State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 10, 2007

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

FROM: Office of the General Counsel (Fudge)
Division of Competitive Markets & Enforcement (Buys, Kennedy)

RE: Docket No. 060732-TL – 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.

AGENDA: 01/23/07 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060732.RCM.DOC

Case Background

On November 7, 2006, Lennar Homes, Inc. (Lennar) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for failure to provide service in violation of its Carrier of Last Resort (COLR) obligation. Lennar states that it is in the process of developing subdivisions and thus qualifies as an applicant under Rule 25-4.089(1), Florida Administrative Code, as well as an "owner or developer" under Section 364.025(6)(a)(1), Florida Statutes. On December 1, 2006, BellSouth filed a Response to Lennar Homes, Inc.'s Complaint. On December 20, 2006, Lennar filed its Response to BellSouth's Assertion of Affirmative Defenses.

During its 1995 session, the Legislature created Section 364.025, Florida Statutes, Universal Services. At the time, Section 364.025(1), Florida Statutes, provided in part:

> It is the intent of the Legislature that universal service objectives be maintained after the local exchange market if 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. For a period of 4 years after the effective date of this section, each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory.

Section 364.025, Florida Statutes, has been amended several times since its 1995 adoption by the Legislature. Each time the carrier of last resort obligation was nearing expiration, the Legislature saw fit to amend the statute, extending the date on which the carrier of last resort obligation would be sunset.

In 2006, the Legislature amended Section 364.025, Florida Statutes, by defining certain conditions wherein an incumbent local exchange company would not be required to serve as carrier of last resort for certain multitenant business or residential properties. Even so, the carrier of last resort obligation was retained by the Legislature.

Lennar Complaint

In the process of developing the "Echo Lake" project, Lennar began discussion with BellSouth to serve as the telecommunications provider for Echo Lake. As a result of those discussions, BellSouth sent a letter to Lennar, attached hereto as Attachment A, requiring the developer to execute the letter before BellSouth would incur costs to prepare the property for BellSouth service.[1] Lennar contends that the letter indicates that if any affiliated party, homeowner, or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or bulk service agreement with a provider of any voice, data, or video service, within 18 months of first occupancy, Lennar will be responsible to BellSouth for any "unrecovered costs associated with the engineering and installation of the initial facilities."

Lennar contends that there are only four specific circumstances which automatically eliminates the COLR obligation if the owner or developer:

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

[1] BellSouth sent similar letters to other Lennar developments including Copper Creek and Madeira Isles. Exhibits 2 and 3 to Lennar's Complaint.

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.

If the LEC believes one of the conditions cited above has occurred, the LEC must notify the Commission of that fact in a timely manner.

Absent one of the circumstances identified above occurring, a LEC may seek a waiver of its COLR obligation "for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property."

Lennar argues that "by attempting to bully Lennar into the certifications described in the letter, it appears that BellSouth is trying to use the new law as a veritable sledgehammer in negotiations to extract more favorable terms and conditions of service." In addition, Lennar contends that the certifications required by BellSouth fall short of the "good cause" required by section 364.025, Florida Statutes, and that section 364.025, Florida Statutes, does not indicate that services other than voice service should be considered when determining whether the good cause standard has been met. Lennar states that the new law was designed to relieve BellSouth of its COLR obligation when conditions for providing its basic local telecommunications service to customers at a property are prohibitive, not just when conditions are competitive.

BellSouth Response

On December 1, 2006, BellSouth filed its response and affirmative defense. BellSouth alleges that Lennar has not requested that BellSouth provide any services to Lennar and thus, Lennar lacks standing to bring the complaint. BellSouth proceeds to admit or deny each paragraph of the Complaint.

Lennar Response

On December 20, 2006, Lennar filed a Response to BellSouth's assertion of affirmative defenses. Lennar argues that BellSouth has improperly pled its affirmative defense because it did not state with specificity the grounds for the defense, as well as the substantial matters of law intended to be argued. Lennar goes on to state that it has requested that BellSouth extend its facilities and make service available to LHI homes in the Echo Lake project, as well as to the Copper Creek and Madera Isles projects.

Next, Lennar explains that it meets the standing test identified in *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). First, the attestations required by BellSouth's letter impairs Lennar's ability to freely contract with cable and broadband providers. Second, the timely provision of the carrier of last resort obligation is within the zone of interest that 364.025, Florida Statutes, was designed to protect.

Discussion of Issues

Issue 1: What action should the Commission take regarding Lennar's Complaint against BellSouth Telecommunications, Inc. for Failure to Provide Services in Accordance with Section 364.025(1), Florida Statutes?

