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State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: December 8, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Beard, Broussard, Brown, Buys, Curry, Maduro, Mann, Watts, Wright)
Office of the General Counsel (Scott, Susac)

RE: 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.

AGENDA: 12/20/05 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Deason, Bradley, Edgar

PREHEARING OFFICER: Deason

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041464.RCM.DOC

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Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ACF	Annual Charge Factors
ALEC	Alternative Local Exchange Company
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FDN	Florida Digital Network
FPSC	Florida Public Service Commission
FX	Foreign Exchange
ICB	Individual Case Basis
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
LMU	Loop Make-Up
NRC	Non-Recurring Charge
NXX	Central Office Code/Prefix
OSS	Operational Support Systems
POI	Point-of-Interconnection
RNM	Routine Network Modification
Sprint	Sprint-Florida, Incorporated
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
VNXX	Virtual NXX
VOIP	Voice Over Internet Protocol

Case Background

On December 30, 2004, Sprint-Florida, Inc. (Sprint) filed a petition with the Florida Public Service Commission (FPSC or Commission) to arbitrate certain unresolved issues associated with negotiations for an Interconnection, Collocation, and Resale Agreement between itself and Florida Digital Network, Inc. d/b/a FDN Communications (FDN). The hearing for this arbitration was held August 4, 2005.

Sprint and FDN have continued to negotiate and reduced the number of disputed issues from 66 to 13. The remaining disputed issues relate primarily to unbundled network elements (UNEs), the Triennial Review Order (TRO), the Triennial Review Remand Order (TRRO) and the definition of local traffic.

For Sprint, the primary issue in this arbitration is the implementation of the cost-based UNE rates approved for Sprint by the Commission in the generic proceeding that concluded in January 2003. Sprint has been trying unsuccessfully to incorporate the Commission-approved rates into FDN's agreement, but FDN has not accepted the rates. (TR p. 210) Staff addresses this item in issue 34.

FDN's primary issue in this arbitration is defining the appropriate local calling area for purposes of intercarrier compensation. (TR p.213) FDN believes its local calling area should be the LATA, while Sprint believes the local calling area should be defined as Sprint's rate centers. Staff addresses this item in issue 5. Issues 35, 36, and 37 also relate to the local calling area and may be affected by the decision made in Issue No. 5.

Since the filing of the post hearing briefs, the parties have also settled issues number 25 and 27. The parties continue to negotiate and the possibility remains that other issues will be settled as well.

Discussion of Issues

Issue 5: How should "local traffic" be defined?

Recommendation: Staff recommends local traffic 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. (Maduro)

Position of the Parties

Sprint: Local traffic should be defined as traffic that is originated and terminated within Sprint's local calling area or mandatory extended area service (EAS) area.

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.

Staff Analysis:

Parties' Arguments

Sprint

Sprint states that "local calling" is a fundamental basis for Sprint's regulated rate structure. (Exh. 3 p. 45) Sprint communicated that its definition of local calling applies to all wireline carriers, consistent with Sprint's Commission-approved access tariffs. Sprint believes that the current local calling area definition will afford all wireline carriers including Sprint, FDN, LECs and IXCs competitive opportunities and the same access to revenue opportunities as Sprint and other ILECs. (Exh. 3 p. 45) Sprint contends that if the local calling definition were to change, it would give an unfair competitive advantage to FDN and perhaps other CLECs.

Sprint points out that its rates and intercarrier compensation are subject to ILEC regulation. (TR p. 121) Sprint explained that its rates and rate structure are designed on historic geographically defined calling areas which are subject to Commission regulation. Accordingly, Sprint contends that if local calling boundaries are redrawn, intercarrier compensation for non-local calls will change substantially. In essence, calls that were formerly considered to be long distance would overnight be deemed local and thus be reclassified to reciprocal compensation instead of access rate compensation. (TR p. 121)

In light of the fact that intrastate access rates are higher than reciprocal compensation rates, and since intrastate access provides revenue for originating traffic whereas reciprocal compensation does not, Sprint states that redefining long distance calls as local calls would reduce its opportunity for intercarrier compensation revenue. (TR p. 121) Sprint believes that restructuring the calling area would have a significant impact because under the preexisting universal service mechanism approved by the Commission, access revenues provide significant support for their basic local service rates. (TR p. 121-122) Sprint notes, because of its ILEC status, it is not permitted to adjust its regulated rates without the Commission's approval, thus it

has no alternative opportunity to recover the loss of intercarrier compensation revenue if the local traffic boundaries were redrawn (TR p. 122).

Sprint believes that the present definition of local traffic (Sprint's local calling area) does not create competitive disparity between the parties since both would be subjected to the same designation for access and local traffic compensation. Sprint explains that FDN would be able to collect and pay access and reciprocal charges on the same basis that Sprint would, thus creating a neutral playing field. (TR p. 122)

Sprint reiterates that if the LATA is used as the basis for the local calling area, FDN will be afforded an unfair advantage and thus would not be considered competitively neutral as the Supreme Court had mandated. (TR p.123) FDN witness Smith believes that wireline competition in Sprint's territory is not at a desirable level for Florida consumers, and nowhere close to what is in BellSouth's territory. (TR p. 148) Sprint indicates that the comparison of the level of competition in Sprint's territory to that found in BellSouth's territory is of no value. Sprint pointed out that its service territory is much more rural than BellSouth's territory. Sprint added that FDN witness Smith stated, "Sprint does not serve as many large urban centers as does BellSouth" and "in the initial phases of competition, at least, the influx of CLECs focused on larger urban areas". (TR p. 135)

Sprint notes that FDN would in essence be given a lower rate for access charges than IXCs and/or other CLECS, which would be unfair. (Sprint BR, p. 3) Also, Sprint is required to serve as "carrier of last resort" and provide basic service at rates strictly regulated by the Commission. The revenue that Sprint would lose under FDN's proposal is needed to support Sprint's ability to meet this obligation. (TR p. 123) Sprint expounds that FDN has the flexibility in choosing whom it may serve and at what price and hence is not impacted to the same degree as Sprint. Moreover, Sprint opines that such an arrangement would give FDN an unfair advantage over Sprint and other carriers who would still be subject to the existing ILEC local calling areas for determining compensation. Sprint provides an example where a long distance LATA call from an AT&T customer to a Sprint local customer would require AT&T to pay terminating access, but the same call from the same customer served by FDN would allow FDN to avoid paying terminating access and instead pay the much lower reciprocal compensation rate. (TR p. 123)

Sprint points out that the 2003 Telecompetition Innovation and Infrastructure Act[1] has changed the landscape and has afforded CLECs a more competitive environment since it will rebalance the ILEC's local rates and access charges. (Sprint BR, p. 4) Sprint states it will reduce its access rates while increasing its local rates, thus reflecting the true costs of providing local service. (Sprint BR, p.4) This development will make competition more attractive in its territory. Sprint argues that this reduction should eliminate the primary reason for FDN requesting a LATA-wide local calling area.

[1] This act allowed the Commission to consider whether allowing the ILECs to reduce their intrastate access charges to interstate levels, and to make offsetting increases in local service rates, will further the legislature's goal of increasing competition in the local telephone market.

In summary, Sprint expresses concern that FDN's LATA-wide local calling proposal would redraw the lines that presently separate local and long distance rates and create an unfair and incoherent system of compensation. Sprint communicates that it is a strong proponent of reforming intercarrier compensation to replace the current regulatory traffic distinctions between local and long distance compensation, however, it wants a uniform compensation mechanism which allows ILECs the opportunity to recover any lost access revenues from the proposed alternative system. (TR p. 123) Sprint believes that redrawing the compensation lines to benefit a single carrier is not in the best interest of the industry, consumers and/or the regulatory agencies who have to monitor competition in the telecom sector. (Sprint BR, p. 5)

FDN

FDN rebuffs Sprint's notion that changing the definition of the local calling area would jeopardize its revenues as they relate to its "carrier of last resort" (COLR) obligations. FDN contends that the intraLATA access revenues that FDN pays Sprint are not significant enough to jeopardize Sprint's subsidization of its "carrier of last resort" duties. (TR p. 159) In support of its position, FDN states that the Commission should compare FDN's intraLATA intrastate access payments to Sprint versus what Sprint claims it needs for its Florida COLR obligations. (TR p. 159) FDN expresses reservation that the subject compensation revenues would represent any significant percentage of Sprint's total revenues collected via access charges for its COLR obligations. (TR p. 159-160)

FDN also pointed out that the FCC changed its rules pertaining to other carriers requesting to opt into another carrier's interconnection agreement. They explain that the FCC rules now require that the requesting carrier must opt into the entire agreement and cannot merely pick and choose parts of the agreement they like. (TR p. 160) FDN stated that the FCC essentially agreed with the ILEC's argument that this new rule would give carriers greater flexibility in negotiating resolutions to carrier-specific issues. With the spirit of the new rule in mind, FDN stated it tried to offer a trade-off to their present LATA-wide calling proposal. (TR p. 160)

One such proposal involved FDN offering to interconnect at each tandem (at its own cost of transporting the traffic to each) in a multi-tandem LATA, even though FDN has no legal obligation to do so. (TR p. 160) Additionally, FDN indicated its willingness to agree to terms whereby VOIP traffic would be subject to intercarrier compensation if Sprint would accept a LATA-wide local calling area. FDN indicates that Sprint refused all of FDN's suggested compromises. (TR p. 161)

FDN communicates that wireline competition in the Sprint territory lags behind wireline competition in BellSouth and Verizon territory in Florida. (TR p. 161) FDN noted that the CLEC penetration in Sprint's market was just 8 percent in 2004, 6 percent in 2003; and 4 percent in 2002. (TR p. 148) FDN communicated that the 2004 Competition Report indicates wireline competition in Sprint's territory is not at a desirable level for Florida consumers, and is nowhere close to competition levels in BellSouth's territory. Also, FDN explains that it is one of the few facility-based carriers still operating in Sprint's territory, and that the overall CLEC births and rate of CLEC market expansion is lacking. (TR p. 161) To date, FDN states it is not aware of many other carriers lining up behind FDN to opt into the FDN/Sprint agreement merely because

there was a provision for LATA-wide local calling for intercarrier compensation purposes in the agreement and despite the additional concessions that FDN offered that favor Sprint. Likewise, in BellSouth's territory, where FDN presently has a LATA-wide agreement, FDN is unaware of any significant number of carriers that want to opt into their agreement. (TR p. 161) FDN maintained that even if other carriers were interested in opting into the proposed agreement, such an arrangement would benefit consumers and facilitate facilities-based competition in Sprint's territory.

