

ORIGINAL

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Subject: FW: Corrected E-filing for FPSC Docket No. 040156-TP
Attachments: FDN Motion for Reconsideration.doc

To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket FDN Communication's Motion for Reconsideration.

In accordance with the Commission's e-filing procedures, the following information is provided:

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(b) Docket No. and Title: 040156-TP, 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.

(c) The party on whose behalf the document is filed: Florida Digital Network, Inc. d/b/a FDN Communications

(d) Number of pages of the document: 14 pages.

(e) Description of each document attached: Motion for Reconsideration and Motion for Temporary Relief from Enforcement by Florida Digital Network, Inc. d/b/a FDN Communications.

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GCL _____ *Life is like a coin, you can spend it any way you wish, but you can only spend it once....*

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of)
Amendment Interconnection Agree-)
ments with Certain Competitive)
Local Exchange Carriers and)
Commercial Mobile Radio Service)
Providers in Florida by Verizon)
Florida, Inc.)
_____)

Filed: December 20, 2005

Docket No.: 040156-TP

**MOTION FOR RECONSIDERATION AND MOTION FOR TEMPORARY
RELIEF FROM ENFORCEMENT BY
FLORIDA DIGITAL NETWORK, INC.
d/b/a FDN COMMUNICATIONS**

Pursuant to Rules 25-22.060 and 25-28.106.204, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications (“FDN”) respectfully moves the Commission to reconsider its Final Order issued in the captioned case on December 5, 2005.¹ Further, since the Final Order requires parties to submit a conforming amendment within 30 days, the Commission should either extend that period or refrain from enforcing that part of its Order or the conforming amendment to the extent relating to the subject of this motion. In support of this Motion, FDN states as follows:

SUMMARY

1. This motion concerns one specific aspect of the Final Order: the Order’s imposition of a cap of ten DS-1 dedicated transport circuits on all routes between all Verizon wire centers, regardless of tier, rather than just to those routes where DS-3

¹ Order No. PSC-05-1200-FOF-TP (hereinafter “Final Order” or the “Order”).

dedicated transport is unimpaired, i.e., routes between Tier 1 or Tier 2 wire centers.² This part of the Final Order must be reconsidered and reversed.

2. In deciding on a DS-1 dedicated transport cap that applied universally, the Commission overlooked several points of law and failed to consider and to apply the rules of statutory construction and the FCC's intent in establishing the DS-1 dedicated transport cap.

3. The Final Order effectively deletes critical language from the text of the TRRO and impermissibly rewrites the TRRO by applying the DS-1 dedicated transport cap to all wire centers regardless of tier. Under the Final Order, the cap improperly applied in all settings, even where it makes no net difference whatsoever to the impairment analysis. Further, the DS-1 dedicated transport cap should apply consistently from ILEC to ILEC throughout the state, and in BellSouth territory, at least, the cap will only apply on routes where DS-3 transport is unimpaired.³

4. The Commission should not require the parties to file a conforming amendment to address the issue which is the subject of this motion or should refrain from enforcing its Order or an amendment insofar as they relate to the issue which is the subject of this motion until this matter is resolved. It would be inefficient and wasteful for the CLECs and for Verizon, as well as disruptive to CLEC end use customers, to require the rearrangement of any UNE DS-1 transport circuits over the maximum of 10

² See Final Order at p. 36.

³ The Prehearing Order in Docket No. 041269-TP, BellSouth's generic change of law proceeding, the parties did not dispute that the cap of 10 DS-1 dedicated transport circuits applied only on routes where DS-3 transport is unimpaired. Order No. PSC-05-1054-PHO-TP, issued October 31, 2005, p. 48. In addition, in Docket No. 041464, an interconnection agreement arbitration case between FDN and Sprint, the staff recommendation provides that the cap of 10 DS-1 dedicated transport circuits should only apply on routes where DS-3 transport is unimpaired. The Commission approved that staff recommendation at the Dec 20 Agenda Conference.

circuits if the Commission were to ultimately reverse itself on reconsideration as FDN requests.

standard OF REVIEW ON RECONSIDERATION

5. A motion for reconsideration should be granted if it identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its Order.⁴ The motion should be based upon matters set forth in the record and susceptible to review.⁵

6. FDN maintains that the standard of review for granting a motion for reconsideration is met in this case because the Final Order overlooks the points of law identified below.⁶

RECONSIDERATION ARGUMENT

7. An analysis of the issue presented by this motion should start with the TRRO itself. Paragraph 128 of the TRRO states in part:

On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS-1 transport circuits that each carrier may obtain on that route to 10 circuits. . . . When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS 3 facility, we find that our DS3 impairment conclusions apply.

