State of Florida

Public Service Commission

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

DATE: AUGUST 8, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BANKS, FUDGE) FRB BK
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS)

RE: DOCKET NO. 010098-TP - PETITION BY FLORIDA DIGITAL NETWORK, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED INTERCONNECTION AND RESALE AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. UNDER THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: 08/20/02 - REGULAR AGENDA - POST HEARING DECISIONS-MOTIONS FOR RECONSIDERATION/CROSS-MOTION FOR RECONSIDERATION - ORAL ARGUMENT MAY BE HEARD AT THE COMMISSION'S DISCRETION PURSUANT TO RULE 25-22.060(1)(F), F.A.C.- MOTION TO STRIKE- ORAL ARGUMENT NOT REQUESTED PURSUANT TO RULE 25-22.058,F.A.C. - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\010098c.rcm

CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No.

PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all of those issues except one. An administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike cross-motion for reconsideration, or in the Alternative, Response to FDN's cross-motion on July 5, 2002.

Staff notes that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This recommendation addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

The Commission has jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161, and 364.162, Florida Statutes. Section 252 states that a State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, the Commission should utilize discretion in the exercise of such authority. In addition, Section 120.80(13)(d), Florida Statutes, authorizes this Commission to employ procedures necessary to implement the Act.

The Commission retains jurisdiction of its post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion for Clarification or Reconsideration filed by Florida Digital Network, Inc. be granted?

RECOMMENDATION: No. FDN has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the Motion for Clarification or Reconsideration should be denied. **(BANKS)**

STAFF ANALYSIS:

FDN's Motion for Clarification or Reconsideration

On June 17, 2002, FDN filed a Motion for Clarification or Reconsideration. In its Motion, FDN seeks clarification or reconsideration of the Commission's decision in Section III of Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, issued June 5, 2002. Staff notes that Section III of the Final Order on Arbitration addresses whether BellSouth should be required to continue to provide its FastAccess Internet Service when its customer changes to another voice telecommunications provider. FDN states that it is requesting that the Order be clarified to explicitly prohibit BellSouth from refusing to provide its FastAccess service to FDN voice customers regardless of whether the customer does or does not receive BellSouth FastAccess at the time of porting to FDN. Staff notes that in its motion, it appears that FDN uses the terms of FastAccess service and DSL service interchangeably. FDN asserts that only if the Order establishes an across-the-board rule requiring BellSouth to provision its FastAccess service to any qualified requesting customer receiving voice service will the Commission's intent to remove the competitive barrier be fulfilled. FDN believes that only then will it be able to serve Florida consumers on similar terms and conditions as BellSouth.

FDN asserts that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice unless the consumers exercised rights at just one specific point in time (prior to porting to an ALEC voice provider.) FDN concludes that

this would be completely at odds with the Commission's stated intent of removing the competitive barrier posed by BellSouth's "tying its DSL service to its voice service."

FDN explains that BellSouth's practice of disconnecting its FastAccess Internet service when a customer changes its voice provider to an ALEC creates an unreasonable competitive advantage for BellSouth. FDN states that BellSouth has offered no justification for the practice, other than to claim that "it is not required to provide DSL service over a loop if BellSouth is not providing the voice service over that loop." FDN contends that BellSouth's 99 percent market share in the DSL market certainly qualifies as monopoly power. FDN points out that in its Order, the Commission recognized the competitive harms inflicted by BellSouth's alleged tying policy and agreed that the practice violates Florida law. However, FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation.

FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to qualified customers served by ALECs over BellSouth loops. FDN explains that without an explicit across-the-board rule requiring BellSouth to provide FastAccess service to any FDN voice customer who requests it-whether currently receiving BellSouth's FastAccess service or not-the competitive barrier the Commission sought to remove shifts somewhat but definitely remains in place. Therefore, FDN requests that the Commission clarify that its Order prohibits BellSouth from refusing to provide FastAccess DSL service whenever a qualified customer receiving ALEC voice services orders DSL service.

