

Ruth Nettles

From: Rhonda Dulgar [rdulgar@yvlaw.net]
Sent: Friday, December 21, 2007 11:47 AM
To: Sandra Khazraee; Susan Masterton; Beth Salak; Filings@psc.state.fl.us; Richard Bellak; Schef Wright
Subject: Electronic Filing - Docket 070649-TL
Attachments: TB.PetitionToIntervene.12-21-07.pdf

a. Person responsible for this electronic filing:

Robert Scheffel Wright
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b. Docket No. 070649-TL

In Re: Petition for Declaratory Statement by Embarq Florida, Inc. Regarding Implementation of Order No. PSC-07-0311-FOF-TL, Rule 25-4.094, F.A.C. and Embarq's General Exchange Tariff Section A5,G.

c. Document being filed on behalf of the Treviso Bay Development, LLC.

d. There are a total of 8 pages.

e. The document attached for electronic filing is the Petition to Intervene of Treviso Bay Development, LLC.

(see attached file: TB.PetitionToIntervene.12-21-07.pdf)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
Secretary to Schef Wright
Phone: 850-222-7206
FAX: 850-561-6834

DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Declaratory Statement)
By Embarq Florida, Inc. Regarding) Docket No. 070649-TL
Implementation of Order No. PSC-07-)
0311-FOF-TL, Rule 25-4.094, F.A.C.) Filed: December 21, 2007
and Embarq's General Exchange)
Tariff Section A5,G)
_____)

PETITION TO INTERVENE OF TREVISO BAY DEVELOPMENT, LLC

Treviso Bay Development, LLC ("Treviso Bay"), pursuant to Chapter 120, Florida Statutes,¹ and Rules 25-22.039 and 28-106.205, Florida Administrative Code ("F.A.C."), and by and through its undersigned counsel, hereby petitions to intervene in the above-styled docket. In summary, Treviso Bay's substantial interests would be directly and immediately affected by Embarq Florida, Inc.'s ("Embarq") petition for declaratory statement (the "Petition for Declaratory Statement") because the alleged factual basis for Embarq's requested declaratory statement directly concerns Treviso Bay and Treviso Bay's development. Accordingly, Treviso Bay is entitled to intervene in this docket to protect its substantial interests.

1. The name, address, and telephone number of the petitioner for intervention is as follows:

Treviso Bay Development, LLC
19275 West Capitol Drive, Suite 100
Brookfield, WI 53045.

¹ All references herein to the Florida Statutes are to the 2007 edition thereof.

DOCUMENT NUMBER-DATE

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2. All pleadings, orders and correspondence should be directed to Petitioner's representatives as follows:

Robert Scheffel Wright, Attorney at Law
John T. LaVia, III, Attorney at Law
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301
(850) 222-7206 Telephone
(850) 561-6834 Facsimile.

3. The agency affected by this Petition to Intervene is:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850.

Background

4. Treviso Bay Development, LLC is developing a residential subdivision in Collier County, Florida, known as Treviso Bay. The Treviso Bay community will include several different neighborhoods and is projected to have approximately 1,200 residences when it is fully built out. Treviso Bay has requested that Embarq provide voice telephone service to the Treviso Bay development, and Treviso Bay has provided easements for Embarq's facilities to provide such service. On several occasions, Embarq advised Treviso Bay in writing that Embarq would provide the requested service and that the easements and dedications were acceptable.

5. Treviso Bay intervened in, and defended its interests in, Commission Docket No. 060763-TL, in which the Commission

rendered its Order No. PSC-07-0311-FOF-TL, which is a key part of the subject matter of this declaratory statement proceeding. In that docket, Embarq litigated its issue of whether Embarq's providing service to Treviso Bay would be uneconomic. Embarq attempted, unsuccessfully, to prove that providing basic local exchange telecommunications service to Treviso Bay would be uneconomic.

6. The Commission recognized that Embarq does not qualify for any of the automatic exemptions from its Carrier of Last Resort ("COLR") obligations pursuant to Section 364.025(6)(b)1, Florida Statutes, and Embarq is the only communications service provider that is capable of providing, and statutorily required to provide, wire-line, land-line voice service, i.e., service that is commonly known as basic local exchange telecommunications service, to the residents of Treviso Bay. Accordingly, in Docket No. 060763-TL, after a full evidentiary hearing, the Commission determined that Embarq failed to demonstrate that providing the requested service would be uneconomic to Embarq, and held accordingly that Embarq must provide that basic wire-line service.

