

ORIGINAL

Matilda Sanders

From: Cara Gowan [CGowan@mail.fdn.com]  
 Sent: Thursday, September 02, 2004 3:07 PM  
 To: Filings@psc.state.fl.us  
 Cc: Nancy Sims; 'meredith.mays@bellsouth.com'; Lee Fordham; Matthew Feil; Scott Kassman  
 Subject: Docket No. 030829-TP

Please file the attached Prehearing Statement on behalf of FDN Communications in the following docket:

- 1) 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 Certificate of Service, and FDN Communications' Prehearing Statement, for a total of eleven (11) pages.

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

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

CMP \_\_\_\_\_  
 COM 3  
 CTR \_\_\_\_\_  
 ECR \_\_\_\_\_  
 GCL \_\_\_\_\_  
 OPC \_\_\_\_\_  
 MMS \_\_\_\_\_  
 RCA \_\_\_\_\_  
 SCR \_\_\_\_\_  
 SEC 1  
 OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE

09663 SEP-2 3

9/3/2004

FPSC-COMMISSION CLERK

ORIGINAL

September 3, 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 electronic filing in the above docket the Prehearing Statement,  
submitted by FDN Communications ("FDN").

If you have any questions regarding the enclosed, please call me at 407-447-6636.

Sincerely,

*s/ Scott A. Kassman*

Scott A. Kassman  
Assistant General Counsel  
FDN Communications

DOCUMENT NUMBER-DATE

09663 SEP-23

FPSC-COMMISSION CLERK

**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 2nd day of September, 2004.

BellSouth Telecommunications, Inc.  
Nancy B. White/Meredith Mays  
C/O Ms. Nancy H. Sims  
150 S. Monroe Street  
Suite 400  
Tallahassee, FL 32301-1556  
[nancy.sims@bellsouth.com](mailto:nancy.sims@bellsouth.com)  
[meredith.mays@bellsouth.com](mailto:meredith.mays@bellsouth.com)

Mr. Lee Fordham  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850  
[cfordham@psc.state.fl.us](mailto:cfordham@psc.state.fl.us)

*s/ Scott A. Kassman*

---

Matthew Feil  
Scott A. Kassman  
FDN Communications  
2301 Lucien Way, Ste. 200  
Maitland, FL 32751  
(407) 447-6636  
[mfeil@fdn.mail.com](mailto:mfeil@fdn.mail.com)  
[skassman@fdn.mail.com](mailto:skassman@fdn.mail.com)

ORIGINAL

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.	)	

**PREHEARING STATEMENT OF FDN COMMUNICATIONS**

Pursuant to Order No. PSC-04-0121-PCO-TP, issued February 4, 2004, as subsequently amended (“Order Establishing Procedure”), FDN Communications (“FDN”) hereby files its Prehearing Statement in the captioned dockets as follows:

**A. Known Witnesses**

FDN will call the following witnesses to offer direct and rebuttal testimony on the issues in this matter:

<u>Witness</u>	<u>Testimony</u>	<u>Subject Matter</u>
Panel of Dr. August H. Ankum & Sharon R. Warren	Direct & Rebuttal (revised)	All issues

FDN reserves the right to call witnesses to respond to Florida Public Service Commission (“Commission”) inquiries not addressed in direct or rebuttal testimony and to address issues not presently designated but that may be designated by the Prehearing Officer at the Prehearing Conference to be held on September 14, 2004.

**B. Known Exhibits**

DOCUMENT NUMBER-DATE  
09663 SEP-2 3  
FPSC-COMMISSION CLERK

FDN pre-filed Exhibits AHA-1 (CV of Dr. August H. Ankum) and AHA/SRW-1 (Dispute Analysis Spreadsheet). However, FDN reserves the right to identify and introduce additional exhibits during cross-examination of other parties' witnesses and re-direct of its own, if any, and, to the extent permitted by Commission rules and the Florida Rules of Civil Procedure, to identify and introduce the depositions of other parties' agents, officers and employees.

**C. Statement of Basic Position**

This matter concerns billing disputes arising from BellSouth's unlawful practice of assessing non-recurring charges ("NRCs") for disconnects in winback situations, as well as charges related to BellSouth's unilateral implementation of this Commission's *120-Day Order* (Order No. PSC-02-1311-FOF-TP), which among other things, set new UNE rates and reallocated certain wire centers to different rate zones. While BellSouth attempts to simplistically frame this matter as one in which FDN seeks to avoid the terms and conditions of its interconnection agreement, FDN maintains that this matter is not that simple.

