

BEFORE THE PUBLIC SERVICE COMMISSION

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.	DOCKET NO. 060763-TL ORDER NO. PSC-07-0635-FOF-TL ISSUED: August 3, 2007
---	--

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

ORDER DENYING RECONSIDERATION

BY THE COMMISSION:

I. Case Background

On November 20, 2006, pursuant to Section 364.025(6)(d), Florida Statutes, Embarq Florida, Inc. ("Embarq") filed its Petition for Waiver of its carrier-of-last-resort ("COLR") obligations in the Treviso Bay subdivision ("Development") in Collier County. Embarq's petition was opposed by the developer, Treviso Bay Development, LLC ("Treviso Bay").

On February 14, 2007, we conducted a hearing on Embarq's petition. On March 13, 2007, at our regularly scheduled agenda conference, we voted to deny the petition. On April 12, 2007, the Commission issued Order No. PSC-07-0311-FOF-TL denying the petition ("Final Order").

On April 27, 2007, Embarq filed its "Motion for Reconsideration of Order No. PSC-07-0311-FOF-TL." On May 4, 2007, Treviso Bay filed its "Response To Embarq's Motion For Reconsideration" ("Response").

II. Embarq's Motion for Reconsideration

A. Issues Involved

Embarq requests that we reconsider our negative decisions on the following three issues as identified and framed by the parties:

Issue 2: Has Treviso Bay entered into any agreements, or done anything else, that would restrict or limit Embarq's ability to provide the requested communications service?;

DOCUMENT NUMBER-DATE

06680 AUG-3 07

FPSC-COMMISSION CLERK

Issue 3: Do Treviso Bay's existing agreements make it uneconomic for Embarq to provide the requested communications service to the customers of Treviso Bay?; and

Issue 5: Has Embarq demonstrated "good cause" under Section 364.025(6)(d) for a waiver of its carrier-of-last-resort obligation in Treviso Bay?

With respect to Issue 2, Embarq argues that we improperly narrowed the scope of the issue. With respect to Issue 3, Embarq argues that we overlooked or ignored key facts. And with respect to Issue 5, Embarq argues that because of the fundamental mistakes in determining Issues 2 and 3, we are required to reconsider our decision on Issue 5.

B. Embarq's Theory of the Case

Embarq's legal theory of the case is straightforward and shapes its motion for reconsideration. Embarq argues a "two-prong" test for determining under the statute that "good cause" exists for relief of the COLR obligation. Specifically, Embarq argues that "good cause" is demonstrated when the ILEC can show *both* of the following:

1. provision of voice service to the area would be "uneconomic"; and
2. mandated provision of voice services by the COLR is "unnecessary" because "voice or voice replacement service will be available."

Embarq believes that it has proven the above two propositions. It argues that no one disputes that "voice or voice replacement service will be available." (Motion at 2) Next, Embarq argues that "construction of facilities to provide voice only services is uneconomic and unnecessary" because of Treviso Bay's agreements with Comcast and, implicitly, contrary conclusions are simply unrealistic. (Motion at 2)

C. Issue 2 - Scope of the Issue

Embarq states that we "apparently narrowed the scope of the issue to address only whether Treviso Bay had entered into any agreements that physically restrict Embarq's placement of the facilities necessary to provide voice communications to residents of Treviso Bay. (March 13, 2007 Agenda Conference Transcript at page 22)." (Motion at 3) Embarq says this is erroneous because in doing so "the Commission failed to consider or overlooked the plain language of the statement of the issue." (Id.) which in turn led to our overlooking the alleged projected adverse effect of Treviso Bay agreements on Embarq's future market penetration at Treviso Bay.

D. Issue 3 - Uneconomic Argument

Embarq argues that "(i)n concluding that Embarq failed to meet its burden of proof the Commission overlooked, failed to consider or fundamentally misunderstood the evidence offered by Embarq on several key points . . ." (Motion at 6). Four of these are addressed below.

