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Sent: Thursday, September 01, 2005 4:48 PM
To: Filings@psc.state.fl.us
Subject: RE: E-Filing for Docket No. 041464
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Please find attached for filing in the captioned docket FDN Communications' Post Hearing Brief.

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: 40 pages.

(e) Description of each document attached: FDN Communications' Post Hearing Brief.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Sprint-Florida, Inc. for Arbitration of an Interconnection Agreement with Florida Digital Network, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996	)	Docket No. 041464 Filed: September 1, 2005

POST-HEARING BRIEF AND POST-HEARING STATEMENT OF ISSUES AND POSITIONS OF FLORIDA DIGITAL NETWORK, INC. d/b/a FDN COMMUNICATIONS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Resistance to change no matter how small, vehement protection of every cent of subsidized revenue as though receipt were an absolute right, manipulating the rules when advantageous to do so, retaining dominant market share, imposing unfair or irrational obstacles for its competitors – all are the earmarks of the old telecom monopoly in transition to a competitive environment. And all of these characteristics have been exhibited by Sprint in this proceeding, with at least one marking each of Sprint's positions in this arbitration. Considering that Sprint is the last of the 3 major Florida ILECs not to have made the transition to competition, Sprint's towing the monopoly line is to be expected. But the time has come for this Commission to take concrete action in the defense of wireline competition in Sprint's Florida territory and decree that the ILECs' monopolist tendencies must be a thing of the past. This case is an opportunity for the Commission to do just that.

Wireline competition in Sprint's territory lags behind that of competition in the BellSouth and Verizon territories, and FDN is one of the few facilities-based carriers left in Sprint territory. As of May 2004, the last date for which composite information was available, wireline competition in Sprint territory was 8%, compared to 11% in Verizon territory and 22% in BellSouth territory. (Exhibit No. 7, PSC Competition Report, page 22.)[1] Competition for business customers drives the overall percentages for the ILECs, but even in the business market segment, Sprint was at 17%, while BellSouth was at 35% and Verizon 28%. (Id.) That Sprint may be losing residential market share to intermodal providers,[2] as Sprint witness Sywenki

[1] In discovery, Sprint did provide the number of total business access lines for 2005, but could not substantiate or explain the number; Sprint did not provide number of CLEC lines for 2005. (Exhibit No. 5, page 104; Exhibit No. 6, page 29.)

[2] This claim is not definitively proven in the record since the degree to which line loss stems from second lines formerly used for dial up Internet and supplemental purposes is not quantified. See Exhibit No. 8, p. 42 – 3.

bemoans, only serves to highlight that wireline competitors reliant on Sprint for UNE and other services (whose market share grows at a sluggish 2% a year in Sprint territory) are at a disadvantage in Sprint territory. If the Commission is to fulfill the promise of facilities-based competition in Sprint territory, and promote the benefits all consumers may receive from that competition, the Commission must adopt the positions FDN has proposed for the arbitrated issues in this matter.

Though resolving over 40 issues through negotiation with FDN, Sprint has rejected all of the compromises and trade-offs FDN has offered to resolve three broad categories of outstanding issues. Sprint's stubborn adherence to the status quo and Sprint's desire to preserve its dominant market share are the chief obstacles to resolution of these open issues. The three core issues left to be decided in this proceeding – all pivotal to reversing the paucity of wireline competition in Sprint territory – are as follows: (1) UNE rates, (2) local calling area for intercarrier compensation purposes, and (3) TRRO related issues.

As to the first, UNE rates, the Commission cannot expect facilities-based competition in Sprint territory to be sustainable if the Commission approves Sprint's proposed UNE rates. Sprint's proposed UNE rates are exorbitant, not TELRIC complaint and based on dated, four-year-old data and assumptions. The Commission has denied FDN all rights under the Telecom Act to examine Sprint's cost study and to arbitrate the appropriate UNE rates. The Commission cannot lawfully deny FDN reasonable opportunity to arbitrate the UNE rates in this proceeding and then simply incorporate by cross-reference UNE rates from another proceeding (Docket No. 990649B). Further, Sprint's request to impose these Docket No. 990649B UNE rates on FDN as of December 31, 2004, is utterly without merit or legal foundation. The Commission lacks authority to impose retroactive rates. The parties' letter agreements sanction postponement of a

new agreement and provide that the existing agreement will apply until a new agreement is in place. Further, FDN is not at fault for the District Court's silence (up to this point) on FDN's complaint regarding the Docket No. 990649B UNE rates or, for that matter, the Commission's silence on the FDN/KMC alternative motion for stay in Docket No. 990649B. There is no evidence that FDN alone and in bad faith caused delay in negotiating a new agreement. Additionally, to the extent Sprint had a right under the existing interconnection agreement to enforce the Docket No. 990649-B UNE rates through complaint, arbitration or otherwise, Sprint could have initiated such a proceeding at anytime after the Commission's order in Docket No. 990649-B became final; Sprint did not, and Sprint should not be rewarded for its own inaction.

Sprint's defenses to FDN's proposal for the local calling area and intercarrier compensation, the second major issue, may be several in number, but they are very thin on substance. FDN's intrastate access payments for 2004 constituted .14% of the total so-called carrier of last resort (COLR) subsidies Sprint receives from intrastate access charges. But even this de minimus sum Sprint deems sacrosanct. To induce compromise, FDN made numerous offers. Yet, with all of this in hand, Sprint remarkably still demands to safeguard a less than 1% revenue subsidy. Why? Sprint protests about access rebalancing as the only way to improve competition and about discrimination toward IXCs – who do not and cannot perform the mutual traffic termination services LECs do -- but Sprint's real complaint is that Sprint wants to avoid competition. There is no other logical explanation. In any case, Sprint's arguments on this subject are flawed because, by definition, only toll traffic is subject to access charges, and toll calls are subject to additional charges, typically assessed per minute of use. As long as FDN's LATA wide local calls are not toll calls, they should not be subject to access charges.

Lastly, the TRRO does not support Sprint's other assertions on the TRRO related issues. Sprint argues that UNEs may only be used if there is some undefined amount of a local exchange service provided over the UNE. Under the Telecom Act, the TRRO, and the FCC's rules, use of UNEs are not restricted as Sprint suggests, to the provision of local exchange services. Despite Sprint's attempts to rewrite the law more favorably to its monopolistic intentions, there is no such UNE proviso recognized. Additionally, Sprint's claim that the TRRO imposed a universal ten circuit cap for DS-1 level transport on all routes, regardless of the end point wire centers' tier classifications, does not withstand scrutiny. Indeed, the end result of Sprint's recommended universal cap is a rewrite of the TRRO to attain no net change in the impairment analysis. This is anathema to the rules of statutory construction.

For the reasons stated herein, the Commission should resolve this arbitration in favor of FDN on every outstanding issue.

FDN STATEMENT OF ISSUES AND POSITIONS

FDN believes that some of the issues below are linked or related and therefore has briefed certain issues together, although the issues were originally identified separately.

ISSUE 5 **How should "local traffic" be defined?**

FDN: *"Local traffic" should be defined as traffic originated and terminated in the LATA, provided the originating carrier transports its originated traffic at least as far as the tandem serving the called party.*

This issue is not about Sprint's so-called COLR obligations. FDN's contribution to Sprint's total intrastate access charge subsidies is .14%[3] Nor is this issue about competitive neutrality vis-à-vis IXCs. IXCs offer toll services, not local services as FDN proposes to do; IXCs

[3] Sprint's total COLR intrastate access subsidy (i.e. above cost revenues recieved) for 2004 was $142 million. (Exhibit No. 5, page 109 - 110.) That same year, FDN paid Sprint about $200,000 in intrastate access, or 0.14% of the total subsidy. (Exhibit No. 4, FDN Answer to Staff Interrogatory No. 59.)

do not and cannot provide reciprocal local termination services; and arrangements like the one FDN proposes already exists in the market place outside Sprint territory without complaint from the IXCs. (Tr. 150 -2, 163 - 5.) Instead, what this issue is about is Sprint's fear of wireline competition whittling away at its monopolistic market share.

The FDN Proposal

FDN proposed that for intercarrier compensation purposes, FDN be permitted the option of using the LATA as its local calling area. (Tr. 146-152; Exhibit No. 15, p. 8, 76-77.) This proposal is similar to the "originating carrier rule" approved by the Commission in Docket No. 000075 (the "Generic Reciprocal Compensation Docket")[4] with the modifications that FDN has agreed (a) the geographic scope of its local calling area will be fixed as the LATA and (b) FDN will bear responsibility for transporting its originated traffic at least as far as the Sprint tandem switch serving the called subscriber, even if that means establishing more than one point of interconnection per LATA.[5] Further, to address other concerns Sprint raised during the course of this arbitration, and as an additional trade-off appropriate for a "baseball" style arbitration where, on balance, one party's position is accepted over the other's, FDN would also stipulate that only traffic originated over FDN-provided dial tone would fall under the LATA-wide local arrangement[6] and that FDN would not send Sprint VoIP traffic identified as local traffic if that

[4] Docket No. 000075-TP, Phases II and IIA, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002.

