

State of Florida



Public Service Commission

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

DATE: June 27, 2007

TO: Office of Commission Clerk (Cole)

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

RE: Docket No. 070126-TL – Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Section 364.025(6)(d), F.S., for Villages of Avalon, Phase II, in Hernando County, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

AGENDA: 07/10/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None (Statutory Deadline Waived)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\070126.RCM.DOC

Case Background

On February 23, 2007, BellSouth Telecommunications, Inc., d/b/a AT&T Florida (AT&T Florida) filed a petition for relief from its carrier-of-last-resort obligations pursuant to Section 364.025(6)(d), Florida Statutes, for Villages of Avalon, Phase II, located in Hernando County, Florida.

On March 12, 2007, Avalon Development LLC (Avalon Development), submitted its reply to AT&T Florida's petition. In its reply, Avalon Development requests that the Commission deny AT&T Florida's petition, deny the relief requested by AT&T Florida, and dismiss this proceeding with prejudice. Avalon Development further contends that as AT&T Florida already provides voice service to the Villages of Avalon, Phase I under a previously accepted easement, it should not be permitted by the Commission to reject the same easement or refuse to provide service to the adjacent Phase II.

On March 23, 2007, and again on April 24, 2007, AT&T Florida submitted its responses to Staff Data Requests No. ATT-1 and ATT-2, respectively. The responses include confidential information that indicate the number of customers to whom AT&T Florida is providing voice service in The Villages of Avalon, Phase I.

On May 8, 2007, AT&T Florida filed a letter requesting that this item be rescheduled to be addressed at the July 10, 2007, Agenda Conference to allow the parties time to discuss the possibility of Avalon Development paying to AT&T Florida special construction charges for the installation of AT&T Florida's network facilities at the subject property. Subsequently, AT&T Florida submitted a letter dated June 7, 2007, describing its efforts to negotiate special construction charges with Avalon Development.

AT&T Florida is the carrier of last resort (COLR) for its service territory in Hernando County where the development known as The Villages of Avalon is located. The Villages of Avalon is a private deed-restricted residential community consisting of approximately 811 lots under development by Avalon Development. The Villages of Avalon, Phase II, which is the property subject to AT&T Florida's petition, contains approximately 466 lots and is contiguous to Phase I.

AT&T Florida purports that Avalon Development has entered into agreements with Beyond Communications a/k/a Baldwin County Internet/DSSI Service, L.L.C. and/or Capital Infrastructure, LLC d/b/a Connexion Technologies, to be the exclusive provider of data and video services to homes in the community, and that the charges for those services are paid through the HOA (Homeowners' Association) dues. It appears that Beyond Communications is offering its voice service to the residents on an individual customer basis by subscription.

Avalon Development is requesting that AT&T Florida install its network facilities in Phase II of the Villages of Avalon; however, Avalon Development is prohibiting AT&T Florida from providing video and data services to those homes by granting restricted easements to AT&T Florida.

Section 364.025(6)(b), Florida Statutes, permits a local exchange company (LEC) to be automatically relieved of its COLR obligations if any of four specific conditions is satisfied. If a LEC is not automatically relieved pursuant to any of the four conditions, a LEC may seek a waiver of its COLR obligation from the Commission for good cause shown under subparagraph (d).

In this case, AT&T Florida is seeking a waiver of its COLR obligations for the Villages of Avalon, Phase II, pursuant to Section 364.025(6)(d), Florida Statutes, which states:

A local exchange telecommunications company that is not automatically relieved of its carrier-of-last-resort obligation pursuant to subparagraphs (b)1.-4. may seek a waiver of its carrier-of-last-resort obligation from the commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property. Upon petition for such relief, notice shall be given by the company at the same time to the relevant building owner or developer. The commission shall have 90 days to act on the petition. The commission shall implement this paragraph through rulemaking.

The Commission has jurisdiction over this matter pursuant to Sections 364.01 and 364.025, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant AT&T Florida's Petition for relief from its carrier-of-last-resort obligation pursuant to Section 364.025(6)(d), Florida Statutes, for the provision of service at the Villages of Avalon, Phase II in the development known as Villages of Avalon located in Hernando County, Florida?

