

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-05-0855-FOF-TP
ISSUED: August 22, 2005

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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.

In accordance with the Order Establishing Procedure (OEP)¹, 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.² 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, 2005.³

¹ Order No. PSC-05-0496-PCO-TP, issued May 4, 2005.

² The fundamental issue has been the parties' interpretations of Issue 34. FDN argued that the issue is what are the appropriate rates for UNEs under the Agreement. Sprint argued that the issue regarding UNE rates is 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." The Prehearing Officer ruled that Sprint's interpretation of Issue 34 was correct.

³ Order No. PSC-05-0732-PCO-TP.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

On July 18, 2005, FDN filed its Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order, or, in the Alternative, Motion to Revise Schedule (Motion for Reconsideration). Therein, FDN asks that the Prehearing Officer's determinations as to the scope of this docket be rejected, as well as the decision to strike certain testimony deemed beyond the scope of the proceeding. In the alternative, FDN asks that Sprint be compelled to respond to all previously served discovery, arguing that the discovery requests are still pertinent even though the issues have been limited. Furthermore, FDN's alternative request seeks postponement to allow additional testimony on the reconstituted issue and compelled discovery. Sprint filed its Response to FDN's Motion for Reconsideration on July 25, 2005.

II. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317. This standard is equally applicable to reconsideration of a Prehearing Officer's Order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

III. Arguments

FDN's Motion for Reconsideration

Pursuant to Rule 25-22.0376, F.A.C., FDN filed a Motion for Reconsideration of the Prehearing Officer's July 8, 2005 ruling. FDN contends that the July 8th Order "fails to accommodate, or even acknowledge, FDN's right under the federal Communications Act to arbitrate UNE rates in this interconnection arbitration." FDN further contends that the July 8th Order "is also based on an erroneous, and legally unsupportable, interpretation of the Commission's prior Order No. PSC-99-1078." FDN contends that the Prehearing Officer's interpretation of Order No. PSC-99-1078-PCO-TP is violative of the Florida Administrative Procedures Act, as well as the federal Telecommunications Act.

If the Motion for Reconsideration is denied, FDN requests that the procedural schedule be revised and the discovery requests identified in FDN's Motion to Compel be granted so as to allow FDN the opportunity to present evidence on Issue 34 as framed by the July 8th Order. Issue 34 is now defined as "Whether the UNE rates established in Docket No. 990649B-TP should be incorporated into the interconnection agreement that is the subject of this arbitration?"

In the alternative, FDN contends that "if the Commission believes that incumbent local exchange carrier ("ILEC") UNE rates should be determined only in generic proceedings, then

this Commission should initiate such a proceeding to set new UNE rates for Sprint and set the matter for hearing, just as this Commission acted on Verizon's request for new UNE rates earlier this year." See Petition of Verizon Florida Inc. to reform UNE cost of capital and depreciation inputs to comply with the FCC's guidance in the Triennial Review Order, Docket No. 050059-TL.

Sprint's Response

Pursuant to Rule 25-22.0376, F.A.C., Sprint filed its Response to FDN's Motion for Reconsideration on July 25, 2005. Sprint contends that the Motion for Reconsideration fails to meet the standard for review of such a motion. Sprint further contends that FDN misinterprets the Prehearing Officer's ruling in Order No. PSC-05-0732-PCO-TP in that FDN erroneously interpreted the ruling to address "whether UNE rates could be adopted only in a generic proceeding." Sprint argues that the prior ruling's emphasis was that "Sprint UNE rates at issue in this proceeding were properly adopted in a generic proceeding in which FDN intervened and participated as a full party." Sprint further argues that FDN's argument that it has an absolute right under Section 252 of the Telecommunications to litigate any and all issues is an argument that FDN has made throughout this arbitration.

Sprint contends that Section 252 of the Telecommunications Act, as well as case law supports the Prehearing Officer's prior ruling. Sprint points out that Section 252(g) of the Telecommunications Act provides in pertinent part that "a state commission may...consolidate proceedings...in order to reduce administrative burdens." Sprint references Quest v. Koppendayer, 2004 U.S. Dist. LEXIS 6064 (U.S. Dist. Ct. for Minnesota), for the proposition that "the 1996 Act allows state commissions to establish rates for UNEs in generic proceedings, suggesting that commissions need not review interconnection agreements before setting UNE rates." Id. at 17. Sprint also argues that "the Sprint UNE Order provides that the rates are effective when incorporated through an amendment to an existing interconnection agreement or into a new interconnection agreement." Sprint further argues that allowing parties dissatisfied with the result in a generic proceeding to relitigate issues in an arbitration would render useless the rationale of establishing a generic proceeding.

