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**From:** Fatool, Vicki [Vicki.Fatool@BellSouth.COM]  
**Sent:** Thursday, July 12, 2001 3:16 PM  
**To:** 'filings@psc.state.fl.us'  
**Subject:** Filing in Docket No. 010098-TP (Objection)

**Importance:** High



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The attached document is from:

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for James Meza III  
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Docket No. 010098-TP - In re: Petition of 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

Number of pages: 8 including letter to Ms. Bayo and pleading and certificate of service.

Pleading entitled: Objection of Bellsouth Telecommunications, Inc. to Florida Digital Network, Inc.'s Request for New UNEs or Unbundled Packet Switching and Motion to Strike Testimony

A paper copy will be filed with the Division of the Commission Clerk and Administrative Services today.

By filing electronically, BellSouth accepts that the official copy is the version printed by the Public Service Commission's Division for the Commission clerk and Administrative Services and filed in the official docket file.

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FPSC-RECORDS/REPORTING

JAMES MEZA III  
Attorney

**BellSouth** Telecommunications, Inc.  
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July 12, 2001

Mrs. Blanca S. Bayó  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Objection to Florida Digital Network Inc.'s Request for New UNEs or Unbundled Packet Switching and Motion to Strike Testimony, which we ask that you file in the 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.

Sincerely,

  
James Meza III

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

**CERTIFICATE OF SERVICE  
DOCKET NO. 010098-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 12th day of July, 2001 to the following:

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James Meza III

**(+) Signed Protective/Non Disclosure  
Agreement**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Florida Digital Network, )  
Inc., for Arbitration of Certain Terms and ) Docket No. 010098-TP  
Conditions of Proposed Interconnection and )  
Resale Agreement with BellSouth - ) Filed: July 12, 2001  
Telecommunications, Inc. Under the )  
Telecommunications Act of 1996 )

**OBJECTION OF BELLSOUTH TELECOMMUNICATIONS, INC.  
TO FLORIDA DIGITAL NETWORK, INC.'s REQUEST FOR NEW UNEs OR  
UNBUNDLED PACKET SWITCHING AND MOTION TO STRIKE TESTIMONY**

Florida Digital Network, Inc.'s ("FDN's") prefiled direct testimony addressing Issue 1 urges the Commission to create a new unbundled network element or to unbundle packet switching so that FDN can provide its own xDSL service over a UNE loop it purchases from BellSouth. Issue 1 in this proceeding, however, has nothing to do with creating a UNE or with unbundling packet switching. Instead, the issue FDN chose to present as Issue 1 is whether BellSouth Telecommunications, Inc. ("BellSouth") must provide its wholesale ADSL service over a UNE loop that FDN is using to provide voice service to an FDN customer. FDN's pre-filed direct testimony addressing Issue 1, therefore, improperly attempts to inject new issues into this proceeding. BellSouth objects to this attempt and moves the Commission to prohibit FDN from seeking any new UNEs or from seeking to have packet switching unbundled in these proceedings. BellSouth also moves the Commission to strike FDN's pre-filed testimony addressing Issue 1.

**I. ISSUE 1, AS DESCRIBED IN FDN'S OWN PETITION AND IN THE LANGUAGE OF THE ORDER ESTABLISHING PROCEDURE, HAS NOTHING TO DO WITH NEW UNES OR WITH UNBUNDLING PACKET SWITCHING.**

In its Petition for Arbitration, FDN presented Issue 1 as follows: "Should BellSouth be required to provide FDN just, reasonable, and nondiscriminatory access to UNEs such that xDSL service over a UNE loop is available when a customer and number port to FDN local service?" See Petition at p. 4. In support of FDN's position on this Issue, the Petition alleges that "when a UNE loop and telephone number ports to FDN, the customer's BellSouth-provided asymmetric digital subscriber line ("ADSL") service is disconnected." Petition at 4, ¶8 (emph. added). The Petition goes on to allege that "[i]t is technically feasible for BellSouth to provide wholesale ADSL service to FDN over a BellSouth UNE loop that FDN utilizes to provide end-user local service," *id.*, and it states that "BellSouth should be required, at a minimum, to allow BellSouth wholesale ADSL across a UNE loop ported to FDN." *Id.* at 5, ¶8 (emph. added). In its response to the Petition, BellSouth explained its position on this issue accordingly:

Under the FCC's January 19, 2001 Line Splitting Order, BellSouth has absolutely no obligation to provide xDSL service when, as here, BellSouth is not the voice provider. See FCC Order 01-26 at ¶ 26. In that order, the FCC explicitly held that "[a]lthough the Line Sharing Order obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, it does not require that they provide xDSL service when they are not [sic] longer the voice provider." *Id.* Accordingly, BellSouth is not required to provide FDN with the requested access.

Response at 5. Subsequently, the parties participated in an Issue Identification Conference with the Staff on April 12, 2001. During that conference, the parties and the Staff agreed to the language that would be used to describe Issue 1 in this

proceeding. That language, which appears in Appendix A of the June 7, 2001 Order Establishing Procedure, reads as follows:

For purposes of the new interconnection agreement, should BellSouth be required to provide xDSL service over UNE loops when FDN is providing voice service over that loop?