FDN contests the notion that if the proposed LATA-wide calling area was adopted, Sprint would not be able to recoup the loss of any intercarrier compensation. FDN pointed out that Sprint could petition the Commission for recovery of lost access revenues if it so chose. Additionally, FDN stated that ILEC's "regulated rates" for non-basic services (multi-line business and features etc.) are subject to change on 15 days notice, without Commission approval, and non-basic service rates can increase 6% within a 12 month period in all markets and 20% a year in markets with a competitor. (TR p.162) Mr. Kevin P. Smith, Vice President of Marketing for FDN, explained that he often sees ILECs change their pricing for non-basic services by merely filing the subject tariff change with the Commission. He stated that Sprint had made such a tariff change in November 2004, which he believed resulted in a net revenue increase for the company.[2] He continued by stating that in regards to residential and single-line business accounts, ILECs can raise their rates by inflation minus one (1) percent without the Commission's approval and even more with the Commission's approval. (TR p.4) FDN suggested that if Sprint believes it lost or will lose revenue from one source, it has multiple ways to recoup those losses – non-basic services being one of them. (TR p. 5)

FDN contends that its access charge payment to Sprint is only .14% of their intraLATA revenues, which is very small in the scheme of things. (Exh. 5 p. 109-110) Also, FDN states Sprint's contention about competitive neutrality pertaining to IXCs is a non-factor since, IXCs offer toll service and not local services. (FDN BR, p. 5) IXCs do not, and can not, provide reciprocal local termination services. (FDN BR, p. 6)

FDN states that Sprint is charging above-cost intrastate access charges which effectively blocks and/or severely limits competition in many of Sprint's calling areas. (TR p. 163) FDN believes that the exorbitant access fees ultimately hurt the consumer and retard facility-based growth and competition. FDN used part of one of the FPSC orders to illustrate its assertion.[3] FDN asserts that access barriers still exist and these barriers are detrimental to FDN and Florida consumers in the Sprint territories. (TR p. 164-165) FDN theorizes that Sprint does not acknowledge the competitive barriers that access charges pose. FDN summarizes that Sprint contends that FDN can do whatever it chooses with regard to retail local calling. (TR p. 164) FDN asserts that in theory that may sound justifiable, but in reality it is economically impractical

[2] See rebuttal testimony of Kevin P. Smith on behalf of FDN – Docket No. 041464-TP (June 24, 2005) page 4

[3] See Public Service Commission Order No. 02-1248-FOF-TP - "Using the ILEC's retail local calling area appears to effectively preclude an ALEC from offering more expansive calling scopes. Although an ALEC may define its retail local calling area as it sees fit, this decision is constrained by the cost of intercarrier compensation. An ALEC would be hard pressed to offer local calling in situations where the form of intercarrier compensation is access charges, due to the unattractive economics"

or impossible. FDN cited an example where a carrier could charge $10 for a local calling service and pay $12 in access costs for the service, but the reality is no one will do that on a sustainable basis – it wouldn't make economic sense. (TR p. 164)

FDN cites that Sprint's customers are not given an opportunity to explore competitive pricing because Sprint basically has instituted cost-prohibitive access charges which protect it from true competition. Unlike Sprint customers, FDN contends that customers in BellSouth's territory are afforded a more competitive environment because they are exposed to multiple plans.

FDN states the local calling area should be LATA-wide with FDN transporting its originated traffic at least as far as Sprint's tandem. Only FDN-provided dial tone would fall under the LATA-wide designation. No Sprint VOIP traffic would be included. Such an arrangement would increase competition in Sprint's territory and thus provide an environment for facility-based expansion while augmenting the telecom choices available to Sprint's customers. (TR p. 160-161)

Analysis

Both parties have presented valid and well-supported arguments and concerns pertaining to the fair and non-discriminatory definition of local calling. To fully evaluate this issue, the original rationale and intent of the Telecommunications Act of 1996 (Telecom Act) should be examined. The Telecom Act was proposed and eventually passed as a vehicle to open local exchange markets to competition, foster the deployment of advanced services, and reduce regulation.[4] Most parties involved in this Herculean endeavor recognized that Congress' vision of creating a competitive environment through resale, interconnection and facilities-based provisions and/or a combination thereof, was an extremely difficult proposition which had inherent risks and limitations.

The FCC pointed out that even though unbundling served to bring competition to the market faster than it might have otherwise developed, in the long run unbundling tended to undermine the incentives of both the ILECs and new entrants to invest in new facilities and deploy new technologies. In its own words, the FCC struggled with many issues and communicated that the path to its rules and policies are neither straight nor easy.[5]

Staff believes that the local calling area should be expanded to include the intraLATA region. Staff believes facilitating new technologies and products, reducing prices and enhancing the quality/experience for business/residential consumers who, according to the Telecom Act, were to be its ultimate beneficiaries, should be the goal. The staff was influenced by the fact that a LATA-wide provision has been initiated in BellSouth's territory, and although staff cannot point to it being the only factor, the subject territory has experienced increased competition. Although, Sprint's contentions such as COLR obligations are valid, BellSouth has the same responsibilities and seems to have absorbed or adjusted to any reduced revenues by offering products and services that win new customers or retain their existing ones.

[4] See the FCC 03-36 - FCC's Triennial Review Order – Chapter 1 Section 3 – Page 7
[5] See FCC 03-36 – FCC's TRO Chapter 1 Section 6 – Page 8

In relation to Sprint's assertion that using the LATA-wide definition for local calls would discriminate against IXCs, staff was not persuaded by this argument since the primary consequences of local call boundaries tend to affect compensation in terms of the origination and termination of traffic, whereas IXCs' services are generally restricted to long distance services. To be included or even classified as a CLEC and/or ILEC-related service, an IXC would have to at least be certificated, at which time its classification would change to reflect the service(s) (and hence its applicable compensation) it was delivering at that specific time in the process.

Staff notes that the recommendation to expand the local calling area has limitations and is somewhat restricted by the Florida Supreme Court decision[6] concerning designating a local calling area that's non-discriminatory and neutral in nature. The Florida Supreme Court ruled that neither the ILEC's retail local calling area nor the LATA-wide calling area were competitively neutral. The Court concluded that either option could give an unfair advantage to one party versus another and would most likely chill negotiations and lead to one-sided outcomes between the parties when it came to negotiating interconnection agreements.

While reviewing the Court's decision, staff came to the conclusion that a hybrid mechanism could be created that would satisfy the Court without being unduly restrictive or beneficial to either party. Due to the passing of the 2003 Act, which basically provides ILECs the opportunity to increase local rates while simultaneously reducing access charges, staff believes that the Commission can expand the local service area without severely compromising the revenues of the ILECs. ILECs have continually expressed the notion that the 2003 Act allows them to charge end users the true cost of providing local call service. Accordingly, increasing the local calling area should have a smaller impact on the ILECs than it would have otherwise, while concurrently enhancing the opportunity for other CLECs to be more competitive in the ILECs' territories. Prior to the passage of the 2003 Act, the ILECs may have been able to argue that increasing the calling scope provides CLECs an unfair competitive advantage. Now that ILECs can adjust their access charges to reflect what they deem to be applicable costs, their argument pertaining to CLECs being able to circumvent access charges and instead pay lesser reciprocal compensation charges is somewhat blunted.

Staff reviewed the current trends as they relate to wireline competition in the State of Florida. It appears that our trend line in terms of CLEC competition/penetration is slowing considerably or regressing, particularly in the residential market. Though our latest statistics show that CLEC market share in the BellSouth territory is more than double that of Verizon and triple that of Sprint, we note that overall wireline access lines are declining in general. In relation to the stagnant growth patterns for the wireline companies, we find that among the major ILECs, notably BellSouth, Verizon and Sprint, CLEC market share was 22%, 11% and 8% respectively.[7] Some key factors underlying this differential of market penetration may include BellSouth's lower UNE rates and territory which includes the most densely populated areas of the state. Staff notes that many of Sprint's coverage areas are now experiencing explosive population growth. According to the United States Census Bureau, between 2000 and 2004, 12

[6] See Florida Supreme Court Cases SC03-235 and SC03-236 which involved among other things, appeal and cross-appeal of issues pertaining to the authority, definition and jurisdiction of the local calling areas.
[7] See the FPSC 2004 Status of Competition in the Telecommunications Industry in Florida Report to the Florida Legislature

of the fastest growing US counties are in the State of Florida. Of those fastest growing counties, 6 were located in Sprint's territory, 5 in BellSouth's territory and 1 in Verizon's territory.[8]

In light of the overall decline in wireline access lines and noting the apparent need for increased competition, in Sprint's territory, staff believes that the FPSC has a responsibility to encourage competition among providers of telecommunication services. By Section 364.01(4)(b), Florida Statutes, the Florida Legislature gave a mandate to the FPSC by stating, "The Commission shall exercise its exclusive jurisdiction in order to ... Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services". Therefore, staff believes that FDN's local calling area should be the LATA.

Conclusion

Upon consideration of the record and the parties arguments stated in their briefs, staff believes that FDN represents the kind of competition that the Congress, FCC and the Florida Legislature envisioned. FDN's facility-based operation is necessary to foster competitive prices and advanced technology. Staff believes that LATA-wide based local calling will further the goal of competition in the State of Florida. Therefore, staff recommends local traffic 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.

[8] See US Census Bureau Report on the 100 fastest growing counties in the US – Based on counties with a population of at least 10,000 - information gathered between April 1, 2000 – July 1, 2004.

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?

Recommendation: The parties have agreed to most issues pertaining to the resale of Contract Service arrangements, Special arrangements, and Individual Case Basis arrangements. The outstanding aspect of this issue pertains to the application of termination liability. Staff recommends that termination liability should apply if an end user chooses to transfer service from Sprint to FDN prior to the expiration of the customer's contract with Sprint. (Maduro)

Position of the Parties

Sprint: Termination liability should apply if an end user chooses to transfer service to the CLEC before the contract terms are fulfilled.

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.

Staff Analysis:

Parties' Arguments

Sprint

Sprint states that it often provides telecommunication service to end users via contract service arrangements (CSA) or Individual Case Basis (ICB) Arrangements that include services that are specific/unique to the circumstances of its customers. (TR p. 27) This arrangement can include a termination liability that obligates the client to pay Sprint a fee for early termination of the contract. (TR p. 28) Sprint indicated that these fees ensure its ability to recoup costs that may have been deferred over the life of the agreement. Sprint explained that this ultimately benefits the customer and spreads the cost of the service over the total period instead of collecting it in the initial period, often before the client has benefited from the service or arrangement. (TR p. 28) Sprint believes that this type of arrangement is necessary and this liability fee should be invoked whenever an end user chooses to transfer service to a CLEC reseller before the CSA termination date. Sprint states that FDN opposes these terms and is seeking an indefinite "*fresh look*"[9] period, which in essence allows the end user to avoid these contractual obligations. (TR p. 28) Sprint contends that the fresh look period, which was used primarily to jump start business competition in the period immediately following passage of the Telecommunications Act of 1996 (Telecom Act), was formulated a decade ago and is no longer necessary in today's highly competitive environment. (TR p. 29)

Sprint asserts that fresh look arrangements are dated and ineffective. By Order No. PSC-99-0539-NOR-TX, issued March 24, 1999, in Docket No. 980253-TX, In Re: Proposed Rules

[9] A fresh look period is a time of limited duration in which end users are allowed to opt out of a CSA or similar arrangement with an Incumbent Local Exchange Carrier (ILEC), choosing service from a competing provider, without incurring the cost of termination liabilities.

