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August 30, 2004

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

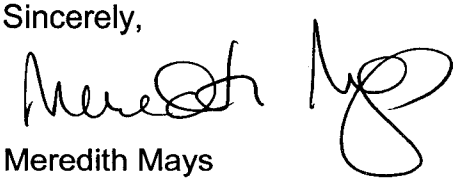
**Re: Docket No. 030829-TP (FDN Complaint)**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition to FDN's Motion for Reconsideration, which we ask that you file in the above referenced docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Meredith Mays

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

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**CERTIFICATE OF SERVICE**
**DOCKET NO. 030829-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 30th day of August, 2004 to the following:

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Meredith E. Mays

**(+) signed Protective Areement**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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|---|---|---|
| In Re: | ) | |
| | ) | |
| Complaint of FDN Communications for | ) | Docket No. 030829-TP |
| Resolution of Certain Billing Disputes | ) | |
| And Enforcement of UNE Orders and | ) | Filed: August 30, 2004 |
| Interconnection Agreements with | ) | |
| BellSouth Telecommunications, Inc. | ) | |
| | ) | |

**BELLSOUTH TELECOMMUNICATION, INC.'S RESPONSE IN OPPOSITION TO FDN'S MOTION FOR RECONSIDERATION**

## INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") files this response in opposition to the Motion for Reconsideration ("Motion") filed by Florida Digital Network, Inc. d/b/a FDN Communications ("FDN"). FDN's Motion, which seeks reconsideration of Order No. PSC-04-079-PCO-TP ("Discovery Order"), fails to demonstrate any legal or factual issue this Commission failed to consider. Instead, FDN reiterates its mantra of over-recovery of costs in a proceeding in which it has stated time and again that it is not challenging nonrecurring disconnect rates. FDN's theory is simply inconsistent – even assuming this Commission set nonrecurring disconnect rates without regard to the possibility of end users migrating between carriers (which is doubtful), then the appropriate remedy would be to address the cost and rate structure in a generic cost proceeding rather than withholding payment for bills. Because FDN concedes it has no dispute with the rates established in Docket No. 990949A, then any alleged cost over-recovery theory has no relevance to this proceeding. Because a motion for reconsideration should not constitute a vehicle for reargument when the losing party disagrees with the outcome, which is precisely the nature of FDN's Motion, it should be summarily rejected by the Commission.

## DISCUSSION

FDN's Motion claims that errors were committed in the Discovery Order. FDN outlines four alleged errors. Each of FDN's purported "errors" reflect nothing more then its dissatisfaction with the outcome of its Motion to Compel, as explained more fully below.

### A. First Alleged Error – The Discovery Order "Presumes the Proper Interpretation of the Parties' Interconnection Agreement." (Motion, General Errors, p. 6).

FDN devotes several pages of its Motion to its contention that the Discovery Order has presumed an interpretation of the parties' Agreement. Conspicuously absent from FDN's Motion is a single citation to a point of fact or law that this Commission allegedly overlooked. FDN has not cited to any regulatory decision that conflicts with the legal authority BellSouth relied upon in its Response in Opposition to FDN's Motion to Compel; namely, that "the construction of all written instruments is a question of law to be determined by the court where the language used is clear, plain, certain, undisputed, unambiguous, unequivocal and not subject to conflicting inferences." *See Royal American Realty Inc. v. Bank of Palm Beach,* 215 So.2d 336, 337 (Fla. 4th DCA 1968) (citations omitted). The rules of contract construction further require that "no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts can be given to it." *Id.; see also Nevel v. Monteleone,* 514 So.2d 383, 384 (Fla. 4th DCA 1987) (parol evidence is not admissible to vary, contradict or defeat the terms of a complete and unambiguous written instrument) (citations omitted).

BellSouth has consistently testified that the language in the Agreement authorizes nonrecurring disconnect fees. FDN agreed that it "shall pay" the disconnect rates in the Agreement, which rates include nonrecurring disconnect rates. That FDN has concocted a

nonsensical theory to justify withholding payment to BellSouth because it claims the Agreement is silent concerning the application of disconnect fees is no reason to reconsider a straightforward argument denying discovery. The reality is that even if FDN could engage in unfettered discovery, no cost-recovery or other theory provides a legal basis for disregarding unambiguous contract language. Therefore none of FDN's discovery is reasonably calculated to lead to the discovery of admissible evidence. The fact that the Commission is cognizant of applicable law while FDN chooses to ignore it does not provide a basis to reconsider the Discovery Order.

**B. Second Alleged Error – The Discovery Order Uses a More Restrictive Evidentiary Standard to Evaluate FDN's Discovery Requests. (Motion, General Errors, p. 6).**

FDN also claims that the Commission has erroneously analyzed FDN's discovery requests. This claim is without basis. The Discovery Order recognizes, at page 6, the very rule that FDN "contends is the correct standard", which is Florida Rule of Civil Procedure 1.280(b). As indicated above, Rule 1.280(b) requires that discovery appear reasonably calculated to lead to admissible evidence and none of the discovery requests that FDN sought to compel from BellSouth meet that standard.

