

Florida  
**Digital**  
N e t w o r k

July 11, 2002

Ms. Blanca Bayó, Director  
Division of the Commission Clerk  
& Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

via Overnight Delivery

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.

Dear Ms. Bayó,

Please find enclosed for filing in the above-captioned docket an original and seven copies of Florida Digital Network, Inc.'s Response to BellSouth Telecommunication, Inc.'s Motion to Strike. A diskette containing an electronic file of the document is also enclosed.

If you have any questions regarding this filing, please call me at 407-835-0460.

Sincerely,



Matthew Feil  
Florida Digital Network  
General Counsel

L O C A L

L O N G     D I S T A N C E

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Florida Digital Network, } Inc., for Arbitration of Certain Terms and } Conditions of Proposed Interconnection and } Resale Agreement with BellSouth Telecom- } munications, Inc. Under the Telecom- } munications Act of 1996 } <hr/>	Docket No. 010098-TP
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**FLORIDA DIGITAL NETWORK, INC.'S RESPONSE TO BELLSOUTH  
TELECOMMUNICATION, INC.'S MOTION TO STRIKE**

Pursuant to Rule 28-106.204, Florida Administrative Code, Florida Digital Network, Inc., ("FDN") hereby files its response to the Motion to Strike filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 5, 2002. In support hereof, FDN states as follows:

**Background**

1. On June 5, 2002, the Commission issued its Final Order on Arbitration in this proceeding ("Final Order"). On June 17, 2002, FDN filed a Motion for Clarification or Reconsideration ("FDN Motion for Clarification") wherein FDN asked the Commission to clarify that the Final Order applied to FDN UNE voice customers who wish to acquire BellSouth ADSL in addition to those customers who already have BellSouth ADSL at the time they switch to FDN voice service. BellSouth filed a response in opposition to the FDN Motion for Clarification and filed its own Motion for Reconsideration or, in the Alternative, Clarification, on June 20, 2002 ("BellSouth Motion for Reconsideration"). Among other things, the BellSouth Motion for Reconsideration states that BellSouth should be permitted provision xDSL services to FDN customers over a separate loop at

unspecified rates, terms and conditions. On June 27, 2002, FDN timely filed a response in opposition to BellSouth's Motion for Reconsideration and a Cross-Motion for Reconsideration ("FDN Cross-Motion for Reconsideration"). The FDN Cross-Motion for Reconsideration asks the Commission to reconsider its decision denying FDN's request to require BellSouth to unbundle the packet switching functionality of parts of its network so as to create what has been called a "broadband UNE." The FDN Cross-Motion for Reconsideration was precipitated directly by the BellSouth Motion for Reconsideration, which, as FDN explained in its post order pleadings, would totally eviscerate the purpose of the Final Order. BellSouth's July 5 Motion to Strike asks the Commission to strike the FDN Cross-Motion for Reconsideration.

### Argument

2. With little more than an unsubstantiated notion of what constitutes a cross-motion, BellSouth seeks to strike the FDN Cross-Motion for Reconsideration. And in the style with which this Commission must certainly now be accustomed, BellSouth conjures argument from canard and requests relief on that basis.

3. BellSouth begins its Motion to Strike by relying on an incomplete quote of the FDN Motion for Clarification. The FDN Motion for Clarification, referring to portions of the Commission's Final Order not subject to the clarification request, states,

While FDN respectfully disagrees with the Commission's decision on these issues, FDN does not **in this motion** seek reconsideration of those aspects of the Order, **but it reserves its rights relative to those issues.**

FDN Motion for Clarification, p. 3 (emphasis added.) BellSouth's Motion to Strike completely ignores the reservation language. The FDN Motion for Clarification does not

seek either clarification or reconsideration of the Commission's decisions relative to a new broadband UNE or resale of ADSL; however, FDN did put BellSouth and the Commission on notice by expressly reserving all of its rights relative to the issues not addressed in the FDN Motion for Clarification. The rights reserved include the rights to seek review, including the right to seek review under the Commission's own rules.

Commission Rule 25-22.060(1)(b), Florida Administrative Code, grants a party adversely affected by a Commission decision the right to file a cross-motion for reconsideration if another party has filed a motion for reconsideration. With its Cross-Motion for Reconsideration, FDN merely exercised the right that it expressly and timely reserved and that the Commission's own rules grant FDN. Though disguising its argument, BellSouth grumbles that FDN somehow waived its right to file a cross-motion. But this argument is utterly without basis, since FDN expressly reserved its rights.

