

ORIGINAL



July 17, 2001

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

via Overnight Delivery

Re: Docket No. 010098-TP – 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.

Dear Ms. Bayó,

Please find enclosed for filing in the captioned docket an original and seven (7) copies of the Prefiled Rebuttal Testimony and Exhibits of Mr. Michael P. Gallagher to be filed in the captioned proceeding and an accompanying Certificate of Service. Also enclosed for filing in the docket is an original and 15 copies of Florida Digital Network, Inc.'s Prehearing Statement with accompanying Certificate of Service.

A diskette with a copy of the text of the testimony and prehearing statement is also enclosed.

If you have any questions regarding this Notice or the Petition, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

- APP _____
- CAF _____
- CMP _____
- COM 3 _____
- CTR _____
- ECR _____
- LEG 1 _____
- OPC _____
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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Inc., for Arbitration of Certain Terms and } Docket No.010098-TP
Conditions of Proposed Interconnection and }
Resale Agreement with BellSouth Telecom- }
munications, Inc. Under the Telecom- }
munications Act of 1996 }
_____ }

REBUTTAL TESTIMONY AND EXHIBIT OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.

July17, 2001

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08752 JUL 18 2001
FPSC-COMMISSION OF FRK

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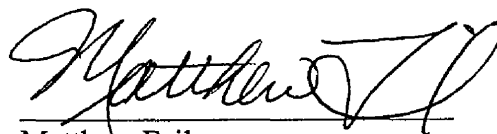
Docket No.010098-TP

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the prefiled rebuttal testimony and exhibit of Michael P. Gallagher filed in the captioned docket was served on the following by overnight delivery this 17th day of July, 2001.

Mr. James Meza, III
C/o Ms. Nancy H. Sims, Dir., Reg. Relations
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Ms. Felicia Banks
Florida Public Service Comm'n
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460

1 **Q. Please state your name and address.**

2 A. My name is Michael P. Gallagher. My business address is 390 North

3 Orange Avenue, Suite 390, Orlando, Florida, 32801.

4 **Q. What is the purpose of your rebuttal testimony?**

5 A. I will respond to some of the arguments of BellSouth witnesses Williams

6 and Kephart concerning issues still in contention in this case.

7 **Q. Did you also provide direct testimony in this case?**

8 A. Yes.

9 ISSUE NO. 1

10 **Q. Mr. Williams of BellSouth testified that FDN's position on Issue**

11 **#1 is that "FDN wants the Commission to order BellSouth to provide**

12 **BellSouth's ADSL service to FDN's end user over the same UNE loop**

13 **that FDN is using to provider voice service to that end user." Is Mr.**

14 **Williams' description an accurate characterization of FDN's position?**

15 A. No. BellSouth has apparently misread or unduly limited the scope of

16 FDN's request. As I explained in my direct testimony, FDN seeks the

17 provision of wholesale UNE and resale products with which FDN can

18 provide retail xDSL service.

19 **Q. Given Mr. Williams' restrictive view of FDN's request, do the**

20 **legal arguments in his testimony overcome those in support of FDN's**

21 **request?**

22 A. No. The FCC and South Carolina decisions relied upon by Mr.

23 Williams do not relate to FDN's request for wholesale UNE and resale

1 products, as those cases address only an ILEC's providing retail xDSL
2 service on lines where it is not the voice carrier. Moreover, as I explained in
3 my direct testimony, the FCC's decision in the *Line Sharing Reconsideration*
4 *Order* does not have any bearing on BellSouth's obligation to provide access
5 to UNEs and resale products under Section 251. (Gallagher Direct at 10-11,
6 38-40.) The FCC's *Line Sharing Reconsideration Order* did not address the
7 merits of the underlying issue; rather, it stated that reviewing the issue of
8 ILEC-provided retail xDSL service over ALEC UNE voice loops was outside
9 the permissible scope of reconsideration because it was not an issue in the
10 final order being reconsidered.

11 Several of the "business reasons" offered by Mr. Williams as
12 justification for BellSouth's refusal to provide xDSL service on ALEC-
13 served voice lines are likewise irrelevant to FDN's request for wholesale
14 UNE and resell products, as they are based upon scenarios in which
15 BellSouth would provide retail services on an FDN UNE loop.

