Dorothy Menasco

From: Woods, Vickie [vf1979@att.com]
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To: Filings@psc.state.fl.us
Subject: 060822-TL AT&T Florida's Post-Hearing Brief
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ORIGINAL

A. Vickie Woods
Legal Secretary to James Meza III, Manuel A. Gurdian
and Tracy W. Hatch
BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vickie.woods2@bellsouth.com

B. Docket No.: 060822-TL

Petition of BellSouth Telecommunications, Inc. for Relief from Carrier-of-Last Resort Obligations Pursuant to Florida Statutes §364.025(6)(d)

C. AT&T Florida
on behalf of Manuel A. Gurdian

D. 26 pages total (.pdf) (includes letter, pleading and Certificate of Service)
24 pages total (word doc.)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Post-Hearing Brief

.pdf word doc.

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at&t

Manuel A. Gurdian
Attorney
Legal Department

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (305) 347-5561
F: (305) 577-4491
manuel.gurdian@att.com

ORIGINAL

August 7, 2007

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 060822-TL
Petition of BellSouth Telecommunications, Inc. for Relief from Carrier-of-Last-Resort Obligations (COLR) Pursuant to Florida Statutes §364.025(6)(d) for two private subdivisions in Nocatee development

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Post-Hearing Brief, which we ask that you file in the captioned docket.

Copies were served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

Enclosures

cc: All Parties of Record
Jerry D. Hendrix
E. Earl Edenfield, Jr.
James Meza III

CERTIFICATE OF SERVICE
Docket No. 060822-TL

I HEREBY CERTIFY that a true and correct copy was served via (*) Electronic Mail and First Class U. S. Mail this 7th day of August, 2007 to the following:

Florida Public Service Commission
Patrick Wiggins, Staff Counsel (*)
Rick Mann, Staff Counsel (*)
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
pwiggins@psc.state.fl.us
rmann@psc.state.fl.us

Nocatee Development Company
Attention: Richard T. Ray
4314 Pablo Oaks Court
Jacksonville, Florida 32224

Anne T. Klinepeter, Registered Agent
4314 Pablo Oaks Court
Jacksonsville, FL 32224

The Parc Group, Inc.
Attention: Richard T. Ray
4314 Pablo Oaks Court
Jacksonville, Florida 32224

Anne T. Klinepeter, Registered Agent
4314 Pablo Oaks Court
Jacksonsville, FL 32224

SONOC Company, LLC
Attention: Richard T. Ray
4310 Pablo Oaks Court
Jacksonville, Florida 32224

DDI, Inc., Registered Agent
4310 Pablo Oaks Court
Jacksonville, FL 32224

Toll Jacksonville Limited Partnership
250 Gibraltar Road
Horsham, PA 19044

CT Corporation System, Registered Agent
1200 South Pine Island Road
Plantation, FL 33324

Pulte Home Corporation
c/o Jane Celofsky, Legal Dept.
100 Bloomfield Hills Parkway
Suite 300
Bloomfield Hills, MI 48304

CT Corporation System, Registered Agent
1200 South Pine Island Road
Plantation, FL 33324

Nocatee Development Company/SONOC Company LLC
M. Lynn Pappas (*)
c/o Pappas Law Firm
245 Riverside Avenue, Suite 400
Jacksonville, FL 32202
Tel. No. (904) 353-1980
Fax No. (904) 353-5217
lpapas@papnet.com

Floyd R. Self **(+)**(*)
Messer Caparello & Self, P.A.
Regional Center Office Park
2618 Centennial Place
P.O. Box 15579 (32317)
Tallahassee, FL 32308
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
fself@lawfla.com
Represents Nocatee

Manuel A. Gurdian

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE:	)	
	)	Docket No. 060822-TL
Petition of BellSouth Telecommunications,	)	
Inc. for Relief from Carrier-of-Last-Resort	)	
Obligations Pursuant to Florida Statutes	)	
§364.025(6)(d).	)	Filed: August 7, 2007
	)	

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T FLORIDA'S POST-HEARING BRIEF

BellSouth Telecommunications, Inc. d/b/a ("AT&T Florida") respectfully submits this Post-Hearing Brief in the above-captioned docket.

INTRODUCTION AND SUMMARY

This case is about the Nocatee Development Company's and SONOC Company LLC's (collectively, "Developer") decision to prevent AT&T Florida from providing video and data service to approximately 2,000 single-family homes in two private subdivisions in the Nocatee development ("Private Subdivisions", collectively or "Riverwood" or "Coastal Oaks", individually"). The rationale for the Developer's decision is simple – if AT&T Florida is allowed to compete and provide these services, the Developer could lose significant financial consideration that it currently receives from Comcast. Comcast has agreed to pay the Developer this financial consideration in return for (1) the effective or *de facto* exclusive right to provide video and data service to residents in the Private Subdivisions; and (2) the Developer's agreement to exclusively market Comcast's ***voice***, ***video***, and ***data*** services to all potential, future, and actual residents of Nocatee. Notwithstanding this decision to restrict AT&T Florida's ability to compete, the Developer is attempting to force AT&T Florida, through its carrier-of-last-resort ("COLR") obligation, to make uneconomic investments by installing duplicative facilities in the Private Subdivisions to provide voice service ***only***.

