

**ATTACHMENT B**

**BellSouth Telecommunications, Inc.  
FPSC Docket No. 020252-TP  
Request for Confidential Classification  
Page 1 of 1  
4/24/02**

**REQUEST FOR CONFIDENTIAL CLASSIFICATION OF BELLSOUTH  
TELECOMMUNICATIONS, INC.'S ANSWER AND COUNTERCLAIM TO  
FLORIDA DIGITAL NETWORK'S COMPLAINT AND REQUEST FOR  
EMERGENCY RELIEF AS FILED ON APRIL 3, 2002 IN  
FLORIDA PUBLIC SERVICE  
COMMISSION DOCKET 020252-TP**

**2 Redacted Copies for Public Disclosure**

**REDACTED**

DOCUMENT NUMBER-DATE

04539 APR 24 08

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of Florida Digital Network, ) Docket No. 020252-TP  
Inc. Against BellSouth Telecommunications, )  
Inc. and Request for Emergency Relief ) Filed: April 3, 2002  
)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
ANSWER AND COUNTERCLAIM TO FLORIDA DIGITAL NETWORK'S  
COMPLAINT AND REQUEST FOR EMERGENCY RELIEF**

1 BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this  
2 Answer and Counterclaim to Florida Digital Network's ("FDN") Complaint and  
3 Request for Emergency Relief Requiring BellSouth to Process Service Orders  
4 Pending Resolution of Disputes ("Complaint"). The Florida Public Service  
5 Commission ("Commission") should summarily deny and/or dismiss FDN's  
6 requests for relief and should grant BellSouth's Counterclaim.

**INTRODUCTION**

7 BellSouth and FDN are before this Commission because of one simple  
8 reason: FDN is not and has not paid its bills on time. As of March 29, 2002,  
9 FDN owes BellSouth in CRIS (UNE and resale) and CABS  
10 (access) charges. Of this amount, is for current charges while  
11 ( for CRIS; for CABS) is past due  
12 and undisputed.<sup>1</sup>

13 Despite not paying its bills, FDN has allegedly experienced a 25 percent  
14 growth in access lines since August 2001. See Docket 990649A-TP, Tr. Vol. V.  
15 p. 649, ln. 16 - p. 650, ln. 16, attached hereto as Exhibit A. (On cross-  
16 examination, Mr. Gallagher, FDN's CEO, represented that FDN gained 20,000

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1 access lines since August 2001). Thus, it is clear that, unless FDN is giving  
2 service away, it is receiving increased revenue and purchasing additional  
3 services from BellSouth but, in turn, not paying BellSouth for those services.<sup>2</sup>

4 In addition, FDN is incurring, on average, monthly billings totaling

5 As a result, because FDN is not paying its current charges, the total  
6 amount that FDN owes BellSouth for past due amounts increases every month.<sup>3</sup>

7 At the same time, independent evidence suggests that FDN appears to be  
8 experiencing a period of financial distress. This evidence includes (1) FDN's  
9 Dunn and Bradstreet's rating, which is 4A3 (with a scale of 1-4, 1 being the best  
10 and 4 being the worst); and (2) FDN's Dunn and Bradstreet's PAYDEX score,  
11 which is 53 (payments to vendors average 22 days beyond terms). See March  
12 21, 2002 Letter of Sandra Cetti, attached hereto as Exhibit B. Thus, FDN  
13 continues to incur additional charges without any visible signs that it can pay its  
14 current charges, let alone the growing past due amount.

15 Unfortunately, in today's economic times, FDN's recent payment history  
16 and apparent financial distress is not something new for BellSouth.<sup>4</sup> From  
17 January 2001 to the present, 68 carriers who purchased services from BellSouth  
18 have gone bankrupt or out of business, representing approximately \$103 million  
19 in uncollectible charges. In fact, with one recent bankruptcy filing, BellSouth was  
20 unable to recover over \$20 million in undisputed, legitimately owed charges.

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<sup>1</sup> This figure does not include the amount in CABS billings that FDN has disputed. FDN has not disputed any CRIS billings.

<sup>2</sup> Even if FDN was giving telecommunications service away, FDN would still not be excused from paying its bills.

<sup>3</sup> For instance, since January 2002, FDN's past due billings have increased approximately \$1 million per month.

<sup>4</sup> The recent downturn in the economy has effected both ALECs and ILECs.

1 BellSouth, like any other business, expects and requires payment for services  
2 received on a timely basis in order to survive. There is no doubt that FDN  
3 expects the same from its customers.

4 With this Answer and Counterclaim, BellSouth, among other things, is  
5 respectfully requesting that the Commission (1) recognize that FDN owes  
6 BellSouth in undisputed CABS and CRIS billings; (2) require FDN  
7 to pay all past due and undisputed amounts to BellSouth immediately; and (3)  
8 require FDN to place all disputed amounts in escrow.

#### ANSWER

9 Turning to the Complaint, BellSouth now answers the enumerated  
10 paragraphs, on a paragraph-by-paragraph basis, of the Complaint.

11 1. BellSouth admits that this Commission has the authority under  
12 Florida statutes and the Interconnection Agreement to resolve billing disputes  
13 arising out of FDN's purchase of services from BellSouth under the  
14 Interconnection Agreement and BellSouth's Florida intrastate tariffs. BellSouth  
15 denies that this Commission has jurisdiction over billing disputes arising out of  
16 FDN's purchase of interstate services from BellSouth's FCC Tariff No. 1.

17 2. BellSouth denies the allegations sets forth in Paragraph 2 of the  
18 Complaint.

