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April 17, 2001

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 010098-TP (Florida Digital)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Opposition to Motion of Florida Digital Network, Inc. to Amend Arbitration Petition, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III (LKA)

James Meza III

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 010098-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 17th day of April, 2001 to the following:

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James Meza III (KA)
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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 Telecommunications, Inc. Under the Telecommunications Act of 1996	)	Docket No. 010098-TP Filed: April 17, 2001

MEMORANDUM OF BELLSOUTH TELECOMMUNICATIONS, INC. IN OPPOSITION TO MOTION OF FLORIDA DIGITAL NETWORK, INC. TO AMEND ARBITRATION PETITION

Florida Digital Network, Inc. ("FDN") filed a Motion to Amend Arbitration Petition on April 9, 2001, seeking to inject Issue 10 into this proceeding. Although FDN was aware of Issue 10 before it filed its Petition to Arbitrate, and although FDN was aware that Issue 10 had not been resolved as of the date it filed its Petition, FDN nevertheless "did not include [Issue 10] in the Petition." *See* Motion at ¶2. Moreover, since at least February 21, 2001, FDN has known that Issue 10 "could not be resolved in a satisfactory time frame." *Id.* at ¶3. Even after this became apparent to FDN, however, it still waited another 47 days to file its Motion.

All in all, FDN has attempted to inject an additional issue into this proceeding 234 days after negotiations commenced; 74 days after FDN filed its Petition; 49 days after BellSouth filed its Response to the Petition; and 47 days after FDN acknowledged that it became aware that Issue 10 would not be resolved to its liking. As explained below, the Telecommunications Act of 1996 ("the Act") does not allow FDN to amend its pleadings in order to add issues that were not presented in its Petition or in BellSouth's

Response. Additionally, even if the Act somehow did allow such amendments, FDN has not met its burden of proving that its delay in filing the amendment was reasonable. The Commission, therefore, should deny the Motion.

I. THE COMMISSION SHOULD DENY FDN'S MOTION TO AMEND BECAUSE THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT PERMIT THE AMENDMENT SOUGHT BY FDN.

The Telecommunications Act of 1996 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. A party requesting arbitration, for example, must petition a State commission for arbitration "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section." 47 U.S.C. §252(b)(1). The non-petitioning party then has 25 days to respond to the petition, *id.* §252(b)(3), and the State commission has 9 months to "conclude the resolution of any unresolved issues." §252(b)(4)(C).

In light of these timeframes, it comes as no surprise that Congress requires the parties to explicitly identify all issues they want the Commission to resolve on the front end of the proceeding. Thus, along with the petition itself, the petitioning party is required to submit "all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties." *Id.* §272(b)(2)(A)(emphasis added). If the non-petitioning party wishes to add additional issues into the mix, it must do so in its response to the petition. *See Id.*, §252(b)(3).

The petition and the response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings. In the words of Congress, a State commission "shall limit its consideration of any petition under [the Act] to the issues set forth in the petition and in the response, if any . . . ." *See Id.*, §252(b)(4)(A). Federal courts reviewing State commission decisions under the Act have strictly construed this provision, explaining that "[d]uring an arbitration, the State commission must limit its review to the issues set forth in the petition and any response thereto . . . ." *See Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F.Supp.2d 628, 632 (S.D. Ind. 1998). (emphasis added); *accord MCI Telecom., Inc. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768, 793 (E.D. Mich. 1999)(state commission acted unlawfully by imposing limitation of liability provision when the issue of limitations on liability was not the subject of arbitration"); *MCI Telecom., Inc. v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 (N.D. Cal. Sept. 29, 1998)(commission precluded from arbitrating issue concerning MCI's access to dark fiber because the issue was not raised in arbitration petition). Not only can the parties not inject issues that are not set forth in the petition or the response, but "the [State commission] cannot independently raise an issue not raised by one of the parties." *US West Comm. v. Minnesota Pub. Utilities Comm'n*, 55 F.Supp.2d 968, 976-77 (D. Minn. 1999).

