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June 21, 2005

Ms. Blanca S. Bayo
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000121A-TP

Dear Ms. Bayo:

Attached please find the Response of Florida Digital Network, Inc., d/b/a FDN Communications in Opposition to BellSouth Telecommunication, Inc.'s Motion to Dismiss and FDN Communications' Request for Oral Argument. Please file these documents in the above referenced docket file. Copies of these documents will be served on all parties via U.S. Mail.

Thank you for your assistance with this filing.

Sincerely,

Bill L. Bryant, Jr.

Enclosures

cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies (BellSouth Track).	Filed: June 21, 2005 Docket No.: 000121A-TP

RESPONSE OF FLORIDA DIGITAL NETWORK, INC., d/b/a FDN COMMUNICATIONS IN OPPOSITION TO BELLSOUTH TELECOMMUNICATION, INC.'S MOTION TO DISMISS

Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") by and through its undersigned attorneys responds to BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Dismiss as set forth below:

1. Order No. PSC-05-0488-PAA-TP (the PAA Order), issued May 5, 2005, was issued as a proposed agency action order and afforded "[a]ny person whose substantial interests are affected by the action proposed" an opportunity to protest within 21 days and seek a Section 120.57, Florida Statutes, hearing.

2. FDN exercised its right to request a hearing, in accordance with the terms of the PAA Order by filing its timely protest on May 26, 2005.

USING THE VARNES STANDARD, BST'S MOTION TO DISMISS MUST BE DENIED

3. The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). When making this determination, only the petition can be reviewed. Moreover, in considering a motion to dismiss, the facts alleged in the petition must be viewed in the light most favorable

to the petitioning party--in this case, FDN. Id., See also, PSC Order No. PSC-02-0422-PCO-EU, issued March 28, 2002, denying Tampa Electric Company's Motions to Dismiss. Indeed, a motion to dismiss tests only the legal sufficiency of a petition to state a cause of action and is not intended to determine issues of ultimate fact. McWhirter, Reeves, McGlothlin, Davidson, Reif & Backus, P.A. v. Weiss, 704 So.2d 214, 215 (Fla. 2nd DCA 1998). Moreover, a motion to dismiss for failure to state a claim should be granted only if it appears to a certainty that the petitioner would be unable to recover under any set of facts that could be proved in support of the petition. See, e.g., Hunnings v. Texaco, Inc., 29 F.3d 1480, 1484 (11th Cir. 1994). For the reasons stated below, FDN's petition, taken in the most favorable light, does state a cause of action upon which relief may be granted.

4. FDN has clearly outlined allegations resulting in a cause of action upon which relief may be granted by the FPSC. For example, by its own admission, BellSouth acknowledges that "the purpose of the SQM/SEEM plan is to ensure that BellSouth maintains a level of performance that gives CLECs a meaningful opportunity to compete in the local market". See, BellSouth Motion at pps. 6 & 7. FDN wholeheartedly agrees with the above-stated purpose and, in fact, FDN's protest to the PAA Order goes to the very heart of this statement. The disputed issue of fact raised by FDN in its protest relates to whether the revised plan continues to give CLECs that competitive opportunity consistent with state and federal law. It is FDN's contention that the revisions to the plan be analyzed and tested by the Commission and the parties to ensure that there are sufficient incentives for BellSouth to achieve and maintain reliable service to its CLEC customers. See, FDN Protest at pg. 3.

5. To be absolutely clear, the PAA Order approving the revised plan contains no analysis that shows that the revised plan provides measures that will sufficiently motivate BellSouth to provide and maintain a level of performance that gives CLECs a meaningful

opportunity to compete in the local market. The PAA order contains the statement that the stipulated plan is an "improved and more efficient performance monitoring mechanism" with no discussion, much less analysis, of how this conclusion was reached. As stated in the protest, FDN disputes whether the revised plan adequately measures and assesses BellSouth's service performance to all CLECs in Florida. Only the Florida Public Service Commission can resolve this issue.[1] FDN notes that the Commission can even set this for hearing on its own motion.

6. Not only is BellSouth's analysis in its motion to dismiss fundamentally flawed, it is disingenuous. BellSouth inaccurately portrays FDN's concern as one solely related to whether FDN will be compensated by BellSouth. The FPSC should not be confused by this BellSouth misstatement. Compensation (or to use BellSouth's term, "remedy payments") to the CLECs and the Commission has always served as the performance incentive for BellSouth. This is nothing new. The Commission's orders in this docket have alluded to the fact that remedy payments have been used to motivate BellSouth to meet required performance standards. For instance, Order No. PSC-02-1736-PAA-TP, issued in this docket on December 10, 2002, states:

> BellSouth's SEEM Plan, as approved in Order No. PSC-01-1819-FOF-TP, describes in detail the means by which enforcement will be determined. This includes the appropriate level of performance measurement disaggregation for compliance reporting and the statistical methodology to be used to compare retail to wholesale performance for determination of penalties and payments. (emphasis added)

[1] See, PAA Order No. PSC-05-0488-PAA-TP, p. 1. The FPSC is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01(3), Florida Statutes, the Florida Legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry.