Lest there be any confusion, AT&T Florida desires to serve all of the residents of Nocatee with all of its services; however, AT&T Florida should not be forced to make uneconomic investments because the Developer has hijacked COLR for its own financial gain. Importantly, AT&T Florida is not seeking COLR relief because it is at a competitive disadvantage due to the exclusive marketing agreement Comcast has with the Developer. Indeed, because the Developer has not restricted the types of services AT&T Florida can provide

in the public communities of Nocatee, AT&T Florida is serving these areas even though Comcast has a distinct competitive advantage. Tr. at 99-100. Accordingly, AT&T Florida's Petition is not about retribution for the Developer choosing Comcast over AT&T Florida or about AT&T Florida needing leverage in future negotiations with developers. Tr. at 139. Rather, this case is about the Developer forcing AT&T Florida to make uneconomic investments under the guise of COLR for their own financial gain. Simply put, absent the Developer-imposed restrictions on the types of services AT&T Florida can provide, AT&T Florida would not be before the Commission asking for COLR relief. Tr. at 80; 103.

Under § 364.025, AT&T Florida has the right to seek COLR relief from the Florida Public Service Commission ("Commission") for "good cause" shown. AT&T Florida submits that "good cause" is established when the following conditions are satisfied: (1) a developer has entered into an exclusive or near exclusive agreement for video and data services with an alternative provider; (2) a developer expressly or effectively restricts the LEC to providing voice service only; (3) providers other than the LEC will be or will have the capability of providing voice or voice replacement service to residents; and (4) the provision of voice service by the LEC is uneconomic. The following compelling, unrefuted evidence establishes "good cause" in this case:

- Through a voice-only easement, the Developer is prohibiting AT&T Florida from providing anything other than voice service to the Private Subdivisions. Tr. at 72.

- The Developer has entered into a contract with Comcast, wherein Comcast agrees to provide the Developer with significant "door fees" for every home purchased in Nocatee and, depending on Comcast's penetration rate for each service, a varying percentage of the monthly recurring revenue Comcast receives from every resident that purchases voice, data, or video

services from Comcast. Tr. at 152; Exhibit 4, Compensation Agreement at § 1; Marketing Support Addendum at § 2; Installation and Services Agreement at § 9.

- In return for this financial consideration, (1) Comcast has the ability to provide voice, data, and video services throughout Nocatee, including the Private Subdivisions; and (2) the Developer/Builders are obligated to market Comcast's voice, video, and data services to potential residents from the time a customer first looks at a home until the time a home closes and a customer moves in. Tr. at 140; Exhibit 4, Marketing Support Addendum at § 1; Installation and Services Agreement at § 7.

- Under the terms of the contracts with the Developer, Comcast has the right to terminate any payments to the Developer if AT&T Florida is granted the right to provide video and data service in a private easement and AT&T Florida "turns-up" video and data services in the Private Subdivision. Tr. at 97-98; Exhibit 4, Compensation Agreement at § 2; Marketing Support Addendum at § 2.2; Installation and Services Agreement at § 13.4.

- The Developer has stated that, "as long as the agreement we have with Comcast is active, then AT&T will be restricted from providing video and data services." Exhibit 12 at 57.

- Residents of the Private Subdivisions will be able to obtain voice service from Comcast, another VoIP provider, or a wireless carrier. Tr. at 66-67; Exhibit 6, Nocatee's Response to Request for Admission Nos. 18, 19.

- AT&T Florida estimates that it will cost $2.3 million to deploy facilities to provide voice service in the Private Subdivisions. Tr. at 40.

- Based on another single-family home development in Florida where AT&T Florida is restricted by a voice-only easement, AT&T Florida anticipates that its take rate for voice service will be 20 percent or less. Tr. at 76. In fact, because the Developer has every

economic incentive to push residents to Comcast's voice service due to the compensation arrangement between the Comcast and the Developer, AT&T Florida's actual take rate may be substantially less.

- AT&T Florida has offered to share in the economic burden associated with providing voice service only by charging the Developer, pursuant to its special construction tariff and the Commission's line extension rule, special construction costs that exceed AT&T Florida's five year estimated local exchange revenue. Tr. at 78. The Developer has refused to pay this or any amount and thus has not agreed to take on any financial burden associated with its COLR request. *Id.*

ISSUES AND POSITIONS

***Issue 1*:** Under Section 364.025(6)(d), Florida Statutes, has AT&T Florida shown good cause to be relieved of its Carrier-of-Last-Resort obligation to provide service at the Coastal Oaks and Riverwood subdivisions in the Nocatee development located in Duval and St. Johns Counties?

****Position:* Yes, AT&T Florida has established good cause to be relieved of its COLR obligation for the Private Subdivisions. Alternatively, and in the event the Commission finds otherwise, AT&T Florida has no obligation to install facilities in the Private Subdivisions until the Developer pays special construction charges.***

I. "Good Cause" Exists for AT&T Florida to Be Relieved of Its COLR Obligation for Nocatee.

A. The Legislature Has Determined that a LEC's COLR Obligation Is Not Absolute and Does Not Apply in Certain Circumstances.

