

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 17, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Banks, Fordham)
Division of Competitive Markets & Enforcement (Harvey, Bulecza-Banks, Fisher)

RE: Docket No. 030301-TP – Petition by Mpower Communications Corp. and Florida Digital Network, Inc. for expedited temporary and permanent relief against BellSouth Telecommunications, Inc. for alleged anticompetitive conduct regarding Florida Digital Network Inc.'s proposed acquisition of assets and customer base of Mpower Communications Corp.

AGENDA: 06/29/04 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030301.RCM2.DOC

Case Background

On March 27, 2003, Florida Digital Network, Inc. d/b/a FDN Communications (FDN) and Mpower Communications, Corp. (Mpower) filed a Petition For Expedited Temporary and Permanent Relief Against BellSouth Telecommunications, Inc. for its Anticompetitive Conduct Regarding Florida Digital Network, Inc.'s Proposed Acquisition of the Assets and Customers of Mpower Communications Corp. In Florida (Petition). On April 15, 2003, BellSouth Telecommunications, Inc. filed its Answer to the Petition.

On July 8, 2003, Mpower, FDN and BellSouth filed a Joint Stipulation for temporary relief. On July 10, 2003, Mpower, FDN and BellSouth filed a Joint Motion for Extension of Time to File Testimony in this proceeding. By Order No. PSC-03-0825-PCO-TP, issued July 16, 2003, the Motion for Extension of Time to File Testimony was granted.

On August 8, 2003, Mpower, FDN and BellSouth filed a Joint Motion for Continuance. By Order No. PSC-03-0997-PCO-TP, issued September 4, 2003, the Joint Motion was granted. Thereafter, several motions for continuance were granted allowing parties additional time to resolve the issues in this docket.

On May 4, 2004, Mpower and FDN filed a Joint Notice of Voluntary Withdrawal, without prejudice.

Discussion of Issues

Issue 1: Should the Commission acknowledge Mpower and FDN's Notice of Voluntary Withdrawal of their petition and close this docket?

Recommendation: Yes, the Commission should acknowledge Mpower and FDN's Notice of Voluntary Withdrawal of their Petition and close this docket. In addition, the Commission should find that the voluntary withdrawal renders any and all outstanding motions moot, and all confidential materials in this Docket should be returned to the filing party. Since no further Commission action is necessary, staff recommends that this docket be closed. **(F. BANKS)**

Staff Analysis: The law is clear that the plaintiff's right to take a voluntary dismissal or withdrawal is absolute. Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975). It is also established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68, 69 (Fla. 1978)

Therefore, staff recommends that the Commission acknowledge Mpower and FDN's Notice of Voluntary Withdrawal of their Petition, and find that the voluntary withdrawal renders any and all outstanding motions moot. Additionally, all confidential materials filed in this Docket should be returned to the filing party. Since no further Commission action is necessary, staff recommends that this docket be closed.