

**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: August 15, 2003
BellSouth Telecommunications, Inc.)	

COMPLAINT

Florida Digital Network, Inc. d/b/a FDN Communications (“FDN”) hereby brings this Complaint against BellSouth Telecommunications, Inc. (“BellSouth”) for: (1) unfairly and wrongfully assessing FDN disconnect charges when BellSouth initiates a request to port customers away from FDN; (2) violation of the Florida Public Service Commission’s (“Commission”) Orders in *Docket No. 99064A9-TP, Investigation Into the Pricing of Unbundled Network Elements*; and (3) breach of the parties’ interconnection agreement(s).

BellSouth’s practice of levying a non-recurring charge (“NRC”) against FDN to disconnect a loop when BellSouth initiates activity for the customer to be ported back to BellSouth, or ported to some other carrier ordering through BellSouth, is improper, patently unfair and anticompetitive. Accordingly, FDN seeks to compel BellSouth to refund, or in the alternative to credit, FDN all monies charged by BellSouth, with interest and including any applicable late payment charges, for the wrongful application of disconnect NRCs associated with BellSouth initiated port-out requests. FDN also requests the Commission enjoin BellSouth from attempting to recover from FDN costs

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associated with disconnecting loops serving customers ported back to BellSouth, or ported to some other carrier ordering through BellSouth, in the future.

Further, BellSouth has unlawfully charged FDN higher rates for unbundled network elements (“UNEs”) by altering the zone designations of its wire centers (and only the zone designations) without first amending the parties’ interconnection agreement, despite the clear language of the Commission’s orders and the parties’ then-effective interconnection agreement(s). FDN seeks in this action to enforce the Commission’s prior orders and the parties’ interconnection agreement(s), and to compel BellSouth to refund, or in the alternative to credit, FDN all monies overcharged by BellSouth, with interest and including any applicable late payment charges, for the period beginning with BellSouth’s unilateral implementation of the Commission’s orders through the effective date of the parties’ current interconnection agreement.

Accordingly, FDN supports this Complaint as follows:

PARTIES

1. FDN is a Delaware corporation with its principal place of business at 390 North Orange Avenue, Suite 2000, Orlando, Florida 32810. FDN holds a Certificate of Public Convenience and Necessity issued by the Commission that authorizes FDN to provide local exchange services in Florida. FDN is a “telecommunications carrier” and “local exchange carrier” under the Telecommunications Act of 1996, as amended (“the Act”).

2. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier

("ILEC"), as defined in Section 251(h) of the Act, and is a "local exchange telecommunications company" as defined by Section 364.02(6), Florida Statutes.

3. The persons authorized to receive notices, pleadings, and other communications regarding this Complaint are:

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JURISDICTION

4. The Commission has jurisdiction with respect to the claims asserted in this Complaint under Chapters 120 and 364, Florida Statutes; Chapters 25-22 and 28-106, Florida Administrative Code. The Commission also has jurisdiction under the Commission's Order No. PSC-03-0690-FOF-TP, issued June 9, 2003, in which the Commission approved the FDN-BellSouth interconnection agreement, which provided for dispute resolution by the Commission. Moreover, the Commission has jurisdiction to enforce interconnection agreements inherent in its authority to approve such agreements under Section 252 of the Act.

BACKGROUND

I. DISCONNECT NRCs

A. BellSouth is the Cost Causer of the Charge/Charge Unfairly Applied

5. On or about January, 2002, FDN began receiving invoices from BellSouth containing NRCs for disconnecting loops in situations where BellSouth initiated a port-

out request. Prior to that time, FDN believes BellSouth did not charge FDN a disconnect fee in such instances.

