



September 22, 2003

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

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

Dear Ms. Bayo:

Please find enclosed for filing an original and seven (7) copies of the "Answer of
FDN Communications to BellSouth's Counterclaim" in the above-referenced docket.

Also enclosed for filing is a diskette containing a Microsoft Word file of the
aforementioned document.

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

Sincerely,

Scott A. Kassman
Asst. General Counsel
FDN Communications

- AUG _____
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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

Complaint of FDN Communications)	Docket No. 030829-TP
for Resolution of Certain Billing Disputes)	
and Enforcement of UNE Orders and)	
Interconnection Agreements with)	Filed: September 23, 2003
BellSouth Telecommunications, Inc.)	

ANSWER OF FDN COMMUNICATIONS
TO BELLSOUTH'S COUNTERCLAIM

INTRODUCTION

Florida Digital Network, Inc. d/b/a FDN Communications ("FDN") hereby files its Answer to the Counterclaim of BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth's arguments are inapposite and should be rejected by the Commission for the reasons stated below.

FDN never agreed to pay BellSouth disconnect non-recurring charges ("NRCs") in situations where customers port their service back to BellSouth. Indeed, the parties' interconnection agreements do not address how or when the disconnect charge is applied. Moreover, nowhere in the Commission's UNE Order is there any discussion of how or when the ordered disconnect charge applies. FDN accepts paying the disconnect fees only when FDN is the cost-causer, and FDN is not the cost-causer in the disputes at bar.

BellSouth's *res judicata* and collateral estoppel arguments are similarly without merit. Collateral estoppel applies only where issues were actually litigated and determined. FDN maintains that the issue of how and when the disconnect fees apply was never litigated, much less determined, by the Commission in the UNE docket

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(Docket No. 990649A). And while FDN may have tangentially raised the matter of disconnect charges in the winback docket (Docket No. 020119), the Commission simply did not address the matter. Thus, collateral estoppel cannot prevent FDN from raising the issue here. Furthermore, BellSouth's argument that *res judicata* should bar FDN's claims in this matter is patently absurd. This case is no different from many other billing disputes heard by the Commission where the application of a rate or charge is at issue. BellSouth repeatedly disputed application of reciprocal compensation on ISP-bound calls, but those claims were not foreclosed simply because the PSC set reciprocal compensation rates in a UNE proceeding. Besides, the Supreme Court of Florida has held that differences between the courts and administrative agencies necessitate different application of principles of finality and mandate great caution in applying those principles to administrative decisions.

BellSouth's arguments concerning implementation of the Commission's zone designations in Docket No. 990649-TP defy logic and simply cannot stand. As FDN stated in its Complaint, the FDN-BellSouth interconnection agreement requires that the parties amend the agreement upon a change in law. Such contract provisions are commonplace; they provide an orderly transition to the new rule or regulation by preserving the *status quo* for a period of time. The Commission recognized as much by requiring parties to amend their interconnection agreements before the Order could take effect. In doing so, the Commission sought to ensure that carriers' existing contract rights were not altered until the parties had coordinated such. It should logically follow that BellSouth cannot unilaterally implement the new zone structure -- splitting implementation of the Commission's UNE Order into two pieces -- as such action would

impair competitive carriers' existing contract rights by allowing BellSouth to immediately charge rates different from those it had been charging. It simply makes no sense to say that the Commission intended parties to amend their existing interconnection agreements before new, *i.e., different*, rates can take effect, while at the same time allowing ILECs to charge CLECs different rates through self-executing zone changes.

The Commission must also summarily reject BellSouth's arguments that FDN "has failed to specify any statute or rule that BellSouth has violated" and therefore that "FDN has failed to state a claim for which the Commission can grant relief." FDN has asked the Commission to resolve a billing dispute, interpret and enforce its Orders and the parties' interconnection agreements. To the extent the Complaint raises the specter of anticompetitive/unfair behavior, then various Sections of the Florida Statute (including but not limited to § 364.01(4)(g)) are invoked, both independently and as guidance in interpreting said Orders and agreements. Moreover, the pleading standard before the Commission is very liberal. Liberally construing the Complaint in favor of FDN, as required under the law, the Commission must reject BellSouth's contention that FDN has failed to state a claim for which the Commission can grant relief.

Accordingly, as set forth herein and in FDN's Complaint, the Commission should reject BellSouth's Affirmative Defenses and Counterclaim and grant FDN the relief requested in FDN's Complaint. Since BellSouth's Counterclaim incorporates the enumerated paragraphs of BellSouth's Answer, FDN answers BellSouth's Counterclaim by tracking said enumerated paragraphs.

ANSWER TO SPECIFIC ALLEGATIONS

1. FDN denies that it has breached the parties' interconnection agreement by refusing to pay BellSouth the charges at issue. To the contrary, FDN's actions are consistent with the dispute resolution terms of the parties' interconnection agreement, which FDN has addressed in Paragraph 11 of its Complaint and which, as BellSouth has noted in Paragraph 11 of its Answer and Counterclaim, speaks for itself. FDN denies any remaining allegations in Paragraph 1 of BellSouth's Counterclaim.

