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**To:** Filings@psc.state.fl.us  
**Cc:** Matthew Feil  
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**Attachments:** FDN Response to Sprint Motion for Reconsideration.doc

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To: Division of the Commission Clerk and Administrative Services

Please find attached for filing in the captioned docket FDN Communication's Response to Sprint-Florida, Inc's Motion for Reconsideration and Motion for Stay Pending Reconsideration.

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

The person responsible for this filing is:

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Docket No. and Title: 041464-TP Petition of Sprint-Florida, Inc. for arbitration of an Interconnection Agreement with Florida Digital Network, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996.

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

Number of pages of the document: 12 pages.

(e) Description of each document attached: Response to Sprint-Florida, Inc's Motion for Reconsideration and Motion for Stay Pending Reconsideration by Florida Digital Network, Inc. d/b/a FDN Communications.

*Thank You!*

*Glenda Chapman*

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

2/2/2006

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint-Florida, Inc. for	)	
Arbitration of an Interconnection Agreement	)	Docket No. 041464
with Florida Digital Network, Inc. Pursuant to	)	
Section 252 of the Telecommunications	)	Filed February 1, 2006
Act of 1996	)	
	)	

FDN COMMUNICATIONS' RESPONSE TO SPRINT-FLORIDA, INC.'S MOTION FOR RECONSIDERATION

AND

MOTION FOR STAY PENDING RECONSIDERATION

Pursuant to Rules 25-22.060 and 28-106.204, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") hereby responds to the Motion for Reconsideration of Sprint-Florida, Inc. ("Sprint") served in the captioned docket January 25, 2006, ("Sprint Reconsideration Motion") and moves the Commission to temporarily stay that portion of Order No. PSC-06-0027-FOF-TP ("Arbitration Order") requiring the parties to submit a conforming agreement within 30 days until the Commission rules on the reconsideration. In support of the foregoing, FDN states as follows:

SPRINT RECONSIDERATION MOTION

1. Although Sprint's Reconsideration Motion refers the Commission to the proper standard for reconsideration, Sprint totally misses the mark in applying the standard to the case at bar. Sprint instead asks the Commission to re-evaluate arguments the Commission already considered, re-weigh evidence the Commission already heard, and/or arbitrate anew issues (with the benefit of hindsight of the result) the Commission already decided so Sprint

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can change the case it made throughout the arbitration. The Commission must reject all of Sprint's arguments, as none pass muster with the reconsideration standard. Below, FDN addresses in order each of the issues Sprint raised in its motion.

#### Issue 5 – LOCAL CALLING AREA

2. Contrary to Sprint's assertion that the Commission failed to consider key points of fact,<sup>1</sup> Sprint simply reargues facts and opinion that are in the record and already considered by the Commission. Indeed, Sprint's Reconsideration Motion reads remarkably like its testimony and brief, which the Arbitration Order itself already summarizes. Further, by asking the Commission to delay implementation of LATA-wide calling, Sprint seeks the opportunity to arbitrate Issue No. 5 anew and attempts to eviscerate the pro-competitive intent of the Commission's decision.

3. Sprint makes three basic arguments regarding the local calling area, none of which meet the reconsideration standard. Sprint first argues that the Commission did not consider the alleged anticompetitive impact(s) an FDN-Sprint LATA-wide calling area would have on IXCs and other carriers. Sprint's argument flies in the face of the Arbitration Order itself, which is replete with references to the same Sprint arguments, culled from Sprint's case and brief, and to FDN's counter-arguments (Arbitration Order at pp. 4. -7) and then squarely addresses those arguments in the analysis (Arbitration Order at pp. 9 – 10). The Sprint Reconsideration Motion is unabashed reargument. Sprint then argues that the Commission overlooked the difference between Sprint and BellSouth territories and did not review the FDN-BellSouth interconnection agreement. Again, Sprint merely reargues that which Sprint has already argued and the Commission already considered. Moreover, the

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<sup>1</sup> Sprint Reconsideration Motion at pp. 3 – 8.

