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June 24, 2002

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
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 Response to Florida Digital Network's Motion for Clarification or Reconsideration, 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.

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CTR _____
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OPC _____
MMS _____
SEC 1 _____
OTH _____

Sincerely,

Patrick W. Turner
Patrick W. Turner
(2)

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

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M. Blackard
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**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 Federal Express this 24th day of June, 2002 to the following:

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**(+) Signed Protective/Non Disclosure
Agreement**

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: June 24, 2002
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)	
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BELLSOUTH TELECOMMUNICATIONS, INC'S RESPONSE TO FDN'S MOTION FOR CLARIFICATION OR RECONSIDERATION

BellSouth Telecommunications Inc. ("BellSouth") respectfully submits its Response to the "Motion for Clarification or Reconsideration of Florida Digital Network, Inc." ("FDN") that was filed on or about June 14, 2002 and served upon BellSouth on June 17, 2002.¹ FDN's Motion asks the Florida Public Service Commission to change its Order from one that explicitly requires BST to "continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops," see Order at 11, to one that affirmatively requires BellSouth to offer an enhanced, nonregulated, nontelecommunications Internet access service to any and all of FDN's voice customers, even though FDN is not impaired in its ability to offer high-speed internet access services to its customers. For the reasons set forth below and in BellSouth's "Petition for Reconsideration or, in the Alternative, Clarification with Regard

¹ The cover letter to FDN's Motion indicates that it was mailed on June 14, 2002 "via overnight delivery." The day after June 14, 2002, however, was a Saturday. BellSouth, therefore, was not actually served with FDN's Motion until June 17, 2002, which is the "filed" date indicated on the face of the Motion.

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to Section III of the Commission's Final Order on Arbitration" ("BellSouth's Petition")² the Commission should deny FDN's Motion in its entirety.

I. FDN IS ASKING THE COMMISSION DO SOMETHING THAT IT CANNOT DO – ATTEMPT TO REGULATE AN ENHANCED, NONREGULATED, NONTELECOMMUNICATIONS SERVICE.

Section III of the Commission's Order applies *only* when a BellSouth customer is receiving FastAccess service from BellSouth at the time the customer decides to obtain voice service from FDN over UNE loops. No other conclusion reasonably can be drawn from the following language of the Order:

However, we 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

* * *

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.

See Order at 8-9 (emphasis added). See *also* Order at 11 ("BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.").

It is clear that the Commission consciously decided to limit the scope of the Order in this manner. After all, the Commission correctly found that BellSouth's FastAccess service is an "enhanced, nonregulated, nontelecommunications Internet access service" that is not within the jurisdiction of the Commission. See Order at 8. As such, the Commission could not order – and in fact, has not ordered – BellSouth to

² BellSouth incorporates this Petition, which was filed with the Commission on

provide retail FastAccess service to all (or even some) of FDN's existing customers. Similarly, the Commission could not order – and in fact, has not ordered – BellSouth to provide FastAccess to any and every FDN end user that may want to order FastAccess. Instead, the Commission has “caution[ed] that this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service,” *id* at 11(emphasis added), and it expressly stated that the driving force of its decision in Section III of the Order was “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 switched to FDN voice service” See Order at 8 (emphasis added).

Despite the plain language and intent of Section III of the Order, FDN is asking the Commission to do what the Commission expressly cautioned that it was not doing – attempting to exercise jurisdiction over the regulation of DSL service. Even though BellSouth has no duty to offer its retail FastAccess service at all, and even though the regulatory requirements that apply to telecommunications services do not apply to BellSouth’s retail FastAccess service, FDN is asking the Commission to require BellSouth to offer that unregulated service to *all* of FDN’s end user customers. If the relief requested by FDN in its Motion were applied to the end users of all ALECs, the Commission could *require* BellSouth to offer retail FastAccess service to every end user in its territory that is *not* a Bellsouth end user (i.e. to every end user served by an ALEC). How can such a result be characterized as anything but an attempt to exercise jurisdiction over the regulation of DSL service?

June 20, 2002, herein by reference.

