M C
& S

MESSER CAPARELLO & SELF, P.A.

Attorneys At Law

www.lawfla.com

August 7, 2007

ORIGINAL

BY HAND DELIVERY
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 060822-TL

Dear Ms. Cole:

Enclosed for filing on behalf of Nocatee Development Company, SONOC Company, LLC, Toll Jacksonville Limited Partnership, Pulte Home Corporation and Parc Group, Inc. ("Nocatee") are an original and fifteen copies of Nocatee's Post-Hearing Brief in the above referenced docket. Also enclosed is a 3 ½" diskette with the document on it in MS Word 2003 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Floyd R. Self

CMP
COM
CTR
ECR
GCL 2 (diskette)
OPC
RCA
SCR
SGA
SEC
OTH

FRS/amb
Enclosure
ec: Lynn Pappas, Esq.
Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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

NOCATEE POST-HEARING BRIEF

Nocatee Development Company, SONOC Company, LLC, Toll Jacksonville Limited Partnership, Pulte Home Corporation and Parc Group, Inc. ("Nocatee"), pursuant to Order No. PSC-07-0473-PCO-TL, issued June 1, 2007, hereby submit their post-hearing brief in the above captioned matter.

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?

NOCATEE'S SUMMARY POSITION: *AT&T has not shown good cause to be relieved of its COLR obligations – there are no limitations on AT&T's ability to provide telephone service or on a customer's ability to choose AT&T. There is no basis for any financial compensation to AT&T for building its network within the private communities.*

NOCATEE'S ANALYSIS AND ARGUMENT:

A. INTRODUCTION

While the prehearing order has identified only a single issue for this case, there are two fundamental issues to be decided – first, has AT&T shown good cause to be relieved of its carrier-of-last resort ("COLR") obligations for the two private communities within Nocatee; and second, under what circumstances, if any, would financial compensation be due to AT&T before AT&T would build its network in the two private communities. AT&T's request and supporting

evidence does not substantiate a basis for a COLR waiver nor a demand for financial compensation to build a telephone network to serve thousands of customers.

This case really began several years ago when Nocatee sought to negotiate an exclusive contract for services with AT&T (at that time, BellSouth) to provide voice telephone, broadband or data, and video or televisions services to the entire 14,000 homes to be build in the Nocatee community, the largest DPI in Northeast Florida. Hearing Exh. 12, at 7-9. When AT&T was unable to provide the full level of the triple play service desired by the developer, Nocatee negotiated a marketing agreement with Comcast that did not limit AT&T's ability to offer voice telephone service. Hearing Exh. 12, at 27-30. Notwithstanding AT&T's ability to offer telephone services in the private communities, AT&T petitioned this Commission to be relived of its COLR obligation.

AT&T has not shown good cause to be relieved of its COLR obligations within any part of Nocatee. The essence of this case is that AT&T is seeking to be relieved of its obligation to provide telephone service because it can only provide telephone service within the private communities. Since AT&T is not limited in its ability to provide voice telephone service, and customers are not limited or incentivized to choose one telephone provider over another, there is no good cause shown. If the waiver is granted, some 2,000 Nocatee homes, representing several thousand individuals, will be denied voice services, and the precedent here could serve to deny telephone service to 5,000 to 7,000 homes that are later to be built in the later private subdivisions.

As for the financial compensation question, this issue is really independent of the COLR question since it is AT&T's position that financial compensation is due regardless of the COLR obligation. Given AT&T's tariff language, building a local exchange telephone network to serve

thousands of people over the next 20 years does not constitute "special construction" for which AT&T can seek compensation. Thus, regardless of whether AT&T has a COLR obligation within any or all of the private communities within Nocatee, Nocatee is not required under Florida law to pay any compensation to AT&T to build out its network within Nocatee.

In order to present its analysis and argument, Nocatee in this first section has provided some basic introductory information. In Section B below, Nocatee will address the burden of proof and good cause shown question. Section C will address the statutory basis for denying COLR relief. In Section D, the brief will analyze why on the evidentiary record in this case AT&T should not be granted its waiver. Finally, in Section E, Nocatee will brief the tariff and why it does not support the financial compensation AT&T is seeking.

B. BURDEN OF PROOF & GOOD CAUSE SHOWN

AT&T has failed to meet its burden of proof to demonstrate good cause for relief from its COLR obligation and has also failed to substantiate its demand for financial compensation to construct a ubiquitous telephone network within the Nocatee private communities. It is well established in Florida that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." *Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981). The meaning of the burden of proof has been summarized by the Fifth DCA as follows:

> The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon

> the party asserting the affirmative of the issue, and **unless he meets this obligation upon the whole case he fails.**

Westerheide v. State, 888 So.2d 702, 705 (Fla. 5th DCA 2004) (emphasis added), citing *In re Ziy's Estate*, 223 So.2d 42, 43 (Fla.1969).

In the instant case, AT&T bears the burden of proof to demonstrate good cause for why it should no longer be obligated to provide voice telephone service to the residents of the private communities within Nocatee. The specific statutory exception that AT&T is relying upon is Section 364.025(6)(d), which provides as follows:

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

The statute does not provide any further information as to the meaning of the term "good cause shown."

The implementing rule, Rule 25-4.084, F.A.C. is a rule governing the procedure for obtaining a waiver of the COLR requirements, with subsection (3)(d) requiring only that the petition for waiver include "[t]he specific facts and circumstances that demonstrate good cause for the waiver as required by Section 364.025(6)(d), F.S." The rule provides no further definition or guidance for the construction of the term "good cause shown."

Since AT&T's burden of proof is to demonstrate good cause is not clearly articulated by the Legislature, the courts in other contexts have provided some guidance as to the scope of a good cause shown burden.

The term "good cause shown" is generally construed to vest an element of discretion in an enforcing agency to apply the facts and determine "good cause" as based on the regulatory or statutory program standards from which a deviation is sought. *See, e.g.*, *Ratley v. Batchelor*, 599 So.2d 1298 (Fla. 1st DCA 1991); *Standard Distributing Co. (of Pensacola, Fla.) v. Florida Dept. of Business Regulation*, 473 So.2d 216 (Fla. 1st DCA 1985). Though the good cause shown concept is most widely used in the judicial context, there are several appellate cases that offer guidance as to the scope of an agency's exercise of discretion in determining whether to grant relief from some obligation based upon "good cause."

