BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by 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 ORDER NO. PSC-02-1453-FOF-TP ISSUED: October 21, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

ORDER DENYING MOTIONS FOR RECONSIDERATION, CROSS-MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August

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15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-motion for Reconsideration, or in the Alternative, Response to FDN's Cross-motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This Order addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we should utilize discretion in the exercise of such authority. In addition, Section

120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

FDN'S MOTION FOR RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974);Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

We believe that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, we believe that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice

unless the consumers exercised rights at just one specific point in time, prior to porting to an ALEC voice provider. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECs over BellSouth loops.

BellSouth responds that the Order states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." Order at 11. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.

Although FDN argues that we overlooked a material aspect of the anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In our decision, we determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, we determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, we found that BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that we considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, FDN's motion is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974);Diamond Cab Co. v. King, 146 So.

2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). We have applied this same standard in addressing BellSouth's motion.

We believe that BellSouth has failed to demonstrate that we made a mistake of fact or law in rendering our decision. Therefore, we deny BellSouth's Motion for reconsideration regarding this issue.

In its Motion, BellSouth states that we have improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated nontelecommuications DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. We agree. Section 251(d)(3) of the Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local carriers;
> > (B) is consistent with the requirements of this Section [251];
> > (C) does not substantially prevent implementation of requirements of this section and the purposes of this part.

Order at 10. Further, we believe that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale ADSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of Section 706 of the Act is to encourage

the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit consumer choice in the local voice market. We agree. As stated in the Order, we determined that Congress has clearly directed state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its FastAccess DSL service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in our Order, the Florida statutes provide that we must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . . " Order at 9. As addressed in the Order, we found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit Court of Appeals vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, we do not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to local competition. Thus, we do not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, we believe that FDN's position is in line with the tenor of our decision. While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers.

We indicated in our Order that our finding regarding FastAccess Internet Service should not be construed as an attempt to exercise jurisdiction over DSL service but as an exercise to promote competition in the local voice market. Order at 11. To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff. As indicated in our order, under Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes. We believe that BellSouth has failed to make a showing that our decision is contrary to any controlling law. Further, at the hearing, BellSouth's witness Williams testified that although it would be

costly, it would be feasible to track UNE loops. To the extent that these technical limitations can be overcome, we infer that it would be technically feasible to provision FastAccess on an FDN UNE loop.

In summary, although BellSouth has asserted that we overlooked a number of material facts, BellSouth has not identified a point of fact or law which was overlooked or which the we failed to consider in rendering our decision. Therefore, the motion for reconsideration shall be denied. However, we envisioned that BellSouth's migration of its FastAccess Internet Service to an FDN customer would be seamless. Consequently, we clarify that BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a seamless transition for a customer changing voice service from BellSouth to FDN in a manner that does not create an additional barrier to entry into the local voice market.

BELLSOUTH'S MOTION TO STRIKE

In its Motion, BellSouth seeks to strike FDN's Cross-Motion for Reconsideration because it believes it is an untimely motion for reconsideration. Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one of them.[1] Nor could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, we have held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, we find that BellSouth's Motion to Strike is denied.

[1]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

FDN'S CROSS-MOTION FOR RECONSIDERATION

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs, does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[2]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate FDN's own DSLAM because "[t]he rates of return aren't there."

BellSouth responds that there is no evidence that BellSouth buys DSLAMS in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs or line cards. BellSouth contends that FDN's assertion that the Commission overlooked the FCC's guidance to consider the economies of scale in performing an impairment analysis is not correct. BellSouth states that FDN has failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide.

We believe that FDN has failed to show any evidence that we overlooked or failed to consider. We considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In so doing, we

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[2]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that we overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central office. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by us. Upon consideration of this competing evidence, we found that "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.

Finally, FDN asserts that we did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

We did not overlook or fail to consider this issue, because the issue was not before us. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." Based on the foregoing, we believe that FDN has failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order.

The parties shall be required to file their final interconnection agreement within 30 days after the issuance of this

Order conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by us of the filed agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunication's Inc.'s Motion to Strike is hereby denied. It is further

ORDERED that Florida Digital Network, Inc.'s Cross-Motion for Reconsideration is hereby denied.

ORDERED that the parties shall file an interconnection agreement as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open pending the approval of the interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st Day of October, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.