

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7647

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

July 18, 2001

VIA OVERNIGHT COURIER

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:

Please find enclosed for filing an original and seven copies of the Opposition of Florida Digital Network, Inc. to BellSouth's Motion to Strike, or Alternatively, Motion to Amend Arbitration Petition. Copies have been served to the parties shown on the attached Certificate of Service.

An extra copy of the Opposition is enclosed. Please mark it to indicate that the original was filed and return the copy to me in the enclosed envelope. Please feel free to contact me on 202-295-8458 if you have any questions or require further information.

Sincerely yours,



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

Enclosure

cc: All Parties of Record
Matthew Feil

DOCUMENT NUMBER - DATE

08775 JUL 19 2001

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION**

In Re: Petition of Florida Digital Network,)	
Inc. for Arbitration of Certain Terms and)	Docket No. 010098-TP
Resale Agreement with BellSouth)	
Telecommunications, Inc. Under the)	Dated: July 19, 2001
Telecommunications Act of 1996)	
<hr/>		

**OPPOSITION OF FLORIDA DIGITAL NETWORK, INC. TO
BELLSOUTH MOTION TO STRIKE, OR ALTERNATIVELY,
MOTION TO AMEND ARBITRATION PETITION**

Through undersigned counsel, Florida Digital Network, Inc. ("FDN") submits this Opposition to BellSouth's July 12, 2001 filing titled, "Objection of BellSouth Telecommunications, Inc. to Florida Digital Network, Inc.'s Request for New UNES or Unbundled Packet Switching and Motion to Strike Testimony" (hereinafter "Motion to Strike" or "Motion"). BellSouth's Motion should be denied. In the alternative, FDN moves for leave to amend its arbitration petition.

INTRODUCTION & SUMMARY OF ARGUMENT

BellSouth's Motion to Strike argues that the one sentence identification of Issue No. 1 in the FDN's Arbitration Petition ("Petition") differs from the 34-page discussion of facts relating to this issue in Mike Gallagher's June 7, 2001 pre-filed testimony. As a consequence of this purported difference, BellSouth seeks to strike Mr. Gallagher's testimony on the grounds that FDN is "attempt[ing] to change horses in mid-stream and inject new issues into this proceeding" Motion to Strike at 4.

BellSouth's claim is nonsense and the relief it seeks should be denied. First, there is no conflict between the statement of Issue No. 1 in FDN's Petition (nor the issue's reformulation in the Procedural Order) and the explanation in Mr. Gallagher's testimony. The Petition identifies

the *issue* before the Commission in this arbitration – *i.e.*, FDN’s request for a product enabling it to provide DSL to all its prospective customers in Florida. Mr. Gallagher’s testimony provides the *facts* relevant to this issue.

Although, prior to reading Mr. Gallagher’s testimony, BellSouth may have not fully understood the remedies that FDN is seeking – not unusual in litigation before the exchange of discovery – that misunderstanding cannot be blamed on FDN and should long since have been cleared up, as Mr. Gallagher’s testimony is quite specific. In all events, the Commission should not permit BellSouth to transform *its* misapprehension of FDN’s position into a procedural sword to defeat FDN’s proposal.

To the extent that the Commission, nonetheless, finds that the relief requested by FDN cannot be founded upon the Petition as filed, the appropriate remedy would be to instruct FDN to amend its Petition accordingly. Although FDN does not believe that conforming amendments are necessary in the present circumstances, this Commission has routinely permitted such conforming amendments under similar circumstances.

Whether the Commission instructs FDN to amend the Petition or not, it should clearly deny BellSouth’s Motion to Strike. BellSouth received Mr. Gallagher’s testimony on June 8, 2001, and has thus had knowledge of FDN’s specific proposals for more than a month. During this period BellSouth has had ample opportunity to propound additional discovery (which it has not done), draft rebuttal testimony (originally due the day after BellSouth filed the Motion to Strike), and prepare for the August 15, 2001 hearing. Thus, BellSouth cannot claim any prejudice resulting from the specific remedies requested in Mr. Gallagher’s testimony. Granting BellSouth’s Motion to Strike, however, will result in a significant waste of time and energy, as

FDN will simply be required to pursue this issue before the Commission in a separate proceeding.

