggins baited me again.

21 MR. WIGGINS: I'm just trying to help.

22 COMMISSIONER McMURRIAN: No, I appreciate that, and I
23 don't think we have forgotten the end user. I mean, to be
24 honest with you, if I had my way, we wouldn't have these
25 agreements to start with. I would rather -- I would rather an

1 individual customer, whether they live in a multi-tenant
2 situation or whether it's just down the road from me in a
3 single family home, I would rather the customer have the option
4 of picking between the two and let they duke it out. And I
5 don't care who wins. I just think it is better for the
6 customer that these guys are duking it out. And I'm concerned
7 that ultimately there are going to be impacts on the other end
8 users who may not be directly impacted in that situation,
9 because it was an uneconomic decision for the carrier of last
10 resort. And, frankly, I just don't know that that's fair. And
11 I --

12 MR. WIGGINS: I didn't mean to suggest that you were.

13 COMMISSIONER McMURRIAN: No, and I know. I wasn't
14 trying to be overly defensive, but I just wanted you to know
15 that from my perspective, that's how I feel about the issue.
16 But I don't get to decide that part. And, correctly, we don't
17 have jurisdiction over broadband and video, but it does play
18 into the economic impact on the carrier of last resort, which I
19 feel like I am charged to worry about.

20 MR. WIGGINS: I just felt like I needed to state as
21 forcefully as I could where we were coming from.

22 COMMISSIONER McMURRIAN: I understand. And, again, I
23 think that the CIAC is a good approach to try to address this.
24 Again, it goes back to making a finding that this is not good
25 cause.

1 And, you know, something that kind of keeps bugging
2 me, another issue that keeps bugging me is under these four
3 automatic criteria, under the first one you have a situation
4 where if they show the automatic -- that automatic criteria is
5 met, you will have only one provider, and it will not be, at
6 least in this situation, it would not be a traditional wireline
7 carrier. And I think that because it contemplates that kind of
8 scenario, I don't know that I can call that scenario bad. And
9 it kind of goes back to the ultimate -- what I see as sort of
10 the ultimate or the original purpose of COLR. To me, it is
11 more of a safety net than making sure there is a competitive
12 choice.

13 And I realize that's also part of our mandate is to
14 worry about competition and to make sure there are
15 alternatives. But to me, in this situation, you do have
16 alternatives. They may not be entirely equal. I realize there
17 are 911 considerations, and as discussed probably more later,
18 alarm situations and things like that. But I don't know how
19 equal they have to be to consider them a substitute.

20 So, again, I guess where I'm at, and maybe I should
21 ask you the question. Do we have to make a finding -- and it
22 sort of pains me to ask this, because I don't want to avoid the
23 duty to make the call, but do we have to make a finding one way
24 or the other about good cause?

25 CHAIRMAN EDGAR: Before you respond, let me jump in

1 because I was doing to ask, I think, a similar question and
2 just slightly -- worded slightly differently, and maybe you can
3 respond then to both at the same time.

4 Does the staff -- if the staff recommendation were to
5 be adopted, does that include a finding that -- hang on, let me
6 think for a second. Does the staff recommendation include the
7 finding that good cause does not exist?

8 MR. WIGGINS: I want to make sure that I'm on the
9 same page with staff, but as I have understood our discussions,
10 it's a finding that a prima facie case for good cause has not
11 been made. It's not the same thing as saying it doesn't exist.
12 I don't necessarily -- even though this may not be the most
13 efficient process to contemplate, I don't see it as being with
14 prejudice against filing again if some other development comes
15 up.

16 Of course, I do understand that there are time lines
17 and that might make it impractical. But the way I have
18 approached it is based on what we have been shown today, we
19 don't think that given the 90-day time frame with what we have
20 that we can recommend a PAA that good cause has been found. It
21 doesn't mean that it doesn't exist, it just means in this
22 situation. So we see it as very limited. Am I on board with
23 that?

