

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Petition for Declaratory Statement )  
By Embarq Florida, Inc. Regarding ) Docket No. 070649-TL  
Implementation of Order No. PSC-07- )  
0311-FOF-TL, Rule 25-4.094, F.A.C. ) Filed: December 21, 2007  
and Embarq's General Exchange )  
Tariff Section A5,G )  
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**TREVISO BAY DEVELOPMENT, LLC'S MEMORANDUM OF LAW IN  
OPPOSITION TO PETITION FOR DECLARATORY STATEMENT**

Treviso Bay Development, LLC ("Treviso Bay"), by and through its undersigned counsel, and subject to its Petition to Intervene filed simultaneously herewith, hereby files its Memorandum of Law in opposition to the petition for declaratory statement filed by Embarq Florida, Inc. ("Embarq") in this proceeding. In summary, the Commission should decline to grant the requested declaratory statement for the following reasons.

- ▶ The issues raised are inappropriate for a declaratory statement, rather being in the nature of a tariff dispute. Moreover, even if Embarq's tariff were applicable, there are disputed issues of material fact that preclude the Commission from issuing the declaratory statement requested by Embarq.
- ▶ Embarq's tariff does not provide the basis for Embarq to charge Treviso Bay anything, because it provides that any deposit "shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide."
- ▶ The petition is an inappropriate attempt by Embarq to get a third bite at the apple - a third attempt at proving Embarq's claim that providing service to Treviso Bay is uneconomic, which Embarq already had a full opportunity to litigate and litigated, and which the Commission rejected after a full evidentiary hearing and again on

reconsideration - that is barred by the doctrine of collateral estoppel.

- ▶ The Commission should not apply its rules, adopted 36 years ago to protect captive customers of monopoly telephone companies in the context of conventional regulation, to protect Embarq's profitability by shielding Embarq from risks that Embarq accepted when it chose price regulation.

In further support of its position that the Commission should decline to grant the requested declaratory statement, Treviso Bay states as follows.

#### **BACKGROUND**

Treviso Bay Development, LLC is developing a residential subdivision in Collier County, Florida, known as Treviso Bay. The Treviso Bay community will include several different neighborhoods and is projected to have approximately 1,200 residences when it is fully built out. Treviso Bay has requested that Embarq provide voice telephone service to the Treviso Bay development, and Treviso Bay has provided easements for Embarq's facilities to provide such service. On several occasions, Embarq advised Treviso Bay in writing that Embarq would provide the requested service and that the easements and dedications were acceptable.

Treviso Bay intervened in, and defended its interests in, Commission Docket No. 060763-TL, in which the Commission rendered its Order No. PSC-07-0311-FOF-TL, which is a key part of the subject matter of this declaratory statement proceeding. In that docket, Embarq litigated its issue of whether Embarq's

providing service to Treviso Bay would be uneconomic. Embarq attempted, unsuccessfully, to prove that providing basic local exchange telecommunications service to Treviso Bay would be uneconomic.

The Commission recognized that Embarq does not qualify for any of the automatic exemptions from its Carrier of Last Resort ("COLR") obligations pursuant to Section 364.025(6)(b)1, Florida Statutes, and Embarq is the only communications service provider that is capable of providing, and statutorily required to provide, wire-line, land-line voice service, i.e., service that is commonly known as basic local exchange telecommunications service, to the residents of Treviso Bay. Accordingly, in Docket No. 060763-TL, after a full evidentiary hearing, the Commission determined that Embarq failed to demonstrate that providing the requested service would be uneconomic to Embarq, and held accordingly that Embarq must provide that basic wire-line service.

#### **SUMMARY OF ARGUMENT**

The real issues here are whether Embarq's tariff provides a basis for it to charge Treviso Bay a deposit for placing sufficient facilities in the Treviso Bay development to provide "basic local exchange telecommunications service" as required by the COLR obligation under Section 364.025(1), Florida Statutes, and by Commission Order No. 07-0311-FOF-TL, and if so, what the

required deposit should be. These are issues that are appropriate to a tariff dispute proceeding, not a declaratory statement proceeding. Moreover, Embarq's tariff does not provide the basis for Embarq's substantive claim, because the tariff, by its plain language states that any deposit "shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide." Here, there is no difference between the facilities requested and the facilities that Embarq would normally provide.

Additionally, Embarq's petition is barred by the doctrine of collateral estoppel, because Embarq's claims here depend critically and necessarily on its assertion that providing service to Treviso Bay would be uneconomic, and that issue has been fully litigated and determined adversely to Embarq by the Commission in its Order No. 07-0311-FOF-TL. (Embarq also argued specific issues relating to its "uneconomic" claim in its motion for reconsideration, which the Commission rejected by Order No. PSC-07-0635-FOF-TL, dated August 3, 2007. See especially pages 7 through 9 of that order.)