Moreover, the expansion of the Order requested by FDN goes well beyond any attempt to address the Commission's concerns regarding what it erroneously perceived to be possible barriers to competition in the voice market in Florida. To date, FDN is serving more than 80,000 customers throughout Florida. How can FDN legitimately claim that that any BellSouth practice constitutes a "barrier" to its ability to compete for customers that *it already has won*? Similarly, if a BellSouth customer is not receiving BellSouth's retail FastAccess service from BellSouth at the time the customer decides to switch to FDN, how can FDN seriously contend that the fact that BellSouth will not be providing FastAccess service to that customer after it switches to FDN constitutes a "barrier" to FDN's ability to compete for that customer's voice service? Additionally, FDN is not impaired in its ability to provide its own DSL service to its own end user customers. How can it be a barrier to competition for BellSouth not to offer a nonregulated, enhanced, nontelecommunications service over which the Commission has no jurisdiction to FDN's end users when FDN itself is not impaired in its ability to provide the same type of service to the same end users?

As explained more fully in its Petition, BellSouth disagrees that the Commission can or should require BellSouth to provide FastAccess service to FDN end users under any circumstances.³ To the extent that the Commission has any such authority,

³ FDN's Motion claims that "BellSouth has offered no justification for [its] 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." See FDN's Motion at 4. This is not correct. BellSouth's Petition summarizes the evidence that provides additional "justification" for BellSouth's practice, including without limitation, the fact that the efficiencies that make ADSL and FastAccess competitively viable depend on the simultaneous provision of voice service over the same loop; see Petition at I.B.3; and

however, the Commission acted rationally and appropriately in limiting the requirements of Section III of the Order to situations in which BellSouth is providing FastAccess service to an end user at the time the end user obtains voice service from FDN over UNE loops. A BellSouth end user that is receiving FastAccess service at the time it obtains voice service from FDN over UNE loops has already evaluated the available broadband options and chosen FastAccess as its option of choice. It could be argued, therefore, that having to choose a different broadband option could possibly dissuade that customer from changing voice providers. In contrast, an end user that is not receiving FastAccess service when it chooses FDN's voice service does not have to decide between keeping a broadband option it has already chosen or receiving voice service from FDN. Instead, the customer could obtain broadband service from a cable or satellite provider without ever having to leave FDN's voice service. Alternatively, FDN could accommodate that end user's desire for broadband service by providing a single BellSouth resold line to the end user over which BellSouth is willing to provide its FastAccess service. The Commission's decision to limit its ruling in Section III to end users who have FastAccess at the time they switch to FDN, therefore, is a rational one.

Clearly, the Commission perceived that a barrier to competition possibly exists only when a BellSouth FastAccess customer is purportedly faced with the choice of either receiving voice service from FDN or continuing to receive FastAccess service that it already is receiving from BellSouth.⁴ Accordingly, this is the only situation that is

the fact that providing the relief requested by FDN would require burdensome and costly changes to its systems.

⁴ BellSouth disputes that this is actually the choice that such an end user must face, even if FDN continues to elect not to make the investments necessary to provide

(or even arguably should be) addressed by Section III of the Commission's Order. To go any further would be to abandon any argument that the Commission is not attempting to regulate an enhanced, nonregulated, nontelecommunications service. The Commission, therefore, should deny FDN's Motion.

II. FDN'S ARGUMENT THAT DSL IS THE APPROPRIATE MARKET FOR THE COMMISSION TO CONSIDER IS WRONG AS A MATTER OF LAW.

FDN's Motion is based on its contentions that "BellSouth's 99 percent market share in the DSL market certainly qualifies as monopoly power" and that "it is . . . 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)." See FDN's Motion at 4 (emphasis added). FDN, therefore, clearly is laboring under the mistaken assumption that there is a "DSL market." FDN's assumption, however, is erroneous. The market is broader than DSL-based Internet access and includes Internet access by cable modem service as well as satellite.

As explained in Section I.B.4 of BellSouth's Petition, the D.C. Circuit Court of Appeals recently vacated the FCC's "Line Sharing Order." See *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). In doing so, the Court stated:

Petitioners primarily attack the Line Sharing Order on the ground that the [FCC], in ordering unbundling of the high frequency spectrum of copper loop so as to enable [ALECs] to provide DSL services, completely failed to

high-speed Internet access services to its end users in Florida. As explained throughout the evidence BellSouth presented in this docket, such an end user could continue to receive FastAccess service if FDN simply resold the line over which that service is being provided and provided service over the other lines by way of a UNE arrangement. Of course, FDN could also decide to compete by making the investment necessary to provide high-speed Internet access services to its end users in Florida.

consider the relevance of competition in the broadband services coming from cable (and to a lesser extent satellite). We agree.