19 3. BellSouth admits that FDN is certificated as an Alternative Local  
20 Exchange Company ("ALEC") in the State of Florida. BellSouth denies the  
21 remaining allegations in Paragraph 3 of the Complaint for lack of knowledge.

4. The allegations of Paragraph 4 of the Complaint do not require a response from BellSouth.

5. BellSouth admits the allegations of Paragraph 5.

6. BellSouth admits that (1) the Commission approved the current Interconnection Agreement on September 22, 1998 in Docket No. 980908-TP, Order No. PSC-98-1327-FOF-TP; (2) the Commission has approved 7 amendments to the Interconnection Agreement, and (3) FDN and BellSouth are currently arbitrating the terms of a new Interconnection Agreement. BellSouth denies the remaining allegations in Paragraph 6 of the Complaint.

7. BellSouth denies the allegations of Paragraph 7 of the Complaint.

8. BellSouth denies the allegations of Paragraph 8 of the Complaint.

9. BellSouth denies the allegations of Paragraph 9 of the Complaint, except to admit that the Interconnection Agreement contains a provision that addresses the reconciliation of billing disputes. The Interconnection Agreement speaks for itself and is the best evidence of its terms and conditions.

10. BellSouth denies the allegations of Paragraph 10 of the Complaint, except to admit that the dispute resolution process set forth in the Interconnection Agreement speaks for itself and is the best evidence of its terms and conditions. To the extent FDN is alleging that neither FDN nor BellSouth followed the required process for resolving billing under the Interconnection Agreement, it is denied. BellSouth has complied with the provisions of the Interconnection Agreement in resolving all billing disputes that were the subject of a "Notice of Discrepancy", as required by the Interconnection Agreement.

11. BellSouth denies the allegations of Paragraph 11 of the Complaint, except to admit that the Interconnection Agreement speaks for itself and is the best evidence of its terms and conditions.

12. BellSouth denies the allegations of Paragraph 12 of the Complaint, except to admit that FDN has submitted hundreds of written "Notices of Discrepancy" pursuant to the Interconnection Agreement. As a result of these Notices, BellSouth has credited FDN certain amounts when the disputes are upheld and has also denied certain disputes, without any further objection by FDN.

13. BellSouth denies the allegations of Paragraph 13, except to admit that BellSouth sent FDN, via certified mail, a demand letter dated January 29, 2002 for \$2,587,210.09, which is attached hereto as Exhibit C. That letter speaks for itself and is the best evidence of its terms and conditions.

13a.<sup>5</sup> BellSouth denies the allegations of Paragraph 13a, except to admit that the January 29, 2002 demand letter and the Interconnection Agreement speak for themselves and are the best evidence of their terms and conditions. In addition to this general denial, BellSouth specifically denies any allegation that the January 29, 2002 demand letter is defective, because FDN, as evidenced by the fact that it referenced said letter in its Complaint, premised its Complaint on said letter, made approximately \$2.5 million in payments pursuant to that letter, and negotiated with BellSouth about the amounts in the demand letter, received the demand letter and has acquiesced to it.

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<sup>5</sup> FDN's Complaint contains two paragraphs identified as Paragraph 13. For the purpose of this Answer, BellSouth refers to the second Paragraph 13 as Paragraph 13a.

Moreover, BellSouth specifically denies FDN's allegations that it submitted a "Notice of Discrepancy" for a \$63,596.00 collocation charge ("Collocation Dispute") in October 2001. BellSouth has no evidence that FDN submitted said dispute at that time. In fact, BellSouth's records establish that FDN first submitted the Notice of Discrepancy for the Collocation Dispute on February 1, 2002, which was after BellSouth sent FDN the January 29, 2002 demand letter.

14. Regarding Paragraph 14 of the Complaint, BellSouth admits that, BellSouth and FDN began discussions regarding the January 29, 2002 demand letter in the afternoon of February 27, 2002 when BellSouth initiated said discussions. BellSouth specifically denies, however, any allegation that the parties discussed any disputed amounts in these initial discussions. Rather, the discussions centered solely on when and if FDN would satisfy the January 29, 2002 demand letter. Without contesting or challenging any of the rights asserted by BellSouth in the January 29, 2002 demand letter or of the amount set forth in that demand letter, FDN informed BellSouth on February 27, 2002 that it would make a partial payment on February 28, 2002 – the due date set forth in the demand letter.

BellSouth denies FDN's allegations regarding the time period in which FDN made partial payments to BellSouth, except to admit that on February 28, 2002, BellSouth received a payment of \$97,345.02, leaving an outstanding balance of \$2,489,865.07. Further, BellSouth admits that on March 1, 2002, BellSouth received two payments from FDN totaling \$1,017,843.41, leaving an outstanding balance of \$1,472,021.66. Because negotiations were continuing

and in the spirit of cooperation, BellSouth did not disconnect or terminate FDN's services on February 28, 2002 or March 1, 2002, notwithstanding FDN's failure to fully comply with the demand letter.

BellSouth denies any remaining allegations of Paragraph 14 of the Complaint.

15. BellSouth denies the allegations contained in Paragraph 15 of the Complaint, except to admit that, as of March 1, 2002, FDN did not satisfy the January 29, 2002 demand letter. BellSouth also admits that, within its rights under the Interconnection Agreement, BellSouth's FCC Tariff No. 1, and BellSouth's Florida E Tariff<sup>6</sup>, BellSouth stopped processing new service orders requested by FDN for those services that are billed through CABS on February 28, 2002 because FDN failed to satisfy the January 29, 2002 demand letter. The refusal to process FDN's new CABS orders did not disrupt service to FDN's current customer base. In addition, BellSouth did not and has not, up to this time,<sup>7</sup> stopped processing orders for services that are billed through CRIS, which includes resale orders, UNE-P orders, and SL-1 loop orders.

