

ORIGINAL

Timolyn Henry

From: Matthew Feil [mfeil@mail.fdn.com]
Sent: Thursday, June 16, 2005 4:07 PM
To: Filings@psc.state.fl.us
Subject: RE: E-Filing for Docket No. 041464 -- FDN Response to Sprint Motion to Strike
Attachments: FDN Response to Sprint Motion to Strike with Exhibits.pdf

To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket FDN Communications' Response to Sprint Motion to Strike.

In accordance with the Commission's e-filing procedures, the following information is provided:

(a) The person responsible for this filing is:

Name: Matthew J. Feil, General Counsel
Address: FDN Communications
 2301 Lucien Way, Ste. 200
 Maitland, FL 32751
Phone No: 407-835-0460
Email: mfeil@mail.fdn.com

(b) Docket No. and Title: Docket No. 041464 -TP – Petition for Arbitration of Certain Unresolved Issues Associated with Negotiations for Interconnection, Collocation, and Resale Agreement with Florida Digital Network, Inc., d/b/a FDN Communications by Sprint-Florida, Incorporated

(c) The party on whose behalf the document is filed: Florida Digital Network, Inc. d/b/a FDN Communications

(d) Number of pages of the document: 12 pages (inclusive of Exhibit).

(e) Description of each document attached: FDN Communications' Response to Sprint Motion to Strike.

CMP _____
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 RCA _____
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 SEC 1
 OTH Kim P.

DOCUMENT NUMBER-DATE

05760 JUN 16 '05

COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint–Florida, Inc. for)	
Arbitration of an Interconnection Agreement)	Docket No. 041464
with Florida Digital Network, Inc. Pursuant to)	
Section 252 of the Telecommunications)	Filed June 16, 2005
Act of 1996)	

FDN COMMUNICATIONS’ RESPONSE TO SPRINT MOTION TO STRIKE

Pursuant to Rule 28-106.204, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications (“FDN”) hereby responds to the Motion to Strike served by Sprint-Florida, Inc. (“Sprint”) on June 14, 2005 (“Motion to Strike”).¹

1. Sprint seeks to strike the direct testimony of FDN’s panel of expert witnesses from the QSI consulting firm whose testimony challenges assumptions underlying the rates for unbundled network elements (“UNEs”) that Sprint proposes be incorporated into the parties’ interconnection agreement. The basis for this position – which Sprint is raising here for the first time – is Sprint’s contention that FDN should be compelled to accept the UNE rates approved by the Commission in Docket No. 990649B. The relief Sprint seeks is both legally and procedurally improper and the motion must, therefore, be denied.

2. First, pursuant to Section 252 of the federal Communications Act (the “Act”), FDN has the legal right to arbitrate, and the Commission has the duty to resolve, all of the issues

¹ Sprint’s Motion to Strike is contained in the same document as Sprint’s Response to FDN’s June 7 Motion to Postpone, and it appears to FDN that all of the paragraphs of the combined pleading were intended to pertain to the Motion to Strike. Sprint suggests that if the Commission is inclined to postpone filing dates and the hearing, Sprint proposes at least a ninety day postponement with new filing dates for direct, rebuttal, surrebuttal, prehearing and hearing so Sprint may prepare a new cost study. FDN does not object to Sprint’s proposed postponement. If the Commission grants such a postponement, FDN believes that the Sprint Motion to Strike would essentially be moot. In a separate pleading served June 13, Sprint also filed objections to discovery FDN served on Sprint insofar as that discover related to the inputs

identified by the parties to the extent they are covered by the local competition provisions of the Act. Since the inception of this proceeding, UNE rates have been an issue in this arbitration. Sprint's own arbitration petition identifies the issue as, "What are the appropriate rates for UNEs provided by Sprint to FDN?"² In the Order Establishing Procedure,³ the parties modified that language as follows: "What are the appropriate rates for UNEs and related services provided under the Agreement?"⁴ Sprint's Motion to Strike would effectively re-write the issue to read, "Should FDN be required to pay the rates established in Docket No. 990649B?" That is not, and never has been, the issue that is before this Commission.

