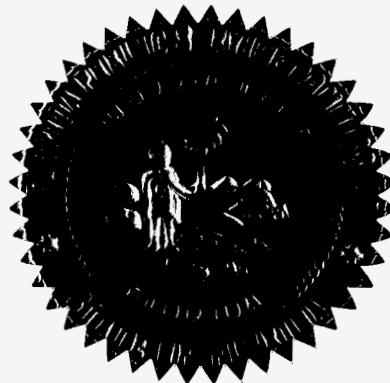


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041464-TP

In the Matter of:

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.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 13

BEFORE: COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, August 2, 2005

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR, CRR
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1 APPEARANCES:

2 MATTHEW FEIL, ESQUIRE, representing FDN
3 Communications.

4 SUSAN MASTERTON, ESQUIRE, representing
5 Sprint-Florida, Incorporated.

6 JEREMY SUSAC, ESQUIRE, and KIRA SCOTT, ESQUIRE,
7 representing the Florida Public Service Commission Staff.

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P R O C E E D I N G S

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3 CHAIRMAN BAEZ: Commissioners, I think that leaves
4 the panel item, Item 13.

5 COMMISSIONER DEASON: Yes. We're on Item 13.

6 Commissioners, I believe we need to decide Issue 1,
7 which is the question of oral argument -- I'm sorry. Does
8 staff wish to introduce the item?

9 MS. SCOTT: Yes.

10 COMMISSIONER DEASON: Please proceed.

11 MS. SCOTT: Kira Scott on behalf of Commission staff.

12 Commissioners, Item 13 addresses staff's
13 recommendation on FDN's omnibus motion for reconsideration of
14 the prehearing officer's July 8th, 2005, order in Docket
15 041464-TP, petition for arbitration of certain unresolved
16 issues associated with negotiations for interconnection,
17 collocation, and resale agreement with Florida Digital Network,
18 Inc., doing business as FDN Communications, by Sprint-Florida
19 Incorporated.

20 Staff recommends that the panel deny FDN's motion for
21 reconsideration because it does not meet the standard of review
22 for such a motion. The panel's decision today will affect
23 whether this case proceeds to hearing on August 4th, is delayed
24 or bifurcated.

25 FDN has requested oral argument, and staff recommends

1 granting this request. The parties are present and, along with
2 staff, are available for any questions you may have.

3 COMMISSIONER DEASON: Okay. Thank you.

4 Commissioners, I believe we need to decide whether we
5 are going to entertain oral argument, and I'd open it up for a
6 discussion or a motion.

7 COMMISSIONER EDGAR: Commissioner Deason, I'm
8 interested in hearing oral argument. I would ask though if
9 we're going to come close to 15 minutes a side, could we maybe
10 take a five-minute break before we get started?

11 COMMISSIONER DEASON: Sure. Let's do that. We will
12 take a short -- we will take a ten-minute recess at this point,
13 and then we'll come back -- first of all, is there any
14 objection to oral argument from Commissioner --

15 COMMISSIONER BRADLEY: No. No objection.

16 COMMISSIONER DEASON: Okay. We'll take a ten-minute
17 recess and then we will hear oral argument at that time.

18 (Recess taken.)

19 COMMISSIONER DEASON: We'll call the agenda back to
20 order. And we have had Item 13 introduced, and I believe the
21 Commission agreed to entertain oral argument. And, Mr. Feil, I
22 believe it's your motion.

23 MR. FEIL: Yes, sir.

24 COMMISSIONER DEASON: You may proceed.

25 MR. FEIL: Thank you, sir. I should start by saying,

1 Commissioners, that the best way to resolve this sort of issue
2 is through negotiation. But, unfortunately, the posture of the
3 case now is that Sprint really has little motivation to
4 negotiate. If you approve the staff recommendation, they'll
5 basically be home free and FDN won't have any ability to
6 present its case.

7 We have contentious issues, FDN does, with other
8 carriers like BellSouth. And I think much to BellSouth's
9 credit they've come to the table, they've been negotiating with
10 us recently on several issues, including the hot cut case, and
11 we're hopeful of resolving a lot of those issues.