⁴ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962), *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981); *In Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

⁵ *Id.*

⁶ FDN's position is supported by evidence in the record. The prefiled direct testimony and prefiled exhibit of the Competitive Carrier Group ("CCG") support the contention that the cap of 10 DS-1 dedicated transport circuits should only apply on routes where DS-3 transport is unimpaired. See Tr. 165 – 166 (prefiled direct of CCG panel, pp. 23 – 24) and Exhibit No. 16, pp. 27.

(Emphasis added.) In Appendix B to the TRRO, the new rule § 51.319(e)(2)(B) states in pertinent part:

A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

In examining these two quoted provisions, the Final Order in the instant docket observes,

The language in the TRRO and the language in the rule can lead to different conclusions regarding the DS1 cap. However, we must look to the rule for guidance on this matter. If the parties believe the FCC's TRRO is not clear on this matter, they could seek clarification from the FCC.⁷

8. The Commission failed to consider that applying the cap as the Final Order suggests (without a proviso for DS3 unimpaired routes) cannot be achieved unless one effectively deletes significant portions of ¶ 128. Paragraph 128 begins, “On routes for which we determine that there is no unbundling obligation for DS3 transport.” This stated proviso, if the Final Order is not reconsidered, would be rendered superfluous and pointless, since the DS1 cap would apply whether DS3 impairment exists or not. Taking the argument a step further, if the DS-1 cap applied universally, there would be no reason for the FCC to also state at the end of ¶ 128, “we find that our DS3 impairment conclusions apply,” because those impairment conclusions would be without effect should the DS1 cap apply to every route. In short, one cannot reconcile the Final Order's interpretation of the DS-1 cap with the terms of ¶ 128 unless the above language from ¶ 128 was deleted in its entirety.

9. If there is a lack of clarity in the TRRO regarding when the cap of 10 UNE DS1 dedicated transport circuits applies and when it does not, the Final Order's

⁷ Final Order at p. 36.

interpretation/application of the TRRO -- that the cap applies universally to all dedicated transport routes -- does not resolve the issue in a way that (a) harmonizes all parts of the TRRO and gives meaning to all of the TRRO's provisions and (b) makes a net difference to the impairment analysis. The Final Order is thus inconsistent with the rules of statutory construction and the FCC's intent. By granting this motion for reconsideration, the Commission will harmonize all parts of the TRRO, will give meaning to all provisions of the TRRO, rather than delete provisions, and arrive at an end result consistent with impairment analysis.

10. There is no apparent ambiguity in ¶ 128 standing alone; but when ¶ 128 is read in conjunction with the rule, the Final Order suggests the presence of ambiguity or conflict.⁸ To the extent that the Final Order finds a conflict exists (perhaps as an "as applied" conflict) and by asserting the rule language should control, the Final Order effectively rewrites the TRRO, deleting all of the language referenced above from paragraph 128.

11. In the TRRO, the FCC created three tiers of wire centers and linked the dedicated transport impairment analyses to those tiers. DS3 dedicated transport is unimpaired where the end points of the route are either Tier I or II. And both DS1 and DS3 dedicated transport are unimpaired where the end points of a route are both Tier I.⁹ The crux of this dispute on reconsideration is with transport involving Tier III wire centers, because dedicated transport between a Tier I, II or III wire center and a Tier III

⁸ Direct conflict would exist if, for instance, the rule expressly stated that the cap applied on all routes where there is an unbundling obligation for DS3 transport.

⁹ Per Exhibit No. 10 (AFC-1), page 4, there are thirteen Tier I or Tier II wire centers in Verizon Florida territory, leaving all other Verizon wire centers in Florida as Tier III wire centers, by definition. 47 CFR § 319(e)(3)(iii).

wire center is, with very limited exception, **always** impaired.¹⁰ Notably, the FCC did not make an explicit finding of nonimpairment as to DS-1 dedicated transport where a Tier III wire center was involved, and the impairment analysis remanded to the FCC by the D.C. Court of Appeals is the focus of the TRRO.