Recommendation: No. AT&T Florida has not made a prima facie case for good cause, and the Commission should deny AT&T Florida's Petition for relief from its carrier-of-last-resort obligations for the provision of basic local telecommunications service to Phase II of the development known as Villages of Avalon, located in Hernando County. **(Buys, R. Mann, Wiggins)**

Staff Analysis:

AT&T Florida's Petition

AT&T Florida is asking to be relieved from its COLR obligations pursuant to Section 364.025, Florida Statutes, for the provision of basic telephone service to the residents in Phase II of the development known as the Villages of Avalon in Hernando County. In its Petition, AT&T Florida claims the following circumstances and conditions constitute good cause.

1. Avalon Development plans to grant AT&T Florida a "voice-only" easement for Phase II, which will restrict AT&T Florida to providing only voice services at the property and as a result, AT&T Florida will not be able to offer subscribers in Phase II its full panoply of services that exist today or in the future, including video and data services.
2. The restriction on service offerings results in (1) reduced revenue opportunities that create uncertainty as to the time period it will take for AT&T Florida to recover the cost of installing its facilities in the development, (2) the inability of AT&T Florida to offer subscribers in Phase II the discounts obtainable when subscribers purchase a bundle of voice and data services, and (3) the necessity to modify AT&T Florida's front-end ordering and provisioning systems to comply with the voice-only restriction.
3. Avalon Development has entered into a non-exclusive agreement with Connexion Technologies who in turn contracted with Beyond Communications to provide voice service at Avalon, Phase II.
4. Avalon Development has entered into a bulk agreement with Beyond Communications for video and data services to all homes within the development, and the HOA fees include charges for cable television and Internet (data) service.
5. Connexion Technologies and/or Beyond Communications have compensated Avalon Development for the rights extended to Connexion Technologies and/or Beyond Communications to be the exclusive provider of video and data services.
6. Notwithstanding the service agreements for the provision of voice, data, and video services between Avalon Development and Connexion Technologies and/or Beyond

Communications, Avalon Development has requested that AT&T Florida install facilities and provide voice-only service to Avalon, Phase II. Because of the service agreements between Avalon Development and Connexion Technologies and/or Beyond Communications, and the attendant service restrictions on AT&T Florida, AT&T Florida claims that there is an “incredible amount of uncertainty” as to the anticipated demand, if any, for AT&T Florida’s voice services in the Villages of Avalon, Phase II.

7. The cost of installing facilities in the Villages of Avalon, Phase II, will amount to approximately \$244,966.
8. AT&T Florida should not be forced, pursuant to COLR, to make unwise economic decisions by installing duplicative facilities.
9. The COLR statute was not enacted to countenance such an inefficient economic result, especially where consumers are not in jeopardy of not having the ability to obtain voice service from an alternative provider that has entered into an agreement with the developer to provide voice service to the residents of the development over the developers’ own network infrastructure.

AT&T Florida states that it already incurred a cost of approximately \$230,000 to install its facilities in the Villages of Avalon, Phase I. AT&T Florida explained that at that time, the circumstances involved with the installation of its facilities in Phase I occurred prior to the enactment of Section 364.025(6), Florida Statutes; thus, AT&T Florida was unable to seek a waiver of its COLR obligation and installed its facilities under its COLR obligation.¹

Avalon Development’s Response to AT&T Florida’s Petition

Avalon Development objects to AT&T’s petition and disagrees with the factual basis for AT&T Florida’s arguments. Avalon Development is requesting that the Commission deny AT&T Florida’s petition, deny the relief requested by AT&T Florida, and dismiss this proceeding with prejudice. In support of its objections and request, Avalon Development asserts:

- Avalon Development has provided AT&T Florida with all rights it requires to provide voice service to Phase II and all remaining phases of the development, and AT&T Florida is already providing voice service to Phase I of the Villages of Avalon.
- The COLR obligations are based on voice services, not video and data services. The fact that AT&T is already providing service to Phase I belies AT&T Florida’s argument that it cannot economically provide voice service to the development if it is unable to also provide video and data services.
- Avalon Development and AT&T Florida previously agreed on easement rights for Phase I of the development and Avalon Development remains committed to granting AT&T Florida the easement over Phase II.

¹ AT&T Florida’s Petition, footnote on page 7.

