Voice | Data | Internet | Wireless | Entertainment

EMBARQ™

Embarq
Mailstop: FLTLHO0102
1313 Blair Stone Rd
Tallahassee, FL 32301
embarq.com

REDACTED

October 15, 2007

070649-TL

RECEIVED-FPSC
07 OCT 15 PM 4:15
COMMISSION CLERK

Ms. Ann Cole
Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Embarq Florida, Inc's Petition for Declaratory Statement

Dear Ms. Cole:

Enclosed for filing on behalf of Embarq Florida, Inc. is the original and fifteen copies of Embarq's Petition for Declaratory Statement.

Copies are being served pursuant to the attached certificate of service.

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

CMP
COM
CTR
ECR 3
GCL
OPC 1
RCA
SCR
SGA
SEC
OTH

Sincerely,

Susan S. Masterton
Senior Counsel

Susan S. Masterton
SENIOR COUNSEL
Voice: (850) 599-1560
Fax: (850) 878-0777
susan.masterton@embarq.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery (*) or Overnight Mail+ this 15th day of October, 2007 to the following:

Beth Salak (*)
Division of Competitive Markets & Enforcement
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Patrick Wiggins (*)
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Treviso Bay Development, LLC (V.K.) (+)
Christopher Cramer
c/o V.K. Development Corporation
19275 W. Capitol Drive, Suite 100
Brookfield, WI 53045

Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Declaratory Statement by Embarq Florida, Inc. regarding implementation of Order No. PSC-07-0311-FOF-TL, Rule 25-4.094, F.A.C. and Embarq's General Exchange Tariff Section A5, G.	Docket No. 070649
	Filed: October 15, 2007

EMBARQ FLORIDA, INC.'S PETITION FOR DECLARATORY STATEMENT

Embarq Florida, Inc. ("Embarq"), by and through its undersigned counsel, hereby files this Petition for Declaratory Statement in accordance with section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code. Embarq seeks a determination from the Florida Public Service commission ("FPSC" or "Commission") concerning the applicability of the provisions of Order No. PSC-07-0311-FOF-TL directing Embarq to use existing rules to ameliorate uneconomic service provisioning at the Treviso Bay subdivision in Collier County.[1] In addition, Embarq seeks a determination regarding the applicability of Rule 25-4.094, Florida Administrative Code, and Embarq's General Exchange Tariff Section A5, Gi, which implements the rule, under the particular facts existing at Treviso Bay. These facts include the developer's exclusive agreements with Comcast to provide data and video services to the future residents, the availability of Comcast's digital voice service to future residents over these same facilities and the developer's failure to pay the advance deposit Embarq requested in accordance with the rule and tariff.[2]

---

[1] *In re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.*, Order No. PSC-07-0311-FOF-TL, issued April 12, 2007 in Docket No. 070763-TL, hereinafter "Embarq Waiver Order," included as Attachment No. 1.

[2] These facts and circumstances are very similar to the facts and circumstances at the Nocatee subdivision where the Commission recently granted AT&T's request for a waiver of its carrier of last resort (COLR) obligation at the development, citing primarily the availability of alternative voice replacement services. During the discussion at the Agenda Conference, Nocatee's failure to pay AT&T for its anticipated

In support of this Petition Embarq states as follows:

1. The name and address of the Petitioner is as follows:

Embarq Florida, Inc.
555 Lake Border Drive
Apopka, Florida

2. Embarq's authorized representative, who should receive all notices, pleadings, orders or other documents, is:

Susan S. Masterton
Embarq
1313 Blair Stone Road
Tallahassee, FL 32301
(850) 599-1560 (phone)
(850) 878-0777 (fax)
susan.masterton@embarq.com

3. Embarq is a certificated, price-regulated incumbent local exchange company regulated by the Commission under chapter 364, Florida Statutes.

4. As an incumbent local exchange company, Embarq is subject to carrier of last resort (COLR) obligations under section 364.025, Florida Statutes.

BACKGROUND

5. On November 20, 2006, Embarq filed its Petition for Waiver of its carrier of last resort obligations under the provisions of section 364.025(6)(d), Florida Statutes, for the Collier County subdivision known as Treviso Bay. On December 13, 2007 Embarq filed a Revised Petition, and a request for an expedited hearing. Embarq's Request for an Expedited Hearing was granted

construction costs in advance was noted. (September 25, 2007 Agenda Conference Transcript, Item 5 at page 5). The Commission recognized that the advance payment discussion was mooted by its decision to grant a COLR waiver to AT&T (9/25/07 Agenda Transcript, Item No. 5 at page 6). However, this issue is very much alive in the Treviso Bay case, since Embarq's request for a waiver was denied. While AT&T requested an advance payment for construction under Rule 25-4.067 relating to line extension charges for special construction, Embarq has requested an advance deposit under Rule 25-4.094 relating to underground facilities in new residential subdivisions.

and a hearing was held on February 14, 2007. Embarq's request for waiver of its COLR obligation was based on: 1) the developer's bulk agreements with Comcast to provide data and video services paid for through mandatory homeowners' dues, effectively limiting Embarq to providing only voice service; 2) Comcast's ability and intent to provide its digital voice services to future residents of Treviso Bay on the date of occupancy; and 3) the resulting effect of rendering Embarq's provision of voice only services to the development uneconomic.

6. The Commission voted to deny Embarq's request for a waiver at its March 13, 2007 Agenda Conference. The Embarq Waiver Order reflecting this decision was issued on April 12, 2007.[3]

7. Although the Commission specifically found that voice services from alternative providers would be available to the residents of Treviso Bay, the Commission denied Embarq's request for a waiver based on its determination that "Embarq has not met its burden of proof that it will be uneconomic to provide voice telephone service to Treviso Bay." Embarq Waiver Order at page 17. Significantly, the Commission did not find that Embarq's provision of service to Treviso Bay would be economic, rather the Commission found that Embarq had not conclusively proven that it would not be.

8. While the Commission ultimately ruled that overall Embarq had not demonstrated "good cause" for a waiver, the Commission made several findings that are relevant to this request for declaratory relief. In the Order, the

[3]Embarq's subsequent request for reconsideration was denied in Order No. PSC-07-0635-FOF-TL.

Commission found that "voice service from other providers using Voice over Internet Protocol technology and wireless cellular technology will be available on an individual customer basis at retail prices to the residents living in Treviso Bay development at the time of each resident's occupancy."[4] (Embarq Waiver Order at page 5) In addition the Commission observed that: "[t]he record suggests that due to the Agreement between Treviso Bay and Comcast, it is likely that Embarq will obtain fewer subscribers in the Treviso Bay development than without such an agreement." (Embarq Waiver Order at page 9) The Commission also recognized that "[s]ome economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast..." (Embarq Waiver Order at page 12)

9. Based on its recognition that the facts and circumstances existing at Treviso Bay would necessarily have an effect on the economics of Embarq's provision of voice services, the Commission also provided guidance to Embarq as to how those concerns might be addressed. Specifically, the Commission stated:

> Our decision does not preclude Embarq from using tools that may be available to it under existing rules in addressing the alleged problem of uneconomic provisioning of service. (Embarq Waiver Order at page 18)

It is the implementation of this provision of the Embarq Waiver Order that is the subject of Embarq's request for a declaratory statement.

[4] An affidavit from Comcast was entered into the evidentiary record of the proceeding attesting to Comcast's ability and intent to offer its digital voice service to residents on an individual customer basis. See Docket No. 060763-TL, Hearing Exhibit No. 8.

REQUIREMENTS FOR DECLARATORY STATEMENT

10. Section 120.565, Florida Statutes, provides that "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances."

11. A petition seeking a declaratory statement is appropriate when there is a need for "resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or orders over which the agency has authority." Rule 28-105.001, Florida Administrative Code. A declaratory statement must relate to a petitioner's particular set of circumstances. *Id.* In addition, a declaratory statement may not be used to determine the conduct of another person. *Id.* The Commission has held that its declaratory statement authority extends to determining the applicability of tariffs filed under its jurisdiction.[5]

12. A declaratory statement is particularly appropriate to answer Embarq's questions regarding the applicability and intent of the Embarq Waiver Order and the advance deposit rule and tariff that Embarq applied to the circumstances at Treviso Bay in accordance with that Order. Because the Commission has jurisdiction over Embarq, but not the developer of Treviso Bay, it only has jurisdiction to determine Embarq's obligations when the

[5] See, *In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building ("Maxihut") located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department*, Order No. PSC-06-0306-DS-TL, issued April 19, 2006 in Docket No. 060049-TL.

developer refuses to pay the deposit requested in accordance with the Commission's rule and Embarq's tariff, which is exactly the ruling Embarq is requesting.

13. The requested declaratory statement applies to Embarq's particular set of circumstances at Treviso Bay, specifically: 1) the Commission's denial of Embarq's request for a waiver; 2) combined with the Commission's guidance to Embarq to use existing mechanisms to address potential uneconomic provisioning of service at Treviso Bay; 3) the particular facts and circumstances regarding the costs to provide service and Embarq's ability to recover those costs; and 4) Treviso Bay's failure or refusal to pay the deposit in advance of construction as required by the Commission's rules and Embarq's tariffs. In ruling on this Petition for Declaratory Statement, the Commission may rely on the statement of facts set forth by Embarq without making a determination regarding the validity of these facts. Rule 28-105.003, Florida Administrative Code.

14. Embarq is substantially affected by the decision requested in this petition for declaratory statement because the application of the Commission rule and Embarq's tariff relating to advance deposits affects Embarq's ability to recover its costs when the developer has failed or refused to pay the advance deposit Embarq has requested under the rule and tariff.

RULING REQUESTED AND BASIS FOR RELIEF

15. In the Embarq Waiver Order the Commission denied Embarq's request to be relieved of its COLR obligation but provided guidance that Embarq could use

existing rules to protect against uneconomic investment. Embarq is seeking a ruling from the Commission that, in accordance with Rule 25-4.094, Florida Administrative Code, (hereinafter "Advance Deposit Rule," included as Attachment No. 2) and Embarq's General Exchange Tariff Section A5, Gi (hereinafter "Advance Deposit Tariff," included as Attachment No. 3), the developer must pay the advance deposit deemed necessary by Embarq to "guarantee performance" or Embarq is not required to place facilities to serve the development. In addition, Embarq seeks clarification that, if the developer refuses to pay the applicable deposit, Embarq has complied with the Embarq Waiver Order and is not in violation of that portion of the Order denying Embarq's request to be relieved of its COLR obligation.

16. Embarq requested a deposit from Treviso Bay under the provisions of the Advance Deposit Rule and Embarq's implementing Advance Deposit Tariff. (See Attachment No. 4, Embarq's May 22, 2007 letter to Treviso Bay) Treviso Bay responded to Embarq's letter. (See, Attachment No. 5, Treviso Bay's June 4, 2007 letter to Embarq) Subsequently, Embarq and Treviso Bay engaged in conference calls to discuss each party's position concerning the deposit request.

17. As a result of these discussions, Embarq revised the deposit amount and provided further detail regarding the refund mechanism. (See, Attachment No. 6, Embarq's July 27, 2007 letter to Treviso Bay) Treviso Bay failed to respond to Embarq's revised request by the date set forth in the letter and has not responded to Embarq as of the date of filing this Petition.

18. Embarq calculated the revised advance deposit requested in the May letter using cost and revenue assumptions based on the facts and circumstances at Treviso Bay. Embarq first determined the number of Treviso Bay residents that would be required to purchase voice services from Embarq for Embarq to break even based on the estimated cost for construction of the necessary facilities. The deposit computation then involved subtracting the reasonably expected number of Treviso Bay residents who might purchase Embarq voice services, given the existence of the agreements with Comcast for data and video services and the availability of Comcast's voice service. This difference in customers was then used to compute the potentially unrecovered cost of construction of the facilities.

19. The same simplified approach was used to calculate the applicable refunds, yielding a unit cost of construction value for each customer in excess of the projected demand for Embarq's service. The deposit and refund calculations are reflected on Confidential Attachment No. 7.

20. The Advance Deposit Rule was adopted by the Commission in 1971, after hearings involving comments from all affected parties, in conjunction with the Commission's adoption of Rules 25-4.088-25-4.097, Florida Administrative Code, which require local exchange telephone companies to place all facilities to new residential subdivisions underground.[6] The requirement is triggered when the developer of a new residential subdivision submits a proper application and meets certain conditions prior to the local exchange

[6] The original numbering of the rules has changed, but the substance has remained the same. Similar rules also were adopted for electric companies. See, Rules 25-6.077-6.082, Florida Administrative Code.

company's placement of facilities. The Commission held formal hearings as part of the rule adoption process and took comments from local exchange companies into account in the final rule provisions.

21. In reviewing the transcripts of the rule hearings related to the undergrounding rules, and specifically the rule authorizing advance deposits, it is clear that the Commission was concerned that local exchange companies might face uneconomic risks in meeting developer requests to place facilities underground to serve a subdivision, which generally would require all facilities to be placed on the front end to serve all anticipated homes in the subdivision, regardless of the certainty or timing of customers subscribing to a company's service.[7] The Advance Deposit Rule was adopted specifically to protect local exchange companies from this potential for uneconomic investment.[8] On pages 523 and 524 of the Underground Rules Hearing Transcript, the purpose of the deposit requirement is discussed. Certain telephone companies had expressed concerns that houses would not be built timely to ensure enough subscribers for the companies to realize sufficient revenues to recover their costs for placing facilities. According to the staff witness's testimony:

[7] January 20, 1971 Hearing Transcript in Docket No. 69246-PU, *In the Matter of Investigation of the policies, programs, and practices of the electric utilities and telephone companies with reference to the installation of underground facilities for residential service, the costs and assessment thereof incident to such installations, replacement of existing facilities, for the purpose of assisting the Commission in the promulgation of such reasonable rules and regulations governing such policies, programs, and practices as may be necessary and proper,* hereinafter "Underground Rules Hearing Transcript," included as Attachment No. 8.