BellSouth denies any remaining allegations of Paragraph 15 of the Complaint.

16. BellSouth denies the allegations of Paragraph 16 of the Complaint, except to admit that the parties continued to negotiate several issues, including FDN's failure to cure the January 29, 2002 demand letter, during the weekend of

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<sup>6</sup> See Section 20.1.1, Interconnection Agreement, attached hereto as Exhibit D; BellSouth's FCC Tariff No. 1 at Section 2.1.8, attached hereto as Exhibit E; BellSouth's Florida E Tariff at Section E2.1.8, attached hereto as Exhibit F.



March 2-3, 2002. It was BellSouth's understanding, based on discussions over that weekend that FDN agreed to wire to BellSouth the balance owed under the January 29, 2002 demand letter, or \$1,472,021.66, by 9:00 a.m. on Monday, March 4, 2002. BellSouth specifically denies any allegation that BellSouth agreed that the demand letter would be cured by a lesser payment of \$1,210,446.07.

17. BellSouth denies the allegations contained in Paragraph 17, except to admit that, contrary to FDN's statements over the March 2-3, 2002 weekend, FDN wired BellSouth \$1,210,446.07 at the close of business on March 4, 2002, leaving a balance owed of \$261,575.59. Despite the fact that FDN had still not complied with the January 29, 2002 demand letter five days after BellSouth had the right to terminate FDN, BellSouth, in the spirit of cooperation, did not disconnect or terminate FDN's service.

BellSouth further denies any allegation that BellSouth informed FDN on March 5, 2002 that it still owed \$207,193.46 under the January 29, 2002 demand letter. The amount that BellSouth informed FDN that it still owed was \$261,575.59. Further, in the parties' discussions on March 5, 2002, FDN agreed to wire \$426,798.31 to BellSouth on March 6, 2002. This amount included (1) \$165,222.72 for past due and undisputed CRIS billings subject to a February 18, 2002 demand notification; and (2) \$261,575.59 to satisfy the remainder owed under the January 29, 2002 demand letter for undisputed and past due CABS billings. Contrary to FDN's previous statements and without any explanation, on

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<sup>7</sup> While BellSouth has yet to stop processing CRIS orders, BellSouth reserves the right to exercise such a stoppage or any other rights available to it under the Interconnection Agreement

1 March 6, 2002, FDN wired to BellSouth only \$372,856.12. In a fax FDN sent to  
2 BellSouth, FDN requested that \$165,662.66 be applied to the outstanding CRIS  
3 bill and that \$207,293.46 be applied to the remaining owed under the January 29,  
4 2002 demand letter. As a result, the above payment cured the delinquency on  
5 the CRIS billing but left FDN \$54,328.13 short on the CABS billing.

6 BellSouth denies any remaining allegations of Paragraph 17 of the  
7 Complaint.

8 18. BellSouth denies the allegations contained in Paragraph 18 of the  
9 Complaint, except to admit that, by March 6, 2002, or seven days after FDN was  
10 required to cure the January 29, 2002 demand letter and seven days after  
11 BellSouth had the right to disconnect FDN, FDN made several partial payments  
12 to BellSouth that totaled \$2,532,827.96, which was still short of the amount  
13 necessary to comply with the January 29, 2002 demand letter. BellSouth also  
14 admits that, notwithstanding these payments, BellSouth refused to process  
15 FDN's CABS orders because, from the expiration of the notice period on  
16 February 28, 2002 to March 6, 2002, BellSouth determined that in  
17 undisputed CABS billings became past due.<sup>8</sup> Soon thereafter, BellSouth  
18 determined that an additional undisputed in CABS billings became  
19 past due. See March 14, 2002 Demand Letter, attached hereto as Exhibit H.  
20 Accordingly, a total of in undisputed CABS billing had become  
21 past due since February 28, 2002.

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for FDN's failure to timely pay undisputed and past due CRIS bills.

<sup>8</sup> In fact, on that same date, BellSouth sent FDN a second demand letter, notifying FDN that a total of undisputed CRIS and CABS billings were over due and requesting that

1 If FDN had satisfied the full amount of the January 29, 2002 demand letter  
2 on February 28, 2002, March 1, 2002, on March 4, 2002 as promised, or even on  
3 March 5, 2002, BellSouth would have restored FDN's ordering capabilities for  
4 CABS orders at that time. Indeed, because FDN satisfied the amount that was  
5 owed and past due for CRIS billings on March 6, 2002, which was within the time  
6 specified in the February 18, 2002 CRIS notice, BellSouth did not stop  
7 processing CRIS orders, notwithstanding the fact that BellSouth subsequently  
8 determined that FDN owed an undisputed CRIS billings.<sup>9</sup>

9 BellSouth denies any allegation that FDN included a portion of the  
10 Collocation Dispute in the amount paid to BellSouth "because [FDN] thought BST  
11 would lift the embargo after receiving all requested amounts." Complaint at 9  
12 n.21. At no time did BellSouth inform FDN that it would process FDN's orders if  
13 FDN paid something less than the full amount set forth in the January 29, 2002  
14 demand letter. In addition, prior to March 6, 2002, FDN provided no explanation  
15 as to why it did not pay the full amount of the demand letter as promised. In fact,  
16 based on FDN's payment behavior and apparent stalling tactics, FDN's claim that  
17 it paid less than the full amount of the January 29, 2002 demand letter because  
18 of the Collocation Dispute appears to be nothing more than a convenient post-  
19 hoc rationalization for FDN's failure to comply with its March 5, 2002 commitment  
20 to pay the entire amount owed.

