

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of certain unresolved issues associated with negotiations for interconnection, collocation, and resale agreement with Florida Digital Network, Inc. d/b/a FDN Communications, by Sprint-Florida, Incorporated.

DOCKET NO. 041464-TP  
ORDER NO. PSC-05-0732-PCO-TP  
ISSUED: July 8, 2005

ORDER DENYING FLORIDA DIGITAL NETWORK, INC.  
D/B/A FDN COMMUNICATIONS'S MOTION FOR POSTPONEMENT OF, AND  
ESTABLISHMENT OF, DUE DATES AND GRANTING SPRINT-FLORIDA  
INCORPORATED'S MOTION TO STRIKE FDN'S DIRECT PANEL TESTIMONY

I. Case Background

On December 30, 2004, Sprint-Florida, Incorporated (Sprint) filed its Petition for Arbitration of 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). On January 24, 2005, FDN filed its response to Sprint's Petition. Pursuant to Sprint's request for arbitration, this matter has been scheduled for an administrative hearing.

In accordance with the Order Establishing Procedure (OEP)<sup>1</sup>, FDN and Sprint filed direct testimony on May 27, 2005. On June 7, 2005, FDN file its Motion for Postponement of, and Establishment of, Due Dates (Motion for Postponement). Sprint filed its Response in Opposition to FDN's Motion for Postponement and Motion to Strike FDN's Direct Panel Testimony on June 14, 2005. On June 16, 2005, FDN filed its Response to Sprint's Motion to Strike.

II. Parties' Arguments

A. FDN's Motion for Postponement

FDN requests postponement of the case schedule so that rebuttal testimony is due July 11, 2005, rather than June 24, 2005. FDN further requests that the Prehearing and Hearing be postponed by at least 30 days so that the setting of proper UNE rates (Issue 34) can be addressed through surrebuttal testimony. FDN asserts that "UNE rates have been an issue in this proceeding from the inception." FDN argues that it has been prejudiced by Sprint not providing its cost study to FDN.

<sup>1</sup> Order No. PSC-05-0496-PCO-TP, issued May 4, 2005.

B. Sprint's Response and Motion to Strike

Sprint argues that FDN's Motion for Postponement should be denied, and the arbitration should continue under the procedural schedule as set forth in the OEP. Sprint understands the issue regarding UNE rates to be limited to "whether the UNE rates approved by the Commission in the [Sprint UNE Order] should be incorporated into the parties' interconnection agreement that is the subject of this arbitration." Sprint further contends that FDN is attempting to relitigate the issues that were in the Sprint UNE docket, which Sprint argues is an improper attempt at a second Motion for Reconsideration.

Alternatively, Sprint suggests a ninety (90) day postponement if it is decided that the issue is not limited to the applicability of the rates established in the Sprint UNE Order. Sprint indicates it would need this time to propose and file the necessary cost study.

In its Motion to Strike, Sprint contends that the arguments in the direct panel testimony submitted by FDN are "substantially the same" as FDN's arguments in both its post-hearing brief filed on May 28, 2002, in the Sprint UNE docket and in FDN's Motion for Reconsideration filed on January 23, 2003. Thus, Sprint argues that FDN's direct panel testimony amounts to an improper second attempt at reconsideration of the UNE rates set by this Commission.

C. FDN's Response to Sprint's Motion to Strike

FDN argues that all of its direct panel testimony is "proper, material, and relevant to Issue No. 34 in this proceeding." FDN argues that it has a legal right under the Telecommunications Act of 1996 to arbitrate all of the issues identified by the parties. FDN further argues that it is not seeking reconsideration of the Sprint UNE Order; rather, it seeks to arbitrate the UNE rates Sprint has proposed to charge on a going-forward basis regardless of where the rates originated.

III. Standard for Granting Motion to Strike Testimony

Section 120.569(2)(g), Florida Statutes, states that "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Section 90.401, Florida Statutes, states that "Relevant evidence is evidence tending to prove or disprove a material fact." Additionally, Section 90.402, Florida Statutes, maintains that "all relevant evidence is admissible, except as provided by law." However, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence." Section 90.403, Florida Statutes.

In addition, the motion should be confined specifically to the inadmissible portions. *See Lewis v. State*, 55 Fla. 54; 45 So. 998 (1908); *Thompson v. State*, 52 Fla. 113, 41 South. Rep. 899; *Herrin v. Abbe*, 55 Fla. 769, 46 South Rep. 183. "[A] motion to strike out evidence that has

been introduced in a case must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that it is not sufficient.” Lewis, 55 Fla. 54; 45 So. 998, 1002 (1908); *citing* Platt v. Rowand, 54 Fla. 237, 45 South Rep. 32.

#### IV. Decision

In Docket No. 981834-TP, this Commission found it appropriate to establish a generic docket in lieu of using an arbitration proceeding as a vehicle for addressing UNE rates. *See* Order No. PSC-99-1078-PCO-TP, issued May 26, 1999, at pg. 7. We found “that certain important pricing issues should be examined on a generic basis” because it allows “the equal participation of all affected and interested carriers.” *Id.* 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. On July 21, 1999, FDN petitioned to intervene in that proceeding, and pursuant to Rule 28-106.205, Florida Administrative Code, FDN took the case as it found it. At hearing, FDN stipulated to all of the testimony and exhibits filed. Subsequent to our Final Order, on January 23, 2003, FDN filed a Motion for Reconsideration in the Sprint UNE proceeding, which was denied. *See* Order No. PSC-03-0918-FOF-TP, issued August 8, 2003. FDN has since appealed the Sprint UNE Order and the appeal is still pending. FDN has not raised as an issue on appeal the propriety of our decision to conduct a generic rate proceeding in lieu of setting UNE rates in individual arbitrations.

Upon consideration, I find that the scope of this arbitration proceeding shall be limited to the issues as set forth in the Order Establishing Procedure. However, the Sprint UNE docket issues shall not be relitigated in this current proceeding. Thus, Sprint’s interpretation of what this Commission will address in the context of deciding Issue 34 is correct. I emphasize 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. As such, the appellate process is the proper vehicle for dealing with issues already raised and addressed by this Commission in Docket No. 990649B-TP. Thus, the request for postponement is denied.

In view of my decision regarding Issue 34, I hereby grant Sprint’s Motion to Strike FDN’s Direct Panel Testimony. The specific portions of the panel’s testimony identified by Sprint, pages 12-18 and 20-28, which address UNE rate setting issues are hereby stricken. This Commission will not revisit in this proceeding the policies, methodologies, and cost studies considered in the Sprint UNE proceeding. Therefore, the testimony set forth in these pages is not relevant. Furthermore, any measure of relevancy that could be attached to this testimony is far outweighed by the danger of confusion of the issues and prejudice to the opposing party.

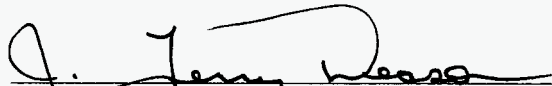
Based on the foregoing, this proceeding shall continue under the current schedule as set forth in the Order Establishing Procedure and portions of FDN’s Direct Panel Testimony as set forth herein shall be stricken.

Based upon the foregoing, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Florida Digital Network, Inc. d/b/a FDN Communications's Motion for Postponement of, and Establishment of, Due Dates is hereby denied. It is further

ORDERED that Sprint-Florida, Incorporated's Motion to Strike FDN's Direct Panel Testimony is hereby granted to the extent set forth in the body of this Order.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 8th day of July, 2005.

  
J. TERRY DEASON  
Commissioner and Prehearing Officer

(SEAL)

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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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director,

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Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.