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Please find attached for filing in the captioned docket FDN Communication's Motion for Reconsideration of Order Establishing Procedure or, in the Alternative, Motion to Establish True-Up

In accordance with the Commission's e-filing procedures, the following information is provided:

(a) The person responsible for this filing is:

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(b) Docket No. and Title: 041338, Joint petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine; Birch Telecom of the South, Inc. d/b/a Birch Telecom and d/b/a Birch; DIECA Communications, Inc. d/b/a Covad Communications Company; Florida Digital Network, Inc.; LecStar Telecom, Inc.; MCI Communications, Inc.; and Network Telephone Corporation ("Joint CLECs") for generic proceeding to set rates, terms, and conditions for hot cuts and batch hot cuts for UNE-P to UNE-L conversions and for retail to UNE-L conversions in BellSouth Telecommunications, Inc. service area.

(c) The party on whose behalf the document is filed: Florida Digital Network, Inc. d/b/a FDN Communications

(d) Number of pages of the document: 11 pages.

(e) Description of each document attached: FDN Communications' Motion for Reconsideration of Order Establishing Procedure or, in the Alternative, Motion to Establish True-Up.

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Generic Proceeding to Set Rates, Terms, and Conditions for Batch Hot Cuts for UNE-P to UNE-L Conversions and for ILEC to UNE-L Conversions in the BellSouth Telecommunications, Inc. Service Area) Docket No. 041338-TP

In Re: Petition of Supra Telecommunications and Information Systems, Inc.'s for arbitration With BellSouth Telecommunications, Inc.) Docket No. 040301-TP Filed: April 29, 2005

FDN COMMUNICATIONS' MOTION FOR RECONSIDERATION OF ORDER ESTABLISHING PROCEDURE OR, IN THE ALTERNATIVE, MOTION TO ESTABLISH TRUE-UP

Pursuant to Rule 25-22.060, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") respectfully moves the Commission to reconsider the case schedule for Phase I set forth in the Order Establishing Procedure¹ or, in the alternative, moves the Commission to establish a true-up mechanism, as set forth in the body of this Motion. FDN requests that the Commission expedite its consideration of this Motion, since, as explained below, time is of the essence. In support of this Motion, FDN states as follows:

SUMMARY

1. The Order Establishing Procedure fails to bring Phase I of this case to final conclusion in sufficient time to (a) allow Florida CLECs to perform batch hot cuts of UNE-P services to UNE-L services at a fair, just, reasonable and non-discriminatory rate approved by the

¹ Order No. PSC-05-0433-PCO-TP, issued April 20, 2005, by Commissioner Bradley, as Prehearing Officer (hereinafter the "Order Establishing Procedure").

Commission before the March 11, 2006, deadline set in the TRRO² and (b) promote facilities-based competition (as this Commission, the FCC and BellSouth have all advocated) such that UNE-L services may replace the diminution in competitive market share that will undoubtedly result from the elimination of UNE-P. The Order Establishing Procedure, therefore, sets a schedule inconsistent with state and federal policy.

2. The Order Establishing Procedure erroneously fails to consider establishing a hearing for Phase I on non-consecutive days, which would significantly shorten the case schedule.

3. The Order Establishing Procedure erroneously relies on the premise that BellSouth requires and has a right to submit an entirely new cost study to support rates as yet unseen and unfiled. In Docket No. 040301, BellSouth was faced with the issue of whether the Commission should set a batch hot cut rate. BellSouth proceeded to hearing in Docket No. 040301 with the cost studies BellSouth had filed in Docket No. 990649A as the cornerstone of its case. The Commission postponed the December 1 and 2, 2004, hearing in Docket No. 040301 and merged that docket with Docket No. 040301. The merger of these two dockets should not be a pretext for a nearly year-long delay in a case BellSouth had already prepared to litigate.

4. If the Commission decides not to reconsider the Order Establishing Procedure's Phase I case schedule as set forth herein, FDN moves, in the alternative, for the Commission to establish a true-up date, whereby the current rates BellSouth charges would be trued-up to the rates the Commission ultimately approves in Phase I effective as of a date certain for those CLECs electing a true-up ("True-Up Mechanism"). By establishing such a True-Up Mechanism,

² *In re Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (WC Docket No. 04-313 and CC Docket No. 01-338), F.C.C. 04-290 (released Feb. 4, 2005).

as suggested hereinbelow, the Commission protects the interests of the parties and the appropriate state and federal policy.

