

Matilda Sanders

ORIGINAL

From: Cara Gowan [CGowan@mail.fdn.com]
Sent: Friday, July 23, 2004 11:59 AM
To: Filings@psc.state.fl.us
Cc: Nancy Sims; meredith.mays@bellsouth.com; Lee Fordham; Beth Keating
Subject: Docket No. 030829 - Motion to Compel BellSouth Discovery

Please file the attached Motion to Compel BellSouth Discovery on behalf of FDN Communications in the following docket:

Docket No. 030829 - Complaint of FDN Communications for Resolution of Certain Billing Disputes and Enforcement of UNE Orders and Interconnection Agreements with BellSouth Telecommunications, Inc.

The documents to be filed in above-referenced docket consist of a cover letter, a Motion to Compel BellSouth Discovery, and the Certificate of Service for a total of eight (8) pages.

The person who is responsible for electronically filing these documents is:

Name: Scott Kassman
Address: FDN Communications
2301 Lucien Way, Ste. 200
Maitland, FL 32751
Phone No: 407-447-6636
Email: skassman@mail.fdn.com

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FPSC-COMMISSION CLERK

7/23/2004

ORIGINAL

July 23, 2004

Ms. Blanca S. Bayo
Director, Division of the Commission
Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

via Electronic Mail

Re: Docket No. 030829-TP Complaint of FDN Communications for Resolution of
Certain Billing Disputes and Enforcement of UNE Orders and Interconnection
Agreements with BellSouth Telecommunications, Inc.

Dear Ms. Bayo:

Please find enclosed for filing in the above docket the Motion to Compel BellSouth
Discovery submitted by Florida Digital Network, Inc. d/b/a FDN Communications
("FDN") via electronic mail.

If you have any questions regarding the enclosed, please call me at 407-835-0460.

Sincerely,

s/ Scott A. Kassman

Scott A. Kassman
FDN Communications
Assistant General Counsel

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

Complaint of FDN Communications)	
for Resolution of Certain Billing Disputes)	
and Enforcement of UNE Orders and)	Docket No. 030829-TP
Interconnection Agreements with)	
BellSouth Telecommunications, Inc.)	

FDN COMMUNICATIONS' MOTION TO COMPEL BELLSOUTH DISCOVERY

Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") pursuant to Rules 28.106-204 and 28.106-204, Florida Administrative Code, and Rules 1.280 and 1.380, Florida Rules of Civil Procedure hereby submits this Motion to Compel Discovery requesting the Florida Public Service Commission ("Commission") to order BellSouth Telecommunications, Inc. ("BellSouth") to respond fully and completely to FDN's Second Set of Interrogatories (Nos. 4-14) ("Interrogatories") and Third Request for Production of Documents (No. 5) ("Requests for Production of Documents") (collectively, Exhibit 1). Specifically, FDN requests that the Commission order BellSouth to respond fully and completely to Interrogatory Nos. 4(c) & (d), 11(c), (d) & (e), 12, 13 and 14.

FDN served BellSouth with these discovery requests on or about April 27, 2004. On May 7, 2004, BellSouth served FDN with its General and Specific Objections to FDN's Interrogatories and Requests for Production of Documents (Exhibit 2). On May 20, 2004, BellSouth served its responses to FDN's discovery requests, which incorporate by reference BellSouth's General and Specific Objections (Exhibit 3).

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Relying on these objections, BellSouth produced no information concerning its costs and charges to its retail residential and business customers for initiating or disconnecting basic voice grade service. Similarly, BellSouth refuses to provide any information regarding the percentage of customers in Florida that are eligible for BellSouth's winback promotions or how many customers have entered into term commitments with BellSouth. BellSouth's boilerplate objections that FDN's discovery requests are "not relevant" and "not reasonably calculated to lead to the discovery of admissible evidence" provide no basis for refusing to answer FDN's requests. The Commission should overrule these objections and order BellSouth to answer FDN's requests forthwith.

BACKGROUND

A. Subject Matter of this Proceeding

FDN originally filed its complaint against BellSouth on August 15, 2003 and subsequently filed an amended complaint on November 21, 2003. FDN's pleadings incorporate two distinct disputes: the first concerns BellSouth overcharging FDN for UNEs as a result of BellSouth's unilateral implementation of this Commission's order in Docket No. 990649A-TP; the second concerns BellSouth's unlawful application and assessment of disconnect NRCs when BellSouth wins back a customer from FDN or when a carrier ordering through BellSouth wins a customer from FDN. The instant motion addresses discovery of material related to the latter dispute.

B. BellSouth's Objections to FDN's Discovery

FDN served Interrogatories and Requests for Production of Documents on or

about April 27, 2004, 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 sought 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 sought the percentage of those that have actually entered into contracts with BellSouth for discounted rates.

Specifically, FDN asked 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 asked:

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 asked:

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.

ARGUMENT

I. FDN Has Satisfied the Standard for Discovery of the Information Omitted by BellSouth from its Responses

As this Commission has recognized, discovery is proper and may be compelled if it is not privileged and is or likely will lead to relevant and admissible information:

The test for determining whether discovery is appropriate is set forth in Rule 1.280(b)(1) of the Florida Rules of Civil Procedure which provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant for the subject matter of the pending action . . . 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.” Section 90.401 of the Florida Evidence Code defines “relevance” as evidence tending to prove or disprove a material fact.¹

FDN’s discovery requests are both relevant and likely to lead to the discovery of additional relevant and admissible information. FDN’s discovery requests targets 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, FDN sought detailed information regarding the charges which BellSouth assesses upon its retail customers. As FDN argued in its direct and rebuttal testimony, 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, 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, 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’s 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 here -- to what degree BellSouth is over-recovering its installation costs by recovering those costs from other sources, *e.g.*,

¹ Order Denying Public Counsel’s Motion to Compel, *Jasmine Lakes Util. Corp.*, Docket No. 920148-WS, Order No. PSC-93-0652-PCO-WS, at 2 (Fla. P.S.C. Apr. 28, 1993).

when BellSouth charges its retail winback customers for installation and also charges CLECs like FDN disconnect NRCs; and to what degree CLECs are forced to finance their own demise when BellSouth charges CLECs for winback disconnect NRCs. 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.² 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.

CONCLUSION

For the foregoing reasons and in light of the discovery deadline of August 4, 2004, the Commission should order BellSouth to immediately provide full and complete responses to FDN's Interrogatories and Request for Production of Documents.

Respectfully submitted, this 23rd day of July, 2004.

s/ Scott A. Kassman

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² In order for the Commission to better assess the magnitude of this problem, FDN intends to propound additional discovery concerning the number of lines BellSouth wins back from facilities-based CLECs.

CERTIFICATE OF SERVICE
Docket 030829-TP

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below this 23rd day of July, 2004.

BellSouth Telecommunications, Inc.
Nancy B. White/Meredith Mays
C/O Ms. Nancy H. Sims
150 S. Monroe Street
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nancy.sims@bellsouth.com
meredith.mays@bellsouth.com

Mr. Lee Fordham
Florida Public Service Commission
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s/ Scott A. Kassman

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