Under § 364.025, F.S., a local exchange company ("LEC") is required to furnish basic local exchange telecommunications service within a reasonable period of time to any person requesting such service within the company's service territory. § 364.025, F.S.; Tr. at 65. This obligation has historically been referred to as the LEC's carrier-of-last-resort ("COLR") obligation. *Id.* COLR is specifically tied to Universal Service, which the Florida Legislature has

defined as an "evolving level of access to telecommunications services, taking into account advances in technologies, services, and market demand for essential services, that the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas." *See* § 364.025, F.S. The basic concept of COLR and Universal Service is that all residents in a company's service territory, including those in rural areas, will be able to receive basic local service in a reasonable period of time and at reasonable rates. Tr. at 65.

The obligation of LECs to provide basic voice service in a reasonable period of time and at reasonable rates, however, is not absolute. In recognition of the advance of competition from traditional communications providers and non-traditional, unregulated alternative providers (*e.g.* wireless carriers, cable companies, VoIP providers), the Florida Legislature created several exceptions to a LEC's COLR obligation in the 2006 legislative session. Tr. at 65. These exceptions, which are the Legislature's most recent pronouncement of its intent regarding COLR, are the linchpin of AT&T Florida's case.

The revised COLR statute now provides two avenues for a LEC to obtain relief from its traditional COLR obligation. First, § 364.025(6)(b) provides the LEC with *automatic* relief if one of the four following scenarios applies:

- A developer permits only one communications service provider to install its communications service related facilities or equipment to the exclusion of the LEC, during the construction phrase of the property.

- A developer accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications service providers to the exclusion of the LEC.

- A developer collects from occupants or residents charges from the provision of any communication service provided by an entity other than the LEC, including, but not limited to, collection through rent, fees, or dues.

- A developer 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 LEC's access to the property.

§ 364.025(6)(b), F.S.

In conjunction with creating COLR relief, the Legislature also created two new definitions – "communications service provider" and "communications service". "Communications service provider" is defined as "any person or entity providing communications services, any person or entity allowing another person or entity to use its communications facilities to provide communications services, or any person or entity securing rights to select communications service providers for a property owner or Developers." § 364.025(6)(a)(2). "Communications service" is defined as "voice service or voice replacement service through the use of any technology." § 364.025(6)(a)(3). While not directly at issue in this case, these new definitions and the automatic relief provisions are important in analyzing the instant Petition. This is so because they evidence the Legislature's intention to provide a LEC with COLR relief when (1) another, alternative provider is providing voice service or "voice replacement service through the use of any technology" to residents of a property; and (2) the provision of voice service is economically infirm due to contractual arrangements the Developers has entered into with alternative providers for voice service.

Second, when none of those four specific automatic relief scenarios are present, § 364.025(6)(d), F.S., provides that a LEC may petition the Commission for a waiver of its COLR obligation, which shall be granted upon "good cause" shown:

> 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 Developers. The commission shall have 90 days to act on the petition.

§ 364.025(6)(d). It is this scenario that forms the basis for AT&T Florida's Petition.

B. "Good Cause" Means Valid Grounds to Seek Relief of COLR, and the Burden of Proof Is Not a "Super Burden".

In creating discretionary COLR relief, the Legislature did not articulate what specifically constitutes "good cause." Instead, it left that determination to the Commission. Nevertheless, it is clear that the Legislature intended that a LEC would not have a COLR obligation in certain circumstances – *e.g.*, when "good cause" is shown. Thus, the seminal inquiry is what constitutes "good cause".

"When interpreting a statute, legislative intent is the polestar of the inquiry." *Hanes City HMA, Inc. v. Carter*, 948 So. 2d 904 (Fla. App. 2nd DCA 2007) (citing *Cason v. Florida Dep't. of Mgm't Serv.*, 944 So. 2d 306 (Fla. 2006)). Such intent is derived primarily from looking at the plain meaning of the statute. "If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." *Zuckerman v. Alter,* 615 So. 2d 661, 663 (Fla. 1993). "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or

by the clear intent of the legislature." *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) (citing *Southeastern Fisheries Ass'n, Inc. v. Department of Natur. Resources*, 453 So. 2d 1351 (Fla. 1984)). If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary. *Gardner v. Johnson*, 451 So. 2d 477 (Fla. 1984).

In addition, as stated by the Supreme Court in *Unruh v. State*, 669 So. 2d 242 (Fla. 1996):

> As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless. Furthermore, whenever possible courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. This follows the general rule that the legislature does not intend to enact purposeless and therefore useless legislation.