FDN-BellSouth interconnection agreement is public record and on file with the Commission, as are other agreements with LATA-wide local provisions. There is no requirement that any one produce same as an exhibit – FDN witness Smith testified as to the relevant content. If Sprint thought the whole of those documents were so critical to defense of its position, Sprint could have produced them at any time but, strangely, now casts aspersion on the Commission and/or FDN. Finally, Sprint asks the Commission to delay implementation of the LATA-wide local calling area plan until after the final step-down of its intrastate access rate reduction. In this pursuit, Sprint is trying to dupe the Commission. The final step down will put intrastate access rates at the same level as reciprocal compensation rates, so every in-LATA (and in-state) call would not be subject to intrastate access rates at the levels which the Commission found prevented CLECs from offering different calling plans – the very problem that the FDN LATA-wide plan is tailored to solve. The Commission’s decision was, in part, motivated by the need to promote competition and different calling plans now, not at Sprint’s convenience sometime hence. Accordingly, the Commission should reject Sprint’s arguments.<sup>2</sup>

#### Issue 21 – RESALE OF CONTRACT SERVICES

4. In the portion of the Sprint Reconsideration Motion addressing resale, Sprint not only rehashes old arguments and tries to mischaracterize the import of the Commission’s ruling on resale, Sprint also inappropriately attempts to raise new matters not previously addressed.
5. Sprint claims that requiring Sprint to resale contract telecommunications services

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<sup>2</sup> The arbitrated agreement has a two year term and the final step down of intrastate access rates is planned for November 2007. If the arbitrated agreement becomes effective sometime in March 2006, there would be only a few months of LATA-wide calling before the agreement expires if the Commission delays LATA-wide calling until after November 2007.

pursuant to the FCC's rules unconstitutionally impairs Sprint's contacts. In making this argument, Sprint errs on multiple levels. First, Sprint did not raise the issue of constitutional impairment until now. Therefore, in accordance with the Order on Procedure issued in this case and the Commission's rules, Sprint waived its right to raise the issue. FDN had no prior opportunity to address, or present a case tailored to the elements of, this constitutional claim, and is therefore prejudiced. A motion for reconsideration and a reply thereto are no place to attempt briefing an issue for the first time in any case, let alone a constitutional issue in a Section 252 arbitration. For this reason alone, Sprint's argument should be disallowed, if not outright stricken. Further, the Commission has not been granted jurisdiction by Chapters 120, 350, 364 or the Telecom Act to rule on constitutional questions, and, like any agency, the Commission can only address matters within its lawfully delegated fields of responsibility.<sup>3</sup> Without waiving the foregoing arguments, FDN notes that in a contractual impairment analysis, one must examine whether there was a lawful contract, a change in the law which substantially impairs the contract, and no legitimate and important public purpose is served by the change in law.<sup>4</sup> The FCC's rules requiring resale of all telecommunications services (with limited exception)<sup>5</sup> are not by any stretch new, having been issued shortly after passage of the '96 Act. Sprint must be charged with knowledge of the resale rules prior to having entered into any telecommunications service contracts, including knowledge that any restrictions Sprint may wish to place on resale would not be found reasonable and

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<sup>3</sup> See e.g. *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla.1<sup>st</sup> DCA 1976) Order PSC-03-0598-DS\_EU, issued May 12, 2003.

<sup>4</sup> See e.g. *McGrath v. Rhode Island Entertainment Board*, 88 F.3d12 (1<sup>st</sup> Circuit 1996).

<sup>5</sup> 47 C.F.R. 51.601 et seq.

nondiscriminatory.<sup>6</sup> Further, the resale requirements of the '96 Act and FCC rules serve the legitimate and important public purpose of providing CLECs an opportunity to compete with incumbent's on price when CLECs might not otherwise have that opportunity. Therefore, in accordance with the foregoing, Sprint's constitutional arguments must be rejected.

6. Just as it did during the hearing phase of this proceeding, Sprint again tosses out the red hearing of the DOAH "Fresh Look" case. The Commission has already considered these arguments. The Commission determined that under the FCC's existing rules, Sprint has a legal obligation to resell contracts for communications service and that Sprint did not prove it met an exception to the rule. FDN steps into the shoes of Sprint under a resold contract, and if the customer terminates the resold services of FDN to move to another carrier<sup>7</sup> or for any other reason prior to expiration of the term, the customer would owe FDN termination liability under the contract just as though FDN were Sprint. The contract between Sprint and the customer is not meaningfully altered, let alone materially impaired, because FDN steps into the shoes of Sprint pursuant to the resale rules. The DOAH Fresh Look case, in contrast, concerned the Commission's unilateral decision, not specifically mandated by a pre-existing rule on resale or other subject, to permit outright termination of existing contracts. As FDN explained in its testimony and its brief, and as the Commission already heard, FDN does not want to alter the terms of the contracts FDN resells – Sprint does! Sprint wants to terminate early any contract it is obligated to resell.

