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Timolyn Henry

From: Matthew Feil [mfeil@mail.fdn.com]
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To: Filings@psc.state.fl.us
Cc: Lee Fordham; 'Mays, Meredith'; Nancy Sims
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Please find attached for filing in the captioned docket FDN Communication's Post-hearing Brief and Post-hearing Statement of Issues and Positions.

In accordance with the Commission's e-filing procedures, the following information is provided:

(a) The person responsible for this filing is:

Name: Matthew J. Feil, General Counsel
Address: FDN Communications
2301 Lucien Way, Ste. 200
Maitland, FL 32751
Phone No: 407-835-0460
Email: mfeil@mail.fdn.com

(b) Docket No. and Title: 030829-TP, Complaint of Florida Digital Network, Inc. d/b/a FDN Communications against BellSouth Telecommunications, Inc. for resolution of certain billing disputes and enforcement of unbundled network element (UNE) orders and interconnection agreements.

(c) The party on whose behalf the document is filed: Florida Digital Network, Inc. d/b/a FDN Communications

(d) Number of pages of the document: 28 pages.

(e) Description of each document attached: FDN Communication's Post-hearing Brief and Post-hearing Statement of Issues and Positions.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

POST-HEARING BRIEF AND POST-HEARING STATEMENT OF ISSUES AND POSITIONS OF FLORIDA DIGITAL NETWORK, INC. d/b/a FDN COMMUNICATIONS

Matthew Feil
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
(407) 835-0460
mfeil@mail.fdn.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

To resolve this matter, the Commission will not have to navigate its way through complex rate-setting issues as in a UNE proceeding. Though there are two distinct billing disputes presented for determination, the first concerning BellSouth's attempt to improperly foist costs of subsequent customer migration onto FDN and the second concerning BellSouth's unilateral implementation of UNE rates in violation of a Commission order and TELRIC principles, the Commission is faced with one over-arching question in this proceeding: What is the correct application of certain rates which the Commission has already approved? In this case, there can be no mistake -- BellSouth improperly applied the rates in question and, hence, improperly charged FDN.

As for the first billing dispute, BellSouth charged FDN loop disconnection nonrecurring charges ("NRCs") associated with a customer's subsequent migration from FDN, also referred to as a reverse hot cut.[1] BellSouth's assessing FDN disconnect NRCs[2] for reverse for hot cuts is improper because (a) the Commission did not authorize the charges for reverse hot cuts, (b) BellSouth would over recover costs if the charges applied to reverse hot cuts, (c) BellSouth is the cost-causer and should bear the disconnect costs, and (d) the charges are anticompetitive and unfair in that the charges

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[1] A "reverse hot cut," as referenced throughout this brief, refers to any transfer of or cutting over a loop from a CLEC switch to a BellSouth switch, whether for BellSouth's use to serve a retail customer of its own or to serve a UNE-P or reselling CLEC. In other words, it is the hot cut process described by the FCC for transferring a loop from ILEC to CLEC in footnote 1294 of the Triennial Review Order, but in the reverse. As discussed hereinbelow, FDN maintains the only time the disconnect NRCs could be applied, consistent with cost-causer, TELRIC, economic and competitive principles, is when FDN itself orders a disconnection, not when BellSouth executes a reverse hot cut.

[2] The USOCs and rates BellSouth has charged FDN for reverse hot cuts are: UEAL2 $65.53 (SL2 Loop) and $25.62 (SL1 Loop), PE1P2 (cross-connect) $5.74, and SOMAN (service order- manual) $1.83. (TR 45.)

force CLECs like FDN to bear some of the costs for BellSouth taking CLEC customers. For this first dispute in particular, the Commission must be mindful that there is more at stake than just what FDN was improperly billed. Since the Commission approved new UNE rates for BellSouth in 2001, BellSouth has launched extensive, aggressive winback programs. While the merits of those programs are not at issue here, those programs generate voluminous reverse hot cuts, fuel the size of this dispute and magnify the anticompetitive effect of forcing small CLECs to help finance BellSouth's grab for market share.

For the second billing dispute, BellSouth charged FDN UNE rates reflecting zones out of one Commission order at the rate levels out of a separate Commission order. The resulting cross-bred or "hybrid rates" that BellSouth applied were thus not authorized by either order. And notably, BellSouth does not even attempt to argue that these hybrid rates are TELRIC complaint, because BellSouth knows they were not.

So, with what does BellSouth defend itself for these two disputes? All of BellSouth's arguments in this case can be distilled to one: The rates BellSouth charged must be the right rates because BellSouth's billing system charged them. There is no language in any Commission order, any interconnection agreement, or anywhere else BellSouth can point to which cogently supports application of the disputed rates to the circumstances of this case. Further, as demonstrated in FDN's testimony and the discussion below, clear and convincing evidence establishes BellSouth's charging FDN the disputed rates is unsupportable from every angle.

FDN notes, here at the outset of this brief, its umbrage with BellSouth's asserting that FDN is simply trying to evade paying lawful charges it had agreed to pay. FDN pays

all of its legitimate BellSouth bills, and FDN disputes what it believes BellSouth has not properly billed. Significantly, BellSouth's counterclaim concerns only sums for the two disputes noted above, not sums for any other billed items in arrears. FDN does not casually take up valuable Commission resources in litigation unless FDN is certain of the propriety of its position and believes that circumstances afford it no other alternative.[3] BellSouth can point to no evidence that shows FDN had expressly or even indirectly agreed to pay (a) disconnect NRCs for reverse hot cuts or (b) unapproved, hybrid UNE rates.

