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-04-0926-PHO-TP ISSUED: September 22, 2004

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on September 14, 2004, in Tallahassee, Florida, before Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer.

APPEARANCES:

NANCY B. WHITE, Esquire, and MEREDITH E. MAYS, Esquire, Suite 4300, 675 W. Peachtree Street, NE, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc. (BST).

MATTHEW FEIL, Esquire, and SCOTT KASSMAN, Esquire, 2301 Lucien Way, Suite 200, Maitland, Florida 32751
On behalf of FDN Communications (FDN)

LEE FORDHAM, Esquire, Office of the General Counsel, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399
On behalf of the Florida Public Service Commission.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Formal hearing proceedings before the Florida Public Service Commission are governed by Chapter 120, Florida Statutes, and Chapters 25-22, 25-40, and 28-106, Florida Administrative Code. To the extent provided by Section 120.569(2)(g), Florida Statutes, the Florida Evidence Code (Chapter 90, Florida Statutes) shall apply. To the extent provided by Section 120.569(2)(f), Florida Statutes, the Florida Rules of Civil Procedure shall apply.

Rule 28-106.211, Florida Administrative Code, specifically provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of this

case. This Order is issued pursuant to that authority. The scope of this proceeding shall be based upon the issues raised by the parties up to and during the prehearing conference, unless modified by the Commission or Prehearing Officer.

II. CASE BACKGROUND

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. On November 21, 2003, FDN filed its Motion to Amend Complaint, along with its Amended Complaint. That Motion was granted by Order PSC-03-1391-PCO-TP, filed December 10, 2003. On December 19, 2003, BellSouth filed its Answer and Counterclaim to FDN's Amended Motion. This matter is currently scheduled for an administrative hearing on October 6, 2004.

III. ATTENDANCE AT HEARING: PARTIES AND WITNESSES

Unless excused by the Presiding Officer for good cause shown, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date that:

(i) all parties agree that the witness will not be needed for cross examination; and
(ii) all Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness' testimony.

IV. PENDING MOTIONS

FDN's Motion for Reconsideration and/or Clarification of the Prehearing Officer's Order on Motion to Compel is currently pending.

V. PROPOSED STIPULATIONS

The parties have entered into no stipulations at this time.

VI. OPEN PROCEEDINGS AND PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Confidential information should be treated in accordance with the provisions of the Order Establishing Procedure previously issued in this docket.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing by the Commission.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing, unless approved by the Prehearing Officer for good cause shown. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be

provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files.

VII. PENDING CONFIDENTIALITY MATTERS

There are no pending requests for confidential classification at this time. There are, however, the following claims of confidentiality:

Claim of Confidentiality filed December 19, 2003, for Document No. 13239-03

Should this information be entered into the record at hearing, parties should be cognizant of the applicability of Rule 25-22.006(8)(b), Florida Administrative Code.

VIII. OPENING STATEMENTS

Opening Statements, if any, shall not exceed 20 minutes per party.

IX. WITNESSES: OATH, PREFILED TESTIMONY, EXHIBITS, AND CROSS-EXAMINATION

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read. However, all testimony remains subject to appropriate objections. Upon insertion of a witness' testimony into the record, exhibits appended thereto may be marked for identification.

Following affirmation that the witness has been sworn, the witness shall then be tendered for cross-examination by all parties and staff. Commissioners may also pose questions as they deem appropriate. Witnesses are reminded that, on cross examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and staff have had the opportunity to object and cross-examine, exhibits may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

X. ORDER OF WITNESSES

Witnesses will be heard in the following order except that where a witness has submitted both direct and rebuttal testimony, his or her direct and rebuttal testimony will be heard at the same time.

Witness	Proffered By	Issue Nos.
Direct and Rebuttal		
Dr. August H. Ankum (Revised) *	FDN	All Issues
Sharon R. Warren (Revised) *	FDN	All Issues
Cynthia A. Clark (Including Supplemental)	BST	Issue 5
Carlos Morillo (Revised)	BST	All Issues

* Will testify as a panel

XI. EXHIBITS

The following lists the exhibits proffered by parties and staff prior to the hearing. However, parties and staff reserve the right to identify additional exhibits for the purpose of cross-examination during the hearing.

Witness	Proffered By	I.D. No.	Description
Cynthia A. Clark	BST	(CAC – 1)	Confidential Billing Dispute Workpapers

Witness	Proffered By	I.D. No.	Description
Carlos Morillo	BST	(KKB – 1)	Carrier Notification Letter – Geographically Deaveraged UNE Rate Zones
Carlos Morillo	BST	(CM – 1)	Emails between BellSouth and FDN regarding UNE Rate Zones
Dr. August H. Ankum	FDN	(AHA – 1)	CV of Dr. August H. Ankum
Sharon R. Warren	FDN	(SRW – 1)	Dispute Analysis Spreadsheet

XII. BASIC POSITIONS

BST: This billing dispute arose because FDN seeks to avoid its contractual obligations concerning nonrecurring disconnection fees as well as charges relating from the implementation of deaveraged UNE rate zones. With respect to both disputes, FDN's positions are without basis.