16 **Q. In addition to the "business reasons" that Mr. Williams cites as**
17 **justification for BellSouth's refusal to provide the wholesale service that**
18 **FDN is entitled to under the Act, Mr. Williams further states that "the**
19 **systems BellSouth uses to provide its ADSL service do not currently**
20 **accommodate providing ADSL service over such a loop." Is this**
21 **adequate grounds for denying FDN's request?**

22 A. No. When the Telecommunications Act of 1996 was adopted, the
23 ILECs did not have in place many of the systems that would ultimately be

1 necessary to support the UNEs, interconnection, collocation and resale
2 requirements of the new Act. These systems were developed in response to
3 the obligations imposed by the Act, and as directed by state and federal
4 regulatory proceedings such as this one. The requirements of applicable law,
5 regulations, and arbitrated interconnection agreements should drive the
6 development of these support systems, not the other way around.

7 **Q. One “business reason” cited by Mr. Williams a justification for**
8 **BellSouth’s policy is his statement that BellSouth’s databases do not**
9 **include loop qualification information for FDN’s UNE loops, such that**
10 **BellSouth cannot determine whether such loops are qualified for DSL.**

11 **Do you agree with his assessment?**

12 A. No. FDN uses unbundled loops that are owned, controlled, and
13 provided by BellSouth. BellSouth is in the best position to determine
14 whether these loops are DSL-qualified, and if they are not, whether other
15 DSL-qualified loops would be available. FDN does not at this time have the
16 ability to obtain all of the necessary information to determine whether these
17 loops are DSL-qualified. Other Regional Bell Operating Companies are
18 modifying their databases to enable DSL qualification to be performed based
19 upon circuit identification numbers in addition to telephone numbers.
20 BellSouth should make such changes as are necessary to enable it to provide
21 the UNEs and resale products as required by Section 251 of the Act.

1 **Q. Did BellSouth offer any testimony that undermines FDN's**
2 **request that BellSouth be required to make available for resale a**
3 **wholesale high-speed data service pursuant to Section 251(c)(4)?**

4 A. No. In fact, the testimony of Mr. Williams demonstrates conclusively
5 that BellSouth must offer resold high-speed data service pursuant to Section
6 251(c)(4). On page 5, lines, 22-24 of his testimony, Mr. Williams
7 acknowledges that BellSouth offers "retail xDSL service."

8 **Q. Have any legal developments since your direct testimony**
9 **materially affected your position that BellSouth's high-speed data**
10 **service is subject to the resale obligations of Section 251(c)(4) of the Act?**

11 A. No. On June 26, 2001, the United States Court of Appeals for the
12 District of Columbia denied a petition for review of the FCC's Advanced
13 Services Second Report and Order that defined ILEC sales of high-speed data
14 service to Internet Service Providers as a wholesale offering that is not
15 subject to Section 251(c)(4).¹ However, this decision never comes into play
16 in the scenario I described in my direct testimony, where BellSouth sells its
17 own retail DSL through a BellSouth-owned ISP affiliate, because BellSouth's
18 ISP affiliate is treated as part of BellSouth's ILEC operation for the purposes
19 of Section 251, and not as a separate affiliate.² The recent court decision in
20 no way addressed instances in which an ILEC provides retail high-speed data

1 *Assn. of Comm. Enterprises v. FCC*, Docket No. 00-1144 slip op. (D.C. Cir. June 26, 2001) (*ASCENT II*), denying petition for review of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Second Report and Order (November 9, 1999). Despite identical names, this decision is not related to *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001).

2 See Gallagher Direct Testimony at 32-37, citing *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001) ("*ASCENT*").

1 service through its own ISP affiliate and has no bearing on FDN's request in
2 this arbitration.

3 **Q. Have any State commissions found that the "ISP exemption"**
4 **created by the FCC's Second Report and Order is not relevant to an**
5 **ILEC's obligation to resell the high-speed data it provides through its**
6 **own ISP?**

7 A. Yes. On June 27, 2001, the Indiana Utility Regulatory Commission
8 (IURC) ruled that Ameritech must offer for resale a wholesale discount on
9 the DSL service it provides through its own ISP affiliate. The IURC found
10 that if the FCC's ISP exemption in the Second Report "were the only
11 authority guiding the Commission's decision, Ameritech's position might
12 prevail." However, the IURC held that the DC Circuit's January 9, 2001,
13 *ASCENT* decision required that sales of DSL by an ILEC ISP were not
14 eligible for the exemption under the Second Report, as the retail services of
15 all ILEC affiliates were to be considered collectively as products of the ILEC.
16 The Commission held that "the Second Report . . . do[es] not change that
17 fact," and that "notwithstanding the definition of "at retail" found in the
18 Second Report," Ameritech could not avoid its DSL resale obligations "by
19 setting up a wholly owned affiliate to offer those services." Ameritech was
20 therefore required to make available a resale high-speed data service offering
21 in the manner requested by FDN in this proceeding.