...On September 25-26, 2002 and October 17-18, 2002, the first six-month review workshops were held to gauge the effectiveness of BellSouth's permanent performance measures and to determine whether the current remedy structure is effective in driving BellSouth's performance toward the required standards.

To be clear, FDN asserts that the revised plan will change the compensation scheme such that it no longer provides sufficient incentive to BellSouth to provide adequate service to the CLEC community as a whole. For the Commission's convenience, FDN's assertions are repeated below verbatim from the initial protest:

9. ...**Adequate compensation is vital in order to motivate** BellSouth to provide non-discriminatory service to competitors.

10. Neither is there a discussion of whether the revised plan provides sufficient incentives to BellSouth to achieve, and notably, maintain reliable provisioning service to its CLEC customers. One important purpose of performance monitoring is to establish a standard against which CLECs and the Commission can measure performance over time to detect and correct any degradation of service provided to CLECs.

11. FDN disputes whether the revised plan adequately measures and assesses BellSouth's service performance to CLECs in Florida.

7. Implementation of the PAA Order would unquestionably affect the rights of FDN and all CLECs in Florida. The PAA Order dramatically changes the way the Commission requires BellSouth to measure its performance, the way BellSouth is incented or not incented to perform, and the remedy payments that CLECs and the Commission are to receive when

BellSouth fails to perform. FDN succinctly raises all of these matters within the four corners of its protest, as the above quoted excerpts indicate, and the Commission must accept FDN's allegations as true, that is: (a) that the revised SQM/SEEM plan will not adequately measure and assess BellSouth's performance; (b) that the revised SQM/SEEM plan does not provide adequate remedy payments for service failures by BellSouth, which is vital in order to motivate BellSouth to provide reliable provisioning service to its CLEC customers; (c) that the revised SQM/SEEM plan does not contain a true transition mechanism to phase in the new plan; and (d) that federal and state law require reversal of the PAA order. To suggest, as BellSouth's Motion ultimately does, that the Commission is somehow without authority to redress FDN's grievances is nonsensical. The Commission has authority over the existing SQM/SEEM plans, and the Commission has authority over any changes to those plans. FDN has alleged that it is aggrieved by the changes to the plans (as to both SQM and SEEM) which the Commission approved as PAA; therefore, the Commission can and must redress FDN's grievances as to the changes to those plans. Indeed, to approve BellSouth's motion to dismiss in this matter is to erase the PAA part of the PAA order.

8. In footnotes (1) and (7) of its motion, BellSouth incorrectly argues that the FDN protest of the PAA Order is limited to SEEM revisions. FDN's petition clearly states it is protesting all of the changes to the Performance Assessment Plan, which includes SQM and SEEM. See FDN Protest at pg. 6. The SQM is a detailed description of BellSouth's performance measurements for service provided to CLECs through its Operations Support Systems (OSS). FDN disputes that the proposed revisions to the SQM adequately measure BellSouth's OSS. See FDN Protest at pps. 3 & 5.

WHETHER OR NOT FDN PARTICIPATED IN PRIOR SETTLEMENT DISCUSSIONS OR WORKSHOPS IS IRRELEVANT

9. FDN's protest and request for hearing is not tied whatsoever to its participation or lack thereof to settlement talks or workshops. BellSouth's assertions to the contrary are absurd. The fact remains that pursuant to Florida law and the Commission's own order, a substantially affected person may protest the FPSC's PAA Order. Whether FDN participated in all, twelve, two, six or none of the settlement meetings or workshops is completely irrelevant.[2] In its Motion, BST seems to inappropriately suggest that the Commission should deny the protest now because FDN could have participated earlier in the process. This argument is not only irrelevant but it defies logic. If all persons who were not signatories to the settlement were going to be precluded from a subsequent protest, there would have been no reason for the Commission to issue the order as PAA. Likewise, there would be no need to issue the order as PAA if all persons that were substantially affected and presumably had a right to suggest alternatives had been a party to the settlement. Just as other affected parties were allowed to voice concerns and suggest alternatives to BellSouth's proposed changes to the plans during the workshops and settlement process, FDN can do so now, and FDN is assured by the Florida Administrative Procedures Act and by the PAA Order itself the right to do so.