BellSouth's Response

BellSouth asserts that FDN requests that the Commission clarify its Order to explicitly require BellSouth to offer an enhanced, nonregulated, nontelecommunications Internet access service to any and all of FDN's voice customers, even though FDN is not impaired in its ability to offer high-speed Internet access

services to its customers. BellSouth states that Section III of the Commission's order applies only when a BellSouth customer is receiving FastAccess service from BellSouth at the time the customer decides to obtain voice service from FDN over UNE loops. BellSouth believes that no other conclusion can be drawn from the language of the Order. In support, BellSouth cites from the Commission Order:

> However, we believe that FDN has raised valid concerns regarding possible barriers to competition in the local telecommunications voice market that could result form BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service...
>
> * * *
>
> We believe that FDN has demonstrated that this practice raises a competitive barrier in the voice market for carriers that are unable to provide DSL service.

See Order at 8-9. BellSouth points out that the Order also states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." (emphasis added) Order at 11. BellSouth states that the Commission consciously decided to limit the scope of the Order. BellSouth states that the Commission correctly found that BellSouth's FastAccess service is an "enhanced, nonregulated, nontelecommunications service." As such, BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Instead, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. BellSouth points out that the Commission "caution[ed] that this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service." Order at 11.

Further, BellSouth contends that the Commission's decision regarding the issue of FastAccess service was premised on its belief that BellSouth's practice of disconnecting customers' FastAccess Internet service when they switched to FDN voice service was a potential barrier to competition in the voice market. Order at 8. BellSouth asserts that the Commission perceived a barrier to

competition possibly exists only when a BellSouth FastAccess customer is purportedly faced with the choice of either receiving voice service from FDN or continuing to receive FastAccess service. BellSouth contends that to go any further beyond this interpretation would be to abandon the Commission's assertion that it is not attempting to regulate an enhanced, nonregulated, nontelecommunications service. Therefore, BellSouth requests that the Commission deny FDN's Motion for Clarification or Reconsideration.

Staff Analysis

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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff believes that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, staff believes that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain

voice and DSL-based services from the provider(s) of their choice unless the consumers exercised rights at just one specific point in time (prior to porting to an ALEC voice provider.) Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECS over BellSouth loops.

BellSouth responds that the Order states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." Order at 11. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. Staff agrees.

Although FDN argues that the Commission overlooked a material aspect of anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In its decision, the Commission determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, the Commission determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, the Commission found that BellSouth should continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

Staff believes that the Commission was clear in its decision that BellSouth is required to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that the Commission considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, staff recommends FDN's motion should be denied.

ISSUE 2: Should the Motion for Reconsideration or in the alternative, Clarification filed by BellSouth Telecommunications, Inc. be granted?

RECOMMENDATION: No. BellSouth has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the motion for reconsideration, or in the alternative, clarification should be denied. **(BANKS)**

STAFF ANALYSIS:

BellSouth's Motion for Reconsideration, or Clarification

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. In its Motion, BellSouth states that the Commission should reconsider its decision because the Commission overlooked numerous points of fact and law in reaching that decision. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In the alternative, BellSouth requests that the Commission clarify the manner in which BellSouth plans to implement this decision to comply with the Commission's Order. BellSouth contends that:

> (1) under Section III of the Order, an arbitration proceeding under the federal Telecommunications Act has been improperly converted to a state law complaint case (as stated previously, staff notes that Section III of the Order addresses whether BellSouth should be required to continue to provide its FastAccess Internet Service when its customer changes to another voice telecommunications provider);
>
> (2) the FCC has ruled that BellSouth's practice of not offering DSL over a UNE loop is neither discriminatory nor an unreasonable denial of service;
>
> (3) Section 706 of the Act does not support the Commission's decision;

> (4) the efficiencies that make ADSL and FastAccess competitively viable depend on the simultaneous provision of voice service;
>
> (5) no evidence suggests that BellSouth has market power in the market for high-speed Internet access, and no evidence suggests that BellSouth could use whatever power it may have in that highly competitive market to have any appreciable negative effect on the market for local telecommunications service; and
>
> (6) even if BellSouth had market power in a properly defined market for DSL services or DSL-based Internet access, the ability of BellSouth to use that power to have a substantial effect on the market for local voice services is small.

BellSouth states that it has both a wholesale DSL regulated transport service and a retail nonregulated DSL-based Internet access service. BellSouth asserts that its FastAccess Internet Service is BellSouth's retail high-speed DSL-based internet access service and notes that FastAccess is a non-regulated information service offering. BellSouth indicates that the Commission made its findings under state law regarding the manner in which BellSouth offers its retail service, which is not a telecommunications service. BellSouth argues, thus, it is not a service over which this Commission has jurisdiction. See Order at 8. BellSouth opines that under Section 251 of the Act, there is no duty or obligation that would require an ILEC to continue to provide a non-regulated Internet access service to the customers of ALECs.

