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Timolyn Henry

From: Whitt, Chrystal [LTD] [Chrystal.Whitt@sprint.com]
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Subject: 041464-TP Sprint's Motion for Reconsideration
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Filed on behalf of:

Susan S. Masterton
Counsel
Law/External Affairs
Sprint
1313 Blair Stone Rd.
Tallahassee, FL 32301
M/S FLTLHO0102
(850) 599-1560 v
(850) 878-0777 f
susan.masterton@sprint.com

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Wang

ORIGINAL

Sprint

Susan S. Masterton
Attorney

Law/External Affairs
FLTLHO0107
Post Office Box 2214
1313 Blair Stone Road
Tallahassee, FL 32316-2214
Voice 850 599 1560
Fax 850 878 0777
susan.masterton@mail.sprint.com

January 25, 2006

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 Motion for Reconsideration of Order No. PSC-06-0027-FOF-TP

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,

Susan S. Masterton

Susan S. Masterton

Enclosure

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 25th day of January, 2006 to the following:

Florida Public Service Commission
Kira Scott
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Florida Public Service Commission
Cheryl Bulecza-Banks/ Dale Buys
James Maduro/ John Mann
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Cole, Raywid & Braverman
Michael C. Sloan, Counsel
1919 Pennsylvania Avenue, NW
Washington, DC 20006

FDN Communications
Mr. Matthew Feil
2301 Lucien Way, Suite 200
Maitland, FL 32751-7025

Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Filed: January 25, 2006

SPRINT-FLORIDA INCORPORATED'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-06-0027-FOF-TP

Pursuant to Rules 25-22.060 and 28-106.204, F.A.C., Sprint-Florida Incorporated (hereinafter, "Sprint") files this Motion for Reconsideration of Order No. PSC-06-0027-FOF-TP ("Arbitration Order"), issued January 10, 2006. Sprint seeks reconsideration of the Florida Public Service Commission's ("Commission") decision on certain issues in Sprint's interconnection agreement arbitration with FDN. Specifically, Sprint seeks reconsideration of the Commission's decision on Issues 5, 21, 22 and 24. As support for this Motion, Sprint states as follows:

INTRODUCTION

In its rulings in the Arbitration on each of the Issues 5 (definition of "local traffic"), 21 (resale of contract service arrangements), 22 (DS1 dedicated transport cap) and 24 (availability of UNEs) the Commission overlooked or failed to consider several critical points of fact or law that mandate that the Arbitration Order be modified. As as result the Commission should reconsider its decision on these issues to:

Issue 5 – define "local traffic" as traffic that originates or terminates in

Sprint's local calling area, or, at a minimum, delay LATA-wide local calling until Sprint's rebalancing is complete

Issue 21 - Allow Sprint to assess termination liability on its end users when FDN obtains a Contract Service Arrangement for resale, or, in the alternative, allow Sprint to recover any unrecovered up-front costs associated with a CSA, or apply a lesser resale discount

Issue 22 – Conform its decision in the Verizon TRRO proceedings to say that the cap DS1 cap of 10 applies all wire centers, regardless of the DS3 impairment status

Issue 24 - Define "eligible local telecommunications service" as "local exchange service" and prohibit FDN from providing information services over a UNE unless it also provides an eligible telecommunications service over that UNE.

Sprint's specific arguments on each of the issues are fully set forth below.

STANDARD FOR RECONSIDERATION

As the Commission has recognized consistently in its rulings on Motions for Reconsideration, the standard for granting reconsideration is that the Motion must identify some point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See, *Stewart Bonded Warehouse 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 161 (Fla. 1st DCA 1981). The Commission has held that it is not a sufficient basis for a Motion for Reconsideration that the movant merely believes that a mistake was made nor is it

appropriate for the movant to reargue the same points of fact or law that were considered in the original ruling. See, *Stewart Bonded Warehouse* at 317; *State ex.rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958).

