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Sent: Friday, February 10, 2006 4:44 PM
To: Filings@psc.state.fl.us
Subject: 041464
Attachments: Sprint's Motion for Clarification.pdf

Filed on behalf of:

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Docket No. 041464

Title of filing: Sprint's Motion for Clarification

Filed on behalf of Sprint

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February 10, 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 Clarification of Order No. PSC-06-0089—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

Enclosure

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

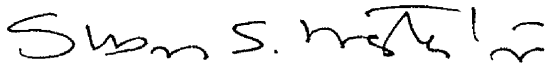
I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail on this 10th day of February, 2006 to the following:

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


Susan S. Masterton
Susan S. Masterton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for arbitration of certain unresolved) Docket No. 041464-TP
Issues associated with negotiations for)
Interconnection, collocation, and resale agreement)
With Florida Digital Network, Inc. d/b/a FDN)
Communications, by Sprint – Florida, Incorporated.) Filed: February 10, 2006
_____)

SPRINT-FLORIDA, INCORPORATED'S MOTION
FOR CLARIFICATION OF ORDER NO. PSC-06-0089-FOF-TP

Pursuant to Rule 28-106.204, F.A.C., Sprint-Florida, Incorporated (hereinafter, "Sprint") files this Motion for Clarification of Order No. PSC-06-0089-FOF-TP ("Stay Order"), issued February 8, 2006. The Order stays the requirement in Order No. PSC-06-0027-FOF-TP ("Arbitration Order"), that the parties file a conforming agreement reflecting the Commission's decision on the arbitration issues 30 days after issuance of the Order, that is, by February 9, 2006. Sprint seeks clarification that Stay Order intended to stay the date for filing the agreement, but did not intend to stay the effective date of the provisions of the agreement, or at least did not intend to stay the effective date of those provisions for which neither party requested reconsideration. As support for this Motion, Sprint states as follows:

1. In accordance with applicable rules, Sprint filed its Motion for Reconsideration in this docket on January 25, 2006, seeking reconsideration of four issues in the arbitration: Issue 5, relating to the definition of local traffic; Issue 21, relating to termination liability for resold contract service arrangements; Issue 22, relating to the application of the FCC cap on DS1 transport UNEs; and Issue 24, relating to the use

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of UNEs to provide information services. As part of that Motion Sprint indicated that it was not requesting to delay the date for filing an agreement reflecting the Commission's Order, because any delay in filing the agreement could delay the effective date of the UNE rates ordered by the Commission. (Motion for Reconsideration at page 23)

2. On February 1, 2006, FDN filed its Response to Sprint's Motion for Reconsideration, but did not file a cross-motion seeking reconsideration of any aspect of the Arbitration Order. In addition to its response, FDN included a Motion to Stay the requirement in the Order that the parties file a conforming agreement reflecting the decisions in the Arbitration Order within 30 days of the date of issuance of the Order. FDN incorrectly asserted in its Motion for Stay that neither party would be harmed by a stay, ignoring the clear and substantial harm to Sprint of a further delay in implementing the new rates as well as the clear benefit to FDN of a delay. FDN did not contact Sprint prior to filing its Motion or note Sprint's opposition to the Motion, as required by Rule 28-106.204, F.A.C.
3. On February 8, 2006 the Commission issued its Order granting the stay, prior to Sprint's filing its response to FDN's Motion. Under the normal process outlined in Rules 28-106.204 and 28-106.103, F.A.C., Sprint's Response would have been due on February 9, 2006, since Sprint was served with FDN's Motion via e-mail after 5 p.m. on February 1, 2006.¹

¹ Sprint recognizes that the rule allows the Commission to rule on a Motion without a response from other parties,

The Stay Order relied on Order No. PSC-06-0018-FOF-TP, issued in a Verizon proceeding relating to changes in law to reflect the FCC's TRO and TRRO decisions, as precedent for its ruling on FDN's Motion.²

4. The Stay Order does not address specifically the effect of the stay on the effective date of the provisions of the agreement. Logically, there is no rational basis for delaying the effective date for those provisions for which neither party requested reconsideration, particularly when a delay in the effective date imposes material financial harm on one of the parties. Since the Arbitration Order made the UNE rates effective commensurate with the effective date of the new agreement incorporating the rates, delaying the execution of the agreement without further clarification regarding the effective date of the rates substantially and irreparably affects Sprint's financial interests, since it delays Sprint's ability to collect the new rates and does not require FDN to post adequate security during the pendency of the reconsideration.³
5. As has been discussed frequently from the inception of and throughout this arbitration proceeding, Sprint's ability to implement as to FDN the Commission-approved rates has already been delayed for over three years.

or to set a shorter timeframe for responses, based on timing considerations.

