

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 16, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Higgins, Dowds)
Office of the General Counsel (Mann, Poblete)

RE: Docket No. 070678-TL – Petition by Embarq Florida, under Section 364.025(6)(d), Florida Statutes, for relief from its carrier of last resort obligations at the Greater Lakes/Sawgrass Bay subdivisions located in Lake County, Florida.

AGENDA: 01/29/2008 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: 90 – Day Statutory Deadline: 2/5/2008

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\070678.RCM.DOC

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Case Background

Embarq Florida (Embarq) is the carrier of last resort (COLR) in Lake County, Florida, where the development known as The Greater Lakes/Sawgrass Bay subdivision is located. The Greater Lakes/Sawgrass Bay is two individual private platted subdivisions that comprise a single community development district. The Sawgrass Bay community is designed to encompass 629 single family residences, and the Greater Lakes community is designed to encompass 612 single family residences, at completion. Throughout this recommendation, the two subdivisions will collectively be referred to as “Sawgrass Bay.”

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The Sawgrass Bay developers, Deluca and Engle Homes, have entered into agreements with Bright House Networks, LLC (Bright House Networks) to be the bulk services provider (non-exclusive) of both data and video services for the entire development. Payments for data and video services will be made by the residents of Sawgrass Bay through their monthly Home Owners' Association (HOA) dues. Bright House Networks will also be offering its digital phone service on an individual subscriber basis. Embarq became aware of these provisions via emails received from the developers on March 6, 2007 and April 11, 2007.

The Sawgrass Bay developers are requesting that Embarq install its network facilities in order to provide its services to the entire development. Embarq is not expressly restricted as to the services it can provide.

Embarq sent a letter on August 22, 2007 to the Sawgrass Bay/Greater Lakes Community Development District requesting an advance deposit of \$632,779 prior to Embarq installing its underground facilities to serve the development. Embarq was later informed that the two subdivisions, Greater Lakes and Sawgrass Bay, are under separate ownership regimes and have created two separate homeowners' associations. Accordingly, two separate deposit requests, both dated October 5, 2007, were sent to the respective subdivision developers. Engle Homes, the developer of Sawgrass Bay, received a deposit request in the amount of \$252,664. Deluca Homes, the developer of Greater Lakes, received a deposit request in the amount of \$245,074. Embarq states that neither Engle Homes nor Deluca Homes has submitted the requested deposit amounts.

On November 7, 2007, Embarq filed a petition for relief from its carrier-of-last-resort obligation, pursuant to Section 364.025(6)(d), Florida Statutes, for the Sawgrass Bay subdivisions.

Section 364.025(6)(b), Florida Statutes, provides for an incumbent local exchange company (ILEC) to be automatically relieved of its COLR obligations if any of four specific conditions are satisfied. If an ILEC is not automatically relieved pursuant to any of the four conditions, an ILEC may seek a waiver of its COLR obligation from the Commission for good cause shown under subparagraph (d). In all other respects, the COLR obligation continues to apply to ILECs.

In this case, Embarq is seeking a waiver of its COLR obligations for Sawgrass Bay pursuant to the good cause provision of Section 364.025(6)(d), Florida Statutes, which states:

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.

Docket No. 070678-TL

Date: January 16, 2008

The developers of Sawgrass Bay did not file a response to the petition and have not otherwise participated in this proceeding.

The Commission has jurisdiction over this matter pursuant to Sections 364.01 and 364.025, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Embarq's Petition for relief of its carrier-of-last-resort obligations pursuant to Section 364.025(6)(d), Florida Statutes, for the provision of basic local telecommunications service to the Sawgrass Bay subdivisions located in Lake County, Florida?

Recommendation: Yes. The Commission should approve Embarq's Petition for relief of its carrier-of-last-resort obligations for the provision of basic local telecommunications service to the residents of the Sawgrass Bay subdivisions located in Lake County, Florida. **(Higgins, Dowds)**

Staff Analysis:

In its petition, Embarq notes that in the recent Nocatee decision (Docket No. 060822-TL), albeit based on the facts and circumstances of that case, the Commission found that AT&T Florida had demonstrated "good cause" for relief, finding in the final order:

1. The existence of exclusive arrangements between the developers of Nocatee and Comcast Cable for the provision of data and video services.
2. The availability of alternative voice or voice replacement services, including wireless voice service, and fixed and over-the-top VoIP.
3. The ability to demonstrate through reasonable estimates that the provision of voice services only to the development would be uneconomic.¹

Embarq requests that it be relieved from its COLR obligations pursuant to Section 364.025(6)(d), Florida Statutes, for the provision of basic local telephone service to the residents of the Sawgrass Bay subdivisions located in Lake County, Florida. Embarq contends that ". . . the facts and circumstances at Sawgrass Bay are substantially similar to the facts and circumstances demonstrated to exist at the Nocatee subdivision."² In its petition, Embarq claims the following circumstances demonstrate good cause for relief:

1. The Sawgrass Bay developers have entered into agreements with Bright House Networks to be the bulk services provider of data and video services for the entire development. Payments for data and video services will be made by the residents of Sawgrass Bay through monthly HOA dues, effectively limiting Embarq to providing voice services only.
2. Bright House Networks will be offering its digital voice services to the residents of Sawgrass Bay through the same network it will deploy for its video and data service offerings. In addition to Bright House Networks' digital voice service, voice alternatives such as over-the-top VoIP and wireless telecommunications will be available to the residents of Sawgrass Bay.

