

ORIGINAL

Matilda Sanders

From: Cara Gowan [CGowan@mail.fdn.com]
Sent: Monday, August 23, 2004 4:49 PM
To: Filings@psc.state.fl.us
Cc: Nancy Sims; meredith.mays@bellsouth.com; Lee Fordham; Matthew Feil; Scott Kassman
Subject: FW: Docket No. 030829-TP

Please file the attached Motion for Reconsideration and/or Clarification on behalf of FDN Communications in the following docket:

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

The documents to be filed in above-referenced docket consist of a cover letter, a Certificate of Service, and FDN Communications' Motion for Reconsideration and/or Clarification, for a total of sixteen (16) pages.

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

Name: Scott A. Kassman
Address: FDN Communications
 2301 Lucien Way, Ste. 200
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8/23/2004

FPSC-COMMISSION CLERK

ORIGINAL

August 23, 2004

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

via Electronic Mail

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

Dear Ms. Bayo:

Please find enclosed for electronic filing in the above docket a Motion for
Reconsideration and/or Clarification, submitted by Florida Digital Network, Inc. d/b/a
FDN Communications ("FDN").

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

Sincerely,

s/ Scott A. Kassman

Scott A. Kassman
Assistant General Counsel
FDN Communications

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FDCR 00000000

CERTIFICATE OF SERVICE

Docket 030829-TP

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below this 23rd day of August, 2004.

BellSouth Telecommunications, Inc.
Nancy B. White/Meredith Mays
C/O Ms. Nancy H. Sims
150 S. Monroe Street
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Mr. Lee Fordham
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s/ Scott A. Kassman

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

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

**FDN COMMUNICATIONS' MOTION FOR RECONSIDERATION
AND/OR CLARIFICATION**

Pursuant to Rule 25-22.0376, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") respectfully moves the Commission to reconsider the non-final Order on Motion to Compel ("Order") issued in this docket on August 13, 2004. In support of this Motion, FDN states as follows:

SUMMARY

1. The Order must be reconsidered or at least clarified because it over-reaches by making numerous erroneous factual and legal conclusions and borders on pre-judging the outcome in this matter. As identified in the body of this Motion, FDN maintains that (1) Issue No. 1 in this case indeed addresses over-recovery by BellSouth; (2) the Order erroneously presumes the proper interpretation of the parties' interconnection agreement, effectively pre-judging the outcome of this proceeding; and (3) the Order incorrectly uses a more restrictive standard under the Florida Rules of Evidence to evaluate FDN's discovery requests, rather than the correct standard under the Florida Rules of Civil Procedure.

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FPCO-COMMISSION OF PUBLIC UTILITIES

standard OF REVIEW

2. A motion for reconsideration should be granted if it identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its Order.¹ The motion should be based upon specific matters set forth in the record and susceptible to review.² The Commission's substantive determinations must be based upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached."³ The evidence must "establish a basis of fact from which the fact at issue can reasonably be inferred."⁴ Findings wholly inadequate or not supported by the evidence will not be permitted to stand.⁵

Additionally, clarification is warranted if a party has a genuine basis to claim that the order is ambiguous, unclear or inconsistent in a way that may affect a party's rights or interests, or if the Commission deems it necessary to explicate its ruling. FDN contends that a Pre-Hearing Officer has the authority to clarify his/her own orders and that such a result is appropriate here.

BACKGROUND

¹ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962), *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981); *In Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

² *Id.*

³ *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. DCA 1957); see also, *Agrico Chem. Co. v. State of Fla. Dept. of Environmental Reg.*, 365 So.2d 759, 763 (Fla. 1st DCA 1979); *Ammerman v. Fla. Board of Pharmacy*, 174 So.2d 425, 426 (Fla.3d DCA 1965).

⁴ *DeGroot*, 95 So.2d at 916.

⁵ *Caranci v. Miami Glass & Engineering Co.*, 99 So.2d 252, 254 (Fla. 3d DCA 1957).

3. FDN originally filed its complaint against BellSouth on August 15, 2003 and subsequently filed an amended complaint on November 21, 2003. FDN's pleadings incorporate two distinct disputes: the first concerns BellSouth overcharging FDN for UNEs as a result of BellSouth's unilateral implementation of this Commission's order in Docket No. 990649A-TP; the second concerns BellSouth's unlawful application and assessment of disconnect NRCs when BellSouth wins back a customer from FDN or when a carrier ordering through BellSouth wins a customer from FDN.