1. *Net Present Value.* Embarq argues that we committed fundamental error in rejecting its Net Present Value (“NPV”) computations. According to Embarq, we used unrealistic inputs to the model and failed to consider evidence that the “Commission’s unrealistic penetration assumptions do not generate positive NPV well beyond any reasonable time frame for concluding that an Embarq investment of \$1.3M in capital would be considered economic.” (Motion at 7)

With respect to the alleged unrealistic penetration assumptions, Embarq argues that “(t)he Commission’s characterization that only minor changes to the penetration and per customer revenue assumptions produces a positive NPV result is not supported by the record.” Basically, Embarq argues that the “minor changes” contemplated by us involved significant percentage increases. Thus, for example, a “67% increase in customers taking service” and “185% increase in the customers taking bundled services” are not “minor” as characterized by us. (March 13, 2007 Agenda). (Id.)

2. *Significance of Penetration Rate to NPV Analysis.* We concluded that Embarq’s projected market penetration rates “lacked supporting evidence.” Our conclusion was based on the record and the testimony of the witnesses. In reviewing the testimony of Messrs. DeChellis and Dickerson, Embarq’s two witnesses, we observed that there was some inconsistency in Mr. Dickerson’s testimony with respect to the significance of Mr. DeChellis’ initial projections. Embarq argues that “the Commission appeared to determine that this ‘inconsistency’ impaired the evidentiary value of Mr. Dickerson’s testimony supporting the penetration rate.” (Motion at 10) In reaching this conclusion, we allegedly overlooked or failed to consider the focus of Mr. Dickerson’s Direct Testimony on the penetration rate as a key component of the NPV analysis where he allowed that the penetration rate used in the NPV analysis was “optimistic at best.” (citation omitted) (Id.)

3. *Devcon Wireless Rider.* Embarq argues that we also misunderstood the scope and meaning of the rider to the Devcon alarm monitoring agreement relating to wireless monitoring. (Hearing Exhibit No. 5 at page 263) Moreover, Embarq states that we overlooked or failed to consider that Comcast’s digital voice service is not a wireless service. Partly as a consequence, we embraced penetration rates that are allegedly too high. (Motion at 11- 13) Embarq argues as follows:

Notably, the Waiver Order is inconsistent in its representations of the language and meaning of the wireless rider. In the discussion regarding the rider under Issue 2, the Order correctly reflects that the rider applies to “wireless communications via VoIP” rather than to VoIP as a stand alone service (Waiver Order at page 8) In contrast, in the discussion of the rider under Issue 3, the Order incorrectly reflects that the rider applies to wireless or VoIP services, separately. (Motion at 12)

4. *Market Share Studies.* Embarq also alleges that “The Commission overlooked or failed to consider factors relating to the market share analyses provided by Embarq that support, rather than contradict, Embarq’s projected penetration rate.” (Motion at 13) For example,

Embarq argues that “the Commission overlooked that Comcast digital voice service will be available to Treviso Bay residents on day one, unlike the majority of the developments in the market share analyses, where cable voice services, in general, became available after Embarq began providing services to the developments.” We also allegedly failed to consider that the penetration rates for other developments served by Embarq would result in a positive NPV only after 20 years. (Motion at 14)

E. Issue 5 - The “Fallout” or Ultimate Issue of Good Cause

Embarq seeks reconsideration of our decision with respect to the ultimate issue in this docket, i.e., whether Embarq had established good cause for waiving its COLR obligation. The Final Order explains our decision as follows:

Issue 5 is a fall-out of Issues 1 through 4A, and only addresses whether Embarq has established “good cause” for a waiver of its COLR obligation in Treviso Bay. Having reviewed the affirmative case presented by Embarq based on the evidence adduced and arguments made under the preceding issues, we conclude that Embarq has not demonstrated “good cause” under Section 364.025(6)(d), Florida Statutes, for a waiver of its carrier-of-last-resort obligation in Treviso Bay. Therefore, we deny Embarq’s petition. (Final Order at 17)

Embarq argues that due to the alleged fundamental errors identified above, we should reconsider our decision to deny the petition for waiver of the COLR obligation. Embarq summarizes its arguments as follows:

