

issued January 8, 2003 (the "Prehearing Order"), discovery obligations were suspended during a roughly 40-day continuance, and discovery responses were ruled due by February 5, 2003, if the parties could not reach a settlement during said continuance. Unfortunately, no settlement was reached by the parties during the continuance or since. Thus, objections to the FDN discovery referenced above were due December 13, 2002, and responses are due on February 5, 2003.

3. On December 13, 2002, BellSouth served form-based "General Objections" to the FDN's discovery (including an objection to FDN's definition of the term "winback") and made certain specific objections to FDN's Interrogatories Nos. 34 – 37, 40, 42, 46, 47, 49 and 50. Since BellSouth often provides substantive responses to discovery questions for which it has posed objections, FDN did not know whether a motion to compel would be necessary prior to BellSouth's actually serving its responses on the due date. BellSouth served discovery responses to most of FDN's referenced Interrogatories, despite and subject to certain objections, but did not provide an answer to Interrogatory No. 34. In response to Interrogatory No. 34, BellSouth provided only a relevancy objection. After BellSouth served responses on February 5, counsel for FDN asked counsel for BellSouth whether an answer to Interrogatory No. 34 would be forthcoming, but counsel for BellSouth stated that BellSouth stood by its objections. Accordingly, Interrogatory No. 34 is the subject of this motion.

4. FDN's Interrogatory No. 34 to BellSouth states,

Referring to the exhibit attached to Mr. Gallagher's prefiled rebuttal testimony and marked for identification as MPG-5, state by year the total amount of revenue collected by BellSouth as a result of each of the rate changes that took place on or after January 2001 as shown in the exhibit.

Contrary to BellSouth's December 13, 2002, and February 5, 2003, objections to this interrogatory, the information FDN seeks is relevant and reasonably calculated to lead to the

discovery of admissible evidence. Indeed, aside from FDN's assertion that the information is relevant and discoverable, BellSouth's own filings in this case put BellSouth's rate increases at issue.

5. FDN has maintained throughout this proceeding that BellSouth's so-called promotional discounts are unduly discriminatory on their face, as well as in practice (the latter because the discounts are not offered to all eligible customers). FDN has also maintained that any BellSouth discounts should be given across-the-board to all BellSouth customers within a class. Relevant to those points, Mr. Gallagher proffered rebuttal exhibit MPG-5 (referenced in the subject Interrogatory No. 34), which itemizes BellSouth's rate increases to single and multi-line business customers since 2000. FDN has maintained that it is unfair, anticompetitive and discriminatory for BellSouth to create what amounts to a class within a class by increasing rates for some business customers while decreasing rates for others, particularly in the manner and on the magnitude with which BellSouth has done in this case.

6. In defending its practice of increasing rates for some customers while discounting rates to others, BellSouth invoked the "competitive necessity doctrine" (see Ruscilli Direct, p. 3, line 23, through p. 4, line 10) and BellSouth has indicated that it may not be economical for BellSouth to apply a discount to all customers (see Pitofsky Rebuttal, p. 8, line 16). FDN maintains that the competitive necessity doctrine does not sanction a dominant carrier's increasing rates to some customers to pay for other customers' receiving rate decreases. Indeed, the competitive necessity doctrine stipulates that customers who are discriminated against do not receive rate increases at all. See e.g. *In re American Telephone & Telephone Company, Long Lines Department Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, Memorandum Opinion and order, Docket No. 18128 (rel. September 23, 1976).

BellSouth has not provided documentation justifying the reasonableness of its discriminatory rate increases – increases BellSouth has imposed for the exact same services that BellSouth discounts by 40% (or more) for other customers. Additionally, if, as BellSouth’s witness suggest, it may be “uneconomical” for BellSouth to offer discounts to all of its customers, then FDN and the Commission should be able to evaluate the magnitude of the rate increases in the context of other factors, such as the magnitude of the discounts and how the discounts are offered, to test BellSouth’s assertions.² BellSouth cannot be permitted to hide behind a bald assertion that across-the-board discounts at any level may be uneconomical, when BellSouth’s rate increases are likely what make it economical for BellSouth to offer discounts in the first place.

7. FDN and the Commission are entitled to know information (a) that will show how BellSouth is financing its rate decreases through rate increases, and the magnitude with which BellSouth is doing so, (b) that will show the inapplicability of the competitive necessity doctrine that BellSouth itself invoked, and (c) that is needed to test the alleged uneconomical aspects, if any, of offering across-the-board rate decreases. Chapter 364, Florida Statutes, expressly bars unfair, discriminatory and anticompetitive conduct, and FDN asserts that BellSouth’s conduct violates Chapter 364 on all three counts. For FDN to defend its position, and for the Commission to be fully apprised of the magnitude of BellSouth’s inappropriate burdening some customers to the benefit of others, FDN must be provided the information requested in its Interrogatory No. 34.

8. FDN has consulted counsel for BellSouth regarding this motion and represents that BellSouth counsel opposes this motion and stands by its objections.

² In a confidential response to FDN Interrogatory No. 23, BellSouth provided the dollar amount of Key Customer discounts.

9. If BellSouth refuses to answer the subject interrogatory after this Commission orders BellSouth to answer, FDN requests permission to hereafter identify those portions of BellSouth's testimony pertaining to the information sought which should be stricken as a remedy for BellSouth's failure to comply.

WHEREFORE and in consideration of the above, Florida Digital Network, Inc. respectfully requests the Commission to do the following:

(a) compel BellSouth to immediately answer FDN Interrogatory No. 34, but by no later than February 17, and

(b) permit FDN to identify at the hearing those portions of BellSouth's testimony pertaining to the information sought which should be stricken as a remedy for BellSouth's failure to comply with a Commission order compelling an answer by February 17.

Respectfully submitted, this 11 day of Feb 2003.



Matthew Feil
Florida Digital Network, Inc
390 North Orange Ave.
Suite 2000
Orlando, FL 32801
407-835-0460
mfeil@floridadigital.net

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 11th day of February, 2003.

BellSouth Telecommunications, Inc.*
Nancy White/Meredith Mays
C/O Ms. Nancy H. Sims
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301-1556
nancy.sims@bellsouth.com

Ms. Felicia Banks
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
fbanks@psc.state.fl.us

Time Warner Telecom of Florida LP
C/O Carolyn Marek
233 Bramerton Court
Franklin, TN 37069-4002
carolyn.marek@twtelecom.com

XO Florida, Inc.
Ms. Dana Shaffer
105 Molloy Street, Suite 300
Nashville, TN 37201-2315
dshaffer@xo.com

Rutledge Law Firm
Ken Hoffman/MartinMcDonnell/M.Rule
PO Box 551
Tallahassee, FL 32302-0551
ken@reuphlaw.com

Pennington Law Firm
Karen M. Camechis
PO Box 10095
Tallahassee, FL 32302-2095
karen@penningtonlawfirm.com

Florida Competitive Carriers Assoc.
C/O McWhirter Law Firm
Joseph McGlothlin/Vicki Kaufman/Perry
117 S. Gadsden Street
Tallahassee, FL 32301
vkaufman@mac-law.com

US LEC of Florida, Inc.
Mr. Greg Lunsford
6801 Morrison Blvd
Charlotte, NC 28211-3599
glunsford@uslec.com



Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460
mfeil@floridadigital.net