



June 14, 2002

Ms. Blanca Bayó, Director
Division of the 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 above-captioned docket an original and seven copies of Florida Digital Network, Inc.'s Motion for Clarification or Reconsideration. Also enclosed is a diskette containing a Word file of the document.

If you have any questions regarding this filing, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

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**BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION**

In Re: Petition of Florida Digital Network,)	
Inc. for Arbitration of Certain Terms and)	Docket No. 010098-TP
Resale Agreement with BellSouth)	
Telecommunications, Inc. Under the)	Dated: June 17, 2002
Telecommunications Act of 1996)	
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**MOTION FOR CLARIFICATION OR RECONSIDERATION OF
FLORIDA DIGITAL NETWORK, INC.**

Pursuant to Rule 25-22.060, Florida Administrative Code, Florida Digital Network, Inc. ("FDN") respectfully submits this Motion for Clarification or Reconsideration of the Commission's Final Order on Arbitration ("Order"), issued June 5, 2002, in the above captioned proceeding. FDN requests that the Order be clarified to explicitly prohibit BellSouth from refusing to provide DSL service to FDN voice customers regardless of whether the customer does or does not receive BellSouth DSL at the time of porting to FDN. Only if the Order establishes an across-the-board rule requiring BellSouth to provision its DSL services to any qualified requesting customer (whether currently receiving BellSouth DSL or not) receiving FDN voice service will the Commission's intent to remove a competitive barrier be fulfilled and will FDN be able to serve Florida consumers on similar terms and conditions as BellSouth.

The Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice unless the consumers exercised rights at just one specific point in time (prior to porting to an ALEC voice provider).

This would be completely at odds with the Commission's stated intent of removing the competitive barrier posed by BellSouth's tying its DSL service to its voice service.

Although FDN's proposed clarification for an across-the-board pronouncement is the most obvious and logical interpretation of the Order, there are passages in the Order that could be cited for the proposition that BellSouth is only required to forebear from disconnecting existing DSL customers who switch to FDN voice. Accordingly, out of an abundance of caution,¹ FDN seeks clarification that the Order is aimed at BellSouth's anti-competitive practice of tying voice and DSL *generally*, and not merely at one manifestation of that practice.

ARGUMENT

I. Background

This arbitration began with FDN's January 2001 Petition to arbitrate ten separately identified issues. By the time the arbitration hearing began in August 2001, this list had been whittled down to a single issue, which the Prehearing Order identified as follows: "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?" In its pre-filed and live testimony, FDN explained that this issue encompassed two separate business concerns: (1) FDN's desire to provide FDN-branded high-speed Internet access service to its customers via

¹ This Motion could be mooted by BellSouth's willingness to commit to appropriate interconnection language. During preliminary discussions, however, BellSouth refused to make such a commitment.

UNE loops and resale; and (2) FDN's desire to assure that its voice customers could also receive *BellSouth* DSL service, if the customer so desired.

With respect to the first prong of FDN's request, the Order denied FDN's requests for the UNEs and resale products that FDN views as necessary to provide the telecommunications services that it seeks to offer. While FDN respectfully disagrees with the Commission's decision on these issues, FDN does not in this motion seek reconsideration of those aspects of the Order, but it reserves its rights relative to those issues.

This Motion is instead aimed at the second prong of FDN's request. FDN argued that "BellSouth should not be permitted to deny providing its DSL Internet access service to FDN voice customers." FDN Post-Hearing Brief at 39. In other words, FDN sought an end to BellSouth's anti-competitive practice of "tying" its voice and DSL service together. Under this policy, BellSouth will only provide its DSL service (whether branded under the BellSouth FastAccess name or provided by other means such as by a third-party ISP) to consumers who purchase retail voice service (provided on the low-frequency portion of the loop) from BellSouth. BellSouth will not provide DSL to customers who purchase voice service from another carrier such as FDN.