Next, BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally tariffed, wholesale DSL telecommunications service over a UNE loop is not discriminatory and therefore does not violate Section 202(a) of the Act.[1] BellSouth observes that the Commission noted in its Order that it was not attempting to address competition in the advanced

[1] In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Docket No. 02-35 (May 15, 2002).

services market, but instead attempting to remove what it perceived to be a barrier to entry into the voice market. BellSouth asserts that the Order states that Section 706 of the Act directs State commissions to use "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure development." Order at 8-9. However, BellSouth contends that Section 706 directs State commissions to take such measures for the express purpose of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability. . . " BellSouth explains that the Order acknowledges that the Commission's decision is not designed to encourage deployment of advanced services. Instead, the Commission's decision is designed to remove what is perceived as a competitive barrier in the voice market. Id. Consequently, BellSouth believes that Section 706 does not support the decision set forth in Section III of the Order.

BellSouth asserts that the Commission overlooked the fact that the efficiencies that make ADSL and FastAccess competitively viable depend on the simultaneous provision of voice service over the same loop. BellSouth states that it is efficient for it to provide its tariffed ADSL and FastAccess services because BellSouth is also providing the basic telephone service. BellSouth contends that the cost of providing ADSL service on a stand-alone basis would necessarily entail the costs of providing basic telephone service in any event, because that is how ADSL is designed to be provisioned. BellSouth states its ADSL service is analogous to a cable modem high-speed Internet access, in that the provision of the cable modem service is efficient because the cable company is already providing basic cable service.

BellSouth asserts that the Commission overlooked that no evidence suggests that BellSouth has market power in the market for high-speed Internet access. BellSouth also points out that no evidence suggests that it could use its leverage in the market to have any appreciable negative effect on the local telecommunications market. BellSouth states that FDN complains that BellSouth's current practice "clearly appears designed to leverage its market power in the high-speed data market as an anticompetitive tool to injure its competitors in the voice services market." (TR 64-65) BellSouth contends that FDN has failed to either allege or prove that BellSouth has market power in the high-speed Internet access market. BellSouth asserts that the *Line*

Sharing Order[2] required ILECs to unbundle the high frequency spectrum of copper loops to enable ALECs to provide DSL services. BellSouth indicates that the D.C. Circuit vacated the FCC's order because the FCC had failed to take into account the substantial competition for DSL service today.[3] BellSouth indicates that although the Commission stated that it has "not relied on the *Line Sharing Order*" for its decision, Order at 8, the D.C. Circuit's rationale for vacating that Order applies equally here.

In its motion, BellSouth is also requesting that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but that instead, BellSouth may provide that service over a new loop that it installs to serve the end user's premises. BellSouth asserts that the evidence supports a decision that BellSouth is not required to provide FastAccess over a UNE Loop. As stated previously, BellSouth states that its retail FastAccess service is a nonregulated service that is not within the jurisdiction of the Commission. BellSouth explains that its FCC Tariff No. 1 provisions DSL service only over an in-service BellSouth-provided exchange line facility. A UNE loop is not an "in-service [BellSouth] provided exchange line facility." Consequently, BellSouth concludes that if it were to place its tariffed DSL on a UNE loop, it would be in violation of its federal tariff. BellSouth observes that the Commission cautioned that its decision was not an attempt to exercise jurisdiction over DSL. Order at 8-9. Moreover, BellSouth asserts that it would have to make extremely onerous and costly changes to its systems in order to provision FastAccess to an end user served by an ALEC using a UNE loop. BellSouth notes that if the Commission does not amend its Order, BellSouth intends to comply with the Order by providing its FastAccess service over a new loop facility to those FDN users that are addressed in the Order. Based on the foregoing, BellSouth requests that its motion for reconsideration, or in the alternative, clarification be granted.

