State of Florida

Public Service Commission

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

DATE: February 17, 2006

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

FROM: Division of Competitive Markets & Enforcement (Bulecza-Banks, Casey, Maduro, Buys, Mann, Brown)
Office of the General Counsel (Scott)

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: 02/28/06 – Regular Agenda – Motion for Reconsideration – Participation at the Discretion of the Panel

COMMISSIONERS ASSIGNED: Edgar, Deason

PREHEARING OFFICER: Deason

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

On December 30, 2004, Sprint-Florida, Inc. (Sprint) filed a petition with the Florida Public Service Commission (the Commission) to arbitrate 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). An administrative hearing was held on August 4, 2005.

On January 10, 2006, the Commission issued Order No. PSC-05-1200-FOF-TP (Order on Arbitration) rendering its specific findings on the issues established for this Docket. On January 25, 2006, Sprint filed its Motion for Reconsideration (Motion) of the Commission's determination of Issues 5, 21, 22, and 24. Later, on February 1, 2006, FDN filed its Response to Sprint's Motion for Reconsideration and Motion for Stay Pending Reconsideration (Response). The Order on Arbitration in this proceeding required the parties to file their agreement on February 9, 2006. In light of this requirement and the Issues now in contention, the Prehearing Officer granted FDN's request for stay of the filing requirement on February 8, 2006. Neither party has requested oral argument.

This recommendation addresses Sprint's Motion for Reconsideration.

Discussion of Issues

ISSUE 1: Should the Commission grant Sprint-Florida, Incorporated's Motion for Reconsideration?

RECOMMENDATION: No. Sprint's Motion for Reconsideration should be denied. Staff believes that Sprint's Motion fails to identify any points of fact or law that the Commission overlooked or failed to consider in its decisions as to Issues 5, 21, 22, and 24. However, Sprint's Motion does identify certain aspects of the Order on Arbitration that should be clarified or amended, as set forth in the staff analysis below. Accordingly, staff recommends that the Commission on its own motion clarify its decisions on Issues 21 and 24. **(SCOTT, MADURO, MANN, BROWN, BUYS)**

STAFF ANALYSIS: As set forth in the Case Background, Sprint has filed a Motion for Reconsideration of the Commission's findings in this proceeding on Issues 5, 21, 22, and 24, and FDN has filed a Response. The parties' arguments are addressed in the following analysis.

I. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order on Arbitration. 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.

II. Parties' Arguments

A. Sprint's Motion for Reconsideration

Sprint seeks reconsideration of the Commission's decisions on Issues 5, 21, 22, and 24. In support of its Motion, Sprint asserts that the Commission overlooked or failed to consider points of fact or law in reaching its decisions on the Issues in contention.

(1) Issue 5

Issue 5 addresses the definition of the local calling area. In support of its Motion, Sprint contends that in rendering its decision on Issue 5, *i.e.* the local calling area shall be the LATA, the Commission failed to consider that a LATA-wide calling scope was anti-competitive to other carriers, namely IXCs. Motion at 3. Sprint further contends that competitive neutrality extends beyond the context of negotiations. Id. at 4. Sprint argues that since IXCs pay access charges as opposed to reciprocal compensation they will pay more than FDN for terminating the same

traffic. Id. Sprint also cites to Commission Order No. PSC-02-1248-FOF-TP for the proposition that this type of inequality is discriminatory.[1] Id. at 5.

Furthermore, Sprint contends that the Commission's reliance on the fact that BellSouth Telecommunications, Inc. (BellSouth) offers FDN a LATA-wide local calling scope is flawed in that it failed to consider the differences between BellSouth and Sprint. Id. Specifically, Sprint contends that the Commission overlooked or failed to consider testimony distinguishing Sprint from BellSouth and the impact a LATA-wide calling scope would have on Sprint. Id. Sprint argues that it "is more rural than BellSouth, incurs higher costs to provide service and, therefore, is more reliant on access charge revenues than BellSouth." Id. Also, Sprint argues that the Commission failed to consider that there was no evidence in the record to show the specific terms of FDN and BellSouth's agreement or the mechanisms BellSouth has put in place to adjust to a LATA-wide calling scope. Id. Consequently, Sprint argues that the Commission's decision was improperly based on speculation. Id. at 6.

Finally, Sprint contends that the Commission overlooked or failed to consider that the access reductions associated with rebalancing will be implemented over time, having a greater effect on Sprint's access revenues on the front-end of rebalancing. Motion at 4. Sprint argues that in accordance with the Rebalancing Order[2], Sprint will reduce its access charges over a period of three years ending in November 2007. Id. at 6. Sprint further argues that the Commission failed to consider the increases in traffic as a result of the LATA-wide decision and failed to consider the nature of the process by which Sprint will reduce its access charges. Id. at 7.

In conclusion, Sprint contends that the decision regarding the local calling scope be reconsidered, or in the alternative, be delayed until Sprint's rebalancing is complete. Id. at 8.

