

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-05-0793-PHO-TP  
ISSUED: August 1, 2005

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on July 18, 2005, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

SUSAN MASTERTON, Esquire, Sprint-Florida, Inc., 1313 Blair Stone Road, Tallahassee, Florida 32316-2214  
On behalf of Sprint-Florida, Incorporated ("SPRINT").

MATTHEW FEIL, Esquire, FDN Communications, 2301 Lucien Way, Ste. 200, Maitland, Florida 32751,  
On behalf of Florida Digital Networks, Inc. d/b/a FDN Communications ("FDN").

MICHAEL C. SLOAN, Esquire, Cole, Raywid & Braverman, LLP, 1919 Pennsylvania Avenue NW, Ste. 200, Washington, DC 20006,  
On behalf of Florida Digital Networks, Inc. d/b/a FDN Communications ("FDN").

KIRA SCOTT, Esquire; and C. LEE FORDHAM, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Commission ("STAFF").

**PREHEARING ORDER**

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

DOCUMENT NUMBER-DATE

07373 AUG-1 05

FPSC-COMMISSION CLERK

## II. 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). FDN's Motion for Postponement requested postponement of the procedural schedule in this arbitration so that testimony could be filed addressing the setting of proper UNE rates. 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. Sprint's Motion to Strike sought to strike testimony addressing arguments and positions on the UNE rate issue. On June 16, 2005, FDN filed its Response to Sprint's Motion to Strike. An Order Denying FDN's Motion for Postponement and Granting Sprint's Motion to Strike FDN's Direct Panel Testimony was issued on July 8, 2005.<sup>2</sup>

On June 3, 2005, FDN served Sprint with FDN's First Set of Interrogatories and Requests for Production of Documents. Sprint filed general and specific objections to FDN's discovery on June 13, 2005. FDN filed its First Motion to Compel on June 29, 2005.

On July 18, 2005, a Prehearing Conference was held in this docket. At the Prehearing the parties provided oral argument addressing FDN's First Motion to Compel. Consistent with the Prehearing Officer's July 8 ruling, a preliminary ruling was provided to the parties via e-mail on July 20, 2005. The parties were notified that FDN's First Motion to Compel would be granted as to Interrogatories Nos. 3 - 11, 13, 52, 73, 91 and 92 and, Requests for Production of Documents No. 2, and denied with respect to Interrogatories Nos. 1, 2, 12, 14 - 51, 53 - 72 and 74 - 90, and Requests for Production of Documents Nos. 1, and 3 - 15. The written ruling on this Motion is contained in Section XIV.C. of this Prehearing Order.

On July 18, 2005, FDN filed its Ominbus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order, or, in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order (Motion for Reconsideration). FDN's Motion for Reconsideration will be addressed by the Panel at the August 2, 2005, Agenda Conference. If the Motion is granted, the hearing in this matter may be delayed, or may need to be bifurcated to allow sufficient time to receive additional testimony and discovery addressing the expanded pricing issues.

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

<sup>2</sup> Order No. PSC-05-0732-PCO-TP.

### III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services's confidential files.

#### IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

#### V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled.<sup>3</sup> All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

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<sup>3</sup> Certain testimony pertaining to UNE rate setting (Issues 30 and 34) may be stricken depending upon the outcome of FDN's Motion for Reconsideration, filed July 18, 2005. The Motion for Reconsideration will be addressed by the Panel at the August 2, 2005 Agenda Conference.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Direct and rebuttal will be taken simultaneously.

