

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 16, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bellak) *RCB SMC.*
Division of Competitive Markets & Enforcement (Buys, Ollila) *RCB S.O.*

RE: Docket No. 070649-TL – Petition for declaratory statement regarding implementation of Order PSC-07-0311-FOF-TL, Rule 25-4.094, F.A.C., and general exchange tariff Section A5, G by Embarq Florida, Inc.

AGENDA: 01/29/08 – Regular Agenda – Parties May Participate at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: 01/14/08 – 90 day limit provided by Section 120.65, F.S., extended to January 29, 2008

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070649.RCM.DOC

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Case Background

On October 17, 2007, Embarq Florida, Inc. (Embarq) filed a Petition for Declaratory Statement. In pertinent part, the Petition asks the Commission to declare that Embarq is not required to place facilities serving the Treviso Bay development if the developer fails to pay the deposit requested by Embarq. Previously, the Commission issued Order No. PSC-07-0311-FOF-TL, denying Embarq’s petition for waiver of its obligation to provide carrier of last resort service to Treviso Bay. However, that order also stated the following:

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Our decision does not preclude Embarq from using the tools that may be traditionally available to it under existing rules in addressing the alleged problem of uneconomic provisioning of service. [emphasis supplied]

Petition, Attachment 1, at p. 18. In effect, Embarq's current Petition asks the Commission to verify that "existing rule" 25-4.094, Florida Administrative Code, is a proper tool for Embarq to use in the following facts and circumstances:

- 1) The developer's bulk agreements with Comcast to provide data and video services paid for through mandatory homeowners' dues effectively limits Embarq to providing only voice service.
- 2) Voice service 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.
- 3) 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.
- 4) Some economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast.

Petition, pp. 3-4.

In support of its argument that the deposit requested is appropriate, Embarq has attached to its petition a copy of Rule 25-4.094, Attachment 2; Embarq's General Exchange Tariff Section A5 Gi, Attachment 3; hearing transcripts relevant to the adoption of Rule 25-4.094, Attachment 5; and correspondence between Embarq and Treviso Bay setting out, inter alia, the developer's objections to the deposit, Attachment 4; and the order denying Embarq's prior petition for waiver of its COLR obligation to serve Treviso Bay, Attachment 1.

On December 21, 2007, Treviso Bay Development, LLC (Treviso Bay or developer) filed a Petition to Intervene, a Request for Oral Argument and Alternative Motion for Leave to Address the Commission, and a Memorandum of Law in Opposition to Petition for Declaratory Statement. Embarq filed its responses to Treviso Bay's filings on January 8, 2008. Embarq agreed to extend the time for the Commission's decision to January 29, 2008.

Discussion of Issues

Issue 1: Should Treviso Bay's Petition to Intervene be granted?

Recommendation: Yes, the Petition to Intervene should be granted. (Bellak)

Staff Analysis: If the Commission issues the declaratory statement requested by Embarq, Treviso Bay will be required to pay an advance deposit in order to obtain service from Embarq. This demonstrates that Treviso Bay is a substantially affected party. Any substantially affected party can intervene in a declaratory statement proceeding before the agency. Chiles v. Department of State, Div. of Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1997). No objection to Treviso Bay's intervention has been filed.

The remaining arguments in the Petition to Intervene are restatements of arguments that are more fully set out in Treviso Bay's Memorandum of Law in Opposition to Petition for Declaratory Statement. As such, they are relevant to the merits of Embarq's Petition and should only be considered in Issue 3.

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Issue 2: Should Treviso Bay's Request for Oral Argument or Alternative Request for Leave to Address the Commission be granted?

Recommendation: Treviso Bay's Alternative Request for Leave to Address the Commission should be granted.

Staff Analysis: The Commission has the discretion to allow parties to address the Commission at the agenda conference. If Treviso Bay is granted intervention in this matter, staff recommends that Treviso Bay be allowed to address the Commission.

Because staff is recommending that Treviso Bay's Alternative Motion to Address the Commission be granted, its request for oral argument is moot.

Issue 3: Should the Commission issue a declaratory statement to the effect that Embarq is not required to place facilities in Treviso Bay if the developer fails to pay the advance deposit requested by Embarq?

Recommendation: Yes, the Commission should issue the requested declaratory statement in the affirmative and declare that Embarq can require a deposit pursuant to rule 25-4.094, F.A.C., as a condition to serving Treviso Bay. (Bellak, Buys, Ollila)

Staff Analysis: The Commission is required by statute to exercise its exclusive jurisdiction to

Protect the public health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

Section 364.01(4)(a), Florida Statutes.

Both Commission regulatory orders and statutes have identified carriers of last resort (COLRs) such as Embarq as the providers obligated to provide that service:

. . . The COLR is the provider that must provide basic local service at affordable rates to any customer in its service territory.

In Re: Determination of funding for universal service and carrier of last resort responsibilities, Order No. PSC-95-1592-FOF-TP. See also, Section 364.025(1):

It is . . . the intent of the Legislature that during this transition period [to competitively provided services] the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these [universal service] objectives.

