

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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)	Docket No. 041464 Filed June 7, 2005
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FDN COMMUNICATIONS’ MOTION FOR POSTPONEMENT OF, AND ESTABLISHMENT OF, DUE DATES

Pursuant to Rule 25-22.060, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications (“FDN”) respectfully moves the Prehearing Officer to amend the case schedule set forth in the Order Establishing Procedure¹ by setting July 11, 2005, as the due date for filing rebuttal testimony. This would constitute a three-week extension from the June 24, 2005 date on which it is currently due. FDN further moves the Commission to postpone the Prehearing Conference and Hearing by at least 30 days so surrebuttal testimony, addressed to the setting of proper rates for unbundled network element (“UNE”) rates, can be submitted.

FDN requests that the Prehearing Officer expedite its consideration of this Motion. A prompt determination is needed for the parties to appropriately plan their efforts in this case. In support of this Motion, FDN states as follows:

Background and Introduction

1. UNE rates have been an issue in this proceeding from inception. FDN plans to litigate the setting of UNE rates in this proceeding and, to that end, has retained the assistance of the QSI Consulting firm, which has considerable experience before this and other state Commissions with UNE rate-setting issues. Accordingly, even before the Order Establishing

¹ Order No. PSC-05-0496-PCO-TP, issued May 5, 2005, by Commissioner Deason, as Prehearing Officer (hereinafter the “Order Establishing Procedure”).

Procedure in this case was issued, FDN asked Sprint to provide support for the rates it proposed in the interconnection agreement. FDN's requests were initially verbal and were subsequently made in writing. (See, e.g. attached Exhibit No. 1.)

2. Pursuant to their duty to negotiate in good faith under sections 251(b) and (c) of the federal Communications Act, incumbent local exchange carriers ("ILECs"), such as Sprint, must "furnish cost data that would be relevant to setting rates if the parties were in arbitration." 47 C.F.R. §51.301(c)(8). The rule does not require requests for cost data to be made through formal discovery. A simple request suffices. But Sprint has, thus far, refused.²

3. Sprint's needless recalcitrance has prejudiced FDN, requiring the delay and procedural amendments requested above. The parties filed direct testimony on May 27, 2005. Sprint's direct testimony did **not** include a cost study filing, even though UNE rates are an issue in this proceeding. Sprint's witnesses simply cross-referenced the prior Commission orders in Docket No. 990649B. FDN's direct testimony addressed aspects of the old Sprint cost study, relying largely on QSI's familiarity with that and other Sprint cost proposals. QSI did not have the benefit of directly reviewing the Sprint cost support at issue in this proceeding and, thus, may be of only limited use to the Commission.

4. FDN is concerned that if an extension is not provided, FDN's case in rebuttal will be greatly prejudiced. On Friday, June 3, 2005, FDN served Sprint with a substantial volume of

² Sprint's negotiator originally asserted that FDN should already have a copy of the study because the rates Sprint is proposing in this proceeding are the same as those set in Docket No. 990649B, in which FDN participated as a party. As FDN explained, however, the non-disclosure agreement in Docket No. 990649B barred FDN's use of the UNE cost support materials here. Even though FDN executed a non-disclosure agreement for this proceeding immediately after Sprint proffered one on May 10, nearly a month ago, Sprint has still not provided the cost support information. Moreover, FDN's experts were not able to install the electronic information contained on the CD retained from the prior case.

discovery requests, including a request for the proprietary version of Sprint's UNE cost study and other information pertinent to Sprint's proposed UNE rates. In accordance with the Order Establishing Procedure, Sprint's responses will be due on June 23, only one day before rebuttal testimony is due under the present schedule. FDN clearly requires additional time to review Sprint's cost studies, and therefore requests that additional time be provided as set forth in this Motion.

Argument

5. Sprint had a duty to provide FDN with the cost information FDN requested. Sprint should have done so when FDN first asked for it, when the parties were negotiating the new interconnection agreement, and it should have been included as part of Sprint's direct case in this proceeding. Instead, Sprint's direct case on the issue of UNE rates appears to consist of nothing more than 2 ½ pages of testimony cross referencing the Commission's prior determination.³

6. Sprint's failure to file its cost study as part of Sprint's direct case is justification for postponement (if not outright judgment against Sprint, given that Sprint has the burden of proof in this proceeding).⁴ A petitioner such as Sprint cannot simply point to an old commission order – an order whose underlying facts and findings are challenged in the respondent's pleadings and testimony, not to mention still pending review on appeal – and claim without more

³ See Direct Testimony of Sprint witness Maples, pages 32 – 34.

⁴ FDN reserves its right to argue that Sprint's failure to file adequate information supporting its direct case is grounds for judgment in favor of FDN or dismissal of certain Sprint claims.

that the petitioner has proven its direct case on the record.⁵

7. Given that Sprint's discovery responses are not due until June 23, it would be impractical to expect that FDN would be able to analyze Sprint's responses to that discovery, including the proprietary version of the cost study, and incorporate all pertinent analysis into rebuttal testimony, which is due the following day, June 24.⁶ Further, FDN believes that depositions of certain Sprint witnesses and additional discovery will be necessary after the initial discovery responses are received.

8. FDN is one of the few facilities-based CLECs of any size remaining in Sprint's territory, where competitors currently have only an 8 percent market share, well below that found elsewhere in the state. FDN maintains that one reason that competition has lagged in Sprint's territory is because of the unreasonably high UNE rates set in Docket No. 990649B.

