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September 25, 1998

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SEP 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capacity; Docket No. 98-147

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and four (4) copies of Comments of Florida Digital Network, Inc. on Notice of Proposed Rulemaking.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. If you have any questions regarding this filing please contact me at 202/424-7791.

Sincerely,

Robert V. Zener

RVZ/ta
enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capacity	)	

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SEP 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF FLORIDA DIGITAL NETWORK, INC.
ON NOTICE OF PROPOSED RULEMAKING

Florida Digital Network, Inc. ("FDN"), through undersigned counsel, hereby submits its Comments on the Notice of Proposed Rulemaking released August 7, 1998, on various issues relating to deployment of wireline services offering advanced telecommunications capability. FDN has obtained certification as a provider of local exchange service in Florida. It plans to serve residential and business customers in Jacksonville, Orlando, Tampa/St. Petersburg, Miami and Palm Beach. Its service will include a DSL offering. It plans to own its own switching equipment.

FDN is concerned that allowing incumbents to provide advanced services through affiliates will inevitably lead to discrimination in favor of those affiliates, regardless of what the formal requirements for separation may be. As a consequence, the Commission should take a strict view of the proposed "separate affiliate" loophole.

In addition, these comments discuss the issue of collocation of switching equipment, pointing out that a liberalization of the present restriction would foster local competition by

reducing required CLEC capital expenditures and preventing discrimination and distortion of CLEC decisions as to the type of switching equipment to be purchased.

I. An Advanced Services Affiliate of the Incumbent That Interconnects with the Incumbent's Network Should Be Considered a "Successor" of the Incumbent Subject to Open Access Obligations.

Section 251(h) extends the competitive open-access obligations of section 251(c) to any entity that becomes a "successor or assign" of an incumbent after the date of enactment. The Supreme Court has stated that whether a company is a "successor" requires analysis of the interests of the parties and the policies of the law involved "in light of the facts of each case and the particular legal obligation which is at issue." Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, etc., supra, 417 U.S. at 262 n.9. Where the policies of section 251 of the Act are served by imposing "successorship" obligations on the affiliate, then the affiliate is a "successor" for purposes of section 251(h).

Any provision of advanced data services through ILEC affiliates that are not subject to the open access obligations of section 251(c) involves significant risk of undermining the pro-competitive policies of the Act. The incumbent and the affiliate will inevitably be operated for each other's benefit, and this can be done in a manner that will escape detection, no matter what the Commission's separation requirements may be.

For example, as the attached affidavit of Michael Gallagher ("Gallagher Afft.") points out, ADSL based Internet access products require continuous copper local loops of a certain length, which are scarce and extremely valuable. An ILEC affiliate that knows the location of these loops has an advantage over CLECs in terms of knowing where to collocate and where to focus its sales effort. The NPRM would prohibit the incumbent LEC from discriminating in

favor of its affiliate in the provision of information, among other things. NPRM ¶ 96. It would also require the affiliate to have separate officers, directors and employees. Id. But the NPRM would not prevent the ILEC affiliate from staffing itself with former ILEC employees who know the location of these copper loops. Given the common financial interest of the ILEC and its affiliate, it is difficult to see how sharing of this information could be prevented.

Indeed, the history of local exchange competition since passage of the Telecommunications Act of 1996 convincingly demonstrates that where ILECs have an incentive to discriminate in favor of their own operations, effective enforcement of nondiscrimination obligations is extraordinarily difficult.

In addition, as time passes, an increasingly large portion of the local exchange network will be devoted to data services – and if the NPRM is promulgated, the ILEC data affiliate will own and operate a growing portion of the network free of any open access obligation. The ultimate result will be progressive erosion of the competitive goals of section 251.

Congress' decision to allow RBOC affiliates meeting the separation requirements of section 272 to provide interLATA service in certain circumstances is not a basis for allowing use of separate affiliates to avoid the open-access obligations of section 251(c). In the case of interLATA service, the RBOCs are not allowed to operate through a separate affiliate until they have complied with the competitive checklist; and their obligation to comply will continue. By contrast, the NPRM proposes a mechanism to relieve the ILECs of their open-access obligation for advanced services before they have complied with that obligation with respect to basic services.