Here, the statute is clear and unambiguous: A LEC not automatically relieved of its COLR obligation "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." *See* 364.025(6)(d), F.S. "Good" is defined by *Black's Law Dictionary* (6th ed.) as "valid; sufficient in law", while "cause" is defined by *Black's Law Dictionary* (6th ed.) as a "ground for a legal action". Further, "good cause" is defined by *Blacks Law Dictionary* (6th ed.) as "[l]egally sufficient ground or reason." Accordingly, based on its plain and ordinary meaning, "good cause" essentially means valid grounds to bring a request for COLR relief.[1]

Moreover, upon reading the provisions of § 364.025 together and giving full effect to all, as required under the law, it is clear that "good cause" or "valid grounds" for COLR relief exist if the following conditions are satisfied: (1) a developer has entered into an exclusive or near

[1] This meaning is consistent with how the Florida Supreme Court has defined "good cause" in the context of untimely pleadings: "We have defined 'good cause' in this context . . . [as] a substantial reason, one that affords a legal excuse, or a cause moving the court to its conclusion, not arbitrary or contrary to all the evidence. . . ." *In re: Estate of Goldman*, 79 So. 2d 846 (Fla. 1955). AT&T Florida has been unable to locate any Florida case law setting forth the definition of "good cause" in a more relevant context.

exclusive agreement for video and data services with an alternative provider; (2) the LEC is expressly or effectively restricted by the developer to providing voice service only; (3) providers other than the LEC will be or will have the capability of providing voice or voice replacement service to residents; and (4) the provision of voice service by the LEC is uneconomic.

Such an interpretation harmonizes *discretionary* COLR relief with *automatic* COLR relief in that, with both, residents will have access to voice or voice replacement service from another provider, which is the ultimate purpose of COLR. Tr. at 133 (". . .carrier of last resort by its nature means that, there's someone there to provide service."). Further, under both, COLR relief would be available when it is uneconomic to provide voice service to a development due to contractual arrangements a developer makes with an alternative provider. *See e.g.,* § 364.025(6)(b)(3).

Any suggestion by Nocatee that, because COLR is limited to voice service, discretionary relief is not available when a LEC is only restricted in providing video and data service is erroneous. As an initial matter, this argument would render the discretionary relief provisions of § 364.025(6)(d) meaningless. This is so because it would require a restriction on a LEC's ability to provide voice service in order to obtain discretionary COLR relief; however, 364.025(6)(b) already provide *automatic* COLR relief in those situations. Therefore, under this argument, there would be no situations where a LEC could obtain discretionary relief. *See Unruh*, 669 So. 2d at 245 ("As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless. . . This follows the general rule that the legislature does not intend to enact purposeless and therefore useless legislation.").

Moreover, the express wording of Section 364.025(6)(d) does not support this claim. Unlike the automatic provisions, which focus on the provision of "communications services" by

a "communications service provider", the discretionary COLR relief provision provides a LEC with the right to seek COLR relief "for good cause shown based on the facts and circumstances of ***provision of service*** to the multitenant business or residential property." § 364.025(6)(d) (emphasis added). The use of "service" instead of "communications service" is significant. It makes it clear that the Legislature did not intend for discretionary relief to be limited to only when a LEC is prohibited in providing voice service. Had the Legislature intended otherwise, it would expressly used "communications service" and not "service" in § 364.025(6)(d).

Furthermore, this expected argument from Nocatee disregards the fact that the automatic relief provisions of § 364.025(6)(b) recognize that automatic relief is available when it is uneconomic for the LEC to provide voice service to a property. *See* § 364.025(6)(b)(3) (stating that a LEC has automatic relief when the Developers collects charges for communications service provided by an alternative provider in the form of rent, fees, or dues). Clearly, if the Legislature determined that a LEC has *automatic* COLR relief when it is uneconomic to provide voice service due to a Developer's contractual arrangement with an alternative provider, the Legislature also intended for a LEC to obtain *discretionary* COLR relief when it is uneconomic for the LEC to provide voice service, even if the Developer has not expressly included voice service in the contractual arrangement with the alternative provider. Such an interpretation harmonizes discretionary COLR relief with automatic COLR relief and renders a consistent application of the 2006 revisions to the COLR statute. *See Golf Channel v. Jenkins,* 752 So. 2d 561, 564 (Fla. 2000) ("[R]elated statutory provisions should be read together to determine legislative intent. . .); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.").

Equally unpersuasive is any argument that AT&T Florida must meet a "super burden" in order for the Commission to grant discretionary COLR relief. At the outset, the express wording of § 364.025(6)(d) does not contain any language to suggest that a petition must prove "good cause" by clear and convincing evidence, beyond a reasonable doubt, or any other standard that imposes a heightened burden of proof on the petitioner. Rather, the statute simply provides that relief can be sought for "good cause shown based on the facts and circumstances of the provision of service to" each property. *See* 364.025(6)(d). Had the Legislature intended to impose a "super burden" it would have done so expressly by imposing that requirement in the language of the statute.[2] In addition, Florida law suggests that the standard for establishing "good cause" is the "preponderance of the evidence" standard and not a heightened "clear and convincing" standard. *See e.g., Cochran v. Broward County Police Benev. Assoc., Inc.*, 693 So. 2d 134, 135 (Fla. App. 4th DCA 1997).