12. Even though a carrier could order absolutely massive amounts of unbundled DS3 transport capacity, up to 12 UNE DS3s or the equivalent of 336 DS-1 channels,¹¹ from a Tier I, II or III wire center to a Tier III wire center because DS-3 transport is unimpaired, the Final Order would hold that a carrier cannot order more than 10 UNE DS1s on that route.¹² On its face, this makes no practical sense. Logically, the only time ordering equivalent services would enter the impairment equation is when a carrier is trying to “game” the system by ordering infinite UNE DS1s to avoid the prohibition on ordering UNE DS3s. And that is the very position FDN advocates here. Taking the Verizon side of the argument to its logical conclusion means: (1) the FCC was not concerned at all with impairment when it came to UNE DS1 transport and Tier III wire centers, but, for some unexplained purpose, was concerned with incenting CLECs to order more DS3s and fewer DS1s and (2) for the majority of the dedicated transport routes in the country and in Verizon Florida territory, CLECs must (a) reconfigure existing DS1 UNE transport circuits, including those combined with loops in EELs,

¹⁰ The only exception, per Rule 47 CFR § 51.319(e)(2)(iii)(B), is the limit of 12 unbundled DS3 dedicated transport circuits on routes where DS3 transport is impaired. In effect, impairment for a particular carrier on a particular route stops at a particular volume of DS3 circuits, i.e. 12 DS3s.

¹¹ See TRRO ¶ 128.

¹² Verizon may emphasize (and take the FCC out of context) that it is “consistent with the pricing efficiencies of aggregating traffic” to order a DS3 transport circuit on a route where a carrier will have 11 or more DS1s. Even if one accepted this perceived efficiency as true, where DS3 dedicated transport is impaired, a carrier’s ordering DS1 after DS1 instead of a DS3 does not change the fact that DS3s are available as UNEs, and in large quantities, on that route. The TRRO’s focus is impairment, not perceived pricing/ordering efficiencies as some sort of separately identifiable problem. Besides, as will be explained above, it is ludicrous to suggest that it is somehow “efficient” to disrupt the service of existing customers served via DS1 circuits in favor of putting them on a DS3 when both UNE DS1s and DS3s are available on the same route anyway and there is no net difference to impairment.

seriously disrupting the service for thousands of customers,¹³ and (b) change the way they order UNE DS1 transport and EELs when doing so makes no difference whatsoever when it comes to impairment.

13. The intent of ¶ 128 of the TRRO is obvious. The FCC placed a cap of 10 UNE DS1s on routes where DS3 was unimpaired because the FCC did not want requesting carriers to by-pass the DS3 impairment test through ordering an infinite number of UNE DS-1s that would equal or exceed a disallowed UNE DS3. In other words, the FCC closed a possible loop hole in the impairment analysis, finding that 11 UNE DS1s are the economic equivalent to one UNE DS3.¹⁴ The cap serves no legal purpose otherwise.

14. The FCC itself has held that its orders and the rules adopted thereby **should be read in conjunction** with one another and the FCC's other rules.¹⁵ In other words, one should not read an FCC rule by turning a blind eye to the orders which spawned and explicate the rule. This, the Final Order failed to consider. Indeed, the Commission recognized "different results" could be found by comparing ¶ 128 with § 51.319(e)(2)(B) and therefore the Commission should have invoked the rules of statutory construction to aid its interpretation. Two pillars of statutory construction of particular applicability here are (a) that one must read all provisions of a statute or rule together to give all of the words in the statute or rule meaning and (b) that all related statutes or rules must be read

¹³ The majority of Verizon's wire centers will be Tier III, and it is in Tier III wire centers where, by definition, there are fewer customers, where collocation is less likely and where, therefore, EELs are more likely. Hence, if the DS1 cap applies universally to all tiers and routes, there is a great likelihood of customer disruption for UNE DS1 transport circuits to be groomed onto a UNE DS3 transport circuit or otherwise rearranged.

¹⁴ The cap of ten DS-1 UNE loops per building exists to close a similar "escape" in the impairment analysis regarding loops. Only ten UNE DS1 loops per building are permitted because the FCC obviously did not want carriers to bypass the one UNE DS3 loop per building limit by ordering an infinite number of UNE DS1 loops to the same building.