4. In the Order Establishing Procedure, the Pre-Hearing Officer listed six tentative issues to be decided in this proceeding:⁶

- Issue 1: In consideration of appropriate cost-causer, economic, and competitive principles, under what circumstances should BellSouth be allowed to assess a disconnect charge to FDN. (sic).
- Issue 2: In light of Order Nos. PSC-01-1181-FOF-TP and PSC 02-1311-FOF-TP and the parties' interconnection agreements, does BellSouth appropriately assess disconnect charges when BellSouth issues an order for an FDN customer to port out?
- Issue 3: In order to implement changes in rate zone designations, is it necessary for the parties to negotiate an amendment to their interconnection agreement?
- Issue 4: In light of policy considerations, the parties' interconnection agreements, Order Nos. PSC-01-1181-FOF-TP and PSC 02-1311-FOF-TP, any other applicable regulatory requirements, can BellSouth implement changes in rate zone designations without implementing any associated changed rates?
- Issue 5: Given the resolution of Issues 1, 2, and 3 above, what remedies are appropriate?
- Issue 6: Should all or any portion of the parties claims or counterclaims be barred by the doctrines of res judicata or collateral estoppel?

A. FDN's Discovery Request

⁶Attachment A to *Order Establishing Procedure*, Order No. PSC-04-0121-PCO-TP (Feb. 4, 2004).

5. FDN served Interrogatories and Requests for Production of Documents on or about April 27, 2004, seeking information regarding BellSouth's processes for migrating customers to and from BellSouth's network, and the charges which BellSouth assesses in those instances. FDN also sought information concerning BellSouth's application of charges to its retail residential and business customers, as well as information concerning the number of retail residential and business customers eligible for BellSouth winback promotions. Of those eligible customers, FDN sought the percentage of those that have actually entered into contracts with BellSouth for discounted rates.

6. Specifically, FDN asked in Interrogatory No. 4:

Referring or relating to instances in which BellSouth wins back a UNE-L (basic voice grade) customer from FDN, please identify and describe in detail: . . . (c) All retail charges that BellSouth applies to its retail residential and business customers for initiating basic voice grade service; (d) All retail charges through which BellSouth recovers (or partially recovers) the costs it incurs for initiating basic voice grade service to a retail residential and business customer.

7. In Interrogatory No. 11, FDN also asked:

Referring or relating to instances in which FDN wins a basic voice grade retail customer from BellSouth and opts to serve that customer with a UNE loop (provided by BellSouth), please: . . . (c) Identify all recurring, non-recurring, or other charges through which BellSouth currently recovers the costs of connection/installation; (d) Identify all recurring, non-recurring, or other charges through which BellSouth currently recovers the costs of disconnection; (e) Discuss how BellSouth's rate application and business rules (governing the application of its tariffed rates) distinguish between the activities required for a disconnect of its own retail customer and the connect activities of a UNE loop to FDN facilities.

8. In Interrogatory No. 12, FDN asked:

Do BellSouth's retail recurring and/or non-recurring charges for basic voice grade service recover any costs for disconnecting the retail customer in the event the customer discontinues his/her service with BellSouth? If the answer is no, please discuss how BellSouth does recover these disconnect costs. If the answer is not an unqualified no, please discuss and identify all disconnect costs and activities that are recovered through the recurring and/or non-recurring charges.

9. In Interrogatory No. 13, FDN asked:

What is the percentage of retail business customers in Florida eligible for discounted rates as part of or in exchange for a term commitment (*e.g.*, 2002, 2003, 2004 Key Customer promotion) that are currently obligated to BellSouth under such contracts. Please express the percentage using the following formula: Total number of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates divided by the total number of retail business customers in Florida eligible for discounted rates as part of or in exchange for a term commitment with BellSouth but which have not entered into such commitments. Identify in your response the promotional programs included in your calculation.

10. In Interrogatory No. 14, FDN asked:

What is the percentage of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates (*e.g.*, 2002, 2003, 2004 Key Customer promotion). Please express the percentage using the following formula: Total number of BellSouth retail business customers in Florida that have entered into term commitments with BellSouth in exchange for discounted rates divided by the total number of BellSouth retail business customers in Florida. Identify in your response the promotional programs included in your calculation.