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[2] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 99-355, 14 FCC Rcd 20912 (1999); remanded and vacated line sharing rule requirement, United States Telecom Association v. FCC,290 F.3d 415, 428-29(D.C. Cir. 2002)

[3] See United States Telecom Ass'n v. FCC, 290 F.3d 415, 428-29(D.C. Cir. 2002)

FDN's Response

FDN states that BellSouth's claim that the "Commission has no authority to [determine whether it offers DSL services in compliance with state law]. . .," fails for two reasons. First, FDN asserts that its request is inextricably related to its rights under Section 251 of the Act. FDN also indicates that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. FDN explains that the Florida Legislature has authorized the Commission to promote competition by ensuring the availability of the widest possible range of consumer choices in the provision of all telecommunications. Second, FDN states that Section 252(e)(3) of the Act provides, in part, that "nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement." FDN contends that State commissions have broad discretion to determine that an issue for arbitration, and proposed resolutions therefore, relate to Section 251 of the Act. FDN notes that in rejecting arguments by Ameritech to narrow the scope of state commission authority, a federal district court determined that "state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, even if these matters are not specifically identified by parties as open issues in their petitions for arbitration."[4]

FDN contends that the FCC has declined to require Verizon Pennsylvania to provide DSL on CLEC UNE loops "in order to demonstrate compliance with" a Section 271 checklist item. (BellSouth BR at 34). FDN states that this Commission rejected BellSouth's argument that this FCC decision preempted its own consideration of BellSouth's policy under state and federal law. FDN asserts that in reaching its decision, the Order rejected BellSouth's argument that the FCC had dispositively addressed this issue. FDN states this Commission also recognized that the FCC has never decided this issue on the merits. Order 4-5, 6-8. FDN believes that the *FCC's Georgia/Louisiana 271 Order* suggests that a DSL service requirement might not be necessary if there is the

[4] TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin, 980 F.Supp. 992, 1000 (W.D. Wis. 1997).

option of line splitting for ALECs.[5] However, FDN states that in the instant case, line splitting would be a completely ineffective strategy for an ALEC.

FDN states that BellSouth argues that the Commission overlooked the "fact" that Section 706 of the Act does not support its decision in Section III of the Order. FDN disagrees. FDN contends that the Commission's Order is entirely consistent with Section 706 of the Act. FDN asserts that it is true that one of the factors which prompted the Commission's decision was to fulfill its role in fostering competition in the basic services market. FDN believes that the Order will support the deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barrier that limit consumer choice in the local voice market.

FDN also acknowledges BellSouth's argument that the Commission overlooked the alleged fact that its cost of providing ADSL service would increase if forced to sell the service on telephone lines where it was not the provider. FDN, however, asserts that the Commission did not overlook BellSouth's claims but rather it considered and rejected them. FDN indicates that the Commission rejected the argument that nondiscriminatory provision of DSL "would result in increased costs and decreased efficiency," concluding that "[t]he record does not, however, reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be unduly burdensome." Order at 10.

FDN states that BellSouth's argument that the Commission overlooked the availability of cable modem to consumers who purchase FDN voice service is flawed. FDN observes that where customers cannot obtain cable modem service and have only BellSouth as a choice of DSL provider, BellSouth is put in a position of commanding leverage.

FDN further contends that BellSouth's assertion that even if it has some market power, it is not enough to have a substantial effect on the market for local voice services, is absurd. FDN argues that the record demonstrates that BellSouth's exclusionary

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[5]See, e.g. Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Docket 02-35, Memorandum Opinion and Order, FCC 02-147 (rel. May 15, 2002) at ¶ 157.

DSL offering is causing significant injury to FDN. FDN observes that its customer base is being depleted as a result of FDN's inability to provide DSL service.

FDN contends that BellSouth's proposed provisioning method for its DSL service would be harmful and undermine the Commission's intent. FDN states that BellSouth proposes to provide ADSL service over a separate loop on different terms, rates and conditions than the ADSL service that it provides on loops for which BellSouth is the voice carrier. FDN states that the FCC has explained numerous disadvantages of the use of separate loops for ADSL in its *Line Sharing Order*.[6] First, FDN indicates that the FCC states that second loops are not ubiquitously available. Where a customer premises is only served by one copper loop, or when end users have exhausted the facilities that serve them by installing multiple phone, modem and fax lines, end users will not have additional facilities available to them. FDN states further that the FCC indicated that an additional loop reduces the efficient use of the existing loop plant.

For the foregoing reasons, FDN requests that the Commission deny BellSouth's motion.

Staff Analysis

As stated previously, 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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

[6] Line Sharing Order at ¶ 38.

Staff believes that BellSouth has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, staff believes that BellSouth's Motion regarding this issue should be denied.

In its Motion, BellSouth states that the Commission has improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. Staff agrees. Section 251(d)(3) of the Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local carriers;
> > (B) is consistent with the requirements of this Section [251];
> > (C) does not substantially prevent implementation of requirements of this section and the purposes of this part.