In *Sherburne v. School Bd. of Suwannee County*, 455 So.2d 1057 (Fla. 1st DCA 1984), the school board of Suwannee County decided to terminate a teacher (through non-renewal of her teaching contract) for alleged cohabitation with a male friend. The school superintendent recommended renewal of the contract, meaning that non-renewal by the board could be done only for "good cause." The board decided not to renew the contract for the "good cause" of the teacher's violation of a statutory "good moral character" provision. In construing the extent of the discretion vested in the school board by the unspecified "good cause" language, the First District held that:

> "Good cause" is not statutorily defined. However, . . . the term may be equated with a showing of "failure . . . to meet the criteria of Chapter 231, Fla.Stat."
>
> . . .
>
> We are led to conclude from our examination of the authorities on the subject that in the absence of specific, valid, statutory directives, the appropriate standard to be applied is that private, off-campus conduct ostensibly involving a consensual sexual relationship between a teacher and an adult of the opposite sex cannot, in and of itself, provide "good cause" for a school board's rejection of a teacher nominated for employment by the superintendent **unless it is shown that such conduct adversely affects the ability to teach**.

Id. at 1060-1061 [emphasis added].

In *Standard Distributing Co. (of Pensacola, Fla.) v. Florida Dept. of Business Regulation*, 473 So.2d 216 (Fla. 1st DCA 1985), the court construed a provision that allowed a liquor distributor to petition DBR for a declaratory statement regarding a manufacturer's withdrawal of a brand or label. The statute provided that a brand or label could not be withdrawn "unless good cause for its withdrawal is shown by the manufacturer." In construing the "good cause" requirement, the Court held that:

> The statute requires an affirmative showing of good cause. It does not contemplate that the distributor who is threatened with withdrawal by the manufacturer must prove lack of good cause. Nor does the statute contemplate that mere status as a successor in an arm's length transaction constitutes good cause. In order to terminate a distributor under §§ 564.045(5) or 565.095(5), a manufacturer or successor manufacturer must first demonstrate good cause. Good cause may be determined by the actions of the distributor, and the manufacturer carries the burden of proving such acts.
>
> In its memorandum of law submitted to DBR, ISC stated that its decision to appoint other distributors of its own choice was made for "business reasons" which ISC characterized as synonymous with good cause. While business reasons may be grounds for termination, ISC failed to establish any such business reasons. The record of the proceedings below contains nothing more than bare assertions that ISC was entitled to terminate Standard. DBR erred in failing to hold an evidentiary hearing in order to find facts and to determine whether, on the basis of the evidence adduced, the brands were withdrawn from Standard for good cause.

Id., at 218-219.

In *School Board of Osceola County v. UCP of Cent. Florida*, 905 So.2d 909 (Fla. 5th DCA 2005), the court dealt with a school board's ability to deny a charter school for "good cause." In denying a charter, the Osceola County school board determined that funding the school would, due to limitations on state funding, dilute resources available to other charter

schools in the district. The school board argued that, due to its broad authority over issues of fiscal responsibility, financial feasibility and school impacts, coupled with the charter school's financial plan and the unique financial problems faced by the Osceola County school district, "good cause" could be based upon factors other than those specified by the statute.

The State Board of Education determined that the school board did not have "good cause" to reject the charter school application because the applicant met all the statutory requirements. In its ruling in the case, the Fifth District noted that "a denial based on good cause contemplates a legally sufficient reason." *Id.*, at 914. The Court continued:

> UCP's application for a charter school may be denied by the School Board for "good cause." § 1002.33(6)(b)3, Fla. Stat. (2003). Unfortunately, the term "good cause" is not defined in the charter school legislation. The reason given by the School Board to justify its denial of the application and qualify as good cause was inadequate charter school capital funding. However, both the Commission and the State Board agreed that the School Board's reason did not constitute the statutory "good cause" that would support denial of the charter school application.

Finally the Court concluded its opinion by stating that:

> [u]nder these facts it appears that lack of capital funding or use of operational dollars to fund capital expenses does not constitute good cause to deny a charter school application. The propriety of allowing new school construction to continue while state funding remains frozen is clearly a matter of debate best directed to the Legislature and not this court.

Although the reason set forth by the school board for denial of the charter school application was within the broad scope of its duties and responsibilities, the Court held that the basis for issuance or denial had to be based on reasons related to the purpose of the underlying statute.

In *Florida West Realty Partners, LLC v. MDG Lake Trafford, LLC*, ___ So.2d ___, 2007 WL 1988843 (Fla. 2nd DCA 2007), the Second District construed Section 48.23(2), Florida Statutes, which provides the standards for filing a lis pendens, and authorizes the court to extend

the time for filing "on reasonable notice and for good cause." In construing the statutory "good cause" requirement, the court found that the determination was in the discretion of the court, with the following set forth to guide the exercise of discretion:

> The statute does not define good cause. The parties found no cases discussing this statutory requirement. Nevertheless, fair nexus does not necessarily equate to good cause. . . .
>
> We defined good cause in [*In re Estate of] Goldman,* [79 So.2d 846 (Fla.1955)], finding that it is "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, and not mere ignorance of law, hardship on petitioner, and reliance on [another's] advice." ...
>
> The determination of good cause is based on the peculiar facts and circumstances of each case. Obviously the trial court is in the best position to weigh the equities involved, and [its] exercise of discretion will be overruled only upon a showing of abuse.

Id., at 2.

From the cases decided by the courts, it can be extrapolated that, although "good cause" does carry with it an element of discretion in an agency to determine good cause on a factual, case-by-case basis, the reason used to support allowing or disallowing an otherwise required service or action must be related to purposes of the statutory or regulatory requirements. As applied to this case, AT&T is seeking to avoid its obligation to provide COLR telephone service to the two private Nocatee subdivisions. The "good cause" claimed by AT&T is that it is uneconomic to serve because Nocatee has a marketing agreement with Comcast that limits AT&T's ability to provide video and broadband service within the two private communities. But the issue is not video and data services, which is not only not related to the statutory purpose of universal service but which is specifically exempted from Commission jurisdiction. The issue is whether there are limits on AT&T's ability to build its network and sell telephone service and

whether there are limitations on the ability of customers to choose AT&T's telephone service. As is more fully discussed in the next two sections, there are no such limitations on AT&T or on the customers. Thus, AT&T has failed to demonstrate "good cause" sufficient to relieve it of its statutory obligation to ensure availability of telecommunications service to Florida citizens that are unable to procure such service elsewhere. Similarly, AT&T has also failed to demonstrate that its special construction tariff applies to the construction of an exchange telephone network.