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?**

FDN: *BellSouth should not charge FDN disconnect NRCs for BellSouth initiated reverse hot cuts, only for disconnects FDN initiates. For reverse hot cuts, BellSouth is the cost-causer and economic beneficiary and should bear disconnect costs. Where FDN pays disconnect NRCs for reverse hot cuts, BellSouth over-recovers and FDN finances BellSouth winbacks. *

A reverse hot cut occurs where BellSouth itself wins back a retail subscriber from FDN via a promotional discount or standard rates and where BellSouth services a reseller or UNE-P carrier who ultimately serves the subscriber. While FDN acknowledges that its interconnection agreement contains NRCs for disconnects, there is no language in the agreement which specifies the charges apply for reverse hot cuts. (TR 55 – 56.) In none of its orders does the Commission ever authorize application of a subsequent disconnect

[3] Before filing its complaint, FDN followed the dispute resolution procedures of the parties' interconnection agreement. FDN and BellSouth have had several negotiation sessions in an attempt to resolve this matter after the hearing. Unfortunately, no settlement was reached.

NRC to reverse hot cuts. (TR 55- 56.) All BellSouth can point to is a number or numbers on a rate schedule, nothing more. [4]

Furthermore, it is unlikely the Commission would have previously addressed the application of subsequent disconnect charges in reverse hot cut situations because, as Dr. Ankum testified, BellSouth's UNE cost study does not even contemplate reverse hot cuts, only stand-alone, CLEC-requested disconnects. (TR 79, 84, 85, 95-96.) At the time of the cost study, the BellSouth winback programs, which are the catalyst for most reverse hot cuts, were virtually non-existent compared with their prevalence today. (TR 88.) Indeed, BellSouth's Central Office Winback Procedures manual was not even issued until after the Commission issued the final order in Docket 990649A. (TR 84, 195.) Thus, it is not possible that the Commission could have considered winback activities and work times when it set the rate for the disconnect NRC at issue. Not surprisingly, BellSouth witness Morillo was unable provide any information to gainsay Dr. Ankum's findings regarding the BellSouth cost study. (Tr. 196).

BellSouth cites to the Commission's decision to remove the subsequent loop disconnection costs from the initial connection NRCs as though the Commission's doing this was dispositive of the current FDN dispute. Far from it. In its 1999 MCI-ATT-BellSouth Arbitration Order,[5] where the subsequent disconnection costs were first removed from the initial connection NRC, the Commission stated,

> **[W]hen a CLEC requests disconnection** of a loop, BellSouth may not actually physically disconnect the line. Yet BellSouth has modeled the NRCs to include physical disconnect for every installation.

[4] A reading of the interconnection agreement and orders verify that they contain no language describing application of the disconnect NRCs.

[5] Order No. PSC-98-0604-FOF-TP, issued April 29, 1998, in Dockets Nos. 960757, 960833, and 960849.

MCI-ATT-BellSouth Arbitration Order at 60 (emphasis added).[6] The Commission then went on to say that parties should negotiate how disconnect costs should be addressed. Clearly, the Commission contemplated a subsequent disconnection NRC **only when a CLEC requests disconnection**.[7] In a reverse hot cut situation, FDN does not request the disconnection, and it is BellSouth, not FDN, who initiates the reverse hot cut process leading to the disconnection. (TR 45 – 46, 73.)[8] The parties' negotiated interconnection agreement does not address disconnect NRCs applying to reverse hot cuts, so one can only conclude that, consistent with the Commission's prior order, the disconnect NRCs apply when FDN requests the disconnection and not in any other circumstance. Further, as the quoted language above demonstrates, the Commission was concerned that physical disconnection does not occur in every instance. Yet, the subsequent disconnection NRCs BellSouth imposes include the cost of a physical disconnection for every reverse hot cut, whether that activity takes place or not. [9]

In its August 24, 2004, Order in Case 02-C01425, the New York Commission also addressed recovery of subsequent disconnection costs in the initial connection NRC. Noteworthy here are the reasons the NYPSC gave for excluding subsequent disconnection costs from the initial connection NRC. The NYPSC was not concerned

[6] When BellSouth cites this order, it conveniently omits this language.

[7] See also Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, in Docket No. 990649A, page 338 (the Commission agrees that "when an ALEC requests service" the "non-recurring activities are those that benefit only the specific CLEC").

[8] BellSouth issues the disconnect order for reverse hot cuts. (TR 45 – 46.) And regardless of who physically issues the order, it is BellSouth, not FDN, who initiates the subsequent migration.

[9] BellSouth witness Morillo admitted BellSouth attempts to reuse facilities whenever it can, whether for itself or for another carrier. (TR 202.)

with the initial connection NRC posing an entry barrier or risk allocation. Instead, the NYPSC excluded the subsequent disconnection costs for the very reasons why making a CLEC pay a subsequent disconnect NRC for a reverse hot cut is inappropriate. The NYPSC stated as follows:

> Disconnection Costs
>
> The hot cut rate ordered here includes no disconnection costs. These are eliminated because, in many instances, these costs will be paid by another carrier.
>
> Many of the parties challenge the inclusion of costs for disconnection as a policy matter, arguing that it is inappropriate for Verizon to charge up front for costs that will only be incurred later. These parties generally assert that this up-front collection of costs constitutes a barrier to entry. They further argue that it is inappropriate to 'mismatch' the payment of costs with the time that the costs are incurred. Several parties cite the ruling of the FCC's Wireline Competition Bureau, sitting in the place of the Virginia Commission, in denying the recovery of disconnection costs in the Virginia Arbitration Order. One of the grounds for the denial of disconnection recovery cited in the Virginia Arbitration Order was this policy of not collecting disconnection costs in an up-front charge.
>
> We do not base our denial of the recovery of disconnection costs on this ground. This Commission has previously allowed the collection of disconnection charges in an up-front charge as an appropriate and efficient way to collect costs that will certainly be incurred in the future. Such collection protects Verizon from the risk that the CLEC customer may go out of business or into bankruptcy leaving substantial obligations unpaid. Consequently, as a general policy matter, we are not opposed to up-front collection of termination charges. While they may constitute a barrier to entry, they are an appropriate barrier to entry to balance the risks between Verizon and its customers, including the CLECs who are customers of Verizon's wholesale services.
>
> However, in the particular context of hot cuts, **the costs to disconnect a customer will often already be paid by another carrier**. This is so because the hot cut 'connect' costs include the costs **both to disconnect from the prior carrier and to connect to a new carrier. Therefore, whenever an end-use customer migrates to another carrier, including the so-called win-back scenario where the customer returns to Verizon as a retail customer, the next hot cut charge, paid by the new carrier, will include all the costs to disconnect from the former carrier.** If separately stated disconnection costs were included in the hot cut rate, the result would be a windfall to Verizon whenever there is a migration. It is for this reason that we exclude all disconnection costs from Verizon's hot cut rates. We note that the FCC Wireline

Competition Bureau's determination in the Virginia Arbitration Proceeding also rested on its finding that the disconnection cost results in double recovery whenever there is a migration.

