

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application of Florida Digital Network, Inc. d/b/a FDN Communications, holder of CLEC Certificate No. 5715 and IXC Registration No. TJ246, and FDN, LLC, d/b/a FDN Communications; for transfer and name change of CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN Communications; acknowledgment of cancellation of IXC Registration No. TJ246; acknowledgment of registration as an IXC and adoption of Florida Digital Network, Inc. d/b/a FDN Communications' IXC tariff by FDN, LLC d/b/a FDN Communications, effective on notification by companies that merger has been completed; and for waiver of carrier selection requirements of Rule 25-4.118, F.A.C.

DOCKET NO. 070190-TP  
ORDER NO. PSC-07-0361-PAA-TP  
ISSUED: April 26, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman  
MATTHEW M. CARTER II  
KATRINA J. McMURRIAN

NOTICE OF PROPOSED AGENCY ACTION ORDER  
APPROVING TRANSFER, NAME CHANGE  
AND RULE WAIVER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, Under Rule 25-22.029, Florida Administrative Code.

**Background**

On March 26, 2007, Florida Digital Network, Inc. d/b/a FDN Communications, its parent, FDN Holdings, LLC, NuVox Transition Subsidiary, LLC (FDN, LLC) and its parent, NuVox, Inc., submitted a notice to the Commission of their intent to consummate a stock transaction involving the merger of Florida Digital Network, Inc. with and into FDN, LLC. Ultimately, Florida Digital Network, Inc. will cease to exist as a corporate entity. Upon closing of the merger transaction, FDN, LLC will be the provider of local and long distance service to

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customers currently served by Florida Digital Network. In addition, FDN, LLC will acquire and use the fictitious name, FDN Communications, upon closing of the merger transaction.

Florida Digital Network, Inc. is currently certificated to provide competitive local exchange telecommunications company (CLEC) services and is registered as an intrastate interexchange company (IXC) in Florida. NuVox Communications, Inc. also currently operates as a CLEC and IXC in Florida.

To complete the merger, the parties have requested Commission approval for transfer of and name change on CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN Communications; acknowledgment of cancellation of IXC Registration No. TJ246; and acknowledgment of registration as an IXC and adoption of Florida Digital Network, Inc. d/b/a FDN Communications' IXC tariff by FDN, LLC d/b/a FDN Communications.

In addition, FDN, LLC seeks Commission approval for a waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection (slamming rule). FDN, LLC is acquiring approximately 53,830 customers currently served by Florida Digital Network. FDN, LLC seeks the waiver so that it will not have to obtain each customer's authorization. With the waiver, FDN, LLC can protect itself from possible complaints of unauthorized carrier changes. Customers will benefit because they will not be subject to a loss of service during the transfer.

Staff will administratively process the acknowledgment of cancellation of Florida Digital Network's IXC Registration No. TJ246, and FDN, LLC's acknowledgment of registration as an IXC in accordance with Sections 2.07.C.5.i. and 2.07.C.5.h, Administrative Procedures Manual, respectively. The parties will notify the Commission when the merger transaction is complete and provide effective dates for the CLEC certificate transfer, cancellation of IXC Registration No. TJ246, and activation of FDN, LLC's new IXC registration.

This recommendation addresses the transfer of and name change on CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN Communications, and the request for waiver of Rule 25-4.118, Florida Administrative Code.

The Commission is vested with jurisdiction in this matter Under Sections 364.02, 364.335, 364.336, 364.337, 364.345, and 364.603, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

### **Discussion**

There are two requests before us that arise out of the above described merger. The first is a request that we approve the transfer of and name change on CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN

Communications. The second is a request that we waive the carrier selection requirements of Rule 25-4.118, Florida Administrative Code, in the transfer of Florida Digital Network, Inc. d/b/a FDN Communications' local and long distance customers to FDN, LLC d/b/a FDN Communications. We address each request separately.

### **Transfer and Name Change**

Under Section 364.345(2), Florida Statutes, Certificates; territory served; transfer, a telecommunications company may not sell, assign, or transfer its certificate or any portion thereof without (a) a determination by the commission that the proposed sale, assignment, or transfer is in the public interest; and (b) the approval of the Commission.

The companies assert that the proposed transaction will serve the public interest. Combining the financial resources, experience and complementary management skills of NuVox Communications, Inc. and FDN, LLC under one umbrella will benefit the public by providing strong telecommunications providers in their respective markets, thereby broadening the available provider choices. The merger of these companies will provide synergies in their operations enabling them to compete more effectively in the telecommunications market. Increased economies of scale will also allow them to operate more efficiently and provide economic choices for consumers.