<u>WITNESS</u>	<u>PROFFERED BY</u>	<u>ISSUES</u>
Steven D. Givner (Direct)	SPRINT	Background and Issue 34
James M. Maples (Direct and Rebuttal)	SPRINT	21, 22, 24, 25, 27, 29, 30 and 34
Jimmy R. Davis (Direct and Rebuttal)	SPRINT	28, 29 and 49
Peter Sywenki (Direct and Rebuttal)	SPRINT	5, 36, 37, 38 and 39
Kevin P. Smith (Direct and Rebuttal)	FDN	5, 21, 22, 23, 24, 25, 27, 29, 34, 36, 37, 38, 39, and 62
Panel of Dr. August Ankum (Direct and Rebuttal), Warren R. Fischer, CPA, (Direct) and Sidney L. Morrison (Direct )	FDN	30 and 34

VII. BASIC POSITIONS

**SPRINT:**

The Commission's goal in this proceeding is to resolve each issue in this arbitration consistent with the requirements of Section 251 of the Telecommunications Act of 1996 ("1996 Act"), including the regulations prescribed by the Federal Communications Commission ("FCC"). Sprint and FDN have continued to negotiate in good faith and have resolved a significant number of issues since Sprint's request for arbitration was filed with this Commission. Nevertheless, there remain a number of issues for which the parties have been unable to reach a solution. These issues range in scope and complexity but the primary issue necessitating this arbitration is FDN's refusal to implement the FPSC's January 8, 2003, Order No. PSC-03-0058-FOF-TP that approved new rates for Sprint unbundled network elements ("UNE RateOrder").

**FDN:**

Wireline competition in Sprint's territory lags behind that of competition in the BellSouth and Verizon territories, and FDN is one of the few facilities-based carriers left in Sprint territory. If the Commission is to fulfill the promise of facilities-based competition in Sprint territory, and promote the benefits consumers receive from that competition, the Commission must adopt the positions FDN has proposed for the arbitrated interconnection agreement. Sprint's stubborn adherence to the status quo and the preservation of its dominant market share are the obstacles to resolution of the open issues. For instance, the Commission should accept FDN's proposal for a LATA-wide local calling area for purposes of intercarrier compensation. Sprint has rejected all of the compromises and trade-offs FDN has offered on this issue; yet, Sprint's concerns over its COLR obligations from loss of FDN intraLATA terminating access and insuring a level playing field for disparate carriers are unsubstantiated or immaterial.

The Commission cannot expect facilities-based competition in Sprint territory to be sustainable if the Commission approves Sprint's proposed UNE rates. Sprint's proposed UNE rates are exorbitant, are based on four-year-old data and assumptions, and are not TELRIC compliant. Sprint has denied FDN its rights under the Telecom Act to examine Sprint's cost study and to arbitrate the appropriate UNE rates. At this time, the Commission has not (despite FDN's requests for relief) enforced FDN's legal rights to arbitrate the appropriate UNE rates. The Commission cannot lawfully deny FDN all reasonable opportunity to arbitrate the appropriate UNE rates in this proceeding and then approve Sprint's proposed rates.

**STAFF:**

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS<sup>4</sup>

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

**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. The Commission should adopt Sprint's definition of local traffic as proposed in paragraph 1.73.

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

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<sup>4</sup> The issues and positions shown are unresolved. All other issues have been resolved by the parties and as such are not listed in this Order.

**STAFF:** Staff has no position at this time.

**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?**

**SPRINT:** Sprint has proposed terms that would apply termination liability if an end user chooses to transfer service to the CLEC before the contract terms are fulfilled. The Commission should adopt the term proposed by Sprint.

**FDN:** FDN should be permitted to resell any term agreement between Sprint and a retail customer at a wholesale discount. FDN should be able to assume an existing agreement, and FDN should not be responsible for early termination fees if the customer leaves early to go back to Sprint service.

**STAFF:** Staff has no position at this time.

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

**SPRINT:** Two specific issues are in dispute. They are (1) the process the parties will follow when Sprint wire centers meet the thresholds defended by the FCC in the TRRO and (2) whether Sprint's proposed cap on the number of DS1 dedicated transport circuits that a CLEC can lease on any given route should be adopted. The process and cap proposed by Sprint in its language are consistent with the TRRO and should be adopted.

**FDN:** FDN should be given direct notice of any Sprint determination to add to the list of wire centers where unbundling of certain high capacity UNEs does not apply. At a minimum, FDN should have party status in a proceeding where another carrier challenges such a Sprint determination. Further, Sprint's assertion that there is a cap of 10 DS-1 dedicated transport circuits applicable on routes between all wire centers of all tiers, is inconsistent with applicable law.