(2) Issue 21

Issue 21 addresses the appropriate terms and conditions applicable to the resale of Contract Service arrangements (CSAs), Special arrangements, or Individual Case Basis (ICB) arrangements. In support of its Motion, Sprint contends that the Commission based its decision solely 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. Id. at 8. Sprint further argues that the CSA is not a contract between Sprint and FDN, but a contract between the end-user customer and Sprint. Id. at 9. Consequently, Sprint argues that the Commission's decision that the end-user customer is not liable for paying termination liability

[1] See In *re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of* 1996, Order on Reciprocal Compensation, Docket No. 000075-TP, issued September 10, 2002.

[2] See *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 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 in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting 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*, Order on Access Charge Reduction Petitions, Docket Nos. 030867-TL, 030868-TL, 030869-TL, and 030961-TI, issued December 24, 2003.

when switching to FDN is an unconstitutional impairment of contracts. Id. Sprint also argues that the Commission failed to consider the Final Order issued by the Division of Administrative Hearings (DOAH) in GTE Florida, Inc. v. Florida Public Service Commission[3] and BellSouth v. Florida Public Service Commission[4]. In its Final Order, DOAH found that the "fresh look" rule, which placed a prohibition on termination liability was an impermissible impairment of contracts. Id.

In support of its Motion, Sprint argues that the parties did not present evidence regarding cost because they "approached the issue as it relates to the competitive effects of disallowing termination liability." Id. at 10. Sprint contends that there is evidence in the record that it will likely not recover all of its up-front costs. Id. Sprint further contends that the Commission was mistaken on Sprint's actual resale discount, which is 19.4 %, and failed to consider that FDN's proposed 12% discount was a compromise to address Sprint's concerns over not recovering its full costs. Id. at 11. Furthermore, Sprint argues that the Commission's decision will have anticompetitive effects because it restricts pricing flexibility. Id. at 13.

In conclusion, Sprint asks for reconsideration on the Commission's decision on the issue of termination liability, and alternatively, asks the Commission to make it clear that the applicable resale discount will be 12% as proposed by FDN, rather than the 19.4% discount. Id. at 14. Also, Sprint further asks that the Commission clarify that its ruling applies only to CSAs entered into after the effective date of the Order on Arbitration. Id.

(3) Issue 22

In support of its Motion, Sprint argues that the Commission overlooked or failed to consider the unambiguous language of FCC Rule 51.319(e)(2)(ii)(b), and only considered the TRRO in its decision regarding caps on DS1 dedicated transport. Id. at 15. Sprint further argues that the Commission violated a fundamental principle of statutory construction, which provides that when the language of a rule is clear and unambiguous, other sources of interpretation are not to be considered. Id. Sprint also points out that the Commission failed to consider its earlier decision on the same issue in the Verizon generic docket[5]. Id. Sprint contends that this issue requires a legal analysis rather than a factual analysis. Id. at 16. Sprint further argues that the Commission's decision overlooked the effect its decision will have 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. Id.

In conclusion, Sprint requests that the Commission reconsider its decision on this Issue and find that the DS1 cap applies in both impaired and nonimpaired wire centers. Id. at 18.

[3] See Case No. 99-5368RP, issued July 13, 2000.
[4] See Case No. 99-5369RP, issued July 13, 2000.
[5] *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 on Arbitration, Docket No. 040156-TP, issued December 5, 2005.

(4) Issue 24

In support of its Motion, Sprint argues that the Commission failed to define "eligible telecommunications services" and failed to clearly delineate what services FDN must provide in order to purchase a UNE that it uses to provide information services. Id. at 18. Sprint does not disagree with the Commission's decision that FDN may purchase UNEs only for "eligible telecommunications services." Id. at 19. However, Sprint contends that there is some confusion with regards to whether "information services" are included within the scope of "eligible telecommunications services." Id. Sprint further contends that the Commission overlooked or failed to consider that "eligible telecommunications services" can only be local exchange services consistent with the Act and FCC rules and the orders interpreting the Act. Id. Sprint also argues that the rulings in the FCC's Broadband Classification Order[6] are narrowly restricted to DSL and are not intended to alter an ILECs UNE obligations. Id. at 21.

In conclusion, Sprint requests that the Commission reconsider its decision on this Issue to provide that FDN may only access a UNE to provide information services if it is also providing an eligible telecommunications service over that UNE, with the exception of DSL.

B. FDN's Response

In its Response, FDN argues that Sprint's Motion for Reconsideration does not meet the standard because Sprint "asks the Commission to re-evaluate arguments the Commission already considered, re-weigh evidence the Commission already heard, and/or arbitrate new issues […]" Response at 1.