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FDN pay that amount by April 5, 2002. See March 6, 2002 demand letter, attached hereto as Exhibit G.

<sup>9</sup> In addition to the undisputed CABS billings, this amount is the subject of the March 6, 2002 and March 14, 2002 demand letters and BellSouth reserves the right to exercise any of its rights under the Interconnection Agreement for FDN's failure to pay this amount, including but not limited to the termination of service.

19. BellSouth denies the allegations of Paragraph 19, except to admit that BellSouth sent FDN a letter dated March 6, 2002 in which it notified FDN that it was in further default of the Interconnection Agreement and/or applicable tariffs for failing to pay \$2,248,961.52 in CRIS and CABS billings. See Exhibit G. The March 6, 2002 demand letter speaks for itself and is the best evidence of its terms and conditions. In addition, BellSouth specifically denies any allegation that the March 6, 2002 demand letter was defective, because FDN, as evidenced by the fact that FDN referenced said letter in its Complaint, premised its Complaint on said letter, and attached said letter to its Complaint, received and acknowledged the demand letter.

BellSouth also denies any allegation that, by requiring FDN to pay all sums that had become past due since the issuance of the March 6, 2002 demand letter in addition to the \$2,248,961.52, BellSouth is somehow seeking to negate FDN's right to withhold payment of disputed amounts or that BellSouth is attempting to circumnavigate the Interconnection Agreement. If FDN had submitted a written, good-faith "Notice of Discrepancy" for any amount that had become past due since the issuance of the demand letter, BellSouth would not, pursuant to the Interconnection Agreement, consider this disputed amount to be past due until the dispute is resolved.<sup>10</sup> Further, there is nothing in the Interconnection Agreement that prohibits BellSouth from demanding payment from FDN for all amounts that are undisputed and that have become past due

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<sup>10</sup> It should be noted that taking this position and complying with the terms of the Interconnection Agreement has allowed other carriers to manipulate and abuse the dispute resolution procedure in order to avoid paying legitimate charges, notwithstanding the carrier's obligation to submit only

1 since the issuance of the demand letter. Indeed, such a requirement is  
2 necessary to avoid the scenario it currently finds itself in – repeatedly issuing  
3 demand letters month after month because an ALEC pays only the amount in the  
4 demand letter to avoid termination of service. Such a scenario results in ALECs,  
5 such as FDN, effectively obtaining free or reduced service because they only pay  
6 the amount set forth in the demand letter to avoid termination of services.

7 20. BellSouth denies the allegations of Paragraph 20 of the Complaint,  
8 except to admit that, BellSouth and FDN had a conference call on March 8, 2002.  
9 BellSouth also admits that, because additional CABS amounts became past due  
10 since the January 29, 2002 demand letter, BellSouth would not process FDN's  
11 CABS orders. BellSouth informed FDN that it would process FDN's CABS  
12 orders if BellSouth could be assured that FDN could and would pay all  
13 undisputed amounts that were past due. Accordingly, BellSouth proposed that,  
14 FDN put a sum certain into escrow, pending resolution of the remaining disputes  
15 and the parties continued negotiations. FDN rejected this offer and refused to  
16 put any amounts into deposit or escrow.

17 21. BellSouth denies the allegations of Paragraph 21 of the Complaint.  
18 BellSouth's decision to stop processing FDN's CABS orders as a result of FDN's  
19 failure to pay in undisputed CABS billings is authorized by both  
20 the Interconnection Agreement, BellSouth's FCC's Tariff No. 1, and BellSouth's  
21 Intrastate E Tariff. Specifically, the FCC Tariff as well as the Florida E Tariff  
22 expressly provide that BellSouth can refuse any requests for service if a carrier

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good faith disputes. As set forth in greater detail in the Counterclaim infra, FDN appears to be doing just that in this proceeding.

fails to become current on past due amounts, after 30 days written notice. See FCC Tariff at 2.1.8(A), Exhibit E; Florida E Tariff at E2.1.8, Exhibit F. Thus, clearly under the FCC Tariff and the Florida E Tariff, BellSouth has the right to refuse to process FDN's CABS orders.

Similarly, Section 20.1.1. of the Interconnection Agreement provides that, if a breaching party fails to cure a breach for nonpayment within 30 days of receiving notice of said breach, "[t]he nonbreaching party shall be entitled to pursue all available legal and equitable remedies for such breach." In addition, the January 29, 2002 demand letter explicitly stated that "payments are expected for any current bills that may become due." See Exhibit C. Accordingly, because FDN failed to pay all undisputed amounts that became due since the issuance of the January 29, 2002 demand letter, BellSouth is entitled under the Interconnection Agreement to implement all legal and equitable remedies, which includes the refusal to process new CABS orders for FDN.<sup>11</sup>

Moreover, BellSouth specifically denies any allegation that BellSouth has refused to follow the 120-day period under the Interconnection Agreement to resolve billing disputes. BellSouth has or is in the process of resolving all of FDN's "Notices of Discrepancy," which only amount to .. Accordingly, pursuant to the Interconnection Agreement, this amount is not included as an undisputed amount.

BellSouth denies any remaining allegations of Paragraph 21 of the Complaint.

1           22.    BellSouth denies the allegations contained in Paragraph 22 of the  
2 Complaint, except to admit that the Interconnection Agreement speaks for itself  
3 and is the best evidence of its terms and conditions. BellSouth specifically  
4 denies any allegation that BellSouth is attempting to disconnect FDN's service for  
5 nonpayment of disputed amounts. As stated above, since the issuance of the  
6 30-day notice set forth in the January 29, 2002, demand letter,                    in  
7 undisputed CABS billings has become past due. The                                 currently in  
8 dispute is not included in this past due amount.