25-4.300, F.A.C., Scope and Definitions; 25-4.301, F.A.C., Applicability of Fresh Look; and 25-4.302, F.A.C., Termination of LEC Contracts, the Commission initiated a "fresh look" rulemaking. The rulemaking was the result of a petition filed by Time Warner AxS of Florida, L.P., requesting that the Commission initiate rulemaking to include "fresh look" requirements. However, after GTE Florida and BellSouth filed a Petition for Administrative Determination of the Invalidity of Proposed Rules with the Division of Administrative Hearings (DOAH), DOAH deemed the rules invalid.[10] In essence, DOAH based its ruling on a variety of findings which suggested that fresh look rules discriminated against ILECs and would ultimately produce less rather than more competition. (TR p. 30) Subsequent to the DOAH ruling, the FPSC withdrew its preliminary ruling and the fresh look rules were never formally approved.[11] Additionally, Sprint pointed out that in the FCC consideration of termination liabilities in the Triennial Review Order (TRO), the Commission declined to require incumbent LECs provide other telecom carriers (CLECs) an opportunity to supersede or dissolve existing contractual arrangements.[12] The language proposed by Sprint is as follows:

> For Contract Service Arrangements, Special Arrangements, or ICBs, the end-user customer's agreement with Sprint will terminate and any applicable termination liabilities will be charged to the end-user customer. The terms of the Contract Service Arrangement, Special Arrangement or ICB will apply commencing on the date CLEC commences to provide service to the end-user customer and ending on the end date of the Contract Service Arrangement, Special Arrangement or ICB. Sprint will apply the rate in the Contract Service Arrangement, Special Arrangement or ICB in accordance with 3 section 38.1.[13]

FDN

FDN contends that it is not asking for a term contract between Sprint and its end user to be re-written. Instead, FDN is asking to resell the contract subject to the wholesale discount, which amounts to the unaltered contract between Sprint and the end user. (TR p. 168)

For example, assume an end user has a three year contract of which the end user is in the second year. The contract contains a termination fee that declines over the life of the term and FDN wants to resell the Sprint services to the subject user. FDN states it doesn't want to cancel the term of the existing contract as Sprint purports to do. Under Sprint's proposal, it would terminate the customer's contract with Sprint and force the customer to pay the early termination charge and then issue a new contract with FDN as the reseller. (TR p. 168)

FDN asserts that all it wants to do is resell the existing agreement to the end user at a 12% wholesale discount. FDN's plan would dictate that it pay Sprint with the wholesale discount applied, but it would not be responsible to Sprint for any early termination charges unless the customer left FDN for another CLEC or canceled the service. It is FDN's contention

[10] Florida's DOAH ruling determined that the establishment of fresh look rules by the Florida Public Service Commission (FPSC) constituted an invalid exercise of delegated legislative authority. See DOAH case No. 99-5368RP and 99-5369RP; July 13, 2000 (DOAH Final Order)

[11] See FPSC Docket No. 980253-TX,

[12] See FCC 03-36; Fresh Look Summary, Paragraphs 692-699

[13] Excerpt from the Direct testimony of James M. Maples provided on May 27, 2005.

that Sprint should not have incentive to lure such a resale customer away from FDN since the termination penalty would have no additional economic benefit to Sprint. (TR p. 169)

FDN states that it does not have any plans at this time to offer widespread resale products, however, it reserves the right to offer these services if it so chooses at a later date. (TR p. 169)

Analysis

It is staff's belief that customers generally enter into CSAs to receive a discount on specific services. In turn, the LEC usually offers competitive terms and rates in lieu of an extended contract. The discounted rates are usually based upon costs that the LECs anticipate recovering during the life of the contract. Theoretically, early termination fees are included in these types of contracts to recoup any unrecovered costs that may have been incurred due to early termination of the contract.

Sprint contends that if it were unable to impose termination penalties to CSAs and similar contracts, it would in essence be providing a service below the associated costs, since the possibility exists that they would not be able to recover specific fixed costs that are inherent to all contracts. They point out if those costs are not reimbursed on a per customer basis, the cost of providing the service would ultimately increase and most likely would be borne by existing customers.

FDN argues that the termination penalties should not apply if FDN resells Sprint's existing contract with the customer less a 12% wholesale discount, unless the customer leaves FDN for another CLEC or canceled the service.

Additionally, the FCC and Florida's Division of Administrative Hearings have reviewed the "Fresh Look" provision and have either refused to grant relief to parties from liability pertaining to early termination contracts or deemed the provision to be anticompetitive.

Conclusion

Upon consideration of the parties' briefs and the record, staff believes that termination fees for contracts cancelled before the expiration of the term of the contract are appropriate. Therefore, staff recommends that termination liability should apply if an end user chooses to transfer service from Sprint to FDN prior to the expiration of the customer's contract with Sprint.

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

Recommendation: Staff recommends that Sprint afford reasonable opportunity to FDN to challenge Sprint's wire center determinations before UNEs are removed from the list. This should be accomplished by listing impairment decisions on the Sprint web site and by sending updated lists of unimpaired wire centers to all carriers that have interconnection agreements with Sprint. On the issue of a proposed cap on DS1 transport circuits, staff believes the Commission should adopt the standard outlined by the FCC in the TRRO of 10 DS1 circuits, therefore, staff recommends that the DS1 dedicated transport cap of 10 lines apply only on routes where DS3 dedicated transport is not required to be unbundled. (Mann)

Position of the Parties

Sprint: Sprint's process for determining when additional wire centers meet the threshold for nonimpairment and the DS1 cap proposed by Sprint are consistent with the TRRO and should be adopted.

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.

Staff Analysis:

Parties' Arguments

Sprint

The TRO[14] and TRRO[15] decisions have established a process for determining when additional wire centers meet the threshold for nonimpairment. This has a direct effect on whether or not UNEs must be made available. The FCC has specifically provided that CLECs may challenge those determinations before state commissions. In paragraph 234 of the TRRO the FCC specifically provides that CLECs may challenge nonimpairment determinations before the state commissions:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based

[14] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (Triennial Review Order), corrected by Errata, 18 FCC Rcd 19020 (2003) (Triennial Review Order Errata), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313, 316, 345 (2004).

[15] In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, Released: February 4, 2005.

> competitors in a particular market..... In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.

On the issue of notice to competitors regarding the status of impaired wire centers and the availability of UNEs, Sprint argues that the TRRO defined a specific process for an ILEC's initial determination that certain wire centers meet the thresholds for nonimpairment established in the TRRO. (Sprint BR, p. 8) While there has been no dispute in this arbitration regarding the initial list of unimpaired wire centers issued by Sprint (Exh. 15 p. 187), an issue has risen about how future determinations of unimpaired status will be communicated to the competitive carrier community. Sprint has proposed in this docket that it provide notice to all CLECs with which it has interconnection agreements when Sprint has determined that certain wire centers meet the FCC's thresholds for nonimpairment. (Sprint BR, p. 7) From there, the CLECs will have 30 days from receipt of the notice to challenge Sprint's determination before the Commission. On the issue of contested impairment decisions, Sprint witness Maples testified that all affected CLECs will have an opportunity to participate in the Commission (state) proceeding. (TR p. 35, TR p. 69)

As far as the issue regarding DS1 caps, Sprint has proposed a cap of 10 on the number of DS1 dedicated transport circuits that a CLEC may order in all wire centers where DS1 dedicated transport is available. (TR p. 33) The cap would apply regardless of whether DS3 transport is available in a wire center. (TR p. 33) It is Sprint's position that this interpretation is consistent with paragraph 128 of the TRRO, in which the FCC states:

> Limitation on DS1 Transport. 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 DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

FDN

FDN believes it should be given direct notice if Sprint proposes to add to the list of wire centers where high capacity circuits are unimpaired. (FDN BR, p. 15) On the issue of DS1 caps, FDN holds that Sprint's proposed cap of 10 UNE DS1 dedicated transport circuits on routes between all wire centers of all tiers is inconsistent with the TRRO. (FDN BR, p. 15-16) Consistent with paragraph 128 of the TRRO, FDN asserts that the cap of 10 UNE DS1 dedicated transport circuits applies only on routes for which the FCC has determined that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport. (FDN BR, p. 16)

FDN argues that it should be noticed directly whenever an impairment decision is made by Sprint. FDN witness Smith testified that FDN should receive direct notice from Sprint of any

proposed changes to the unimpaired wire center list incorporated into the interconnection agreement. (TR p. 169-70) FDN argues further that 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 therefore a like requirement should be applied to impairment status. (FDN BR, p. 15) At a minimum, FDN argues that it be entitled to party status to any future dispute resolution proceeding if UNE status changes. (Exh. 6, p. 22)

FDN argues that there is a lack of clarity in the TRRO regarding when the 10 UNE DS1 transport circuit cap applies and when it does not. (FDN BR, p. 16) FDN claims that application of the cap depends on the availability of DS3 circuits and the status of the originating wire center. In the TRRO, the FCC created three tiers of wire centers and linked the dedicated transport impairment analyses to those tiers.[16]

Analysis

This issue has developed into two basic questions. First, how will notice of nonimpairment be delivered from Sprint to the CLECs and secondly, whether the cap of 10 on the number of DS1 dedicated transport circuits that a CLEC may order is the intent of the FCC for impaired wire centers, regardless of whether DS3 transport is also available.

Notice Requirements

Staff believes that the process outlined by Sprint in this arbitration gives the CLEC community an adequate opportunity to challenge Sprint's wire center determinations before UNEs are removed from the list. Staff would also recommend that notification be given directly over the Sprint web site regarding impairment decisions. Through web notification and by sending updated lists of unimpaired wire centers to all carriers that have interconnection agreements, staff believes the competitive carrier community will have adequate opportunity to contest any wire center determinations that they may disagree with. Staff also believes that by mandating this exchange of information, the Commission will promote administrative efficiency among the parties.

DS1 Cap

The second question that is addressed in this issue is whether the Sprint proposed cap of 10 on the number of DS1 dedicated transport circuits that a CLEC may order in all wire centers where DS1 dedicated transport is available, regardless of whether DS3 transport is available in a wire center, is in accordance with the TRRO and the associated rule making at the FCC.

[16] TRRO Order, p. 4-5. Dedicated Interoffice Transport. Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers. High-Capacity Loops. Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators.

Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers. (TRRO pg. 152)

According to the TRRO, DS3 transport is unimpaired where the end points of the route are either Tier I or II.[17] Both DS1 and DS3 transport are unimpaired where the end points of a route are both Tier I. The crux of the dispute in this arbitration is with transport involving Tier III wire centers. According to Exhibit No. 15, page 187, there are five Tier I and three Tier II wire centers in the Sprint Florida territory, with all other Sprint wire centers in Florida being Tier III wire centers.

FDN argues that 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 by ordering an infinite number of UNE DS1s that would equal or exceed a disallowed UNE DS3. (FDN BR, p. 15)

In the case of DS3 circuits, each CLEC is limited to a maximum of 12 DS3 circuits on a single route.[18] Therefore, the crux of the dispute on this issue is with the Sprint proposed limitation on transport between Tier III wire centers. Staff believes that FDN has correctly interpreted the TRRO and the related rules regarding the cap on the DS1 circuits. As adopted through the TRRO, 47 C.F.R. Section 51.319(e)(2)(ii) includes the following language:

> Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

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[17] TRRO Order, p. 74. ....We conclude that requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both of the wire centers are either Tier 1 or Tier 2 wire centers. Thus, incumbent LECs are obligated to provide unbundled DS3 transport that originates or terminates in any Tier 3 wire center, but are not obligated to provide unbundled DS1 transport on routes connecting any combination of Tier 1 and Tier 2 wire centers.

[18] TRRO Order, p. 75.....Limitation on DS3 Transport. On those routes for which we find impairment for DS3s, we limit the availability of DS3 transport. Although we find that sufficient revenue opportunities generally are not available to justify the deployment of competitive transport facilities on these routes, we nevertheless establish a safeguard to limit access to a carrier that has attained a significant scale on such a route indicating that more than sufficient potential revenues exist to justify deployment, we find no impairment. We give effect to this distinction, as we did in the Triennial Review Order, by establishing a limitation of 12 DS3s per carrier for any route on which carriers are not impaired.

Also adopted through the TRRO, 47 C.F.R. Section 51.319(e)(2)(iii) includes the following language:

> Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

Based on the speed of these lines, it could be reasoned that a CLEC would be entitled to purchase a certain level of capacity from the ILEC where a wire center has been determined to be impaired. Based on a rough calculation, staff has determined that in a given impaired Tier III wire center, the CLECs should be able to obtain 552 megabytes of transport (12 DS3 circuits x 44.736 megabytes + 10 DS1 circuits x 1.544 megabytes = 552 megabytes of capacity). Based on this analysis, Sprint is suggesting that the CLECs be limited to 15.44 megabytes, or a cap of 10 DS1 circuits, at a Tier III wire center where DS3 is not available. This does not appear to be fair or consistent with the intent of the TRRO to allow CLEC access in wire centers where impairment exists.

Staff believes that the cap on DS1 transport outlined by Sprint in this arbitration is not consistent with the objectives of the TRRO, nor is it consistent with the intent of the related FCC rules.[19] From our reading of the record and the TRRO, staff is of the opinion that Sprint has not advanced a sufficient rationale to support its application of a cap on DS1s in circumstances where unbundled DS3 would normally be available. Sprint should not unilaterally benefit from an expansive exclusion based solely on their interpretation of the TRRO. Staff believes the FCC adequately outlined where the cap would apply and that the plain language of the Order and the resulting rule is that the CLECs should not be limited at the Tier III wire centers, based on the impairment, or bottleneck, of critical facilities. Staff is of the opinion that the FCC intended to make DS1s available, in lieu of DS3s, at an impaired wire center. This interpretation of the availability of transport is more faithful to the objectives of the TRRO than the restrictive amendments proposed by Sprint.

