

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: July 21, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Bulecza-Banks, Moses)
Office of the General Counsel (Scott, Susac)

RE: Docket No. 041464-TP – 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.

AGENDA: 08/02/05 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested

COMMISSIONERS ASSIGNED: Deason, Bradley, Edgar

PREHEARING OFFICER: Deason

CRITICAL DATES: 08/04/04 – 08/05/05 (Hearing)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041464.RCM.DOC

Case Background

On December 30, 2004, Sprint-Florida, Incorporated (Sprint) filed its Petition for Arbitration of certain unresolved issues associated with negotiations for an Interconnection, Collocation, and Resale Agreement between itself and Florida Digital Network, Inc. d/b/a FDN Communications (FDN). On January 24, 2005, FDN filed its response to Sprint's Petition. Pursuant to Sprint's request for arbitration, this matter has been scheduled for an administrative hearing.

In accordance with the Order Establishing Procedure (OEP)¹, FDN and Sprint filed direct testimony on May 27, 2005. On June 7, 2005, FDN file its Motion for Postponement of, and Establishment of, Due Dates (Motion for Postponement). FDN's Motion for Postponement requested postponement of the procedural schedule in this arbitration so that testimony could be filed addressing the setting of proper UNE rates.² Sprint filed its Response in Opposition to FDN's Motion for Postponement and Motion to Strike FDN's Direct Panel Testimony on June 14, 2005. Sprint's Motion to Strike sought to strike testimony addressing arguments and positions on the UNE rate issue. On June 16, 2005, FDN filed its Response to Sprint's Motion to Strike. An Order Denying FDN's Motion for Postponement and Granting Sprint's Motion to Strike FDN's Direct Panel Testimony was issued on July 8, 2005.³

On June 3, 2005, FDN served Sprint with FDN's First Set of Interrogatories and Requests for Production of Documents. Sprint filed general and specific objection to FDN's discovery on June 13, 2005. FDN filed its First Motion to Compel on June 29, 2005.

On July 18, 2005, a Prehearing Conference was held. At the Prehearing the parties provided oral argument addressing FDN's Motion to Compel. Consistent with the rationale underlying the Prehearing Officer's July 8th Order, a preliminary ruling was provided to the parties via e-mail on July 20, 2005. The parties were notified that FDN's Motion to Compel would be granted as to Interrogatories Nos. 3 - 11, 13, 52, 73, 91, and 92 and Requests for Production of Documents No. 2, and denied with respect to Interrogatories Nos. 1, 2, 12, 14 - 51, 53 - 72, 74 - 90 and Requests for Production of Documents Nos. 1, and 3-15.

On July 18, 2005, FDN filed its Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order, or, in the Alternative, Motion to Revise Schedule (Motion for Reconsideration). Therein, FDN asks that the Prehearing Officer's determinations as to the scope of this docket be rejected, as well as the decision to strike certain testimony deemed beyond the scope of the proceeding. In the alternative, FDN asks that Sprint be compelled to respond to all previously served discovery, arguing that the discovery requests are still pertinent even though the issues have been limited. Furthermore, FDN's alternative request seeks postponement to allow additional testimony on the reconstituted issue and compelled discovery. Sprint filed its Response to FDN's Motion for Reconsideration on July 25, 2005. This recommendation addresses FDN's Motion for Reconsideration and Request for Oral Argument, as well as Sprint's Response. Staff notes that the Commission's decisions will effect whether the case proceeds to hearing on August 4th, is delayed, or bifurcated.

¹ Order No. PSC-05-0496-PCO-TP, issued May 4, 2005.

² The fundamental issue has been the parties' interpretations of Issue 34. FDN argued that the issue is what are the appropriate rates for UNEs under the Agreement. Sprint argued that the issue regarding UNE rates is limited to "whether the UNE rates approved by the Commission in the [Sprint UNE Order] should be incorporated into the parties' interconnection agreement that is the subject of this arbitration." The Prehearing Officer ruled that Sprint's interpretation of Issue 34 was correct.

³ Order No. PSC-05-0732-PCO-TP.

Discussion of Issues

ISSUE 1: Should FDN's Request for Oral Argument be granted?

RECOMMENDATION: FDN's request for oral argument should be granted with respect to the Motion for Reconsideration in that oral argument may assist the Panel in its understanding and disposition of the complex issues underlying the Motion for Reconsideration. Staff recommends that oral argument be limited to fifteen (15) minutes per side. **(SCOTT)**

STAFF ANALYSIS: In accordance with Rule 25-22.058, Florida Administrative Code (F.A.C.), FDN submitted a request for oral argument at the time it filed its Motion for Reconsideration.

