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Sent: Monday, July 18, 2005 4:31 PM
To: Matthew Feil; Filings@psc.state.fl.us
Subject: E-Filing for Docket No. 041464
Attachments: Motion Docket 041464-TP.DOC; Oral Argument 041464-TP.DOC

To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket FDN Communications' Notice of Depositions.

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

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(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: FDN'S OMNIBUS MOTION FOR RECONSIDERATION 12 pages and FDN COMMUNICATIONS' REQUEST FOR ORAL ARGUMENT 3 pages

(e) Description of each document attached: FDN'S OMNIBUS MOTION FOR RECONSIDERATION OF THE PREHEARING OFFICER'S JULY 8, 2005 ORDER; OR, IN THE ALTERNATIVE, MOTION TO REVISE SCHEDULE PURSUANT TO THE JULY 8 ORDER and FDN COMMUNICATIONS' REQUEST FOR ORAL ARGUMENT

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	Docket No. 041464-TP Filed: July 18, 2005

FDN'S OMNIBUS MOTION FOR RECONSIDERATION OF THE PREHEARING OFFICER'S JULY 8, 2005 ORDER; OR, IN THE ALTERNATIVE, MOTION TO REVISE SCHEDULE PURSUANT TO THE JULY 8 ORDER

Pursuant to Rule 25-22.0376, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications ("FDN"), respectfully moves the Panel assigned to this proceeding to reconsider the Prehearing Officer's July 8 Order denying FDN's Motion for Postponement of, and Establishment of, Due Dates (filed June 7, 2005) ("Motion for Postponement") and granting Sprint-Florida Inc.'s Opposition thereto and Motion to Strike portions of FDN's testimony.[1] FDN's Motion for Postponement sought an extension so that FDN could arbitrate rates for unbundled network elements ("UNEs") in this proceeding, as FDN requested in its response to Sprint's petition for arbitration. *See* FDN Response to Sprint Arbitration Petition (filed Jan. 24, 2005). FDN respectfully seeks reconsideration of the July 8 Order because it fails to accommodate, or even acknowledge, FDN's right under the federal Communications Act to arbitrate UNE rates in this interconnection arbitration. Also, in order for FDN to fairly arbitrate UNE rates, Sprint must produce the cost study FDN requested pursuant to FCC rules and respond to the discovery FDN has propounded, the procedural deadlines must be extended, and the QSI panel testimony reinstated. The July 8 Order is also based on an erroneous, and legally

[1] *See Order Denying Florida Digital Network, Inc. d/b/a FDN Communications' Motion for Postponement of and Establishment of, Due Dates and Granting Sprint-Florida Inc.'s Motion to Strike FDN's Direct Panel Testimony*, Fla. PSC Order No. PSC-05-0732-PCO-TP, July 8, 2005 ("July 8 Order").

unsupportable, interpretation of the Commission's prior Order No. PSC-99-1078. The Prehearing Officer reads Order No. PSC-99-1078 as establishing a *per se* rule denying all Florida CLECs the right to arbitrate UNE rates in interconnection arbitrations. That view of the Commission's prior adjudicative order violates the Florida Administrative Procedure Act. Thus, the July 8 Order is invalid under both federal and state law.

Even if the Commission denies FDN's Motion for Reconsideration, it must still revise the procedural schedule and compel the discovery FDN requested in its Motion to Compel (filed June 29, 2005) so that FDN can present evidence responsive to Issue No. 34 as it has now been construed by the Prehearing Officer. Issue No. 34 was identified in the Order Establishing Procedure as, "What are the appropriate rates for UNEs and related services provided under the Agreement?" Now, according the Prehearing Officer's July 8 Order, Issue No. 34 is defined as whether the UNE rates established in Docket No. 990649B-TP (the "990649 rates" or the "990649 proceeding) "should be incorporated into the interconnection agreement that is the subject of this arbitration." July 8 Order at 2. Whether the 990649 rates should be so incorporated is a disputed question of fact. Accordingly, FDN must be accorded the opportunity to present evidence showing that it would be inappropriate for the Commission to incorporate the 990649 rates into the new interconnection agreement.