STANDARD OF REVIEW ON RECONSIDERATION

5. Generally, a motion for reconsideration should be granted if it identifies a point of fact, law or policy that was overlooked or which the Commission failed to consider in rendering its order.³ The Order Establishing Procedure does not reveal that the arguments raised in this Motion were considered or given any weight at all when the Commission set the Phase I case schedule. Rather, it is apparent that the Order was issued without regard to the context in which it would operate, where a massive and immediate regulatory shift is taking place and significant impacts on the telecommunications market place in Florida will occur. The Phase I case schedule will negatively affect (a) the substantive rights and interests of the CLEC parties and (b) the state and federal goals of promoting facilities-based competition. FDN maintains that the standard of review for reconsideration, to the extent that standard needs to be met for a procedural order, is met in the instant proceeding.

BACKGROUND

6. *Supra* Telecommunications and Information Systems, Inc., (“Supra”) initiated Docket No. 040301 by a complaint filed April 5, 2004 (the “Supra Docket”). A case schedule was established, discovery was conducted, testimony was filed, and the hearing scheduled for December 1 and 2, 2004. Docket No. 041338 (the “Generic Docket”) commenced when the Joint CLECs filed a petition with the Commission for a generic proceeding for hot cut rates and procedures on November 23, 2004. On November 30, 2004, BellSouth filed an emergency

³ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962), *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981); *In Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

motion to continue the hearing in the Supra Docket on the basis that issues raised by the petitioners in the Generic Docket were identical to certain issues in the Supra Docket.⁴ The Prehearing Officer granted BellSouth's motion and continued the hearing in the Supra Docket by an order issued November 30, 2004. The Commission voted to consolidate the two dockets on February 1, 2005. The parties to the consolidated dockets and staff negotiated several iterations of the issues list for the consolidated case. The Order Establishing Procedure in the consolidated dockets was not issued until April 20, 2005. It sets a Phase I case schedule with hearing dates of October 11 – 13, 2005, or some ten months after the hearing in the Supra Docket was supposed to take place.

THE ORDER ESTABLISHING PROCEDURE OVERLOOKS SEVERAL SIGNIFICANT CONSIDERATIONS

7. Any order of the Commission must withstand scrutiny when viewed in light of the circumstances in which the order was issued or will operate. The instant Order overlooks the exigencies of a massive regulatory change which will significantly alter the telecommunications market in Florida. With hearing dates in mid October 2005, Phase I is not likely to result in a final order for another three months after that. Indeed, under the best of circumstances, a final order might be issued by the end of January. And a final order at that time, the Order Establishing Procedure fails to consider, would be too late to stave off serious damage to facilities-based competition.

8. BellSouth effectively holds competition in Florida hostage. BellSouth will attempt to exact a wholesale switching price as high as possible from the UNE-P providers knowing that hot cut rates are too high to sufficiently incent CLECs to purchase UNE-L services and that

⁴ BellSouth's motion was not premised on, and does not even mention, the need to file entirely new cost studies.

resale (a failed business model) is not an option. Competition is up against a looming deadline, and the Order Establishing Procedure eschews that deadline. Making matters worse, BellSouth may use the delay the Order Establishing Procedure affords to propose increases in hot cut rates, not decreases.

9. Per the TRRO, CLECs must perform batch hot cuts of UNE-P services to UNE-L services before the March 11, 2006. Even if BellSouth ramps up its staffing, as BellSouth said it could and would in the Docket No. 030851 (the commission's TRO implementation case for unbundled switching) proceeding, it is inconceivable that BellSouth could convert the hundreds of thousands of UNE-P lines in Florida to UNE-L in the span of a few weeks, i.e. between January 2006, when the Commission would issue a final order in Phase I of the consolidated dockets, and the FCC's March 11, 2006, deadline.