Finally, the Commission should not apply its Rules, adopted 36 years ago to protect captive customers of monopoly telephone companies in the context of conventional regulation, to protect Embarq's profitability by shielding Embarq from risks that Embarq accepted when it chose price regulation.

## ARGUMENT

### A. Embarq's Petition Is an Inappropriate Attempt To Litigate a Tariff Matter Involving Disputed Issues of Material Fact Via a Declaratory Statement.

The real issues here are whether Embarq's tariff provides a basis for it to charge Treviso Bay a deposit for placing facilities in the Treviso Bay development sufficient to provide "basic local exchange telecommunications service" as required by the COLR obligation under Section 364.025(1), Florida Statutes, and by Commission Order No. 07-0311-FOF-TL, and if so, what the required deposit should be. These are issues that are appropriate to a tariff dispute proceeding, not a declaratory statement proceeding.

Embarq has requested that the Commission grant a declaratory statement "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." In other words, Embarq has asked the Commission to declare that its proposed deposit request is appropriate and reasonable. This is at most a factual issue that cannot be resolved in this declaratory statement proceeding.

Even if, contrary to the plain language of Embarq's tariff (see the discussion in Section B below), the tariff applies to this situation, the amount of any deposit is a factual issue

that is in dispute. Embarq has asked the Commission to approve its proposed charges; these depend on assumptions regarding costs, penetration or build-out rates, and timing of both costs incurred and build-out rates. Treviso Bay disputes, as an issue of material fact, the reasonableness of Embarq's requested deposit because it disputes the reasonableness of the cost and penetration rate assumptions.<sup>1</sup> These are issues appropriate for resolution in an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes, not a declaratory statement. Moreover, the Commission already decided the ultimate issue, namely that Embarq failed to prove that providing basic telephone service to the Treviso Bay development would be uneconomic.

B. Embarq's Tariff Does Not Provide the Basis for the Requested Declaratory Statement.

Embarq attempts to rely on its tariff as the basis for collecting an advance deposit. Embarq's reliance is misplaced, however, because its tariff states expressly that any deposit "shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide." Here, there is no difference between the facilities requested and the facilities that Embarq would normally provide.

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<sup>1</sup> Of course, as explained elsewhere in this memorandum, Embarq already litigated these issues unsuccessfully.

Where the Commission has determined that Embarq has an obligation to serve, Embarq cannot claim that the facilities it would install to provide the service requested are different from what Embarq would normally provide. Thus, by the plain language of Embarq's tariff, even assuming that it applies, Embarq has no legitimate basis for a deposit, because there is no difference between the facilities that have been requested and the facilities that Embarq would normally provide (and in this instance, the facilities that Embarq is required to provide by the Commission's prior order) to provide basic local exchange telecommunications service.

C. Collateral Estoppel Applies To Preclude Embarq from Relitigating the Issue Whether Providing Service to Treviso Bay is Uneconomic, Which is Critical to Embarq's Claims Here Just as It Was in Docket No. 060763-TL.

In Docket No. 060763-TL, after a full evidentiary hearing, the Commission determined that Embarq failed to demonstrate that providing the requested service would be uneconomic to Embarq, and held accordingly that Embarq must provide basic local exchange service pursuant to Section 364.025, Florida Statutes.<sup>2</sup> The Commission further considered, and rejected, several specific issues relating to Embarq's "uneconomic" argument in

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<sup>2</sup> 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., PSC Docket No. 060763-TL, Order No. 07-0311-FOF-TL.

its decision denying Embarq's motion for reconsideration. Order No. PSC-07-0635-FOF-TL, dated August 3, 2007, at pages 7-9.

Embarq's claim in this proceeding is predicated on its assertion that it is uneconomic for it to provide service to the Treviso Bay development. Try as it may, Embarq cannot escape this obvious fact: if it is not uneconomic for Embarq to provide service, then it has no claim in fact, let alone in law, to require an advance deposit from Treviso Bay. Embarq fully litigated this very issue in Docket No. 060763-TL, and accordingly, its petition for declaratory statement, which necessarily turns on Embarq's "uneconomic provision of service" assertion, is barred by the doctrine of collateral estoppel.

Collateral estoppel, also known as estoppel by judgment or judicial estoppel, is a legal doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. See Mobil Oil Corporation v. Shevin, 354 So. 2d 372, 374 (Fla. 1977). In Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995), the Court stated that the essential elements of collateral estoppel are that the parties and issues be identical and that the particular matter be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction.