Conclusion

Upon consideration of the record and parties' briefs, staff recommends that Sprint afford reasonable opportunity to FDN to challenge Sprint's wire center determinations before UNEs are removed from the list. Staff recommends that this be accomplished by listing impairment decisions on the Sprint web site and by sending updated lists of nonimpaired wire centers to all

[19] TRRO Order, pgs. 74-75. ....130. We conclude that requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where one or both of the wire centers classifies as either a Tier 1 or Tier 2 wire center because we find that competitive transport facilities have been or can be deployed between such wire centers. Tier 2 wire centers are characterized by the significant revenue opportunities they offer, as evidenced either by fiber-based collocation or by business line density. The significant revenue opportunities at both ends of such routes make it highly likely that competing carriers have deployed or can deploy in an economic manner transport to link such wire centers. Conversely, where one end of a route is a Tier 3 wire center, we cannot infer that carriers are not impaired in serving the route between these wire centers – a link that necessarily requires sufficient opportunities to originate and terminate traffic at both ends of the route. Thus, for all routes with at least one end point classified as a Tier 3 wire center, we find that competing carriers are impaired without access to DS3 transport.

carriers that have interconnection agreements with Sprint. On the issue of a proposed cap on DS1 transport circuits, staff believes the Commission should adopt the standard outlined by the FCC in the TRRO of 10 DSl circuits, therefore, staff recommends that the DS1 dedicated transport cap of 10 lines apply only on routes where DS3 dedicated transport is not required to be unbundled.

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?"

Recommendation: No. Staff recommends that Sprint should not have the ability to restrict UNE availability where there is not a "meaningful amount of local traffic." So long as a competitive LEC is offering an "eligible" telecommunications service *i.e.,* not exclusively long distance or mobile wireless services, it should have the ability to obtain that element as a UNE. (Brown)

Position of the Parties

Sprint: All UNEs must be used to provide local exchange services. The rules established by the TRRO prohibit the use of UNEs for services which are deemed to be competitive. UNEs can be used to provide these services if they are also being used to provide local exchange services.

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.

Staff Analysis:

Parties' Arguments

Sprint

As Sprint understands the issue, FDN believes that it can provide information service on a UNE as long as it is providing any telecommunications service on the UNE, even if it is solely providing interexchange services on that UNE. Sprint states that FDN bases its claim on its position from 47 C.F.R. § 51.100(2)(b) which states: A telecommunications carrier that has interconnected or gained access under 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement so long as it is offering telecommunications services through the same arrangement as well. Sprint does not agree with FDN's interpretation. (TR p. 41)

Sprint asserts the market restriction on telecommunications services imposed by the FCC in the TRRO impacts and modifies the telecommunications services referenced in the above rule. Sprint states that the FCC was concerned with gaming by CLECs and attempts to convert the existing access services to UNEs when it had found that the interexchange and mobile wireless markets are competitive. Sprint believes that FDN is seeking to employ a form of gaming by only providing interexchange telecommunications services over UNEs and not providing any competition for the local exchange market, contrary to the clear intent of the FCC. (TR p. 41-42)

Witness Maples testified that the parties are disputing the terms included in section 40.4 of its proposed interconnection agreement. Sprint modified the terms that were being disputed when the issue statement was being crafted. Sprint initially included use restrictions for UNEs based on the amount of local traffic. Sprint contends that there were two basic disputes. First, Sprint's position is that any Sprint facilities between it and Interexchange or CMRS carriers'

facilities are not available as UNEs. Second, Sprint believes that UNEs can only be used for Interexchange, CMRS, or information services if they are also being used for local exchange services. (TR p.38) Sprints proposal for section 40.4.3 of the proposed interconnection agreement states: 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 or information services if CLEC is also providing local exchange services over the same UNE. (TR p. 39)

Sprint claims its position is based on the FCC's findings in the TRRO. Sprint claims that the Act states that UNEs are provided for telecommunications services. Sprint mentions that as set forth in 47 U.S.C. §251 (c)(3), ILECs have "[t]he duty to provide [UNEs] to any requesting carrier for the provision of telecommunications service." Sprint also claims that in the TRRO, the FCC considered the telecommunications market and divided it into what Sprint calls three distinctive markets: commercial mobile wireless, long distance, and local exchange. Sprint states that the FCC defined mobile wireless as "to refer to all mobile wireless telecommunications services, including commercial mobile radio service (CMRS)." (See Fn 97, TRRO) It defined long distance or interexchange to mean "telecommunications service between stations in different exchange areas." (See Fn 98, TRRO) It defined local exchange as "markets for the services provided by local exchange carriers, which include telephone exchange service and exchange access. 47 U.S.C. § 153(26)." (See Fn 63, TRRO) Further it determined that the commercial mobile wireless service market and long distance services markets were competitive and that UNEs could not be used exclusively to provision those services. (See, ¶15, ¶34-¶36 of the TRRO and 47 C.F.R. §51.309(b).

Finally, Sprint states the FCC based its impairment findings on the impact to the local exchange markets in hopes that it would promote "the same robust competition that characterizes the long distance and wireless markets." (¶3, TRRO.) Sprint therefore believes its position is consistent with the TRRO and that it is appropriate for Sprint to require CLECs to initially seek access to UNEs on the basis of providing local exchange service prior to using it for other services. (TR p. 40-41)

FDN

FDN states that since the time the parties filed their arbitration petitions, Sprint 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." FDN claims that Sprint's interpretation was objectionable because it had no basis in the FCC's rules and it sought to impose an undefined requirement that would inevitably lead to disputes and litigation. (FDN BR, p. 20) FDN states, 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." FDN believes 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. (FDN BR p. 21)

FDN believes 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.) FDN continues by saying "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." (FDN BR p. 21)

Sprint's proposed Section 40.4.3, 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.

FDN states that 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.

FDN believes 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.) FDN believes 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, FDN believes 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. FDN's proposed modifications are as follows:

40.4.2 CLEC may not access a UNE for the exclusive provision of Mobile Wireless Service. Facilities ***whose sole purpose is*** connecting Sprint's network and a CMRS carrier's network do not qualify as UNEs and will not be available to CLEC as UNEs.

40.4.4 CLEC may not access a UNE for the exclusive provision of interexchange services. Unbundled loops ordered by CLEC into a third party collocation cannot be used by the third party collocator to provide retail interexchange services exclusively. Facilities ***whose sole purpose is*** connecting Sprint's network and interexchange carriers' networks do not qualify as UNEs and will not be available to the CLEC as UNEs.

Analysis

In Order FCC 05-150 *Report and Order and Notice of Proposed Rulemaking* released September 23, 2005, the FCC noted that The *Wireline Broadband NPRM* sought comment on the relationship between a competitive LEC's rights under section 251 and the FCC's tentative conclusion that wireline broadband Internet access service is an information service with a telecommunications input. Several competitive LECs and one Bell Operating Company (BOC), argued regardless of how the FCC classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251 (c)(3) of the Act. The FCC agrees with the arguments from both the CLECs and the BOCs.

Section 251 (c)(3) and the FCC's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251 (c)(3); the use to which the incumbent LEC puts the facility is not dispositive. The FCC goes on to state that even if an incumbent LEC is only providing an information service over a facility, the FCC would look to see whether the requesting carrier intends to provide telecommunications service over a facility. Hence, competitive LECs will continue to have the same access to UNEs including DS0s and DS1s to which they are otherwise entitled under FCC rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an eligible telecommunications service *i.e.,* not exclusively long distance or mobile wireless services, it may obtain that element as a UNE.

Conclusion

Upon consideration, staff believes that Sprint may not restrict UNE availability where there is not a "meaningful amount of local traffic." Since the parties filed their petitions for arbitration, the initial focus of negotiations concerning use restrictions have changed. Use restrictions that would have required FDN to show that UNEs would only be used to provide a "meaningful amount of local traffic" were replaced with disputing whether or not all UNEs purchased by the CLEC must be used to provide local telecommunications service.

In FCC Order 05-150, the FCC concluded that wireline broadband Internet access service is an information service with telecommunications input and stated that it believed that competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service. In that same Order, the FCC stated that so long as a competitive LEC is offering an "eligible" telecommunications service, not exclusively long distance or mobile wireless services – it may obtain that element as a UNE. This Order does not restrict use of UNEs to providing an undefined amount of local exchange service. Therefore, staff concludes that UNEs purchased by a CLEC can be used to provide information services without the restriction of providing local service along with information services. Long distance and mobile wireless service access to UNEs exclusively for those markets should be denied.

Therefore staff recommends that Sprint should not have the ability to restrict UNE availability where there is not a "meaningful amount of local traffic." So long as a competitive LEC is offering an "eligible" telecommunications service *i.e.,* not exclusively long distance or mobile wireless services, it should have the ability to obtain that element as a UNE.

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

Recommendation: FDN should compensate Sprint for the costs of routine network modifications to unbundled loop facilities to the extent the costs are not recovered in the unbundled loop rates. If Sprint performs network modifications for its own benefit in the normal course of its business and such network modifications also meet FDN's requirement, Sprint should not charge FDN for the network modification. Sprint's proposed language should be incorporated into the Agreement along with the additional provisional language proposed by FDN (underlined text). The language should read as follows:

> 53.1.1 Sprint will make routine network modifications to unbundled loop facilities used by CLEC where the requested loop facility has already been constructed. Sprint will perform routine network modifications to unbundled loop facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with specifications, of any carrier. CLEC will compensate Sprint for the costs of such routine network modifications to unbundled loop facilities to the extent the costs are not recovered in the unbundled loop rates in accordance with Table One, or Sprint will provide a price quote via the ICB process. (TR p. 27) Where Sprint would perform network modifications for its own benefit in the normal course of its business due to market demand and such network modifications also meet a CLEC requirement, Sprint will not charge CLEC for the network modification. (Exh. 15 p. 72 & 73)
>
> 53.1.2 Sprint will make routine network modifications to unbundled dedicated transport facilities used by CLEC where the requested dedicated transport facilities have already been constructed. Sprint will perform routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier. CLEC will compensate Sprint for the costs of such routine network modifications to unbundled dedicated transport facilities to the extent the costs are not recovered in the unbundled dedicated transport rates. Sprint will provide routine network modifications at the rates on Table One, or Sprint will provide a price quote via the ICB process. (TR p. 28) Where Sprint would perform network modifications for its own benefit in the normal course of its business due to market demand and such network modifications also meet a CLEC requirement, Sprint will not charge CLEC for the network modification. (Exh. 15 p. 73 & 74)

(Buys/Scott/Susac)

Position of the Parties

Sprint: Sprint has included prices, terms and conditions for common routine network modifications, i.e., rearrangement of cable, repeater and doubler installation, smart jack installation, and line card installations. Rates, terms, and conditions for all other routine network modifications should be developed through the ICB process.

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.