After a review of the application, the proposed transaction would not adversely affect customers as FDN, LLC will continue to provide the same services that are currently provided by Florida Digital Network. FDN, LLC will adopt Florida Digital Network's price list that is currently on file with the Commission. The customers will retain the same rates, terms, and conditions of service as currently received.

Therefore, we approve the transfer of and name change on CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN Communications.

### **Waiver of Rule 25-4.118**

In addressing the waiver request, we must consider the requirements of the rule, the availability and authority for a waiver, and the justification of the waiver.

#### **Requirements of the Rule**

Under Rule 25-4.118(1), Florida Administrative Code, a customer's carrier cannot be changed without the customer's authorization. Rule 25-4.118(2), Florida Administrative Code, provides that a carrier shall submit a change request only if one of the following has occurred:

- (a) The provider has a letter of agency (LOA) . . . from the customer requesting the change;
- (b) The provider has received a customer-initiated call for service . . . ;

(c) A firm that is independent and unaffiliated with the provider . . . has verified the customer's requested change . . .

Under Rule 25-24.475(3), Florida Administrative Code, Rule 25-4.118, Florida Administrative Code, is incorporated into Chapter 25-24, and applies to IXCs.

Rule 25-24.455(2), Florida Administrative Code, states:

An IXC may petition for a waiver of any provision of this Part. The waiver shall be granted in whole, granted in Part or denied based on the following:

- (a) The factors enumerated in Section 364.337(4), Florida Statutes;
- (b) The extent to which competitive forces may serve the same function as, or obviate the necessity for, the provision sought to be waived;
- (c) Alternative regulatory requirements for the company which may serve the purposes of this part; and
- (d) Whether the waiver is in the public interest.

Under Rule 25-24.845, Florida Administrative Code, Rule 25-4.118, Florida Administrative Code, is incorporated into Chapter 25-24, and applies to CLECs.

#### Authority for Waiver

Section 364.337(2), Florida Statutes, states in pertinent part;

A certificated competitive local exchange telecommunications company may petition the commission for a waiver of some or all of the requirements of this chapter, except ss. 364.16, 364.336, and subsections (1) and (5). The commission may grant such petition if determined to be in the public interest.

The authority for Rule 25-4.118, Florida Administrative Code, is found in Section 364.603, Florida Statutes, which is a section the Commission is authorized to waive.

#### Justification for Waiver

FDN, LLC has attested that it will provide for a seamless transition while ensuring that the affected customers understand available choices with the least amount of disruption to the customers. Our staff has reviewed the notice that will be sent to Florida Digital Network's customers and found it to be adequate. The customers should not experience any interruption of service, rate increase, or switching fees. In addition, FDN, LLC has agreed to resolve any customer complaints that arise from issues occurring prior to the transfer.

Further, Florida Digital Network does not have any outstanding regulatory assessment fees, penalties or interest associated with its IXC registration or CLEC certification.

In light of the above, we conclude that in this instance it is appropriate to waive the carrier selection requirements of Rule 25-4.118, Florida Administrative Code. Enforcing the rule to require prior authorization in this specific situation would likely be counterproductive and not in the public interest. Specifically, given the number of customers involved, requiring the execution of individual LOAs before transfer is impractical, and imposes burdens on the companies and the customers without conferring benefits to the public. Moreover, in our experience, it is likely that a substantial number of customers would not respond to the request for authorization or select another carrier, and thus lose their local and long distance services. Thus rigid application of the rule would likely result in customers being inconvenienced. Granting the request for waiver, however, will avoid this undesirable result by allowing the companies to implement a transition process designed to be seamless and customer friendly.

For these reasons, we approve the waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code, in the transfer of Florida Digital Network, Inc. d/b/a FDN Communications' local and long distance customers to FDN, LLC.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that transfer of and name change on CLEC Certificate No. 5715 from Florida Digital Network, Inc. d/b/a FDN Communications to FDN, LLC d/b/a FDN Communications is **approved**. It is further

ORDERED by the Florida Public Service Commission that above described request for the waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code, is **approved**. It is further

ORDERED that the findings made in the body of this Order are hereby approved in every respect. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of April, 2007.



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ANN COLE  
Commission Clerk

( S E A L )

PKW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 17, 2007.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.