VI. Analysis

Upon consideration, and for the reasons set forth below, we find that FDN's Motion for Reconsideration fails to meet the standard of review for a motion for reconsideration.

First, FDN's interpretation of the Prehearing Officer's ruling in Order No. PSC-05-0732-PCO-TP is misguided. In Docket No. 990649B-TP (Sprint UNE Cost Docket), this Commission determined, as a result of a Petition filed by several competitive local exchange telecommunications companies (CLECs), that it would be appropriate and more efficient to address Unbundled Network Element (UNE) pricing for the large incumbent local exchange telecommunications companies (ILECs) through generic proceedings. During that proceeding, 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 was a participant in that proceeding and as such, pursuant to Rule 25-22.039, F.A.C., took the case as it found it,

including the outcome. FDN has appealed this Commission's decision in Docket 990649B-TP, and we find that the appellate process is the appropriate means to address any disagreement FDN has with the outcome of the Sprint UNE Cost Docket.

FDN has repeatedly argued that it has an unfettered right to arbitrate any and all issues pursuant to Section 252 of the Telecommunications Act. This legal argument was set out in previous pleadings by FDN and now in its Motion for Reconsideration. We find that this argument has been considered by the Prehearing Officer in his ruling on the Motion for Postponement and, thus is inappropriate in the context of a Motion for Reconsideration.

FDN references 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 in the instant docket as a basis for allowing arbitration of Sprint's UNE rates. We find that Docket No. 050059-TL is distinguishable from the instant docket in that Verizon's appeal of this Commission's decision regarding Verizon's rates has now been resolved, whereas, FDN's appeal of Sprint's rates is still pending. Furthermore, 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.⁴

Similarly, we find that FDN's reference to Supra's request for arbitration of UNE-P to UNE-L conversions, which this Commission is scheduled to address in Docket No. 040301-TP, is distinguishable from the instant docket. FDN refers to Supra's request as an example of another case in which this Commission has not viewed the prior rate-setting proceeding as binding or dispositive. This Docket can be distinguished because issues for consideration in Docket 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.

We find that while this Commission did contemplate that UNE rates set in generic proceedings would likely need to be revisited over time as the markets change, it was also contemplated that the rates would be in operation for some period of time before this Commission revisited them. That being said, we find that 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 this Commission's pricing decisions, although 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 the generic proceeding.⁵ Only now in its Motion for Reconsideration does FDN challenge, in

⁴Verizon has since filed a Notice of Voluntary Dismissal of its Petition.

⁵ We note that Section 252(g) of the Telecommunications Act appears to contemplate that State Commissions may consolidate proceedings to reduce burdens on the carriers and the State Commissions themselves.

an alternative request to postpone the procedural schedule, the validity of the cost study relied on by this Commission in the Sprint UNE Cost Docket.

Finally, FDN argues that Order No. PSC-05-0732-PCO-TP cannot have broad application without running afoul of the rulemaking requirements of Chapter 120, Florida Statutes (F.S.). However, we find that Section 120.80(13)(d), F.S., 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, we find that instituting the rulemaking process would be premature since the rates have not yet been implemented. Given that these rates are currently pending appeal and without the benefit of market experience, rulemaking would likely be ineffective and inefficient. 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).

Furthermore, we find that FDN's alternative request for postponement and to compel discovery is subsumed by its Motion for Reconsideration, because it essentially asks that we reconsider and overturn the Prehearing Officer's earlier ruling and compel discovery inconsistent with that ruling. FDN further requests postponement of the case to allow it to respond to the compelled discovery. Thus, the alternative request is not a true alternative to denying the Motion for Reconsideration, and is rejected.

V. Decision


Upon consideration, we hereby deny FDN's Motion for Reconsideration. We find that FDN's Motion for Reconsideration does not meet the standard of review in that FDN does not address any point of law or fact that the Prehearing Officer had not considered, or any error in his decision.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc. d/b/a FDN Communications' Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order, or, in the Alternative, Motion to Revise Schedule is hereby denied. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 22nd day of August, 2005.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

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NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.