

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
pricing of unbundled network
elements (Sprint/Verizon track).

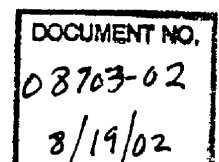
DOCKET NO. 990649B-TP
ORDER NO. PSC-02-1128-PCO-TP
ISSUED: August 19, 2002

ORDER DENYING MOTION TO STRIKE

On June 19, 2002, Sprint-Florida Inc. (Sprint) filed its Motion to Strike Portions of Florida Digital Network, Inc.'s (FDN) Post-Hearing Brief. In its Motion, Sprint seeks to have portions of FDN's brief stricken for citing to facts outside the record in this proceeding. In support of its Motion, Sprint alleges that FDN's use of facts from other proceedings to support its position are information outside the record, which does not qualify as competent substantial evidence upon which a decision may be based. Sprint contends that the facts may be unique to those proceedings, Sprint was not a party to those proceedings, and did not have a chance to cross-examine any witnesses regarding the facts FDN has proffered.

Sprint argues that if the Commission accepts FDN's approach to this proceeding, then intervenors will no longer find it necessary to submit testimony or exhibits. Sprint believes that intervenors would "wait in the weeds" until the company has filed its testimony and discovery has completed, before revealing its strategy for the first time in a prehearing statement.

Sprint states that FDN's attempt to create factual support by reaching outside the record in this proceeding by using previously unnoticed decisions is inappropriate. Sprint cites to Section 90.203, Florida Statutes, for the proposition that a court must take judicial notice of any matter in Section 90.202, Florida Statutes, when a party requests it and provides timely written notice and sufficient information. Sprint states that FDN has neither requested administrative notice, nor has it provided timely written notice of the decisions upon which FDN desires to use findings of fact. In addition, Sprint states that even if the "facts" are to be included in the record, "those facts must have been made available to Sprint-Florida for rebuttal purposes, but they were not. Peoples Bank of Indian River County v. State Dept. of Banking and Finance, 395 So.2d 521 (Fla. 1981)." Therefore, Sprint requests that specific portions of FDN's brief be stricken. However, because the portions that Sprint seeks stricken are



numerous, lengthy and interspersed throughout FDN's brief, Sprint believes it would be more efficient for the Commission to review the offending portions that Sprint has highlighted in FDN's brief, which it has attached to its Motion.

On June 28, 2002, FDN filed its response and states that Sprint's motion is procedurally improper. FDN states that in Sunray Utilities the Commission denied portions of a motion that sought to strike portions of a brief believed to be outside the record. See Order No. 25501, in Docket No. 870539-WS, issued December 17, 1991. The Commission stated that all post hearing briefs have a potential to contain material outside the record; "when material which is outside the record is referred to or relied on in the brief, the Commission simply does not rely on such material. . . ." FDN asserts that even if Sprint's allegations are true, the Commission should deny Sprint's motion and simply disregard the particular factual matter.

FDN also attacks Sprint's premise that a party who does not bear the burden of proof must put on testimony. FDN states that Sprint could fail to meet its burden of proof regarding rates regardless of whether FDN proffered testimony. However, FDN believes it has provided a factual rebuttal based on Sprint's testimony, discovery responses, and cross-examination of Sprint's witnesses. FDN believes it was unnecessary to file testimony to demonstrate the easily identifiable flaws in Sprint's cost model.

Next, FDN states that Sprint had ample notice of the issues FDN would focus on through FDN's discovery and deposition questions, and prehearing statement. FDN asserts that Sprint is attempting to invert the burden in this proceeding by requiring a party to file testimony or reveal its strategy before the prehearing statement is filed.

FDN states that it properly cited to decisions of the FCC and state commissions based on current Commission policy which requires a party to seek official recognition only if the party intends to rely on the facts within the order or ruling. FDN asserts that it is not "gleaning" facts from the cited decisions. FDN states that the only facts relied upon in this proceeding are from the record in this case.

Finally, FDN argues that Sprint's motion should be denied because it fails to plead with particularity. FDN states that it is prejudiced by Sprint's approach to strike large portions of the brief without specific justification for striking those portions.

RULING

When a motion to strike portions of a post-hearing brief is filed, the Commission has chosen to deny the motion and to ignore facts outside the record. See Order No. 25501, in Docket No. 870539-WS, issued December 17, 1991. For this reason alone, the Motion to Strike filed by Sprint-Florida Inc. would fail. In addition, it should be noted that the thrust of Sprint's argument is that FDN is attempting to rely on facts outside the record. To the extent FDN's brief contains "facts" outside the record, this Commission is more than capable of distinguishing extra-record facts from record evidence. However, as FDN points out, it is not attempting to glean facts from the cited decisions, but is relying on the precedential and persuasive authority provided by those decisions, each of which, FDN maintains, presents factual scenarios similar to the case at hand. Accordingly, FDN was not required to seek official recognition as alleged by Sprint.


While Sprint questions FDN's wait and see strategy, FDN takes the risk that it will not be able to rebut Sprint's case without filing any testimony or exhibits. Based on the foregoing, the Motion to Strike filed by Sprint-Florida Inc. is hereby denied.

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Motion to Strike Portions of Florida Digital Network, Inc.'s Post-Hearing Brief filed by Sprint-Florida Inc. is hereby denied. It is further

ORDERED that this Docket shall remain open pending our final decision in this matter.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 19th Day of August, 2002.



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BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

JKF

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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

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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.