

State of Florida



# Public Service Commission

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## -M-E-M-O-R-A-N-D-U-M-

**DATE:** June 27, 2007

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Wiggins) *PCW*  
Division of Competitive Markets & Enforcement (Buys) *DB*

**RE:** Docket No. 060763-TL – Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc. (Motion for Reconsideration)

**AGENDA:** 07/10/07 – Regular Agenda – Post Hearing - Participation is limited to Commissioners and Staff – Oral Argument at the Commissioners’ Discretion

**COMMISSIONERS ASSIGNED:** Edgar, Carter, McMurrian

**PREHEARING OFFICER:** Carter

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\060763.RCM.DOC

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### Case Background

On November 20, 2006, pursuant to Section 364.025(6)(d), Florida Statutes, Embarq Florida, Inc. (Embarq) filed its Petition for Waiver of its carrier-of-last-resort (COLR) obligations in the Treviso Bay subdivision (development) in Collier County. Embarq’s petition was opposed by the developers of Treviso Bay, Treviso Bay Development, LLC (Treviso Bay).

On February 14, 2007, the Commission conducted a hearing on Embarq’s petition. On March 13, 2007, at its regularly scheduled agenda conference, the Commission voted to deny the petition. On April 12, 2007, the Commission issued Order No. PSC-07-0311-FOF-TL denying the petition (“Final Order”).

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Docket No. 060763-TL

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On April 27, 2007, Embarq filed its “Motion for Reconsideration of Order No. PSC-07-0311-FOF-TL” and a request for oral argument. Treviso Bay filed its “Response To Embarq’s Motion For Reconsideration” (“Response”) and its “Response In Opposition To Embarq’s Request For Oral Argument” (“Opposition to OA”) on May 4, 2007.

### **Discussion of Issues**

**Issue 1:** Should Embarq's Request for Oral Argument be granted?

**Recommendation:** No. The Request for Oral Argument should be denied. (WIGGINS)

### **Position of the Parties**

**Embarq:** Embarq argues that oral argument would be appropriate for two basic reasons. First, the issues addressed in the Motion are important to both Embarq and to the implementation of the COLR statute given that this is a case of first impression. Second, the Commission allegedly overlooked or failed to consider certain key facts. According to Embarq "(t)hese facts involved complex technical and financial issues." (Motion at 1) Thus, oral argument "will allow a full explanation of those critical and complex issues that will assist the Commission in consideration of Embarq's motion."

**Treviso Bay:** Treviso Bay opposes oral argument. Treviso Bay contends that the Motion for Reconsideration extensively reargues the merits of the case – matters that were amply argued at hearing and in closing arguments. Treviso Bay concludes that, "oral argument will not assist the Commission in understanding and evaluating these issues. Rather, oral argument will simply provide Embarq another avenue to attempt to improperly reargue the evidence and the issues that the Commission has already decided in this case." (Opposition to OA at 2)

**Staff Analysis:** Under Rule 25-22.060(f), Florida Administrative Code, the Commission may grant or deny oral argument at its discretion. In the instant case, staff believes that oral argument will not aid the Commission in comprehending and evaluating the arguments involved in addressing the Motion for Reconsideration. Staff believes the issues in question were fully addressed by the parties during the course of this proceeding and fully considered by the Commission in rendering its decision and that oral argument would not be useful to the Commission in ruling on the motion. Consequently, staff recommends that Embarq's Request for Oral Argument be denied.

If the request for oral argument is granted, staff recommends that it be limited to 5 minutes.

**Issue 2:** Should Embarq's Motion for Reconsideration be granted?

**Recommendation:** No. Embarq's Motion for Reconsideration does not point out any point of law or material facts that the Commission overlooked, failed to consider, or misapprehended. While Embarq obviously believes that the Commission's decision is fundamentally flawed, Embarq is simply rearguing the merits. Embarq's petition should be denied. (WIGGINS)

**Position of the Parties**

**Embarq:** Embarq requests the Commission to reconsider its negative decisions on the following three issues as identified and framed by the parties:

**Issue 2:** Has Treviso Bay entered into any agreements, or done anything else, that would restrict or limit Embarq's ability to provide the requested communications service?;

**Issue 3:** Do Treviso Bay's existing agreements make it uneconomic for Embarq to provide the requested communications service to the customers of Treviso Bay?; and

**Issue 5:** Has Embarq demonstrated "good cause" under Section 364.025(6)(d) for a waiver of its carrier-of-last-resort obligation in Treviso Bay?