In short, the ILEC and its affiliate will have a common financial interest; their business operations will be closely related; and as data services grow in importance, the ILEC will have a significant and growing incentive to discriminate in favor of the affiliate. Moreover, effective enforcement of nondiscrimination requirements is extremely difficult, particularly in view of the possibilities for information-sharing and other hard-to-detect ways in which an affiliate could receive favored treatment. In these circumstances, the policies of the Telecommunications Act of 1996 counsel against allowing ILECs to escape their open-access obligations by placing their advanced data operations in affiliates.

II. If Separate Affiliates Are Allowed, There Should Be No Sunset Period for the Separation Requirements.

The Commission has requested comment on whether the separation requirements should sunset after a certain period, by analogy to the sunset provisions of section 272. NPRM ¶ 99. As previously pointed out, the separation requirements of section 272 are not a good analogy, because they are triggered only after the RBOC has complied with its open-access obligations, while the NPRM would allow separate ILEC affiliates before the ILEC has complied. Moreover, section 272 is not a technique for avoiding open access obligations, which continue after the separation requirements of section 272 have sunsetted. By contrast, the NPRM would be a technique for the ILEC to avoid open access obligations, and sunsetting separation requirements would remove even that protection while allowing the affiliate to ignore open access obligations.

The fact of the matter is that as long as the incumbent has market power, it will have the incentive to discriminate in favor of its affiliate and against incumbents. Separation requirements

afford some (although probably inadequate) protection against such discrimination. They should not sunset until the incumbent is declared to be a non-dominant carrier.

III. Modification of LATA Boundaries Is Not Allowable To Provide High-Speed InterLATA Access to Network Access Points in other LATAs.

Section 3(25) sets forth no standards for modification of LATA boundaries. That does not mean, however, that there are no limitations on the Commission's discretion to modify LATA boundaries. Congress derived the LATA concept from the AT&T Consent Decree, under which there was a procedure for LATA boundary modification. It is reasonable to conclude that Congress intended the Commission to follow the standards followed under the Consent Decree for modification. The Commission itself has cited the standards followed by the District Court in determining whether to approve requested LATA modifications. Petitions for LATA Association Changes by Independent Telephone Companies, 12 FCC Rcd 11769, ¶ 12 (1997).

Moreover, LATA boundaries are a key element of section 271's restriction on BOC provision of interLATA service. Congress strictly limited the Commission's discretion in allowing exceptions to section 271. Section 10(d) prohibits the Commission from forbearing to apply the requirements of section 271 until they have been fully implemented; and section 271(g) has a limited definition of "incidental interLATA services" exempt from those requirements. In light of these limitations, the Commission was clearly correct in concluding that it could not grant LATA modification requests that are "functionally no different" from requests to forbear from applying section 271 to the provision of particular types of services. NPRM ¶ 82. In essence, section 271 has replaced the Consent Decree, and the LATA modification provision of section 271, like the parallel Consent Decree modification procedure, was not intended to allow

"piecemeal dismantling" of interLATA restrictions. Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, 12 FCC Rcd 10646, ¶ 8 (1997) ("LATA Boundary Decision"), quoting United States v. Western Electric Company, Inc., No. 82-0192, slip op. at 4 (D.D.C. May 18, 1993).

Under the AT&T Consent Decree, the District Court approved modification of LATA boundaries in for "traditional local telephone service between nearby exchanges," under flat-rate non-optional plans, where "the competitive effects were minimal and a sufficient community of interest across LATA boundaries was shown." LATA Boundary Decision, ¶ ¶ 7, 8 (summarizing District Court decisions). The District Court also approved LATA modifications for independent telephone companies seeking to upgrade their networks in a manner that would require routing traffic through a BOC switch in a different LATA. Petitions for LATA Association Changes by Independent Telephone Companies, 12 FCC Rcd 11769, ¶ 5 (1997) (summarizing District Court decisions).