3. Though it does not say so expressly, Sprint seems to suggest that FDN be estopped from litigating any variation from the Commission's now nearly three-year-old decision in Docket No. 990649B, which is based on four-year-old data and assumptions. There is no exception written into Section 252 of the Act which permits that result. Nor does the Global Naps order that Sprint cites⁵ stand for the proposition that a party is foreclosed from arbitrating an issue the Commission addressed previously in a generic case. While that case does refer to a prior determination the Commission made in a generic proceeding, and the Commission refers to the generic case as supportive precedent, there is no language whatsoever in that order to support the absolute issue preclusion Sprint advocates in this case.

4. As the Commission is surely aware, carriers have sought to arbitrate issues that

and methods for Sprint's development of UNE rates. The status of that discovery and objection would have to be revisited if the Commission grants the Sprint-proposed postponement.

² See Sprint Petition to Arbitrate at p. 7. In its response to Sprint's petition, FDN agreed that the appropriate rates were an issue to be arbitrated.

³ At no point prior or during the issue identification process did Sprint elucidate this new view of the UNE rate issue.

⁴ See Issue No. 34, Order Establishing Procedure at p. 11.

⁵ See Sprint Motion to Strike at p. 4.

are the same as or similar to those addressed in generic dockets, the GNAPs order being one example. Indeed, with respect to the “points of interconnection” issue in this case,⁶ Sprint has taken positions inconsistent with the Commission’s generic determinations.⁷ Thus, Sprint itself seems to recognize a parties’ right to arbitrate issues notwithstanding a generic determination – that is, except when it does not suit Sprint to so recognize.

5. Nor is there any validity to Sprint’s claim that FDN’s efforts to arbitrate the UNE rates in this case amounts to an untimely or improper motion for reconsideration of the Commission’s final order in Docket No. 990649B. Those rates were never formally incorporated into the parties’ interconnection agreement and there was, thus, no need for FDN to seek further “reconsideration” or other action from the Commission with respect to that order. Besides, FDN does not seek reconsideration in this proceeding. Rather, FDN seeks to arbitrate, in an original action filed pursuant to Section 252 of the Act, the UNE rates Sprint has proposed to charge FDN on a going-forward basis, whether those rates stem from Docket No. 990649B and the data submitted therein, which is largely 4 years old,⁸ or from any other Sprint cost study. Section 252 of the Telecom Act guarantees FDN that right.

6. Moreover, Sprint does not deny that it failed to provide FDN the cost study which

⁶ See Issue No. 36, page 11 of the Order Establishing Procedure.

⁷ For instance, Sprint originally proposed the requirement that FDN establish multiple “virtual” points of interconnection per LATA, which was little more than a vehicle for Sprint to assess FDN additional costs notwithstanding that FDN was only required to have one point of interconnection per LATA. Though Sprint retreated from that demand, Sprint still maintains that FDN must have more than one point of interconnection per LATA (where Sprint has multiple tandems per LATA). Both of these positions are at odds with the Commission’s rulings in generic Docket No. 000075.

⁸ See, e.g., FDN Panel Direct at p. 9.

Sprint is obligated to provide pursuant to 47 C.F.R. §51.301(c). Sprint nonetheless ignores its obligations under the FCC's rules, and instead concocts a device to eliminate the UNE rate issue that has been part of this proceeding since inception, by seeking to strike testimony on the subject. The Commission must reject this attempt. At no point in Sprint's petition to arbitrate, at no point in the issue identification meetings between the parties and staff, and at no point in the continuing negotiations of the parties, did Sprint ever suggest that FDN should be utterly foreclosed from arbitrating Sprint's proposed UNE rates. To be sure, Sprint stated its position that the UNE rates approved in Docket No. 990649B should be approved in this proceeding, but that is a far cry from completely eliminating the previously-accepted UNE rate issue. As noted above, Sprint cannot by such a fiat eliminate a CLEC's right to arbitrate an issue under Section 252 of the Telecom Act.

7. Sprint's Motion to Strike must be rejected on other grounds, as well. For example, Sprint's repeated allegations that FDN somehow delayed negotiations is contradicted by the letter agreements between the parties, attached hereto as Exhibit A, whereby FDN and Sprint mutually agreed to extend the filing date for an arbitration petition and further agreed that the existing interconnection agreement would govern until a successor agreement was executed. These mutual agreements preclude Sprint's claim that FDN unduly delayed the parties' negotiations.

