

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 010098-TP
ORDER NO. PSC-01-2351-PCO-TP
ISSUED: December 6, 2001

ORDER DENYING FDN'S MOTION TO SUPPLEMENT RECORD OF PROCEEDING

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 (Motion). On April 16, 2001, BellSouth filed its Response In Opposition to the Motion (Response). 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.

An administrative hearing was held in this docket on August 15, 2001. On September 6, 2001, FDN filed a Motion for Extension of Time to File Briefs. Order No. PSC-01-1826-PCO-TP was issued granting FDN's Motion for Extension of Time to File Briefs on September 11, 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.

MOTION

In its motion, FDN states that Issue No. 1 addresses FDN's claim that it is impaired in its ability to provide digital subscriber line (DSL) service by lack of access to certain BellSouth network elements. FDN asserts that the cost for FDN to collocate a digital subscriber line access multiplexer (DSLAM) at BellSouth's remote terminal (RT) is critical to that evaluation.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

FDN explains that BellSouth witness Williams testified at the hearing on August 15, 2001, that "where BellSouth has a DSLAM located in a RT and an ALEC seeks to collocate its DSLAM in the RT and space in the RT is exhausted, BellSouth would provide adjacent/augmented collocation at the RT to accommodate the ALECs collocation request without accessing non-recurring costs that would ordinarily apply to the central office requests." FDN further states that during the September 11, 2001, deposition of BellSouth witness Gray taken in the 271 proceeding, Docket No. 960786A-TL, witness Gray testified as follows:

Where BellSouth has a DSLAM located in RT and an ALEC seeks to collocate its DSLAM in the RT and space in that RT is exhausted, BellSouth provides adjacent/augmented collocation to accommodate the ALECs collocation request but on the same terms and conditions as it would a standard adjacent collocation request.

FDN concludes that BellSouth witnesses Williams and Gray provided testimony at odds with one another on exactly the same subject. FDN asserts that one of BellSouth's two witnesses misrepresented BellSouth's position either inadvertently or intentionally. FDN contends that it is unquestionably prejudiced by this misrepresentation and therefore should have the opportunity to redress on the record.

RESPONSE

In its Opposition to FDN's motion, BellSouth asserts that the evidence in this record shows that BellSouth will not charge ALECs for augmenting or modifying remote terminal facilities for a request to place a DSLAM at a remote terminal when:

- (a) BellSouth has already placed its own DSLAM at the remote terminal, and
- (b) additional space or other facilities necessary for an ALEC to collocate its own DSLAM are not currently available at the remote terminal.

BellSouth contends that during the hearing, witness Williams testified that when augmentation or modification is performed under

these circumstances, BellSouth will undertake the effort itself. BellSouth states that this policy is described in BellSouth's standard interconnection agreement. BellSouth contends that although FDN asserts that the testimonies of BellSouth witnesses Williams and Gray are inconsistent regarding the terms of a DLSAM in collocation, witness Gray's deposition makes it clear that when BellSouth elects to augment space at a terminal site, BellSouth will augment the space at its own expense. Further, BellSouth states that counsel for FDN asked witness Gray about adjacent collocation, which is a general offering by which an ALEC is allowed to construct its own facilities and is not the same as when BellSouth elects to augment space at a remote terminal site in order to accommodate an ALEC's request to collocate a DSLAM. Therefore, BellSouth asserts that the testimonies of witnesses Williams and Gray are consistent.

DECISION

The Commission rules and the Uniform Rules of Procedure do not contemplate reopening the record to admit this type of information. Relevancy is required for admitting evidence into the record. Although FDN's counsel asserts that there appears to be inconsistency in the testimonies proffered by BellSouth's witnesses Williams and Gray, counsel for FDN fails to show how their testimonies are inconsistent and what relevance it has on our decision that is pending. The deposition of BellSouth's witness Gray has not been subject to cross-examination or evidentiary evaluation by BellSouth or staff in this proceeding. To allow this information to be entered into this record without affording BellSouth an opportunity to address the information would be a violation of due process. Further, the Commission has determined that at some point the record in the case must come to a close.¹ I believe that we have reached this point.

Upon consideration, there appears to be no compelling reason to supplement the record with BellSouth's witness Gray's

¹ In re: Petition of General Telephone Company of Florida to Increase Certain Rates and Charges, Order No. 9192, issued December 27, 1979, in Docket No. 790084-TP, at 26. (see also Florida Bridge Company v. Bevis, 363 So. 2d 799 (Fla. 1978) (stating that the Commission has the discretion to terminate its data-gathering function).

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deposition. Accordingly, FDN's Motion to Supplement Record of Proceeding is hereby denied.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason as Prehearing and Presiding Officer, Florida Digital Network, Inc.'s Motion to Supplement Record of Proceeding is hereby denied.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 6th day of December, 2001.

A handwritten signature in black ink, appearing to read "J. Terry Deason", is written over a horizontal line.

J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.