[8] It is clear from the hearing record that the advance deposit for placement of underground telephone facilities was not intended to address a cost differential between placing facilities underground as opposed to overhead. See pages 513-514 of the Underground Rules Hearing Transcript.

> The concern here is evidently that the company may be required to incur an investment in excess of that which would be supported by the immediate or near-term revenues to be generated or in excess of area requirements. We agree that a utility is entitled to such protection in the interest of all other subscribers and suggest that the advanced deposit requirement provisions set out in the language of Rule G provide adequate safeguards.[9]

22. While the situation for Embarq at Treviso Bay is not identical to the situation that formed the basis for the Advance Deposit Rule, since competition for local exchange services did not exist in 1971, the uncertainty regarding Embarq's ability to recover its costs due to the circumstances existing at Treviso Bay is very similar. In this regard, the advance deposit serves the same purpose at Treviso Bay as was contemplated when the rule was adopted. That is, the advance deposit protects Embarq from the potential for uneconomic investment that may result from Embarq fulfilling its COLR obligation to place sufficient underground facilities to serve any potential resident who might request it. The risk is created because the number of actual residents who request Embarq's service necessarily will be reduced by the availability of voice service from the same provider who exclusively will be providing these residents with data and video services. As originally intended, and in its application to Treviso Bay, the advance deposit mechanism appropriately requires that the developer share this potential risk, rather than requiring Embarq to shoulder the entire burden.

23. Embarq's tariff at Section A5, paragraph G, implements the provisions of the rules relating to the obligation to place facilities underground at new

[9] Rule G is the original denomination of what is now Rule 25-4.094.

residential subdivisions. The tariff tracks the language of the rule in many respects.

24. Relating to the calculation of the deposit, the tariff specifies that the deposit "shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide." See Attachment No. 3 at Section A5, Gi. While Embarq has been unable to find any supporting documentation specifically explaining the intent of the Advance Deposit Tariff provision, it is reasonable to look at the record testimony supporting the rule implemented by the tariff to glean this intent. Based on the testimony at the rule hearing, it appears that the language is intended to address the requirement that Embarq provide facilities different from what it would normally do absent the rule and in a manner that may engender additional, potentially unrecoverable, costs. Rule hearing transcripts indicate that the circumstances in the minds of the Commissioners and the parties at the time the rule was adopted revolved around the need to place facilities to serve the entire development regardless of when, whether or how the customers would come on line. See, Underground Rules Hearing Transcript at pages 520 and 524.

25. While not identical, the circumstances envisioned during the original rulemaking are similar to the uncertainty created by Embarq's need to place facilities throughout the Treviso Bay development to meet its COLR obligation to serve any customer who requests service. This uncertainty is created by the bulk data and video agreements which give Comcast a

ubiquitous presence in the development and the availability of Comcast's digital voice service over the same facilities it will have already placed to provide the data and video service components. Like the circumstances contemplated in the original rulemaking, Embarq does not know which customers or how many customers might request Embarq's voice service, if any, given the alternative availability of voice service from the exclusive data and video provider.

26. Additionally, Embarq would not normally place facilities to provide "voice only" services, but in the normal course of business would place facilities with the expectation of having the opportunity to provide its broadband service offerings (i.e., DSL). Also, under normal circumstances Embarq would have the ability to include its DISH video product in the services it markets to prospective customers. As the Commission recognized in its order denying Embarq's waiver, the bulk agreements with Comcast for the provision of data and video services effectively preclude Embarq from obtaining any customers for these services.

27. The deposit requested is calculated to reflect these circumstances that are different from the normal circumstances under which Embarq provides service. Through the advance deposit mechanism the developer assumes a portion of the risk associated with the requirement that Embarq place upfront facilities that may never be used. Even though the Commission ultimately found that the Embarq had not proved conclusively that service would be uneconomic, the Commission recognized the potential for this outcome, and

directed Embarq to use existing tools to address the problem. The risk sharing inherent in the advance deposit mechanism is particularly appropriate to address these uncertain circumstances where the realization of actual customers and revenues will play out many years into the future.

28. As stated in the rule and in Embarq's tariff, the advance deposit is intended as a "performance guarantee." The refund mechanism required by the rule ensures that if, in fact, a sufficient number of customers subscribe to Embarq's services to make the placement of facilities to serve the development economic, then the deposit will be returned to the developer based on the number of customers who subscribe within the first five years after Embarq places the required facilities[10].

CONCLUSION

29. As set forth above, in this petition Embarq seeks a ruling from the Commission that Embarq is not required to place facilities in Treviso Bay if the developer fails to pay the advance deposit requested by Embarq in accordance with the Advance Deposit Rule and Embarq's implementing tariff. Additionally, Embarq seeks a ruling that implementation of the rule and tariff in this manner is consistent with the Embarq Waiver Order.

30. The relief requested by Embarq is consistent with the Commission's recent decision in Docket No. 060822-TL, involving AT&T's request for a waiver of its carrier of last resort obligations in the Nocatee development. Similar to that

[10] Commissioner McMurrian recognized that the "only way to really know what the numbers are is to have [the company] go and invest the facilities and see how many customers take them up on it." 9/25/07 Agenda Transcript, Item No. 5 at page 29. The advance deposit mechanism contemplates and is designed to address exactly these types of future scenarios.

case, the Treviso Bay developer has entered into contracts for data and video services with Comcast. Comcast's digital voice service is available to the residents of Treviso Bay as a replacement for Embarq's voice services and Comcast intends to make this service available to Treviso Bay residents when they move in. As a result of these circumstances, Embarq anticipates that it will not be able to obtain enough customers to ensure sufficient revenues to recover its costs to provide facilities to serve the development. Finally, the developer has refused to pay the deposit requested by Embarq to provide some assurance that Embarq's investment in Treviso Bay will not be wasted as a result of the developer's actions to limit competition at the development.

WHEREFORE, Embarq requests that the Commission grant Embarq's request for a declaratory statement as set forth herein.

Respectfully submitted this 15th day of October 2007.

SUSAN S. MASTERTON
1313 Blair Stone Road
Tallahassee, FL 32301
(850) 599-1560 (phone)
(850) 878-0777 (fax)
susan.masterton@embarq.com

ATTORNEY FOR EMBARQ FLORIDA, INC.

Attachment 1

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.	DOCKET NO. 060763-TL ORDER NO. PSC-07-0311-FOF-TL ISSUED: April 12, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

ORDER DENYING PETITION

BY THE COMMISSION:

Introduction

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. In accordance with the statute, Embarq served a copy of the petition on that same day on the developers of Treviso Bay, Treviso Bay Development, LLC (Treviso Bay).

This is a case of first impression under Section 364.025(6)(d), Florida Statutes, which presents unique circumstances and policy concerns not previously addressed by the Commission. During its 2006 session, the Legislature amended Section 364.025, Florida Statutes, and added Section 364.025(6), Florida Statues, which permits a LEC to be automatically relieved of its COLR obligations 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 all other respects, the COLR obligation continues to apply to incumbent LECs.

In this case, Embarq is seeking a waiver of its COLR obligations 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.

In Order No. PSC-06-1076-PCO-TL, issued December 29, 2006, the Prehearing Officer granted Embarq's motion for an expedited hearing and established the procedural schedule and hearing dates for this docket.

On February 13, 2007, Order No. PSC-07-0128-PHO-TL was issued outlining the conduct and procedures to be used at the Hearing and the issues to be addressed in determining the petition.

Issue 1: Will voice service from other providers be available to customers of Treviso Bay? If so, when and under what conditions?

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?

Issue 4: Has Embarq, formerly known as Sprint-Florida Incorporated, taken any action that would preclude Embarq from obtaining a waiver of its carrier-of-last-resort obligation in Treviso Bay?

Issue 4A: Is Embarq obligated to provide service to Treviso Bay by its tariff or by holding itself out as willing and able to provide service?

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?

Discussion

Issue 1: Will voice service from other providers be available to customers of Treviso Bay? If so, when and under what conditions?

We find that voice service from other providers using Voice over Internet Protocol technology and wireless cellular technology will be available on an individual customer basis at retail prices to the residents living within the Treviso Bay development at the time of each resident's occupancy. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

Parties' Arguments

In its Prehearing Memorandum of Law, Embarq asserts that the criteria for automatic relief from its COLR obligation pursuant to Section 364.025(6), Florida Statutes, clearly

contemplate situations where the universal service objective of the statute is met through the availability of voice or voice replacement service from an alternative provider.[1] Embarq further asserts and states in its Memorandum of Law that:

> . . . it is reasonable to assume that the nature of the facts and circumstances justifying relief would be similar to the automatic exemptions. That is, it is reasonable to assume that the facts and circumstances justifying a waiver demonstrate the existence of an alternative provider with facilities in place to provide voice or voice replacement services that is subject to contractual benefits and obligations which obviate the need for the ILEC to serve the development in order for the universal service goals to be met.[2]

Embarq witness Dickerson argues that the purpose of the COLR obligation will be satisfied through the competitive alternative voice services that will be available to the residents of Treviso Bay. Embarq witness DeChellis maintains that Comcast DVS will be available to every resident from their first day of occupancy, and that residents will have access to voice service from competing VoIP providers via the broadband service each resident will be required to purchase under the bulk agreement that the developer entered into with Comcast.

Treviso Bay agrees that it has entered into a Bulk Cable Television Service and Easement Agreement with Time Warner Cable (assumed by Comcast) to be the provider for cable television and high speed data service.[3] In its response to Embarq's Amended Petition, on page 3, Treviso Bay explains:

> Under the terms of the Bulk Services Agreement, Time Warner [now Comcast] is the provider for cable television and high speed data service. Local phone service otherwise provided by an LETC [Local Exchange Telecommunications Company] is not included in the Bulk Services Agreement. . . . The Bulk Services Agreement does not restrict or prohibit any resident of the Property from obtaining voice telephone services or satellite television services from a LETC or other provider. Each resident is free to choose their voice services and/or satellite television service provider, if any.

Treviso Bay maintains that the only services billed in bulk through the homeowners' association dues are those relating to cable (video) and high speed data service. Voice phone service, whether provided by Embarq, Comcast, or another provider, is not included in the bulk

---

[1] Embarq Florida, Inc.'s Prehearing Memorandum of Law, Filed February 13, 2007, Docket No. 060763-TL, In Re: Petition for waiver of carrier-of-last-resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc., p. 1.

[2] Embarq's Memorandum of Law, p. 5.

[3] Respondent's Objection to Petitioner's Request For Confidential Classification Under Section 364.183(1), Florida Statutes, And Response to Petitioner's Petition For Waiver ("Treviso Bay Response"), Filed December 1, 2006, Docket No. 060763-TL, p. 3, ¶ 16.

services offered at Treviso Bay. The customer will be required to sign up for and will be individually billed for such voice phone service from the provider of the resident's choice.[4]

Treviso Bay argues that the availability of alternative competitive providers for voice service does not satisfy the intent of the Florida Legislature that universal service and COLR objectives be maintained through the ubiquitous nature of the LEC's network. Treviso Bay witness Wood testified that:

> The fact that an alternative to Embarq's voice service may be available in the future does not change the public policy adopted by the Legislature in §364.025(1): "it is the intent of the Legislature that universal service objectives be maintained after the local exchange market is opened to competitively provided services. It is also the intent of the Legislature that during this transition period the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives." This approach ensures the availability of basic telecommunications service during the transition to fully competitive markets. The Legislature did *not* conclude that the existence of a current competitor (or, more to the point in this case, a potential competitor) for basic telecommunications service in a given area is sufficient to ensure that universal service objectives are maintained, and did not conclude that there is no need for the ILEC to serve as a COLR under these circumstances. Given the Legislature's clear policy objectives and its conclusions regarding how those objectives should be met (at least until January 1, 2009), the question of whether Treviso Bay residents will have an alternative provider for voice services in the future is moot.

Analysis

There are three questions to answer for this issue. One, will voice service from other providers be available to customers of Treviso Bay? Two, when will voice service from other providers be available to customers in Treviso Bay? Three, under what conditions will voice service from other providers be available to the customers of Treviso Bay? The answers to questions one and two are undisputed. Alternative choices for voice service will be available upon request to the residents of Treviso Bay once they move in. Residents will be able to obtain voice service utilizing VoIP technology from Comcast and other VoIP providers, in addition to wireless cellular service from several cellular service providers.

The contentious question is under what conditions voice service will be provided. Both parties agree that each resident in Treviso Bay will be able to obtain voice service using VoIP technology via Comcast's broadband service, which will be connected to every home. Embarq witness Dickerson contends that the availability of Comcast DVS to all the residents of Treviso Bay satisfies the purpose of the COLR obligation. Conversely, Treviso Bay witness Wood argues that Comcast DVS is not the same as Embarq's wireline basic local telecommunications service that defines universal service, in that Comcast is not required to provide DVS to any

[4] Treviso Bay Response, p. 6,¶ 18.

person making a request within a reasonable amount of time, nor is Comcast required to continue to provide DVS if it determines after the fact that it is not profitable or desirable to do so. Treviso Bay argues that Embarq is obligated to provide service under its COLR obligation pursuant to Section 364.025, Florida Statutes.[5]

To date, the Federal Communications Commission (FCC) has not decided whether VoIP service that is interconnected with the Public Switched Telephone Network is a telecommunications service or an information service under the 1996 Act. Further, the FCC/NARUC VoIP Consumer Fact Sheet delineates three special considerations for using VoIP and recommends that if someone is considering replacing traditional telephone service with VoIP, to be aware that (1) some VoIP service providers may have limitations to their 911 service, (2) some VoIP services don't work during power outages and the service provider may not offer backup power, and (3) VoIP providers may or may not offer directory assistance/white page listings.

Embarq witness DeChellis testified that he agreed that the service Comcast will offer in Treviso Bay is known as VoIP service and that VoIP is not the same as basic local exchange telecommunications service. In his testimony, witness DeChellis stated that he did not know whether Comcast's digital voice VoIP product provides the same access to 911 and relay services, or provides an alphabetical directory listing as Embarq's wireline voice service. The record was void of any documentation regarding the technical capabilities of Comcast's DVS. However, in June 2005, the FCC adopted rules that impose E911 obligations on providers of VoIP services that interconnect with the public switched telephone network.[6] Comcast DVS would have to comply with the FCC's rules; thus, Comcast DVS would have E911 capabilities.