12 But getting back to the staff recommendation. The
13 core issue raised by FDN's motion is whether or not FDN has
14 the right under the Telecom Act to arbitrate all issues raised
15 in the petition and in the response. The July 8th order of the
16 prehearing officer denies FDN's ability to arbitrate Issue 34,
17 which was identified in the prehearing order or order
18 establishing procedure, excuse me, as "What are the appropriate
19 rates for UNEs and related services under the agreement?"
20 Indeed, the July 8th order, as it's now been interpreted,
21 forecloses FDN from even asking the Commission to consider the
22 merits of FDN's arguments on Issue 34. Instead, Issue 34 is
23 now in effect rewritten to say something closer to "Should the
24 PSC impose the generic docket UNE rates on FDN?" This
25 rewritten issue is -- or appears to be or have a predetermined

1 outcome because FDN, under the July 8th order and this staff's
2 recommendation, is precluded from even presenting a case.

3 The analysis, I maintain, should begin and end with
4 the Telecom Act. Under Section 252, state commissions have the
5 obligation to arbitrate all unresolved issues raised in the
6 petition and the response.

7 The original issue is "What are the appropriate UNE
8 rates?" That covers everything relative to UNE rates and that
9 is the issue that's ripe for resolution.

10 The July 8th order and the staff recommendation
11 simply avoid the responsibilities that the Commission is
12 charged with under the Act. The Commission cannot foreclose
13 and has not in the past foreclosed a litigant from presenting a
14 case in a Telecom Act arbitration on the grounds that the same
15 or similar issue was raised before in a generic proceeding or
16 otherwise. The July 8th order and the recommendation on Page 6
17 reference a PSC decision in 1999 stating that the PSC could
18 consider UNE rates in a generic proceeding. That the
19 Commission can do so in a generic proceeding is a far cry from
20 ruling that the PSC may only do so in a generic proceeding and,
21 even further, from saying that a party has no right to
22 arbitrate certain issues other than in a generic proceeding.

23 In prior pleadings filed on this subject Sprint cited
24 a 2003 GlobalNaps arbitration order and a 2002 Supra
25 arbitration order for the proposition that a generic docket

1 determination trumps the parties' ability to arbitrate issues.
2 Neither of those orders state that though. Neither say that
3 parties are foreclosed in subsequent arbitrations from raising
4 issues heard in generic proceedings.

5 Indeed, if you look at the GlobalNaps orders, issues
6 were litigated in that arbitration even though the same or
7 similar issues were just litigated in a generic proceeding.
8 The idea of issue preclusion is entirely new to this case and
9 must be rejected under the terms of the Telecom Act and should
10 be rejected under the circumstances of this case.

11 As a matter of fact, Commissioners, if you look at
12 Item 14 on the Agenda, which was deferred today, you'll note
13 from reading that recommendation there are a number of issues
14 that'll sound familiar because they've been arbitrated before,
15 including in generic proceedings or pending in generic
16 proceedings.

17 Getting back to the Sprint case. The data and
18 assumptions used for rate setting in the generic UNE Sprint
19 docket are at least four years old. Since that time the FCC
20 has issued the TRO, the TRRO. The telecom landscape has
21 changed significantly. Methods for provisioning service have
22 changed and evolved. Mergers have caused major changes in the
23 market and new technology has been deployed throughout telecom
24 networks. All of these changes affect cost of capital, affect
25 cost inputs and other aspects of a cost model used to establish

1 UNE rates. For the staff recommendation, FDN should have no
2 opportunity to raise any of this, even in defense of Issue 34
3 as it's been reinterpreted by the July 8th order. And FDN has
4 been denied all discovery where FDN has asked for current
5 information from Sprint.

6 FDN wants to arbitrate new going-forward UNE rates.
7 When Verizon recently asked to do so, Verizon was not precluded
8 from doing so. When several carriers asked the PSC to consider
9 hot cut rates for BellSouth, though some of those rates had
10 already been set in a prior generic proceeding, the CLECs were
11 not precluded from asking. And as I indicated before,
12 BellSouth is in good faith negotiating those issues.

13 In a prior June 14th pleading in this case, I would
14 point out, Sprint said that if Issue 34 is not limited to
15 whether the generic proceeding rates should be imposed, then,
16 quote, Sprint would agree that the current procedural schedule
17 is inadequate. In that instance, Sprint would propose to
18 submit new cost studies addressing all of the new UNE rates to
19 be incorporated into the FDN agreement. FDN favors doing just
20 that which Sprint asked.

21 I want to address a few points in the staff
22 recommendation briefly and the analysis that's contained on
23 Pages 6 and 7 of the recommendation.

24 Staff indicates that the appellate process is the
25 appropriate place for FDN to address its disagreement with the

1 Commission's prior determination. FDN filed a complaint with
2 the Northern District Court of Florida, but there's nothing FDN
3 can do if the court hasn't decided that issue in the two years
4 or so that it's been pending. We want to arbitrate
5 going-forward rates, and we believe the Act permits us to do
6 so.