4. In prior orders, the Commission has considered cross motions for reconsideration, and the Commission has addressed cross motion practice as follows:

Although not defined, the practice has been to raise in a cross-motion points **not raised** in the motion for reconsideration. Here, FCCA/AT&T have raised in their Cross-Motion for Reconsideration the identical points raised in the Motions for Reconsideration and have merely indicated that they agree with the movants. Thus, it would appear that the Cross-Motion is redundant, and therefore, not appropriate.

Order No. PSC-00-2190-PCO-TP, issued November 17, 2000, in Dockets Nos. 981834-TP and 990321-TP (emphasis added). There are no similar or redundant points contained in either (a) FDN's Cross-Motion for Reconsideration and BellSouth's Motion for Reconsideration or (b) FDN's Cross-Motion for Reconsideration and FDN's Motion

for Clarification. The BellSouth Motion for Reconsideration announces BellSouth's plans for eviscerating the Commission's Final Order. Rather than provision ADSL over FDN's UNE voice loops, BellSouth desires to provision a dedicated ADSL loop to FDN voice customers and charge those customers extra for the privilege. The BellSouth Motion for Reconsideration precipitated and prompted FDN's Cross-Motion for Reconsideration. The latter motion was made to directly counteract a possible outcome of the former. Such is the essence of cross pleading. For if the Commission grants any part of BellSouth's Motion for Reconsideration, FDN will be in the position it would be in had the Commission never heard evidence of BellSouth's anticompetitive practice of refusing ADSL to ALEC voice customers and never issued the Final Order to right that wrong. To level the competitive playing field again, the Commission would need to grant the FDN Cross-Motion for Reconsideration. Accordingly, the FDN Cross-Motion for Reconsideration comports with the criteria described in Order No. PSC-00-2190-PCO-TP and is, by its nature, a genuine cross pleading.<sup>1</sup>

5. BellSouth's opinion that a "true" cross-motion for reconsideration "must be limited to addressing only those issues raised by another party's Motion for Reconsideration" cannot be reconciled with and is clearly at odds with the Order No. PSC-00-2190-PCO-TP. BellSouth cites no authority whatsoever to support its argument, and the argument does not withstand scrutiny. Where an order decides an issue in favor of party A, and party B seeks reconsideration of that issue, there would be

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<sup>1</sup> By analogy, a cross-appeal is permitted "to call into question error in the judgment appealed, which, although substantially favorable to the appellee, does not accord the relief to which the appellee believes itself entitled." Webb General Contracting, Inc. v. PDM Hydrostorage, Inc., 397 So.2d 1058, 1059-1060 (Fla. 3<sup>rd</sup> DCA 1981). For instance, an order denying the defendant-appellee's motion to dismiss for lack of personal jurisdiction could be cross-appealed following dismissal of the plaintiff's complaint for lack of subject matter jurisdiction and an appeal of the order of dismissal. Allen v. TIC Participations Trust, 722

no need for party A to ask the Commission to reconsider an issue already decided in its favor in a cross-motion for reconsideration. What BellSouth describes is a response to a motion for reconsideration, not a cross motion for reconsideration. Accepting BellSouth's notion of a cross motion for reconsideration is counter to the purpose of cross pleadings and would effectively write cross-motions out of Rule 25-22.060, Florida Administrative Code.

6. The Commission's rules do not limit cross motions for reconsideration only to those parties who have not filed for clarification or, for that matter, reconsideration. Indeed, just the opposite is the case when the rule is read consistent with canons of statutory construction. Rule 25-22.060(1) states,

(a) Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order. The Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration. The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action . . . .

(b) **A party** may file a response to a motion for reconsideration and **may file a cross motion for reconsideration**. A party may file a response to a cross motion for reconsideration.

(Emphasis added.) Significantly, the rule does not say a party may file a cross motion for reconsideration only if the party has not filed any other post-order motions addressing the issues in the order, such as a motion for clarification or reconsideration. Further, the Commission should note that the rule expressly excludes certain types of motions for reconsideration, i.e., those directed to orders disposing of reconsideration motions and those directed to proposed agency action. Had the Commission likewise intended to preclude cross motions under certain circumstances, the rule would have so

provided, but it does not.<sup>2</sup> Instead, the rule does not limit a party's ability to file cross motions. This, of course, is not to say that every filing responding to a motion for reconsideration is permissible as a cross motion. The basic characteristics of a cross motion must be present. As described in the preceding paragraphs, the FDN Cross-Motion for Reconsideration bears those characteristics and comports with Commission's own description of cross motion practice. Since Rule 25-22.060(1) does not limit cross motions to parties who have not filed for clarification, or even reconsideration, whosoever files a motion for reconsideration may expect legitimate cross motions.