It is indisputable that voice service from other providers offering alternative choices including VoIP and wireless cellular service will be available to the residents living in the Treviso Bay development.

Conclusion

Based on the information in the record, we find that voice service from other providers using Voice over Internet Protocol technology and wireless cellular technology will be available on an individual customer basis at retail prices to the residents living within the Treviso Bay development at the time of each resident's occupancy.

[5] Treviso Bay Development, LLC's Memorandum of Law, Filed February 13, 2007, Docket No. 060763-TL, p. 2.

[6] Order No. FCC 05-116, released June 3, 2005, WC Docket No. 04-36 and WC Docket No. 05-196, In Re: IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers.

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?

We find that Treviso Bay has not entered into any agreements, or taken any action, that restricts or limits Embarq's ability to provide basic local voice telecommunications service to the residents at the Treviso Bay development. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

Parties' Arguments

In its amended petition, Embarq agrees that the developer (Treviso Bay) has not entered into an exclusive agreement with Embarq or any other provider for voice service and that Treviso Bay residents are free to choose any provider for voice service.[7] Embarq argues that because the Treviso Bay residents will receive their video and data services from a single provider (Comcast), it is extremely likely that Embarq will not be the voice provider of choice for a significant number of residents in Treviso Bay.[8] Both parties agree that Treviso Bay executed a bulk agreement with Time Warner, which was assumed by Comcast, for the provision of data and video services to all residences within Treviso Bay, where all residents will be billed for the data and video services through their homeowners' association dues.

Embarq argues that because all of the residents will have Comcast broadband service paid for through their homeowners' association dues, and as a result, will have access to alternative voice services such as Comcast Digital Voice Service (DVS), Embarq's ability to obtain customers for its voice service will be limited. Embarq witness DeChellis testified that, "Comcast will have the ability to offer voice telephone services to the residents of this development via the same facilities used to provide video and data services. Comcast is actively marketing its 'Triple Play' of digital cable video, high-speed Internet and digital voice services throughout Collier County where this development is located." Witness DeChellis went on to describe the impacts on Embarq from Treviso Bay's agreement with Comcast:

> With a 100 percent penetration of its video and data services to residents of Treviso Bay via its bulk agreement with the developer, and its ability to offer voice telephone services as an add-on, Comcast is in a strong position to garner a vast majority of the Treviso Bay residents' voice telephone services as well. Based on this scenario, if Embarq were required to place its facilities to provide service in this development, its potential revenues would be limited to only voice telephone services since Comcast has 100 percent penetration of video and data services through its bulk billing of these services, ultimately paid by the residents through their homeowners' dues. Embarq's voice telephone revenues would be further limited to those derived from a small percentage of customers who might

[7] Embarq Florida, Inc.'s Amended Petition for Waiver, Filed December 13, 2006, p. 8.

[8] Embarq's Amended Petition, p. 8.

choose not to subscribe to the voice services offered by Comcast as an add-on to their video and data services.

Embarq contends that Treviso Bay has entered into an agreement that limits its ability to obtain customers. Embarq states in paragraph 23, page 9, of its Amended Petition for Waiver that, "the existence of exclusive video and data arrangements and the availability of an alternative voice product from the exclusive data and video provider, which reduce the likelihood that Embarq will be able to obtain a sufficient number of voice customers to recoup the investment costs that it would incur to place the facilities necessary to serve Treviso Bay, constitute 'good cause' to relieve Embarq of its carrier of last resort obligations for the development under Section 364.025(6)(d)."

In its response to Embarq's Amended Petition, Treviso Bay agrees that Embarq is correct that Treviso Bay has entered into a Bulk Cable Television Service and Easement Agreement (Agreement) with Time Warner Cable, and under the terms of the Agreement, Time Warner (now Comcast) is the provider for cable television and high speed data service.[9] However, Treviso Bay maintains that local voice phone service otherwise provided by a LEC is not included in the Agreement, nor does the Agreement restrict or prohibit any resident of the development from obtaining voice telephone services or satellite television services from a LEC or other provider.[10] Each resident is free to choose their voice services and/or satellite television service provider, if any.[11]

Treviso Bay maintains that the only services billed in bulk through the homeowners' association dues are those relating to cable and high speed data service. Voice phone service, whether provided by Embarq, Comcast, or another provider, is not included in the bulk services at Treviso Bay. The customer will be required to sign up for and will be individually billed for such voice phone service from the provider of the resident's choice.[12]

Analysis

Treviso Bay entered into a bulk agreement with Time Warner on August 8, 2005, for the provision of data and video services to all residences within Treviso Bay. After Treviso Bay executed the Bulk Services Agreement with Time Warner, Comcast obtained Time Warner's cable territory that includes the Treviso Bay development, and assumed the Bulk Services Agreement. The Bulk Services Agreement consists of a base offering of high speed data and video services that are paid for with fees collected through the residents' homeowners'

[9] Respondent's Objection to Petitioner's Request For Confidential Classification Under Section 364.183(1), Florida Statutes, And Response to Petitioner's Petition For Waiver ("Treviso Bay Response"), In Docket No. 060763-TL, Filed December 1, 2006, p. 3, ¶ 16.

[10] Treviso Bay Response, p. 3, ¶ 16.

[11] Treviso Bay Response, p. 3, ¶ 16.

[12] Treviso Bay Response, p. 6.

association dues. The bulk services agreement between Treviso Bay and Comcast does not include voice service. Embarq asserts that Comcast has an alternative product allowing it to provide digital voice services over its high speed data facilities and actively markets this product in Collier County.[13] Embarq reasons that given the bulk agreement with an alternative provider (Comcast) for data services (broadband Internet) billed through all Treviso Bay residents' homeowners' association dues, it is likely that a significant number of residents will choose a provider other than Embarq for their voice service.[14] Hence, Embarq believes that its ability to obtain customers will be limited due to Treviso Bay's agreement with Comcast. Embarq is not precluded from providing video and data services to the residents in Treviso Bay, although it is unlikely that the residents would pay for video and data services from Embarq in addition to paying for like services from Comcast.

Conversely, Treviso Bay has also entered into another agreement that may increase Embarq's ability to obtain customers. Treviso Bay has executed an agreement with Devcon Security Services Corp. (Devcon) whereby Devcon will provide on-site monitoring of all security systems installed in the homes in the Treviso Bay development. The fees for monitoring the security systems, like the Bulk Services Agreement, will be collected from each resident through his homeowners' association dues. Each resident will pay for the security system monitoring service whether or not the home has a security system installed.

In its response to Staff's First Set of Interrogatories, No. 2.c., Treviso Bay was asked if monitoring for the security system will require a telephone line at each residence. In its response, Treviso Bay states, "Yes. Devcon has stated that the monitoring of the security systems is conducted through a telephone line at each residence." Treviso Bay further states that the security system can be monitored using wireless technology via VoIP service. In its Rider To Electronic Protection Service/Monitoring Agreement (Rider), Devcon recommends that each subscriber to Devcon's monitoring service employ an additional method of communication, such as standard telephone service, in addition to any wireless form of communication.

During Treviso Bay's cross-examination, witness DeChellis was questioned about Devcon's recommended form of communication for monitoring purposes. Witness DeChellis agreed that Devcon does not believe that monitoring an alarm service using VoIP technology is a comparable alternative. Subsequently, our staff asked witness DeChellis, "based on your earlier statement about the, Devcon's position on VoIP, would you agree that a prudent customer would choose to have an additional line installed?" Witness DeChellis responded, "I think if, if I was a customer reading this document [Devcon's Rider], I would have a lot of concerns about that." The record indicates that a prudent person signing the security system monitoring agreement with Devcon would consider obtaining a standard telephone line for monitoring purposes. Hence, 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.

[13] Embarq's Amended Petition, p. 8.

[14] Embarq's Amended Petition, p. 9.

The record also shows that from June 20, 2006, through July 19, 2006, Embarq sent five letters to Johnson Engineering (Treviso Bay's Engineering contractor) indicating that Embarq had reviewed the proposed plat and that telephone service would be provided based on the rules and regulations covered in Embarq's Local and General Exchange Tariff. Additionally, on August 10, 2006, Treviso Bay executed a Communication System Right of Way and Easement Deed for Embarq's benefit whereby Embarq was granted an easement at Treviso Bay for the construction, maintenance, expansion, replacement, and removal of a communication system that would serve Treviso Bay.[15] Hence, the record indicates Treviso Bay granted the necessary easements and access to allow Embarq to install its facilities in the development.

The record suggests that due to the Agreement between Treviso Bay and Comcast, it is likely that Embarq will obtain fewer subscribers in the Treviso Bay development than without such an agreement. However, Embarq did not proffer any testimony or evidence to establish that its ability to provide its basic local telecommunications service is restricted. Nothing in the record that shows Treviso Bay has entered into any agreement or taken any action that restricts or limits Embarq from installing its network in the Treviso Bay developments and providing service upon request to the residents of Treviso Bay. Conversely, the record indicates that Treviso Bay has taken the necessary steps that would permit Embarq to install its facilities to provide basic local telecommunications service to the residents in the Treviso Bay development.

Conclusion

Based on information in the record, we find that Treviso Bay has not entered into any agreements, or taken any action, that restricts or limits Embarq's ability to provide basic local voice telecommunications service to the residents at the Treviso Bay development.

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?

We find that that Treviso Bay's existing agreements do not make it uneconomic for Embarq to provide the requested communications service to the customers of Treviso Bay

The negative net present value (NPV) analysis at the foundation of Embarq's case relies on an assumption regarding market penetration that lacks supporting evidence. In addition, the analysis uses per-household revenue calculations based on unweighted averages for customers in the Naples market. These assumptions, critical to Embarq's conclusion on this issue, are easily manipulated to produce a positive NPV result using evidence in the record. The fragile assumptions underlying the negative NPV analysis yield conclusions that fail to make a substantive case that entry into Treviso Bay will be inherently uneconomic. For these reasons, we find that Embarq has failed to meet its burden of proof on this issue.

In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected below.

[15] Treviso Bay's Response, p. 4, ¶ 17.

Parties' Arguments

In direct testimony, Embarq Florida, Inc. (Embarq) witness DeChellis testifies the existence of an exclusive agreement between Treviso Bay Development, LLC (Treviso Bay) and Comcast, Inc., to provide video and data services to residents of Treviso Bay compromises Embarq's revenue potential in the development. Witness DeChellis testifies, "Based on this scenario, if Embarq were required to place its facilities to provide service to this development, its potential revenues would be limited to only voice telephone services since Comcast has 100 percent penetration of video and data services through its bulk billing of these services, ultimately paid by the residents through their homeowners' dues."

Witness DeChellis projects that Embarq's voice telephone revenues will be insubstantial because Treviso Bay residents will have an option to accept voice service from Comcast through a Voice over Internet Protocol (VoIP) arrangement. Witness DeChellis testifies, "Embarq's voice telephone revenues would be further limited to those derived from a small percentage of customers who might choose not to subscribe to the voice services offered by Comcast as an add-on to their video and data services." Based on the existence of an agreement between Comcast and Treviso Bay for data and video services and on his belief that a majority of Treviso Bay residents would subscribe to Comcast's VoIP service, witness DeChellis offers a confidential projection that a minority of the eventual 1200 households would accept wireline voice services from Embarq, which he describes as the "penetration rate" the company can expect.

Witness DeChellis acknowledges Treviso Bay's policy regarding alarm system monitoring may affect the penetration rate in the development, but offered no modifications to his estimate. According to the terms of a security system monitoring agreement between residents of Treviso Bay and the developer, each resident will be assessed a fee, payable to the security firm through homeowner dues, whether or not the resident has an alarm system. A rider to the monitoring agreement holds the security company harmless if residents use wireless telephone or VoIP service as the means of connecting an alarm system with the security monitoring company. Asked if the terms of the security monitoring agreement may lead residents to ask to have additional land lines installed, witness DeChellis responded, "I think if, if I was a customer reading this document, I would have a lot of concerns about that."

Witness DeChellis' penetration rate projection is the foundation for Embarq witness Dickerson' contention that Embarq can not provide voice service economically to Treviso Bay residents: "Key to the analysis is the expected [redacted]% voice service penetration discussed in the Testimony of Mr. DeChellis. The revenue assumed in my analysis is likely optimistic at best in that it assumes this [redacted]% of customers who purchase Embarq's services will purchase higher end bundles of voice services at the average Embarq penetration experience for the overall Naples market."

In an exhibit sponsored by Embarq witness Dickerson, using witness DeChellis' penetration rate, and projecting a fixed revenue-per-subscriber figure that is confidential, witness Dickerson contends that the revenue that will result from an investment of $1.3 M, will be,

"predictably, grossly insufficient for Embarq to recover its capital costs and incremental operating expenses."

Witness Dickerson testifies that in his projected cash flow analysis for Treviso Bay (EXH 21), "Both the revenue per customer buying stand alone residential service and an average amount of a la carte features, as well as the revenue per customer purchasing a bundle, were set based on the actual average experience for each from the Naples market." (TR 64)

Treviso Bay witness Wood rejects the underpinnings of Embarq's economic projections and the company's assertion that its predicted economic losses validate a waiver of carrier-of-last-resort obligations under the "good cause shown" exemption in Section 364.025(6)(d), Florida Statutes. ". . . Embarq suggests that the mere existence of an 'exclusive data and video arrangement' would not constitute good cause, but that the combination of (a) an 'exclusive data and video arrangement' *and* (b) 'the availability of an alternative voice product from the exclusive data and video provider' *and* (c) a demonstration that the combination of these two circumstances would reduce the likelihood that it would be economic for the ILEC to provide basic telecommunications service, would meet the standard."

On specific issues, related to Embarq's financial assessment of the Treviso Bay development, witness Wood questions the validity of the penetration rate offered by Embarq witness DeChellis. Using a confidential exhibit, witness Wood refers to 18 developments to which Embarq provides service in the face of competition from VoIP providers. In each instance, witness Wood testifies, the percentage of addresses served by Embarq is greater than the penetration rate proposed by witness DeChellis.