With respect to Issue 2, Embarq argues that the Commission improperly narrowed the scope of the issue. With respect to Issue 3, Embarq argues that the Commission overlooked or ignored key facts. And with respect to Issue 5, Embarq argues that because of the fundamental mistakes in determining Issues 2 and 3, the Commission is required to reconsider its decision on Issue 5.

**Embarq's Theory of the Case**

Embarq's legal theory of the case is straightforward and shapes its motion for reconsideration. Embarq argues a "two-prong" test for determining under the statute that "good cause" exists for relief of the COLR obligation. Specifically, Embarq argues that "good cause" is demonstrated when the ILEC can show *both* of the following:

1. provision of voice service to the area would be "uneconomic"; and
2. mandated provision of voice services by the COLR is "unnecessary" because "voice or voice replacement service will be available."

Embarq believes that it has proven the above two propositions. It argues that no one disputes that "voice or voice replacement service will be available." (Motion at 2) Next, Embarq argues that "construction of facilities to provide voice only services is uneconomic and unnecessary" because of Treviso Bay's agreements with Comcast and, implicitly, contrary conclusions are simply unrealistic. (Motion at 2)

## **Issue 2 - Scope of the Issue**

Embarq states that the Commission “apparently narrowed the scope of the issue to address only whether Treviso Bay had entered into any agreements that physically restrict Embarq’s placement of the facilities necessary to provide voice communications to residents of Treviso Bay. (March 13, 2007 Agenda Conference Transcript at page 22).” (Motion at 3) Embarq says this is error because in doing so “the Commission failed to consider or overlooked the plain language of the statement of the issue . . .” (Id.) which in turn led to the Commission overlooking the alleged projected adverse effect of Treviso Bay agreements on Embarq’s future market penetration at Treviso Bay.

## **Uneconomic Argument of Issue 3**

Embarq argues that “(i)n concluding that Embarq failed to meet its burden of proof the Commission overlooked, failed to consider or fundamentally misunderstood the evidence offered by Embarq on several key points . . .” (Motion at 6).

## **Net Present Value**

Embarq argues that the Commission committed fundamental error in rejecting its Net Present Value (NPV) computations. According to Embarq, the Commission used unrealistic inputs to the model and failed to consider evidence that the “Commission’s unrealistic penetration assumptions do not generate positive NPV well beyond any reasonable time frame for concluding that an Embarq investment of \$1.3M in capital would be considered economic.” (Motion at 7)

With respect to the alleged unrealistic penetration assumptions, Embarq argues that “(t)he Commission’s characterization that only minor changes to the penetration and per customer revenue assumptions produces a positive NPV result is not supported by the record.” Basically, Embarq argues that the “minor changes” contemplated by staff involved significant percentage increases. Thus, for example, a “67% increase in customers taking service” and “185% increase in the customers taking bundled services” are not “minor” as characterized by staff. (March 13, 2007 Agenda). (Id.)

## **Significance of Penetration rate to NPV Analysis**

The Commission concluded that Embarq’s projected market penetration rates “lacked supporting evidence.” This conclusion was based on the record and the testimony of the witnesses. In reviewing the testimony of Messrs. DeChellis and Dickerson, Embarq’s two witnesses, the Commission observed that there was some inconsistency in Mr. Dickerson’s testimony with respect to the significance of Mr. DeChellis’ initial projections. Embarq argues that “the Commission appeared to determine that this ‘inconsistency’ impaired the evidentiary value of Mr. Dickerson’s testimony supporting the penetration rate.” (Motion at 10) In reaching this conclusion, the Commission allegedly overlooked or failed to consider the *focus* of Mr. Dickerson’s Direct Testimony on the penetration rate as a key component of the NPV analysis

where he allowed that the penetration rate used in the NPV analysis was “optimistic at best.” (citation omitted) (Id.)