10. Further, with the elimination of UNE-P as a TELRIC-priced UNE under Section 251 of the Telecommunications Act, a diminution of competitive market share in Florida is inevitable. This Commission has previously expressed its preference for facilities-based competition.⁵ In its filings with the FCC, BellSouth itself has repeatedly touted the need for facilities-based competition to supplant UNE-P; indeed, in the TRRO, the FCC eliminated UNE-P as a section 251 UNE in part on the rationale that it deterred facilities-based investment. The Order Establishing Procedure fails to consider that the diminution in competition from UNE-P's 251 demise will likely be immediate. To promote facilities-based competition as a substitute for

⁵ For instance, in an October 17, 2002, letter to Florida's congressional delegation and FCC Chairman Powell, this Commission stated: "In the long term, facilities-based competition is the best way to provide maximum benefit to consumers. However, we recognize and we hope others recognize that in order to spur long term investment and commitment it is necessary to provide a stable, reasonably predictable legal and regulatory framework under which investors and service providers can operate with confidence." The Commission's 2004 Annual Report to the Florida Legislature on the Status of Competition in the Telecommunications Industry in Florida cites with approval the D.C.

UNE-P, facilities-based competition needs a jump start. And that jump start must be coincident with the impact from the elimination of UNE-P as a 251 UNE. Otherwise, Florida's consumers will suffer from the drop off in competition, and retail prices will rise.

11. The CLECs are within their rights to request that hot cuts be done at fair, just, reasonable and non-discriminatory rate approved by the Commission.⁶ But, as explained above and as the Order Establishing Procedure failed to consider, time is of the essence. The Commission cannot ask Florida consumers to wait until next year before competition is appropriately resumed.

12. The Order Establishing Procedure erroneously fails to consider that establishing a hearing for Phase I on non-consecutive days would significantly shorten the case schedule. From a review of the Commission's calendar on the Commission website, the movant notes a number of non-consecutive days appear to be open. Nothing in Chapter 364 or the Commission's rules require that a hearing take place on consecutive days. Under the circumstances, a hearing on non-consecutive days is appropriate, and the Order Establishing Procedure should be reconsidered to incorporate a hearing on non-consecutive days to bring Phase I to an earlier conclusion. Staff had mentioned to FDN that hearing dates in August were being considered for Docket No. 041464 (Sprint-FDN Arbitration). This matter certainly take precedence over that docket, and, to the extent necessary and practical, FDN would agree to accommodate a schedule for non-consecutive hearing dates in this case.

Circuit Court's USTA II opinion wherein that opinion states, "The purpose of the Act . . . is to stimulate competition – preferably genuine, facilities-based competition." See 2004 Annual Report at p. 7, 32.

⁶ The 10% off batch rate BellSouth has proposed in Docket No. 030851 and elsewhere has never been reviewed and approved by the Commission. Nor has the Commission ever made a determination that BellSouth's batch processes and rates are compliant with best practices or TELRIC.

13. The Order Establishing Procedure also erroneously relies on the premise that BellSouth requires and has a right to start over and submit an entirely new cost study to support hot cut rates as yet unseen and unfiled. BellSouth proceeded to hearing in the Supra Docket using the cost studies BellSouth had filed in Docket No. 990649A, knowing the Commission would consider setting new hot cut rates. BellSouth requested a delay in the Supra Docket because the Generic Docket presented overlapping issues. If BellSouth was willing to go to hearing in the Supra Docket on the basis of existing cost studies, the merger of the Supra Docket and the Generic Docket should not be a pretext for another ten or months to pass for BellSouth to sanitize and embellish its case before the Commission can make a decision.

14. If BellSouth wanted to create a new cost study, BellSouth could have started it at any time during the Supra Docket. Moreover, BellSouth could have started a new cost study in November 2004 when the Joint CLECs initiated the Generic Docket. BellSouth used the Generic Docket as the basis for asking the Commission to postpone the Supra docket, and BellSouth argued in the Supra Docket that if the commission was inclined to set new hot cut rates, the Commission should do so in a generic docket. So BellSouth cannot genuinely argue that it could not have known it should have started a new cost study when the Generic Docket opened. The Order Establishing Procedure accepts the BellSouth assertion that BellSouth requires some 90 days **from now** to prepare a cost study, without even considering that to the extent BellSouth wanted to conduct a new cost study, BellSouth could have and should have started it in November 2004, if not earlier.