C. "Good Cause" Is Present Based on the Facts and Circumstances of the Nocatee Development.

i. The Developer Has Provided Comcast with the Exclusive Right to Provide Data and Video Service in the Private Subdivisions.

There is no dispute that the Developer and Comcast entered into a 15 year contract for the Nocatee development. Under this contractual arrangement, the Developer receives significant

[2] The United States Supreme Court has held that silence by Congress regarding the standard of proof required "is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 659 111 S.Ct. 654 (1990). Thus, the Court held that it will presume that the "preponderance of the evidence" standard would apply in civil actions between private litigants, unless "'particularly important individual interest or rights are at stake.'" *Id.* (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-390, 103 S.Ct. 683 (1983)). Under this standard, the Court has applied a clear and convincing standard in a proceeding to terminate parental rights and in an involuntary commitment proceeding. *See Herman*, 459 U.S at 389 (citing *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804 (1979); *Woodbury v. INS*, 385 U.S. 276, 285-86, 87 S.Ct. 483 (1966)). Even assuming the right to voice service is an "important individual right", this is not a case where the Commission's decision could result in residents in Nocatee not receiving ***any*** voice service. In fact, if the Petition is granted, residents will receive voice service from Comcast, other VoIP providers, and wireless carriers. Thus, there is no important individual right at stake in this proceeding. It should be noted that AT&T Florida has found no Florida case law adopting the Supreme Court's reasoning.

financial consideration from Comcast in return for the Developer (1) providing Comcast the exclusive or *de facto* exclusive right to provide video and data service in the Private Subdivisions; and (2) marketing only Comcast's voice, data, and video services to potential, future, and actual residents of the entire development. *See* Tr. at 140; Exhibit 4, Marketing Support Addendum at § 1; Installation and Services Agreement at § 7.

Specifically, Comcast has agreed to pay the Developer "door fees" for every home purchased in Nocatee and, depending on Comcast's penetration rate for each service, a varying percentage of the monthly recurring revenue Comcast receives for every resident that purchases voice, data, or video services from Comcast. *See* Tr. at 152; Exhibit 4, Compensation Agreement at § 1; Marketing Support Addendum at § 2. In return for this financial consideration, (1) Comcast has the ability to provide voice, data, and video services throughout Nocatee, including the Private Subdivisions; and (2) the Developer (or builder) is obligated to market Comcast's voice, video, and data services to potential, future, and actual residents of the entire development. Tr. at 140; Exhibit 4, Marketing Support Addendum at § 1. As to the marketing support obligation, the Developer's obligation is extremely broad and covers the time a potential buyer first looks at a home until the time the owner moves in. Indeed, the Developer must do the following under its contract with Comcast:

- Notify residents and prospective residents of the availability of voice, data, and video services from Comcast;
- Present Comcast's marketing materials to existing and prospective residents during sales presentations and at real estate closings and to existing residents who are not subscribers to Comcast's services;
- Display and maintain model home/sales centers materials provided by Comcast;

- Provide to Comcast on a monthly basis the new addresses of new residents prior to their move in date;

- Provide access to activate cable service in new residential units prior to the resident's move-in date and providing Comcast's marketing materials at each residential unit;

- Provide Comcast's sales materials and contact information to purchasers upon acceptance of the purchase and sales agreement.

See Exhibit 4, Marketing Support Addendum at § 1.

Under the terms of the contracts with the Developers, Comcast has the right to terminate any payments to the Developer if AT&T Florida is granted the right to provide video and data service in a private easement and AT&T Florida "turns-up" video and data services in the Private Subdivision. Tr. at 97-98; Exhibit 4, Compensation Agreement at § 2; Marketing Support Addendum at § 2.2; Installation and Services Agreement at § 13.4. Based on these facts, it is clear that the Developer has entered into a contractual arrangement with Comcast that provides Comcast with the exclusive or *de facto* exclusive right to provide video and data service to residents in the Private Subdivisions.

Any argument that the arrangement with Comcast is not exclusive should be summarily rejected. This argument is based on semantics and is premised entirely on the belief that (1) AT&T Florida can install whatever facilities it desires in the private communities; and (2) Comcast has the right to stop making payments to the Developer if AT&T Florida "turns-up" video or data service in the Private Subdivisions. While technically accurate, this argument fails to take into account reality, including the fact that the Developer is willing to provide AT&T Florida with a voice-only easement. Tr. at 72. Accordingly, AT&T Florida has no legal right or opportunity to provide any service other than voice service to the Private Subdivisions. Further,

it disregards the Developer's own statement that "as long as the agreement we have with Comcast is active, then AT&T will be restricted from providing video and data services." Exhibit 12 at 57. Thus, the Developer's own admission makes it clear that it will not jeopardize the financial payments Comcast makes to it by changing the easement and allowing AT&T Florida to provide video and data service.