### Devcon Wireless Rider

Embarq argues that the Commission also misunderstood the scope and meaning of the rider to the Devcon alarm monitoring agreement relating to wireless monitoring (Hearing Exhibit No. 5 at page 263). Moreover, Embarq states that the Commission overlooked or failed to consider that Comcast’s digital voice service is not a wireless service. Partly as a consequence, the Commission embraced penetration rates that are allegedly too high. (Motion at 11- 13) Embarq argues as follows:

Notably, the Waiver Order is inconsistent in its representations of the language and meaning of the wireless rider. In the discussion regarding the rider under Issue 2, the Order correctly reflects that the rider applies to “wireless communications via VoIP” rather than to VoIP as a stand alone service (Waiver Order at page 8) In contrast, in the discussion of the rider under Issue 3, the Order incorrectly reflects that the rider applies to wireless or VoIP services, separately. (Motion at 12)

### Market Share Studies

Embarq also alleges that “The Commission overlooked or failed to consider factors relating the market share analyses provided by Embarq that support, rather than contradict, Embarq’s projected penetration rate.” (Motion at 13) For example, Embarq argues that “the Commission overlooked that Comcast digital voice service will be available to Treviso Bay residents on day one, unlike the majority of the developments in the market share analyses, where cable voice services, in general, became available after Embarq began providing services to the developments.” The Commission also allegedly failed to consider that the penetration rates for other developments served by Embarq would result in a positive NPV only after 20 years. (Motion at 14 )

### **Issue 5 - The “Fallout” or Ultimate Issue of Good Cause**

Embarq seeks reconsideration of the Commission’s decision with respect to the ultimate issue in this docket, i.e., whether Embarq had established good cause for waiving its COLR obligation. The Final Order explains the Commission’s decision as follows:

Issue 5 is a fall-out of Issues 1 through 4A, and only addresses whether Embarq has established “good cause” for a waiver of its COLR obligation in Treviso Bay. Having reviewed the affirmative case presented by Embarq based on the evidence adduced and arguments made under the preceding issues, we conclude that Embarq has not demonstrated “good cause” under Section 364.025(6)(d), Florida Statutes, for a waiver of its carrier-of-last-resort obligation in Treviso Bay. Therefore, we deny Embarq’s petition. (Final Order 17)

Embarq argues that due to the alleged fundamental errors identified above, the Commission should reconsider its decision to deny the petition for waiver of the COLR obligation. Embarq's summarizes its arguments as follows:

As Embarq has demonstrated in its request for reconsideration of Issues 2 and 3, the Commission overlooked or failed to consider material evidence that contradicts its findings regarding several key points, including:

- the full scope of the issue to be resolved under Issue 2;
- the lack of record evidence to support the "minor" changes to penetration and per-customer revenue factors, upon which the Commission based its conclusion that Embarq's provision of service to Treviso Bay could produce a positive cash flow;
- the length of time it would take for Embarq's NPV to turn positive even considering upward revisions to the penetration and revenue assumptions;
- the meaning and scope of the wireless rider to the alarm monitoring contract and the nature of Comcast's digital voice service; and
- important facets of the market share studies Embarq introduced to support its penetration assumptions .