Staff Analysis:

Parties' Arguments

Sprint

Witness Maples testified that the FCC defined a routine network modification (RNM) as "an activity that the incumbent LEC regularly undertakes for its own customer," and that the FCC established principles to determine the specific electronic components that would comprise a routine network modification. (TR p. 51) Sprint developed pricing for the most common network modifications and included them on a price list. Those RNMs are the rearrangement of cable, repeater and doubler installation, smart jack installation, and the installation of line cards. Any RNMs not included in the price list would be priced on an individual case basis (ICB). Sprint proposes to charge FDN for RNMs where Special Construction[20] charges would routinely apply. Those prices were not considered in the Sprint UNE Cost Docket and witness Davis filed cost testimony in support of Sprint's pricing. (TR p. 51) Sprint argues that its proposal for cost recovery for RNMs is reasonable as it provides for recovery only when certain criteria are met that demonstrate that the costs of a modification are incurred for FDN's sole benefit. (Sprint BR, p. 15)

FDN

In its Post Hearing Brief, FDN states that there are two distinct questions left for the Commission to resolve. FDN believes the first question is whether FDN should pay for a routine network modification when Sprint would perform the RNM in the normal course of its business. Witness Smith testified that, "FDN's position is that if Sprint would perform a particular network modification in the ordinary course for its own benefit, then FDN should not have to pay for that modification if FDN also benefited." (TR p. 155 & 156)

[20] Sprint witness Davis testified that Special Construction is required when facilities are not available to meet a customer's order for service and (1) Sprint has no other requirement for the facilities constructed at the customer's request, or (2) the customer requests that service be furnished using a type of facility, or via a route, other than that which Sprint would otherwise utilize in furnishing the requested service, or (3) the customer requests the construction of more facilities than required to satisfy the initial order for service; and submits a mutually agreed upon facility forecast, or (4) the customer requests construction be expedited resulting in added cost to Sprint. (TR p. 101)

FDN believes that the second question is whether FDN should be charged for an RNM when it can show Sprint already recovered the cost of the RNM through rates. FDN argues that Sprint should not be allowed to recover its costs by additional charges for RNMs if it has already recovered those costs through other means. To guard against Sprint's potential double recovery of costs, FDN is proposing to add the words, "or other rates," after "unbundled loop rates" in the language quoted in the staff recommendation above. Witness Smith testified that, "[Witness Maples] objects to just three words FDN proposed as means to ensure against double recovery, i.e., "to the extent the costs are not recovered in the unbundled loop rates or other rates." FDN stands by its proposed language. Even to the extent that Sprint may have recovered the costs through rates for another UNE or non-UNE service, it's still a question of improper double recovery. (TR p. 175) In its Post Hearing Brief, FDN states that, "In ¶ 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." (FDN BR, p. 24)

Analysis

Staff believes FDN whereas Sprint should not charge FDN extra for routine network modifications where Sprint would perform those modifications for its own benefit in the normal course of its business. Sprint seems to be in agreement with this proposal. Sprint witness Davis testified that:

> Consistent with its well established special construction policies, Sprint is not opposed to having to add doublers where there is sufficient demand for DS1 service over time to ensure cost recovery and will not charge CLEC's anything extra for the installation of doublers in these situations. However, there are certain circumstances where doublers are installed that are not expected to generate sufficient demand over the life of the asset to achieve cost recovery. Those situations are known as 'special construction'. . . . To achieve cost recovery in limited situations where an exi[s]ting network has to be modified to provide services under special construction, it is necessary for Sprint to charge CLECs for the installation of doublers (and repeaters) through NRCs.
>
> (TR p. 103)

Further, Sprint witness Davis indicated that there has not been any Special Construction for the installation of repeaters and doublers in Florida during the past 2 years. (Exh. 3 p. 23) In his response to staff's First Set of Interrogatories, Interrogatory Number 40., witness Davis states that, "Sprint knows of no situations where doublers or repeaters have been installed in the state of Florida that meets the conditions for special construction during the past 2 years." (Exh. 3 p. 23). Hence, based on witness Davis' testimony and his response to staff's Interrogatory No. 40, it appears unlikely that Sprint will incur a situation where special construction is necessary for the installation of repeaters and doublers.

The Draft Interconnection Agreement sponsored by Sprint witness Givner, contains notes in addition to the draft agreement language regarding the modifications to unbundled loops. (Exh. 15 p. 73) Those notes indicate that Sprint's practice of charging for special construction of

doublers and repeaters is rare and that in most situations, Sprint is installing doublers and repeaters in the normal course of business.[21] The notes further indicate that FDN's proposed language to reflect Sprint's repeater and doubler installation practices, (*e.g.*, where Sprint would perform network modifications for its own benefit in the normal course of its business due to market demand and such network modifications also meet a CLEC requirement, Sprint will not charge CLEC for the network modification). This is the additional language that staff recommends be included in the Agreement. Sprint indicated more than once that it rarely, if at all, charges for the installation of repeaters and doublers.

Regarding cable pair rearrangements, Sprint indicated that it does not charge CLECs for cable rearrangements consisting of no more than three cable pairs performed under the normal course of business, and the cost of such modifications utilizing ready access terminals are already included in the loop non-recurring costs. (TR p. 98). Staff's First Set of Interrogatories, Interrogatory Number 39, asked Sprint how many cable rearrangements involving more than three pairs have been made on behalf of FDN during the past two years. In his response, witness Davis stated that Sprint does not track that information by customer and the information is not available. However, no additional charges have been levied against FDN for such modifications. (Exh. 3 p. 23)

Further, in response to staff's First Set of Interrogatories, Interrogatory No. 41, witness Davis stated that, "Most network modifications are made by Sprint by it[s] own initiative and CLECs (including FDN) do benefit from these modifications. Sprint does not charge a CLEC anything beyond the Commission approved MRCs and MRCs for UNEs when associated network modifications are beneficial to Sprint." (Exh. 3 p. 23). Therefore, staff believes that it is reasonable and fair to both parties that should Sprint perform network modifications for its own benefit in the normal course of its business due to market demand, and such network modifications also meet a CLEC requirement, Sprint should not charge CLECs for the network modification, and the language in the agreement should reflect this provision.

In regard to FDN's argument of double recovery in other rates, the record does not contain any supporting testimony defining "other rates." On its face, the term, "or other rates" is ambiguous, and for this reason, staff is reluctant to agree with FDN to include "or other rates" in the proposed language. Additionally, FDN has not shown that Sprint has actually "double recovered" its expenses for providing RNMs. Further, Sprint witness Maples testified that, "Sprint agrees that it should not be allowed to double recover the cost of providing UNEs. The FCC clearly cautioned against this in paragraph 640 of the TRO and the prices displayed in the pricing appendix reflect that agreement." (TR p. 52)

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[21] *Draft Interconnection Agreement at pg. 73*; States this requires discussion. Sprint seems to propose certain network modification rates, but has not provided FDN any cost support, though FDN has requested same. Nor has Sprint defined what Special Construction means. "Special Construction" is defined in Section A5, paragraph B of Sprint's General Exchange Tariff" approved in 1997 by the FPSC. Sprint charging for Special Construction of doublers/repeaters are rare. In most situations, Sprint is installing doublers/repeaters in the normal course of business. In those situations, the CLEC is not charged the extra NRC for the repeater doubler. FDN 5/18: If that's the case then the paragraph should say that at the end: Where Sprint would perform network modifications for its own benefit in the normal course of its business due to market demand and such network modifications also meet a CLEC requirement, Sprint will not charge CLEC for the network modification. (Exh. 15 p. 73)

Upon review of the record and parties briefs, both parties acknowledge that Paragraph 640 of the TRO[22] prohibits double recovery of costs for routine network modifications. In the TRO, the FCC noted that, "the costs for routine network modifications are often reflected in the recurring rates that competitive LECs pay for loops." Hence, it is expected that Sprint would recover its costs for RNMs through the recurring costs paid by FDN unless Sprint can show that the modification is made solely for FDN's benefit. Staff believes that Sprint, making use of its best business practices, should be in the position to clearly demonstrate to FDN that a network modification charge is justifiable relative to any service request submitted by FDN.

Conclusion

Upon consideration and review, FDN should compensate Sprint for the costs of routine network modifications to unbundled loop facilities to the extent the costs are not recovered in the unbundled loop rates. If Sprint performs network modifications for its own benefit in the normal course of its business and such network modifications also meet FDN's requirement, Sprint should not charge FDN for the network modification. Sprint's proposed language should be incorporated into the Agreement along with the additional provisional language proposed by FDN (underlined text) as set forth in the recommendation statement.

[22] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98, 98-147, 01-338, FCC 03-36 (released August 21,2003), at ¶ 640, The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here. State commissions have discretion as to whether these costs should be recovered through non-recurring charges or recurring charges. We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through an NRC).

Issue 30: On what rates, terms and conditions should Sprint offer loop conditioning?

Recommendation: If the Commission approves the staff recommendation in Issue 34 and incorporates the rates established in the Sprint UNE Cost Docket, Docket No. 990649B-TP, the rates established for loop conditioning should be incorporated in the Agreement. Should the Commission deny the staff recommendation in Issue 34, then this issue should remain open and the rates for loop conditioning should be arbitrated in full. (Buys/Scott/Susac)

Position of the Parties

Sprint: Sprint and FDN have reached agreement on the terms and conditions of loop conditioning but not on the rates. The rates approved by the FPSC in the Sprint UNE cost docket are the appropriate rates and should be incorporated into the agreement.

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

Staff Analysis:

Parties' Arguments

Sprint

See the discussion in Issue 34.

FDN

See the discussion in Issue 34.

Analysis

Both parties have agreed upon the terms and conditions for loop conditioning, but neither party can agree on the rates. The Commission determined the rates for loop conditioning in Order No. PSC-03-0058-FOF-TP, issued January 8, 2003, in Docket No. 990649B-TP (Sprint UNE Cost Docket). Hence, those rates should be incorporated into the Agreement if the Commission approves the staff recommendation in Issue 34.

Conclusion

Upon consideration and review, if the Commission approves the staff recommendation in Issue 34 and incorporates the rates established in the Sprint UNE Cost Docket, Docket No. 990649B-TP, the rates for loop conditioning established in that docket should also be incorporated in the Agreement. Should the Commission deny the staff recommendation in Issue 34, then this issue should remain open and the rates for loop conditioning should be arbitrated in full.

Issue 34: What are the appropriate rates for UNEs and related services provided under the Agreement?

Recommendation: Staff recommends that the UNE rates approved in Docket No. 990649B-TP be incorporated in the new interconnection agreement between Sprint and FDN. In addition, staff recommends that the new rates be implemented on a prospective basis only. (Wright)

Position of the Parties

Sprint: The UNE rates which the FPSC approved in Sprint's UNE Order are the appropriate rates and should be incorporated into the agreement between FDN and Sprint.

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.

Staff Analysis:

Parties' Arguments

Sprint

Witness Maple states in his direct testimony that the UNE prices that the FPSC approved in Sprint's UNE Cost Docket are applicable and should be incorporated into the agreement between FDN and Sprint. (TR p. 54) Witness Maples points out that the FPSC reached a decision on Sprint's UNE rates on January 8, 2003 after a lengthy process including the filing of extensive testimony, cost models, interrogatories and document requests, depositions, and legal briefs. (TR p. 54) FDN did file a prehearing statement and a post-hearing brief in Sprint's UNE Cost Docket. (TR p. 55) According to Witness Maples, FDN has repeatedly refused to accept the rates determined by the FPSC. (TR p. 55) Witness Maples continues, stating that the UNE decision is recent and there is no reason to re-visit the determination of the FPSC. (TR p. 56)

Sprint points out in its brief that the Commission has already determined that FDN may not relitigate in this arbitration the cost studies and UNE rates approved for Sprint in the Sprint UNE order. (Sprint BR, p. 16) Sprint states that the rates should be included in the FDN/Sprint interconnection agreement to avoid treating FDN more favorably than the other CLECs who have adopted the Commission-approved rates in their interconnection agreements with Sprint. (Sprint BR, p.17) Sprint continues in its brief by stating that the Prehearing Officer, in his ruling on FDN's Motion for Postponement and Sprint's Motion to Strike, rejected FDN's arguments and emphasized that Sprint's UNE rates at issue were properly adopted in a generic proceeding in which FDN intervened and participated as a full party. (Sprint BR p.17)

In response to FDN's argument that Sprint's Commission-approved UNE rates are too high to sustain competition, Sprint points out in its brief that in the Sprint UNE Order, the Commission determined that the approved rates were compliant with TELRIC and that FDN has produced no credible evidence that Sprint's UNE rates have had a negative effect on competition

in Sprint's territory. (Sprint BR, p.18) Sprint states that residential competition in Sprint's territory exceeds the level of residential competition in Verizon's territory. (Sprint Br, p. 19)