This is a matter prior to hearing, and Rule 25-22.0021(1), F.A.C., contemplates giving parties an opportunity to address matters before the Commission when the matter is taken up prior to hearing. However, Rule 25-22.060(1)(f), F.A.C., is clear that oral argument on a Motion for Reconsideration is solely at the discretion of the Commission. FDN requests oral argument addressing its Motion for Reconsideration on the basis that the Motion presents important issues that affect FDN's substantial interests and the state of competition in the telecommunications market in the State of Florida. Accordingly, FDN states that oral argument will assist the Panel in understanding the magnitude of these issues. Additionally, FDN states that a live discussion will be conducive to resolving issues pertaining to requests for relief and the procedural schedule in this arbitration.

Staff believes that oral argument may provide assistance to the Panel in addressing the complexity of issues underlying the Motion for Reconsideration, which is addressed in Issue 2 below.

ISSUE 2: Should the Panel assigned to this Docket grant FDN's Motion for Reconsideration?

RECOMMENDATION: No. FDN's Motion for Reconsideration does not meet the standard of review for a motion for reconsideration. **(SCOTT)**

STAFF ANALYSIS: Staff believes that FDN's Motion for Reconsideration does not meet the standard of review in that FDN does not identify any matter of fact or law that the Prehearing Officer overlooked or failed to consider. First, FDN asserts that it has an unfettered right to arbitrate any issue under Section 252 of the Telecommunications Act. This same argument is made in FDN's First Motion to Compel, and staff believes that this argument was taken into consideration by the Prehearing Officer in rendering his ruling set forth in Order No. PSC-05-0732-PCO-TP. Second, FDN attempts to draw similarities between the instant docket and Dockets Nos. 050059-TL (involving Verizon's Petition to revisit the cost of capital and depreciation rates used to establish Verizon's UNE rates) and 040301-TP (involving Supra's request for arbitration of UNE-P to UNE-L conversions). Staff believes that these two dockets are distinguishable. Third, FDN argues that the data and assumptions in the cost study relied on in Docket No. 990649B-TP are invalid because market conditions have changed. Staff believes that the doctrine of administrative finality makes FDN's last-minute arguments of changed circumstances moot. Fourth, FDN contends that the ruling as set forth in Order No. PSC-05-0732-PCO-TP is violative of the rulemaking provisions of Chapter 120, Florida Statutes (F.S.). Staff believes that Section 120.80(13)(d), F.S., contemplates that the specific procedural provisions of Chapter 120 are not directly applicable to the Commission's decisions implementing the Telecommunications Act of 1996. Furthermore, staff believes that instituting the rulemaking process would be premature since the rates have not yet been implemented.

Finally, staff believes that FDN's alternative request for postponement of the procedural schedule and to compel discovery against Sprint is subsumed by its Motion for Reconsideration. That request essentially asks the Panel to postpone the procedural schedule so that FDN has an opportunity to respond to the compelled discovery. The discovery FDN is requesting that Sprint respond to is inconsistent with the Prehearing Officer's ruling denying FDN's earlier Motion for Postponement and granting Sprint's Motion to Strike, and postponement to allow FDN to respond. Thus, staff believes that the alternative request should not be considered as a true alternative to denying the Motion for Reconsideration.

I. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. 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 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

This standard is equally applicable to reconsideration of a Prehearing Officer's Order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

II. Arguments

A. FDN's Motion for Reconsideration

Pursuant to Rule 25-22.0376, F.A.C., FDN filed a Motion for Reconsideration of the Prehearing Officer's July 8, 2005 ruling. FDN contends that the July 8th Order "fails to accommodate, or even acknowledge, FDN's right under the federal Communications Act to arbitrate UNE rates in this interconnection arbitration." FDN further contends that the July 8th Order "is also based on an erroneous, and legally unsupportable, interpretation of the Commission's prior Order No. PSC-99-1078." FDN contends that the Prehearing Officer's interpretation of Order No. PSC-99-1078-PCO-TP is violative of the Florida Administrative Procedures Act, as well as the federal Telecommunications Act.

If the Motion for Reconsideration is denied, FDN requests that the procedural schedule be revised and the discovery requests identified in FDN's Motion to Compel be granted so as to allow FDN the opportunity to present evidence on Issue 34 as framed by the July 8th Order. Issue 34 is now defined as "Whether the UNE rates established in Docket No. 990649B-TP should be incorporated into the interconnection agreement that is the subject of this arbitration?"

In the alternative, FDN contends that "if the Commission believes that incumbent local exchange carrier ("ILEC") UNE rates should be determined only in generic proceedings, then the Commission should initiate such a proceeding to set new UNE rates for Sprint and set the matter for hearing, just as the Commission acted on Verizon's request for new UNE rates earlier this year." See Petition of Verizon Florida Inc. to reform UNE cost of capital and depreciation inputs to comply with the FCC's guidance in the Triennial Review Order, Docket No. 050059-TL.