9           Further BellSouth denies any allegation that FDN is not in breach of the  
10 Interconnection Agreement, FCC Tariff, or Florida E Tariff. While FDN has paid  
11 BellSouth \$2,532,827.96 pursuant to the January 29, 2002 demand letter, FDN is  
12 still in default of the Interconnection Agreement, the FCC Tariff, and the Florida E  
13 Tariff. This is so because FDN has failed to pay the full amount of the January  
14 29, 2002 demand letter and all amounts that became past due since the  
15 issuance of that demand letter. See January 29, 2002 Demand Letter, Exhibit C.  
16 In fact, under BellSouth's FCC Tariff and Florida E Tariff, if BellSouth does not  
17 disconnect FDN for failure to cure a breach of nonpayment after giving 30 days  
18 notice and the breach continues, BellSouth can disconnect FDN without any  
19 additional notice.<sup>12</sup> Thus, FDN is still in breach of the Interconnection

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<sup>11</sup> Alternatively, even if section 20.1.1 of the Interconnection Agreement does not apply, the Interconnection Agreement does not prohibit BellSouth's refusal to process orders for the failure to pay undisputed billings.

<sup>12</sup> Section 2.1.8 of BellSouth's FCC Tariff provides in pertinent part:

Unless the provisions of 2.2.1(B) or 2.5 following apply, if a customer fails to comply with 2.1.6 preceding or 2.2.2, 2.3.1, 2.3.4, 2.3.5, 2.3.10, or 2.4 following, including any payments to be made by it on the dates and times herein specified, the Telephone Company may, on thirty (30) days written notice by Certified U.S.

1 Agreement, the FCC Tariff, and the Florida E Tariff, and it is disingenuous for  
2 FDN to argue that it is not in default especially when it has yet to pay over  
3 in undisputed CABS billings and \$1.3 million in CRIS billings.

4 BellSouth denies any remaining allegations of Paragraph 22 of the  
5 Complaint.

6 23. BellSouth denies the allegations of Paragraph 23 of the Complaint.

7 As previously stated, BellSouth is complying with the billing dispute process set  
8 forth in the Interconnection Agreement or as modified by the parties for all  
9 Notices of Discrepancies that FDN has provided. Further, BellSouth denies any  
10 argument by FDN that a "joint agreement" is required between the parties before  
11 any dispute can be closed. A joint agreement is only required under the  
12 Interconnection Agreement to close any billing period prior to the expiration of  
13 nine months from the issuance of the bill date. See Exhibit D, Attachment VIII,  
14 Section 3.1.18.3.<sup>13</sup> There is no requirement that, after going through the billing  
15 dispute process, the parties have to jointly agree that a billing dispute is closed.  
16 Such an interpretation would nullify the provision of the Interconnection

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Mail to the person designated by that customer to receive such notices of noncompliance, discontinue the provision of the services to the noncomplying customer at any time thereafter. In the case of such discontinuance, all applicable charges, including termination charges, shall become due. If the Telephone Company does not discontinue the provision of the services on the date specified in the thirty (30) days notice, and the customer's noncompliance continues, nothing contained herein shall preclude the Telephone Company's right to discontinue the provision of the services to the noncomplying customer without further notice."

The Florida E Tariff has identical language. See Florida E Tariff at E2.1.8, Exhibit F.

<sup>13</sup> Attachment VIII, Section 3.1.18.3 provides: "Closure of a specific billing period shall occur by joint Agreement of the parties whereby the parties agree that such billing period is closed to any further analysis and financial transactions, except those resulting from an Audit. Closure shall take place within nine (9) months of the Bill Date." See Exhibit D.



Agreement giving this Commission the authority to resolve billing disputes when the parties cannot agree. See Exhibit D, Section 3.1.18.4.3.

24. BellSouth denies the allegations of Paragraph 24 of the Complaint.

25. BellSouth denies the allegations of Paragraph 25 of the Complaint and states that FDN's continual refusal to pay undisputed CRIS and CABS billings on time is detrimental to BellSouth, Florida end users, other ALECs, and FDN's customers.

26. BellSouth denies the allegations of Paragraph 26 of the Complaint. Immediately upon FDN informing BellSouth that a BellSouth representative allegedly made a disparaging statement about FDN to an alleged FDN customer, BellSouth conducted an investigation. That investigation revealed no evidence to support FDN's allegation.<sup>14</sup> Further, BellSouth has a strict policy against any BellSouth employee making disparaging comments about its competitors. BellSouth takes this policy seriously and does not tolerate any violations.

27. BellSouth denies the allegations of Paragraph 27 of the Complaint, except to admit that immediate Commission action is necessary to address FDN's continual refusal to timely pay undisputed CABS and CRIS billings.

28. BellSouth denies FDN's prayer for relief, except to admit that, the Interconnection Agreement requires that the Commission resolve all disputes arising under the Interconnection Agreement within 60 days.

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<sup>14</sup> In addition to the lack of any evidence to support FDN's claim, FDN's allegation is further suspect because, upon being informed that BellSouth would conduct an investigation and take appropriate action if the investigation revealed a violation of BellSouth's policies, FDN requested that BellSouth not take any adverse action against the BellSouth employee involved.

29. Any allegation not expressly admitted herein, including those contained in the Introduction of FDN's Complaint, is denied.

**WHEREFORE**, BellSouth respectfully requests that the Commission deny all relief requested in FDN's Petition and dismiss the Petition with prejudice.

