

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: August 16, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Buys, Higgins) *DBB*
Office of the General Counsel (Wiggins, Mann) *Wiggins*

RE: Docket No. 070357-TL – Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for Cabana South Beach Apartments, Phase II, in Alachua County, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.

AGENDA: 08/28/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: 09/02/07 (90-Day Statutory Deadline)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: .S:\PSC\CMP\WP\070357.RCM.DOC

Case Background

On June 4, 2007, BellSouth Telecommunications, Inc., d/b/a AT&T Florida (AT&T Florida) filed its petition for relief from its carrier-of-last-resort (COLR) obligation pursuant to Section 364.025(6)(d), Florida Statutes, for the property known as Cabana South Beach Apartments (Cabana), Phase II, located in Alachua County, Florida.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

On July 30, 2007, AT&T Florida filed Exhibit Nos. 1, 2, and 3 in support of its Petition. The exhibits consist of AT&T Florida's cost estimates for deployment of its network facilities in Cabana, Phase II, and calculations of its anticipated five times annual exchange revenue that are used to determine the special construction charges AT&T Florida requested that FortGroup Development Corporation (FortGroup) pay prior to AT&T Florida installing its network facilities. On August 8, 2007, AT&T Florida submitted its responses to Staff's First Data Request in this docket.

Cabana, Phase II, which is the property subject to AT&T Florida's petition, contains approximately 252 apartment units, totaling some 696 individual bedrooms. The property is planned for rental to college students, with each student renting an individual bedroom with its own communications terminals for voice, data, and video.

AT&T Florida states FortGroup has entered into bulk agreements with Gainesville Regional Utilities for the provision of data services, and Cox Communications, Inc. (Cox) for the provision of video services, to all units within both Phase I and Phase II. The payment for those services is included as part of each tenant's rent. Cox also offers a digital voice product to its subscribers within the Gainesville area, but payment for its voice service is not included in the tenants' rent.

FortGroup is a Florida for profit corporation located in St. Augustine, Florida. David H. Fort and Claudia A. Fort are the Chief Executive Officer and Secretary/Treasurer, respectively. FortGroup was incorporated on April 25, 2005, for the purpose of developing multi-family real estate projects.

Gainesville Regional Utilities (GRUCom) is a multi-service utility owned by the City of Gainesville and is the 5th largest municipal electric utility in Florida. Gainesville Regional Utilities provides electric, natural gas, water, wastewater and telecommunications services to approximately 89,000 retail and wholesale customers in Gainesville and surrounding unincorporated areas. Gainesville Regional Utilities provides high-speed Ethernet Internet service under the name GRUCom over its own fiber-to-the-premises network.

Cox Communications Inc., headquartered in Atlanta, Georgia, is the third-largest cable provider in the nation with more than 6 million residential and commercial customers and over 22,000 employees. Cox is a full-service provider of telecommunications products offering an array of advanced digital video, high-speed Internet, and telephony services over its own nationwide IP network, as well as integrated wireless services in partnership with Sprint.

FortGroup informed staff that it has decided not to officially participate in this proceeding. FortGroup indicated that the construction phase for Cabana, Phase II, is complete, and FortGroup has determined that Cox would be able to provide voice service at Cabana, Phase II. At this time, FortGroup is not prepared to allow AT&T Florida access to its property to install its network infrastructure. Initially, FortGroup did request that AT&T Florida install its

infrastructure and provide service in Cabana, Phase II; however, AT&T Florida delayed the installation of its network infrastructure until late in the construction process.

Section 364.025(6)(b), Florida Statutes, permits a local exchange company (LEC) to be automatically relieved of its COLR obligation if any of four specific conditions is satisfied. If a LEC is not automatically relieved pursuant to any of the four conditions, a LEC may seek a waiver of its COLR obligation from the Commission for good cause shown under subparagraph (d).

In this case, AT&T Florida is seeking a waiver of its COLR obligation for the Cabana South Beach Apartments, Phase II, pursuant to Section 364.025(6)(d), Florida Statutes, which states:

A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

The Commission has jurisdiction over this matter pursuant to Sections 364.01 and 364.025, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant AT&T Florida's Petition for relief from its carrier-of-last-resort obligation pursuant to Section 364.025(6)(d), Florida Statutes, for the provision of service at the development known as Cabana South Beach Apartments, Phase II, located in Alachua County, Florida?

Recommendation: Yes. On a going forward basis, AT&T Florida should be relieved from its carrier-of-last-resort obligation to provide basic local telecommunications service to the tenants in Phase II of the development known as Cabana South Beach Apartments, located in Alachua County, Florida, based solely on the fact that the developer has restricted AT&T Florida's access to the property. **(D. Buys, R. Mann, Wiggins)**

Staff Analysis:

AT&T Florida's Petition

AT&T Florida is asking to be relieved from its COLR obligation pursuant to Section 364.025(6)(d), Florida Statutes, for the provision of basic telephone service to the residents in Phase II of the development known as Cabana South Beach Apartments, located in Alachua County. In its Petition, AT&T Florida claims the following circumstances and conditions constitute good cause.

