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April 30, 2001

VIA FEDERAL EXPRESS

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Re: Docket No. 010098-TP (Florida Digital)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of Florida Digital Network's Reply to BellSouth's Opposition to Florida Digital's Motion to Amend Arbitration Petition, as well as an electronic copy of the pleading in MS Word format. We ask that you file this pleading in the above-captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached certificate of service. Please feel free to contact me on 202-295-8458 if you have any questions or require further information.

Very truly yours,

Michael C. Sloan
Counsel for the Florida Digital Network, Inc.

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cc: All Parties of Record

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BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996	)))))	Docket No. 010098-TP Dated: April 30, 2001

REPLY OF FLORIDA DIGITAL NETWORK, INC. TO BELLSOUTH OPPOSITION TO MOTION TO AMEND ARBITRATION PETITION

Through undersigned counsel, Florida Digital Network, Inc. ("FDN") submits this Reply to BellSouth's Opposition to FDN's Motion to Amend Arbitration Petition. BellSouth cites two grounds for opposing FDN's Motion to Amend: first, BellSouth claims that the federal Telecommunications Act of 1996 ("the 1996 Act") categorically *precludes* such amendments as a matter of law. Second, BellSouth claims that FDN has failed to demonstrate the reasonableness of the proposed amendment.

As explained below, neither of the reasons BellSouth cites for opposing FDN's Motion to Amend has any merit. The 1996 Act does not preempt state procedural rules governing the conduct of administrative hearings. Indeed, section 252 of the Act clearly grants broad discretion to state regulatory bodies to conduct interconnection arbitration and other rule-making proceedings which they are delegated by the Act in accordance with appropriate state procedural rules. The Florida Commission routinely permits the timely amendment of pleadings, as it is authorized to do under Rule 1.190 of the Florida Rules of Civil Procedure and the Florida Administrative Code. Indeed, the Commission has even granted such amendments in the context

of arbitrations conducted under section 252.[1] Following this tradition, the Commission should permit FDN to amend its original petition in this instance, as well.

BellSouth is similarly wrong to claim that FDN has not presented adequate justification for amending the Petition. BellSouth has been aware of the operational concerns raised in new Issue #10 for some time; discovery has not yet commenced; opening testimony is not due for six weeks; and the hearing will not take place for another four months. Thus, BellSouth cannot claim any prejudice from FDN's amendment to its arbitration petition. It is clear, however, that significant benefits will result from granting FDN's Motion. Both the parties, and the Commission, will save considerable time and energy by consolidating all the parties' arbitable issues in this one proceeding.

ARGUMENT

In delegating to states the authority to arbitrate interconnection agreements, section 252 of the Act preserves the authority of state commissions to apply their own procedural rules in conducting such proceedings. Indeed, the FCC recognized the authority of the states to conduct section 252 arbitrations according to their own procedural rules in its first order implementing the Act: "[W]e do not purport to advise states on how to conduct arbitration when the Commission has not assumed jurisdiction.... We decline to adopt national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and

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[1] *Petition of Telnet of South Florida, Inc. for Relief Under Section 252(i) of the Telecommunications Act*, Order Granting Motion to Accept Amended Request for Relief, Florida Public Service Commission, Docket No. 970730-TP, Order No. PSC-98-0332-PCO-TP, 1998 WL 178840 (Feb. 26, 1998); *Petition for Emergency Relief by Supra Telecommunications*, Florida Public Service Commission, Docket No. 980800-TP, Order No. PSC-98-1320-PHO-TP, 1998 WL 782040 (Oct. 9, 1998).

arbitration rules that support the objectives of the 1996 Act."[2] The Commission also "note[d] the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act."[3]

BellSouth is, thus, wrong to read detailed procedural mandates into the terms of section 252(b). Rather, as the FCC and most state commissions have recognized, section 252(b) simply provides a framework which the states must supplement with their own detailed procedural rules.[4] For example, section 252(b)(1), which BellSouth curiously cites as an example of the "strict[]" approach taken to the procedural requirements of section 252(b),[5] states that parties may petition "a State commission to arbitrate any open issues" between the 135th and the 160th day of the negotiations period. The text does not contain any express authority permitting the parties to toll the running of these time deadlines, yet parties in most states, including Florida, routinely enter into tolling agreements to extend the negotiations period before which they must file an arbitration petition. Indeed, the parties to the instant action entered into several such tolling agreements prior to the commencement of this arbitration.

The Act provides the same flexibility with respect to the amendment of Petitions. The 50-plus words in section 252(b)(2)(A), dealing with the duties of the petitioning CLEC, state

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), ("*Local Competition Order*") ¶ 1283.

[3] *Id.*, ¶ 1283 (citing the example of procedural rules promulgated by the Ohio and Illinois commissions).