6. FDN first notes that FDN does not take issue with the Commission's creation of a disconnect-only NRC. Nor does FDN take issue with paying a disconnect-only NRC when FDN is the cost causer, i.e., in cases where FDN has initiated the disconnect request because of FDN's own or one of its customer's needs. FDN contends that, consistent with cost causation principles, FDN should not be required to pay BellSouth a loop disconnect charge when BellSouth initiates the port process on behalf of a customer wishing to port its service *either back to BellSouth or to another carrier ordering through BellSouth.*¹

7. (a) FDN also maintains that it is anticompetitive and unfair for FDN to bear the cost of BellSouth's disconnecting FDN's customers when BellSouth not only initiates, but gets the benefit of, the port back transaction. FDN should not have to pay BellSouth for the privilege of a cessation of wholesale service and billing on a circuit that FDN can no longer use because BellSouth took the customer which the circuit served. To allow BellSouth to charge FDN disconnect fees when the customer ports back to BellSouth unfairly foists the costs of BellSouth's winback efforts and programs onto competitive carriers such as FDN. Moreover, with its Key Customer and Simple Solution winback programs, BellSouth waives the retail line connection charges normally

¹ Currently, BellSouth issues the pertinent disconnect orders, not FDN. Whether the Commission ultimately agrees that FDN is responsible for the disconnect fee or not, FDN maintains that BellSouth is in the best position to and should continue to issue the disconnect orders. FDN does not rely strictly on BellSouth's generation of the disconnect order as FDN's basis for claiming that BellSouth is the cost causer. Rather, FDN relies on the fact that BellSouth initiates the disconnection from FDN on behalf of itself and its new customer and therefore BellSouth is the cost causer.

applicable to retail customers when BellSouth takes a customer from FDN.² So, while BellSouth willingly forgoes recovering the cost of connecting the former FDN customer to BellSouth's service, BellSouth charges FDN, not the customer, for the cost of disconnecting that customer from FDN service. This, FDN maintains, exacerbates the inequity.

7. (b) Additionally, it stands to reason that since FDN is asked to bear the cost (via UNE NRCs) for BellSouth's physically disconnecting a customer from BellSouth service and switching the customer to FDN service that BellSouth should bear all costs in the reverse situation, when BellSouth requires itself to physically disconnect the customer from FDN service and switch the customer either to BellSouth service or to the services of another carrier ordering through BellSouth. Conceptually, disconnecting the FDN loop in the latter situations is just as much part of the cutover process as disconnecting the BellSouth service in the former situation.

B. The Parties' Interconnection Agreements

8. FDN adopted, in its entirety, the interconnection agreement between BellSouth and MCImetro dated June 3, 1997. That adoption, which was approved by the Commission on October 12, 1998 in Docket No. 980908-TP, became effective as of July 1, 1998 ("1998 Agreement").

9. The 1998 Agreement was succeeded by an interim agreement negotiated between the parties, which took effect on October 20, 2000 ("Interim Agreement"), and which provided that the parties would continue to operate pursuant to the 1998

² All customers that port from FDN to BellSouth are eligible for these discount/reward programs, and, therefore, the vast majority is likely committed to BellSouth under same.

Agreement until the parties executed a new agreement.³ The Commission approved the Interim Agreement in Docket No.001698-TP on January 22, 2001. The Interim Agreement was amended several times, including, pertinent to this case, by an amendment effective September 5, 2001, whereby the parties incorporated the UNE rates the Commission approved for BellSouth by Order No. PSC-01-1181-FOF-TP, issued May 25, 2001. The 1998 Agreement, the Interim Agreement, and all amendments, will hereafter be collectively referred to as the “Pre-2003 Agreement.”

10. The Pre-2003 Agreement was succeeded by the parties’ current agreement, which took effect on February 5, 2003 (“2003 Agreement”). The Commission approved the 2003 Agreement in Docket No. 010098-TP on June 9, 2003.

11. Part A, Section 2.2 of the 1998 Agreement provides, in pertinent part, that “[i]n the event the FCC or state regulatory body promulgates rules or regulations, or issues orders . . . which make unlawful any provision of this Agreement, the parties shall negotiate of promptly and in good faith in order to amend the Agreement to substitute contract provisions which are consistent with such rules, regulations or orders. In the event the parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the parties shall resolve their under the applicable procedures set forth in Section 23 (Dispute Resolution Procedures) herein.”⁴

12. Further, Part A, Section 22.1.6 of the 1998 Agreement states, “[u]pon (i) the discovery by BellSouth of overcharges not previously reimbursed to [FDN] or (ii) the resolution of disputed audits, BellSouth shall promptly reimburse [FDN] in the amount of any overpayment times the highest interest rate (in decimal value) which may be levied by law for commercial transactions, compounded daily for the number of days from the date of overpayment to and including the date that payment is actually made. In no event, however, shall interest be assessed on any previously assessed or accrued late payment charges.”⁵

³ “Whereas until such time as the Parties execute the New Interconnection Agreement, BellSouth and FDN shall continue to operate under the rates, terms and conditions of the Expired Interconnection Agreement,” i.e., the 1998 Agreement. Interim Agreement, p.1.