C. THE STATUTE DOES NOT SUPPORT COLR RELIEF

The statutory framework for COLR relief demonstrates that the universal service obligations of an incumbent local exchange company ("ILEC") such as AT&T are to be removed only in exceptional circumstances. Both the plain language of the statute and the extrinsic evidence available confirm that AT&T's waiver request fails to meet its heavy statutory burden.

Florida courts have repeatedly and consistently ruled that an agency must look within the four corners of a statute to divine its purpose and meaning. *Verizon Florida, Inc. v. Jacobs*, 810 So.2d 906, 908 (Fla. 2002); *Lee County Elec. Co-op., Inc. v. Jacobs*, 820 So.2d 297 (Fla. 2002). In this context, the Legislature has provided ample language and definitions to make clear its directives for competition in the provision of voice telephone services and that the carrier-of-last-resort obligation is to be removed under only extremely limited circumstances.

The starting point for an analysis of AT&T's waiver request must begin with its preexisting legal duty under Florida law to provide "universal service" under Section 364.025. In Section 364.025(1), the Legislature has said that it is important that consumers have access to telecommunications services at "just, reasonable, and affordable rates" and that these "universal service objectives be maintained after the local exchange market is opened to competitively provided services." In this context, the term "service" carries the definition from Section

364.02(13), Florida Statutes, which specifically excludes broadband service and voice-over-Internet protocol service.

On the basis of this universal service policy, in Section 364.025(1) the Legislature has imposed on each local exchange company a carrier-of-last-resort obligation:

> Until January 1, 2009, each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's territory.

The Commission has implemented this statue by adopting Rule 25-4.091(1), Florida Administrative Code, which provides:

> Upon receipt of a proper application the utility shall install an underground telephone distribution system with sufficient and suitable materials which, in its judgment, will assure that the applicant will receive reasonably safe and adequate telephone service for the reasonably foreseeable future.

In the 2006 amendment to Section 364.025, the Legislature has created the opportunity for a local exchange carrier to be relieved of its carrier-of-last-resort obligation, but only in narrow and specific circumstances. In order to understand this limited relief, the Legislature has added two important definitions to Section 364.025. First, at Section 364.025(6)(a)(2), the Legislature has defined a "communications service provider" as a person or entity that provides communications services or has the right to select a communications service provider for a property owner or developer.

Second, with respect to the definition of "communications service," in Section 364.025(6)(a)(3), this term is defined as "voice services or voice replacement service through the use of any technology." So, for purposes of the carrier-of-last-resort relief, the term "service" means only voice or voice replacement services, which by definition would exclude video and broadband.

This limitation on the definition of service is reinforced by the last subparagraph of the new statute. Section 364.025(6)(f) provides, "This subsection does not affect the limitations on the jurisdiction of the commission imposed by s. 364.011 or s. 364.013." These two statutory references are to services specifically exempted from Commission jurisdiction, including broadband services "regardless of the provider, platform, or protocol" and voice over Internet protocol ("VoIP") services.

Based upon these definitions, the Legislature has determined that a local exchange carrier may be relieved of its carrier-of-last-resort obligations in two ways – either by operation of law under one of four "automatic" provisions or on specific findings of the Commission for "good cause shown."

The four specific circumstances in which the carrier-of-last-resort obligation will be deemed automatically eliminated occur when the owner or developer of a property does the following:

> 1. Permits only one communications service provider to install its communications service-related facilities or equipment, to the exclusion of the local exchange telecommunications company, during the construction phase of the property;
>
> 2. Accepts or agrees to accept incentives or rewards from a communications service provider that are contingent upon the provision of any or all communications services by one or more communications service providers to the exclusion of the local exchange telecommunications company;
>
> 3. Collects from the occupants or residents of the property charges for the provision of any communications service, provided by a communications service provider other than the local exchange telecommunications company, to the occupants or residents in any manner, including, but not limited to, collection through rent, fees, or dues; or
>
> 4. Enters into an agreement with the communications service provider which grants incentives or rewards to such owner or

> developer contingent upon restriction or limitation of the local exchange telecommunications company's access to the property.

Section 364.025(6)(b)(1)-(4), Florida Statutes.

The premise of these four automatic provisions is some kind of arrangement whereby the local exchange company is either excluded from the property or otherwise restricted or limited in its access to the property *or* the customers already pay for the service to another carrier through some type of bulk service arrangement. An ILEC relieved of its carrier-of-last-resort obligation under this statute must timely notify the Commission of that fact. Section 364.025(6)(c), Florida Statutes. AT&T's requested relief is not based upon the automatic relief provisions of Section 364.025(6)(b)(1)-(4), and none of these provisions apply to the facts present for Nocatee. Tr. 160; AT&T Petition, at Para. 3, p. 2.

In the present situation, AT&T has petitioned this Commission under the alternative "good cause shown" provision of Section 364.025(6)(d). This statute provides that an incumbent local exchange company that does not have an automatic waiver under Section 364.025(6)(b)(1)-(4) may petition the Commission and "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."

Reading these statutes together as a whole demonstrates that AT&T has not shown good cause to be granted a waiver. AT&T's whole case rests on the undisputed fact that since AT&T is permitted to offer only telephone service it therefore should be relieved of the obligation to provide telephone service. Tr. 11-13, 40, 97. The fact that AT&T cannot offer video and data services is legally insufficient to grant a waiver of the company's universal service obligations.

First and foremost, the plain language of the statute does not support AT&T's bundling argument. There is nothing in the statute that requires as a precondition to telephone service that

AT&T be allowed to provide video and broadband services. This Commission has no authority with respect to broadband or video services, and both are excluded by operation of the various statutory provision of Chapter 364 in Sections 364.011, 364.013, 364.02(13)-(16), and 364.025(6). There is nothing in Section 364.025(6) that authorizes the Commission to consider non-regulated services. The language of the statute gives no indication that services beyond voice telephone service are to be considered when determining if the "good cause" standard has been met. Rather, throughout the statute, the service at issue is referred to either as "communications service," which is only voice or voice replacement services or it is referred to as the local exchange company's "carrier-of-last-resort" obligation. Neither of these provisions refers to the panoply of other competitive services that the local exchange telecommunications company may offer. These definitions are, instead, specifically tied to "voice or voice replacement" service, as provided in the new law, or to basic local telecommunications service, which is also defined in Section 364.02(1), Florida Statutes, as a voice service offering to residential customers. Thus, reading the statute as a whole with the supplied definitions, the sole consideration for a COLR waiver is the provision of telephone services.