1. FortGroup has entered into bulk arrangements with alternative providers wherein data and video/cable services will be included as part of each resident's rent payment.
2. FortGroup has entered into a bulk agreement with GRUCom for the provision of data services to all units within the development.
3. FortGroup has entered into a bulk agreement with Cox for the provision of cable television services to all units within the development.
4. FortGroup has entered into an arrangement with Cox, where Cox will also be providing voice service to the residents of Cabana, Phase II.
5. As a result of the service arrangements with GRUCom and Cox, there is an incredible amount of uncertainty as to the anticipated demand for AT&T Florida's voice services in Cabana, Phase II, because residents will be able to order voice service from many different providers over their data connection or order voice service from Cox.
6. AT&T Florida estimates the take rate for its voice services at Cabana, Phase II, will be low due to FortGroup's arrangements with other providers for the entire suite of services for residents at Cabana, Phase II, and because payment for the alternative providers' video and data services is included in the residents' rent.

7. AT&T Florida anticipates the take rate for voice service at Cabana, Phase II, will be no more than 3%, considering that the take rate for voice service at Cabana, Phase I, is approximately 2%.
8. AT&T Florida contends that VoIP and/or wireless substitution are significant reasons why AT&T Florida's anticipated take rate for Cabana, Phase II, will be extremely low.
9. AT&T Florida estimates the cost of installing its network facilities in Cabana, Phase II, will amount to approximately \$122,340.
10. In accordance with Rule 25-4.067(3), Florida Administrative Code, AT&T Florida calculated its anticipated five times annual exchange revenue at Cabana, Phase II to be approximately \$42,395.
11. On April 30, 2007, AT&T Florida requested that FortGroup pay to AT&T Florida the amount of \$79,945 prior to installing its facilities. The requested amount is the difference between the amount of the cost to install its network facilities and the amount of its anticipated five times annual exchange revenue.
12. To date, FortGroup has not paid the requested amount to AT&T Florida.
13. AT&T Florida believes it should not be forced, pursuant to COLR, to install duplicative facilities when the unrefuted evidence based on an identical property and the demographics of Cabana, Phase II, clearly establish that AT&T Florida will be economically disadvantaged in serving this development.
14. AT&T Florida contends that the COLR statute was not enacted to countenance such an inefficient economic result, especially where data, video and voice providers have (a) entered into arrangements with a developer to provide said services, (b) are installing their own networks, (c) have the technical capability to offer voice services to residents, and the anticipated take rate for AT&T Florida's services will be extremely low. AT&T Florida also contends that in this scenario, FortGroup is attempting to expand AT&T Florida's COLR obligations beyond its traditional and intended purposes for its own economic interest.

In support of its petition, AT&T included six Exhibits labeled "A" through "F."

- Exhibit "A" is a December 6, 2006, Multi-Housing News magazine article describing the Cabana development.
- Exhibit "B" is a copy of a webpage from the website used to market Cabana South Beach Apartments, www.thecabanaapartments.com, that lists cable television and high-speed Internet as being included in the lease.

- Exhibit "C" is a copy of the May 17, 2007, letter from FortGroup to AT&T Florida informing AT&T Florida that FortGroup does not intend to pay the requested amount for AT&T Florida's line extension.
- Exhibit "D" is the Affidavit of Larry Bishop attesting to AT&T Florida's amount of investment necessary to install its facilities, its anticipated take rate, and the anticipated five times annual exchange revenue.
- Exhibit "E" is a copy of the April 30, 2007, letter from AT&T Florida to Jay Brawley notifying FortGroup that AT&T Florida is requesting payment prior to extending its lines into Cabana, Phase II.
- Exhibit "F" is a copy of the May 18, 2007, letter from AT&T Florida to Jay Brawley notifying FortGroup that AT&T Florida believes it is relieved of its COLR obligation to serve the property.

AT&T Florida also filed Exhibit Nos. 1, 2, and 3 (under Notice of Intent to Request Specified Confidential Classification) wherein it provided an estimate of the amount of its cost necessary to install its network facilities in Cabana, Phase II, and its calculations of its anticipated five times annual exchange revenue. The exhibits show how AT&T Florida determined the amount of special construction charges that AT&T Florida requested FortGroup pay prior to AT&T Florida installing its network facilities.