However, staff believes that implicit in these formulations concerning the obligation to provide COLR service is the assumption that the service will be used and paid for. This is consistent with Section 364.025(6)(b) and (d), Florida Statutes, providing for waiver of the COLR obligation under specific listed circumstances or when “good cause” for such waiver is demonstrated.

As acknowledged by Embarq, the Commission denied Embarq’s prior petition for a waiver of its COLR obligation to provide service to the Treviso Bay development because

Embarq has not met its burden of proof that it will be uneconomic to provide voice telephone service to Treviso Bay.

However, Embarq further notes:

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.

Petition, p. 3, ¶7.

The uncertainty reflected in the previously described findings as to Treviso Bay in the order denying Embarq's waiver petition was discussed during those proceedings:

. . . [The] only way to really know what the numbers [of customers taking Embarq's service] are is to have [the company] go and invest the facilities and see how many customers take them up on it.

Petition, p. 13, n. 10. See, generally, Petition, Attachment 1. The declaratory statement requested here would affirm that the deposit Embarq requests from Treviso Bay pursuant to Rule 25-4.094 is an appropriate means to address that uncertainty. Rule 25-4.094 provides, in pertinent part,

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 extensions 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.

Petition, Attachment 2.

In turn, Embarq's tariff at section A5 Gi provides, in pertinent part,

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 increases in subscribers by the pro-rata share.

Petition, Attachment 3.

Under both the rule and the tariff, any deposit amounts unrefunded after five years would become property of the Company. Embarq does not know if it has ever applied this rule and tariff.

As summarized in Embarq's petition,

the 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 . . . [T]he 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 . . . 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.

Petition, pp. 13-14.

In correspondence included with the Petition in Attachment 4, and in a Memorandum of Law in Opposition to Petition for Declaratory Statement (Developer Memorandum), Treviso Bay lists its objections to the deposit and takes the view that Embarq should bear all of the risk. First, Treviso Bay argues that the issue of whether Embarq can charge Treviso Bay a deposit for placing facilities in the Treviso Bay development is a tariff issue "appropriate to a tariff dispute proceeding, not a declaratory statement proceeding." Developer Memorandum, p. 5.

However, Embarq's petition centers on the application of Rule 25-4.094, F.A.C., and the effect of applying that rule on Order No. PSC-07-0311-FOF-TL (waiver denial), in the context of Section 364.025, Florida Statutes. Section 120.565, Florida Statutes, provides that

Any 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. [emphasis supplied]

Where any one of the separate categories listed would suffice and Embarq's petition implicates all three, Embarq's petition clearly provides, contrary to Treviso Bay, an appropriate basis to request a declaratory statement. Staff notes that Embarq petitions for a declaratory statement to the effect that Embarq may condition its provision of COLR service to Treviso Bay on payment of a deposit calculated as provided for in Rule 25-4.094 and tariff section A5 Gi. In issuing such a statement, the Commission would not be approving a particular deposit amount since that would present a factual issue potentially subject to challenge. Indeed, Embarq itself proposed two different deposit calculations in its negotiations with Treviso Bay prior to filing its Petition in this docket. Petition, Attachment 4.

Treviso Bay then argues that Embarq's petition raises factual issues which cannot be resolved in a declaratory statement proceeding and which, in any event, were already decided against Embarq in the waiver proceeding. However, Embarq's petition asks the Commission to declare that Embarq is authorized by Rule 25-4.094 to impose an advance deposit as a condition to serving Treviso Bay in order to mitigate the economic risk of placing the facilities. The decision by the Commission whether or not to interpret Rule 25-4.094 to issue the requested statement presents a legal issue, not a factual issue. Moreover, the application of Rule 25-4.094 to the alleged facts and circumstances was never an issue in the waiver proceeding. Embarq's petition is, in addition, not premised on the assumption that the service would be uneconomic, the proposition Embarq failed to prove in the COLR waiver proceeding, but on the premise that the outcome is uncertain. That premise is consistent with the Commission's finding in the waiver denial order:

Some economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast . . . [emphasis supplied]

Order No. PSC-07-0311-FOF-TL, at p. 12.

Treviso Bay next argues at pp. 6-7 of the Developer Memorandum,

When 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.

However, that argument is plainly incorrect. At the time Rule 25-4.094 was promulgated,¹ the statutory obligation to serve did not preclude application of an advance deposit requirement to mitigate the risk to the company of placing facilities for a development which might or might not reach timely build-out as planned:

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 [tariff section] G provide adequate safeguards.

Petition, Attachment 5, p. 524.