ARGUMENT

FDN believes that local telecommunication competition will be an unsuccessful experiment unless competitive carriers have the ability to provide end-user customers with the same mix of products and services that are offered by the incumbent. To that end, FDN's Arbitration Petition (at 4) stated that it sought "nondiscriminatory access to UNEs such that xDSL service over a UNE loop is available when a customer and number port to FDN local service." The Petition further explained FDN's understanding of two operational issues that contribute to its inability to provide DSL to many prospective customers: (1) limitations in BellSouth's OSS provisioning systems, and (2) the pervasive presence of digital loop carrier ("DLC") equipment in BellSouth's network. *Id.* at 4-5. Thus, in conformance with section 252(b)(4)(A) of the Act, the Petition clearly sets forth the service *issues* confronting FDN with respect to its attempt to provide high speed data service to its customers.

FDN's Arbitration Petition does not, however, specify the particular kind of product that it seeks to remedy the issue.¹ This is in conformance with the Act, which requires specificity with respect to identifying the *issues* in dispute, not the relief requested. *See* 47 U.S.C. § 252(b)(4)(C). BellSouth's Motion to Strike, however, improperly seeks to graft the specificity required by section 252(b)(4)(A) on to the Commission's authority to order relief, authorized by section 252(b)(4)(C). If the Commission were, in fact, handcuffed in this manner, it is unlikely

¹ The statement in the Petition (at ¶ 8) that "BellSouth should be required, *at a minimum*, to allow BellSouth wholesale ADSL across a UNE loop ported to FDN" (emphasis added) in no way limits the scope of the possible remedies that FDN seeks.

that the Commission would be able to meaningfully address many of the urgent issues set forth in this arbitration and in future cases.

Although the Petition specifically states that FDN seeks “access to UNEs [unbundled network elements]” for the provision of xDSL service, BellSouth somehow seems to have leapt to the conclusion that FDN wanted *only* the ability “to provide *BellSouth* ADSL service to FDN’s” customers.² Despite BellSouth’s misreading of the Petition, that is plainly not the exclusive product offering that FDN seeks. Rather, looking to precedent established by several other state commissions and to the DSL packages offered by SBC in regions where it is deploying its Project Pronto network architecture, Mr. Gallagher proposes that the Commission create a new “end-to-end” UNE, or unbundle packet switching so that FDN can provide *its* own xDSL services to end users. Mr. Gallagher further explains that BellSouth is required by Section 251(c)(4) of the Act to offer for resale a wholesale discount of the retail high-speed data service sold by BellSouth and/or through its affiliates.

Mr. Gallagher’s testimony does not conflict with the statement of the issue in either the Petition or the “tentative” restatement of the issue in the Procedural Order.³ BellSouth’s claim that a conflict exists rests entirely on its contention that FDN’s Petition originally sought to provide “*BellSouth’s* wholesale xDSL service” to FDN customers. *See* Motion to Strike at 3. Neither the Petition nor the Procedural Order, however, states that FDN seeks to provide only BellSouth-branded DSL to FDN’s end-user customers. Although FDN might accept such a

² *See* June 8, 2001 Direct Testimony of Thomas G. Williams at 2; *see also* Motion to Strike at 3.

³ Appendix A of the Procedural Order states expressly that the identification of issues therein is “tentative,” and thus subject to later modification as circumstances require and the Commission permits.

product if no other option were available, FDN would clearly prefer to provide customers with FDN-branded DSL. Thus, the Petition refers generically to FDN's objective of providing DSL to its customers over the same line that FDN serves its voice customers, and specifically requests access to UNEs for that purpose. Mr. Gallagher's testimony conforms perfectly to such a request.

If BellSouth believed that the language in FDN's Petition should have been more specific, BellSouth should have filed a Motion for a More Definite Statement, as it did with respect to Issue 9 in FDN's Initial Petition.⁴ The *details* regarding the specific product that FDN seeks were left to Mr. Gallagher's testimony and FDN's interrogatory answers (and will be further elaborated on in FDN's post-hearing brief). That is as it should be. "A major purpose of discovery," after all, lies in "narrowing and sharpening the issues" in dispute.⁵ That BellSouth now better understands the nature of FDN's objectives in this proceeding – which it most surely does – is evidence that the process established by Congress and this Commission has worked, and provides no basis for granting the draconian relief that BellSouth seeks.

Indeed, notably absent from BellSouth's Motion to Strike is any claim that it has been unfairly surprised or otherwise prejudiced by Mr. Gallagher's testimony. BellSouth could not realistically make such a claim, of course, because it received Mr. Gallagher's testimony more than a month ago, giving it ample time to prepare rebuttal testimony and more than two months to prepare its case for the August 15, 2001 hearing. Moreover, BellSouth should be very familiar with the issues raised in FDN's Petition, as they have been litigated extensively before the FCC

⁴ See BellSouth Feb. 13, 2001 Motion for a More Definite Statement.