Suppose, for example, that Verizon has performed a hot cut so that the end-use customer is being served by CLEC A via UNE-Loop service. If the customer subsequently changes service to UNE-L CLEC B, Verizon will perform a CLEC-to-CLEC hot cut to move the customer to CLEC B. The hot cut charge, paid by CLEC B, includes all of the activities necessary to disconnect the customer from CLEC A. If CLEC A has also paid disconnection costs included in the price it paid for a hot cut, there will be a double recovery by Verizon. If the end-use customer migrates carriers again, there is the potential for a third over-recovery by Verizon, and so on. Similarly, if CLEC B is a UNE-P carrier, Verizon would charge CLEC B for the costs of a reverse hot cut in order to serve the end-use customer. Again, the disconnection costs would thus be paid by both CLEC A and CLEC B, a double recovery to Verizon. In a win-back situation, Verizon should similarly allocate to its own retail operations the cost of a reverse hot cut, with a windfall to Verizon wholesale resulting.

Even in the case of a 'true' disconnect, where a customer closes business or a residential customer moves away or dies, so that the account is closed, Verizon will not always incur costs that it has not otherwise collected. For example, if the end-use customer being served by CLEC A terminates its service, a new customer occupying the premises may elect service from a UNE-L carrier as well. If that carrier is CLEC A, the loop has already been hot cut to CLEC A's presence on the frame and there will be no disconnection costs. If the customer elects to obtain UNE-L service from CLEC B, the line will need to be cross connected once again, but those costs will be paid by CLEC B in the form of an initial UNE-L non-recurring charge.

There remains the scenario where an end-use customer disconnects its service from a UNE-L carrier and a new customer intending to re-use the loop chooses to obtain services from a UNE-P carrier or Verizon retail. While we do not decide this issue today, it appears that those may be instances where Verizon does incur costs that would not otherwise be recovered through a charge assessed on another carrier or appropriately attributed to Verizon's retail operations. We can address that issue if and when Verizon chooses to seek to tariff a separate disconnection charge, which is outside the scope of this proceeding.

2004 WL 192497 (N.Y.P.S.C.) (footnotes omitted) (emphasis added). If including subsequent disconnection costs in the initial connection NRC would be a windfall to the ILEC as the NYPSC found, making the CLEC pay that very same cost at a later date via

a separate disconnect NRC for a reverse hot cut is also an improper windfall. The windfall would simply be deferred until the reverse hot cut takes place.

The FCC in its Virginia Arbitration Order[10] also suggests ILECs will over-recover if they are allowed to assess subsequent disconnect costs in the initial connection NRC because the connection NRC paid by the successor carrier already includes pertinent costs for the new carrier to provide service. According to the FCC,

> In many cases, there is no real cost associated with disconnection because the end-user merely switches LECs, but continues to be served over the same network elements with little or no change in provisioning. If another LEC wins the customer, either Verizon or another competitive LEC, the installation NRC will in most cases cover any cost of connecting the UNE to the new LEC's facilities.[11]

Again, if there is overlapping recovery where the initial connection NRC includes the cost of a subsequent disconnect, because any such costs are already considered for the subsequent migration, then it logically follows that one must not permit the over-recovery at some later time via a separate disconnect NRC.

The reasoning of the NYPSC and the FCC Common Carrier Bureau fully corroborate Dr. Ankum's opinions in this case. Dr. Ankum testified at length that the reverse hot cut, the act of disconnecting the FDN service and connecting the BellSouth service, is a single, synchronous event. (TR 51-52, 79-84.)[12] Indeed, most of the reverse hot cut activities are related to connecting the BellSouth service. (TR 83.) And, as the

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[10] In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e) of the Communication Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., *Memorandum Opinion and Order*, CC Docket No. 00-251, 18 FCC Rcd. 17,722 (Aug. 29, 2003) (Virginia Arbitration Order).

[11] Virginia Arbitration Order at ¶ 596.

[12] BellSouth witness Morillo's terse and self-serving denial (TR 170) of Dr. Ankum's assertion is belied by the BellSouth's own discovery responses describing a highly integrated reverse hot cut process (TR 80-81) and Mr. Morillo's own admission he had no knowledge of the workings of the cost study (TR 196).

NYPSC observed, the very nature of a customer migration involves a disconnection and reconnection whereby "the next hot cut charge, paid by the new carrier, will include all the costs to disconnect from the former carrier." BellSouth itself verified that its initial connection NRC includes the cost of disconnecting service from BellSouth and re-connecting service to the new carrier.

> [T]he CLEC will incur costs associated with the hot cut to disconnect the lop serving the customer from BellSouth's switch and then re-connect the loop to the CLEC's switch.

(TR 54.) So if in a subsequent migration, i.e. reverse hot cut, BellSouth recovers some or all of the cost from another customer or carrier for the subsequent disconnection and reconnection back to BellSouth, BellSouth over-recovers is costs were it also collecting a disconnect NRC from FDN. (TR 52-53.)