B. BellSouth's Objections to FDN's Discovery

11. On May 7, 2004, BellSouth filed objections to each of the aforementioned Interrogatories, asserting that FDN's discovery requests are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

C. FDN's Motion to Compel

12. On July 23, 2004, FDN filed its Motion to Compel, which among other things, maintained that the information sought by FDN is relevant and is likely to lead to the discovery of additional relevant evidence. FDN argued that its discovery request targets

information that is necessary for FDN to show that BellSouth is likely to over-recover for certain activities, including when it recovers installation costs from its retail winback customer and also charges FDN for the disconnects. FDN further argued that the information sought falls squarely within the scope of Issue No. 1 in the proceeding.

DISCUSSION

A. General Errors

13. As identified herein, the Order contains errors, including that it presumes the proper interpretation of the parties' interconnection agreement; it incorrectly uses a more restrictive evidentiary standard to evaluate FDN's discovery requests; and it effectively pre-judges the outcome of this proceeding. But the most serious implication is that it states time and again that there is no issue of over-recovery in this proceeding and therefore that matter is irrelevant.⁷ As FDN details herein, over-recovery is *directly relevant* to Issue No. 1 in this case. Furthermore, the six issues in this proceeding are *tentative or preliminary* issues. A final, exhaustive list of issues is established only upon the issuance of the Pre-Hearing Order, in accordance with accepted Commission procedures and the testimony pre-filed in this case.

B. Interrogatory No. 4

14. As outlined above, Interrogatory No. 4 asks about the costs and charges associated with BellSouth basic voice-grade service *in the context of a winback*. Rather than address the substance of the interrogatory, however, the Pre-Hearing Officer starts his response by stating that the "Commission has already addressed the circumstances in

⁷ FDN finds it inconceivable that the over-recovery of costs is not a potential issue in a Commission proceeding concerning the application of certain charges.

which BellSouth should be allowed to assess disconnect charges.” On its face, this statement appears to pre-judge the outcome and shut down FDN’s case before the parties even get to hearing. Here, the Order unnecessarily over-reaches, but worse, completely misses an essential point in FDN’s case: that in none of the Commission’s prior decisions did it consider disconnects in the context of winbacks.

15. Furthermore, the Order states that, pursuant to a 1998 Commission decision, BellSouth is required to separate NRCs into installation and disconnect costs charges to reduce upfront costs to CLECs. While that statement is factually correct, that decision is inapposite. By requiring BellSouth to separate install and disconnect NRCs, the 1998 Commission order prohibited BellSouth from charging CLECs for an assumed, subsequent disconnection of the customer and instead left BellSouth to recover disconnect costs when the disconnect actually occurs. Notably, that order addressed the timing of the charge, but did not address whether the charge was justified or proper in the context of a winback. Indeed, one will find no discussion of winbacks anywhere in that order. Rather, the only discussion of a disconnect scenario addressed in that order was one in which an end-user moves from the premises but the CLEC elects to leave the circuit in place and retain soft dial tone for the next user.⁸

16. Moreover, the Order goes on to say that “BellSouth’s retail practices have no bearing on wholesale rates” and cites for this proposition Order PSC-02-0875-PAA-TP, which among other things, found that “the resulting wholesale rate may bear no resemblance to the incremental cost of providing the service at retail.” That decision, like

⁸ *Final Order on Arbitration*, Order No. PSC-98-0604-FOF-TP (April 29, 1998) at p. 77.

the prior decision cited, is inapposite. In that decision, the Commission was addressing FDN's claim that BellSouth's Key Customer and other promotional programs are anticompetitive. The referenced quotation was taken from the Commission's discussion of the fact that BellSouth's Key Customer program is available for resale under Section 251(c)(4) of the Telecom Act, in which the Commission went on to say, "We believe that BellSouth's ability to discount retail rates and still cover incremental cost is not instructive in determining the reasonableness of the wholesale discount."⁹ What the Commission was really saying there was that BellSouth's actual cost of providing service, which is measured by using an incremental cost analysis, may bear no resemblance to a resale rate, which is determined using a the "top-down" analysis (retail rate minus avoided costs). Therefore, that decision is irrelevant to the discussion of Interrogatory No. 4 or any of FDN's other interrogatories at issue here. Furthermore, FDN has already stated in its testimony that it is not challenging the rates the Commission has established. The issue at bar is the *application of the rate, not the rate itself*.