Concerning disconnection fees, neither the relevant interconnection agreements between the parties nor prior Commission orders allow FDN to avoid paying rates. The parties' current contract states that FDN shall pay the rates – which include disconnect rates – contained in the Agreement. These disconnect charges resulted from the rate structure this Commission established in Order No. PSC-98-0604-FOF-TP, which structure continued in Order No. PSC-01-1181-FOF-TP. To the extent that FDN had any concerns about when disconnection fees apply, FDN could and should have raised any such concerns in connection with Docket No. 990649-TP. Likewise, FDN had a second opportunity to address disconnection fees in its dispute over BellSouth's promotional tariffs in Docket No. 020119-TP. FDN's failure to resolve this matter in either docket should preclude its claims now.

FDN's allegations about BellSouth's implementation of the Commission ordered geographically deaveraged UNE rate zones are likewise without merit. BellSouth is contractually authorized to provide FDN notice via internet postings of certain contract changes. The agreement also refers to BellSouth's interconnection website for the central office designations associated with state commission ordered geographically deaveraged zones resulting from Order No. PSC-02-1311-FOF-TP ("120 Day Order"). BellSouth provided FDN with notice of its implementation of this Commission's geographically

deaveraged zones consistent with its contractual obligations. Because zone designations are subject to change by order of the state commission, which orders BellSouth must comply with, BellSouth does not contractually agree that certain UNE rate zones will always contain specified central offices until agreements are amended. BellSouth has at all times charged FDN the rates applicable to the geographically ordered zones established by the Commission. FDN's claim that the *zones* can only be changed by amendment to interconnection agreements is not only wrong, it is also illogical. Applying FDN's logic, when a Commission changes rate zones BellSouth would only implement the rate zones on a rolling basis as agreements are amended, which would be administratively burdensome and completely impractical. Instead, BellSouth has at all times charged FDN the agreed upon contractual rate applicable to the UNE products FDN orders.

BellSouth has rendered service to FDN, pursuant to the rates, terms and conditions of theapplicable interconnection agreements between the parties, however FDN has unjustifiably refused to pay the full amounts due for such services. FDN should be required to compensate BellSouth, including late payment charges. The final amount due to BellSouth should be established after the parties have jointly participated in a collaborative billing reconciliation effort following a Commission decision on the parties' dispute.

FDN: 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.

STAFF: Staff has no position at this time.

XIII. ISSUES AND POSITIONS

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

BST: BellSouth is authorized, pursuant to the parties' interconnection agreements and Commission orders, to assess a nonrecurring disconnect charge each time it disconnects UNE-loops and cross connects. FDN contractually agreed to pay disconnect charges without limitation.

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.

STAFF: Staff has no position at this time.

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?**

BST: Yes. BellSouth properly assesses disconnection charges to FDN. If FDN desired to limit the application of disconnect charges, it should have negotiated such terms before entering into agreements that do not make any such distinction.

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.

STAFF: Staff has no position at this time.

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?**

BST: No. The agreements between BellSouth and FDN never required a contract amendment to implement UNE rate zone changes. Instead, the agreements allow internet notifications of certain changes and also contain a reference to a BellSouth website that lists the wire center designation ordered by state

commissions. When a state commission order requires changes to the zone designation for a wire center, BellSouth updates its billing systems to implement the commission's order and issues a carrier notification letter informing CLECs of the change in wire center designation. On October 10, 2002, BellSouth sent a Carrier Notification letter advising CLECs of the implementation of the rate zone changes resulting from the Commission's *120-day UNE Order*. BellSouth's website was updated accordingly. Pursuant to the parties' agreements, once the website modification occurred BellSouth was contractually authorized to bill FDN the rates applicable to the particular UNE zone.

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.

STAFF: Staff has no position at this time.

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

BST: Yes. There are no policy considerations or Commission orders that preclude the implementation of UNE rate zone changes that override the applicable language in the parties' agreements. The agreements authorize BellSouth to implement rate zone redesignations without the need for a contract amendment. Moreover, BellSouth's billing systems are not capable of having a single wire center assigned to multiple rate zones. To implement the *120-day UNE Order*, the necessary changes to the wire center designation became effective on the specific day the redesignation information was entered into the billing system. Rate zone designations are established pursuant to Commission order and are applicable to

all CLECs for the billing of their individually negotiated deaveraged rate elements.

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?**

BST: The appropriate remedy in this proceeding is to require FDN to promptly submit payment to BellSouth for all outstanding disconnect and UNE rate zone charges, along with late payment fees. This amount will need to be established through a cooperative billing reconciliation effort between the parties.

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.

STAFF: Staff has no position at this time.

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

BST: Yes. FDN was a party to the UNE cost proceedings and had ample opportunity to address its position regarding nonrecurring disconnect charges in that docket, as well as in Docket No. 020119. FDN's failure to pursue such options given the parties' unambiguous contract language should bar its claims now.

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.

STAFF: Staff has no position at this time.

XIV. POST-HEARING PROCEDURES

The Commission has the authority and discretion to render a bench decision at the time of the hearing or to render a decision without any post hearing submissions by the parties. Such a determination may be with or without the oral or written recommendation of the Commission staff, at the Commission's discretion.

If the Commission does not make a bench decision at the hearing, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 75 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 75 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together

total no more than 30 pages and shall be filed at the same time, unless modified by the Presiding Officer.

It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 22nd day of September, 2004

RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

(SEAL)

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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.