**STAFF:** Staff has no position at this time.

**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?"**

**SPRINT:** During negotiations, Sprint modified the terms that were being disputed when the issue statement was crafted. Sprint's position is that all UNEs must be used to provide local exchange services. The rules established by the TRRO prohibit the

use of UNEs which are deemed to be competitive. UNEs can be used to provide those services if they are also being used to provide local exchange services, which are defined in the TRRO.

**FDN:** No. UNEs may be used to provide telecommunications or any other service consistent with applicable law. There is no FCC rule or order that restrict UNEs to the provision of local exchange service. Other than the restrictions on EELs, the only use prohibitions the FCC has established for UNEs are that a UNE may not be accessed for the sole purpose of providing CMRS or IXC services.

**STAFF:** Staff has no position at this time.

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

**SPRINT:** Sprint proposes to consider all requests for subloop access through the ICB process, a proposal which is consistent with the Commission's findings in Sprint's UNE cost docket. Once Sprint has provisioned a type of subloop in Florida to a CLEC, Sprint will make available such a subloop under the same or more favorable terms, conditions and charges to other requesting CLECs, upon execution of an amendment or other acceptance of pricing by a CLEC.

**FDN:** If Sprint has provided subloop access to another carrier, FDN should be offered such access on the same rates, terms and conditions should FDN make a similar request. ICB and BFR processes should be used only if FDN is requesting unique, never-been-tried access to a subloop.

**STAFF:** Staff has no position at this time.

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

**SPRINT:** Sprint provides EELS which are a combination of DS1/DS3 UNE loops with DS1/DS3 UNE Dedicated Transport or DS1/DS3 UNE loops or Dedicated Transport commingled with special access DS1/DS3 Transport or channel terminations. The appropriate prices are the UNE rates & the tariffed rates for the loop, transport and special access components. Any facilities required to connect the UNEs would be charged at TELRIC rates. Requests for new combinations or commingled arrangements should be handled through the Bona Fide Request (BFR) process.

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



most of its charges, Sprint has not been clear what charges if any stem from its proposed language that a "CLEC will compensate Sprint the costs of work performed to Commingle UNEs or UNE combinations with wholesale services."

**STAFF:** Staff has no position at this time.

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

**SPRINT:** Sprint has developed pricing for the most common routine network modifications, i.e., rearrangement of cable, repeater and doubler installation, smart jack installation, and line card installations and included those prices on the price list. Those rates and their underlying terms and conditions should be incorporated into the agreement. 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:** Staff has no position at this time.

**ISSUE 30**     **On what rates, terms and conditions should Sprint offer loop conditioning?<sup>5</sup>**

**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:** Rates for conditioning remain outstanding. See FDN position on Issue No. 34 regarding UNE rates.

**STAFF:** Staff has no position at this time.

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<sup>5</sup> The Prehearing Officer's July 8, 2005, ruling denying FDN's Motion for Postponement and granting Sprint's Motion to Strike addresses both Issues 30 and 34, which involve UNE rate setting. If FDN's Motion for Reconsideration is granted, then FDN's direct panel testimony would be reinstated and the procedural schedule would be postponed and revised accordingly to address the UNE pricing issue. However, if this Motion is denied, this arbitration will go forward as scheduled and the UNE pricing issue will not be addressed. The parties' positions on Issues 30 and 34 are being preserved for purposes of the Motion for Reconsideration filed by FDN.

**ISSUE 34**     **What are the appropriate rates for UNEs and related services provided under the Agreement? (See Footnote 4)**

**SPRINT:**     The UNE rates which the FPSC approved in Sprint's UNE cost docket are the appropriate rates and should be incorporated into the agreement between FND and Sprint.

**FDN:**     Sprint's proposed UNE rates are exorbitant, are based on four-year-old data and assumptions, and are not TELRIC compliant. Sprint and, up to this point, the Commission have denied FDN its legal right to examine the Sprint cost study and to arbitrate the appropriate UNE rates. The Commission must proceed in this matter so as to afford FDN reasonable opportunity to arbitrate in full the appropriate UNE rates. The Commission cannot lawfully deny FDN all opportunity to arbitrate the appropriate UNE rates and then approve Sprint's proposed rates. Finally, Sprint's request for retroactive application of its proposed rates is unsupportable.

