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Legal Department

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via Hand Delivery

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

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Re: **Docket No. 030852-TP** In re: Implementation of Requirements Arising from FCC
Triennial UNE Review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops,
Route-Specific Review for DS1, DS3 and Dark Fiber Transport

Dear Ms. Bayó:

This letter is being filed in response to a letter dated October 8, 2003, sent to the Florida Public Service Commission and the parties to the referenced docket, on behalf of Florida Digital Network, Inc. (FDN). Mr. Mathew Feil, in accord with discussions during the pre-hearing conference held on October 6, 2003, wrote on behalf of FDN, raising several issues with certain proposals that BellSouth and the FCCA had made at the pre-hearing conference.

Since the Staff is presumably considering Mr. Feil's comments as it decides what to recommend concerning the proposed modifications, BellSouth has several comments that may facilitate those considerations.

First, Mr. Feil's point regarding discovery taken in another state is a good one. BellSouth was not attempting to bind the Staff, or any public agency in the way discovery would be conducted in Florida. It seems reasonable that parties in Florida who were not parties to the proceedings in other states where the discovery was taken should not be limited in either the objections they might raise to the admissability of the evidence, or in taking further depositions. Consequently, BellSouth would not oppose changing its proposed modifications to the pre-hearing order to reflect this.

Second, Mr. Feil raises an issue, assuming that electronic service is allowed, about when the time starts for responding to requests such as interrogatories that are electronically served after 5 p.m. This is unclear from the proposed modifications, and BellSouth would agree that when a pleading that requires a response is served electronically after 5 p.m. the

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filing would be treated for purposes of determining when a response is due as if it were served on the next business day following the day of electronic service. BellSouth certainly didn't intend to have anyone serve discovery, for instance, at 11 p.m on Friday, and have the time for responding start then, and Mr. Feil's point is a good one.

Mr. Feil's last point, however, is considerably more troubling, and in fact is an example of exactly what BellSouth is concerned about in these dockets. It is fortunate that it has come up this early in the process, because it is clearly something that the Commission is going to have to address.

The FCC has established triggers that when met require the states to make a finding of "no impairment," not only for switching, but for high capacity loops and transport as well. Without attempting to repeat what the FCC said word for word, if the Commission finds that three facilities-based CLECs are providing qualifying services to mass market customers in a relevant geographic market, the Commission, in the words of the FCC, "must" find "no impairment." Obviously one of the issues that the Commission must address is identifying the CLECs that have switches (irrespective of where they are located) that provide qualifying services to mass market customers in Florida. Further, the Commission must address the issue of where the mass market customers of those CLECs are located. If the CLECs in Florida that are providing qualifying services to mass market customers do not elect to participate in the docket the Commission has opened to consider these matters, it seems clear that the Commission is going to have to do something to facilitate the collection of the information from those CLECs anyway.

One possibility is for the parties who have intervened to utilize the discovery process that is allowed for non-parties generally. This involves taking depositions of those non-parties, either orally or through written questions. It is reasonably certain that the Commission would have to participate in such activities by issuing subpoenas, and enforcing the subpoenas to implement this process. Such a process, given the number of CLECs certified in Florida, will be expensive and time consuming.

The other alternative was the one mentioned in the earlier letter BellSouth sent transmitting the proposed modifications. The Commission itself has the authority to ask anyone subject to its jurisdiction, whether they are a party to a particular proceeding or not, for information regarding their operations and facilities. BellSouth could submit its questions to the Staff, who could then serve the questions on the CLECs who have the relevant information, but there are obvious problems with this. First, the Staff would have to do this on behalf of all the parties who were interested in obtaining such information, and that might require a lot of time and effort by the Staff, in addition to their normal duties. Second, to the extent a non-party objected, the Staff would have to deal with those objections. Finally, to the extent that a non-party refused to cooperate, the Staff would have to deal with that as well.


All BellSouth proposed in its letter is to have the Commission order all of the entities the Commission has certificated, to cooperate with regard to the discovery needed in these cases, so that the parties rather than the Staff or the Commission can deal with these issues.

Of course, this is not mere a hypothetical problem that is being raised. FDN, based on publicly available data, is a facilities-based carrier providing local, long distance and high speed internet service to more than 30,000 business customers in more than 100 cities in Florida. Further, according to publicly available information, FDN has more than 100,000 voice and data lines in service in Florida. Simple math indicates that some significant number of FDN's customers will have to be mass market customers irrespective of the definition that the

Commission ultimately approves. In light of this, BellSouth believes that FDN will be one of the three facilities-based carriers serving mass market customers in Florida that can be used to satisfy the FCC's trigger test. In order to make that determination, however, someone is going to have to develop admissible evidence that FDN has switches, where FDN's switches are located, and, significantly, where its customers are located. Without FDN's voluntary participation in the docket the Commission has opened to deal with switching, determining the facts regarding FDN is going to be problematic. With that said, and to make the point as clear as possible, based on the most recent information available from the Commission, FDN has chosen to intervene in the docket dealing with loops and transport; however, it has not intervened in the docket dealing with switching. Therefore, unless it chooses to intervene in the switching docket, some method is going to have to be implemented to obtain the information that the parties and the Commission will need from FDN Communications.

Again, BellSouth suggests, as it did during the pre-hearing conference, that the Commission simply direct all of the entities subject to its jurisdiction to cooperate with regard to discovery in these proceedings. BellSouth needs this information, the other parties will need it and, most importantly, the Commission will need it. The FCC has only allowed 9 months to complete this process, and anything that slows discovery down is going to make accomplishing that task more difficult than it already is.

Sincerely,


Nancy B. White (KA)

Enclosures

Cc: All Parties of Record (by e-mail only)
Adam Teitzman (hand delivery)