BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of Florida Digital Network, Inc. d/b/a FDN Communications against BellSouth Telecommunications, Inc. for resolution of certain billing disputes and enforcement of unbundled network element (UNE) orders and interconnection agreements.	DOCKET NO. 030829-TP ORDER NO. PSC-04-0796-PCO-TP ISSUED: August 13, 2004

ORDER ON MOTION TO COMPEL

BY THE COMMISSION:

On August 18, 2003, Florida Digital Network, Inc. d/b/a FDN Communications (FDN) filed a Complaint for Resolution of Certain Billing Disputes and Enforcement of UNE Orders and Interconnection Agreements with BellSouth Telecommunications, Inc. (BellSouth). On September 3, 2003, BellSouth filed its Answer and Counterclaim. This matter is currently scheduled for an administrative hearing on October 6, 2004.

On April 27, 2004, FDN served its second set of interrogatories (Nos. 4-14) and Third request for PODs (No. 5) on BellSouth. On May 7, 2004, BellSouth served FDN with its notice of objections to FDN's second set of interrogatories (Nos. 4-14) and Third request for PODs (No. 5). On May 20, 2004, BellSouth provided its limited responses to FDN's second set of interrogatories (Nos. 4-14) and Third request for PODs (No. 5). On July 23, 2004, FDN filed its Motion to Compel BellSouth Discovery, and on July 30, 2004, BellSouth filed its Response in Opposition to FDN's Motion to Compel Discovery.

In its Interrogatories and Requests for Production of Documents, FDN is seeking information regarding BellSouth's processes for migrating customers to and from BellSouth's network, and the charges which BellSouth assesses in those instances. Additionally, FDN seeks information concerning BellSouth's application of charges to its retail residential and business customers, as well as information concerning the number of retail residential and business customers eligible for BellSouth winback promotions. Of those eligible customers, FDN seeks the percentage of those that have actually entered into contracts with BellSouth for discounted rates.

Specifically, FDN asks in Interrogatory No. 4:

> Referring or relating to instances in which BellSouth wins back a UNE-L (basic voice grade) customer from FDN, please identify and describe in detail: . . . (c) All retail charges that BellSouth applies to its retail residential and business customers for initiating

> basic voice grade service; (d) All retail charges through which BellSouth recovers (or partially recovers) the costs it incurs for initiating basic voice grade service to a retail residential and business customer.

In Interrogatory No. 11, FDN also asks:

> Referring or relating to instances in which FDN wins a basic voice grade retail customer from BellSouth and opts to serve that customer with a UNE loop (provided by BellSouth), please: . . . (c) Identify all recurring, non-recurring, or other charges through which BellSouth currently recovers the costs of connection/installation; (d) Identify all recurring, non-recurring, or other charges through which BellSouth currently recovers the costs of disconnection; (e) Discuss how BellSouth's rate application and business rules (governing the application of its tariffed rates) distinguish between the activities required for a disconnect of its own retail customer and the connect activities of a UNE loop to FDN facilities.

In Interrogatory No. 12, FDN asks:

> Do BellSouth's retail recurring and/or non-recurring charges for basic voice grade service recover any costs for disconnecting the retail customer in the event the customer discontinues his/her service with BellSouth? If the answer is no, please discuss how BellSouth does recover these disconnect costs. If the answer is not an unqualified no, please discuss and identify all disconnect costs and activities that are recovered through the recurring and/or non-recurring charges.

In Interrogatory No. 13, FDN asked:

> What is the percentage of retail business customers in Florida eligible for discounted rates as part of or in exchange for a term commitment (*e.g.,* 2002, 2003, 2004 Key Customer promotion) that are currently obligated to BellSouth under such contracts. Please express the percentage using the following formula: Total number of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates divided by the total number of retail business customers in Florida eligible for discounted rates as part of or in

> exchange for a term commitment with BellSouth but which have not entered into such commitments. Identify in your response the promotional programs included in your calculation.

In Interrogatory No. 14, FDN asked:

> What is the percentage of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates (*e.g.*, 2002, 2003, 2004 Key Customer promotion). Please express the percentage using the following formula: Total number of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates divided by the total number of BellSouth retail business customers in Florida. Identify in your response the promotional programs included in your calculation.

