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January 23, 2002

via Overnight Mail

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

Re: Docket No. 030080-TP - Petition of Florida Digital Network, Inc., for Expedited Waiver of Rule 25-4.118, Florida Administrative Code

Dear Ms. Bayó,

Please find enclosed for filing in a **new docket** an original and seven (7) copies of the following: Florida Digital Network, Inc.'s Petition for Expedited Waiver of Rule 24-8.114, Florida Administrative Code.

Also enclosed is a diskette containing a Microsoft Word for Windows 2000 file of the foregoing document.

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

Sincerely,

Matthew Feil  
Florida Digital Network  
General Counsel

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

LOCAL

DISTRIBUTION CENTER

390 North Orange Ave - Suite 2000 - Orlando, Florida 32801  
407.835.0300 - Fax 407.835.0309 - www.fdn.com

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Florida Digital Network, }  
Inc., for Expedited Waiver of }  
Rule 25-4.118, Florida Administrative Code }  
\_\_\_\_\_ }

Docket No. 030080-TP  
Filed: January 24, 2003

**PETITION OF FLORIDA DIGITAL NETWORK, INC.,**  
**FOR EXPEDITED WAIVER OF RULE 25-4.118,**  
**FLORIDA ADMINISTRATIVE CODE**

Florida Digital Network, Inc., (“FDN” or “Florida Digital”) hereby petitions the Florida Public Service Commission (“FPSC” or “Commission”) pursuant to Section 120.542, Florida Statutes, and Rule 28-104.004, Florida Administrative Code, to allow the transfer of customers of Mpower Communications Corp., f/k/a MGC Communications, Inc., (“Mpower”) to FDN without first obtaining each subscriber’s authorization and verification. In support of its petition, FDN states as follows:

1. FDN is an alternative local exchange carrier (“ALEC”) and in-state interexchange carrier (IXC) certificated by the FPSC.<sup>1</sup>

2. The Petitioner’s name, address and telephone number is:

Florida Digital Network, Inc.  
390 North Orange Ave.  
Suite 2000  
Orlando, FL 32801  
407-835-0300

3. The Petitioner’s representative’s name, address and telephone number is:

Matthew Feil  
Florida Digital Network, Inc  
390 North Orange Ave.  
Suite 2000

<sup>1</sup> In Florida, FDN holds ALEC Certificate No. 5715 and IXC Certificate No. 7048.

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Orlando, FL 32801  
Phone: 407-835-0460  
Fax: 407-835-0309

4. Rule 25-4.118, Florida Administrative Code, states that before submitting a preferred carrier change, carriers must verify each subscriber's authorization of the change via the methods prescribed in said rule. The requirements of Rule 25-4.118 apply to interexchange and alternative local exchange carriers by virtue of Rules 25-24.490 and 25-24.845. FDN respectfully requests a waiver of Rule 25-4.118 so that FDN may acquire the customer base of Mpower as more fully described below.

5. FDN has agreed to purchase certain of the Florida assets of and the rights to serve the Florida customer base of Mpower.<sup>2</sup> Mpower's business plans call for Mpower to promptly sell its Florida customer base and exit the Florida market rather than continue to serve these customers.<sup>3</sup> FDN and Mpower desire to complete the transfer of customers from Mpower to FDN services as soon as possible.

6. Consistent with 47 C.F.R. § 64-1120(e), FDN will mail letters to the affected Mpower customers explaining the transfer. As that rule requires, the affected customers will be informed that they do not have an obligation to take services from FDN, but if they choose a carrier other than FDN, they must do so before the customer transfer date. The waiver requested herein will thus be temporary and for a limited purpose, as described herein. FDN requests that the waiver endure until all notified customers of Mpower who do not select a carrier other than FDN are changed to FDN services.

7. FDN will file the required notice with the Common Carrier Bureau of the Federal Communications Commission ("FCC") in accordance with 47 C.F.R. § 64-1120(e). FDN will

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<sup>2</sup> In Florida, Mpower holds ALEC Certificate No. 5279 and IXC Certificate No. 5752.

<sup>3</sup> Mpower has roughly 11,000 Florida customers.

provide Commission staff a copy of the notification letter for its review. Once the notification letter is sent to the customers, FDN will provide a copy to the Commission.

8. Rule 25-4.118, Florida Administrative Code, lists as authority for the rule Section 350.127(2), Florida Statutes. The Rule lists as the laws implemented Sections 364.01, 364.19, 364.285, and 364.603, Florida Statutes.<sup>4</sup>

9. FDN's waiver request herein meets the standards of Section 120.542, Florida Statutes. The purpose of the underlying statutes at issue is, in relevant part, to ensure that basic local telecommunications services are available to all consumers, to encourage and promote fair competition in order to ensure the widest possible range of consumer choice in the provision of all telecommunications services, and to insure that a subscriber's services and changes to a subscriber's carriers are properly and fairly administered.

