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-06-0238-FOF-TP ISSUED: March 20, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON

ORDER GRANTING IN PART AND DENYING IN PART SPRINT'S MOTION FOR RECONSIDERATION AND CLARIFYING CERTAIN PORTIONS OF ORDER NO. PSC-06-0027-FOF-TP

BY THE COMMISSION:

I. Case Background

On December 30, 2004, Sprint-Florida, Inc. (Sprint) filed a petition with this Commission to arbitrate 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). An administrative hearing was held on August 4, 2005.

On January 10, 2006, we issued Order No. PSC-06-0027-FOF-TP (Order on Arbitration) rendering our specific findings on the issues established for this Docket. On January 25, 2006, Sprint filed its Motion for Reconsideration (Motion) of our determination of Issues 5, 21, 22, and 24. Later, on February 1, 2006, FDN filed its Response to Sprint's Motion for Reconsideration and Motion for Stay Pending Reconsideration (Response). The Order on Arbitration in this proceeding required the parties to file their agreement on February 9, 2006. In light of this requirement and the Issues now in contention, we granted FDN's request for stay of the filing requirement on February 8, 2006.

II. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that this Commission overlooked or failed to consider in rendering its Order on Arbitration. 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.

III. Parties' Arguments

A. Sprint's Motion for Reconsideration

(1) Issue 5

Issue 5 addresses the definition of the local calling area. In support of its Motion, Sprint contends that in rendering our decision on Issue 5, *i.e.* that the local calling area shall be the LATA, we failed to consider that a LATA-wide calling scope was anti-competitive to other carriers, namely IXCs. Sprint further contends that competitive neutrality extends beyond the context of negotiations. Sprint argues that since IXCs pay access charges as opposed to reciprocal compensation they will pay more than FDN for terminating the same traffic. Sprint also cites to Commission Order No. PSC-02-1248-FOF-TP for the proposition that this type of inequality is discriminatory.[1]

Furthermore, Sprint contends that our reliance on the fact that BellSouth Telecommunications, Inc. (BellSouth) offers FDN a LATA-wide local calling scope is flawed in that we failed to consider the differences between BellSouth and Sprint. Specifically, Sprint contends that we overlooked or failed to consider testimony distinguishing Sprint from BellSouth and the impact a LATA-wide calling scope would have on Sprint. Sprint argues that it "is more rural than BellSouth, incurs higher costs to provide service and, therefore, is more reliant on access charge revenues than BellSouth." Also, Sprint argues that we failed to consider that there was no evidence in the record to show the specific terms of FDN and BellSouth's agreement or the mechanisms BellSouth has put in place to adjust to a LATA-wide calling scope.

Finally, Sprint contends that we overlooked or failed to consider that the access reductions associated with rebalancing will be implemented over time, having a greater effect on Sprint's access revenues on the front-end of rebalancing. Sprint argues that in accordance with Order No. PSC-03-1469-FOF-TL[2] (Rebalancing Order) Sprint will reduce its access charges over a period of three years ending in November 2007. Sprint further argues that we failed to

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[1] See In *re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of* 1996, Order on Reciprocal Compensation, Docket No. 000075-TP, issued September 10, 2002.

[2] See *In re: Petition by Verizon Florida, Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes; In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes; In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.; In re: Flow-through of LEC switched access reductions by IXCs, pursuant to Section 364.163(2), Florida Statutes*, Order on Access Charge Reduction Petitions, Docket Nos. 030867-TL, 030868-TL, 030869-TL, and 030961-TI, issued December 24, 2003.

consider the increases in traffic as a result of the LATA-wide decision and failed to consider the nature of the process by which Sprint will reduce its access charges.

In conclusion, Sprint contends that the decision regarding the local calling scope be reconsidered, or in the alternative, be delayed until Sprint's rebalancing is complete.