The requested waiver also flies in the face of the specific statutory directive of Section 364.025(1) that "universal service objectives be maintained after the local exchange market is opened to competitively provided services." AT&T is being asked to provide voice telephone services, and there are no restrictions on the telephone services or bundling of voice services it may offer. The presence of competitive alternatives, standing alone, whether wireless or Comcast's VoIP telephone service, does not establish a basis for a COLR waiver. Tr. 133. In fact, those alternative providers create exactly what the Legislature says it wants – competitive choices for consumers. Section 364.01(3), Florida Statutes.

There is a certain level of discussion in the record regarding the availability of alternative telephone service providers for the Nocatee residents and the claim, or the suggestion, that the availability of these alternatives establishes or contributes to the good cause for COLR relief. Tr. 83. But if the Legislature had intended that the presence of any competitive voice alternative would absolve an ILEC of its COLR obligation, then the Legislature could have written the statute that way. If the presence of an alternative provider was the test, the Legislature would have effectively removed the COLR obligation throughout most of Florida given the proliferation of cellular and broadband VoIP opportunities. But the Legislature did not do this, as this is not what is in the statute. The availability of an alternative provider is relevant only to the extent such availability is linked to an exclusive service arrangements or bulk financial deals which serve to bar the ILEC's ability to compete, conditions that are not true in this case.

A complete read of the plain language of the relevant statutes establishes that the Commission has no authority to consider non-regulated services when evaluating whether a local exchange telecommunications company has demonstrated good cause for being relieved of its statutory carrier-of-last-resort obligation. But assuming that the statute is not plain on its face, it is well settled law that the Commission one can look outside the four corners of the document to explore the legislative history to determine legislative intent. *BellSouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003). While AT&T's failure to demonstrate good cause can be established by looking solely to the relevant statutory language discussed above, in the unlikely circumstance the Commission decides that it must look to extrinsic evidence, in this situation there is explicit legislative rejection of the very basis AT&T is now seeking to employ, which is dispositive of the Legislature's intent on this matter.

As the Legislature considered creating a carrier-of-last-resort exemption, it specifically rejected language that would have expanded the bases for waiver or elimination of the COLR obligation to include other types services, such as cable, broadband, and perhaps even marketing arrangements. The original version of House Bill 817, which was one of the bills in which the carrier-of-last-resort relief provisions were originally placed, contained an additional basis for automatic relief from the carrier-of-last-resort obligation:

> Restricts or limits the types of services that may be provided by an eligible telecommunications carrier or enters into an agreement with a communications service provider which restricts or limits the types of services that may be provided by an eligible telecommunications carrier.

House Bill 817 (available at http://www.myfloridahouse.gov). This provision was, however, eliminated very early on in the legislative process, demonstrating the Legislature's intent to focus the bill on the service that is directly associated with the carrier-of-last-resort obligation – ***voice service***.

Florida courts have unanimously held that consideration and rejection of potential statutory language is telling in understanding legislative intent. *Health Options, Inc. v. Agency for Health Care Administration*, 889 So.2d 849, 852 (Fla. 1st DCA 2004). Here, the Legislature has spoken. The Legislature explicitly rejected the bundling of voice services with video and broadband services, and the Commission should take that rejection for what it is – that the bundling of non-regulated video and broadband services is not an acceptable basis for relief.

AT&T's reliance on its inability to provide unregulated services simply is not recognized by the statute. The focus of any COLR waiver request must be on what is relevant to the Commission's exclusive jurisdiction – and that is telephone service. AT&T has acknowledged

that there are no restrictions on its ability to offer telephone service. Thus, as a matter of law, AT&T's request must be denied and it should be ordered to provide service to these people.

D. NO EVIDENTIARY BASIS FOR A COLR WAIVER

A waiver of a statutory obligation is an extraordinary remedy that should not be granted without full consideration of all of the relevant law and evidence. Such careful consider is especially important when the issue is the long standing universal service obligation of an ILEC. The public policy importance of universal service is well recognized by the Florida Legislature in its statements of legislative intent and purpose for this Commission: "The commission shall exercise its exclusive jurisdiction in order to: (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices. . . ."

The legal and evidentiary analysis as to whether good cause has been shown for the requested waiver boils down to two questions: First, are there any limitations on AT&T's ability to offer voice telephone service within the private communities? Second, are there any limitations on the ability of customers to choose AT&T as their voice telephone service provider? On the basis if this record, there are no such limitations on AT&T or its potential customers.

First, with respect to what AT&T can or cannot do, there are no limitations on AT&T's ability to compete for voice telephone services. Tr. 97. Hearing Exh. 8 (AT&T's Responses to Nocatee's First Set of Interrogatories, Amended Item No. 2). This means that AT&T can plan and build its network as it determines without any limitation on the facilities it can place in the private communities. Likewise, with its network, there is no limit on AT&T's ability to utilize its equipment to provide new or advanced voice services, from bundling various voice services,

from bundling landline telephone service with wireless voice and/or data services, from bundling with satellite video or data services, or from bundling with services other than broadband and video. AT&T is not without meaningful competitive options. Thus, AT&T is "limited" to exactly the service authorized by the certificate of convenience and public necessity issued by this Commission – voice telephone service. Since AT&T is unrestricted in its ability as a regulated telephone company to offer telephone service, there is no good cause shown for a waiver of that obligation to provide telephone service.

AT&T conveniently ignores this relevant and fundamental fact, and instead focuses on the denial of the wired video and data services and then tries to extrapolate this denial into a claim that it is uneconomic for it to provide voice telephone services. But bootstrapping a restriction on AT&T's ability to provide video and broadband services into a good cause argument that AT&T does not have to provide a voice telephone service is disingenuous and a red herring. This argument ignores the fact that this Commission does not regulate video and broadband services, and non-regulated services are not a sufficient basis for not providing regulated telephone services. Sections 364.01(3) and 364.02(13)-(16), Florida Statutes. If AT&T's theory is valid, then the denial of any other service should be a valid basis for not providing voice services. If this were true, then any other non-regulated business that AT&T may be in or wish to enter would be relevant. The fact that AT&T may also prohibited from offering electric, water, wastewater, fire protection, or such other services cannot also be a basis for denying voice telephone services. While some of these examples may seem absurd, the fact that AT&T has made a business ***choice*** to enter other, non-regulated businesses cannot be determinative or at all relevant as to whether AT&T can be relieved of its carrier-of-last-resort obligation for voice telephone customers.