Recommendation: The Commission should require BellSouth to comply with 364.025, Florida Statutes, and provide service to Lennar's homes at Echo Lake and other similarly situated Lennar developments. **(FUDGE)**

Staff Analysis: Section 364.025(1), Florida Statutes, requires "each local telecommunications company [] to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory." *See also* Rule 25-4.091(1), Florida Administrative Code. In response to the Complaint, BellSouth contends that Lennar has not requested that BellSouth provide any services to Lennar."[2] Lennar alleges that that it has requested that BellSouth extend its facilities and make service available to LHI homes in the Echo Lake project, as well as to the Copper Creek and Madera Isles projects.

In its September 21, 2006, letter to Lennar, (Attachment A) BellSouth acknowledges prior conversations with Lennar regarding "BellSouth's service provisioned to the referenced project." In addition, BellSouth states: "Before BellSouth incurs costs to prepare the property for BellSouth service, we require an authorized representative of the developer or affiliated property owner to sign and return this letter. Once we receive the signed letter, BellSouth will commence planning and engineering activities when appropriate to serve the property." Staff believes that the letter indicates a desire by Lennar to procure services from BellSouth. It also appears, from BellSouth's position, that it requires that this letter be signed and returned before it commences service.

While at first glance the letter appears to be a contractual issue between the developer and BellSouth, some of the concessions requested by BellSouth seem inconsistent with 364.025, Florida Statutes. First, BellSouth requires that it "will not be restricted in any way from providing *any service* that it desires to offer at the property. (emphasis added). Second, BellSouth requires that the developer represent that it has not entered into, and does not plan to enter into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement with another provider for communications services, including any voice, *data, or video service*. (emphasis added). These requirements impair the developer's ability to enter into exclusive contracts with video/broadband providers and is not a condition upon which Bellsouth is relieved of its COLR obligation. Finally, BellSouth states that if the developer, or any affiliated party or homeowner's or condominium association enters into such an agreement

[2] BellSouth raises an affirmative defense by asserting that Lennar has not requested service from BellSouth. However, an affirmative defense may only serve as a basis for a motion to dismiss if the defense appears within the four corners of the complaint. *Value rent-A-Car, Inc. v. Grace*, 794 So. 2d 619, 620 (Fla. 2d DCA 2001), *citing Randles v. Moore*, 780 So. 2d 158 (Fla. 2d DCA 2001); *see also Hayward & Assocs. v. Hoffman*, 826 So. 2d 332 (Fla. 2d DCA 2002)(finding error for trial court to go beyond the four corners of the complaint to consider the affirmative defense of res judicata.). Based on the Complaint filed in this case, it appears that Lennar has requested service from BellSouth. *See* Complaint, Exhibit 1, BellSouth's Letter to Lennar regarding provisioning of service to the project.

with another service provider for communications services, including any voice, data, or video service, within 18 months of the date of first occupancy, the developer will be responsible to BellSouth for the unrecovered costs associated with the engineering and installation of the initial facilities. While staff agrees that such a provision is reasonable if the developer or an affiliated party enters into an agreement for communications service, such restraint should not be placed on the party's ability to enter into such agreement for data or video service.

Staff recommends that in accordance with section 364.025, Florida Statutes, BellSouth cannot condition its compliance with its COLR obligation on any restriction of the Developer's ability to contract for data or video service. Moreover, based on BellSouth's letter to Lennar, it appears that Lennar has requested service from BellSouth. BellSouth has not notified the Commission that it is automatically relieved of its COLR obligation, nor has it requested a waiver of its COLR obligation. Therefore, BellSouth should be required to provide service to Lennar's homes at Echo Lake and other similarly situated Lennar developments.

Issue 2: Is BellSouth's letter of engagement in compliance with 364.025, Florida Statutes?

Recommendation: No. BellSouth impermissibly conditions its compliance with its COLR obligation with restrictions on the Developer's ability to contract for data and/or video services. Any letter of engagement provided by BellSouth in connection with its COLR obligation should only deal with the provision of basic local telecommunications service. In addition, BellSouth should notify the Commission that the letter has been revised and should provide this revised letter to any Developer that has received previous letters. **(FUDGE, KENNEDY)**

Staff Analysis: The allegations made in this docket are consistent with the allegations made in Docket No. 060554-TL, regarding Proposed adoption of Rule 25-4.084, F.A.C., Carrier-of-Last-Resort; Multitenant Business and Residential Properties, and the most recent complaint of Litestream Holdings, LLC, in Docket No. 060684-TL. While staff recognizes that BellSouth disputes the allegations made in this docket, BellSouth's letter of engagement sent to the Developer speaks for itself.