(1) Issue 5

FDN argues that Sprint's Motion reargues facts contained in the record and already considered by the Commission in this proceeding. Id. at 2. FDN further argues that Sprint's request to delay implementation of a LATA-wide local calling scope is an attempt to unravel the Commission's pro-competitive decision. Id. FDN contends that Sprint's argument that the Commission did not consider the anti-competitive impact a LATA-wide calling scope would have on other carriers is the same argument it addresses in its case and post-hearing brief. Id. Furthermore, FDN argues that Sprint's argument that the Commission failed to consider the differences between BellSouth and Sprint were also already argued by Sprint and considered by the Commission. Id. Also, FDN argues that the interconnection agreement between FDN and BellSouth is public record and on file with the Commission. Id. at 3.

FDN contends that Sprint's request to delay implementation of a LATA-wide calling scope until reduction of access charges is complete will create a situation where intrastate access rates will be put at the same level as reciprocal compensation rates. Id. FDN further argues that the end result would be that in-state calls would not be subject to intrastate access rates at the levels which the Commission found prevented CLECs from offering different calling plans. Id.

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

In footnote 2 of its Response, FDN notes that the arbitrated agreement has a two year term with the likelihood of there only being a few months of LATA-wide calling before rebalancing is complete in November of 2007. Id.

In conclusion, FDN argues that Sprint's Motion be denied.

(2) Issue 21

FDN argues that on the issue of resale Sprint attempts to reargue its position and raises new matters not addressed in this proceeding. Id. at 3. First, FDN contends that Sprint raises its argument on the unconstitutional impairment of contracts for the first time in its Motion. Id. at 4. Consequently, FDN argues that pursuant to the Order Establishing Procedure[7] in this proceeding, Sprint has waived its right to raise this issue. Id. FDN further argues that Sprint improperly uses its Motion to brief the impairment of contracts issue for the first time. Id. On this same point, FDN argues that the Commission, and similar agencies, have not been delegated the responsibility to rule on constitutional issues like the one raised by Sprint. Id.

Furthermore, FDN contends that Sprint reargues the DOAH "fresh look" case, which the Commission already considered in this proceeding. Id. at 5. FDN argues that the contract between Sprint and the customer are not materially altered or impaired since FDN "steps into the shoes" of Sprint. Id. FDN points out that the Commission made a decision consistent with the FCC rules in that Sprint has a legal obligation to resell contracts. Id. FDN also contrasts the DOAH "fresh look" case as one in which the Commission unilaterally decided that termination liability did not apply. Id. In the instant proceeding, FDN argues that the Commission is merely following an FCC rule. Id.

FDN notes that the 12% wholesale discount rate it proposed as a compromise was less than the Commission-approved discount for Sprint at 19.4%. Id. at 6. Thus, FDN argues that Sprint may be recovering more of its cost not less of its costs. Id.

In conclusion, FDN argues that the Commission deny reconsideration on this Issue and on its own motion consider applying the Commission-approved discount rate of 19.4% to ensure consistency. Id.

(3) Issue 22

In its Response, FDN cites to Commission Order No. PSC-05-1054-PHO-TP[8] issued in Docket 041269-TP to support its contention that the Commission has already accepted a similar result on DS1 Caps. Id. at 7. FDN further argues that the Commission's recent determination in Docket 040156-TP to deny the CLECs' Motions for Reconsideration regarding inconsistent rulings in recent Commission arbitrations on this issue is sufficient reason to deny Sprint's Motion in this proceeding. Id.

[7] See Order No. PSC-05-0496-PCO-TP, issued May 5, 2005.
[8] *In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Prehearing Order, Docket No. 041269-TP, issued October 31, 2005.

In conclusion, FDN argues that the Commission's decision is properly supported, and since the Commission already considered Sprint's arguments on this Issue, Sprint's Motion should be denied. Id.

(3) Issue 24

As to this Issue, FDN argues that the FCC has already defined eligible telecommunications services" and as such the Commission was not required to do so in its Order on Arbitration. Id. FDN further argues that in accordance 47 C.F.R. §51.309(a) ILECs are prohibited from imposing "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer." Id. at 8. FDN contends that Sprint is attempting to place use restrictions that are prohibited by the FCC Rule. Id. FDN further contends that the only exception to the Rule is found in subsection 309(b), which prohibits a requesting telecommunications carrier from accessing UNEs for the exclusive use of mobile wireless services or interexchange services. Id. FDN asserts that when using UNEs to provide information services to its end users it does not exclusively provide the services listed in the exception. Id.

FDN further argues that Sprint's contention that only local exchange services are "eligible telecommunications services" for the purchase of UNEs is baseless. Id. at 9. FDN cites to the FCC's Broadband Classification Order for the proposition that "telecommunications services that are used to provide information services remain available as UNEs for purchase by CLECs." Id.; See ¶¶ 126 and 127. FDN also argues that the FCC has long recognized that telecommunications services and information services are "mutually exclusive" regulatory classifications. Response at 9; See also Broadband Classification Order at ¶103. In conclusion, FDN argues that there is no clear indication in the Broadband Classification Order that it only applies to DSL. Id. at 10.

