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Sent: Tuesday, January 08, 2008 2:50 PM
To: Filings@psc.state.fl.us
Cc: Susan Masterton; Kelly, Tamela D [EQ]
Subject: 070649-TL Embarq's Memorandum of Law
Attachments: 070649 Memorandum of Law filed 1-8-08.pdf

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Docket No. **070649-TL**

Title of filing: **Memorandum of Law**

Filed on behalf of: **Embarq Florida, Inc.**

No of pages: **12**

Description: **Embarq Florida Inc.'s Memorandum of Law**

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FILED ELECTRONICALLY

January 8, 2008

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

RE: Docket No.: 070649-TP

Dear Ms. Cole:

Enclosed please find Embarq Florida, Inc.'s Memorandum of Law in the above referenced docket matter.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at (850) 599-1560.

Sincerely,

s/Susan S. Masterton
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE
DOCKET NO. 070649-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail this 8th day of January, 2008 to the following:

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s/Susan S. Masterton
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Declaratory Statement by Embarq Florida, Inc. regarding implementation of Order No. PSC-07-0311-FOF-TL, Rule 25-4.094, F.A.C. and Embarq's General Exchange Tariff Section A5G	Docket No. 070649-TL Filed: January 8, 2008
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EMBARQ FLORIDA, INC.'s MEMORANDUM OF LAW

Embarq Florida, Inc. ("Embarq") files this Memorandum of Law in response to the arguments presented in the Memorandum of Law in Opposition to Embarq's Petition for Declaratory Statement, filed by Treviso Bay, LCC ("Treviso Bay") on December 21, 2007.¹ Although Embarq filed and served on counsel for Treviso Bay its Petition for Declaratory Statement ("Declaratory Petition") on October 15, 2007, Treviso Bay waited more than two months to intervene and provide its positions on Embarq's Declaratory Petition. The arguments made by Treviso Bay in its Memorandum of Law in opposition to Embarq's Petition have no merit and should be rejected by the Commission, as set forth below.

Summary of Embarq's Arguments

At the 11th hour, Treviso Bay seeks to intervene in this proceeding to oppose Embarq's request for a declaratory statement from the Commission regarding the application of a Commission Order, Commission rules and Embarq's tariffs to the

¹ Treviso Bay also filed a Petition to Intervene and a Request for Oral Argument and Alternative Motion for Leave to Address the Commission on the same day as it filed its Memorandum of Law. Embarq notes that Rule 25-22.0021, F.A.C., explicitly provides that "In certain types of cases in which the Commission issues an order based on a given set of facts without hearing, such as declaratory statements and interim rate orders, the Commission allows informal participation at its discretion."

DOCUMENT NUMBER-DATE

00195 JAN-8 8

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specific facts existing at Treviso Bay. Treviso Bay's arguments provide no basis for the Commission to deny the declaratory relief requested by Embarq. Specifically:

- Embarq has properly requested a Declaratory Statement to obtain the Commission's opinion as to the applicability of Order No. PSC-07-0311-FOF-TL², Commission Rule 25-4.094 and Embarq's General Exchange Tariff Section A5, G, to the particular facts involving Embarq's request for an advance deposit from the developer of Treviso Bay;

- Embarq's proposed deposit and refund mechanism appropriately implements the Order, rule and tariff by requesting a deposit to ensure that Embarq recovers its costs to make voice only services available to Treviso Bay residents under the circumstances of the bulk agreements the developer has entered into with Comcast for the provision of data and video services to these residents and Comcast's ability also to provide voice services to these same residents;

- Embarq's request for declaratory relief is not prohibited by the principles of collateral estoppel, since Embarq is requesting the Commission's opinion on the applicability of provisions of the very Order which Treviso Bay argues as the basis for estoppel; and

- The Commission rules and Embarq's tariffs that authorize Embarq to charge an advance deposit continue to apply regardless of Embarq's election of price regulation and are particularly necessary and relevant to the fulfillment of Embarq's COLR obligations in the current competitive environment.

² *In re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.*, Order No. PSC-07-0311-FOF-TL, issued April 12, 2007 in Docket No. 060763-TL.

A. The Relief Embarq Seeks is Appropriate for a Declaratory Statement

Treviso Bay's argument that Embarq is inappropriately attempting to litigate a tariff matter involving disputed issues of material fact through a declaratory statement is incorrect. Section 120.565 states that the purpose of a declaratory statement is to obtain "an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." Rule 28-105.001, F.A.C., further provides that a declaratory statement is a means to resolve a controversy, as well as to answer doubts concerning the applicability of statutory provisions, rules or orders within the agency's authority. This relief is exactly what Embarq seeks through its Declaratory Petition. While Treviso Bay is correct that a declaratory proceeding is not the appropriate forum to resolve disputed issues, the administrative rules implementing s. 120.565 provide that the Commission may accept the facts alleged in a request for a declaratory statement as true. Rule 28-105.003 explicitly provides that the Commission may do so without taking any position with regard to the validity of the facts. Contrary to Treviso Bay's arguments, this principle does not mean that the facts supporting a Petition for Declaratory Statement must be undisputed, rather it means that the Commission need not resolve any disputes in rendering its ruling.³

In its Declaratory Petition, Embarq has asked the Commission to provide its opinion concerning the implementation of a provision of Order No. PSC-0311-FOF-TL that states:

³ To the extent that the facts that form the basis for the declaratory ruling are determined not to apply to a particular situation, then the declaratory ruling would not control.