10. FDN believes that its petition is in the public interest and that alternative regulatory methods (i.e. the FCC's sanctioned notification letter to customers) will serve the same purpose in this instance as the verification requirements of Rule 25-4.118, Florida Administrative Code. FDN request that the Commission accept the draft notice letter attached as Exhibit A in lieu of the verification procedures of Section 25-4.118, Florida Administrative Code. The letter advises customers that they may choose another carrier prior to the transfer date. Customers are also given FDN's toll-free customer service numbers to call with any questions they may have about

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<sup>4</sup> Section 364.01 describes the legislative intent and powers and jurisdiction of the Commission; Section 364.19 grants the Commission authority to regulate the terms of contracts between telecommunications companies and their patrons; Section 364.285 grants the Commission power to impose penalties on entities subject to its jurisdiction for willful violations of lawful rules or orders of the Commission; and Section 364.603 directs the Commission to enact rules to prevent unauthorized changes in telecommunication subscribers' services.

the transaction. FDN believes the letter notification adequately serves the purpose of assuring that customers who remain with FDN genuinely wish to retain FDN as their service provider.<sup>5</sup>

11. The Commission's verification rules would not be served by requiring FDN to obtain the prior authorization and verification of every individual customer to switch from Mpower to FDN under the present circumstances. Customers who fail to timely respond to individual requests for authorization could lose their service altogether, as Mpower exits the market. Further, if the Commission does not permit this rule waiver request, the Commission may create an environment where consolidation among ALECs would be extraordinarily difficult if not completely impossible, as it would likely prove too costly for one ALEC to buy another's assets and/or customer base. FDN's petition is, therefore, consistent with the pro-consumer and pro-competitive designs of Chapter 364, Florida Statutes.

12. Additionally, FDN asserts that it will suffer a substantial hardship if required to obtain individual customer authorizations for some 11,000 customers at once in strict adherence to Rule 24-2.118. It would be an extraordinary strain on FDN's resources -- and on the resources of even the largest of Florida's telecommunications carriers -- to contact, inform, obtain proper authorizations/verifications from for 11,000 customers all at once. FDN also asserts that a substantial hardship would be created for Mpower if Mpower had to continue to serve the affected customers when it no longer has a business plan to do so, and no longer desires to do so.

13. Expedited action on this waiver request is requested. The Mpower – FDN purchase agreement provides that time is of the essence in the transfer of the customer base to

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<sup>5</sup> The FCC determined that compliance with its rules satisfied customer notification requirements as provided in 47 U.S.C. 258(a) and carrier change rules, and that it was unnecessary and burdensome to contact each customer to gain individual consent. *In the Matter of 2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and rules concerning Unauthorized Changes of consumers Long Distance Carriers, CC Docket Nos. 00-257, 94-129, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, 16 FCC Rcd 11218, 11221-22, ¶¶ 9, 10 (2001).*

accommodate Mpower's business plans. Granting FDN's petition would allow FDN to provide a seamless transition to former Mpower customers, while ensuring that the affected customers clearly understand available choices. Therefore, the Commission should grant FDN's request for an expedited waiver of the Commission's authorization and verification requirements of Rule 25-4.118, Florida Administrative Code.

14. The Commission has granted expedited waiver requests similar to the instant request. See, e.g. Dockets Nos. 020473-TP and 020948-TP (concerning BellSouth's and Sprint's acquisition of certain Adelphia customers). Therefore, the Commission should grant the instant request.

15. In accordance with Rule 28-104.002, Florida Administrative Code, a copy of this petition has been mailed to the Joint Administrative Procedures Committee.

WHEREFORE and in consideration of the above, Florida Digital Network, Inc. respectfully requests the Commission grant this petition for rule waiver.

Respectfully submitted, this 23 day of January 2003.



Matthew Feil  
Florida Digital Network, Inc  
390 North Orange Ave.  
Suite 2000  
Orlando, FL 32801  
407-835-0460  
[mfeil@floridadigital.net](mailto:mfeil@floridadigital.net)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by email (to those with an email address listed) and by regular mail to the persons listed below this 23<sup>rd</sup> day of

January, 2003.

Joint Administrative Procedures  
Committee  
Room 120  
The Holland Building  
Tallahassee, FL 32399-1300

Mpower Communications Corp  
Mr. David Woodsmall  
175 Sully's Trail, Suite 300  
Pittsford, NY 14534-4558  
[dwoodsmall@mpowercom.com](mailto:dwoodsmall@mpowercom.com)

Ms. Beth Keating  
Florida Public Service Comm'n  
2540 Shumard Oak Blvd.  
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