Based on these critical issues of fact that the Commission overlooked or failed to consider in reaching its decision to deny Embarq's request for a waiver, the Commission erred in determining that Embarq had failed to meet its burden of proof and should reconsider its decision and grant Embarq's request. (Motion at 15)

**Treviso Bay:** Treviso Bay raises general objections to Embarq's motion for reconsideration. For example, Treviso Bay argues that the Final Order reflects thorough consideration of the testimony of Embarq's witnesses as well as Embarq's legal brief. Treviso Bay then argues as follows:

Embarq is thus effectively arguing that the Commission, having considered everything that it specifically mentioned in the Order Denying COLR Waiver, "overlooked or failed to consider" a raft of other information that Embarq provided. In fact, the opposite – and far more reasonable – inference should be drawn: that the Commission considered all evidence in the record, but, quite naturally, only recited and referred to what it deemed most important in its Order Denying COLR Waiver. (TB Response at 3, footnote omitted)

Treviso Bay further emphasizes that discretionary omission of some facts from the discussion in a final order does not render it infirm. Treviso Bay argues in essence that the Final Order appropriately served its purpose to reflect "the fundamental holding of the case is that Embarq has not demonstrated 'good cause' to justify relief from its COLR obligations." (TB Response at 5)

## **Issue 2 - Scope of the Issue**

In its Response, Treviso Bay counters that “(t)he key words in this issue statement are ‘restrict,’ ‘limit,’ and ‘ability’.” Treviso Bay then provides definitions of these words from Webster’s Ninth New Collegiate Dictionary, as follows:

- "Restrict" means "to confine within bounds; to place under restrictions as to use or distribution."
- "Limit" means "to assign certain limits to; to restrict to set bounds or limits."
- "Ability" means "the quality or state of being able; *esp*: physical, mental, or legal power to perform."

(TB Response at 6) Treviso Bay thus argues that the Commission did not narrow the scope of the issue, but rather used the ordinary meaning of the words to properly define the scope.

## **Issue 3 - Uneconomic Argument**

Treviso Bay responds generally by emphasizing that Embarq reargues the merits - that Embarq has not identified anything overlooked, ignored, or misapprehended by the Commission. Treviso Bay then responds to Embarq’s more specific arguments. For each, Treviso Bay reviews the record and the Final Order’s treatment of the record to demonstrate that the Commission did not overlook, ignore, or misapprehend any evidence in finding Embarq’s case unpersuasive. Treviso Bay stresses throughout its Response that the rejection of an argument about the significance of a fact or about the reliability of projected results is not the same thing as overlooking, ignoring or misapprehending the argument, the facts, or the projections.

For example, in addressing Embarq’s criticisms of the Commission’s handling of market share information, Treviso Bay concludes as follows:

Thus, the Commission explicitly considered the evidence that Embarq suggests it overlooked, as well as Embarq's witness's testimony on this point, and even recognized that this evidence affords some validity to Embarq's position. However, the Commission remained unconvinced by the totality of the evidence. Again, in spite of the Commission's consideration of Embarq's evidence on this point, which was explicitly articulated in the Order Denying COLR Waiver, Embarq doesn't like the way that the Commission weighed all the evidence. This is insufficient to support reconsideration: the Commission considered the evidence, and the Commission should accordingly deny Embarq's Motion. (TB Response at 17)

## **Issue 5 - The “Fallout” or Ultimate Issue of Good Cause**

Treviso Bay argues that Embarq did not meet the high burden necessary to be relieved of its COLR obligations and cannot accept that the Commission is simply unpersuaded. Treviso Bay reiterates that “Embarq's argument for reconsideration is really just re-argument of the evidence.” (TB Response at 18)



Treviso Bay then falls into rearguing the merits, reiterating its central argument that under the applicable statute, the COLR may be relieved of its COLR obligations for good cause *only* when the alternative provider(s) provide “basic local exchange service.” Treviso Bay argues that once it was established that the alternative provider of voice service was a VoIP provider, Embarq’s petition should have been denied. (TB Response at 19).

## **Staff Analysis:**

### **Standard of Review**

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Final Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3<sup>rd</sup> DCA 1959), citing State ex rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

### **Staff's General View**

Embarq's motion is without merit. In rendering the decision committed to its discretion, the Commission considered, either explicitly or implicitly, each of the items on Embarq's list of perceived oversights and misapprehensions. Staff thus generally agrees with Treviso Bay with respect to the completeness of the Commission's review of the record, the integrity of the Commission's decision, the solidity of the Final Order - and the immateriality of Embarq's objections. In the many pages of its motion Embarq does not point out any evidence that the Commission overlooked, failed to consider, or fundamentally misunderstood. Rather Embarq takes issue with how the Commission evaluated the evidence, and consequently ends up simply rearguing the merits, although inferentially. In staff's view, the motion should be denied.