Sprint Witness Givner's direct testimony avers that the primary issue necessitating this arbitration proceeding is FDN's refusal to implement the Florida Commission's January 8, 2003, Order No. PSC-03-0058-FOF-TP that approved new rates for Sprint's unbundled network elements (UNE Rate Order). Witness Givner continues that "Although FDN participated in the UNE cost proceeding that resulted in the UNE Rate Order, despite Sprint's efforts to implement the UNE Rate Order in the manner directed by the Commission, FDN has unreasonably refused to execute an interconnection agreement amendment to incorporate the new, approved rates." (TR p.18) Sprint, in its brief, states that FDN has benefited from its bad faith refusal to abide by the Sprint UNE Order for over two years, giving it an advantage in the marketplace over other CLECs in Sprint's territory who properly accepted the Commission's ruling. The Commission should approve Sprint's position that the rates in the Sprint UNE Order be incorporated into the parties' agreement and that they should be effective back to December 30, 2004. (Sprint BR, p. 21)

FDN

Witness Ankum states that FDN maintains it has the right to arbitrate UNE rates as part of this arbitration proceeding regardless of whether the Commission previously approved UNE rates in a generic proceeding or elsewhere. (TR p.207) Witness Ankum also states "FDN believes whether the UNE rates authorized in the generic proceeding (Docket No. 990649B) were implemented or not does not change FDN's right to arbitrate the UNE rates now in this case. (TR p. 207) According to witness Ankum, FDN believes those UNE rates set in Docket No. 990649B should not be implemented in this case because the rates are not TELRIC compliant, the cost inputs used to develop the rates are inflated and improper, and the rates are too high to sustain, much less enable, facilities based competition. (TR p. 208) Witness Ankum states "FDN believes Sprint's proposed rates for basic LNP, loop and transport services – the necessary building blocks for facilities based competition – are simply cost prohibitive. (TR p. 208)

FDN, in its brief, states:

> 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 not TELRIC compliant. (FDN BR, p. 25) FDN's brief goes on to state that "In striking the QS1 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." FDN, in its brief , states that "FDN should be permitted the opportunity to arbitrate appropriate UNE rates in this proceeding. The 990649B rates should not be incorporated into the interconnection agreement because, as

> FDN would show if it were given the opportunity, they are neither based on current data, nor TELRIC compliant." (FDN BR, p.26-27)

In response to Sprint advocating that the Commission should approve UNE rates in this case retroactive to Sprint's petition date, FDN maintains that Sprint's arguments on this issue must be rejected. (TR p. 178) Witness Smith states that "Sprint's theory seems to be that since Sprint could not successfully negotiate an amendment to the existing interconnection agreement or a new interconnection agreement with FDN to include the UNE rates that are under appeal, the Commission should approve UNE rates in this case on a retroactive basis, to the date of Sprint's December 30, 2004, petition. (TR p. 178) FDN witness Smith argues that the parties mutually agreed to an extension of the arbitration window several times, and the parties also agreed to abide by the existing interconnection agreement until a new agreement was in place. (TR p. 178) Witness Smith states that:

> Once the petition was filed, the Commission worked through the issue identification process with the parties and set a hearing schedule. If there was not another minute of negotiations after the petition was filed and if not another issue was eliminated from the arbitration list through negotiations, the parties would still be governed by the Commission's schedule before a final agreement could be completed.
>
> (TR 179)

In its brief FDN states:

> Sprint relies solely on the testimony of its witness, Steven Givner, who has characterized FDN's refusal to accept the 990649B rates as "unreasonable", and further claimed that FDN "delayed negotiations on a new agreement in order to avoid increased charges that it would incur under the new rates." 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 ...

Analysis

In Docket No. 981834-TP, the Commission found it appropriate to establish a generic docket in lieu of using numerous arbitration proceedings as a vehicle for addressing UNE rates. The docket that was opened as a result of that decision was Docket No. 990649-TP, which was later bifurcated to address rates for all three of the large ILECs. The Commission issued Order No. PSC-03-00580-FOF-TP in Docket No. 990649B-TP on January 8, 2003, approving new rates for Sprint's unbundled network elements. Subsequent to the Final Order, FDN filed a Motion for Reconsideration on January 23, 2003, which was denied. FDN appealed Sprint's approved UNE rates to the United States District Court for the Northern District of Florida on the grounds that the rates set in Docket 990649B were not based on substantial evidence and were not TELRIC compliant. (TR p. 187) On November 2, 2005, the United States District Court for the Northern District of Florida, Tallahassee Division, Florida Digital Network, Inc. v. Sprint-

Florida, Inc., et. al., Case No. 4:03cv282-RH (N.D. Fla. 2005), affirmed the Commission's decision approving new rates set in Docket No. 990649B-TP.[23]

On May 27, 2005, FDN filed direct panel testimony and exhibits of Dr. August Ankum, Warren Fischer, and Sidney Morrison in Docket No. 041464-TP which addressed a number of issues related to Sprint's cost studies. On June 14, 2005, Sprint filed a Motion to Strike FDN's Direct Panel Testimony along with its Response in Opposition to FDN's Motion for Postponement. On July 8, 2005, the Commission issued Order No. PSC-05-0732-PCO-TP which granted Sprint's Motion to Strike specific portions of the panel's testimony identified by Sprint, pages 12-18 and 20-28. The Prehearing Officer stated that the Commission would not revisit in this proceeding the policies, methodologies, and cost studies considered in the Sprint UNE proceeding. The Prehearing Officer in that order also stated that the Sprint UNE docket issues shall not be relitigated in this current proceeding. The Prehearing Officer emphasized that FDN was a party to the Sprint UNE docket, and the arguments and issues addressed therein are pending before the U.S. District Court for the Northern District of Florida.

Staff believes that Section 252 (g) of the Telecommunications Act (the Act) contemplates the consolidation of proceedings by State commissions. That Section states in pertinent part that State commissions may consolidate proceedings "where not inconsistent with the requirements of [the] Act ... to the extent practical ... in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under [the] Act." In Docket No. 990649B-TP (the Sprint UNE Docket), the Commission determined, as a result of a Petition filed by several CLECs, that in the interest of efficiency, UNE pricing for ILECs would be more appropriately addressed through generic proceedings. In light of Section 252 (g), staff believes that the Commission was well within its authority to consolidate the pricing issue rather than address it in individual arbitrations.

Pursuant to Section 120.80 (13) (d), Florida Statutes, the Commission is authorized to employ procedures consistent with the Act. Staff believes that this statutory authority further supports the Commission's use of generic proceedings to arbitrate UNE rates.

Staff believes it is important to note that FDN intervened in the Sprint UNE Docket and fully participated. FDN has appealed the Commission's decision in that Docket, and it has been determined by the Panel in this proceeding that the appellate process is the more appropriate vehicle for FDN to espouse its disagreement with the outcome in the Sprint UNE Docket.[24] FDN has continuously argued throughout this proceeding that it has an unconditional right under Section 252 of the Act to arbitrate UNE rates in this proceeding, however, staff believes that this argument alone does not necessarily warrant the Commission revisiting its earlier decisions in the Sprint UNE Docket. Staff believes that to revisit the Commission's pricing decisions in the Sprint UNE Docket, without a showing of changed circumstances, would nullify the basic rationale for consolidating such proceedings, as contemplated by Section 252(g) of the Act.

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[23] The Court held that "[t]he Commission placed the burden of proof on Sprint, considered all evidence in the record, and made the decision it concluded was appropriate based on the governing law and evidence. The decision accorded with the governing law and was not arbitrary or carpricious."

[24] See Order No. PSC-05-0855-FOF-TP, Order Denying Motion for Reconsideration.

Based on the analysis above, staff agrees with Sprint's position that the UNE rates approved in Docket No. 990649B-TP should be the rates incorporated in the new interconnection agreement between FDN and Sprint. In response to staff's first set of interrogatories, number 42, Sprint has listed 73 CLECs that have voluntarily accepted the UNE rates approved in Sprint's UNE docket. (Exh. 3 p. 24-26) Sprint has also indicated in response to staff's first set of interrogatories, number 43, that Sprint is attempting to implement the UNE prices in the interconnection agreements of seven additional companies (FDN included). (Exh. 3 p. 26-27) Staff believes it would be discriminatory to allow FDN to arbitrate different rates than what has been approved in Docket No. 990649-TP. In sum, staff believes that the use of a generic proceeding rather than 73 separate arbitrations was more practical and efficient. Staff believes that, on its face, it would be impossible for the Commission to effectively and efficiently arbitrate 73 separate interconnection agreements. Thus, staff believes that the circumstances surrounding the decision to create a generic proceeding left the Commission with no other viable alternative.

Retroactive Treatment of UNE Rates:

Staff believes that the new UNE rates should be implemented on a prospective basis only without any retroactive treatment. Staff would agree with FDN's argument in their brief that it is not at fault for the District Court's silence on FDN's complaint regarding Docket No. 990649B. (FDN BR, p. 28) As mentioned previously, the Commission decision made in Docket No. 990649B-TP was affirmed on November 2, 2005 by the United States District Court for the Northern District of Florida. Staff would agree with FDN that their current interconnection agreement with Sprint provides that the current rates will remain in effect until a new agreement is executed and that according to Sprint's UNE rate order, the new UNE rates will only be effective prospectively and only upon the execution and approval of new interconnection agreements. (FDN BR, p. 29-30)

Conclusion

Upon review and consideration of the record and the parties' briefs, staff recommends that the UNE rates approved in Docket No. 990649-TP be incorporated in the new interconnection agreement between Sprint and FDN. In addition, staff recommends that the new rates be implemented on a prospective basis only.

Issue 35: What are the parties' obligations regarding interconnection facilities?

Recommendation: FDN should establish one Point of Interconnection (POI) per LATA. FDN may establish more than one POI per LATA at its discretion. (Buys/Scott/Susac)

Position of the Parties

Sprint: FDN should maintain a minimum of one POI per LATA. To the extent Sprint has more than one tandem in a LATA, FDN should establish a POI at each Sprint tandem where FDN terminates traffic.

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.

Staff Analysis:

Parties' Arguments

Sprint

Sprint believes that establishing a POI at each tandem is the best approach to establish efficient interconnection arrangements and ensure a reasonable sharing of costs incurred to transport traffic between the parties. Sprint is aware that prior Commission precedent has held that CLECs are required to establish only one POI per LATA at their option. (Sprint BR, p. 22) However, Sprint believes that the Commission should deviate from its prior decision because (1) the issue of double-tandeming was never discussed in the Order on Reciprocal Compensation, (2) establishing a POI at each tandem is the most efficient means of interconnection, and (3) Sprint will agree to share the cost of any interconnection facilities, based on the proportionate use of the facilities by Sprint and FDN. (Sprint BR, p. 22 & 23)

FDN

If the Commission does not approve FDN's proposal in issue 5, i.e., local traffic should be defined as traffic originated and terminated within the LATA, then the Commission should uphold FDN's right to designate one POI per LATA. (FDN BR, p. 35) Witness Smith testified that,

> It is well established that a CLEC is only required to have one POI per LATA for the mutual exchange of traffic. FDN has expressed its willingness to go beyond the minimum required and establish a POI at each Sprint tandem in the LATA where FDN will mutually exchange local traffic with Sprint, provided that the local calling area for intercarrier compensation purposes is the LATA. . . . FDN should not be required to establish a POI at each tandem in a multi-tandem LATA without compromise from Sprint on the local calling area boundaries. (TR p. 18)

Analysis

In its Order on Reciprocal Compensation in Docket No. 00075-TP, the Commission concluded that the CLEC has the exclusive right to unilaterally designate single POIs within a LATA, and the CLEC has the ability to negotiate its prerogative in exchange for other considerations.[25] In its Post Hearing Brief, FDN strongly emphasized the Commission's prior disposition on this matter. (FDN BR, p. 34 & 35) Further, Sprint did not challenge FDN's right to establish only one POI per LATA. In the Deposition of Sprint witness Sywenki, he agreed that the statement from the Order on Reciprocal Compensation, "We find that ALECs have the exclusive right to unilaterally designate single POIs for the mutual exchange of traffic of telecommunications traffic at any technically feasible location on an incumbent's network within a LATA" is the basic state of the law with respect to POIs. (Exh. 8, pg. 26).