FDN acknowledges that its interconnection agreement contains a NRC for disconnects. However, FDN maintains that it never agreed to such a charge in the case of customers porting their service back to BellSouth or to a carrier ordering through BellSouth, *e.g.*, a UNE-P carrier. The Commission never addressed the proper application of disconnect charges in any of its orders. Indeed, the Commission could not have addressed the application of disconnect charges in winback situations, *i.e.*, a "reverse hot cut," because BellSouth's UNE cost study does not contemplate winbacks but rather contemplates only "stand-alone" disconnects. Accordingly, the disconnect rate

in FDN's interconnection agreement applies only to what the Commission addressed -- stand-alone disconnects. Furthermore, FDN should not be required to pay BellSouth disconnect NRCs in winback situations because FDN is *not* the cost causer. Moreover, allowing BellSouth to charge disconnect NRCs in winback situations is tantamount to allowing BellSouth to over-recover its costs.

BellSouth's defense to FDN's UNE rate zone dispute is equally without merit. BellSouth claims it can unilaterally implement a Commission order, even though the order provides otherwise, simply because the parties' agreement states that BellSouth may provide FDN notice of certain changes to the terms of the agreement via BellSouth's Web site, and because the rate sheet in the parties' agreement list the URL for BellSouth's Web site. Just because BellSouth says so doesn't make it so.

The interconnection agreement provision which BellSouth relies on to flout the Commission's order was intended to address BellSouth changes in business rules. It was not intended (and FDN did not and does not now agree) that the provision on which BellSouth relies allows it to unilaterally amend the agreement upon a change in law, for which there is a separate provision. Indeed, the *120-Day Order* required parties to implement the Commission's order pursuant to change of law provisions.

Additionally, UNE rates and zones are not severable from one another. The two cannot be "mixed and matched" but rather can only exist together as originally approved by the Commission in order to be lawful. Yet, BellSouth played this "mix and match" game by severing the "old" (then-existing) zone structure from the "old" (then-existing) rates and applying the "old" UNE rates to the "new" UNE zones structure, resulting in rates that are *not* TELRIC-compliant. BellSouth's claim that it would be

“administratively burdensome and completely impractical” to lawfully implement the Commission’s zone changes is no excuse for BellSouth to intentionally disregard the law.

**D – F. Statement of Issues and Positions**

Below is a list of issues, as identified in the Commission’s Order Establishing Procedure and FDN’s tentative positions on those issues.

***Issue 1: In consideration of appropriate cost-causer, economic, and competitive principles, under what circumstances should BellSouth be allowed to assess a disconnect charge to FDN?***

**FDN:** BellSouth should not be allowed to assess disconnection NRCs to FDN in winback situations. BellSouth should only be allowed to assess disconnection NRCs to FDN in the case of “stand-alone” disconnects, *e.g.*, where the customer moves outside of the FDN and BellSouth footprints, or disconnects one line of a multi-line account. BellSouth is the cost-causer in the case of disconnects that occur as a result of a winback, not FDN. The disconnection is for the benefit of BellSouth and its new customer, not FDN. And, even if FDN were to receive some tangential benefit from the disconnection, the Commission has stated that NRCs are only appropriate where the CLEC is the *sole* beneficiary of a particular activity. Furthermore, to allow BellSouth to charge FDN for disconnects that occur as a result of a customer migration, *e.g.*, a winback, would be to permit BellSouth to over-recover its costs, which would effectively force FDN to finance its own demise.

**Issue 2:** *In light of Order Nos. PSC-01-1181-FOF-TP and PSC 02-1311-FOF-TP and the parties' interconnection agreements, does BellSouth appropriately assess disconnect charges when BellSouth issues an order for an FDN customer to port out?*

FDN: No. The Commission never addressed the proper application of disconnect charges in either of those orders. In fact, Commission could not have addressed the application of disconnect charges in winback situations because BellSouth's UNE cost study does not contemplate winbacks but rather contemplates only "stand-alone" disconnects. FDN maintains that the disconnect rate in its interconnection agreement applies only to what the Commission addressed -- stand-alone disconnects -- which FDN pays to BellSouth in such cases.

**Issue 3:** *In order to implement changes in rate zone designations, is it necessary for the parties to negotiate an amendment to their interconnection agreement?*

FDN: Yes. First, the Commission's *120-Day Order* expressly states that the rates are only effective once interconnection agreements are amended accordingly. It is manifest that UNE rates and zones are not severable from one another. The two cannot be "mixed and matched" but rather can only exist together as originally approved by the Commission in order for the UNE rates to be lawful. Further, the interconnection agreement provision which BellSouth relies upon was intended to allow BellSouth the flexibility to change its business rules and processes without having to amend every CLEC's interconnection agreement. It was not intended (and FDN did not and does not now agree) that the provision on which

BellSouth relies allows it to unilaterally amend the agreement upon a change in law. In fact, the agreement has a separate provision which governs in the event of a change in law, such as is the case here where the Commission ordered new rates and changed the allocation of wire centers and the zones to which those wire centers correspond.

