

Hong Wang

From: Hong Wang
Sent: Thursday, May 18, 2006 3:27 PM
To: David Smith
Cc: Blanca Bayo; Kay Flynn; Marguerite Lockard
Subject: FW: FDN v. FPSC and Sprint-FL, Case No 6:06-CV-674-ORL-18-DAB

Ok. Since Docket 041464 is closed, we'll document number it and enter it in 060000.

Thanks!

-----Original Message-----

From: David Smith
Sent: Thursday, May 18, 2006 3:18 PM
To: Hong Wang
Subject: RE: FDN v. FPSC and Sprint-FL, Case No 6:06-CV-674-ORL-18-DAB

The docket with which it is associated is 041464-tp, Sprint-FDN arbitration. I thought you all wanted a copy to put in the file. It doesn't initiate anything at the commission, it is like a notice of appeal.

-----Original Message-----

From: Hong Wang
Sent: Thursday, May 18, 2006 3:16 PM
To: David Smith
Cc: Blanca Bayo; Kay Flynn; Marguerite Lockard
Subject: FDN v. FPSC and Sprint-FL, Case No 6:06-CV-674-ORL-18-DAB

David, I just got a copy of the Complaint for Declaratory and Equitable Relief from FDN (Case No 6:06-CV-674-ORL-18-DAB). Is this a copy for my information or a filing with CCA? If it is a filing with CCA, should a new docket be opened or should it be entered in 060000? It does not belong in any open dockets, right?

Hong

Table with 4 columns: Tracking, Recipient, Delivery, Read. Rows include David Smith, Blanca Bayo, Kay Flynn, Marguerite Lockard.

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COM
CTR
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OPC
RCA
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SEC
OTH Lockard Wang

DOCUMENT NUMBER-DATE
04382 MAY 18 06
FPSC-COMMISSION CLEAR

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RECEIVED

RECEIVED-FPSC

MAY 18 PM 1:45

2006 MAY 17 PM 1:12

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

COMMISSION
CLERK

FLORIDA DIGITAL NETWORK)

Plaintiff,)

vs.)

The FLORIDA PUBLIC)
SERVICE COMMISSION; LISA POLAK)
EDGAR, Chairman of the Florida Public Service)
Commission; and J. TERRY DEASON,)
ISILIO ARRIAGA, MATTHEW M. CARTER, III,)
and KATRINA J. TEW, in their official)
capacities as Commissioners of the Florida)
Public Service Commission; and SPRINT-)
FLORIDA, INC., a Florida corporation n/k/a)
EMBARQ FLORIDA, INC.;)

Defendants.)

Civil Action No. 06-06-CV-674-ORL-18-
DAB

**COMPLAINT FOR
DECLARATORY AND EQUITABLE RELIEF**

Plaintiff, Florida Digital Network, Inc. ("FDN"), by and through undersigned counsel and for its complaint against the Florida Public Service Commission and Commissioners Lisa Polak Edgar, J. Terry Deason, Isilio Arriaga, Matthew M. Carter, III, and Katrina J. Tew, acting in their official capacities only (collectively, "Commission" or "PSC"), and Sprint-Florida, Inc. n/k/a Embarq Florida, Inc. ("Sprint-Florida"), hereby complain and allege as follows:

NATURE OF THE ACTION

1. This action is asserted to enforce provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et. seq.* ("1996 Act" or "Act"), an Act designed to open local telephone markets to competition. The 1996 Act requires

incumbent local exchange carriers ("ILECs") to provide new entrants into local telecommunications markets (known as competitive local exchange carriers ("CLECs"), such as Plaintiff FDN, with access to the incumbents' telephone network and services on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. These requirements are specifically intended to open monopoly local telephone markets to competition as quickly as possible.

2. Under the 1996 Act, incumbents are required to negotiate in good faith with new entrants and to develop interconnection agreements specifying the terms and conditions upon which CLECs may access the incumbent's network.

3. When the parties cannot arrive at a complete interconnection agreement through voluntary negotiations, the Act provides the state commission the opportunity to conduct arbitration proceedings to resolve disputed issues in a manner consistent with the substantive requirements of the Act and the implementing regulations adopted by the Federal Communications Commission ("FCC"). The appropriate rates for unbundled network elements ("UNEs") are among the issues that state commissions are specifically authorized and required to address in such arbitration proceedings. *See* 47 U.S.C. § 252(d).

4. UNEs are the individual piece parts of an ILEC's network, including "local loops" (*i.e.*, the transmission lines that run from an end-user's location to the telephone company's central office), that ILECs must "unbundle" and make available to requesting CLECs pursuant to the unbundling provisions of the 1996 Act. *See* 47 U.S.C. § 251(c)(3). The 1996 Act requires that the wholesale price an ILEC charges a CLEC for UNEs be "based on the cost" to the ILEC of providing it. 47 U.S.C. § 252(d)(1)(A)(i).

5. The Act authorizes the FCC to promulgate regulations implementing the Act's local competition provisions. Pursuant to that authority, the FCC has prescribed a methodology for estimating UNE rates known as "Total Element Long Run Incremental Cost," known by its acronym, "TELRIC."

6. On December 30, 2004, Sprint filed a Petition for Arbitration with the Commission, asking the Commission to decide certain issues that it and FDN had been unable to resolve during their private negotiations. On January 24, 2005, FDN filed its Response, as anticipated by the Act. On May 5, 2005, the Commission issued the Order Establishing Procedure, which, among other things, identified the issues that the Commission would adjudicate and decide in the arbitration.