As Embarq has demonstrated in its request for reconsideration of Issues 2 and 3, the Commission overlooked or failed to consider material evidence that contradicts its findings regarding several key points, including:

- the full scope of the issue to be resolved under Issue 2;
- the lack of record evidence to support the “minor” changes to penetration and per-customer revenue factors, upon which the Commission based its conclusion that Embarq’s provision of service to Treviso Bay could produce a positive cash flow;
- the length of time it would take for Embarq’s NPV to turn positive even considering upward revisions to the penetration and revenue assumptions;
- the meaning and scope of the wireless rider to the alarm monitoring contract and the nature of Comcast’s digital voice service; and
- important facets of the market share studies Embarq introduced to support its penetration assumptions.

Based on these critical issues of fact that the Commission overlooked or failed to consider in reaching its decision to deny Embarq’s request for a waiver, the

Commission erred in determining that Embarq had failed to meet its burden of proof and should reconsider its decision and grant Embarq's request. (Motion at 15)

III. Treviso Bay's Response

A. General Response

Treviso Bay raises general objections to Embarq's motion for reconsideration. For example, Treviso Bay argues that the Final Order reflects thorough consideration of the testimony of Embarq's witnesses as well as Embarq's legal brief. Treviso Bay then argues as follows:

Embarq is thus effectively arguing that the Commission, having considered everything that it specifically mentioned in the Order Denying COLR Waiver, "overlooked or failed to consider" a raft of other information that Embarq provided. In fact, the opposite – and far more reasonable – inference should be drawn: that the Commission considered all evidence in the record, but, quite naturally, only recited and referred to what it deemed most important in its Order Denying COLR Waiver. (TB Response at 3, footnote omitted)

Treviso Bay further emphasizes that discretionary omission of some facts from the discussion in a final order does not render it infirm. Treviso Bay argues in essence that the Final Order appropriately served its purpose to reflect "the fundamental holding of the case is that Embarq has not demonstrated 'good cause' to justify relief from its COLR obligations." (TB Response at 5)

B. Issue 2 - Scope of the Issue

In its Response, Treviso Bay counters that "(t)he key words in this issue statement are 'restrict,' 'limit,' and 'ability'." Treviso Bay then provides definitions of these words from Webster's Ninth New Collegiate Dictionary, as follows:

- "Restrict" means "to confine within bounds; to place under restrictions as to use or distribution."
- "Limit" means "to assign certain limits to; to restrict to set bounds or limits."
- "Ability" means "the quality or state of being able; *esp.*: physical, mental, or legal power to perform."

(TB Response at 6) Treviso Bay thus argues that we did not narrow the scope of the issue, but rather used the ordinary meaning of the words to properly define the scope.

C. Issue 3 - Uneconomic Argument

Treviso Bay responds generally by emphasizing that Embarq reargues the merits - that Embarq has not identified anything that we overlooked, ignored, or misapprehended. Treviso Bay then responds to Embarq's more specific arguments. For each, Treviso Bay reviews the record and the Final Order's treatment of the record to demonstrate that we did not overlook, ignore, or misapprehend any evidence in finding Embarq's case unpersuasive. Treviso Bay stresses throughout its Response that the rejection of an argument about the significance of a fact or about the reliability of projected results is not the same thing as overlooking, ignoring or misapprehending the argument, the facts, or the projections.

For example, in addressing Embarq's criticisms of our handling of market share information, Treviso Bay concludes as follows:

Thus, the Commission explicitly considered the evidence that Embarq suggests it overlooked, as well as Embarq's witness's testimony on this point, and even recognized that this evidence affords some validity to Embarq's position. However, the Commission remained unconvinced by the totality of the evidence. Again, in spite of the Commission's consideration of Embarq's evidence on this point, which was explicitly articulated in the Order Denying COLR Waiver, Embarq doesn't like the way that the Commission weighed all the evidence. This is insufficient to support reconsideration: the Commission considered the evidence, and the Commission should accordingly deny Embarq's Motion. (TB Response at 17)