**STAFF:**     Staff has no position at this time.

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

**SPRINT:**     FDN should maintain a minimum of one POI per LATA with a POI at each Sprint tandem where FDN terminates traffic.

**FDN:**     FDN is required to have just one POI per LATA. FDN agrees to one POI at one Sprint tandem in each LATA.

**STAFF:**     Staff has no position at this time.

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

**SPRINT:**     FDN should maintain a minimum of one POI per LATA with a POI at each Sprint tandem where FDN terminates traffic. Consistent with Sprint's position on Issue 5, the local calling area should be Sprint's local calling areas or mandatory EAS 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 where FDN's NXXs are homed, provided the local calling area for intercarrier compensation purposes is the LATA.

**STAFF:**     Staff has no position at this time.

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

**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 Issues Nos. 5 and 36. Non local traffic should be compensated at tariffed access rates.

**STAFF:**       Staff has no position at this time.

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

**SPRINT:**     VNXX traffic should be subject to long distance access charges because the originating customer and terminating customer are not located within the applicable local calling area.

**FDN:**         The terms should be reciprocal such that both FDN and Sprint VNXX traffic, if any, is treated/compensated for the same regardless of the directional flow of such traffic.

**STAFF:**       Staff has no position at this time.

**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)?**

**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:**         There is no need for the agreement to address VoIP traffic at this time. The Commission should await an FCC determination on the status of VoIP traffic in the IP Enabled Services docket and then permit the parties to negotiate amendment thereafter.

**STAFF:** Staff has no position at this time.

**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?<sup>6</sup>

**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:** Staff has no position at this time.

IX. EXHIBIT LIST

WITNESS	PROFFERED BY	I.D. NO.	DESCRIPTION
Steven D. Givner	SPRINT	Exhibit SDG-1	Sprint-FDN Interconnection Agreement
James M. Maples	SPRINT	Exhibit JMM-1	Determination of Business Lines and Fiber-based collocators by wire center (CONFIDENTIAL)
James M. Maples	SPRINT	Exhibit JMM-2	Summary of Business Lines by Wire Center for Florida (CONFIDENTIAL)
James M. Maples	SPRINT	Exhibit JMM-3*	Comparison of FDN Pricing Issues
Jimmy R. Davis	SPRINT	Exhibit JRD-1	Routine Modification of Facilities
Kevin P. Smith	FDN	KPS-1	Extension Agreements
Panel of Dr. August Ankum, Warren R. Fischer, CPA, and Sidney L. Morrison	FDN	AHA-1 WRF-1 SLM-1	Dr. Ankum's C.V. Warren R. Fischer's C.V. Sidney L. Morrison's

<sup>6</sup> This issue was not included in the tentative issues list attached to the Order Establishing Procedure. See Section XIV.B. below for details as to the inclusion of this issue.

			C.V.
Dr. August Ankum	FDN	AHA-2*	Sprint Objections and Discovery Responses

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

\*Use of this exhibit at hearing is contingent on the resolution of the Motion for Reconsideration. Its inclusion in this Order is to preserve the parties' positions.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

FDN has the following motion pending:

Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order; or, in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order, filed July 18, 2005.

XII. PENDING CONFIDENTIALITY MATTERS

Sprint has the following Request for Confidential Classification pending:

Sprint's Request for Confidential Classification of Document No. 06778-05 (x-reference Document Nos. 06040-05, 06041-05, and 06042-05), filed July 15, 2005. The information contained in these documents will remain confidential until a formal ruling is made.

XIII. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

Parties have stated in their prehearing statements that the following decisions have a potential impact on our decision in this proceeding:

**FDN**: A decision by the district court in FDN's pending petition to overturn the Commission's final order setting Sprint UNE rates in Docket No. 990649B-TP or by the Florida Supreme Court in the parallel appeal made to that court may impact the Commission's resolution of Issue No. 34. Otherwise, FDN is not aware of a pending FCC or court decision that has preempted or may preempt or otherwise impact the Commission's ability to resolve any of the above issues.