(2) Issue 21

Issue 21 addresses the appropriate terms and conditions applicable to the resale of Contract Service arrangements (CSAs), Special arrangements, or Individual Case Basis (ICB) arrangements. In support of its Motion, Sprint contends that we based our decision solely on whether Sprint would recover its up-front costs for providing a service to the customer at the discounted CSA rates when the CSA is further discounted and resold by FDN. Sprint further argues that the CSA is not a contract between Sprint and FDN, but a contract between the end-user customer and Sprint. Consequently, Sprint argues that our decision that the end-user customer is not liable for paying termination liability when switching to FDN is an unconstitutional impairment of contracts. Sprint also argues that we failed to consider the Final Order issued by the Division of Administrative Hearings (DOAH) in GTE Florida, Inc. v. Florida Public Service Commission[3] and BellSouth v. Florida Public Service Commission[4]. In its Final Order, DOAH found that the "fresh look" rule, which placed a prohibition on termination liability, was an impermissible impairment of contracts.

In support of its Motion, Sprint argues that the parties did not present evidence regarding cost because they "approached the issue as it relates to the competitive effects of disallowing termination liability." Sprint contends that there is evidence in the record that it will likely not recover all of its up-front costs. Sprint further contends that we were mistaken on Sprint's actual resale discount, which is 19.4 %, and failed to consider that FDN's proposed 12% discount was a compromise to address Sprint's concerns over not recovering its full costs. Furthermore, Sprint argues that our decision will have anticompetitive effects because it restricts pricing flexibility.

In conclusion, Sprint asks for reconsideration on the issue of termination liability, and alternatively, asks that we make it clear that the applicable resale discount will be 12% as proposed by FDN, rather than the 19.4% discount. Also, Sprint further asks that we clarify that our ruling applies only to CSAs entered into after the effective date of the Order on Arbitration.

(3) Issue 22

In support of its Motion, Sprint argues that we overlooked or failed to consider the unambiguous language of FCC Rule 51.319(e)(2)(ii)(B), and only considered the TRRO in our decision regarding caps on DS1 dedicated transport. Sprint further argues that we violated a fundamental principle of statutory construction, which provides that when the language of a rule is clear and unambiguous, other sources of interpretation are not to be considered. Sprint also points out that we failed to consider our earlier decision on the same issue in the Verizon generic

[3] See Case No. 99-5368RP, issued July 13, 2000.
[4] See Case No. 99-5369RP, issued July 13, 2000.

docket[5]. Sprint contends that this Issue requires a legal analysis rather than a factual analysis. Sprint further argues that we overlooked the effect our decision will have on the cap the FCC imposed on the number of DS3s available as UNEs in wire centers in which DS3 dedicated transport is found to be impaired.

In conclusion, Sprint requests that we reconsider our decision on this Issue and find that the DS1 cap applies in both impaired and nonimpaired wire centers.

(4) Issue 24

In support of its Motion, Sprint argues that we failed to define "eligible telecommunications services" and failed to clearly delineate what services FDN must provide in order to purchase a UNE that it uses to provide information services. Sprint does not disagree with our decision that FDN may purchase UNEs only for "eligible telecommunications services." However, Sprint contends that there is some confusion with regards to whether "information services" are included within the scope of "eligible telecommunications services." Sprint further contends that we overlooked or failed to consider that "eligible telecommunications services" can only be local exchange services consistent with the Act and FCC rules and the orders interpreting the Act. Sprint also argues that the rulings in the FCC's Broadband Classification Order[6] are narrowly restricted to DSL and are not intended to alter an ILECs UNE obligations.

In conclusion, Sprint requests that we reconsider our decision on this Issue to provide that FDN may only access a UNE to provide information services if it is also providing an eligible telecommunications service over that UNE, with the exception of DSL.

B. FDN's Response

(1) Issue 5

FDN argues that Sprint's Motion reargues facts contained in the record and already considered in this proceeding. FDN further argues that Sprint's request to delay implementation of a LATA-wide local calling scope is an attempt to unravel a pro-competitive decision. FDN contends that Sprint's argument that we did not consider the anti-competitive impact a LATA-wide calling scope would have on other carriers is the same argument it addresses in its case and post-hearing brief. Furthermore, FDN argues that Sprint's argument that we failed to consider the differences between BellSouth and Sprint were also already argued by Sprint and considered in this proceeding. Also, FDN argues that the interconnection agreement between FDN and BellSouth is public record and on file with this Commission.