Alternatively, if the Commission believes that incumbent local exchange carrier ("ILEC") UNE rates should be determined only in generic proceedings, then the Commission should initiate such a proceeding to set new UNE rates for Sprint and set the matter for hearing, just as the Commission acted on Verizon's request for new UNE rates earlier this year.[2]

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[2] *See Petition of Verizon Florida Inc. to reform UNE cost of capital and depreciation inputs to comply with the FCC's guidance in the Triennial Review Order* (Dkt. No. 050059-TL). It is immaterial that Docket No. 050059-TP was initiated pursuant to Verizon's petition as opposed to one from the CLECs. Verizon effectively asked for arbitration with all CLECs based on what it contended were

Finally, FDN requests expeditious consideration of this motion. FDN asks that a Special Agenda be convened as quickly as possible or that FDN's motion be placed on the August 2, 2005 agenda.

STANDARD OF REVIEW

A motion for reconsideration should be granted if it identifies a point of fact, law or policy that was overlooked or which the Commission failed to consider in rendering its order.[3] The Commission should reconsider the July 8 Order and grant FDN's Motion for Postponement (and deny Sprint's Motion to Strike) because it overlooked FDN's right to arbitrate UNE rates and is further based on an erroneous view of Florida law.

ARGUMENT

I. Federal Law Requires that FDN be Given the Opportunity to Arbitrate UNE Rates In This Proceeding

Under the federal Communications Act, FDN has the right to arbitrate in Section 252 interconnection arbitrations any and all issues identified in Sprint's initial petition or in FDN's response. *See, e.g.,* 47 U.S.C. § 252(b)(4)(C) ("The State commission shall resolve *each* issue set forth in the petition and the response ....") (emphasis added). Sprint's Petition for Arbitration, FDN's Response, the Order Establishing Procedure, and the parties' prehearing

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changed circumstances. FDN, of course, can only seek bilateral arbitration with one ILEC at a time, but has essentially made the same request as Verizon, arguing that UNE rates established in the 990649 docket should be reformed. FDN seeks reformation of the Sprint rates for the same reasons. As explained at greater length in Section II, below, the Sprint rates are based on stale data and legal assumptions that have been superseded by the FCC's *Triennial Review Order.* To the extent the Commission feels bound by the "secret rule" invoked by the Prehearing Officer requiring that all such proceedings be conducted in generic dockets, then the Commission should convene one.

[3] *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962), *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981); *In Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

statements, all frame Issue No. 34 as follows: "What are the appropriate rates for UNEs and related services provided under the Agreement?"

Thus, until the July 8 Order re-cast its meaning, Issue No. 34 permitted, on its face, arbitration of Sprint's UNE rates *de novo* in this proceeding. To that end, and even before the procedural schedule was established, FDN asked Sprint to provide the cost study Sprint planned to rely on, and subsequently followed that request with formal discovery requests. Sprint said that it planned to rely on the 990649 rates and directed FDN to that cost study. FDN sought the study so that it could demonstrate that it was an inappropriate basis for setting UNE rates and retained the services of the QSI consulting firm to assist with that review.

As the ILEC, of course, Sprint has the burden to prove the reasonableness of the UNE rates it seeks to charge CLECs.[4] In addition, Sprint is obliged to provide information during interconnection negotiations reasonably necessary to reach agreement, including, without limitation, "cost data that would be relevant to setting rates." *See* 47 C.F.R. § 51.301(c)(8)(ii) (failure to provide such information constitutes "bad faith" by the ILEC).

Sprint dragged its feet before it announced (through its refusal to respond to FDN's discovery) that it would not provide FDN the study.[5] Throughout this period, however, Sprint *never* claimed that FDN was precluded from litigating UNE rates by virtue of the rates established in the 990649 proceeding. To the contrary, Sprint raised this argument for the first time in its Opposition to FDN's Motion for Postponement.

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[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 680 (1996) (placing the burden squarely on the ILEC to "prove to the state commission the nature and magnitude of any forward-looking costs that it seeks to recover").

[5] Sprint does not deny that FDN requested the cost study pursuant to the FCC's rules before the Order Establishing Procedure was issued, nor does Sprint deny that it never furnished FDN with the cost study.