8. FDN maintains that all of the panel direct testimony which Sprint now seeks to strike is proper, material and relevant to Issue No. 34 in this proceeding. As explained above, Issue No. 34 is properly before the Commission.

WHEREFORE, for the reasons stated above, FDN Communications moves the

Prehearing Officer to deny Sprint's Motion to Strike and, in so doing, affirm FDN's right to arbitrate Sprint's proposed UNE rates.

RESPECTFULLY SUBMITTED, this 16th day of June, 2005.

/s/ Matthew Feil

Matthew Feil
FDN Communications
2301 Lucien Way, Suite 200
Maitland, FL 32751
(407) 835-0460

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below this 16th day of June, 2005.

Ms Kira Scott and Mr. Jeremy Susac
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
jsusac@psc.state.fl.us
kscott@psc.state.fl.us

Susan S. Masterton, Attorney
Sprint
P.O. Box 2214
Tallahassee, FL 32316-2214
(850) 599-1560
Fax: (850) 878-0777
Susan.masterton@mail.sprint.com

Kenneth A. Schifman, General Attorney
Sprint
6450 Sprint Parkway
Overland Park, KS 66251
(913) 315-9783
Fax: (913) 523-9827
Kenneth.schifman@mail.sprint.com

/s/ Matthew Feil

Matthew Feil
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
(407) 835-0460
mfeil@mail.fdn.com



Exhibit A

November 21, 2003

Via Overnight Mail

Mr. John Chuang
Sr. Manager – Sprint BWM
KSOPHM0310-3A464
6480 Sprint Parkway
Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

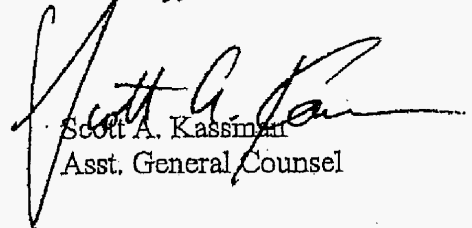
Dear John:

As you are aware, the Telecommunications Act of 1996 specifies a period of 135 days from the initial request for interconnection negotiations as the time frame to negotiate an agreement between the parties. The period from day 135 to day 160 is designated for arbitration of any open issues. As we discussed, the 160 day deadline falls on January 1, 2004, and we have not yet concluded our negotiations. Accordingly, FDN Communications requests that the deadline be extended for approximately 60 days until March 1, 2004.

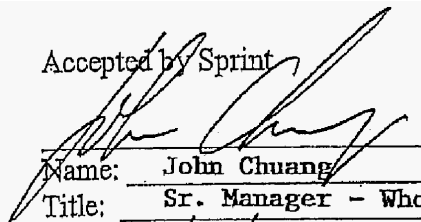
To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,


Scott A. Kassman
Asst. General Counsel

Accepted by Sprint


Name: John Chuang
Title: Sr. Manager - Wholesale Services
Date: 11/25/03

LOCAL LONG DISTANCE INTERNET

390 North Orange Avenue • Suite 2000 • Orlando, FL 32801
407.835.0300 • Fax 407.835.0309 • www.fdn.com



February 5, 2004

Via Overnight & Electronic Mail

Mr. John Chuang
Sr. Manager – Sprint BWM
KSOPHM0310-3A464
6480 Sprint Parkway
Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

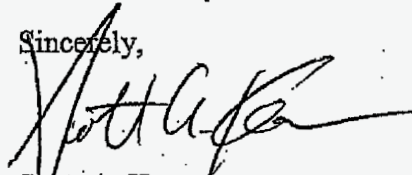
Dear John:

Per our letter agreement dated November 21, 2003, Sprint and FDN Communications agreed to extend for 60 days, until March 1, 2004, the deadline for arbitrating any unresolved issues between the parties. Since it appears that we will not be able to conclude our negotiations before March 1, 2004, FDN requests that the parties extend the deadline an additional two months until May 1, 2004. As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place.