To each of the aforementioned Interrogatories, BellSouth responded that FDN's discovery requests are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

FDN argues that its discovery requests are both relevant and likely to lead to the discovery of additional relevant and admissible information. FDN states that its discovery requests target information that is necessary for FDN to show that BellSouth over-recovers its costs when it assesses disconnect charges upon FDN in winback situations, specifically, the charges which BellSouth assesses upon its retail customers. FDN urges that BellSouth is likely to over-recover for certain activities, including when it recovers installation costs from its retail winback customer and also charges FDN for the disconnects. Thus, claims FDN, the information sought in Interrogatory Nos. 4(c) & (d), 11(c), (d) & (e) is directly relevant to whether BellSouth should be permitted to charge FDN a disconnect charge, either upon winning back a customer or in situations where a carrier ordering through BellSouth wins a customer from FDN. Furthermore, FDN argues, the information sought is clearly within the scope of Issue No. 1 identified in Attachment A to the Order Establishing Procedure, i.e., "In consideration of cost-causer, economic, and competitive principles, under what circumstances should BellSouth be allowed to assess a disconnect charge to FDN."

FDN alleges that its interrogatories concerning the percentage of customers eligible for winback promotions/discounts, as well as the percentage of those that have actually entered into promotional contracts with BellSouth, are relevant in that the responses will allow this Commission to see the scope of the problem -- to what degree BellSouth is over-recovering its installation costs by recovering those costs from other sources, e.g., when BellSouth charges its retail winback customers for installation and also charges CLECs like FDN disconnect

nonrecurring charges (NRCs); and to what degree CLECs are forced to finance their own demise when BellSouth charges CLECs for winback disconnect NRCs. FDN notes that BellSouth has admitted to this Commission in Docket No. 020119 that it wins back almost all of the lines it loses to CLECs. To the extent that the majority of those CLECs are facilities-based, and therefore are charged disconnect NRCs by BellSouth, FDN posits that the scope of this problem is quite large. Accordingly, FDN contends that the requested information is relevant in that it goes directly to the issue of competition and falls squarely within Issue No. 1 as set out above, and the Commission should order BellSouth to immediately provide full and complete responses to FDN's Interrogatories and Request for Production of Documents.

BellSouth asserts this entire proceeding concerns a billing dispute. BellSouth has billed FDN, and FDN has refused to pay, nonrecurring disconnect rates. According to BellSouth, there is no factual dispute that BellSouth and FDN are parties to an interconnection Agreement, nor is there any factual dispute that the Agreement contains nonrecurring disconnect rates in Attachment 2. BellSouth states the Agreement provides, at subsection 1.7.1, "The prices that FDN shall pay to BellSouth for Network Elements and Other services are set forth in Exhibit B to this Attachment." In evaluating both FDN's discovery requests and its motion, BellSouth urges the Agreement between the parties controls. The parties' billing dispute arose after FDN refused to pay nonrecurring disconnect fees contained in the Agreement. In resolving this dispute, BellSouth notes the law provides that "the construction of all written instruments is a question of law to be determined by the court where the language used is clear, plain, certain, undisputed, unambiguous, unequivocal and not subject to conflicting inferences." See Royal American Realty Inc. v. Bank of Palm Beach, 215 So.2d 336, 337 (Fla. 4' DCA 1968) The rules of contract construction further require that "no word or part of an agreement is to be treated as a redundancy or surplus age if any meaning, reasonable and consistent with other parts can be given to it." Id.

Conspicuously absent from FDN's prefiled testimony, BellSouth contends, is any valid explanation for ignoring the terms of the Agreement. Also, FDN has not testified that the terms of the Agreement are ambiguous or that it did not intend to enter into an Agreement containing nonrecurring disconnect fees. Instead, BellSouth urges, FDN takes great pains to advance a theory of an alleged over-recovery of costs (which BellSouth disputes), yet offers no legitimate explanation that would allow this Commission to disregard the language and the rates in the Agreement. Thus, according to BellSouth, even assuming that FDN could show that BellSouth "over-recovers" its costs, an affirmative answer to that question will not and cannot obviate the unambiguous contractual language that provides FDN "shall pay" the disconnect rates set forth in the Agreement, without limitation. BellSouth asserts that FDN has not proffered any sound legal basis that would justify admitting evidence that has no bearing on existing contractual language. Nevel v. Monteleone, 514 So.2d 383, 384 (Fla. 4th DCA 1987) (parol evidence is not admissible to vary, contradict or defeat the terms of a complete and unambiguous written instrument). Consequently, regardless of FDN's theory, Bellsouth argues that it fails to meet the legal standard for relevancy because it will not lead to admissible evidence nor will it prove or

disprove a material fact. Because any claimed cost over-recovery cannot invalidate the language in the Agreement requiring FDN to pay disconnect rates, BellSouth argues, FDN's reliance upon Issue 1 as determinative of this discovery dispute is baseless.