XIV. RULINGS

- A. Opening statements, if any, shall not exceed ten minutes per party.
- B. Issue 62 was not included in the tentative issues list attached to Order No. PSC-05-0496-PCO-TP, which set forth the procedural schedule in this docket. The issue has been addressed in the parties' testimonies and there were no objections made at the Prehearing Conference by either side as to the inclusion of the issue. Upon consideration, Order No. PSC-05-0496-PCO-TP is hereby revised to include Issue 62. Order No. PSC-05-0496-PCO-TP is affirmed in all other respects.
- C. At the Prehearing, the parties presented oral argument addressing FDN's First Motion to Compel filed on June 29, 2005. FDN's Motion to Compel is hereby granted in part and denied in part. The Motion is granted with respect to Interrogatories Nos. 3 - 11, 13, 52, 73, 91, and 92 and Requests for Production of Documents No. 2, and it is denied with respect to Interrogatories Nos. 1, 2, 12, 14 - 51, 53 - 72, 74 - 90 and Requests for Production of Documents Nos. 1, and 3-15 as identified by FDN in its Motion to Compel.

Rule 1.280(b)(1), Florida Rules of Civil Procedure, states in part that parties may obtain discovery regarding any matter relevant to the proceeding, unless it is privileged. The scope of discovery is broad and may be permitted on information that would be inadmissible at trial, if it would likely lead to the discovery of relevant, admissible evidence. The Motion is granted with respect Interrogatories Nos. 3 - 11, 13, 52, 73, 91, and 92 and Requests for Production of Documents No. 2 in that the information contained in Sprint's responses may lead to relevant, admissible evidence in relation to issues involved in this arbitration.

Interrogatories Nos. 1, 2, 12, 14 - 51, 53 - 72, 74 - 90 and Requests for Production of Documents Nos. 1, and 3 - 15 are related to issues and arguments stemming from Docket No. 990649B-TP (Sprint UNE Cost Docket). Consistent with the rationale set forth in Order No. PSC-05-0732-PCO-TP, Sprint shall not be compelled to respond to these requests. These requests exceed the broad scope of discovery in that they seek information directly related to this Commission's decisions regarding the pricing of UNEs for Sprint in Docket No. 990649B-TP. As set forth in Order No. PSC-05-0732-PCO-TP, it is inappropriate to relitigate the issues addressed by this Commission in that case. Thus, these discovery requests, which are designed to elicit information pertaining to the issues addressed in that prior case, exceed even the broad scope of discovery. Again, I emphasize that this Commission determined, as a result of a Petition filed by several CLECs, that it would be appropriate and more efficient to address UNE pricing for the large ILECs through generic proceedings. No party advanced the argument that it was inappropriate for this Commission to act on a generic basis, as opposed to addressing pricing in individual arbitrations. FDN availed itself of

the opportunity to participate in that proceeding. As such, pursuant to Rule 25-22.039, Florida Administrative Code, FDN took the case as it found it, including the outcome. FDN has already chosen the appropriate means to address its disagreement with the outcome of Docket No. 990649B-TP; it has appealed this Commission's decision.

While this Commission did contemplate that UNE rates set in our generic proceedings would likely need to be revisited over time as the markets change, it is clear that we contemplated that the rates would be in operation for some period of time before we revisited them. Even without the benefit of market experience, the doctrine of administrative finality would require at least some showing of changed circumstances that would warrant revisiting our pricing decisions, although I recognize that recent courts have emphasized that agencies should be wary of applying the doctrine too strictly. See Peoples Gas Sys. v. Mason, 187 So. 2d 335, 338-339 (Fla. 1966); but see McCaw Communications of Florida, Inc., Appellant, vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996). In this instance, FDN made no initial claim as to any changed circumstance, but instead, argued merely that it has an unabridged right under federal law to arbitration of the rates, in spite of our prior generic proceeding. I disagree.<sup>7</sup>