In addition, witness Wood cites a second confidential exhibit showing Embarq's penetration rate in six additional developments where cable internet phone service is available. In the six examples cited in the confidential exhibit, in two instances Embarq's penetration rate is lower than that testified to by witness DeChellis and in four instances, Embarq's penetration is more than double the rate projected by witness DeChellis. Witness Wood concludes, "These results are not consistent with a conclusion that the presence of 'cable internet phone service' in a given area represents an accurate predictor of Embarq's market share."

Embarq witness Dickerson agrees that while witness DeChellis' estimated penetration rate may not be "precisely the 'right' answer," because it is a projection, an exact number is not necessary. Witness Dickerson testifies, "Obviously Embarq is convinced of this negative result, or it would have gladly gone forward with the construction and operation of a profitable network in Treviso Bay."

Treviso Bay witness Wood insists the projection of a negative economic result cannot be extrapolated based on the evidence or testimony provided by Embarq witnesses DeChellis and Dickerson: "there is no correlation there between Embarq's reported market share and even the existence at all of a cable company providing voice service. So there may be some factors that can be used to accurately predict what Embarq's market share would likely be, but based on any statistical measure, the presence of a cable company offering VoIP service is not one of those factors."

Analysis

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.

Witness DeChellis predicts a low percentage of Treviso Bay residents will choose wireline voice service from Embarq but offers no basis for his assumption. Exhibits 4(a) and 10(a) indicate Embarq fares significantly better at attracting customers in competitive environments in Naples than Embarq witness DeChellis projects. Embarq witness Dickerson suggests these figures are unreliable because the comparison is dissimilar, noting that unlike the developments cited by Treviso Bay witness Wood, "Comcast has every customer that exists in Treviso Bay the day they move in." Embarq witness Dickerson's criticism of the penetration rates in the developments subject to comparison has some validity. It remains, however, difficult to reconcile witness DeChellis' projected penetration rate for Treviso Bay with any other evidence in the record. It also appears Embarq witness DeChellis fails to account for wireline demand that may result from Treviso Bay's insistence that all residents pay for security system monitoring, whether or not they use a system, and that a wireline connection is the only means by which the security company will accept liability for system failures .

The task of reconciling witness DeChellis' expected penetration rate in Treviso Bay is compounded by inconsistent statements by Embarq witness Dickerson on the relevance of what percentage of Treviso Bay residents Embarq expects to serve. Initially, Embarq witness Dickerson appears to place great stock in witness DeChellis' projection, noting in direct testimony, "Key to the analysis is the expected [redacted]% voice service penetration discussed in the Testimony of Mr. DeChellis."

Subsequently, witness Dickerson appears to infer the actual penetration rate, previously described as "key" to his analysis, may not be as significant: "And I would point out that there is a wide range of penetrations and prices that produce the same result. So handwringing (sic) over what the precise penetration of our dismal amount of sales is going to be, you can nearly double what we believe the ceiling is for our likely sales and still reach a conclusion that this is an uneconomic venture for Embarq." Finally, witness Dickerson testifies, "I would emphasize again, as I did in my summary, that you can, you can put a higher, more optimistic view for sales of our voice-only service into my net present value analysis and still conclude that it's an uneconomic venture for Embarq."

This testimony appears to contradict responses provided by Embarq in discovery, in which the company acknowledges changing certain assumptions may result in a positive net present value (NPV) analysis. Embarq was asked to adjust witness Dickerson's net present value analysis to project serving 50 percent of Treviso Bay residents with all customers purchasing some form of a bundled voice package and, separately, to adjust the analysis to assume serving 75 percent of Treviso Bay households, with each household purchasing a bundled voice package.

In both instances, the witness responded, "While the mathematical result of the postulated . . . penetration for customers and 100% purchase of bundles yields a positive cumulative NPV, Embarq denies that this mathematical exercise yields a positive NPV relative to Embarq's petition given what Embarq believes to be an effectively zero probability of the assumed Embarq customer and voice bundle penetration assumptions occurring." Thus it appears that despite Embarq witness Dickerson's assertions to the contrary, a positive cash flow result is possible using different values for penetration rates and per-customer revenues.

In addition to uncertainty surrounding Embarq witness DeChellis' penetration rate projection, questions arise stemming from Embarq witness Dickerson's testimony regarding revenue streams on a per-customer basis. Witness Dickerson testified that in his projected cash flow analysis for Treviso Bay he relies on per-customer revenues that "were set based on the actual average experience" for the Naples market.

Marketing materials from the Treviso Bay development indicate the least expensive dwelling unit prices will be between $595,000 and $725,000, while custom home prices will begin at $4.5 million excluding the price of a lot, which have a range of $830,000 to $930,000. There are no per-capita income figures for the Naples area in the record of this proceeding, however, it would appear based on home prices alone that residents of Treviso Bay will be part of an economic demographic distinct from what is average for the Naples market. A prudently constructed cash flow analysis for Treviso Bay should be modeled on developments comparable in value to Treviso Bay in the Naples area to bring economic assumptions more closely into line with realities of the existing market. In addition, the weighted average per-customer revenue figure used in Embarq witness Dickerson's NPV analysis reflects the provision of a single line to each of the residences Embarq projects it will serve. This is a conservative assumption. Record evidence shows residents will be biased toward using a land line for alarm service monitoring because they are obligated to pay for the service whether or not they use the service and because the monitoring company waives liability if residents use wireless or VoIP technologies for monitoring.

Conclusion

The negative net present value (NPV) analysis at the foundation of Embarq's case relies on an assumption regarding market penetration that lacks supporting evidence. In addition, the analysis uses per-household revenue calculations based on unweighted averages for customers in the Naples market. These assumptions, critical to Embarq's conclusion on this issue, are easily manipulated to produce a positive NPV result using evidence in the record. The fragile assumptions underlying the negative NPV analysis yield conclusions that fail to make a substantive case that entry into Treviso Bay will be inherently uneconomic. For these reasons, Embarq has failed to meet its burden of proof on this issue.

Issue 4: Has Embarq, formerly known as Sprint-Florida Incorporated, taken any action that would preclude Embarq from obtaining a waiver of its carrier-of-last-resort obligation in Treviso Bay?

In this case of first impression, we are not persuaded that Embarq's behavior in dealing with Treviso Bay should be considered as valid grounds for denying Embarq the ability to prosecute its petition for waiver. In reaching this conclusion we considered the arguments of the parties and the record as reflected below.

Parties' Arguments

Treviso Bay witness Wood testified that for the past two years, Treviso Bay has requested that Embarq provide basic telecommunications service to Treviso Bay and to specific subdivisions within the development. Witness Wood also states that in each instance, Embarq has stated that "telephone service will be provided based on the rules and regulations covered in our Local and General Exchange Tariff, approved and on file with the Florida Public Service Commission." Treviso Bay asserts that based on Embarq's representations, it cannot now renege on those commitments. Treviso Bay argues that once it requested service from Embarq, Embarq was bound to provide those services subject to the terms of the tariff. Treviso Bay claims that it would be unsound public policy to "allow any utility to commit to provide service pursuant to its tariff and then attempt to escape those tariff obligations."

Embarq contends that Treviso Bay's arguments are based on the principles of estoppel and detrimental reliance. Embarq explains that to establish estoppel, a party must show that: "1) there was a representation of material fact that is contrary to a later asserted position; 2) there was a reliance on that representation; and 3) the reliance was detrimental to the party claiming the estoppel." (Embarq ML 8, *citing Mandarin Paint and Flooring v. Potura Coating*, 744 So. 2d 482 (Fla. 1st DCA 1999)). Embarq argues that while Treviso Bay has asserted that it has relied on Embarq's representations, Treviso Bay has failed to allege that it suffered any detriment as a result of that reliance.

Embarq argues that estoppel and detrimental reliance are civil law concepts based on fraud and contract law, which are outside our jurisdiction. Embarq also contends that such arguments are irrelevant to its request for waiver of its COLR obligation, which is governed by Section 364.025, Florida Statutes. Finally, Embarq states that to the extent Treviso Bay believes Embarq has suffered damages based on Embarq's actions, the proper remedy is a civil circuit court action for breach of contract.[16]

[16] Embarq points out that all the letters relied on by Treviso Bay are unsigned and therefore argues that any contract for service from Embarq was never consummated by the parties.

Treviso Bay contends that because of Embarq's representations during the past two years, Embarq is precluded from obtaining a waiver of its COLR obligation.[17] Treviso Bay contends that it would be unsound public policy to allow Embarq to commit to provide service pursuant to its tariff and then seek to escape those tariff obligations.[18]

Analysis

We recognize Treviso Bay's arguments that it believed that build-out of the telecommunications infrastructure by Embarq was not in doubt. We further believe that Embarq should have been more forthright and timelier in expressing its position to Treviso Bay.

We also agree that a validly filed tariff "constitutes the contract of carriage between the parties." *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 859 (Fla. 2002). Nevertheless, "contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts." *H. Miller and Sons v. Hawkins*, 373 So. 2d 913, 914 (Fla. 1979).

Conclusion

In this case, the Legislature has determined that in some instances a carrier-of-last-resort can be relieved of its obligation to serve upon a showing of good cause. Moreover, this is a case of first impression in applying section 364.025(6)(b) or (d) Therefore, we conclude that it is permissible for Embarq to seek a waiver of its COLR obligations despite its representations to Treviso Bay.

Issue 4A: Is Embarq obligated to provide service to Treviso Bay by its tariff or by holding itself out as willing and able to provide service?

We hold that Embarq is required to provide service in accordance with its tariff and applicable law, unless the conditions set forth in either section 364.025(6)(b) or (d), Florida Statutes, have been met. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected above in the analysis for Issue 4.

[17] Treviso Bay argues that four of the five letters sent by Embarq were sent after the Legislature enacted the 2006 amendments to Section 364.025, Florida Statutes. However, the amendments to Section 364.025, Florida Statutes, became effective June 7, 2006, which was before the letters were sent to Treviso Bay. Laws of Florida 2006-80.

[18] While Treviso Bay asserted that it reasonably relied on Embarq's commitments, it provided no support for that assertion. In fact, it appears that Treviso Bay failed to take even the slightest objective action in signing and returning the service availability letters upon which its claim is based.

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?

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, and we therefore deny Embarq's petition for a waiver of its carrier-of-last-resort obligation in Treviso Bay. In reaching this finding we considered the arguments of the parties and the evidentiary record as reflected in our treatment of Issues 1 through 4(a), and as further reflected below.

Analysis

Embarq's case for a waiver of its carrier-of-last-resort obligation in Treviso Bay arises from two sets of circumstances. First, Treviso Bay has entered into agreements with Comcast for the provision of data and video services to the future residents of Treviso Bay. Second, Comcast retail digital voice service allegedly will be available to residents of Treviso Bay who wish to subscribe to it on the day that they move in.

Embarq's petition for relief of its COLR obligation is grounded in the consequences that allegedly arise from the above circumstances. These alleged consequences are as follows:

- The existence of the bulk data and video agreement with Comcast ensures Comcast virtually 100 percent penetration for these services, and it means that Embarq can anticipate effectively zero revenue from Treviso Bay customers for its data and video offerings.

- Because Comcast will have 100 percent penetration for its data and video services, it will have the advantage in marketing its digital voice service as an add-on to its bulk data and video service. This advantage will detrimentally affect Embarq's ability to obtain customers for the voice-only services that Treviso wants Embarq to provide.

- Embarq expects a low penetration rate for its services and, as a result, will not be able to realize sufficient revenues to cover the costs it will incur to stand ready as the COLR provider of voice services to Treviso Bay.

These circumstances and consequences were addressed within the framework of Issues 1 through 4A to assess Embarq's attempt to demonstrate a showing of "good cause" under Section 364.025(6)(d), Florida Statutes. Based on the evidence of record, the following summarizes our determinations with respect to each issue.

Issue 1

Voice service via Voice over Internet Protocol (VoIP) technology and wireless cellular technology will be available to the residents of Treviso Bay at the time of each resident's occupancy. Typically, people anywhere in Florida have access to voice service via wireless

technology and VoIP services (if they have broadband connections.) We conclude that the availability of these services, although a factor, is not sufficient to warrant a COLR waiver.

Issue 2

Treviso Bay has not entered into any agreements, or taken any action, that restricts or limits Embarq's ability to provide basic local voice telecommunications service to the residents of Treviso Bay. Treviso Bay has entered into bulk agreements for video and broadband with Comcast. However, these agreements do not restrict or limit Embarq's ability to provide voice service to the residents of Treviso Bay. Prior to the spin-off of its wireline services, we note that Sprint made attempts to market its video, wireline, and broadband services to Treviso Bay. Sprint was apparently willing to execute a revenue sharing arrangement with Treviso Bay. Were Sprint's efforts successful, then Embarq would have been the beneficiary as the successor to Sprint, just as Comcast was as the successor to Time Warner.

Issue 3

Embarq has not met its burden of proof that it will be uneconomic to provide voice telephone service to Treviso Bay. Because Comcast has exclusive agreements with Treviso Bay for its video and broadband services, Embarq believes that it will not be in its economic interests to invest in a network to provide voice services to the residents of Treviso Bay. Embarq believes that this factor, coupled with the other circumstances at Treviso Bay, warrant relief of its COLR obligations. This "uneconomic" argument appears to be the core of Embarq's petition. However, due to the fragile assumptions underlying its NPV analysis, we conclude that Embarq failed to make a substantial case that its entry into Treviso Bay will be inherently uneconomic. Moreover, although an uneconomic condition is an important consideration, we remain unconvinced that it amounts per se to a sufficient justification for relieving a carrier of its COLR obligation.

Issues 4 and 4A

Embarq can seek a waiver of its COLR obligations despite its prior representations to Treviso Bay.

Conclusion

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.

