ORIGINAL

Matilda Sanders

From: Barclay, Lynn [Lynn.Barclay@BELLSOUTH.COM]

Sent: Friday, July 30, 2004 11:02 AM

To: Filings@psc.state.fl.us

Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith

Subject: Docket No. 030829-TP BellSouth's Response in Opposition to FDN's Motion to Compel Discovery

a. Lynn Barclay
Legal Secretary to Meredith E. Mays
BellSouth Telecommunications, Inc.
c/o Nancy Sims
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0788
lynn.barclay@bellsouth.com

b. 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.)

c. BellSouth Telecommunications, Inc.
on behalf of Meredith E. Mays

d. 10 pages total (including attachment)

e. BellSouth Telecommunications, Inc.'s Response in Opposition to Florida Digital Network, Inc.'s Motion to Compel
Discovery

<<030829 response in opposition.pdf>>

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
RCA _____
SCR _____
SEC 1
OTH _____

Lynn Barclay
Legal Department
675 West Peachtree Street
Suite 4300
Atlanta, GA 30375
404 335-0788

*****

ORIGINAL

Legal Department

Meredith Mays
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0750

July 30, 2004

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 030829-TP (FDN Complaint)

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition to FDN's Motion to Compel Discovery, which we ask that you file in the above referenced docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith Mays (GP)
Meredith Mays

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

545783

CERTIFICATE OF SERVICE
DOCKET NO. 030829-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 30th day of July, 2004 to the following:

Lee Fordham
Staff Counsel
Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No.: 850 413-6199
cfordham@psc.state.fl.us
jschindl@psc.state.fl.us

Matthew Feil (+)
Scott Kassman(+)
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
Tel. No. 407 835-0460
Fax No. 407 835-0309
mfeil@mail.fdn.com
skassman@mail.fdn.com

Meredith E. Mays

(+) signed Protective Areement

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Complaint of FDN Communications for	)	Docket No. 030829-TP
Resolution of Certain Billing Disputes	)	
And Enforcement of UNE Orders and	)	Filed: July 30, 2004
Interconnection Agreements with	)	
BellSouth Telecommunications, Inc.	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE IN OPPOSITION TO FLORIDA DIGITAL NETWORK, INC.'S
MOTION TO COMPEL DISCOVERY

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") files this response in opposition to the Motion to Compel responses to FDN's interrogatories 4 (c) and (d), 11 (c), (d), and (e), 12, 13, and 14. FDN erroneously asserts that the information requested is relevant to Issue No. 1 in this proceeding. FDN is incorrect, and its Motion to Compel should be rejected.

As FDN acknowledges, there are two issues between the parties: (1) a billing dispute concerning UNE zone changes; and (2) a billing dispute concerning nonrecurring disconnect charges. FDN claims its motion concerns nonrecurring disconnect charges. (FDN's Motion to Compel, p. 2).

The gist of FDN's entire motion is that the information it seeks relates to its theory that BellSouth allegedly over-recovers certain costs in winback situations. FDN relies upon Issue 1, which includes the language "cost-causer, economic, and competitive principles" as somehow providing it with free rein to discover information about

BellSouth's retail service. However, there is nothing in Issue No. 1 that remotely addresses a possible over-recovery of costs, and considering FDN's witness has testified FDN is not challenging the rates this Commission has previously established, there is no reason to allow FDN's fishing expedition. (*See* Ankum Dir., p. 5; Ankum Reb. p. 7). Consequently, FDN's reliance on Issue 1 is misplaced and its motion to compel should be denied.

II. DISCUSSION

This entire proceeding concerns a billing dispute. BellSouth has billed FDN, and FDN has refused to pay, nonrecurring disconnect rates. There is no factual dispute that BellSouth and FDN are parties to an interconnection Agreement ("Agreement"), nor is there any factual dispute that the Agreement contains nonrecurring disconnect rates in Attachment 2, Exhibit B. The Agreement provides, at subsection 1.7.1, "[t]he prices that FDN *shall pay* to BellSouth for Network Elements and Other services are set forth in Exhibit B to this Attachment." (emphasis supplied).

In evaluating both FDN's discovery requests and its motion, 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, 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. 4th DCA 1968) (citations omitted). The rules of contract construction further require that "no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning,

reasonable and consistent with other parts can be given to it." *Id.* BellSouth has consistently testified that the language in the Agreement authorizes nonrecurring disconnect fees. (Blake Dir. pp. 5, 8; Morillo Reb. pp. 12-13).