Our decision does not preclude Embarq from using tools that may be available to it under existing rules in addressing the alleged problem of uneconomic provisioning of service. (Order No. PSC-0311-FOF-TL at page 18)

Specifically, Embarq has asked the Commission to provide guidance, in light of the Order, regarding Embarq's obligations to provide service when the developer of a new residential subdivision refuses or fails to pay a deposit requested by Embarq in accordance with the Commission's rules and Embarq's tariffs implementing those rules.

It is significant that Treviso Bay never complained to the Commission or raised any disputed issues before the Commission regarding the applicability of Embarq's tariff or the deposit requested by Embarq, prior to Embarq filing its request for declaratory relief.⁴ In fact, Treviso Bay waited more than two months after Embarq filed its Declaratory Petition before it intervened to provide its position in this docket. If Treviso Bay disputed the applicability of the rule or Embarq's tariff or the facts relating to Embarq's deposit request, Treviso Bay could have filed a complaint and asked the Commission to resolve any disputed issues it had with Embarq's request. However, despite two letters from Embarq and related conference calls to discuss the application of the tariff and the basis of Embarq's deposit request, Treviso Bay ultimately chose to take no action. Treviso Bay's inaction essentially left Embarq in an untenable position regarding its obligations at Treviso Bay in light of the Commission's Order denying Embarq's request for a COLR waiver but authorizing Embarq to use existing mechanisms to address potential uneconomic service provisioning.

⁴ While Rule 28-105.003 contemplates that the Commission could conduct a hearing to resolve a declaratory request, practically, the lateness of Treviso Bay's filings precludes the Commission pursuing this avenue, given the time frame for ruling on a petition established in s. 120.565, F.S.

On the other hand, Embarq's opportunities to bring any disputes with Treviso Bay to the Commission for resolution were limited. Since Treviso Bay is not regulated by the Commission, and, therefore, is not under the Commission's jurisdiction, Embarq could not file a complaint against Treviso Bay to enforce its deposit request.⁵ Under the administrative rules of procedure, a request for a declaratory statement seeking guidance from the Commission as to how the applicable Order, rules and tariffs apply to Embarq was an appropriate procedural option when Treviso Bay failed to respond to Embarq's July 27, 2007 letter or to pay the requested deposit.

B. Embarq's tariff is applicable to Treviso Bay

Treviso Bay also argues that Embarq has not properly implemented its tariff in requesting a deposit from Treviso Bay. Again, Treviso Bay's arguments are without merit. Treviso Bay points to the sentence in Embarq's tariff that states that the deposit "shall be the difference in cost of the facilities requested and the facilities the Company would normally provide." Treviso Bay asserts that the facilities it has requested are the same as the facilities Embarq would normally provide. That is patently not the case, as Embarq discusses at length in its Declaratory Petition (¶¶ 24-28). The tariff is intended to address the requirement that Embarq provide facilities to serve a new residential development in a manner that may engender additional, potentially unrecoverable, costs. This is exactly the situation Embarq finds itself in at Treviso Bay, where it must place facilities throughout the Treviso Bay development to meet its COLR obligation to serve any customer who requests service, regardless of the number of customers Embarq expects to actually obtain given the bulk agreement with Comcast and the ready

⁵ Of course, Treviso Bay can choose voluntarily to bring itself under the Commission's jurisdiction, either through filing a complaint or petition requesting relief related to an entity regulated by the Commission, such as Embarq, or petitioning to intervene in proceedings initiated by a regulated entity, such as Embarq.

availability of Comcast's digital voice service. Additionally, Embarq would not normally place facilities to provide "voice only" services, but in the normal course of business would place facilities with the expectation of having the opportunity to provide its broadband service offerings (i.e., DSL) and to include its DISH video product in the services it markets to prospective customers.⁶ As the Commission recognized in its order denying Embarq's waiver, the bulk agreements with Comcast for the provision of data and video services effectively preclude Embarq from obtaining any customers for these services. (Order No. PSC-0311-FOF-TL at page 8) Contrary to Treviso Bay's assertions, the deposit requested is calculated to reflect these circumstances that are different from the normal circumstances under which Embarq provides service.

C. Collateral Estoppel does not apply to Embarq's Request for Guidance on the meaning of the Commission's Order

Treviso Bay asserts that Embarq is requesting the Commission to revisit an issue that it already decided regarding whether Embarq's provision of service to Treviso Bay is uneconomic. In making this argument Treviso Bay completely ignores the provisions of the Commission's Order that are the foundation of Embarq's request for declaratory relief. Treviso Bay also mischaracterizes the Commission's findings regarding Embarq's allegations that the provision of service to Treviso Bay would be uneconomic.