¹ Embarq's Petition, at page 6.

² Id.

3. As a result of the two circumstances listed above, effectively exclusive agreements between the developers and Bright House Networks for the provision of data and video services, and the availability of alternate voice services, Embarq is uncertain of its ability to obtain a sufficient number of customers to recover costs associated with network deployment.³

Staff has reviewed correspondence between Embarq and the developers of Sawgrass Bay communities, and it appears that the developers have entered into agreements with Bright House Networks to be the bulk services provider of data and video services for the entire development. Through this particular bulk services arrangement, the homeowners will pay for these services whether or not they are utilized. Embarq contends that such an arrangement ensures that Bright House Networks will effectively achieve a 100% take rate for data and video services. Staff notes, however, that Embarq is free to market and sell any of its service offerings to the residents of Sawgrass Bay.

Embarq included in its COLR waiver petition information on its estimated network deployment costs and advance deposit derivations for service to the Sawgrass Bay communities in support of its claim that such service would be uneconomic.⁴ This information is contained in the affidavit of Kent W. Dickerson. Also included in this affidavit are Embarq's net present value (NPV) analyses of the costs and revenues associated with providing service to the two Sawgrass Bay subdivisions. Embarq's NPV analyses compare the net present value of cash inflows and cash outflows. Typically, an NPV study is used to analyze the profitability of an investment or project. In capital budgeting practice, if the NPV of a future project is positive, then the project should be undertaken. However, if the NPV is negative, then the project should be rejected.

Staff sent a data request to Embarq to confirm certain aspects of the NPV analyses presented by Mr. Dickerson. Filed under confidentiality, Embarq's response includes the detailed calculations underlying the NPV analyses of the cost to deploy network facilities in Sawgrass Bay. Each NPV analysis includes: projected capital expenditures; projected revenues; ongoing maintenance and retail costs; cost of money; percentage of customers who purchase bundled services; and average revenues for customers who purchase bundled services and those who purchase services individually.

Embarq's NPV analyses span a ten-year build-out time frame. At the end of this ten-year time frame, the anticipated cumulative net cash flows are estimated to be negative. Embarq contends that its assumption as to the percent of customers who will take its services is optimistic, and is based on its actual experience in what it believes are two similarly-situated subdivisions, Victoria Park and Overlook at Parkside.⁵ Staff subsequently sent a data request to confirm Embarq's actual take rates for its services in the Victoria Park and Overlook at Parkside subdivisions. The confidential responses include information as to the number of customers

³ Embarq's Petition, at pages 9-10.

⁴ Embarq's Petition, Exhibit KWD-3, pages 1-4.

⁵ Embarq's Petition, Attachment No. 2, pages 8-9.

Embarq is actually serving in these two subdivisions. Like Sawgrass Bay, these two developments are both within Embarq and Bright House Networks service areas, and both have bulk services agreements with Bright House Networks for the provision of data and video services.⁶

Staff notes that in its NPV analyses and deposit calculations, Embarq assumed a higher take rate than has been achieved in the Victoria Park and Overlook at Parkside developments. Staff has reviewed the other key components of the NPV analyses presented by Embarq and finds on balance their results are reasonable. Both analyses demonstrate negative net cash flows at the end of the ten-year time frame.

Conclusion

Staff believes that alternative voice and voice replacement service will be available in Sawgrass Bay from entities such as Bright House Networks and wireless providers. Due to the existence of bulk service agreements between the developers and Bright House Networks, it is questionable whether Embarq will be able to attract a sufficient number of customers for its provision of service to Sawgrass Bay to be compensatory; staff notes that Embarq's NPV analyses yield negative results. Based on these findings we believe that Embarq has demonstrated good cause and should be relieved of its COLR obligation in the Sawgrass Bay subdivisions.⁷

⁶ Embarq's Petition, Attachment No. 2, pages 5-6.

⁷ If the COLR waiver is granted, staff believes that Commission Rule 25-4.094, F.A.C. would be inapplicable in the Sawgrass subdivisions; as such, any advance would have to be negotiated by the parties. To the extent that Embarq opts to provide service to Sawgrass, it would no longer be pursuant to the regulatory mandate of Section 364.025.

Docket No. 070678-TL
Date: January 16, 2008

Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order, in the form delineated in Rule 28-106.201, Florida Administrative Code, and that identifies with specificity the issues in dispute. **(Mann)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the above staff recommendation.