22 If the Second Report had no bearing on the decision to require
23 Ameritech to resell its high-speed data service in Indiana, the D.C. Circuit's

1 affirmation of the Second Report likewise has no bearing on BellSouth's
2 obligation to resell its high-speed data services in Florida.

3 ISSUES 3A & 3B

4 **Q. In Mr. Kephart's direct testimony on page 7, beginning at line 7, he**
5 **states "FDN is asking the Commission to assume that any trouble that**
6 **clears while a trouble ticket is open was the result of a problem in**
7 **BellSouth's network" Is that what FDN is asking in this case?**

8 A. No. FDN is not asking the Commission to make any assumptions
9 about the underlying cause of a given trouble ticket.

10 The principles FDN seeks to be incorporated into the interconnection
11 agreement are spelled out in my direct testimony. In Mr. Kephart's direct
12 testimony, he agrees FDN will be notified before closing all trouble tickets,
13 he agrees to terms for cooperative testing, and he agrees FDN will not be
14 charged for continued cooperative testing and dispatch where a trouble is on
15 BellSouth's network. Thus, there appears to be agreement in principle as to
16 the intent behind Issue No. 3A. FDN's position on Issue No. 3B is not that
17 FDN should benefit from an assumption that all cleared/corrected no-trouble-
18 found tickets are BellSouth's fault. Rather, FDN simply asks that the
19 interconnection agreement establish the basis for FDN's not being charged
20 where FDN can prove through remote diagnostic test results or otherwise that
21 trouble tickets closed as no-trouble-founds should not have been. Beginning
22 at page 7, line 14 of his testimony, Mr. Kephart accepts the concept that FDN
23 should not be charged "where FDN can show that the trouble reported

1 stemmed from BellSouth's network." FDN maintains that it can make that
2 showing through its remote line diagnostic test results. Further, FDN can
3 make that showing where FDN proves there was dial tone at FDN facilities at
4 the CO but not at the customer's demarcation point. The interconnection
5 agreement should accept these testing methods as proof and as sufficient
6 basis for FDN not to be charged unless BellSouth can otherwise prove that
7 FDN or the end-user caused the trouble. Attached as Exhibit ___ MPG-7 is a
8 copy of language reflecting FDN's proposal recently submitted to BellSouth.

9 ISSUE 10

10 **Q. On page 15, starting at line 4, Mr. Kephart states that "FDN is in**
11 **essence asking BellSouth to determine which loop type is needed rather**
12 **than FDN making that determination for itself." Should FDN have the**
13 **burden of determining whether BellSouth must design a circuit or not**
14 **prior to ordering a voice-grade loop?**

15 A. No. FDN should be able to simply order a voice-grade loop. It is unfair
16 for BellSouth, with over 60% of its access lines served through remote DLCs
17 and therefore likely in need of design work, to require FDN to follow what
18 amounts to a pre-qualification process (similar to complex DSL ordering) for
19 every UNE voice-grade loop just to avoid delay in service delivery and
20 additional charges.

21 FDN does not seek to dictate to BellSouth how BellSouth should
22 provision a voice loop. FDN seeks the ability to simply order all voice-grade
23 loops the same way, on reasonable terms, without delays that jeopardize

1 parity, and with coordination options. FDN should not have to go through a
2 pre-qualification process to achieve its desired results. BellSouth designed
3 and built its network and stores its network information. BellSouth fashioned
4 its SL-1 and SL-2 voice-grade loop types in apparent recognition of its DLC-
5 dominated network architecture.