Order at 10. Further, staff believes that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale DSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of the Section 706 of the Act is to encourage the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by

removing significant barriers that limit consumer choice in the local voice market. Staff agrees. As stated in the Order, the Commission determined that Congress has clearly directed state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its tariffed DSL and FastAccess service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in its Order, Florida statutes provide that the Commission must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . " Order at 9. As addressed in the Order, the Commission found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, staff does not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to competition. Thus staff does not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a

BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, staff believes that FDN's position is in line with the tenor of the Commission's decision. While the Order is silent on provisioning, staff believes the Commission envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers. Being required to have installed and to use a second loop solely for the FastAccess definitely changes how the service is provided.

Furthermore, staff believes that the best remedy regarding the issue of provisioning is a business solution whereby the parties would negotiate the terms of the provision of the DSL. Order at 18. Nevertheless, since the specific means for BellSouth's continued provision of FastAccess was not specifically addressed at the hearing or in the Commission's decision, staff does not recommend that the Commission make any decision or clarification on this point of reconsideration.

Although BellSouth has asserted that the Commission overlooked a number of material facts, it fails to demonstrate that a point of fact or law has been overlooked. The Order clearly demonstrates that the Commission considered the arguments raised by BellSouth. Thus, BellSouth's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, staff recommends BellSouth's motion should be denied.

ISSUE 3: Should the Motion to Strike filed by BellSouth Telecommunications, Inc. be granted?

RECOMMENDATION: No, the Motion to Strike should be denied. **(FUDGE)**

STAFF ANALYSIS:

BellSouth's Motion to Strike

On July 5, 2002, BellSouth filed a Motion to Strike FDN's Cross-Motion, because it believes it is an untimely Motion for Reconsideration. BellSouth points out that in FDN's Motion for Clarification or Reconsideration filed June 17, 2002, FDN expressly stated that it "does not in this motion seek reconsideration of [Section IV or Section V] of the Order . . . ." Likewise, in BellSouth's Petition for Reconsideration or Clarification it indicated that its Petition was limited solely to Section III and that it "was not seeking reconsideration or clarification of Sections IV or V of the Order." BellSouth states that the first time reconsideration of Section IV is requested is in FDN's Cross-Motion.

BellSouth states that Rule 25-22.060(3), Florida Administrative Code, requires that a "motion for reconsideration of a final order shall be filed within 15 days after issuance of the order." BellSouth also points out that the Commission has consistently held that it does not have the authority to extend the time period for filing a motion for reconsideration. In addition, BellSouth argues that while Rule 25-22.060(b), Florida Administrative Code, provides for cross-motions for reconsideration, such motions should be limited to issues raised in the motion for reconsideration to which the cross motion is responding. BellSouth believes that "[a]ny other interpretation would allow an issue to be presented for reconsideration more than fifteen days after entry of the Commission's final order." BellSouth believes that a party should not be "allowed to file a motion for reconsideration, expressly state that it is not seeking reconsideration of an issue, and later seek reconsideration of an issue that neither party has timely asked the Commission to reconsider."

FDN's Response

FDN asserts that it put BellSouth and the Commission on notice by expressly reserving its rights on the issues not raised in its motion for reconsideration. FDN states that the cross-motion practice before the Commission has been to raise in a cross-motion points not raised in the motion for reconsideration and that it is inappropriate to raise identical points. See Order No. PSC-00-2190-PCO-TP, issued November 17, 2000, in Dockets Nos. 981834-TP and 990231-TP. FDN asserts that there are no redundant points in its cross-motion and it was made to counteract BellSouth's Motion for Reconsideration.

FDN also states that rule 25-22.060(1)(b), Florida Administrative Code, does not limit cross-motions to those parties who have not filed any other post-order motions. FDN points out that Rule 25-22.060(1)(a), Florida Administrative Code, only prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders. FDN believes that if the Commission wanted to limit cross-motions, it would have done so.

FDN also rejects BellSouth's assertion that FDN's cross-motion would extend the time for perfecting appeal. FDN cites to Rule 25-22.060(c), Florida Administrative Code, which states that a Final Order is not deemed rendered for appellate purposes until the Commission disposes of any motion and cross motion for reconsideration.

