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**Sent:** Tuesday, June 14, 2005 4:46 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 041464-TP Sprint's Response in Opposition to FDN's Motion for Postponement and Motion to Strike Dir. Panel Test.  
**Attachments:** 041464 Sprint's Res to FDN's Motion.pdf

**Filed on behalf of:**

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**Docket No. 041464-TP**

**Title of filing:** Sprint's Response in Opposition to FDN's Motion for Postponement and Motion to Strike Dir. Panel Test.

**Filed on behalf of: Sprint**

**No. of pages: 13**

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**Description:** Sprint's Response in Opposition to FDN's Motion for Postponement and Motion to Strike Dir. Panel Test.

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June 14, 2005

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk  
& Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 041464-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Response in Opposition to FDN's Motion for Postponement and Motion to Strike FDN's Direct Panel Testimony.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at 850-599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton".

Susan S. Masterton

Enclosure

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE  
DOCKET NO. 041464-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail on this 14<sup>th</sup> day of June, 2005 to the following:

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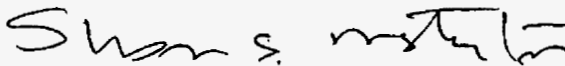
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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint-Florida, Inc. for )  
Arbitration of an Interconnection Agreement )  
With Florida Digital Network, Inc. Pursuant to )  
Section 252 of the Telecommunications )  
Act of 1996 )  
\_\_\_\_\_ )

Docket No. 041464-TP

Filed: June 14, 2005

**SPRINT'S RESPONSE IN OPPOSITION TO**  
**FDN'S MOTION FOR POSTPONEMENT**  
**AND MOTION TO STRIKE FDN'S DIRECT PANEL TESTIMONY**

Pursuant to Rule 28-106.204, Florida Administrative Code, Sprint-Florida, Incorporated ("Sprint") hereby files its Response to the Motion for Postponement of, and Establishment of, Due Dates, filed by FDN Communications on June 7, 2005 and its Motion to Strike FDN's Direct Panel Testimony. In support thereof, Sprint states as follows:

**RESPONSE IN OPPOSITION**

1. Sprint disagrees with FDN's characterization of the issue regarding UNE rates that is in dispute between the parties in this arbitration. As Sprint understands it, the issue is whether the UNE rates approved by the Commission in *In Re: Investigation into pricing of unbundled network elements (Sprint/Verizon Track)*, Order No. PSC-03-0058-FOF-TP issued January 8, 2003 in Docket No. 990649B-TP (hereinafter, "Sprint UNE Proceeding" and "Sprint UNE Order," respectively) should be incorporated into the parties' interconnection agreement that is the subject of this arbitration.

2. Pursuant to the Sprint UNE Order, the effective date of the rates approved in that Order is “when existing interconnection agreements are amended to incorporate the approved rates, and the amended agreements are deemed approved by us. For new interconnection agreements, the rates shall become effective when the agreements are deemed approved by us.” (Sprint UNE Order at page 218) As contemplated by the Order, Sprint has negotiated with the CLECs that it has interconnection agreements with to incorporate the new rates into their agreements either as amendments to existing agreements or as part of new agreements, to the extent that existing agreements have expired.
3. Sprint has attempted to implement the new rates with FDN in this manner for the past two and one-half years. In response, FDN has continued to resist the Sprint UNE Order rates, first through legal challenges (to date unsuccessfully), then through its refusal to negotiate the inclusion of the new rates into its then existing interconnection agreement, and finally by stalling and refusing to reach agreement on a “follow on” agreement when the existing agreement expired in December 2003.<sup>1</sup> In fact, it appears to Sprint that FDN’s refusal to incorporate the Sprint UNE Order rates into the new agreement is the primary reason that the parties have been unable to agree to a follow on agreement, resulting in the filing of this arbitration. FDN’s attempt to relitigate the Sprint UNE Order rates in this proceeding is just another facet of its strategy to delay as long as possible the implementation of the Sprint UNE Order rates.