REQUEST FOR RECONSIDERATION

A. ISSUE 5 - LOCAL CALLING AREA

1. Introduction

Issue 5 addresses the definition of "local traffic" for the purposes of defining intercarrier compensation obligations between Sprint and FDN. In rendering its decision that the local calling area for the purposes of intercarrier compensation between FDN and Sprint should be the LATA, the Commission overlooked or failed to consider several key points of fact and law. First, while finding that a LATA-wide local calling scope in this arbitration was not anti-competitive in a negotiations context, the Commission overlooked or failed to consider that a LATA-wide local calling scope was anticompetitive to other carriers, particularly IXCs. In addition, the Commission relied heavily on the fact that BellSouth apparently offers FDN a LATA-wide local calling scope for intercarrier compensation purposes, but overlooked or failed to consider the differences between Sprint and BellSouth that make a LATA-wide local calling scope inappropriate for Sprint. Furthermore, the Commission overlooked or failed to consider that there is no evidence in the record as to the specific terms and conditions of the BellSouth/FDN agreement or whether and how the terms of the agreement would be appropriate for Sprint. Finally, the Commission based its decision that a LATA-wide local calling scope was appropriate for the Sprint/FDN agreement on the reduction in Sprint's access charges that will result from the Commission's recently

implemented Rebalancing Order.[1] However, the Commission overlooked or failed to consider that the access reductions associated with rebalancing will be implemented over time, so that the effect on Sprint's access revenues of FDN's LATA-wide local calling scope (and the anticipated adoption of the FDN agreement by other carriers) will be greater in the initial years of rebalancing.

2. LATA-wide local traffic is anticompetitive to IXCs and other carriers

First, the Commission determined that "competitive neutrality, in terms of impact on negotiations, is no longer a concern." (Order at page 9) However, competitive neutrality involves not only neutrality as it relates to negotiations, but also neutrality as it relates to higher rates that other carriers, particularly IXCs, would have to pay for termination of traffic that originates and terminates at the same end points as FDN's intraLATA traffic. (Sywenki Testimony at page 7, Tr. at 123) Because IXCs pay access charges rather than reciprocal compensation for the termination of traffic, and because Sprint's access charges are higher than its reciprocal compensation rates, IXCs will pay more than FDN for terminating the same traffic under the Commission's Order. (In the case of the Sprint/FDN agreement, the reciprocal compensation rate actually is zero since the parties have agreed to bill and keep for the exchange of local traffic.) In its earlier ruling defining "local" for intercarrier compensation purposes in the Generic Reciprocal Compensation docket, the Commission

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[1] *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 a 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 on a revenue-neutral manner through decreases in intrastate switched access charges with offfsetting 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*, Docket No.s 030867-TL, 030868-TL, 030869-TL and 030961-TI, Order No. PSC-03-1469-FOF-TL,

found this inequality to be discriminatory and the Supreme Court agreed. (*In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Order No. PSC-02-1248-FOF-TP in Docket No. 000075-TP, issued September 10, 2002, hereinafter "Generic Reciprocal Compensation Order" at page 52; *Sprint-Florida, Inc. v. Jaber*, 885 So. 2d 286 (Fla. 2004)) The Commission overlooked or failed to consider this anti-competitive aspect of its ruling in the Arbitration Order.

3. Sprint is different from BellSouth

The Commission also appeared to be persuaded heavily by evidence in the record that "BellSouth has the same obligations and appears to have adjusted to any reduced revenues by offering products and services that win new customers and retain existing ones." (Order at page 9) In making this determination, the Commission overlooked or failed to consider testimony distinguishing Sprint as a carrier from BellSouth and thereby distinguishing the impact of a LATA-wide calling scope on Sprint from the impact on BellSouth. (Sywenki Rebuttal Testimony at pages 7-8, Tr. at 139-140) As Sprint's witnesses Mr. Sywenki discussed, Sprint is more rural than BellSouth, incurs higher costs to provide service and, therefore, is more reliant on access charge revenues than BellSouth. (Sywenki Rebuttal Testimony at page 7, Tr. at 139) In addition, the Commission overlooked or failed to consider that FDN offered no specific evidence regarding the terms of its agreement with BellSouth or the mechanisms BellSouth has used to respond to LATA-wide local calling in its territory. (Sywenki Rebuttal Testimony at page 7, Tr. at 139) As the Commission is aware,

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issued on December 24, 2003. (hereinafter, "Rebalancing Order.").