⁵ 1970 advisory note to Fed. R. Civ. P. 33(b).

and state commissions around the country. *See* Gallagher Direct Testimony at 29-35. As Mr. Gallagher explains, FDN's objectives in this proceeding are not novel. Rather, they are similar to the products that SBC offers to CLECs where SBC offers retail high-speed data service over fiber-fed loops. Thus, while BellSouth will, undoubtedly, have difficulty defending its policy of denying CLECs the opportunity to provide a retail DSL offering to all Floridians, those difficulties will stem from the inherent weakness of the position, not from any prejudice BellSouth might claim from its original misunderstanding of FDN's Petition.

While BellSouth will suffer no prejudice if this proceeding is permitted to move forward, FDN, on the other hand, clearly will. Since FDN originally filed its Petition on January 24, 2001, the parties have amicably settled, or FDN has voluntarily dismissed, *seven* of the ten issues originally submitted to the Commission for resolution. Issue 1, the DSL issue, is by far the most important and contentious of the remaining issues. While FDN is always prepared to engage in settlement discussions, BellSouth has not to date indicated any willingness to settle this issue on acceptable terms or even to discuss FDN's proposals. FDN's business plan, however, requires that it pursue a resolution to the problems identified in Issue #1. Thus, if the Motion to Strike is granted, FDN will have no recourse but to revisit this DSL issue through the bona fide request process of its interconnection agreement with BellSouth and/or through a petition to the Commission for relief in a generic proceeding. The issue would inevitably reach this Commission again in the very near future. All that will be gained from granting BellSouth's Motion to Strike 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. In the alternative, if the Commission finds that the state of the pleadings requires FDN

to amend its Petition to precisely reflect the nature of the product identified in Mr. Gallagher's testimony, then the Commission should give FDN the opportunity to do so.

Although BellSouth cites several cases which it purports stand for the proposition that the law prohibits CLECs from "inject[ing] new issues into" section 252 arbitration proceedings, the cases BellSouth cites say nothing of the kind. Rather, each of the cases listed in the string cite on page 5 of BellSouth's Motion to Strike stands for the entirely different proposition that "the State Commission cannot independently raise an issue not raised by one of the parties." Motion to Strike at 5 (quoting *US West Comm. v. Minnesota Pub. Utilities Comm'n*, 55 F.Supp.2d 968, 976-77 (D.Minn. 1999).

The fact is that Florida law *encourages* the amendment of pleadings to conform with the evidence. As the Prehearing Officer explained in his May 22, 2001 ruling granting FDN's Motion to Amend, "the Commission should follow a policy of allowing pleadings to be freely amended ... in order that disputes may be resolved on the merits."⁶ The Prehearing Officer's ruling was based on a long line of Commission precedent that favors the rights of parties to amend pleadings upon a showing of good cause.⁷ The same logic should prevail here. Although

⁶ *Order Granting Motion to Amend Arbitration Petition*, Petition by Florida Digital Network, Inc., Docket No. 010098-TP, Order No. PSC-01-1168-PCO-TP (May 22, 2001) at 3.

⁷ *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); *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).

FDN does not believe that an amendment to its Petition should be required, such an approach would clearly be preferable to striking Mr. Gallagher's testimony at this point in the proceeding.

CONCLUSION

For the foregoing reasons, FDN respectfully requests that BellSouth's Motion to Strike be denied. In the alternative, FDN requests that it be permitted to amend its Petition to conform the statement of Issue 1 to Mr. Gallagher's testimony.

Respectfully submitted this 18th day of July, 2001,



Eric J. Branfman
Michael C. Sloan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116
(202) 424-7500

and

Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460

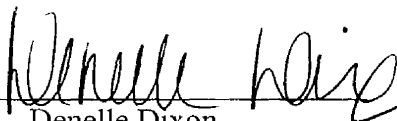
Attorneys for Florida Digital Network, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the attached Opposition of Florida Digital Network, Inc. to BellSouth Motion to Strike, or Alternatively, Motion to Amend Arbitration Petition, filed in the captioned docket was served on the following by overnight delivery this 18th day of July, 2001.

Mr. James Meza, III
C/o Ms. Nancy H. Sims, Dir., Reg. Relations
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Ms. Felicia Banks
Florida Public Service Comm'n
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850


Denelle Dixon