Conspicuously absent from FDN's prefiled testimony is any valid explanation for ignoring the terms of the Agreement. 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, 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 the Commission to disregard the language and the rates in the Agreement. Thus, 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. FDN has not proffered any sound legal basis that would justify admitting evidence that has no bearing on existing contractual language. *See 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) (citations omitted). Consequently, regardless of FDN's theory, 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, FDN's reliance upon Issue 1 as determinative of this discovery dispute is baseless.

Interrogatory No. 4, subparts (c) and (d)

In Interrogatory No. 4, subparts (c) and (d), FDN seeks to require BellSouth to provide information concerning retail charges that BellSouth applies to its retail customers. FDN claims a link exists between BellSouth's retail information and the parties' billing dispute under its theory that BellSouth allegedly over-recovers costs. FDN's illogical conclusion fails to satisfy the legal standard for relevancy.

First, 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 would not result in 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, which provides that FDN "shall pay" nonrecurring disconnect charges. If FDN seeks to reevaluate nonrecurring charges to reconsider the cost structure underlying prior Commission decisions, then such a theory should be advanced in the next cost proceeding or during the next arbitration between the parties. FDN's theory, however, does not address the contractual language mandating payment of the charges, and any discovery that seeks to elicit information about BellSouth's retail practices has no bearing on the terms of the Agreement.

Interrogatory No. 11 (c), (d), and (e)

FDN's purported need for the information is seeks in Interrogatory 11, subparts (c) through (e), is that it "is directly relevant to whether BellSouth should be permitted to charge FDN a disconnect charge . . . ." Similar to Interrogatory No. 4, however, FDN's motion fails to show the materiality of the information requested. In addition, FDN has made no attempt to link its discovery request to admissible evidence. The Agreement between the Parties contains disconnect charges that FDN "shall pay"; a rate structure which resulted from this Commission's 1998 Order. FDN's discovery will not override the 1998 Order or the language in the Agreement. BellSouth's retail charges do not relate to either. Consequently, no material facts can possibly be proven or disproven through FDN's discovery requests and its motion to compel should be denied.

Interrogatory No. 12

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. FDN has not made any attempt to justify the information it seeks in Interrogatory No. 12, and neither BellSouth nor the Commission should be left guessing about why FDN considers its discovery request to be relevant (which BellSouth disputes in any event).

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", the Commission should deny the Motion to Compel. 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 any 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 therefore would have no relevance.

Interrogatories 13 and 14

Interrogatories 13 and 14 seek information concerning percentages of *retail* customers that are either eligible for or that have 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.

To bolster its motion, FDN relies solely upon Order No. PSC-93-0652-PCO-WS. FDN's reliance is misplaced. In Order No. PSC-93-0652-PCO-WS, this Commission denied a Motion to Compel filed by the Office of Public Counsel. In explaining its decision, the Commission stated that "[t]he 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. Putting aside FDN's melodramatic hyperbole, the fact

remains that neither question is one of the issues to be decided in this proceeding and FDN's Motion to Compel must be denied.

III. CONCLUSION

FDN cannot rescue any of its deficient discovery requests through the "catch-all" language in Issue No. 1. FDN's vehement insistence on including the prefatory language "cost-causer, economic, and competitive principles" in Issue No. 1 does not transform a straightforward billing dispute arising under existing rates, terms, and conditions of an unambiguous contract into a second bite at the apple of the UNE cost docket. The legal standard for evaluating relevancy does not provide parties with an unfettered license to delve into matters that are both immaterial and inadmissible. The Agreement provides for nonrecurring disconnect fees. The Agreement contains rates for such fees. The Agreement states that FDN "shall pay" the rates therein. There is no link whatsoever between BellSouth's retail practices and the Agreement. There is no legal or regulatory vehicle that allows FDN to rewrite a contract after execution. Consequently, all of the information FDN seeks is completely immaterial to this proceeding, and the Commission should deny FDN's Motion to Compel.

Respectfully submitted this 30th day of July, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy White (BB)

NANCY B. WHITE
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

Meredith Mays (BB)

R. DOUGLAS LACKEY
MEREDITH E. MAYS
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0750

545146