[5] As explained in greater detail below, toll traffic is by definition subject to access charges and non-toll traffic is subject to reciprocal compensation. Therefore, as a carrier originating non-toll traffic, FDN should be free to designate a LATA or LATAs as its local calling area. FDN recognizes that its proposal as drafted may not be flexible enough to permit Sprint to expand its local calling areas to include the LATA and have such changes flow through the intercarrier compensation provisions of the agreement. In the final agreement, as directed by the Commission, FDN would agree to such modifications or, alternatively, the parties could simply negotiate an amendment at a later date if and when Sprint makes such a change to its local calling areas, just as the parties would for a change of law.

[6] See Exhibit No. 4, FDN Answer to Staff Interrogatory No. 53. Sprint's concern that FDN could use its intercarrier compensation proposal to provide other carriers termination services is thus negated. Sprint's other worries are all to the effect that FDN could breach the agreement by improperly routing or identifying traffic. These should all be rejected. In its diatribes about arbitrage opportunity lurking everywhere, Sprint acknowledges these concerns exist

traffic would otherwise be subject to access charges.[7] FDN even went so far as to accept additional transport obligations via a virtual POI scheme if FDN did not establish POIs at each tandem (see proposed sections 54.3.1.4 and 55.2.2, pages 76, 77 of Exhibit No. 15), but FDN now withdraws that proposal.[8]

The Generic Reciprocal Compensation Docket

Understandably, FDN's proposal in this case will be viewed in light of the Commission's final order in the Generic Reciprocal Compensation Docket, ("Order on Reciprocal Compensation")[9] and its subsequent appeal. FDN's proposal[10] is easily reconciled with and consistent with both. In the Order on Reciprocal Compensation,[11] the Commission found: (1) ILEC intrastate access charges pose an obstacle to CLECs' offering more expansive calling

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even without the FDN proposal and does not allege FDN has ever been an arbitrage entrepreneur. (See Exhibit No. 3, Sprint Response to Staff Interrogatory No. 3.) Moreover, pursuant to law and in accordance with the interconnection agreement, Sprint and FDN will have mutual obligations to properly identify, account for and bill traffic exchanged between their two networks. There is no evidence suggesting that one side or the other will breach the agreement before it is even in place; and even if there were a breach somewhere down the road, the parties are adequately protected by the remedies available at law and under the agreement.

[7] FDN agreed to accept Sprint's proposed alternative VoIP language if the phrase "or for a Party at that Party's request" (Sprint Witness Sywenki Direct at page 14 (Tr. 130), line 19 -23) is deleted, since the "actual knowledge" standard should apply to what third parties do on behalf of one of the parties to the agreement. The "end points" of the call referred to in Sprint's alternative language on the VoIP issue would, and should, be viewed in the context of FDN's LATA proposal.

[8] Sprint expressed no interest in this proposal on (or off) the record.

[9] Order No. PSC-02-1248-FOF-TP, issued September 10, 2002.

[10] In the Generic Reciprocal Compensation Docket, Sprint was concerned that too many CLECs would burden Sprint with a non-uniform local calling area. Here, Sprint argues it is concerned that just FDN wants a different local calling area. By Sprint's reasoning, only conformance with Sprint's retail local calling area is allowed. This case is an individual arbitration, so, naturally, only one CLEC's rights are determined. FDN has strived to make its proposal as administratively simple as possible.

[11] The Order on Reciprocal Compensation was issued in a generic docket. Though constituting valid precedent to the extent its holdings were not disturbed on appeal, the Order on Reciprocal Compensation has not heretofore been interpreted to foreclose parties from arbitrating under Section 252 of the Telecom Act any issues addressed in said Order. See, e.g G NAPS Arbitration Order, PSC-03-0805-FOF-TP, issued July 9, 2003. Indeed, in the case just cited and others like it, a generic case order has had no preclusive effect, but was viewed as precedent.

scopes;[12] (2) a default rule should be as competitively neutral as possible, in the sense that a default should not chill interconnection agreement negotiations and lead to one-sided outcomes;[13] (3) a LATA-wide local default rule for reciprocal compensation may discriminate against IXCs,[14] (4) a default rule for local calling areas of either the ILEC's retail local calling area or the LATA[15] would not be as competitively neutral as a default whereby the originating carrier's local calling area determined the treatment of intercarrier compensation.[16] On appeal, the Supreme Court of Florida upheld the Commission's authority to approve local calling areas (for intercarrier compensation purposes) different from the ILEC retail calling areas,[17] did not disturb the Commission's finding that ILEC intrastate access charges pose an obstacle to CLECs offering more expansive calling scopes, but the Court did overturn the Commission's finding that the originating carrier rule was the most competitively neutral option because no testifying witness supported it as such.[18]

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[12] Order on Reciprocal Compensation, p. 50-51.

[13] Id.

[14] Id.

[15] The Commission's reference is to the LATA with no further condition placed on the CLEC's transport responsibilities, such as what FDN proposes.

[16] Id.

[17] The FCC had already recognized that the state commissions had this authority. In ¶ 1035 of the First Report and Order on Local Competition, the FCC said, "With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different."

[18] Sprint-Florida, Inc. v. Jaber, 885 So.2d 286, 297 (Fla. 2004). On remand from the Court, the Commission elected to close the docket rather than hold further proceedings on a default rule.

In this proceeding, the evidence establishes that, consistent with precedent, Sprint's intrastate access charges still pose a barrier to FDN's offering on a sustainable basis expanded local calling areas to its customers. (Tr. 143, 163 - 165; Exhibit No. 4, FDN Response to Staff Interrogatory No. 53.) Further, FDN established that it has a LATA-wide local intercarrier compensation arrangement with BellSouth and offers expanded local calling products in BellSouth territory, as do others.[19] (Tr. 163- 165.) No IXCs have complained about discrimination stemming from these arrangements, nor are IXCs in a position to do so. (Tr. 167.) IXCs do not offer local service and do not perform reciprocal traffic termination services for LECs, as LECs do for one another; rather, access services are but an input to an IXC product. (Tr. 150 -1, 166 -7 .)[20] Competitive neutrality, in the sense of the ILECs' and CLECs' respective bargaining power, is not even an issue in this individual arbitration. This is not a generic proceeding setting a default rule for the industry. There is no "chilling" of negotiations for the Commission to concern itself with here.[21]

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[19] Sprint asserts two meaningless distinctions to justify a difference between Sprint and BellSouth as follows: (1) Sprint's access rates are higher than BellSouth's and (2) BellSouth's has a denser customer base. Neither of these distinctions, even if true, change the fact that FDN and its customers provide a de minimus (less than 1% of the total) portion of the access subsidy Sprint collects. Moreover, what Sprint is really saying is that because its costs of serving are higher than BellSouth's, Sprint can ill afford to lose customers to competition.

[20] Sprint witness Sywenki strained credulity in his deposition by arguing IXCs perform reciprocal termination services for LECs "in a sense," though he ultimately conceded that LECs and IXCs do not perform for each other identical services over the same type of facilities that interconnected LECs perform for one another. (Exhibit No. 8, page 37 - 39.) As FDN witness Smith pointed out, IXCs have no local interconnection trunks, no local switching, no local service, no CLEC certification – in short, comparing LEC services with IXC services is an apples and oranges comparison. (Tr. 150-1.)

[21] As an individual carrier, FDN orders more UNE-L services from Sprint than all the other CLECs in Sprint Florida territory combined and, therefore, has more UNE-L devoted network investment. (Exhibit No. 4, FDN Response to Interrogatory No. 59.) That said, it is questionable that other carriers would opt into the FDN-Sprint agreement if the Commission approves FDN's proposals. (Tr. 160.) But, even if other carriers did adopt the agreement, it would only improve the status of facilities-based competition in Sprint territory and benefit consumers.