Notwithstanding BellSouth's over-recovering as described above, another aspect of the cost recovery problem is whether BellSouth **should** recover subsequent disconnection costs from someone other than the carrier that loses the customer. Under BellSouth's proposed regime, the cost burden for disconnection is placed on FDN twice and never imposed on BellSouth. That is, when FDN obtains a customer from BellSouth, FDN pays to disconnect the customer's service from BellSouth and to connect it to FDN. FDN then pays again to subsequently disconnect service from FDN when, in a subsequent migration, the customer moves back to BellSouth service. Since FDN paid to disconnect the service from BellSouth when FDN acquired the customer, equal treatment dictates that when a customer goes back to BellSouth, BellSouth bear the cost of disconnecting service from FDN. That way, each party pays the cost of disconnecting the

customer from the former carrier coincident with receiving the economic benefit of obtaining the customer.[13]

In a typical cost allocation analysis, the recipient of economic benefit is the cost causer and is assigned with paying for the cost caused. In the case of reverse hot cuts, FDN is decidedly not the cost causer and is not the recipient of an economic benefit.[14] As Dr. Ankum testified, BellSouth, not FDN, initiates the reverse hot cut and disconnect process. (TR 46.) No FDN-initiated order flows though BellSouth's OSS for any part of the reverse hot cut procedure.[15] (TR 46.) Indeed, if a CLEC like FDN was the cost causer for the subsequent migration (and coincident disconnection from CLEC services), the NYPSC and FCC would not have spared CLECs from paying subsequent disconnection costs in the first place.[16]

BellSouth's defense to FDN's cost causation arguments is tenuous at best, and in some respects, absurd. For instance, BellSouth argues that cost causation principles cannot trump the terms of a Commission order. The order Bellsouth references here is the order setting the disconnect NRC. BellSouth could not seriously argue rate setting does not inherently involve principles of cost causation, for the Commission's rate setting

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[13] To the extent BellSouth is not already recovering these costs through charges to its retail end users or other carriers, BellSouth may, of course, attempt to do so.

[14] Just as FDN pays bears the cost of disconnecting from the former carrier at the time FDN first obtains the economic benefit of a stream of revenues from the customer, BellSouth should also bear costs the cost of disconnecting from the former carrier (FDN in the case of a reverse hot cut) when BellSouth obtains the economic benefit of a customer revenue stream.

[15] As noted in FDN's Complaint and its testimony (TR 46-47), FDN should not be required to issue a disconnect order just so BellSouth will stop billing FDN for the loop FDN no longer uses after the reverse hot cut. FDN's argument hinges more on who initiates the reverse hot cut process. (TR 73.)

[16] It should not go unnoticed that BellSouth actually credited FDN disconnect NRCs for reverse hot cuts on certain FDN billings known as Q Accounts. BellSouth witness Clark maintained that these credits were awarded in error; however, she also acknowledged that the credits were awarded over several years by several different BellSouth analysts. (TR 140 - 143.) The lack of consensus among BellSouth analysts illustrates that even BellSouth is unsure of the merits of its position.

orders and TELRIC implicitly embody cost causation and economic principles. (TR 56, 75.) And yet, BellSouth asserts FDN would have an order – an order which does not contemplate charging for any service other than for services a CLEC requests -- trumped by cost causation principles already inherent in that order? BellSouth's argument makes no sense.

BellSouth also argues FDN is the cost-causer of a subsequent customer migration. (Tr. 203.) BellSouth's theory of FDN as cost-causer is the product of a "but-for" test which posits "but for" FDN's ordering a BellSouth loop, a subsequent reverse hot cut would never occur. **(e.g., TR 171.)** This, of course, does not account for any of BellSouth's intervening actions or the passage of time. BellSouth would have us believe it became invisible and the clock stopped. As BellSouth acknowledges, FDN's initial service order and the subsequent customer migration may be years apart. (Tr. 203-204.) In reality, BellSouth markets and promotes its winback programs to customers, and upon a sale, BellSouth initiates the reverse hot cut process. (TR 86, 88.) The correct cost causation analysis, like in tort or criminal law, must not turn a blind eye to independent, intervening and superceding acts or events sufficient to establish causal responsibility. Using the correct analysis, BellSouth's initiation of the subsequent migration process establishes BellSouth as the true cost-causer.[17]

Regulatory changes have allowed BellSouth to aggressively market services to customers to win back their services. This Commission's draft of the Annual Report of the Status of Telecommunications Competition even acknowledged "the changing

[17] BellSouth's charging FDN disconnect NRCs for a reverse hot cut is akin to FDN charging BellSouth for costs FDN incurs for placing a new loop order with BellSouth. BellSouth caused FDN to incur those costs because "but for" BellSouth's being the supplier, FDN would not have incurred the costs.

regulatory environment and RBOC re-entry into the long distance market" may result in the Bell companies "recaptur[ing] 80% of the CLEC access lines by the end of 2005."[18, 19] It is one thing for shifts in the marketplace to engender increased competition, but quite another for one competitor to bear the cost for transferring its customers base to its chief rival. By charging FDN disconnect NRCs on reverse hot cuts, BellSouth would have FDN finance BellSouth's efforts to obtain FDN customers. (TR 53, 55.) This scheme effectively also permits BellSouth to begin even more aggressive winback programs to lure away FDN customers. (TR 78.) In its drive to winback nearly all competitor customers, BellSouth waives its retail connection charges for the customers it wins from competitors, and then charges the competitors a fee for losing the customers. (TR 78.) The Commission cannot permit this egregious conduct to go on.

Based on the foregoing, the Commission can only reasonably conclude that BellSouth should not charge FDN any disconnect NRCs in reverse hot cut situations. The record, however, also supports an alternative. As noted in the MCI-ATT-BellSouth Arbitration Order, the Commission was concerned that BellSouth modeled physical disconnection of every circuit, though physical disconnection does not happen every time. BellSouth witness Morillo testified that BellSouth makes every attempt to re-use circuits, whether for itself or for another carrier. (TR 202.) Dr. Ankum testified that a reverse hot cut is a single, synchronous event, with most of the activities and job steps related to initiation of BellSouth service, but the only activity arguably related to FDN

[18] Draft *Annual Report on the Status of Telecommunications Competition*, issued September 27, 2004. The Commission took official notice of this document. Exhibit No. 1.