FortGroup's Response

Mr. Jay Brawley, Director of Development for FortGroup, informed staff that FortGroup does not intend to officially respond or participate in this proceeding. Mr. Brawley indicated that the construction of Phase II of Cabana South is complete, and units are available for rent. At this stage in the construction phase, it is too late for AT&T Florida to install its network facilities to provide voice service in Phase II. In his letter of May 17, 2007, to AT&T Florida, Mr. Brawley did respond to AT&T Florida's request for payment in the amount of \$79,945 to extend its lines to serve Cabana, Phase II. In his letter, Mr. Brawley explains:

- FortGroup disagrees with AT&T Florida's request to pay almost \$80,000 to provide service for the continuation of the project.
- FortGroup considers the amount an improper and discriminatory charge for infrastructure.
- Phase I is served by AT&T Florida, and the project is legally and technically one project, under management by one entity.
- One half of the project will be served by AT&T Florida and the remainder by another provider.
- FortGroup did request AT&T Florida to provide service as its first choice and now has no choice except to consider other providers.

- There is no demarcation line in the finished project, and FortGroup will have to resolve issues with tenants regarding who can and cannot subscribe to AT&T Florida's services.
- Installation of AT&T Florida's infrastructure has been in dispute since late 2006, and AT&T Florida's letter of April 30, 2007, requesting payment for line extension was so late in the construction process that FortGroup was not afforded sufficient time to consider AT&T Florida's demands.
- FortGroup does not agree that AT&T Florida's COLR obligation should be waived in this instance.

Staff Analysis

In this case, FortGroup has restricted AT&T Florida's access to Cabana, Phase II; apparently as a result of AT&T Florida's actions. Consequently, AT&T Florida will not be able to install its network facilities to serve the tenants in Cabana, Phase II. Staff believes this fact alone is good cause for the Commission to relieve AT&T Florida of its COLR obligation. Nonetheless, staff considered the other facts and circumstances in AT&T Florida's petition, but in this case, the fact that the developer has restricted AT&T Florida's access to the property renders the other facts and circumstances moot.

This is a case where the two contiguous subsections of a development are being built in overlapping phases. The construction of Cabana, Phase I, began in the summer of 2005. In Phase I, FortGroup requested that AT&T Florida install its network facilities to provide voice service pursuant to its COLR obligation; AT&T Florida complied. However, before construction began on Phase II, the Legislature amended the COLR statute to allow AT&T Florida to petition the Commission for a COLR waiver. Consequently, AT&T Florida's apparent decision not to provide voice service to Phase II placed FortGroup in the dilemma of not having a provider for voice service.

FortGroup maintains that AT&T Florida was its first choice to be the provider of voice services in both phases of the development. When FortGroup began construction of the development in the summer of 2005, Cox had yet to offer its digital voice product to its customers in Gainesville.¹ Hence, it seems likely that FortGroup had not considered any providers other than AT&T Florida for voice service at the inception of the development. It is AT&T Florida's belief, and staff concurs, that only after AT&T Florida requested that FortGroup pay for the extension of its lines to Cabana, Phase II, did FortGroup decide to pursue another option for a voice service provider at Cabana, Phase II.² FortGroup then contacted Cox and

¹ An August 1, 2005, press release from Cox announced that Cox will launch Cox Digital Telephone in Central Florida (including Gainesville) before the end of 2005.

² AT&T Florida Response to Staff's First Data Request, Item No. 11(c).

requested that it make its digital voice product available to the tenants. Cox already had installed its communications facilities to provide cable television service to the tenants; thus, Cox did not have to install its outside plant after construction was completed, unlike AT&T Florida.

Staff disagrees with AT&T Florida's premise that the motivation for FortGroup to enter into the agreements with Cox and GRUCom was to generate revenue streams from telecommunications, video, and data services. There is no evidence in this docket that indicates FortGroup received compensation for entering into the arrangements with Cox and GRUCom. The decision by FortGroup to include video and data services in the rent appears to be market driven, not the desire to generate additional revenue at the expense of AT&T Florida. The inclusion of cable television service and broadband Internet service as part of the tenants' rent is a standard amenity in the college student housing market.³ The rent also includes all furnishings and appliances, a 32-inch television, washer and dryer, water/sewer, pest control, and an allotment of either \$30 or \$35 for electric service.

According to Mr. Brawley's letter of May 17, 2007, to AT&T Florida, FortGroup considers both Phase I and Phase II as one project under management by one entity. The development does not have a demarcation line separating Phase I from Phase II. Mr. Brawley also indicates that the installation of AT&T Florida's infrastructure in Phase II was in dispute since late 2006. AT&T Florida contends that AT&T Florida had many discussions, not disputes, with FortGroup that began in October of 2005 for both Phase I and Phase II.⁴ AT&T Florida contends it was not until April 17, 2007, that FortGroup first requested AT&T Florida to provide facilities in Phase II within a specified time period.⁵ However, AT&T Florida was aware that FortGroup planned for AT&T Florida to provide its services in both Phase I and Phase II as early as October 2005.⁶ In fact, on November 11, 2005, the BellSouth Building Industry Consulting Service delivered its recommended structure specifications package for Phase I and Phase II.⁷ Based on this sequence of events, it appears that AT&T Florida was aware that FortGroup planned and requested AT&T Florida to install its network facilities in Phase II well in advance of the start of construction.