6 BellSouth witness Kephart suggests FDN make a manual or
7 mechanized loop make-up (“LMU”) query of BellSouth prior to ordering a
8 voice loop so FDN could know which type of voice loop to order. In other
9 words, BellSouth would require FDN to prequalify voice loops. BellSouth’s
10 LFACS database and LMU process are clearly geared toward xDSL ordering,
11 not voice loop ordering. A UNE voice-grade loop is unlike an xDSL-capable
12 loop where prequalification may be necessary because the ordering CLEC or
13 DLEC may desire to review loop architecture or order specific facilities or
14 services for the loop to make it functional with the CLEC/DLEC technology
15 and equipment. There are no such peculiarities for a voice-grade loop that
16 should necessitate ordering prequalification of the sort BellSouth promotes.
17 No other ILEC with which FDN does business differentiates voice loop types
18 as BellSouth does or insists on a prequalification look-up as a means for the
19 CLEC to know what type of voice loop it should order. FDN simply orders a
20 voice-grade loop from those ILECs. Voice service is not advanced service
21 and should not be treated as such when it comes to ordering and
22 prequalification.

1 FDN's arbitration petition was filed in January 2001. It is not clear
2 from Mr. Kephart's testimony when BellSouth made its LMU data available
3 electronically to all CLECs. In any case, Mr. Kephart acknowledges the
4 LFACS database may not have IDLC information available for all loops and
5 that a manual query may be necessary. BellSouth's standard interval and
6 costs for manual queries are wholly impractical for voice service ordering.
7 BellSouth previously informed FDN that the standard turnaround for a
8 manual look-up is seven business days. By its May 25, 2001, final order on
9 BellSouth UNEs in Docket No. 990649-TP, the FPSC set a manual look-up
10 rate, without facility reservation, of \$43.10. Prior to that Order, BellSouth
11 sought \$134 per manual LMU query, without facility reservation. There is
12 no way that a seven-business-day interval just to figure out what loop type to
13 order and a non-recurring charge of about \$1.50 less than the non-recurring
14 charge for the SL-1 loop itself will work from a practical or economic
15 standpoint for ordering voice service.

16 On a mechanized basis, BellSouth sought to charge \$1.08 per query
17 before the FPSC's May UNE Order, which approved a \$.6757 per query
18 charge. Although FDN has discussed a mechanized LFACS – LMU option
19 with BellSouth as a means for addressing efficient voice loop ordering, FDN
20 does not know when the LFACS database will have the necessary
21 information and when it won't. The bottom line, however, is that no CLEC
22 should have to go through a prequalification process to know which

1 BellSouth-created voice loop type to order. CLECs should be able to simply
2 order a voice-grade loop.

3 BellSouth currently offers coordination options for SL-1 loops that
4 were not available at acceptable prices before the Commission's May UNE
5 Order. FDN requests that those same options be available for its proposed
6 generic voice-grade loop type.

7 **Q. Does that conclude your rebuttal testimony?**

8 A. Yes.

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EXHIBIT MPG-7

FILED WITH THE REBUTTAL TESTIMONY OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.

Attachment Two

¶ 2.2.12

If FDN reports a trouble on loops and no trouble actually exists, BellSouth will charge FDN for any dispatching and testing (both inside and outside the CO, as applicable) required by BellSouth in order to confirm the loop's working status. However, if BellSouth reports that no trouble exists on a loop when FDN's remote line diagnostic testing results show that there was a trouble attributable to BellSouth facilities or when FDN tests show there is dial tone at FDN facilities at the CO but not at the customer demarc, BellSouth will not charge FDN for dispatching and testing for the trouble unless BellSouth can show that FDN or the end user caused the trouble. Further, if BellSouth subsequently finds trouble in the BellSouth network within 30 days of a report which was previously closed by BellSouth to FDN as no trouble found, BellSouth will rebate any charges covered in this paragraph. BellSouth will ensure that all loops will be repaired to the specifications of TR 73600 for the particular loop being repaired. BellSouth will close all reports of trouble with FDN to allow FDN to test and accept all resolved troubles closed by BellSouth regardless of loop type. FDN must be prepared to conduct joint acceptance testing and complete such testing within 15 minutes of BellSouth's notification that it has worked and is prepared to close the trouble ticket. FDN may conduct its portion of joint acceptance testing remotely and will not be required to field dispatch within 15 minutes. Testing which exceeds 15 minutes may be conducted by BellSouth by FDN's requesting and paying for additional acceptance testing as outlined in BellSouth's FCC #1 tariff. FDN will not be charged for acceptance testing if the trouble is not resolved at the time of the test. FDN may request a dispatch of a loop where BellSouth determines, through its own testing, that a trouble does not exist. However, FDN may be charged for any dispatching where a trouble is not found in BellSouth's network, as provided above. FDN's acceptance testing permits closure of the ticket if the problem is cleared but does not constitute FDN's acceptance of BellSouth's stated disposition of the ticket.