ORIGINAL

Matilda Sanders

From: Smith, Debbie N. [Debbie.N.Smith@BellSouth.COM]
Sent: Friday, May 13, 2005 2:18 PM
To: Filings@psc.state.fl.us
Cc: Edenfield, Kip; Fatool, Vicki; Slaughter, Brenda ; Nancy Sims; Holland, Robyn P; Linda Hobbs; Bixler, Micheale
Subject: Florida Docket No. 041338-TP
Importance: High
Attachments: bstresponse.pdf; resp.doc

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c/o Nancy Sims
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B. Docket No. 041338-TP: Petition for Generic Proceeding to Set Rates, Terms and Conditions for

Batch Hot Cuts for UNE-P to UNE-L Conversions and for ILEC to UNE-L Conversions in the BellSouth Telecommunications, Inc. Service Area

C. BellSouth Telecommunications, Inc.
on behalf of E. Earl Edenfield, Jr.

D. 8 pages total in PDF format
5 pages total (WORD - in lieu of disk)

E. BellSouth's Response to FDN's Motion for Reconsideration.

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Legal Department

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May 13, 2005

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 040301-TP
Petition of Supra Telecommunications and Information Systems, Inc. for Arbitration with BellSouth Telecommunications, Inc.

Docket No. 041338-TP
Petition for Generic Proceeding to Set Rates, Terms and Conditions for Batch Hot Cuts for UNE-P to UNE-L Conversions and for ILEC to UNE-L Conversions in the BellSouth Telecommunications, Inc. Service Area

Dear Ms. Bayó:

Enclosed is BellSouth's Response to FDN's Motion for Reconsideration, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield, Jr.

Enclosure

cc: All Parties of Record
Marshall M. Criser III
Nancy B. White
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket Nos. 040301-TP & 041338-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and/or U.S. Mail this 13th day of May, 2005 to the following:

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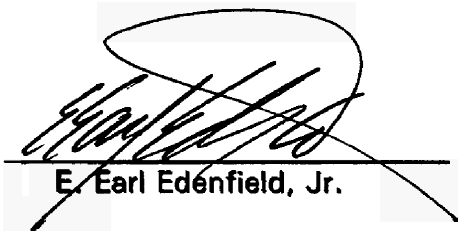

E. Earl Edenfield, Jr.

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Generic Proceeding to Set Rates, Terms, and Conditions for Batch Hot Cuts for UNE-P to UNE-L Conversions and for ILEC to UNE-L Conversions in the BellSouth Telecommunications, Inc. Service Area	)	Docket No. 041338-TP Filed: May 13, 2005

BELLSOUTH'S RESPONSE TO FDN'S MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") files this Response to the Motion for Reconsideration ("Motion") filed by Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") on April 29, 2005. In its Motion, FDN seeks reconsideration of the hearing schedule established in the Order Establishing Procedure[1] or, alternatively, requests that the Commission order a one-sided true-up of the "hot cut" rates. As discussed below, FDN's Motion is legally insufficient, factually flawed, contrary to Commission precedent, and inconsistent with the fundamental tenets of equity. Therefore, the Commission should deny the Motion.

A. FDN's Motion for Reconsideration is Legally Insufficient.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an order. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (citing State ex. Rel. Jayatex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Moreover, a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Co., 394 So.2d at 891.

[1] Order No. PSC-05-0433-PCO-TP, issued April 20, 2005. The Order Establishing Procedure was amended on April 29, 2005 (See, Order No. PSC-05-0433A-PCO-TP).

Indeed, a motion for reconsideration should not be granted based upon an arbitrary belief that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review. Steward Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

In this instance, the Prehearing Officer convened a call regarding, *inter alia*, the schedule to be implemented for this proceeding. Each party was given an opportunity to challenge the proposed procedural schedule and, in fact, FDN presented its position opposing the proposed schedule to the Prehearing Officer. In its Motion, FDN does not raise any argument not previously considered, and rejected, by the Prehearing Officer, nor does FDN identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order Establishing Procedure. Indeed, the entirety of FDN's Motion is nothing more than a regurgitation of the same arguments made by FDN to the Prehearing Officer. Thus, FDN's Motion is legally insufficient and should be rejected by the Commission.

B. FDN's Motion is Factually Flawed.

In addition to being legally insufficient, FDN's Motion is premised upon arguments that are factually incorrect. For example, the primary argument upon which FDN relies in support of the Motion is that FDN cannot begin the conversion process (UNE-P to UNE-L) until a final order is rendered in this proceeding. (Motion at ¶¶1 and 7) This argument is non-sense. BellSouth has a conversion process (which was endorsed by the FCC on at least two occasions) in place today with applicable rates that are found in FDN's Interconnection Agreement with BellSouth. There is absolutely nothing stopping FDN from submitting conversion orders today. If FDN is not submitting conversion orders it is because of litigation posturing, not any limitation on BellSouth's processes. If FDN is truly concerned (which BellSouth doubts) about

BellSouth's ability to convert large numbers of UNE-Ps to UNE-Ls (Motion at ¶9), then FDN should go ahead and start that process now, not wait until the last possible second.