The Commission should also reject the argument that, even if the agreement with Comcast is exclusive, AT&T Florida can attempt to convince the Developer to modify the voice-only easement. Such an argument defies logic because it would require the Developer to risk losing the financial payments Comcast currently makes. And, as stated above, the Developer has made it clear that allowing AT&T Florida to provide video and data services in the Private Subdivisions is not an option as long as the agreement with Comcast is in place. Exhibit 12 at 57. As cogently stated by Mrs. Shiroishi:

> . . . We have been in discussions with Nocatee about the easement since the time that they have communicated to us that they were going to choose Comcast and the voice-only restriction. And we have seen, although I'm not personally involved in those negotiations, as you can see from the documents, we've seen no movement from them on changing that easement. Nor from a common sense perspective does it seem to me that they would have any incentive to do so if, if they wanted to retain the financial benefits that are there today.

Tr. at 98. Accordingly, the Commission should find that the Developer and Comcast have entered into an exclusive or *de facto* exclusive agreement for the provision of data and video services within the Private Subdivisions.

ii. The Developer Is Only Allowing AT&T Florida to Provide Voice-Service in the Private Subdivisions.

There is also no dispute that the Developer, through a voice-only easement, is only allowing AT&T Florida to provide voice-service to residents of the Private Subdivisions. Tr. at

72; Nocatee's Response to Request for Admission No. 8. And, as stated above, the Developer has no intention of changing this voice-only restriction.

iii. Residents in the Private Subdivisions Will Be Able to Receive Voice Services from Other Providers.

The underlying purpose of COLR is for consumers to have access to voice service, not voice service from a LEC. The 2006 revisions to § 364.025, F.S. make this clear as the law now automatically relieves AT&T Florida of its COLR obligation in certain situation and authorizes AT&T Florida to seek relief in others. While the automatic provisions are not directly at issue in this case, these new provisions are important, because they evidence the Legislature's intention to provide a LEC with COLR relief when an alternative provider is providing voice service or "voice replacement service through the use of any technology" to residents of a property.

This concept applies equally when AT&T is seeking discretionary COLR relief. As stated by former Commissioner Deason: "I believe that requiring uneconomic investment under the guise of carrier of last resort obligation is wasteful and is not productive and not in the public interest. And if there are viable alternatives to customers, then they have service, and that is the primary requirement of COLR obligations it seems to me." *See* Docket No. 060554-TL, Dec. 19, 2007 Agenda Conference Transcript at 25-26.

Here, there is no dispute that Comcast will be providing its VoIP voice service to residents within the Private Subdivisions. *See* Tr. at 66-67; Exhibit 6, Nocatee's Response to Request for Admission Nos. 18, 19. In describing this service to potential customers, Comcast claims that, with its "Digital Voice" product, subscribers "sacrifice nothing and gain everything. You get the same quality, clarity, and features as traditional phone service, plus advanced features – such as online access to Voice Mail – all on our private broadband network." Exhibit 13. Similarly, the Comcast marketing materials that the Developer is obligated to provide to

potential, future, and actual residents of Nocatee state that "Comcast Digital Voice is an advanced phone service that enables you to enjoy cool new features without sacrificing any of your current phone features or the clarity you expect." Exhibit 4, Nocatee's Responses to Staff's First Request for Production No. 3. Thus, Comcast is advising subscribers that its voice service is equal, if not superior, to traditional wireline service. This is consistent with Mrs. Shiroishi's testimony, where she stated that Comcast's voice service is a fixed VoIP service, which is very similar to fixed wireline service from a consumer standpoint. Tr. at 120.

In addition to Comcast offering voice service, residents of the Private Subdivisions will also be able to obtain voice service from other VoIP providers (*e.g.* over-the-top VoIP) and wireless carriers. Tr. at 66-67. The Commission has already determined in Docket No. 060763-TL that Comcast's Digital Voice product and wireless service are alternative voice service for residents in a development: ". . . [W]e find that voice service from other providers 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 within the Treviso Bay development at the time of each resident's occupancy." *See* Order No. PSC-07-0331-FOF-TL at 5.

Accordingly, no resident in the Private Subdivisions will be without voice service if AT&T Florida's Petition is granted. "They will be able to obtain voice service from Comcast and they will also be able to obtain voice service from another VoIP provide or from a wireless carrier." Tr. at 67.

iv. **Providing Voice Service Only to the Private Subdivisions Is Uneconomic for AT&T Florida.**

As testified by Mr. Bishop, AT&T Florida estimates that it will cost $2.3 million to deploy facilities to deploy a fiber-to-the-curb ("FTTC") architecture in the Private Subdivisions

to provide voice service. Tr. at 40.[3] Given the size and geographical location of the Nocatee development, FTTC architecture is the most economical architecture to provide voice service to the Private Subdivisions "no matter what services [AT&T Florida] is able to provide." Tr. at 38, 42.[4] Further, because AT&T Florida has no way of knowing which residents in the Private Subdivisions may actually order voice service, AT&T Florida must install facilities throughout the development even though it estimates a 20 percent take rate. As stated by Mr. Bishop: "You have to plan as if you're going to serve each one of those living units because you don't know which ones will actually take your service. And the reasons why we placed those [facilities] up-front is [that] we don't want to have to go back and dig up driveways, dig up customers landscaping and things like that to have to place those facilities after the fact." (Tr. at 45).