[4] *See Implementation of Section 252(i) of the Telecommunications Act of 1996,* Wash. Util. and Trans. Comm'n, Docket No. UT-990355, 2000 WL 1055385 (April 12, 2000), ¶ 4.

[5] *See* BellSouth Opposition at 3.

simply that the petitioner must identify the issues it seeks to arbitrate and provide relevant documentation. The provision contains no procedural mandates. Similarly, section 252(b)(4)(A), which describes state commissions' duties in adjudicating interconnection arbitrations, instructs that "[t]he State commission shall limit its consideration of any petition ... to the issues set forth in the petition and the response, if any." Thus, the plain words of the statute contain no prohibitions whatsoever against amending petitions to add issues erroneously left out of the original filing.

BellSouth would thus have the Commission read into the statute words that simply do not exist. There is no indication whatsoever, however, that Congress intended any limitation on parties' ordinary right to amend complaints after the commencement of proceedings. Given that such a rule would constitute a dramatic departure from the ordinary rules of adversarial procedure – including the rules of this Commission – Congress would be expected to clearly state its intent to prevent parties from amending arbitration petitions if, in fact, it had intended to impose such a restriction.[6] That it did not speaks volumes.

Although BellSouth's Opposition cites several cases that it claims support its interpretation of the law, see Opposition at 3, these cases stand for nothing of the kind. Rather, each of the cases BellSouth cites stands for the entirely different proposition that "the State Commission cannot independently raise an issue not raised by one of the parties." Opposition at 3 (quoting *US West Comm. v. Minnesota Pub. Utilities Comm'n*, 55 F.Supp.2d 968, 976-77 (D.Minn. 1999) (punctuation altered). Thus, BellSouth fails to cite a single decision holding that

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[6] *See* BellSouth Opposition at 3-4 (noting that numerous state procedural rules contain provisions permitting parties to amend initial pleadings). In fact, FDN would be surprised if *every* state did not have a similar rule. *See, e.g.*, Fed. R. Civ. P. 15(a).

section 252 prevents parties from amending arbitration petitions. It has not done so, of course, because the law poses no such limitation, and no such cases exist.

Congress clearly intended to delegate procedural questions of this sort to the States – and this Commission, for one, has already spoken on the question of amending section 252 arbitration petitions, and found them perfectly acceptable under Florida law. In the *Telenet* case,[7] for example, BellSouth opposed Telenet's motion to amend its section 252(i) petition. Citing both the Florida Administrative Code and the Florida Rules of Civil Procedure, the Commission found that Telenet was entitled to amend its Petition upon a showing of good cause:

> Thus, the courts inform that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on their merits.[8]

Finding that Telenet had shown good cause for amending its arbitration petition, the Commission authorized the amendment. *See also Supra Telecom*, 1998 WL 782040, *6 (granting Supra motion to amend arbitration petition); *Wireless One Network,* 1997 WL 787188 (Fla. P.S.C.), *1 (Commission noting that the docket had been left "open in order to allow Wireless One the opportunity to amend its petition").[9]

The same logic should prevail here. The provisioning issue raised in proposed issue #10 has been the subject of intensive discussion and debate between the parties for over a year. BellSouth negotiators and engineers are deeply familiar with FDN's concerns. When FDN filed

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[7] *See Supra*, note 1.

[8] *Id. at *2.*

[9] *Complaint and/or Petition for Arbitration Against Sprint Florida, Inc. by Wireless One Network*, Order Granting Request for Dismissal and Closing Docket, Florida Public Service Commission, Docket No. 970788-TP, Order No. PSC-97-1522-FOF-TP (Dec. 3, 1997).

its arbitration petition, on January 24, 2001, FDN understood that it was close to resolving the issue with BellSouth and, therefore, omitted the issue from the petition. FDN learned a month later, however, that BellSouth would not take any steps to correct the problems it has had obtaining timely and properly provisioned SL-1 loops. FDN, therefore, filed the instant amendment.

BellSouth would suffer no prejudice from consolidating this issue into the arbitration. As noted above, the parties have not yet exchanged any discovery, and the hearing is months away. All that would be gained from denying FDN's Motion to Amend is further delay, which obviously works to BellSouth's advantage as the incumbent monopoly telephone company seeking to delay meaningful competitive entry into its markets for as long as possible. FDN's business requires that it pursue a resolution to the problems identified in Issue #10. Thus, if FDN's amendment is not permitted, it will have no recourse but to seek the change through the bona fide request process of its existing interconnection agreement with BellSouth. The issue would thus reach this Commission again in the very near future.

CONCLUSION

For the foregoing reasons, FDN respectfully requests that its Motion to Amend Arbitration Petition be granted.

Respectfully submitted this 30th day of April, 2001,

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