7. The Commission should have no concern that the plain meaning of Rule 25-22.060(1) would permit a party to submit a motion and a cross-motion for reconsideration in the same proceeding and somehow obstruct review procedures; and, in particular, the Commission can have no such concern in this case. First, as the Commission noted in Order No. PSC-00-2190-PCO-TP, where a cross motion for reconsideration is not redundant of a motion for reconsideration, the cross motion is permitted. In other words, a party or parties with the same position on an issue should not be able to argue parallel points in a motion and a cross motion, as repetition in this regard, aside from being unnecessary, simply would not qualify as a cross motion. As explained above, the FDN Motion for Clarification and Cross-Motion for

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<sup>2</sup> The plain meaning rule of statutory construction requires the law under review be given its plain and ordinary meaning. See, e.g., City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984). Since Rule 25-22.060(1)(b) does not state an exception, its plain meaning permits a cross-motion for reconsideration whenever another party files a motion for reconsideration. Generally, where there is no ambiguity in the law reviewed, there is no need to move beyond its plain meaning. See, e.g., Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU. But even if there was ambiguity to Rule 25-22.060(1), Florida Administrative Code, the rule of inclusio unius est exclusio alterius (the inclusion of one thing is the exclusion of the other) further supports FDN's argument. See, e.g., Order No. PSC-92-0104-FOF-WU, supra. Since Rule 25-22.060(1) lists circumstances where cross motions for reconsideration will not be considered but does not identify circumstances where cross motions will not be considered, such as where the movants requested clarification already, the Commission

Reconsideration concern two distinct questions and are not in the least repetitive or overlapping, and the FDN Cross-Motion for Reconsideration is a genuine cross pleading permitted by the Commission's rules. Further, there is no prospect for inconsistent or dual decision-making tracks. The Commission typically decides timely motions for clarification, reconsideration and cross reconsideration all at the same time, and the Commission is likely to do so in this case. No appellate review proceedings will run simultaneous to the Commission's reconsideration track. As discussed below, the Final Order in this or any case is not deemed rendered for appellate purposes until the Commission disposes any motions and cross motions for reconsideration. Rule 25-22.060(c), Florida Administrative Code. Therefore, the Commission's decision will not be heading in different directions on different days as a result of reconsideration and cross reconsideration. Additionally, even if the Commission for some reason deemed it inappropriate to permit reconsideration and cross reconsideration on different aspects of one order by one party, in this case, the Commission should consider that the FDN Motion for Clarification seeks more clarification than reconsideration and, therefore, FDN's cross motion should be permitted.

8. Rule 25-22.060(c), Florida Administrative Code, provides that a final order is not rendered for the purpose of judicial review until the Commission dispose of any motions and cross motions for reconsideration. Therefore, BellSouth cannot argue that a cross motion for reconsideration improperly extends the time for perfecting appeal. Instead, BellSouth's argument is that the time for perfecting appellate jurisdiction would be improperly extended in this case based on the false assertion that FDN did not reserve

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must infer the intent not to establish such a restriction for cross motions.



its right of cross motion and the erroneous view of what constitutes a cross motion. As explained above, neither of these BellSouth arguments is sustainable. The FDN Cross-Motion for Reconsideration is legitimate. This notwithstanding, however, BellSouth's argument is little more than smoke. The time for perfecting appeal is not extended by a cross motion for reconsideration as long as the order is not deemed rendered because of a pending motion for reconsideration. In accordance with Rule 25-22.060(c), a final order is not deemed rendered until all motions for reconsideration are decided, regardless of whether cross motions for reconsideration are filed. In this case, BellSouth itself filed for reconsideration, so the Final Order is not rendered for appellate review purposes until that motion is addressed, even if FDN filed no post order pleadings. FDN does not somehow extend the time for perfecting appeals by a cross motion of reconsideration to the Final Order when that Final Order is not deemed rendered to begin with because of BellSouth's own pending reconsideration request. And there is no partial rendering of a final order. Thus, there is no issue of jurisdictional magnitude here, as BellSouth would like to have the Commission believe. Moreover, BellSouth cannot claim any prejudice from the Commission's consideration of the FDN Cross-Motion for Reconsideration since FDN reserved its right to file and did timely file for cross reconsideration, BellSouth's own reconsideration request triggered the FDN cross motion, and the Final Order is not ripe for appeal.