A straightforward review of FDN's Motion demonstrates the irrelevancy of its discovery. FDN explains "its discovery requests go to whether BellSouth is over-recovering" and whether BellSouth is allegedly over-recovering relates to "cost-causation." (Motion, p. 10). FDN's argument makes no sense. Cost-causation logically considers the basis, or the origin for a cost. In this proceeding, BellSouth's witnesses explained that nonrecurring disconnect fees are caused, or come into existence, because FDN requests an unbundled loop. The chain of causation is clear: FDN first asks for an unbundled loop (and pays the installation costs for the connection of BellSouth's loop to FDN's switch). Because FDN asked for the loop in the first instance, when

an end user later seeks to migrate from FDN to another carrier, BellSouth incurs costs to disconnect the loop from FDN's switch (and FDN appropriately pays the disconnection costs for the same loop it requested to begin with). The disconnection is a natural and foreseeable consequence that only occurred because FDN asked for the loop to begin with. Thus, but for FDN's initial request for the unbundled loop there would not be disconnect costs.

FDN, in contrast, erroneously claims the chain of causation begins when BellSouth wins an FDN customer. In FDN's view, once it has requested and received the loop, the chain of causation ends, and restarts anew when the end user requests service from a different carrier. Regardless of which party prevails in a cost-causation argument (which cannot modify unambiguous contracts in any event), FDN's theory of an *over-recovery* of costs does not address actual *causation*. Either FDN's initial order causes the costs or it does not. *How* the costs are recovered does not impact *what* causes the costs to begin with. Thus, despite the fact that FDN "finds it inconceivable that the over-recovery of costs is not a potential issue" (Motion, n. 7), Issue No. 1, which includes "cost-causation" does not mean that, even under the "forgiving" relevancy standard of Rule 1.280(b) FDN is entitled to the discovery it seeks. Moreover, FDN's skepticism notwithstanding, the Motion conveniently restates the issues as including "the application of certain charges." There is no such issue and, even if there were, an Agreement in which one party agrees that it "shall" pay the rates at issue explicitly addresses the circumstances in which rates apply in any event.

### C. Third Alleged Error – The Discovery Order "Prejudges" the Outcome of This Proceeding. (Motion, General Errors, p. 6).

FDN claims that the Discovery Order "pre-judges" the dispute and is therefore appropriate for reconsideration. This claim, similar to FDN's allegation about the Discovery Order "presuming" a certain interpretation of the Agreement, is without merit and is devoid of

any factual or legal support that justifies reconsideration. FDN's entire argument simply rehashes its prior arguments and, for the reasons set forth in subpart A above, should be summarily rejected. What FDN apparently fails to realize is that in resolving a discovery dispute concerning relevance – which requires consideration of whether the contested questions "lead to the discovery of admissible evidence" – some consideration of what evidence may or may not be admissible must occur. Simply because the decision-making body must evaluate discovery to make a determination about what leads to admissible evidence does not mean that the ultimate merits of the underlying dispute have been decided.

**D. Fourth Alleged Error – The Discovery Order Repeatedly States there is No Issue of Over-Recovery in this Proceeding. (Motion, General Errors, p. 6).**

FDN's overall disagreement with the Discovery Order revolves around the its cost over-recovery theory, and how that theory relates to Issue No. 1. FDN cannot rescue its deficient discovery requests through the "catch-all" language in Issue No. 1. As BellSouth previously explained in its opposition to FDN's Motion to Compel, FDN's vehement insistence on including the prefatory language "cost-causer, economic, and competitive principles" in Issue No. 1 does not transform a straightforward billing dispute arising under existing rates, terms, and conditions of an unambiguous contract into a second bite at the apple of the UNE cost docket. Likewise, Issue No. 1 does not provide FDN with another opportunity to raise arguments that it concedes were "tangentially" posed in the Key Customer Docket. (*See* FDN's Response to BellSouth's Counterclaim). The legal standard for evaluating relevancy does not provide parties with an unfettered license to discover anything under the sun. The parties' Agreement provides for nonrecurring disconnect fees, contains rates for such fees, and states that FDN "shall pay" the rates therein. There is no link whatsoever between any of FDN's discovery and the actual issues in this proceeding. Regardless of any theory, FDN cannot legally rewrite a contract after

execution. The Prehearing Officer correctly denied FDN's Motion to Compel and the Commission should likewise deny FDN's Motion for Reconsideration.

## III. CONCLUSION

BellSouth requests that the Commission deny FDN's Motion for Reconsideration.

Respectfully submitted this 30th day of August 2004.

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