Neither of these situations is remotely analogous to allowing LATA boundary modifications to enable a BOC to reach network access points in another LATA. Granting that type of relief would go far beyond the fine-tuning of particular geographical boundaries the District Court granted to recognize local communities of interest. Instead, it would allow the BOC to provide a particular type of interLATA service. In section 271(g) Congress specifically listed the types of interLATA service it wanted to exempt from the overall restriction of § 271. There is no basis for adding an additional type of service to that list.

Moreover, if there is demand in a particular area for high-speed access to an out-of-LATA network access point, there is no reason why that demand cannot be fulfilled by one of the

existing IXCs. The market for high-speed access interLATA transmission is exploding in this country, and several carriers are building networks to attempt to meet this demand. It is understandable that the BOCs are anxious to participate in this market, as they are for other aspects of the interLATA market. But section 271 establishes a process for BOC entry into the interLATA market – a process which, by requiring the BOCs to cooperate in opening local markets to competition, will benefit consumers in all areas of the country. The BOCs must comply with section 271 before they are authorized to provide high-speed interLATA access to the Internet.

IV. The Commission Should Require Physical Collocation of Switching Equipment.

The attached Affidavit of Michael Gallagher shows that significant additional capital expenditures are involved when a CLEC must locate its switching equipment off-site. As Gallagher points out, these additional expenditures are particularly significant for a CLEC such as FDN, which is seeking to bring competition to smaller markets.

In view of this large difference in capital expenditures, the Commission is clearly right in its tentative conclusion that the incumbent must allow CLECs to collocate equipment to the same extent as it allows its advanced services affiliate to do so. NPRM ¶ 129. Otherwise, as the Gallagher Affidavit describes, the advanced services affiliate could obtain a significant cost advantage by collocating switching equipment while CLECs could not.

In addition, where equipment includes functionalities that are concededly used for interconnection or UNE access, the fact that the equipment may also have switching functionality should not enable the ILEC to deny collocation. The Commission's regulations permit collocation of equipment that is merely "<u>used</u> for interconnection or access to unbundled network

elements. 47 C.F.R. § 51.323(b) (emphasis added). There is no prohibition in the Commission's rules against using collocated equipment for other purposes as well.

The Commission has correctly concluded that "the availability of cost efficient collocation arrangements is essential for the deployment of advanced services by facilities-based competing providers," and that "incumbent LECs have a statutory obligation to offer cost efficient and flexible collocation arrangements." NPRM ¶ 64. As the Gallagher Affidavit shows, where space is available, denial of collocation to switching equipment involves otherwise unnecessary capital expenditures and thus is not "cost efficient." Moreover, it creates an artificial economic incentive in favor of switching equipment with functions that would qualify it for collocation – thus distorting a decision that should be made on technical and cost grounds. Moreover, as Gallagher points out, the additional costs create a significant barrier to entry of small competing providers in smaller markets.

Respectfully submitted

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Counsel for Florida Digital Network, Inc.

September 25, 1998

252128.1

AFFIDAVIT OF MICHAEL GALLAGHER

Michael Gallagher, being duly sworn, hereby deposes and says:

1. My name is Michael Gallagher. I am President, Chief Executive Officer and a Director of Florida Digital Network, Inc. (FDN). I have had extensive experience as a CLEC and IXC executive. Before assuming my present post, I was Regional Vice President for Brooks Fiber Communications (WorldCom), where I had overall responsibility for all operations, engineering, finance and sales in Texas. I came to Brooks from its merger with Metro Access Networks (MAN), where I was President and a co-founder of that company (a Texas regional CLEC). At MAN, I developed all business strategies, designed network architecture and secured contracts with the company's original customer base. Before working for MAN, I worked for Williams Telecommunications Group (Wiltel) in sales management and for Intermedia Communications (ICI) in sales. I hold a BS in Mathematics and Physics from Rollins College.

2. FDN has applied for certification as a provider of local exchange service in Florida. It plans to serve residential and business customers in Jacksonville, Orlando, Tampa/St. Petersburg, Miami and Palm Beach. It service will include a DSL offering. It plans to own its own switching equipment.