interconnection agreements are the result of give and take negotiations. Therefore, the Commission must consider that BellSouth likely negotiated favorable contract provisions to receive in return for allowing the LATA to be used for defining intercarrier compensation obligations. (Sywenki Rebuttal Testimony at page 7, Tr. at 139) It is simply not appropriate to point to a single provision in the BellSouth/FDN negotiated agreement as a reason for requiring Sprint to allow LATA-wide local calling without evaluating the BellSouth/FDN agreement in its entirety. As a result of this lack of evidence, the Commission's decision was based improperly on speculation about these issues, rather than record evidence. (Arbitration Order at page 9)

4. At a minimum, the decision should be delayed until Sprint's rebalancing takes full effect

Finally, the Commission based its decision on the perceived small financial impact that LATA-wide local calling would have on Sprint due to the implementation of access charge and local rate rebalancing after the Florida Supreme Court affirmed the Commission's Rebalancing Order. Specifically, the Commission found:

> Prior to the passage of the 2003 Act, the ILECs may have been able to argue that increasing the calling scope provides the CLEC an unfair competitive advantage. Now that ILECs can adjust their access charges to reflect what they deem to be applicable costs, their argument that CLECs are able to circumvent access charges and instead pay lesser reciprocal compensation charges is blunted. (Arbitration Order at page 10)

In making this finding, the Commission overlooked or failed to consider that the rebalancing process does not happen all at once. Rather, in accordance with the Rebalancing Order, Sprint will reduce its access charges in a 4-step process over three-years, completing the rebalancing in November 2007. (Rebalancing Order at page 59) Therefore, at least during the

initial years of rebalancing, the effect on Sprint's access revenues will be greater than the Commission apparently assumed.

While it is true that Sprint's access rates will be decreasing, the Commission must consider that other CLECs have the ability to adopt the FDN/Sprint interconnection agreement and, also, receive LATA-wide local calling well in advance of the completion of Sprint's full rebalancing. Furthermore, as long as IXCs are unable to receive this same beneficial treatment for termination of intraLATA traffic, these carriers have an incentive to negotiate an arrangement with any carrier, such as FDN, who is receiving this favorable treatment, to route their traffic over FDN's local interconnection trunks and mask this traffic as FDN traffic. (Sprint's Response to Staff's Interrogatory No. 3, Hearing Exhibit No. 3) Consequently, the potential loss in access revenues for Sprint goes well beyond the current FDN/Sprint intraLATA traffic. Because the Commission overlooked or failed to consider potential increases in traffic subject to this LATA-wide decision as a result of MFN and arbitrage opportunities, as well as the graduated nature of Sprint's access reductions, the Commission should reconsider its Order and, at the very least, defer the implementation of the LATA-wide local calling scope until rebalancing is complete.

5. Conclusion

In ruling that the local calling area for intercarrier compensation purposes between FDN and Sprint should be the LATA, the Commission overlooked or failed to consider critical points of fact or law relating to the anti-competitive effects of the decision, the significance of the BellSouth/FDN agreement allowing for LATA-wide local calling and the

graduated time frame for access reductions. Because of these omissions, the decision should be reconsidered and LATA-wide local calling should be rejected or, in the alternative, should be delayed until Sprint's rebalancing of access charges and local rates is complete.

B. ISSUE 21 – RESALE OF CONTRACT SERVICE ARRANGEMENTS

1. Introduction

Issue 21 addresses whether termination liability is due from a customer when Sprint provides service through a contract service arrangement (CSA) and FDN obtains the customer through resale of Sprint's CSA. The Commission decided the issue solely based 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. (Arbitration Order at page 13) In making this determination, the Commission overlooked or failed to consider that the contract on which termination liability is due is between Sprint and the retail customer, not Sprint and FDN, and that the Commission is constitutionally restricted from impairing the terms of existing contracts. The Commission also overlooked or failed to consider the uncontroverted evidence in the record that Sprint might not recover all of its up-front costs if FDN assumes a CSA and pays Sprint the CSA rates, minus Sprint's Commission-established resale discount. Moreover, the Commission overlooked or failed to consider the evidence in the record concerning the amount of Sprint's wholesale discount and the lesser discount offered by FDN's compromise proposal. Finally, the Commission overlooked or failed to consider the anticompetitive effects of requiring Sprint to allow FDN to resell a CSA without imposing termination liability on the customer.