2. FDN admits that the relevant contracts between FDN and BellSouth refer to BellSouth's interconnection Web site for the central office designations associated with state commission ordered geographically deaveraged zones. However, such zone designations are subject to change only by order of the Commission. FDN denies that BellSouth has charged FDN the rates applicable to the geographically ordered zones. FDN denies any remaining allegations in Paragraph 2 of BellSouth's Counterclaim.

3. The allegations in Paragraph 3 do not require a response.

4. FDN denies allegations in Paragraph 4 that it has failed to state a claim under the orders and agreements referenced in its Complaint for which the Commission can grant relief. FDN affirmatively states that neither the agreements nor the Commission's orders address application of the disconnect charges at issue and that FDN has met its burden under the Commission's liberal pleading standard simply by alleging that application of disconnect NRCs in winback situations is improper.

5. FDN admits the allegations in Paragraph 5 of BellSouth's Counterclaim.

6. FDN admits that the Commission separated installation and disconnect charges in non-recurring rates in the AT&T/MCI arbitration (Order No. PSC-98-0604-FOF-TP) and set disconnection rates in the UNE Order (Order No. PSC-01-1181-FOF-

TP). FDN affirmatively states that BellSouth's support for the proposition that it is not the cost causer of disconnect fees in winback situations is a *non sequitur*. BellSouth cites to the AT&T/MCI arbitration order in which the AT&T/MCI witness proposed that CLECs pay the disconnect fee only at the time such activity is physically performed. It does not necessarily follow that BellSouth is not the cost causer simply because AT&T and MCI may have agreed to pay the disconnect fee in situations unidentified. Moreover, BellSouth takes the AT&T/MCI witness' statement out of context. The AT&T/MCI Arbitration Order indicates the witness was actually arguing that AT&T and MCI should not be subject to disconnect charges when a CLEC end-user *moves from its premises*, as the "CLEC may elect to leave the circuit in place as Dedicated Inside Plant and Dedicated Outside Plant, retaining soft dial tone for the next customer."¹ Clearly, the witness' example has nothing to do with disconnect charges in a winback situation. FDN denies any remaining allegations in Paragraph 6.

7.(a) FDN admits that it raised the issue of disconnect charges in its pre-filed testimony in Docket No. 020119, as well as in its discovery responses to Staff. FDN also admits that it initiated the Key Customer docket after the time it submitted its first billing dispute concerning disconnect charges. FDN denies the allegation that it could and should have resolved this issue either in that docket or the UNE docket. FDN affirmatively states that, because the Commission failed to address the issue in the winback docket, the matter remains unresolved. FDN also affirmatively states that disconnect disputes were not fully and finally escalated through BellSouth's dispute resolution procedures at the time the winback case was litigated. FDN denies any remaining allegations in Paragraph 7(a).

¹ Order No. PSC-98-0604-FOF-TP at p. 68.

7.(b) FDN denies the allegations in Paragraph 7(b) of BellSouth's Counterclaim.

8. FDN admits that the BellSouth-MCImetro Agreement was approved on or about June 19, 1997.

9. FDN admits that the parties executed an "Interim Agreement" effective October 20, 2000 and a Standalone Agreement" effective September 5, 2001, and that the Standalone Agreement incorporated the Commission's May 2001 UNE rates. FDN denies any remaining allegations in Paragraph 9.

10. Paragraph 10 does not require a response.

11. Paragraph 11 does not require a response.

12. Paragraph 12 does not require a response.

13. Paragraph 13 does not require a response.

14. Paragraph 14 does not require a response.

15. Paragraph 15 does not require a response.

16. FDN admits that the parties agreed to disconnection rates in the Standalone Agreement and in the agreement effective September 5, 2003, but FDN affirmatively states that those agreements do not address the proper application of the disconnect charge. FDN denies the allegations that its claims are barred by the doctrines of *res judicata* and collateral estoppel. If the Commission is to take BellSouth's own arguments and apply them to BellSouth, BellSouth should be foreclosed from counterclaiming and denying FDN's disputes here because (a) BellSouth should have realized or sought clarification in Docket 990649-TP that the disconnect charge applies only when the CLEC makes a request for disconnection and is the cost-causer; and (b)

BellSouth should have known or sought clarification that the UNE Order required implementation of the entire UNE Order (the rates and the corresponding zones) via an amendment to the interconnection agreement.²

17. Paragraph 17 does not require a response.

18. FDN denies BellSouth's allegations and answers by referring to paragraph 18 of its Complaint.

19. FDN admits, as does BellSouth, that seeking dispute resolution from the Commission in this matter is appropriate. FDN denies that it has failed to state a claim for which the Commission can grant relief. Further, FDN denies BellSouth's statement that FDN did have a choice in this matter -- that FDN could have paid BellSouth's bill -- as irrelevant and condescending.