[19] An internal BellSouth publication boasts that during the first quarter of 2004 BellSouth's consumer unit "reacquired about one of every two competitive disconnects" and that its "small business unit reacquired about 2 of every 3 competitive disconnects." *BellSouth Investor News*, April 22, 2004 at p. 3, www.bellwouth.com/investor.

was removal of or moving the jumpers. (TR 43, 81.) Therefore, as an alternative, the Commission could endorse BellSouth's charging FDN only a separate and distinct charge for removal of the jumpers/cross-connects: currently, a $5.74 charge. (TR 45)

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?**

FDN: *No. Neither the referenced Orders nor the interconnection agreements explicitly or by implication authorize BellSouth to assess FDN disconnect NRCs for reverse hot cuts. See also FDN Position and argument on Issue No. 1.*

See argument for Issue No. 1 above. FDN's argument in Issue No. 1 above encompasses its arguments on this issue.

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?**

FDN: *Yes. The Commission's UNE Orders require an interconnection agreement amendment to implement new UNE rates. Rate levels, rate structure, and rate zones are approved as a whole. Sectioning that whole and pasting sections to sections from some other order(s) results in billing a hybrid rate, not approved in any order.*

If the Commission did not change which wire centers were in which UNE rate zones from its prior orders to the 120-Day Order,[20] there would not be a second billing dispute in this proceeding. But the Commission did make rate zone changes, those changes involved wire centers from which FDN ordered BellSouth services, and those changes are the genesis of the second billing dispute.

[20] Order No. PSC-02-1311-FOF-TP, issued September 27, 2002, in Docket No. 990649A.

It is undisputed that the result of the Commission's 2001 UNE Rate Decision[21] was incorporated into FDN's interconnection agreements. The Miami wire center MIAMFLAL, for instance, was a Zone 1 wire center under those prior orders. Under the 120-Day Order, that wire center was a Zone 2 wire center. Without changing rate levels or any other aspect of the results approved in the 120-Day Order, without an approved amendment to the parties' interconnection agreement, BellSouth changed the zone designations for the wire centers to those stated in the 120-Day Order. BellSouth the billed FDN the Zone 2 UNE Rate Decision rate levels for loops in MIAMFLAL instead of the Zone 1 UNE Rate Decision rate levels. (TR 59 – 60, 89 - 90.) BellSouth's argues it did not implement a rate change, just a zone change. But for loops in wire centers thus effected, BellSouth billed FDN a rate not approved by the PSC in either the 2001 UNE Rate Decision or the 120-Day Order. The result of the BellSouth billings with the zone changes was a net increase on FDN's bills. (TR 59 - 60, 89 – 90.)

Consider, by way of illustration, a utility serving two service territories, A and B, with a separate rate of $10 for A and $15 for B. In a rate case, the Commission orders that cost differences in the two service areas do not justify separate rates anymore. It approves a $15 rate, orders the territories consolidated under B, and orders the utility not to implement the new rates until it files tariffs. Without filing tariffs, the utility changes the name of both of its serving territories to B in its billing system and, as a result, charges everyone $15. No one would argue that the utility followed the Commission's requirement for rate implementation. No one, that is, except BellSouth.

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[21] Order No. PSC-01-11810FOF-TP, issued May 25, 2001, revised on motions for reconsideration and to conform analysis by Order No. PSC-01-2051-FOF-TP, issued October 18, 2001, in Docket No. 990649A.

BellSouth's argument in this case, applied to the example, is that the utility did not implement new rates. The rates did not change. Rather, the BellSouth theory goes, the utility only implemented the territory consolidation the Commission ordered, and corresponding geographic designations can change without rates changing.

As the example illustrates, however, separately implementing rate levels, rate structure, and geographic rate designations (or zones) yields results which are result true to neither the prior or new Commission-ordered "rates." It is manifest that "rates" includes the rate levels, rate structure, and any corresponding geographic rate assignments. Any mixing and matching of part of one rate order and part of another means the rates under neither order are implemented.[22] Instead, the rates billed are some sort of cross-bred or hybrid, which can cause the service provider to over recover.

The bottom line in the instant dispute is that BellSouth billed FDN rates not approved in the Commission's 2001 UNE Rate Decision, not approved in the 120-Day Order, and not consistent with TELRIC. Instead, BellSouth overbilled FDN, collected greater than the TELRIC rate, and over-recovered its costs. (TR 63.)

Rate implementation achieved through a clearly understandable, cooperative, and mutual process was precisely why the Commission's 2001 UNE Rate Decision and 120-Day Order required an interconnection agreement amendment, signed by both parties, filed and approved by the Commission. The Commission would thus avoid billing disputes where one side thought the effective date was be X and the other thought it

[22] That the 120-Day Order refers to the "rates" on Appendix A when the zone designations are on Appendix B is not significant or controlling. The 2001 UNE Rate Decision also refers to the rates on Appendix A and zones on Appendix B, see e.g. Order No. PSC-01-2051-FOF-TP at 31. But as explained above, BellSouth did not bill FDN the rates that correspond to the zones approved in the 2001 UNE Rate Decision and BellSouth thus violated that decision.

should be Y. BellSouth eschews the controlling language of the pertinent orders,[23] but perhaps more importantly, ignores the underlying purpose because that purpose does not suit BellSouth's argument today.

Ironically, in the 2001 UNE Rate Decision, BellSouth's own witness Varner stated "BellSouth will require some time to conform its billing and administrative systems to implement UNE rates," and suggested implementation upon interconnection agreement amendment.[24] The orders do not reflect Mr. Varner's saying anything about a different implementation schedule for zones versus rate levels, and the orders do not direct or permit BellSouth to implement zone designations on an independent basis.

BellSouth asserts two other defenses which warrant some retort. First BellSouth points out that the parties' interconnection agreement references a web site containing zone designations and BellSouth notified carriers of a change to that site via a web posting. (TR 158.) This argument must be rejected because (a) as explained above, the Commission's orders, not BellSouth's website, set the implantation schedule, (b) the interconnection agreement does not state that the website containing zone information may change from time to time, at BellSouth's discretion, (c) interconnection agreements typically state BellSouth may provide notice of some changes via BellSouth's web site, but those provisions are designed for changes in business rules, not "changes in law," which go through an amendment process as the Commission required in the 120-Day Order,[25] and (d) BellSouth cannot trump Commission orders via a web posting. Second,

[23] See, pp. 115 – 116, 120-Day Order and pp. 546 – 548 of Order No. PSC-01-1181-FOF-TP.