In the July 8 Order denying FDN's motion and granting Sprint's, the prehearing officer ruled (at 3) that "the scope of this arbitration proceeding shall be limited to the issues as set forth in the Order Establishing procedure. However, the Sprint UNE docket issues shall not be relitigated in this current proceeding." These adjoining sentences plainly conflict with one another, as the issue had previously authorized FDN to litigate Sprint's UNE rates in this proceeding. Neither staff nor Sprint disavowed this view until it was too late.

And it is no answer to claim, as does the July 8 Order, that the ruling in the 990649 proceeding precludes reevaluating those rates in this proceeding. If that was the case, then it is plain that the Commission never actually intended to consider "the appropriate rates for UNEs and related services," as Issue No. 34 is denominated, and that FDN has been severely prejudiced by the Prehearing Officer's invocation of a secret rule. The Commission has a legal obligation to arbitrate and resolve all issues identified by the parties' in the petition for arbitration and the response thereto. Nothing in Section 252, and no case FDN is familiar with, provides the Commission the authority to choose the issues it wishes to arbitrate and decline addressing those it would rather not.[6]

Moreover, as explained in greater length in Part II, below, there are good reasons to re-visit Sprint's UNE rates today. The 990649 proceeding concluded in the fall of 2002, nearly three years ago, and was based on evidence that Sprint submitted to the Commission in 2001. Moreover, the UNE rates adopted in the 990649 proceeding were largely proposed by Sprint, which the Commission accepted because there was no testifying witness to advocate specific

[6] A decision to ignore issues placed before it in arbitration would strip the Commission of jurisdiction in this matter, pursuant to Section 252(e)(5), 47 U.S.C. § 252(e)(5). *See, e.g.*, Order, *Petition of WorldCom Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n*, 17 F.C.C.R. 27039 (2003). Although it would rather not, FDN is prepared to seek relief from the FCC under Section 252(e)(5).

adjustments to the Sprint cost study. As a consequence, the Commission believed that it was bound to accept the Sprint cost study as filed, even though the Commission recognized that it had numerous flaws. While FDN did not agree with the Commission's conclusion in that case, FDN is striving in this proceeding to provide the Commission with a complete record so that appropriate adjustments may be made to Sprint's model and the resulting UNE rates. And the Commission has recently shown a willingness to reconsider UNE rates, having convened a proceeding to establish new rates for Verizon. This new proceeding will revise Verizon rates, which were established at the same time (and in the same 990649 docket) as Sprint's 990649 rates. *See* Docket No. 050059-TP.

Finally, the July 8 Order erroneously relies on Order No. PSC-99-1078 as establishing a "rule" that all ILEC UNE rates be set in generic proceedings. *See* July 8 Order at 3. But Order No. PSC-99-1078 establishes no such rule as, standing alone, it could not. To the contrary, Order No. PSC-99-1078 simply granted a coalition of competitive carriers' request to set BellSouth's UNE rates in a generic docket in which all parties could participate. Nothing in Order No. PSC-99-1078 suggests that the Commission intended to establish a blanket rule mandating that all ILEC UNE rates be set in generic proceedings.

In the first place, there is good reason to doubt that such a rule ever existed, as illustrated by the Commission's recent granting of Supra's request to arbitrate BellSouth's rates for converting UNE-P loops to UNE-L in a private complaint case. *See* Docket No. 040301-TP. The Commission never invoked Order No. PSC-99-1078 to preclude that proceeding. Although the Commission ultimately consolidated the Supra case into a multi-party proceeding, *see* Docket No. No. 041338-TP, it did so for administrative convenience and because Supra

consented, not because of any pre-existing rule precluding the setting of such rates in private party proceedings.

Indeed, if the Commission had intended to establish such an industry-wide rule, it was required by the Florida Administrative Procedure Act to promulgate it as a regulation so that all Florida carriers would have notice of its existence. *See, e.g.,* Ch. 120.54 Florida Statutes. As the Florida courts have held, "an agency statement that is the equivalent of a rule must be adopted in the rulemaking process. This requirement ... prevents an administrative agency from relying on general policies that are not tested in the rulemaking process ...." *Environmental Trust v. Dept. of Environmental Protection*, 714 S.2d 493, 498 (Fla. 1st DCA 1998) (internal quotations omitted). And it is a black letter rule of administrative law that "secret" agency rules may not be invoked to a party's prejudice, as the July 8 Order seeks to do with its invocation of Order No. PSC-99-1078 against FDN. *See Dept. of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla. 1st DCA 1998) (invalidating PSC order for failing to follow appropriate rule-making process); *Florida Public Service Comm'n v. Central Corp.*, 551 So.2d 568 (Fla. 1st DCA 1989) (same). These cases directly forbid the Commission from invoking Order No. PSC-99-1078 as a procedural bar to arbitrating UNE rates in this proceeding.