III. Staff Analysis

A. Issue 5: Local Calling Scope

Staff does not believe that the Commission overlooked or failed to consider any point of fact or law in rendering its decision to expand the local calling area to the LATA. First, Sprint's argument that the resulting decision is anti-competitive to other carriers, including IXCs, is the same argument raised by it in its case-in-chief and its brief. Motion at 4; Sprint's Post-Hearing Brief, filed September 1, 2005, at 3. In its Motion, Sprint even cites to testimony in which its witness makes these same arguments. Id. Therefore, on this point, staff believes that Sprint's Motion fails to meet the standard for reconsideration since it merely reargues the same factual points that were part of the record in this proceeding, and considered by the Commission in rendering its decision.

Second, Sprint reargues its position on the Commission's ruling as set forth in the Order on Reciprocal Compensation in Docket No. 000075-TP. Id. at 4 -5. However, staff believes that the Commission effectively distinguished this case from the instant proceeding in its Order on Arbitration. In its Order on Arbitration, the Commission ruled in pertinent part that it "was establishing a default definition to be applied whenever parties agree. We were therefore

necessarily concerned with competitive neutrality, since an inappropriate default could tip the balance of negotiations in favor of one party or the other." Order on Arbitration at 9. Moreover, the Commission's decision in the instant proceeding to require a LATA-wide local calling area hinged on FDN's voluntary proposals to carry traffic to each tandem in the LATA and to deliver local VOIP traffic under reciprocal compensation arrangements. Id. at 9 – 10.

Third, Sprint argues that the Commission overlooked or failed to consider the differences between Sprint and BellSouth in the affects a LATA-wide calling area would have on Sprint. Motion at 5. Staff believes that Sprint's arguments distinguishing its territory from BellSouth's were considered, and were included as part of the Commission's Order on Arbitration in this proceeding. Id. Sprint and FDN both presented evidence regarding BellSouth's territory and the impacts of having a LATA-wide calling scope. Throughout this proceeding Sprint has presented evidence of the rural nature of its territory and why a LATA-wide calling scope would be inappropriate in its case. Staff believes that these arguments were considered by the Commission in its original ruling, and thus are improper in the context of a motion for reconsideration. Staff notes that Sprint did not provide the BellSouth/FDN interconnection agreement as evidence in this record. Thus, the Commission did not overlook or fail to consider a point of fact before it in this proceeding.

Finally, Sprint argues that the Commission overlooked or failed to consider the incremental nature of the rebalancing process. On this point, staff believes that the Commission did not overlook or fail to consider the multi-step process of rebalancing.

As an additional note, the Commission's decisions on Issues 36 and 39 will be affected if reconsideration is granted on Issue 5. Issue 36 addresses points of interface (POIs) and as a compromise to attaining the entire LATA as the local calling area, FDN agreed to voluntarily establish a POI at each tandem in each LATA where FDN terminates traffic. Without this compromise, FDN is not willing, nor is the company required by any rule or law, to establish a POI at each tandem in each LATA.

Furthermore, if the Commission reconsiders its original decision on Issue 5 and accepts Sprint's proposal to define local traffic as traffic that is originated and terminated within Sprint's local calling area or mandatory EAS area, then the Commission should also reconsider its decision on Issue 36. Staff is recommending that in the event the Commission denies staff's recommendation as to Issue 5, that it find that FDN only be required to establish one POI per LATA, and may establish more than one POI per LATA at its own discretion.

On Issue 39 staff recommends that if the Commission accepts Sprint's proposal to define local traffic as traffic that is originated and terminated within Sprint's local calling area or mandatory EAS area, then the Commission should hold Issue 39 in abeyance until the FCC determines the status of VOIP traffic.

B. Issue 21: Resale of Contract Service Arrangements

Staff believes that Sprint incorrectly argues that the Commission overlooked or failed to consider that the contract containing termination liability is between Sprint and the retail

customer, not between Sprint and FDN. Motion at 9. Furthermore, Sprint reargues its position that the exclusion of termination liability in CSAs will prevent it from recovering all of its up-front costs. Motion at 9. Sprint made this argument in its case-in-chief and brief. Contrary to Sprint's argument, staff believes that the Commission did not find that Sprint failed to address the possibility that it may not recover all of its up-front costs, rather the Commission found that the evidence was lacking in support of Sprint's general contention. Order on Arbitration at 13. Moreover, Sprint recognizes that the parties did not present evidence on the cost implications as it relates to termination liability. Motion at 10. In its Motion, Sprint fails to address any specific evidence in the record to support its general contention, which may have been overlooked or not considered by the Commission in rendering its decision.