As FDN explained, this practice gives BellSouth an unreasonable competitive advantage in the "tied" market (*i.e.*, the analog voice market). Commissioner Palecki recognized the "twofold" nature of the problem presented by this practice, which injures FDN both in its ability to capture existing BellSouth customers who have DSL service and in its ability to retain existing FDN customers who want DSL service:

COMMISSIONER PALECKI: So the problem is twofold. You're losing existing customers, any existing customer that wants DSL is gone, and any customer you want to target that has DSL, you have no potential to capture that customer.

Tr. at 110.

At the hearing, FDN witness Mike Gallagher agreed with Commissioner Palecki's characterization of the problem: "Yes sir," Mr. Gallagher replied, "that's the one big issue that we're here [for]." *Id.* Likewise, in its Post-Hearing Brief, FDN explained that

BellSouth's refus[al] to sell its FastAccess DSL products to consumers who purchase voice service from FDN ... threatens to undermine the already troubled state of telecommunications competition in Florida by effectively preventing FDN from competing in the voice market for customers who purchase DSL from BellSouth. Customers who switched to FDN would lose their BellSouth DSL, and FDN is not in a position to offer them alternative DSL service. Similarly, any current FDN voice customer that wants DSL will have to drop FDN service and purchase both voice and DSL from BellSouth.

FDN Post-Hearing Brief at 38-39.

BellSouth has offered no justification for the practice, other than to claim that it "is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop." BellSouth Post-Hearing Brief at 29. BellSouth also cited the FCC's decision in the *Line Sharing Reconsideration Order* for support.

FDN's Post-Hearing Brief demonstrated the hollowness of BellSouth's position. It is highly anti-competitive for a monopolist such as BellSouth – and BellSouth's 99 percent market share in the DSL market certainly qualifies as monopoly power – to simply refuse to deal with qualified customers such as FDN's. It is also highly anti-competitive for BellSouth to use its monopoly power in one market (the DSL market) to thwart competition in a second market (in this case, the voice market). BellSouth's practice is prohibited under the antitrust laws under a variety of theories. *See generally* FDN Post-Hearing Brief at 38-44. FDN also demonstrated

that BellSouth's reliance on the FCC's *Line Sharing Reconsideration Order* was utterly misplaced. *See id.* at 44-45. Finally, FDN pointed out that Florida law gave the Commission independent authority to take measures necessary to promote competition in the state. *Id.* at 39-40.

II. The Commission's Arbitration Order

In its Order, the Commission recognized that one of its primary "mandate[s]" from the Legislature is to adopt policies that "promot[e] competition ... [by] ensur[ing] the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9. Based on the evidence presented at the hearing, and the commissioners' own cross-examination of the witnesses, the Commission made the following findings:

- [W]e believe FDN has raised valid concerns regarding possible barriers to competition in the local telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. That is an area over which we do have regulatory authority. *Id.* at 8.
- We are troubled by FDN's assertions that BellSouth uses its ability to provide its FastAccess Internet Service as leverage to retain voice customers, creating a disincentive for customers to obtain competitive voice service. *Id.*
- We believe that FDN has demonstrated that this practice raises a competitive barrier in the voice market for carriers that are unable to provide DSL service. *Id.*
- BellSouth's practice of disconnecting its FastAccess service unduly prejudices or penalizes those customers who switch their voice service, as well as their new carrier. *Id.* at 9.
- BellSouth's practice of "disconnecting its FastAccess service when a customer changes its voice provider to FDN ... reduces customers' options for local telecommunications service." *Id.* at 10.
- "[T]his practice unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth." *Id.*

- [B]ecause we find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider, this practice is also in violation of Section 364.01(4), Florida Statutes. *Id.*

Based upon these findings, the Commission held that “ BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.”
Id.