- Should the Commission grant AT&T Florida's petition, residents in Phase II could be charged higher rates for (or even denied) backup or emergency service, which are currently available to residents of Phase I, since Phase I is now being served by AT&T Florida.
- Avalon Development believes all of the necessary equipment AT&T Florida will need to serve Phase II (except for in-ground facilities in Phase II) has already been installed.
- Avalon Development views AT&T Florida's petition as an attempt to deny that it has received easements granted by Avalon Developer. As AT&T Florida is already providing voice service in Phase I, Avalon Development cannot understand the reasoning behind permitting AT&T Florida to abandon service to the development at this late date. If the Villages of Avalon development and easements were sufficient in the first place to provide voice service, it is not clear why they are now insufficient.
- AT&T Florida has always been aware of the other providers providing service in the area when it began to provide service in Phase I. The existence of competition for services, even competition for voice services, should not be a sufficient excuse for AT&T Florida to simply walk away from the residents of the Villages of Avalon, Phase II.

Staff Analysis

AT&T Florida is seeking a waiver of its COLR obligation for good cause shown based on the conditions and circumstances of providing voice service to the Villages of Avalon, Phase II pursuant to Section 364.025(6)(d), Florida Statutes. AT&T Florida's burden to show good cause is high due to the importance that the Florida Legislature attaches to meeting universal service objectives by ensuring that customers who desire basic local exchange telecommunications service receive it from the incumbent LECs, such as AT&T Florida.

In its petition, AT&T Florida points to nine conditions (numbered 1 – 9 above) it believes justify a waiver of its COLR obligation. Staff's analysis of each of AT&T Florida's claims follows.

1. ***AT&T Florida claims that it will not be able to provide its full panoply of services, including video and data, due to the granting of a "voice-only" easement.*** Staff reviewed the easements granted to AT&T Florida by Avalon Development and concurs that it appears AT&T Florida is restricted from providing video and data services to the residents of the Villages of Avalon, Phase II. However, the prohibition on AT&T Florida's provision of video and data services does not preclude AT&T Florida from bundling its voice service with its other service offerings such as cellular telephone service, long distance, or its other vertical voice features, such as call waiting, voice mail, caller ID, and more. Further, AT&T Florida admits that it does have a marketing relationship with DirecTV for the provision of satellite video services to AT&T Florida's customers.²

² AT&T Florida Response to Staff Data Request No. ATT-1, Item No. 4.

2. ***AT&T Florida claims that the restriction on service offerings results in (1) reduced revenue opportunities that create uncertainty as to the time period it will take for AT&T Florida to recover the cost of installing its facilities in the development, (2) the inability of AT&T Florida to offer subscribers in Phase II the discounts obtainable when subscribers purchase a bundle of voice and data services, and (3) the necessity to modify AT&T Florida's front-end ordering and provisioning systems to comply with the voice-only restriction.*** AT&T Florida's argument implies that because it cannot provide video and data services, it does not know if it will ever recover the cost of installing its facilities in the development. AT&T Florida has not provided any documentation to support its claim. Second, AT&T Florida has not explained how the inability to offer subscribers discounts on a bundle of voice and data services affects its ability to provide voice service pursuant to COLR obligations. AT&T is not prohibited from offering its subscribers discounts on a bundle of voice service and cellular service. Third, AT&T Florida has not included any documentation or cost data supporting its claims that it is necessary to modify its front-end ordering and provisioning system to comply with a voice-only restriction.
3. ***AT&T Florida claims that Avalon Development has entered into a non-exclusive agreement with Connexion Technologies who in turn contracted with Beyond Communications to provide voice service at Avalon, Phase II.*** Staff concurs with AT&T Florida that it appears Beyond Communications will provide voice service in the development. Staff confirmed that Beyond Communications' website lists the Villages of Avalon as one of the communities for which it provides communications service. The website indicates that voice service is "available" at the development. However, Avalon Development refused staff's request to provide copies of any agreements with other communications providers for the provision of video, data, and voice services.
4. ***AT&T Florida claims that Avalon Development has entered into a bulk agreement with Beyond Communications for video and data services to all homes within the development in which the Home Owner Association Fees include cable television and Internet (data) service.*** To support its claim, AT&T Florida proffered a copy of a webpage from William Ryan Homes' website, a builder selling homes in the Villages of Avalon. The William Ryan Homes webpage states, "HOA fees include cable, internet service (fiber optics) and much much more." Staff does not believe that the information AT&T Florida provided constitutes irrefutable proof of its claim. Staff is unable to confirm, at this time, if Avalon Development has entered into a bulk agreement for video and data services. Avalon Development refused to provide staff with copies of its agreements with Connexion Technologies and/or Beyond Communications. Staff confirmed that Beyond Communications' website also indicates that video and data services are "included" in the development. However, staff does not believe a bulk agreement for video services is relevant to AT&T Florida's Petition as AT&T Florida indicated in its response to staff's data request that it is not offering video services in Hernando County at this time.
5. ***AT&T Florida claims that Connexion Technologies and/or Beyond Communications have compensated Avalon Development for the rights extended to Connexion Technologies and Beyond Communications to be the exclusive provider of video and***

data services. AT&T Florida did not provide any documentation in its petition to support its claim.