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<sup>1</sup> Because of these delaying tactics by FDN, Sprint has requested a retroactive effective date for the Sprint UNE Order rates in its Petition for Arbitration. (Arbitration Petition at page 10)

4. Contrary to Sprint's understanding of the scope of the issue before the Commission in this arbitration, FDN presents the issue as a revisitation of the justifications and cost studies underpinning the Sprint UNE Order rates that have already been considered and ruled on by the Commission. It appears that FDN views this arbitration as an opportunity to again attempt what it failed to accomplish through its filings in the Sprint UNE Proceeding, that is, a reconsideration of the Sprint UNE Order to obtain a result more to its liking. In fact, the arguments made by FDN in the Direct Panel Testimony it filed on May 27, 2005, are so close to the arguments it made in the brief it filed in the Sprint UNE proceeding and its subsequent Motion for Reconsideration of the Sprint UNE Order as to be substantially the same. The similarities of these arguments and the Commission's decisions in response to them are discussed more fully in paragraphs 12-17, below.
5. FDN's attempt to relitigate substantially the same failed arguments it made in the Sprint UNE Proceeding through this arbitration are an improper attempt at a second Motion for Reconsideration of that Order and should be rejected by the Commission. Rule 25-22.060, F.A.C. allows a party to file a single Motion for Reconsideration within 15 days after the issuance of an Order. The rule specifically prohibits a motion for reconsideration of an order that disposes of a motion for reconsideration.
6. FDN availed itself of the opportunity for reconsideration in the Sprint UNE Proceeding, but its Motion was denied. (See, Order Denying FDN and KMC's Motion for Reconsideration of Sprint UNE Order, Order No. PSC-03-0918-FOF-

TP, issued August 8, 2003) After the Commission rules on a motion for reconsideration of an order, jurisdiction over the order passes to the courts, if an appeal is filed. FDN did appeal the Sprint UNE Order to the federal district court and that appeal is still pending.<sup>2</sup> The arguments FDN made in its appeal are, again, much the same arguments it raises in its Direct Panel Testimony. It is absurd for FDN to attempt to relitigate the exact same issues before the Commission in this arbitration, based on essentially identical arguments, when those arguments were previously considered and rejected by the Commission and while the parties are awaiting a ruling by the federal court on these same arguments.

7. Contrary to FDN's statement in paragraph 6 and footnote 5 of its Motion, the Commission has frequently relied on its decisions in generic proceedings to resolve issues raised in subsequent arbitrations. See, e.g., *In re: Petition by Global NAPs, Inc. for arbitration pursuant to 47 U.S.C. 252(b) of interconnection rates, terms and conditions with Verizon Florida, Inc.*, Order No. PSC-03-0805-FOF-TP, issued July 9, 2003 in Docket No. 011666-TP; *In re: Petition by BellSouth, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, Order No. PSC-02-0413-FOF-TP, issued March 26, 2002 in Docket No. 001305-TP.
8. If the Commission agrees that the issue in dispute in this arbitration is whether or not the Sprint UNE Order is applicable to FDN, as Sprint believes, then the

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<sup>2</sup> Pursuant to Rules 25-22.060 and 25-22.061, F.A.C., Commission orders are effective pending reconsideration or on appeal unless a stay is granted. FDN filed a Motion to Stay the Sprint UNE Order, but that Motion was never ruled on by the Commission. Consequently, the rates approved by the Commission in the Sprint UNE Order are currently in effect, subject to the decision of the federal court.

current procedural schedule provides the parties ample time to adequately argue that issue. Ultimately, the issue is primarily a legal issue properly addressed in post-hearing briefs and requiring minimal testimony. Therefore, the Commission should deny FDN's Motion for Postponement and the arbitration should continue under the current schedule.