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[5] *In re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida, Inc.*, Order No. PSC-05-1200-FOF-TP, Order on Arbitration, Docket No. 040156-TP, issued December 5, 2005.

[6] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, released September 23, 2005.

FDN contends that Sprint's request to delay implementation of a LATA-wide calling scope until reduction of access charges is complete will create a situation where intrastate access rates will be put at the same level as reciprocal compensation rates. FDN further argues that the end result would be that in-state calls would not be subject to intrastate access rates at the levels which this Commission found prevented CLECs from offering different calling plans. In footnote 2 of its Response, FDN notes that the arbitrated agreement has a two-year term with the likelihood of there only being a few months of LATA-wide calling before rebalancing is complete in November of 2007. In conclusion, FDN argues that we deny Sprint's Motion as to Issue 5.

(2) Issue 21

FDN argues that on the issue of resale Sprint attempts to reargue its position and raises new matters not addressed in this proceeding. First, FDN contends that Sprint raises its argument on the unconstitutional impairment of contracts for the first time in its Motion. Consequently, FDN argues that pursuant to the Order Establishing Procedure[7] in this proceeding, Sprint has waived its right to raise this issue. FDN further argues that Sprint improperly uses its Motion to brief the impairment of contracts issue for the first time. On this same point, FDN argues that this Commission, and similar agencies, have not been delegated the responsibility to rule on constitutional issues like the one raised by Sprint.

Furthermore, FDN contends that Sprint reargues the DOAH "fresh look" case, which was already considered in this proceeding. FDN argues that the contract between Sprint and the customer are not materially altered or impaired since FDN "steps into the shoes" of Sprint. FDN argues that we made a decision consistent with the FCC rules in that Sprint has a legal obligation to resell contracts. FDN also contrasts the DOAH "fresh look" case as one in which this Commission unilaterally decided that termination liability did not apply. In the instant proceeding, FDN argues that we are merely following an FCC rule.

FDN notes that the 12% wholesale discount rate it proposed as a compromise was less than the Commission-approved discount for Sprint at 19.4%. Thus, FDN argues that Sprint may be recovering more of its cost not less of its costs.

In conclusion, FDN argues that we deny reconsideration on this Issue and on our own motion consider applying the Commission-approved discount rate of 19.4% to ensure consistency.

(3) Issue 22

In its Response, FDN cites to Commission Order No. PSC-05-1054-PHO-TP[8] issued in Docket 041269-TP to support its contention that we have already accepted a similar result on DS1 Caps. FDN further argues that our recent determination in Docket 040156-TP to deny the

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[7] See Order No. PSC-05-0496-PCO-TP, issued May 5, 2005.

[8] *In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Prehearing Order, Docket No. 041269-TP, issued October 31, 2005.

CLECs' Motions for Reconsideration regarding inconsistent rulings in recent Commission arbitrations on this issue is sufficient reason to deny Sprint's Motion in this proceeding.

In conclusion, FDN argues that our decision is properly supported, and since we already considered Sprint's arguments on this Issue, Sprint's Motion should be denied.

(3) Issue 24

As to this Issue, FDN argues that the FCC has already defined eligible telecommunications services" and as such we were not required to do so in our Order on Arbitration. FDN further argues that in accordance 47 C.F.R. §51.309(a) ILECs are prohibited from imposing "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer." FDN contends that Sprint is attempting to place use restrictions that are prohibited by the FCC Rule. FDN further contends that the only exception to the Rule is found in subsection 309(b), which prohibits a requesting telecommunications carrier from accessing UNEs for the exclusive use of mobile wireless services or interexchange services. FDN asserts that when using UNEs to provide information services to its end users it does not exclusively provide the services listed in the exception.