III. Need for Clarification/Reconsideration

In its Order, the Commission recognized the competitive harms inflicted by BellSouth’s tying policy and agreed that the practice violates Florida law. The Commission has taken an important step in promoting competition in the Florida local exchange market. The Order does not appear, however, to explicitly address FDN’s entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. The anticompetitive effects of BellSouth’s tying practice **are the same** whether the customer is presently a BellSouth customer, whom FDN cannot capture because of the tie, or is presently an FDN customer, whom FDN will lose because of the tie. Though the logic and public policy objectives announced in the Order obviously suggest the Commission meant to adopt an across-the-board rule requiring BellSouth to provide DSL service to qualified customers served by ALECs over BellSouth loops, some of the language in the Order is, arguably, not clear enough in establishing this rule.

The section of the Order which begins the discussion of FDN’s DSL-tying claim begins as follows: “We have been asked to decide whether BellSouth should be required to continue to provide its FastAccess Internet Service when its customer changes to another voice telecommunications provider.” Order at 4. However, as the Prehearing Order makes clear,

FDN's request was not limited to newly ported customers. The Prehearing Order identifies the issue as follows: "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?" This request plainly encompasses the situation in which existing BellSouth DSL customers transfer to FDN's network as well as when an *existing* FDN customer desires to order DSL. Indeed, the Order recognizes that "FDN seeks relief from what it claims to be BellSouth's "anticompetitive practice of leveraging its control of the DSL market in Florida to injure competitors in the voice market." *Id.* (quotation in original).²

DSL usage is increasing exponentially in Florida. In competing in the market for voice service, FDN cannot be saddled with having to tell customers, existing or new, that if they take voice service from FDN, they will be unable to have DSL service. Without an explicit across-the-board rule requiring BellSouth to provide DSL Service to any FDN voice customer who requests it – whether currently receiving BellSouth DSL or not – the competitive barrier the Commission sought to remove shifts somewhat but definitely remains in place.

Additionally, there could be perverse results for FDN customers without a clarified rule. Existing FDN voice customers could either not get BellSouth DSL service at all or could only get it if they took the cumbersome, two-step approach of first signing up for BellSouth service and then trying to switch back to FDN. Inevitably, some FDN customers who took this inconvenient two-step approach would, once they had switched to BellSouth, never come back to

² Antitrust cases in which tying has been declared unlawful have, of course, never been limited to situations in which the customer is purchasing the tying product from the defendant prior to the imposition of the tie-in. *See, e.g., United States Steel Corp. v. Fortner Enterprises, Inc.*, 394 U.S. 38 (1962).

FDN. Additionally, another concern is that the Order may permit BellSouth to refuse to allow grandfathered FDN voice / BellSouth DSL customers to make DSL service changes ordinarily available to BellSouth voice / BellSouth DSL customers, such as different DSL speeds, new features, or alternative rate plans. The Commission did not approve and could not have intended outcomes such as these. Rather, the Commission sought to remove a competitive barrier, and without an explicit across-the-board rule, that barrier persists.

If the Commission does not clarify its Order as requested herein, FDN will be unable to retain its current customers who may want DSL service in the future. Further, FDN will be unable to market to prospective new customers, who are not currently receiving DSL service from BellSouth. Such new customers may include: (1) current BellSouth customers who do not currently take DSL, (2) customers who move into the area, (3) customers who move to a new location, (4) customers who do not currently take any telephone service, and (5) customers who are currently served by another ALEC. An inability to compete for such customers would put FDN at a significant competitive disadvantage vis-à-vis BellSouth and would deprive those groups of customers of the benefits of FDN's competitive offerings.

CONCLUSION

For the foregoing reasons, FDN respectfully requests that, consistent with the argument hereinabove, the Commission clarify that its Final Order on Arbitration prohibits BellSouth from refusing to provide DSL service whenever a qualified customer receiving ALEC voice services orders DSL service.

Respectfully submitted this 14th day of June, 2001,



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Inc., for Arbitration of Certain Terms and }
Conditions of Proposed Interconnection and }
Resale Agreement with BellSouth Telecom- }
munications, Inc. Under the Telecom- }
munications Act of 1996 }
_____ }

Docket No.010098-TP

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was served by overnight mail on the following by overnight delivery this 4 day of June, 2002.

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