By denying the petition we maintain Embarq's status as the carrier-of-last-resort to Treviso Bay. Our decision does not preclude Embarq from using the tools that may be traditionally available to it under other existing rules in addressing the alleged problem of uneconomic provisioning of service.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Embarq Florida, Inc.'s petition for waiver of its carrier-of-last-resort obligations in the Treviso Bay subdivision in Collier County is hereby *denied.*

ORDERED that the findings made in the body of this Order are hereby approved in every respect.

By ORDER of the Florida Public Service Commission this 12th day of April, 2007.

ANN COLE
Commission Clerk

By: Hong Wang
Hong Wang, Supervisor
Case Management Review Section

(SEAL)

PKW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

25-4.094 Advance by Applicant.

(1) The utility may require a reasonable deposit from the applicant before construction is commenced, in order to guarantee performance, such requirement to be in accordance with approved tariffs relating to extension of facilities. The deposit shall be returned to the applicant on a pro-rata basis at either quarterly or annual intervals on the basis of installations of service to new subscribers. If returned quarterly, no interest need be paid; but if refunded annually, the refundable portion of the deposit shall bear interest at a rate equivalent to the then-current prime interest rate.

(2) Any amount due the utility under Rule 25-4.093, F.A.C., may be withheld when the deposit is being returned to the applicant.

(3) Any portion of the deposit remaining unrefunded five (5) years from the date the utility is first ready to render service from the extension will be retained by the utility as liquidated damages and credited to an appropriate account.

Specific Authority 350.127(2) FS. Law Implemented 364.03, 364.15 FS. History–New 4-10-71, Formerly 25-4.94.

GENERAL EXCHANGE TARIFF

CHARGES APPLICABLE UNDER SPECIAL CONDITIONS

F. BULK FACILITY TERMINATIONS FOR SECRETARIAL SERVICE FACILITIES

Secretarial service firms generally have sufficient activity (i.e., installations of secretarial service lines terminated in telephone answering bureau switchboards) to warrant the provision of a bulk facility termination which will enable the Company to more readily meet the customer's service needs. Where, in the Company's judgment, such termination of a bulk facility is required, cable facilities will be provided as fixed terminations on secretarial line jacks of telephone answering bureau switchboards at charges based on costs at the time this work is done. These charges will be applicable to the secretarial service firm and will be in addition to all other appropriate tariff rates and charges for work done and services provided.

G. UNDERGROUND DISTRIBUTION SYSTEM - SUBDIVISIONS

a. Requests for underground distribution systems must be made in writing by the developer. The application must give detail as to the area to be served, development schedule, location of utility easements and such other information that may be required to assist in the planning for the distribution system.

b. The Company shall have the right to reject these requests whenever the electric distribution system is of overhead design.

c. Rights-of-Way and easements suitable to the Company must be furnished by the applicant in reasonable time to meet service requirements and, at no cost to the Company, must be cleared of trees, tree stumps, paving, and other obstructions, staked to show property lines and final grade by the applicant before the Company will commence construction of the underground distribution system. Such clearing and grading must be maintained by the applicant during construction by the Company.

CHARGES APPLICABLE UNDER SPECIAL CONDITIONS

G. UNDERGROUND DISTRIBUTION SYSTEM - SUBDIVISIONS (Cont'd)

d. Temporary facilities of aerial type may be utilized during the initial construction stages of the underground distribution system to meet the immediate requirement for telephone service.

e. The distribution system will be constructed with suitable material to assure that the applicant will receive adequate telephone service for the reasonably foreseeable future.

f. Any damages to the lines, equipment or facilities of the Company caused by the customer, sub-divider, builder, developer, their agents, or representatives shall be repaired by the Company and charges associated with such repairs shall be paid by the customer, sub-divider, builder, or developer.

g. The Company will install the underground distribution system at no charge to the applicant except that the applicant will be required to provide conduit of suitable size for the entrance facilities at multiple-occupancy buildings.

h. The entrance conduit will be terminated in an accessible space of sufficient size to permit the termination of the entrance facility. The space provided must also be equipped with grounding facility.

i. A cash deposit may be required as a performance guarantee. When the deposit is necessary, it shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide. This deposit would be equated on a pro rata basis for making quarterly refunds during the first five years after the construction completion. The refund amount would be determined by multiplying the quarterly increase in

CHARGES APPLICABLE UNDER SPECIAL CONDITIONS

G. UNDERGROUND DISTRIBUTION SYSTEM - SUBDIVISIONS (Cont'd)

i. (Cont'd)

subscribers by the pro rata share. Quarterly refunds will be made during the first five years after construction completion or until such time as the deposit is depleted if prior to the five years. Any portion of the deposit remaining unrefunded after the fifth year will become the property of the Company. No interest will accrue on the deposit if refunded quarterly. If not refunded quarterly, interest will accrue on the refund- able amount at the then current prime interest rate.

H. CONTRACT SERVICE ARRANGEMENTS

1. When economically practicable, customer specific contract service arrangements may be furnished in lieu of existing tariff offerings provided there is reasonable potential for uneconomic bypass of the Company's services. Uneconomic bypass occurs when an alternative service arrangement is utilized, in lieu of Company services, at prices below the Company's rates but above the Company's incremental costs.

2. Rates, Charges, Terms, and additional regulations, if applicable, for the contract service arrangements will be developed on an individual case basis, and will include all relevant costs, plus an appropriate level of contribution.

3. Costs for the contract service arrangements may include one or more of the following items:

   a. Labor, engineering, and materials.

   b. Operating expenses, i.e., maintenance, administration, etc.

   c. Return on investment.

Attachment 4

Embarq Corporation
Mailstop: FLTLHO0102
1313 Blair Stone Rd.
Tallahassee. FL 32301
EMBARQ.com

May 22, 2007

Mr. Christopher Cramer, Esq.
Treviso Bay Development, LLC
c/o VK Development Corporation
19275 W. Capital Drive, Suite 100
Brookfield, WI 53045

RE: Treviso Bay/Advance Deposit

Dear Mr. Cramer:

On April 12, 2007, the Commission issued Order No. PSC-07-0311-FOF-TL denying Embarq's Petition for a Waiver of its carrier of last resort obligations in Treviso Bay. In the Order, the Commission acknowledged that Embarq is entitled to pursue recovery of its costs associated with providing facilities to serve Treviso Bay, in accordance with the Commission's rules. While Embarq has filed a Motion for Reconsideration of the Commission's Order denying the waiver, Embarq believes we should proceed with discussions concerning cost recovery, pending the Commission's ruling on that Motion. Consistent with the Order, Embarq requests an advance deposit from Treviso Bay in the amount of $806,870 prior to Embarq placing its facilities to serve Treviso Bay.

Under Rule 25-4.094, Florida Administrative Code, and Section A5, G of Embarq's General Exchange Tariff, which implements the rule, Embarq is entitled to request an advance deposit from Treviso Bay prior to placing its facilities as a performance guarantee to ensure that Embarq will be able to recover its construction costs. The deposit amount was calculated based on the costs of construction of Embarq's facilities to serve Treviso Bay, as set forth in Docket No. 060763-TL. Consistent with the rule and the tariff, Embarq has calculated the construction costs and anticipated revenues for the first five years of serving Treviso Bay. The anticipated revenues were calculated

Susan S. Masterton
COUNSEL
LAW AND EXTERNAL AFFAIRS REGULATORY
Voice: (850) 599-1560
Fax: (850) 878-0777

based on the number of customers Embarq anticipates will subscribe to its services under circumstances existing at Treviso Bay. The deposit amount reflects the net present value of the difference between the costs and the anticipated revenues. A summary of the deposit calculations is attached.

As provided in the rule and Embarq's tariff, Embarq will refund a pro-rated amount of the deposit annually for each additional customer who subscribes to Embarq's voice service, beyond the number of anticipated customers used to calculate the estimated five-year revenues. As provided in the rule and tariff, these refunds will continue for five years after Embarq begins providing service in the development. At the end of the five-year period, if any portion of the deposit amount remains, Embarq is entitled to keep these funds as liquidated damages to cover its construction costs.

The advance deposit and subsequent refunding mechanism of pro-rated amounts based on customer demand is consistent with the Commission's rules and Embarq's tariffs. In addition, it responds to Treviso Bay's request for Embarq to make voice services available to Treviso Bay's residents who wish to subscribe, while providing Embarq reasonable protection from the risk of uneconomic losses from its investment at Treviso Bay.

Please sign below to acknowledge your receipt of this letter outlining the deposit and the refund mechanism and return in the enclosed envelope. Embarq is available to meet with you to discuss the deposit requirement and refund mechanism at your earliest convenience. We look forward to implementing a solution that considers both of our interests. Once Embarq receives the advance deposit payment from Treviso Bay, and depending on the Commission's ruling on Embarq's Motion for Reconsideration, Embarq will begin the construction activities necessary to make its services available to residents of Treviso Bay.

Sincerely,

Susan S. Masterton

Treviso Bay, LLC

By: _____
Name:
Title:

Cc: Sanjay Kuttemperoor, VK Development Corporation
R. Scheffel Wright, Young Law Firm

Treviso Bay
NAPLES

June 4, 2007

Via Email and U.S. Mail
Susan S. Masterton, Esq.
Embarq Corporation
Mail Stop FLTLHO0102
1313 Blair Stone Road
Tallahassee, FL 32301

Re: Treviso Bay – PSC Docket No. 060763-TL

Dear Ms. Masterton:

I am in receipt of your letter dated May 22, 2007, regarding Embarq's request for an advance deposit relating to the facilities Embarq is required to provide to serve Treviso Bay. Needless to say, Treviso Bay Development, LLC ("TBD") is surprised at Embarq's request, and believes the same is misplaced for the following reasons:

1. Your letter states that the request for an advance deposit is consistent with the order (the "Order") issued by the Florida Public Service Commission (the "PSC") in this matter. The PSC in its Order requires Embarq to provide service at Treviso Bay. The Order does not include any finding that any advance deposit is required by TBD as a condition of Embarq complying with the Order and providing basic local exchange telephone service. Further, the Order does not contain any finding that any special construction is necessary or that it is uneconomic for Embarq to provide the required services to Treviso Bay.

2. You reference in your letter Section A5 of Embarq's General Exchange Tariff (the "Tariff") as authorizing the requested deposit. On its face, this section is not applicable to this matter. Section A5 of the Tariff applies to "CHARGES APPLICABLE UNDER SPECIAL CONDITIONS," and Section G of that Tariff addresses the terms and conditions applicable to "UNDERGROUND DISTRIBUTION SYSTEM – SUBDIVISIONS." As an initial matter, there is no special construction of facilities at issue in this case; underground construction is the standard to which Embarq is required to build in any event, and the facilities to be installed and constructed by Embarq are those that Embarq would otherwise normally install. Additionally, even if this tariff were applicable, it would only authorize a deposit equal to "the difference in cost of the facilities requested and the facilities which the Company would normally provide." There is no difference between the cost of the facilities requested and the underground

facilities that Embarq would normally provide. Embarq never suggested that special construction would be required to provide the requested service at Treviso Bay, the PSC has made no finding that any special construction is required in order for Embarq to comply with the Order, and no special construction has been requested by TBD. Further, the tariff provision refers to the deposit as a "performance guarantee" and, as explained below, TBD has fully performed its obligations relative to the requested service. Therefore, Section A5 of the Tariff is inapplicable in this circumstance.

3. Your letter further references Rule 25-4.094 of the Florida Administrative Code as requiring the requested deposit to insure Embarq recovers its cost of construction. Embarq's characterization of the deposit required if Rule 25-4.094, Florida Administrative Code, applies is incorrect. First, this rule states that the deposit is to guarantee performance by applicant. This rule and deposits contemplated under it are thus intended to guarantee performance by the applicant (Treviso Bay), but they are not intended to guarantee revenue for Embarq or guarantee that Embarq will recoup its investment in the facilities. Second, TBD has already performed the necessary actions required of it for Embarq to provide the required service. Embarq has reviewed and approved the plats furnished by TBD, and TBD has granted to Embarq the appropriate easements relating to the installation of Embarq's facilities. Therefore, no deposit would be required to guarantee TBD's performance under this rule even if the rule were applicable as TBD has already satisfied its obligations. Finally, this rule, if applicable, requires only a reasonable deposit to guarantee applicant's performance. We do not believe Embarq's request is reasonable. Per your May 22, 2007, letter, Embarq is unreasonably and improperly requesting a deposit guaranteeing a return to Embarq of Embarq's estimated costs in installing, construction, and otherwise providing the services ordered by the PSC.

In summary, Embarq is currently subject to an enforceable order of the PSC to provide the required phone service to Treviso Bay and must comply with that Order, and Embarq's asserted reliance on its tariff and PSC Rule 25-4.094, F.A.C., is misplaced. Although TBD expects Embarq to immediately perform as ordered by the PSC without further delay or posturing, TBD may be willing to consider and respond to a reasonable request by Embarq relating to Embarq's construction and installation of Embarq's required facilities. To that end, and although TBD does not believe it is required to provide any deposit for the reasons stated above and others, TBD may consider discussing a reasonable deposit with Embarq in order to settle this matter and avoid

further unnecessary delay and litigation. If Embarq is interested in discussing this option, please contact me so we can begin such discussions.

Sincerely,

Christopher W. Cramer, Esq.
Corporate Counsel

cc: Sanjay Kuttemperoor, Esq. via email
R. Scheffel Wright, Esq. via email

Attachment 6

Embarq Corporation
Mailstop: FLTLHO0102
1313 Blair Stone Rd.
Tallahassee. FL 32301
EMBARQ.com

July 27, 2007

Mr. Christopher Cramer, Esq.
Treviso Bay Development, LLC
c/o VK Development Corporation
19275 W. Capital Drive, Suite 100
Brookfield, WI 53045

RE: Treviso Bay/Advance Deposit

Dear Mr. Cramer:

In response to our discussions concerning Embarq's request for an advance deposit prior to placing underground facilities in the Treviso Bay subdivision, Embarq has simplified the deposit calculation and related refund mechanism from what was set forth in our May 22, 2007 letter. Originally, Embarq requested a deposit of $806,870. Under this revised approach, Embarq has reduced that amount to $685,631. This number contemplates a simplified and objective refund mechanism that will ensure that the risks and benefits of Embarq's construction of underground facilities to serve the future residents of Treviso Bay are equitably allocated between both parties.