On April 30, 2007, AT&T Florida sent FortGroup a letter requesting that the developer pay to AT&T Florida the amount of \$79,945 before AT&T Florida would extend its lines to Cabana, Phase II. FortGroup responded to AT&T Florida indicating that AT&T Florida's request for payment was so late in the construction process that FortGroup was not afforded sufficient time to consider AT&T Florida's demands. The payment AT&T Florida is requesting would be for installing its outside plant and connecting to each of the apartment buildings in Phase II. FortGroup already pre-wired the network terminating wire in all the apartment

³ *AT&T Florida Response to Staff's First Data Request, Item No. 6, Production of Documents, includes a chart listing seven other rental properties in the Gainesville market area. The chart indicates that all competing properties also include cable television and high speed Internet service.*

⁴ *AT&T Florida Response to Staff's First Data Request, Item No. 11.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

buildings as part of its construction. Copies of emails and correspondence between FortGroup and AT&T Florida filed in response to Staff's First Data Request provide more detail and further insight into AT&T Florida's conduct related to requesting payment of special construction charges. The information was filed under a Notice of Intent to Request Specified Confidential Classification, and as such, cannot be openly discussed in this recommendation.

AT&T Florida's letter of May 18, 2007, to Mr. Brawley, indicates that on May 7, 2007, Mr. Brawley advised AT&T Florida that FortGroup would not pay the requested amount and that FortGroup was going to work with GRUCom and Cox in order to obtain the services, including voice service, for the development. AT&T Florida further indicates that on May 16, 2007, Mr. Brawley advised that FortGroup had made the decision to use another vendor to provide voice service and does not require or request AT&T Florida to provide voice service for Cabana, Phase II. In the same letter, AT&T Florida advised FortGroup that it understands that FortGroup has chosen another communications service provider to install its communications facilities at Cabana, Phase II, to the exclusion of AT&T Florida, and AT&T Florida thus believes that it is relieved of its COLR obligation to serve the property pursuant to the provisions of Section 364.025, Florida Statutes.

AT&T Florida estimates the take rate for its voice services at Cabana, Phase II, will be low due to FortGroup's arrangements with other providers for the entire suite of services for the residents at Cabana, Phase II, and because payment for the alternative providers' video and data services are included in the residents' rent. Staff agrees with AT&T Florida that the take rate for its voice services will most likely be low, and because of the low take rate, AT&T Florida likely will not recover the amount of its investment to install its network in Cabana, Phase II, within five years. Staff estimates that it will take approximately fourteen years for AT&T Florida to recover its investment, given the information provided by AT&T Florida.

Staff confirmed that Cox will be providing cable television service to all of the residents at Cabana and that Cox will offer its digital voice product to the residents in Cabana, Phase II on an individual subscriber basis. Staff also confirmed that GRUCom will be providing broadband data services to all of the residents. The fees for both data and cable television services are included in each resident's rent.

Conclusion

Staff has concerns about whether AT&T Florida acted in good faith in its negotiations with FortGroup to arrive at an equitable agreement to provide voice service to Cabana, Phase II. It appears AT&T Florida delayed the installation of its network facilities and then presented its request for payment to FortGroup so late in the construction phase that FortGroup had no other reasonable choice than to seek an alternative provider for voice service at Cabana, Phase II. Staff believes AT&T Florida could have filed its petition with the Commission earlier, which would have afforded FortGroup an opportunity to provide a meaningful response. On a going forward basis, however, the lone fact that the developer will not allow AT&T Florida access to the property is good cause for the Commission to grant AT&T Florida a waiver from its carrier-

of-last-resort obligation at Cabana, Phase II. Staff believes no other reasons in the petition need be considered. Nevertheless, staff believes that in the future, should the facts and circumstances change, and the developer requests AT&T Florida to install its network facilities to serve the tenants in Cabana, Phase II, the facts and circumstances at that time should be used to determine whether AT&T Florida is obligated to provide service as the carrier-of-last-resort.

Accordingly, staff recommends that, on a going forward basis, AT&T Florida should be relieved from its carrier-of-last-resort obligation to provide basic local telecommunications service to the tenants in Phase II of the development known as Cabana South Beach Apartments, located in Alachua County, Florida, based solely on the fact that the developer has restricted AT&T Florida's access to the property.

Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested this docket should be closed administratively upon issuance of the Consummating Order. **(R. Mann, Wiggins)**

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