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July 5, 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 Motion to Strike FDN's Cross-Motion for Reconsideration or, in the Alternative, Response to FDN's Cross-Motion for 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.

Sincerely,

Patrick Turner

Patrick Turner
(28)

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 Hand Delivery (*), Electronic Mail and Federal Express this 5th day of July 2002 to the following:

Agreement

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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: July 5, 2002

BELLSOUTH TELECOMMUNICATIONS, INC'S MOTION TO STRIKE FDN'S "CROSS-MOTION FOR RECONSIDERATION" OR, IN THE ALTERNATIVE, RESPONSE TO FDN'S "CROSS-MOTION FOR RECONSIDERATION"

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Motion to Strike Florida Digital Network ("FDN"), Inc.'s Cross-Motion for Reconsideration or, in the Alternative, its Response to FDN's Cross-Motion for Reconsideration.

I. THE COMMISSION SHOULD STRIKE FDN'S "CROSS-MOTION" BECAUSE IT IS, IN REALITY, A TIME-BARRED MOTION FOR RECONSIDERATION.

The Florida Public Service Commission ("Commission") issued its "Final Order on Arbitration" ("Order") in this docket on June 5, 2002, and on June 17, 2002, FND filed a "Motion for Clarification or Reconsideration." That Motion expressly states that "FDN does not in this motion seek reconsideration of [Section IV or Section V] of the Order . . . ." See FDN's Motion for Clarification or Reconsideration at 3. Subsequently, BellSouth filed a timely "Petition for Reconsideration or, in the Alternative, Clarification with Regard to Section III of the Commission's Final Order on Arbitration," in which BellSouth plainly states that "[t]hese alternative Petitions relate solely to Section III of the [Order]. BellSouth is not seeking reconsideration or clarification of Sections IV or V of the Order." See BellSouth's Petition at 1 n.1.

On June 27, 2002 – 22 days after the Commission issued its Order in this docket – FDN filed a document it calls a "Cross-Motion for Reconsideration" in which FDN, for

the first time, asks the Commission to reconsider its decision in Section IV of its Order. Thus, more than 15 days after the Commission issued its Final Order, FDN purports to seek reconsideration of an issue that BellSouth did not raise in its Petition for Reconsideration and that FDN itself consciously and explicitly decided not to raise in its own Motion for Clarification or Reconsideration. Recognizing that the time period for filing a motion for reconsideration has long expired, FDN attempts to camouflage its untimely request for the Commission to reconsider its decision in Section IV of the Order as a "Cross-Motion for Reconsideration." The Commission, however, should reject such a characterization because FDN's "Cross-Motion" it is not a true cross motion for reconsideration. Rather, as explained below, it is nothing more than an untimely motion for reconsideration.

Rule 25-22.060(3), Florida Administrative Code, provides that a "motion for reconsideration of a final order shall be filed within 15 days after issuance of the order." The Commission has routinely held, as a matter of law, that it does not have the authority to extend the time period to file a motion for reconsideration and that the failure to timely file such a motion constitutes a waiver of the right to do so. See In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues with Supra Telecommunications and Information Sys., Inc., Docket No. 001305-TP, Order No. PSC-02-0464-PCO-TP (Apr. 4, 2002) (denying Supra's request to extend time period to file motion for reconsideration and stating that "[t]he Courts have construed failure to timely file a motion for reconsideration as a waiver of the right to do so, and have also found that the time permitted for filing such a motion may not be extended by the administrative tribunal); *see also, In re: American Communication Services of*

Jacksonville, Inc. dba e.spire Communications, Inc., Docket No. 981008-TP, PSC Order No. 99-1453-FOF-TP (stating that "current case law indicates that it is not appropriate to grant an extension of time for filing a motion for reconsideration."); *In re: Application for Amendment of Certificate Nos. 17-W and 76-S in Orange County by Park Manor Waterworks, Inc.*, Docket No. 95-0471-WS, Order No. PSC-95-0928-PCO-WS (stating that an agency does "not have authority to grant an extension of time to file a motion for reconsideration.").