B. Sprint's Response

Pursuant to Rule 25-22.0376, F.A.C., Sprint filed its Response to FDN's Motion for Reconsideration on July 25, 2005. Sprint contends that the Motion for Reconsideration fails to meet the standard for review of such a motion. Sprint further contends that FDN misinterprets the Prehearing Officer's ruling in Order No. PSC-05-0732-PCO-TP in that FDN erroneously interpreted the ruling to address "whether UNE rates could be adopted only in a generic proceeding." Sprint argues that the prior ruling's emphasis was that "Sprint UNE rates at issue in this proceeding were properly adopted in a generic proceeding in which FDN intervened and participated as a full party." Sprint further argues that FDN's argument that it has an absolute right under Section 252 of the Telecommunications Act to litigate any and all issues is an argument that FDN has made throughout this arbitration.

Sprint contends that Section 252 of the Telecommunications Act, as well as case law supports the Prehearing Officer's prior ruling. Sprint points out that Section 252(g) of the Telecommunications Act provides in pertinent part that "a state commission may...consolidate proceedings...in order to reduce administrative burdens." Sprint references Quest v. Koppendayer, 2004 U.S. Dist. LEXIS 6064 (U.S. Dist. Ct. for Minnesota), for the proposition

that “the 1996 Act allows state commissions to establish rates for UNEs in generic proceedings, suggesting that commissions need not review interconnection agreements before setting UNE rates.” *Id.* at 17. Sprint also argues that “the Sprint UNE Order provides that the rates are effective when incorporated through an amendment to an existing interconnection agreement or into a new interconnection agreement.” Sprint further argues that allowing parties dissatisfied with the result in a generic proceeding to relitigate issues in an arbitration would render useless the rationale of establishing generic proceedings.

III. Analysis

Upon consideration, and for the reasons set forth below, staff believes that FDN’s Motion for Reconsideration fails to meet the standard of review for a motion for reconsideration.

Staff believes that FDN’s interpretation of Order No. PSC-05-0732-PCO-TP is misguided. In Docket No. 990649B-TP (Sprint UNE Cost Docket) the Commission determined, as a result of a Petition filed by several competitive local exchange telecommunications companies (CLECs), that it would be appropriate and more efficient to address Unbundled Network Element (UNE) pricing for the large incumbent local exchange telecommunications companies (ILECs) through generic proceedings. During that proceeding, no party advanced the argument that it was inappropriate for the Commission to act on a generic basis, as opposed to addressing pricing in individual arbitrations. FDN was a participant in that proceeding and as such, pursuant to Rule 25-22.039, F.A.C., took the case as it found it, including the outcome. FDN has appealed the Commission’s decision in Docket 990649B-TP, and staff believes that the appellate process is the appropriate means to address any disagreement FDN has with the outcome of the Sprint UNE Cost Docket.

FDN has repeatedly argued that it has an unfettered right to arbitrate any and all issues pursuant to Section 252 of the Telecommunications Act. This legal argument was set out in FDN’s First Motion to Compel and now in its Motion for Reconsideration. Staff believes that this argument has been considered by the Prehearing Officer in his ruling on the Motion to Compel and, thus is inappropriate in the context of a Motion for Reconsideration.

FDN references Verizon’s Petition in Docket No. 050059-TL to revisit the cost of capital and depreciation rates used to establish Verizon’s UNE rates, and contends that the same arguments used by Verizon in that docket are applicable in the instant docket as a basis for allowing arbitration of Sprint’s UNE rates. Staff believes that Docket No. 050059-TL is distinguishable from the instant docket in that Verizon’s appeal of the Commission’s decision regarding Verizon’s rates has now been resolved, whereas, FDN’s appeal of Sprint’s rates is still pending. Furthermore, Verizon pursued its request for appellate relief through to completion, and thereafter, requested specific, limited relief based on its interpretation of specific provisions in the TRO, which it claimed amounted to a significant change in circumstances.⁴

Staff also believes that FDN’s reference to Supra’s request for arbitration of UNE-P to UNE-L conversions, which the Commission is scheduled to address in Docket No. 040301-TP, is

⁴Verizon has since filed a Notice of Voluntary Dismissal of its Petition.

distinguishable from the instant docket. FDN refers to *Supra*'s request as an example of another case in which the Commission has not viewed the prior rate-setting proceeding as binding or dispositive. Staff believes it can be distinguished because issues for consideration in Dockets Nos. 040301-TP and 041338-TP, which are consolidated, address whether or not the parties' interconnection agreement contains an applicable rate for UNE-P to UNE-L conversions. See Order No. PSC-05-0433A-PCO-TP.

