

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-01-1653-PHO-TP
ISSUED: August 13, 2001

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on August 2, 2001, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

MATTHEW J. FEIL, ESQUIRE, 390 North Orange Avenue, Suite 2000, Orlando, Florida 32801-1640
On behalf of Florida Digital Network, Inc.

MICHAEL C. SLOAN, ESQUIRE, Swidler, Berlin, Shereff & Friedman, LLP, 3000 K Street, Northwest, Suite 300, Washington, District of Columbia
On behalf of Florida Digital Network, Inc.

NANCY B. WHITE, ESQUIRE, c/o Ms. Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556
On behalf of BellSouth Telecommunications, Inc.

JAMES MEZA III, ESQUIRE, 150 West Flagler Street, Suite 1910, Miami, Florida 33130
On behalf of BellSouth Telecommunications, Inc.

PATRICK W. TURNER, ESQUIRE, 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc.

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FELICIA R. BANKS, ESQUIRE, and JASON FUDGE, ESQUIRE,
Florida Public Service Commission, 2540 Shumard Oak
Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

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. Order No. PSC-01-1273-PCO-TP, establishing the procedure for this proceeding was issued on June 7, 2001.

BellSouth filed a Motion to Reschedule Hearing on June 22, 2001. On July 11, 2001, Order No. PSC-01-1452-PCO-TP was issued granting the Motion to Reschedule Hearing. On July 12, 2001, BellSouth filed a Motion for Extension of Time to File Rebuttal Testimony and Prehearing Statement. On that same day, BellSouth filed a Supplemental Motion for Extension of Time to File Rebuttal Testimony and Prehearing Statement (Supplemental Motion). Order No. PSC-01-1470-PCO-TP, granting an extension of time to file rebuttal testimony and prehearing statements, was issued on July 13, 2001. On July 12, 2001, BellSouth filed an Objection to FDN's Request for New UNEs or Unbundled Packet Switching and Motion to Strike Testimony. FDN filed its Opposition of Florida Digital

Network, Inc. to BellSouth's Motion to Strike, or Alternatively, Motion to Amend Petition. This matter is currently set for administrative hearing.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7)

days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words,

set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 50 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and Rebuttal*</u>		
Michael P. Gallagher	FDN	all
Jerry Kephart	BellSouth	3a, 3b and 10
John Ruscilli	BellSouth	1
Thomas G. Williams	BellSouth	1

* Direct and Rebuttal Testimony will be taken together.

VII. BASIC POSITIONS

FDN: All unresolved interconnection agreement issues between the parties should be resolved as FDN has proposed. At the forefront of these issues, and at the forefront of establishing competition for voice and data services for business and residential customers in BellSouth territory in Florida, is FDN's demand that BellSouth offer FDN for resale or as an unbundled network element (UNE) product the high frequency portion of access lines FDN uses to provide subscribers voice service. BellSouth's network architecture in Florida is unique. Over 60% of all BellSouth access lines in the State are foreclosed to CLECs desiring to offer voice and high-speed data services over the same line (as BellSouth may offer its own end-users), not because the line cannot support the data service, but because BellSouth refuses to allow CLECs meaningful opportunity to compete on a level playing field. BellSouth's refusal to offer FDN any of its requested high frequency options is fundamentally anticompetitive and unjustifiable in addition to being unlawful. With regard to BellSouth's trouble ticket services, FDN merely desires the interconnect agreement to validate the impropriety of BellSouth's charging for trouble tickets BellSouth closes as "no trouble found" where FDN can prove a trouble must have existed on BellSouth's facilities. FDN also maintains that it should be able to order a simple voice-grade loop from BellSouth without having to specify in advance that BellSouth must process the order one way or another because of BellSouth's own network design and without having to go

through what amounts to a prequalification process to insure timely execution of FDN's orders.

BELLSOUTH:

The Commission's goal in this proceeding is to resolve each issue that is appropriately before the Commission in this arbitration consistent with the requirements of Section 251 of the Telecommunications Act of 1996 ("1996 Act"), including the regulations prescribed by the Federal Communications Commission ("FCC"). BellSouth and Florida Digital Network, Inc. ("FDN") have continued to negotiate in good faith, and have resolved many issues since FDN's request for arbitration was filed with this Commission. Nevertheless, there remain three issues for which the parties have not been able to reach a solution. BellSouth submits that FDN's positions on these issues will not withstand close scrutiny. BellSouth believes that its positions are both reasonable and fair. Accordingly, the Commission should adopt BellSouth's position on these issues.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

[LEGAL ISSUE]A: What is the Commission's jurisdiction in this matter?

POSITIONS

FDN: FDN has not indicated a position on this issue.

BELLSOUTH: BellSouth has not indicated a position on this issue.