7. Sprint's Petition for Arbitration, FDN's Response, and the Order Establishing Procedure all identified one of the issues (No. 34 in the Order Establishing Procedure) as, "What are the appropriate rates for UNEs and related services provided under the Agreement?" Thus, FDN fully expected from the inception of the arbitration proceeding that it would have the opportunity to arbitrate Sprint's UNE rates *de novo* in arbitration proceeding. Under the 1996 Act, FDN has the right to arbitrate in Section 252 interconnection arbitrations any and all issues identified in Sprint's initial petition or in FDN's response, including appropriate UNE rates. *See, e.g.,* 47 U.S.C. § 252(b)(4)(C) ("The State commission shall resolve each issue set forth in the petition and the response ...").

8. The Commission ultimately denied FDN's request to arbitrate new UNE rates. Instead, in a July 8, 2005 order issued more than six months after the proceeding commenced, the Commission announced that it would, instead, rely on rates set in a generic proceeding conducted more than 2-1/2 years earlier ("the '990649 Rate Order"). The Commission not only

refused to set new rates in the Sprint-FDN arbitration proceeding, it also refused to permit FDN to take discovery or present evidence that would have demonstrated that the 990649 rates were not "cost based" as required by the 1996 Act.

9. As FDN would have demonstrated, had it been given the opportunity, the 990649 rates are based on a proceeding that concluded in the fall of 2002, more than three years ago, and are based on evidence that Sprint submitted to the Commission in 2001. That evidence is now stale. Moreover, the UNE rates adopted in the 990649 proceeding were largely proposed by Sprint, which the Commission accepted because there was no testifying witness to advocate specific adjustments to the Sprint cost study. As a consequence, the Commission believed that it was bound to accept the Sprint cost study as filed, even though the Commission recognized that it had numerous flaws. While FDN did not agree with the Commission's conclusion in 990649 proceeding, FDN sought in the subsequent arbitration proceeding, from which this appeal arises, to provide the Commission with a complete record so that the Commission could set appropriate UNE rates for Sprint.

10. The Commission's refusal to permit FDN to present that evidence was error.

11. On April 17, 2006 the Commission issued its final order approving an interconnection agreement between Sprint and FDN.

JURISDICTION

12. This claim arises under the Communications Act of 1934, as amended, a law of the United States, and under the FCC's regulations implementing that Act. Jurisdiction is proper pursuant to Section 252(e)(6) of the Act, 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337. To the extent any state law is implicated, this Court has supplemental jurisdiction under 28 U.S.C. § 1367.

VENUE

13. Venue is proper in this District under 28 U.S.C. § 1391(b). The Commission is a Florida state agency and its orders and decisions have affect throughout the state. A substantial part of Sprint's operations are within this District and thus, a substantial part of the property that is the subject of the action is situated in this District. Venue is also proper in this District because a substantial part of the events giving rise to this action occurred with this District. FDN and Sprint reside in the District for venue purposes. FDN has its headquarters and principal place of business in the District. Sprint maintains several offices and facilities throughout the District, including a major operation center. FDN and Sprint also conduct business throughout the District, and the Commission regulates in the District. All parties hereto have significant contacts with the District so as to warrant venue being proper here.

PARTIES

14. Plaintiff FDN is a corporation organized under the laws of the State of Delaware, is authorized to do business in the State of Florida with its principal place of business in Florida. Plaintiff provides telecommunications services in Florida.

15. Defendant Sprint-Florida is a Florida corporation with its principal place of business in Florida. Sprint-Florida is the provider of local exchange service throughout a service area covering large portions of Florida, including within this judicial district. Sprint is an "incumbent local exchange carrier" within the meaning of Section 251(h)(1) of the Act.

16. Defendant Commission is an administrative agency of the State of Florida and is a "state commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

17. Defendant Commissioners Edgar, Deason, Arriaga, Carter, III, and Tew are Commissioners of the Florida Public Service Commission. They are being sued in their official capacities only.

VIOLATION ALLEGED

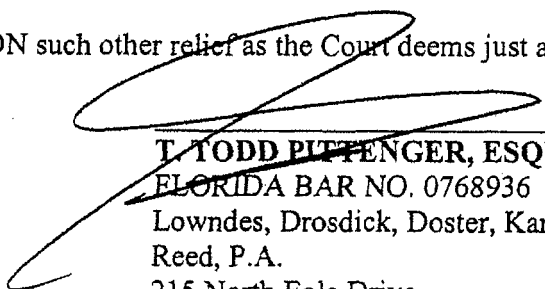
18. FCC regulations require that UNE rates be set pursuant to its TELRIC cost methodology. The UNE rates which the Commission has ruled that Sprint may charge FDN are not TELRIC-compliant and are therefore unlawful. Even if they were once TELRIC compliant, when they were adopted more than 3-years ago, they are no longer TELRIC-compliant today in light of the passage of time and changed circumstances. Finally, the Commission violated the Act by failing to arbitrate UNE rates *de novo*, as FDN had requested.

19. FDN has been aggrieved by the commission's pricing determinations and is entitled to declaratory and other equitable relief.

PRAYER FOR RELIEF

WHEREFORE, FDN requests that this Court grant it the following relief:

- (a) That the Court declare that the Commission's arbitration order is unlawful.
- (b) That the Court vacate the order and remand this cause to the Commission for further proceedings.
- (c) That the Court grant FDN damages to be paid by Sprint as measured by the difference between lawful UNE rates and those approved in the order.
- (d) That the Court award FDN such other relief as the Court deems just and proper.


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