9. If the Commission decided that a party may not request both reconsideration and cross reconsideration on different issues in one order, the Commission should at least permit a party to request clarification and cross reconsideration on different issues

of the same order. On the differences between “clarification” and “reconsideration,” the Commission has ruled the following:

We note that neither the Uniform Rules of Procedure nor our rules specifically make provision for motions for clarification. However, we have typically applied the Diamond Cab standard in evaluating a pleading titled a motion for clarification when the motion actually sought reconsideration of some part of the substance of a Commission order. 146 So.2d 889. In cases where the motion **only sought explanation or clarification** of a Commission order, we have typically considered whether the order required further explanation or clarification to fully make clear our intent.

Order No. PSC-01-2449-FOF-TP, issued December 14, 2001, in Docket No. 000121-TP (emphasis added; citation omitted).<sup>3</sup> Thus, it is not the title of the pleading that is dispositive in determining clarification or reconsideration, but the remedy sought by the motion. The remedy sought by reconsideration is, essentially, for the Commission to change its mind or concede error because of some point of fact or law overlooked. The remedy sought by clarification, as the above order suggests, is for the Commission to explain, clarify or elaborate on some point of its decision.<sup>4</sup> In the FDN Motion for Clarification, FDN did not ask the Commission to overturn its decision requiring BellSouth ADSL over FDN UNE voice loops – a decision in FDN’s favor. Rather, the FDN Motion for Clarification requests the Commission explain whether its decision applies equally to customers who have BellSouth ADSL at the time of they obtain FDN voice as to customers who wish to acquire BellSouth ADSL after obtaining FDN voice.

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<sup>3</sup> At the end of the above quote, the Commission cited to Order No. PSC-95-0576-FOF-SU, issued May 9, 1995. This appears to be an error since the order disposing of reconsideration and clarification motions in the docket (Docket No. 940963-SU) was Order No. PSC-95-0965-FOF-SU, issued August 8, 1995.

<sup>4</sup> See, e.g., Order No. PSC-00-0513-FOF-TP, issued March 8, 2000, in Dockets Nos. 990930-TL and 9901037-TP, where the Commission addressed Sprint’s motion for clarification or reconsideration. The Commission rejected reconsideration because the Commission believed the underlying decision was correct and that Sprint’s motion failed to identify a point of fact or law the Commission overlooked. However, the Commission did grant clarification of the order to remove certain inappropriate portions thereof.

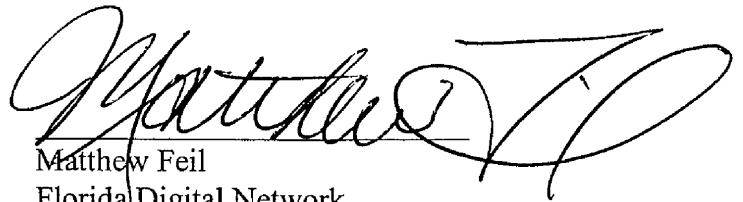
In contrast, the FDN Cross-Motion for Reconsideration asks the Commission to change its ruling relative to creation of a broadband UNE because the Commission overlooked or improperly weighed certain matters. The FDN Motion for Clarification does not seek reconsideration insofar as the remedy requested clearly is explanation and/or clarification, not flat-out reversal, of the Commission's ruling. Even the BellSouth Motion for Reconsideration characterizes BellSouth's plan for provisioning ADSL to FDN voice customers over a separate loop as a request for "clarification," when, as FDN maintains, acquiescing to the plan would strike the very heart of the Final Order. Since a request for clarification does not seek reversal of some part of a final order, it cannot be said that any subsequent cross motion for reconsideration may constitute a second attempt to reverse some part of the order. Therefore, at a minimum, the Commission should permit a genuine and timely motion for clarification and cross motion for reconsideration by the same party where said motions address different aspects of the same order.<sup>5</sup>

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<sup>5</sup> Since BellSouth sought reconsideration, the Commission need not address the issue of whether a motion for clarification alone can or should extend the time for perfecting an order for appeal. The Commission has stated, "[T]he same time frame for requesting reconsideration should apply to motions for clarification to insure the finality of our orders." Order No. PSC-01-2449-FOF-TP, issued December 14, 2001. In this case, the FDN Motion for Clarification was filed well before the due date for motions for reconsideration.

WHEREFORE, FDN respectfully requests that the Commission deny  
BellSouth's Motion to Strike and consider FDN's Cross-Motion for Reconsideration.

RESPECTFULLY SUBMITTED, this 11 day of July 2002.

A handwritten signature in black ink, appearing to read "Matthew Feil", written over a horizontal line.

Matthew Feil  
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Certificate of Service

I hereby certify that a true and complete copy of the foregoing was served on the following by e-mail and overnight delivery this 11 day of July 2002.

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Mr. James Meza, III  
C/o Ms. Nancy H. Sims, Dir., Reg. Relations  
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