9. However, to the extent the Commission determines that the issue is not limited to the applicability of the Sprint UNE Order, but rather is a fundamental re-examination of Sprint's UNE rates, then Sprint would agree that the current procedural schedule is inadequate.<sup>3</sup> In that instance, Sprint would propose to submit new cost studies addressing all of the new UNE rates to be incorporated into the FDN agreement, rather than narrowly limiting the discussion to specific aspects of the previously considered and approved rates with which FDN disagrees.
10. Should the Commission determine that the appropriate scope of the UNE rate issue in this proceeding is the adoption of new rates, rather than applicability of the rates previously approved in the Sprint UNE Order, Sprint believes that the Order on Procedure should be modified to allow both parties to fully address what new rates should apply. As opposed to the schedule proposed by FDN in paragraph 10 of its Motion for Postponement, Sprint suggests a postponement of at least 90 days and the establishment of new dates for additional direct testimony, rebuttal testimony and surrebuttal testimony. Under this new procedural schedule,

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<sup>3</sup> Pursuant to section 252(i) of the federal Telecommunications Act, any new rates that come out of this proceeding will be available to other CLECs who opt to adopt the FDN/Sprint agreement.



Sprint would anticipate submitting costs studies supporting its proposed rates with its additional direct testimony.

### **MOTION TO STRIKE**

11. As discussed in paragraphs 4 and 5 above, FDN's Direct Panel Testimony is generally a rehash of the arguments FDN previously made before the Commission in the Sprint UNE Proceeding, albeit unsuccessfully. Through its arguments and position on the UNE rate issue in this proceeding, FDN seeks to improperly gain reconsideration of the Sprint UNE Order which this Commission has previously denied.
12. Pages 12-14 of the Direct Panel Testimony address Sprint's methodology for determining customer locations. The arguments in the panel testimony are substantially the same arguments made by FDN on pages 7-11 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 56-58 of the Sprint UNE Order. FDN raised these same issues, again, in its Motion for Reconsideration filed on January 23, 2003 at pages 13 and 16. The Commission again rejected FDN's position as a basis for reconsideration of the Sprint UNE Order in its Order on Reconsideration issued August 8, 2003 at pages 20-24. Specifically, the Commission found that "we did not overlook or fail to consider a point of fact or law regarding the customer locations utilized in this proceeding." (Order on Reconsideration at page 24)
13. Pages 15-16 of the Direct Panel Testimony address Sprint's cable fill factor methodology. The arguments in the panel testimony are substantially the same as

the arguments made by FDN on pages 17-24 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 75-84 of the Sprint UNE Order. FDN raised these same issues, again, in its Motion for Reconsideration filed on January 23, 2003 at pages 9-13. The Commission again rejected FDN's position as a basis for reconsideration of the Sprint UNE Order in its Order on Reconsideration issued August 8, 2003 at pages 16-19. Specifically, the Commission found that "we did not overlook or fail to consider a point of fact or law concerning Sprint's fill factors." (Order on Reconsideration at page 19)

14. Pages 24-28 of the Direct Panel Testimony address Sprint's geographic deaveraging proposal. The arguments in the panel testimony are substantially the same as the arguments made by FDN on pages 1-6 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 23-29 of the Sprint UNE Order. FDN raised these same issues, again, in its Motion for Reconsideration filed on January 23, 2003 at pages 7-9. The Commission again rejected FDN's position as a basis for reconsideration of the Sprint UNE Order in its Order on Reconsideration issued August 8, 2003 at pages 13-16. Specifically, the Commission found "we did not overlook or fail to consider a point of fact or law regarding the deaveraging approach used in this proceeding." (Order on Reconsideration at page 16)

15. Pages 22-23 of the Direct Panel Testimony address Sprint's service order charges. The arguments in the panel testimony are substantially the same as the arguments

made by FDN on pages 28-31 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 154-156 and 160-163 of the Sprint UNE Order. FDN raised these same issues, again, in its Motion for Reconsideration filed on January 23, 2003 at pages 25-27. The Commission again rejected FDN's position as a basis for reconsideration of the Sprint UNE Order in its Order on Reconsideration issued August 8, 2003 at pages 37-39. Specifically, the Commission found that "we did not overlook or fail to consider any point of fact or law in rendering our decision regarding Non-Recurring OSS Charges utilized in this proceeding." (Order on Reconsideration at page 39)