17. By relying on the aforementioned erroneous predicates, the Order reaches a similarly faulty conclusion with respect to Interrogatory No. 4 (c) and (e), stating that, "FDN's discovery requests are not likely to lead to admissible evidence that proves or disproves facts bearing on the actual Agreement." That conclusion assumes that the interconnection agreement speaks to the application of disconnect charges upon winback. FDN has repeatedly maintained throughout this proceeding that the agreement does not speak to those circumstances and thus FDN should not be required to pay disconnect

⁹ Notice of Proposed Agency Action Regarding BellSouth's 2002 Key Customer Tariff Program and Winback Promotions, Docket No. 02119-TP, Order No. PSC-02-0875-PAA-TP (June 28, 2002) at p.13.

NRCs in those situations. By making such an assumption, the Order once again over-reaches and pre-judges the matter. FDN argues that its discovery requests go to whether BellSouth is over-recovering, which is *directly relevant* to the question of cost-causation and economic principles, which is an express issue in this case. In light of the foregoing, the Pre-Hearing Officer's analysis and conclusions must be reconsidered or, at least, clarified.

C. Interrogatory No. 11

18. The Order's analysis and conclusion related to Interrogatory No. 11 suffers from the same defects as that of Interrogatory No. 4. The Order states that, "The Agreement between the Parties contains disconnect charges that FDN shall pay; and a rate structure which resulted from this Commission's 1998 Order." Again, the Order over-reaches and pre-judges the matter by ruling on the merits or the substance of the case, rather than simply addressing the discovery sought. As stated above, FDN has repeatedly maintained that the agreement does not speak to the circumstances in which FDN is required to pay disconnect NRCs. As also stated above, the 1998 Commission order is inapposite here.

19. Further, in reaching the erroneous conclusion that FDN's requests are not likely to lead to the discovery of admissible evidence, the Order states that "BellSouth's retail charges do not relate to either" (referring to the interconnection agreement and the 1998 Order). However, Interrogatory No. 11 asks about all types of BellSouth charges, not just retail charges. Moreover, the Order states that "FDN's motion fails to show the materiality of the information as it pertains to Interrogatory No. 11, subparts (c) and (e)."

The Order makes no mention of subpart (d), however, leaving FDN to wonder whether subpart (d) passes muster.

20. Additionally, the case to which the Order cites is inapposite in this context and leads to incorrectly analyzing FDN's requests under a more restrictive standard under the Florida Rules of Evidence (Section 90.401 of the Florida Statutes), rather than the more forgiving standard under Rule 1.280(b) of the Florida Rules of Civil Procedure. In *Jordan v. Masters, et al.*, which is cited in the Order, the Court quotes the work of Professor Charles W. Ehrhardt, the author of *Florida Evidence*, stating, "As Professor Ehrhardt notes, "[i]ncluded within the section 90.401 definition of relevancy is the concept of materiality; the evidence must 'tend to prove or disprove a material fact.' When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial." The standard under section 90.401 is used to admit evidence *at trial* (which is not yet the case here) and therefore is more restrictive than the discovery standard under Rule 1.280(b) of the Florida Rules of Civil Procedure, which governs discovery requests. That rule incorporates the concept of relevance (not materiality) and is much more lenient ("*it will not be grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*").

21. FDN contends that the correct standard is one of relevance under Rule 1.280(b). FDN maintains that its discovery requests go to whether BellSouth is over-recovering, which is *directly relevant* to the issue of cost-causation, which is an express issue in this proceeding. For all of the foregoing reasons, the analysis and conclusions related to Interrogatory No. 11 must be reconsidered.

D. Discussion of Interrogatory No. 12

22. The Order erred by concluding that FDN's Motion to Compel is devoid of any *discussion* concerning Interrogatory No. 12. The first paragraph of FDN's to Compel states, "Specifically, FDN requests that the Commission order BellSouth to respond fully and completely to Interrogatory Nos. 4(c) & (d), 11(c), (d), & (e), 12, 13 and 14."