20. Paragraph 20 does not require a response.

21. Paragraph 21 does not require a response.

22. FDN admits that the parties executed a standalone Agreement effective September 5, 2003 and admits that the Agreement refers to BellSouth's interconnection Web site for the central office designations associated with state commission ordered geographically deaveraged zones. FDN admits that such zone designations are subject to change by order of the Commission, but only when and how the Commission so orders. A passing reference to BellSouth's website BellSouth controls in the interconnection agreement does not and cannot serve to override the plain terms of the Commission's UNE Order, which required implementation of the whole order -- not just part -- by interconnection agreement amendment. FDN denies that BellSouth has charged FDN the

² In its original Complaint, footnote 9, FDN mistakenly refers to Docket No. 030301 instead of Docket No. 020119. The latter docket number is the correct reference, and from its Answer and Counterclaim, BellSouth understood the error.

proper rates applicable to the geographically ordered zones. FDN denies any remaining allegations in Paragraph 22.

23. FDN admits that rate changes ordered by the Commission must be reflected in amendments to interconnection agreements and denies that BellSouth can implement the Commission's zone structure without an amendment. The entire UNE Order, rates and zones together, must be implemented by interconnection agreement amendment. FDN denies any remaining allegations in Paragraph 23 of BellSouth's Counterclaim.

24. While FDN admits that it is possible that BellSouth may have received FDN's billing disputes related to the zone issue on or about November 18, 2002, FDN clarifies that FDN submitted the initial disputes against the October billing cycle.

25. FDN admits that it has disputed approximately \$85,000 relating to BellSouth's implementation of the Florida deaveraged UNE zone designations.

26. FDN admits that seeking dispute resolution by the Commission in this matter is appropriate. FDN denies that it has failed to state a claim for which the Commission can grant relief. FDN denies any remaining allegations in Paragraph 26.

27. Paragraph 27 does not require a response.

28. FDN denies that it has failed to state a claim for which the Commission can grant relief. FDN is asking the Commission to resolve a billing dispute, to interpret and enforce its orders and the parties' interconnection agreement. To the extent the Complaint raises the specter of anticompetitive/unfair behavior, then various Sections of the Florida Statute (including but not limited to § 364.01(4)(g)) are invoked, both independently and as guidance in interpreting said Orders and agreements. FDN admits

that it has not paid any of the disputed charges. FDN contends that if it prevails in this matter, that BellSouth should credit its invoices so that all charges, late payments, and interest associated with the disputes are zeroed-out. FDN denies any remaining allegations in Paragraph 28 of BellSouth's Counterclaim.

29. Paragraph 29 does not require a response.

30. FDN continues to maintain that BellSouth has acted unlawfully and anticompetitively by violating the parties' agreements and the Commission's orders through unilateral implementation of the Commission's zone structure.

31. FDN admits that it has disputed approximately \$85,000 in billing related to UNE zone changes. FDN denies any remaining allegations in Paragraph 31 of BellSouth's Counterclaim.

32. FDN admits that it is not entitled to a *refund*, but contends that if it prevails in this matter, that BellSouth should *credit* its invoices so that all charges, late payments, and interest associated with the disputes are zeroed-out.³ FDN denies that it has failed to state a claim for which the Commission can grant relief. FDN denies any remaining allegations in Paragraph 32.

33. Paragraph 33 does not require a response.

34. FDN admits that the parties' interconnection agreements contain provisions that address changes in law and admits that the parties can and should amend the agreements, consistent with those provisions, to incorporate both the Commission's rates and zones, consistent with the Commission's UNE Orders. FDN denies that it has

³ To the extent that FDN may have erred by overlooking charges it meant to dispute, and therefore mistakenly paid monies to BellSouth, FDN reserves its right to a refund.

breached the parties' interconnection agreements and continues to maintain that it is BellSouth that has breached those agreements.

35. FDN admits that it has disputed approximately \$85,000 in billing related to UNE zone changes and that it has not paid those charges to BellSouth. FDN denies any remaining allegations in Paragraph 35 of BellSouth's Counterclaim.

36. FDN admits that it is not entitled to a *refund* but contends that if it prevails in this matter, that BellSouth should *credit* its invoices so that all charges, late payments, and interest associated with the disputes are zeroed-out.⁴ FDN denies that it has failed to state a claim for which the Commission can grant relief. FDN denies any remaining allegations in Paragraph 36.

37. Any allegations not expressly admitted are hereby denied.

38. FDN asserts the following affirmative defenses:

AFFIRMATIVE DEFENSES

39. BellSouth's claims are barred by *res judicata* and collateral estoppel.

40. BellSouth has failed to state a claim for which the Commission can grant BellSouth's Counterclaim.

⁴ To the extent that FDN may have erred by overlooking charges it meant to dispute, and therefore mistakenly paid monies to BellSouth, FDN reserves its right to a refund.

WHEREFORE, FDN respectfully requests that the Commission reject
BellSouth's Affirmative Defenses and Counterclaim and permit this matter to go forward.

Respectfully submitted this 23rd day of September, 2003.

FDN COMMUNICATIONS



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 22nd day of Sept, 2003.

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