To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

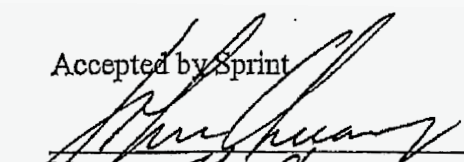
If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,



Scott A. Kassman
Asst. General Counsel

Accepted by Sprint



Name: John Chuang
Title: Program Mgr 10
Date: 2/11/04

LOCAL • LONG DISTANCE • INTERNET

390 North Orange Avenue • Suite 2000 • Orlando, FL 32801
407.835.0300 • Fax 407.835.0309 • www.fdn.com



April 9, 2004

Via Overnight & Electronic Mail

Mr. John Chuang
Sr. Manager – Sprint BWM
KSOPHM0310-3A464
6480 Sprint Parkway
Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

Dear John:

Per our letter agreement dated February 5, 2004, Sprint and FDN Communications agreed to extend for 60 days, until May 1, 2004, the deadline for arbitrating any unresolved issues between the parties. Since it appears that we will not be able to conclude our negotiations before May 1, 2004, FDN requests that the parties extend the deadline an additional three months until August 1, 2004. As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place.

To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,

Scott A. Kassman
Asst. General Counsel

Accepted by Sprint

Name: John Chuang
Title: Sr. Mgr.
Date: 4/12/04

LOCAL

LONG DISTANCE

INTERNET



July 12, 2004

Via Overnight & Electronic Mail

Mr. John Chuang
Sr. Manager – Sprint BWM
MS: KSOPHM0310-1B370
6450 Sprint Parkway
Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

Dear John:

Per our letter agreement dated April 9, 2004, Sprint and FDN Communications agreed to extend for approximately 90 days, until August 1, 2004, the deadline for arbitrating any unresolved issues between the parties. Since it appears that we will not be able to conclude our negotiations before August 1, 2004, FDN requests that the parties extend the deadline an additional two months until October 1, 2004. As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place.

To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,

Scott A. Kassman
Asst. General Counsel

Accepted by Sprint

Name: John Chuang
Title: Sr. Mgr.
Date: 7/13/04

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FDN
COMMUNICATIONS

Scott A. Kassman, Esq.
Assistant General Counsel
2301 Lucien Way
Suite 200
Maitland, FL 32751
Phone (407) 447-6636
Fax (407) 447-4839
skassman@mail.fdn.com

September 29, 2004

Via Overnight & Electronic Mail

Mr. Steven Givner

Sprint

6450 Sprint Parkway

Mailstop: KSOPHN0116-1B568

Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

Dear Steven:

Per our letter agreement dated July 9, 2004, Sprint and FDN Communications agreed to extend for approximately 90 days, until October 1, 2004, the deadline for arbitrating any unresolved issues between the parties. Since it appears that we will not be able to conclude our negotiations before October 1, 2004, FDN requests that the parties extend the deadline approximately three months until January 1, 2005. As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place.

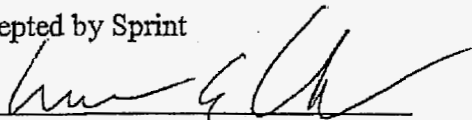
To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,

Scott A. Kassman

Accepted by Sprint



Name: William E. Check

Title: AVP – Strategic Sales & Account Management

Date: 9/30/04



Scott A. Kassman, Esq.
Assistant General Counsel
2301 Lucien Way
Suite 200
Maitland, FL 32751
Phone (407) 447-6636
Fax (407) 447-4839
skassman@mail.fdn.com

September 29, 2004

Via Overnight & Electronic Mail

Mr. Steven Givner
Sprint
6450 Sprint Parkway
Mailstop: KSOPHN0116-1B568
Overland Park, KS 66251

RE: FDN – Sprint Interconnection Agreement Negotiations

Dear Steven:

Per our letter agreement dated July 9, 2004, Sprint and FDN Communications agreed to extend for approximately 90 days, until October 1, 2004, the deadline for arbitrating any unresolved issues between the parties. Since it appears that we will not be able to conclude our negotiations before October 1, 2004, FDN requests that the parties extend the deadline approximately three months until January 1, 2005. As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place.

To acknowledge Sprint's acceptance of the foregoing, please have a Sprint officer or employee with authority bind Sprint in such matters sign in the space provided below

If you have any questions, please do not hesitate to contact me at 407-447-6636.

Sincerely,

A handwritten signature in black ink that reads "Scott A. Kassman". The signature is written in a cursive style with a large, sweeping initial "S".

Scott A. Kassman

Accepted by Sprint

Name: _____
Title: _____
Date: _____