Further, page 3 of FDN's Motion to Compel expressly quotes Interrogatory No. 12, in which FDN asks whether BellSouth's retail charges for basic voice-grade service recover any costs of disconnecting that retail customer. While the "Argument" section of FDN's motion inadvertently failed to expressly mention Interrogatory No. 12, there is clearly a *discussion* of BellSouth's retail charges and their relevance to the matter before the Commission, including the following: "As FDN argued in its direct and rebuttal testimony, BellSouth is likely to over-recover for certain activities, including when it recovers installation costs from its retail winback customer and also charges FDN for the disconnects."

23. The Order's position that there is no *discussion* of Interrogatory No. 12 appears to hinge on that fact that the "Argument" section of FDN's motion did not expressly mention Interrogatory No. 12 ("The argument section of FDN's motion, at page 5, expressly refers to Interrogatories 4 and 11 and indirectly refers to Interrogatories 13 and 14."). FDN contends that while it inadvertently failed to specifically reference Interrogatory No. 12 in the "Argument" section, it nonetheless indirectly refers to that interrogatory through its discussion of BellSouth retail charges on page 5 of its motion.

E. Interrogatory No. 12 and Over-Recovery of Costs

24. In the discussion of Interrogatory No. 12, the Pre-Hearing Officer states that, “There is no issue concerning the alleged over-recovery of costs in this proceeding.” Further, on page 6 of the Order, it states, “there is nothing in Issue No. 1 that addresses a possible over-recovery of costs....” Moreover, at the beginning of that same paragraph on page 6, the Order states that, “There are two issues between the parties: (1) a billing dispute concerning UNE zone changes; and (2) a billing dispute concerning non-recurring disconnect charges.” The Order erroneously relied on these statements to arrive at the flawed conclusion that information concerning BellSouth’s over-recovery of costs is both immaterial and unlikely to lead to the admissibility of relevant evidence.

25. **First, the Order once again erroneously uses the evidentiary standard to analyze FDN’s discovery request.** Second, there are in fact several expressly enumerated, preliminary issues in this proceeding, all of which relate to the two discrete disputes in this proceeding. It is this list of enumerated issues and the testimony filed that we must look to -- not the two disputes which the Order references -- in order to determine whether information sought through discovery is relevant. As FDN has stated above, the information sought is *directly relevant* to Issue No. 1 in this proceeding. Accordingly, FDN maintains that the Commission must reconsider the Pre-Hearing Officer’s analysis and conclusions with regard to Interrogatory No. 12.

F. Interrogatory Nos. 13 and 14

26. At the bottom of page 5, the Order states, “Neither an alleged over-recovery of installation costs nor CLECs financing their own demise have any bearing on the issues to be decided in this proceeding.” Similarly, the Order states, “percentages of retail customers that have entered into term agreements will not prove or disprove any material

information about the existing terms of the Agreement.” First, FDN contends that the Order erred by undertaking the wrong analysis -- framing the question of whether FDN’s discovery request is relevant such that the data which FDN requests must prove or disprove material information about the parties’ interconnection agreement. Again, the wrong standard is used to analyze FDN’s request. FDN argues that correct standard to be used here involves the Florida Rules of Civil Procedure and the concept of relevance, not the Rules of Evidence and the concept of materiality. The correct analysis to be undertaken is whether the percentage of retail customers that have entered into promotional term agreements with BellSouth is relevant to FDN’s claim that BellSouth’s application of disconnect NRCs to winback situations is inconsistent with cost-causer, economic, and competitive principles (Issue No. 1). FDN submits that upon undertaking the correct analysis, its discovery request is relevant because, to the extent that BellSouth wins back the vast majority of customers it initially loses to CLECs, it tends to make more likely that BellSouth is over-recovering, which is relevant to the issue of cost-causation.

conclusion

27. For the foregoing reasons, the Commission should grant this Motion for Reconsideration and/or Clarification. Specifically, the Commission should reverse the Order and grant FDN’s Motion to Compel or, at a minimum, the Pre-Hearing Officer should clarify the Order so as to specify that the Order does *not*: (1) state that over-recovery is not an issue in this proceeding; (2) presume one or another interpretation of the parties’ interconnection agreement; (3) use the more restrictive evidentiary standard to evaluate the validity of FDN’s discovery requests; and (4) appear to pre-judge the outcome of this proceeding.

RESPECTFULLY SUBMITTED, this 23rd day of August, 2004.

s/ *Scott A. Kassman*

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