Additionally, the Commission's decision in the "Access/Retail Rate Rebalancing Dockets"[22] may present new circumstances that could cause the Commission to supplement its rationale in the Order on Reciprocal Compensation. As a result of the Commission's decision in the Access/Retail Rate Rebalancing Dockets, Sprint's intrastate access rates will be reduced over time. This will not change the fact that FDN pays less than 1% of the Sprint access subsidy today, or that FDN's intercarrier compensation proposal should be approved today. However, to the extent the Commission is concerned with any alleged disparity in the respective positions of FDN and other carriers such as IXCs, those other carriers will be paying lower intrastate access charges to Sprint and therefore their contribution to the access subsidy will be diminishing.[23] While implementing the Access/Retail Rate Rebalancing Dockets could translate to more residential competition, to suggest (as Sprint does) that rebalancing is the **only** way the Commission can or should improve wireline competition is preposterous. Nothing in the Commission's decision in that case or the underlying statute suggests rebalancing is the only vehicle to spur competition, and if more competition does come to Sprint territory as result of rebalancing, it will be likely be in the residential market from intermodal providers.[24]

Toll Calling versus Local Calling

FDN's proposal conforms to the statutory definitions of "telephone toll service," "telephone exchange service" and "exchange access" -- all terms defined in the Telecom Act by

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[22] See Order No. PSC-03-1469-FOF-TL, issued December 24, 2003, in consolidated Dockets Nos. 030867, 030868, 030869, and 030961, and recently upheld on appeal by the Florida Supreme Court.

[23] Sprint witness Sywenki acknowledged that Sprint's IXC arm is incented to reduce access payments wherever it can. Exhibit No. 8, p. 34. And there is one thing that the Commission can be assured of. Sprint the IXC has no problem whatsoever tracking and paying disparate access rates wherever it can get a lower overall cost; but Sprint the ILEC cannot tolerate even .14% of its access subsidy to fall out of line.

[24] Even if Sprint increases residential retail rates, the UNE rates approved in Docket No. 990649B may still too high to tempt UNE-based provider to serve the residential market anywhere but in the limited Zone 1 wire centers. (Exhibit No. 4, FDN Response to Staff Interrogatory No. 59, Appendix 34-A.)

Congress -- whereas Sprint's proposal does not.[25] Sprint witness Sywenki testified, and Sprint's contract language reflects, that the sole test for determining whether a voice call is subject to reciprocal compensation or access charges is the end points of the call. (Tr. 127; Exhibit No. 8, p. 14 – 15.) On this critical point, Sprint's position is contrary to the Telecom Act and FCC rules.

"Exchange access" is defined in 47 U.S.C. § 153(16) as the use of local facilities to originate or terminate toll calls or, in statutory terms, calls which constitute "telephone toll service." "Telephone toll service" is the statutory term that corresponds most closely to the colloquial term "long distance" service and is defined in the Telecom Act as "telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service."[26] Thus, for a call to properly be classified as "telephone toll service" it must meet two criteria: (1) the call must begin and end in different "exchange areas" and (2) the call must be subject to a separate charge that is not included in the charge for telephone exchange service. Similarly, traffic is only properly classified as "exchange access" traffic when there is an underlying toll call that is originated or terminated using local exchange facilities. FCC rule 47 CFR § 51.701(b)(1) states that all traffic is subject to reciprocal compensation, essentially, as local traffic, unless it is either "information access" (not relevant to the issue here) or "exchange access." The definition of "exchange access" requires that the underlying service offered to the end user be a "telephone toll service." If the underlying call is not provided as a toll service – one for which "a separate charge that is not included in the charge

[25] In arbitrating unresolved issues for an interconnection agreement, a state commission must ensure that the arbitrated agreement contains conditions that "meet the requirements of section 251, including regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(2). The state commission has no discretion to grant the competitor different or lesser rights than the law provides if the competitor insists on that right, as FDN is doing here.

[26] 47 U.S.C. § 153(48).

for telephone exchange service" is accessed – then the call is not excluded from treatment as a normal local call and subject to reciprocal compensation.

Accordingly, if FDN, as a carrier originating a call does not assess a separate toll charge[27] on the end user, but rather, includes a charge in the contract for local service, (e.g by establishing a the LATA as its local calling area at a higher contract price) the function of terminating that call cannot be "exchange access," and the call is not excluded from reciprocal compensation under FCC rule 47 CFR § 51.701(b)(1). Thus, FDN's proposal is fully consistent with the Telecom Act's definitions. In practical terms, then, whether the function of originating and terminating a call meets the statutory definition of "access" depends on the local calling area established by the originating party, as the Commission had correctly concluded, albeit for different reasons, in the Order on Reciprocal Compensation.

Conclusion

FDN's proposal in this case is entirely consistent with the Commission's originating carrier determination in the Order on Reciprocal Compensation. Further, (1) competitive neutrality insofar as the respective bargaining power of ILECs and CLECs is not an issue in this case, (2) FDN has provided ample evidence that any alleged disparity in the position of IXCs is not a valid concern, (3) FDN's compromise offers are unique to the FDN-Sprint relationship and represent valuable consideration to Sprint in exchange for the benefit of FDN's proposal,[28] (4) Sprint's pending implementation of the Commission's order in the Access/Retail Rate Rebalancing Dockets should mitigate over time any alleged disparity between FDN and other carriers such as

[27] Sprint witness Sywenki testified that a toll charge is normally one assessed per minute of use. (Exhibit No. 9, page 15.)

[28] FDN's offer to restrict its proposed intercarrier compensation scheme to traffic originated over FDN-provided dial tone is a notable example of something that an IXC could not offer Sprint.

IXCs if the Commission finds such to be a concern, and (5) Sprint's position that the only test for determining whether a voice call is subject to reciprocal compensation or access charges is the end points of the call is, upon closer examination, completely at odds with the Telecom Act and FCC rules.

In consideration of the foregoing, one is only left to conclude that Sprint's defense of this issue, like others in this proceeding, is largely motivated by its fear of competition. Clearly, wireline competition in Sprint territory is in need of a boost. The Commission must look to promote competition that will benefit the broadest base of customers. FDN purchases more UNE-L services from Sprint Florida than all other CLECs combined and therefore has more UNE-L network investment than any other CLEC in Sprint Florida territory. (Exhibit No. 6, page 25-6.) Thus, FDN is uniquely situated to provide greater wireline competition in Sprint territory, and FDN's intercarrier compensation proposal is a step in the right direction for improving consumer choice.

ISSUE 21 **What are the appropriate terms and conditions applicable to the resale of Contract Service arrangements, Special arrangements, or Individual Case Basis (ICB) arrangements?**

FDN: *FDN should be permitted to resell any term agreement between Sprint and a retail customer at a wholesale discount such that FDN assumes the term agreement and does not pay early termination fees if the customer leaves early to go back to Sprint service.*

According to section 251(b)(1) of the Telecom Act and FCC rule 47 CFR § 51.601 et seq, ILECs must resell to a requesting carrier any telecommunications service the ILEC sells to an end user. It does not matter if those services are subject to a contract between the ILEC and its end user, nor does it matter if that contract contains an early termination fee. The only resale restrictions recognized by law are provided in FCC rule 47 CFR § 51.613, which provides that an

ILEC resale restriction not specifically recognized elsewhere in the rules may be sustained by a state commission only if the ILEC proves the restriction is reasonable and nondiscriminatory.

In this proceeding, Sprint proposes not to resell to FDN the telecommunications service Sprint provides it to an existing end user "as is," but rather to terminate that service, charge the end user applicable early termination fees, and instead resell to FDN what amounts to a new service to a new end user. (Tr. 152 -3, 168-9.) This defeats the very idea of reselling an existing service,[29] and no end user would incur the early termination fee to migrate to another carrier at similar rates. (Tr. 152 -3, 168-9.) It cannot be emphasized enough that Sprint admitted that up until 2005, Sprint resold existing agreements to requesting carriers in "as is" condition, just as FDN requests here. (Exhibit No. 3, p. 46.) However, Sprint wants to cease that practice because customers would actually migrate to other carriers pursuant to that policy, but will not under the new Sprint policy. Again, Sprint's position is motivated by preservation of its dominant market share.

FDN maintains that Sprint has not met its burden of showing that the restriction is reasonable and nondiscriminatory in accordance with the FCC rule. The more reasonable approach is one where the intent of the resale requirement is honored, customers have opportunity to migrate as the resale rule intends, Sprint is fairly compensated for any differential between the standard wholesale rate and the exposure covered by its early termination charges, and Sprint does not benefit from FDN having to pay Sprint early termination fees when Sprint obtains the economic benefit of the customer's return to Sprint. Therefore, FDN's proposal to require Sprint to resell such contracts at a 12% wholesale discount[30] rather than the standard discount and to bar

[29] As explained in FDN's testimony and discovery responses, it was the classic red herring for Sprint to interject "fresh look" concerns in response to FDN's proposal. Sprint's terming a customer's contract prior to resale is more of a "fresh squeeze" by Sprint.