2. Constitutional restriction on impairment of contracts

As stated above, the Commission based its decision on this issue solely on a consideration of whether Sprint would recover its costs associated with a CSA if FDN obtained the customer from Sprint and resold the arrangements to the customer, taking advantage of the wholesale discount approved by the Commission for Sprint. [2] In reaching its decision, the Commission appears to have overlooked or failed to consider that a CSA is a contract between Sprint and its end user customer NOT Sprint and FDN. Therefore, in deciding that an end user customer need not honor the terms of the CSA by paying termination liability to Sprint when the customer switches to FDN to provide the service, the Commission overlooked or failed to consider that it's decision impermissibly would result in the impairment of the contract between Sprint and the end user.

In considering a challenge to a prior rule relating to applying termination liability to the assumption of ILEC contracts by CLECs, the Division of Administrative Hearings (DOAH) unequivocally found that the prohibition on termination liability embodied in the rule was an impermissible impairment of the contract between an ILEC and its end user.[3] (DOAH Order at ¶25) The DOAH Order extensively analyzes several Florida cases relating to impairment of contracts in support of its legal conclusions. (DOAH Order at ¶¶ 82-105) Those cases are equally applicable here. While Sprint pointed to the DOAH decision as support for its position that termination liability should apply between the end user customer

[2] As stated in Sprint witness Maples's testimony, Contract Service Arrangements often involve the sale of CPE or other nontelecommunications services, in addition to telecommunications services that Sprint is required to resell. Since Sprint is not required to resell the CPE or other nontelecommunications services, Sprint would not continue to receive revenue for those services when FDN assumed a CSA, denying Sprint cost recovery of revenues deferred over the life of contract. (Maples Rebuttal Testimony at page 7, Tr. at 63)

[3] *GTE v. FPSC*, and *BellSouth v. FPSC*, Final Order in Case No. 99-5368RP and Case No. 99-5369RP, issued July 13, 2000

and Sprint, the Commission apparently overlooked DOAH's clear findings and the applicable case law on which the decision was based. (Maples Direct Testimony at pages 7-8, Tr. at 29-30)

3. Sprint may not recover its costs at the current resale discount

In making its decision that no termination liability should apply, the Commission stated:

> Upon review and consideration of the parties' arguments and the record, we hereby find that termination liability is inappropriate under a resale arrangement, because there is a lack of evidence in the record that Sprint would be unable to recover its up-front costs associated with service over the life of the contract. (Order at page 13)

In finding that there was no record evidence to support that Sprint might not recover its up-front costs if Sprint's approved resale discount was applied but no termination liability was allowed, the Commission overlooked or failed to consider several key facts in the record.

Because the parties approached this issue as it relates to the competitive effects of disallowing termination liability, the parties did not present extensive evidence regarding costs. However, the evidence is uncontroverted that, without termination liability or at least an adjustment in the resale discount rate, Sprint likely will not recover all of its up-front costs associated with CSAs. First, Sprint's witness Maples states in his Rebuttal Testimony that "in many cases the cost that is deferred over the life of the contract and recovered through a termination fee is for the purchase and installation of specific customer equipment. Sprint does not avoid these costs if it resells the CSA to FDN or any other CLEC." [Maples Rebuttal at pages 7-8, Tr. At 63) In addition, the Commission overlooked or failed to consider the provisions of its previously approved rule, cited by Sprint's witness Maples, in

which the Commission recognized the potential for insufficient cost recovery and allowed termination liability to be imposed to the extent necessary to ensure appropriate cost recovery[4]

Second, the Commission was mistaken regarding the level of Sprint's resale discount, believing it be in the neighborhood of 10% (December 20, 2005 Agenda Conference Transcript, Item 10, at page 9) or no more than the 12% discount proposed by FDN (December 20, 2005 Agenda Conference Transcript, Item 10, at pages 11 and 13). In fact, Sprint's approved resale discount is 19.4% and is clearly set forth in the record in Exhibit SGD-1, Hearing Exhibit No. 15, at page 167, (the proposed interconnection agreement between the parties). As a result of the Commission's fundamental error regarding Sprint's actual resale discount, the Commission overlooked or failed to consider that FDN was not disputing that Sprint likely would not recover its full costs if FDN assumed a CSA. Rather, FDN conceded this point and proposed a lesser discount (12%) to attempt to address Sprint's concerns. (Post-hearing Brief and Post-hearing Statement of Issues and Positions of Florida Digital Network, Inc. d/b/a FDN Communications at pages 14-15)