In its Turkey Creek decision, the Commission adopted the collateral estoppel standard applied by the United States 11th Circuit Court of Appeals:

1) The issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

In Re: Application for Certificates to Provide Water and Wastewater Service in Alachua County Under Grandfather Rights by Turkey Creek, Inc., 95 FPSC at 11:628 (citing I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549; and Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985)). The test for collateral estoppel applied by the United States 11th Circuit Court of Appeals is functionally equivalent to the test utilized by Florida courts.

Here, all four elements are satisfied. The issue - whether provision of service to Treviso Bay is uneconomic - is the same. That issue was actually litigated in Docket No. 060763-TL. The Commission's decision that Embarq had failed to establish that providing service to Treviso Bay was uneconomic was a critical and necessary part of the Commission's decision. And finally, Embarq obviously had a full and fair opportunity to litigate, and did in fact litigate, this very issue in the earlier

proceeding. Accordingly, collateral estoppel applies to prohibit Embarq from relitigating the issue whether its provision of service to the Treviso Bay development is uneconomic. This in turn is a critical element of Embarq's instant Petition, and the Commission must accordingly deny that Petition.

D. The Commission Should Not Apply Its Rules To Protect Embarq's Profitability By Shielding It From Risks That Embarq Accepted When It Chose Price Regulation.

The Commission's rules were adopted 36 years ago, in the era of conventional regulation of a utility's base rates, rate base, and rate of return, to protect customers, not utility shareholders. It is inappropriate to apply the Commission's rules in the current circumstances, where Embarq has elected price regulation pursuant to Section 366.051, Florida Statutes.

Embarq cites the history of Rule 25-4.094, F.A.C., as being intended to protect "all other subscribers" of a local exchange company. Embarq's Petition at 10. While Embarq acknowledges that the telecommunications market is different today because of competition in that market (or those markets), id., its argument that the Commission intended to protect the companies themselves is misplaced in today's world.

The Commission's rules were not intended to protect companies: they were intended to protect other captive customers in a monopolized, highly regulated market. In that market,

costs that might be borne by the monopoly company could, and in the long run likely would, translate into rate impacts on all customers. In today's competitive world, however, Embarq had the option of remaining under conventional rate base regulation but opted instead for the risks - and the rewards - of price regulation. It would be unfair to allow Embarq to hide behind rules that were intended to protect captive customers in order to protect its profits. It would be unfair to use the Commission's rules to guarantee Embarq's profitability by shielding it from part of the risks, well-known and clearly spelled out in Florida Statutes, of its choice of price regulation.

Moreover, any suggestion that requiring Embarq to bear the investment risk of installing the facilities needed to serve Treviso Bay would translate into adverse impacts on other Embarq customers is at best highly speculative. For such impacts to occur, Embarq would have to experience circumstances sufficient to either warrant additional rate relief based on special circumstances, or to induce Embarq to return to conventional rate base regulation. Treviso Bay submits that both of these scenarios are at most very, very remote possibilities.

So, the real result that Embarq seeks is to protect its profits. If its profits were, hypothetically,<sup>3</sup> reduced because of having to fulfill its COLR obligation in some instances, Embarq might well choose to retain funds for shareholder profits instead of spending them to serve its customers, but that would be the result of a decision by Embarq's management, not the result of the Commission's enforcing its order that Embarq must fulfill its COLR obligation.

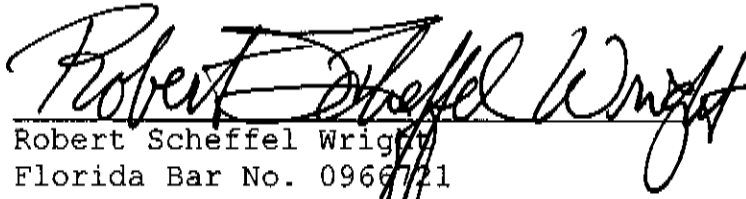
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<sup>3</sup> In the instant dispute, of course, the Commission has specifically found that Embarq has failed to prove that its profits would be adversely affected at all. Indeed, the Commission recognized that the Treviso Bay development has a built-in market for basic local exchange service because of the security system company's clear recommendation that only basic land-line service will meet the security company's reliability requirements. Even Embarq's witness acknowledged that customers would have "a lot of concerns about" relying only on Comcast's VoIP product for security purposes. Order No. PSC-07-0311-FOF-TL at 8.

**CONCLUSION**

WHEREFORE, for the reasons explained above, the Commission should decline to grant the declaratory statement requested by Embarq in this proceeding.

Respectfully submitted this 21st day of December, 2007.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 21st day of December, 2007, to the following:

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