The bottom line is that neither Sprint nor the Commission can cite to any prior decision where arbitration of an issue was barred because the same or similar issue was heard in a prior arbitration or generic proceeding – as the Commission would be in derogation of its duties under the Act should it do so.[7] Thus, for all these reasons, the panel assigned to this case should

[7] Sprint cites two cases as standing for the unremarkable proposition that "the Commission has frequently relied on its decisions in generic proceedings to resolve issues raised in subsequent arbitrations." *See* Sprint Opposition to FDN's Motion for Postponement, at p. 4, ¶ 7 (citing *Petition of Global NAPs, Inc. for arbitration pursuant to 47 U.S.C. 252(b) of interconnection rates, terms and Conditions with Verizon Florida, Inc.*, Order No. PSC-03-0805-FOF-TP (July 9, 2003) and *Petition by BellSouth, Inc. for arbitration of certain issues in interconnection agreement Supra Telecom. and Info.*

reconsider the Prehearing Officer's July 8 Order denying FDN's Motion for Postponement and granting Sprint's Motion to Strike, which affirmatively preclude FDN from arbitrating UNE rates in this proceeding, and reverse those rulings. The Prehearing Officer should, likewise, grant FDN's Motion to Compel, which is still outstanding, so that FDN will have the evidence necessary to present its case.

II. In The Alternative, the Commission Should Postpone the Procedural Deadlines and Compel Sprint Discovery Pursuant to its Construction of Issue No. 34.

Without waiving FDN's contention that it is entitled to arbitrate UNE rates in this proceeding, but in the event FDN's Motion for Reconsideration is denied, and the focus of the arbitration becomes whether the 990649 rates should be incorporated into the Sprint-FDN interconnection agreement, FDN will still require an extension of time to file appropriate testimony and propound discovery on Sprint. FDN therefore moves for a postponement of the procedural schedule pursuant to issue No. 34, as recast by the July 8 Order.

A rational assessment of whether Sprint's pre-existing UNE rates should be included in the parties' new contract requires consideration of the facts that would affect whether or not it makes sense to do so. Those facts relate, basically, to whether the data upon which the pre-existing UNE rates relied remains a valid basis for rate-setting today. To make that assessment requires discovery into the basis for those rates.

There is good reason to believe that they do not. The 990649 rates are based on evidence Sprint submitted to the Commission in 2001 — four years ago. It is only logical to conclude that the underlying data is older still. Clearly, there is good reason to suspect that those rates, based

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Systems, Inc., Order No. PSC-02-0413-FOF-TP (Mar. 26, 2002)). Because Sprint's pleading contains no pinpoint cite to these voluminous orders, it is impossible to tell what specific Commission rulings Sprint is referring to. Be that as it may, the Commission's adjudicative authority to invoke precedent to guide future decision making is not being challenged. But nothing in the cases Sprint cites stands for the proposition that issues of general applicability may only be addressed in generic proceedings.

on such stale data, might not be appropriate to include in a contract that will likely run from 2005 into 2008. Given the interpretation of Issue 34 adopted by the Prehearing Officer, FDN is plainly entitled to discovery from Sprint regarding the basis of the pre-existing UNE rates, such as, for example, the cost study on which those rates are based – which Sprint has steadfastly refused to provide. FDN is also plainly entitled to discovery from Sprint regarding factors within Sprint's knowledge that would tend to show that the assumptions and data in the cost study are no longer valid. (Sprint, of course, would be free to present its own evidence as to why it thinks those rates should be retained.)