Finally, FDN argues that to the extent the Commission does not permit reconsideration and cross-reconsideration on different issues in one order, then the Commission should permit a party to request clarification and cross-reconsideration on different issues of the same order. FDN goes on to explain the difference between its motion for clarification and its cross-motion for reconsideration.

Staff Analysis

Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one

of them.[7] Nor, could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, the Commission has held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, staff recommends that BellSouth's Motion to Strike be denied.

[7]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

ISSUE 4: Should the cross-motion for reconsideration filed by Florida Digital Network Inc. be granted?

RECOMMENDATION: If the Commission approves staff's recommendation on Issue 3, then the cross-motion should be denied. However, if the Commission denies staff on Issue 3, this issue is rendered moot. **(FUDGE)**

STAFF ANALYSIS:

FDN's Cross-Motion for Reconsideration

On June 27, 2002, FDN filed a cross-motion for reconsideration. In its Motion, FDN seeks reconsideration of the Commission's decision in "Section IV of its Order not to require BellSouth to offer an unbundled broadband loop with packet switching where BellSouth has deployed Digital Loop Carriers "DLCs" that prevent FDN from providing xDSL-based services using its own DSLAM in a central office."

FDN asserts that the Commission overlooked evidence when it found that "the record nevertheless reflects that the initial cost of installing a DSLAM in a remote terminal is similar for FDN and BellSouth." FDN argues that the record demonstrated that the cost of self-provisioning DSLAMs at remote terminals is more for FDN than for BellSouth. FDN argues that because BellSouth can purchase DSLAMs at volume discounts that are unavailable to FDN, FDN's cost per customer is significantly higher. FDN states that the Commission overlooked the economies of scale enjoyed by BellSouth when it applied the cost factor of the impairment test.

Next, FDN argues that even if the costs were the same for BellSouth and FDN, the Commission overlooked the fact that FDN remains impaired because it does not have the same access to capital as does BellSouth. FDN cites to witness Gallagher who testified that "it would be impossible for FDN to raise sufficient capital to allow FDN to compete in the DSL market by collocating its own DSLAMs at remote terminals." FDN argues that regardless of what the Commission concludes about what FDN can deploy in theory, it still will be unable to do it in reality as evidenced by the fact that not a single ALEC DSLAM has been located at a BellSouth remote terminal in Florida.

FDN also argues that collocation of DSLAMs is not the only hurdle in providing xDSL service where BellSouth has deployed DLCs. FDN argues that even if it were able to collocate a DSLAM it is unlikely that it would be able to obtain a transport facility back to the central office. FDN argues that a DSLAM is useless without this transport, because "BellSouth will not allow FDN to connect a remote terminal DSLAM to the lit fiber that is used to carry BellSouth's high-speed data service to the central office." FDN contends that it would be impaired in its ability to offer xDSL service because it cannot afford the time or expense of constructing its own fiber-optic transport between the remote terminal and its facilities.

Moreover, FDN states that BellSouth can add DSLAMs and DSL to its remote terminals without incurring the costs of placing new fiber, because it typically reserves a substantial amount of fiber capacity between the remote terminal and central office that is unavailable to ALECs. FDN states that even if BellSouth's bandwidth were exhausted, it would be able to upgrade the bandwidth by changing the electronics on the end of the lit fiber. "This option, which BellSouth will not provide to ALECs, is tremendously cheaper than installation of new fiber."

Finally, FDN argues that the Commission did not address "the relative ability of FDN to collocate xDSL line cards, in lieu of DSLAMs, when BellSouth begins to deploy Next Generation Digital Loop Carriers (NGDLC) in Florida." FDN states in a NGDLC architecture, line cards can perform the same role as a DSLAM at the remote terminal. FDN states that BellSouth denies FDN DSLAM functionality at remote terminals because it does not allow FDN to collocate its own line cards in the BellSouth NGDLC. FDN argues that where BellSouth has deployed NGDLCs, FDN is impaired under the four-part standard set forth in the UNE Remand Order that requires ILECs to unbundle packet switching when "(1) the ILEC has installed DLC systems; (2) there are no spare copper loops that are capable of supporting the xDSL services the CLEC seeks to offer; (3) requesting CLECs are not allowed or able to collocate DSLAMs at ILEC remote terminals on the same terms and conditions that apply to the ILEC's own DSLAM, and (4) the ILEC has deployed packet switching for its own use." FDN requests that "the Commission reconsider its decision and order BellSouth to provide UNE broadband loops with packet switching where it has deployed xDSL line cards at remote terminals."

