

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-01-1168-PCO-TP
ISSUED: May 22, 2001

ORDER GRANTING MOTION TO AMEND ARBITRATION PETITION

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. An issue identification meeting was held for this docket on April 12, 2001. 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. This matter is currently set for an administrative hearing.

MOTION

In its Motion, FDN asserts that prior and subsequent to FDN's filing the Petition, FDN and BellSouth representatives had discussed in negotiations an unbundled network element (UNE) ordering issue that FDN did not include in its Petition. Prior to filing its Petition for Arbitration, FDN alleges that it believed that parties would be able to negotiate a mutually satisfactory resolution of this issue, proposed Issue 10 (See Attachment A). However, on February 21, 2001, BellSouth informed FDN that the issue could not be resolved in a satisfactory time frame. FDN states further that it has not received any information on the issue from BellSouth since that time, and no agreement has been reached.

DOCUMENT NUMBER-DATE

06448 MAY 22 2001

PSC-RECORDS/REPORTING

FDN maintains that it should be allowed to amend its Petition to include the proposed Issue 10. FDN explains that the inclusion of this issue will not prejudice BellSouth's case since BellSouth has been aware of the issue for some time. The parties discussed the issue before and after the Petition was filed and FDN argues adding the issue will not necessitate any change in the established case schedule. Moreover, FDN contends that the arbitration process is designed to resolve issues such as the one presented here. FDN indicates that the parties' current interconnection agreement provides a vehicle for Commission resolution of such an issue, which is addressed in the Bona Fide Request Process and expedited Resolution Procedures. Whether in this case by amendment of the Petition or in a separate request for expedited dispute resolution, FDN asserts that the Commission will be asked to resolve this issue in roughly the same interval if the parties can not reach an agreement. Thus, FDN alleges that administrative economy supports permitting the requested amendment to avoid the inefficient and duplicative efforts inevitable in dual, simultaneous proceedings. Further, FDN states that pursuant to Rule 28-106.202, Florida Administrative Code, a petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer. If the Motion is granted, FDN asserts that Section 1.190(c), Fla. R. Civ. Pro., provides that amendments to pleadings, where permitted by rule or order, "shall relate back to the date of the original pleading." Accordingly, FDN states that if the Motion is granted, it should be deemed filed on the date of the original Petition to arbitrate.

RESPONSE

In its Response, BellSouth asserts that the Act does not allow FDN to amend its pleading in order to add issues that were not presented in its Petition or in BellSouth's Response. BellSouth states that the Act establishes an explicit and streamlined timetable for the resolution of issues that remain unresolved after at least 135 days of good-faith negotiations over the terms and conditions of an interconnection agreement. BellSouth contends that even if the Act allows an amendment to the Petition, FDN has not met its burden of proving that its delay in filing the amendment was reasonable. BellSouth explains that the petitioning party is required to submit "all relevant documentation concerning the unresolved issues, the position of each of the parties with

respect to those issues, and any other issues discussed and resolved by parties. Section 252(b)(2)(A) of the Telecommunications Act of 1996 (Act). BellSouth asserts that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

BellSouth alleges that FDN's assertion that its Motion cures the fact that proposed Issue 10 does not appear in its Petition because amendments to pleadings "shall relate back to the date of the original pleading" is incorrect. BellSouth explains, however, that federal courts reviewing arbitration rulings in some other jurisdictions have ruled that state commissions have no authority to decide issues not raised in either the petition for arbitration or the response. BellSouth states that although FDN's Motion makes it clear that the proposed Issue 10 was identified during these negotiations and that it remained unresolved at the time that FDN filed its Petition, FDN failed to raise this unresolved issue in its Petition. BellSouth contends that FDN filed its Motion 47 days after FDN knew that proposed Issue 10 would not be resolved. Hence, BellSouth requests that the Commission deny FDN's Motion to Amend Petition because FDN has not provided a reasonable explanation for its delay in seeking leave to amend its Petition.

DECISION

Pursuant to Rule 28-106.202, the petitioner may amend its petition after the designation of the presiding officer only upon order of the presiding officer. Accordingly, it appears that the presiding officer has the authority to render a decision on a motion to amend petition. I note that FDN's Reply to BellSouth Opposition to Motion to Amend arbitration petition is not contemplated by Commission rules; therefore, it is not addressed herein. In its Response, BellSouth states that FDN's Motion should be denied because FDN failed to provide a reasonable explanation for why it had not filed Motion earlier. Although BellSouth asserts that the Act does not provide parties an allowance to amend a petition for arbitration, BellSouth has not presented a compelling argument that the Act requires that I deny FDN's Motion. I concur, nevertheless, with BellSouth in its assertion that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

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However, in Docket No. 970730-TP, Petition for arbitration filed by Telenet, Telenet filed for a Motion to Accept Telenet's Amended Request for Relief. Having found that Telenet should be allowed to amend its request for relief, Order No. 98-0332-PCO-TP was issued granting Telenet's Motion to Accept Amended Request for Relief. In this Order, it was established that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on the merits. Although, it appears that FDN had an opportunity to amend its Petition earlier, there is no indication that FDN abused its privilege to amend its petition. In keeping with the notion of judicial economy, I believe that adding the proposed Issue 10 would allow parties to address the merits of their case in this proceeding. Further, it does not appear that BellSouth will be unduly prejudiced since it was aware that proposed Issue 10 had not resolved by parties. Accordingly, FDN's Motion to Amend Petition is hereby granted. BellSouth shall have seven days from the issuance date of this Order to file its Amended Response to proposed Issue 10 in FDN's Amended Petition for Arbitration.

Based on the foregoing,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Florida Digital Network, Inc.'s Motion to Amend Arbitration Petition, is hereby granted.

ORDERED that BellSouth Telecommunications, Inc. shall respond within seven days from the issuance date of this Order to Florida Digital Network, Inc.'s Amended Petition for Arbitration as set forth in the body of this Order.

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By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 22nd Day of May, 2001.



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.

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 Records and Reporting, in the form prescribed by Rule 25-22.060,

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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.

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ATTACHMENT A

PROPOSED ISSUE 10:

Should BellSouth be required to provide FDN a service order option for all voice-grade UNE loops (other than SL-1 and SL-2) whereby BellSouth will (1) design circuits served through an integrated subscriber loop carrier (SLC), where necessary and without additional requirements on FDN, (2) meet intervals at parity with retail service, (3) charge the SL-1 rate if there is no integrated SLC or the SL-2 rate if there is, and (4) offer the order coordination option?