Moreover, based on another single-family, residential development in Florida, Avalon, Phase I, where AT&T Florida is restricted by a voice-only easement, AT&T Florida believes that the take rate for its voice services in the Private Subdivisions will be 20 percent or less.[5] The take rate for Avalon, Phase I is appropriate to use in the instant matter because (1) both developments consist of single-family homes; (2) both developments, through easements, are limiting AT&T Florida to providing voice service only; and (3) both developments have entered into contractual arrangements with alternative providers for the provision of voice, data, and video service. Tr. at 76. As stated by Ms. Shiroishi, ". . . Avalon Phase I is the most concrete data that we have." Tr. at 124-25.[6]

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[3] As stated by Mr. Bishop at the hearing, the $2.3 million estimate includes overhead charges, which are authorized under AT&T Florida's special construction tariff, in addition to labor and material costs. Tr. at 40.

[4] For instance, as stated by Mr. Bishop, "[i]n our analysis, the copper distribution was actually a more expensive alternative. And given the fact that copper prices continue to increase – the average cost per linear foot of copper is $1.08; whereas the average cost for fiber is .84 cents. So we did the analysis and fiber-to-the-curb is the cheapest alternative . . ." Tr. at 42.

[5] Indeed, the take rate for Avalon, Phase I is 15.5 percent. Tr. at 76.

[6] As Ms. Shiroishi explained, ". . . we don't have a lot of history or data around these types of developments. This is a relatively new thing in the market. So when we were looking for what would be a good estimation of a potential

In further support of the anticipated take rate is the fact that Comcast has a distinct competitive advantage over AT&T Florida. Specifically, as a result of the voice-only easement, AT&T Florida will not be able to offer the residents of the Private Subdivisions AT&T Florida's full panoply of services that exist today and that will exist in the future, including data and video services. Conversely, Comcast will be able to offer its "triple-play" of voice, data, and video to every-single resident of the Private Subdivisions. Tr. at 73. As a result, Comcast can use its full arsenal of promotions and discounted bundles to obtain customers while AT&T Florida is limited to only providing voice service. This puts AT&T Florida at an extreme competitive disadvantage and results in little take rate for AT&T Florida's voice services. Tr. at 74.

Moreover, because the Developer receives a varying percentage of the monthly recurring revenue Comcast receives for every resident that purchases Comcast's voice, video, or data service, the Developer has every economic incentive to push residents to Comcast for all of their services, including voice. Tr. at 140. Additionally, pursuant to the Marketing Support Addendum, the Developer will be marketing only Comcast's services to all potential, future, and actual residents of the Private Subdivisions. Consequently, AT&T Florida's actual take rate for the Private Subdivisions could be substantially less than the 20 percent AT&T Florida used to conduct its economic analysis.

Nocatee may argue that Avalon, Phase I is not an appropriate proxy for the Private Subdivisions, because the Riverwood subdivision may have a significant elderly population. However, such an argument disregards the fundamental fact that (1) developers in both properties have restricted AT&T Florida to providing voice services only; and (2) residents in each development will be able to obtain voice, data, and video services from an alternative

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take rate, we looked at Avalon and had the data there to know what developments were actually occupied, which is important in a new development, and then also where we were providing." Tr. at 115.

provider. This similarity makes Avalon, Phase I the most appropriate proxy for AT&T Florida's anticipated take rate in the Private Subdivisions. Moreover, given the fact that Comcast's voice service is a fixed VoIP product, which is very similar to traditional wireline service, the mere fact that one subdivision may have a large elderly population is not significant. Tr. 119-20.

Further buttressing AT&T Florida's uneconomic argument is the fact that AT&T Florida has offered to share in the economic burden of serving the Private Subdivisions pursuant to the Commission's Line Extension Rule as well as its special construction tariff. Specifically, AT&T Florida has offered to only charge the Developer those costs that exceed AT&T Florida's five year estimated local exchange revenue. Tr. at 77. As testified by Mr. Bishop, the estimated cost to place facilities to serve the initial phases of the Private Subdivisions is approximately $636,000. Tr. at 38. Using AT&T Florida's standard financial model, which includes inputs such as build-out rate, forecasted take rate, and average revenue per unit, the "estimated five times annual revenue for the initial phases of Riverwood and Coastal Oaks is approximately $77,000 and $91,000 respectively." Tr. at 39.

Pursuant to AT&T Florida's special construction tariff (§ A.5) and this Commission's Line Extension Rule (25-4.067, F.A.C.), AT&T Florida has provided the Developer with a special construction bill of $444,000 to deploy facilities in the Private Subdivisions. *Id.* To date, the Developer has not agreed to pay any amount of special construction and has not even presented a counter-offer. *Id.* Consequently, even though the Developer is demanding that AT&T Florida made unwise economic investments pursuant to COLR for its own financial gain, the Developer is refusing to take ***any*** financial responsibility associated with this decision. Tr. at 78.