***Issue 4: In light of policy considerations, the parties' interconnection agreements, Order Nos. PSC-01-1181-FOF-TP and PSC 02-1311-FOF-TP, any other applicable regulatory requirements, can BellSouth implement changes in rate zone designations without implementing any associated changed rates?***

**FDN:** No. UNE rates and UNE rate zones cannot be “mixed and matched” but rather can only exist together as originally approved by the Commission in order for the UNE rates to be lawful. In other words, rates approved for one zone structure but applied to a different zone structure result in rates that are not TELRIC-compliant. Besides, the parties' agreement expressly provides that an amendment is required upon a change in law, which is consistent with what the Commission ordered in its *120-Day Order*. Lastly, BellSouth's inadequate billing systems, which are frequently cited here and in other proceedings as an excuse for BellSouth's failings, are in fact not an excuse for BellSouth to blatantly disregard the law.

***Issue 5: Given the resolution of Issues 1, 2, and 3 above, what remedies are appropriate?***

**FDN:** The appropriate remedies are those expressly provided for in FDN's amended Complaint, which include (1) a Commission holding that BellSouth's practice of assessing disconnect NRCs upon customer

migrations/winbacks is inconsistent with industry cost-causation principle, anticompetitive, and unfair; (2) a Commission holding that BellSouth is prohibited from assessing disconnect NRCs to recover the cost of disconnecting loops for customers that port back to BellSouth or a carrier ordering through BellSouth; and (3) for BellSouth to credit FDN for the disconnect NRCs and for the UNE rates at issue. In fact, BellSouth has already credited FDN for disconnect NRCs on its Q accounts (non-designed loops), which FDN contends is an admission that BellSouth wrongfully applied these charges in winback situations. FDN believes that the final credit amounts may be established through a cooperative reconciliation process.

***Issue 6: Should all or any portion of the parties' claims or counterclaims be barred by the doctrines of res judicata or collateral estoppel?***

**FDN:** No. As FDN has maintained throughout this proceeding, winbacks were largely unheard of at the time of UNE cost proceedings and thus FDN could not have raised the issue. And as FDN has previously noted, BellSouth's cost study as filed in that proceeding does not contemplate disconnects associated with winbacks, *i.e.*, "reverse hot cuts" and therefore the Commission also did not and could not have addressed the application of disconnects in winback situations. In response to BellSouth's argument that FDN could have raised the disconnect issue in Docket No. 020119, FDN, in fact, tangentially raised the issue but the Commission failed to address the matter altogether. Moreover, the Florida

Supreme Court has held that differences between courts and administrative agencies necessitate different application of principles of finality and mandate greater caution in applying those principles to administrative decision.

**G. Stipulated Issues**

The parties have entered into no stipulations at this time. FDN is willing to stipulate into the record the deposition transcripts and exhibits of all witnesses, as well as previously filed discovery responses, the parties' interconnection agreements, and the following Commission orders: PSC-01-1181-FOF-TP, PSC-02-1311-FOF-TP, and PSC-98-0604-FOF-TP. FDN is unwilling, however, to stipulate to resolving this matter without a hearing.

**H. Pending Motions**

FDN's Motion for Reconsideration and/or Clarification of the Prehearing Officer's Order on Motion to Compel is currently pending. To the extent that BellSouth plans to file a Motion for Summary Final Disposition, FDN counters that there are several issues of material fact for the Commission to consider. FDN will respond to any such motion filed by BellSouth in detail at the necessary time and as provided for under Florida law.

**I. Pending Confidentiality Issues**

FDN has no confidentiality claims or requests pending at the time of serving this filing.

**J. Order Establishing Procedure Requirements**

To FDN's knowledge, at the time of serving this filing, there are no requirements of the Order Establishing Procedure that cannot be complied with.

**K. Decisions or Pending Decisions**

At the time of serving this filing, FDN is not aware of any decision, or pending FCC or court decision, that has or may preempt or otherwise impact the Commission's ability to resolve any of the above issues.

RESPECTFULLY SUBMITTED, this 2nd day of September, 2004.

*s/ Scott A. Kassman*

---

Matthew Feil  
Scott Kassman  
FDN Communications  
2301 Lucien Way  
Suite 200  
Maitland, FL 32751  
(407) 447-6636  
skassman@mail.fdn.com