The point bears repeating — ***the Commission is hearing this petition only because AT&T has chosen to offer non-regulated services***. If AT&T had chosen not to be in the video and data business, this petition would not exist. If AT&T's decisions to enter non-regulated markets can determine whether it's COLR obligation continues, then the universal service statute will be meaningless. This is a slippery slope the Commission must avoid. AT&T is entitled to make business decisions to provide new services, enter new markets, and generally bundle those services. But the inability to bundle unregulated services with telephone service is not relevant to demonstrating good cause for COLR relief.

The line in the sand is telephone services. AT&T is not being denied the opportunity to put in any facilities it wants nor is it being denied the opportunity to provide voice services. It is being asked to fulfill its statutory obligation to provide universal telephone service. Good cause for relief from providing telephone service can only involve voice services, not other services that may or may not choose to offer.

Second, there are no limitations on the ability of customers to choose AT&T's telephone service. There is no requirement that homeowners must take Comcast's telephone service. Indeed, there is no requirement that homeowners must take Comcast's video or data services, and they are free to choose non-wired alternatives. Likewise, none of the Comcast services are bundled into other services and, most critically, there are no bulk agreements or other contractual obligations whereby the homeowners pay for any Comcast service. Hearing Exh. 12, at 12 and 26-27. This means that homeowners are not paying for telephone services, or video or broadband services either, through homeowners' fees or any other fees. Thus, consumers are free to choose the telephone service they want — but only if AT&T's network is there to serve them.

Since there are no limitations on customer choice, and no incentives for customers to choose Comcast services, AT&T focuses on the Comcast Compensation Agreement and Marketing Support Addendum with Nocatee. Hearing Exhs. 4 and 5. But from a customer perspective, there is nothing in these two documents that limits, inhibits, or controls an end user customer's choice for voice telephone service. The Comcast documents only provide that Nocatee will instruct its developers to make available to potential homebuyers certain Comcast marketing materials. Hearing Exh. 12, at 57-59. This availability or presentation of marketing materials does not incentivize or reward homebuyers who choose Comcast.

Since there are no limitations on customer choices for telephone service, AT&T has tried to deflect the issue by pointing out that Nocatee receives certain financial compensation from Comcast, and the money the greedy Nocatee receives places AT&T at a disadvantage. But again, any compensation that Nocatee may receive has no impact on AT&T's ability to build and offer telephone services just has it has no influence on a customer's choice for telephone service.

The AT&T witness testified how Nocatee would be out there pushing customers to take Comcast service, but this is unsubstantiated speculation that is not supported by the evidence of the actual business relationship. Tr. 140-141. As Mr. Ray testified, Nocatee's commitment to Comcast was to require the developers of the actual subdivisions to notify customers as to the availability of services via displays and presenting the materials. Hearing Exh. 12, at 58-59. Thus, there is no direct relationship or contract between Nocatee and the potential homebuyers. While Comcast does have a marketing advantage with customers through the availability of marketing materials to potential home buyers, these materials are hardly dispositive of the question and certainly do not constitute competent substantial evidence of record to support a COLR waiver. Indeed, the AT&T witness acknowledged that the company is free to market its

services via any traditional marketing channel and the AT&T name and history for voice telephone services certainly is highly valuable. Tr. 58-59, 140-141.

As for the actual financial compensation to Nocatee under the compensation agreement and marketing addendum, to the extent it may be relevant it is not significant. There is a nominal amount of compensation paid by Comcast for each house sold each quarter regardless as to whether the homeowner signs up for any Comcast service; this was sometimes referred to in the record as the "door fee." Hearing Exh. 5 (Compensation Agreement, at page 1). While the specific amount is considered confidential by Nocatee, the cumulative one time door fees over the life of the buildout is not huge and would be substantially less than the compensation AT&T is seeking.

There is also a separate sliding scale of recurring fee revenues which may be paid to Nocatee. Hearing Exh. 5 (Marketing Support Addendum, at 2 and 6). Again, the specific terms were filed confidentially with the Commission, but the Commission should carefully consult the circumstances in which this compensation may occur and the total amount that would be due. If you assume a 100 percent penetration rate for Comcast's telephone service, and that customers pay the higher of the two current rate alternatives for Comcast's telephone service, the cumulative annual revenues due at total buildout for just the phone service would be about a fifth of the total door fees due. But these projected revenue streams are contingent on total buildout and assume Comcast captured the entire market, conditions that are not immediate or likely. This speculation does not support the perceived advantage stated by the AT&T witness and it is certainly not competent substantial evidence to support a COLR waiver. Indeed, these minimal revenue streams only substantiate Mr. Ray's testimony as to the lack of incentives, and thus influence, Nocatee has over customers to choose Comcast over AT&T.

AT&T has also conveniently excluded the advantages it brings to the market. Of primary significance is the fact that Comcast's voice telephone service offering is a very different kind of service than AT&T's traditional landline ubiquitous telephone network. Tr. 135-141. Comcast's service requires a broadband connection, a cable modem, a router, and an embedded multimedia terminal adapter ("EMTA"), for which extra charges apply. Hearing Exhibit 5 (Nocatee's Responses to Staff's First POD, Item No. 3, Comcast marketing materials at Bates Nos. Noc-15, NOC-26, NOC-28, NOC-40, and NOC-42). AT&T's landline service does not require this additional equipment. Moreover, the Comcast literature states that its telephone service may be unavailable during an extended power outage. Tr. 51-52. Likewise, not all customer premises equipment ("CPE") is compatible with the Comcast's telephone service. The dynamics for Comcast as a VoIP provider are very different and certainly not ubiquitous in the same way as AT&T's voice telephone service.

The bottom line is that the potential compensation to the developer is not significant or relevant, and even if it was, the developer's compensation is not linked to and has absolutely no impact on the choices consumers will make for telephone service. If AT&T builds its network, as it should, then customers will have a real competitive choice between different technologies, different traditions, and different capabilities. So why did Nocatee enter into this arrangement and why doesn't Nocatee just grant AT&T the right to sell all services and let Comcast decide if it wants to break the marketing agreement? The real issue behind the Comcast agreement was discussed by Mr. Rick Ray in his deposition.

> Well, many residents just prefer traditional landline phone service because it has a proven history of connection with 911, dependable service, and no need for backup electric power. The only service that Comcast offered for voice was their Comcast digital voice service. And I know they've had success with it, but it's also a very new product and not one with a proven history, and so the

> traditional landline phone service was something that we felt was particularly important in communities with older residents, who are less likely to rely on cell phones or the newer forms of technology. For example, in these private communities that we're speaking of, one of the communities currently being denied access is an age-restricted, active adult community with residents 55 and older, and the other is a high end gated community, which typically will have somewhat older residents.
>
> So we did not feel that we wanted to – again, very similar to what we did with BellSouth in 2006, we were not prepared to risk the community and to limit the choices of the residents to technologies that, while they may be very successful in the future, they haven't proven themselves to be – they don't have a history, a track record of success in the past. And while we felt that way with the Internet protocol television with BellSouth in 2006, we felt the very same way when it came time to dealing with Comcast. Comcast had very good video services and very good data services, but could not offer a voice service that was comparable to the traditional landline that BellSouth has historically offered, and we wanted the residents to have a choice.