7 There's been a passage of time of some three years
8 since the Commission decided the case and circumstances have
9 changed to render the Commission's prior determination stale.

10 The Commission staff points out that FDN's argument
11 regarding the Telecommunications Act and its arbitration rights
12 were considered in the order of July 8th. But if you look at
13 that order, it is silent on the subject. It does not address
14 the Telecom Act or FDN's rights under 252.

15 Staff makes an attempt to distinguish the Verizon and
16 BellSouth hot cut cases, and in response to that attempt I'd
17 say as follows. FDN can't help that the court took longer in
18 our case to decide the arbitration -- or the generic
19 determination than it did in the Verizon case. FDN would
20 assert changed circumstances as Verizon has, but it was only as
21 of the July 8th order that Issue 34 was recast, and FDN has
22 been denied discovery on the subject in seeking to get current
23 information from Sprint. And the issues in the hot cut case do
24 include issues previously addressed by the Commission in the
25 generic rate setting docket where BellSouth's rates were set.

1 Staff also has a discussion regarding the doctrine of
2 administrative finality, and I think staff misses, misses the
3 point on administrative finality. In that discussion, I would
4 respond that the issue was recast as of the July 8th order, and
5 that is why FDN is now seeking to have the opportunity to
6 present evidence in support of its case and more tailored to
7 the issue as recast.

8 Secondly, even if the doctrine of administrative
9 finality attaches, staff doesn't cite the Sunshine Utilities
10 rate case in which the First District Court of Appeals said,
11 "Unlike the issues raised in prior cases, the issue of
12 prospective ratemaking is never truly capable of finality."
13 Everything needs to get revised or reviewed at some point in
14 time, and four years is a lifetime in the telecommunications
15 area.

16 Staff also references Section 120.80 of the
17 Administrative Procedures Act. I'm not exactly clear for what
18 proposition staff is referencing that for, but the provision
19 states, "Notwithstanding the provisions of this chapter," i.e.,
20 120, "in implementing the Telecommunications Act of 1996 the
21 Public Service Commission is authorized to employ procedures
22 consistent with that Act." The Telecommunications Act does not
23 state that arbitration of unresolved issues can be abrogated
24 simply because they were decided in a generic docket of two,
25 three or four or however many years ago. And this provision of

1 Section 120.80 does not say that Chapter 120 does not apply to
2 matters involving the Telecommunications Act.

3 Another reason the Commission should not preclude FDN
4 from arbitrating UNE rates in this proceeding is the public
5 interest. According to the Commission's own 2004
6 telecommunications report, competition in Sprint territory is
7 at 8 percent, which is below significantly BellSouth territory
8 wireline competition figures and Verizon.

9 Per the discovery in this case where we asked Sprint
10 to identify the number of UNE loops that were in its Florida
11 territory, we've identified that FDN is basically half of the
12 total number of UNE loops in Sprint territory. So in terms of
13 facilities-based competition in Sprint territory, if your
14 design is to encourage facilities-based competition, I would
15 point out to you first that FDN is the chief competitor in
16 Sprint territory.

17 And, secondly, if you look at a comparison of the
18 wholesale rates, the UNE rates from that generic docket to
19 Sprint's current retail rates, almost uniformly the wholesale
20 rates that we have to pay are higher than the retail rates that
21 Sprint's end-users have to pay.

22 I wanted to pass out to you, if I may, Commissioners,
23 a brief analysis and then I'll finish up.

24 Basically what this example sheet shows,
25 Commissioners, is that with the exception of Zone 1, with the

1 example being there Maitland, the wholesale UNE rates that were
2 approved in the generic docket are higher than the retail
3 rates. And in Zone 1 -- unfortunately there are only four
4 Zone 1 wire centers in Sprint territory: One of them is FSU
5 and one of them is Shalimar in the Panhandle, which is not very
6 big. Maitland is really the only example of a Zone 1 wire
7 center where there's -- at least FDN has a competitive
8 presence. So in short, not only is there not a lot of
9 facilities-based competition in Sprint territory now, but,
10 given these numbers, there's probably not going to be. So I
11 would represent to you that there's a problem in Sprint
12 territory and that it needs to be fixed.

13 We ask that you deny staff's recommendation, that you
14 continue the hearing, or at least the Issue 34 portion of the
15 hearing, to give the parties the opportunity to present cost
16 cases, or alternatively at least give FDN the opportunity to
17 present a case showing why the imposition of the generic UNE
18 rate docket rates is inappropriate. Thank you.