24 MR. KENNEDY: Yes.

25 CHAIRMAN EDGAR: And I guess, Commissioner McMurrian,

1 as I have been listening and thinking this through as we have
2 had the discussion, my reading of this did not include a
3 finding regarding good cause specifically. And I do note that
4 it is a PAA. I fully recognize that there are, of course, the
5 statutory time lines that we have, but also time lines that
6 exist in the real world, and time does not stop, and I
7 recognize that as well. But it is a PAA, and the way the
8 statute is structured it is case-by-case individually, at this
9 point in time anyway.

10 And I guess where my struggle is, and not to put
11 words in your mouth, but it seems to me that you are struggling
12 perhaps with this being precedent-setting, and I don't know
13 that I see it quite that way. As definitively, anyway. And I
14 didn't mean to interrupt if you have further.

15 COMMISSIONER McMURRIAN: No. I'll just respond to
16 that. I mean, the way I did -- and, perhaps, I am reading it
17 wrong, but the way I did read it was that we were making a
18 finding that good cause has not been shown here. And I can't
19 really agree with that, or I can't agree with that. I feel
20 like that the circumstances with this case when you take them
21 all into consideration together, it's not that they just have
22 an exclusive agreement with data and video, it is not that
23 there is just someone else out there, one or two or three, it
24 is not any of those things alone. I think when you put them
25 together I think it constitutes good cause.

1 But I do realize this is PAA, and I do realize that
2 staff has made a very good attempt at coming up with something
3 that might address some of the concerns that might essentially
4 mandate that the carrier of last resort lose money. So, I will
5 just add that. But I don't know that we have to say that the
6 prima facie case for good cause has not been made here, but I
7 guess that was my question. But if we have to say one way or
8 the other, we think this is it or this is not it, I think this
9 is it.

10 CHAIRMAN EDGAR: Commissioners, further questions or
11 discussion? I'm not sure we can take it much further, but I'm
12 glad to allow the time if we need to. But as I said, we will
13 take a lunch break at some point if we keep going because I'm
14 hungry.

15 COMMISSIONER McMURRIAN: May I ask one more question?

16 CHAIRMAN EDGAR: Okay. Commissioner McMurrian for
17 one additional question.

18 COMMISSIONER McMURRIAN: I will address this to our
19 general counsel. And I have sort of hinted at this. Do we
20 need to decide one way or the other if this case constitutes
21 good cause? And I realize with what the Chairman said that it
22 may not be precedent-setting, but I think still you say that we
23 don't think they have made a case for good cause here. Do we
24 even have to address that? I mean, I realize we have to say
25 whether or not -- we have to respond to the petition, and we

1 have got a 90-day deadline for that, but is there any way -- is
2 there any way around saying that the good cause hasn't been met
3 here and still deciding on the petition?

4 MR. COOKE: I think Mr. Wiggins explained it well.
5 I'm not sure I can add to that. I think what staff is saying,
6 as I understand it, is staff does not believe necessarily --
7 it's not that good cause can't exist under these circumstances,
8 it's that a prima facie case, in staff's opinion, has not been
9 made under these specific circumstances with the information
10 that's available. And to the extent the information has been
11 tested, that good cause -- a prima facie case of good cause
12 exists.

13 I'm not sure I can think of a way around that,
14 however. I don't know that I would view it as -- one of the
15 problems is this is a new statute, and I think Mr. Wiggins also
16 explained it well, that we are caught between parties who want
17 to make this a cut and dried one way or the other type of
18 approach, and we are trying to do this under a PAA. And as
19 experience -- as we gain experience with these matters,
20 particularly if there are hearings held, it doesn't mean that
21 under these circumstances coming back in the future we might
22 not come to a different conclusion, in my mind.

23 CHAIRMAN EDGAR: Commissioner Carter.

24 COMMISSIONER CARTER: I was just going to pick up on
25 where the general counsel was is basically I think staff is

1 saying that based upon the circumstances in this particular
2 case, the -- on its face, on its face, a cause has not been
3 shown to ignore the COLR requirement. And that's all it's
4 saying is that -- I'm not saying that it can't be done, and I'm
5 sure there are could be a case for good cause, but this is not
6 it, not as it currently stands. And I agree with staff on
7 this. I think they are right.

8 I think that on its face without more, you're setting
9 the threshold far too low. I think the staff is correct on
10 this one. Based upon the facts and circumstances as presented,
11 you don't have a prima facie case for waiving the COLR
12 requirement. That's it. That is the way I see it.