Hearing Exh. 12, at 27-28. What was important to the development was to ensure the future technology infrastructure of the community through the best possible service providers. For telephone service, that is AT&T.

AT&T has also tried to argue that the cost to build a telephone exchange network in the Nocatee private communities is uneconomic. As is more fully discussed in the next section of this brief, the tariff AT&T is relying upon does not apply in this situation to the construction of a local, ubiquitous telephone network. But putting aside the legal argument and accepting AT&T's cost at face value, there are several fundamental problems with AT&T's cost recovery bill.

The first problem with the uneconomic to serve argument is that the analysis is predicated on a 20% penetration rate. The sole basis for the 20% is AT&T's experience with the Avalon Phase I development, but there is no evidence of record relating how or why the Avalon

experience is relevant to Nocatee. Tr. 48, Hearing Exh. 8 (AT&T's Responses to Nocatee's First Set of Interrogatories , Item Nos. 7-9). Indeed, the AT&T witness could not describe how Avalon was similar to the Nocatee communities. Tr. 49-50. In fact, the actual penetration rate for Avalon exceeded AT&T's estimate for Avalon. Hearing Exh. 8 (AT&T's Responses to Nocatee's First Set of Interrogatories, Item No. 8). But more importantly, AT&T has also admitted that it has no idea what the take rate would be for AT&T telephone services in Nocatee. Tr. 124-125; Hearing Exh. 2 (AT&T Florida's Response to Staff Data Request No. BS-1, Item No. 7). This type of speculative and unsubstantiated information does not rise to the level of competent substantial evidence of record that will support the multi-million dollar requested cost recovery. Thus, there is no basis for any compensation.

To the extent there is any credible evidence of record on the penetration rate, it certainly should be higher than 20%. As Mr. Ray testified, the Riverwood development within Nocatee is a Del Webb, age restricted community, which means the minimum age to be a resident is 55 years old, and the other community is a high end, heavily amenitized, gated community. Hearing Exh. 12, at 9, 48-49; Hearing Exh. 4 (Nocatee's Responses to Staff's First Data Request NOC-1, Item No. 3). These are not the types of customers who are willing to part with their traditional landline telephone service. Indeed, Mr. Ray, as the developer of the property and the person most familiar with the customer market and other development demographics, estimated a 50% penetration rate. Nocatee does not concede that a 50% penetration is the correct number. However, a 50% penetration rate significantly changes the cross over point at which the revenues recover the investment costs, and under some approaches places the development within the five year cost recovery window. Hearing Exh. 3 (AT&T's Responses to Staff's Data Request, Item No. 7).

Another problem with the 20% penetration level is that while AT&T is only assuming a 20% penetration rate, the network it is proposing to construct would be able to serve 100% of the customers. Tr. 44. While there is no disputing the fact that no one knows which residence may take the AT&T service and which may not, to build a network capable of serving 100% of the residences and then to seek recovery of 100% of the cost based on a 20% penetration rate unfairly and inappropriately saddles the developer with far more costs than are necessary or appropriate. If AT&T truly believes that the penetration rate is only going to be 20%, then the network should be designed in such a manner as to ultimately ensure a 20% penetration level, with some margin of error and growth factor built in. This may mean that the network is designed as if only 30%, 40%, 50%, or some such other percentage of the residences were going to be built. For example, if there are 288 residences in Riverwood and the penetration rate is expected to be 20%, that means approximately 46 residences will ultimately choose AT&T's service. If the optical network units are designed to handle 12 residences each, instead of deploying 19 ONUs for the entire development, AT&T may still be able to safely serve 20% of the development if it deployed fewer ONUs, perhaps somewhere in the range of 5 to 10. Tr. 48. Likewise, fiber down the street may be sized to serve every house of the street, but if AT&T really believes in a 20% penetration level, then the total number of fibers and other supporting equipment could be and should be less. The point here is not to say what the correct lesser quantities of equipment would be, but rather to simply make the point that if there are 46 residences in Riverwood (20% of 228), AT&T would not be deploying 19 ONUs.

Related to this issue is the fact that AT&T has isolated the cost recovery to just the two respective private communities without regard to the overall penetration within the entire Nocatee development. Basically, AT&T is slicing the pie in such a manner as to allocate all the

costs on the smallest possible basis in order to generate the largest possible cost recovery allocation to the developer. Since by AT&T's own admission the network within the private communities is exactly the same network architecture as for the public communities, and since this is all one DRI, AT&T should distribute the costs over the entire project and not just the private communities.

There is no evidence that proves by competent substantial evidence that it is uneconomic for AT&T to serve these communities. AT&T bears the burden of proof in demonstrating good cause based upon all the facts and circumstances. The only few and limited alleged facts that AT&T has offered, even if they are accepted as true, do not even close to good cause.

In the final analysis, the record does not support a finding of good cause for AT&T to be relieved of its COLR obligation. There are no limitations on AT&T to build its network and offer services, and customers are free to choose AT&T telephone service without adverse effect. The other evidence AT&T has presented is highly speculative or irrelevant to the Commission's analysis. Thus the request should be denied.

E. NO BASIS FOR ANY COMPENSATION

AT&T's compensation argument is based exclusively on the application of its "special construction" or the contributions in aid of construction ("CIAC") tariff. Since tariffs are contracts, the tariff is to be strictly construed against the utility. Thus, in this case, to the extent there is any ambiguity as to whether the tariff applies to the present situation, as a matter of law such questionable applicability must be construed against AT&T. Rule 25-4.034, Florida Administrative Code; *see also, Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So.2d 716 (Fla. 1983); *Louisville & Nashville Railroad v. Speed-Parker, Inc.*,

137 So. 724 (Fla. 1931); *Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So.2d 440, 442 (Fla. 3d DCA 1984).

As AT&T's witness testified, until the PAA order in this docket, the company had never collected any financial compensation from a developer to build its network in a development. Tr. 86-87; Hearing Exh. 2 (AT&T's Responses to Staff's Second Request for Interrogatories, Item Nos. 27-28). As AT&T has acknowledged, what is being requested within the private communities is the construction of the basic local exchange telephone network. Tr. 41-43. There is nothing fancy, nothing extra, and nothing out of the ordinary. It is, quite simply, the exact same network architecture as AT&T is constructing or proposing to construct in the public communities at AT&T's own design and expense. Tr. 41. This is not a case of a single customer 20 miles from the nearest line, or a customer requesting 8 lines into a residence, or a customer such as a reservations service or answering service requesting numerous lines to a single location. While not admitted by AT&T, the distinction between these extraordinary individual customer requests for which the tariff does apply and the present situation which involves the construction of the complete local exchange network is simple – the tariff does not apply.