STAFF:

Section 252 of the Federal Telecommunications Act of 1996 (Act) sets forth the procedures for negotiation, arbitration,

and approval of agreements. Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section. In this case, however, the parties have explicitly waived the 9-month requirement set forth in the Act. Furthermore, this Commission has jurisdiction pursuant to Chapter 364, Florida Statutes, and Section 252 of the Federal Telecommunication Act of 1996 (Act) to arbitrate interconnection agreements, and may implement the processes and procedures necessary to do so in accordance with Section 120.80(13)(d), Florida Statutes. However, pursuant to Section 252(e)(5) of the Act, if a state commission refuses to act, then the FCC shall issue an order preempting the Commission's jurisdiction in the matter, and shall assume jurisdiction of the proceeding.

ISSUE 1: For purposes of the new interconnection agreement, should BellSouth be required to provide xDSL service over UNE loops when FDN is providing voice service over that loop?

POSITIONS

FDN: Yes. The Commission should require BellSouth to offer a UNE broadband product that includes high-speed transmission from the customer to the Digital Loop Carrier (DLC) at a remote terminal (RT), DSLAM functionality at the RT, transmission from the RT to the CO, and packet switching. In addition, BellSouth must be required to resell wholesale high-speed data services, pursuant to Section 251(c)(4) of the Act, that can be provided over the same loop as FDN's voice service to an end user.

BELLSOUTH:

No. The FCC has made it clear that BellSouth is not required to provide its ADSL service over a loop if BellSouth is not providing voice service over that loop. Additionally, without waiving and subject to BellSouth's Pending Objection and Motion to Strike FDN's testimony regarding Issue 1, and although the issues of unbundling of packet switching

functionality and the creation of new UNEs are not appropriately before the Commission, BellSouth is not required to unbundle packet switching or create new UNEs for FDN so that FDN can provide its own xDSL service over a UNE loop.

STAFF:

Staff has no position at this time.

ISSUE 2: For the purposes of the new BellSouth/FDN interconnection agreement, should reciprocal compensation payments be made for ISP-bound traffic? If so, at what rates?

This issue has been withdrawn.

ISSUE 3A: Should BellSouth be required to consult with FDN prior to closing a trouble ticket?

POSITIONS

This issue has been withdrawn.

ISSUE 3B: When FDN reports a trouble ticket, should BellSouth charge FDN for that trouble ticket when BellSouth reports "no trouble found" and the trouble is resolved while the ticket is open?

POSITIONS

FDN: No. The interconnection agreement should provide that where FDN can show through remote line diagnostic tests or otherwise that there was a BellSouth caused trouble on a ticket that BellSouth closed as "no trouble found," FDN should not be charged.

BELLSOUTH:

Yes. If BellSouth dispatches a technician to investigate a trouble reported by FDN or performs continued cooperative testing, BellSouth should be able to charge FDN and recover its costs for dispatching a technician or continued cooperative testing for that trouble ticket, unless it is determined that the original trouble was caused by a problem in BellSouth's network.

STAFF:

Staff has no position at this time.

ISSUE 4A: Is the issue regarding due dates for move orders as stated in 4(B) below, a performance measure issue? If so, is it appropriate to arbitrate the issue in this proceeding?

This issue has been withdrawn.

ISSUE 4B: For purposes of the new BellSouth/FDN interconnection agreement, in the event BellSouth misses a due date for a customer move order, should BellSouth be required to provide retail phone service to FDN at the new address at no charge until the move order is completed?

This issue has been withdrawn.

ISSUE 5: For purposes of the new BellSouth/FDN interconnection agreement, should BellSouth be required to tag all FDN UNE loops at no charge? If so, where?

This issue has been withdrawn.

ISSUE 6: For the purposes of the new BellSouth/FDN interconnection agreement, should BellSouth be required to test dial tone up to the NID on all UNE SL-1 and SL-2 loops without additional charge?

This issue has been withdrawn.

ISSUE 7: For the purposes of the new interconnection agreement, should BellSouth be required to notify FDN of all loop modifications that involve a change in the circuit ID?

This issue has been withdrawn.

ISSUE 8A: Is the issue regarding a FDN- dedicated BellSouth frame attendant, as stated in 8(B) below, a performance measure issue? If so, is it appropriate to arbitrate the issue in this proceeding?

This issue has been withdrawn.

ISSUE 8B: For the purposes of the new BellSouth/FDN interconnection agreement, should BellSouth be required to allow FDN the option of a BellSouth frame attendant who works exclusively on FDN orders, if FDN agrees to fully fund this frame attendant?

This issue has been withdrawn.

ISSUE 9: Should the Commission address any unresolved issues between BellSouth and FDN regarding rights-of-way, conduit and pole attachments?

This issue has been withdrawn.

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?