BellSouth's Response

On July 5, 2002, BellSouth filed a Motion to Strike FDN's Cross Motion, or in the alternative, Response to FDN's Cross-Motion. In its Response, BellSouth states that there is no evidence that BellSouth buys DSLAMs in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs and line cards or that FDN does not enjoy the same bulk discount. BellSouth states that witness Gallagher's testimony only addresses line cards and not DSLAMs. BellSouth contends that witness Gallagher never quantifies "a whole bunch" nor does he suggest that FDN is unable to receive the same bulk discount. BellSouth states that Late Filed Exhibits 12 and 13 demonstrate that an 8-port DSLAM can be purchased by FDN at a price comparable to that available to BellSouth. Consequently, BellSouth believes there is no basis for any finding that BellSouth can obtain volume discounts that are not available to FDN.

Next, BellSouth responds to FDN's assertion that the Commission overlooked the FCC's guidance to consider economies of scale in performing an impairment analysis. BellSouth indicates that this "guidance" is from the UNE Remand Order which was overturned by the D.C. Circuit Court of Appeals in United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002). BellSouth responds to FDN's argument that its cost per customer is higher than BellSouth by quoting the D.C. Circuit which discounted the concern that a CLEC is not able to enjoy economies of scale comparable to an ILEC's, stating that "average unit costs are necessarily higher at the outset for any new entrant into virtually any business." Id. at 427. The court also stated that "[t]o rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act's unbundling provision." Id.

Next, BellSouth responds to FDN's argument that it does not have the same access to capital that is enjoyed by BellSouth. BellSouth notes that in fulfilling the purpose of the Act, each unbundling of an element should strike a balance between "spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities," and "eliminating the need for separate construction of facilities where such construction would be wasteful." Id. BellSouth quotes the D.C. Circuit which states that "[a] cost disparity approach that links 'impairment' to

universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance." Id. BellSouth argues that FDN has not presented any evidence to suggest that its difficulty in obtaining capital is linked to any natural monopoly. In addition, BellSouth contends that FDN would not be able to present any such evidence, because broadband is not a natural monopoly.[8]

BellSouth also rejects FDN's assertion that it would have to construct its own fiber-optic transport, because it would be unable to obtain the transport from BellSouth. BellSouth cites witness Gallagher's acknowledgment that BellSouth will sell FDN subloops between the remote terminal and the BellSouth central office at UNE subloop rates established by the Commission. BellSouth believes the Commission did not overlook any evidence, because it recognized that FDN can purchase sub-loops to connect its DSLAM to the central office.

Finally, BellSouth responds to FDN's request for unbundled access to line cards where BellSouth has deployed NGDLC. BellSouth states that FDN failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide. BellSouth states that to the extent FDN is seeking unbundling of dual purpose line cards, such a requirement would allow FDN to reap the rewards of the risk BellSouth may decide to take in deploying facilities to provide broadband services. BellSouth points out that the concern that unbundling would have a detrimental impact on facilities-based investment was shared by the Commission and is consistent with USTA v. FCC. Consequently, BellSouth believes that the Commission's decision regarding DSLAMs and line cards is appropriate and should not be revisited.

Staff Analysis

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs,

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[8]BellSouth states that in USTA, the court agreed that "[p]etitioners primarily attack the Line Sharing Order on the ground that the [FCC], in ordering unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)."

does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." (TR 97) FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[9]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate its own DSLAM because "[t]he rates of return aren't there." (TR 95)

Staff believes that FDN has failed to show any evidence that the Commission overlooked or failed to consider. The Commission considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In doing so, the Commission also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that the Commission overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central officer. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by the Commission. (TR 148-151) Upon consideration of this competing evidence, the Commission found that "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16.

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[9]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

Finally, FDN asserts that the Commission did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

Staff believes that the Commission did not overlook or fail to consider this issue, because the issue was not before the Commission. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." (TR 55) However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." (TR 387) Based on the foregoing, staff believes that FDN has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issues 1, 2, and 4, the parties should be required to file their final interconnection agreement within 30 days after the issuance of the Order from this recommendation, conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by the Commission of the filed agreement. **(BANKS, FUDGE)**

STAFF ANALYSIS: No. If the Commission approves staff's recommendation in Issues 1, 2, and 4, the parties should be required to file their final interconnection agreement within 30 days after the issuance of the Order from this recommendation, conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by the Commission of the filed agreement.