Embarq calculated the revised deposit amount by first determining the number of Treviso Bay residents purchasing Embarq voice services required to break even on the estimated cost for the Embarq facility construction at issue here. The deposit computation then subtracted the reasonably expected number of Treviso Bay residents who might purchase Embarq voice services, given the existence of the agreements with Comcast for data and video services and the availability of Comcast's voice service. This difference in customers is then used to compute the unrecovered cost of the prospective newly constructed Embarq facilities.

Susan S. Masterton
SENIORCOUNSEL
LAW AND EXTERNAL AFFAIRS REGULATORY
Voice: (850) 599-1560
Fax: (850) 878-0777

We have used this same simplified approach for the purposes of calculating the applicable refunds, yielding a unit cost of construction value for each customer in excess of Embarq's projected demand who subscribes to Embarq's service. (These calculations are reflected on the confidential spreadsheet attached to this letter.) Embarq will provide the refunds annually and include applicable interest.

The deposit and refund mechanism described above fulfills the Commission's guidance in Order No. PSC-07-0311-FOF-TL that Embarq may use "the tools that may be traditionally available to it under other existing rules in addressing the alleged problem of uneconomic provisioning of service." Embarq's approach is fully consistent with Rules 25-4.088 through 25-4.097 relating to developer requests for underground extensions (which in Treviso Bay is the exclusive method of providing wireline service). Specifically, Embarq's approach complies with Rule 25-4.094, which authorizes Embarq to require advance deposits as a condition of providing service, and is consistent with Embarq's implementing tariff, found at Section A5, paragraph G.

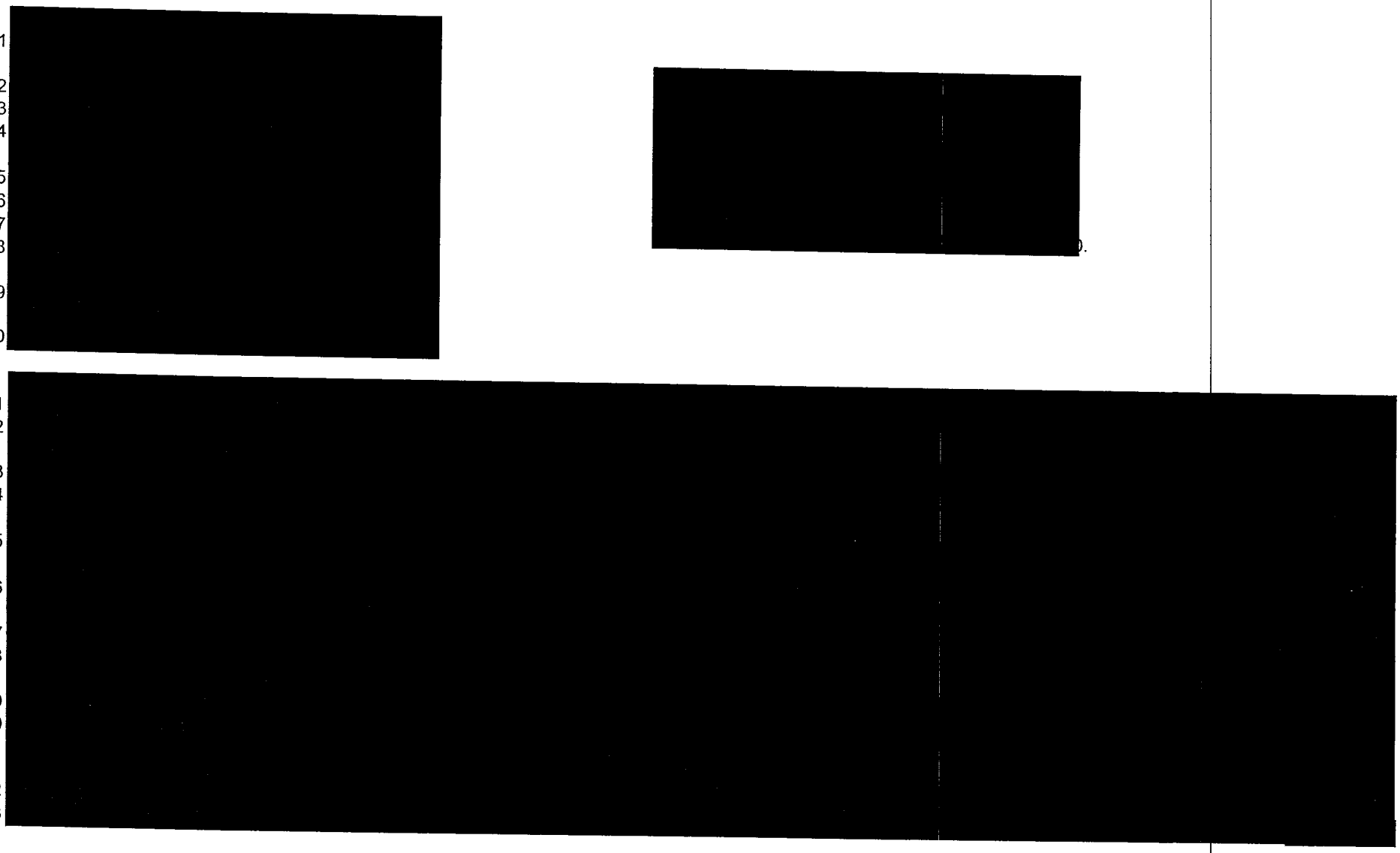
By entering into contracts for the provision of the data and video components of its residents' portfolio of services, while concurrently requesting Embarq to place facilities for the provision of voice services to these same customers, Treviso Bay essentially has held itself out to act on behalf of all future residents of Treviso Bay for the procurement of these facilities and services. Accordingly, Embarq must receive an affirmative response from you to this letter no later than August 13, 2007, for Embarq to timely provision the services you have requested. If Treviso Bay declines to respond by this date, or refuses to pay the requested deposit, Embarq will have fulfilled its obligations under the applicable statutes, rules and tariffs regarding the provision of services to the future residents of Treviso Bay.

Sincerely,

Susan S. Masterton

Cc: Beth Salak, FPSC (confidential attachment filed w/ Commission Clerk)
Patrick Wiggins, Esq., FPSC
Sanjay Kuttemperoor, VK Development Corporation
R. Scheffel Wright, Young Law Firm

Attachment 7
Treviso Bay Deposit and Refund Calcı - Redacted



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of Investigation of the policies, programs, and practices of electric utilities and telephone companies with reference to the installation of underground facilities for residential service, the costs and assessment thereof incident to such installations, replacement of existing facilities, for the purpose of assisting the Commission in the promulgation of such reasonable rules and regulations governing such policies, programs, and practices as may be necessary and proper.	DOCKET NO. 69246-PU

Hearing Room
Public Service Commission
Tallahassee, Florida
Wednesday, January 20, 1971

Met pursuant to notice at 9:30 A.M.

Before: JESS YARBOROUGH, Chairman
WILLIAM H. BEVIS, Commissioner
WILLIAM T. MAYO, Commissioner

APPEARANCES:

F. PERRY ODOM, P. O. Box 1170, Tallahassee, Florida, for Florida Home Builders Association, Intervenor.

NATHAN H. WILSON, 819 Jacobs Building, Jacksonville, Florida, representing Southern Bell Telephone and Telegraph Company.

D. FRED McMULLEN, P. O. Box 391, Tallahassee, Florida, representing Southeastern Telephone Company.

EDWIN L. MASON, 129 West Jefferson Street, Tallahassee, Florida, representing United Telephone Company of Florida.

DONALD R. ALEXANDER, 700 South Adams Street, Tallahassee, Florida, for the Commission Staff and the public generally.

LEWIS W. PETTEWAY, General Counsel for the Commission, 700 South Adams Street, Tallahassee, Florida, appearing on behalf of the Commission.

WAYNE FREEMAN, 4515 Monteclair Road, Orlando, Florida appearing on behalf of Winter Park Telephone Company.

P R O C E E D I N G S

CHAIRMAN YARBOROUGH: The Commission will come to order.

Mr. Petteway, will you read the notice?

MR. PETTEWAY: The Florida Public Service Commission has set this time and place for a public hearing in Docket 69246-PU for the purpose of considering adoption of certain proposed rules governing residential telephone underground extensions.

All objections to said proposed rules will be considered at this hearing.

We are ready for appearances.

CHAIRMAN YARBOROUGH: We will now take appearances.

MR. ODOM: F. Perry Odom, P. O. Box 1170, Tallahassee, Florida, representing the intervenor, Florida Home Builders Association.

MR. WILSON: Nathan H. Wilson, 819 Jacobs Building, Jacksonville, Florida, representing Southern Bell Telephone and Telegraph Company.

MR. McMULLEN: D. Fred McMullen, P. O. Box 391, Tallahassee, Florida, representing Southeastern Telephone Company.

MR. MASON: Edwin L. Mason, 129 West Jefferson

Street, Tallahassee, Florida, representing United Telephone Company of Florida.

MR. ALEXANDER: Donald R. Alexander, 700 South Adams Street, Tallahassee, Florida, for the Commission Staff and the public generally.

MR. PETTEWAY: Lewis W. Petteway, General Counsel for the Commission, 700 South Adams Street, Tallahassee, Florida, appearing on behalf of the Commission.

MR. FREEMAN: Wayne Freeman, 4515 Montclair Road, Orlando, Florida, on behalf of Winter Park Telephone Company.

CHAIRMAN YARBOROUGH: Are we ready to proceed?

MR. PETTEWAY: Mr. Chairman, we have at least two telephone companies who have filed exceptions to the proposed rules. I would like to call Mr. James as a witness and have him take up the exceptions and the rules to which the exceptions are directed and then after he has gone through with those submit him for interrogation by the parties.

HAROLD E. JAMES,

having been produced and first duly sworn as a witness on behalf of the Commission testified as follows:

CHAIRMAN YARBOROUGH: Give us your name, address and title?

THE WITNESS: My name is Harold E. James. I reside at 2145 Armstead Road, Tallahassee. I am employed by the Florida Public Service Commission. I am presently serving as Director of its Engineering Department.

CHAIRMAN YARBOROUGH: Before you start off, Mr. James, the thought came to me in both the telephone and power company underground regulations, say the City of Fort Lauderdale came out and passed an ordinance stating that by May 1, 1973 all power and electric wirings will be underground and no other municipality has it. Would there be an additional expense to the power companies and telephone companies and if not paid by the ratepayers of that town, the expenses would go to everybody in that area? Wouldn't you think we should have something in these regulations governing that, whereby that expense could be added to that governmental jurisdiction without raising the rates outside?

THE WITNESS: There is one basic difference, Mr. Chairman, between the rules for the electric underground and those for the telephone and that is with respect to the rules for the electric utilities the proposed rules contemplate that any differential cost shall be recovered. That, of course, is absent

from the telephone rules or the premise that at this point in time there are no measurable cost differentials involved. So it seems to me that the protection is already afforded through the proposed rules for the differential cost for electric and since there are none in the telephone none would be needed.

CHAIRMAN YARBOROUGH: We would have adequate provision for rate making if that is true?

THE WITNESS: Yes, sir.

MR. WILSON: Mr. Chairman, let me say on that point, since Fort Lauderdale is a very likely city since it passed a pass-on tariff in Florida some 12 or 15 years ago, we at least are contemplating filing a tariff on the same theory as the pass-on tariff so if a town or city forced a conversion of overhead to underground, that the cost of that would be passed on to the citizens living within that particular municipality. I think what you are thinking must be considered and a city shouldn't be allowed to impose 40 or 50 million dollars worth of cost on a utility and have it borne by the ratepayers in other areas.

MR. PETTEWAY: Since that has been mentioned, Mr. Chairman, let me say that that question is involved in the electric portion of this docket and

is before the Commission as a result of yesterday's hearing and would not be involved in this particular situation.

CHAIRMAN YARBOROUGH: Proceed.

DIRECT EXAMINATION

BY MR. PETTEWAY:

Q Mr. James, will you take the proposed telephone rules and the exceptions and discuss for the benefit of the Commission and the parties here, the Staff's position with reference to the exceptions as described in the particular rules?

A Yes, sir.

Responses to the Commission's Order No. 4966 have been entered by only two parties at interest in this phrase of the docket. That would be United Telephone Company of Florida and the Winter Park Telephone Company.

First, let me say that the exceptions which have been entered by the Winter Park Telephone Company in their response consists of a series of numbered paragraphs which are not specifically identified with a particular rule. I have attempted to relate those responses to the particular rule to which they appear to be directed and I will discuss them on that basis.

First, both respondents have taken the position that there is an absence of any need for the promulgation

of any rules on the installation of underground telephone systems. Winter Park in Paragraph 5 of its response states that it plans to continue its policy of providing buried distribution facilities where economically feasible and where no overriding practical objection exists with or without the proposed rules.

The United Telephone Company contends that previous testimony in this case, both by the companies and intervenor witnesses, suggests that the existing policies and programs of the several companies adequately provide for underground telephone systems and, further, that the imposition of the proposed rule is an undue administrative burden on the companies since their tariffs on file with the Commission are sufficient and accomplish the same purpose.

First let me say that a decision with respect to the need for rules on underground systems is beyond the scope of staff responsibilities or authority since it is a policy decision and, therefore, more properly reserved to the Commissioners. I might say, however, that if the practices of the several companies are consistent with the existing provisions in their tariffs, our examination of those tariffs do not indicate to us that they are uniform among the companies nor or they consistent with the requirements of these proposed rules.

Accordingly, it would appear that some guidelines are desirable to insure uniform and consistent treatment be accorded to all segments of the public.

Now with respect to Rule A-1, Winter Park Telephone Company in Paragraph 2 of their response, points out that the proposed rules purport to apply to certain "applicants," that is developers of a new subdivision, but will not apply to all applicants or subscribers for new telephone service. It also notes and presumably objects to the developer option which is provided in the proposed electric rules but which is absent in the telephone rules.