19 MS. MASTERTON: Good morning, Commissioners. Susan
20 Masterton representing Sprint.

21 FDN has asserted a variety of arguments in its
22 self-styled omnibus motion, but the staff recommendation is
23 correct that FDN has raised no issues either individually or
24 collectively that meet the standard for reconsideration of the
25 prehearing officer's ruling. And I want to emphasize that the

1 standard is whether the motion identifies a point of fact or
2 law which was overlooked or which the Commission failed to
3 consider in rendering its order. And that doesn't include new
4 arguments that were made subsequent to the order being issued
5 or made today through handouts, things that were not mentioned
6 either in the original motion or in the motion for
7 reconsideration.

8 First, FDN's motion identifies no point of fact or
9 law that the prehearing officer overlooked or failed to
10 consider in ruling on Sprint's motion to strike, and,
11 therefore, on this point it should be denied. FDN's essential
12 argument is that it has an absolute right to relitigate
13 Sprint's cost-based UNE rates that were previously set by this
14 Commission in a generic proceeding in which FDN intervened and
15 participated. And, contrary to what Mr. Feil said, that issue
16 was addressed in the prehearing officer's ruling.

17 If you look on Page 2 of that ruling, FDN's argument
18 that it has a legal right under the Telecommunications Act of
19 1996 to arbitrate the issues is noted. And then in the
20 prehearing officer's ruling on Page 3, he rejects that, that
21 argument, finding that FDN petitioned to intervene in that
22 proceeding and that it took the case as it found it, that it
23 participated and that it was bound by the outcome of that
24 ruling. So contrary to what Mr. Feil said, that argument was
25 addressed by the prehearing officer in his ruling. Therefore,

1 the prehearing officer fully considered FDN's argument and
2 rejected it.

3 And contrary to FDN's position, the
4 Telecommunications Act does not require relitigation of
5 decisions made in generic proceedings. In fact, it supports
6 the prehearing officer's ruling that generic proceedings are
7 permissible and appropriate as a method of determining ILEC UNE
8 rates. And there's case law out there that also supports that
9 proposition.

10 FDN attempted to introduce some new arguments in its
11 motion for reconsideration as to why Sprint's UNE rates should
12 not be included in the party's agreements related to the status
13 of competition, deployment of additional facilities. As staff
14 notes, it's procedurally improper to raise new issues in a
15 motion for reconsideration, but, in any effect, several of
16 those arguments are erroneous on their face. For instance,
17 while UNE-based competition may not be increasing, you just
18 need to look at a trade journal or financial reports to know
19 that intermodal competition is increasing substantially in ILEC
20 territories, and that ILECs face substantial risk as a result
21 of -- in the challenge to be competitive to respond to that
22 competition.

23 As far as the argument related to DLC deployment, the
24 cost study upon which Sprint's UNE rates are based assumed
25 100 percent DLC deployment, so it really is irrelevant what's

1 happening in Sprint's embedded network today.

2 FDN also fails to introduce any new point of fact or
3 law that was overlooked by the prehearing officer in denying
4 FDN's motion for postponement. FDN attempts to characterize
5 this portion of its motion as a new motion for postponement
6 based on what he interprets as the new scope of the UNE issue
7 determined by the prehearing officer.

8 And I want to correct FDN's statements that they did
9 not -- were not aware of what the scope of that issue was. All
10 throughout the negotiations the dispute between the parties was
11 always the implementation of the generic UNE order rates, and
12 that order required that those rates would not be effective,
13 that they needed to be incorporated into agreements either
14 through amendments or in new agreements in order to be
15 effective. And Sprint's been trying, since that order was
16 adopted, to implement those rates with FDN. That's been the
17 entire substance of their dispute. And in the petition for
18 arbitration Sprint made it clear, FDN agreed with Sprint's
19 representation of the issue, and in our direct testimony we
20 made it clear that that was the scope of the issue. So it's a
21 misrepresentation that FDN did not know until Sprint's response
22 to its recent pleadings that that was the scope of the issue.

23 Nevertheless, FDN has filed this motion for
24 reconsideration of postponement and said that even if the issue
25 is narrowed to that, they need more time to respond. The

1 prehearing officer considered that and ruled that, that no
2 additional time was necessary, and FDN hasn't raised anything
3 new, no point of fact or law overlooked by the prehearing
4 officer in issuing that ruling.

5 FDN also appears to be asking the panel to rule on
6 its motion to compel Sprint to respond to its first set of
7 discovery. However, the prehearing officer has already issued
8 a ruling on that motion, has granted it in part and denied it
9 in part. And, in fact, Sprint has provided its responses to
10 those discovery questions that it was required to respond to.
11 So one would have to look at FDN's motion as another motion to
12 reconsider the Commission, the prehearing officer's ruling on
13 the motion to compel.