7. The Commission has already considered and rejected Sprint's arguments that it

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<sup>6</sup> Indeed, under rule 51.613(b) Sprint had the burden to prove to the Commission that its restriction on reselling contract arrangements was reasonable and nondiscriminatory. This, Sprint failed to do in this arbitration. Moreover, Sprint had not imposed restrictions on resale of contracts in its prior interconnection agreement with FDN.

<sup>7</sup> The Commission reasonably found that termination liability would be triggered if the customer migrated to another carrier other than Sprint.

will not recover some undefined, unidentifiable cost if resale of contracts is required. The Commission relied upon the fundamental principles of a resale arrangement. By reselling service, Sprint is avoiding retail-related costs and therefore has no need to recover those retail-related costs. The wholesale discount reflects this. Should FDN remit appropriate early termination liability, if any, to Sprint, Sprint recovers the costs it believes were reflected in the discounted price of its contracts. Moreover, as Sprint acknowledges, the wholesale discount rate FDN had proposed to mitigate any Sprint concerns with cost recovery (12%) was less than the normal wholesale discount the Commission has approved for Sprint (19.4%). Thus, Sprint may be over-recovering cost, not under-recovering cost. If anything, the Commission should deny Sprint's Reconsideration Motion and reconsider on its own motion the application of its previously mandated discount rate of 19.4% to ensure consistency among resold services.

Issue 22 – DS-1 CAP

8. The Commission stated as follows in that portion of the Arbitration Order addressing the issue of whether the DS1 cap on UNE dedicated transport applied to all routes or just routes where DS3 level transport was impaired:

. . . . We find that FDN has correctly interpreted the TRRO and the related rules regarding the cap on DS1 circuits.

. . . .

We find that the cap on DS1 transport outlined by Sprint in this arbitration is not consistent with the objectives of the TRRO, nor is it consistent with the intent of the related FCC rules. **Based on the record and the TRRO**, Sprint has not advanced a sufficient rationale to support its application of a cap on DS1s in circumstances where unbundled DS3 would normally be available. Sprint should not unilaterally benefit from an expansive exclusion based solely on its interpretation of the TRRO. The FCC adequately outlined where the cap would apply and that **the plain language of the TRRO and the resulting rule** is that the CLECs should not be limited at the Tier II wire centers, based on the impairment, or bottleneck, of critical facilities. Furthermore, the FCC intended to make DS1s available, in lieu of DS3s, at an impaired wire center. This interpretation of the availability of transport is more faithful to the objectives of the

TRRO, than the restrictive amendments proposed by Sprint.

Arbitration Order at pp. 17, 18 (emphasis added, footnotes omitted.) The Commission's decision is thus clearly and unequivocally supported in the Arbitration Order. Sprint's only argument on reconsideration that differs from arguments already made is that the end result arrived at in the Verizon generic arbitration, Docket No. 040156, was different on this issue. However, Sprint glosses over the fact that the Commission accepted the same result arrived at in the Arbitration Order here in the BellSouth generic arbitration, Docket No. 041269.<sup>8</sup> In the Verizon proceeding, FDN and other carriers sought reconsideration of the Commission's DS1 cap ruling on the basis of the TRRO and the inconsistency in the end results in Florida ILEC arbitrations. By rejecting the CLEC motions in the Verizon case, the Commission determined that inconsistency in the result of these individual cases is not sufficient basis for reconsideration. Therefore, since the Commission's decision in this proceeding is properly explained and supported, and the Commission already rejected Sprint's arguments, the Commission should deny Sprint's motion.

Issue 24 – MEANINGFUL AMOUNT OF LOCAL TRAFFIC

9. Sprint's Motion for Reconsideration with respect to Issue No. 24 is based on a fundamental misunderstanding of the controlling law. First, the Commission was not required to specify which services CLECs may provide when using UNEs – *i.e.*, it was not required to define “eligible telecommunications services,” as Sprint claims (*see* Motion at 19) – because the FCC *has already done so*. As FDN has explained, the FCC's rules provide that “an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting

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<sup>8</sup> See Order No. PSC-05-1054-PHO-TP, issued October 31, 2005, p. 48.



telecommunications carrier seeks to offer.” 47 C.F.R. § 51.309(a). This rule categorically prohibits the imposition of precisely the kind of use restrictions that Sprint seeks in this case.