In developing the proposed rules it was felt that the provision of underground services to individual applicants at isolated locations, without charge, could not be justified but that a concentration of customers in a compact area such as a subdivision or apartment complex would provide the economies of scale necessary to justify the practice and avoid subsidy by the general body of ratepayers.

The minimum of five or more which has been suggested is without objection although it is logical to assume that a greater number would normally be involved.

The developer option was provided in the electri rules because of the existing differences in the relative

costs of underground versus overhead systems between the electric and telephone systems, that is at this point in time the average cost ratio of underground to overhead electric systems in Florida is approximately 1.6, whereas the weight of evidence in this case indicates that for the telephone companies, under normal conditions, the relative costs of underground and overhead systems are not materially different. Under these conditions the developer option preserves to the owner his basic individual rights of ownership and control since the alternative would place the Commission in the position of requiring the developer to incur an investment in excess of that which he might wish to commit for the project.

Since under normal conditions no charges are applicable for the telephone installation, the presumption is that the developer would prefer an underground system. The exception in A-1 of the telephone rules, as well as Rule J, affords protection against those situations where underground installation costs may be unreasonably excessive.

With respect to Rule C-2 which appears on Page 2 of Appendix B, the Winter Park Telephone Company in Paragraph 6 of their response states that in their service area developers do not prepare all the property in a subdivision in advance of construction; that construction may

start at opposite ends of streets before any grading of streets in intervening blocks; that in many cases the grading of the building lot is not accomplished until construction on each lot is about to commence, and that such conditions require, from a practical standpoint, a separate trip and separate installation of service entrance facilities for each building.

We agree that any utility should be entitled to protection against unreasonable and unnecessary expenses during construction, and we suggest that the language in Rule C-2 provides that protection. The rule establishes the responsibility of the developer with respect to site preparation as well as the maintenance of site conditions. We suggest that the failure of the developer to meet the requirements of this rule, as well as the requirements of Rule H-1, should be construed as relieving the company of the responsibility to provide the underground system without charge as set out in Rule E. In our view the utility should have not only the right but also the responsibility to be reimbursed for unnecessary costs in order to protect its other subscribers.

Winter Park also in Paragraph 4 of its response states "The proposed Rules purport to require that all extensions of telephone distribution lines to furnish permanent telephone service 'to all structures within a ne

residential subdivision' shall be made underground."

Unless there is something in that language that escapes me, that appears to be merely a quote of a portion of the language in A-1. No specific objection is indicated and no response appears to be required.

Now with respect to proposed Rule E which appears on Page 3 of Appendix B, in Paragraph 5 of their response which we previously discussed, under the objections entered to the need for any rules, except for the matter of "economic feasibility." We suggest that protection against any excessive cost of construction is provided by the language under Rule J and, further, that necessary protection against requiring an investment in excess of an amount which would be supported by near-term revenues is afforded through Rule G.

Also with respect to that same proposed Rule E, United suggests that the utility should be protected, should it run into difficulty due to rock, trees, water or other unusual conditions causing an excessive construction cost, they suggest adding the following insert after the word "applicant" which appears on Line 2, ". . . except that the applicant shall be required to reimburse the utility for excessive cost resulting from unusually expensive construction, and the applicant may further be required by the utility . . ." et cetera.

The entire rule would read as follows: "The utility shall install the underground telephone distribution system at no charge to the applicant; except that the applicant shall be required to reimburse the utility for excessive costs resulting from unusually expensive construction, and the applicant may further be required by the utility to furnish suitable conduit for the placement of service entrance facilities to multiple-occupancy buildings, which shall be required in all such installations."

We agree that the utility should be entitled to protection against extreme conditions which would require excessive construction costs. This contingency was considered in developing the proposed rules and accounts for the language in Rule J which, in our opinion, provides the necessary protection.

I might add further that we prefer that the existing language be retained since the proposed revision would have the effect of transferring the burden of appeal or reference to the Commission from the Company to the applicant who would not normally be as familiar with Commission regulations and his rights under them.

Also with respect to Proposed Rule E, the Winter Park Telephone Company points out that the present tariffs of the company provide for a single non-recurring

charge of $10 for the installation of buried drops. The company in Paragraph 7 of their response objects to the elimination of this tariff charge, stating that it is unjust and unreasonable to eliminate this revenue in the absence of an off-setting increase in other rates and charges.

As we stated previously, testimony has been introduced by various company witnesses in this docket to the effect that the cost of installing underground telephone plant is, on average, comparable with and no greater than overhead facilities. As a matter of fact, several exhibits have been introduced showing the comparative cost of underground and overhead systems in typical subdivisions which demonstrate that in many instances the cost of installing the underground system is lower than for comparable overhead.

While revenue considerations are important and should not be ignored, it appears to us, particularly in view of the evidence of lower underground costs, that it would be equally unreasonable to permit one company to continue charging for buried drops while all other companies provide the same facility without charge.

Now with respect to proposed Rule F which appears on that same page, United suggests that the existing language in Rule F allows an interpretation which

could unreasonably and impracticably require replacing with buried or underground cable and existing aerial lead when such lead was being reinforced or was undergoing some other similar modification.

The interpretation to be placed on the language in Rule F was discussed in considerable detail at the September staff-level conference, the question being resolved was whether the placement of the plant extension from the existing system to the subdivision should be governed by economic or aesthetic considerations. It is not the intent of the proposed rules to ignore the economic considerations involved and we suggest that clarification will be provided by deleting the word "underground" which appears on Line 3.

That, I mig t add here, is consistent with the suggestions which were made at the hearing yesterday with respect to the electric utilities.

The next reference is to Rule G which starts at the bottom of that same page.

The Winter Park Telephone Company in Paragraph 3 of their response states that in their service area there is not a uniformity of need; that in many instances many subdivision lots are surveyed but not sold where immediate or early construction and in numerous cases remain vacant and unimproved for months or even years.

Also, as set forth in Paragraph 6 of their response, a builder may plan a number of homes but starts construction on only a few and defers start on the remainder until the earlier ones are completed.

The concern here is evidently that the company may be required to incur an investment in excess of that which would be supported by the immediate or near-term revenues to be generated or in excess of area requirements. We agree that a utility is entitled to such protection in the interest of all other subscribers and suggest that the advanced deposit requirement provisions set out in the language of Rule G provide adequate safeguards.

Also in connection with this same rule United takes the position that the accounting procedures necessary to insure a quarterly return of the deposit is extremely involved, excessively costly, and unduly burdensome, and that the cost to the utility in maintaining such accounting would outweight the advantage of the deposit, and they have alternatively suggested that the deposit refunds be made at annual intervals.

The staff has no strong feelings either way other than to suggest that if refunds are to be made only once a year, consideration might be given to requiring the payment of interest on the refundable portion of the

deposit. Since no other objections have been entered to the rule, an alternative might be to rewrite the rule to provide an option, if returned quarterly no interest need be paid, if refunded annually interest would be paid at a rate of whatever is prescribed on the refundable portion.

The next is proposed Rule H which appears on Page 3 of Appendix B. The Winter Park Telephone Company states that it is an invasion of management discretion to require joint use of trenches as proposed in Rule H-2.

As we view the language in this proposed rule, it does not require the use of joint trenching in all instances but only when the conditions specified in the rule are satisfied. The primary consideration here, of course, is economy. What the rule says, in effect, is that if the company can install its underground system more economically with joint trenching, and without sacrifice to service or safety, it should employ that practice. It seems to me that in the interest of keeping the cost of service as low as possible, each utility has a basic responsibility to its customers to take advantage of any economies available to it.

The last exception which has been filed has been filed with respect to Rule I-2 which appears on Page 5 of Appendix B and it has been entered by the United

Telephone Company which has some difficulty with the rule, maintaining that compliance with the requirements of the rule would be extremely costly and virtually uncontrollable after the establishment of jointly used facilities and that without computerization it would be difficult, if not impracticable and unreasonable, to maintain the separate records for underground as required by this section.

The nature and extent of the record keeping to be required by the rules was, quite naturally, a matter of concern to the companies and was reviewed in some detail at an accounting conference held in Tampa last summer. Subsequently, the Commission's Accounting Department prepared a memorandum on the subject which was issued to the companies at or about the time of the staff-level conference held in September, inviting their review, comments and objections. While no serious objections were filed, several of the responses request a clarification and our Accounting Department has since prepared a second memorandum which provides a more detailed explanation of record keeping requirements. I have a copy of that memorandum and I believe that reference is some of the language set out in that memorandum will indicate that compliance with the rule would not be as burdensome as the objection would appear to indicate.

I don't know whether these have been distributed or not.

MR. WILSON: They were last distributed about four days ago.

A (Cont'd) Then I presume all of the companies have copies of it.

In the first part of the memorandum it states that the accounting data required by this memoranda are intended to provide a trend as to whether construction and maintenance differential cost between overhead and underground systems is increasing, decreasing or remaining constant.

Now with particular reference to Rule I-2, on Page 4 of that memorandum, the language reads as follows: "The normal accumulation of cost to eachcompany's work order procedures should satisfy this requirement." That as I understand it is standard practice with the companies and would impose no unreasonable burden.

Q Does that complete your discussion of the rules to which exceptions were filed?

A Yes, sir.

MR. PETTEWAY: Mr. Chairman, Mr. James is available for questioning from the companies.

CHAIRMAN YARBOROUGH: Is there any connection between the closeness of telephone lines and power

lines as to noise on a telephone line?

THE WITNESS: Yes, sir, there is, but the precise tolerances or distances which are involved I cannot answer.

CHAIRMAN YARBOROUGH: Let me ask you this question. When you go in and trench individually, is there any depth or width between a telephone and power company going into a residential area?

THE WITNESS: A power cable is usually deeper, yes, sir. I believe it is 36 inches. That's subject to verification but I believe that is correct.

CHAIRMAN YARBOROUGH: To go back to the deposits. We require a man to be paid 6% interest on deposits beginning from the time the deposit is put up. It may be up two weeks before it is installed. It must be there for six months.

THE WITNESS: A minimum of six months, yes, sir.

CHAIRMAN YARBOROUGH: You stated if rebated annually the interest must be paid if it is there six months and returned in the ninth month, no interest would be paid for the ninth month?

THE WITNESS: The only two alternatives which have been suggested here, Mr. Chairman, the one suggested by the rule which is a quarterly refunding, and the alternative suggested by United is annually.

So I would presume we would either go with one or the other.

CHAIRMAN YARBOROUGH: One final question. You stated overhead and underground are about the same cost. When you say "underground," you mean individual wires going into a residence. You don't mean personalized underground cable as compared to overhead?

THE WITNESS: I think that the -- as I recall, the exhibits which were submitted and made a part of the record were concerned more with the distribution system itself rather than the service drops going into the individual residences.

CHAIRMAN YARBOROUGH: Mr. Odom.

MR. ODOM: Mr. Chairman, members of the Commission, I just have one question and then I would like to make a statement.

CROSS EXAMINATION

BY MR. ODOM:

Q Mr. James the question with regard to what Commissioner Yarborough asked you about the payment of interest of 6% on deposits, is not that payment of interest on deposits the customers put up rather than deposits the subdivider would put up?

A Under the existing rules I think the deposit requirements the Chairman was discussing would be the

normal deposit requirements in connection with the service he receives, whether electric, telephone or whatever.

Q So that would not be applicable in regard to the situation we had here regarding new installations and deposits contemplated under Rule G, is that correct; that the interest requirement --

A The deposit requirement here is actually more in the nature of a customer advance for construction rather than the deposit requirements which we have been discussing. That's correct.

Q What you have now in your rule as proposed would not bear any interest, isn't that correct?

A The language in the existing rule --

Q This is Rule G.

A That's correct. As I recall, the language in the existing rule -- that's right. It does not contemplate the payment of interest since we are returning it or the rule proposes that it be returned on a quarterly basis.

MR. ODOM: I have no further questions.

I would like to comment and will keep it brief with respect to some of the objections filed.

First I would like to respectfully point out that United Telephone Company is in error in their statement that home builders witnesses acknowledged

the absence of any need for rules. I cannot find such a statement made by any of our witnesses.

Mr. Shimberg testified on Page 5 of his testimony that virtually all of the telephone companies who responded to the Commission's order are presently installing underground service at no additional charge billed to the homeowner. He went further to say that "Perhaps the overall basic philosophy of the telephone companies with respect to URD can best be summarized. . ." and then a statement was quoted from United's presentation, the statement being "In the interest of improved customer service and aesthetic duty, it is the policy of United Telephone Company of Florida to place telephone distribution facilities underground whenever and wherever possible. The general effect of this policy results in most new investments being in underground service.

"It further is United's policy as a company in service to the citizens in the area in which it operates, to participate in civic betterment. Certainly those steps which can be taken to improve the physical appearance of the community are worthwhile and United expects to continue to share with the public and other businesses in the cost of aesthetic improvements."

Mr. Shimberg commended United for their position and their policy but nowhere in the testimony of my witnesses do I see where we acknowledged the absence of any need for rules and regulations. As a matter of fact, with the testimony filed by the intervenor, we attached proposed rules on telephone underground extensions, obviously indicating to the Commission that we felt such rules were necessary.

I am very pleased that the staff, I think, followed our rules as a guideline. It did furnish a good working vehicle and a guide for the staff to use in presenting rules to the Commission. We certainly feel that rules are necessary for the sake of uniformity, for the sake of reasonableness as between developers, to avoid discriminatory practice, but most important of all for the sake of the Commission's application to the public, to see to it that this is done in a reasonably and orderly and uniform fashion.

So I cannot agree with that statement made in United's objections.

We feel on the question of excessive cost that Rule J is certainly adequate to take care of the situation and if the rule is amended as United suggested, it would create untold disputes as between

the applicant and the telephone company as to what was an excessive cost or what was an unusual problem of construction.

United wanted to delete, and Mr. James said it would be impossible to remove the word "underground" under Rule F in connection with distribution systems which required that the connection from the existing telephone distribution system to the underground system installed when the applicant's subdivision shall be made underground. United objected to that because they said it would allow interpretation with regard to replacing existing overhead with underground. I submit that is a strained and improbable interpretation of the rule.