Decision

First, (Regarding Interrogatory No. 4, subparts (c) and (d),) this Commission has already addressed the circumstances in which BellSouth should be allowed to assess disconnect charges. Pursuant to Order No. PSC-98-0604-FOF-TP ("1998 decision"), BellSouth is required to separate nonrecurring charges into installation and disconnect charges to reduce upfront costs to CLECs. Second, BellSouth's retail practices have no bearing on wholesale rates. See Order No. PSC-02-0875-PAA-TP ("the resulting wholesale rate may bear no resemblance to the incremental cost of providing the service at retail"). Third, FDN's discovery requests are not likely to lead to any admissible evidence that proves or disproves facts bearing on the actual Agreement. Stated simply, FDN's theory of an over-recovery of costs has no bearing on the billing dispute under the terms of an existing Agreement.

Similar to Interrogatory No. 4, FDN's motion fails to show the materiality of the information requested as it pertains to Interrogatory 11, subparts (c) and (e). In addition, FDN has not linked its discovery request to admissible evidence. The Agreement between the Parties contains disconnect charges that FDN "shall pay"; and a rate structure which resulted from this Commission's 1998 Order. BellSouth's retail charges do not relate to either. Consequently, these requests are not likely to lead to the discovery of admissible evidence,

FDN's Motion is devoid of any discussion concerning Interrogatory No. 12. The "Argument" section of FDN's motion, at page 5, expressly refers to Interrogatories 4 and 11 and indirectly refers to Interrogatories 13 and 14. Nonetheless, to the extent that FDN intended to argue that all of its interrogatories that seek retail information relate to its allegations of "over-recovery", I disagree. In Jordan v. Masters et al., 821 So.2d 342,349 (FL. 4th DCA 2002), the court explained that definition of relevancy under Florida law includes the concept of materiality. Thus, evidence offered to prove a fact which is not at issue is immaterial. There is no issue concerning the alleged "over-recovery" of costs in this proceeding. Accordingly, to the extent FDN seeks information "to show that BellSouth over-recovers its costs", such information would be immaterial, and unlikely to lead to the discovery of admissible evidence.

Interrogatories 13 and 14 seek information concerning percentages of retail customers that are either eligible for or have already entered into term commitments. FDN rationalizes its requests claiming any responses will show "to what degree BellSouth is over-recovering its installation costs . . ." and "to what degree CLECs are forced to finance their own demise." Neither an alleged over-recovery of installation costs nor CLECs financing "their own demise" have any bearing on the issues to be decided in this proceeding. Percentages of retail customers that have entered into term agreements will not prove or disprove any material information about

the existing terms of the Agreement. In Order No. PSC-93-0652-PCO-WS, we denied a Motion to Compel filed by the Office of Public Counsel. In explaining our decision, we stated that "the real issue of the relevance test is whether or not the requested document or information will directly answer the inquiry." Even assuming that BellSouth provided FDN with the percentages of retail customers eligible for or electing term commitments, such information would not answer the question of an alleged over-recovery of costs, nor would it have any bearing on whether FDN is forced to finance its own demise. The fact remains that neither question is one of the issues to be decided in this proceeding.

The pertinent rule on this issue is Rule 1.280(b), Florida Rule of Civil Procedure, which states that:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defenses of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

There are two issues between the parties: (1) a billing dispute concerning UNE zone changes; and (2) a billing dispute concerning nonrecurring disconnect charges. The parties agree FDN's motion concerns only nonrecurring disconnect charges. FDN relies upon Issue 1, which includes the language "cost-causer, economic, and competitive principles" as its vehicle to discover information about BellSouth's retail service. However, there is nothing in Issue No. 1 that addresses a possible over-recovery of costs, and considering FDN's own witness has testified FDN is not challenging the rates this Commission has previously established, there is no reason to allow FDN's request. (See Ankum Dir., p. 5 ; Ankum Reb. p. 7). The Agreement provides for nonrecurring disconnect fees. The Agreement contains rates for such fees. The Agreement states that FDN "shall pay" the rates therein. Additionally, there is no link between BellSouth's retail practices and the Agreement. Consequently, all of the information FDN seeks is immaterial to this proceeding and unlikely to lead to the discovery of admissible evidence. Accordingly, FDN's reliance on Issue 1 is rejected and its motion to compel is denied.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Florida Digital Network, Inc. d/b/a FDN Communications' Motion to Compel is hereby denied.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 13th day of August, 2004.

RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

(SEAL)

LF

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.