This issue has been withdrawn.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Michael P. Gallagher	FDN	_____ (MPG-1)	D L C Architecture Schematic
		_____ (MPG-2)	Jan. - May 2001 BellSouth C a u s e d T r o u b l e s Tickets

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Michael P. Gallagher	FDN	_____	FDN Order
		(MPG-3)	Notes for T r o u b l e s Tickets: F2 or F1 pair pulled or broken
		_____	FDN Order
		(MPG-4)	Notes for T r o u b l e tickets: "No Trouble Found" examples
(Rebuttal)		_____	Examples: Move
		(MPG-5)	Orders and T e m p o r a r y Lines
		_____	Examples: Bad
		(MPG-6)	Cuts
		_____	Trouble Ticket
		(MPG-7)	Proposal
Tommy Williams	BellSouth	_____	Precursor
		(TW-1)	Group Newsletter February 22, 2001
		_____	Line Sharing
		(TW-2)	RT Project Charter

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no pending stipulations.

XI. PENDING CONFIDENTIALITY MATTERS

On July 30, 2001, BellSouth filed a Notice of Intent to Request Specified Confidential Classification to Staff's First Request for Production of Documents No. 3 and Second Set of Interrogatories No. 4. Also, on August 1, 2001, BellSouth filed a Notice of Intent to Request Specified Confidential Classification of BellSouth's Responses to FDN's Request for Production of Documents Nos. 3(a), 3(c), 3(e), 3(f), 3(g) and 3(h). To date, however, no Request for Specified Confidential Classification has been filed. Thus, this information will continue to be treated as confidential in accordance with Section 364.183, Florida Statutes, Rule 25-22.006, Florida Administrative Code, and Order No. PSC-01-1273-PCO-TP until such requests have been filed and a ruling is rendered. However, if such requests are not filed, this information will become public in accordance with Rule 25-22.006, Florida Administrative Code.

XII. RULINGS

Opening Statements

Opening statements, if any, shall not exceed five minutes per party.

Motion to Strike Testimony

In response to the Direct testimony filed June 8, 2001, by Florida Digital Network, Inc. (FDN), recommending that the Commission create a new unbundled network element or to unbundle packet switching, BellSouth Telecommunications, Inc. (BellSouth) filed an Objection to FDN's Request for New UNEs or Unbundled Packet Switching and Motion to Strike Testimony (Motion) on July 12, 2001. On July 19, 2001, FDN filed an Opposition to BellSouth's Motion to Strike, or Alternatively, Motion to Amend Arbitration Petition (Response). At the prehearing conference, counsel for BellSouth stated that Attachment A, which is the interconnection agreement between the parties, provides that BellSouth shall be required to provide nondiscriminatory access to unbundled packet switching in certain instances. Further, BellSouth's counsel stated

that the direct testimony filed by Mr. Gallagher alleges that FDN requests that packet switching should be unbundled in circumstances other than those outlined in the agreement. Counsel asserts that the issue in the case is simply whether BellSouth be required to provide xDSL service over a UNE loop. Counsel explains that FDN agreed to language that states the issue in terms of whether or not BellSouth's xDSL service, not network elements, should be provided. Further, Counsel alleges that FDN agreed to the language in agreement, and that FDN's attempt to arbitrate a new language after an agreement has been reached is unacceptable.

In response to BellSouth's arguments, counsel for FDN asserted that the issue in the petition states whether BellSouth should be required to provide FDN just, reasonable and nondiscriminatory access to UNEs such that xDSL service over a UNE loop is available when a customer and number port to FDN local service. FDN's counsel stated that the petition says, "At a minimum, FDN should be able to get BellSouth wholesale DSL service over the same line." He argued that neither the issue as worded in the petition nor in the text of the petition limit the redress that FDN might seek to remedy the problem. Counsel stated that the issue as reworded at the issue identification meeting does not limit the redress problem. Further, Counsel stated that BellSouth is in no way prejudiced by the direct testimony filed by Mr. Gallagher. Counsel asserted that BellSouth has been on notice of the direct testimony filed by Mr. Gallagher since June 8, 2001, and that BellSouth has filed rebuttal testimony on that issue as addressed by Mr. Gallagher's direct testimony.

Although BellSouth asserts that the direct testimony of Mr. Gallagher's is beyond the scope of the petition regarding the issue of unbundled packet switching, I believe that the language that is contained in the petition for arbitration is broad enough to capture the nuances as described within the direct testimony of FDN's witness Gallagher filed by FDN. I note that BellSouth has been aware of the direct testimony filed by FDN since June 8, 2001. There is no indication that BellSouth has been prejudiced in any way. Further, BellSouth has filed rebuttal testimony on the issue as addressed by FDN. In the interests of judicial economy and administrative

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efficiency, I believe that the issue regarding unbundled packet switching as addressed by FDN is appropriate for consideration in this docket and not another proceeding. Accordingly, BellSouth's Motion to Strike Testimony is hereby denied.

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 13th Day of August, 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.

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.