[30] Sprint understood that a different wholesale discount for resold contracts was an available compromise for resolving this issue, but instead chose an all-or-nothing proposition on the outcome. Sprint presented no evidence refuting FDN's proposed 12% figure.

Sprint from assessing early termination charges to FDN if the customer migrates back to Sprint is by far more reasonable. (Exhibit No. 4, FDN's Response to Interrogatory No. 54.)

ISSUE 22 **What terms and conditions should be included to reflect the FCC's TRO and TRRO decisions?**

FDN: *FDN should be given direct notice if Sprint proposes to add to the list of wire centers where high capacity circuits are unimpaired. Sprint's proposed cap of 10 UNE DS-1 dedicated transport circuits on routes between all wire centers of all tiers is inconsistent with the TRRO.*

As the case has progressed and matters were resolved, this broad issue now consists of just a few distinct questions still unresolved by the parties.[31] The first of these concerns the process by which Sprint will make changes to the list of wire centers where high capacity unbundling is available. The second concerns which routes the TRRO sets a maximum number of DS1 transport circuits that a carrier may order as UNEs. FDN addresses these questions in turn, below.[32]

Notice for Prospective Wire Center Designations

As FDN witness Smith testified, FDN should receive direct notice from Sprint of any proposed changes to the unimpaired wire center list incorporated into the interconnection agreement. (Tr. 169 -70.) Carriers on the waiting list for collocation space in a wire center receive direct notice from the ILECs regarding the status of that space per the Commission's collocation orders; and CLECs with high capacity UNEs already in a wire center should receive the same if UNE status is about to change. At a minimum, FDN should be entitled to party status to any future dispute resolution proceeding if UNE status changes, as Sprint witness Maples conceded. (Exhibit No. 6, p. 22.)

[31] FDN does not dispute Sprint's initial list of wire centers attached as Exhibit A to the draft interconnection agreement. (See page 187 of Exhibit No. 15 (SDG-1).

[32] Issue No. 24, regarding the use of UNEs, is also a TRRO related matter, but is addressed separately in the section on Issue No. 24 below.

The TRRO and the Ten DS1 Circuit Cap

An analysis of this question should start with the TRRO itself.[33] Paragraph 128 of the TRRO states in part:

> **On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport**, we limit the number of DS-1 transport circuits that each carrier may obtain on that route to 10 circuits. . . . . When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS 3 facility, **we find that our DS3 impairment conclusions apply**.

(Emphasis added.) In Appendix B to the TRRO, the new rule § 51.319(e)(2)(B) states in pertinent part:

> A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Comparing these two quotes, one may see the dilemma. Paragraph 128 contains the express proviso that the cap applies only on routes where there is no unbundling obligation for DS3 transport. Rule § 51.319(e)(2)(ii)(B) does not expressly contain that proviso. But the Commission should see that resolution of this apparent difference is obvious.

Even if there is a lack of clarity in the TRRO regarding when the 10 UNE DS1 transport circuit cap applies and when it does not, Sprint's interpretation, that it always applies, does not resolve the issue in a way that (a) harmonizes all parts of the TRRO and gives meaning to all of the TRRO's provisions and (b) makes a net difference to the impairment analysis. FDN's position is correct in that FDN's interpretation harmonizes all of the TRRO, gives meaning to all provisions of the TRRO and makes a net difference to the impairment analysis.

[33] Sprint witness Maples testimony and opinion on this issue is of marginal or no value. Mr. Maples admits that he is not qualified as a legal expert and has no experience with or understanding of the rules of statutory construction. Exhibit No. 7, page 11 – 12. FDN maintains that this issue is, at bottom, a legal question, i.e. one of statutory construction.

There is no apparent ambiguity in ¶ 128 standing alone, but when ¶ 128 is read in conjunction with the rule, the Commission could find ambiguity, but not direct conflict. Direct conflict would exist if, for instance, the rule expressly stated that the cap applied on all routes where there **is** an unbundling obligation for DS3 transport, rather than when there **is not** an unbundling obligation for DS3 transport. Yet that is precisely the conflict which Sprint argues does exist (perhaps as an "as applied" conflict) and by asserting such conflict and asserting the rule language controls such conflict, Sprint effectively rewrites the TRRO, specifically, by deleting the bolded language above from paragraph 128.

To read the TRRO as Sprint suggests, i.e. without a DS3 nonimpaired proviso, is impossible unless one deletes much of ¶ 128. That paragraph begins, "On routes for which we determine that there is no unbundling obligation for DS3 transport." This proviso, according to Sprint's argument, is superfluous, since the DS1 cap applies whether DS3 impairment exists or not. Moreover, taking Sprint's argument a step further, there was no reason for the FCC to state at the end of ¶ 128, "we find that our DS3 impairment conclusions apply," because those impairment conclusions are basically without effect when the DS1 cap applies universally to every route.

In the TRRO, the FCC created three tiers of wire centers and linked the dedicated transport impairment analyses to those tiers. DS3 transport is unimpaired where the end points of the route are either Tier I or II. Both DS1 and DS3 transport are unimpaired where the end points of a route are both Tier I.[34] The crux of the dispute in this case is with transport involving Tier III wire

[34] Per Exhibit No. 15 (SDG-1), page 187, there are five Tier I and three Tier II wire centers in Sprint Florida territory, leaving all other Sprint wire centers in Florida as Tier III wire centers, by definition. 47 CFR § 319(e)(3)(iii).

centers, because dedicated DS1 and DS3 transport between a Tier I or II and a Tier III wire center is, with one limited exception,[35] always impaired.

Sprint asserts that even though a carrier could order absolutely massive amounts of unbundled DS3 transport capacity, up to 12 DS3s, from a Tier I or II to a Tier III wire center, a carrier cannot order more than 10 DS1s on that same route.[36] On its face, this makes no practical sense. Logically, the only time ordering equivalent services could or should enter the impairment equation is when a carrier is trying to "game" the system by ordering infinite UNE DS1s to avoid the prohibition on ordering UNE DS3s. Taking Sprint's argument to its natural end also means: (1) the FCC was not concerned at all with impairment when it came to DS1 transport and Tier III wire centers, but, bizarrely, with incenting CLECs to order more DS3s and fewer DS1s and (2) for the majority of the dedicated transport routes in the country and in Sprint Florida territory, CLECs must (a) reconfigure existing DS1 UNE transport circuits, including those combined with loops via EELs, and seriously disrupt the service for thousands of customers,[37] and (b) change the way they order UNE DS1 transport and EELs for the sole purpose of making no difference whatsoever when it comes to impairment.

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[35] Rule 47 CFR § 51.319(e)(2)(iii)(B) imposes a limit of 12 unbundled DS3 dedicated transport circuits on routes where DS3 transport is impaired. In effect then, impairment for a particular carrier on a particular route stops at 12 DS3s.

[36] Sprint emphasizes, it is "consistent with the pricing efficiencies of aggregating traffic," to order a DS3 on a route where a carrier will have 11 or more DS1s. (See e.g. Exhibit 3, p. 10.) Even if that were true, where DS3 dedicated transport is impaired, a carrier's ordering DS1 after DS1 instead of a DS3 does not change the fact that UNE DS3s are available on the subject route. The TRRO's focus is impairment, not perceived pricing efficiencies. Besides, as explained above, it is ludicrous to suggest that it is "efficient" to disrupt the service of existing customers served via DS1 circuits in favor of putting them on a DS3 when both UNE DS1s and DS3s are available and there is no net difference to impairment.

[37] Since Sprint has very few wire centers it classifies as Tier I or II, the vast majority of its wire centers will be Tier III. And it is in Tier III wire centers where, by definition, there are fewer customers, where collocation is less likely and where, therefore, EELs are more likely. Hence, if the DS1 cap applies universally to all tiers and routes, there is a great likelihood of customer disruption for UNE DS1 transport circuits to be groomed onto a UNE DS3 transport circuit.

The rationale of ¶ 128 of the TRRO is intuitive. The FCC placed a cap of 10 UNE DS1s on routes where DS3 was unimpaired because the FCC did not want requesting carriers to by-pass the DS3 impairment test through ordering an infinite number of UNE DS-1s that would equal or exceed a disallowed UNE DS3. In other words, the FCC closed a possible loop hole in the impairment analysis, finding that 11 UNE DS1s are the economic equivalent to one UNE DS3.[38] Under Sprint's proposal in this case, there is no loophole in the impairment analysis that needed to be closed; rather, despite the language at the end of ¶ 128, the FCC wanted to establish a DS1 cap that had no impact on the DS3 impairment analysis.