Staff believes that while the Commission did contemplate that UNE rates set in generic proceedings would likely need to be revisited over time as the markets change, it was also contemplated that the rates would be in operation for some period of time before the Commission revisited them. That being said, staff believes that even without the benefit of market experience, the doctrine of administrative finality would require at least some showing of changed circumstances that would warrant revisiting the Commission's pricing decisions, although recent courts have emphasized that agencies should be wary of applying the doctrine too strictly. See *Peoples Gas Sys. v. Mason*, 187 So. 2d 335, 338-339 (Fla. 1966); but see *McCaw Communications of Florida, Inc., Appellant, vs. Susan F. Clark*, 679 So. 2d 1177 (Fla. 1996). In this instance, FDN made no initial claim as to any changed circumstance, but instead, argued merely that it has an unabridged right under federal law to arbitration of the rates, in spite of the generic proceeding.⁵ Only now in its Motion for Reconsideration does FDN challenge, in an alternative request to postpone the procedural schedule, the validity of the cost study relied on by the Commission in the Sprint UNE Cost Docket. Staff believes that FDN's alternative request for postponement and to compel discovery is subsumed by its Motion for Reconsideration, because it essentially asks the Panel to reconsider and overturn the Prehearing Officer's earlier ruling and compel discovery inconsistent with that ruling. FDN further requests postponement of the case to allow it to respond to the compelled discovery. Thus, the alternative request is not a true alternative to denying the Motion for Reconsideration.

Finally, FDN argues that Order No. PSC-05-0732-PCO-TP cannot have broad application without running afoul of the rulemaking requirements of Chapter 120, Florida Statutes (F.S.). However, staff believes that Section 120.80(13)(d), F.S., contemplates that the specific procedural provisions of Chapter 120 are not directly applicable to the Commission's decisions implementing the Telecommunications Act of 1996. Furthermore, staff believes that instituting the rulemaking process would be premature since the rates have not yet been implemented. Given that these rates are currently pending appeal and without the benefit of market experience, rulemaking would likely be ineffective and inefficient. See Order No. PSC-99-1744-PAA-TP (which was protested, and subsequently revised by Order No. PSC-99-2393-FOF-TP, but only as to specific collocation guidelines).

Conclusion

Staff believes that the Panel should deny FDN's Motion for Reconsideration. Staff believes that FDN's Motion for Reconsideration does not meet the standard of review in that FDN does not address any point of law or fact that the Prehearing Officer had not considered.

⁵ Staff notes that Section 252(g) of the Telecommunications Act appears to contemplate that State Commissions may consolidate proceedings to reduce burdens on the carriers and the State Commissions themselves.

First, FDN asserts that it has an unfettered right to arbitrate any issue under Section 252 of the Telecommunications Act. This same argument is made in FDN's First Motion to Compel, and staff believes that this argument was taken into consideration by the Prehearing Officer in rendering his ruling set forth in Order No. PSC-05-0732-PCO-TP.

Second, FDN attempts to draw similarities between the instant docket and Dockets Nos. 050059-TL (involving Verizon's Petition to revisit the cost of capital and depreciation rates used to establish Verizon's UNE rates) and 040301-TP (involving Supra's request for arbitration of UNE-P to UNE-L conversions). Staff believes that these two dockets are factual and legally distinguishable.

Third, FDN argues that the data and assumptions in the cost study relied on in Docket No. 990649B-TP are invalid, because market conditions have changed. Staff believes that the doctrine of administrative finality makes FDN's last-minute arguments of changed circumstances moot. Furthermore, it is inappropriate to raise new arguments for the first time on reconsideration. See Order No. PSC-04-1160-PCO-EI; citing Order No. PSC-92-0132-FOF-TL.

Fourth, FDN contends that the ruling as set forth in Order No. PSC-05-0732-PCO-TP is violative of the rulemaking provisions of Chapter 120, Florida Statutes (F.S.). Staff believes that Section 120.80(13)(d), F.S., contemplates that the specific procedural provisions of Chapter 120 are not directly applicable to the Commission's decisions implementing the Telecommunications Act of 1996. Furthermore, staff believes that instituting the rulemaking process would be premature since the rates are still pending on appeal and have not yet been implemented. See also Order No. PSC-99-2393-FOF-TP.

Finally, staff believes that FDN's alternative request for postponement of the procedural schedule and to compel discovery on Sprint is subsumed by its Motion for Reconsideration, because it essentially asks the Panel to reconsider and overturn the Prehearing Officer's earlier ruling and seeks discovery inconsistent with the Prehearing Officer's limitation of the scope of the issues. Thus, staff believes that the alternative request should be rejected.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No. This Docket is scheduled for hearing on August 4 – 5, 2005.
(SCOTT)

STAFF ANALYSIS: No. This Docket is scheduled for hearing on August 4 – 5, 2005.