⁴ MCImetro-BellSouth Interconnection Agreement, Part A, Section 2.2 (“1998 Agreement”).

⁵ *Id.* at Part A, Section 22.1.6.

13. Part A, Section 22.3 provides that “Section 22 shall survive expiration or termination of this Agreement for a period of two (2) years after expiration or termination of this Agreement.”⁶

14. The billing dispute terms of the 2003 Agreement provide, in pertinent part, that

“[e]ach Party agrees to notify the other Party upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the notification date. If the Parties are unable within the 60 day period to reach resolution, then the aggrieved Party may pursue dispute resolution in accordance with the General Terms and Conditions of this Agreement.”⁷

15. The general dispute resolution provision of the 2003 Agreement states, in pertinent part, that “[e]xcept as otherwise stated in the Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission . . . for resolution of the dispute.”⁸

16. Significantly, while a disconnect-only charge appears in the rate schedules to the 2003 Agreement and in Pre-2003 Agreement (by virtue of the September 5, 2001 amendment), nowhere do those documents address under what circumstances the disconnect charges apply. Nor has the Commission addressed in any of its orders when such disconnect charges apply.⁹ As set forth above, FDN maintains the disconnect charges should not apply, and FDN should no longer be billed for an unused circuit, because BellSouth caused the disconnect to occur.

⁶ *Id.* at Section 22.3.

⁷ FDN-BellSouth Interconnection Agreement, Attachment 7, Section 2.1.1 (“2003 Agreement”).

⁸ *Id.* at Part A, Section 15.

⁹ The Commission’s UNE Orders do not address application of the disconnect-only charge. Although FDN complained in Docket No. 020119 that the disconnect charge should not apply in a winback environment, no issue was developed on the subject, and the Commission did not address the subject in its decision. Hence, FDN cannot be precluded from raising the issue in this proceeding.

C. FDN's Attempts to Resolve Its Claims

17. FDN initiated a formal dispute upon discovering that BellSouth was charging FDN a disconnect fee in situations where a customer either ported its service back to BellSouth or to another carrier ordering through BellSouth. FDN first sent BellSouth notice of the dispute on or about January, 2002.

18. As a result of BellSouth's anticompetitive conduct, FDN estimates that, between January, 2002 and the present time, it has been wrongfully charged more than \$100,000¹⁰ for disconnecting loops that were ported back to BellSouth.

19. Because BellSouth has denied FDN's claims, FDN has been left with no choice but to seek resolution by the Commission.

II. UNE RATES

A. Docket No. 990649A-TP

20. On May 25, 2001, the Commission issued Order No. PSC-01-1181-FOF-TP, its *Final Order on Rates for Unbundled Network Elements Provided by BellSouth* ("*Final Order*"), which, inter alia, established UNE rates and zones for BellSouth. The Commission held that the rates shall become effective when existing interconnection agreements are amended to incorporate the approved rates. For new interconnection agreements, the Commission held the rates shall become effective when the agreement is approved. The Commission also ordered BellSouth to refile, within 120 days of the issuance of the Order, revisions to its cost study addressing various cost issues.

¹⁰ This figure represents an estimate of BellSouth's "N" account billing for designed circuits and "Q" accounts for non-designed circuits billed to FDN.