The FCC itself has held that its orders and the rules adopted thereby should be read in conjunction with one another and the FCC's other rules.[39] Further, the canons of statutory construction provide that one must read all provisions of a statute or rule together to give all of the words in the statute or rule meaning and that all related statutes or rules must be read in pari material to give effect to each part. See, e.g. Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1273 (Fla. 2000), and Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992). As explained above, the only way the Commission can accept Sprint's proposal on this issue is if the Commission deletes significant portions of ¶ 128. FDN asserts that instead, the Commission can and should interpret ¶ 128 of the TRRO and its adopted rule § 51.319(e)(2)(ii)(B) together, and as a whole, so that none of the FCC's words are effectively omitted and the FCC's obvious intent to close a loop hole in the impairment analysis is honored. This can be done if, consistent with ¶ 128, the cap of ten UNE DS1 dedicated transport circuits

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[38] Sprint witness Maples' attempt to draw support from the 10 circuit cap on UNE DS1 loops proves FDN's point, not Sprint's. The loop cap per building also exists to close a similar loop hole in the impairment analysis. Only one UNE DS3 loop per building is permitted because the FCC obviously did not want carriers to bypass the one UNE DS3 per building limit by ordering an infinite number of UNE DS1s to the same building.

[39] *In the Matters of TSR Wireless, LLC, et al. v. U.S. West Communications, Inc.*, 2000 WL 796763 (FCC), 15 F.C.C.R. 11166.

applies only "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport." This interpretation does not delete or negate any portion of rule § 51.319(e)(2)(ii)(B), but harmonizes the rule with ¶ 128.

ISSUE 24 **May Sprint restrict UNE availability where there is not a "meaningful amount of local traffic?" If so, what is a "meaningful amount of local traffic?"**

FDN: *No. UNEs may be used to provide telecommunications or any other service consistent with applicable law. No FCC rule or order restricts use of UNEs to providing some undefined amount of local exchange service.*

Since the parties filed their arbitration petitions, Sprint has abandoned the use restriction it sought that would have required FDN to demonstrate that UNEs would only be available if used to provide a "meaningful amount of local traffic." Sprint apparently recognized that the proposal was objectionable both because it had no basis in the FCC's rules and because it sought to impose an undefined requirement that would have inevitably led to disputes and litigation.

However, Sprint continues to insist on inserting use restrictions into the interconnection agreement that have no basis in the Act or the FCC's rules. The main dispute now centers on Sprint's proposed Section 40.4.3, which provides the following:

> CLEC must use any UNE purchased from Sprint for the purpose of providing local exchange services. CLEC may use a UNE for the provision of interexchange, mobile wireless, or information services if CLEC is also providing local exchange services over the same UNE.

(Tr. 40 – 41.)

This proposal would impose an impermissible use restriction on FDN's right to use UNEs. Part 51 of the FCC's rules, which governs CLECs' use of UNEs, provides that "an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer." 47

C.F.R. § 51.309(a). The only exception relevant for present purposes is that contained in subsection 309(b), which states that "[a] requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services." 47 C.F.R. § 51.309(b). Accordingly, FDN has proposed language that more closely tracks the exception codified in 47 C.F.R. § 51.309(b). FDN opposes the incorporation of any other use restriction into the parties' interconnection agreement.

For reasons it has failed to explain, Sprint opposes the insertion of the "whose sole purpose" language, and proposes section 40.4.3 of the draft agreement, which would limit the availability of UNEs to the provision of "local exchange service." This restriction has no basis in law. Under the Act, Sprint has "[t]he duty to provide [UNEs] to any requesting carrier for the provision of telecommunications service." No other restrictions are permitted by the law.

Sprint's justification for its "local exchange service" use restriction is based on its erroneous claim that in the TRRO the FCC considered the telecommunications market and divided it into three distinct markets: commercial mobile wireless, long distance, and local exchange. (Tr. 40 -1.) Building off this erroneous tripartite market delineation, Sprint then reasons that since the FCC found the mobile wireless and long distance markets are sufficiently competitive such that UNEs should not be available for the *exclusively* provision of such services, then all UNEs must be used to provide at least some local exchange services, since that is the only category of services "left."

But the FCC never "divided" the telecommunications market in the manner that Sprint claims, and Sprint has cited no cogent authority to support this bald assertion on which it bases its proposal. The lack of such authority is not surprising, since UNEs remain available to telecommunications carriers to provide a variety of different services to end users, including

information services and emergency services, to name just two.

As a consequence, as FDN has explained, it has the legal right to provide its end-user customers with information services using UNEs it purchases from Sprint, even if no other "local exchange services" are being provided over that facility. (Tr. 172.) Indeed, the statutory definition explains that, information services are "ma[de] available ... via telecommunications ...." 47 U.S.C. § 153(20). When FDN is the "telecommunications carrier," 47 U.S.C. § 153(44), that is providing the "telecommunications service," 47 U.S.C. § 153(46), over which information services are provided to customers, the right to use UNEs for that purpose is uncontestable under the law. And since there are no restrictions on its right to use UNEs to provide telecommunications services to its customers, other than those identified by the FCC in 47 C.F.R. § 51.309(b), it follows, inescapably, that FDN may use UNEs to provide information services without restriction.

Accordingly, the use restriction Sprint proposes be incorporated into the interconnection agreement as section 40.4.3 should be rejected entirely. Likewise, the Commission should adopt the modifications FDN proposes to sections 40.4.2 and 40.4.4 because they conform to Section 51.309(b) of the FCC's rules.

ISSUE 25 **When and how should Sprint make subloop access available to FDN?**

FDN: *FDN withdraws its opposition to Sprint's proposed language and accepts the proposed language in Mr. Maples Direct Testimony, page 43 of the Transcript.*

ISSUE 27 **Under what circumstances must Sprint, at FDN's request, combine and provide individual network elements that are routinely combined in Sprint's network?**

FDN: *All nonrecurring charges for commingled services identified in the agreement should be in the agreement and any vague language for additional charges deleted.*

As Sprint witness Maples conceded in his deposition, the parties seem to be in agreement in principle, but have not yet agreed to language to go into the contract. Mr. Maples agreed that the sole contract language at issue, i.e, "[t]he CLEC will compensate Sprint for the cost of work performed to commingle UNEs or UNE combinations with wholesale services," is only intended to apply to connecting facilities for arrangements not specifically identified in the agreement. (Exhibit 6, p. 5 – 9.) For arrangements specifically identified in the agreement, Sprint agrees to no charge. (Id.) Therefore, the Commission should direct the parties to incorporate language into the final agreement consistent with Mr. Maples' testimony.

ISSUE 29 **What rates, terms and conditions should apply to routine network modifications on UNEs available under the Agreement?**

FDN: *The agreement should include provisions that preclude Sprint from recovering RNM charges where Sprint may already recover its costs in rates or where Sprint performs a RNM in the ordinary course for its own principal benefit or provides an RNM to its own end use customer at no additional charge.*

There are two distinct questions left for the Commission to resolve here, but both pertain to proper circumstances to assess an RNM charge, as opposed to the amount of the charges. The first question is whether FDN should pay for a routine network modification ("RNM") when Sprint would perform the RNM in the normal course of its business. The second is whether FDN should be charged for an RNM when it can show Sprint already recovered the cost of the RNM through rates. As to the first, Sprint admits in commentary Sprint inserted into the draft interconnection agreement that, at least as to doublers/repeaters servicing loops, Sprint would not in "most situations" charge for that type of RNM to the CLEC. (See Exhibit No. 15, p. 73.) FDN merely sought to incorporate that notion into the terms of the agreement. (Tr. 175.) Besides, FDN's position is consistent with principles of allocating costs based on who receives the majority benefit of those costs. Secondly, FDN maintains that any potential double recovery of costs through an

RNM charge may not just be through loop charges. In the ¶ 640 of the TRO, the FCC makes reference to double-recovery through loop charges, but does not state that loop charges are the only means by which double recovery may occur. Therefore, FDN's proposal that double recovery through unbundled loop rates "or other rates" is appropriate. (Tr. 175.)

ISSUE 30 **On what rates, terms and conditions should Sprint offer loop conditioning?**

FDN: * See FDN position and argument on Issue No. 34 regarding other UNE rates from Docket No. 990649B.*

ISSUE 34 **What are the appropriate rates for UNEs and related services provided under the Agreement?**

FDN: *The Commission has unlawfully denied FDN its right to examine the Sprint cost study and to arbitrate the appropriate UNE rates The Commission cannot approve UNE rates by cross-reference to another docket in lieu of arbitration. Sprint's request for retroactive application of its proposed rates is unlawful and unsupported.*

There are two questions posed by Issue No. 34: (1) what rates should be incorporated into the new interconnection agreement being arbitrated in this proceeding, and (2) when should those rates be effective? These separate questions are addressed in turn, below.