Thus, whether denominated obligation to serve, as in 1971, or carrier-of-last resort obligation, that obligation did not then and does not now preclude its being conditioned on an advance deposit pursuant to Rule 25-4.094, F.A.C. In this instance, Embarq states that it would not normally provide facilities under the facts and circumstances alleged, and seeks a deposit which bridges the gap between the low rate of service utilization it believes will occur and the break-even utilization point that would lead Embarq to view its business prospects as at least viable. This is directly analogous to the above-cited discussion about the use of an advance deposit to protect a company from having 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.

Id.

Treviso Bay next argues that the doctrine of collateral estoppel prevents Embarq from relitigating the issue it lost in the waiver case, *i.e.*, that provision of the service would be uneconomic. However, Embarq is not relitigating that issue at all. Instead, Embarq is asking the Commission to state that Embarq can require a deposit to mitigate the risk of uncertainty inherent in placing facilities under the circumstances described. In effect, Embarq's petition reflects, rather than relitigates, the Commission's waiver order conclusions that Embarq had not

¹ Rule 25-4.094 became effective on April 10, 1971.

proven that providing service would be uneconomic, but that some economic risk does exist for Embarq in Treviso Bay. The attempt to prove that providing the service would be uneconomic is not identical to addressing the fact that the facilities must be placed before anyone can know with certainty whether providing the service will or will not be economic. Therefore, litigating – and losing – the former issue in the waiver case does not collaterally estop Embarq to present the latter issue here.

Treviso Bay's final point is that the Commission should not "apply its rules to protect Embarq's profitability by shielding it from the risks that Embarq accepted when it chose price regulation." This argument, found at pp. 10-12 of the Developer's Memorandum, is premised on differentiating between protecting the interests of other customers (subscribers) and protecting utility shareholders. According to Treviso Bay,

The Commission's rules were adopted 36 years ago. . . . It is inappropriate to apply the Commission's rules in the present circumstances, where Embarq has elected price regulation . . . While Embarq acknowledges that the telecommunications market is different today because of competition in that market (or those markets) . . . its argument that the Commission intended to protect the Companies themselves is misplaced in today's world.

Developer Memorandum, p. 10.

In a word, Treviso Bay's analysis is incorrect whether viewed in the context of 36 years ago or the present. First, the cited rule hearing discussion does not, in this instance, differentiate protecting the company's investment from protecting the interests of subscribers; it expressly mentions both:

The concern here is that the company may be required to incur an investment . . . in excess of area requirements . . . [A] utility is entitled to such protection in the interest of all other subscribers. . .

Petition, Attachment 5, p. 524.

It is not surprising that both the risks to the company's investment and the interests of subscribers were discussed in connection with the advance deposit rule. The rule was designed to mitigate the economic risks inherent in the uncertainty concerning development build-out. Requiring unnecessary facilities would be a negative result as to both the company's shareholders and the customers.

The change to price regulation has not altered that conclusion or rendered the rule protecting against such economic risks either irrelevant or inapplicable. If Embarq elected to provide service to Treviso Bay based on what it perceived to be marketplace competitive incentives, then Treviso Bay would be correct that protecting the company would be "misplaced in today's world." However, the facts establish that if Embarq serves Treviso Bay, it is because of regulatory statutes and orders which the Commission administers, not because of competitive market incentives:

We disagree with FCTA's claim that COLR is a new obligation that arose due to the introduction of local exchange competition . . . Under traditional monopoly rate of return regulation the obligation to make service available . . . was part of the regulatory bargain.

Order No. PSC-95-1592-FOF-TL.

It is just as important to administer regulatory requirements reasonably today as it was 36 years ago, including protecting both the company's investment in meeting those requirements and the interests of customers. The advance deposit rule is a useful mechanism for that purpose.

In Order No. PSC-07-0311-FOF-TL, the Commission denied Embarq's waiver request based in part, on evaluating competing testimony as to how many customers would sign-up for Embarq's service, but did not resolve the uncertainty as to which projection would ultimately prove to be accurate. The deposit would mitigate that uncertainty in a manner analogous to the mitigation of project build-out uncertainty that led to promulgation of the deposit rule. Petition, p. 6, ¶21.

Embarq is not providing COLR service in response to competitive market incentives, but in response to regulatory requirements. For those regulatory requirements to be reasonable, the Company should be protected from unjustified economic costs in complying with those requirements. Staff recommends issuance of the declaratory statement requested because staff agrees with Embarq that a deposit would appropriately address the uncertainties inherent in the facts presented. If Treviso Bay residents subscribe timely to Embarq's service in substantial numbers, the deposit will be refunded to the developer. If the residents do not subscribe, the deposit will mitigate some of the economic cost to Embarq of its investment. This appears to staff to be a more reasonable approach than Embarq bearing all of the risk.

Conclusion

Based on the above, the Commission should issue a declaratory statement in the affirmative and declare that Embarq can require a deposit pursuant to Rule 25-4.094, Florida Administrative Code, as a condition to serving Treviso Bay.

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Issue 4: Should this docket be closed?

Recommendation: Yes, the docket should be closed.

Staff Analysis: If the Commission acts to either grant or deny the petition, the docket should be closed.

RCB