### **Issue 2: Scope of the Issue**

Staff believes that Embarq's justification for reconsideration on Issue 2 is without merit, i.e., that the issue was not narrowed, unjustly or otherwise. First, staff agrees with Treviso Bay that the Commission did not overlook or fail to consider the plain language of the issue, but rather adhered to the generally accepted meaning of the words “limit” and “restrict and “ability”

Second, Embarq's approach would inject economic arguments directly into Issue 2. These are addressed in Issue 3. There is no reason to read Issue 2 to provide for redundant consideration of Embarq's argument that provision of local service at Treviso Bay will be uneconomic.

Third, it is Embarq that would narrow the inquiry, not the Commission. As noted earlier, Embarq argues a “two-prong” test for establishing good cause for relief from the COLR obligation. Embarq believes that under the statute “good cause” for relief of the COLR obligation under the statute is demonstrated when the ILEC can show that (1) provision of voice service to the area would be “uneconomic,” and (2) mandated provision of voice services by the COLR is “unnecessary” because “voice or voice replacement service will be available.” From

Embarq's perspective *every* issue relates to either "uneconomic" provision of service or availability of "voice or voice replacement service."

Embarq's "two-prong" approach narrows the Commission's field of vision in a case of first impression. There are other interpretations of this statute and other possibilities not contemplated in Embarq's simple "two-prong" test. It is possible that a developer could enter into agreements, either with the ILEC itself or the cable competitor, that do not bar physical access to the property but in some way contractually restrict or limit the ILEC from provision of service. As framed and properly decided by the Commission, Issue 2 clarifies that these other factors were not involved.

### **Issue 3 – Uneconomic claim**

Embarq's affirmative case under Issue 3 is a simple one. Embarq argues that because of Treviso Bay's agreements with Comcast it will be uneconomic to provide the requested communications service to the customers of Treviso Bay. In support of that basic proposition, Embarq advances two sub-propositions: (1) the customers will be few in number; and (2) the average revenue per customer will be low. Assuming that both propositions above are true, the total revenues from projected customers would be so low that it is unrealistic to believe that the provision of service will ever turn a profit. This is Embarq's "uneconomic" justification in a nutshell.

In the Final Order the Commission addresses some of the deficiencies in Embarq's case. For example, with respect to Embarq's projection of too few customers, the Commission noted that the Embarq's assumed penetration rate "lacks supporting evidence." (Final Order at 13) And with respect to the per-household revenue projection advanced by Embarq, the Commission observed that Embarq "based this amount on unweighted averages for customers in the Naples market." (Id. ) Based on the record, the Commission concluded:

Some economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast, *but we do not believe evidence presented by Embarq witnesses DeChellis and Dickerson is sufficiently rooted in objective statistical or fiscal analysis to be dispositive.* (Emphasis added) (Final Order at 12)

In short, the Commission found the evidence presented by Embarq to be unpersuasive.

It was Embarq's burden to prove its case, but it did not. Embarq failed to put before the Commission credible evidence sufficient to persuade the Commission that it will have customers so few in number and the average revenue per customer so low that provision of service at Treviso Bay is fated to be uneconomic. The Commission evaluated the evidence in the record and the arguments presented by Embarq and concluded that there was not reliable, persuasive evidence to prove either sub-proposition. The fact that Embarq believes that the Commission got it wrong is not a basis for reconsideration.

### Embarq's Specific Points

To reiterate, the Commission concluded that Embarq's overall case was not persuasive. The Commission did recognize that Treviso Bay's arrangements with Comcast would have some adverse effect on penetration rates and average per household revenues; it simply was not persuaded that Embarq's future was as bleak as Embarq contends. Waiving the COLR obligation is a serious decision and requires serious justification.