The Commission Should Establish New UNE Rates for Sprint and not Incorporate the 990649B Rates into the Interconnection Agreement

Since FDN submitted its response to Sprint's Arbitration Petition, it has made clear its intent to arbitrate new Sprint UNE rates to replace those established by the Commission in the Sprint phase of the generic UNE rate proceeding, Docket No. 990649B, Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida, Inc., Order No. PSC-03-0058-FOF-TP, issued January 8, 2003 (the "Sprint UNE Order.").

To that end, FDN sought voluminous discovery from Sprint. *See* FDN First Request for Production of Documents and FDN First Set of Interrogatories. Likewise, FDN submitted the panel testimony of QSI consultants, Messrs. Ankum, Fischer and Morrison. These filings were all designed to document that the data and inputs used in the 990649B proceeding were now out of date and to document the many reasons why FDN believes that the rates adopted by the Commission in the 990649B proceeding were not TELRIC compliant. It was not until Sprint resisted discovery and sought to strike portions of the QSI panel testimony that Sprint's plan to prevent FDN from arbitrating new UNE rates in this proceeding was revealed.

As FDN has explained to the Commission in its various pleadings and filed testimony, the Commission is bound by the Communications Act and related administrative law principles to permit FDN to arbitrate UNE rates in this interconnection proceeding, which the evidence FDN pleaded to be heard by the Commission would show that the 990649B rates are neither current nor TELRIC compliant. *See* FDN Communications Motion for Postponement of, and Establishment of, Due Dates (filed June 7, 2005); FDN Response to Sprint Motion to Strike (filed June 16, 2005); Rebuttal Testimony of August H. Ankum (filed June 24, 2005); FDN Motion to Compel (filed June 29, 2005); FDN Prehearing Statement (filed July 5, 2005); FDN Omnibus Motion for Reconsideration of Prehearing Officer's July 8, 2005 Order or, In the Alternative, Motion to Revise Schedule Pursuant to July 8 Order (filed July 18, 2005); Motion to Accept Supplemental Testimony of Dr. August Ankum (including Supplemental Testimony of August H. Ankum) (filed August 1, 2005).[40] FDN incorporates by reference all of these submissions.

[40] FDN agreed by letter that the latter pleading was constructively denied by the Commission's denying FDN's motion for reconsideration, heard at the August 2, 2005, Agenda Conference.

Not only has the Commission refused to permit FDN to arbitrate UNE rates in this proceeding, in violation of its own precedent,[41] it has also prevented FDN from presenting evidence on the question that the Commission has deemed is "really" at issue in this proceeding, *i.e.*, whether the 990649B rates should, in fact, be incorporated into the next interconnection agreement. *See* Commissioner Deason's July 8 Order, at 2 (redefining Issue No. 34 as whether the 990649B rates "should be incorporated into the interconnection agreement that is the subject of this arbitration") and Order Denying Reconsideration, issued August 22, 2005.

As FDN has explained, whether the 990649B rates should be so incorporated is a disputed question of fact. In striking the QSI panel testimony, denying FDN the discovery it has requested – even as to the issue as the Commission has redefined it -- and denying FDN the opportunity to present evidence, the Commission has effectively prevented FDN from contesting this issue. Indeed, because it has been prevented from establishing a record, FDN has been effectively foreclosed by this Commission from demonstrating why it would be inappropriate to incorporate the 990649B rates into the interconnection agreement.

The Commission should not take the lack of argument here, however, as an indication that FDN consents to the incorporation of the 990649B rates into the interconnection agreement. To the contrary, FDN opposes the incorporation of those rates here on the grounds stated in FDN's previous filings, cited above. FDN should be permitted the opportunity to arbitrate appropriate UNE rates in this proceeding. The 990649B rates should not be incorporated into the

[41] As Commissioner Davidson has explained, the Commission is "duty-bound by Section 252(b)(4)(C) of the Act to resolve issues set forth in a petition for arbitration or in the response to such petition that are within the scope of those issues that the incumbent companies are required to negotiate pursuant to Section 251 (c) and (b) of the Act." Order Granting in Part, and Denying in Part, Motions to Compel and Motions for Protective Order and Denying Motion in Limine, *Petition for arbitration of unresolved issues resulting from negotiations with Sprint-Florida, Incorporated for interconnection agreement, by AT&T Communications of the Southern States*, LLC d/b/a AT&T and TCG South Florida, Docket No. 030296-TP, Order No. PSC-03-1014-PCO-TP (Florida PSC Sep. 9, 2003).

interconnection agreement because, as FDN would show if it were given the opportunity, they are neither based on current data, nor TELRIC compliant.

Whatever UNE Rates Are Adopted Here Should Be Effective Prospectively Only

This proceeding arises from Sprint's Petition to arbitrate a new Interconnection Agreement to replace the existing Agreement, which was executed by the Parties in December 2001 (the "2001 Agreement")[42] and which remains in effect today pursuant to agreement between the parties which were included in Exhibit No. 17. Despite the fact that the parties have an effective agreement in place today, and the fact that this proceeding was established to create a new, forward-looking agreement, with new forward-looking UNE rates, Sprint claims that rates established here should not merely govern under the terms of the new contract, but should also be made retroactive to December 2004, the date when Sprint filed its arbitration petition. Thus, Sprint would require FDN to "true-up" all payments made since then to the new (higher) rates.

Sprint's request for retroactive rates is based on an old grievance – namely FDN's refusal to amend the 2001 Agreement to incorporate the UNE rates the Commission established in January 2003 in Docket No. 990649B. FDN's objections to the 990649B rates are well documented and need not be reiterated here. FDN must, of course, acknowledge that it has refused to voluntarily sign an amendment to the 2001 Agreement, or to voluntarily execute a new interconnection agreement, that contains the 990649B Rates.

Sprint relies solely on the testimony of its witness, Steven Givner, who has characterized FDN's refusal to accept the 990649B rates as "unreasonabl[e]," and further claimed that FDN "delay[ed] negotiations on a new agreement in order to avoid increased charges that it would incur

[42] The 2001 Agreement has not been entered into the evidentiary record of this proceeding. Sprint has not submitted any testimony or evidence which suggests that the 2001 Agreement plays a part in its retroactivity claim in any event. To support its claim to retroactive rates, Sprint's prefiled testimony has relied only on the assertion that FDN delayed implementation of the 990649B rates. However, in his deposition, Sprint witness Givner could not identify any specific authority for retroactive application. (Exhibit No. 10, p. 5 – 9.)

under the new rates." (Tr. 18 – 20.) Both claims are false. First, there is nothing "unreasonable" about FDN's refusal to voluntarily adopt rates that, for reasons FDN has explained to the Federal District Court, are unlawful. FDN is not at fault for the District Court's silence (up to this point) on FDN's complaint regarding the Docket No. 990649B UNE rates nor, for that matter, is FDN at fault for the Commission's silence on the FDN/KMC alternative motion for stay in Docket No. 990649B.[43] Given FDN's active legal opposition to the 990649B rates, it would be peculiar for FDN to voluntarily accept them while the referenced proceedings remain pending.

FDN's opposition does not mean that Sprint has been without recourse. The Sprint UNE Rate Order lays out what should have occurred: "[w]e find that recurring and non-recurring rates and charges shall take effect when existing interconnection agreements are amended to incorporate the approved rates, and the amended agreements are deemed approved by us." Sprint UNE Rate Order at 218. In so ruling, the Commission expressly rejected Sprint's request that the new rates be deemed effective by operation of law. Id. at 216-217. So Sprint has known from the time the 990649B rates were promulgated that if it wanted them to be included in the 2001 Agreement, that Agreement would have to be amended to include them, and the amendment itself approved by the Commission. If Sprint was unsatisfied with FDN's response to Sprint's desire to put those rates into the 2001 Agreement, Sprint was free to bring the matter to the Commission's attention.

