

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: December 7, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Moore, Tan)
Division of Competitive Markets & Enforcement (Kennedy, Moses)
Division of Economic Regulation (Dickens, Hewitt)

RE: Docket No. 060554-TL – Proposed adoption of Rule 25-4.084, F.A.C., Carrier-of-Last-Resort; Multitenant Business and Residential Properties.

AGENDA: 12/19/06 – Regular Agenda – Rule Proposal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060554.RCM.DOC

Case Background

Section 2 of Chapter 2006-80, Laws of Florida, (Senate Bill 142) amended section 364.025, Florida Statutes, governing universal service, to provide that a local exchange telecommunications company is automatically relieved from its carrier-of-last-resort obligation (COLR) under certain enumerated circumstances. (Attachment C.) The COLR obligation requires local exchange telecommunications companies (LECs) to provide basic local telecommunications services¹ within a reasonable time to any person requesting such service

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"Basic local telecommunications service" means voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multifrequency dialing, and access to the following: emergency services such as "911," all

within the company's service territory until January 1, 2009. Section 364.025(1), Florida Statutes. The 2006 legislation automatically relieves a LEC of this obligation to customers in multitenant business or residential property, such as apartments, condominiums, subdivisions, office buildings, or office parks, when the owner or developer of the property:

1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;
2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;
3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or
4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property.

§ 364.025(6)(b), Fla. Stat. (2006). "Communications service" is defined in section 364.025(6)(a)3 as "voice service or voice replacement service through the use of any technology." The LEC relieved of its COLR obligation under the above provisions must notify the Commission of that fact in a timely manner. § 364.025(6)(c), Fla. Stat. (2006). In addition, the statute provides a method to reestablish the LEC's COLR obligation. § 364.025(6)(d), Fla. Stat. (2006).

Paragraph (6)(d) of section 364.025, Florida Statutes, provides that a LEC that is not automatically relieved of its COLR obligation may petition the Commission for a waiver of the obligation for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. The LEC filing such a petition is required to give notice at the same time to the building owner or developer. The Commission has 90 days to act on the petition. The Commission is required to implement this paragraph through rulemaking. Staff initiated this rulemaking to comply with the statute.

locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing. For a local exchange telecommunications company, the term shall include any extended area service routes, and extended calling service in existence or ordered by the commission on or before July 1, 1995. § 364.02 (1), Fla. Stat. (2006).

Staff conducted a rule development workshop on September 14, 2006, to receive comments on its draft of Rule 25-4.084, F.A.C. Participating in the workshop were local exchange companies BellSouth Telecommunications, Inc. ("BellSouth"), Verizon Florida, Inc. ("Verizon"), Embarq Florida, Inc. ("Embarq"); competitive local exchange carrier Time Warner Telecom of Florida, L.P.; the Florida Real Access Alliance, a representative of real estate owners; Lennar Developers, Inc.; the Florida Cable Telecommunications Association ("FCTA"); Comcast; the International Council of Shopping Centers; and the Building Owners and Managers Association of Florida ("BOMA"). Many of the participants also submitted post-workshop comments. Staff made several changes to the rule based on the participants' comments.

The Commission has rulemaking authority pursuant to sections 120.54, 350.127(2), and 364.025(6)(d), Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission adopt Rule 25-4.084, F.A.C., Carrier-of-Last-Resort; Multitenant Business and Residential Properties, to implement section 364.025(6)(d), Florida Statutes?

Recommendation: Yes.

Staff Analysis: Rule 25-4.084, F.A.C., prescribes the filing requirements for a petition for waiver of the COLR obligation. It requires the petitioning LEC to deliver a copy of the petition to the relevant property owner or developer and specifies the information that must be included in the petition. The rule requires the petitioner to include the specific facts and circumstances that demonstrate good cause for a waiver, and that interested persons have 14 days from receipt of the petition to file a response to the petition. The period of 14 days for a response is modeled on the time provided for comments on a petition in Rule 28-104.003, F.A.C., the uniform rule on rule waivers and variances. The uniform rule implements a statute requiring agencies to grant or deny a petition within 90 days after receipt of a completed petition. Rule 25-4.084 further provides that any response must include whether the respondent disputes the facts and circumstances alleged in the petition.

Workshop and Post-Workshop Comments

Good Cause Definition or Factors

At the rule development workshop and in post-workshop comments, the LECs asserted that the rule should include several factors that the Commission will consider in determining whether good cause exists for a waiver of the COLR obligation. These include whether the property owner or developer has entered into an agreement with another communications service provider or a provider of data, video or other services, and the effect of the agreement on the LEC's provision of service. Another factor is whether residents, tenants or occupants of the property have access to communications service from a source other than the LEC. Other factors could be considered by the Commission.

The Real Access Alliance, Lennar Developers, and FCTA opposed stating in the rule what constitutes good cause. Rather, they asked that the Commission limit the scope of its good cause inquiry to voice service and that any limitations imposed by the developer on a LEC's ability to provide any service other than voice service should not be a consideration in the Commission's determination. The Florida Real Access Alliance also asked for the rule to articulate facts and circumstances, or actions taken by a property owner, that do not constitute good cause.

Lennar Developers further asked that the Commission make clear in the rule that "good cause" is limited to a physical impairment in the COLR provider's ability to provide communications service (voice service or voice replacement service), or a significant economic impairment that results in precluding construction and operation of the provider's network to the premises and end users. Lennar asserted that this would add a certain level of regulatory

certainty that would help parties to resolve disputes during negotiations for service between the LECs and property owners.

