

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: March 1, 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: 03/13/07 – 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 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. 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;

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

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.

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

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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 section 364.025, Florida Statutes, was designed to protect.

February 13, 2007 Agenda Conference

At the February 13, 2007, Agenda Conference, the parties agreed to a resolution on the provision of service to the three properties that are the subject of the complaint. In addition, BellSouth withdrew the letter that was the subject of staff's recommendation and agreed not to send out any letter to developers in the next 30 days.

On February 22, 2007, the parties submitted proposed letters for review and also position papers on the policies at issue in this docket. The Commission has authority over this matter pursuant to section 364.025, Florida Statutes.

Discussion of Issues

Issue 1: Is BellSouth's COLR letter of engagement in compliance with section 364.025, Florida Statutes?

Recommendation: Yes, staff recommends that the Commission find that BellSouth's COLR letter of engagement is in compliance with section 364.025, Florida Statutes. **(FUDGE, KENNEDY, D. BUYS)**

Staff Analysis: At the February 13, 2007, Agenda Conference, BellSouth agreed to cease sending the letter complained of in this docket for 30 days. On February 22, 2007, BellSouth submitted its revised letter (Attachment A) and a network planning letter. (Attachment B). Also on February 22, 2007, Lennar filed similar letters.² Lennar is concerned that BellSouth is seeking information on video or data services or marketing arrangements that are not an appropriate basis for seeking a waiver. To address this issue, BellSouth has proposed sending two separate letters. The first is a purely COLR letter. BellSouth has framed the second letter as a Network Planning Letter.

BellSouth's proposed COLR letter reflects the conditions for automatic waiver contained in section 364.025(6)(b)1-4, Florida Statutes. The letter does not seek any information on video or data services, or marketing agreements of which Lennar has complained. Therefore, staff believes the COLR letter is in compliance with section 364.025(6)(b), Florida Statutes.

The network planning letter proposed by BellSouth seeks information to "(1) assist AT&T Florida (AT&T) in network planning for the Development and (2) allow AT&T Florida to determine if circumstances exist that allow AT&T Florida to petition the Florida Public Service Commission to be relieved of its [COLR] obligation to provide basic local telecommunications service, under section 364.025(6)(d), Florida Statutes." While Lennar did not directly address AT&T's letter, Lennar is concerned about AT&T's ability to solicit information about cable, video, and data services relating to COLR relief and the extent to which BellSouth will use the information.

The Network Planning Letter seeks the information through Yes/No answers and to the extent and explanation is necessary AT&T seeks only generalities. Moreover, to the extent that the Developer contends that the requested information is confidential, AT&T maintains that it will not share such designated information with any third parties.

Staff believes that the Network Planning Letter clearly sets forth the reasons for the information and the extent to which AT&T will use the information. More importantly, the letter does not condition AT&T's COLR obligation on a response to the letter, although a response, if any, may lead BellSouth to seek a waiver. Further, staff is reluctant to recommend that the

² Lennar filed letters similar to those proposed by BellSouth. (Attachments C and D) However, this recommendation concerns the propriety of BellSouth's letter and its compliance with section 364.025, Florida Statutes. Consequently, staff has confined its review to those letters submitted by BellSouth and whether those letters are in compliance with the statute.

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Commission set limits on AT&T's Network Planning Letter except for statements that may constitute a violation of Section 364.025, Florida Statutes.

Staff believes that because the Network Planning Letter does not condition compliance with the COLR obligation on a response to the letter and does not violate section 364.025, Florida Statutes, the Commission should find that BellSouth's COLR letter of engagement is in compliance with section 364.025, Florida Statutes.

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Issue 2: Should this docket be closed?

Recommendation: 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)**

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.