For reasons known only to it, however, Sprint never did so. Instead, as explained below, Sprint voluntarily executed a series of extensions to the 2001 Agreement, which as a matter of law kept the rates about which Sprint is now complaining legally in full force and effect. It is therefore disingenuous of Sprint to claim that ***FDN*** refused to adopt the new rates when ***Sprint*** expressly

[43] The KMC/FDN Alternative Motion for Stay was filed in Docket No. 990649B on September 8, 2003, and has not been ruled on by the Commission. At the August 2, 2005, Agenda Conference, Commissioner Deason opined from the bench that this motion could be viewed as constructively granted.

and repeatedly consented, to the continuation of those rates, all the while failing to take any steps that it may have had the right to take if it wished to incorporate the 990649B rates into the 2001 Agreement.[44]

Nor has FDN dragged its feet in negotiating a successor agreement, as the record demonstrates. Sprint's attempts to show otherwise are inadequate and exiguous at best. It was FDN, not Sprint, that on July 25, 2003, first requested negotiations for a new agreement, some five months before the 2001 Agreement was set to expire. (Tr. 18.) Sprint witness Givner had little or no direct knowledge of the negotiations prior to being assigned to the negotiations in October 2004, and even though he was noticed to bring with him to his deposition all documents supporting his testimony, Mr. Givner had no proof of anything with him and enunciated no clear basis for Sprint's claims. (Exhibit No. 10, p. 13 - 21.) In short, Sprint cannot prove FDN had disengaged in negotiations. Indeed, the emails included in Exhibit 11 prove otherwise, including indications that the parties had exchanged redlines in August 2004. Of course, there have been some delays in the process, some stemming from circumstances beyond both parties' control, such as, for example, hurricanes in mid 2004 and the fact that both parties changed negotiations toward the end of 2004. (Exhibit No. 11.) Sprint itself could not document that it promptly responded to FDN redlines after negotiators changed in late 2004 (Exhibit No. 10, p 24 – 26.)

But all of this history is largely irrelevant. The Commission cannot order retroactive rates for at least two reasons. First, doing so would constitute an improper abrogation of the private, bilateral contract between Sprint and FDN, which provides that the current agreement, including rates, will remain in effect until a new agreement is executed. Second, the retroactive rates Sprint seeks would be contrary to the rule the Commission established in the 990649B proceedings,

[44] Indeed, as FDN acknowledged more than a year ago, if Sprint wanted the 990649B rates incorporated into the 2001 Agreement, it could seek relief from the Commission. *See* August 17, 2004 e-mail from FDN representative Scott Kassman to Sprint Representative John Chuang. (Exhibit No. 11 at 5)

applicable to all ILECs, which provides that new UNE rates will only be effective prospectively and only upon the execution and approval of new interconnection agreements. This rule against the retroactive application of UNE rates has constitutional underpinnings, and reflects the fact that retroactive ratemaking is highly disfavored.

As noted above, FDN disputes both the characterization – and the relevance – of Sprint's claim that FDN delayed negotiating a new interconnection agreement so that it could avoid paying the higher 990649B rates. More importantly, however, whatever caused the delays that followed FDN's July 2003 request to negotiate a new interconnection agreement, Sprint clearly acquiesced in those delays. That acquiescence is reflected in a series of letter agreements the parties executed in November 2003, February 2004, April 2004, July 2004, and September 2004, in which the parties agreed to extend the deadline for filing an arbitration petition with the Commission so that private negotiations could continue. (Exhibit No. 17.)

In addition to extending the negotiations period, the February 2004, April 2004, July 2004 and September 2004 agreements also contained the following identically-worded provision: "As we discussed previously, the parties will continue to operate under the existing Interconnection and Resale Agreement until a new agreement is in place." Thus, the parties contractually agreed to continue operating under the 2001 Agreement, including the "old" rates contained therein, "until a new agreement is in place." An order imposing new rates retroactive to the date Sprint filed for arbitration would clearly violate this agreement.

It is black-letter law that "a state regulatory agency c[an] not modify or abrogate private contracts unless such action [i]s necessary to protect the public interest." *United Tel. Co. of*

Florida v. Public Service Commission, 496 So.2d 116, 119 (Fl. 1986).[45] In the *United Tel.* case, two Florida telephone companies appealed Commission orders which modified their private bilateral contracts. The Florida Supreme Court ruled that the Commission neither had the statutory nor the constitutional authority to do so. As the Court explained, "to modify private contracts in the absence of [] public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution." *Id.* The Commission has subsequently relied on *United Tel.* for the proposition that it does have authority to enforce private contracts,[46] and as the basis for the limitation on its ability to abrogate those agreements.[47]

United Tel. and its progeny are controlling here. Sprint and FDN agreed to continue operating under the 2001 Agreement until a successor agreement was arbitrated and "in place." Sprint's request for rates retroactive to December 2004 would violate that agreement and must, therefore, be rejected.

Moreover, federal law dealing specifically with interconnection agreements leads to this same conclusion. Section 252(a)(1) of the Communications Act, 47 U.S.C. § 252(a)(1), indicates that voluntary agreements by ILECs in connection with their Section 251/252 duties are "binding" in nature; non-voluntary agreements are binding because they are imposed by regulators. Sprint's repeated voluntary, agreed extensions to the 2001 Agreement, made in the context of negotiating a new agreement, are clearly "binding" under this federal law principle as well.

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[45] There is no evidence in the record that a true-up is necessary to promote the public interest. If the public interest required retroactive application, one must question why Sprint did not complain to the Commission earlier.

[46] Order Granting BellSouth's Partial Motion to Dismiss, *In re: Complaint against BellSouth by IDS Telecom LLC*, Docket No. 031125-TP, Order No. PSC-04-0423-FOF-TP (Florida Public Service Commission April 26, 2004).

[47] Order Denying Motion for Extension of Contract Performance Dates, *In Re: Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Between Panda-Kathleen, L.P. and Florida Power Corporation*, Docket No. 950110-EI, Order No. PSC-98-0596-FOF-EI (Florida Public Service Commission April 27, 1998).

As noted above, in the Sprint UNE Rate Order and in the other UNE rate orders for BellSouth and Verizon issued in the 990649 Docket, the Commission established that new UNE rates would be implemented prospectively only in new interconnection agreements approved by the Commission. Sprint's proposal would violate this rule and for that reason alone must be rejected.

This rule results from the Commission's long-standing acknowledgment of the "general prohibition on retroactive ratemaking ...."[48] The policy underlying this "general prohibition ... is lack of notice and reliance." *Id.*; *accord Public Utilities Com'n of State of Cal. v. F.E.R.C.*, 988 F.2d 154, 163 (D.C. Cir. 1993) ("[p]redictability is an underlying purpose of ... the rule against retroactive ratemaking"). Nothing in the Commission's rulings in the 990649 Docket or elsewhere gives any sort of indication or notice that rates determined in the 990649 proceedings would be subject to retroactive true-up, either as a result of the 990649 Docket (which, as noted above, expressly disclaims any retroactive effect), or in the course of arbitrating a new agreement.[49] As the United States Court of Appeals for the D.C. Circuit has explained,

> [I]t is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."

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[48] Final Order on Arbitration of Complaint, *In Re BellSouth Telecommunications, Inc.*, Docket No. 030300-TP, PSC Order No. 04-0974-FOF-TP (Fl. PSC Oct. 7, 2004), 2004 WL 2359261, *6.

[49] Pursuant to the interim rate provisions of Section 364.055 Fla. Stat., the legislature has provided the Commission with the tools to true-up rates without running afoul of retroactivity principles, but that provision is not applicable here. It is, however, noteworthy because the Florida Legislature and Congress are silent on the Commission's authority to order an interim UNE rate in an interconnection agreement arbitration. To FDN's knowledge, this Commission has not heretofore found that it has the authority to approve an interim rate in the absence of the parties' agreement.

Natural Gas Clearinghouse v. F.E.R.C., 965 F.2d 1066, 1075 (D.C. Cir. 1992) (quoting *Columbia Gas Transmission Corp. v. F.E.R.C.*, 895 F.2d 791, 793 (D.C. Cir. 1990)). The Commission made no announcement of provisional rates at the outset of or conclusion of Docket No. 990649.

Not only was FDN not notified by the Commission that it might consider retroactively imposing a true-up on rates, but the Commission provided precisely the opposite guidance in the UNE rate orders, when it stated that all UNE rates for all ILECs would be prospective only. Accordingly, it would be impermissible for the Commission to reverse course at this point and require a retroactive true-up.

For the foregoing reasons, whatever rates are adopted in this proceeding must take effect prospectively, effective beginning only on the date the Commission approves a new FDN-Sprint interconnection agreement.

ISSUE 35[50] **What are the parties' obligations regarding interconnection facilities?**

FDN: *FDN is required to have one POI per LATA. FDN agrees to establish one POI at a single Sprint tandem in each LATA, unless FDN's LATA local calling proposal is approved, in which case FDN agrees to one POI per tandem.*

ISSUE 36 **What terms should apply to establishing Points of Interconnection (POI)?**

FDN: *FDN may not be required to establish more than one POI per LATA. Where there is more than one tandem in a LATA, FDN proposes to establish POIs at both tandems, provided the local calling area for intercarrier compensation purposes is the LATA.*

ISSUE 37 **What are the appropriate terms for transport and termination compensation for:**
(a) local traffic
(b) non-local traffic
(c) ISP-bound traffic?