This language is entirely consistent with the language FDN used in its Petition and with the language BellSouth used in its Response.

It is clear, therefore, that the scope of Issue 1 is limited to whether BellSouth must provide BellSouth's wholesale xDSL service over a UNE loop that FDN is using to provide voice service to one of its end user customers. This issue has absolutely nothing to do with whether BellSouth must provide an unbundled network element that FDN can use to provide FDN's xDSL service to its end user. The creation of a new UNE and the unbundling of packet switching simply are not issues that are before this Commission in this proceeding.

The pre-filed direct testimony submitted by FDN with regard to Issue 1, however, is devoted to asking the Commission to either create a new UNE or to unbundle packet switching so that FDN can provide FDN's own xDSL service to its end users. On page 10 of his pre-filed direct testimony, for example, FDN witness Michael Gallagher claims that, instead of seeking to require BellSouth "to provide retail xDSL or ISP services to consumers who are also FDN customers," FDN "proposes to purchase wholesale access to BellSouth's unbundled network elements pursuant to Section 251 of the Act." See Prefiled Direct Testimony of Michael Gallagher at IO (emphasis in original). Mr. Gallagher goes on to claim that "it is necessary to establish additional UNEs and/or apply the FCC's standard to unbundle packet switching in order to ensure that CLECs

can provide ubiquitous xDSL service in Florida using UNEs.” /cf. at 11-12 (emph. added).

Neither the notion of creating a new UNE nor the notion of unbundling packet switching appears anywhere in the language FDN used to describe the issue it chose to arbitrate in this proceeding. Nor does any such notion appear in the language of Issue 1 that is set forth in Appendix A to the Order – language to which FDN agreed. Mr. Gallagher’s pre-filed direct testimony on Issue 1, therefore, simply does not address any issue in this arbitration.

**II. THE COMMISSION MAY NOT DECIDE ANY ISSUE THAT IS NOT SET FORTH IN FDN’S PETITION OR IN BELL SOUTH’S RESPONSE TO THE PETITION.**

FDN’s attempt to change horses in mid-stream and inject new issues into this proceeding is improper. The federal Telecommunications Act of 1996 (“the Act”) provides that a party requesting arbitration must petition a State commission for arbitration “[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section.” 47 U.S.C. §252(b)(1). The non-petitioning party then has 25 days to respond to the petition, *id.* §252(b)(3), and the Commission has 9 months to “conclude the resolution of any unresolved issues.” §252(b)(4)(C).

The petition and the response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings. In the words of Congress, a State commission “shall limit its consideration of any petition under [the Act] to the issues set forth in the petition and the response, if any . . . .” See *Id.*, §252(b)(4)(A).

Federal courts reviewing State commission decision under the Act have strictly construed this provision, explaining that “[d]uring an arbitration, the State commission must limit its review to the issues set forth in the petition and any response thereto . . . .” See *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F.Supp.2d 628, 632 (S.D. Ind. 1998)(emphasis added). Accord *MCI Telecom., Inc. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768 (E.D. Mich. 1999)(state commission acted unlawfully by imposing limitation of liability provision when the issue of limitations on liability was not the subject of arbitration”); *MCI Telecom., Inc. v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 (N.D. Cal. Sept. 29, 1998)(commission precluded from arbitrating issue concerning MCI’s access to dark fiber because the issue was not raised in arbitration petition). Not only can the parties not inject issues that are not set forth in the Petition or the Response, but “the [State commission] cannot independently raise an issue not raised by one of the parties.” *US West Comm. v. Minnesota Pub. Utilities Comm’n*, 55 F.Supp.2d 968 (D. Minn. 1999).

## CONCLUSION

For the reasons stated above, BellSouth objects to FDN’s attempt to inject new issues into this proceeding.’ The Commission should sustain BellSouth’s objection and

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<sup>1</sup> Pre-filed rebuttal testimony is due on Wednesday, July 18, 2001. Depositions in this matter have been scheduled for August 2-3, 2001, and the hearing is scheduled for August 15, 2001. In light of this expedited schedule, and solely as a precautionary measure to protect itself in the event that its objection to the injection of these new issues is overruled and/or that its motion to strike is denied, BellSouth intends to address FDN’s testimony requesting a new UNE or the unbundling of packet switching in its pre-filed rebuttal testimony. This should not be viewed as a withdrawal of BellSouth’s objection and motion to strike, nor should it be viewed as BellSouth’s implicit consent to having any new issues tried and decided in this proceeding.

prohibit FDN from seeking any new UNEs or from seeking to have packet switching unbundled in these proceedings. The Commission also should strike FDN's pre-filed testimony addressing Issue 1.

Respectfully submitted this 12th day of July, 2001.

BELLSOUTH TELECOMMUNICATIONS, INC.

Handwritten signature of Nancy B. White in cursive.

NANCY B. WHITE

JAMES MEZA III

c/o Nancy H. Sims

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