FDN further argues that Sprint's contention that only local exchange services are "eligible telecommunications services" for the purchase of UNEs is baseless. FDN cites to the FCC's Broadband Classification Order for the proposition that "telecommunications services that are used to provide information services remain available as UNEs for purchase by CLECs." See Broadband Classification Order at ¶¶ 126 and 127. FDN also argues that the FCC has long recognized that telecommunications services and information services are "mutually exclusive" regulatory classifications. See Broadband Classification Order at ¶103. In conclusion, FDN argues that there is no clear indication in the Broadband Classification Order that it only applies to DSL.

IV. Analysis

A. Issue 5: Local Calling Scope

First, Sprint's argument that the resulting decision is anti-competitive to other carriers, including IXCs, is the same argument raised by it in its case-in-chief and its brief. See Sprint's Post-Hearing Brief, filed September 1, 2005, at 3. In its Motion, Sprint even cites to testimony in which its witness makes these same arguments. Therefore, on this point, Sprint's Motion fails to meet the standard for reconsideration since it merely reargues the same factual points that were part of the record in this proceeding, and considered in rendering our decision.

Second, Sprint reargues its position on this Commission's ruling as set forth in the Order on Reciprocal Compensation in Docket No. 000075-TP. We effectively distinguished this case from the instant proceeding in the Order on Arbitration. In the Order on Arbitration, we ruled in pertinent part that this Commission "was establishing a default definition to be applied whenever parties disagree. We were therefore necessarily concerned with competitive neutrality, since an

inappropriate default could tip the balance of negotiations in favor of one party or the other." Order on Arbitration at 9. Moreover, our decision in this proceeding to require a LATA-wide local calling area hinged on FDN's voluntary proposals to carry traffic to each tandem in the LATA and to deliver local VOIP traffic under reciprocal compensation arrangements. Id. at 9 – 10.

Third, Sprint argues that we overlooked or failed to consider the differences between Sprint and BellSouth in the affects a LATA-wide calling area would have on Sprint. We considered Sprint's arguments distinguishing its territory from BellSouth's. Sprint and FDN both presented evidence regarding BellSouth's territory and the impacts of having a LATA-wide calling scope. Throughout this proceeding Sprint has presented evidence of the rural nature of its territory and why a LATA-wide calling scope would be inappropriate in its case. Sprint's arguments were considered in our original ruling, and thus are improper in the context of a motion for reconsideration. We note that Sprint did not provide the BellSouth/FDN interconnection agreement as evidence in this record.

Finally, we disagree with Sprint's argument that we overlooked or failed to consider the incremental nature of the rebalancing process. For the reasons stated above, Sprint's Motion for Reconsideration is denied as to Issue 5.

B. Issue 21: Resale of Contract Service Arrangements

Sprint incorrectly argues that we overlooked or failed to consider that the contract containing termination liability is between Sprint and the retail customer, not between Sprint and FDN. Furthermore, Sprint reargues its position that the exclusion of termination liability in CSAs will prevent it from recovering all of its up-front costs. Sprint made this argument in its case-in-chief and brief. Contrary to Sprint's argument, we did not find that Sprint failed to address the possibility that it may not recover all of its up-front costs, rather we found that the evidence was lacking in support of Sprint's general contention. Order on Arbitration at 13. Moreover, Sprint recognizes that the parties did not present evidence on the cost implications as it relates to termination liability. In its Motion, Sprint fails to address any specific evidence in the record to support its general contention, which may have been overlooked or not considered in rendering our decision.

Sprint further argues that the DOAH ruling on "fresh look" prohibits this Commission from ruling as we did in the instant proceeding. The DOAH "fresh look" ruling is distinguishable from the instant proceeding. The DOAH "fresh look" ruling was made within the context of this Commission's rulemaking authority. This Commission, upon a request to initiate rulemaking, proposed "fresh look" rules that applied generically. The instant proceeding is a unique arbitration between two distinct parties, who have requested that this Commission render decisions on issues framed by the parties to form the basis of their interconnection agreement. We find this to be a distinguishable factor. Moreover, the rulings in this proceeding are prospective rather than retrospective. Thus, Sprint's argument that the decision in the instant case is an unconstitutional impairment of *existing* contracts is invalid. As to this point, Sprint

requests clarification. We clarify that the exclusion of termination liability from CSAs is applicable to those CSAs entered into after the effective date of the Order on Arbitration.