21. On September 27, 2002, the Commission issued Order No. PSC-02-1311-FOF-TP, resolving BellSouth's 120-day filing and setting revised monthly recurring UNE rates ("*120-day Order*"). Most germane to the instant matter, however, is that the order also changed the distribution of wire centers and the density zones to which they relate. For instance, the Miami wire center designated as MIAMFLAL, which was formerly a Zone 1 wire center, was moved to Zone 2.¹¹ The Commission approved the modified rates and closed the docket, ordering the rates to take effect when existing interconnection agreements are amended and the amended agreement becomes effective under the law.¹² It further held that the rates would become effective for new interconnection agreements when the Commission approved the agreement.¹³

B. The Parties' Interconnection Agreements

22. The parties implemented the Commission's *Final Order* via an amendment to the Interim Agreement; the amendment became effective on September 5, 2001. The Pre-2003 Agreement was not amended to reflect the *120-day Order*; rather, the parties incorporated the *120-day Order* in the 2003 Agreement. However, prior to the effective date of the 2003 Agreement, BellSouth unilaterally implemented the *120-day Order* and billed FDN as if the parties' pre-2003 Agreement had been amended. BellSouth implemented the Commission's order such that it took the Commission's new zone framework, *i.e.*, the wire centers and the corresponding zones, without also taking the rates that correspond to those wire centers/zones. For example, the JCVLFLOW wire center moved from Zone 2 to Zone 3 as a result of the Commission's *120-day Order*. Instead of billing FDN for a loop out of that wire center at the Zone 2 rate listed in the

¹¹ Order at p. 157 (Appendix B).

¹² *Id.* at p. 115.

¹³ *Id.*

pre-2003 Agreement, BellSouth billed FDN at the Zone 3 rate listed in the parties' Pre-2003 Agreement. Thus, BellSouth unilaterally implemented the Commission's new structure without taking the corresponding "new" rates.

23. For avoidance of doubt, FDN is not asserting that BellSouth should have charged FDN the "new" rates and applied the Commission's new zone framework without an amendment to the parties' pre-2003 Agreement. Rather, FDN contends that BellSouth cannot implement the Commission's new *zone structure* without an amendment to the pre-2003 Agreement because the zone structure is indispensable to and not severable from the Commission's *120-day Order*. FDN maintains that BellSouth's approach is inconsistent: BellSouth has billed under the Commission's new zone structure while at the same time charging FDN the old UNE rates.

C. FDN's Attempts to Resolve Its Claims

24. FDN initiated a formal dispute upon discovering that BellSouth was charging FDN for UNEs under the Commission's new rate structure without first attempting to amend the pre-2003 Agreement. FDN first sent BellSouth notice of the dispute on or about October, 2002.

25. As a result of BellSouth's illegal conduct, FDN estimates that, between October, 2002, and the effective date of the parties' 2003 Agreement, FDN was overcharged for UNEs in the amount of \$85,917.11.¹⁴

26. Because BellSouth has been unwilling to resolve FDN's claims, FDN has been left with no choice but to seek resolution by the Commission.

COUNT ONE

¹⁴ This figure represents BellSouth's "N" account billing for designed circuits and does not reflect non-designed circuits billed to FDN on BellSouth "Q" accounts.

27. FDN incorporates paragraphs 1-26 of this Complaint as if fully set forth herein.

28. FDN requests the Commission to declare that:

(a) BellSouth's practice of assessing NRCs for disconnecting loops where the customer either ports back to BellSouth, or ports to another carrier ordering through BellSouth, is inconsistent with industry cost causation principles and is unfair and anticompetitive;

(b) BellSouth is prohibited from attempting to recover from FDN the cost of disconnecting loops upon port-backs to BellSouth or ports to another carrier ordering through BellSouth;

(c) FDN is entitled to relief for the period beginning January, 2002, inclusive, through the present time, which FDN estimates at more than \$100,000;

(d) BellSouth should be ordered to refund said amount, plus interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable;

(e) its prior holdings in Docket No. 990649-TP require carriers to amend their interconnection agreements prior to implementing the Commission's orders;

(f) BellSouth has acted illegally and in contravention of the Commission's Orders by unilaterally implementing the Commission-approved zones from the *120-day Order*;

(g) the pre-2003 Agreement requires that the parties negotiate an amendment prior to implementing Commission orders;

(h) BellSouth breached the pre-2003 Agreement by unilaterally implementing the Commission-approved rates;

(i) FDN is entitled to enforcement of the pre-2003 Agreement;

(j) notwithstanding that the pre-2003 Agreement has been replaced by the 2003 Agreement, FDN is entitled to relief for the period beginning October, 2002, inclusive, through February 5, 2003, in which FDN estimates it was overcharged for UNEs in the amount of \$85,917.11;

(k) BellSouth should be ordered to refund said amount, plus interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable.