The parties' obligations regarding interconnection facilities has been previously established by the Commission in its Order on Reciprocal Compensation and is acknowledged by both parties. As a consequence of that Order, FDN is obligated to establish only one POI in each LATA in which it terminates traffic. However, FDN is free to establish more than one POI per LATA at its discretion.

Conclusion

Upon consideration and review, FDN should establish one POI per LATA. FDN may establish more than one POI per LATA at its discretion.

[25] In Order No. PSC-02-1248-FOF-TP (Order on Reciprocal Compensation), issued September 10, 2002, in Docket No. 000075-TP, page 25, the Commission states, ". . . 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 consideration."

Issue 36: What terms should apply to establishing Points of Interconnection (POI)?

Recommendation: If the Commission determines in Issue 5 that the Local Calling Area is the entire LATA, FDN should voluntarily establish a POI at each tandem in each LATA where FDN terminates traffic, as FDN has proposed.

If the Commission determines in Issue 5 that the Local Calling Area is not the entire LATA, then FDN should establish one POI per LATA, and may establish more than one POI per LATA at its own discretion. (Buys/Scott/Susac)

Position of the Parties

Sprint: FDN should maintain a minimum of one POI per LATA with a POI at each Sprint tandem where FDN terminates traffic. As discussed in Issue 5, the local calling area for reciprocal compensation purposes should be Sprint's local calling area.

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.

Staff Analysis:

Parties' Arguments

Sprint

Sprint believes that establishing a POI at each tandem is the best approach to establish efficient interconnection arrangements and ensure a reasonable sharing of costs incurred to transport traffic between the parties. Sprint is aware that prior Commission precedent has held that CLECs are required to establish only one POI per LATA at their option. (Sprint BR, p. 22) However, Sprint believes that the Commission should deviate from its prior decision because (1) the issue of double-tandeming was never discussed in the Order on Reciprocal Compensation, (2) establishing a POI at each tandem is the most efficient means of interconnection, and (3) Sprint will agree to share the cost of any interconnection facilities, based on the proportionate use of the facilities by Sprint and FDN. (Sprint BR, p. 22 & 23)

Witness Sywenki explained that double-tandeming occurs when calls pass through two tandem switches on route to their final destination and establishing a POI at each tandem would eliminate the need for additional trunk ports and tandem switching. (TR p. 125)

FDN

Witness Smith testified that FDN would establish a POI in each tandem in a multi-tandem LATA where FDN terminates traffic provided FDN can deem the entire LATA as the local calling area for the purposes of reciprocal compensation. (TR p. 156) Witness Smith also testified that witness Sywenki's description of "unnecessary double-tandeming" does not change the fact that a CLEC is only required to have one POI per LATA and is only responsible for bearing the cost of transporting traffic to that one POI. (TR p. 176) FDN further argues in its

Post Hearing Brief that, "FDN has the prerogative, as the Commission acknowledged in the quote above [from the Order on Reciprocal Compensation], to barter its single POI right, in exchange for other considerations." (FDN BR. p. 34 & 35)

Analysis

Each party testified on Issue 35 and Issue 36 collectively. Both Issues 35 and 36 address the same question; if FDN should establish a POI at each tandem in a multi-tandem LATA. The obligation of the parties for establishing POIs is addressed in Issue 35. This issue addresses the terms that should apply in establishing the POIs. As previously established in the Order on Reciprocal Compensation, FDN is responsible for the cost of transporting traffic up to the point of interconnection.[26] Further, in the same Order, the Commission found that the mandated sharing of originating carrier transport costs proposed by the ILEC witnesses potentially conflicts with the requirements of Section 252(d)(2)(A) of the Act.[27]

Establishing a POI at each tandem is not technically necessary for the mutual exchange of traffic. In his Deposition, Sprint witness Sywenki confirmed that Sprint can switch FDN originated traffic if FDN has only one POI in a multi-tandem LATA as long as there is transport between the two tandems, but it is more costly, and it requires Sprint to take on additional costs. (Exh. 8 p. 45 & 46). However, the record does not include specific cost data for Sprint's additional costs. Sprint asserts that if FDN is interconnected with Sprint at one POI per LATA it would incur the costs associated with terminating FDN-originated traffic at TELRIC rates for tandem switching ($0.002053 per minute) and shared transport ($0.000814 per minute). (Exh. 3 p. 59)

In contrast, FDN would incur additional costs to establish a POI at each tandem in a multi-tandem LATA. (FDN BR, p. 35) In its response to staff's Interrogatory No. 61., FDN provided an estimate of the minimum costs it would incur should it establish a POI at each tandem. Those costs included $2,880 in monthly recurring costs, $11,520 in non-recurring costs, and $550 in monthly maintenance costs. (Exh. 4, pg 36)

FDN witness Smith testified that FDN would establish a POI in each tandem in a multi-tandem LATA where FDN terminates traffic provided FDN can deem the entire LATA as the local calling area for the purposes of reciprocal compensation (TR p. 156). Sprint maintains that FDN should maintain a POI at each tandem where FDN terminates traffic. Hence, both parties would be in agreement to establish a POI at each tandem should the Commission find that the LATA is the local calling area for purposes of reciprocal compensation.

[26] Order No. PSC-02-1248-FOF-TP (Order on Reciprocal Compensation), issued September 10, 2002, in Docket No. 000075-TP, page 25., the Commission states, ". . . we find that an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange (ALEC) in each LATA for the mutual exchange of traffic."

[27] Order No. PSC-02-1248-FOF-TP, issued September 10, 2002, in Docket No. 000075-TP, at page 25.

Conclusion

Upon consideration and review, if the Commission determines in Issue 5 that the Local Calling Area is the entire LATA, FDN should voluntarily establish a POI at each tandem in each LATA where FDN terminates traffic, as FDN has proposed. If the Commission determines in Issue 5 that the Local Calling Area is not the entire LATA, then FDN should establish one POI per LATA, and may establish more than one POI per LATA at its own discretion.

Issue 37: What are the appropriate terms for transport and termination compensation for:

(a) local traffic
(b) non-local traffic
(c) ISP-bound traffic

Recommendation: The parties have come to a mutual agreement on the appropriate compensation method for local, non-local, and ISP-bound traffic. The parties disagree as to the definition of local service, which is addressed in Issue 5. (Broussard)

Position of the Parties

Sprint: Sprint and FDN should exchange (a) local traffic and (c) ISP-bound traffic on a Bill and Keep basis when that traffic is roughly in-balance. Tariffed access charges should apply to the (b) non-local traffic that is exchanged.

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.

Staff Analysis: Except for the issue of defining Local Traffic, all the items associated with this Issue have been resolved by the parties. The issue of defining Local Traffic is fully addressed in staff's Issue No. 5.

Conclusion

The parties have come to a mutual agreement on the appropriate compensation method for local, non-local, and ISP-bound traffic. The parties disagree as to the definition of local service, which is addressed in Issue 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 homed (Virtual NXXs)?

Recommendation: VNXX traffic should be subject to long distance access charges based on the end points of the calls and the terms should be reciprocal such that both FDN VNXX and similar Sprint FX traffic, if any, is compensated in the same manner regardless of the directional flow of such traffic. The Agreement should incorporate the following language:

> 55.4 Calls terminated to end users physically located outside the local calling area in which their NPA/NXXs are homed (Virtual NXXs), are not local calls for purposes of intercarrier compensation and access charges shall apply. For CLEC or Sprint originated traffic terminated to the other party's Virtual NXXs or similar FXs neither party shall be obligated to pay reciprocal compensation, including any shared interconnection facility costs, for such traffic.

(Buys/Scott/Susac)

Position of the Parties

Sprint: Consistent with the Commission's previous ruling, VNXX traffic should be subject to long distance access charges because the originating customer and terminating customer are not located within the same local calling area.

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.

Staff Analysis:

Parties' Arguments

Sprint

Virtual NXX (VNXX) calls are not local calls and not subject to reciprocal compensation. Witness Sywenki testified that the Commission previously determined that "... calls terminated to end-users outside the local calling area in which their NPA/NXXs are homed are not local calls for the purposes of intercarrier compensation, therefore, we find that carriers are not obligated to pay reciprocal compensation for this traffic." (TR p. 129). Sprint does not oppose the use of VNXX by a CLEC to allow retail end-users to dial-up the Internet without incurring toll charges (TR p.129). Further, in its Post Hearing Brief, Sprint states that, ". . . to the extent that FDN provides a service that is similar to the FX service that Sprint provides and that is used for a similar purpose, Sprint does not object to the reciprocity language FDN demands." (Sprint BR p. 24).

FDN

Witness Smith testified that FDN's only disagreement with Sprint on this issue is reciprocity. FDN believes that the language in the Agreement should be, "For CLEC or Sprint originated traffic terminated to the other party's Virtual NXXs, neither party shall be obligated to pay reciprocal compensation, including any shared interconnection facility costs, for such traffic." (TR p.177) In its Brief, FDN referenced the Commission's Order on Reciprocal Compensation citing, "We 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." (FDN BR p. 36).

Analysis

A VNXX occurs when a telephone number NPA-NXX assigned to a specific geographic local calling area is assigned to a customer who is not physically located in that local calling area. Use of VNXXs is typically used by a CLEC to connect its customers to dial-up internet service providers. If the call originates and terminates within the local calling area, then reciprocal compensation would apply. However, VNXX calls do not typically occur within a geographic local calling area and are considered toll calls, and thus, are not subject to reciprocal compensation.

Both parties are correct in their arguments. Both parties agree that the end points of a call determine whether a call is local and subject to intercarrier compensation. FDN's only real point of disagreement with Sprint is that any compensation should be reciprocal. (TR p. 177) Both parties cited excerpts from the Commission's Order on Reciprocal Compensation in Docket No. 000075-TP to support their arguments. However, to clarify, in its Reciprocal Compensation Order, the Commission determined that VNXX and FX service are similar[28] and concluded virtual NXX traffic and FX traffic shall be treated the same for intercarrier compensation purposes. The Commission's Conclusion on page 33 of the Order on Reciprocal Compensation reads as follows:

> We find that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed. In addition, we find that intercarrier compensation for calls to these numbers shall be based upon the end points of the particular calls. This approach will ensure that intercarrier compensation will not hinge on a carrier's provisioning and routing method, nor an end user's service selection. We find that calls terminated to end users outside the local calling area in which their

[28] In Order No. PSC-02-1248-FOF-TP (Order on Reciprocal Compensation), issued September 10, 2002, in Docket No. 000075-TP, page 28, the Commission states, "We believe that virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years. Differing network architectures necessitate differing methods of providing this service; nevertheless, we believe that virtual NXX and FX service are similar "toll substitute services." Therefore, we believe carriers should be permitted to assign NPA/NXXs in a manner that enables them to provision these competitive services.

> NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; therefore, we find that carriers shall not be obligated to pay reciprocal compensation for this traffic. Although this unavoidably creates a default for determining intercarrier compensation, we do not find that we mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volumes may be relatively small, and the costs of modifying the switching and billing systems to separate this traffic may be great, we 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.

In summary, the Commission previously determined that FX service and VNXX service are similar, and according to its Post Hearing Brief, Sprint would not object to the reciprocity language FDN proposes if FDN provides service that is similar to Sprint's FX service. (Sprint BR, p. 24) Therefore, staff believes it appropriate that FDN's reciprocity language should be incorporated into the Agreement. VNXX traffic should be subject to long distance access charges based on the end points of the calls and the terms should be reciprocal such that both FDN VNXX and similar Sprint FX traffic, if any, is compensated in the same manner regardless of the directional flow of such traffic.