The origin of this well-settled precedent lies with Florida Rule of Civil Procedure 1.090, which provides that a court cannot "extend the time for making a motion for new trial, for rehearing, or to alter or amend a judgment . . . ," and from the decision of *City of Hollywood v. Public Employees Relations Commission*, 432 So. 2d 79 (4th Dist. Ct. App. 1983). In *City of Hollywood*, the Public Employees Relations Commission ("PERC") granted the City of Hollywood an extension of time to file a motion for reconsideration. 432 So. 2d at 80. On appeal, the Fourth District Court of Appeals held that PERC did not have authority to grant an extension of time to file a motion for reconsideration, stating that:

> There is no express authority either in the APA, PERC's rules, or in the Model Rules of Procedure for extending the time for filing such a motion. Nor do we believe the agency has inherent power to do so. By analogizing an agency's inherent power to that of a court of general jurisdiction, we conclude that if a circuit court cannot extend the time for filing a motion for new trial in a criminal case, then it would seem to follow that an agency cannot extend the time for filing a motion for reconsideration in an administration proceeding.

Id. at 81. Based on this decision and the precedent discussed above, the Commission must reject any motion for reconsideration that is filed after the 15-day period set forth in Rule 25-22.060.

While the Commission's rules allow for cross motions for reconsideration to be filed after the filing of a motion for reconsideration, (*see* Rule 25-22.060(b)), any such motion must be limited to the issues raised in the motion for reconsideration to which the cross motion is responding. Stated another way, a party in a cross motion for reconsideration must be limited to addressing only those issues raised by another party's Motion for Reconsideration. Any other interpretation would allow an issue to be presented for reconsideration more than fifteen days after entry of the Commission's final order, and as explained above, the Commission has no authority to extend the time period for issues to be presented for reconsideration. To the contrary, the Commission is prohibited as a matter of law from doing so. *See e.g., In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues with Supra Telecommunications and Information Sys., Inc.*, Docket No. 001305-TP, Order No. PSC-02-0464-PCO-TP (Apr. 4, 2002).

In any event, no reasonable reading of Rule 25-22.060(b) could allow a party to file a motion for reconsideration on certain issues, expressly state that it is not seeking reconsideration on other issues, and later (after the time period to seek reconsideration has expired) seek reconsideration of an issue that neither it nor any other party has timely asked the Commission to reconsider. That, however, is exactly what FDN is seeking to accomplish here. Neither FDN nor BellSouth filed motions for reconsideration of any aspect of Section IV of the Commission's Order. In fact, both FDN and BellSouth explicitly stated that they were not seeking reconsideration of Section IV of the Order. FDN, however, has attempted to get another bite at the apple by filing a purported "Cross-Motion for Reconsideration" that seeks reconsideration of

Section IV of the Order almost a month after the Commission issued the Order. The Commission, therefore, should strike and not consider FDN's "Cross-Motion."

II. IN THE ALTERNATIVE, THE COMMISSION SHOULD DENY FDN'S "CROSS-MOTION FOR RECONSIDERATION" BECAUSE THE COMMISSION'S DECISIONS IN SECTION IV OF THE ORDER ARE SUPPORTED BY FACTS OF RECORD AND ARE CONSISTENT WITH CONTROLLING FEDERAL AUTHORITY.

The Commission found that "the record . . . reflects that the initial cost of installing a DSLAM in a remote terminal is similar for FDN and BellSouth." *See* Order at 16. The Commission further found 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 BellSouth." *Id.* at 17. Despite FDN's assertions to the contrary, these findings are fully supported by the evidence of record, and they are consistent with controlling federal authority. The Commisison, therefore, should deny FDN's "Cross-Motion for Reconsideration."

A. The Record Does Not Support FDN's Argument That BellSouth Receives "Bulk" Discounts on DSLAMS and Line Cards or That Any Such "Bulk" Discounts Are Not Available to FDN.

FDN argues that BellSouth can "obtain volume discounts that are not available to FDN" because "BellSouth is able to purchase equipment on a larger scale for its entire nine-state region . . . ." "Cross-Motion" at 3. In support of this argument, FDN cites page 97 of the hearing transcript and claims that FDN's witness, Mr. Gallagher, testified that "BellSouth has advantage (sic) 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." *See* "Cross-Motion" at 3 n.6. That, however, is not what Mr. Gallagher said.