Next, FDN suggests that the rate BellSouth will charge for wholesale switching in commercial agreement negotiations will be too high to compete. (Motion at ¶8) Again, this assertion is belayed by the true facts. BellSouth has entered into more than 120 commercial agreements (including arrangements with AT&T and MCI) through which CLECs can obtain wholesale switching from BellSouth at a reasonable commercial rate. Obviously, these CLECs do not suffer from the same unfounded concerns that FDN suggests here. Frankly, FDN can solve its own problem by negotiating with BellSouth in good faith and, as have the other 120 CLECs, entering into a commercial agreement. As to FDN's concern that rates could increase as a result of this proceeding (*Id.*), then maybe that should serve as incentive for FDN to go ahead and start the conversion process at the rates currently in its Interconnection Agreement. FDN's flawed logic would seem to suggest that the sole purpose for ratemaking activities such as the instant procedure is to reduce existing rates. FDN is simply wrong.

FDN also claims that the timing of the hearing in this case will have some direct negative impact on competition. (Motion at ¶10) Aside from being a bit far-fetched, this argument fails to consider that UNE-P (in particular unbundled switching) was de-listed as a UNE because the UNE-P was harming competition. Again, if FDN truly believes that competition will benefit from UNE-P conversions being implemented as soon as possible, then FDN should immediately begin submitting such conversion orders. Somehow, BellSouth doubts that FDN will take such action.

FDN argues that "hot cuts be done at fair, just, reasonable and non-discriminatory rate (sic) approved by the Commission." (Motion at ¶11) BellSouth could not agree more. As a threshold matter, this Commission has previously established such rates and such rates are

currently in effect. The schedule established by the Prehearing Officer in this proceeding does exactly what FDN suggests by giving BellSouth the time and opportunity (*i.e.*, due process) to present a complete cost study based on the specific issues in this proceeding. FDN's arguments appear to be designed to deny BellSouth due process by expediting the proceeding at such a pace so as to preclude BellSouth from adequately and fully participating. Indeed, FDN goes so far as to claim that it would be erroneous for BellSouth to have the right to "submit an entirely new cost study" in this docket and then proceeds to mischaracterize events in another docket to which FDN was not even a party. (Motion at ¶¶13 and 14) Apparently, FDN is not interested in the Commission reaching a decision based on a full record with everyone having an opportunity to fairly present their case. The Commission should not condone this type of unfair trial tactic. Because FDN's Motion is premised upon unsupported factual premises, the Commission should deny the Motion.

C. **FDN's Request for a True-Up is Unsupported and Inequitable.**

Furthering the notion that FDN has no desire for an equitable and fair resolution of the issues in this proceeding, FDN seeks a one-sided true-up as an alternative form of relief. Indeed, FDN has the audacity to propose a true-up that favors only FDN and requests that "[t]he True-Up Mechanism, however, should not work both ways, i.e., BellSouth should not be permitted to true-up if the Commission approves higher rates." There is no clearer statement in the entire Motion as to FDN's true intent here...that is, to convince the Commission to have a proceeding in which only FDN gets to present its case and BellSouth is precluded from having a full and fair hearing on the merits. Frankly, the Commission should be offended by this suggestion.

Aside from the clear inequities of the suggested true-up, there are a number of substantive problems. For instance, FDN cites to no legal authority for the proposition that the Commission can set rates retroactively. Indeed, there is no such legal support. Further, there are

existing, commission-approved rates applicable to the conversions at issue in this proceeding. Certainly, there is no need for the Commission to true-up existing lawful rates...that simply makes no sense. Finally, Commission precedent has been to apply rates established in generic UNE dockets prospectively only:

> BellSouth's UNE rates, as established herein, may be incorporated as amendments to existing interconnection agreements. Therefore, upon consideration, we find that it is appropriate for the rates to become effective when the interconnection agreements are amended to reflect the approved UNE rates and the amended agreement is approved by us. For new interconnection agreements, the rates shall become effective when we approve the agreement. Pursuant to Section 252(e)(4) of the Telecommunications Act of 1996....

In re: Investigation into Pricing of Unbundled Network Elements, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP, dated May 25, 2001, at 471.

In conclusion, FDN's Motion is legally insufficient, factually flawed, contrary to Commission precedent, and inconsistent with the fundamental tenets of equity. Therefore, BellSouth respectfully requests that the Commission deny the Motion.

Respectfully submitted this 13th day of May 2005.

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