14 And, again, FDN has identified no point of fact or
15 law that the prehearing officer overlooked or failed to
16 consider in making that ruling, so that FDN's motion should be
17 denied as it relates to compelling Sprint's responses to
18 discovery.

19 Sprint's renewed request for postponement in all of
20 the pleadings that it's filed do reveal FDN's -- I mean --
21 excuse me. I mean, FDN's renewed request for postponement
22 reveals FDN's true purpose underlying this motion and all the
23 other pleadings that it's filed in this proceeding, and that is
24 to attempt to delay the resolution of this arbitration and
25 delay the implementation of the UNE rates.

1 FDN first started out in its response to Sprint's
2 arbitration petition saying, you know, you have to delay this,
3 give us more time to negotiate, even though the parties
4 initiated negotiations for the new agreement in July of 2003.
5 So they'd been negotiating for over a year by the time Sprint
6 brought the arbitration.

7 Then at the Issue ID FDN argued, we have to postpone
8 this because there's, you know, 70 issues that need to be
9 resolved and we need more time to negotiate. However, the
10 procedural schedule was put in place, and in that ensuing time
11 within the schedule that was set forth the parties have
12 negotiated the 61 original issues that were identified down to
13 only 14 disputed issues that are, that are to be ruled on by
14 the Commission today.

15 After FDN's efforts to just generally delay the
16 arbitration failed, then FDN began filing motions asking --
17 such as the motion to postpone, the motion to compel, this
18 motion for reconsideration, and a motion that I guess was
19 actually filed today to supplement its rebuttal testimony in
20 this proceeding. And the central theme of all of these motions
21 has been to postpone a decision by the Commission as to whether
22 the UNE rates that were previously approved by the Commission
23 for Sprint should apply to FDN.

24 As Sprint has responded to staff discovery, over
25 70 CLECs have agreed to Sprint's Commission-approved UNE rates

1 today. By FDN's continued resistance to implementing these
2 rates, FDN is getting a discriminatory UNE pricing compared to
3 all the other CLECs that purchase UNEs in Sprint's territory.

4 In conclusion, despite FDN's confusing array of
5 arguments and motions set forth in its omnibus pleading, FDN
6 has failed to meet the standard for reconsideration that this
7 Commission consistently applies; that is, FDN has failed to
8 identify any point of fact or law that the prehearing officer
9 overlooked or failed to consider in its rulings on FDN's motion
10 for postponement, Sprint's motion to strike or FDN's motions to
11 compel. Therefore, the Commission should deny FDN's motion for
12 reconsideration, and the hearing in this matter should go
13 forward as scheduled on August 4th. And I'll be happy to
14 answer any questions. Thank you.

15 COMMISSIONER DEASON: Mr. Feil.

16 MR. FEIL: Just a few things in rebuttal. The
17 Commission's holding a generic docket does not permit the
18 Commission, nor does any order where the Commission initiated a
19 generic docket say that that is being done in abrogation of a
20 party's right to arbitrate any issue under the Telecom Act. So
21 the fact that there is a generic docket relative to rates or
22 any other issue that parties may want to arbitrate before or
23 subsequently doesn't really make a difference because that is
24 not, again, an abrogation of parties' rights to arbitrate in
25 individual interconnection agreements pursuant to the Telecom

1 Act.

2 Ms. Masterton mentioned intermodal competition.
3 Well, you know, if intermodal competition is all that's going
4 to be available to customers in Sprint territory and they won't
5 have wireline competition, then the Commission will be facing
6 the prospect of reporting to the Legislature that that is the
7 case.

8 We're not asserting here an absolute right to
9 relitigate. We're asserting a right to arbitrate the UNE
10 rates. The issue as framed in the order establishing procedure
11 issued May 5th was, "What are the appropriate UNE rates?" The
12 plain meaning of that issue is, encompasses -- at least in
13 FDN's reading of the plain meaning of that issue is the
14 arbitration of the UNE rates.

15 Ms. Masterton talked about Sprint's efforts to
16 implement the generic docket order. FDN filed a court action.
17 I can't help it if the court hasn't resolved that issue over
18 the last two years. Sprint has known for some time that to the
19 extent that it believes that the Commission's generic
20 determination was a change of law under the existing
21 interconnection agreement, then Sprint could have filed to
22 arbitrate an amendment to include that change of law into the
23 parties' existing interconnection agreement.