WHETHER OR NOT THE SEEM PAYMENTS ARE THE CLEC'S EXCLUSIVE REMEDY IS IRRELEVANT

10. BellSouth's argument that the SQM/SEEM plan is not the CLEC's exclusive remedy for performance-related issues is an unabashed attempt to sidestep the motion to

[2] BellSouth seems to incorrectly suggest that the disposition of a motion to dismiss turns on the level of participation of a substantially affected person prior to some decision making event. Needless to say, BellSouth cites no authority, nor can it, for this position. In any event, had FDN participated in settlement talks between BellSouth and the CLEC Coalition, FDN would not have accepted the settlement terms, largely for the reasons explained in FDN's protest.

dismiss standard. Unquestionably, the SQM/SEEM plan is a remedy of the CLECs for BellSouth's failure to perform,[3] and the SQM/SEEM plan is a remedy which BellSouth posits is intended to insure proper performance. In its protest, FDN asserted that the Commission's proposed SQM/SEEM alterations will diminish BellSouth's incentive to perform by significantly reducing the remedy payments the CLEC community receives for BellSouth's failure to perform – allegations which the Commission must accept as true. Despite this, BellSouth would have the Commission believe that the possibility of some "other" remedy legally excuses the drastic alteration, or even complete elimination, of the subject SQM/SEEM remedies.

11. BellSouth also reaches the pointless conclusion that the FDN protest fails to identify a cause of action upon which relief can be granted because the Commission cannot grant any prospective relief based on conjecture and speculation. See BellSouth Motion at ppg. 8 & 9. Not only is this argument irrelevant to the consideration of a motion to dismiss, it is fundamentally flawed. FDN's protest is neither premature nor based on speculation. On the contrary, as succinctly stated in its protest, FDN asserts that the revisions to the plan have not been analyzed and tested to ensure, and will not ensure, that there are sufficient incentives for BellSouth to achieve and maintain reliable provisioning service to its CLEC customers.

12. BellSouth's argument that it is premature for FDN to raise concerns about the revised SQM/SEEM plan is preposterous and another clumsy attempt to sidestep the motion to dismiss standard. BellSouth would have the Commission and the CLEC community wait for a six-month informal plan review following the implementation of the revised plan to see how it goes. If it were to follow BellSouth's totally circular argument, the Commission could

[3] A CLEC's contractual and other remedies are typically limited by the terms of its interconnection agreement to credits for the proportionate charge for the service during the period in which the service was affected. The possibility of a partial credit of some kind does not insure that BellSouth's performance will be at parity, that BellSouth's performance will be nondiscriminatory, or that BellSouth's performance will be at a level that gives CLECs a meaningful opportunity to compete against BellSouth in the local market.

never accept any protest to any PAA order, since all protests to a PAA order, by definition, are based on the expected, anticipated impact of a preliminary Commission action. To accept BellSouth's "let's wait and see" approach, would be akin to the Commission dismissing a protest by customers of a utility to a PAA order approving a rate increase because it was based on the premise that the increase, if implemented, would cause the utility to overearn. In this example, the utility customers' argument is necessarily prospective in nature since the utility has not implemented the rate increase and, therefore, is not yet in an overearning position. Following BellSouth's absurd logic, in this rate case example the Commission should simply implement the increase and then wait and see what the utility actually earned based on surveillance reports. This, of course, is not how PAA protests to rate cases are treated. Instead, protesting parties are afforded the opportunity through a hearing process to proffer evidence supporting their position. FDN should be given this same opportunity, as is its right pursuant to the terms of the PAA order.

SUMMARY HEARING IS NOT APPLICABLE HERE

13. BellSouth inappropriately suggests that a Section 120.574, Florida Statutes, summary hearing could be conducted to address FDN's concerns. FDN does not agree to a summary hearing. First, BellSouth has not sufficiently met the criteria in Section 120.574, Florida Statutes, to justify the Commission holding a summary hearing. See 120.574.(1)(b), Florida Statutes. Second, BellSouth ignores FDN's contention that a more thorough analysis of the revised plan must be conducted to fully evaluate the impact on competition for the entire CLEC market. A thorough analysis cannot be concluded via a summary hearing. To be equally clear on this point, FDN reiterates its belief that the Commission and interested persons must adequately determine whether, on a going forward basis, BellSouth will be incented properly to provide non-discriminatory service to competitors on a continuing basis

on any revised plan. There is a disputed issue of material fact. FDN does not believe the proposed revised performance assessment plan (SQM and SEEM combined) results in a plan that accurately measures BellSouth's performance in Florida. To alleviate the concern in this regard, FDN anticipates that the Commission will need a full, multi-day evidentiary proceeding with cross-examination and testing of BellSouth's arguments. Simply stated, a summary hearing cannot adequately address these concerns and moreover FDN is entitled to a Section 120.57 hearing. [4]