Mr. Gallagher's testimony on page 97 of the hearing transcript addresses line cards and not DSLAMs:

> There's 12-port cards: there's 24-port cards; there may even be 48-port cards. And you just drop those in on "X" dollars per card. And if you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly chea

(Tr. at 97).[1] Mr. Gallagher never attempts to quantify how many "a whole bunch" is, nor does he suggest that FDN is unable to purchase "a whole bunch of [line cards] . . . fairly cheap" just like BellSouth purportedly can. Nor is there any evidence that BellSouth buys DSLAMs in bulk, that FDN cannot buy DSLAMs or line cards in bulk, or that any alleged "bulk" discounts that may be available to BellSouth are not available to FDN as well. Absent such evidence, there simply is no basis for any requested finding that BellSouth can obtain volume discounts that are not available to FDN.

In fact, the evidence presented in this docket conclusively demonstrates that FDN is not having any problems finding vendors willing to sell FDN DSLAMs and that FDN is getting competitive offers and competitive pricing for DSLAMs. (*See* Tr. at 144)(Mr. Gallagher's testimony on cross-examination). Additionally, BellSouth's Late-Filed Exhibit 12 indicates that the "Manufacturer's List Price *for a quantity of one (1)* MicroRam 1100" 8-port DSLAM is $6,095, while FDN's Late-Filed Exhibit 13 indicates that the price of an unspecified model of an 8-port DSLAM is $6,900. Nothing in these Late-Filed Exhibits suggests that: (1) FDN cannot obtain an 8-port DSLAM for a price that is comparable to the price for which BellSouth can obtain an 8-port DLSAM, or (2)

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[1] As noted above, FDN's cross-motion claims that Mr. Gallagher testified that "BellSouth has advantage (sic) because it buys [DSLAMs and line cards] in bulk . . . ." and that this testimony appears on page 97 of the hearing transcript. BellSouth cannot find any such testimony on page 97 of the hearing transcript or on any other page of the hearing transcript.

the $6,095 price quoted by BellSouth is the result of any "bulk" discount. Clearly, the evidence does not support FDN's claims that it would have to pay any more for DSLAMs or line cards than BellSouth pays for them.

The findings the Commission made in Section IV of its Order, therefore, are fully supported by the evidence of record, and the Commission should reject FDN's request that it reconsider those findings.

B. FDN's Assertions that the Commission overlooked FCC Guidance Ring Hollow In Light of the D.C. Circuit's Overturning of the FCC's *UNE Remand Order* and the FCC's *Line Sharing Order.*

FDN claims that the Commission "has overlooked" Federal Communications Commission ("FCC") "guidance" to the effect that a state Commission should consider an ILEC's economies of scale in performing an impairment analysis. *See* "Cross-Motion" at 3-4. FDN further argues that the Commission overlooked evidence that, according to FDN, demonstrates that "the economics of remote terminal DSLAM deployment" are different for FDN than for BellSouth. *Id.*. In truth, however, it is FDN that has overlooked the fact that: the FCC "guidance" to which FDN refers has been overturned by the Courts; and the evidence upon which FDN relies does not satisfy the applicable impairment standard.

The FCC "guidance" upon which FDN relies is the FCC's *UNE Remand Order*.[2] *See* "Cross-Motion" at 3. In *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), the D.C. Circuit Court of Appeals overturned the *UNE Remand Order* and remanded it to the FCC. In the same opinion, the Court vacated the FCC's Line

[2] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, 15 FCC Rcd 3696 (1999).

Sharing Order and remanded it to the FCC as well. As explained below, many aspects of the Court's opinion squarely address – and refute – the arguments FDN makes in its "Cross-Motion."

FDN, for instance, argues that "at least initially," FDN will have a lower "take rate" for broadband services than BellSouth and that, as a result, FDN's "cost *per customer*" will be higher than BellSouth's. *See* "Cross-Motion" at 3 (emphasis in original). The D.C. Circuit, however, ruled that such arguments do not support an unbundling requirement:

> The [UNE Remand Order] refers explicitly to a CLEC's probable inability to enjoy scale economies comparable to ILECs' "*particularly in the early stages of entry.*" But average unit costs are necessarily higher at the outset for any new entrant into virtually any business. The Commission has in no way focused on the presence of economies of scale "*over the entire extent of the market.*" Without a link to this sort of cost disparity, there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable.
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> To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions.