D. Issue 5 - The "Fallout" or Ultimate Issue of Good Cause

Treviso Bay argues that Embarq did not meet the high burden necessary to be relieved of its COLR obligations and cannot accept that we are simply unpersuaded. Treviso Bay reiterates that "Embarq's argument for reconsideration is really just re-argument of the evidence." (TB Response at 18)

Treviso Bay then falls into rearguing the merits, reiterating its central argument that under the applicable statute, the COLR may be relieved of its COLR obligations for good cause *only* when the alternative provider(s) provide "basic local exchange service." Treviso Bay argues that once it was established that the alternative provider of voice service was a VoIP provider, Embarq's petition should have been denied. (TB Response at 19)

IV. Analysis and Discussion

A. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering the Final Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st

DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

B. Issue 2 - Scope of the Issue

Embarq’s justification for reconsideration on Issue 2 is without merit; the issue was not narrowed, unjustly or otherwise. First, we agree with Treviso Bay that we did not overlook or fail to consider the plain language of the issue, but rather adhered to the generally accepted meaning of the words “limit” and “restrict” and “ability”.

Second, Embarq’s approach would inject economic arguments directly into Issue 2. These are addressed in Issue 3. There is no reason to read Issue 2 to provide for redundant consideration of Embarq’s argument that provision of local service at Treviso Bay will be uneconomic.

Third, it is Embarq’s approach that would narrow the inquiry, not our approach. As noted earlier, Embarq argues a “two-prong” test for establishing good cause for relief from the COLR obligation. Embarq believes that under the statute “good cause” for relief from the COLR obligation under the statute is demonstrated when the ILEC can show that: (1) provision of voice service to the area would be “uneconomic”; and (2) mandated provision of voice services by the COLR is “unnecessary” because “voice or voice replacement service will be available.” From Embarq’s perspective *every* issue relates to either “uneconomic” provision of service or availability of “voice or voice replacement service.”

Embarq’s “two-prong” approach narrows our field of vision in a case of first impression. There are other interpretations of this statute and other possibilities not contemplated in Embarq’s simple “two-prong” test. It is possible that a developer could enter into agreements, either with the ILEC itself or the cable competitor that do not bar physical access to the property but in some way contractually restrict or limit the ILEC from provision of service. As framed and properly decided by us, Issue 2 clarifies that these other factors were not involved.

C. Issue 3 – Uneconomic claim

Embarq’s affirmative case under Issue 3 is a simple one. Embarq argues that because of Treviso Bay’s agreements with Comcast it will be uneconomic to provide the requested communications service to the customers of Treviso Bay. In support of that basic proposition, Embarq advances two sub-propositions: (1) the customers will be few in number; and (2) the average revenue per customer will be low. Assuming that both sub-propositions are true, the total revenues from projected customers would be so low that it is unrealistic to believe that the provision of service will ever turn a profit. This is Embarq’s “uneconomic” justification in a nutshell.

In the Final Order we address some of the deficiencies in Embarq's case. For example, with respect to Embarq's projection of too few customers, the Commission noted that Embarq's assumed penetration rate "lacks supporting evidence." (Final Order at 13) And with respect to the per-household revenue projection advanced by Embarq, the Commission observed that Embarq "based this amount on unweighted averages for customers in the Naples market." (Id.) Based on the record, we concluded:

Some economic risk does exist for Embarq in Treviso Bay as a result of the bulk agreement for data and video services with Comcast, *but we do not believe evidence presented by Embarq witnesses DeChellis and Dickerson is sufficiently rooted in objective statistical or fiscal analysis to be dispositive.* (Emphasis added) (Final Order at 12)

In short, we found the evidence presented by Embarq to be unpersuasive. 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. Waiving the COLR obligation is a serious decision and requires serious justification.

In concluding that Embarq's basic case was unpersuasive, we addressed some perceived weaknesses in the building blocks of Embarq's case. For example, we identified some specific problems with Embarq's projected penetration rates, its projected average revenues per household, and its net present value computations (which form the basis of its "uneconomic" provision of service claim). As noted above in Section II D., Embarq's Motion for Reconsideration argues that the criticisms of its proof are wrong, and result from the Commission overlooking, ignoring, or misapprehending critical information. We now respond to Embarq's arguments for reconsideration on four key items.