24 Sprint, in the two years that have passed, never
25 sought to do that, and yet Sprint is blaming the delay on us.

1 Moreover, during that same time period Sprint signed letters
2 of -- letter agreements extending the current agreement until a
3 new agreement was put into place.

4 With respect to the fact that -- or the allegation
5 that 70 CLECs have signed off on this new rate, well, I would
6 say that my response to that would be I'm sure that those CLECs
7 are not providing the same level of facilities-based service in
8 Sprint territory that FDN is. Moreover, none of those CLECs
9 participated in the generic proceeding or are participating in
10 the appeal or in the arbitration, with the exception of KMC.

11 And in terms of the procedural schedule, yes, we've
12 abided by the procedural schedule ever since it was put in
13 place. But what we haven't been able to get from Sprint is any
14 discovery relative to the cost study or the cost information,
15 even current cost information to prove up our case. That's why
16 we're asking for a continuance of at least Issue 34.

17 COMMISSIONER DEASON: Commissioners, questions?

18 COMMISSIONER EDGAR: This is to staff initially. My
19 understanding from FDN's presentation is that it is your
20 position that this Commission has granted similar requests to
21 Verizon recently and to BellSouth prior to that.

22 In the staff analysis it does say that this matter
23 before us can be distinguished from the Verizon decision, and
24 I'd like you to elaborate on how the Verizon decision is
25 distinguishable from this one.

1 MR. SUSAC: Yes, Commissioner. Both those are
2 distinguishable -- first, I'd like to point out the Verizon
3 docket, 050059, I believe, is distinguishable because they let
4 the appellate process run. They let the proper review of the
5 courts go forth, the order came down. And, secondly, it's
6 distinguishable for -- they also pointed out in their petition
7 that the change in circumstances coming from the triennial
8 review should change their cost of input, cost of capital
9 inputs and their depreciation inputs. They're very specific
10 and particular with their petition based on changed results and
11 they let the appellate process run.

12 Here you have a different matter. FDN has an appeal
13 pending. Excuse me. We don't know what the court will do. It
14 would not be wise at this, at this juncture to go ahead and
15 arbitrate these rates.

16 COMMISSIONER DEASON: Well, let me ask staff a
17 question. The wording of Issue 34, when that was first put
18 forward what was the understanding as to the scope of that
19 issue, or was it not defined?

20 MS. SCOTT: I believe, I believe that the scope of
21 the issue as stated -- there wasn't much discussion as to
22 really whether or not there was a difference between the
23 parties on that issue. It was -- everybody understood it as
24 how it was stated at the time, which was what are the
25 appropriate UNE rates in this, for this interconnection

1 agreement that they're negotiating? Not until FDN's motion for
2 postponement later on was there any difference in opinion. So
3 at that point though --

4 COMMISSIONER DEASON: Was there an Issue ID
5 conference in this case?

6 MS. SCOTT: Yes, there was, sir.

7 COMMISSIONER DEASON: Was there a discussion at that
8 point that FDN anticipated a full arbitration with cost studies
9 and basically a replication of what took place in the generic
10 docket?

11 MS. SCOTT: No, I do not believe that was discussed.
12 Only the language of the issue, there was some tweaking to it.
13 Other than that, there wasn't an elaborate discussion.

14 COMMISSIONER DEASON: Further questions?

15 COMMISSIONER EDGAR: This is to FDN. Why do you
16 believe that the Commission would have conducted a UNE rate
17 generic proceeding, if it was not to establish UNE rates on a
18 go-forward basis?

19 MR. FEIL: I think that the Commission can, with the
20 parties' participation, hold a generic proceeding, but I don't
21 think that a generic proceeding can be used as a pretext for
22 abrogation of rights under the Act. True, it's not all that
23 common now here in 2005 where an individual carrier will say, I
24 want to arbitrate rates. Back in probably 2000 or before it
25 took place probably more often with, say, AT&T and BellSouth

1 where rates were arbitrated in the context of an individual
2 carrier-to-carrier arbitration.

3 But I'm not saying that the Commission exceeds its
4 authority if it approves an issue in a generic proceeding. FDN
5 has participated in generic proceedings. What I'm saying is
6 just because there's a generic proceeding, doesn't mean I'm
7 forever foreclosed of arbitrating any issue decided in the
8 generic proceeding. And as I indicated when I made my
9 presentation, the Commission sees issues more than once. I
10 mean, it's not uncommon. I mean, if the only difference here
11 is that it's a rate rather than a transport obligation, then
12 there's, that's really not a difference.