### **AFFIRMATIVE DEFENSES**

The Commission lacks subject matter jurisdiction to address BellSouth's defenses under its FCC tariff. As grounds for this defense, BellSouth states the following:

1. The Commission has the authority to interpret and enforce BellSouth's intrastate tariffs, which have been filed and approved by the Commission. The Commission also has the authority to enforce and interpret Interconnection Agreements it has approved. See Section 364.162(1), Florida Statutes. The Commission, however, does not have the authority to interpret and enforce BellSouth's interstate tariffs, which have been filed and approved by the FCC. The primary reason for this lack of authority is the fact that the Commission does not have the authority to regulate interstate traffic. See 47 U.S.C. §152(b); Bell Atlantic MD. Inc. v. MCI WorldCom, Inc., 240 F. 3d 279, 299 (4th Cir. 2001).

2. In its Complaint, FDN has alleged that BellSouth was without authority under the Interconnection Agreement to refuse to process orders that were billed under CABS because FDN satisfied all but approximately \$53,000 of the January 29, 2002 demand letter, with the remainder owed being disputed. BellSouth's response, among others, is that BellSouth has the express right

under its FCC Tariff No. 1 to refuse to process orders when a carrier, like FDN, fails to cure a breach for nonpayment after 30 days notice. See Exhibit E, Section 2.1.8.

3. BellSouth's FCC's tariff is applicable to the instant dispute because the January 29, 2002 demand letter included billings for purchases FDN made under BellSouth's FCC tariff. Accordingly, to resolve FDN's Complaint, the Commission will have to interpret and apply BellSouth's rights and obligations under its interstate FCC tariff, which is beyond the Commission's jurisdiction.

4. Accordingly, because the Commission has no authority to interpret or enforce BellSouth's FCC tariff, the Commission should dismiss FDN's claim as it relates to those amount purchased under the FCC Tariff. In addition, the Commission should recognize that, resolution of FDN's Complaint solely under the terms and conditions of the Interconnection Agreement will not definitively resolve this matter. This is so because the appropriate forum, which is not the Commission, will have to determine whether BellSouth's actions or inactions were permitted under its FCC tariff.

#### **COUNTERCLAIM**

Pursuant to Florida Rule of Civil Procedure 1.170 and Rule 25-22.036, F.A.C., BellSouth submits the following Counterclaim to FDN's Complaint.

#### **JURISDICTION**

1. The Commission has jurisdiction over this Counterclaim pursuant to Sections 364.162(1), Florida Statutes, which authorizes the Commission to "arbitrate any dispute regarding interpretation of interconnection or resale prices

and terms and conditions." The Commission also has jurisdiction under the parties' Interconnection Agreement. See Exhibit D, Section 23. Specifically, the Interconnection Agreement provides that "the parties agree that any dispute arising out of or relating to this Agreement that the parties themselves cannot resolve, may be submitted to the Commission for resolution." Id.

#### **GENERAL FACTUAL ALLEGATIONS**

2. BellSouth is Georgia corporation and an Incumbent Local Exchange Company regulated by the Commission and authorized to provide local exchange telecommunications and IntraLATA toll telecommunications in the State of Florida.

3. FDN is a Delaware corporation with its principal place of business located in Orlando, Florida. FDN is a certificated Alternative Local Exchange Company. FDN's address is 390 North Orange Avenue, Suite 2000, Orlando, FL 32801.

4. BellSouth and FDN are parties to an Interconnection Agreement that was approved by the Commission on September 22, 1998 in Docket No. 980908-TP, Order No. PSC-98-1327-FOF-TP. That agreement had an expiration date of June 2, 2000. FDN and BellSouth are currently negotiating a new Interconnection Agreement and are operating under the current Interconnection Agreement until the new agreement is finalized.

**CLAIMS FOR RELIEF**

1 I. FDN Owes BellSouth <sup>15</sup> In Undisputed Past Due  
2 Billings.

3 5. FDN currently owes BellSouth n CRIS (UNE and  
4 resale) and CABS (access) charges.

5 6. Of this amount, is for current charges and  
6 for CRIS; for CABS) is past due  
7 and undisputed.

8 7. The Interconnection Agreement requires FDN to submit a "Notice of  
9 Discrepancy" for any billing discrepancy. See Exhibit D, Attachment VIII, Section  
10 3.1.18. Since execution of and pursuant to the Interconnection Agreement, FDN  
11 has submitted hundreds of written "Notices of Discrepancy" with supporting  
12 documentation. FDN has submitted these "notices" through several mediums,  
13 including fax and e-mail.

14 8. In a March 8, 2002 conference call, FDN, for the first time, made a  
15 vague, unsupported assertion that it was disputing over in BellSouth  
16 billings. FDN did not provide a detailed explanation as to what disputes were  
17 contained in this figure or if this dispute encompassed previously submitted or  
18 new disputes. Since the time of that call and despite the fact that the parties  
19 have exchanged numerous communications over the past couple of weeks, FDN  
20 has not (1) provided BellSouth with a written "Notice of Discrepancy" for this

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<sup>15</sup> If the Commission accepts BellSouth's argument that the Commission cannot resolve billing disputes arising out of BellSouth's FCC tariff, then this amount should be reduced by the amount

1           dispute; (2) provided any evidence to support a           dispute; or (3)  
2 raised the \$5 million dispute again.

3           9.     On March 14, 2002, BellSouth issued a third demand letter to FDN.  
4 See Exhibit H. This demand letter (1) informed FDN that, at that time,  
5           in CABS billings and           in CRIS billings were owed  
6 and past due<sup>16</sup>; and (2) requested payment of this past due amount and any  
7 current bills that become due within 30 days. Id.