United States Telecom, 290 F.3d at 427 (emphasis in original). FDN presented no evidence to suggest that its purportedly higher initial cost per customer is not universal as between new entrants and incumbents in any industry. To the contrary, Mr. Gallagher acknowledged that as is the case in most industries, FDN's per-customer costs will go down as the number of customers it serves goes up, (Tr. at 97), and he explained that "as you keep adding subscribers, your marginal cost of capital is cheaper and cheaper and cheaper . . . ." (Tr. at 159).

FDN further argues that the Commission "overlooked" evidence to the effect that FDN "remains impaired because as a smaller, newer company, it does not have the same access to capital as does BellSouth." *See* "Cross-Motion" at 4. FDN, however, presented no evidence that even arguably compares FDN's "access to capital" to BellSouth's "access to capital." Moreover, the D.C. Circuit noted that:

> Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities. At the same time -- the plus that the Commission focuses on single-mindedly -- a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. Justice Breyer concluded that fulfillment of the Act's purposes therefore called for "balance" between these competing concerns. *A cost disparity approach that links "impairment" to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance.* The [UNE Remand] Order reflects little Commission effort to pin "impairment" to cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful.

Id. at 427 (emphasis added). Even assuming that FDN's access to capital is a legitimate matter of inquiry in this docket, the capital to which FDN seeks access would, in this case, be used to fund its provision of broadband services. FDN presented no evidence to suggest that any difficulty it may have in obtaining such capital is somehow linked to any natural monopoly.

FDN did not present any such evidence because it cannot – the market for broadband services[3] is not a natural monopoly. As the D.C. Circuit court noted, "the

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[3] In this docket, FDN attempts to divert the Commission's attention from the relevant market by couching its testimony and arguments in terms of DSL services instead of in terms of broadband services. The D.C. Circuit, however, made it clear that FDN's attempts must be rejected. *See United States Telecom.*, 290 F.3d at 428 ("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

[FCC's] own finding (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 D.C. Circuit further noted the FCC's findings that "no competitor [in the broadband market] has a large embedded base of paying residential consumers" and that the "record *does not indicate that the consumer market is inherently a natural monopoly.*" *Id.* at 428-29 (emphasis added).

The evidence presented in this docket is entirely consistent with the Court's findings. 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). Finally, while there are literally millions of end users in BellSouth's service territory in the state of Florida, "[a]s of the end of April 2001, BellSouth had [only] 133,015 wholesale and retail high-speed data subscribers in the State of Florida . . . ." (*See* Hearing Exhibit 1, BellSouth's Response to FDN's 1st Set of Interrogatories, Item No. 2). The evidence shows that the broadband market is not a natural monopoly.

In summary, the Commission's rejection of FDN's arguments is not the result of the Commission's having overlooked any evidence or any controlling authority. Instead, it is the result of Commission's recognition that not just any conceivable cost disparity constitutes an impairment that justifies the unbundling of a network element. This

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CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite). *We agree.*)(emphasis added).

recognition is consistent with the D.C. Circuit's ruling that

> cost comparisons of the sort made by the [FCC], largely devoid of any interest in whether the cost characteristics of an "element" render it at all unsuitable for competitive supply, seem unlikely either to achieve the balance called for explicitly by Justice Breyer or implicitly by the Court as a whole in its disparagement of the [FCC's] readiness to find "*any*" cost disparity reason enough to order unbundling.

Id. at 427. The decisions the Commission reached in Section IV of the its Order, therefore, are entirely consistent with controlling federal authority, and the Commission should reject FDN's request that it reconsider those decisions.

C. The evidence does not support FDN's claim that it would have to construct its own fiber-optic transport facilities in order to connect its DSLAM to its collocation arrangement.