Rather than determining unequivocally that Embarq's provision of service to Treviso Bay would not be uneconomic, in Order No. PSC-07-0311-FOF-TL the Commission recognized that the bulk agreements entered into by Treviso Bay likely would have some negative impact on the economics of Embarq's provision of service.

⁶ As Embarq discussed in its Declaratory Petition, these facts and circumstances are very similar to the facts and circumstances at the Nocatee subdivision where the Commission recently granted AT&T's request for a waiver of its carrier of last resort (COLR) obligation at the development.

Specifically, in the Order the Commission stated that: “[t]he record suggests that due to the Agreement between Treviso Bay and Comcast, it is likely that Embarq will obtain fewer subscribers in the Treviso Bay development than without such an agreement.” (Order No. PSC-07-0311-FOF-TL at page 9) The Commission also recognized that “[s]ome economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast...” (Order No. PSC-07-0311-FOF-TL at page 12). And, in its subsequent Order denying Embarq’s Request for Reconsideration the Commission again noted, in reference to Order No PSC-0311-FOF-TL:

We did recognize, however, that Treviso Bay’s arrangements with Comcast would have some adverse effect on penetration rates and average per household revenues; we simply were not persuaded that Embarq’s future was as bleak as Embarq contends. (Order No. PSC-07-0635-FOF-TL at page 8)

This uncertainty about the economics of Embarq’s provisioning of service to Treviso Bay was the very reason that the Commission directed Embarq to use existing rules to address the “alleged problem of uneconomic provisioning of service.” The advance deposit rule is perfectly suited to these uncertain circumstances because it requires the developer to assume a portion of the risk, created by the developer’s actions in entering into the bulk agreement with Comcast and associated with the developer’s request that Embarq place upfront facilities that may never be used. If the developer is right and Embarq obtains more customers that it anticipates, the developer will receive a refund, with interest, of its deposit money. If the future indeed ends up being “as bleak as Embarq contends” then the deposit will serve to ensure that Embarq is appropriately compensated for its investment.

D. Embarq's tariff is applicable in a price-regulated environment

Finally, Treviso Bay argues that is inappropriate to apply the Commission's rules and Embarq's tariffs relating to placing underground facilities in new residential subdivisions, because Embarq elected price-regulation subsequent to the enactment of the rules. This argument is unsupportable and should be rejected. First, the statute authorizing Embarq's election of price regulation mandates that its tariffs in effect on July 1, 1995 continue to apply. (Section 364.051(2), F.S.) Embarq's tariff implementing the advance deposit rule existed on that date and so continues to apply to Embarq under the statutory price regulation scheme.

Second, the advance deposit rule is part of a larger body of rules that govern Embarq's provision of service to new residential subdivisions (Rules 25-4.088 through 25-4.097, F.A.C.). The obligations imposed under these rules continue to apply, regardless of Embarq's election of price regulation. In fact, these rules form the basis of Treviso Bay's request for Embarq to place facilities to serve the development. Since the obligations under the rules continue to apply, certainly the corollary protections afforded by the advance deposit rule also continue to apply to Embarq's provision of services to the development.

Price regulation did not eliminate the need for these rules. In fact, the affect of Treviso Bay's bulk agreements with Comcast on Embarq's ability to obtain customers makes the rules even more necessary and applicable in today's competitive environment. Prior to price regulation, and the competition that attended it, Embarq would have been guaranteed a virtual 100% penetration of sales to each home constructed in a new residential subdivision. In that environment, the only risk was whether and how quickly

the homes would be built and occupied. Today, Embarq faces not only the risk of whether the homes will be built and occupied, but also the greater risk of competition for making sales to each occupied home. In Treviso Bay, the circumstances of the bulk agreements that prevent Embarq from selling any data or video services and give Comcast a guaranteed relationship with 100% of Treviso Bay's residents, combined with Comcast's ability to provide voice services to these same residents, create a significant competitive disadvantage for Embarq in marketing its voice services. These circumstances seriously jeopardize the number of subscribers Embarq can ultimately expect. In addition, the presence of broad competitive choices in Embarq's other markets means that Embarq cannot ask other customers living outside of the Treviso Bay development to pay for operating cost shortfalls not recovered from Treviso Bay customers. It is clear that the advance deposit rule not only is applicable but also necessary when Embarq is required to fulfill its COLR obligation under the circumstances at Treviso Bay.

Conclusion

Treviso Bay's arguments set forth in its Memorandum of Law are without merit and provide no basis for denying Embarq's request for declaratory relief. The Commission should reject Treviso Bay's arguments and grant the relief requested in Embarq's Petition for Declaratory Statement. That is, the Commission should rule that:

- 1) Embarq is not required to place facilities in Treviso Bay if the developer fails to pay the advance deposit requested by Embarq in accordance with the Advance Deposit Rule and Embarq's implementing tariff; and

2) Implementation of the rule and tariff in this manner is consistent with Order
No. PSC-07-0311-FOF-TL.

Respectfully submitted this 8th day of January 2008.

s/Susan S. Masterton
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