Hearing Exhibit 14 is a copy of the tariff AT&T is relying upon – Section A5, Charges Applicable Under Special Construction. At the outset, it must be said that the tariff by its express terms does not apply to network distribution facilities constructed in public or private rights of way when such facilities serve "subscribers in general." *See* Sections A5.2.4.A and A5.2.5.A. There is not dispute that the facilities at issue are for the construction of the exchange telephone network that will serve all the residents of the Nocatee private communities. Thus, the tariff simply does not apply.

Now, AT&T may argue that the rest of Sections A5.2.4.A and A5.2.5.A provide that special construction may apply "if the provision of such facilities is determined to be unreasonable" by this Commission. But AT&T has not provided any evidence that that network proposed for the two private communities is unreasonable since it is the network that AT&T has designed. Tr. 41-45. Likewise, Section A5.2.5.A discusses obtaining easements satisfactory to the company at no cost, but the only objection AT&T has to the proposed easements for Nocatee is the limitation to selling voice telephone services and excluding the non-regulated video and data services – as everyone agrees, there is no limitation in the proposed easements as to the facilities that may be constructed.

This exclusionary language should be sufficient to demonstrate the inapplicability of the special construction tariff. However, if the Commission believes it is appropriate to consider that other provisions regarding special construction, it is clear from a review of those provisions that even the other provisions do not apply to the Nocatee private communities.

The tariff provides a definition of "special construction" in two places, but the language is the same. In both Section A5.1.2 and Section A5.2.1.A.1 the tariff defines Special Construction as follows:

> Special Construction consists of a series of tariff regulations that are designed to protect the Company from undue risk associated with specially constructed facilities and allows the Company to recover excessive investments incurred by the construction of facilities that will carry services currently offered on a general basis in a service tariff. These regulations are also designed to prevent undue subsidization of specially constructed facilities by the general body of rate payers.

Initially, it must be said that this definition is somewhat circular – "special construction" consists of tariff regulations "to protect the Company from undue risk associated with specially

constructed facilities." The Encarta Dictionary defines "special" as follows: "unusual or superior; distinct, different, unusual, or superior in comparison to others of the same kind." As Mr. Bishop testified, there is absolutely nothing special, or unusual regarding the network being built in the private communities. It is exactly the same type of network as AT&T is constructing in the public communities except that AT&T will not be putting in the additional electronics by which AT&T can offer video or data services. Tr. 41-43.

While there is nothing special regarding the proposed facilities for the private communities, there is additional language in the definition that further limits the reach of this tariff section. The rest of the first sentence of the definition establishes two important limitations on the special construction: first, it is to recover "excessive investments" in facilities, and, second, the investment is to be made for "services currently offered on a general basis in a service tariff." This limitation to only "services currently offered" by the tariff is important because it means that since the tariff does not address broadband or video services, none of the special construction charges can be assessed for facilities designed for those services.

As for the "excessive investments" language, this language is expanded upon in Section A5.2.1.B.1, but none of the conditions itemized in this section apply to the Nocatee private developments. Section A5.2.1.B.1 states:

> Special construction is required when suitable facilities are not available to meet a customer's order for service and/or a mutually agreed upon facility forecast and one or more of the following conditions exist:
> - The Company has no other requirement for the facilities constructed at the customer's request;
> - The customer requests that service be furnished using a type of facility, or via a route, other than that which the Company would otherwise utilize in furnishing the requested service;
> - The customer requests the construction of more facilities than required to satisfy his initial order for service; and submits a mutually agreed upon facility forecast;

> - The customer requests construction be expedited resulting in added cost to the Company;
> - The customer requests that temporary facilities be constructed;
> - The cost to construct line extension facilities for an individual subscriber when the cost exceeds the estimated five year exchange revenue;
> - The term "customer" as used in the preceding context also includes those entities/businesses which, due to the nature of their business operations, may create a requirement to terminate a concentration of network facilities at said entities' operational centers. Such facilities may be individually ordered by and billed to separate customers who are patrons of the entities and typically utilize the facilities to avail themselves of the entities' services. Examples of such entities or businesses include, but are not limited to Telephone Answering Services, Alarm Central

Thus, two conditions are necessary – "suitable facilities are not available" or do not meet a mutually agreed upon forecast and one or more of the eight specifically identified conditions do not apply. There is no disputing that suitable facilities do not currently exist, so the real issue is whether one or more of the eight enumerated conditions apply.

The first condition is whether the company has "no other requirement" for the facilities. It is undisputed that the facilities being requested are for AT&T to provide regulated voice telephone service within its certificated incumbent local exchange service territory to two separate subdivisions consisting of thousands of potential customers. This is exactly the type of service AT&T has provided to other communities, and is providing elsewhere within the Nocatee community, as it has done for over a century. It cannot be said that AT&T has no other requirement for these facilities. It should also be noted that if the COLR relief is denied, then since the facilities are required by operation of law, this tariff provision would not apply

The second condition involves a request for service "using a type of facility, or via a route" that the company would not otherwise use. This is unquestionably not the situation within the two Nocatee developments at issue. As Mr. Bishop testified, the network for the private

communities is exactly the same type of network as AT&T is building in the public communities. Tr. 41-43. The network design has been done exclusively by the AT&T engineers, and Nocatee has not requested any type of facility or any specific route for the network. Thus, this is not a facility or route the company would not otherwise use.

The third condition involves requests for facilities that are more than are required to satisfy the initial order for service based upon a mutually agreed upon facility forecast. Again, the developer has not specifically requested any facilities other than those necessary to deliver voice telephone service. Thus, the developer has not requested specific quantities or types of facilities, and the request has not been for more facilities than are necessary to deliver service. Likewise, the developer certainly does not dispute the facility forecast for building out the network. AT&T has designed the network the way it believes is best. Tr. 41-43. Therefore, since the proposed facilities are exactly what AT&T says are necessary to deliver voice only service, and by its own admission, no more, excessive facilities are not being requested or required.