Sprint further argues that the DOAH ruling on "fresh look" prohibits the Commission from ruling as it did on this Issue. Staff believes that the DOAH "fresh look" ruling can be distinguished from the instant proceeding. The DOAH "fresh look" ruling was made within the context of the Commission's rulemaking authority. The Commission, upon a request to initiate rulemaking, proposed "fresh look" rules that applied generically. The instant proceeding is a unique arbitration between two distinct parties, who have requested that the Commission render decisions on issues framed by the parties to form the basis of their interconnection agreement. Staff believes that this is a distinguishable factor. Moreover, the rulings in this proceeding are prospective rather than retrospective. Thus, the argument that the decision in the instant case is an unconstitutional impairment of *existing* contracts is invalid. On this point, staff believes that the Commission should clarify on its own motion that its decision to exclude termination liability from CSAs is applicable to those CSAs entered into after the effective date of the Order on Arbitration.

Sprint also argues that the Commission failed to request information on the issue of cost recovery. Motion at 12. Sprint further argues that the Commission should have attempted to gather sufficient evidence to address the issue of cost. Id. Staff notes that the particular section of the Telecommunications Act of 1996 (the Act) cited by Sprint to address the Commission's obligations provides that "[t]he 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." Section 252(b)(4)(B) (emphasis added) Staff believes that although the Commission and its staff may not have tailored its discovery to the issue of cost recovery, it does not place prohibitions on the Commission's ultimate decision or the manner in which it reaches its decision.

In conclusion, staff believes as to this Issue, Sprint has failed to meet the standard for a motion for reconsideration. The factual and legal arguments made by Sprint in its Motion are the same arguments considered by the Commission in rendering its decision on this Issue. That being said, staff believes that it may be appropriate for the Commission on its own motion to clarify the applicable discount rate for resale. Staff believes that the Commission intended to rule that if FDN resells Sprint's existing contract with an end-user the applicable discount rate is the 12% discount rate proposed by FDN as a compromise, rather than the Commission-approved 19.4% discount rate.

C. Issue 22: DS1 Caps

Sprint argues (1) that the Commission's legal interpretation of FCC Rule 51.319(e)(2)(ii)(b) is fatally flawed and (2) that the effect of the Commission's departure from the plain meaning of the Rule creates its own incongruous result, i.e., the circumvention of the DS3 cap. Motion at 14 - 18.

With respect to the Commission's legal interpretation, Sprint argues that (a) the Commission's decision ignores the plain language and meaning of the FCC Rule and (b) conflicts with its own recent decision in the Verizon generic arbitration, which applies the language of the Rule as written. As staff understands, Sprint is alleging an initial fundamental error in the Commission's approach, which is not curable by subsequent analysis of the facts and policy. Given the allegation of fundamental error, it is useful to provide the legal framework for applying statutes and rules.

Rules of Construction

The construction and application of a rule and a statute are essentially the same. The Commission's approach here must conform to the rules of sound statutory construction. Although most courts, commentators, and attorneys would agree readily to certain platitudes about construction, nevertheless "[…] American courts have no intelligible, generally accepted and consistently applied theory of statutory construction." [9] Moreover, "[a] careful review of state court opinions discloses that rules of statutory construction are not rules in the same sense as are other rules of law [. . .]."[10] Rules of construction are more like guidelines than requirements.

With these caveats in mind, Florida courts embrace two historical theories of statutory construction. The first is the "plain meaning" rule. "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to statutory interpretation and construction; the statute must be given its plain meaning." Holly v. Auld, 450 So. 2d. 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. McRainey, 137 So. 2d 217, 219 (Fla. 1984). This is a literal approach that precludes the type of analysis used by the Commission in its decision.

The next historical theory embraced by Florida has recently been called "The Absurdity Doctrine." [11] This approach holds that "[a] statute's plain and ordinary meaning controls only if it does not lead to an unreasonable result." State v Burris, 875 So. 2d. 408, 459 (2002). However, the exception to the "plain meaning" rule created by the "absurdity doctrine" is probably narrower than this language suggests. The literal application of the statute must cause some ridiculous, absurd, or palpably unjust result, or thwart the legislative intent of the statute, or create disharmony with other statutes. Where these unreasonable results do occur, the plain

[9] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process; Basic Problems in Making Application of Law,* pg. 1169 (William N. Eskridge and Philip P. Frickey, eds. Foundation Press, 1994).
[10] Uniform Statute and Rule Construction Act (1995), Commentary at page 23.
[11] Maddox v. State, 31 Fla. L. Weekly S24 (Fla. Jan. 12, 2006), J. Cantero, dissenting.

meaning may be ignored. Thus, the "absurdity doctrine" creates a narrow exception to the "plain meaning" rule that must be justified under the particular circumstances of the case.

Arbitrations are Specific

Staff believes that given the complex context of the application of the FCC rules it is imperative that the Commission subject the literal application of the FCC rules to a reasonableness test to assure that the public interest is being served. Moreover, this "reality check" on the literal application of the rules must be done based on the record established in the specific arbitration; consequently it is to be expected that different dockets may be resolved differently. Staff notes that arbitration proceedings are not precedential. At the same time, rejecting the plain meaning of a rule must not be done lightly. And staff specifically acknowledges that reasonable persons can in good faith disagree in these arbitrations whether the plain meaning of the words can be avoided, *i.e.*, whether the absurdity doctrine may be invoked.