COUNT TWO

29. FDN incorporates paragraphs 1-4, 8-15, 20-26 of this Complaint as if fully set forth herein.

30. The Commission Orders referenced herein, *supra*, hold that the approved rates shall become effective when existing interconnection agreements are amended to incorporate those rates. The Orders provide no mechanism by which BellSouth may unilaterally incorporate zones or rates or both into carriers' existing interconnection agreements. By applying the zones approved in the *120-day Order* without an

amendment to the pre-2003 Agreement, BellSouth has acted illegally, through its knowing and blatant disregard of the Commission's Orders.

31. As a result of BellSouth's illegal conduct, FDN estimates that, from October, 2002 through the effective date of the parties' 2003 Agreement, it was overcharged for UNEs in the amount of \$85,917.11.

32. BellSouth should be ordered to refund to FDN, for the period beginning October, 2002, inclusive, through February 5, 2003, the amount of \$85,917.11, plus interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable.

COUNT THREE

33. FDN incorporates paragraphs 1-4, 8-15, 20-26 of this Complaint as if fully set forth herein.

34. The pre 2003 Agreement requires that the parties amend the interconnection agreement upon a change in law. The UNE rates approved in Docket No. 990649-TP represent a change in law that should have triggered an amendment to the parties' pre-2003 Agreement. Accordingly, BellSouth breached the pre-2003 Agreement through its unilateral implementation of the Commission's *120-day Order*.

35. As a result of BellSouth's illegal conduct, FDN estimates that, from October, 2002 through the effective date of the parties' 2003 Agreement, it was overcharged for UNEs in the amount of \$85,917.11.

36. BellSouth should be ordered to refund to FDN, for the period beginning October, 2002 inclusive, through February 5, 2003, the amount of \$85,917.11, plus

interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable.

PRAYER FOR RELIEF

WHEREFORE, FDN respectfully requests that the Commission:

- (1) declare that BellSouth's practice of assessing NRCs for disconnecting loops upon port-backs to BellSouth, or ports to another carrier ordering through BellSouth, is inconsistent with industry cost causation principles and is unfair and anticompetitive;
- (2) declare that BellSouth is prohibited from assessing NRCs to recover the cost of disconnecting loops for customers that port from FDN to BellSouth or another carrier ordering through BellSouth;
- (3) declare that FDN is entitled to relief for the period beginning January, 2002, inclusive, through the present time, in which FDN estimates it was unfairly charged more than \$100,000.
- (4) declare that BellSouth should be ordered to refund said amount, plus interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable;
- (5) declare that its prior holdings in Docket No. 990649-TP require carriers to amend their interconnection agreements prior to implementing Commission orders;
- (6) declare that BellSouth has acted illegally and in contravention of the Commission's Orders by unilaterally implementing the Commission-approved zones from the *120-day Order*;

(7) declare that the pre-2003 Agreement requires that the parties negotiate an amendment prior to implementing Commission orders;

(8) declare that BellSouth breached the pre-2003 Agreement by unilaterally implementing the Commission's *120-day Order*;

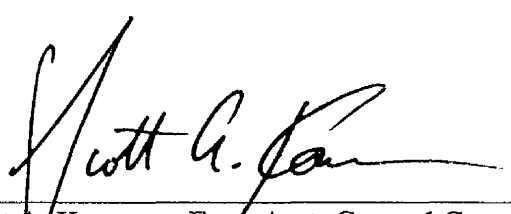
(9) declare that FDN is entitled to enforcement of both the pre-2003 Agreement and the 2003 Agreement;

(10) declare that, notwithstanding that the pre-2003 Agreement has been replaced by the 2003 Agreement, FDN is entitled to relief for the period beginning October, 2002, inclusive, through February 5, 2003, in which FDN estimates it was overcharged for UNEs in the amount of \$85,917.11;

(11) order BellSouth to refund to FDN the aforementioned sum of money, plus interest, and including any applicable late payment charges, or some other amount that the Commission deems reasonable.

(12) order such further relief as the Commission deems just and appropriate.

Respectfully submitted this 30th day of November, 2003.

By: 
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