8           10.    In the March 14, 2002 demand letter, BellSouth also provided a  
9 detailed analysis of all CABS disputes that were the subject of a "Notice of  
10 Discrepancy" and which were withheld from the undisputed portion of the CABS  
11 bill. Id. These disputes total           and include the following:

- 12           a.     Bill and Keep on Trunks and Facilities -
- 13           b.     Collocation Dispute -
- 14           c.     Maintenance and Dispatch Charges -

15 See Exhibit G.<sup>17</sup>

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of undisputed CABS billings that FDN purchased out of BellSouth's FCC Tariff. BellSouth will provide this amount in its pre-filed testimony.

<sup>16</sup> From the issuance of that demand letter to the filing of this Counterclaim, the amount past due has increased to           for CABS billings and           for CRIS billings.

<sup>17</sup> In the March 8, 2002 conference call, FDN, for the first time, verbally submitted two disputes: (1) a local interconnection billing issue where FDN alleged that BellSouth charged FDN an incorrect rate for local and ISP usage for four months; and (2) the UNE rate issue for the September and October 2001 bills where FDN stated that it did not pay either of these bills because BellSouth allegedly used the wrong UNE rate. Despite the fact that FDN did not submit these disputes in writing or with any documentation, BellSouth agreed to look at these verbal disputes solely for the purpose of and in the hopes of facilitating settlement. BellSouth's investigation revealed that, regarding the first issue, FDN was correct and on March 29, 2002 BellSouth issued a credit of approximately \$95,000 to FDN. See Exhibit H. Regarding the second issue, BellSouth's investigation revealed that BellSouth has already corrected the rate and issued appropriate credits and debits to FDN. Id.

1 11. BellSouth also notified FDN in the March 14, 2002 demand letter  
2 that it was not recognizing any CABS disputes other than those set forth in the  
3 March 14, 2002 demand letter. Specifically, BellSouth stated:

4 BellSouth does not recognize any disputes other than  
5 the ones mentioned above, and if Florida Digital has  
6 any CABS disputes other than the ones mentioned  
7 above they will need to be resubmitted to BellSouth  
8 for consideration. As of the date of this letter,  
9 however, the foregoing resolves every pending CABS  
10 dispute between our companies, or places the sums  
11 at issue in abeyance until the issues can be  
12 satisfactorily negotiated or resolved by other means.

13 See Exhibit H. To date, FDN has not objected to BellSouth's assertions  
14 regarding the total number of CABS disputes or the total amount of these  
15 disputes. In addition, since the issuance of the March 14, 2002 Demand Letter,  
16 FDN has not submitted any additional CABS disputes or otherwise attempted to  
17 resubmit any disputes.

18 12. Because FDN has not provided a legitimate Notice of Discrepancy,  
19 with supporting documentation, for any CABS disputes other than the  
20 set forth in the March 14, 2002 demand letter, FDN owes  
21 BellSouth is CABS charges.

22 13. In addition, to date, FDN has not submitted a "Notice of  
23 Discrepancy" for any CRIS billings. Accordingly, FDN owes BellSouth  
24 in past due CRIS billings.

25 14. Based on the foregoing and pursuant to Florida Statutes and the  
26 Interconnection Agreement, BellSouth requests that the Commission (1) find that

1 FDN owes BellSouth at least <sup>18</sup>  
2 in undisputed and past due CRIS and CABS billings and (2) order FDN to  
3 immediately pay BellSouth this amount.

4 **II. FDN's Bill and Keep Dispute Is Invalid.**

5 15. As an initial matter, BellSouth believes that this dispute is not  
6 subject to the Commission's jurisdiction because it only involves BellSouth's  
7 imposition of FCC tariff charges on FDN for certain USOCs. As explained in  
8 detail below, BellSouth was forced to apply these charges because FDN has  
9 repeatedly failed to provide BellSouth with the necessary information to allow  
10 BellSouth to determine whether FDN's traffic is interstate, intrastate, or local. In  
11 the event that this Commission rejects this contention and finds that it has  
12 jurisdiction to resolve this billing dispute, BellSouth respectfully requests that the  
13 Commission deny FDN's dispute for the following reasons.

14 16. FDN has submitted several "Notices of Discrepancy" regarding the  
15 application of bill and keep on trunks and dedicated facilities for local traffic.  
16 Essentially, FDN claims that the parties' bill and keep agreement applies to  
17 elements which are in a proposed, yet unexecuted, amendment.

18 17. Under the Interconnection Agreement, bill and keep applies to  
19 trunks and dedicated local interconnection elements that are in the  
20 Interconnection Agreement and used for local traffic. Each party reports factors  
21 to the other party in order to designate the local interconnection elements in the  
22 agreement that are used for local traffic (and thus subject to bill and keep).

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<sup>18</sup> As previously stated in note 15, supra, this figure should be reduced if the Commission accepts BellSouth's argument that it does not have the authority to resolve billing disputes arising out of



18. Pursuant to BellSouth's FCC Tariff No. 1, FDN is required to provide BellSouth with a Percent Interstate Usage ("PIU") factor to apportion between interstate and intrastate jurisdiction the services of switched local channel and switched dedicated interoffice channel. Further, both BellSouth and FDN report to each other a Percent Local Facility ("PLF") factor to apportion between the intrastate access and local jurisdiction for the same services. The absence of such a PLF factor indicates to BellSouth that a carrier is not using switched facilities for local traffic, and thus the PLF factor for local traffic defaults to zero.

19. Additionally, FDN provides BellSouth with factors on each order placed via the Access Service Request ("ASR") Process to indicate the jurisdiction of the installation of each service (whether the installation is via the FCC Access Tariff, Florida Access Tariff, or Local Interconnection Agreement).