6. *AT&T Florida is claiming that notwithstanding the service agreements for the provision of voice, data and, video service between Avalon Development and Connexion Technologies and/or Beyond Communications, Avalon Development has requested that AT&T Florida install facilities and provide voice-only service to Avalon, Phase II. Because of the service agreements between Avalon Development and Connexion Technologies and/or Beyond Communications, and the attendant service restrictions on AT&T Florida, there is an incredible amount of uncertainty as to anticipated demand, if any, for AT&T Florida's voice services in Avalon, Phase II.* Staff understands AT&T Florida's claim to mean that if AT&T Florida is restricted from providing video and data services along with its voice services, it is likely that only a few residents will choose voice service from AT&T Florida. In its letter dated June 7, 2007, AT&T Florida estimates that it expects a 20% take rate for its voice service in Avalon, Phase II, based on the actual percentage of residents who ordered service from AT&T Florida in Avalon, Phase I.³ Staff concurs with AT&T Florida that a 20% estimated take rate is reasonable for Phase II, based on the actual take rate in Phase I. In its response to Staff's Second Data Request, AT&T Florida provided information that shows the number of customers in Avalon, Phase I to which AT&T Florida is providing voice service. AT&T Florida claims that its actual take rate for Phase I is 15.5%.⁴
7. *AT&T Florida states that the cost of installing facilities in Avalon, Phase II will amount to approximately \$244,966. AT&T Florida included the Affidavit of Larry Bishop, dated February 23, 2007, wherein Mr. Bishop affirms the estimated cost for AT&T Florida's installation of network facilities is reasonable.* Staff does not dispute this amount, but AT&T Florida did not include in its petition any detailed cost data or documentation to support its estimates. AT&T Florida indicates that it has already installed its facilities in Phase I and is currently providing voice service to some of the residents in Phase I, which is adjacent to Phase II. AT&T Florida states that it already incurred a cost of approximately \$230,000 install facilities in Phase I.⁵
8. *AT&T Florida argues that it should not be forced, pursuant to COLR, to make unwise economic decisions by installing duplicative facilities.* AT&T Florida did not demonstrate through cost studies or financial projections that providing voice services pursuant to COLR in the Villages of Avalon, Phase II, is an "unwise economic decision." Nor did AT&T Florida provide documentation that supports its claim that its facilities are duplicative to those installed by Connexion Technologies.
9. *The COLR statute was not enacted to countenance such an inefficient economic result, especially where consumers are not in jeopardy of not having the ability to obtain voice service from an alternative provider that has entered into an agreement with the developer to provide voice service to the residents of the development over the developers own network infrastructure.* AT&T Florida did not include adequate

³ FPSC Document No. 0704624, AT&T Florida letter dated June 7, 2007, page 2.

⁴ FPSC Document No. 0704624, AT&T Florida letter dated June 7, 2007, page 2, footnote 1.

⁵ AT&T Florida Petition, footnote on page 7.

documentation in its petition to demonstrate that providing voice services to the residents in the Villages of Avalon, Phase II, will yield an inefficient economic result, nor did AT&T Florida define or quantify an “inefficient economic result.”

Rule 25-4.067, Florida Administrative Code (F.A.C.), Extension of Facilities, Contributions in Aid of Construction, allows AT&T Florida to recover a portion of its costs for extending its facilities pursuant to the rule and its standard extension provisions set forth in its tariff. Under this rule, it appears AT&T Florida could seek to recover from the developer the portion of construction costs that exceed five times AT&T Florida’s anticipated annual exchange revenues from the residents.

While not included in its petition, AT&T Florida informed the Commission that on or about May 15, 2007, AT&T Florida sent correspondence to Avalon Development requesting payment for a portion of its costs to install facilities to serve Avalon, Phase II, in accordance with Rule 25-4.067(3), Florida Administrative Code, and its tariffs. In this case, AT&T Florida requested from Avalon Development payment in the amount of \$171,606 prior to extending its lines to serve Avalon, Phase II. In its letter to Avalon Development, AT&T Florida indicated that it estimates that it will incur a cost of approximately \$326,819 to install its facilities in Avalon, Phase II and that the anticipated five times annual exchange revenue in Avalon, Phase II is approximately \$155,213, based on a take rate of 20%.⁶ Hence, AT&T Florida requested the portion of its cost ($\$326,819 - \$155,213 = \$171,606$) that exceeds its anticipated five times annual exchange revenues.