15. In a conference call among the parties and Commission staff on April 29, 2005, in Docket No. 040269 (BellSouth generic arbitration for TRO/TRRO change in law), counsel for BellSouth complained that if the Commission did not address certain issues up front and

specifically approve new TRO/TRRO contract language, a November 2005 hearing date would bring that case to closure too late for interconnection agreements to be properly amended before the FCC's March 11, 2006, deadline. These concerns may be legitimate and worthy of evaluation in due course to protect BellSouth's interests. However, with regard to the FCC's looming deadline, the matter of setting appropriate hot cut rates, terms and conditions is of far more serious consequence to the public interests of the State of Florida. Appropriate rates, terms and conditions must be set **well in advance of the FCC's deadline, not at the deadline**, so the massive regulatory shift the FCC ordered is carried out smoothly and efficiently with minimal harm to competition and consumers.

16. In consideration of the foregoing, the Commission should reconsider the Order Establishing Procedure to insure that Phase I of the case concludes no later than October of this year, whether by adoption of a schedule more in line with the Joint CLEC's proposed schedule⁷ and/or by use of any non-consecutive hearing dates available on the Commission's calendar.

ALTERNATIVE MOTION FOR TRUE-UP

17. If the Commission decides not to reconsider the Order Establishing Procedure's Phase I case schedule as set forth herein, FDN moves, in the alternative, for the Commission to establish a True-Up Mechanism. In this way, the current rates BellSouth charges for hot cuts would be trued-up to the rates the Commission ultimately approves in Phase I, effective as of a date certain.

⁷ On February 28, 2005, per staff's request, the Joint CLECs provided staff and BellSouth the following proposed schedule: April 30 for direct testimony and cost studies, June 15 for rebuttal and prehearing statements, June 29 for the prehearing Conference, July 6 & 7 for the hearing, August 5 for briefs, September 8 for the staff recommendation, September 20 for the Agenda, and October 11 for the order.

18. A True-Up Mechanism is the best way to balance the interests of all interested persons if the Commission does not reconsider the Order Establishing Procedure. If the Commission approves lower hot cut rates at the conclusion of the case, the CLECs would receive the benefit of the lower rate earlier than under the current Phase I schedule, and, in exchange, BellSouth would be given more time to submit the new cost studies BellSouth claims it needs to submit. The True-Up Mechanism, however, should not work both ways, i.e., BellSouth should not be permitted to true-up if the Commission approves higher rates. As proposed, BellSouth would already be getting the benefit of an unnecessary delay in the schedule for Phase I, so BellSouth should not get a financial windfall in addition that delay.

19. The True-Up Mechanism should be at the option of party CLECs.⁸ The date certain for the true-up should be the date on which the Commission issues its order requiring a true-up.

20. By establishing such a True-Up Mechanism, the Commission protects and balances the interests of the parties and the appropriate state and federal policies.

21. The undersigned counsel has attempted to contact counsel for the other parties to this proceeding (except for staff counsel) regarding this Motion. None of the CLEC attorneys expressed opposition to this Motion. Counsel for BellSouth stated that BellSouth opposes the Motion and will file a response in due course.

CONCLUSION

For the reasons stated above, the Commission should, in an expedited manner, reconsider the Order Establishing Procedure and set a Phase I case schedule, using non consecutive hearing

⁸ The Commission could, of course, expand this relief to all Florida CLECs to assure a level playing field and deflect any criticisms of discrimination. In the Verizon UNE docket (Docket No. 990649B), where the Commission conditioned Verizon's requested stay of new UNE rates on a potential true-up, the Commission required CLECs who would avail themselves of the true-up to file a statement to that effect within a specified time frame.

dates as necessary, such that new hot cut procedures and rates are effective well in advance of March 11m 2006, or, alternatively, establish a True-Up Mechanism as set forth in the body of this Motion.

RESPECTFULLY SUBMITTED, this 29th day of April, 2005.

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by email, provided an email address is listed below, and by U.S. mail this 29th day of April, 2005.

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