Staff recommends that the Commission not attempt to define good cause in the rule, or to mandate what factors it will consider in making its determination. All or any of the factors suggested by the parties may be considered by the Commission without being stated in the rule, and whether or not good cause is established should be determined on a case-by-case basis. At this time, staff believes it is premature for the rule to go beyond prescribing requirements for filing and responding to a petition. Once the Commission gains some experience with adjudicating petitions for waiver of the COLR obligation based upon actual facts and circumstances, or by adjudicating complaints, it may have sufficient knowledge to address "good cause" by rulemaking.² In addition, staff believes that attempting to include provisions about good cause in the rule now will result in a protracted rulemaking given the significant differences of opinions of property owners and developers and the LECs.

Requiring Property Owners to Provide Information to LEC and Creating a Rebuttable Presumption of Good Cause

The LECs ask that the rule require owners and developers to provide specific information to the LEC in order for the LEC to assess its obligation to serve. The information the LECs want from a developer also includes the nature of any agreements the owner has entered into, or plans to enter into, with a provider of data, video or other service, the details of such services, and the name of the provider. Under the LEC's proposal, failure of an owner or developer to provide the information by notarized certification within 20 days of the LEC's request would create a rebuttable presumption of good cause for a waiver of the LEC's COLR obligation. In addition, a rebuttable presumption of good cause would exist if no response opposing a petition for waiver is filed or if a response does not comply with the rule.

Staff did not include such a requirement in the rule for several reasons. Default-type provisions are not appropriate because the Commission is not simply resolving a dispute between the LEC and a developer or property owner in proceedings to waive a COLR obligation. The Commission's duty goes beyond the two parties and reaches to the tenants or occupants of the multitenant property, who section 364.025, Florida Statutes, is designed to protect. The Commission also establishes policy and precedent with its decisions—decisions that should be based on the merits and its interpretation of law and the facts.

Section 364.025, Florida Statutes, establishes a policy of universal service and the COLR obligation—an obligation that exists unless one of the automatic exemptions expressed in subparagraphs 364.025(6)(b)1-4 applies, or unless the Commission finds good cause under

² There are two complaints and one petition for waiver of the COLR obligation presently pending before the Commission: Docket No. 060684-TP - In re: Complaint and petition for declaratory relief against BellSouth Telecommunications, Inc. for refusal to provide telephone service to a new development, by Litestream Holdings, LLC; Docket No. 060732-TL - In re: Complaint regarding BellSouth Telecommunications, Inc.'s failure to provide service on request in accordance with section 364.025(1), F.S., and Rule 25-4.091(1), F.A.C. by Lennar Homes, Inc.; and Docket No. 060763-TL - Petition by Embarq Florida, Inc. under section 364.025(6)(d), Florida Statutes, for relief from its carrier of last resort obligations.

paragraph 364.025(6)(d) to waive the obligation. Providing a rebuttable presumption in the rule would shift the burden of proof to the developer or property owner to demonstrate that the COLR obligation should not be waived. Staff believes that adding such a provision to the rule would be contrary to the statute and would stand the intent of the Legislature on its head.

Expedited Disposition

The LECs also asked that the rule include a provision stating that a petitioner may request expedited consideration, and that if the petitioner supports such a request with circumstances that demonstrate a need for expedited consideration, the Commission will grant or deny the petition for waiver within 30 days of its filing. Verizon asserted that in certain circumstances the local carrier (COLR provider) must make network construction decisions on short notice. If it does not know whether it must provide service, that is, it does not know whether conditions exist that establish an automatic statutory waiver, it risks either commencing uneconomic construction or waiting for a decision from the Commission and possible failure to meet COLR obligations on time if a waiver is denied. Lennar Developers suggested that the Commission consider providing for an expedited interim determination step in the rule for an owner or developer to obtain relief when it appears a LEC is declining to serve for reasons that would not meet a good cause standard.

Staff does not recommend including a provision requiring expedited action by the Commission in the rule. The relevant property owner or developer must have time to respond to the petition and the legal requirements for notice, the practicalities of scheduling, and the Commission's calendar would make it virtually impossible in most cases for the Commission to make a decision within 30 days of a petition's filing. The statute gives the Commission 90 days to act on a petition; however, there is nothing in the rule that would preclude a petitioner or a respondent from asking the Commission to expedite its decision at the time it files a petition. Under section 364.058(1), Florida Statutes, the Commission may conduct an expedited proceeding upon petition or its own motion. In addition, if there are no genuine issues as to material facts, any party may move for summary final order pursuant to Rule 28-106.204(4), F.A.C. If any party disputes the facts, it may ask for a hearing early in the proceedings, and need not wait to protest the Commission's proposed agency action.

Summary

Staff recommends the Commission adopt a rule that is limited to providing the detailed procedural requirements for petitions to waive the COLR obligation. Staff does not believe the Commission should attempt to resolve with this rule all of the disputes LECs and property owners or developers have or may have with each other about service availability, the scope of COLR obligations, the permissibility of access agreements, and the effect of exclusive agreements with providers of other services. For the most part, these issues will be resolved by the Commission when it decides petitions for waiver filed under this rule or complaints for violations based upon actual facts and circumstances, or by the LECs and owners in the course of their normal business negotiations. Additional rulemaking may be considered after the Commission resolves the issues on a case-by-case basis.

Statement of Estimated Regulatory Cost:

There should be little to no impact on individuals or companies subject to this rule because it merely adds detail to the process that is provided for by statute. A Statement of Estimated Regulatory Cost is attached. (Attachment B.)

Issue 2: Should this docket be closed?

Recommendation: Yes, if no requests for hearing or comments are filed, the rule as proposed should be filed for adoption with the Secretary of State and the docket should be closed.

Staff Analysis: Unless comments or requests for hearing are filed, the rules as proposed may be filed with the Secretary of State without further Commission action. The docket may then be closed.

Attachments

Rule
SERC
Statute