Having acknowledged that reasonable persons can differ as to whether the plain meaning of a rule must be literally applied, staff believes that the Commission did not overlook or misapply the significance of the plain meaning of the words contained in the FCC Rule. On the contrary, the Commission did consider the plain meaning and determined that the result of the literal interpretation required further analysis. With this framework as an introduction, staff now proceeds to revisit the unreasonable results that justify not applying the plain meaning of the words.

FCC Rule

Sprint argues that the Commission overlooked the unambiguous provisions of the FCC's Rule 51.319(e)(2)(ii)(b), which details in part:

> "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." Motion at 15.

Sprint glosses over the issues that the parties placed before the Commission for determination in this arbitration proceeding. This particular Issue was framed as follows: What terms and conditions should be included to reflect the FCC's TRO and TRRO decisions? Staff believes that by reading the underlying language of the TRO[12] and the TRRO[13], it becomes readily apparent that a competitive carrier is to be afforded certain levels of unbundled transport

[12] Order No. FCC 03-36, released August 21, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, *In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking at ¶130.

[13] Order No. FCC 04-290, released February 4, 2005, WC Docket No. 04-313 and CC Docket No. 01-338, *In Re: Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand.

between wire centers. This intent is expressed in Rule 51.319(e)(2) which provides in pertinent part:

> "(iii) Dedicated DS3 transport. Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.
>
> (A) General availability of DS3 transport. Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. **As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.**
>
> (B) Cap on unbundled DS3 transport circuits. **A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.**" (emphasis added)

In this arbitration, the argument under this Issue was framed to involve Tier 3 wire centers where DS3 is not available. In Sprint's post-hearing brief, it asserts that it "has also proposed a cap of 10 on the number of DSl dedicated transport circuits that a CLEC may order in all wire centers where DS1 dedicated transport is available. **As proposed, Sprint's cap applies regardless of whether DS3 transport is available in a wire center."**[14] (emphasis added)

According to Rule 51.319(e)(2), the LEC must unbundle this transport in a Tier 3 wire center, and in such cases where as a logical matter it cannot, staff believes that it would be unreasonable to allow the LEC to restrict the purchase of transport capacity by limiting the availability of DS1 circuits. Furthermore, staff believes it would be unreasonable to mandate a certain level of available transport in a suburban wire center (Tier 2), where a LEC does not offer DS3 circuits from a certain rural wire center (Tier 3), then the available capacity to a competitor in a rural area could be restricted. Staff does not believe this is fair, or that it complies with the FCC's overall policy intentions as set forth in the TRRO. The FCC has mandated that this transport be made available: "Thus, for all routes with at least one end point classified as a Tier 3 wire center, we find that competing carriers are impaired without access to DS3 transport."[15]

[14] See Sprint's Post-Hearing Statement at pg. 8.
[15] TRO at ¶130.

Staff recognizes that there is a limitation on the availability of DS3 circuits:

> "131. *Limitation on DS3 Transport*. **On those routes for which we find impairment for DS3s, we limit the availability of DS3 transport.** Although we find that sufficient revenue opportunities generally are not available to justify the deployment of competitive transport facilities on these routes, we nevertheless establish a safeguard to limit access to a carrier that has attained a significant scale on such a route indicating that more than sufficient potential revenues exist to justify deployment, we find no impairment. We give effect to this distinction, as we did in the *Triennial Review Order*, **by establishing a limitation of 12 DS3s per carrier for any route on which carriers are not impaired.**"[16] (emphasis added)

Staff believes that the LEC would be allowed to avoid the requirement of providing a set amount of capacity for interoffice transport by simply stating that it does not offer DS3 service.[17] Thus, this scenario would lead to an unfair result. According to the TRRO, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

Verizon Ruling

Sprint also argues that the Commission overlooked its earlier decision on the same issue in the Verizon generic arbitration proceeding. Staff respectfully disagrees and believes that this is an "apples and oranges" comparison. First, the parties in that docket framed the DS1 caps issue differently in the context of that more generic arbitration proceeding. Second, staff believes that the record in the Verizon generic arbitration is sparse on the DS1 caps issue, while the record in the instant proceeding contains detailed evidence that there are a large number of Tier 3 wire centers in Sprint's territory,[18] which would likely not be the case in Verizon's territory (Tampa/St. Petersburg).