FDN now makes reference to Verizon's Petition in Docket No. 050059-TL to revisit the cost of capital and depreciation rates used to establish Verizon's UNE rates, and contends that the same arguments used by Verizon in that docket are applicable here as a basis for allowing arbitration of Sprint's rates. Again, I disagree. Notably, Verizon's appeal of our decision regarding Verizon's rates has now been resolved, whereas, FDN's appeal of Sprint's rates has not. Verizon pursued its request for appellate relief through to completion, and thereafter, requested specific, limited relief based on its interpretation of specific provisions in the TRO, which it claimed amounted to a significant change in circumstances.<sup>8</sup>

FDN also references *Supra*'s request for arbitration of UNE-P to UNE-L conversions, which we are scheduled to address in Docket No. 040301-TP, as an example of another case in which we have not viewed the prior rate-setting proceeding as binding or dispositive. That case can, however, be distinguished from this one, because issues for consideration in Dockets Nos. 040301-TP and 041338-TP, which are consolidated, address whether or not the parties' interconnection agreement contains an applicable rate for UNE-P to UNE-L conversions. See Order No. PSC-05-0433A-PCO-TP.

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<sup>7</sup> In addition to the discussion contained in my prior Order on this issue, I find it noteworthy that Section 252(g) appears to contemplate that State Commissions may consolidate proceedings to reduce burdens on the carriers and the State Commissions themselves, which I believe is what this Commission did by addressing UNE pricing on a generic basis.

<sup>8</sup> I note that Verizon has since filed a Notice of Voluntary Dismissal of its Petition.

Finally, FDN argues that our Order cannot have broad application without running afoul of the rulemaking requirements of Chapter 120, Florida Statutes. However, Section 120.80(13)(d), Florida Statutes, contemplates that the specific procedural provisions of Chapter 120 are not directly applicable to this Commission's decisions implementing the Telecommunications Act of 1996. Furthermore, until rates are actually in effect, and we can have some experience with them, rulemaking appears premature. See Order No. PSC-99-1744-PAA-TP (which was protested, and subsequently revised by Order No. PSC-99-2393-FOF-TP, but only as to specific collocation guidelines).

For all the above reasons, FDN's Motion to Compel as it pertains Interrogatories 1, 2, 12, 14-51, 53-72, 74-90, and Requests for Production of Documents Nos. 1, and 3-15 are denied.

I note that in its Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order; or, in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order (Motion for Reconsideration) of my prior Order, FDN makes an alternative request that discovery it has already served on Sprint addressing the pricing issues be compelled, even if the Commission agrees that FDN cannot revisit the issues addressed in Docket No. 990649B-TP. That request for alternative relief will be considered in the context of FDN's Motion for Reconsideration.

The Hearing in this docket is scheduled for August 4 - 5, 2005. Accordingly, Sprint shall provide, to the best of its ability, responses to the identified Interrogatories (Nos. 3 - 11, 13, 52, 73, 91, and 92) and Requests for Production of Documents (No. 2) by the close of business, July 27, 2005.

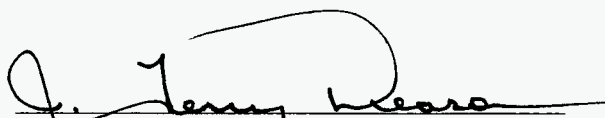
- D. FDN filed its Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order; or, in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order (Motion for Reconsideration) on July 18, 2005, requesting that the Panel assigned to this arbitration reconsider Order No. PSC-05-0732-PCO-TP. FDN has also requested Oral Argument to assist the Panel in the understanding and disposition of the complex issues underlying the Motion for Reconsideration. Sprint filed its Response to the Motion for Reconsideration on July 25, 2005. In its Response, Sprint contends that FDN's Motion for Reconsideration should be denied because it fails to meet the standard for such a motion and "is based on flawed premises and unproven factual speculations." The Motion for Reconsideration shall be addressed by the Panel at the August 2, 2005 Agenda Conference.



It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 1st day of August, 2005.

  
J. TERRY DEASON  
Commissioner and Prehearing Officer

( S E A L )

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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, 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.