20. Despite numerous requests for the PIU and PLF factors and also providing FDN with information to assist in the preparation of its factors, FDN did not provide BellSouth with such factors until late March, 2002 and only for prospective application.<sup>19</sup> Consequently, BellSouth was forced to bill FDN all prior recurring charges on switched dedicated facilities from the FCC Tariff due to FDN's failure to provide the required factors.

21. FDN is also alleging that other elements contained in a proposed amendment, which has yet to be executed by either party, are also somehow in effect and thus subject to bill and keep. Specifically, BellSouth offered to

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BellSouth's FCC Tariff.

incorporate additional elements in the Interconnection Agreement (and thus subject to bill and keep) on a prospective basis through a proposed amendment containing new and additional rate elements. See December 20, 2001 e-mail from Beth Shiroishi to Matt Feil, attached hereto as Exhibit I. To date, however, FDN has not executed such proposed amendment. Further, FDN has not responded to BellSouth's proposal, even after repeated inquiries by BellSouth.

22. Even if BellSouth and FDN executed the amendment containing the new and additional rates, such an agreement would only have prospective application and would not apply to the dispute currently at hand. As such, for the time period prior to the effective date of the amendment, bill and keep would still only apply to the elements in the agreement for the time period of the dispute. Notwithstanding these facts, FDN has disputed charges for the use of trunks and facilities, which are not subject to bill and keep.

23. In compliance with the Interconnection Agreement, this dispute has been through the entire dispute resolution process and the parties have still not reached a resolution. Accordingly, pursuant to Attachment VIII, Section 3.1.18.4.3 of the Interconnection Agreement, BellSouth requests that the Commission resolve this dispute and find that FDN's bill and keep dispute is invalid because (1) FDN did not submit appropriate factors for bill and keep to apply to the elements set forth in the Interconnection Agreement; (2) FDN has yet to execute an amendment incorporating new and additional rates; and (3)

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<sup>19</sup> FDN provided BellSouth with factors indicating that 5 percent of its switched dedicated facilities are interstate, 1.9 percent are intrastate access, and 93.1 percent are local.

even if FDN executed the proposed amendment, that agreement would only apply prospectively.

**III. BellSouth's Requests Emergency Relief.**

28. BellSouth requests that the Commission resolve this Counterclaim on an emergency basis. An emergency or expedited proceeding is necessary to prevent FDN from continuing to harm BellSouth by incurring additional charges while not paying its current bills or any past due and undisputed amounts. As previously explained, independent evidence suggests that FDN is experiencing a period of financial instability, which could lead to BellSouth being unable to collect the growing amount of charges owed by FDN. The sooner the Commission resolves this Counterclaim, the less of a risk BellSouth has that FDN will not be able to pay the amounts set forth above and any future charges.

29. In addition, the Interconnection Agreement requires that the Commission resolve any dispute within 60 days. See Exhibit D, Part A, Section 23. Pursuant to this provision, BellSouth requests that the Commission resolve this counterclaim within 60 days, if not sooner.

**IV. FDN Should Make an Immediate Payment to BellSouth for all Undisputed Amounts and Escrow any Amounts in Dispute.**

30. Based on FDN's payment history as well as independent financial evidence, BellSouth is concerned that FDN will not have the funds necessary to pay BellSouth the amount the Commission eventually finds to be past due and undisputed pursuant to BellSouth's Counterclaim.

31. Consequently, to minimize this risk, the Commission should require FDN to (1) immediately pay all amounts that it considers to be undisputed, which

1 should include, at a minimum, . In CRIS bills because FDN has  
2 raised no disputes as to these bills; and (2) put any disputed amounts in escrow  
3 with the Commission, pending resolution of this proceeding. The total amount  
4 paid or escrowed should equal, at a minimum, <sup>20</sup>, which is the total  
5 amount of CRIS and CABS bills that BellSouth considers to be past due and  
6 undisputed and the value of FDN's bill and keep dispute.

**PRAYER FOR RELIEF**

7 **WHEREFORE**, BellSouth respectfully requests that the Commission (1)  
8 find that FDN owes BellSouth at least (or as subsequently  
9 modified to reflect the extent of the Commission's jurisdiction to resolve certain  
10 billing disputes) in undisputed and past due CRIS and CABS billings and order  
11 FDN to immediately pay BellSouth this amount; (2) determine that FDN's bill and  
12 keep dispute is invalid if the Commission finds that it has the authority to address  
13 this dispute; (3) address BellSouth's counterclaim on an expedited, emergency  
14 basis but no later than 60 days; and (4) require FDN to immediately pay all  
15 amounts that it considers to be undisputed, which should include, at a minimum,  
16 \$1,961,073.80 in CRIS bills because FDN has raised no disputes as to these bills  
17 and to put any amounts that FDN considers to be disputed in escrow with the  
18 Commission, pending resolution of this proceeding.

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<sup>20</sup> As previously stated, if this Commission determines that it does not have jurisdiction over amounts that were billed pursuant to BellSouth's FCC Tariff, this figure should be reduced by the amount of CABS billings that represents FDN's purchase of services out of the FCC Tariff. BellSouth will provide the Commission with this amount in its pre-filed direct testimony.

Respectfully submitted this 3rd day of April, 2002.

**BELLSOUTH TELECOMMUNICATIONS, INC.**

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**EXHIBIT B  
ENTIRE DOCUMENT  
REDACTED**

**EXHIBIT H**  
**ENTIRE DOCUMENT**  
**REDACTED**

**EXHIBIT I  
ENTIRE DOCUMENT  
REDACTED**