13 COMMISSIONER DEASON: Mr. Feil, what obligation do
14 you and your client have, if you do not wish to be bound by a
15 generic UNE rate proceeding, what obligation do you have to, if
16 any, to show that those generic rates are no longer applicable
17 and that there have been changed circumstance and to put
18 parties on notice that that is your position and that
19 they're -- and that we need to proceed accordingly?

20 MR. FEIL: Well, in terms of what we've done up to
21 this point, as I indicated, we filed the court action, which
22 the court has not acted on. After Sprint had indicated that it
23 wanted to implement the UNE rates via amendment or otherwise,
24 we filed a motion for stay with the Commission to the degree
25 that a stay was indeed necessary, and that motion has never

1 been ruled on.

2 In terms of the issue itself, Issue 34 --

3 COMMISSIONER DEASON: Well, the fact that it hasn't
4 been ruled upon, does that in essence mean you've been granted
5 your stay because there's not been any -- those rates have not
6 been implemented; correct?

7 MR. FEIL: Right. I think you can make that
8 argument. Yes, sir. Or that it is effectively not necessary
9 or not ripe until, until the time comes.

10 With respect to Issue 34 itself, as Ms. Scott said,
11 there was not a great deal of discussion through the Issue ID
12 process of what either side intended to do relative to that
13 issue. I mean, Ms. Scott seemed to indicate that FDN didn't
14 say, we're going to arbitrate the rates to the nth degree, but
15 nor did Sprint say that FDN is foreclosed from arbitrating the
16 rates or even asking for the cost study. In each instance
17 where we've asked for the cost study there was never any
18 written response from Sprint. And in terms of the discovery
19 we've served on them, they've objected, haven't responded and
20 thus far haven't been compelled to answer that discovery.

21 COMMISSIONER DEASON: Did you review the Verizon
22 petition which you referred to in your pleading?

23 MR. FEIL: Yes, sir.

24 COMMISSIONER DEASON: Was it your opinion they were
25 very specific about two issues being depreciation and cost of

1 capital and set forth reasons in their opinion why this
2 Commission should entertain a review?

3 MR. FEIL: I think that the Verizon petition does do
4 that. But, again, that's not an abrogation of a party's right
5 to -- or a generic proceeding such as Verizon has should not be
6 an abrogation to an individual carrier's right to arbitrate.
7 Moreover, to the extent that Verizon claimed the TRO changed
8 this input or that input, that's the same TRO that was issued
9 after the generic docket in the Sprint proceeding.

10 COMMISSIONER DEASON: Did you make that claim
11 anywhere in this proceeding up until the point you filed your
12 reconsideration?

13 MR. FEIL: Not in the pleadings, no, sir.

14 COMMISSIONER DEASON: Okay.

15 MR. FEIL: But we did in our direct testimony
16 indicate that the information input into the cost model was
17 some four years old and, therefore, stale. That is in our
18 direct testimony.

19 COMMISSIONER DEASON: Any further questions?

20 COMMISSIONER BRADLEY: Well, a comment. The standard
21 for, for reconsideration is, is somewhat static and very high.
22 And I listened very carefully and I'm having a little
23 difficulty determining what the possible mistake of fact or law
24 might have been as it relates to the prehearing officer's
25 ruling, and that is the reason why we're here. We're here, and

1 we've had some discussion about the merits of this case, but
2 we're here primarily to give consideration to reconsideration
3 of the prehearing officer's ruling. And I've been trying to
4 listen and decide where the mistake of fact is or where the
5 mistake of law is, and I haven't quite heard either of those
6 questions be answered.

7 I guess my question would be of the two parties, at
8 this point is it possible for you all to continue to negotiate?

9 MR. FEIL: Commissioner, I think it's possible. But
10 the problem is in terms of the relative leverage between the
11 parties where we are here on the eve of the hearing with FDN
12 having no information via discovery or the cost study and the
13 staff recommendation suggesting that we should be shut out from
14 even making our case, Sprint has, you know, very little
15 motivation to, to come down and meet us somewhere in the middle
16 on Issue 34.

17 COMMISSIONER BRADLEY: Well, I don't, I don't think
18 that staff is, is implying that you should be shut out. What
19 staff is dealing with purely is the legal situation, that is a
20 mistake of fact or law. And, you know, I've heard it stated
21 that, you know, this was considered by the prehearing officer
22 conceptually.

23 But my question is is it possible for you all to
24 continue to negotiate and avoid, you know, arbitration is the
25 issue? Negotiation is the other option.