16. Page 24 of the Direct Panel Testimony address Sprint's non-recurring charge work times. The arguments in the panel testimony are substantially the same as the arguments made by FDN on pages 32-38 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 169-177 of the Sprint UNE Order. FDN raised these same issues, again, in its Motion for Reconsideration filed on January 23, 2003 at pages 20-25. The Commission again rejected FDN's position as a basis for reconsideration of the Sprint UNE Order in its Order on Reconsideration issued August 8, 2003 at pages 33-37. Specifically, the Commission found "that FDN and KMC's Motion did not identify any point of fact or law which was overlooked or which we failed to consider regarding the Work-Times for Non-Recurring Charges utilized in this proceeding." (Order on Reconsideration at page 37)

17. In addition to the issues discussed above that have been previously addressed by the Commission in both the Sprint UNE Order and the Order on Reconsideration, FDN raised a couple of issues that are substantially the same as issues raised in its post-hearing brief but that were not included in its Motion for Reconsideration of the Sprint UNE Order. Pages 16-18 of the Direct Panel Testimony addresses Sprint's structure sharing methodology. The arguments in the panel testimony are substantially the same as the arguments made by FDN on pages 16-17 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 71-73 of the Sprint UNE Order. Also, pages 20-21 of the Direct Panel Testimony address Sprint's digital loop carrier assumptions. The arguments in the panel testimony are substantially the same as the arguments made by FDN on pages 26-28 of its post-hearing brief filed on May 28, 2002 in the Sprint UNE Proceeding. The Commission considered the arguments raised by FDN, ultimately rejecting them, at pages 111-114 of the Sprint UNE Order.

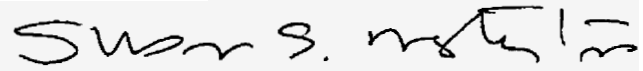
18. As previously stated, as Sprint understands it, the issue that is before the Commission in this arbitration is primarily a legal issue, that is, whether the UNE rates approved by the Commission in the Sprint UNE Order are applicable to FDN. FDN's testimony is merely a rehash of its previously failed arguments and amounts to an improper attempt to request reconsideration of the Commission's Order on Reconsideration of the Sprint UNE Order. Therefore, the testimony is improper and should be stricken.

## CONCLUSION

FDN's Motion for Postponement and the Direct Panel Testimony FDN submitted in this proceeding represent improper attempts by FDN to revisit the Sprint UNE Order and obtain a second reconsideration the Sprint UNE Order to achieve rulings favorable to FDN that were specifically rejected by the Commission in the Sprint UNE Proceeding. Since the issuance of the Sprint UNE Order two and one-half years ago, FDN has adamantly refused to recognize the validity of the Commission's decision. In fact, FDN's appeal of that Order is currently pending in federal court. FDN's appeal is the appropriate place for FDN's exceptions to the Sprint UNE Order and Order on Reconsideration to be addressed. The issue to be addressed in this arbitration proceeding is the primarily legal issue of whether the Sprint UNE Order rates apply to FDN.

WHEREFORE, Sprint requests that the Commission clarify that it is not appropriate to reconsider the Sprint UNE Order in this arbitration, deny FDN's Motion for Postponement, and allow the arbitration to proceed as currently scheduled. In the alternative, should the Commission determine that it is appropriate to revisit in this proceeding the UNE rates that it previously approved for Sprint in the Sprint UNE Order, Sprint requests that the Commission approve a postponement of the scheduled dates for testimony and the hearing, as set forth above, and establish new dates that provide an opportunity to fully address new cost studies and rates to replace the rates previously approved by the Commission in the Sprint UNE Order.

Respectfully submitted this 14<sup>th</sup> day of June 2005.



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