Staff agrees that the language in the TRRO and the language in the Rule can lead to different conclusions regarding the DS1 cap. In the Verizon generic arbitration, it appears that there was an inadequate basis in the record to reject the plain meaning of the Rule. In the instant proceeding, there was support in the record regarding the number of wire centers that would be impacted, and how literal application of the Rule regarding the DS1 limitation in a Tier 3 wire

[16] Id. at ¶388.
[17] See Sprint's Post-Hearing Statement at pg. 8.
[18] See FDN's Post-Hearing Brief – Footnote 37 "Since Sprint has very few wire centers it classifies as Tier 1 or 2, the vast majority of its wire centers will be Tier 3. And it is in Tier 3 wire centers where, by definition, there are fewer customers, where collocation is less likely and where, therefore, EELs are more likely. Hence, if the DS1 cap applies universally to all tiers and routes, there is a great likelihood of customer disruption for UNE DS1 transport circuits to be groomed onto a UNE DS3 transport circuit."

center could create disruption of service for competitive carrier customers and the possible assessment of change order expense.[19]

Staff notes that in Docket 041269-TP, the Commission recently accepted the following conditions outlined in a 9-state stipulated agreement with its competitive carrier customers that provided in part:

> "CLEC(s) shall be entitled to obtain up to (10) DS1 UNE Dedicated Transport circuits on each Route where there is no unbundling obligation for DS3 UNE Dedicated Transport. Where DS3 Dedicated Transport is available as UNE under Section 251(c)(3), no cap applies to the number of DS1 UNE Dedicated Transport circuits CLEC can obtain on each Route."[20]

At the very least, this stipulation suggests that the purposes of the TRRO and the adopted rules are served by avoiding literal application of the rule in every circumstance. Moreover, staff believes that the Commission's decision here is consistent with prior regulatory treatment of the DS1 cap issue.

Effect on DS3 Cap

In its Motion, Sprint contends that "the Commission Order misinterprets Sprint's position by arguing that it would result in a limitation to 15.44 megabytes of transport in an unimpaired Tier 3 wire center."[21] Sprint further contends that "this analysis is flawed because DS3 transport is available as a UNE on any route where one of the end points is a Tier 3 wire center, so there can be no unimpaired Tier 3 wire center." [22] However, Sprint states the contrary in its post-hearing brief that "Sprint has also proposed a cap of 10 on the number of DSl dedicated transport circuits that a CLEC may order in all wire centers where DS1 dedicated transport is available. **As proposed, Sprint's cap applies regardless of whether DS3 transport is available in a wire center.**[23] (emphasis added) It is staff's belief that the purpose of the TRRO was to limit the amount of capacity that LECs had to unbundle for competitive carriers.

In summary, the gist of the dispute in this Issue is whether or not FDN should be required to move its DS1 customers in a Tier 3 wire center to DS3 service. It is staff's belief that as long as the competitive carrier is not gaming the system and demanding more capacity than that which is required by the TRRO, then there is no reason why FDN should be forced to change the service it is receiving from Sprint. Staff believes that requiring this change could likely cause

[19] According to Access Service Tariff, Sixth Revised Page, pg. 135, there is a $366 nonrecurring charge for obtaining DS-3 service.
[20] Joint Stipulation Regarding Settlement of DS1 Transport Cap Issue; BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South, Inc. ("CompSouth") joint stipulation. By this Stipulation, BellSouth and CompSouth wish to inform the Commission of: (a) settlement of the disputed issue in the above-referenced proceeding regarding implementation of the "DS1 transport cap" set forth in the Triennial Review Remand Order (the "TRRO"); and (b) agreement on a process to finalize the identification of "fiber-based collocators" for purposes of the TRRO unbundled network element ("UNE") impairment analysis.
[21] Motion at 17.
[22] Id.
[23] See Sprint's Post-Hearing Brief, filed September 1 , 2005, pg. 8.

the competitive carrier to be assessed nonrecurring charges for the change in service,[24] and there is the real potential that FDN customers could experience disruption in their service during the change from DS1 to DS3. In addition, there is nothing in the record that supports the notion that Sprint will suffer a financial loss by providing DS1 versus DS3 service. To the contrary, it would be less expensive for FDN, on a per user basis, to have all of its customers serviced by DS3 circuits.[25]

Based on the record, staff is concerned that forcing conversion of certain FDN customers may have an anti-competitive effect. It is staff's belief that as long as FDN is not requesting transport capacity greater than that afforded under the TRRO, then FDN should not be forced to change service or be limited to just 10 DS1 circuits in Tier 3 wire centers. To do otherwise could cause harm, such as service disruptions and the imposition of additional nonrecurring charges, and it would not further the intent of the TRRO and the FCC to allow competitive carriers access to a set amount of interoffice transport in rural wire centers.

Should there be an occasion where a competitive provider requests unbundled interoffice transport in excess of the FCC mandated amounts, Sprint would have the opportunity to deny service or file a complaint with the Commission. Until this occurs, staff believes it would be unfair and unjust to force competitive carriers to buy capacity that they may not be able to use, to allow the imposition of nonrecurring charges for changes the competitive carrier does not want, or most importantly, to put the customers of competitive carriers at risk for disruption in service while unnecessary changes are being made.

In conclusion, staff believes that based on the foregoing analysis, Sprint's Motion as to this Issue should be denied.