In reaching its determination, the Commission relied heavily in the lack of evidence in the record as to whether and to what extent Sprint would be denied cost recovery in a resale situation. (Arbitration Order at page 13) As stated above, the arguments offered by the parties primarily focused on the effects on competition, rather than the costs. While FDN proposed a compromise intended to address cost recovery, FDN did not present testimony on

[4] The language of the rule stated:"For CSAs, the termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract." (DOAH Order at ¶ 17)

the issue, so that neither Sprint or the Commission explored the validity of the proposed 12% discount. Rather, it was only during the Agenda Conference at which the Commission considered its final order (and where parties were prohibited from participating) that the cost issue became the focus of the discussion. In resting its decision on a lack of evidence, the Commission overlooked or failed to consider the provisions of section 252 of the 1996 Telecommunications Act,[5] which provide the Commission with the means to request from the parties any information it deems necessary to make its decision regarding disputed arbitration issues.[6] Although Commission staff served the parties with extensive discovery requests, (and, similarly, FDN served Sprint with extensive discovery) no information was sought to quantify the effect of prohibiting termination liability on Sprint's ability to recover its up-front costs associated with CSAs. To fulfill its obligations under the Act, if the Commission believed that cost recovery, or lack thereof, was the key factor in determining whether or not Sprint should be allowed to apply termination liability, the Commission should have attempted to gather sufficient evidence to inform its ruling. Instead, the Commission made its determination based on erroneous or absent evidence.

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[5] 47 U.S.C. §§ 153 et.seq. (hereinafter "the Act").

[6] Specifically, 47 U.S.C. § 252 (b) (4) provides:

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The 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. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(Emphasis added)

4. Anticompetitive effects

Finally, in rendering its decision regarding the applicability of termination liability to Sprint's end user customers who switch to FDN for the provision of a particular CSA, the Commission overlooked or failed to consider the anticompetitive effects of its decision, as described by Sprint's witness Maples and as corroborated by DOAH when it rejected the Commission's previously proposed rules. As stated by DOAH:

> ....there was no demonstration that the ILECs' long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC's long term contract. Therefore, the fact that the rules capture contracts of ILECs, but no contracts of ALECs renders the rules discriminatory, arbitrary and capricious. Indeed, this discriminatory component may, contrary to the Commission's intended goal, produce less, rather than more, competition. (DOAH Order at ¶ 114)

As in the earlier proceeding, there is no evidence in the record to show that Sprint's long-term contracts impede competition any more than FDN's do. Again, the Commission apparently overlooked or failed to consider Sprint's witness Maples's testimony that "the fact that ILECs have to resell CSA's restricts their pricing flexibility, since it is very possible that after signing a contract with the ILEC the end user may seek to receive additional discounts by transferring the contract to a CLEC." (Maples Rebuttal at page 8, Tr. at 64)

5. Conclusion

The Commission overlooked or failed to consider several key points of fact and law in ruling that Sprint should not be able to assess termination liability on its end user customer when FDN obtains the customer through resale of the CSA. The Commission should reconsider amd modify its decision to allow Sprint to recover any unrecovered costs, as it did

for ILECs in its prior rule. In the alternative, the Commission should reconsider its decision to make it clear that the applicable discount will be the 12% discount proposed by FDN, rather than the 19.4% discount applicable to resale of Sprint's services at the full retail rates. In any event, the Commission should make it clear that its ruling applies only to CSAs entered into after the effective date of the Arbitration Order, consistent with the constitutional prohibition on impairment of contracts.

C. ISSUE 22 – DS1 CAP

1. Introduction

This issue involves the application of the FCC's cap on the availability of DS1 dedicated transport as a UNE. In the Order, the Commission determined that:

> On the issue of a proposed cap on DS1 transport circuits, we agree with the standard outlined by the FCC in the TRRO of 10 DS1 circuits, therefore, we hereby find that the DS1 dedicated transport cap of 10 lines apply only routes where DS3 dedicated transport is not required to be unbundled. Arbitration Order at page 18)

In reaching its decision, the Commission overlooked or failed to consider several key points of law, including: the unambiguous provisions of the governing FCC rule; the Commission's decision in the Verizon arbitration in which it reached the opposite conclusion; and, the effect of its decision on the FCC's cap of 12 DS3 dedicated transport UNEs in impaired wire centers.