On July 27, 2006, staff met with BellSouth to discuss its concerns as well as concerns raised by developers regarding BellSouth's letters. Staff advised BellSouth that certain conditions contained in the letter were in conflict with Section 364.025, Florida Statutes. BellSouth agreed that staff would prepare a draft of suggested changes to the letter and submit these changes to BellSouth for review and comment. In preparing suggested changes to BellSouth's letter, staff attempted to address those conditions that it believed were in conflict with the requirements of Section 364.025, Florida Statutes, and forwarded those changes to BellSouth for review and consideration. (Attachment B).

On September 1, 2006, BellSouth notified staff of its appreciation of staff's proposed changes, but it planned to continue using the developer letter in its current form. BellSouth commented that staff's revised draft does contain some of the key points requested by BellSouth, but only references the part of the new COLR relief legislation that provides "automatic" COLR relief to the LEC. BellSouth was concerned that the revised draft does not contemplate the part of the legislation under which a LEC can petition the FPSC for relief from COLR for good cause due to other facts and circumstances. BellSouth's letter seeks to secure information and commitments from developers about agreements with alternate providers that may yield automatic relief or such facts and circumstances that may support a petition for waiver.

As stated above, certain provisions in BellSouth's letter are inconsistent with section 364.025, Florida Statutes. Staff believes that in accordance with section 364.025, Florida Statutes, BellSouth cannot condition its compliance with its COLR obligation on any restriction of the Developer's ability to contract for data or video service. Staff recommends that BellSouth revise its letter to remove any restriction on the developer's ability to contract with any service provider for video or data service as follows:

- BellSouth will not be restricted in any way from providing voice ~~any~~ service that it desires to offer at the property.

- The developer, any affiliated property owner or other affiliated party, and any homeowners or condominium association, have not entered into, and do not plan to enter into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (i.e., similar mechanism), with another provider for ~~communications~~ voice or voice replacement services~~, including any voice, data, or video service~~.

- If [the developer] or any affiliated party or homeowner's or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (as defined above) with another service provider for voice or voice replacement communications services~~, including any voice, data, or video service,~~ within 18 months of the date of first occupancy, the developer will be responsible to BellSouth for the unrecovered costs associated with the engineering and installation of the initial facilities.

BellSouth should notify the Commission that the changes have been made and be required to furnish this revised letter to developer's who have received the prior letter.

Issue 3: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. **(FUDGE, KENNEDY)**

Staff Analysis: At the conclusion of the protest period, if no protest is filed this docket should be closed upon the issuance of a consummating order.

Staff's Suggested Changes to BellSouth's Provisioning Letter

This letter is from our Engineering Group requesting certain information regarding the provision of BellSouth's service to the referenced project. Before BellSouth will commit to installing service, or incur costs, BellSouth requires a signed letter of authorization from an authorized representative of the developer or affiliated property owner. BellSouth needs the following information and conditions met prior to installing service:

- Easements, at no cost to BellSouth, for the placement of its cables and equipment within the property at mutually agreeable locations. To meet the estimated service dates of this project, easements must be granted and recorded by _____.

- Site plans and valid addresses for the project by _____. The plans will include lot lines and measurements.

- To the extent required by applicable laws and rules, or as otherwise agreed upon, the developer or its affiliated property owner will provide support structures necessary for the installation of BellSouth's facilities (for example, conduits, trenches, pullboxes, equipment space, backboards, electrical power, as applicable.)

BellSouth is not required under Section 364.025, Florida Statutes, to provide communications service as the carrier-of-last-resort if one of the following conditions exists:

- Only one communications service provider is allowed to install its communications service-related facilities or equipment, to the exclusion of BellSouth, during the construction phase of the property.

- If the developer or property owner accepts 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 BellSouth.

- The developer or property owner 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 BellSouth to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues.

- An agreement with the communications service provider which grants incentives or rewards to the owner or developer contingent upon restriction or limitation of BellSouth's access to the property.

By signing this document you are attesting that none of the conditions listed above exist or are expected to exist in the near future. You further agree that if BellSouth begins installation of the facilities and the service is canceled, that BellSouth will be reimbursed for expenses incurred. The person signing below must be a representative who is authorized to sign for your company and by singing below represents that he or she has that authority.

Thank you for choosing BellSouth. If you have questions, please contact me at 407/327-0530.

Sincerely,

BellSouth Telecommunications, Inc.

_____
Gaines F. Spivey

Accepted and Agreed By:

By:_____
Authorized Representative

Name:_____

Title:_____

Date:_____