1 MS. MASTERTON: Yeah. I mean, can I respond on
2 behalf of Sprint?

3 COMMISSIONER BRADLEY: Yes.

4 MS. MASTERTON: And you're talking specifically about
5 the UNE rate issue. I mean, we are always open to negotiation,
6 and we've had some discussion with FDN along those lines. I
7 guess the problem that we're faced with is that these rates,
8 you know, apply to everybody. And FDN, unless, you know, they
9 have some uniqueness to FDN as to why they should have a
10 different rate, it's difficult for us -- I mean, it's
11 discriminatory, in fact, for us to agree to a different rate
12 for FDN just because they don't like the rates that were
13 approved by the Commission. So, I mean, we're somewhat limited
14 in our ability to completely negotiate new rates just because
15 those are the rates that were approved by the Commission and
16 the rates that are in place for every other CLEC.

17 But, but, you know, we are open to discussion with
18 FDN on their unique circumstances and what we might be able to
19 do, you know, to address that.

20 MR. FEIL: And, Commissioner, we, too, are open for
21 discussions. But part of the problem is that you have an
22 arbitration hearing that's supposed to start on Thursday,
23 which -- and we have this pending matter before you today,
24 which -- so in terms of getting something done, you know, now,
25 it's not likely to happen.

1 And with respect to Ms. Masterton's response that it
2 would be discriminatory, the timing of installation of UNE
3 rates is always going to be discriminatory because not
4 everybody is going to have the same rate on the same day. To
5 the extent FDN and Sprint negotiate a rate of X, Sprint is
6 certainly free to offer that rate to any of the other carriers
7 it wishes to offer it to.

8 COMMISSIONER BRADLEY: Both parties have compelling
9 arguments, but I still can't, in my mind, sort through this
10 discussion and determine where the mistake of fact or law is.

11 MR. FEIL: Commissioner, if I may, with respect to
12 the mistake of law, the chief thing, it seems to me, is that
13 the July 8th order says that if you had an issue decided in a
14 generic proceeding, that means that you do not have the right
15 under the Telecom Act to arbitrate that issue even though the
16 Telecom Act says you have that right. I mean, that is the
17 chief mistake of law that we believe the July 8th order makes.

18 MS. MASTERTON: I just want to say, I mean, I think,
19 I think Mr. Feil is misrepresenting what the order said. I
20 don't think it said you can never do it. It just said in this
21 case there was a generic proceeding, FDN did participate as a
22 full party, took the case as it found it, in fact, has appealed
23 it and is awaiting a ruling on that appeal and, therefore, in
24 this instance is not entitled to relitigate the case in this
25 arbitration. And, in fact, you know, in the direct testimony

1 that FDN filed, that was all they did. Every point they
2 raised, and we filed this in our motion to strike, was an
3 identical point to a point that was ruled on in the generic
4 docket and that is the subject of the appeal. And so I think
5 that the prehearing officer's ruling was much narrower than FDN
6 represents it and was correct as a point of law.

7 MR. FEIL: BellSouth's rates are on appeal, but
8 they're also being litigated.

9 COMMISSIONER DEASON: Further questions or a motion?

10 COMMISSIONER BRADLEY: Question?

11 COMMISSIONER EDGAR: Okay. Well, similar to another
12 issue that we had before us earlier today, I am finding some of
13 the discussion and the argument interesting. Actually I'm
14 enjoying the discussion. But I am not persuaded that the legal
15 threshold for the granting of a motion for reconsideration is
16 met in this instance. And I am also persuaded by the fact
17 distinguishing this matter from the Verizon case that we heard
18 previously, recently, that had already gone through the
19 appellate process; whereas, this one has some issues pending
20 before the appellate court. So I'd like to go ahead and make a
21 motion in support of the staff recommendation.

22 COMMISSIONER DEASON: Is there a second?

23 COMMISSIONER BRADLEY: Second.

24 COMMISSIONER DEASON: Moved and seconded. All those
25 in favor, say aye.

1 (Unanimous affirmative vote.)

2 COMMISSIONER DEASON: Show that the motion carries.

3 And that disposes -- well, do we have any other
4 issues on, on 13?

5 MR. FEIL: Issue 3.

6 COMMISSIONER DEASON: Issue 3. We certainly are not
7 going to close the docket at this point. We have the hearing
8 day after tomorrow. So without objection, the docket shall
9 remain open. And I believe that's the last issue on Item 13
10 and that's, Item 13 is the last item on today's agenda. Thank
11 you all.

12 (Agenda Conference concluded at 11:46 a.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 8TH DAY OF AUGUST, 2005.

Linda Boles
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FPSC Official Commission Reporter
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