v. **Public Policy Supports a Finding of Good Cause.**

In addition to the above facts, which conclusively establish "good cause", public policy further supports granting AT&T Florida's Petition. The overriding policy question in this case is whether developers can manipulate COLR to force LECs to make uneconomic investment while also stifling consumer choice for the suite of communications and entertainment services that residents expect. Tr. at 62-63. "AT&T Florida supports the idea that consumers should be free to choose any company they want for video, data, and voice service. Indeed, AT&T Florida has invested, and will continue to invest, hundreds of millions of dollars in Florida to be able to offer consumers meaningful video, data, and voice competition." However, AT&T Florida wants to use its investment dollars wisely to bring Florida residents all of our advanced services instead of using those dollars to bring a single, duplicative service. Tr. at 63. Indeed, by requiring AT&T Florida to invest in a duplicative network limited to providing voice service, "the Commission will effectively shift those investment dollars away from other consumers in the state would stand to receive the full suite of advanced services from AT&T Florida." Tr. at 64.

And, although the Commission does not have regulatory authority over developers, or over broadband data and video services, the Commission is in a position to influence the behavior of developers. By granting COLR relief under this particular set of facts, the Commission sends a message to developers that exclusive service arrangements are not in the best interest of the public. Such a message will certainly get the attention of developers. Tr. at 63.

For all of these reasons, AT&T Florida has established "good cause" to be relieved of its COLR obligation for the Private Subdivisions.

II. If the Commission Does Not Find that "Good Cause" Exists, the Commission Should Find that AT&T Florida Is Not Obligated to Install Facilities Until the Developer Pays Special Construction Charges.

In the event the Commission does not find that "good cause" exists, the Commission should then find that AT&T Florida has no obligation to install facilities unless and until the Developer pays special construction charges. This analysis is entirely independent of the good cause analysis under § 364.025, F.S.

The Commission's Line Extension Rule, Rule 25-4.067(1), F.A.C., requires AT&T Florida to "make reasonable extensions to its lines and service and shall include in its tariffs . . . a statement of its standard extension policy setting forth the terms and conditions" by which AT&T Florida will extend facilities to serve applicants for service. Rule 25-4.067(1), F.A.C. It also requires that any policy "have uniform application" and that it "provide that the proportion of construction expense to be borne by the utility shall not be less than five times the annual exchange revenue of the applicants." *Id.* If the cost equals or exceeds the estimated cost of the proposed extension, AT&T Florida must construct the extension of facility without charge to the applicants. If, however, the estimated costs exceed the amount "which the utility is required to bear" – five times annual exchange revenue – "the excess cost may be distributed equally among all subscribers initially served by the extension." Rule 25-4.067(1), F.A.C. AT&T Florida's Tariff provides that special construction applies when "the cost to construct line extension facilities for an individual subscriber . . . exceeds the estimated five year exchange revenue." *See* GSST at A5.2.1(B)(1).

As stated above, AT&T Florida's cost to construct line extension facilities pursuant to the Developer's request exceeds the estimated five year exchange revenue. Accordingly, AT&T Florida is entitled to charge the Developer special construction charges per Rule 25-4.067(1),

F.A.C. and AT&T Florida's Tariff § A5.2.1(B)(1). And, per AT&T Florida's Tariff, payment of special construction "is due upon presentation of a bill for the specially constructed facilities." § A5.2.2.2(B). If the party requesting special construction fails to pay in advance, then AT&T Florida has no obligation to deploy facilities. Tr. at 81.

AT&T Florida recognizes that, historically, the Line Extension Rule has primarily applied to individual subscribers. Tr. at 82. However, in this situation, where developers are effectively acting as agents for future, yet-to-be-identified residents of a property, the Line Extension Rule applies to Developers. *Id.* "Indeed, if developers can use COLR to force AT&T Florida to make uneconomic investments by installing duplicative facilities in properties where consumer choice is restricted, developers also must be responsible for the liabilities associated with such use. Stated another way, if a developer can trigger COLR before any residents exist on the property, then the developer, for all practical purposes, is in fact the subscriber for the entire development." *Id.*

Accordingly, the Commission should find that, in this situation, AT&T Florida's Tariff governs and that AT&T Florida has no obligation to proceed with installing facilities irrespective of any COLR obligation, should the Developer refuse to pay special construction charges. Deciding this issue any other way guts the historical, industry-standard application of special constructions, violates AT&T Florida's Commission-approved Tariff, and renders the entire special construction process – a process designed to protect the LEC from "undue risk associated with specially constructed facilities" -- meaningless. *See* Tariff at § A5.1.2(A)(1).

CONCLUSION

For the foregoing reasons, AT&T Florida respectfully requests that the Commission grant its Petition to be relived of its COLR obligation for the Private Subdivisions within the Nocatee

development. Alternatively, AT&T Florida respectfully requests that the Commission find that AT&T Florida has no obligation to install facilities in the Private Subdivisions until the Developer pays special construction charges.

Respectfully submitted this 7th day of August, 2007.

JAMES MEZA III
AUTHORIZED HOUSE COUNSEL NO. 464260
TRACY W. HATCH
MANUEL A. GURDIAN
AT&T Florida
c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

E. EARL EDENFIELD, JR.
AT&T Southeast
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0763

#685500