As one example of a relevant factor that has plainly and materially changed in the intervening years, the pre-existing UNE rates from Docket No 990649-TP are based on a consolidated cost of capital of 9.86%, with an assumed 11.49% cost of equity and 7.43% cost of debt. Under today's market conditions, however, these rates are at least three percentage points, if not more, too high. In Docket No. 990649-TP, the cost of capital was benchmarked against a "riskless" investment in T-bills. According to the order in that case, T-bills were then yielding 6%.[8] T-bills today yield between 3 and 4 percent.[9] So the cost of capital underlying the pre-existing UNE rates is plainly overstated for financial reasons alone. Also, the intensity and range of competition in the telecommunications industry has drastically declined since 2001, which was probably the peak year of the telecom "boom" before the bust. This new risk profile further lowers the appropriate cost of capital that can rationally be included in Sprint's rates.

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[8] Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida, Inc., *Investigation into pricing of unbundled network elements (Sprint/Verizon track)*, Dkt. No. 990649B-TP, Order No. PSC-03-0058-FOF-TP (Jan. 8, 2003), at 66-67.

[9] *See <<http://www.federalreserve.gov/releases/h15/current/>>* (identifying the federal funds rate as 3.27 percent as of July 15, 2004).

Moreover, the lower financial and market risk profile facing Sprint also has an impact on the appropriate assumptions regarding depreciation of the facilities and equipment used to provide UNEs and therefore the rates that can reasonably be charged for those UNEs. In this regard, FDN is entitled to discovery on the extent to which Sprint has modified its telecommunications plant since 2000, which could dramatically affect forward-looking costs. For example, FDN understands that Sprint has accelerated deployment of DLC loop plant, and that a considerable amount of copper loop plant has been retired. Likewise, there should be much better and more recent cost data available now in light of the considerable amount of reconstruction Sprint has likely undertaken in the aftermath of the recent hurricanes. Consideration of this new data is plainly and directly relevant to whether it makes sense to apply the Docket No. 990649-TP rates in this proceeding.

The re-arbitration of these and other cost inputs for Verizon is conclusive proof that the Commission recognizes that these and many other cost factors have changed since the 990649 docket closed. And all of this information, and other information as well, is directly relevant – indeed, central – to answering the question posed by Issue 34 as the Prehearing Officer has construed it. FDN has sought discovery on much of this information, but Sprint has refused to provide it. Sprint's claim is that this type of information is not relevant to whether the 990649-TP rates should apply here. That claim, however, is plainly wrong, as shown above. Accordingly, FDN urges the Commission to grant its motion to compel discovery from Sprint, and further asks the Commission to extend the procedural deadlines in this case so that FDN may have adequate time to review Sprint's discovery once it is received, and to propound additional discovery, as necessary.[10]

[10] If necessary, FDN stands ready to supplement its pending Motion to Compel with arguments specifically geared towards the scope of Issue 34 as the Prehearing Officer has construed it. To the extent

III. The Commission Must Rule Expeditiously on this Motion

The hearing in this docket is set for August 4, 2005. Because of the short time-frames involved, FDN requests that the panel assigned to the case convene a special agenda meeting as soon as possible to consider FDN's Motion for Reconsideration. Alternatively, FDN asks that FDN's Motion be considered at the August 2 Agenda Meeting. If neither of these requests can be accommodated, FDN asks that the Panel vote on this Motion at the beginning of the August 4, 2005 hearing and continue the hearing and resolution of Issue No. 34 consistent with the relief FDN has requested herein.

CONCLUSION

For the reasons stated herein, the Panel should reconsider the July 8 Order and permit FDN to arbitrate UNE rates in this case. Likewise, the Panel should extend the procedural deadlines, compel discovery from Sprint, and reverse the Prehearing Officer's decision to strike portions of FDN's pre-filed testimony. In the alternative, the Panel should grant FDN's alternative motion to extend deadlines and compel discovery so that FDN can respond to Issue No. 34, as newly recast by the Prehearing Officer.

RESPECTFULLY SUBMITTED, this 18th day of July, 2005.

/s/
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that FDN did not understand the scope of that issue previously, its arguments regarding the relevance of the discovery addressed in that motion were necessarily not focused as they could now become based on the recast issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by email, provided an email address is listed below, and by U.S. mail this 18th day of July, 2005.

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