Conclusion

Upon consideration and review, VNXX traffic should be subject to long distance access charges based on the end points of the calls and the terms should be reciprocal such that both FDN VNXX and similar Sprint FX traffic, if any, is compensated in the same manner regardless of the directional flow of such traffic. The Agreement should incorporate the language set for the in the recommendation statement.

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)?

Recommendation: If the Commission finds in Issue 5 that the Local Calling Area should be the entire LATA for the purposes of reciprocal compensation, the parties should incorporate the following language into the Agreement:

> 55.5 Neither Party will knowingly send voice calls that are transmitted by a Party at any point, in whole or in part, via the public Internet or a private IP network over local interconnection trunks for termination as local traffic by the other Party, nor shall either Party engage a third party for the purpose of sending such calls where the Party has actual knowledge that the third party shall do so, until a mutually agreed Amendment is effective. Except that either Party may send the other VoIP traffic that is also Local Traffic based on the originating and terminating geographical locations prior to executing such amendment. The Parties further agree that this Agreement shall not be construed against either Party as a "meeting of the minds" that VoIP traffic is or is not local traffic subject to reciprocal compensation in lieu of intrastate or interstate access. By entering into this Agreement, both Parties reserve the right to advocate their respective positions before state or federal commissions whether in bilateral complaint dockets, arbitrations under Sec. 252 of the Act, commission established rulemaking dockets, or in any legal challenges stemming from such proceedings.

Should the Commission find in Issue 5 that the local calling area is not the LATA, the Commission should hold this issue in abeyance until the FCC determines the status of VoIP traffic as it pertains to intercarrier compensation and allow the parties to amend the Agreement in accordance with the FCC's decision. (Buys/Scott/Susac)

Position of the Parties

Sprint: Intercarrier compensation for VoIP traffic should be the same as the compensation for non-VoIP traffic (e.g., reciprocal compensation, interstate access and intrastate access).

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 an amendment thereafter.

Staff Analysis:

Parties' Arguments

Sprint

Witness Sywenki testified that it is Sprint's position that intercarrier compensation for Voice over Internet Protocol (VoIP) traffic should be the same as compensation for non-VoIP traffic, i.e., reciprocal compensation, interstate and intrastate access charges, since VoIP traffic uses the public switched network. (TR p. 130; Sprint BR, p. 25) Sprint contends that the FCC has addressed VoIP compensation several times. Specifically, Sprint argues that in its Declaratory Ruling in WC Docket 02-361, AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, the FCC determined that access charges are applicable when the connections are phone to phone, undergo no network protocol change, and use the North American Numbering Plan for routing the calls in. (Sprint BR p. 26) Sprint agrees that there may be some specific types of IP services which the FCC has determined to be exempt from access charges, but the FCC has not exempted VoIP services in general. (Sprint BR p. 27)

FDN

Witness Smith testified that the Commission should defer resolution of the issue until the FCC decides the compensation issue for VoIP traffic in the IP Enabled Services rulemaking docket and require the parties to negotiate an amendment to the agreement thereafter. (TR p. 177 & 178) In the meantime, FDN remains willing to negotiate a compromise on the VoIP issue as a part of a trade-off in which the local calling area is defined as the LATA. (TR p. 177 & 178) In its Post Hearing Brief, FDN reiterates that, "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." (FDN BR, p. 37)

Analysis

Intercarrier compensation applicability for VoIP traffic has been debated since the inception of VoIP. VoIP is a nascent technology providing telecommunications alternatives to the traditional public switched telephone network (PSTN) that, thus far, has had little regulatory oversight. Currently, the FCC is addressing this matter in a Notice of Proposed Rule Making in WC Docket No. 04-36, In the Matter of IP-Enabled Services. Staff agrees with FDN that the Commission should not expend resources on addressing the applicability of intercarrier compensation to VoIP when the FCC is currently in the process of rule making on the matter.

As Sprint points out, the FCC determined that access charges apply to AT&T's specific service which is defined in the FCC's Order. The FCC concluded that, ". . . AT&T's specific service, which an end-user customer originates by placing a call using a traditional touch-tone telephone with 1+ dialing, utilizes AT&T's Internet backbone for IP transport, and is converted

back from IP format before being terminated at a LEC switch, is a telecommunications service and is subject to section 69.5(b) of the Commission's [FCC] rules."[29] Additionally, in the Order on Reciprocal Compensation, the Commission declined to make a generic judgment on the intercarrier compensation mechanism issue until the market for IP telephony develops further. However, it did not preclude the carriers from petitioning the Commission for decisions regarding specific IP telephony services through arbitration or complaint proceedings.[30] However, in this case, neither Sprint nor FDN has cited any specific IP telephony services (VoIP traffic) that FDN would route to Sprint. Hence, staff believes that there is not enough evidence in the record to support a recommendation requiring FDN to pay access charges on VoIP traffic that FDN indicates it is not routing at this time, nor plans to do so in the future.

FDN has indicated that it has no intention of routing VoIP traffic as local traffic. (FDN BR, p. 37). As such, the language proposed by Sprint addresses this matter. Sprint witness Sywenki testified that if FDN is not seeking to terminate interexchange VoIP traffic at this time, Sprint proposed the language as stated in staff's recommendation, be contained in the interconnection agreement. (TR p. 130 & 131). FDN agreed in concept to the language proposed by Sprint if Sprint were to agree to the local calling area being the LATA. FDN witness Smith states in his rebuttal testimony, "If Sprint were to agree to FDN's proposal on the local calling area, FDN could compromise on Sprint's alternative language on VoIP traffic on page 14, line 18, through page 15, line 11, with some minor wording changes." (TR p. 177). In its Post Hearing Brief, FDN indicated that the minor wording changes are the deletion of the phrase, "or for a Party at that Party's request." (FDN BR, p. 37, footnote 54) Hence, as a compromise, staff believes the best alternative is to incorporate Sprint's proposed alternative language, along with FDN's proposed changes.

Conclusion

Upon consideration and review, if the Commission finds in Issue 5 that the Local Calling Area should be the entire LATA for the purposes of reciprocal compensation, the parties should incorporate the language set forth in the recommendation statement into the Agreement. Should the Commission find in Issue 5 that the local calling area is not the LATA, the Commission should hold this issue in abeyance until the FCC determines the status of VoIP traffic as it pertains to intercarrier compensation and allow the parties to amend the Agreement in accordance with the FCC's decision.

[29] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, FCC 04-97 (April 21, 2004)

[30] Order No. PSC-02-1248-FOF-TP (Order on Reciprocal Compensation), issued September 10, 2002, in Docket No. 000075-TP, Conclusion at page 37.

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?

Recommendation: Yes. Sprint should provide FDN a means for accessing on a pre-ordering basis information identifying which Sprint loops are served through remote terminals. (Beard)

Position of the Parties

Sprint: Yes, Sprint does provide this information as part of loop make-up. This is the same information that is available to Sprint. The Commission-approved rates for loop make-up are the rates applicable here.

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

Staff Analysis:

Parties' Arguments

Sprint

Sprint's Brief states that its loop pre-qualification and loop make-up information process are in compliance with what the FCC requires. (BR p. 28) The Brief also states, "Sprint's loop make-up reports are designed to provide the information regarding remote terminals that FDN seeks." (BR p. 28)

Sprint proposes the following language:

> 46.1 Sprint will offer unbundled access to Sprint's operations support systems to the extent technically feasible in a non-discriminatory manner at Parity. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by Sprint's databases and information. The OSS element includes access to all loop qualification information contained in Sprint's databases, or other records, including information on whether a particular loop is capable of providing advanced services.
>
> 47. LOOP MAKE-UP INFORMATION
>
> 47.1 Sprint shall make available Loop Make-Up Information in a non-discriminatory manner at Parity with the data and access it gives itself and other CLECs, including affiliates. The charges for Loop Make-Up Information are set forth in Table One to this Agreement.
>
> 47.2 Information provide to the CLEC will not be filtered or digested in a manner that would affect the CLEC's ability to qualify the loop for advanced services.
>
> 47.3 Sprint shall provide Loop Make-Up Information based on the individual telephone number or address of an end-user in a particular wire center or NXX

code. Loop Make-Up Information request will be rejected if the service address is not found within existing serving address information, if the telephone number provided is not a working number or if the POI identified is not a POI where the requesting CLEC connects to the Sprint LTD network.

47.4 Errors identified in validation of Loop Make-Up Information inquiry order will be returned to CLEC.

47.5 Sprint may provide the requested Loop Make-Up Information to the CLECs in whatever manner Sprint would provide to their own internal personnel, without jeopardizing the integrity of proprietary information (i.e., - fax, intranet inquiry, document delivery, etc.). If the data is provide via fax, CLEC must provide a unique fax number used solely for the receipt of Loop Make-Up Information.

47.6 If CLEC does not order Loop Make-Up Information prior to placing an order for a loop for the purpose of provisioning of an advanced service and the advanced service cannot be successfully implemented on that loop, CLEC agrees that:

47.6.1 CLEC will be charged a Trouble Isolation Charge to determine the cause of the failure;

47.6.2 If Sprint undertakes Loop Make-up Information activity to determine the reason for such failure, CLEC will be charged a Loop Make-Up Information Charge; and

47.6.3 If Sprint undertakes Conditioning activity for a particular loop to provide for the successful installation of advanced services, CLEC will pay applicable conditioning charges as set forth in Table One pursuant to Section XX of this Agreement.

FDN

Witness Smith stated in his direct testimony that there has been an on-going problem identifying, "areas of difficulty for provisioning Sprint loops." (TR p. 157) Witness Smith continues to state that Sprint has a large amount of loops served through remote terminals. (TR p. 157-158) The current process Sprint uses is largely a manual process, which according to FDN, is time-consuming when compared with other "ordinary loop provisioning." (TR p. 158) The amount of time this provisioning takes is a concern to FDN, testifying that customers may choose to cancel their order for services from FDN and go to another company that can provide those services in a more timely manner. (TR p. 158) FDN asserts that "...it could save FDN, the customer, and Sprint time and resources if there was a means for FDN to determine up front which loops are served through remotes." (TR p. 158) FDN states, "All non-recurring charges for those services should be identified in the agreement." (TR p. 174)

FDN proposes the following language be added to that proposed by Sprint. (BR p. 38; TR p. 88-90)

> 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, as such information will be no less accurate or reliable than what Sprint has available to itself and other CLECs.

Analysis

The FCC requires that ILECs provide access to loop make-up information in a nondiscriminatory and timely manner, and that the information should be the same as available to the ILEC. (FCC 97-295). The FCC also states that ILECs are not required to make an automated process available to CLECs, if they themselves are only utilizing a manual process. (FCC 97-295) As Sprint currently uses only a manual process, it is only required to make information available to FDN through this same process, which it presently does. (TR p. 111) Sprint is under no current obligation to establish an automated system for purposes of obtaining information for pre-ordering until is proven to be cost-effective for the ILEC. (FCC 97-295)

Conclusion

Upon review and consideration, the language established by Sprint should be accepted without the addition proposed by FDN. The FCC includes remote terminals as one of the areas of loop qualification information, therefore making it redundant. (FCC 93-28) While FDN may be uncomfortable with the manual process used by Sprint, the amount of requests received for information does not exceed the cost of replacing that part of the system. (TR p.111) Therefore, staff recommends that Sprint should provide FDN a means for accessing on a pre-ordering basis information identifying which Sprint loops are served through remote terminals.

Issue 63: Should this docket be closed?

Recommendation: No, the parties should be required to submit a signed agreement that complies with the Commission's decisions in this docket for approval within 30 days of issuance of the Commission's Order. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996. (Susac/Scott)

Staff Analysis: The parties should be required to submit a signed agreement that complies with the Commission's decisions in this docket for approval within 30 days of issuance of the Commission's Orders. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.