² The Stay Order issued in the Verizon Order is not reflective of general Commission precedent in arbitration proceedings. In a cursory review of past arbitration proceedings, Sprint could find no other instance in which a stay of the date of the filing of an agreement was granted over the objection of one of the parties nor could Sprint find an instance where the party requesting the stay had not requested reconsideration and had not alleged or demonstrated irreparable harm if the stay was not granted.

³ At the levels of UNEs currently ordered by FDN, a delay in the effective date of the rates denies Sprint the ability to collect approximately \$100,000 a month in money Sprint is otherwise lawfully entitled to under the

This delay resulted because FDN has, through legal maneuvering that has been utterly and completely unsuccessful with regard to the merits, resisted agreeing to incorporate the rates into either an amendment or new agreement, as required by the Commission's decision in the UNE Order.⁴ During the Agenda Conference at which the Commission voted on the Arbitration Order, the Commissioners recognized that the ruling in the UNE Order afforded a party who disagreed with the Commission's decision an opportunity to avoid the decision by refusing to negotiate an amendment or agreement and using the regulatory process to further delay the effectiveness of an agreement incorporating the rates. (Transcript of December 20, 2005 Agenda Conference, Item No. 10, at pages 17-19)

6. This avoidance is exactly what has occurred in this arbitration, which Sprint initiated in December of 2004 but which is still not finally resolved 14 months later. The Stay Order, by not addressing the impact of a stay on the effective date of the UNE rates, exacerbates the delay already imposed by the regulatory process, since there is no time certain when the Commission must rule on Sprint's Motion for Reconsideration and the Commission has not set a time frame for filing the agreement after the Motion for Reconsideration is addressed.⁵

Commission's UNE order issued in January 2003.

⁴ *In re: Investigation into pricing of unbundled network elements (Sprint/Verizon track)*, Order No. 03-0058-FOF-TP, in Docket No. 990649B-TP, issued January 8, 2003, at page 218.

⁵ Sprint is attempting to work with FDN to reach agreement on language to conform the agreement to the Arbitration Order as it relates to issues that are not under reconsideration in an effort to expedite the filing of an

7. Granting Sprint's Motion to clarify that the agreement, specifically the new rates, are effective on February 9, 2006 (the date the agreement would have been filed if no party had filed a Motion for Reconsideration), corrects this perhaps unforeseen consequence of the Stay Order. It also is consistent with the rules and law governing the conditions for and considerations applicable to granting stay requests.
8. Rule 25-22.061(2), F.A.C., which applies to requests for stays pending judicial appeals of Commission Orders, and generally tracks the Florida Appellate Rules governing temporary injunctions in civil court cases⁶, sets forth the following criteria the Commission must apply when considering granting a stay:
 - (a) Whether the petitioner is likely to prevail on appeal
 - (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
 - (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Granting Sprint's Motion for Clarification is consistent with this rule because it ensures that no party is substantially or irreparably harmed by granting the stay.⁷

9. Rule 28-106.211, F.A.C., cited by the Commission as authority for the

agreement once on decision on the issues for which Sprint has requested reconsideration is reached. Sprint does not believe an additional 30 days to file a conforming agreement after the decision on reconsideration would be necessary or appropriate.

⁶ See, *Trawick's Florida Practice and Procedure*, 2004 Edition, at §28-2.

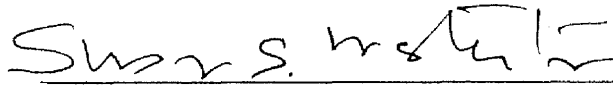
⁷ Notably FDN made no allegations of irreparable harm to justify its request for a stay, not could it, since FDN itself did not request reconsideration and any issue, indicating that it did not perceive any harm resulting from filing a conforming agreement reflecting the Arbitration Order. On the other hand, Sprint specifically stated in its Motion for Reconsideration that it was not requesting a stay because a stay would harm Sprint by delaying implementation

Stay Order, allows the prehearing officer to issue any orders “necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.” (emphasis added) Staying the actual date for filing the agreement arguably is consistent with this rule in that it promotes efficiency by requiring that only one agreement be filed and approved. Clarifying that the uncontested provisions are effective on February 9, 2006 also is consistent with the rule because it promotes the just determination of all aspects of the case in that it ensures that no party is harmed by a delay in filing the final agreement.

WHEREFORE, Sprint requests that the Commission grant Sprint’s Motion to clarify that, while the Stay Order delays the date for filing a conforming agreement until after the Commission renders its decision on Sprint’s Motion for Reconsideration, the effective date of the provisions of the agreement, specifically the effective date of the approved and uncontested UNE rates (and the date Sprint can legally collect and enforce these rates), is February 9, 2006, the date on which the agreement would have been filed if no party has requested reconsideration of the Arbitration Order.

of the UNE rates. (Motion for Reconsideration at page 23)

Respectfully submitted this 10th day of February, 2006.

A handwritten signature in black ink, appearing to read "Susan S. Masterton", written over a horizontal line.

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