The fourth condition involves a request for expedited construction. There has not been any request for expedited construction. To the extent there is any exigent circumstances in this case, it is by AT&T's only failure to build out its network.

The fifth condition is a request for temporary facilities. No one disputes that the facilities at issue are for a permanent voice telephone network, so this condition does not apply.

The sixth condition is when the cost to construct "line extension facilities for an individual subscriber" exceeds the estimated five year exchange revenue. The phrase "individual subscriber" is not defined in Section A5 or in Section A1, Definition of Terms. However, the phrase "subscriber" is defined in Section A1 as follows:

> Any person, firm, partnership, corporation, municipality, cooperative organization or governmental agency furnished communication service by the Company under the provisions and regulations of its tariff.

General Subscriber Service Tariff, Section A1, Original Page 18. Based upon this language, Nocatee is not a subscriber for purposes of the application of this tariff. Nocatee, as the property developer, is not going to use the proposed network and purchase any tariff services from AT&T. The homeowners will be the subscribers once AT&T builds its network. There simply is no basis for applying a five year revenue analysis to Nocatee when Nocatee will never purchase any of the services. Indeed, even AT&T recognizes this fact as prior to Nocatee it has never applied this tariff to a development like Nocatee. Tr. 134.

The seventh condition is not a condition at all, but rather is a definition of "customer" that applies to the "preceding context" which is the line extension policy. This definition of customer includes entities or businesses that require the concentration of network facilities to a location, such as may be required by a telephone answering service, alarm central location, specialized mobile radio system, or a radio common carrier. This situation does not apply.

The final condition involves a service wire or drop wire that exceeds 75 feet or which requires avoiding encumbrances or the additional of load coils, extenders, or other equipment. There is no evidence of record that any of these situations apply. And even if there was, these limitations apply to drops to a specific premises and not the construction of the basic network itself that runs up and down the streets of the development.

The remaining provisions of Section A5 are not applicable on their face, and so are not relevant to the compensation AT&T is now seeking. For example, the rest of A5.2.2 addresses the specific implementation provisions if the special construction provisions apply. Likewise, the subsequent sections address such matters as the deferral of the start of service, contract

service arrangements, emergency service continuity plan, and the conversion of overhead facilities to underground.

As this clause by clause review of the tariff makes clear, the tariff does not apply to Nocatee or its residents for the AT&T infrastructure to be built in the private communities. Whether there is a COLR obligation or not, the service being requested is the construction of a regulated, exchange telephone service network for an entire subdivision that is a part of the overall regulated telephone network being built within the greater Nocatee development. There is no "special construction" within the meaning of the Commission's rules or AT&T's tariff. Indeed, the subsequent provisions of A5 specifically state that special construction does not apply to facilities constructed in public or private rights of way when the facilities are used for subscribers in general. Thus, there is no basis to apply the special construction tariff to Nocatee.

F. CONCLUSION

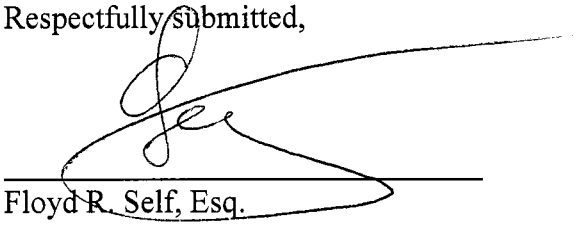
The fundamental question is whether AT&T has demonstrated good cause to be relieved of its obligation to build a telephone network to serve two entire subdivisions as it has done everywhere else within its service territory for the last 100 years. The competent substantial evidence of record establishes that there are no limitations on AT&T's ability to build its network or offer its services within the Nocatee private communities and the customers are not restricted or otherwise limited in their ability to choose AT&T as their telephone service provider. Thus, there is no basis for a waiver.

Likewise, the tariff that AT&T relies upon does not apply. If this is special construction, then any local network that hereafter is to be constructed would be "special construction," and the language of the tariff is clear that facilities to serve subscribers in general is not special construction. If AT&T has no obligation to build this network at its own cost then the universal

service goals of Florida law are meaningless. Without universal service, the ubiquitous public switched network will come to an end, to the detriment of customers not just within the private communities of Nocatee but to all customers everywhere. Accordingly, the requested carrier-of-last-resort waiver and the request for compensation should be denied.

As Ms. Shiroishi stated in her summary, AT&T's objective is to use the regulatory process to end its COLR responsibilities because "[w]e want to use our investment dollars wisely to bring Florida residents our advanced services." Tr. 84. The business decision to want to compete in competitive markets is laudable, but AT&T cannot make that choice at the expense of its obligation to build the basic telephone network that provides universal service for thousands of people. This is not about the "greed" of the developer that cut a marketing deal that excludes AT&T from being able to provide unregulated services. Rather, this is about AT&T's greed to have it all or else it walks. This is precisely why the COLR obligation exists and why the requested waiver and compensation should be denied.

Respectfully submitted,



Floyd R. Self, Esq.
MESSER, CAPARELLO & SELF, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
(850) 222-0720 (voice)
(850) 224-4359 (facsimile)
fself@lawfla.com

M. Lynn Pappas
PAPPAS LAW FIRM
245 Riverside Avenue, Suite 400
Jacksonville, FL 32202

Attorneys for Nocatee Development Company, SONOC Company, LLC, Toll Jacksonville Limited Partnership, Pulte Home Corporation and Parc Group, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U.S. Mail this 7th day of August, 2007.

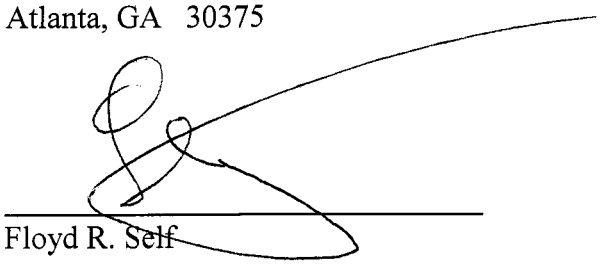
H. F. Mann, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Patrick Wiggins, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Dale Buys
Division of Competitive Markets and
Enforcement
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

James Meza III
Michael Gurdian
Tracy Hatch
c/o Nancy H. Sims
AT&T Florida
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
nancy.sims@bellsouth.com

E. Earl Edenfield
AT&T Southeast
675 West Peachtree Street, Suite 54300
Atlanta, GA 30375



Floyd R. Self