[24] See, p. 546 of Order No. PSC-01-1181-FOF-TP

[25] (TR 90, 207.) Compare, for example, the change of law provision in section 21.4 on page 23 to the change management provision in section 2.2 on page 277 of the FDN-BellSouth interconnection agreement. The change of law provision contains a mechanism for requiring renegotiation in the event any

BellSouth admits its billing system cannot accommodate zone changes at different times for different carriers. (TR 160.) This is more of an excuse than a defense -- an excuse BellSouth invokes often. FDN is not asking for the Commission to order BellSouth to change its billing system. FDN is only asking that it receive credit for BellSouth billing it the wrong rates: roughly $155,641.12 (TR 51). If the Commission wanted uniform implementation of the UNE rates, rate structure and/or UNE zones, it would have said so. It did not.[26] BellSouth hides behind its billing system as cover for taking implementation of rate changes into its own hands.

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?**

FDN: *No, as stated under Issue No. 3, rate levels cannot be severed from zone designations and remain true to the order setting rates. BellSouth should have requested relief from the orders implementation requirements if it knew its billing system could not accommodate the implementation scheme ordered. *

"legislative, regulatory, judicial or other legal action materially affects any material rates, terms of conditions of this Agreement . . . ."

[26] BellSouth witness Morillo complained a carrier could delay signing an amendment and implied FDN improperly took three or so months to sign the 120-Day Order amendment. These assertions merely accentuate the flaw in BellSouth's reasoning. If the Commission wanted to fix a date certain for rate implementation, it would have done so. Requiring the parties to both negotiate and agree to an amendment would have been unnecessary. But the Commission did not fix a date certain for rate implementation. If one or both parties to an implementation amendment found it convenient or desirable to tie implementation to some other need or event (such as BellSouth suggested was necessary in the 2001 UNE Rate Decision), nothing prohibits it. If either party does not negotiate an amendment in good faith or the parties reach an impasse, there is a dispute resolution procedure at the disposal of the harmed party. In this case, the simple fact remains that BellSouth took it upon itself to implement just part of the 120-Day Order and did not obtain FDN's assent via an amendment. If BellSouth's billing system could not accommodate the implementation scheme ordered, there is no reason why FDN should have to bear the cost of that shortcoming or the cost of BellSouth's failing to call that shortcoming to the Commission's attention at the time of the rate order.

See FDN's argument for Issue No. 3 above. The argument above encompasses FDN's argument for this issue.

Issue 5: **Given the resolution of Issues 1, 2, and 3 above, what remedies are appropriate?**

FDN: *The remedies ordered should include: (1) barring BellSouth from assessing disconnect NRCs for reverse hot cuts and (2) ordering BellSouth to credit/refund to FDN for disconnect NRCs assessed for reverse hot cuts and for billing the hybrid UNE rates.*

The evidence in this case dictates the Commission's granting FDN the relief requested in its initial Complaint. The two chief remedies FDN seeks are as stated in the position statement above. The amounts FDN believes are in dispute are identified in the revised rebuttal of witnesses Ankum and Warren (TR 91), as FDN agreed may be adjusted (TR 111 -112).[27] Any late payment charges or interest assessed or to be assessed on the principal amounts in dispute should also be credited. If necessary, FDN believes that the final credit amounts may be established through a cooperative reconciliation process with BellSouth. Though the hybrid rate billing dispute covered a finite period of time, the disconnect NRCs dispute grows monthly. If the Commission does not agree that FDN should be relieved of paying all disconnect NRCs associated with reverse hot cuts,[28] the record supports an alternative of requiring FDN to pay

[27] The record does not establish any significance to FDN's method for tracking dispute dollars. (TR 113 - 117). Besides, even BellSouth's own witnesses take little exception with the amounts FDN claims are the total dollars in dispute.

[28] The USOCs and rates FDN should not have to pay for reverse hot cuts are UEAL2 $65.53 (SL2 Loop) and $25.62 (SL1 Loop), PE1P2 (cross-connect) $5.74, and SOMAN (service order- manual) $1.83. (TR 45)

BellSouth only for disconnecting the jumpers, represented by a separate and distinct NRC of $5.74.[29]

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

FDN: * No. Prior Commission proceedings did not address the billing issues raised here, and in particular, do not address charging CLECs disconnect NRCs for reverse hot cuts. Therefore, res judicata and collateral estoppel do not apply. If anything, res judicata bars BellSouth's counterclaim to collect the hybrid UNE rates.*

In an over-reaching effort to quash FDN's billing disputes by any means possible, BellSouth raised this issue. FDN suggested the issue, if accepted, be re-framed to also encompass BellSouth's counterclaims. Sophomoric retribution did not motivate FDN to make this suggestion; rather, FDN intended to illustrate the illogic and hypocrisy of BellSouth's defense by applying res judicata and collateral estoppel to BellSouth's own position.

Before addressing the application of those doctrines to this case, however, the Commission should review the elements of these two doctrines. Instructive are the Commission's recent Aloha Utilities Refund Order[30] and the cases cited therein, Albrecht v. State[31] in particular. In Albrecht, the court ruled that for res judicata to apply, several conditions must be present: identity of the thing sued for, identity of the cause of action, identity of the parties, and identity of the quality in the person for or against whom the

[29] The USOC PE1P2. (TR 45.)

[30] In re: Application for Increase in Water Rates for Seven Sprint System in Pasco County by Aloha Utilities, Inc., Order No. PSC-04-1050-FOF-WU, issued October 26, 2004, in Docket No. 010503-WU. (Hereinafter, the docket is referred to as "Aloha" and the order as "Aloha Utilities Refund Order").

[31] Albrecht v. State, 444 So.2d 8 (Fla. 1984).

claim is made. Albrecht at 12. The settled rule for estoppel, the Albrecht court continued, is:

> [W]hen the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel **except as to those issues actually litigated and determined in it**. . . . . The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

See Albrecht at 12 (cites omitted) (emphasis added).