D. Issue 24: Meaningful Amount of Traffic

Staff believes that Sprint's Motion should not be granted as to this Issue as there is no point of fact or law the Commission did not consider in rendering its decision. Although staff concedes that the Order on Arbitration may be unclear, such an argument does not meet the standard for reconsideration of the Issue. However, staff recommends that the Commission clarify its decision on its own motion.

Sprint states in its Motion that the Commission's ruling on this Issue is inconsistent and unclear. Motion at 18. While staff agrees with Sprint that the language in the Order on Arbitration may be unclear as to this Issue, staff does not believe that reconsideration is warranted. First, Sprint argues that the Commission failed to define "eligible telecommunications services." Id. Clearly, the Commission is not required to provide a definition and this point alone does not support Sprint's contention that this Issue should be reconsidered. Sprint's argument that the Commission did not define "eligible telecommunications services" does not bring to light any point of fact or law that the

[24] According to the Sprint tariff, there is a nonrecurring charge of $366 for ordering DS1 service. Access Service Tariff, Sixth Revised, pg. 135.

[25] Per the Sprint tariff for an interoffice channel, the charge for DS1 – 1.544 Mbps is $71 per month, or $46 per Mbps. The charge for DS3 – 44.736 Mbps, is $472, or $10.55 per Mbps. Access Service Tariff, Sprint, Second Revised , pg. 9.

Commission overlooked or failed to consider in rendering its decision. Moreover, neither party provided a definition of "eligible telecommunications services" in testimony, discovery, or the post-hearing briefs. There is no apparent definition for "eligible telecommunications services." A definition may be inferred from the FCC's rules, the Act, and the TRO and TRRO, but it is still not clear what services are included as an "eligible telecommunications service." However, staff's understanding is that an "eligible telecommunications service" is not limited only to local exchange service, as Sprint argues. Rather, it is staff's belief that an "eligible telecommunications service" does not include mobile wireless services or long distance services. In other words, staff understands what an "eligible telecommunications service" is not.

The Act provides that a "telecommunications service" is "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). The Commission's ruling on this Issue intended to be consistent with Rule 47 C.F.R. 51.309 (a) and (b) in finding that FDN may obtain a particular element of a UNE so long as it is offering an "eligible telecommunications service," that is not exclusively offering long distance or mobile wireless services. Generally, Rule 51.309 (a) sets forth that an ILEC "shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer." Rule 51.309 (b) is the exception in that "[a] requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services."

Staff believes that the Commission's intent was to find that Sprint shall not have the ability to restrict UNE availability where there is not a "meaningful amount of local traffic." As noted in the Order on Arbitration at page 22, "the initial focus of negotiations concerning use restrictions changed" midstream in this proceeding. Additionally, the Commission intended to rule that FDN may purchase a UNE from Sprint if it is providing an "eligible telecommunications service," *i.e.* not exclusively long distance or mobile wireless services. This ruling is consistent with the Rule and its noted exception. Staff agrees with Sprint's argument that there is a clear inconsistency in the Order on Arbitration at page 23, where it appears there was a typo. The word "not" was inadvertently omitted from the language of the Order on Arbitration. The inconsistent language is that "Sprint shall have the ability to restrict UNE availability […]" Rather that portion of the ruling should read "Sprint shall not have the ability to restrict UNE availability […]"

Finally, Sprint argues that the Commission's ruling implies that an information service is included within the definition of an "eligible telecommunications service." Staff believes that the Commission intended such a ruling in light of the FCC's findings in the Broadband Classification Order. In that Order the FCC ruled that CLECs "will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled […] regardless of the statutory classification of service to the incumbent LECs provide over those facilities. So long as a competitive LEC is offering 'eligible' telecommunications service—i.e., *not exclusively long distance or mobile wireless services*—it may obtain that element as a UNE." Broadband Classification Order at ¶127. Staff believes that the scope of the Broadband Classification Order does not apply just to DSL, since the FCC does not explicitly state such an intention.

IV. Conclusion

Sprint's Motion for Reconsideration should be denied. Staff believes that Sprint's Motion fails to identify any points of fact or law that the Commission overlooked or failed to consider in its decisions as to Issues 5, 21, 22, and 24. However, Sprint's Motion does identify certain aspects of the Order on Arbitration that should be clarified or amended, as set forth in the staff analysis below. Accordingly, staff recommends that the Commission on its own motion clarify its decisions on Issues 21 and 24.

ISSUE 2: Should the Commission require submission of the agreement within 15 days of the vote on this recommendation?

RECOMMENDATION: Yes. **(SCOTT)**

STAFF ANALYSIS: In order to prevent any further delay, the Commission should require that the parties file their agreement consistent with the findings in its Order No. PSC-05-1200-FOF-TP (Order on Arbitration), issued January 10, 2006.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This Docket should remain open pending the submission and approval of the agreement between the parties. **(SCOTT)**

STAFF ANALYSIS: Final Order No. PSC-06-0027-FOF-TP required that the parties' agreement be submitted for approval by the Commission. Accordingly, this Docket should remain open pending the submission and approval of the agreement.