Sprint also argues that we failed to request information on the issue of cost recovery. Sprint further argues that we should have attempted to gather sufficient evidence to address the issue of cost. We note that the particular section of the Telecommunications Act of 1996 (the Act) cited by Sprint to address this Commission's obligations provides that "[t]he State commission *may* require the petitioning party and the responding party to provide such information as *may* be necessary for the State commission to reach a decision on the unresolved issues." Section 252(b)(4)(B) (emphasis added) Although we may not have tailored our discovery to the issue of cost recovery, it does not place prohibitions on our ultimate decision or the manner in which we reach our decision.

Based upon the foregoing, we find that Sprint has failed to meet the standard for a motion for reconsideration. Accordingly, Sprint's Motion as to Issue 21 is denied. The factual and legal arguments made by Sprint in its Motion are the same arguments we considered in rendering our decision on this Issue. However, clarification is appropriate on the applicable discount rate for resale. We clarify our ruling in that if FDN resells Sprint's existing contract with an end-user the applicable discount rate is the 12% discount rate proposed by FDN as a compromise, rather than the Commission-approved 19.4% discount rate.

C. Issue 22: DS1 Caps

As to this Issue, we hereby grant Sprint's Motion for Reconsideration on the basis that we overlooked or failed to consider our previous decision on DS1 Caps in the Verizon generic arbitration proceeding. Rule 51.319(e)(2)(ii)(B) places a cap on unbundled DS1 transport circuits. The Rule is clear and unambiguous, in that a telecommunications carrier may request no more than "ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." Where a rule is clear and unambiguous, it must be strictly interpreted and applied. Therefore, we find that there shall be a cap on DS1 dedicated transport applying in both impaired and nonimpaired wire centers.

D. Issue 24: Meaningful Amount of Traffic

Sprint fails to identify any point of fact or law that we overlooked or failed to consider in rendering our decision on this Issue, and therefore, has not met the standard for a motion for reconsideration. Accordingly, Sprint's Motion is denied and there is no need for clarification.

V. Decision

Based upon the foregoing analysis, we hereby grant in part in and deny in part Sprint's Motion for Reconsideration. Sprint's Motion is granted as to Issue 22 and denied as to Issues 5, 21, and 24, because it fails to identify any points of fact or law that we overlooked or failed to consider in rendering our decisions as to those particular issues. Furthermore, we find it appropriate to clarify certain portions of our ruling on Issue 21. Specifically, that our ruling on the exclusion of termination liability from CSAs is applicable to those CSAs entered into after

the effective date of the Order on Arbitration. Also, the applicable discount rate is the 12% discount rate proposed by FDN as a compromise, rather than the Commission-approved 19.4% discount rate.

In order to prevent any further delay, we order that the parties file their agreement within 15 days of our vote on Sprint's Motion.[9] The agreement shall be consistent with the findings in Order No. PSC-06-0027-FOF-TP and our vote on Sprint's Motion. In addition, we order the parties to include an effective date of March 11, 2006 in their agreement. Order No. PSC-06-0027-FOF-TP required that the parties' agreement be submitted for approval by this Commission. Accordingly, this Docket shall remain open pending the submission and approval of the agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sprint-Florida, Incorporated's Motion for Reconsideration of Order No. PSC-06-0027-FOF-TP is hereby granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that we clarify certain portions of our decisions in Order No. PSC-06-0027-FOF-TP. It is further

ORDERED that the parties' agreement shall be submitted to this Commission for approval within 15 days of the vote on the Motion for Reconsideration. It is further

ORDERED that the parties shall include an effective date of March 11, 2006 in their agreement. It is further

ORDERED that this Docket shall remain open pending the submission and approval of the parties' agreement.

By ORDER of the Florida Public Service Commission this 20th day of March, 2006.

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

(SEAL)

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[9] We addressed Sprint's Motion for Reconsideration at the February 28, 2006 Agenda Conference. Therefore, the deadline for filing the parties' agreement is March 15, 2006.

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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.