The [FCC's] own findings (in a series of reports under §706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market.

Id. at 428 (emphasis added). The record in this docket confirms the robust competition that exists in the broadband market. In fact, BellSouth witness John Ruscilli presented evidence that “cable is out there providing high-speed entertainment and high-speed Internet access at a level of almost two to one over what DSL is as far as the penetration in the marketplace.” (Tr. at 236). Later, Mr. Ruscilli presented evidence that “cable has 78 percent of the market, and ADSL has 16 percent.” (Tr. at 239). This robust competition means that consumers that want to purchase broadband services have options and that most Floridians choose an option other than BellSouth’s FastAccess service.

Despite this undisputed evidence of record, and despite the fact that FDN’s own witness acknowledged during the hearing that DSL is only part of the high-speed Internet access market, (Tr. at 166-167), FDN is asking this Commission to significantly expand the scope of Section III of its Order based on FDN’s assertions that BellSouth’s share of a mere segment of the overall broadband market leaves customers without a broadband choice. This simply is not true. Just as the FCC erred in unbundling the high-frequency portion of the loop without considering the relevance of the broadband competition represented by cable and satellite, FDN has erred in basing its Motion on a non-existent “DSL market” and by ignoring the fact that cable has a two-to-one lead

over DSL in the broadband market. The Commission, therefore, should deny FDN's Motion in its entirety.

III. FDN'S MOTION IMPROPERLY ATTEMPTS TO CHANGE THE NATURE OF THE RELIEF FDN REQUESTED IN THIS PROCEEDING.

FDN claims that in this docket, it argued that "BellSouth should not be permitted to deny providing its DSL Internet access service to FDN voice customers," and it cites page 39 of its Post-Hearing Brief for this proposition. See FDN's Motion at 3. What FDN conveniently overlooks, however, is the fact that its own witness, Michael Gallagher, made it abundantly clear that FDN was not seeking to require BellSouth to provide retail service to FDN's voice customers and that it was not seeking to require BellSouth to have an end-user relationship with FDN's voice customers. (See Tr. at 36; 64; 79). In fact, during the hearing, Mr. Gallagher maintained that FDN does not want to provide BellSouth's retail FastAccess service to its end user customers, but that instead FDN wants to put its own brand on any such services that it provides to its end users. (Tr. at 134). In fact, even to the extent that FDN was seeking to resell DSL service, FDN's witness made it clear on cross-examination that FDN was seeking to resell the DSL telecommunications component (the pipe) and not the retail FastAccess service (both the pipe and the water):

Q. Is [FDN] wanting to resell the Internet service that BellSouth provides to its Internet service end users? In other words, the pipe and the water. Or does FDN only want to resell the pipe itself, the DSL telecommunications transport?

A. The pipe.

Q. Okay. So you are not asking the Commission to allow FDN to resell the Internet Service as a package; right?

A. Correct.

(Tr. at 152). In response to a question from the bench, Mr. Gallagher went on to explain that FDN only wanted to resell the DSL telecommunications component (the pipe) because it already has its own Internet services (the water to put in the pipe). (Tr. at 153). As Mr. Gallagher put it, “I’m sure I already got my own water company built” (Id.).

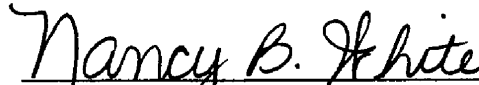
After having presented all of the evidence it desired to present during the hearing in this docket, FDN cannot now – in a Motion for Reconsideration – be allowed to change what it asked for during the hearing or to claim that it really meant to ask for something different.

CONCLUSION

For all of the reasons set forth above, the Commission should deny FDN’s Motion in its entirety.

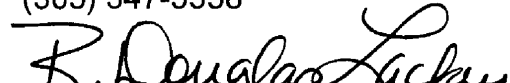
Respectfully submitted this 24th day of June, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



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