In its letter to the Commission dated June 7, 2007, AT&T Florida indicated that on four separate occasions, it contacted Avalon Development to schedule a meeting to discuss its request. AT&T Florida claims that it has not received a response from Avalon Development regarding its request for payment.

The estimated cost in AT&T Florida’s request for payment from Avalon Development is significantly more than the amount (\$244,966) of the estimate to which Larry Bishop attested to in his Affidavit filed with AT&T Florida’s petition. AT&T Florida offered no explanation for the discrepancy in cost estimates.

Based on the figures provided by AT&T Florida, staff estimates that AT&T Florida will collect enough revenue to cover its costs for installing facilities in Avalon, Phase II in just under eight (8) years using AT&T Florida’s estimated cost of \$244,966. AT&T Florida anticipates it will receive \$155,213 in revenue within the first five (5) years. Extrapolating this amount out over time until the revenue equals \$244,966, it will take 7 years and 11 months for AT&T Florida to recover its cost. Using AT&T Florida’s higher cost estimate, it would take 10 ½ years for AT&T Florida to recover its costs.

Avalon Development’s arguments fail to address the specific issues AT&T Florida cites in its petition. Avalon Development instead argues that AT&T Florida should not be granted a COLR waiver because (1) AT&T Florida is already providing service to Avalon, Phase I, (2) Avalon Development has granted all the easements required for AT&T Florida to provide voice

⁶ FPSC Document No. 0704624, AT&T Florida letter dated June 7, 2007, page 2.

service in Phase II, (3) AT&T Florida's COLR obligation applies only to voice service, (4) Avalon Development's agreements with other service providers for data and video services are irrelevant to AT&T Florida's COLR obligation, and (5) it is not uneconomic for AT&T Florida to provide service in Avalon, Phase II since it is already providing service to Avalon, Phase I.

Conclusion

Staff reviewed the easements granted to AT&T Florida by Avalon Development and concurs that it appears AT&T Florida is prohibited from providing video and data service to the residents of the Villages of Avalon, Phase II. Staff requested from Avalon Development copies of the agreements between Avalon Development and Connexion Technologies and/or Beyond Communications for the provision of communications services to the Villages of Avalon. Avalon Development claims that it is not at liberty to disclose any of the information pursuant to the agreements and questions "whether the provision of video and data services to residents in Avalon (whether by AT&T or other providers) is within the regulatory jurisdiction of the Commission."⁷

Staff believes that for the Commission to grant a waiver, the burden to make a showing of good cause rests solely on the petitioner. In this case, staff believes that AT&T Florida has not provided compelling documentation and data supporting its claim that good cause exists for the Commission to relieve AT&T Florida of its COLR obligation to make its voice service available to any resident requesting such service. At a minimum, staff believes AT&T Florida should prove that Avalon Development entered into an exclusive agreement with Connexion Technologies and/or Beyond Communications to provide video and data, and provide conclusive cost data to support its estimated cost to install facilities for voice service only.

In this case, AT&T Florida did not prove that the developer has an exclusive agreement with another party to provide video and data, nor did AT&T Florida provide any data supporting its cost estimate for voice service only. AT&T Florida, in its petition, proffered only WebPages and emails that allude to the circumstances that exist at the Villages of Avalon, Phase II: none of which appear to relate to the actual provision of voice services. AT&T Florida also proffered an affidavit by one of its employees attesting to the cost of installing facilities, but failed to provide any supporting cost information. Moreover, based on AT&T Florida's estimated cost of installing its facilities in Avalon, Phase II and its anticipated exchange revenue, staff estimates AT&T Florida will recover its costs of installing its facilities in less than eight years.

Therefore, staff believes that AT&T Florida has not made a prima facie case for good cause, and the Commission should deny AT&T Florida's Petition for relief from its carrier-of-last-resort obligations for the provision of basic local telecommunications service to Phase II of the development known as Villages of Avalon, located in Hernando County.

⁷ Avalon Development's response to Staff Data Request No. VA-1, received on March 29, 2007.

Docket No. 070126-TL

Date: June 27, 2007

Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested this docket should be closed administratively upon issuance of the Consummating Order. **(R. Mann, Wiggins)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the above staff recommendation.