2. Unambiguous language of the rule

In reaching its decision on this issue in the Sprint/FDN arbitration, the Commission apparently considered only the language of the TRRO. (Arbitration Order at pages 16-18) In focusing only on the TRRO, the Commission overlooked or failed to consider the

unambiguous provisions of Rule 51.319(e)(2)(ii)(b), as discussed in detail by Sprint's witness Maples and in Sprint's brief. (Maples Direct at page 14, Tr. at 36, Sprint-Florida Incorporated's Post-hearing Brief at page 9) This rule states:

> Cap on unbundled DS1 transport circuits. 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.

While the Arbitration Order refers to the TRRO and "related rules," the Order never specifically describes or discusses the provisions of the relevant rule. In focusing solely on the TRRO, rather than the rule, the Commission violated fundamental principles of statutory construction, which hold that if the language of a statute or rule is unambiguous, then the Commission may not resort to external sources to interpret or alter the clear language of the statute or rule. See, *Holly v. Auld*, 450 so. 2d 217, 219 (Fla. 1984). See, also, *Lee County Elec. Coop. v. Jacobs*, 820 So. 2d 297, 303 (Flas. 2002; *Verizon v. Jacobs*, 810 so. 2d 906,908 (Fla. 2002); and further cases cited page 8 of the January 12, 2006 Staff Recommendation in Docket No. 040156-TP (hereinafter, Verizon MFR Staff Recommendation"). There is no doubt that the language of the rule places a cap on ALL DS1 dedicated transport UNEs. The Commission clearly erred when it overlooked or failed to consider the clear provisions of the rule.

3. Verizon decision

In addition to failing to consider the provisions of the governing rule in reaching its decision on the DS1 cap in the Sprint/FDN arbitration, the Commission also overlooked or failed to consider its earlier decision on the same issue in the Verizon proceeding to

implement the TRRO.[7] In the Verizon case, the Commission reached the opposite conclusion to the conclusion reached in the instant case, even though the parties made essentially the same arguments in both cases.[8] Specifically, in the Verizon proceeding the Commission held:

> 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. (Verizon Order at page 36)

Since the decision on this issue involves a legal anaylsis concerning the proper interpretation of the FCC's rules and orders, rather than a factual analysis, there is no valid basis in the law or evidentiary record for reaching a different conclusion in one proceeding than the other.

4. Effect on the 12 DS3 limitation

In addition to ignoring the unambiguous terms of the FCC rule and its own decision in the Verizon proceeding, in its discussion of the practical implications of applying the DS1 cap in both impaired and nonimpaired wire centers the Commission's Order was internally inconsistent and in some cases erroneous. Furthermore, the Commission also overlooked the effect of its decision 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. (Arbitration Order

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[7] *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, issued December 5, 2005 in Docket No. 040156-TP, at pages 33 and 36 (hereinafter, "Verizon Order.).The Commission denied Motions for Reconsideration of the Commission's Order on this issue at its January 24, 2006 Agenda Conference.

[8] Because the Verizon decision was not rendered until December 5, 2005, well after the parties submitted their briefs in this case, the decision was not discussed by the parties. Regardless, the Commission should be deemed

at page 17, citing paragraph 74 of the TRRO.)

First, the Commission engaged in an analysis of the total amount of capacity available to a CLEC in an impaired wire center as prescribed by the FCC in its rules and in the TRRO. (Arbitration Order at pages 17-18) According to the Order, the Commission staff used rough calculations to determine that in an impaired Tier III wire center a CLEC should be able to obtain a total of 552 megabytes of transport. Then, the Order misinterprets Sprint's position by arguing that it would result in a limitation to 15.44 megabytes of transport in an unimpaired Tier III wire center. This analysis is flawed because DS3 transport is available as a UNE on any route where one of the end point is a Tier III wire center, so there can be no "unimpaired Tier III wire center." And, contrary to staff's analysis, if Sprint's position were adopted, CLECs in Tier III wire centers would be able to obtain the 10 DS1s and 12 DS3s identified in staff's calculations described above.