FDN argues in its "Cross-Motion" that if FDN collocates a DSLAM at a BellSouth remote terminal, "it likely would not be able, realistically, to obtain transport back to the central office." *See* "Cross-Motion" at 4. It then argues that to connect its DSLAM to its collocation arrangement at a BellSouth central office, "FDN would have to construct its own fiber-optic transport between the remote terminal and FDN's facilities [collocated at the BellSouth central office], obtaining rights-of-way, performing construction, and laying the fiber." *Id.* at 4-5. In support of these arguments, FDN cites the portions of Mr. Gallagher's pre-filed testimony that appear on pages 43-44 and 54 of the hearing transcript. *See Id,* notes 11-14.

As the Commission notes in its Order, however, "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16. (*See also* Tr. at 290-91; 299-300). None of these alternatives entail FDN's constructing its own fiber-optic transport facilities. In fact, Mr. Gallagher himself acknowledged that once FDN has collocated a

DSLAM at a BellSouth remote terminal, BellSouth will sell FDN UNE subloops between the remote terminal and the BellSouth central office. (*See* Tr. at 148). Mr. Gallagher further acknowledged that BellSouth has agreed to provide these UNE subloops at the rates established by the Commission. (*See* Tr. at 151). Once FDN collocates a DSLAM at a BellSouth remote terminal, all of the parts needed to complete a voice and data combination to serve an end user that is served by BellSouth DLC facilities are available to it. (*See* Tr. at 291).

The Commission, therefore, did not "overlook" the pre-filed testimony that FDN relies upon in its "Cross-Motion." Instead, the Commission properly recognized what Mr. Gallagher himself acknowledges: that rather than laying its own fiber, FDN can simply purchase UNE subloops from BellSouth at Commission-established prices in order to connect its DSLAM to its collocation arrangement at a BellSouth Central office. The findings the Commission made in Section IV of the Order are fully supported by the evidence of record, and the Commission should reject FDN's request that it reconsider those findings.

D. The Commission properly rejected FDN's request for unbundled access to line cards where BellSouth has deployed NGDLC.

In the final argument set forth in its "Cross-Motion," FDN claims that the Commission did not consider FDN's request for unbundled access to line cards where BellSouth has deployed NGDLC. "Cross Motion" at 5. This argument is without merit for several reasons. First, FDN has failed to make the requisite impairment showing with regard to line cards for all of the same reasons that it has failed to make the requisite impairment showing with regard to DSLAMs. Second, the evidence shows

that BellSouth has not deployed line cards in the state of Florida that are capable of providing the broadband services FDN seeks to provide. As BellSouth witness Mr. Williams testified:

> You would need a combo card for the voice and the data. The NGDLC that's deployed by BellSouth in only about 7 percent of the cases, as I recall, none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data.

(Tr. at 387). (*See also* Tr. at 292-293)("Mr. Gallagher is correct when he states that ALECs cannot collocate combo cards at remote terminals, but BellSouth itself does not use combo cards in remote terminals."). The Commission, therefore, properly declined to order BellSouth to unbundled elements that are not part of its Florida network.

Finally, to the extent that FDN is asking the Commission to require BellSouth to unbundled any dual purpose or "combo" line cards that it may deploy in the future, FDN is asking this Commission to allow it to reap the rewards of the risks that BellSouth may decide to take by deploying facilities to provide broadband services to Floridians. In its Order, however, the Commission stated that "[w]e share the concern that, in the nascent xDSL market, unbundling would have a detrimental impact on facilities-based investment and innovation." Order at 17. Once again, the Commission's Order is consistent with the D.C. Circuit's opinion in which the Court stated:

> If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.

United States Telecom. 290 F.3d at 424. Accordingly, the Commission's decision not to allow FDN to reap where it has not sown – with regard to both DSLAMs that BellSouth has deployed and line cards that BellSouth may deploy – is entirely appropriate and should not be revisited.

CONCLUSION

The Commission should strike FDN's "Cross-Motion for Reconsideration" because in the context of this proceeding, it is in reality a late-filed motion for reconsideration. In the alternative, the Commission should deny FDN's "Cross-Motion for Reconsideration" for the reasons set forth above.

Respectfully submitted this 5th day of July 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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