9. Those UNE rates were largely proposed by Sprint, which the Commission accepted because there was no testifying witness to advocate specific adjustments to the Sprint cost study. As a consequence, the Commission believed that it was bound to accept the Sprint cost study as filed, even though the Commission recognized that it had numerous flaws. While FDN did not agree with the Commission's conclusion in that case,⁷ FDN is striving in this proceeding to provide the Commission with a complete record so that appropriate adjustments may be made to Sprint's model and the resulting UNE rates. Sprint has, thus far, made that

⁵ Nothing in the Telecom Act or other applicable law provides that a CLEC is bound to accept in a subsequent arbitration the UNE rates approved by the Commission in another proceeding, generic or otherwise.

⁶ Given the volume of the discovery FDN is serving, FDN does not believe imposing a shorter response time on Sprint would be practical.

⁷ FDN has sought review of the Commission's determination in federal district court and that petition is still pending.

impossible by failing to provide a copy of the study. FDN should not be penalized for Sprint's failure to fulfill Sprint's legal obligation to provide FDN information. And if the Commission does not permit FDN fair opportunity to present a detailed case in this matter, and Sprint's proposed UNE rates are simply rubber-stamped, the Commission could see the already de minimus competitive wireline figures in Sprint territory stagnate or reverse.

10. In consideration of the above, the Prehearing Officer should postpone the case schedule so rebuttal testimony is due July 11, 2005, rather than June 24, 2005. FDN further requests that the Commission postpone the Prehearing and Hearing by at least 30 days.⁸ If this latter request is granted, the Commission should establish a filing date for surrebuttal testimony on the issue of UNE rates (Issue No. 34.)⁹ Given the state of the direct testimony already filed by the parties on UNE rates and the significant amount of discovery to be conducted and rebuttal that will have to be filed, surrebuttal on UNE rates would be appropriate under the circumstances. The filing date for Prehearing Statements should also be postponed and rescheduled to a later date in proximity to the new Prehearing. If the current Prehearing and Hearing dates remain unchanged, FDN moves that Prehearing Statements be due no earlier than July 11, 2005.

11. FDN believes that no party is prejudiced by this motion. Had Sprint simply provided FDN the cost study when FDN first requested, the crush in the case schedule may not have occurred. And, as set forth above, the relief sought represents a fair balancing of the parties' interests, and is in the public interest. The parties have already waived their rights to a 9-

⁸ The Commission calendar may accommodate hearing dates in late September.

⁹ FDN does not herein propose a specific due date for surrebuttal since FDN does not know what new hearing dates the Commission would select. However, FDN suggests that if the hearing dates are moved, staff consult with the parties regarding a due date.

month determination under section 252(b)(4)(c) of the Telecom Act.

14. The undersigned counsel attempted to contact counsel for Sprint before filing this motion, but was unable to make contact.

WHEREFORE, for the reasons stated above, FDN Communications moves the Prehearing Officer to modify the case schedule in the Order Establishing Procedure as set forth above in the body of this Motion.

RESPECTFULLY SUBMITTED, this 7th day of June, 2005.

/s/ Matthew Feil

Matthew Feil
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and overnight mail to the persons listed below this 7th day of June, 2005.

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Matthew Feil

Exhibit No. 1

From: Matthew Feil
Sent: Tuesday, April 26, 2005 5:12 PM
To: 'Givner, Steve D [SBS]'
Subject: RE: Proposed Language

Steve,

Here's a redline for the whole deal. I think (or hope) we're inching closer.

As I've requested before, we need to have Sprint's list of TRRO wire centers no longer subject to unbundling and all supporting data that list. We also need your cost support/cost study for whatever rates you're requesting. I believe I asked for that previously as well.

I'd like to know if you have any language on conversions from SA to UNEs and EELs, since there's none in the draft, although there appeared to be a rate in the rate schedules.

Talk to you Thursday. Let me know if you have any questions before then.

Matt

Matthew Feil

From: Matthew Feil
Sent: Friday, May 13, 2005 2:39 PM
To: 'Givner, Steve D [SBS]'
Subject: RE: Sprint - FDN draft 5-13-05

This is the cost study info just for network modifications? Is the rest coming by mail?

What about the support for the Exhibit A CO list?

I can start earlier on the 19th but not the 16th. I could be available on the 23rd.

-----Original Message-----

From: Givner, Steve D [SBS] [mailto:steven.d.givner@mail.sprint.com]
Sent: Friday, May 13, 2005 11:39 AM
To: mfeil@mail.fdn.com
Subject: Sprint - FDN draft 5-13-05

Matt,

I believe we're set for 2pm Central on Monday and Thursday next week. If you can start earlier--1 or 1:30, I'm available. How long will you be available those days? Also, are you available Monday 5/23 at 1 Central?

Updated agreement attached.
<<Sprint FDN draft 5-13-05.DOC>>

Note the following:

43.3 - Proposed language

44.6.5 - Proposed language

44.7.5 - Proposed language

49.2.4 - Proposed language

49.3.4 - Proposed language

49.5.3 - Proposed language

53.1.1 - Added comment

<<Cost Study and Work Order Detail - FL1.xls>>

70.6.1.4.1 - Proposed language

99 - Added new section