In Albrecht, an applicant's permit to fill and bulkhead submerged lands was denied after hearing and appeal, and the applicant later filed a separate suit for inverse condemnation because the desired land use was prohibited. The Albrecht court held neither res judicata nor estoppel barred the condemnation suit, finding that the taking claim "constitutes a separate and distinct cause of action from that litigated previously" and "the facts necessary to maintain the taking action are different." Id. at 12. Neither doctrine applied, the court continued, "because the second cause of action is not the same as the first and the issues now presented were not actually litigated in the previous proceedings." Id.

In Aloha, the Commission considered whether doctrines of administrative finality, res judicata, collateral estoppel, and equitable estoppel barred it from requiring an additional refund of interim rates collected during an appeal period, although the Commission had already ordered a refund of interim rates collected from initiation of the case until the final rates (stayed on appeal) were implemented.[32] The Commission ruled:

> We find that Aloha's reliance on the principles of administrative finality, res judicata, collateral estoppel, and equitable estoppel to show that we are precluded from requiring a refund of all monies collected during the appeal period is unfounded. Under res judicata, "a final judgment by a court of competent

[32] The issue framed in the instant case does not encompass administrative finality or equitable estoppel, so FDN does not believe that those doctrines are properly at issue here.

> jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue." Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). . . . . In the Final Order, we never addressed what would happen in the event of an appeal or stay of the final rates. . . . . [W]e never made any pronouncement in the Final Order concerning the methodology for refunding interim rates collected during the appeal period. Therefore, we find that the principles of res judicata and administrative finality are inapplicable to this case.
>
> Collateral estoppel is a judicial doctrine that "prevents identical parties from relitigating the same issues that have already been decided." Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995). For collateral estoppel to apply, the parties and issues must be identical, and the particular matter must have been "fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." Id. Because the question of what amount of interim rates collected during the appeal period should be refunded was never litigated in the evidentiary proceeding or addressed by this Commission in our Final Order, collateral estoppel is not appropriate here.

Aloha Utilities Refund Order at 12.

With BellSouth's apparent focus on the disconnect NRC dispute, BellSouth misplaces reliance on prior proceedings to argue the defenses of res judicata and collateral estoppel. However, the only element of res judicata or collateral estoppel which BellSouth can arguably establish from prior proceedings is identity of parties. Because all other essential requirements necessary for application of the doctrines to FDN's claims in this case are absent, BellSouth's arguments fail.

The two prior proceedings BellSouth references are Docket No. 990649A, where BellSouth's UNE rates, including the disconnect NRC, were set, and Docket No. 020119, FDN's complaint on BellSouth's Key Customer winback program. In the former docket, as BellSouth's fallacious argument goes, the Commission removed disconnect costs from initial connection NRCs and included those costs in a separate disconnect NRC.[33]

[33] The Commission made the decision to remove disconnect costs from the initial connection NRC in the MCI-ATT-BellSouth Arbitration Order. In Docket No. 990649A, the Commission merely continued this approach.

BellSouth concludes the Commission thus already decided that the disconnect NRC applies to reverse hot cuts or that FDN should have and could have litigated the issue of applying disconnect NRCs to reverse hot cuts then. In the latter docket, BellSouth complains, an FDN witness noted that disconnect NRCs were billed for reverse hot cuts at the conclusion of a winback, so FDN should be foreclosed from asserting a billing dispute on such disconnect NRCs now.

Application of res judicata fails when invoking Docket No. 990649A as a prior proceeding for several reasons. Even conceding identity of parties,[34] the Commission cannot find that the UNE rate setting case and this billing dispute regarding proper application of those rates are based on identical causes of action. None of the Commission's orders in Docket No. 990649A specifically address **when** the disconnect NRC applies.[35] The thing sued for here, is not the level of the rate per se, for the rates were set in the prior docket, but FDN sues for a separate and distinct purpose, i.e. whether the approved rates apply to the specific circumstance of a reverse hot **cut.**[36] Reverse hot cuts were not addressed in Docket No. 990649A, nor was there reason to address them. As noted above, BellSouth's winback programs were much more passive and/or virtually nonexistent at the time the UNE rates were set, so no consideration was then given to reverse hot cuts. Further, as Dr. Ankum established, BellSouth's cost study

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[34] FDN was not a party to the MCI and ATT arbitration but was a party to Docket No. 990649A.

[35] As noted earlier in this brief, the Commission's Order in the MCI-ATT-BellSouth Arbitration does indicate that such a charge would apply only where the CLEC requests the disconnect.

[36] The circumstances under which a rate already established could be revisited or adjusted by this Commission present a somewhat different question. Clearly, the Commission has authority to alter a rate it has approved under appropriate circumstances, such as with changes in policy, passage of time, new evidence, etc. See e.g. McCaw Communications v. Clark, 679 So.2d 1177 (Fla. 1996). Circumstances not considered at the time of an initial decision may warrant adjustment to any approved rate.

filed in that proceeding does not even contemplate reverse hot cuts. As in the Aloha Utilities Refund Order, where the Commission never addressed a refund in the event of appeal, the Commission in Docket No. 990649A never addressed a disconnect NRC for reverse hot cuts. A totally different legal issue is thus presented, one not considered at the time of the prior proceedings. Like in Albrecht, the prior proceeding was merely background for or a predicate to a later cause founded on a distinct theory of action.

If anything, the disconnect NRC should apply, as do all of the other UNE rates established in Docket No. 990649A, when, and only when, a CLEC initiates a request for the service billed. See MCI-ATT-BellSouth Arbitration Order, supra. By the same premise that BellSouth might argue FDN could have litigated application of the disconnect NRCs to reverse hot cuts at the time of Docket No. 990649A, FDN can argue BellSouth should have litigated the opposite. But FDN's argument has greater force because of the MCI-ATT-BellSouth Arbitration Order. BellSouth should have understood at the time of Docket No. 990649A that UNE rates only apply when CLECs order the service billed. BellSouth therefore must be estopped from applying disconnect NRCs to reverse hot cuts.