Relying on Rule 1.190(c) of the Florida Rules of Civil Procedure, FDN argues that its Motion cures the fact that Issue 10 does not appear in its Petition because amendments to pleadings "shall relate back to the date of the original pleading." *See* Motion at ¶7. FDN, however, is wrong. If Rule 1.190(c) applied to this proceeding, then logically Rule 1.190(b) would also apply. That rules provides that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to confirm to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues.

The Federal Rules of Civil Procedure,[1] as well as the Minnesota,[2] Michigan,[3] and California[4] procedural rules, all have the same or similar provisions. As noted above, however, federal courts reviewing arbitration rulings of the Minnesota, Michigan, and California commissions have ruled that these State commissions have no authority to decide issues not raised in either the petition for arbitration or in the response to the petition, s*ee above*, even though the "conforming evidence" provisions of the applicable rules of civil procedure would have allowed these State commissions to make such a ruling.

It is clear, therefore, that Congress adopted a streamlined arbitration procedure that does not allow for amendments to the pleadings, either to inject new issues into a proceeding before a hearing or to conform the pleadings to the evidence after a hearing. Instead, Congress clearly expected the parties to identify in their pleadings all issues that remain unresolved after at least 135 days of good-faith negotiations. Although FDN's Motion makes it clear that Issue 10 was identified during these negotiations and that it remained unresolved at the time the FDN filed its Petition, FDN

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1 See Fed. R. Civ. P. 15(b).
2 *See* Minn. R. Civ. P. 15.02.
3 *See Michigan Rules of Court* 2.118(c).
4 *See 20th Century Cigarette Vendors v. Shaheen*, 50 Cal. Rptr. 773, 776 (2nd Dist. Ct. App. 1966)("Amendments to conform to proof should be liberally granted.").

did not raise this unresolved issue in its Petition. See Motion at ¶2. The 1996 Act prohibits FDN from injecting Issue 10 into this proceeding some 74 days later.

II. EVEN IF THE ACT PERMITTED FDN TO AMEND ITS PETITION, FDN HAS FAILED TO MEET ITS BURDEN OF PROVING THAT ITS 74-DAY DELAY IN FILING ITS MOTION IS REASONABLE.

Even if the 1996 Act did not prohibit FDN from amending its petition, courts will not grant motions to amend if the underlying circumstances show undue delay in filing the motion. *See Vacation Break U.S.A. v. Marketing Response Group & Laser Co.,* 189 F.R.D. 474, 477 (M.D. Fla. 1999) (Citing *Foman v. Davis*, 371 US 178 (1962)). In fact, the party seeking to amend its pleadings "bears the burden of proof in explaining the reasons for delay in seeking leave to amend." *See Tarkett Inc. v. Congoleum Corp.,* 144 F.R.D. 289, 290 (E.D. Penn. 1992). FDN's own motion shows that it has delayed seeking leave to amend its Petition for Arbitration, and it provides no explanation for that delay.

As noted above, for example, the 1996 Act requires FDN to identify all unresolved issues no later than 160 days after negotiations have commenced. *See* §252(b)(1). FDN, however, filed its motion 234 days after negotiations commenced. Although FDN states that it "believed that the parties would be able to readily negotiate a mutually satisfactory resolution of [Issue 10]," *see* Motion at ¶ 3, it is clear from FDN's motion that such resolution had not been reached (and, therefore, the issue remained unresolved) as of the date FDN filed its Petition for Arbitration. Motion at ¶ 2. Moreover, FDN acknowledges that it was clear beyond all doubt that Issue 10 remained unresolved as early as February 21, 2001. *See* Motion at ¶3. FDN, however, waited

an additional 47 days after that to file its Motion to Amend, and FDN's Motion provides no explanation whatsoever for this 47-day delay. FDN, therefore, has not met its burden of proof that its delay in filing the Motion was reasonable.

CONCLUSION

The 1996 Act does not allow parties to amend their pleadings to insert additional issues into arbitration proceedings. Even if it did, however, FDN has provided no reasonable explanation for its delay in seeking leave to amend its Petition. The Commission, therefore, should deny FDN's Motion to Amend Arbitration Petition.

Respectfully submitted this 17th day of April, 2001.

BELLSOUTH TELECOMMUNICATIONS, INC.

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