The Commission also overlooked or failed to consider that applying the DS1 cap only to unimpaired wire centers would allow possible circumvention of the limit of 12 DS3 UNE in impaired wire centers, by allowing FDN to order an infinite number of UNE DS1s on those routes. (See, Verizon MFR Staff Recommendation at footnote 4) That the FCC did not intend this result is supported by its limit on the number of DS1 loops at a single location to avoid circumvention of the single DS3 limit at any location.

5. Conclusion

The Commission failed to consider the clear provisions of the governing FCC rule and its own contrary decision on the same issue in the Verizon proceeding, as well as the

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to be aware of its own decisions as guiding precedent on similar or identical issues. However, the Commission

impact of its decision on the FCC's cap of 12 DS3s in impaired wire centers. Based on these omissions, the Commission should reconsider its decision and find that the DS1 cap applies in both impaired and nonimpaired wire centers, just as it did in the Verizon Order.

D. ISSUE 24 – ELIGIBLE TELECOMMUNICATIONS SERVICES

1. Introduction

This issue involves whether FDN may purchase a UNE solely for the provision of an information service or whether FDN must provide local exchange services over a UNE before it can be used to provide either information services or long distance or wireless services telecommunications services. The Commission's decision on this issue is internally inconsistent and, therefore, unclear. Specifically, the Order states:

> Therefore, we hereby find that UNEs purchased by a CLEC can be used to provide information services without the restriction of providing local service along with information service. Long distance and mobile wireless service access to UNEs exclusively for those markets should be denied.
>
> We conclude that Sprint shall have the ability to restrict UNE availability where there is not a "meaningful amount of local traffic." So long as a competitive LEC is offering an "eligible" telecommunications service. (Order at pages 22-23)

First, the Order fails to define "eligible telecommunications service" and, consequently, fails to state clearly what services FDN must provide in order to purchase a UNE that it uses to provide information services. Also, the Commission overlooked or failed to consider the provisions of section 251 of the Act and the FCC's implementing rules, which set forth the purposes for which UNEs can be obtained. Finally, in its discussion of the issue, the Commission overlooked or failed to consider that the FCC's Broadband Services Order

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failed to acknowledge, much less distinguish, its ruling in the Verizon case.

applies only to DSL.

2. Definition of eligible telecommunications service

First, the Order states that FDN may purchase UNEs only for "eligible telecommunications services." (Arbitration Order at pages 22 and 23) Sprint does not disagree with the statement; however, the Order fails to define "eligible telecommunications services" and in later portions of the Order seems to imply that "information services" are included in the scope of "eligible telecommunications services." This inconsistency is mistaken and confusing.

In the Act, "telecommunications services" are defined as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (46) "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." 47 U.S.C. § 153(43) Under the TRRO and implementing rules, the FCC has determined that long distance and wireless services are competitive services and, therefore, are not "eligible" telecommunications services. (TRRO at ¶¶ 34-40) As defined in the Act, information services are not and cannot be telecommunications services, and, therefore, cannot be "eligible telecommunications services. (47 U.S.C. 153(2). See, also, Broadband Order at ¶ 128 and footnote 32) The Commission overlooked and failed to consider that "eligible telecommunications services" can only be local exchange services consistent with the Act and FCC rules and orders interpreting the Act. (Maples Rebuttal at page 16, Tr. at 72)

3. Section 251 and related rules

In ruling (apparently) that FDN can provide information services over a UNE without providing an eligible telecommunications service, the Commission overlooked or failed to consider the provisions of section 251 of the Act, which states:

> **(3) Unbundled access**
> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. (Emphasis supplied)

Clearly, the Act requires access to UNEs only for the provision of telecommunications services, not information services. The FCC has clarified the meaning of the Act by determining that UNEs cannot be obtained for the purpose of providing long distance or wireless service alone and by determining that information services can only be provided over a UNE when an eligible telecommunications service is also provided over that UNE. (FCC Rule 51.100(b))[9] The Commission apparently overlooked or failed to consider the Act and the FCC rules in determining in the Arbitration Order on page 23 that "UNEs purchased by a CLEC can be used to provide information services without the restriction of providing local exchange. The Commission apparently overlooked or failed to consider the Act and the FCC rules in

[9] 51.100(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

determining on page 23 that "UNEs purchased by a CLEC can be used to provide information services without the restriction of providing local exchange services along with information services."