Another reason BellSouth's arguments do not withstand scrutiny is because if the Commission bars FDN's billing dispute on the basis of res judicata, the Commission would likewise forever bar the entire category of billing disputes which question the proper application of a rate. So, for example, with a reciprocal compensation rate set, BellSouth's arguments that the reciprocal compensation rate did not apply to ISP-bound traffic would have been barred. (TR 89.) Only bill typos or incorrect rate table entries

would be left for billing disputes in a world where no disputes questioning the application of a rate were allowed because of BellSouth's version of res judicata. (TR 89.)

Res judicata fails to apply when Docket No. 020119 is considered as a prior proceeding for similar reasons. There is no identity in the causes of action or the thing sued for as between this case and that one. In Docket No. 020119 FDN's complaint requested revocation of BellSouth 2002 Key Customer retail winback tariffs because those tariffs were anticompetitive, unfair and discriminatory.[37] FDN's complaint in this case, by contrast, disputes application of UNE disconnect NRCs to all reverse hot cuts, whether ultimately serving a UNE-P provider, reseller or a BellSouth retail customer enrolled in a winback program or otherwise. While FDN may have made brief mention of disconnect NRCs in Docket No. 020119, such notation was certainly not material to the claims made in that proceeding. The billing dispute in this case was no more at issue or material in Docket No. 020119 than the merits of the 2002 Key Customer tariffs were at issue or material to this case. The claim of improper application of a rate in this proceeding, like the condemnation claim in Albrecht, is based on a cause of action distinct and separate from the claims of the prior proceedings -- in Albrecht, the permit denials, and, in Docket No. 020119, FDN's claims of anticompetitive behavior, discrimination, etc. stemming from specific BellSouth retail tariffs.

Additionally, an examination of orders and pleadings in Docket No. 020119 reveals that application of disconnect NRCs was not an identified issue in the proceeding in the Order Establishing Procedure or Prehearing Order, BellSouth's brief makes no mention of it, the staff recommendations make no mention of it, the Commission's Final

[37] See filings posted to Commission website for Docket No. 020119. FDN's Complaint in Docket No. 020119 was filed February 2002.

Order and Order on Reconsideration make no mention of it. This acute silence is odd for an issue BellSouth claims could have been considered.[38] In addition, the evidentiary record in Docket No. 020119 was closed February 2003, when the hearing was concluded. The complaint in this case was filed six months later in August 2003. Even if, as BellSouth seems to suggest, FDN's billing complaint was somehow germane or material to resolution of a retail tariff revocation proceeding, one must wonder how the billing complaint was even ripe for resolution when BellSouth was rather unsure of the amount in dispute when it filed its testimony in this case.[39] FDN's mention of the disconnect NRC was, at best, an ancillary fact in Docket No. 020119, and any dispute involving such was not ripe for adjudication.

And finally, taking BellSouth's reasoning to its logical end, were a party ever aware of, or so much as hint at, another possible issue in one proceeding, the party would be barred from raising that issue in any subsequent proceeding regardless of how different the causes of action or the purposes of the dockets may be. BellSouth suggests an utterly untenable result, at odds with sound jurisprudence. The purpose of res judicata is to dispel wasteful, duplicative litigation, not to serve as some kind of "gotcha" that closes the courthouse doors to legitimate claims. The Commission should reject BellSouth's arguments and instead find, as it found in the Aloha Utilities Refund Order, res judicata does not apply because the facts and circumstances of the second proceeding were not previously considered by the Commission.

[38] If the Commission did address disconnect NRCs in Docket No. 020119, BellSouth would have no doubt complained that the issue was not raised in FDN's complaint or identified as an issue in the case and, therefore, not ripe for adjudication.

[39] See TR 124, 91 – 93.

Collateral estoppel does not apply to the disconnect NRC dispute, whether one looks to Docket No. 990649A or Docket No. 020119 as a prior proceeding, since collateral estoppel requires that the same parties have **actually litigated** the same issues to a final determination in a prior proceeding. Albrecht, Aloha, supra. In neither Docket No. 990649A nor Docket No. 020119 was there an identified issue or Commission pronouncement regarding the application of disconnect NRCs to reverse hot cuts. As asserted above, if anything, the Commission determined in Docket No. 990649A that disconnect NRCs apply only where the CLEC orders the service, which is not the case with reverse hot cuts and, thus, BellSouth is estopped from making its counterclaim.

Since BellSouth's testimony and Prehearing Statement do not specify, FDN is unsure whether BellSouth will argue that res judicata or collateral estoppel bar FDN's hybrid rate billing dispute.[40] Suffice to say, as FDN argues in the issues above, the Commission's UNE rate orders set the process for implementation of new UNE rates. Rate zones and rate structure are as much a part of "rates" the Commission orders implemented as the dollar value of the rate levels, and an interconnection agreement amendment was the Commission's proscribed means for UNE rate implementation. Neither the UNE rate orders nor the parties' interconnection agreement(s) sanction any kind of tiered implementation of rate levels, rate structure, rate zones or any other crossbred mixing and matching. Therefore, if there is any argument that res judicata and collateral estoppel bar a claim in this proceeding, they bar BellSouth from claiming it could separately implement rate zones and rate levels. BellSouth knew its billing system could not handle rate implementation as the Commission had ordered. (Tr. 159.) And

[40] In its Prehearing Statement, BellSouth makes vague reference to the unambiguous language of the FDN-BellSouth interconnection agreement, but this is with apparent reference to the disconnect NRC dispute.

the age-old BellSouth excuse of a billing system limitation cannot relieve it from abiding the Commission's order and crediting FDN for the disputed sum.

RESPECTFULLY SUBMITTED, this 14th day of January, 2005.

/s/
Matthew Feil
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
(407) 835-0460
mfeil@mail.fdn.com

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 this 14th day of January, 2005.

BellSouth Telecommunications, Inc.
Nancy B. White/Meredith Mays
C/O Ms. Nancy H. Sims
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301-1556
nancy.sims@bellsouth.com

Mr. Lee Fordham
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
cfordham@psc.state.fl.us

/s/
Matthew Feil
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
(407) 835-0460
mfeil@mail.fdn.com