[50] Below, FDN briefs Issues 35, 36 and 37 on a combined basis.

FDN: *Local and ISP bound traffic should be compensated on a bill and keep basis, consistent with the parties agreed language. Local traffic should be defined consistent with FDN's positions in Issue No. 5. Non local traffic should be compensated at tariffed access rates.*

This Commission has time and time again arbitrated issues respecting CLEC and ILEC obligations on the point of interconnection ("POI") and the responsibility of the originating carrier to transport traffic up to the POI. In the Generic Reciprocal Compensation Docket, the Commission summed up its disposition on these matters as follows:

> We are persuaded by the record that **an originating local exchange carrier is financially responsible for bringing its traffic to the POI in a LATA**. . . . . If the ILEC proposals are adopted, a terminating carrier would be responsible for paying a portion of the transport costs of an originating carrier's traffic. . . . .
>
> . . . .
>
> Neither [BellSouth nor Verizon] provide any basis supporting the right of an ILEC to have authority in designating POIs. . . . . We find persuasive the extensive authority cited by [Sprint] and the ALEC witnesses, and therefore, we find that **ALECs have the exclusive right to unilaterally designate single POIs** for the mutual exchange of telecommunications traffic at any technically feasible location on an incumbent's network **within a LATA. Nothing in this Order should be construed as an infringement on an ALEC's ability to negotiate this prerogative in exchange for other considerations**.
>
> . . . . Therefore, we find that an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated y the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic.
>
> . . . .
>
> Based on the foregoing, we find that an originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection in a LATA.

Order on Reciprocal Compensation, pp. 22 - 24 (Emphasis added.)

As FDN witness Smith testified (Tr. 156, 176), and as Sprint witness Sywenki does not refute (Exhibit No. 8, p. 26), FDN has the right to designate one POI per LATA. FDN has the prerogative, as the Commission acknowledged in the quote above, to barter its single POI right in

exchange for other considerations. Further, as noted above, under section 252(c)(2) of the Telecom Act, the state commission has no discretion to grant a competitor different or lesser rights than the minimum the law provides if the competitor insists on its right. FDN insists on the right to one POI per LATA but has been and remains willing to have one POI per tandem provided its intercarrier compensation proposal is accepted.

By asking that FDN have one POI per tandem rather than per LATA, Sprint proposes that FDN bear additional cost over and above the single POI per LATA FDN has the right to designate and therefore, Sprint's proposal runs afoul of the Commission's and the FCC's requirements. That establishing POIs at each tandem may be more "efficient" or "natural" for Sprint is of no consequence, because, if it were, it would have been part of the POI calculus set by the FCC and the Commission in the first place (as multi tandem LATAs are nothing new), but it is not part of the calculus. FDN would incur additional costs[51] to establish additional POIs per tandem which outweigh the de minimus transport costs[52] Sprint would incur for tandem transport. Therefore, the Commission should uphold FDN's right to designate one POI per LATA if the Commission does not approve FDN's proposal in Issue No. 5.

ISSUE 38 **What are the appropriate terms for compensation and costs of calls terminated to end users physically located outside the local calling area in which their NPA/NXXs are homes (Virtual NXXs)?**

FDN: *The terms should be reciprocal such that both FDN and Sprint similarly situated traffic is treated/compensated similarly regardless of the directional flow of equivalent traffic.*

[51] Exhibit No. 4, FDN Response to Interrogatory No. 61.

[52] Exhibit No. 3, Sprint Response to Interrogatory No. 7; Order on Reciprocal Compensation, p 24.

In the Order on Reciprocal Compensation, the Commission addressed various issues pertaining to Virtual NXX and FX traffic, finding that the two were competitive equivalents and concluding, in part, as follows:

> [W]e find it is appropriate and best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While we hesitate to impose a particular compensation mechanism, we find that virtual NXX traffic and FX traffic shall be treated the same for intercarrier compensation purposes.

Order on Reciprocal Compensation at p. 26, 32. FDN generally does not take issue in this arbitration with the Commission's previous ruling that where an NXX is homed should dictate how an FX or VNXX call is treated for intercarrier compensation purposes. Rather, FDN is interested in reciprocity. The draft agreement provides, "For Sprint-originated traffic terminated to CLEC's Virtual NXXs, Sprint shall not be obligated to pay reciprocal compensation, including any shared interconnection facility costs, for such traffic." (Tr. 128.) This same provision should apply similarly to Sprint's equivalent FX services.[53]

ISSUE 39 **What are the appropriate terms for compensation and costs of calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP)?**

FDN: *The agreement need not address VoIP traffic at this time. The Commission should await an FCC determination on the status of VoIP traffic in the IP Enabled Services docket and then permit the parties to negotiate amendment thereafter.*

[53] In his rebuttal testimony, FDN witness Smith, while citing the need for reciprocity, mistakenly suggests in FDN's proposed language that Sprint would offer VNXX, not FX service. (See Tr. 177, line 8.) Though the reference was in error, the intent was clear and is consistent with the Commission's Order on Reciprocal Compensation. The Commission should therefore approve FDN's language with that clarification.

As noted in Issue No. 5 above, FDN agrees to Sprint's alternative language proposal for VoIP traffic, with one modification,[54] provided FDN's intercarrier compensation proposal is approved. If FDN's intercarrier compensation proposal is not approved, the Commission should simply defer ruling on this issue until the FCC addresses the regulatory status of VoIP traffic. Sprint has recognized that this issue has been pending at the FCC for some time. (Exhibit No. 8, p. 8.) The issue has been extensively debated and briefed in great technical and policy detail before the FCC, and the FCC has primary jurisdiction over the subject. The Commission should not expend resources addressing the matter needlessly or repeatedly, changing course as the FCC directs, when in this case, Sprint has presented no evidence whatsoever that there is a compelling need for the Commission to address this issue because FDN has, or is poised to, flood Sprint with VoIP traffic originated from Internet points far away but routed as local traffic and not subject to access charges. Even if FDN does just that in the future – and FDN has no such intent -- Sprint is perfectly able to seek appropriate remedies at the FCC or Commission.

ISSUE 62 **Should Sprint provide FDN a means for accessing on a pre-ordering basis information identifying which Sprint loops are served through remote terminals?**

FDN: *Yes, and such information should be the same as that available to Sprint.*

Though Sprint maintains that the information FDN seeks about remotes should be contained in a loop make up ("LMU") response,[55] FDN's actual experience with LMUs is quite different. In FDN's experience, Sprint LMU responses usually do not contain information

[54] FDN agreed to accept Sprint's proposed alternative VoIP language if the phrase "or for a Party at that Party's request" is deleted, since the "actual knowledge" standard should apply to what third parties do. See footnote 7, above.

[55] See Tr. 87 . Sprint also asserts that there is currently no alternative to LMUs available for CLECs to determine if a customer is served behind a remote. (Exhibit No. 7, Maples Late-filed Deposition Exhibit No. 4, page 2 - 3.)

pertinent to whether a remote is present or otherwise indicative of whether Sprint must write an engineering design order (referred to by Sprint as a "Ciras" order) to serve the customer and thus delay ordinary provisioning. (Exhibit 4, FDN Response to Interrogatory No. 64 .) Indeed, in the example FDN provided, Sprint delayed an order several times before notifying FDN that Sprint would undertake a Ciras order to provision the service, even though the LMU response from Sprint contained no indication of a remote or other electronics. (Id.) Sprint asserts that LMU responses are supposed to contain the information FDN seeks, but maintains there was an oversight in the FDN example due to "human error in terms of properly interpreting and reporting the information" and that "the individual responsible will receive additional training." (Exhibit No. 7, Maples Late-filed Deposition Exhibit No. 4, page 2.) FDN questions how much error FDN and its customers are supposed to tolerate on LMU responses.

FDN proposed language designed to cure its poor experience with Sprint LMU responses. (See Exhibit No. 15, page 101.) FDN's position has been that if Sprint must offer a new type of OSS service to cure this issue, so be it. However, as a compromise for purposes of this arbitration, FDN proposes that the Commission approve a clarification of the LMU provisions in Section 47 of the draft interconnection agreement such that Sprint's obligations and FDN's rights are clear. Accordingly, FDN proposes that the following be added to Section 47.1:

> Sprint's Loop Make-Up Information provided to CLEC will provide CLEC a means for accessing on a pre-ordering basis information identifying which customers are served through remote terminals, and such information will be no less accurate or reliable than what Sprint has available to itself and other CLECs.

To the degree that FDN's prior experience continues, FDN will pursue the remedies available to it under the interconnection agreement.

Respectfully submitted this 1st of September, 2005.

Matthew Feil /s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and United States mail to the persons listed below this 1st day of September, 2005.

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