Within the context of denying the petition because Embarq's basic case was unpersuasive, the Commission addressed some perceived weaknesses in the building blocks of Embarq's case. For example, the Commission identified some specific problems with Embarq's projected penetration rates, its projected average revenues per household, and its net present value computations (which form the basis of its "uneconomic" provision of service claim). Embarq's Motion for Reconsideration argues that the criticisms of its proof are wrong, and result from the Commission overlooking, ignoring, or misapprehending critical information.

### Net Present Value

The Commission changed some of the inputs to Embarq's NPV model to test that model's reliability. The Commission characterized these input changes as "minor." Embarq objects, arguing that the "percentage" changes are significant. (See page 4, *infra*) The record reflects that the input changes are minor when stated as a percentage of total number of potential households. Moreover, the percentage increases that Embarq uses to portray the changes as substantial actually suggest that Embarq's original projected take rates are unreasonably low. In any event, the purpose of using varying inputs was to determine whether Embarq's predictive model was *robust*, i.e., whether it is able to cope well with variations without losing its predictive functionality.

In this context, the NPV produced substantial swings in outcomes based on changes in inputs. From the perspective of proof, this suggests that the NPV model is not reliable. The Commission wisely concluded, that given the record, the NPV was not reliable for the purpose of demonstrating that provision of service would be uneconomic as Embarq projects. In doing so, it considered all of the evidence.

### Significance of Penetration rate to NPV Analysis

Embarq argues that the Commission overlooked the central thrust of Mr. Dickerson's testimony while addressing inconsistency between his testimony and that of Mr. DeChellis. In a sense, Embarq is arguing that the Commission looked at the testimony of its witnesses too closely – that the Commission apparently seized on a trivial point and missed the significance and import of the testimony of its witnesses. This view of the Commission's treatment of the testimony is not consistent with the careful or objective treatment given the testimonies in the Final Order. A neutral reading of the Final Order reflects that the Commission did not misapprehend Mr. Dickerson's testimony in either theme or in detail.

Devcon Wireless Rider

As reflected above, Embarq argues that the Commission failed to recognize distinctions between wireless VoIP versus wireline and cable VoIP in considering the Devcon Wireless Rider. Staff believes that Embarq's arguments are without merit.

The Commission reasonably concluded based on the record that "it is possible that the agreement between Treviso Bay and Devcon for security system monitoring services will increase the likelihood that more residents will subscribe to Embarq's wireline telephone service." With respect to the rider, the Commission noted that it recommends that each subscriber to Devcon's monitoring service employ an additional method of communication, such as standard telephone service, if monitoring is being provided via a wireless form of communication. As the Final Order observes, Embarq's own witness acknowledged that in light of the language of the rider, a prudent customer would consider obtaining standard telephone service for the alarm system in addition to VoIP service. The Commission did not misunderstand the rider. The Commission simply concluded that on balance, within in the context of the Treviso Bay developments, the Devcon Wireless Rider would tend to encourage residents to subscribe to Embarq's wireline telephone service.

**Issue 5 - The "Fallout" or Ultimate Issue of Good Cause**

In Final Order PSC-07-0311-FOF-TL, the Commission ruled that "Embarq has not demonstrated 'good cause' under Section 364.025(6)(d), Florida Statutes, for a waiver of its carrier-of-last-resort obligation in Treviso Bay," and thus denied Embarq's petition. (Final Order at 17). Embarq now argues that due to the previously discussed errors, the Commission should reconsider its decision. Staff disagrees. As fully addressed above, Embarq has not demonstrated that when addressing the issues in this docket, the Commission overlooked a point of fact or law in rendering its decision.

Docket No. 060763-TL

Date: June 27, 2007

**Issue 3:** Should this docket be closed?

**Recommendation:** Yes. Staff recommends that if the Commission approves staff's recommendation in Issue 2 , this docket should be closed as no other issues need to be addressed by the Commission. (WIGGINS)

**Staff Analysis:** Staff recommends that the Commission take action as set forth in the foregoing staff recommendation statement.