10. The only exception is that contained in subsection 309(b), which prohibits a “requesting telecommunications carrier [from] ... access[ing] an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.” 47 C.F.R. § 51.309(b). When FDN uses UNEs to provide information services to its end-user customers it does not “exclusive[ly] provi[de] ... mobile wireless services or interexchange services,” and thus does not fall within the limited exceptions established by section 309(b).

11. Under the Communications Act, Sprint has “[t]he duty to provide [UNEs] to any requesting carrier for the provision of telecommunications service.” 47 U.S.C. § 251(c)(3). And that is exactly how FDN uses UNEs when it provides information services to its customers. As their statutory definitions make clear, “information services” are provided via “telecommunications,” and utilize the “telecommunications services” offered by “telecommunications carriers” as an input to the finished “information service” CLECs (and others) offer to end-users.<sup>9</sup> The FCC has explained this important distinction, which Sprint plainly fails to grasp, as follows: “[W]hen an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing,

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<sup>9</sup> “The term telecommunications means 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 as sent and received.” 47 U.S.C. § 153(43). A “telecommunications service” is “the offering of telecommunications for a fee directly to the public ....” 47 U.S.C. § 153(46). Likewise, a “telecommunications carrier” means any provider of telecommunications services ....” 47 U.S.C. § 153(44). “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ....” 47 U.S.C. § 153(20).

or making available information,' it does not offer telecommunications. Rather it offers an 'information service' even though it uses telecommunications to do so."<sup>10</sup>

12. Moreover, there is no basis to Sprint's claim that "eligible telecommunications services" for which UNEs may be purchased "can only be local exchange services ...." Motion at 19.<sup>11</sup> This should be self-evident from the fact that Sprint cites no authority whatsoever in support of its self-serving assertion, as well as from the language of the statute (which places no such limitations on the use of UNEs, as explained above) and from the FCC's implementing regulation, which, likewise, makes clear that UNEs are available for any telecommunications service a CLEC may wish to offer (except for the two specific services discussed above). Indeed, that was the whole point of the discussion in paragraphs 126 and 127 of the FCC's recent *Broadband Classification Order*.<sup>12</sup> That FCC order makes plain that telecommunications services that are used to provide information services remain available as UNEs for purchase by CLECs. Given that the FCC has long recognized that telecommunications services and information services are "mutually exclusive" regulatory classifications, *see Universal Service Report* ¶ 103, and that telecommunications services are essential inputs to information service offerings, no other conclusion was possible.

Paragraphs 126 and 127 simply reaffirm this long-standing position, and makes clear that

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<sup>10</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, ¶ 39 (1998) ("Universal Service Report").

<sup>11</sup> *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 17145, ¶¶ 135-40 (2003) (*Triennial Review Order*).

<sup>12</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Order No. 05-150 (released Sep. 23, 2005).

even though ILECs have the legal obligation to unbundled the underlying telecommunications components of their information service offerings.

13. Finally, there is nothing in the *Broadband Classification Order* that indicates that it is directed only at DSL. *See* Sprint Motion at 22. Sprint cites no authority for this claim, which is absurd on its face. Carriers offer Internet access services using a host of transmission technologies, and except for those that have been exempted from Section 251(c)(3) unbundling obligations, ILECs have a continuing duty to make those network elements available to requesting CLECs. Nothing in the *Broadband Classification Order* provides otherwise.

#### **FDN REQUEST FOR STAY PENDING RECONSIDERATION**

14. In the Verizon generic arbitration Order No. PSC-06-0018-PCO-TP, issued January 4, 2006, in Docket No. 040156-TP, (“Stay Order”) the Commission temporarily stayed the requirement that Verizon and CLECs file conforming amendments/agreements until after reconsideration was addressed, recognizing that reconsideration would consume most of the time allocated by the order for the contract filing. FDN requests that the Commission issue a similar temporary stay of the filing requirement here. Assuming the Commission promptly addresses reconsideration, as it did in the Verizon case, there should be no or minimal prejudice to any party by the temporary stay. Moreover, it would be an ineffective use of resources for the parties and Commission to process multiple iterations of the argument, as Sprint suggests.

WHEREFORE, for the reasons stated above, FDN Communications asks the Commission to deny Sprint's Motion for Reconsideration and moves for the Commission to temporarily suspend the requirement of filing a conforming agreement, pending reconsideration.

RESPECTFULLY SUBMITTED, this 1<sup>ST</sup> day of February 2006.

/s/ Matthew Feil  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent by e-mail and U.S. mail to the persons listed below this 1<sup>st</sup> day of February, 2006.

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