AN ADEQUATE TRANSITION MECHANISM IS CRITICAL

14. FDN maintains that the questions surrounding a true transition mechanism remain, and that BellSouth's argument that FDN's concerns in this regard "have been answered" have nothing to do with the transition mechanism FDN addresses and has even less to do with a motion to dismiss. The transition mechanism described by BellSouth in its Motion is not discussed in the PAA order. The PAA order merely contains a footnote that references a BellSouth email with no description of this alleged transition mechanism. Further, FDN maintains that the mechanism described by BellSouth in its Motion is not a true transition to the new plan. As stated in FDN's petition, when dealing with a substantial regulatory change, regulatory authorities often provide a period of time which allows affected companies to ramp down from one scheme to a new one. In this case, BellSouth asserts the period of time is one month, with a transition relating **only to resetting all failed month counters** in the first month after implementation. What BellSouth is calling a "transition" is nothing of the kind. The PAA Order proposed a flash cut to an entirely new SQM/SEEM plan. The consecutive months' counter is nothing more than a thread, a link, a common element between the two plans. FDN contends that a true transition mechanism would phase

[4] Order No. PSC-05-0488-PAA-TP at 4.

in the new plan and would allow companies to adjust operations before a revised plan is fully implemented. In any case, FDN's allegations regarding the need for a transition plan must be accepted as true, and BellSouth's assertion that FDN's transition claims "have been answered" cannot serve as a basis for a motion to dismiss.

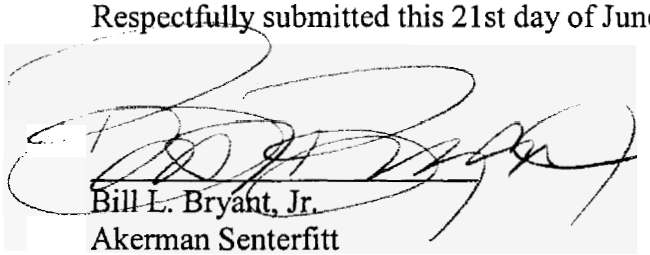
15. In its Petition, FDN is requesting that the Commission set this matter for a public hearing pursuant to Sections 120.569 and 120.57, Florida Statutes. FDN intends that once the matter is set for hearing, FDN will attempt to engage in settlement discussions with BellSouth during the pendency of this hearing process.

FEDERAL LAW ENCOURAGES AND ANTICIPATES ONGOING STATE PERFORMANCE MONITORING

16. In its petition, FDN contends that a full and complete assessment by the Commission of the impact of revisions to the SQM/SEEM plan is required under state and federal law, referencing Sections 364.01(3), 364.01(4)(g) and 364.27, Florida Statutes, and Section 271 of the Federal Telecommunications Act of 1996 (The Act). Both state and federal law encourage performance monitoring to ensure that all telecommunications providers are treated fairly. Such law supports the notion that any changes to the performance plan designed to motivate BellSouth to provide non-discriminatory service to competitors on a continuing basis should only be made after a thorough analysis of the impact on the affected CLECs and, thus, the competitive telecommunications market in Florida. FDN's petition invokes the Commission's legal authority and requires that the matter be set for hearing to fully explore appropriate revisions to the SQM/SEEM plan. BellSouth manipulates the reading of FDN's petition, asserting that the reference to state and federal law is somehow too general. This is yet another transparent attempt to sidestep the motion to dismiss standard.

WHEREFORE, FDN respectfully requests the Commission to deny BellSouth's Motion to Dismiss FDN's Petition Protesting Order No. PSC-05-0488-PAA-TP and set this matter for hearing pursuant to Sections 120.569 and 120.57, Florida Statutes.

Respectfully submitted this 21st day of June, 2005.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by Email, if available, and by U.S. mail this 21st day of June, 2005.

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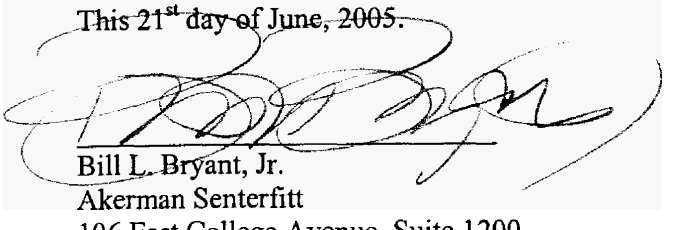
This 21st day of June, 2005.



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