3. ADSL based internet access products require continuous copper local loops (loops that do not pass through a Digital Loop Carrier) of a certain length. CLECs trying to acquire such loops must physically co-locate ADSL equipment in ILEC offices under the ILEC's terms. The CLEC must then submit a Local Service Inquiry with the ILEC to verify if such continuous copper exists to the CLEC's requested customer address. The ILEC has up to two weeks to respond to the CLEC. These copper pairs are extremely valuable as they are scarce.

4. In the circumstances described in paragraph 3, an ILEC affiliate may have several advantages:

a. The ILEC affiliate may already know the location of the valuable continuous copper loops due to earlier ILEC studies identifying such loops.

b. The ILEC affiliate may be passed leads from the ILEC for potential customers of data services.

c. The ILEC affiliate may be allowed to collocate ADSL transmission equipment that the ILEC prohibits a CLEC from collocating.

d. The ILEC affiliate may be allowed more favorable terms for physical or virtual collocation of such equipment.

5. In our discussions concerning interconnection, BellSouth is taking the position that virtual collocation is best for both parties, due to more rapid availability and avoidance of construction costs. However, from FDN's standpoint, there are several reasons why physical collocation is preferable, including: ability to install equipment on FDN's timetable; ability to install NEBS compliant equipment that BellSouth personnel are not trained in maintaining; and ability to connect equipment together versus having BellSouth connect and charge connection fees.

6. Another possible advantage for the ILEC affiliate would be if it were allowed to collocate switching equipment and the CLEC were not. This issue is most important for bringing competition to smaller markets, because there would be large "sunk" capital expenditures required by the CLEC to prepare a separate site for switch installation and to construct the additional fiber and transmission electronics to the separate site. The following examples illustrate the point:

Example 1

Typical CLEC small city (under 150,000 access lines) site preparation capital cost: (This architecture assumes the CLEC leases office space within 1 mile of the ILEC required interconnection point which is typically a tandem switch site located in a downtown area. It also assumes that the CLEC builds a small fiber network to connect to the latter. Minimum numbers have been used, actual construction costs can be much higher.)

Annual Office Rent	$30,000	(2,000 RSF at $15/ft)
Civil Leasehold Improvements	$100,000	(2,000 sq. ft at $50/ft)
Mechanical Leasehold Improvements (HVAC)	$80,000	(2 Leibert HVAC systems)
AC Electrical Leasehold Improvement	$75,000	(600 Amp Service & Breakers)
DC Power Distribution	$50,000	(Various Fuse Panels)
Generator Backup	$100,000	(300 KVA Generator & Housing)
Fiber Cable Network to connect to ILEC	$125,000	($25/ft at 5,000 ft)
Transmission Electronics for Fiber	$150,000	(2 node OC-12 Sonet System)
Total CLEC Site Prep Capital Cost	$710,000	

Example 2

The CLEC is allowed to install a small switch capable of handling approximately 15,000 access lines inside an ILEC tandem office in a designated physical collocation area. All DC power is assumed to be backed up via the ILEC generator and the HVAC systems are common.

Annual Rent	$7,500	(500 sq. ft cage at $15/ft)
ILEC Common area construction charge	$50,000	(assumed pro-rata all colo space)
DC Power distribution charge	$50,000	(assume costs equal to ex #1)
DS-1 cable charges to connect to ILEC	$58,800	(336 cables at $175 per cable run)
POTS Bay Installation	$25,000	(worst case)
Total CLEC Site Prep Capital Cost	$191,300	

Michael Gallagher

Subscribed and sworn to before me this 24 day of September, 1998

Notary Public

JODIE L. SMITH
MY COMMISSION # CC
EXPIRES: May 21, 20
Bonded Thru Notary Public Und

Jodie L. Smith

CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on this 25th day of September 1998, copies of the foregoing Comments of Florida Digital Network, Inc. were hand delivered to those parties marked with an asterisk. All others were served by first class mail.

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Teri Lee Amaya

Teri Lee Amaya