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June 27, 2002

BY COURIER

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shurnard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 0100198-TP

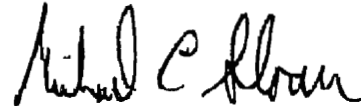
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CLERK

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Digital Network, Inc. in the above-referenced docket is an original and fifteen copies of the Opposition of Florida Digital Network, Inc. to BellSouth's Motion for Reconsideration or Clarification as well as 15 copies of Florida Digital's Cross-Motion for Reconsideration.

Please date stamp and return the enclosed extra copy of this filing. Should you have any questions concerning this filing, please do not hesitate to call me on 202-295-8458.

Respectfully submitted,



Michael C. Sloan

Enclosures

cc: Parties of record.
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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 27, 2002
Telecommunications Act of 1996)	
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**FLORIDA DIGITAL NETWORK, INC.'S CROSS-MOTION FOR
RECONSIDERATION**

Pursuant to Rule 25-22.060 of the Florida Administrative Code, Florida Digital Network, Inc. ("FDN") respectfully submits this Cross-Motion for Reconsideration to urge the Commission to reconsider its decision in Section IV of its Order not to require BellSouth to offer an unbundled broadband loop with packet switching where BellSouth has deployed Digital Loop Carriers "DLCs" that prevent FDN from providing xDSL-based services using its own DSLAM in a central office. A Motion for Reconsideration must identify points of fact or law that were overlooked or not considered in rendering the Order.¹ In denying FDN's request for access to this network element on an unbundled basis, the Commission appears to have overlooked the substantial evidence in the record that it would be far more difficult, time-consuming and expensive for FDN to self-supply these network elements than it is for BellSouth to provide DSL services on DLC loops.

In its Motion for Reconsideration or Clarification of Section III of the Order, filed on June 14, 2002, FDN stated that while it disagrees with the Commission's decision on the UNE issue, it did not at that time seek reconsideration of those aspects of the Order. However, upon review of BellSouth's Petition for Reconsideration, filed June 20, 2002, FDN recognizes that it

¹ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); see also *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962).

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must in the interest of self-preservation pursue all avenues of relief on this most important of issues. Although the relief ordered by the Commission in Section III will be less effective than the creation of a new UNE in ensuring FDN's ability to exercise its rights under the Act, both of these avenues of relief are intended to address the same underlying problem, which is the impairment of FDN's ability to compete in the local voice services market because of its inability to enable its customers to obtain DSL services.² BellSouth's Petition for Reconsideration or Clarification threatens to overturn or undermine the only relief awarded by the Commission to address this problem. Even if the Commission denies BellSouth's Petitions for Reconsideration and Clarification, FDN now believes that it must seek the additional protection of the availability of a UNE. BellSouth has indicated that it may appeal the Commission's Order, and it is also evident from its Petition for Clarification that if forced to sell DSL on FDN UNE lines, BellSouth will do everything in its power to frustrate the effectiveness of that option.³

I. THE RECORD DEMONSTRATES THAT FDN DOES FACE A GREATER BURDEN IN SELF-PROVISIONING DSL LOOPS THAN DOES BELL SOUTH

The Commission's decision not to create a new UNE is based in large part on its finding that FDN is not impaired in its ability to offer xDSL services without unbundled access to such network elements. The Commission wrote that "the record nevertheless reflects that the initial cost of installing a DSLAM in a remote terminal is similar for FDN and BellSouth."⁴ Upon this finding, the Commission concluded that "FDN has not demonstrated that it is any more burdensome for FDN to collocate DSLAMs in BellSouth's remote terminals than it is for

² Relief in Section IV is also needed to address FDN's impairment in its ability to offer xDSL services in Florida.

³ See FDN Opposition to BellSouth Petition for Reconsideration and Clarification (June 27, 2002), at Section II.

BellSouth. Since the record does not reflect that FDN faces a greater burden than does BellSouth, we do not find that FDN is impaired in this regard.”⁵ In reaching this conclusion, the Commission overlooked evidence that it is more difficult, time-consuming and expensive (particularly on a per-customer basis) for FDN to do what BellSouth is doing for itself. In addition, the Commission only looked at the burdens of collocating a DSLAM at a remote terminal, and did not consider the other elements of self-provisioning that impair FDN’s ability to offer its own DSL loops through BellSouth DLCs.

First, the Commission overlooked evidence that the cost of self-provisioning DSLAMs at remote terminals is more for FDN than for BellSouth. Because BellSouth is able to purchase equipment on a larger scale for its entire nine-state region, it can obtain volume discounts that are not available to FDN.⁶ In addition, FDN is even relatively more disadvantaged because its cost *per customer* will be significantly higher. The record reflects that “CLECs cannot realistically hope to obtain a ‘take rate’ of more than a small, single digit percentage of the total possible market for DSL service. BellSouth is able to garner a higher take rate, at least initially, because of its greater name recognition and established relationships with existing customers.”⁷ The FCC has determined that, in applying the cost factor of the impairment test, the state commission should consider the economies of scale enjoyed by incumbents as a result of their ubiquitous networks.⁸ The Commission has overlooked this guidance and the evidence that

⁴ Order at 15.

⁵ Order at 16.

⁶ Tr. at 97 (Mr. Gallagher testifying that, “BellSouth has advantage because it buys [DSLAMs and line cards] in bulk: And if you're buying a whole bunch of them, you can buy those . . . fairly cheap.”)

⁷ Tr. at 47.

⁸ Tr. at 47; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696 (1999) (“*UNE Remand Order*”) at ¶ 48.

demonstrates that the economics of remote terminal DSLAM deployment is significantly different for FDN than for BellSouth.