¹⁵ *In the Matters of TSR Wireless, LLC, et al. v. U.S. West Communications, Inc.*, 2000 WL 796763 (FCC), 15 F.C.C.R. 11166.

in pari material to give effect to each part. See, e.g. Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1273 (Fla. 2000), and Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992). As explained above, the only way the Commission can affirm the Final Order on this issue is if the Commission deletes significant portions of ¶ 128 of the TRRO. FDN asserts that instead, the Commission must interpret ¶ 128 of the TRRO and its adopted rule § 51.319(e)(2)(ii)(B) together, and as a whole, so that none of the FCC's words are effectively omitted and the FCC's obvious intent to close a loop hole in the impairment analysis is honored. This can be done if, consistent with ¶ 128, the cap of ten UNE DS1 dedicated transport circuits applies only "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport." This interpretation does not delete or negate any portion of rule § 51.319(e)(2)(ii)(B), but harmonizes the rule with ¶ 128.

15. Even if clarification from the FCC were appropriate under the circumstances,¹⁶ the Commission should not rewrite the TRRO pending a clarification and take the most restrictive interpretation possible, particularly where that position will cause needless disruption to end use customers while their services are rearranged.

16. Throughout BellSouth's nine-state region, the cap of 10 DS1 dedicated transport circuits will only apply to routes where DS3 transport is unimpaired.¹⁷ In the FDN-Sprint arbitration, the Commission approved the same application of the DS-1 cap.

¹⁶ While pending requests at the FCC may address the DS1 cap issue, unfortunately, the FCC has been very slow in recent years to address reconsideration/clarification requests.

¹⁷ See the Prehearing Order in Docket No. 041269-TP, BellSouth's generic change of law proceeding in Florida, Order No. PSC-05-1054-PHO-TP, issued October 31, 2005, p. 48. BellSouth agreed to interconnection agreement language reflecting this application of the cap for all states in its region.

Based on its research, FDN acknowledges state commissions have reached mixed results on the DS1 cap issue. While states like Michigan and Ohio have looked only at the rule and held the cap of 10 DS1 dedicated transport circuits applies to every route, New York and Maine have harmonized the rule and the order and found that the cap only applies on routes where DS3 is unimpaired. FDN maintains that on an issue involving the application of a single FCC rule on impairment, there should be consistency among the Florida ILECs and one rule for the entire State. The Final Order did not address consistency in Florida. For the reasons explained above, and to minimize customer disruption, the rule in Florida for all ILECs should be consistent with the rule adopted for BellSouth and Sprint.

RELIEF FROM ENFORCEMENT OF ORDER

17. A motion for reconsideration generally may not stay the effect of the order being reconsidered. Rule 25-22.060(c), Florida Administrative Code. Therefore, until this matter is resolved,¹⁸ FDN requests that the Commission either temporarily not require the parties to file a conforming amendment to address the issue which is the subject of this motion or temporarily refrain from enforcing its Order or amendments insofar as they relate to the issue which is the subject of this motion. It would be inefficient, expensive and wasteful for the CLECs to submit orders and for Verizon to process orders for the rearrangement of any UNE DS-1 transport circuits over the maximum of 10 circuits on every route in Verizon Florida territory if the Commission were to ultimately reverse itself on reconsideration as FDN requests. Additionally, as

¹⁸ FDN contemplates this temporary relief would extend until an order on reconsideration is issued and the Commission's directives, if any, are carried out. Thus, if the Commission ruled in FDN's favor on reconsideration, the relief would extend until an order on reconsideration was issued and conforming amendments were filed and approved, if the Commission so directed. Any parties that may choose to appeal the Commission's ruling on the motion for reconsideration would have to seek a stay pending appeal by separate pleading.

stated above, such rearrangements will cause disruption to end use customer's service – a disruption that may ultimately prove unnecessary.

18. FDN maintains that Verizon is not harmed in any meaningful way by this request for temporary relief.

conclusion

For the foregoing reasons, the Commission should grant this motion by ordering the following: (a) the cap of ten DS-1 dedicated transport circuits shall only apply on routes where DS-3 dedicated transport is impaired, (b) amendments conforming with the Commission's approval of this motion will be filed within 30 days of the Commission's order, (c) the Commission will not require the parties to this docket to file a conforming amendment to address the DS-1 cap per the Final Order and/or will refrain from enforcing the Final Order as to the DS-1 cap until this issue is resolved.

Respectfully submitted this 20th of
December, 2005.

_____/s/_____
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of)
Amendment Interconnection Agree-)
ments with Certain Competitive)
Local Exchange Carriers and)
Commercial Mobile Radio Service)
Providers in Florida by Verizon)
Florida, Inc.)

Docket No.: 040156-TP

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail, for those with an email address listed below, and U.S. mail to the persons listed below this 20th day of December 2005.

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This 20th day of December, 2005.

_____/s/_____
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