13 CHAIRMAN EDGAR: Commissioners, further questions?
14 Any questions?

15 Commissioner Carter, are you prepared to make a
16 motion?

17 COMMISSIONER CARTER: (Inaudible. Microphone off.)

18 CHAIRMAN EDGAR: You're recognized.

19 COMMISSIONER CARTER: I will move staff's
20 recommendation on this issue for this matter.

21 COMMISSIONER McMURRIAN: I knew we were going to end
22 up here.

23 The one thing that makes me more comfortable with
24 this rec was the CIAC, and I mentioned that several times, ad
25 nauseam, that I think that that will move the issue along. I

1 still have a lot of discomfort about saying there wasn't a
2 prima facie case here, because I think I just disagree, and I
3 think with the circumstances and with this being kind of a case
4 of first impression, I think that reasonable minds can disagree
5 on this. And, yes, I can second the motion and just -- I mean,
6 everyone is, of course, well-versed on what my concerns are
7 now. But I can see that moving this along and trying staff's
8 approach of applying CIAC in these kind of situations may be a
9 good answer.

10 But as long as there is the understanding that we
11 haven't once and for all made a case, and I realize what the
12 actually rec statement says, that we haven't once and for all
13 ruled that this isn't good cause, that given these
14 circumstances in this rec that it doesn't constitute good
15 cause.

16 So I can second the motion.

17 CHAIRMAN EDGAR: Thank you, Commissioner McMurrian.

18 And I, too, am prepared to support the motion. So,
19 with that, all in favor say aye.

20 (Unanimous affirmative vote.)

21 CHAIRMAN EDGAR: Opposed? Show it adopted.

22 MR. HATCH: Madam Chair, may I ask for a
23 clarification as to what's included within the Commission's
24 decision with respect -- because as Commissioner McMurrian
25 pointed out, the CIAC is part of the staff's recommendation.

1 And in terms of -- essentially, what you have done is deny the
2 waiver of COLR, so we now have a COLR obligation in this
3 instance. With respect to CIAC, are we allowed to delay
4 deploying facilities in Nocatee in question until we come to
5 agreement where there is an ultimate decision on the CIAC
6 issue?

7 CHAIRMAN EDGAR: Mr. Wiggins.

8 MR. WIGGINS: That is not ripe for determination.
9 Sorry, buddy.

10 But the deal is this: We are going to write this
11 order with as much clarification and as much guidance to bring
12 as much certainty to the process as possible as reflected in
13 the order. And I'm sure staff will remain open to all the
14 stakeholders in this to try to be of use. But it is not teed
15 up right now so that a specific -- failure of a specific CIAC
16 negotiation invokes your COLR exemption. It is just not teed
17 up that way, but we will do the very best we can with this
18 incremental order to be as specific as we can to give the
19 parties the guidance.

20 Clearly, we have sent a signal that if those
21 negotiation fail or for some reason that there is an impasse
22 that the ILEC is not precluded from revisiting this. We do
23 also understand the time constraints. You know, I wish we
24 could be more useful, but that's the nature of the process we
25 are dealing with.

1 MR. SELF: And, Madam Chairman, if I can help. I
2 mean, I think Mr. Wiggins said it right. I mean, I appreciate
3 the fact that you all have taken so much time today to deal
4 with this issue. And I think there's multiple messages that
5 have been well received. And I think what needs to happen is
6 the parties need to talk. And if they can't resolve that, then
7 I'm sure you may inevitably see something, whether it is a COLR
8 waiver, whether it's a CIAC dispute, I don't know. But I will
9 pledge that we will attempt in good faith to see if we can't
10 bring this in for a landing.

11 CHAIRMAN EDGAR: Thank you, Mr. Self.

12 Mr. Hatch.

13 MR. HATCH: That's fine, yes, ma'am.

14 CHAIRMAN EDGAR: Okay. Thank your for the question,
15 and for each of you. Okay.

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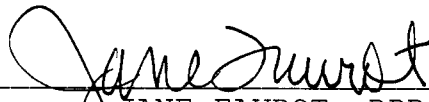
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I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 20th day of March, 2007.

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