Second, the Commission has overlooked the evidence that even if the cost in dollars were the same to BellSouth and FDN, FDN remains impaired because as a smaller, newer company, it does not have the same access to capital as does BellSouth. Mr. Gallagher testified that it would be impossible for FDN to raise sufficient capital to allow FDN to compete in the DSL market by collocating its own DSLAMs at remote terminals.⁹ Whatever the Commission concludes about FDN's ability to deploy DSLAMs in theory, it still will not be able to do it in reality. The evidence in the record that not a single ALEC DSLAM has been located at a BellSouth remote terminal in Florida confirms this unfortunate reality.¹⁰

Third, the Commission overlooked the evidence in the record that collocation of DSLAMs is not the only hurdle in providing xDSL service where BellSouth has deployed DLCs. The record demonstrates that even if FDN were able to collocate a DSLAM at a BellSouth remote terminal, it likely would not be able, realistically, to obtain transport back to the central office.¹¹ Without this transport, the remote terminal DSLAM is worthless, because BellSouth will not allow FDN to connect a remote terminal DSLAMs to the lit fiber that is used to carry BellSouth's high-speed data service to the central office.¹² In most cases, dark fiber will not be available to FDN between these locations, either from BellSouth as a UNE or from a third party.¹³ To connect its DSLAM, FDN would have to construct its own fiber-optic transport between the remote terminal and FDN's facilities, obtaining rights-of-way, performing

⁹ Tr. at 95.

¹⁰ Tr. at 353; see also FDN Br. at 9.

¹¹ Tr. at 43-44.

¹² Tr. at 54.

¹³ Tr. at 43-44.

construction, and laying the fiber. FDN cannot realistically afford the significant time or expense of this undertaking, and therefore is impaired in its ability to offer xDSL services.¹⁴

By contrast, BellSouth does not incur these costs when it places a DSLAM at its remote terminals, because, unlike FDN, BellSouth would not be required to place new fiber in order to carry new traffic.¹⁵ Because BellSouth typically reserves a substantial amount of fiber capacity between its remote terminals and central offices that it does not make available to ALECs, BellSouth can add DSLAMS and DSL to its remote terminals without placing new fiber facilities.¹⁶ Furthermore, even if its bandwidth were exhausted between an RT and central office, BellSouth can upgrade its bandwidth by changing the electronics on the ends of its lit fiber to secure additional bandwidth for its DSL.¹⁷ This option, which BellSouth will not provide to ALECs, is tremendously cheaper than installation of new fiber.¹⁸ The Commission therefore has erred in concluding that FDN faces no greater burden in self-provisioning DSL loops through DLCs than does BellSouth. The Commission should reconsider its decision upon the evidence above that it apparently overlooked in reaching its initial decision.

II. THE COMMISSION DID NOT CONSIDER FDN'S IMPAIRMENT WHERE BELLSOUTH DEPLOYS NEXT-GENERATION DSL LINE CARDS

Finally, the Commission Order does not address the relative ability of FDN to collocate xDSL line cards, in lieu of DSLAMs, when BellSouth begins to deploy Next Generation Digital Loop Carriers (NGDLC) in Florida. In NGDLC architecture, line cards perform the role of the

¹⁴ *Id.*

¹⁵ Tr. at 45.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

DSLAM at the remote terminal.¹⁹ BellSouth will not allow FDN to collocate its own line cards in the BellSouth NGDLC.²⁰ Line cards are significantly smaller and cheaper and are more effective even than the smallest commercial DSLAM.²¹ Thus, BellSouth would deny the ability of CLECs to place DSLAM functionality at the remote terminal on the same terms on the same terms and conditions that it affords to its own operations.

Therefore, where BellSouth deploys NGDLCs, FDN qualifies as impaired under the four-part standard set forth in the *UNE Remand Order*, which requires ILECs to unbundle packet switching when (1) the ILEC has installed DLC systems; (2) there are no spare copper loops that are capable of supporting the xDSL services the CLEC seeks to offer; (3) requesting CLECs are not allowed or able to collocate DSLAMs at ILEC remote terminals *on the same terms and conditions that apply to the ILEC's own DSLAM*; and (4) the ILEC has deployed packet switching for its own use.²² At a minimum, therefore, the Commission should reconsider its decision and order BellSouth to provide UNE broadband loops with packet switching where it has deployed xDSL line cards at remote terminals.

¹⁹ Tr. at 48; see also *Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, ASD File No. 99-49, Second Memorandum Opinion and Order, FCC 00-336 (rel. September 8, 2000) ("*Project Pronto Order*"), at ¶ 16.

²⁰ Tr. at 48.


²¹ *Id.*

²² *UNE Remand Order* at ¶ 313 (emphasis added).

III. CONCLUSION

For the foregoing reasons, the Commission should grant this Cross-Motion for Reconsideration and revise its Order to require BellSouth to offer an unbundled broadband loop with packet switching where BellSouth has deployed xDSL capability at its remote terminals.

Respectfully submitted this 27th day of June, 2001,



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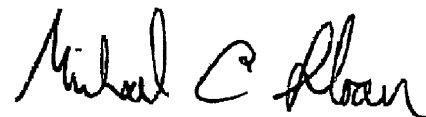
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CERTIFICATE OF SERVICE

I hereby affirm that the foregoing Cross-Motion for Reconsideration has been served by electronic mail upon BellSouth counsel James Meza and Patrick Turner via electronic first class mail on this June 27, 2002.

A handwritten signature in black ink that reads "Michael C. Sloan". The signature is written in a cursive style with a large initial "M" and "S".

Michael C. Sloan