1. *Net Present Value.* We changed some of the inputs to Embarq's NPV model to test that model's reliability. We characterized these input changes as "minor." Embarq objects, arguing that the "percentage" changes are significant. (See page 4, *infra*) The record reflects that the input changes are minor when stated as a percentage of total number of potential households. Moreover, the percentage increases that Embarq uses to portray the changes as substantial actually suggest that Embarq's original projected take rates are unreasonably low. In any event, the purpose of using varying inputs was to determine whether Embarq's predictive model was *robust*, i.e., whether it is able to cope well with variations without losing its predictive functionality.

In this context, the NPV produced substantial swings in outcomes based on changes in inputs. From the perspective of proof, this suggests that the NPV model is not reliable. We reasonably concluded, that given the record, the NPV was not reliable for the purpose of demonstrating that provision of service would be uneconomic as Embarq projects. In doing so, we considered all of the evidence.

2. *Significance of Penetration Rate to NPV Analysis.* Embarq argues that we overlooked the central thrust of Mr. Dickerson's testimony while addressing inconsistency between his testimony and that of Mr. DeChellis. In a sense, Embarq is arguing that we looked at the testimony of its witnesses too closely – that we apparently seized on a trivial point and missed the significance and import of the testimony of its witnesses. This view of our treatment of the testimony is not consistent with the careful or objective treatment given the testimonies in the Final Order. A neutral reading of the Final Order reflects that we did not misapprehend Mr. Dickerson's testimony in either theme or in detail.

3. *Devcon Wireless Rider:* As reflected above, Embarq argues that we failed to recognize distinctions between wireless VoIP versus wireline and cable VoIP in considering the Devcon Wireless Rider. Embarq's arguments are again without merit.

We reasonably concluded based on the record that "it is possible that the agreement between Treviso Bay and Devcon for security system monitoring services will increase the likelihood that more residents will subscribe to Embarq's wireline telephone service." With respect to the rider, we noted that it recommends that each subscriber to Devcon's monitoring service employ an additional method of communication, such as standard telephone service, if monitoring is being provided via a wireless form of communication. As the Final Order observes, Embarq's own witness acknowledged that in light of the language of the rider, a prudent customer would consider obtaining standard telephone service for the alarm system in addition to VoIP service. We did not misunderstand the rider. We simply concluded that on balance, within the context of the Treviso Bay developments, the Devcon Wireless Rider would tend to encourage residents to subscribe to Embarq's wireline telephone service.

E. Issue 5 - The "Fallout" or Ultimate Issue of Good Cause

In Final Order PSC-07-0311-FOF-TL, we ruled that "Embarq has not demonstrated 'good cause' under Section 364.025(6)(d), Florida Statutes, for a waiver of its carrier-of-last-resort obligation in Treviso Bay," and thus denied Embarq's petition. (Final Order at 17). Embarq now argues that due to the previously discussed errors, we should reconsider our decision. We disagree. As fully addressed above, Embarq has not demonstrated that when addressing the issues in this docket, we overlooked, ignored, or misapprehended a point of fact or law in rendering our decision.

V. **Conclusion**

Embarq's motion for reconsideration is without merit. In rendering our decision, we considered, either explicitly or implicitly, each of the items on Embarq's list of perceived oversights and misapprehensions. In the many pages of its motion, Embarq does not point out any evidence that we overlooked, failed to consider, or fundamentally misunderstood. Rather, Embarq takes issue with how we evaluated the evidence, and consequently simply reargues the merits, although inferentially. This is not a proper basis for reconsideration and thus Embarq's motion is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Embarq Florida, Inc.'s Motion for Reconsideration of Order No. PSC-07-0311-FOF-TL is *denied*. It is further

ORDERED, that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd day of August, 2007.



ANN COLE
Commission Clerk

(S E A L)

PKW

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.