The proposed rules in A-1 indicate at the outset that the extension of telephone distribution lines to all structures within a new subdivision. So we are not talking about converting. Conversion is, however, touched upon in Rule H-1 which says "to the extent practicable where existing aerial facilities retired and removed from service, replacement will be made with underground construction whenever economically feasible." So H-3 is the only one concerned with conversion and I submit it would be improper, and I guess this is one place where I do

disagree with Mr. James, that it would be improper to delete the word "underground" from Rule F. That should remain in there in keeping with the testimony of the companies and I hope to be the wishes of the Commission, that these facilities should be installed underground, including the connection to existing facilities to be put underground. That does not deal with replacement or conversion.

Regarding the return of deposits, I think testimony on cross-examination clarified this, that the 6% does not apply in this situation. We feel that the developer if he is required to put up his money oftentimes has to pay very high interest. Construction funds, as you know, are much higher. We all know that construction costs are higher and are going higher all the time. Nevertheless, if the developer has to borrow money at 6, 8 or sometimes 10% interest, and it has been higher than that lately, then that money should either be returned quarterly, and the additional bookkeeping involved would not be that complicated because most companies the size of United do have computerization. I understand United is going into this computerization now, so the cost of doing this would not outweigh the benefit. If they want to keep it for a year, then we

feel very strongly that they should be required to pay interest not at 6% but at the rate the builder has to pay. We feel if an alternative is built into the rule, we feel that the rule should say that if they keep it on an annual basis they must pay interest at the rate being paid by the developer for the money.

One final thing with regard to the joint use of trenches and record keeping and accounting. We feel again that the Commission has a duty to see to it that all feasible economies are practiced and the testimony, I know, that was offered by the intervenor, and particularly the testimony of Mr. Willard Bryant, who is a nationwide authority in this field, indicates that the joint use of trenches is one of the economies which has proven to be of great benefit in bringing the cost of underground, be it electric or telephone, down over the years.

The testimony indicated that many companies are not availing themselves of this now and we feel the Commission has the responsibility to see that they do where economically feasible and we certainly urge the Commission to retain that in there, the requirement of joint use trenching.

The record keeping and accounting is essential

in order to keep the Commission advised as to what they are doing and the economies they are following.

So in summary we feel the rules as proposed in the last tendered order should be adopted by the Commission without any further change.

MR. PETTEWAY: May I ask you a question, Mr. Odom?

Mr. Odom, if interest is required, would you object to a provision that the interest rate should be the prevailing prime rate of interest at the time?

MR. ODOM: I think I have to go along with that, Mr. Petteway, since it is a common practice. In actuality, in all candor, many times developers must pay much more than prime rates but I couldn't object too strongly to that.

MR. PETTEWAY: I can see some problems in paying the interest rate some of the developers now pay. He might not be a good risk and have to pay a higher interest rate. Then again, the interest rate that he pays on monies, that would lead into many problems

MR. ODOM: It would. I can see that.

CHAIRMAN YARBOROUGH: Mr. Odom, we would appreciate any cooperation the Home Builders Association can give us to keep from cutting cable.

MR. ODOM: Yes, sir. I did stress that point at

the annual convention when we were discussing this hearing.

CHAIRMAN YARBOROUGH: Mr. Wilson.

MR. WILSON: Mr. Chairman, Southern Bell did not take exception to the rules as finally distributed and we concur in Mr. James' advice to you today. We have not taken exception because we believe the rules require us to do what we are already doing.

In new subdivisions in Florida Southern Bell is going virtually 100% to buried service with no direct charges to the builder or owner.

During the past three years over 90% of all new cable has been put underground. Our goal is to give the people service with out-of-sight plant, if we can. So I concur in the Commission Staff's recommendations.

CHAIRMAN YARBOROUGH: How about the conversion?

MR. WILSON: That's another ball game. We will be back on that.

MR. McMULLEN: Mr. Chairman, Southeastern filed no exception to the rules as proposed and I have no questions to ask of Mr. James.

CHAIRMAN YARBOROUGH: Are you all putting most of your new subdivisions underground?

MR. McMULLEN: I think so, yes, sir.

CHAIRMAN YARBOROUGH: Mr. Mason.

MR. MASON: United also is putting nearly 100% of its new construction underground and this was recognized by the witnesses, hence the statement in the United exceptions that the Florida Builders witnesses had acknowledged the absence of the need since this was being done. I am not going to argue that. We submit that question to the Commission on the records.

The schedule of charges that we have made exceptions to, and as explained by Mr. James, we have only this comment to make. It would seem more reasonable to require the builder to reimburse the utility for excessive cost unless the builder, if he felt there was some dispute, or some dispute arose, let the builder under Section J come in and present that to the Commission and have the Commission resolve it. There may be no dispute. If the builder has this obligation, and understands it at the outset, and it is amicably worked out, then there would be no dispute. However, if this is not in there it is our interpretation that each time there is excessive cost that it must come in and be presented on an individual casesbasis under Section J and this was the reason we felt it would be simply

a clarification of that language.

The next exception that we filed --

MR. WILSON: Mr. Mason, would you yield just a minute on that exception?

It is my recollection that in September we all discussed the interpretation of that particular rule and you will recall that it says the utility or the applicant and it seemed to me the way it would actually come about would be the applicant would be demanding underground service, Southern Bell or United would refuse to do it because of the high cost, and the burden would still be on the applicant if he wanted to achieve that and bring it to the Commission. I don't think the burden would necessarily be on us.

MR. MASON: Unless the Commission allows the applicant make a presentation to the Commission and the Commission direct it. I just felt that for clarification only, and that's the purpose of the rule, so that everyone knows by what procedures we play the game, and it was just for clarification and submitted in that spirit.

CHAIRMAN YARBOROUGH: I notice none of you gentlemen are questioning Mr. James but are making individual statements.

MR. MASON: I was going to make these observations first, Mr. Chairman.

With regard to our exception to Paragraph F, connections to the existing system, with the suggestion that Mr. James has suggested, with the removal of the word "underground," in Line 3, we think that this would substantially correct that. We agree with him that some other interpretation is possible and we agree that that would be a good amendment.

Now as to the advancement by the applicant, we simply felt that to maintain the necessary records for a quarterly return could conceivably become burdensome and involved. If the Commission desires to put this on the basis of keeping the money for a year and requires some prime rate of interest, we have no objection to that. It gives them an alternative that if it does not get too involved, we can return it to them and if the Commission felt so inclined, to put it on a semi-annually basis, which would make it not quite as burdensome as a quarterly basis and possibly eliminate the alternative but we just felt, because it was something we have not been involved with before, that we could become involved and we are looking for some relief in that area.

Now with regard to Paragraph I and the record and report which was our last exception, we just have received this memorandum as Mr. James referred to and Appendix A, Page 1 of 2, mileage of outside plant.

THE WITNESS: Would you give me that reference again, please?

MR. MASON: The second draft we received just a few days ago.

MR. PETTEWAY: Are you talking about the accounting rules?

MR. MASON: Yes, sir.

I have attached to that suggested information be required, listing the account numbers entitled name of the company, various relationship of overhead and underground plant.

MR. PETTEWAY: I think I ought to suggest for the record that these accounting suggestions are not part of the rule and I don't believe we ought to get involved in this in the rule-making process.

CHAIRMAN YARBOROUGH: Particularly with Mr. James on the stand.

MR. PETTEWAY: Yes. He is qualified in a number of areas but he is not qualified with reference to that. I think if there is any problem, they should take that up with the Accounting Department.

MR. MASON: I understood this is the one he made reference to in his testimony.

MR. PETTEWAY: He did and he got that reference in before I knew he was going to make it.

MR. MASON: May I ask Mr. James from an engineering standpoint, whether or not it is his understanding that the records now kept would be acceptable and would pick up from the time of the adoption of the rule. To whom may I address that inquiry?

MR. PETTEWAY: That's an accounting record and I would suggest that you address it to Mr. Talbott.

CHAIRMAN YARBOROUGH: That would be the ruling.

MR. MASON: Then I have no questions of Mr. James.

MR. FREEMAN: We maintain our position as set forth in the exceptions but we have no questions.

CHAIRMAN YARBOROUGH: Any other questions?

MR. PETTEWAY: I would like to make one observation, Mr. Chairman.

I believe this will be my last appearance as General Counsel in a public hearing. I would hope it would be understood that I have no plans to go underground.

COMMISSIONER MAYO: I would like to make this statement.

I don't recall in previous studies of these proposed rules but one thing occurred to me here today in regard to maybe a self-imposed rule between the developer and the utility involved should be settled by the Commission.

Has such consideration been given to the time?

THE WITNESS: There is no provision in the existing language of any of the proposed rules for that.

COMMISSIONER MAYO: This thing occurs to me. I think we ought to give consideration to it in some way. I realize the Commission should give consideration to a prompt settlement of such a dispute but I think we ought to have something in the rule which makes it mandatory that we do so.

If a developer or a telephone or electric company got involved in a dispute of some kind, and the developer was pressed for time because he has a business to run with large capital involved and he wants to get that project completed and sell his homes. It just seems to me if we don't give consideration to time for resolving these things, that the developer would find himself in the position of rather than go the long road and take this to the Commission for some type settlement, he will just go

ahead and take his lump and get through and get out.

THE WITNESS: That should be accomplished, Mr. Commissioner, with some additional language in conjunction with Rule J.

What my view on this situation was, normally the adjudication of differences between the developer and the utility would follow the informal process. In other words, it would come in at the staff level and in all probability be referred either to our department or our department and the Accounting Department and we would attempt to resolve those differences immediately, or as soon as we could, on an informal basis.

If we were unable to resolve those differences to the mutual satisfaction of the parties, then, of course, we would have to come to the Commission. It seems to me from our experience in matters of this nature, that treating the matter informally does usually speed up the process.

COMMISSIONER MAYO: I don't have any objection to the informal treatment as long as we put into these rules some obligation on the part of the proper department to give it prompt attention.

THE WITNESS: We can do that by additional language in conjunction with Rule J.

COMMISSIONER MAYO: I would simply want equal protection to both parties.

CHAIRMAN YARBOROUGH: Don't you anticipate that engineers would settle these claims?

COMMISSIONER MAYO: I would hope so. I am only concerned with the time.

MR. ODOM: I too am concerned.

I think it's a very good point.

MR. PETTEWAY: I think we should have a suggestion from somebody as to time while everybody is here.

CHAIRMAN YARBOROUGH: Does anybody have a suggestion as to the time? 30 days from receipt of the application, do you have any comment on that?

MR. ODOM: Mr. Chairman, I think 30 days could very well be too long.

CHAIRMAN YARBOROUGH: Expeditiously.

MR. ODOM: Well, "expeditiously," that sounds good but it is also kind of nebulous. It is the kind of word lawyers like to argue about.

I would say 15 days after presentation. This would put the staff on notice that it is the wishes of the Commission that settlement of this type of dispute should receive priority. I think all parties will be anxious to expedite it and then the parties

can work together closely with the staff and I believe virtually all of these can be resolved at the staff level administratively but I think 15 days would be sufficient.

MR. PETTEWAY: Let me see if I understand the trend of this thinking.

Are we talking about requiring the staff to settle the problem within 15 days or are we talking about the problems of the party submitting it for consideration within 15 days.

I would object to the staff being required to reach a decision on it within 15 days because I know the Commission would run across many instances where the Commissioners themselves would think they have other problems that are far more important than getting this decided and they have the staff working on something else. I think it is fine to require the parties to submit it to somebody here for decision within 10 days and then let the Commission see that the staff does it.

Don't write it into the rules that the staff has to do something within 10 or 15 or even 30 days.

MR. MASON: Mr. Petteway, may I inquire, is that 10 days from what? When would that time begin?

MR. ODOM: Mr. Mason, if you would yield, I

really don't think we need to put a time limit on when the parties submit it. I guarantee you if a developer is held out there on his construction, he will want to submit it immediately. That's not the problem. I don't think that is the problem Mr. Mayo addressed himself to. We don't need to say how soon they must submit it.

I do feel we should say something in here about how soon the special ruling should be forthcoming. I agree that the staff is busy and I think, as everyone knows, the Commission is understaffed. This would be an expression on the part of the Commission that that's what they feel should be done.

MR. PETTEWAY: Mr. Chairman, I don't know of but one provision where this Commission is required to act within a specified period of time. As far as I know it has never observed that statutory requirement simply because it cannot. These are not the most important things that come before the Commission.

COMMISSIONER MAYO: I realize they may not be, Mr. Petteway, but we are setting rules that we hope are going to be helpful to the utility and the home building industry regarding some of these matters and it looks to me like we ought to have a time element on settling undisputed claims which result from this.

If it requires additional manpower, that's what we should be able to cope with.

MR. WILSON: Mr. Chairman, I can see both sides. I think there is not going to be a lot of cases coming to you under Paragraph J. I believe the utilities see the intent of this Commission.

Why not say for prompt or special ruling which shall be rendered promptly. That is just to indicate the intent of fast handling.

The way it really works, if Don Alexander calls Mr. Wilson over there and says the Engineering Department is going to recommend to the Commission against you on this, we go ahead and close that case out right then.

COMMISSIONER MAYO: I am only concerned with the time the Engineering Department is going to make their recommendation from the time it gets it.

MR. PETTEWAY: I would have no problem with seeing it gets done promptly or with priority but to tie the staff down by a rule in things of this sort to one day, ten days, fifteen days, that I think is unreasonable.

COMMISSIONER MAYO: I would like to say here and now that I would like to suggest we give it a try and if this rule proves to be a burden or an unwork-

able time element to impose on the staff, we can always relax it.

CHAIRMAN YARBOROUGH: Any further comment?

Any further cross-examination?

You are excused, Mr. James.

(Witness excused.)

CHAIRMAN YARBOROUGH: This is the sixth hearing we have had on this matter. As soon as the staff can get their recommendation in to the Commission, we will give it prompt consideration.

(Whereupon, the case was submitted and the Commission adjourned.)