7. This separate proceeding was initiated by Embarq's Petition for Declaratory Statement filed on October 15, 2007.

Statement of Affected Interests

8. In this docket, the Commission will decide whether to grant Embarq's Petition for Declaratory Statement. To participate as a party in this proceeding, an intervenor must demonstrate that its substantial interests will be affected by the proceeding. Specifically, the intervenor must demonstrate that it will suffer a sufficiently immediate injury in fact that is of the type the proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982); see also Chiles v. Dept. of State, 711 So. 2d 151, 155 (Fla. 1st DCA 1998). (stating that "any substantially affected party may intervene in a declaratory statement proceeding."). Here, it is clear from the face of Embarq's Petition for Declaratory Statement that Treviso Bay's substantial interests will be affected. For example, in the conclusion of its Petition for Declaratory Statement, Embarq states:

As set forth above, in this petition Embarq seeks a ruling from the Commission that Embarq is not required to place facilities in Treviso Bay if the developer [Treviso Bay] fails to pay the advance deposit requested by Embarq in accordance with the Advance Deposit Rule and Embarq's implementing tariff. Additionally, Embarq seeks a ruling that implementation of the rule and tariff in this manner is consistent with the Embarq Waiver Order.

Petition for Declaratory Statement at 13. Accordingly, the adverse impacts to Treviso Bay are present and immediate, and these interests are the type of interests that the proceeding is designed to protect.

Disputed Issues of Material Fact

9. Section 120.565(1), Florida Statutes, provides that any substantially affected person may seek a declaratory statement from an agency regarding the applicability of a statute or rule to the "petitioner's particular set of circumstances." Accordingly, the petitioner in a declaratory statement proceeding sets forth in its petition the underlying facts that would form the basis for the requested declaratory statement. In other words, the alleged facts must be assumed true and no "disputed issues of material fact" are appropriate to a declaratory statement proceeding. However, as noted in Treviso Bay's Memorandum of Law in Opposition to Petition for Declaratory Statement, which will be filed concurrently with this Petition to Intervene, Treviso Bay disputes many of the factual allegations set forth in Embarq's Petition for Declaratory Statement.

Statement of Ultimate Facts Alleged

10. Treviso Bay believes that the following facts entitle it to the specific relief requested herein, i.e., intervention

as prayed by this Petition to Intervene, and also to the denial of Embarq's requested declaratory statement.

a. Treviso Bay's substantial interests will be affected by this proceeding; thus, Treviso Bay has standing to intervene.

b. The issues raised in the Petition for Declaratory Statement are inappropriate for a declaratory statement, rather being in the nature of a tariff dispute. Moreover, even if Embarq's tariff were applicable, there are disputed issues of material fact that preclude the Commission from issuing the declaratory statement requested by Embarq.

c. Embarq's tariff does not provide the basis for Embarq to charge Treviso Bay anything, because it provides that any deposit "shall be the difference in cost of the facilities requested and the facilities which the Company would normally provide."

d. The petition is an inappropriate attempt by Embarq to get a third bite at the apple - a third attempt at proving Embarq's claim that providing service to Treviso Bay is uneconomic, which Embarq already had a full opportunity to litigate and litigated, and which the Commission rejected after a full evidentiary hearing and again on reconsideration - that is barred by the doctrine of collateral estoppel.

e. The Commission should not apply its Rules, adopted 36 years ago to protect captive customers of monopoly telephone companies in the context of conventional regulation, to protect Embarq's profitability by shielding Embarq from risks that Embarq accepted when it chose price regulation.

Statutes and Rules that Require the Relief Requested
by Treviso Bay

11. Treviso Bay is entitled to relief by Section 120.565, Florida Statutes, and Commission Rule 25-22.039, F.A.C.

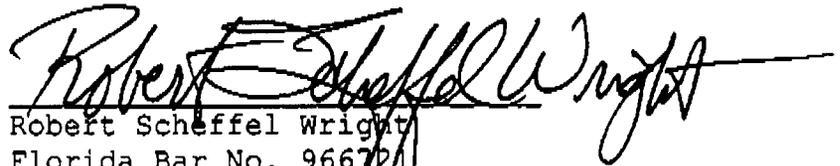
CONCLUSION AND RELIEF REQUESTED

The facts alleged above demonstrate that Treviso Bay Development, LLC's substantial interests will be affected by the

Commission's actions in this proceeding. If the Commission were to grant the requested declaratory statement, Treviso Bay's interests would be adversely affected. The impacts are immediate, and the Commission's determinations in this proceeding will determine Treviso Bay's substantial interests. Accordingly, Treviso Bay is entitled to intervene in this docket as a full party.

WHEREFORE, Treviso Bay Development, LLC respectfully requests the Florida Public Service Commission to enter its order GRANTING this Petition to Intervene and requiring that all parties to this proceeding serve copies of all pleadings, notices, and other documents on Treviso Bay's representatives indicated in paragraph 2 above.

Respectfully submitted this 21st day of December, 2007.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 21st day of December, 2007, to the following:

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