4. Application of the Broadband Order to DSL only

In addition to overlooking or failing to consider key provisions of the Act and the FCC's rules, in rendering its decision the Commission overlooked or failed to consider that the exception to the restriction on providing an information service over a UNE for DSL established by the FCC in the Broadband Order was narrowly restricted to DSL only and by its terms was not intended to alter an ILECs UNE obligations.[10] In the Broadband Order, the FCC determined that facilities-based wireline-broadband Internet access service provided by telecommunications carriers is an information service. (Broadband Order at ¶ 12) The Broadband Order is narrow in scope and addresses only wireline broadband Internet access services, not all technologies that might be classified as information services. (Broadband Order at footnotes 15, 130, 107 and ¶ 11) Despite this classification of wireline broadband access as an information service, the FCC found that requesting carriers still should be able to purchase UNEs to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act.[11] But, in reaching this conclusion, the FCC was careful to state that "the Order does not disturb incumbent LEC's unbundled network element (UNE) obligations or competitive carriers' rights to obtain UNEs." (Broadband Order at footnote 21;

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

[11] Sprint does not dispute that FDN may still provide stand-alone DSL over UNEs it purchases from Sprint and Sprint's proposed terms recognize that. See, Exhibit SGD-1, Hearing Exhibit No. 15, Section 40.4.5, at page

see, also, paragraph 128) The Commission overlooked or failed to consider the FCC's intent in the Broadband Order only to ensure that DSL could continue to be provided by CLECs through the purchase of UNEs. Instead, the Arbitration Order went far beyond the FCC's rulings, appearing to allow FDN the ability to access UNEs to provide any information service, regardless of whether FDN uses the UNE to provide a telecommunications service, a ruling that clearly conflicts with the Act and FCC rules relating to unbundling.

5. Conclusion

The Commission's order relating to the use of UNEs to provide information services is internally inconsistent and unclear. The Commission restricted access to UNEs to the provision of "eligible telecommunications services" but failed to define the term. In addition, contrary to that ruling, the Commission appeared to hold that FDN could use a UNE to provide any information services, regardless of whether FDN used the UNE to provide an eligible telecommunications service. In making this decision, the Commission overlooked or failed to consider the provisions of the Act, the FCC rules and the Broadband Order related to the use of UNEs to provide information services. Because the Commission overlooked or failed to consider the several points of law in rendering its decision, and because the decision is inconsistent and unclear, the Commission should reconsider the Order to provide that (with the exception of DSL) FDN may only access a UNE to provide information services if it is also providing an eligible telecommunications service (i.e., local exchange service) over that UNE.

44.

THE ORDER SHOULD NOT BE STAYED

The Commission's rules are clear that a Motion for Reconsideration does not stay the effectiveness of a final order. See, Rule 25-22.0060(1)(c), F.A.C. Sprint accepts that the Arbitration Order regarding the issues for which Sprint is seeking reconsideration is final unless and until reconsideration is granted by the Commission. By filing this Motion for Reconsideration, Sprint does not seek a stay of the Arbitration Order. Rather, Sprint intends to submit a final agreement within 30 days of the issuance of the Order (February 9, 2006), subject to later amendment should the Commission grant Sprint's Motion and modify the Arbitration Order in any respect. Sprint opposes a stay because there is no time frame within which the Commission must rule on a Motion for Reconsideration. FDN has already successfully used the regulatory process to delay implementation of Sprint's cost-based UNE rates approved by the Commission in January 2003 for over two years (including a delay of more than a year since Sprint filed its Petition for Arbitration). Any further delay of the implementation of the new rates is unwarranted and unconscionable, given the extreme delay already imposed by the regulatory process.

CONCLUSION

Wherefore, the Commission should grant Sprint's Motion for Reconsideration of Issues 5, 21, 22 and 24 and modify its decision on these issues as set forth in the body of this Motion.

Respectfully submitted this 25th day of January 2006.

Susan S. Masterton, Esq.
1313 Blair Stone Road
P.O. Box 2214
Tallahassee, FL 32316-2214
(850) 599-1560 (phone)
(850) 878-0777 (fax)
susan.masterton@sprint.com

ATTORNEY FOR SPRINT